## 1NC

### 1

“Restriction on war powers authority” must limit presidential discretion

**Lobel, 8** - Professor of Law, University of Pittsburgh Law School (Jules, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War” 392 OHIO STATE LAW JOURNAL [Vol. 69:391, <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/04/69.3.lobel_.pdf>)

So  too, the congressional power to declare or authorize war has been long held to permit Congress to authorize and wage a limited war—“limited in place, in objects, and in time.” 63 When Congress places such restrictions on the President’s authority to wage war, it limits the President’s discretion to conduct battlefield operations. For example, Congress authorized President George H. W. Bush to attack Iraq in response to Iraq’s 1990 invasion of Kuwait, but it confined the President’s authority to the use of U.S. armed forces pursuant to U.N. Security Council resolutions directed to force Iraqi troops to leave Kuwait. That restriction would not have permitted the President to march into Baghdad after the Iraqi army had been decisively ejected from Kuwait, a limitation recognized by President Bush himself.64

“Authority” is the ex-ante allocation of decision rights

Garfagnini, ITAM School of Business, 10/15/2012

(Umberto, italics emphasis in original, “The Dynamics of Authority in Innovating Organizations,” <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=MWETFall2012&paper_id=62>)

Why do organizations change their internal allocation of authority over time? We propose a simple theory in which innovation with a new technology generates an *endogenous need for coordination* among divisions. A division manager has private information about the expected productivity of new technologies, which can be communicated strategically to headquarters. The organization has an advantage in coordinating technologies across divisions and can only commit to **an ex-ante allocation of decision rights** (**i.e.**, ***authority***). When the importance of cross-divisional externalities is small and the organization's coordination advantage is moderate, we show that an organization can optimally delegate authority to a division manager initially and then later centralize authority.

Vote negative—

Limits–hundreds of policies raise the costs of Presidential authority in the future – they allow all of them

Ground–the key question is overarching authority in future situations – not programmatic changes

Precision–it’s the most important distinction

Solum, professor of law at UCLA, 2003

(Lawrence, “Legal Theory Lexicon 001: Ex Ante & Ex Post,” <http://lsolum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html>)

**If I had to select only one theoretical tool for a** first-year law **student to master**, **it would be the ex post/ex ante distinction**. (Of course, this is cheating, because there is a lot packed into the distinction.) The terminology comes from law and economics, and here is the basic idea:

The ex post perspective is backward looking. From the ex post point of view, we ask questions like: Who acted badly and who acted well? Whose rights were violated? Roughly speaking, we associated the ex post perspective with fairness and rights. The ex post perspective in legal theory is also loosely connected with deontological approaches to moral theory. In general jurisprudence, we might associate the ex post perspective with legal formalism.

The ex ante perspective is forward looking. From the ex ante point of view, we ask questions like: **What affect will this rule have on the future?** Will decision of a case in this way produce good or bad consequences? Again, roughly speaking we associate the ex ante perspective with policy and welfare. The ex ante perspective in legal theory is loosely connected with consequentialist (or utilitarian or welfarist) approaches to moral theory. In general jurisprudence, we might associate the ex ante perspective with legal instrumentalism (or legal realism).

### 2

#### The plan undermines first and last line of defense against terrorism

White, 10

(Counsel-Baker Botts LLP, Brief for Foundation for Defense of Democracies, Kyemba v. Obama, http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_RespondentAmCuFDD.authcheckdam.pdf)

Federal law bars the admission of aliens whom the Government reasonably suspects of engaging in certain terrorist or terrorism-related activities. Among the prohibited classes of aliens are those who have engaged in terrorist activity; those who are members of a terrorist organization; those whom the Secretary of Homeland Security or Attorney General “knows, or has reasonable ground to believe, [are] engaged in or [are] likely to engage after entry in any terrorist activity”; those who endorse terrorist activity; and those who received “military-type training” from terrorist organizations. Id. §1182(a)(3)(B). As explained in detail below, pp 12-20, petitioners’ records more than justify the Government’s conclusion that the terrorism-related prohibitions against entry apply to them. Petitioners casually dismiss not only these statutes, Pet. Br. 32, 42, 45, 46, but also appropriations bills (mere “post-hoc 2009 legislation”) directly prohibiting their release into the United States, id. at 49. Perfunctory treatment of this comprehensive body of law, passed by Congress and signed by the President, does ill service to both the statutory text and the historical national experience underlying the evolution of those statutes. Congress’ determination that the Government must prohibit entry by aliens whose records suggest a material threat to the Nation’s domestic civilian population is rooted in the history of our Nation’s self-defense, including the difficult lessons learned through catastrophic acts of terrorism. Aliens’ initial entry into the Nation is a core matter of national security, committed to the political Branches. The power to regulate aliens’ initial entry—and not, as petitioners propose (Br. 35), the power to expel aliens already inside the Nation’s borders—**is the primary guard against “unprotected spot[s] in the Nation’s armor**.” Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953), quoted in Zadvydas, 533 U.S. at 695-96. For decades following the Nation’s Founding, immigration policy was fixed not by legislation but by the Executive Branch’s exercise of “inherent \* \* \* executive power to control the foreign affairs of the nation.” Knauff, 338 U.S. at 542. As early as 1875, however, Congress began to pass laws prohibiting entry by dangerous aliens. The Act of March 3, 1875 authorized the exclusion of criminal aliens. 18 Stat. 477. It codified what largely had been the status quo. “As to criminals, the power of exclusion has always been exercised, even in the absence of any statute on the subject.” Chae Chan Ping v. United States, 130 U.S. 581, 608 (1889). In the late twentieth century, as the Nation grew increasingly aware of the specific threat of terrorism, Congress began to address the threat directly through immigration laws. The Immigration Act of 1990, for instance, prohibited the admission of any alien who “has engaged in terrorist activity” or whom “a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity.” Pub. L. No. 101-649, §601(a)(3)(B), 104 Stat. 4978, codified at 8 U.S.C. §1182(a)(3)(B)(i). The Act defined “terrorist activity” to include activities such as “[t]he use of any \* \* \* explosive, firearm, or other weapon or dangerous device \* \* \* with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Id. §601(a)(3)(B)(iii)(V)(b), codified at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b). The Nation grew more aware of the threat of terrorism after the 1993 bombing of the World Trade Center. Congress responded by passing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. That Act reinforced the Nation’s commitment to preventing terrorist-trained aliens from entering by expanding the list of inadmissible aliens to include not only those suspected of having personally engaged in terrorist activity, but also those who are representatives or members of terrorist organizations. Id. §411, codified as amended at 8 U.S.C. §1182(a)(3)(B)(i). In enacting this law, Congress stressed that “the prevention of alien terrorists from entering the United States in the first place \* \* \* present[s] among the most intractable problems of immigration enforcement. The stakes in such cases are compelling: protecting the very lives and safety of U.S. residents, and preserving the national security.” H.R. Rep. No. 383, 104th Cong., 1st Sess. 53 (1995). “The object of preventing terrorist aliens from entering the U.S. is equally important to the national interest as the removal of alien terrorists. On this question, the demands of due process are negligible, and Congress is free to set criteria for admission and screening procedures that it deems to be in the national interest.” Id. at 58.3 Five years later, in response to the catastrophic terrorist attacks of September 11, 2001, Congress further expanded the class of aliens whose entry is categorically prohibited on terrorism-related grounds. Congress amended the laws to exclude not only terrorists themselves and members or representatives of terrorist organizations, but also aliens suspected of having “associated” with a terrorist organization, or those suspected of intending to engage in activities that threaten public safety. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §411(a)(2), 115 Stat. 272, codified at 8 U.S.C. §1182(a)(3)(F). That Act also broadened the definitions of “terrorist activity” and “engaged in terrorist activity,” and expanded the Attorney General’s authority to detain aliens whom he suspects of involvement in terrorism. Id. §§411(a)(1) & 412, codified at 8 U.S.C. §§1182(a)(3)(B) & 1226a. The next year, Congress transferred immigration authority to the newly-created Department of Homeland Security (“DHS”). See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, §441, 116 Stat. 2135. The House Report described DHS’s fundamental mission as “preventing terrorist attacks within the United States, reducing the United States’ vulnerability to terrorism, minimizing the damages from attacks, and assisting in recovery from any attacks, should they occur.” H.R. Rep. No. 609(I), 107th Cong., 2d Sess. 63 (2002). A critical component of DHS’s mission is “securing U.S. borders” because, “as recent events have illustrated, the Nation’s democratic tradition of free and open borders is at once its greatest strength and most easily exploitable liability.” Id. at 63-64. In addition to conducting its own post-September 11 deliberations, Congress created the National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) to research the events responsible for that catastrophic breach of national security and to propose reforms. In 2004, the 9/11 Commission issued its public report, which stressed immigration law’s central role in national security. Nat’l Comm’n on Terrorist Attacks Upon the United States, The 9/11 Commission Report (2004) (“The 9/11 Commission Report”). The 9/11 Commission observed that “[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.” Id. at 383. It stressed that **“[t]he border and immigration system” must serve “as a vital element of counterterrorism**.” Id. at 387. In response to the 9/11 Commission’s recommendations, Congress acted. Recognizing that national security was threatened not only by active terrorists and members of terrorist organizations, but also by nonmembers who were trained by these groups, Congress prohibited admission of aliens who have received “military-type training” from terrorist organizations. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, §103(a), 119 Stat. 231, codified at 8 U.S.C. §1182(a)(3)(B)(i)(VIII). That provision’s sponsor stressed that the goal of the REAL ID Act’s immigration provisions “is straightforward. It seeks to prevent another 9/11-type attack by disrupting terrorist travel.” 151 Cong. Rec. H454 (daily ed. Feb. 9, 2005) (Rep. Sensenbrenner). Quoting the 9/11 Commission, he stressed that “[a]buse of the immigration system and the lack of interior enforcement were working together to support terrorist activities.” Ibid. In sum, at no point in the history of federal immigration law have the political Branches evinced an intent to allow aliens—especially aliens with apparent ties to terrorism—to enter the United States simply because they are not “enemy combatants,” applicable immigration prohibitions notwithstanding. Instead, at every turn, Congress and the President have responded to the Nation’s national-security experience by barring terrorists, terrorist affiliates, and persons trained by terrorists from entering the country. Congress passed each of the aforementioned statutes to confirm and expand the President’s ability to protect the Nation’s domestic civilian population. And in administering those statutes, the President’s authority is at “its maximum” because he “acts pursuant to an express \* \* \* authorization of Congress[.]” Medellin v. Texas, 128 S. Ct. 1346, 1350 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Finally, the immigration laws prohibiting petitioners’ release into the United States are not the result of hasty judgment or political partisanship. Rather, they embody the sustained bipartisan consensus of both Republican and Democratic Presidents and Republican- and Democratic-controlled Congresses—the epitome of sound federal governance. See The Federalist No. 10 (James Madison); cf. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2354 (2008).

Nuclear terrorism causes extinction

Hellman 8 (Martin E. Hellman, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING 2008 THE BENT OF TAU BETA PI, <http://www.nuclearrisk.org/paper.pdf>)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engi- neering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

### 3

The judiciary adheres to political question deference now—but doctrinal repudiation would reverse that

Franck ‘12

Thomas, Murray and Ida Becker Professor of Law, New York University School of Law Wolfgang Friedmann Memorial Award 1999, *Political Questions/Judicial Answers*

Sensitive to this historical perspective, many scholars, but few judges, have openly decried the judiciary’s tendency to suspend at the water’s edge their jealous defense of the power to say what the law is. Professor Richard Falk, for example, has criticized judges’ “ad hoc subordinations to executive policy”5 and urged that if the object of judicial deference is to ensure a single coherent American foreign po1icy, then that objective is far more likely to be secured if the policy is made in accordance with rules “that are themselves not subject to political manipulation.”6 Moreover, as a nation publicly proclaiming its adherence to the rule of law, Falk notes, it is unedifying for America to refuse to subject to that rule the very aspect of its governance that is most important and apparent to the rest of the world.7 Professor Michael Tigar too has argued that the deference courts show to the political organs, when it becomes abdication, defeats the basic scheme of the Constitution because when judges speak of “the people” as “the ultimate guardian of principle” in political-question cases, they overlook the fact that “the people” are the “same undifferentiated mass” that “historically, unmistakably and, at times, militantly insisted that when executive power immediately threatens personal liberty, a judicial remedy must be available.” Professor Louis Henkin, while acknowledging that certain foreign relations questions are assigned by the Constitution to the discretion of the political branches, also rejects the notion that the judiciary can evade responsibility for deciding the appropriate limits to that discretion, particularly when its exercise comes into conflict with other rights or powers rooted in the Constitution or laws enacted in accordance with its strictures.9 His views echo earlier ones espoused by Professor Louis Jaffe, who argued that while the courts should listen to advice tendered by the political branches on matters of foreign pol icy and national security, “[t]his should not mean that the court must follow such advice, but that without it the court should not prostrate itself before the fancied needs of diplomacy and foreign policy. The claim of policy should be made concrete in the particular instance. Only so may its weight, its content, and its value be appreciated. The claims of diplomacy are not absolute; to question their compulsion is not treason.”° There has been little outright support from the judiciary for such open calls to repudiate the practice of refusing to adjudicate foreign affairs cases on their merits. While some judges do refuse to apply the doctrine, holding it inapplicable in the specific situation or passing over it in silence, virtually none have hitherto felt able to repudiate it frontally. On the other side, some judges continue to argue vigorously for the continued validity of judicial abdication in cases implicating foreign policy or national security. These proponents still rely occasion ally on the early shards of dicta and more rarely on archaic British precedents that run counter to the American constitutional ethos. More frequently today, their arguments rely primarily on a theory of constitutionalism—separation of powers—and several prudential reasons.

Denied cert on PQD—plan destroys that

Feith ‘12

Daniel, Yale Law, Restraining Habeas: Boumediene, Kiyemba, and the Limits of Remedial Authority

The Uighurs’ odyssey then took another twist. The Government appealed Judge Urbina’s ruling to the D.C. Circuit, and while the appeal was pending, each of the Uighurs received an offer of resettlement from a foreign country, which the government communicated to the D.C. Circuit.[14] The D.C. Circuit reversed Judge Urbina’s decision.[15] His order, it held, trenched upon “the exclusive power of the political branches to decide which aliens may, and which aliens may, enter the United States, and on what terms.”[16] A court may only review a decision by the political branches to exclude an alien if “‘expressly authorized by law.’”[17] Since the district court “cited no statute or treaty authorizing its order,”[18] the D.C. Circuit held that it lacks the authority to review, let alone reverse, the government’s decision to deny the Uighurs admission to the United States.[19] That holding suggested an important corollary: that judicial remedial authority in habeas cases is not absolute.[20] The D.C. Circuit reaffirmed its decision in its entirety one year later,[21] after the Supreme Court vacated and remanded Kiyemba I in light of new factual developments.[22] That ruling leaves the Uighurs only two options: accept an offer of resettlement or remain at Guantanamo.

PQD key to Sonar training

Gartland ‘12

Maj. Charles, B.A., University of Alaska - Anchorage; J.D., cum laude, Gonzaga University School of Law; LL.M., George Washington University Law School) is a United States Air Force judge advocate currently serving as the Environmental Liaison Officer for the Air Force Materiel Command, “ARTICLE: AT WAR AND PEACE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT: WHEN POLITICAL QUESTIONS AND THE ENVIRONMENT COLLIDE,” 68 A.F. L. Rev. 27

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs" (emphasis added). n407 At least two Supreme Court Justices disagreed n408 with Chief Justice Roberts' characterization in Winter, and, arguably, four of them disagreed (depending on how the partial concurrence/dissent by Justice Breyer, partially joined by Justice Stevens, is construed). n409 Certainly the Ninth Circuit disagreed, n410 and that highlights a significant rub, namely, that the drastic remedy of an injunction appears to have no predictability whatsoever. In one nuclear detonation case, Committee for Nuclear Responsibility v. Schlesinger, the test goes forward; n411 another two years later, Enewetak, a different test is enjoined. n412 In one training case, Barcelo v. Brown, military training exercises are allowed to proceed, n413 whereas in others, Evans and Winter (until the Supreme Court phase) they are enjoined. n414 Such uncertainty is a natural outcome of the process unfolding in all these cases: a judicial decision to grant an injunction under NEPA against a national defense activity is--by the very nature of the four part injunction test--a policy decision; and people (and judges) disagree about what constitutes good public policy. Policy decisions lie with the legislative and executive branches, and in the case of national defense, the policy decision has already been settled by statute and the Constitution--both of which provide for a national defense establishment that, in protecting the Republic, allows statutes like NEPA to exist in the first place.

**That’s key to overall Naval power and anti-submarine warfare.**

Popeo et al ‘8

Daniel, Paul Kamenar, Washington Legal Foundation, Andrew McBride, Thomas McCarthy, Andrew Miller, William R. Dailey, Wiley Rein LLP, “Brief for Amici Curiae The Washington Legal Foundation, Rear Admiral James J. Carey, U.S. Navy (Ret.), National Defense Committee, and Allied Educational Foundation in Support of Petitioners,” http://www.wlf.org/upload/07-1239winter.pdf

Throughout our Nation's history, the Navy has played a vital role in major world events occurring during both times of war and peace. As a maritime Nation, the United States relies on the "Navy's ability to operate freely at sea to guarantee access, sustain trade and commerce, and partner with other nations to ensure not only regional security but defense of our own homeland." App. 314a (statement of Rear Admiral Ted N. Branch). For this reason, it has been recognized that this ability "to operate freely at sea is one of the most important enablers of national power- diplomatic, information, military and economic." App. 315a-316a (statement of Rear Admiral Ted N. Branch). The only way to ensure our Nation's ability to so operate at sea is through naval training. Indeed, it is a Navy maxim that "We train as we will fight so that we will fight as we have trained." J.A. 576 (statement of Captain Martin N. May). Antisubmarine warfare has long been a key component of naval warfare. Because submarine detection and antisubmarine warfare require the coordinated efforts of vast numbers of Navy personnel, repeated training in battle conditions is essential to naval readiness. And, in our modern era, advanced technologies enable our enemies to deploy submarines that are capable of carrying long-range weapons while operating in virtual silence, nearly wholly undetectable except through the use of MFA sonar. Thus, antisubmarine warfare training utilizing MFA sonar is an absolute necessity in preparing our Navy to detect and combat enemy submarines. It goes without saying that, in a time of armed conflict, naval training and readiness are indispensable. Indeed, with American troops currently deployed throughout the world and, specifically, engaged in war in Afghanistan and Iraq, the Navy's role in our national security has never been more important than at the present. Maintaining an effective and proficient Navy, therefore, is of the utmost importance to the United States' national defense and homeland security. It is for this reason that the President determined that "the COMPTUEX and JTFEX, including the use of mid-frequency active sonar in these exercises, are in the paramount interest of the United States." App. 232a. A. A Well-Trained Navy Has Always Been A Cornerstone Of Our National Defense. Naval training has undoubtedly been at the center of the U.S. Navy's prior wartime and peacetime successes. Only a well-trained navy could have successfully fought in both the Atlantic and Pacific oceans simultaneously, as the U.S. Navy demonstrated in World War II. During World War II, the U.S. Navy's antisubmarine training was largely responsible for defeating the German submarines that were dangerously close to securing victory in the Battle of the Atlantic. See THEODORE ROSCOE & RICHARD G. VOGE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II xviii (Naval Institute Press 1949). It was also the joint training exercises of Operation Tiger that prepared the U.S. Navy and Army for the Normandy Invasion. See Operational Archives, Naval Historical Center, Operation Tiger, available at http-//www.history. navy.mil/faqs/faq20-l.htm (last visited July 23, 2008). Without this preparation, one of the most important battles in world history, D-Day, may have resulted in devastating failure for the United States and its allies. The Cuban Missile Crisis presented another major world event in which the Navy's readiness was of critical importance to our national security. In 1962, naval forces under U.S. Atlantic Command maintained a month-long naval "quarantine" of the island of Cuba in order to prevent the Soviet Union's deployment of ballistic missiles there. Cuban Missile Crisis, 1962, available at http '//www. history, navy. mil/faqs/faq90-l.htm (last visited July 23, 2008). The immediate readiness of the U.S. Navy in these circumstances defused a situation that came as close as the United States and Soviet Union ever came to global nuclear war. Id. At a minimum, the Navy blockade was a demonstration of the United States' strength. Naturally, the beneficial effects of naval training did not end with World War II or even the Cold War. Naval training exercises have continued to adequately prepare the Navy for effective and safe military campaigns and have continued to symbolize a strong Nation at the ready to protect its interests at home and abroad. That a well-trained Navy indicates and symbolizes American strength is not a creation of fantasy. It is a theme well-recognized by our Nation's prior and current enemies. Indeed, the importance of the U.S. Navy was not overlooked by the Japanese in their bombing of Pearl Harbor, nor was the symbolism of a U.S. Navy destroyer lost in al-Qaeda's suicide bombing attack against the USS Cole. That the Navy has been a target of strategic and symbolic attacks from our Nation's enemies further demonstrates the need for proper training to ensure the safety and success of the Navy in its vital role of defending the homeland. Undoubtedly, thorough training is a requisite to an effective Navy. **On-the-job** **training in combat**, it follows, "is the worst possible way of training personnel" and can place the success of military missions "at significant risk." App. 278a (statement of Rear Admiral John M. Bird). Consequently, naval training should be performed prior to actual combat to ensure the preparedness and eventual success in our Navy's military missions. This seemingly obvious statement is, quite possibly, even more relevant to the Navy's mission of defending against enemy submarines. B. Training For Anti-Submarine Warfare Is A Critical Component Of Naval Readiness. The Navy is the only service—military or otherwise—that can address the threat from submarines, and any curtailment of its ability to train for this mission would decrease the Navy's ability to handle that threat. App. 315a (statement of Rear Admiral Ted N. Branch). For years, the Navy has employed SONAR to "identify and track submarines, determine water depth, locate mines, and provide for vessel safety." App. 266a (statement of Rear Admiral John M. Bird). The Navy started using SONAR after World War I, and every naval vessel engaged in antisubmarine activity was equipped with sonar systems by the start of World War II. App. 268a. Indeed, as indicated above, antisubmarine warfare was integral to the Navy's successful campaigns against German submarines in World War II. Antisubmarine warfare is a science in which considerable effort goes into making and maintaining contact with the submarine. App. 354a~356a; see also App. 278a ("ASW occurs over many hours or days. Unlike an aerial dogfight, over in minutes and even seconds, ASW is a cat and mouse game that requires large teams of personnel working in shifts around the clock to work through an ASW scenario.") This fact is even more applicable when quiet, diesel-electric submarines—submarines increasingly utilized by hostile nations—are involved; modern diesel-electric submarines are capable of defeating the best available passive sonar technology by "suppress[ing] emitted noise levels." App. 274a. In addition, the far-reaching range of weapons found on modern submarines make it possible for those submarines to avoid placing themselves within range of passive sonar. App. 274a. As a result, active sonar is necessary to detect the presence of diesel-electric submarines. App. 269a\_270a. The Nation's top naval officers agree that the Navy must be able to freely utilize MFAS during antisubmarine warfare training in order to properly defend against the threats posed by diesel-electric submarines. See, e.g., App. 311a-325a, 338a-347a, 350a-357a.. If the Navy were prevented from training with MFAS or other active sonar, and were limited to using passive sonar in certain situations, the survivability of the Navy's antisubmarine missions would ultimately be placed at "great risk." App. 269a (statement of Rear Admiral John M. Bird). "[Rlealistic and repetitive [antisubmarine warfare] training with active SONAR is necessary for our forces to be confident and knowledgeable in the Navy's plans, tactics, and procedures to perform and **survive** in situations leading up to hostilities as well as combat." App. 277a. Therefore, blanket mitigation measures on MFAS training "would dramatically reduce the realism of [antisubmarine warfare] training" and would be fraught with "severe national security consequences." App. 273a (statement of Rear Admiral John M. Bird). C. The Navy's Use Of MFA Sonar In The Challenged Military Exercises Is Indispensable To Our National Security In This Time Of Armed Hostilities Across the Globe. It is clear that the COMPTUEX and JTFEX training exercises are the only way the Navy's Pacific Fleet can gain the realistic training that is necessary, especially during a time of war. These exercises represent the singular opportunity for 6,000-plus Sailors and Marines to train together in a realistic environment prior to deployment and to gain proficiency in MFAS. App. 270a-271a; App. 343a. Anytime a strike group is prevented from becoming fully proficient in MFAS, and therefore cannot be certified as combat ready, national security is negatively affected. App. 271a (statement of Rear Admiral John M. Bird). And, considering the heightened sensibilities in a time of war, any interference creates a severe impact on training and certification of readiness to perform realistic antisubmarine warfare. Because the stakes of antisubmarine warfare are so high, contact with an enemy submarine is not surrendered unless there is an order to do so. App. 355a. Even a few minutes of MFAS shutdown "would be potentially fatal in combat." App. 355a-356a (statement of Vice Admiral Samuel J. Locklear, III). As a result, a single lost contact with the submarine "cripples certification for the units involved" in the exercises. App. 356a>\* see also id. ("It may take days to get to the pivotal attack in antisubmarine warfare, but only minutes to confound the results upon which certification is based."). For these reasons, the Chief of Naval Operations, who is specifically responsible for organizing, training, equipping, preparing and maintaining the readiness of Navy forces, described COMPTUEX and JTFEX as "indispensable" training exercises. App. 342a (statement of Admiral Gary Roughead). Unsuccessful naval training in the area of antisubmarine warfare can have far-reaching consequences. As Rear Admiral Ted N. Branch recognized Any restriction or disadvantage imposed on our [antisubmarine warfare] capability that impedes the U.S. Navy's ability to retain control of the sea or project naval forces may . . . result in nothing less than a breakdown of the global system, a significant change in our international standing, and an alteration in our established way of life.

That unleashes a laundry list of nuclear conflicts

Eaglen ‘11

(Mackenzie research fellow for national security – Heritage, and Bryan McGrath, former naval officer and director – Delex Consulting, Studies and Analysis, “Thinking About a Day Without Sea Power: Implications for U.S. Defense Policy,” Heritage Foundation

Global Implications. Under a scenario of dramatically reduced naval power, **the** **U**nited **S**tates **would cease to be active in any international alliances.** While it is reasonable to assume that land and air forces would be similarly reduced in this scenario, the lack of credible maritime capability to move their bulk and establish forward bases would render these forces irrelevant, even if the Army and Air Force were retained at today’s levels. In Iraq and Afghanistan today, 90 percent of material arrives by sea, although material bound for Afghanistan must then make a laborious journey by land into theater. China’s claims on the South China Sea, previously disputed by virtually all nations in the region and routinely contested by U.S. and partner naval forces, are accepted as a fait accompli, effectively **turning the region into a “Chinese lake.”** China establishes expansive oil and gas exploration with new deepwater drilling technology and secures its local sea lanes from intervention. Korea, unified in 2017 after the implosion of the North, signs a mutual defense treaty with China and solidifies their relationship. Japan is increasingly isolated and in 2020–2025 executes long-rumored plans to create an indigenous nuclear weapons capability.[11] By 2025, Japan has 25 mobile nuclear-armed missiles ostensibly targeting China, toward which Japan’s historical animus remains strong. China’s entente with Russia leaves the Eurasian landmass dominated by Russia looking west and China looking east and south. Each cedes a sphere of dominance to the other and remains largely unconcerned with the events in the other’s sphere. Worldwide, trade in foodstuffs collapses. Expanding populations in the Middle East increase pressure on their governments, which are already stressed as the breakdown in world trade disproportionately affects food importers. Piracy increases worldwide, driving food transportation costs even higher. In the Arctic, Russia aggressively asserts its dominance and effectively shoulders out other nations with legitimate claims to seabed resources. No naval power exists to counter Russia’s claims. India, recognizing that its previous role as a balancer to China has lost relevance with the retrenchment of the Americans, agrees to supplement Chinese naval power in the Indian Ocean and Persian Gulf to protect the flow of oil to Southeast Asia. In exchange, China agrees to exercise increased influence on its client state Pakistan. The great typhoon of 2023 strikes Bangladesh, killing 23,000 people initially, and 200,000 more die in the subsequent weeks and months as the international community provides little humanitarian relief. Cholera and malaria are epidemic. Iran dominates the Persian Gulf and is a nuclear power. Its navy aggressively patrols the Gulf while the Revolutionary Guard Navy harasses shipping and oil infrastructure to force Gulf Cooperation Council (GCC) countries into Tehran’s orbit. Russia supplies Iran with a steady flow of military technology and nuclear industry expertise. Lacking a regional threat, the Iranians happily control the flow of oil from the Gulf and benefit economically from the “protection” provided to other GCC nations. In Egypt, the decade-long experiment in participatory democracy ends with the ascendance of the Muslim Brotherhood in a violent seizure of power. The United States is identified closely with the previous coalition government, and riots break out at the U.S. embassy. Americans in Egypt are left to their own devices because the U.S. has no forces in the Mediterranean capable of performing a noncombatant evacuation when the government closes major airports. Led by Iran, a coalition of Egypt, Syria, Jordan, and Iraq attacks Israel. Over 300,000 die in six months of fighting that includes a limited nuclear exchange between Iran and Israel. Israel is defeated, and the State of Palestine is declared in its place. Massive “refugee” camps are created to house the internally displaced Israelis, but a humanitarian nightmare ensues from the inability of conquering forces to support them. The NATO alliance is shattered. The security of European nations depends increasingly on the lack of external threats and the nuclear capability of France, Britain, and Germany, which overcame its reticence to military capability in light of America’s retrenchment. Europe depends for its energy security on Russia and Iran, which control the main supply lines and sources of oil and gas to Europe. Major European nations stand down their militaries and instead make limited contributions to a new EU military constabulary force. No European nation maintains the ability to conduct significant out-of-area operations, and Europe as a whole maintains little airlift capacity. Implications for America’s Economy. If the United States slashed its Navy and ended its mission as a guarantor of the free flow of transoceanic goods and trade, globalized world trade would decrease substantially. As early as 1890, noted U.S. naval officer and historian Alfred Thayer Mahan described the world’s oceans as a “great highway…a wide common,” underscoring the long-running importance of the seas to trade.[12] Geographically organized trading blocs develop as the maritime highways suffer from insecurity and rising fuel prices. Asia prospers thanks to internal trade and Middle Eastern oil, Europe muddles along on the largesse of Russia and Iran, and the Western Hemisphere declines to a “new normal” with the exception of energy-independent Brazil. For America, Venezuelan oil grows in importance as other supplies decline. Mexico runs out of oil—as predicted—when it fails to take advantage of Western oil technology and investment. Nigerian output, which for five years had been secured through a partnership of the U.S. Navy and Nigerian maritime forces, is decimated by the bloody civil war of 2021. Canadian exports, which a decade earlier had been strong as a result of the oil shale industry, decline as a result of environmental concerns in Canada and elsewhere about the “fracking” (hydraulic fracturing) process used to free oil from shale. State and non-state actors increase the hazards to seaborne shipping, which are compounded by the necessity of traversing key chokepoints that are easily targeted by those who wish to restrict trade. These chokepoints include the Strait of Hormuz, which Iran could quickly close to trade if it wishes. **More than half of the world’s oil is transported by sea.** “From 1970 to 2006, the amount of goods transported via the oceans of the world…increased from 2.6 billion tons to 7.4 billion tons, an increase of over 284%.”[13] In 2010, “$40 billion dollars [sic] worth of oil passes through the world’s geographic ‘chokepoints’ on a daily basis…not to mention $3.2 trillion…annually in commerce that moves underwater on transoceanic cables.”[14] These quantities of goods simply cannot be moved by any other means. Thus, a reduction of sea trade reduces overall international trade. U.S. consumers face a greatly diminished selection of goods because domestic production largely disappeared in the decades before the global depression. As countries increasingly focus on regional rather than global trade, costs rise and Americans are forced to accept a much lower standard of living. Some domestic manufacturing improves, but at significant cost. In addition, shippers avoid U.S. ports due to the onerous container inspection regime implemented after investigators discover that the second dirty bomb was smuggled into the U.S. in a shipping container on an innocuous Panamanian-flagged freighter. As a result, American consumers bear higher shipping costs. The market also constrains the variety of goods available to the U.S. consumer and increases their cost. A Congressional Budget Office (CBO) report makes this abundantly clear. A one-week shutdown of the Los Angeles and Long Beach ports would lead to production losses of $65 million to $150 million (in 2006 dollars) per day. A three-year closure would cost $45 billion to $70 billion per year ($125 million to $200 million per day). Perhaps even more shocking, the simulation estimated that employment would shrink by approximately 1 million jobs.[15] These estimates demonstrate the effects of closing only the Los Angeles and Long Beach ports. On a national scale, such a shutdown would be catastrophic. The Government Accountability Office notes that: [O]ver 95 percent of U.S. international trade is transported by water[;] thus, the safety and economic security of the United States depends in large part on the secure use of the world’s seaports and waterways. A successful attack on a major seaport could potentially result in a dramatic slowdown in the international supply chain with impacts in the billions of dollars.[16]

### 4

#### The plan decimates plenary powers

Kagan, 10

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

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

#### Plenary power over immigration key to cooperation with Mexico

Saslaw, 12

(Poli Sci-Claremont McKenna, “One People, One Nation, One Power? Re-Evaluating the Role of the Federal Plenary Power in Immigration,” http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1432&context=cmc\_theses)

On the other hand, Mexico has also responded to the United States as a whole. In an amicus curiae brief submitted to the Ninth Circuit Court of Appeals in United States v. Arizona, one of Mexico’s major concerns was that “SB 1070 dangerously leads to a patchwork of immigration laws that **impede effective and consistent diplomatic relations**.” 66 The brief expresses concern that **Mexican-American “sovereign-to- sovereign” relations will be damaged by inconsistent American immigration policy**. 67 It even quotes James Madison in Federalist 42, saying “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”68 While Mexico may be able to adapt its policies in response to a single state law like SB 1070, **the country appears unwilling to embrace the resulting patchwork throughout the entire U**nited **S**tates. Other countries with weaker ties to the United States are even less likely to regard each state as a sovereign in regards to immigration policy. Beyond concerns about the actions of a single state, **the federal government should also worry about the consequences of several states acting in concert**. If five states pass anti- alien legislation, national consequences may be small. But if over 50 percent of the country enacts a law, it may begin to appear that the nation is speaking with one voice – just not the voice of the President. **Given the potential for foreign policy consequences, the national security rationale behind the plenary power still stands and the President and Congress should continue to control entrance and abode.**

#### Stops drug cartels which collapse Mexico

Rozental, former deputy foreign minister of Mexico, senior fellow @ Brookings, 2/12/’1

(Andrés, chair of the U.S.-Mexico Migration Panel, convened by the Carnegie Endowment for International Peace and the Instituto Tecnológico Autónomo de México, “Mexico-U.S. Migration: A Shared Responsibility,” <http://www.carnegieendowment.org/pdf/files/M%20exicoReport2001.pdf>)

Simply put, the Panel recognizes that organized criminal activities have a deeply corrosive effect on the institutions of both countries and cooperation in their relentless pursuit should be as seamless as efforts are in other areas where there is an identifiable common threat, much as communicable diseases are in the public health arena. The additional incentives that the United States can put on the table in the form of much greater access to its labor markets, can reinforce the Fox Government’s determination to do much betterthan its predecessor. Showing measurable progress on this issue can change the deeply-held overall impression in the United States that Mexico has only a weak commitment to and, as a result, has been ineffective in attacking the organized criminal networks that have plagued the U.S.-Mexico relationship in recent years.

#### Causes global war

Haddick, MBA – U. Illinois, managing editor – Small Wars Journal, ‘8

(Robert, <http://westhawk.blogspot.com/2008/12/now-that-would-change-everything.html>)

There is one dynamic in the literature of weak and failing states that has received relatively little attention, namely the phenomenon of “rapid collapse.” For the most part, weak and failing states represent chronic, long-term problems that allow for management over sustained periods. The collapse of a state usually comes as a surprise, has a rapid onset, and poses acute problems. The collapse of Yugoslavia into a chaotic tangle of warring nationalities in 1990 suggests how suddenly and catastrophically state collapse can happen - in this case, a state which had hosted the 1984 Winter Olympics at Sarajevo, and which then quickly became the epicenter of the ensuing civil war. In terms of worst-case scenarios for the Joint Force and indeed the world, two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico. Some forms of collapse in Pakistan would carry with it the likelihood of a sustained violent and bloody civil and sectarian war, an even bigger haven for violent extremists, and the question of what would happen to its nuclear weapons. That “perfect storm” of uncertainty alone might require the engagement of U.S. and coalition forces into a situation of immense complexity and danger with no guarantee they could gain control of the weapons and with the real possibility that a nuclear weapon might be used. The Mexican possibility may seem less likely, but the government, its politicians, police, and judicial infrastructure are all under sustained assault and pressure by criminal gangs and drug cartels. How that internal conflict turns out over the next several years will have a major impact on the stability of the Mexican state. Any descent by the Mexico into chaos would demand an American response based on the serious implications for homeland security alone. Yes, the “rapid collapse” of Mexico would change everything with respect to the global security environment. Such a collapse would have enormous humanitarian, constitutional, economic, cultural, and security implications for the U.S. It would seem the U.S. federal government, indeed American society at large, would have little ability to focus serious attention on much else in the world. The hypothetical collapse of Pakistan is a scenario that has already been well discussed. In the worst case, the U.S. would be able to isolate itself from most effects emanating from south Asia. However, there would be no running from a Mexican collapse.

### 5

#### The plan decimates global adherence to LOAC—firmly supporting executive detention authority is key to enforcing the laws of war

Bialke, 4

(Lt. Colonel, MA & JD-University of North Dakota, LLM-University of Iowa, “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict,” 55 A.F. L. Rev. 1, Lexis)

U.S. International Obligations & Responsibilities and the International Rule of Law

The U.S. is in compliance with its international obligations and responsibilities. Al-Qaeda and Taliban combatants willfully engaged in unlawful belligerency en masse in violation of LOAC. Taliban combatants en masse willfully failed to meet the four criteria of lawful belligerency. Al-Qaeda combatants are stateless hostes humani generis, and also en masse willfully failed to meet the four criteria. As a matter of international law, both the Taliban and al-Qaeda are unlawful combatants. The U.S. has no requirement under international law to bestow POW status to such enemy al-Qaeda and Taliban unlawful combatants upon capture. No requirement exists to hold individual Geneva Convention art. 5 POW status tribunals to reaffirm gratuitously the unlawful combatant status of either the Taliban or al-Qaeda, nor, upon capture, their lack of POW status. The U.S. is treating humanely, beyond what is required by international standards, all al-Qaeda and Taliban unlawful combatant detainees interned at Guantanamo Bay. In accordance with customary international law, the U.S. is **authorized to continue to hold these detainees** until the end of armed conflict. At present, however, Taliban remnants and al-Qaeda remain a viable military threat against the national security interests of the U.S. and its allies. Unfortunately, the international armed conflict against al-Qaeda is highly likely to be long and sustained. The U.S. and its allies, through their militaries and other instruments of national power, in the exercise of their inherent right of collective self-defense, may continue to use armed force until the threat posed by al-Qaeda and its affiliates no longer exists. Al-Qaeda should not be underestimated in the wake of continuing international progress in the Global War against Terrorism. Considering al-Qaeda's declared hegemonic theocratic-political ideology, and the proven terrorist capabilities it continues to possess, al-Qaeda remains a clear and present danger to the national security interests of the U.S. and its allies. Nevertheless, the U.S. has no desire to, and will not, hold any unlawful [\*82] combatant indefinitely. When individual detainees no longer pose a significant security threat to the international community, no longer possess any intelligence value, and are not facing criminal charges, the U.S. will release them. However, an unlawful combatant detainee accused of war crimes may be tried before a U.S. military commission. n83 Beginning in November 2001, the U.S. has spent over two and one half years updating its military commission procedures; and developing a military commission system that is just, in complete compliance with contemporary U.S. and international law, and one that is consistent with U.S. national security interests and its ongoing war efforts against al-Qaeda. If convicted in such a U.S. military commission, the detainee may be further confined to serve the term of imprisonment adjudged by the military commission. However, **adherence to the international Rule of Law is at the crux of this entire matter**. As an influential member in the international community and full supporter of the international Rule of Law, U.S. actions in regards to al-Qaeda and Taliban detainees could not be anything less than what is noted above. The U.S. and every nation in the world **have the cardinal international duty**, indeed the moral imperative**, to encourage compliance with, and to discourage violations of international humanitarian law and LOAC** regardless of domestic or international political objections and criticisms, ensuing controversies, or the difficulties of doing so**. Casually affording** Geneva Convention III POW status with its **greater privileges and attendant implicit legitimacy** to either al-Qaeda or the Taliban **would turn a blind eye to this foundational duty**. n84 To grant POW status to al-Qaeda or Taliban detainees [\*83] would be to acknowledge that they are privileged combatants, and convey that they and these groups have a right to associate together and wage war in the manner that they do. It would be incorrect, irresponsible, and unwise for the U.S. to afford POW status to captured members of al-Qaeda and the Taliban as they are not entitled to, and are undeserving of this status. n85 International terrorists, and civilian-dressed combatants of a collapsed state ruled by a de facto government that willfully provides the terrorists safe haven, have never before been granted POW status upon capture in an international armed conflict. For a permanent member of the United Nations Security Council, who also is the world's premier military superpower and its leading global economic power, to do so would set a **highly injudicious international legal precedent inconsistent with the Rule of Law** and the long-term interests of the international community. It would **recklessly foster future abuses in armed conflict by undermining directly long-standing rules of war** crafted carefully to protect noncombatants [\*84] by deterring combatants in armed conflicts from pretending to be protected civilians and hiding among them. All nations and their armed forces are subject to LOAC. Combatants in armed conflict who blatantly disregard these laws are outside of them and do not, upon capture at the discretion of the capturing party, receive several of their benefits. LOAC is only effective, and civilians protected in armed conflict, when the parties to a conflict comport their belligerency to such laws, and enforce consistently strict compliance with all the provisions of such laws. Parties to a conflict are significantly more likely to observe such laws if they have both affirmative incentives for complying with them and if appreciable negative consequences follow when such laws are disregarded or violated. Designating captured members of al-Qaeda or the Taliban as POWs would consequently place protected civilians and other noncombatants into much greater peril during future armed conflicts, because unlawful combatants would no longer experience sufficient negative consequences from endangering protected noncombatants by egregiously violating international law and customs. This eventuality is not attractive. A carte blanche designation of Geneva Convention III POW status by the U.S. to Taliban and al-Qaeda unlawful combatants certainly would be politically expedient internationally. By letting captured Taliban and al-Qaeda reap and enjoy every benefit of POW status, the U.S. would mollify temporarily some U.S. detractors. But, such U.S. action would be wrong. Just as protected noncombatant civilians have borne the consequences of the Taliban and al-Qaeda's previous perfidies and patent violations of international law, protected noncombatant civilians would also then be relegated to shoulder and suffer all the concomitant burdens and costs of the Taliban and al-Qaeda being accorded POW status. Shortsighted action to placate U.S. critics and dissentients momentarily **would lastingly reward, rather than penalize, all unlawful combatants who contravene international humanitarian law and LOAC intentionally, continually, and abhorrently**. **LOAC should never be utilized, construed, or developed in such a way that would benefit terrorists** and rogue states that provide aegis to terrorists, or in such a way that would otherwise serve the ends of terrorism. The negative prices that combatants who engage in armed conflict without meeting the requirements of lawful belligerency pay, that hostes humani generis pay, and that rogue states pay for unlawfully hosting or otherwise willfully supporting hostes humani generis, must remain high. Endorsing captured al-Qaeda, the Taliban, or other agents of global terror as POWs would be inapposite, as it may be viewed as symbolically elevating their international status. It would be tantamount to bestowing tacit international recognition and credibility to their reprehensible objectives, appalling atrocities, and insidious terrorist tactics. n86 [\*85] The U.S. does not take lightly its international role, influence, obligations, and responsibilities. Classifying al-Qaeda or the Taliban captured enemy combatants as POWs under Geneva Convention III would have broad, and most undesirable ramifications. **It would erode significantly a combatant's** considerable, at times **primary, incentive to comply with LOAC** and thereby would **increase substantially** and unnecessarily **the risks to civilians and other protected noncombatants in future armed conflicts**. n87 Ultimately, **woefully undercutting customary LOAC** and international humanitarian law by granting POW status arbitrarily to unworthy, unlawful combatants would simply lead to an **added loss of international respect for, and future observance of, long-established international armed conflict norms,** customs, and laws. This would be unacceptable.

Nuclear war

Delahunty, associate prof – U St. Thomas Law, and Yoo, law prof – UC Berkeley, ‘10

(Robert and John, 59 DePaul L. Rev. 803)

Finally, the extension of IHRL to armed conflict may have significant consequences for the success of international law in advancing global welfare. Rules of the LOAC represent the delicate balancing between the imperatives of combat and the humanitarian goals in wartime. The LOAC has been remarkably successful in achieving compliance from warring nations in obeying these rules. This is most likely due to the reciprocal nature of the obligations involved. Nations treat prisoners of war well in order to guarantee that their own captive soldiers will be treated well by the enemy; **nations will refrain from using** weapons of mass destruction because they are deterred by their enemy's possession of the same weapons. It has been one of the triumphs of international law to increase the restrictions on the use of unnecessarily destructive and cruel weapons, and to advance the norms of distinction and the humane treatment of combatants and civilians in wartime. IHRL norms, on the other hand, may suffer from much lower rates of compliance. This may be due, in part, to the non-reciprocal nature of the obligations. One nation's refusal to observe freedom of speech, for example, will not cause another country to respond by depriving its own citizens of their rights. If IHRL norms--which were developed without much, if any, consideration of the imperatives of combat--merge into the LOAC, it will be likely that compliance with international law will decline. If nations must balance their security [\*849] needs against ever more restrictive and out-of-place international rules supplied by IHRL, we hazard to guess that the latter will give way. Rather than attempt to superimpose rules for peacetime civilian affairs on the unique circumstances of the "war on terror," a better strategy for encouraging compliance with international law would be to adapt the legal system already specifically designed for armed conflict.

### 6

**The executive branch of the United States federal government should issue a public statement of policy, clarifying that its authority for indefinite detention derives from the Laws of Armed Conflict.**

**The executive branch should release individuals in military detention who have won their habeas corpus hearing.**

The CP maintains broad detention authority under LOAC

Stimson, 13

(Senior Fellow and Manager, National Security Law Program-Heritage, “Law of Armed Conflict and the Use of Military Force,” 5/16, http://www.heritage.org/research/testimony/2013/05/the-law-of-armed-conflict)

The AUMF and Detention Authority

Despite the fact that the express language of the AUMF does not include the words “detention,” each of the three branches of the federal government, including the Executive Branch across two administrations, has recognized that the AUMF necessarily includes the power to detain those subject to the boundaries of the AUMF. In June 2002, the Bush administration argued in its brief before the Fourth Circuit in the case of United States v. Hamdi, that the authority to detain Yasser Hamdi flowed from the Commander in Chief’s Article II powers and from the “statutory authorization from Congress…Furthermore, the President here is acting with the added measure of the express statutory backing of Congress.” It cited the AUMF. Similarly, in its brief before the Supreme Court in Hamdi in 2004, the Bush administration argued that its detention authority stemmed, in part, from the AUMF as that authority “comes from the express statutory backing of Congress.” And, as is well known by now, the Supreme Court held in Hamdi that “Congress has in fact authorized Hamdi’s detention, through the AUMF.” As the Court explained, citing longstanding, consistent executive practice and the law of war, “detention of individuals [who fought against the United States as part of the Taliban], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”[10] The Bush administration relied on the AUMF’s detention authority in subsequent cases, including those regarding Jose Padilla and Ali Saleh Kahlah al-Marri. The Obama administration has continued to rely on the AUMF for detention authority. In its first brief before a court on the matter—here, in the context of habeas litigation from three Guantanamo detainees—the administration argued that “The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force.”[11] Their brief went on to say that “**detention authority conferred by the AUMF is necessarily informed by principles of the laws of war**,”[12] which is a position also taken by the Bush administration and the courts in numerous instances. In particular, it arrived at the following “definitional framework,” premised on the application of the law of armed conflict to the AUMF, that has subsequently been **upheld by** the United States Court of Appeals for **the D.C. Circuit: The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks** that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. **The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces** or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces[13]. Congress, in turn, ratified that framework in Section 1021 of the 2012 National Defense Authorization Act (“NDAA”). That provision “affirms” the authority of the President under the AUMF to detain certain “covered persons”: A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks. A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces. And although there have been differences between the two administrations in terms of their reliance on Article II powers and detention authority, the fact remains that both administrations have consistently relied on the AUMF to justify detention of members of al Qaeda, the Taliban, and associated forces.

The policy decision to release the Uighurs is distinct---solves the aff without undermining authority

Modirzadeh, 10

(Head of Policy–Harvard Program on Humanitarian Policy and Conflict Research, “The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict,” *International Law Studies* Vol. 86)

Move from Law to Policy, Emphasizing Pragmatism over Formal Legal Rules

In this final path, human rights advocates and scholars would need to get their hands dirty in actual military policymaking and planning. Rather than insisting on formal normative consensus, or repeatedly citing unclear and relatively impractical legal definitions of “effective control,” “cause and effect” and other grounds for human rights jurisdiction, those following this approach would make a definitive turn away from law and toward policy. Leaving behind the normative certainty of convergence and the trump card of rights talk, advocates and scholars might instead seek to formulate human rights in the language of military policy and planning. We increasingly see that the military references much of its behavior on policy grounds. Thus, detainee treatment going above the standards of IHL (such as providing advocates for detainees going before boards, or providing compensation for civilian victims of attacks) is often explained not on the basis of IHL (where States would normally deny that they have such obligations) or formal human rights obligation, but rather as a matter of policy (a policy that may well be presented as influenced by a number of factors including human rights, counterterrorism and nation building). It may well be that human rights talk and rights culture have, to varying degrees based on the country in question and its domestic rhetoric around rights and international law, been absorbed into military and State thinking on strategic and policy decisions on the ground. Indeed, one could likely trace the human rights origins of key provisions in individual coalition member’s detention policies in Iraq and Afghanistan, or in important paragraphs of their bilateral security arrangements with those nations. Human rights actors and scholars can and should be proud of such impact on strategy and policymaking, and that the absorption of human rights norms into bilateral agreements,96 detention policies, rules of engagement, counterinsurgency doctrine97 and even individual orders in the field may well result in improved conditions and treatment of civilians and prisoners inspired by the content of human rights instruments. **But we should not forget that there is a difference between decision-making and conduct on the basis of policy, and obligations to act as a matter of law**. At the margins, and in areas where interpretations of law are wildly divergent, formalism may still matter. To the extent that concerns about the specifics of applying convergence, or “operationalizing” its norms, are dismissed by States with claims that human rights law is already applied as a matter of policy, or that it is already part and parcel of any on-the-ground decision-making environment, it is worth pointing out that when a detainee brings a claim for remedy on the basis of international human rights law, or when a humanitarian organization is attempting to understand its roles and responsibilities on the ground, actual legal obligations will determine outcomes. However, this approach could be the most impactful of all in terms of real change to State and military behavior, and tangible increases in protection, treatment and respect for basic rights. While it involves considerable sacrifices in terms of the types of argumentation available to human rights advocates, and while it moves away from the current focus on litigation, this approach would facilitate more fluid negotiations with the military planners and decision-makers on the ground and at the capital level, leaving law and obligations out of the room and focusing on the practical ways in which States can **improve their outcomes by incorporating human rights principles into the day-to-day operations of soldiers**. I imagine that one reason this approach would be unattractive to many human rights advocates is that it would involve, first, promoting human rights in a context that might involve justifying these principles on the basis of counterterrorism, counterinsurgency, increased cooperation of the population with the military, increased acquiescence of the population to the policy desires of foreign States, etc. Second, such an approach would necessarily mean getting involved with the ugly realities of military decision making, accepting that not all legal rights–holders will be granted protections in the same way, and that military security will likely always trump policy-based rights and protections. Finally, contrary to much of human rights advocacy that relies on soliciting public support and eliciting public outrage, this approach would likely need to be confidential, involving little engagement with the public and focusing on identifying compelling and practical tools that will convince States that it is in their interests to embrace aspects of human rights into their military policies, rules of engagement and orders. That said, this approach may facilitate a discussion and practical engagement with human rights in armed conflict that moves out of academic scholarship and discussions at conferences over lex specialis, and shifts to the real choices human rights advocates expect military leaders and soldiers to make on the ground. Rather than engaging in an adversarial conversation mediated by courts or human rights bodies, this approach would ask that human rights advocates envision rights through the prism of armed conflict, and from the perspective of the military. This raises a number of serious concerns about the extent to which this would still be human rights advocacy as we know it, but it may also **pave the way for actual and significant changes in on-the-ground decisions, and in the ability of individuals caught in armed conflict to lead more dignified lives.**

### Courts

#### No one models American courts – Canada is the model

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(David S. and Mila, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” 87 N.Y.U.L. Rev. 762, Lexis)

In 1987, to mark the bicentennial of the U.S. Constitution, Time magazine released a special issue in which it called the Constitution "a gift to all nations" and proclaimed proudly that 160 of the 170 nations then in existence had modeled their constitutions upon our own. n2 As boastful as the claim may be, the editors of Time were not entirely without reason. Over its two centuries of history, the U.S. Constitution has had an immense impact on the development of constitutionalism around the world. n3 Constitutional law has been called [\*765] one of the "great exports" of the United States. n4 In a number of countries, constitutional drafters have copied extensively, and at times verbatim, from the text of the U.S. Constitution. n5 Countless more foreign constitutions have been characterized as this country's "constitutional offspring." n6

It is widely assumed among scholars and the general public alike that the United States remains "the hegemonic model" for constitutionalism in other countries. n7 The U.S. Constitution in particular continues to be described as "the essential prototype of a written, single-document constitution." n8 There can be no denying the popularity of [\*766] the Constitution's most important innovations, such as judicial review, entrenchment against legislative change, and the very idea of written constitutionalism. n9 Today, almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement. n10 As a result, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state. n11

There are growing suspicions, however, that America's days as a constitutional hegemon are coming to an end. n12 It has been said that [\*767] the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights. n13 Indeed, to the extent that other countries still look to the United States as an example, their goal may be less to imitate American constitutionalism than to avoid its perceived flaws and mistakes. n14 Scholarly and popular attention has focused in particular upon the influence of American constitutional jurisprudence. The reluctance of the U.S. Supreme Court to pay "decent respect to the opinions of mankind" n15 by participating in an ongoing "global judicial dialogue" n16 is supposedly diminishing the global appeal and influence of American constitutional jurisprudence. n17 **Studies conducted by** [\*768] **scholars in other countries** have begun to **yield empirical evidence that citation to U.S. Supreme Court decisions by foreign courts is** in fact **on the decline**. n18 By contrast, however, the extent to which the U.S. Constitution itself continues to influence the adoption and revision of constitutions in other countries remains a matter of speculation and anecdotal impression.

**With** the help of **an extensive data set** of our own creation **that spans all national constitutions over the last six decades**, this Article explores the extent to which various prominent constitutions - including the U.S. Constitution - epitomize generic rights constitutionalism or are, instead, increasingly out of sync with evolving global practice. **A stark contrast can be drawn between the declining attraction of the U.S. Constitution as a model for other countries and the increasing attraction of the model provided by America's neighbor to the north**, **Canada**. We also address the possibility that today's constitution makers look for inspiration not only to other national constitutions, but also to regional and international human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Our findings do little to assuage American fears of diminished influence in the constitutional sphere.

Part I introduces the data and methods used in this Article to quantify constitutional content and measure constitutional similarity. Part II describes the global mainstream of rights constitutionalism, in the form of a set of rights that can be found in the vast majority of the [\*769] world's constitutions. From this core set of rights, we construct a hypothetical generic bill of rights that exemplifies current trends in rights constitutionalism. We then identify the most and least generic constitutions in the world, measured by their similarity to this generic bill of rights, and we pinpoint the ways in which the rights-related provisions of the U.S. Constitution depart from this generic model.

Part III documents the growing divergence of the U.S. Constitution from the global mainstream of written constitutionalism. Whether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: **The U.S. Constitution has become an increasingly unpopular model for constitutional framers elsewhere**. Possible explanations include the sheer brevity of the Constitution, its imperviousness to formal amendment, its omission of some of the world's generic constitutional rights, and its inclusion of certain rights that are increasingly rare by global standards.

Parts IV and V tackle the question of whether a prominent constitution from some other country has supplanted the U.S. Constitution as a model for global constitutionalism. Part IV contrasts the growing deviance of the U.S. Constitution from global constitutional practice with the increasing popularity of the Canadian approach to rights constitutionalism. Unlike its American counterpart, the Canadian Constitution has remained squarely within the constitutional mainstream. Indeed, **when Canada departed from the mainstream by adopting a new constitution**, **other countries followed its lead**. Closer examination reveals, however, that the popularity of the Canadian model is largely confined to countries with an Anglo-American legal tradition. In other words, our analysis suggests that Canada is in the vanguard of what might be called a Commonwealth model of rights constitutionalism, but not necessarily of global constitutionalism as a whole.

Part V considers whether the widely celebrated constitutions of Germany, South Africa, or India might instead be leading the way for global constitutionalism. **Although all** three are currently **more mainstream than the U.S. Constitution**, we find little evidence that global constitution-writing practices have been strongly shaped by any of the three.

Part VI explores the possibility that transnational human rights instruments have begun to shape the practice of formal constitutionalism at the national level. The evidence that international and regional human rights treaties may be serving as models for domestic constitutions varies significantly from treaty to treaty. In particular, [\*770] we find that the average constitution has increasingly grown to resemble the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as the African Charter on Human and Peoples' Rights and the Charter of Civil Society for the Caribbean Community. There is little evidence, however, that any of these treaties is actually responsible for generating global consensus as to what rights demand formal constitutional protection. Although these treaties may express and reinforce preexisting global constitutional trends, they do not appear to define those trends in the first place.

Finally, the Conclusion discusses **possible explanations for the declining influence of American constitutionalism**. These **include a broad decline in American hegemony** across a range of spheres, **a judicial aversion to constitutional comparativism**, **a historical and normative commitment to American exceptionalism**, **and sheer constitutional obsolescence**.

True for pres powers

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(David S. and Mila, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” 87 N.Y.U.L. Rev. 762, Lexis)

Our analysis thus far offers strong evidence that the U.S. Constitution is losing popularity as a model for constitution makers, at least as far as the enumeration of rights is concerned. But what of the structural and institutional innovations for which the U.S. Constitution is also renowned? There are three features of what has come to be known as the "structural constitution" n50 that are closely associated with American constitutionalism: federalism, n51 presidentialism, n52 and judicial review. n53 Is it merely the rights guarantees found in the U.S. Constitution that fail to inspire today's constitution makers, or is the global popularity of the structural constitution also in decline? The answer appears to be that the most distinctive and celebrated structural features of the U.S. Constitution have also fallen out of vogue.

1. Federalism

Federalism held considerable appeal to constitution makers in the early nineteenth century, and nowhere more so than in Latin America, where it was embraced by Argentina, Brazil, Chile, Uruguay, Venezuela, and Mexico, among others. n54 Even at the peak of its popularity in the early twentieth century, however, only 22% of [\*786] the world's nations employed some form of federalism. n55 Since that time, federalism has diminished in popularity. n56 Following a significant decline in the inter-war period, the proportion of countries with a federal system recovered somewhat to about 18% in the immediate aftermath of World War II but has since stabilized at a mere 12%. These developments are depicted in Figure 7, which graphs the proportion of countries with a federal system over the last two centuries. n57

[\*787] Figure 3. Similarity to the U.S. Constitution in 1946 [\*788] Figure 4. Similarity to the U.S. Constitution in 1966 [\*789] Figure 5. Similarity to the U.S. Constitution in 1986 [\*790] Figure 6. Similarity to the U.S. Constitution in 2006 [\*791] Figure 7. Percentage of Countries with Federal Systems

2. Presidentialism

A similar fate has befallen another famous American constitutional innovation, that of presidentialism. Like federalism, presidentialism enjoyed early popularity in Latin America. n58 Many of these early Latin American experiments with presidentialism degenerated into dictatorial rule, n59 however, **and these failures helped to give presidentialism itself a bad name** n60 **and to discourage other nations from adopting similar systems**. n61 Figure 8 depicts the prevalence of presidential, semi-presidential (or mixed), and parliamentary systems [\*792] among the world's democracies over the last six decades. n62 In absolute terms, the parliamentary model has consistently been the most popular of the three and is at present the choice of roughly half of the world's democracies. By contrast, although presidentialism has enjoyed a slight resurgence since its nadir in the 1970s, it remains less widespread now than it was in the immediate aftermath of World War II. What has gained popularity over time, mainly at the expense of parliamentarism, is the mixed or semi-presidential model, which was widely adopted among the former Soviet bloc countries that emerged from communism in the 1990s. n63

[\*793]

Figure 8. Popularity of Presidential, Parliamentary, and Mixed Systems

3. Judicial Review

It is perhaps ironic that the most popular innovation of American constitutionalism has been judicial review, n64 given that this celebrated institution is nowhere mentioned in the U.S. Constitution itself. Today, the majority of the world's constitutions mandate judicial review in some form, as shown in Figure 9. n65 In 1946, only 25% of all constitutions explicitly provided for judicial review; by 2006, that proportion had increased to 82%.

[\*794]

Figure 9. Percentage of Constitutions That Provided Explicity for Judicial Review

**The** particular **form of judicial review that has proven most popular**, however, **is not the form** that was **pioneered by the U**nited **S**tates. n66 Under the American model, the power of judicial review is vested in courts of general jurisdiction, which rule upon the constitutionality of government action as the need arises in the course of ordinary litigation. n67 Under the European model, by contrast, the power to decide constitutional questions is exercised exclusively by a specialized constitutional court that stands apart from the regular [\*795] judiciary. n68 The prototypical examples of this model are the constitutional courts that Hans Kelsen devised for Austria. n69 A further distinction is routinely drawn between concrete review, which characterizes the American model, and abstract review, which typifies the European model. In a system of concrete review, courts decide constitutional questions in the course of ordinary litigation, as part of what Americans would call a case or controversy, n70 whereas in a system of abstract review, the constitutionality of a law can be decided in the absence of a concrete, adversarial dispute and, indeed, before the law has even gone into effect. n71

**Over the last six decades**, **a growing proportion** of constitutions **have adopted the European model of abstract review by specialized courts**, **as opposed to the American model** of concrete review by [\*796] ordinary courts. At the close of World War II, the American model enjoyed a commanding lead over the European model as the choice of over 80% of constitution makers, but its popularity began to erode in the 1970s. By the mid-1990s, the European model had overtaken the American model as the choice of over half the world's constitutions. Figure 10 illustrates these global trends. The creation of specialized constitutional courts of the European variety has proven especially popular among newly democratic states, where distrust of existing judicial institutions associated with the old regime is often widespread. n72 Thus, **although the U.S. Constitution may have pioneered the idea of binding judicial enforcement** of individual rights - an idea that now enjoys nearly universal acceptance - **it is no longer the leading source of inspiration for how such enforcement is to be institutionalized**. America's long and successful experience with judicial review may be responsible for encouraging other countries to adopt the practice, but the form of judicial review that other countries actually choose to adopt has a more European than American flavor.

One ruling doesn’t solve

Rex Glensy, Associate Professor, Drexel University College of Law, 11 [“THE USE OF INTERNATIONAL LAW IN U.S. CONSTITUTIONAL ADJUDICATION,” International Law in U.S. Constitutional Adjudication, Vol. 25, 2011]

The other side of the coin is represented by the consequences for the United¶ States if it decides to forego the increasing judicial conversation that is taking¶ place between courts of different countries. The failure of U.S. courts to¶ engage in this enterprise “weakens Amer¶ ica’s voice as a principled defender of¶ human rights around the world and diminishes America’s moral influence and¶ stature.”¶ 182¶ In fact, because of the raised profile of the United States in the¶ world, its actions are routinely more heavily scrutinized than those of other¶ nations, and **any notion** of the United States disengaging from international¶ dialogue, or behaving in a manner that is considered inappropriate by the¶ international community, results in a greater diminution of influence than if¶ those same actions were to be performed by another nation.¶ 183¶ This diminution¶ of influence is already beginning to take its course, in large part due to the¶ current **Supreme Court’s predominantly regressive jurisprudence that has¶ shown hostility to ideas and authority that originate from abroad**.¶ 184¶ Thus, even¶ though historically the Un¶ ited States has provided, through its Constitution,¶ inspiration to many fledgling democracies,¶ 185¶ “the recent direction of United¶ States constitutional jurisprudence has led most constitution-makers to seek¶ alternative models.”¶ 186¶ Unfortunately, the United Stat¶ es is increasingly used by courts of other nations as a “c¶ ounter-example” because “as a global¶ constitutionalism begins to flourish, this failure to engage [by the United States¶ Supreme Court (in particular)] threat¶ ens increasingly to marginalize the¶ experience of the constantly evolving United States Constitution that was once¶ the inspiration of all constitutionalists.”¶ 187¶ Concerns about the reputation of the United States’s legal system similarly¶ motivate an integration of comparative law within American jurisprudence.¶ Reputation is an important component¶ of a nation’s ability to function on the¶ international stage, and historically, the United States, through its international¶ leadership and its “commitment to the rule of law and to the betterment of the¶ human situation,” obtained a reputation that drew other nations towards¶ adopting its values and outlook.¶ 188¶ But **reputation is a characteristic that needs¶** constant feeding**, and resting on its past laurels**, or worse, showing disinterest¶ or contempt for the international stage,¶ 189¶ will result in long-term damage to¶ the United States’s reputation (which ta¶ kes a long time to rebuild), with the¶ consequent diminution of its ability to impact other nations.¶ 190¶ By showing¶ willingness to consult legal ideas derive¶ d from international law principles,¶ courts in the United States can go some way towards increasing their clout on¶ the international stage, with the consequent improvement of the United States’s¶ international reputation on the whole. Ultimately, it is in the interest of the¶ United States to do so.¶ Nevertheless, the “pursuit of self-interest is tempered by recognition of the¶ legitimate interests of other players and a desire to encourage reciprocal¶ behavior.”¶ 191¶ That is, because of the assured interaction between the United¶ States (either through its institutions or its citizens) and foreign countries in the¶ future, the United States would want to guarantee itself a modicum of¶ treatment equal to the level of treatment such foreign countries (or their citizens) would receive in the United States.¶ 192¶ Thus, reciprocity, assisted by¶ “transjudicial communication,”¶ 193¶ gives a regime a “longer shelf life”¶ 194¶ as it is¶ helped along by international cooperation (or non-interference) of foreign¶ nations.¶ Many scholars have noted that the current lack of reciprocity (personified¶ by the reticence of U.S. courts to participate in the comparative enterprise) is¶ not going unnoticed in international bodies and foreign countries.¶ 195¶ International judges too have noticed this retrenchment by the U.S. Supreme¶ Court and its failure to cite interna¶ tional sources, particularly from those¶ international tribunals that referred, or used to refer, to the U.S. Supreme¶ Court’s own decisions, thereby noting that (through reciprocity) **those same¶ international tribunals are going to rely on the U.S. Supreme Court’s decision¶ with less and less frequency.**¶ 196¶ This attitude is exemplified by a Canadian¶ Supreme Court decision preventing the extradition from Canada to the United¶ States of two defendants who faced the death penalty.¶ 197¶ It cited, among other¶ international authorities, Justice Breyer’s dissent in¶ Knight v. Florida¶ in¶ concluding that the death penalty was being phased out.¶ 198¶ The need to provide reciprocal treatment to other nations of the world has¶ been exacerbated by the fact that the world has become more interconnected,¶ and consequently, domestic law and activity increasingly have international consequences, and vice versa.¶ 199¶ As a result of this interconnection, the United¶ States has demonstrated that it holds no reservations to imposing laws and¶ regulations over activities occurring abroad that supposedly have effect within¶ its territory.¶ 200¶ It seems inconsistent to advocate a one-way ratchet approach to¶ the effects of globalization that allows for exports but is resistant to imports,¶ particularly when imports serve the same interests as do the exports. In fact,¶ this excessive nation-centric view of the world, with the premise that any legal¶ thought of any importance can only originate from the United States, seems¶ largely obsolete in the new world order,¶ and has already been rejected by the¶ United States in areas such as international trade.¶ 201¶ Like recent developments¶ in the area of international trade, the use of international law as persuasive¶ authority for domestic cases merely acknowledges today’s global reality and¶ serves the United States by offering reciprocity to other nations, thus¶ enhancing its stature on the international legal stage.

The aff can’t solve rule of law and there’s no impact

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The effects of this burgeoning rule-of-law aid are generally positive,¶ though usually modest. After more than ten years and hundreds of millions¶ of dollars in aid, many judicial systems in Latin America still function¶ poorly. Russia is probably the single largest recipient of such aid,¶ but is not even clearly moving in the right direction. The numerous ruleof-¶ law programs carried out in Cambodia after the 1993 elections failed¶ to create values or structures strong enough to prevent last year’s coup.¶ Aid providers have helped rewrite laws around the globe, but they have¶ discovered that the mere enactment **of laws accomplishes little** **without**¶ considerable investment in **changing the conditions** for implementation¶ and enforcement. Many Western advisers involved in rule-of-law assistance¶ are new to the foreign aid world and have not learned that aid¶ must support domestically rooted processes of change, not attempt to¶ artificially reproduce preselected results.¶ **Efforts to strengthen basic legal institutions have proven slow and difficult.¶** Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor¶ impact. The desirability of embracing such values as efficiency, transparency,¶ accountability, and honesty seems self-evident to Western aid¶ providers, but for those targeted by training programs, such changes¶ may signal the loss of perquisites and security. Major U.S. judicial reform¶ efforts in Russia, El Salvador, Guatemala, and elsewhere have foundered¶ on the assumption that external aid can substitute for the internal¶ will to reform.¶ Rule-of-law aid has been concentrated on more easily attained type¶ one and type two reforms. Thus it has affected the most important elements¶ of the problem least. Helping transitional countries achieve type¶ three reform that brings real change in government obedience to law is¶ the hardest, slowest kind of assistance. It demands powerful tools that¶ aid providers are only beginning to develop, especially activities that¶ help bring pressure on the legal system from the citizenry and support¶ whatever pockets of reform may exist within an otherwise selfinterested¶ ruling system. It requires a level of interventionism, political¶ attention, and visibility that many donor governments and organizations¶ cannot or do not wish to apply. Above all, it calls for patient, sustained¶ attention, as breaking down entrenched political interests, transforming¶ values, and generating enlightened, consistent leadership will¶ take generations.¶ The experience to date with rule-of-law aid suggests that it is best to¶ proceed with caution. The widespread embrace of the rule-of-law imperative¶ **is heartening, but it represents only the first step** for most transitional¶ countries on what will be a long and rocky road. Although the¶ United States and other Western countries can and should foster the¶ rule of law, even large amounts of aid will not bring rapid or decisive¶ results. Thus, it is good that President Ernesto Zedillo of Mexico has¶ made rule-of-law development one of the central goals of his presidency,¶ but the pursuit of that goal is certain to be slow and difficult,¶ as highlighted by the recent massacre in the south of the country. Judging¶ from the experience of other Latin American countries, U.S. efforts¶ to lighten Mexico’s burden will at best be of secondary importance. Similarly,¶ Wild West capitalism in Russia should not be thought of as a brief¶ transitional phase. The deep shortcomings of the rule of law in Russia¶ **will take decades to fix**. The Asian financial crisis has shown observers¶ that without the rule of law the Asian miracle economies are unstable.¶ Although that realization was abrupt, remedying the situation will be a¶ long-term enterprise.

#### Democracy doesn’t solve war

Kupchan, Professor of International Affairs – Georgetown University, April ‘11

(Charles A, “Enmity into Amity: How Peace Breaks Out,” <http://library.fes.de/pdf-files/iez/07977.pdf>)

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

They don’t solve Iraq---their ev cites sectarianism and population growth.

No escalation

**Cook 7** – fellow at the Council on Foreign Relations

Steven A., and Ray Takeyh (fellow at the Council on Foreign Relations), Suzanne Maloney (senior fellow at Saban Center) Brookings Institution, International Herald Tribune, “Why the Iraq war won't engulf the Mideast,” 6-28, www.iht.com/articles/2007/06/28/opinion/edtakeyh.php

It is abundantly clear that major outside powers like Saudi Arabia, Iran and Turkey are heavily involved in Iraq. These countries have so much at stake in the future of Iraq that it is natural they would seek to influence political developments in the country. Yet, the Saudis, Iranians, Jordanians, Syrians, and others are very unlikely to go to war either to protect their own sect or ethnic group or to prevent one country from gaining the upper hand in Iraq. The reasons are fairly straightforward. First, Middle Eastern leaders, like politicians everywhere, are primarily interested in one thing: self-preservation. Committing forces to Iraq is an inherently risky proposition, which, if the conflict went badly, could threaten domestic political stability. Moreover, most Arab armies are geared toward regime protection rather than projecting power and thus have little capability for sending troops to Iraq. Second, there is cause for concern about the so-called blowback scenario in which jihadis returning from Iraq destabilize their home countries, plunging the region into conflict. Middle Eastern leaders are preparing for this possibility. Unlike in the 1990s, when Arab fighters in the Afghan jihad against the Soviet Union returned to Algeria, Egypt and Saudi Arabia and became a source of instability, Arab security services are being vigilant about who is coming in and going from their countries. In the last month, the Saudi government has arrested approximately 200 people suspected of ties with militants. Riyadh is also building a 700 kilometer wall along part of its frontier with Iraq in order to keep militants out of the kingdom. Finally, there is no precedent for Arab leaders to commit forces to conflicts in which they are not directly involved. The Iraqis and the Saudis did send small contingents to fight the Israelis in 1948 and 1967, but they were either ineffective or never made it. In the 1970s and 1980s, Arab countries other than Syria, which had a compelling interest in establishing its hegemony over Lebanon, never committed forces either to protect the Lebanese from the Israelis or from other Lebanese. The civil war in Lebanon was regarded as someone else's fight. Indeed, this is the way many leaders view the current situation in Iraq. To Cairo, Amman and Riyadh, the situation in Iraq is worrisome, but in the end it is an Iraqi and American fight. As far as Iranian mullahs are concerned, they have long preferred to press their interests through proxies as opposed to direct engagement. At a time when Tehran has access and influence over powerful Shiite militias, a massive cross-border incursion is both unlikely and unnecessary. So Iraqis will remain locked in a sectarian and ethnic struggle that outside powers may abet, but will remain within the borders of Iraq. The Middle East is a region both prone and accustomed to civil wars. But given its experience with ambiguous conflicts, the region has also developed an intuitive ability to contain its civil strife and prevent local conflicts from enveloping the entire Middle East.

### Soft power

Can't solve legitimacy

Fettweis 10

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Both theoretical logic and empirical evidence suggest that actions taken in the present will likely not have a predictable effect on the crises of the future, for better or for worse. The almost overwhelming tendency to try to send messages through national actions increases the odds of policy mishaps and outright folly, for at least two reasons. First, and most basically, an eye toward the future prevents complete focus on the present. During a crisis, the national interest cannot be correctly ascertained unless policymakers de-link present concerns from future expectations. Second, as unsettling as it may be, the future is not subject to our control. There is much that can and will occur between the current crisis and the next, and the international environment will change in quite unpredictable ways. Target actors – whether they be superpowers or terrorist groups or vaguely-defined “threats” – are not likely to believe that the actions of a state give clues to its future actions. In other words, they believe that our actions are independent, and there is little that can be done to change that.81 Generally speaking, therefore, policymakers are wise to fight the natural temptation to look beyond the current crisis when deciding on action.

Honor is a socially determined good, in the sense that the community is the ultimate arbiter of whether any individual possesses it. Likewise, the status of its credibility is beyond the control of the United States. Neither people nor states own their reputation, which can be affected by the actions to some extent but ultimately exist primarily in the minds of others. “Credibility exists,” noted the recent U.S. politician perhaps most obsessed with its maintenance, “only in the eye of the beholder.”82 Try as they might, states cannot exert complete control over their reputations or level of credibility; target adversaries and allies will ultimately form their own perceptions, ones that will be affected by their needs and goals. Even if states were to take what appeared to be the logical actions to protect their credibility, it is possible (perhaps likely) that others will not receive the messages in the way they were intended.83 Sending messages for their consideration in future crises, therefore, is all but futile.

Legitimacy inevitable and irrelevant - not key to cooperation

Brooks and Wohlforth 09

Stephen G. Brooks is Associate Professor of Government at Dartmouth College. William C. Wohlforth is Daniel Webster Professor of Government and Chair of the Department of Government at Dartmouth College, Foreign Affairs, March/April 2009, "Reshaping the World Order", http://www.dartmouth.edu/~govt/faculty/BrooksWohlforth-FA2009.pdf

THE LEGITIMACY TO LEAD?

For analysts such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States’ ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a ﬁxed resource that can be obtained only under special circumstances. The political scientist G. John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good.

But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action—such as the Vietnam War or the invasion of Iraq—may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the ﬁrst time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan’s ﬁrst term, when he called the Soviet Union an “evil empire.” Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies, oversaw a marked improvement in relations with France, Germany, and India in recent years—even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France.

Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration’s approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the beneﬁts of its global role. No other state has any claim to leadership commensurate with Washington’s. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system’s leader hinges on whether the system’s members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected.

Moreover, history provides abundant evidence that past leading states—such as Spain, France, and the United Kingdom—were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spain fashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe’s preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure of lucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways—notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly aªecting the development of new rules by deﬁning the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world’s agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the United States today has the necessary legitimacy to shepherd reform of the international system.

Snowden means no soft power

Parisella 6/27/13

John Parisella is a contributing blogger to AQ Online. He is the former Québec delegate general in New York and currently an invited professor at University of Montréal’s International Relations Center, The Americas Quarterly, June 27, 2013, "The Effect of Edward Snowden-A Canadian Perspective", http://www.americasquarterly.org/content/effect-edward-snowden-canadian-perspective

To some, former CIA and National Security Administration (NSA) employee Edward Snowden is seen as a classic whistleblower, who divulged government secrets that contradict the U.S. Constitution and its 4th amendment. Many who espouse his view—on both the left and right—have applauded his courage and regard him as a hero. To others—especially within the U.S. political class—he is now considered a charged felon, who has willingly pursued a plan to embarrass his government, and in so doing, has breached matters of national security and made the United States less safe. His weekend flight from Hong Kong to Russia may lead some to go as far as to label him a “traitor”. Which is it—hero, felon or traitor? It is too early to answer this. But the longer the situation drags on, the more damage it will inflict on the reputation of the United States on the world stage. The 4th amendment of the U.S. Constitution sets guidelines to protect individual privacy. Even in matters of national security, we are told that due process must be followed. NSA programs, including the ones covering telephone records as well as internet activity that Snowden denounced, must be subjected to safeguards that protect the right to privacy. President Barack Obama has since justified these NSA programs as the necessary balance between privacy and security in this post-9-11 world. While his administration has been careful in its choice of vocabulary, it has decided to charge Snowden with contravening the Espionage Act. The spectacle of the strongest power on earth chasing Snowden around the globe is not reassuring to those who believe in the value of U.S. diplomacy, U.S. intelligence capacity or U.S. military might. The ease with which Snowden accessed sensitive material and subjected his government to this embarrassing game of “cat and mouse” is also not comforting to those who count on U.S. intelligence forces to keep them safe. Clearly, at the outset, the initial effect of Snowden’s action was to spark a legitimate debate about privacy, security and the importance of the 4th amendment. Libertarian politicians like Rand Paul did not condemn Snowden outright. Snowden also has significant support in progressive circles. Others, like influential Democratic Senator Diane Feinstein and Republican Congressman Mike Rogers—normally on opposite sides, argued that maintaining national security and keeping America safe requires measures that could affect some privacy issues. Together, however, they have vehemently condemned Snowden’s actions .The flight to Russia may have deviated what was becoming a necessary debate in a democracy from matters of substance to theatrics. Snowden detractors refer to another famous whistleblower incident: that of Daniel Ellsberg and the release of the Pentagon papers, which gradually led to the questioning of the Vietnam War. Unlike Snowden, they argue, Ellsberg stayed in the U.S. and faced the justice system. In contrast, Snowden’s behavior, which has been backed by some advocacy journalists such as Glen Greenwald of The Guardian and Wikileaks, seems set on evading the U.S. justice system. The polemics around Snowden’s whereabouts seem to confuse the nature of the conversation America should be having at this time in its history. In the meantime, The United States’ image is not improving around the world. Its government seems hesitant and vulnerable. The ‘soft power’ strengths of the U.S. are being questioned. Countries such as China and Russia, with poor human rights records, are openly defying the wishes of the world’s oldest and strongest democracy, and its rule of law. At the end of the day, the privacy versus security debate is rapidly becoming a secondary issue, and this entire episode is turning into a zero-sum game for the United States where no individual or principle wins the day. And this may well be the unintended consequence of Edward Snowden’s actions.

No impact

Fettweis, 11

Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990.51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.”52 On the other hand, if the pacific trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence.

The verdict from the past two decades is fairly plain: The world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush Administration ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated.

Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered.

However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation.

It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

Credibility fails - empirics

Drezner 11

Daniel W. Drezner, Professor of International Politics at the Fletcher School of Law and Diplomacy at Tufts University, Foreign Affairs, July/August 2011, "Does Obama Have a Grand Strategy?", <http://www.foreignaffairs.com/print/67869>

What went wrong? The administration, and many others, erred in believing that improved standing would give the United States greater policy leverage. The United States' standing among foreign publics and elites did rebound. But this shift did not translate into an appreciable increase in the United States' soft power. Bargaining in the G-20 and the UN Security Council did not get any easier. Soft power, it turns out, cannot accomplish much in the absence of a willingness to use hard power. The other problem was that China, Russia, and other aspiring great powers did not view themselves as partners of the United States. Even allies saw the Obama administration's supposed modesty as a cover for shifting the burden of providing global public goods from the United States to the rest of the world. The administration's grand strategy was therefore perceived as promoting narrow U.S. interests rather than global public goods.

#### Detention restrictions increases rendition and drone strikes—comparatively worse and turns cred

Goldsmith, 12

(Law Prof-Harvard, 6/29, Proxy Detention in Somalia, and the Detention-Drone Tradeoff, www.lawfareblog.com/2012/06/proxy-detention-in-somalia-and-the-detention-drone-tradeoff/

There has been speculation about the effect of the Obama administration’s pinched detention policy – i.e. no new detainees brought to GTMO, and no new detainees to Parwan (Afghanistan) from outside Afghanistan – on its other counterterrorism policies. I have long believed there must be some tradeoff between narrowing U.S. detention capabilities and other counterterrorism options, at least implicitly, and not necessarily for the better. As I wrote three years ago, in response to news reports that the Obama administration’s cutback on USG detentions resulted in more USG drone strikes and more outsourcing of rendition, detention, and interrogation: There are at least two problems with this general approach to incapacitating terrorists. First, it is not ideal for security. Sometimes it would be more useful for the United States to capture and interrogate a terrorist (if possible) than to kill him with a Predator drone. Often the United States could get better information if it, rather than another country, detained and interrogated a terrorist suspect. Detentions at Guantanamo are more secure than detentions in Bagram or in third countries. The second problem is that terrorist suspects often end up in less favorable places. Detainees in Bagram have fewer rights than prisoners at Guantanamo, and many in Middle East and South Asian prisons have fewer yet. Likewise, most detainees would rather be in one of these detention facilities than be killed by a Predator drone. We congratulate ourselves when we raise legal standards for detainees, but in many respects all we are really doing is driving the terrorist incapacitation problem out of sight, to a place where terrorist suspects are treated worse. The main response to this argument – especially as it applies to the detention-drone tradeoff – has been to deny any such tradeoff on the ground that there are no terrorists outside of Afghanistan (a) whom the United States is in a position to capture on the ground (as opposed to kill from the sky), and (b) whom the USG would like to detain and interrogate. Dan Klaidman’s book provides some counter-evidence, but I will save my analysis of that for a review I am writing. Here I would like to point to an important story by Eli Lake that reveals that the “United States soldiers have been hunting down al Qaeda affiliates in Somalia”; that U.S. military and CIA advisers work closely with the Puntland Security Force in Somalia, in part to redress piracy threats but mainly to redress threats from al-Shabab; that the Americans have since 2009 captured and brought to the Bosaso Central Prison sixteen people (unclear how many are pirates and how many are al-Shabab); and that American interrogators are involved in questioning al-Shabab suspects. The thrust of Lake’s story is that the conditions of detention at the Bosaso Central Prison are atrocious. But the story is also important for showing that that the United States is involved outside of Afghanistan in capturing members of terrorists organizations that threaten the United States, and does have a national security need to incapacitate and interrogate them. It does not follow, of course, that the USG can or should be in the business of detaining every al-Shabab suspect currently detained in the Bosaso Central Prison. But the Lake story does show that the alternatives to U.S. detention are invariably worse from a human rights perspective. It portends (along with last month’s WPR Report and related DOD press release) that our creeping involvement on the ground in places like Somalia and Yemen mean that the USG will in fact be in a position to capture higher-level terrorists in al Qaeda affiliates. And that in turn suggests that the factual premise underlying the denial of a detention-drone tradeoff will become harder and harder to defend.

## 2NC

### DA

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#### Kiyemba detainees have vetoed resettlement elsewhere—that means the aff releases them to the US—it’s the core legal question in the case

Jennifer K. Elsea, Congressional Research Services, Legislative Attorney, and Michael John Garcia, Legislative Attorney, 12/11/2012, Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings, http://www.fas.org/sgp/crs/natsec/R41156.pdf

Kiyemba v. Obama, 130 S.Ct. 1235 (2010)

In October 2009, the Supreme Court agreed to review a ruling by a three-judge panel of the D.C. Circuit Court of Appeals in the case of Kiyemba v. Obama, discussed infra. The Kiyemba case involved several Guantanamo detainees who, despite no longer being considered enemy combatants and having been cleared for release, had not been transferred from Guantanamo on account of the government being unable to effectuate their release to a foreign country. The Kiyemba petitioners sought reversal of a D.C. Circuit ruling finding that a federal habeas court lacked the authority to compel the executive to release the detainees into the United States. Following the Supreme Court’s grant of certiorari, however, several Kiyemba petitioners were resettled in foreign countries, and the United States was able to find countries willing to settle the remaining petitioners, although five petitioners rejected these countries’ offers for resettlement. On March 1, 2010, the Supreme Court vacated the appellate court’s opinion and remanded the case in light of these developments. Because the Supreme Court had granted certiorari on the understanding that no remedy was available for the petitioners other than release into the United States, it returned the case to the D.C. Circuit to review the ramifications of the new circumstances. Discussion of subsequent action taken by the D.C. Circuit, as well as by the Supreme Court with respect to another petition for certiorari by the Kiyemba petitioners, is found below.

Kiyemba v. Obama, 131 S. Ct. 1631 (2011)

Following the Supreme Court’s remand of the Kiyemba case back to the D.C. Circuit, the circuit panel reinstated its opinion with slight modifications. The Kiyemba petitioners once again sought Supreme Court review of the circuit court’s ruling that federal habeas courts lacked authority to compel the petitioners’ release into the United States. On April 18, 2011, the Supreme Court denied their request for review. Eight Supreme Court Justices took part in the decision, with Justice Kagan recusing herself. In joining the opinion, Justice Breyer issued a statement joined by Justices Kennedy, Ginsburg, and Sotomayor, which emphasized that the issue that had initially been presented when the Kiyemba petitioners first sought review by the Supreme Court was “whether a district court may order the release of an unlawfully held prisoner into the United States where no other remedy is available.” Because the government had received offers of resettlement for the petitioners, the petitioners had not proffered or alleged evidence that they would face torture or other harm, and the government continued to seek plaintiffs’ resettlement, Justice Breyer found “no Government-imposed obstacle to petitioners’ timely release and appropriate resettlement.” However, Justice Breyer stated that should these circumstances materially change, the petitioners “may of course raise their original issue (or related issues) again in the lower courts and in this Court.”

Mandating release spills-over to broader detention power

Popeo, 10

(Attorney-Washington Legal Foundation, Brief on Behalf of Retired Military Officers, National Defense Committee and Washington Legal Foundation, Kiyemba v. Obama, No. 08-1234, Lexis)

Boumediene indicated that a "habeas court must have the power to order the conditional release of an individual unlawfully detained." 128 S. Ct. at 2266. Based on that statement, Petitioners erroneously conclude that the decision below, by denying them a remedy, must conflict with Boumediene. Petitioners' conclusion overlooks Boumediene's admonition that the power to release arises only after the court determines that a petitioner is being "unlawfully detained." The United States has explained why Petitioners, although no longer deemed enemy combatants, are stuck in Guantanamo Bay: it has determined that permitting their entry into the United States is against the national interest, and no nation in which Petitioners are willing to resettle has agreed to accept them. To win release, Petitioners must demonstrate that they are being held "in custody in violation of the Constitution or laws or treaties of the United States." They have failed to make such a demonstration. In particular, Petitioners have failed to demonstrate that detention violates their rights to [\*8] substantive due process under the Fifth Amendment. Indeed, [\*\*11] federal courts throughout our history have decisively rejected claims that nonresident aliens possess any substantive due process rights. Moreover, courts and legal scholars at the Founding and at all times thereafter have agreed that when a sovereign nation denies entry to an alien, he is not entitled to appeal to some higher authority as a basis for overruling that denial. Finally, amici are concerned that recognition of the constitutional rights asserted by Petitioners would raise serious national security concerns. If Petitioners are entitled to substantive due process protections, than so are all the other detainees being held at Guantanamo Bay, including some of the most dangerous terrorists in the world. If those avowed enemies of the U.S. are afforded full Fifth Amendment protections, **the military's power to continue to detain them could be placed in serious jeopardy.**

### AT: They Aren’t Terrorists

Petitioners trained with Al Qaeda—huge risk

White, 10

(Counsel-Baker Botts LLP, Brief for Foundation for Defense of Democracies, Kyemba v. Obama, http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_RespondentAmCuFDD.authcheckdam.pdf)

Petitioners are among the categories of aliens prohibited from entering the United States on terrorism-related grounds. Gov’t Br. 29-31. They downplay the nature of their activities in Afghanistan: they claim that they merely “had been living in Afghanistan,” Pet. Br. 5, and that their weapons training merely was of the sort received by “[m]illions of American civilians, and hundreds and thousands of servicemen and women,” Br. of Appellees at 4, Bush v. Kiyemba, D.C. Cir. Nos. 08 5424 et al. (filed Nov. 3, 2008). But their account does not withstand scrutiny. Publicly-available documents establish that petitioners received “military-type training” from al Qaida operatives, rendering them categorically inadmissible. 8 U.S.C. §1182(a)(3)(B)(i)(VIII). 1. The ETIM For a complete account of Petitioners’ pre-detention activities, one must consider the context in which they were captured and detained. Petitioners’ choice of location speaks for itself. As early as 2000, in the days preceding al Qaida’s attack on New York and Washington, petitioners were trained by a designated al Qaida affiliate at camps run by senior terrorists. Petitioners primarily were at a camp in Afghanistan’s Tora Bora Mountains, a known stronghold for al Qaida and the Taliban. United States Special Operations Command, History 93 (2007). The camp was run by two notorious terror chieftains, Hassan Mahsum and Abdul Haq, central figures in the history of the East Turkistan Islamic Movement (“ETIM”).4 According to a recent ETIM propaganda video, Mahsum founded the ETIM and moved its base of operations to the Taliban’s Afghanistan in the late 1990s to train its members for jihad against the Chinese government.5 The ETIM returned the Taliban’s hospitality in kind, as ETIM members “fought alongside” al Qaida and Taliban forces during Operation Enduring Freedom in late 2001.6

### CP

### Signal – 2NC

#### CP sends the most powerful signal (while avoiding Congressional confrontation)

Zbigniew Brzezinski, national security advisor under U.S. President Jimmy Carter, 12/3/12, Obama's Moment, www.foreignpolicy.com/articles/2012/12/03/obamas\_moment

In foreign affairs, the central challenge now facing President Barack Obama is how to regain some of the ground lost in recent years in shaping U.S. national security policy. Historically and politically, in America's system of separation of powers, it is the president who has the greatest leeway for decisive action in foreign affairs. He is viewed by the country as responsible for Americans' safety in an increasingly turbulent world. He is seen as the ultimate definer of the goals that the United States should pursue through its diplomacy, economic leverage, and, if need be, military compulsion. And the world at large sees him -- for better or for worse -- as the authentic voice of America.

To be sure, he is not a dictator. Congress has a voice. So does the public. And so do vested interests and foreign-policy lobbies. The congressional role in declaring war is especially important not when the United States is the victim of an attack, but when the United States is planning to wage war abroad. Because America is a democracy, public support for presidential foreign-policy decisions is essential. But no one in the government or outside it can match the president's authoritative voice when he speaks and then decisively acts for America.

This is true even in the face of determined opposition. Even when some lobbies succeed in gaining congressional support for their particular foreign clients in defiance of the president, for instance, many congressional signatories still quietly convey to the White House their readiness to support the president if he stands firm for "the national interest." And a president who is willing to do so publicly, while skillfully cultivating friends and allies on Capitol Hill, can then establish such intimidating credibility that it is politically unwise to confront him. This is exactly what Obama needs to do now.

#### Self-restraint creates a credible signal

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, 2007, The Credible Executive, 74 U. Chi. L. Rev. 865

Our aim in this Article is to identify this dilemma of credibility that afflicts the well-motivated executive and to propose mechanisms for ameliorating it. We focus on emergencies and national security but cast the analysis within a broader framework. Our basic claim is that the credibility dilemma can be addressed by executive signaling. Without any new constitutional amendments, statutes, or legislative action, law and executive practice already contain resources to allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways. By tying policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters that his policies are those that voters would want if fully informed. We focus particularly on mechanisms of executive self-binding that send a signal of credibility by committing presidents to actions or policies that only a well-motivated president would adopt.

### AT: Defunding

#### Obama can work around defunding

Gerstein, writer for Politico, 5/3/2013

(Josh, “Could Obama just release Guantanamo prisoners?,” http://www.politico.com/blogs/under-the-radar/2013/05/could-obama-just-release-guantanamo-prisoners-163211.html)

In the wake of President Barack Obama's comments earlier this week about renewing his push to close Guantanamo, some advocates of closure are arguing that Obama has more authority to move that way than he has acknowledged.

The latest such argument: this letter sent to Obama Friday by longtime consumer activist and presidential candidate Ralph Nader and former Justice Department official Bruce Fein, contending that a legal bar on transfers from Guantanamo doesn't prohibit or limit outright releases.

"No statute or other legal limitation blocks you from this enlightened course of action, which you have commended as who we are as a people. We are supposed to be willing to take risks that other countries shun because we find imprisoning, killing, or otherwise punishing the innocent to be morally reprehensible," Nader and Fein wrote.

Similar technical arguments have been made in the past by others that Obama could avoid limits in spending bills by arranging transfers or releases with funds from government agencies not covered by some of the riders. Or by not spending money at all and simply allowing the International Committee for the Red Cross swoop in and take prisoners away.

#### There’s a national security waiver

Worthington, British historian and investigative journalist, director of a documentary on Guantanamo, 11/12/2013

(http://www.closeguantanamo.org/Articles/109-Will-Carl-Levins-Amendments-to-the-NDAA-Help-President-Obama-Close-Guantanamo)

In his first year in office, President Obama had released 42 of those 156 men, with many going to third countries because it was unsafe for them to be repatriated, and in 2010 he released another 24, but in the last three years just seven prisoners have been released. A major reason for this is the decision by lawmakers to insert passages into the annual National Defense Authorization Act for 2011 (approved in January 2011) banning the use of any funds to bring any Guantánamo prisoners to the U.S. mainland for any reason -- even to face trials -- and also prohibiting the use of funds to purchase or construct any facility on the U.S. mainland for housing prisoners currently held at Guantánamo. Another passage prevented the president from releasing any prisoner unless the defense secretary signed off on the safety of doing so. The bans were intended to scupper the administration's plans, announced at the end of 2009, to hold federal court trials for the alleged 9/11 co-conspirators, and to buy a prison in Illinois to hold prisoners transferred from Guantánamo so that the Cuban facility could be shut down, and they achieved their aim. The 9/11 trial was dropped, and the prison plan abandoned. In addition, the imposition on the defense secretary was an innovation intended to prevent prisoners from being released to countries that lawmakers regarded as dangerous -- a move which I described at the time as "an unwarranted and unconstitutional assault on the president’s powers." There was worse to come, however. In the versions of the NDAA for 2012 and 2013, as well as insisting that the defense secretary would have to certify that it was safe to release any prisoner that the administration wanted to release, lawmakers also imposed a ban on releasing any prisoner to any country that they regarded as having a single example of recidivism related to former Guantánamo prisoners; in other words, if it was alleged, in the extremely dubious claims about recidivism that emerged, at regular intervals, from the Pentagon or the Office of the Director of National Intelligence, that a single released prisoner had "returned to the battlefield," the administration was prevented from releasing any more prisoners to that country. Although it is important to remember that Sen. Carl Levin arranged for a waiver to be introduced into the legislation, so that the president and the defense secretary can bypass Congress and release prisoners without any restrictions if they regard it as being in the national security interests of the United States, the president has chosen not to do so.

### courts

### 2nc prefer our ev

2) Their ev is from a Kiyemba case BRIEF---our ev cites objective data

Liptak, Supreme Court correspondent for the New York Times, 2/6/2012

(Adam, “‘We the People’ Loses Appeal With People Around the World,” http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?\_r=2&&pagewanted=all&gwh=B9B981531CEC01DEE5DB44FD26D5D5CE)

A quarter-century later, the picture looks very different. “The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere,” according to a new study by David S. Law of Washington University in St. Louis and Mila Versteeg of the University of Virginia.

The study, to be published in June in The New York University Law Review, bristles with data. Its authors coded and analyzed the provisions of 729 constitutions adopted by 188 countries from 1946 to 2006, and they considered 237 variables regarding various rights and ways to enforce them.

“Among the world’s democracies,” Professors Law and Versteeg concluded, “constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s.”

Most complete data set

Law, Professor of Law and Professor of Political Science, Washington University in St. Louis, and Versteeg, Associate Professor, University of Virginia School of Law, June 2012

(David S. and Mila, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” 87 N.Y.U.L. Rev. 762, Lexis)

The basis of our empirical analysis is a new collection of data on the rights-related provisions of the written constitutions of every country in the world over the last six decades. n19 This data set covers a total of 729 constitutions adopted by 188 different countries from 1946 to 2006. For each constitution, the text of the entire document was analyzed, and information on 237 different variables regarding both substantive rights and rights-enforcement mechanisms was collected. The measurement of constitutional content in numerical form, of the type required by the statistical techniques that we employ in this Article, required numerous decisions as to what types of constitutional provisions would be coded, and in what manner. Some of the rules that we adopted for handling difficult cases can be justified on substantive grounds, while others were adopted for the sake of minimizing ad hoc, subjective coding decisions and thus enhancing the [\*771] transparency and replicability of our methodology. n20 We describe these coding decisions in greater detail in our earlier work. n21

3) trends

Liptak, Supreme Court correspondent for the New York Times, 2008

(Adam, U.S. Court Is Now Guiding Fewer Nations,

http://topics.nytimes.com/top/reference/timestopics/people/l/adam\_liptak/index.html?inline=nyt-per&pagewanted=all)

Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

“One of our great exports used to be constitutional law,” said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. “We are losing one of the greatest bully pulpits we have ever had.”

From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six.

Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, “they tend not to look to the rulings of the U.S. Supreme Court.”

The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court’s fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another.

We’ve become irrelevant

Mila Versteeg, Associate Professor at the University of Virginia School of Law, 13 (“Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?” 5-29-13, http://www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations)

For some time, both scholars and the public have considered the U.S. Constitution the world’s dominant model. Those beliefs are not without foundation: Fundamental structures like judicial review, as well as the very notion of a written constitution, are American inventions which have long shaped global constitution-making. But a growing number of voices are questioning this notion of American constitutional hegemony, with much of this attention focusing on the reportedly **declining importance of U.S. Supreme Court precedent in foreign judicial decisions** and others, like Justice Ginsburg, suggesting that the Constitution itself is flagging as a model for foreign constitutional drafters.¶ Methodology¶ In this article,[10] David Law and I seek to reconcile these viewpoints empirically. One of the article’s primary goals is to document the similarity between the American Constitution and evolving global constitutional practices over the past 60 years. As I describe in more detail below, we find evidence that the U.S. Constitution’s typicality in the world and, it seems, its sway as a global model are dwindling.¶ The basis for this analysis was a data set of world constitutions that I compiled between 2007 and 2008. The data set quantifies the rights-related provisions of all of the world’s constitutions from 1946 to 2006—729 constitutional versions of 188 countries—on 237 variables. From these 237 variables, my co-author and I aggregated and condensed them into 60 variables that we believe capture the full substantive range of global constitutional rights. We also included two provisions that are not strictly rights-related: judicial review and a national ombudsman.¶ Using this data, we compared each constitution in the data set to every other constitution, yielding a similarity index that ranges from 1 (perfect similarity) to –1 (perfect dissimilarity) between any two documents.¶ Globally Generic Rights¶ Before describing the results of the analysis with regard to the U.S. Constitution, it is worthwhile to explore one of the notions that underlies the question we attempt to answer. That is, how similar are the constitutional rights provisions among the world’s constitutions? And if there exists a high degree of similarity—i.e., an international template of rights (as has been previously documented)—what specific rights does it include?¶ To answer those questions, we created a table ranking all of the 60 identified rights by their world popularity in 2006. At the top of that ranking are rights such as freedom of religion, freedom of expression, the right to private property, equality guarantees, and the right to privacy, each of which appeared in at least 95 percent of constitutions in 2006. At the bottom of the list were provisions such as protection of fetus rights and the right to bear arms, which in 2006 appeared in just 8 percent and 2 percent of constitutions, respectively.¶ Other themes emerged from the data. For instance, almost all of the 60 constitutional components are increasing in similarity; even most of the unpopular ones (such as protection of fetuses) are becoming more popular. In fact, only two provisions, the right to bear arms and the recognition of an official state religion, are less popular now than they were just after World War II.¶ Having assembled the world’s most popular constitutional provisions, we engaged in a thought experiment. It so happens that the 25 most popular rights in 2006 appeared in at least 70 percent of constitutions. By coincidence, the average constitution over the entire 61-year period contained exactly 25 rights. We therefore compiled a theoretical “generic bill of rights” containing those 25 most popular rights. We then compared all of the world’s constitutions over time to the generic bill of rights, finding that similarity has been increasing steadily since 1946 (an unsurprising finding, given that the generic bill of rights is crafted from rights popular in 2006).¶ We also found that although constitutions are becoming more generic, not all constitutions are equally so. On one end of the spectrum, the constitutions of Djibouti, St. Lucia, Botswana, and Grenada are the world’s most generic, with similarity indexes to the generic bill of rights above 0.70. On the other end, constitutions with very few rights, such as those of Saudi Arabia, Brunei, and Australia, are the most unusual, with similarity indexes at or below 0.12.¶ The United States Constitution’s Declining Similarity¶ The existence of this generic set of rights begs the question of whether certain countries have led the way in adopting these generic rights and, if so, to what extent these rights pioneers have impacted the subsequent constitutional practices of other countries. As the article’s title suggests, we focused first and foremost on the U.S. Constitution and whether the conventional wisdom of its status as a constitutional pioneer was supported by the data.[11]¶ Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).¶ This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.¶ Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.¶ For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.¶ A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.¶ Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.¶ Reasons for the Decline¶ It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.¶ Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.¶ These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.¶ Thus, one reason why the Constitution is increasingly atypical may be that modern drafters in other countries prefer to look to modern legal innovations in crafting their own governing documents, and though American law may offer some such innovations, **the U.S. Constitution cannot**. In fact, foreign drafters may be attracted to provisions recognized in comparably modern U.S. statutory law, or even U.S. constitutional law—but not in the Constitution itself. Examples include the statutory innovations in the Civil Rights Act of 1964 and the Social Security Act, as well as the constitutional doctrines of substantive due process and judicial review.

### Canada

Canada solves the aff

Richard 7 [John D. Richard (Chief Justice of the Fed. Court of Appeals in Canada); “JUDICIAL REVIEW IN THE AMERICAS ... AND BEYOND: SYMPOSIUM ISSUE: ARTICLE: Judicial Review in Canada”; Duquesne Law Review; 45 Duq. L. Rev. 483; Spring, 2007]

2. Judicial Independence

**The principle of judicial independence exists in Canada in numerous forms.** The preamble to the Constitution Act, 1867, states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom." As noted by the Supreme Court, "since judicial independence has been for centuries an important principle [\*490] of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble." n12 In addition, **judicial independence is** explicitly referenced in sections 96 through 100 of the Constitution Act, 1867. n13 For example, superior court **judges in Canada enjoy a high degree of security of tenure** in the constitutional guarantee of section 99 of the Constitution Act, 1867, which provides that they "shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons." Finally, section 11(d) of the Charter expressly entitles those arraigned before courts to "an independent and impartial tribunal."

An independent judiciary has long been recognized as the foundation upon which a true democracy rests because it allows judges to make impartial decisions without fear of consequence. This is critical since public trust in the legal system and the judiciary depends upon society's confidence in the impartiality of individual decisions. Impartiality does not mean that judges have no sympathies or opinions, but rather that they are free to consider and act upon different points of view without interference from any source. The judiciary is increasingly at the center of many current debates about social change and social values. As a result, the public has attained a new awareness of the crucial need for judges who are free to make independent and impartial decisions, and to apply the law as they understand it, without fear or favour, and without regard to whether a decision is popular or not.

**Independence of the judiciary, impartiality of the judges and access to justice are** fundamental values **in the eyes of all Canadians,** representing the very essence of a free and democratic society. The public's acceptance and support of judicial decisions is dependent upon the public's confidence in the integrity and independence of the judges. It is therefore important that the Federal Court of Appeal and its judges be perceived as independent and impartial.

As a democratic society, Canada has undergone some very important changes in the relationship between individuals and the state. The judiciary in Canada must have the necessary knowledge and experience to contribute significantly to the maintenance and ongoing evolution of our free and democratic society. The role [\*491] of the courts as adjudicators of disputes, interpreters of the law, and defenders of the Constitution and the Charter requires that their powers and functions be completely separate from all other stakeholders in the legal system. **Canada's tradition of judicial independence ensures that the courts will continue to be accessible to everyone and that the proceedings remain public, transparent and free of interference from the government**.

### 2nc no spillover

Their conception of global judicial spillover has no empirical basis

David Law, Professor of Law and Professor of Political Science, Washington University, and Wen-Chen Chang, Associate Professor, National Taiwan University College of Law, 11 [“THE LIMITS OF GLOBAL JUDICIAL DIALOGUE,” Vol. 86:523, 2011]

INTRODUCTION: MUCH ADO ABOUT NOTHING?

No aspect of the globalization of constitutional law has thus far

attracted more attention or controversy than the use of foreign and

international legal materials by constitutional courts.1 Although judicial

citation of foreign law is hardly a new phenomenon, there is a

widespread sense that constitutional courts are turning more frequently

to foreign jurisprudence for guidance and inspiration.2 Moreover, the

manner in which courts and judges interact with one another has

changed in ways that are said to have systemic implications for the

global evolution of constitutional law. Prominent scholars and jurists

now speak in glowing terms of the emergence of a “global” or

“international” or “transnational judicial dialogue”3 that unites judges around the world in a “common global judicial enterprise.”4 It is said

that, by engaging in “open” and “self-conscious” debate with courts in

other countries over common questions of both substance and

methodology, constitutional courts not only “improve the quality of their

particular national decisions,” but also “contribute to a nascent global

jurisprudence,” most notably in the area of human rights.5

Several varieties of global judicial dialogue are said to exist. One

variety, which has already been mentioned, is comparative analysis of

the type found in judicial decisions. Although judicial citation of foreign

law is hardly a new phenomenon,6 it is increasingly suggested that the

manner in which constitutional courts analyze the work of their

counterparts in other countries is characterized by such a degree of

mutual engagement and substantive debate that it amounts to an ongoing

conversation conducted through the medium of judicial opinions.7 A

second variety of global judicial dialogue is dialogue in a literal sense, in

the form of “direct interactions”8 and networking among judges. This

type of dialogue has been fostered by technological advances, such as

the internet, that have lowered the barriers to international

communication, and by the deliberate efforts of academic institutions,

intergovernmental and international organizations, and constitutional

courts themselves to generate proliferating opportunities for face-to-face

interaction, in the form of conferences, visits, and the like.9

It is not the goal of this Article to contribute to the normative debate

over whether global judicial dialogue is cause for celebration or

consternation. Nor is it our purpose to evaluate the normative arguments

in favor of an interpretive posture of “engagement”10 or a “dialogical”

approach to comparative analysis.11 This Article aims, instead, to explain

as an empirical matter why the concept of “global judicial dialogue”

neither describes the actual practice of comparative analysis by judges

nor explains the emergence of a global constitutional jurisprudence. We

also demonstrate that the frequency with which a court cites foreign law

in its opinions is an extremely unreliable measure of the extent to which

the court actually makes use of foreign law. Scholars who wish to

understand or **measure a particular court’s usage of foreign law must**

**therefore be prepared to supplement quantitative research methods**, such

as statistical analysis of citations to foreign law, with qualitative

approaches that are capable of probing more deeply, such as interviews

with court personnel.

Part II of this Article argues that the notion of “**dialogue” is,** both

**conceptually and empirically, an inapt metaphor for the comparative**

**analysis performed by constitutional courts**. Part III takes advantage of a

natural experiment in judicial isolation to show that judge-to-judge

dialogue and “judicial networks,” as eye-catching as they may be, have

limited impact on constitutional adjudication and do little to explain the

frequency or sophistication with which constitutional judges resort to

foreign law. The natural experiment that we evaluate goes by the name

of Taiwan—a democratic country with an active constitutional court that

is nevertheless systematically deprived of opportunities to interact

directly with other courts for a combination of historical and political reasons. Our case study of Taiwan combines quantitative and qualitative

empirical research methods, in the form of statistical analysis of the

Taiwanese Constitutional Court’s decisions and numerous off-the-record

interviews with members of the Court and their law clerks. Although the

Court rarely cites foreign law, foreign legal research forms a routine and

indispensable part of its deliberations. Taiwan’s experience strongly

suggests that judicial interaction and networking play a much smaller

role in shaping a court’s utilization of foreign law than institutional

factors such as the rules and practices governing the composition and

staffing of the court and the extent to which the structure of legal

education and the legal profession incentivizes judges and academics to

possess expertise in foreign law. Comparison of the Taiwanese

Constitutional Court with the U.S. Supreme Court, which rarely looks to

foreign law for inspiration notwithstanding its extensive participation in

various forms of global judicial dialogue, only reinforces this

conclusion. This comparison is performed in Part IV. The Article

concludes by highlighting the role that American legal education must

play if the global influence of American constitutionalism is to be

revived, or if American courts are to engage in comparativism of their

own.

### JI

Judicial independence is done for other reasons---that’s key to rule of law, per their ev

Nancy Marion, Professor of Political Science at the University of Akron, Rick Farmer is Director of Committee Staff at the Oklahoma House of Representatives, Todd Moore, B.A. in History and Political Science from Miami University, Oxford, Ohio, and a Master's of Applied Politics from the Ray C. Bliss Institute of Applied Politics, University of Akron, “Financing Ohio Supreme Court Elections 1992-2002: Campaign Finance and Judicial Selection”, Akron Law Review, 2005, 38 Akron L. Rev. 567

[\*570] [\*571] Numerous publications and policy discussions have focused on the perceived failures of Ohio's semi-partisan system and campaign finance law. 14 For example, Ohio State University's John Glenn Institute for Public Service and Public Policy, while not arguing explicitly that interest group contributions undermine the court, does support judicial selection reform due to fears that interest group issue-advocacy campaigns threaten judicial independence and impartiality. 15 In addition, The Brennan Center for Justice, Justice at Stake Campaign, Bliss Institute of Applied Politics, Ohio League of Women Voters, Ohio State Bar Association and Ohio Chief Justice Thomas Moyer assembled a judicial conference, "Judicial Impartiality: The Next Steps," addressing [\*572] options for regulating campaign contributions and judicial elections. 16 Recently, national attention addressing state judicial selection and campaign finance reform has criticized elections as a means of ensuring judicial independence. 17 The American Bar Association (ABA) Justice in Jeopardy report x elections as a means of judicial selection, arguing elections produce highly politicized political environments that are contrary to the nature of judicial office. 18 The ABA argues that courts are unique within the separate branches of government and that courts are assumed non-political institutions. 19 It supports replacing elections with a commission-based appointive method that removes the court from the political process. 20 Ohio lawmakers have noted the ABA proposals and have begun drafting legislation that will alter Ohio's semi-partisan system. 21

### Rule of law

That outweighs the plan’s signal

Kleinfeld, Carnegie Endowment, 9/4/2013

(Rachel, http://carnegieendowment.org/2013/09/04/how-to-advance-rule-of-law-abroad/glfa)

No country, including the United States, is perfect when it comes to rule of law. But significant security, economic development, and human rights challenges faced by the United States and other Western countries tend to stem from states where the rule of law is particularly weak. From cybertheft to insider deals that harm Western companies, trade policy is hampered by rule-of-law deficiencies abroad. Organized crime, from drug smuggling to human trafficking, thrives in countries where the rule of law can be circumvented—and then crosses borders. Corrupt police with ties to criminals spur violence throughout Mexico and Central America that spills into the United States. The Arab revolutions that upended Western policy in the Middle East were sparked by anger at sclerotic, corrupt economies and governments that abused rights with impunity.

These issues are not new, nor are they going away. The United States alone has attempted to improve the domestic rule of law within other countries for over one hundred years, since the era when it created police constabularies in multiple Latin American states to reduce civil strife in the decades following the Mexican-American War. Modern rule-of-law-building programs began to proliferate in numbers and expenditure after the Cold War. Today, numerous nongovernmental organizations (NGOs), private and nonprofit contractors, international organizations such as the World Bank, and bilateral donors from the United Kingdom to Japan work on rule-of-law reforms. In the U.S. government, seven cabinet-level departments and 28 agencies, bureaus, and offices have worked on rule-of-law issues in over 184 countries.

The various actors and agencies have conflicting aims and strategies that often undermine one another and overwhelm small local governments. Moreover, programs frequently fail. This is not good news for efforts that are important to so many high-level foreign policy goals.

### 2nc no escalation

Any regional draw-in would contain the conflict

Hadar, research fellow, foreign policy studies – Cato, 7/28/’10

(Leon, <http://www.cato.org/pub_display.php?pub_id=12011>)

In fact, the expectation for U.S. military pull-out from Iraq has helped produce similar incentives for regional powers like Turkey, Iran and the Sunni Arab states to establish a certain balance of power in that country, with Turkey establishing friendly ties with the Kurds in the North while cooperating with Iran to prevent the emergence of an independent Kurdish state. Similarly, Iran and the Saudis have a common interest in averting a full-blown military confrontation between the Shiites and the Sunnis. There is no reason why India and Pakistan would not cooperate in controlling their clients in Afghanistan in order to avoid a regional military conflagration.

### legitimacy

### D---Their cards

Their author says Boumediene was sufficient

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

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

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

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

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

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

Conclusions agrees ---- their article is describing what the court did in Boumediene – going farther causes nuclear terror

Knowles, assistant professor at the New York University school of law, Spring 2009

(Robert, “American Hegemony and the Foreign Affairs Constitution,” 41 Ariz. St. L.J. 87, Lexis)

The hegemonic model generally values courts' institutional competences more than the anarchic realist model. The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations - liberty, accountability, and effectiveness - against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

[End of Cal’s “key to U.S. leadership” card]

The domestic deference doctrines - such as Chevron and Skidmore - are hardly models of clarity, but they are applied and discussed by the courts much more often than foreign affairs deference doctrines, and can be usefully applied to foreign affairs cases as well. n387 The domestic deference doctrines are a recognition that legal interpretation often depends on politics, just as it does in the international realm. n388 Most of the same functional rationales - expertise, accountability, flexibility, and uniformity - that are advanced in support of exceptional foreign affairs deference also undergird Chevron. Accordingly, Chevron deference provides considerable latitude for the executive branch to change its interpretation of the law to adjust to foreign policy requirements. Once courts determine that a statute is ambiguous, the reasonableness threshold is [\*149] easy for the agency to meet; that is why Chevron is "strong medicine." n389 At the same time, Chevron's limited application ensures that agency interpretations result from a full and fair process. Without such process, the courts should look skeptically on altered interpretations of the law.

Returning to domestic deference standards as a baseline clarifies the ways in which foreign affairs are truly "special." The best response to the special nature of foreign affairs matters does not lie simply in adopting domestic deference on steroids. Instead, accurate analysis must also take into account the ways in which the constitutional separation of powers already accommodates the uniqueness of foreign affairs. Many of the differences between domestic and foreign affairs play out not in legal doctrine, but in the relationship between the President and Congress. Under the hegemonic model, courts would still wind up deferring to executive branch interpretations much more often in foreign affairs matters because Congress is more likely to delegate law-making to the executive branch in those areas. n390

Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. Even non-realists will acknowledge that the international realm is much more susceptible to crisis and emergency than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases. n391 It is true that the stable nature of American hegemony will prevent truly destabilizing events from happening without great changes in the geopolitical situation - the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past. n392 Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct [\*150] treaty negotiations, for example, which depend on adjusting positions quickly.

The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose nuclear weapons are among the most serious problems facing the United States today. The United States maintains a "quasi-monopoly on the international use of force," n393 but the rapid pace of change and improvements in weapons technology mean that the executive branch must respond to emergencies long before the courts have an opportunity to weigh in. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong Curtiss-Wright deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President's textually-specified Article I powers.

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. n394 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. n395 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 [\*151] makes it highly unlikely that war would result from such an incident. n396 Moreover, 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 non-constitutional, the Chinese government could seek to have its preferred interpretation enacted into law.

Indeed, 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. n397 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. n398 The American separation-of-powers system provides a way around this problem, allowing the U.S. government to "speak in different voices" at once.

C. Applying the Hegemonic Model: The Enemy Combatant Cases

In the wake of 9/11, the United States invaded Afghanistan and toppled the Taliban government. n399 Thousands of men, most captured by our allies in Pakistan and Afghanistan (but also many other places around the world), were transferred to U.S. custody and detained in a network of prisons stretching from Afghanistan to Eastern Europe to Asia to Guantanamo Bay, Cuba. n400 The President made an executive determination that all detainees held at Guantanamo were "enemy combatants," and that the law of armed conflict - specifically, the Geneva Conventions - did not apply to them. n401 [\*152] The detainees were deliberately held in places where they were thought to have no rights under the U.S. Constitution or any other domestic law. n402 In 2003, the United States invaded Iraq, disrupting relationships with allies and leading to a decline in support around the world for U.S. foreign policy. n403 Theories of American Empire became a hot topic of discussion in the time leading up to, and following, the Iraq invasion. n404 Meanwhile, the Guantanamo detainees began to file habeas claims and the litigation wound its way up to the Supreme Court. n405 The Abu Ghraib prison abuse scandal broke in May 2004, n406 a month before the Court decided Rasul, n407 which was the first enemy combatant case and appeared to herald a shift in the Court's approach to special deference.

The Court may be finally adjusting to the reality of American power. The U.S. has been a global hegemon since 1991 and has used military means to enforce international law norms: for example, the U.S.-led bombing of Serbia in 1998 halted ethnic cleansing in Kosovo. n408 But the scope and impact of America's projection of power since 9/11 has underscored the significance of its unique status. The classic realist view of the world - with great powers achieving a consensus that preserves a precarious balance of power - no longer fits. n409 Accordingly, the institutional competences most valued for achieving governmental effectiveness in foreign affairs in the classic realist world (with the exception of speed) have become less important, and other competences have become more important.

[\*153] Nonetheless, since 9/11, deferentialists have argued that the classic realist justifications for special deference apply with even more force to the war on terror. n410 This is the constitutional equivalent of a problem that has hobbled U.S. foreign policy in the twenty-first century - the persistence of Cold War paradigms in strategic thinking. Administration officials, in the early days after 9/11, tended to lump together terrorist groups such as al Qaeda and rogue states such as Iraq into one common existential enemy to occupy the position of the former Soviet Union. n411 The threat posed by al Qaeda is different because it cannot hope to remove the U.S. from its position as global hegemon - only another great power could do that. Instead, the terrorist threat presents a challenge of hegemonic management that can only be met by the combined effort of all branches of the U.S. government. In the enemy combatant cases, the Court seems to have recognized this shift and asserted its authority. But whether or not the enemy combatant cases were decided with these sorts of broad geopolitical concerns in mind, the changed hegemonic order justifies the jurisprudence.

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees.

Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416

Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations.

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424

The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429

In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436

Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438

At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440

The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.

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

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.

### 2nc no impact to legitimacy

Irrelevant to actual statecraft

Stacey 13

Dr. Jeffrey Stacey is currently Senior Visiting Fellow at the Center for Transatlantic Relations at the Paul H. Nitze School for Advanced International Studies at Johns Hopkins University, Duck of Minerva, February 25, 2013, "Time to Redefine the Term “soft power”?", http://www.whiteoliphaunt.com/duckofminerva/2013/02/time-to-redefine-the-term-soft-power.html

Nye’s classic definition of the term–the attractiveness of a country based on the legitimacy of its policies and the political and cultural values that underpin them–seemed reasonable enough when I first became familiar with it in the mid 1990s. The notion that a country’s cultural power could influence other countries and cause their governments to either agree more with a country of cultural prowess or adopt similar values made a lot of sense. The Cold War had recently come to an end, and the rush of East Central European governments to join the West in all ways seemed just the evidence one needed to subscribe not only to the concept, but also the view that the U.S. possessed a whole lot of soft power that was causing other countries to agree with or emulate it. After all liberalism and openness of all kinds were being celebrated, and the new concept of globalization was further and futher in evidence while the third wave of democracy was spreading fast. But something I always feared as an academic was readily confirmed when I entered the government: more than a decade later, despite the large number of policymakers who learned Nye’s definition in graduate school, for the vast majority of them soft power‘s academic definition is of little practical use. To a pragmatic policymaker the concept is too complex, too difficult to measure, and near impossible to manipulate as a device of influence. While Nye’s definition is intuitive on some level, most policymakers–and especially non American ones–simply choose to define soft power as exercising influence by non military means. And why shouldn’t they? For even more intuitive is the notion that the counterpart to hard power (by military means) naturally is soft power (by non-military means). Thus, the other tools in one’s foreign policy toolbox–from diplomacy to economic sanctions, and development aid to cultural attractiveness–make perfect sense as comprising soft power. Indeed, Hillary Clinton, whom I knew as Madame Secretary, became well known for promoting the concept of smart power, which basically means the same thing and was part of her somewhat successful effort to elevate the D’s of diplomacy and development next to the big D of defense.

States don’t have feelings

**Fan 7** (Ying, Senior Lecturer in Marketing at Brunel Business School, Brunel University in London, “Soft power: Power of attraction or confusion?”, November 14)

The whole concept of soft power — power of attraction — is based on the assumption that there is a link between attractiveness and the ability to influence others in international relations, that is, such a power of attraction does have the ability to shape the preferences of others. This may be the case at the personal or individual level. It is questionable whether attraction power works at the nation level. Wang (2006) identifi es two problems. First, a country has many different actors. Some of them like the attraction and others do not. Whether the attraction will lead to the ability to influence the policy of the target country depends on which groups in that country find it attractive (eg the political elite, the general public or a marginal group), and how much control they have on policymaking. For example, soft power by Country A may have positive infl uence on the political elite but negative infl uence on the general public in Country B, or vice versa. Secondly, policy making at the state level is far more complicated than at the personal level; and has different dynamics that emphasise the rational considerations. This leaves little room for emotional elements, thus significantly reducing the effect of soft power. Even Nye (2004a) has to admit, what soft power can influence is not the policy making itself but only the ‘environment for policy’. Soft power may be counterproductive because societies react differently to American culture, the working of which is extremely complex, not least because of the diversity, as Fehrenbach and Poiger point out, in the ‘ processes by which societies adopt, adapt, and reject American culture ’ ( Opelz, 2004 ).

best studies prove

Stephen **Brooks and** William **Wohlforth 8**, IR @ Dartmouth (World Out of Balance, p. 158-170)

According to the logic of institutionalist theory, the United States thus now faces very significant constraints on its security policy due to the institutional order: the United States must be strongly cooperative across the board to maintain cooperation in those aspects of the order that it favors. As it turns out, the institutionalist argument for why the United States needs to pursue a highly cooperative approach regarding all parts of the institutional order is premised on a particular view of how reputations work. Institutionalist theory rests on the notion that "states carry a general reputation for cooperativeness that determines their attractiveness as a treaty partner both now and in the future. A defection in connection with any agreement will impose reputation costs that affect all current and future agreements."36 Despite the fact that this conception of a general reputation does a huge amount of work within institutionalist theory, the theory's proponents have so far not provided a theoretical justification for this perspective .17 Rather, they have simply assumed this is how reputation works. In the most detailed theoretical analysis of the role that reputation plays within international institutions to date, Downs and Jones argue that there is no theoretical basis for viewing states as having a "a single reputation for cooperation that characterizes its expected reliability in connection with every agreement to which it is a party."" Downs and Jones maintain that it is more compelling to view states as having multiple, or segmented, reputations: "states develop a number of reputations, often quite different, in connection with different regimes and even with different treaties within the same regime."" In other words, there is reason to think that a state's reputation within the security realm cannot be different from the reputation that it has within the economic realm, or, indeed, that a state cannot have varying reputations within different parts of the security realm. As an illustrative example, Downs and Jones note: The United States has one simple reputation for making good on its financial commitments with workers in the UN Office of the Secretary General and another quite different simple reputation with officials of European states in connection with its financial commitments to NATO. Neither group is much concerned with characterizing the reliability of the United Stales in meeting its financial commitments in general. Those inside the Office of the Secretary General are aware of the fact that the United States has paid its NATO bills, and NATO workers know that the United States is behind on its UN dues. However, they design their policies in response to the behavior of the United States in the subset of contexts that is relevant to them.43

### 2nc snowden

Snowden dominates perceptions of the US

Chen 9/9/13

Chen Xiangyang is Deputy Director of the Institute of World Political Science under the Chinese Academy of Contemporary International Relations, China US Focus, September 9, 2013, "Strategic Impacts of the ‘Snowden Incident’ on International Relations", http://www.chinausfocus.com/peace-security/strategic-impacts-of-the-snowden-incident-on-international-relations/

Although the fireworks ignited by the “Snowden incident” have dimmed, its strategic impacts on international relations are only beginning to be felt. The incident is affecting the game theory among the world’s four leading powers of the US, China, Russia and European Union and leftwing forces in Latin America, involving state and non-state entities operating in cyber-space as well as the real world and reflecting a new characteristic of today’s multi-national politics. Due to the incident, three injuries have been inflicted on the US.

First, it has seriously hurt the international image of America and somewhat weakened its “soft strength”. Secret operations such as “PRISM” have exposed the US double-standard on Internet security and online privacy, and proved beyond reasonable doubt the US hypocrisy over human rights, anti-terrorism and moral leadership. It also demonstrates how easy it is for the US not to match its own words with appropriate action and how porous its intelligence out-sourcing system is. There is no doubt the US will review its entire cyber-snooping system and make whatever improvement necessary.

Just two years after WikiLeaks put thousands of classified telecommunications between Washington and US diplomatic missions around the world under the sun, the "Snowden incident" brought more of Washington's dark secrets into public view. Dealing such a heavy blow to the no-holds-barred global electronic surveillance franchise, the damage to US intelligence setup could be comparable to that of "9/11" to national security.

The firm that hired Snowden as an analyst, Booz Allen Hamilton, is a major contractor in the National Security Agency's (NSA) enormous telecom and Internet surveillance program. The NSA has out-sourced a lot of its intelligence science and technology operations since "9/11". There are so many contractors, whose employees come from many different backgrounds, it is almost impossible for the NSA to maintain effective control. Now that the "Snowden incident" has happened, the US intelligence out-sourcing and probably the whole intelligence juggernaut is due for an overhaul.

Overwhelms plan

Global Times 7/3/13

Global Times, July 3, 2013, "Snowden's fate a sign of US hegemony", http://english.people.com.cn/90777/8308527.html

Edward Snowden, a whistle-blower from the US National Security Agency, applied to 21 countries for political asylum on July 1, but encountered negative responses. Snowden withdrew his Russia asylum bid after Russian President Vladimir Putin dictated terms for his stay. The fate of the whistleblower has become a symbol testing US hegemony.

Snowden's exposure has discredited the US. His latest revelations that the US has been spying on the EU mission in New York and its embassy in Washington have caused explosive consequences and strong reactions from EU members like France and Germany.

These immoral actions will further deprive the US of its power to mess with world affairs under the guise of moral values.

Snowden has exposed US hypocrisy, its random violations of citizens' privacy and arrogant cyber espionage in other countries. US soft power has failed to prevent these negative influences spreading across the world. Non-US media refrained from launching harsh criticism against the US, but the storm caused by Snowden's leaks has made the global public well aware of what's going on.

Crushes our international leverage

van Loon 7/2/13

Margot van Loon is a research associate at the American Foreign Policy Council in Washington, DC, US News and World Report, July 2, 2013, "Snowden Reveals the Pathetic State of U.S. Diplomacy", http://www.usnews.com/opinion/blogs/world-report/2013/07/02/edward-snowden-and-the-need-for-us-public-diplomacy

The furor over NSA leaker Edward Snowden provides a case in point. Snowden's disclosures about extensive electronic surveillance carried out by U.S. intelligence agencies against American citizens and foreign countries have, among other things, created a significant image crisis for the United States abroad – one which America's adversaries have used to great effect. Shortly after the leak, for example, Deputy Russian Prime Minister Dmitri Rogozin warned the Russian public about America's proclivity toward the "manipulation of public opinion" through social media in order to deliberately undermine the structure and values of their state. Ecuador, too, has gotten in on the game, coyly considering Snowden's request for asylum while making the U.S. a straight-faced offer of $23 million in economic aid to educate Americans about human rights. Such ploys tarnish America's image, damaging its credibility and integrity when engaging with skeptical foreign audiences. American allies in Europe, meanwhile, are aghast over what is perceived – rightly or wrongly – as a breach of diplomatic trust. The irate remarks of European MPs, journalists and bloggers reflect the growing anger of their publics, who believe that their relationship with the U.S. government has been betrayed. In the face of these accusations, the silence from America's instruments of public messaging has been damning. The Snowden affair provides a teachable moment for a great many things, not least of them the need for robust U.S. public diplomacy. Today more than ever, global public opinion matters. The U.S. cannot conduct itself with disregard for how its actions will be perceived by the rest of the world; even public diplomacy at its best cannot fix bad policy. But modern public diplomacy is not at its best. Its funding is inadequate, its coordination of roles and responsibilities needs work and it still struggles to find effective measures to evaluate whether its tactics have been successful.

Cabinet vacancy

van Loon 7/2/13

Margot van Loon is a research associate at the American Foreign Policy Council in Washington, DC, US News and World Report, July 2, 2013, "Snowden Reveals the Pathetic State of U.S. Diplomacy", http://www.usnews.com/opinion/blogs/world-report/2013/07/02/edward-snowden-and-the-need-for-us-public-diplomacy

June 30 marked the last day in office for Tara Sonenshine, the now-former undersecretary of state for public diplomacy and public affairs. Although Sonenshine tendered her resignation back in April, the Obama administration has yet to nominate her replacement. For months now, the public diplomacy community has dreaded the leadership crisis that this high-level vacancy will create for U.S. soft power efforts abroad. Past experience certainly justifies these concerns. Recent administrations have carelessly allowed a persistent – and bipartisan – lack of U.S. public diplomacy leadership. In the process, they have neutered their ability to interface with, and influence, foreign publics. § Marked 13:05 § For better or worse, the post of undersecretary represents the White House's pointperson in the "war of ideas." Its inhabitant directs America's public diplomacy engagement abroad, coordinates tactics to spread U.S. messaging and participates in developing foreign policy regarding perceptions of America among foreign publics. Yet, in the last decade, the position has turned over rapidly, with each short term in office followed by vacancies that dragged out for 271, 127, 172 and 393-day intervals, respectively. This haphazard pattern has prevented the crafting of a coherent soft power strategy on the part of the U.S. government, much to America's detriment.

## 1NR

### impact

Collapse of LOAC credibility shatters human rights globally—rolls back the plan’s signal

Corn, Presidential Research Professor – South Texas College of Law, Blank, director – International Humanitarian Law Clinic @ Emory Law, Jenks, Assistant Professor of Law and Criminal Justice Clinic Director – SMU Dedman School of Law, and Jensen, Associate Professor – Brigham Young Law School, ‘13

(Geoffrey, Laurie, Chris, and Eric, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule,” 89 INT’L L. STUD. 536) \*\*includes footnote 257

Many might see this result as simply adding greater protection to the LOAC, a seemingly admirable and universally appealing goal. The confla-tion of human rights law and the LOAC inherent in the least harmful means rule is dangerous from either direction, however: it is likely to either emasculate human rights law’s greater protections or undermine the LOAC’s greater permissiveness in the use of force, either of which is a problematic result. Soldiers faced with an obligation to always consider less harmful means when attacking an enemy belligerent may well either refrain from attacking the target—leaving the mission unfulfilled or the innocent victims of an enemy force’s planned attack unprotected—or disregard the law as unrealistic and ineffective. Neither option is appealing. The former exposes friendly forces to unjustified risk and undermines the protection of innocent civilians from unlawful attack, both of which are core purposes of the LOAC. The latter weakens respect for the value and role of the LOAC altogether during conflict, a central component of the protection of all per-sons in wartime.257 [footnote 257 begins] 257. Ironically, this rule could also have a perverse influence on human rights law. If the imposition of a least harmful means rule caused the armed conflict rules for capture and surrender to bleed into the human rights and law enforcement paradigm, the re-strictions on the peacetime use of force in self-defense would diminish. Outside of armed conflict, persons suspected of posing a threat to the safety of others or to society are enti-tled to the same set of rights as other persons under human rights law. A relaxed set of standards will only minimize and infringe on those rights. If states begin to use lethal force as a first resort against individuals outside of armed conflict because the distinction be-tween the use-of-force parameters in the two situations has disintegrated, the established framework for the protection of the right to life would begin to unravel. Not only would targeted individuals suffer from reduced rights, but innocent individuals in the vicinity would also be subject to significantly greater risk of injury and death as a consequence of the broadening use of force outside of armed conflict. [footnote 257 ends] When humans cause such consequences, either through evil intent or mistake, the results are harmful enough. When the law itself facilitates con-sequences that contradict its very purpose, the effects are exacerbated and simply too damaging to countenance. The law must, as it always has, re-main animated by the realities of warfare in the effort to strike a continuing credible balance between the authority to prevail on the battlefield and the humanitarian objective of limiting unnecessary suffering. The clarity of the existing paradigm achieves that goal and scholars should be hesitant to tamper with it.

### uq

Uighur rulings didn’t undermine presidential authority to detain indefinitely—the plan crosses that threshold

Wittes, Chesney, and Reynolds, Harvard Law School National Security Research Committee, ‘12

(Ben, Robert, Larkin, “The Emerging Law of Detention 2.0,” <http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf>)

Most media coverage of the post Boumediene proceedings in federal district court has understandably focused on the bottom line question of which side wins: whether particular detainees have prevailed on the merits in specific cases or whether the government has. **The press** generally **cites** somewhat **lopsided** sheer **numbers**: 38 detainee victories versus 21 for the government , thus far . 20 Before turning to the substance of the emerging case law, a few words are in order regarding th is “ scorecard ” of the habeas proceedings. While the press’s binary approach is accurate on its own terms, it has certain analytical flaws as an approach and does not fully capture the complexity of the current proceedings. In the first instance, there is a definitional question concerning which cases to include in the tally of wins and losses. For example, the detainee victories include 17 Uighur detainees. At one level, this make s sense. **The government**, after all, had **long asserted the** authority **to detain** these **individuals militarily** , and the D.C. Circuit Court of Appeals in Parhat v. Gates rejected that claim. 21 The government , the court held, lacked sufficient evidence to support its contention that the Uighurs were associated with the East Turkistan Islamic Movement (ETIM) or that ETIM in turn was adequately associated with A l Qaeda to warrant application of military detention authority. 22 Parhat was not a habeas case, however, but rather the sole “merits ” decision rendered under the DTA review system struck down as inadequate in Boumediene . 23 In the aftermath of Parhat , the government accepted that the Uighurs were not subject to detention, and it did not defend the propriety of their detentions as enemy combatants in the habeas cases they later pursued. 24 Indeed, even before Parhat , the government had long been attempting to identify states willing to accept transfer of the Uighurs (succeeding with most but not all members of the group). 25 Remaining Uighur detainees proceeded under the rubric of habeas to seek an order requiring the government not just to release them, but to release them into the United States specifically . 26 But these petitions, which ended in a refusal to grant such an order from the D.C. Circuit 27 and a denial of a cert. petition from the Supreme Court, 28 never put at issue the government’s power to hold them as military detainees for the duration of hostilities. From this perspective, it is **misleading** to consider them as part of the broader habeas scorecard. 29

Prefer our evidence-the authority distinction is crucial

Wittes, Chesney, and Reynolds, Harvard Law School National Security Research Committee, ‘12

(Ben, Robert, Larkin, “The Emerging Law of Detention 2.0,” <http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf>)

Even this sort of richer numerical picture is ultimately **inadequate**. For any scorecard ignores — or, rather, downplays — the **most important results** in these cases. These are not numerical but qualitative in nature; that is, it matters **how** the litigants win and lose. In our view, it is far more important to understand the rules of substance and procedure that are emerging from the ongoing litigation than it is to count dispositions. These rules define the scope of the government’s detention authority, and they craft the contours of a unique adversarial process for determining precisely who falls within the scope of that authority. These are matters of transcendent importance . They constitute the law of military detention going forward in the increasingly broad set of circumstances in which judicial review attaches, and they cast a shadow over operational planning and detention decisions even where such review is merely a non trivial prospect. They will have a lasting impact both at Guantánamo and beyond.

### link

#### Combatant status determinations, which determine detention authority within LOAC, are 100% up to executive discretion – the plan wrecks that

Bialke, 4

(Lt. Colonel, MA & JD-University of North Dakota, LLM-University of Iowa, “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict,” 55 A.F. L. Rev. 1, Lexis)

3. Executive Affirmation of Unlawful Combatant Status En Masse In the circumstances in which an entire military organization as a matter of institutional policy and practice incessantly, egregiously, and openly fails en masse to comply with the four requirements of lawful belligerency, there is no requirement under LOAC to convene individual art. 5 tribunals. In such cases where there is no doubt or ambiguity as to the entire military organization's unlawful combatant status, **LOAC does not prohibit a competent authority from also making a presumptive unlawful combatant status determination** as a pertinent statement of fact that would be inclusive of all members of that military organization, thereby formally eliminating any need for individual art. 5 tribunals. n54 An informed, comprehensive, presumptive en masse determination as to the status of a group of captured, non-uniformed combatants, made by a competent authority who is the democratically elected and accountable civilian **Chief Executive of the detaining power and the Commander-in-Chief of its armed forces, would be consistent with the principles and intent of customary LOAC**. n55 Notwithstanding the non-application of art. 5 to al-Qaeda and Taliban unlawful combatants, the President of the U.S., in orderly circumspection, **exercised his discretion** and personally reviewed in toto the evidence [\*54] surrounding the unlawful belligerency of al-Qaeda and the Taliban. The President, acting within his inherent authority as Commander-in-Chief, reviewed and weighed the wealth of relevant evidence including both classified and unclassified information, and considered the totality of circumstances surrounding the organizational stateless structure of al-Qaeda, the highly collusive relationship between al-Qaeda and the Taliban, and the Taliban and al-Qaeda's unlawful conduct in international armed conflict. After considerable review, the President made a pertinent statement of fact that the forces of al-Qaeda and the Taliban are presumptively unlawful combatants and, upon capture, are not entitled to POW status. n56 It is important to note, however, that the President did not act as a "supreme art. 5 tribunal." As explained above, art. 5 tribunals were unnecessary. Rather, after examining the conclusive evidence of al-Qaeda and the Taliban's unlawful belligerency, the President simply confirmed that there existed no factual or legal doubt as to their presumptive unlawful combatant status. Concomitantly, the President decided that POW status would not be afforded to detained al-Qaeda and Taliban unlawful combatants. Because of the President's competent en masse determination and subsequent discretionary decision to not privilege captured Taliban and al-Qaeda members with combatant immunity and POW status, it was formally and uniformly affirmed that individual art. 5 tribunals were not applicable or necessary. Some have claimed that these Presidential discretionary en masse determinations were improperly based upon al-Qaeda and the Taliban's a moral motives for attacking the U.S., and, hence, such determinations followed inappropriately a ius ad bellum (sovereign legal authority to use force in [\*55] international armed conflict or more literally "just war") analysis. However, the factually-supported **Presidential findings and conclusions were based not upon ius ad bellum or any other analogous international legal theory.** The virulent motives of al-Qaeda and the Taliban as to why they waged armed conflict were not important when reaching the President's conclusions. Instead, the President's finding that al-Qaeda and Taliban members are unlawful combatants and the decision not to grant them POW status followed a ius in bello (laws of conduct during international armed conflict) analysis. These executive military decisions were based upon al-Qaeda's stateless classic unlawful combatant status, the interdependent relationship between al-Qaeda and the Taliban; and, ultimately, the illegal belligerent conduct by al-Qaeda and the Taliban in international armed conflict; that is, how al-Qaeda and the Taliban waged armed conflict unlawfully. Despite al-Qaeda and the Taliban's egregious unlawful conduct during armed conflict and al-Qaeda's classic unlawful combatant status, some have commented that the U.S. as the detaining power should have convened individual tribunals under Geneva Convention III, art. 5, to make case-by-case determinations as to "lawful combatant versus unlawful combatant" status and, subsequently, "POW versus battlefield detainee" status. n57 However, as a result of al-Qaeda and the Taliban's substantiated en masse unlawful belligerency, the President's formal presumptive factual affirmation and legal holding, and the absence of sufficient evidence to overcome the established presumption of unlawful belligerency, there is **no legal requirement** for the U.S. to convene any individualized administrative tribunals to reconsider pro forma what has already been determined accurately and lawfully.

US detainee classification is the make it or break it for the global regime

Bialke, 4

(Lt. Colonel, MA & JD-University of North Dakota, LLM-University of Iowa, “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict,” 55 A.F. L. Rev. 1, Lexis)

International Obligations & Responsibilities and the International Rule of Law

The United States (U.S.) is currently detaining several hundred al-Qaeda and Taliban unlawful enemy combatants from more than 40 countries at a multi-million dollar maximum-security detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba. These enemy detainees were captured while engaged in hostilities against the U.S. and its allies during the post-September 11, 2001 international armed conflict centered primarily in Afghanistan. The conflict now involves an ongoing concerted international campaign in collective self-defense against a common stateless enemy dispersed throughout the world. Domestic and international human rights organizations and other groups have criticized the U.S., n1 arguing that al-Qaeda and Taliban detainees in Cuba should be granted Geneva Convention III prisoner of war (POW) n2 status. They contend broadly that pursuant to the international laws of armed conflict (LOAC), combatants captured during armed conflict must be treated equally and conferred POW status. However, no such blanket obligation exists in international law. There is no legal or moral equivalence in LOAC between lawful combatants and unlawful combatants, or between lawful belligerency [\*2] and unlawful belligerency (also referred to as lawful combatantry and unlawful combatantry). The U.S. has applied well-established existing international law in holding that the al-Qaeda and Taliban **detainees are presumptively unlawful combatants** not entitled to POW status. n3 Taliban and al-Qaeda enemy combatants captured without military uniforms in armed conflict are not presumptively entitled to, nor automatically granted, POW status. POW status is a privileged status given by a capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that POW status is merited. In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict, and al-Qaeda's failure to adequately align with a state show POW status is not warranted. The role of the U.S. in the international community is unique. The U.S., although relatively a young state, is the world's oldest continuing democracy and constitutional form of government. The U.S. is a permanent member of the United Nations Security Council, the world's leading economic power, and its only military superpower. The U.S. is the only country in the world capable of commencing and supporting effectively substantial international military operations with an extensive series of military alliances, and the required numbers of mission-ready expeditionary forces consisting of combat airpower, land and naval forces, intelligence, special operations, airlift, sealift, and logistics. Great influence and capabilities, however, exact great responsibility. As a result of its unique role and influence within the international community, the U.S. has been placed at the forefront of respecting LOAC and promoting international respect for LOAC. The U.S. military has the largest, most sophisticated and comprehensive LOAC program in the world. The U.S. demonstrates respect for LOAC by devoting an extraordinary and unequalled level of resources to the development and enforcement of these laws, through an unparalleled LOAC training and education regimen for U.S. and allied [\*3] military members, and a **conscientious and consistent requirement that its forces comply with these laws in all military operations**. Customary LOAC binds every country in the world including the U.S. **International collective security and U.S. national security may be achieved only through a steadfast commitment to the Rule of Law**. For the U.S. to grant POW status to captured members of al-Qaeda or the Taliban **would be an abdication of these international legal responsibilities** and obligations. It would set a **dangerous precedent contrary to the Rule of Law and LOAC,** and to the highest purpose of the laws of warfare, the protection of civilians during armed conflict. This article begins by explaining how LOAC protects civilians through the **enforcement of clear distinctions between lawful combatants, unlawful combatants, and protected noncombatants**. It summarizes the four conditions of lawful belligerency under customary and treaty-based LOAC, and instructs why combatants who do not meet these conditions do not possess combatant's privilege; that is, the immunity provided to members of the armed forces for acts in armed conflict that would otherwise be crimes in time of peace. The article then reviews why LOAC does not require that captured unlawful combatants be afforded POW status, and addresses specifically captured al-Qaeda and Taliban fighters. The practices and behavior of these fighters en masse in combat deny them privileges as lawful belligerents entitled to combatant's privilege. The article argues that al-Qaeda unlawful combatants are most appropriately described as hostes humani generis, "the common enemies of humankind." The article subsequently explains why al-Qaeda members, as hostes humani generis, are classic unlawful combatants, as part of a stateless organization that en masse engaged in combat unlawfully in an international armed conflict without any legitimate state or other authority. The article explicates al-Qaeda's theocratic-political hegemonic objectives and its use of global terrorism to further those objectives. The article expounds as to why international law deems a transnational act of private warfare by al-Qaeda as malum in se, "a wrong in itself." Related to al-Qaeda's status as hostes humani generis, the article describes one of the Taliban's many violations of international law; that is, willfully allowing al-Qaeda hostes humani generis to reside within Afghanistan's sovereign borders from where al-Qaeda could and did attack unlawfully other sovereign states. The article then details a state's inherent rights if and when attacked by such hostes humani generis. Following this, the article continues by asserting that there is no doubt or ambiguity as to the unlawful combatant status of the Taliban and al-Qaeda (shown by the failure of the Taliban en masse to meet the four fundamental criteria of lawful belligerency, al-Qaeda's statelessness en masse, and both their many acts of unlawful belligerency and violations of LOAC). As a result, the article states that **there is no need or requirement for proceedings** under [\*4] Geneva Convention III, art. 5 **to adjudicate their presumptive unlawful combatant status and non-entitlement to POW status pro forma.** The article subsequently illustrates that, even though captured al-Qaeda and Taliban are unlawful combatants and not POWs, the U.S. as a matter of policy has treated and continues to treat all al-Qaeda and Taliban detainees humanely in accordance with customary international law, to the extent appropriate and consistent with military necessity and in a manner consistent with the principles and spirit of the Geneva Conventions. The article discusses that, under LOAC, the detainees are captured unlawful combatants that **can be interned without criminal charges or access to legal counsel until the cessation of hostilities**. However, the article then points out that the U.S. has no desire to, and will not, hold any unlawful combatant indefinitely. The article then notes that al-Qaeda and Taliban detainees, as unlawful combatants, are subject to trial by U.S. military commissions for their acts of unlawful belligerency or other violations of LOAC and international humanitarian law. It expounds that, when an opposing force detains an unlawful combatant in time of armed conflict, the unlawful combatant's right to legal counsel or other representation only arises if criminal charges are brought against the unlawful combatant. The article illustrates the security measures, evidence procedures, and the many executive due process protections afforded to detainees subject to the jurisdiction of U.S. military commissions. The article states that; if tried and convicted in a U.S. military commission, a detainee may be required to serve the adjudged sentence, such as punitive confinement. The article concludes that it is in the immediate and long-term national security interests of the **U.S. to respect and uphold LOAC in all military operations**. Ultimately, the United States has an obligation to the international community and the Rule of Law not to afford POW status to captured unlawful combatants such as the al-Qaeda and Taliban detainees in furtherance of both domestic and international security.

The scope of the aff applies broader than just the Uighers, it applies to AQ affiliates

Popeo, 10

(Attorney-Washington Legal Foundation, Brief on Behalf of Retired Military Officers, National Defense Committee and Washington Legal Foundation, Kiyemba v. Obama, No. 08-1234, Lexis)

Amici are concerned that, should the Court recognize the constitutional rights being asserted by [\*4] Petitioners in this case, the Executive and Legislative Branches will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. No decision of the Court has ever afforded Fifth Amendment due process rights to military detainees who are nonresident aliens. Petitioners assert a substantive due process right to liberty, a right (they argue) that entitles them to release into the United States. Amici believe that **granting substantive due process rights to all Guantanamo Bay detainees poses a significant threat of release into this country of individuals for whom the Executive Branch and Congress have legitimate national security concerns**.

That undermines the distinction between lawful and unlawful combatants at the heart of the entire legal architecture

Rivkin, 5

(JD-Georgetown & Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies, 2/15, “Unlawful Belligerency and its Implications Under International Law,”

http://www.fed-soc.org/publications/detail/unlawful-belligerency-and-its-implications-under-international-law)

At the dawn of the 21st century, the civilized world is once again seriously menaced by unlawful belligerency. The class of unlawful combatants, which includes al Qaeda and the Taliban, poses a formidable challenge. Judging from the tragic events of September 11 and al Qaeda's subsequent pronouncements, they intend to continue a policy of purposefully targeting civilian populations, and do not feel bound in the slightest by jus in bello norms. The fact that such combatants are actively seeking weapons of mass destruction heightens even further the threat they pose. Suppression of these unlawful combatants is an critical policy priority, and should be aggressively pursued by all law-abiding states. Strict enforcement of the prevailing international law norms, which provide that unlawful combatants are not entitled to the rights of prisoners of war, and can be tried and condemned by military tribunals, is a key aspect of this campaign [64]. Indeed, to erode the distinction between lawful and unlawful combatants, which is to **central to the jus in bello core tenets,** would **undermine the entire effort of subjecting warfare to some sort of normative and legal restraints** and rules [65]. This enterprise is centuries old, and it would be ironic indeed if the 21st century witnessed the destruction of the achievements that have sought to limit, to maximum extent possible, the destruction and horror of war [66].

The CP clarifies LOAC—resolves uniqueness

Pedden, JD, L.L.M, Judge Advocate – US Marine Corps, ‘12

(Iain D., 46 Val. U.L. Rev. 803)

While merger of the laws of war and human rights by treaty or custom may seem inevitable to some, executive authority provides the most responsive means to begin incorporating terms and norms in a way best calculated to serve both operational requirements and national sovereignty. n151 Executive Orders and documents such as the National Security Strategy ("NSS") offer significant opportunity to both command the various aspects of the national security instruments and express opinio juris as head of state. n152 Executive Orders offer an effective means of direct presidential communication on matters of international law. On his first full day in office, President Obama issued three Executive Orders bearing directly on the lawfulness of detention policy, n153 two of which employed a definitions section to invoke, and thereby restrict, their scope to the law of war. The President's more recent Executive Order directing periodic review of detention at Guantánamo both repeats and expands that restriction, n154 making the Order applicable in cases under review as "law of war detention" or those being referred for prosecution. n155 Collectively, these orders express the United States' view that its detention practices are **governed by the law of war**, but retain the possibility of civilian prosecution. However, the announcement, n156 which accompanied Executive Order 13,567, sends a different message that may carry more force under international law than the Executive Order itself. That the President [\*830] encouraged the Senate to provide its advice and consent to Additional Protocol I is no surprise. n157 But the distinct language of the announcement employs terms of art appear to bind the United States to Article 75 of Additional Protocol I as a matter of customary international law. n158 Given that much of this provision is distilled from the ICCPR, n159 the customary application of Article 75 would represent a profound departure from the longstanding national policy noted elsewhere in this Article, and would significantly expand the nation's legal obligations. The nature and scope of that expansion is uncertain. To some extent, the President's statement that the United States will regard Article 75 (and the corresponding portions of the ICCPR) as a matter of legal obligation answers the questions of some critics who objected that there was "no intelligible principle for determining which provisions [of the ICCPR] are incorporated [into the law of war] and which are not." n160 It is far from certain that the announcement answers those critics in a constructive way, as there remains significant confusion on the meaning of these changes. This announcement has already [\*831] generated vigorous discussion among legal scholars, not all of whom agree with this Author's reading of the President's remarks. n161 Former legal adviser to the Department of State John Bellinger concludes that while the President's statement accompanying Executive Order 13,567 was significant, it did not conclusively establish that Article 75 now constituted binding customary international law. n162 Rather, Mr. Bellinger argued that the President has chosen as a matter of policy to establish a leadership role in "attempting to create customary international law through state practice." n163 Commenting further on the matter, Mr. Bellinger maintained his position with respect to the non-customary nature of Article 75, but encouraged the President to clarify the meaning of the statement and whether its language indicates that this treaty language from the law of war would apply to detainees currently held at Guantánamo because its "ambiguity has confused both the [a]dministration's supporters and critics." n164 One might argue whether Mr. Bellinger correctly concludes that the body of practice is insufficient to establish Article 75 as customary law, given 170 states are party and an extensive body of state practice to interpret. However, the President's statement leaves this and other questions unanswered. What remains abundantly clear is that piecemeal incorporation of human rights obligations through Executive Order 13,567 and the statement that accompanied it have increased confusion, even among notable experts, as to which body of law will apply--the law of war, or the law of human rights. V. CONCLUSION The laws of war and human rights do not share the same world view, and no amount of fighting--on the battlefield or in the academy--will change that. Despite the fundamental differences between their [\*832] respective fields of application, the two paradigms stand shoulder to shoulder in current counterinsurgency operations in Afghanistan. Such close proximity has done much to erode the distinction between the laws of war and human rights. Given that current operations are the stuff of which state practice is made, blurring the distinction between the two fields is more than merely academic--it carries with it the threat of ripening into a matter of binding customary international law. Examples of this state practice abound both on the battlefield and the home-front. In combat, military forces apply normative concepts of human rights in the execution of missions, and standards for traditional law of war decisions now contain terms derived from legal systems, which are inextricably rooted in human rights law. Detainees captured on the battlefield petition, not commanders, but domestic civilian courts--institutions whose conceptual framework is drawn from human rights law. Likewise, recent pronouncements by the president also merge these two fields of law. Unfortunately, all of these actors merge the laws of war and human rights in different and therefore confusing ways. As the lead state contributor of combat power in the Afghan counterinsurgency, the United States has vital security, policy, and international legal interests at stake. Those interests are not well-served permitting the haphazard merger of two disparate bodies of law. Ultimately, it is the warfighters and civilians at the tactical level of war who pay the price for this lack of clarity. To protect those persons and better serve the purpose of existing treaties and customary international law, the United States should take a leadership role in clarifying the law in those areas in which a merger of norms is appropriate, and steadfastly objecting to the imposition of human rights norms where the law of war will admit no compromise. Our nation's heroes, and the civilians they are often called upon to protect, are well-deserving of law and policy as clear as the dangers they face in combat.

Self-defense claims are non-unique and inevitable

Corn ‘11

Geoffrey, Professor of Law, South Texas College of Law, Houston, Texas. Previously Lieutenant Colonel, U.S. Army, and Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, “Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello,”

Transnational non-State threats are not going away any time soon. Indeed, it is likely that identifying a rational and credible legal basis for national response to such threats will continue to vex policymakers and legal advisors in the coming years. These threats **will almost certainly** lead States to continue to invoke the inherent right of national and/or collective self-defense to justify extraterritorial responses. This legal basis is not, however, an adequate substitute for defining the legal framework to regulate the operational exercise of this self-defense authority. Nonetheless, the advent of the self-defense targeting theory purports to be just that.

Link outweighs uniqueness cause you know the plan causes more confusion, which has a direct correlation with compliance

### terror

#### Increased judicial review of detentions collapses LOAC norms—causes WMD terror

Rivkin, 3

(JD-Georgetown & Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies, “The Laws of War,” Wall Street Journal, 3/4)

Apprehended in Pakistan, serving under no flag, and having repudiated the laws of war, Mohammed is rightly considered an "unlawful combattant." Over the centuries, **an entire body of laws of war was designed to delegitimize and suppress unlawful combatants**. Thus, captured al Qaeda and Taliban operatives are not due the rights and privileges of lawful prisoners of war under the Geneva Conventions. They are entitled to humane treatment, but can be detained in less comfortable conditions than POWs, and can be interrogated more vigorously -- so as to obtain military and intelligence information. They may be held, without a criminal trial, for the duration of the conflict. In addition, they can be harshly punished for their unlawful resort to force, up to and including the death penalty. Equally, those al Qaeda and Taliban operatives still at large may be lawfully attacked at any time by any legitimate military means. Although they must be allowed to surrender (without condition) if they ask for the opportunity, there is no need for American forces to attempt to capture them when they may more easily be killed or wounded. Unfortunately, many of our allies and even some Americans recoil from the application of these harsh traditional strictures and advocate more "compassionate" treatment for unlawful combatants. Specifically, they claim that captured members of groups like al Qaeda and the Taliban should be presumed to be POWs, until proven otherwise through an elaborate case-by-case legal process. Believing that the peacetime criminal justice system's rules should govern, the American Bar Association has just overwhelmingly passed a resolution, urging that unlawful combatants be given access to counsel and greater opportunities for judicial review, all to better challenge their detention. Numerous human-rights groups decry the Bush administration's vigorous interrogations of unlawful combatants, even though these have helped to avert deadly attacks against Americans and resulted in the capture of numerous al Qaeda and Taliban operatives. Meanwhile, many nongovernmental organizations assert that the laws of war should be changed to accommodate armed, irregular non-state actors, so as to bring them within the "system," and thereby moderate their conduct. It is, of course, unclear how much moderation can be induced in people who fly civilian airplanes into buildings and subscribe to the view that all "infidels" are fair game. Some Europeans have even argued that unlawful combatants (precisely because they do not distinguish themselves from the civilian population, and might be confused with noncombatants) can only be attacked when they are themselves attacking. At other times, the argument goes, they must be treated like criminal defendants, and "arrested." This clearly is the view underlying the condemnation, by international activist groups like Amnesty International and European officials, of Israel's "targeted killings" of Palestinian terrorist leaders. It is also what prompted a senior Swedish government official recently to accuse the U.S. of "summarily executing" a group of al Qaeda leaders killed by a missile attack in Yemen. To put it bluntly, while holding the armed forces of law-abiding states to ever more elaborate restrictions, our allies seek to treat unlawful combatants as well as, or even better than, lawful ones. The obvious rejoinder to these efforts to privilege unlawful combatants is that they have already deliberately rejected the most important aspects of "international humanitarian law," including the injunction against targeting civilians, and that offering them any concessions simply encourages their unlawful conduct. Policy arguments aside, the Bush administration is on very firm legal ground here. Both long-standing customary international law, and the 1949 Geneva Conventions, fully recognize the difference between regular soldiers, who comply with the laws of war and are entitled to POW status, and guerrillas or terrorists, who operate without uniforms, concealing their arms, and deliberately target civilians, who are not. The U.S. courts, in recent cases involving both captured al Qaeda and Taliban operatives, have recognized and upheld this distinction. Most of our allies, however, have accepted "Protocol One," the 1977 addition to the Geneva Conventions "relating to the protection of victims of international armed conflicts." While this treaty also distinguishes between lawful and unlawful combatants -- and the International Committee of the Red Cross assured the world that Protocol One would not legitimize or legalize terrorism -- it has been interpreted by "humanitarian" activists as providing more advantageous treatment for "unlawful combatants." Fortunately for the U.S., Ronald Reagan always could tell humbug from humanitarianism. In early 1987, he rejected Protocol One, denouncing it as an effort to revolutionize -- both literally and figuratively -- the Geneva treaties and the established laws of war by granting the rights and privileges of honorable soldiers to guerrillas and terrorists. These days, this is far from an academic dispute. Because some of our allies felt that U.S. treatment of captured unlawful combatants violated the Geneva Conventions, they indicated that they would not turn al Qaeda and Taliban prisoners, captured in Afghanistan, over to U.S. forces there. Obviously, coalition warfare loses much of its appeal if the participants disagree on the applicable rules. These practical problems aside -- because, in the 21st century, unlawful combatants relentlessly seek access to weapons of mass destruction, and pose a life-and-death threat to democracies -- the need to delegitimize them is particularly compelling. Thus, not according them a full set of POW privileges does not reflect a compassion deficit on our part. Rather, it is an important symbolic act which underscores their status as the enemies of humanity. The failure by many of our allies and international humanitarian groups to appreciate this is particularly ironic. **Blurring the distinction between lawful and unlawful belligerents, which lies at the very core of modern laws of war, is likely to erode this entire hard-won set of normative principles, disadvantaging both the interests of law-abiding states and making warfare even more destructive and barbarous.** To win the war on terror, the Bush administration must aggressively oppose the continuing efforts -- both at home and abroad -- to privilege unlawful combatants under the banner of humanitarianism. This issue is too important to be left to the lawyers, and merits the attention of top U.S. policy makers. **Anything less would threaten our ability to defend ourselves and embolden the Khalid Sheikh Mohammeds of the world.**

### cbw

#### LOAC key to norm against CBW use

Malviya, 1

(Law Prof-Banaras Hindu University, “Laws Of Armed Conflict And Environmental Protection: An Analysis Of Their Inter-Relationship,” http://www.worldlii.org/int/journals/ISILYBIHRL/2001/5.html)

The following analysis of the international law of armed conflict extends to the limitations on the **types of weapons or methods of warfare that can be used** as well as the limitations on the objects of these weapons and methods. The early international customary and treaty law of war can be said to have an environmental protection character but it was never intended to be so by its creators. For example, treaties and customs limiting the use of poisons in war were established to avoid unnecessary sufferings to combatants and not out of concern for the residual effects of these poisons on the surrounding eco-systems. Nevertheless, due to humanity’s increased sensitivity to environmental matters, there is now an additional reason for adhering to such rules. (i) Chemical Warfare Chemical warfare means international employment of toxic gases, liquids or solids to produce casualities. The Hague Conventions of 1899 and 1907 on Laws and Customs of War on Land **forbid the use of poison or poisoned weapons**. The 1925 Geneva Gas Protocol also forbids chemical warfare. The environmental impact of chemical warfare is particularly serious in cases of use of herbicides-chemical defoliants such as those used in the Vietnam war by U.S.A. to destroy enormous stretches of tropical jungle.

Bioterror causes extinction

Mhyrvold ‘13

Nathan, Began college at age 14, BS and Masters from UCLA, Masters and PhD, Princeton “Strategic Terrorism: A Call to Action,” Working Draft, The Lawfare Research Paper Series

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As horrible as this would be, such a pandemic is by no means the worst attack one can imagine, for several reasons. First, most of the classic bioweapons are based on 1960s and 1970s technology because the 1972 treaty halted bioweapons development efforts in the United States and most other Western countries. Second, the Russians, although solidly committed to biological weapons long after the treaty deadline, were never on the cutting edge of biological research. Third and most important, the science and technology of molecular biology have made enormous advances, utterly transforming the field in the last few decades. High school biology students routinely perform molecular-biology manipulations that would have been impossible even for the best superpower-funded program back in the heyday of biological-weapons research. The biowarfare methods of the 1960s and 1970s are now as antiquated as the lumbering mainframe computers of that era. Tomorrow’s terrorists will have vastly more deadly bugs to choose from. Consider this sobering development: in 2001, Australian researchers working on mousepox, a nonlethal virus that infects mice (as chickenpox does in humans), accidentally discovered that a simple genetic modification transformed the virus.10, 11 Instead of producing mild symptoms, the new virus killed 60% of even those mice already immune to the naturally occurring strains of mousepox. The new virus, moreover, was unaffected by any existing vaccine or antiviral drug. A team of researchers at Saint Louis University led by Mark Buller picked up on that work and, by late 2003, found a way to improve on it: Buller’s variation on mousepox was 100% lethal, although his team of investigators also devised combination vaccine and antiviral therapies that were partially effective in protecting animals from the engineered strain.12, 13 Another saving grace is that the genetically altered virus is no longer contagious. Of course, it is quite possible that future tinkering with the virus will change that property, too. Strong reasons exist to believe that the genetic modifications Buller made to mousepox would work for other poxviruses and possibly for other classes of viruses as well. Might the same techniques allow chickenpox or another poxvirus that infects humans to be turned into a 100% lethal bioweapon, perhaps one that is resistant to any known antiviral therapy? I’ve asked this question of experts many times, and no one has yet replied that such a manipulation couldn’t be done. This case is just one example. Many more are pouring out of scientific journals and conferences every year. Just last year, the journal Nature published a controversial study done at the University of Wisconsin–Madison in which virologists enumerated the changes one would need to make to a highly lethal strain of bird flu to make it easily transmitted from one mammal to another.14 Biotechnology is advancing so rapidly that it is hard to keep track of all the new potential threats. Nor is it clear that anyone is even trying. In addition to lethality and drug resistance, many other parameters can be played with, given that the infectious power of an epidemic depends on many properties, including the length of the latency period during which a person is contagious but asymptomatic. Delaying the onset of serious symptoms allows each new case to spread to more people and thus makes the virus harder to stop. This dynamic is perhaps best illustrated by HIV , which is very difficult to transmit compared with smallpox and many other viruses. Intimate contact is needed, and even then, the infection rate is low. The balancing factor is that HIV can take years to progress to AIDS , which can then take many more years to kill the victim. What makes HIV so dangerous is that infected people have lots of opportunities to infect others. This property has allowed HIV to claim more than 30 million lives so far, and approximately 34 million people are now living with this virus and facing a highly uncertain future.15 A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV . It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group could develop such a virus and kill a large part of humanity with it. Indeed, terrorists may not have to develop it themselves: some scientist may do so first and publish the details. Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could drive the human race to extinction. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and could be fought with biotech remedies. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. Modern biotechnology will soon be capable, if it is not already, of bringing about the demise of the human race— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that it takes only a handful of individuals to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, modern biological science has frighteningly undermined the correlation between the lethality of a weapon and its cost, a fundamentally stabilizing mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—will be available to anybody with a solid background in biology, terrorists included.