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#### T IMMIGRATION

#### Topical detention cases must deal with persons designated as enemy combatants---that’s how war powers authority is used in the area

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

The President, assertedly acting under his "war power" in prosecuting the "war on terror," has claimed the authority to detain indefinitely, and without access to counsel, persons he designates as "enemy combatants," an as yet undefined term that embraces selected suspected terrorists or their accomplices. Two cases, each addressing a habeas corpus petition brought by an American citizen, have reviewed the constitutionality of detaining "enemy combatants" pursuant to the President's determination: - Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (Jan. 9, 2004) (No. 03-6696), concerns a citizen seized with Taliban military forces in a zone of armed combat in Afghanistan; - Padilla ex. rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), rev'd sub nom., Padilla ex. rel. Newman v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (Feb. 20, [\*42] 2004) (No. 03-1027), concerns a citizen seized in Chicago, and suspected of planning a terrorist attack in league with al Qaeda. Padilla and Hamdi have been held by the Department of Defense, without any access to legal counsel, for well over a year. No criminal charges have been filed against either one. Rather, the government asserts its right to detain them without charges to incapacitate them and to facilitate their interrogation. Specifically, the President claims the authority, in the exercise of his war power as "Commander in Chief" under the Constitution (Art. II, § 2), to detain persons he classifies as "enemy combatants": - indefinitely, for the duration of the "war on terror"; - without any charges being filed, and thus not triggering any rights attaching to criminal prosecutions; - incommunicado from the outside world; - specifically, with no right of access to an attorney; - with only limited access to the federal courts on habeas corpus, and with no right to rebut the government's showing that the detainee is an enemy combatant.

#### The Kiyemba petitioners are no longer being detained as enemy combatants---their status is based on exclusion from the U.S. founded in immigration authority

Samuel Chow 11, Juris Doctor, Benjamin N. Cardozo School of Law, Summer 2011, “NOTE: THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS,” Cardozo Journal of International and Comparative Law, 19 Cardozo J. Int'l & Comp. L. 775

In addition to its immigration-based analysis, the government interpreted Boumediene narrowly and Munaf broadly to support the argument that the Kiyemba petitioners had been legally released, despite their continued detention. n182 According to the government, Munaf supported the argument that "the Government retains the sovereign authority, independent of the authority to detain enemy combatants, to hold petitions incident to barring them from the United States, and pending efforts to resettle them elsewhere." n183 This was a Mezei-type argument and an effort by the government to extend it to terrorist-based detentions, which it successfully did. As the government would have it, Boumediene's emphasis on the constitutional importance [\*801] of release had been met in Munaf and the D.C. Circuit Court's decision in Kiyemba. The government analogized the Kiyemba petitioners' request to be released into the United States to the Munaf petitioners' request for release as well as an injunction protecting them from the possibility of criminal prosecution. n184 Accordingly, the government argued that the Kiyemba petitioners had already been "released," and merely needed appropriate resettlement. n185 Alternatively, as the government distinguished in Mezei, the Kiyemba petitioners were no longer being "detained" but were simply being excluded from the United States. n186 It seems "release" becomes a mere status determination rather than functionally serving as relief from unlawful detention, since the detention, for all intents and purposes, is continuing. Munaf was, indeed, the first limitation of the writ's remedial application after Boumediene had so largely expanded its scope. n187

#### Vote neg:

#### 1) Limits---they explode the topic to include any class of petitioners whose detention is functionally indefinite but not justified as an expression of war powers---all immigration detention, disease quarantine, the domestic prison system all become viable aff areas.

#### 2) Precision---only our evidence speaks to the actual justification used to detain the Kiyemba petitioners---key to legal precision and topic education.

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#### PLENARY POWER DA

#### Plan wrecks plenary immigration powers

**Rubenstein, Hofstra law professor, 2010**

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

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

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

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

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

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

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

**Schuck, Yalw law professor, 2007**

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

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

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

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

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

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

#### Prolif causes extinction

Matthew Kroenig 12, Assistant Professor of Government, Georgetown University and Stanton Nuclear Security Fellow, Council on Foreign Relations, “The History of Proliferation Optimism: Does It Have A Future?” Prepared for the Nonproliferation Policy Education Center, May 26, 2012, <http://www.npolicy.org/article.php?aid=1182&tid=30>

Further proliferation. Nuclear proliferation poses an additional threat to international peace and security because it causes further proliferation. As former Secretary of State George Schultz once said, “proliferation begets proliferation.”[69] When one country acquires nuclear weapons, its regional adversaries, feeling threatened by its neighbor’s new nuclear capabilities, are more likely to attempt to acquire nuclear weapons in response. Indeed, the history of nuclear proliferation can be read as a chain reaction of proliferation. The United States acquired nuclear weapons in response to Nazi Germany’s crash nuclear program. The Soviet Union and China acquired nuclear weapons to counter the U.S. nuclear arsenal. The United Kingdom and France went nuclear to protect themselves from the Soviet Union. India’s bomb was meant to counter China and it, in turn, spurred Pakistan to join the nuclear club. Today, we worry that, if Iran acquires nuclear weapons, other Middle Eastern countries, such as Egypt, Iraq, Turkey, and Saudi Arabia, might desire nuclear capabilities, triggering an arms race in a strategically important and volatile region.¶ Of course, reactive proliferation does not always occur. In the early 1960s, for example, U.S. officials worried that a nuclear-armed China would cause Taiwan, Japan, India, Pakistan, and other states to acquire nuclear weapons.[70] In hindsight, we now know that they were correct in some cases, but wrong in others. Using statistical analysis, Philipp Bleek has shown that reactive proliferation is not automatic, but that rather, states are more likely to proliferate in response to neighbors when three conditions are met 1) there is an intense security rivalry between the two countries, 2) the potential proliferant state does not have a security guarantee from a nuclear-armed patron 3) and the potential proliferant state has the industrial and technical capacity to launch an indigenous nuclear program.[71] In other words, reactive proliferation is real, but it is also conditional. If Iran enters the nuclear club, therefore, it is likely that some, but not all, of the countries that we currently worry about will eventually follow suit and become nuclear powers.¶ We should worry about the spread of nuclear weapons in every case, therefore, because the problem will likely extend beyond that specific case. As Wohlstetter cautioned decades ago, proliferation is not an N problem, but an N+1 problem. Further nuclear proliferation is not necessarily a problem, of course, if the spread of nuclear weapons is irrelevant or even good for international politics as obsessionists and optimists protest. But, as the above discussion makes clear, nuclear proliferation, and the further nuclear proliferation it causes, increases the risk of nuclear war and nuclear terrorism, emboldens nuclear-armed states to be more aggressive, threatens regional stability, constrains U.S. freedom of action, and weakens America’s alliance relationships, giving us all good reason to fear the spread of nuclear weapons.

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#### Legitimacy DA

#### President will circumvent and backlash to the plan – wrecks court institutional strength

**Pushaw, Pepperdine law professor, 2004**

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

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

#### Weakening the court prevents sustainable development

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

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

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

#### Extinction

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

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

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

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#### SECURITY K

#### Their technical solution locks in exceptionalism - we must ask prior to the debate about the plan what our national security interests are and who is served by those interests

Williams 7 (Daniel, associate professor of law at Northeastern University School of Law. He received a J.D. from Harvard, NORTHEASTERN UNIVERSITY SCHOOL OF LAW. “After the Gold Rush-Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment,” NORTHEASTERN PUBLIC LAW AND THEORY FACULTY WORKING PAPERS SERIES NO. 16-2007. http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=970279)

This fearsome sort of legality is largely shielded from our view (that is, from the view of Americans---the ones wielding this legality) with the veil of democracy, knitted together with the thread of process jurisprudence. Within process jurisprudence, there is no inquiry into the fundamental question: allocation of power between the branches to accomplish . . . what? It is very easy to skip that question, and thus easy to slide into or accept circular argumentation.31 With the focus on the distribution of power, arguments about what to do in this so-called war on terror start off with assumptions about the nature of the problem (crudely expressed as violent Jihadists who hate our freedoms) and then appeal to those assumptions to justify certain actions that have come to constitute this “war.” The grip of this circularity, ironically enough, gains its strength from the ideology of legality, the very thing that the Court seeks to protect in this narrative drama, because that ideology fences out considerations of history, sociology, politics, and much else that makes up the human experience. What Judith Shklar observed over forty years ago captures the point here: the “legalism” mindset--which thoroughly infuses the process jurisprudence that characterizes the Hamdi analysis--produces the “urge to draw a clear line between law and nonlaw” which, in turn, leads to “the construction of ever more refined and rigid systems of formal definitions” and thus “serve[s] to isolate law completely from the social context within which it exists.” 32 The pretense behind the process jurisprudence--and here pretense is purpose--is the resilient belief that law can be, and ought to be, impervious to ideological considerations. And so, the avoidance of the “accomplish . . . what?” question is far from accidental; it is the quintessential act of legality itself.33 More than that, this “deliberate isolation of the legal system . . . is itself a refined political ideology, the expression of a preference” that masquerades as a form of judicial neutrality we find suitable in a democracy.34 If the Executive’s asserted prerogative to prosecute a war in a way that will assure victory is confronted with the prior question about what exactly we want to accomplish in that war--if, that is, we confront the question posed by Slavoj Zizek, noted at the outset of this article—then the idea of national security trumping “law” takes on an entirely different analytical hue. Professor Owen Fiss is probably right when he says that the Justices in Hamdi “searched for ways to honor the Constitution without compromising national interests.”35 But that is a distinctly unsatisfying observation if what we are concerned about is the identification of what exactly those “national interests” are.36 We may not feel unsatisfied because, in the context of Hamdi, it undoubtedly seems pointless to ask what we are trying to accomplish, since the answer strikes us as obvious. We are in a deadly struggle to stamp out the terrorist threat posed by Al Qaeda, and more generally, terrorism arising from a certain violent and nihilistic strain of Islamic fundamentalism. Our foreign policy is expressly fueled by the outlook that preemptive attacks is not merely an option, but is the option to be used. In the words of the Bush Administration’s 2002 National Security Strategy document, “In the world we have entered, the only path to safety is the path of action. And this nation will act.”37 O’Connor and the rest of the Court members implicitly understand our foreign policy and the goal to be pursued in these terms, which explains why the Hamdi opinion nowhere raises a question about what it is the so-called “war on terror” seeks to accomplish. After all, the stories we want to tell dictate the stories that we do tell. We want to tell ourselves stories about our own essential goodness and benevolence, our own fidelity to the rule of law; and that desire dictates the juridical story that ultimately gets told. Once one posits that our foreign policy is purely and always defensive, as well as benevolent in motivation,38 then whatever the juridical story—even one where the nation’s highest Court announces that the Executive has no blank check to prosecute a war on terror—the underlying reality inscribed upon the world’s inhabitants, the consequences real people must absorb somehow, is one where “the United States has established that its only limit on the world stage will be its military power.”39 As O’Connor sees it, the real problem here is that, given that the allocation-of-power issue is tied to the goal of eliminating the terrorist threat, we have to reckon with the probability that this allocation is not just an emergency provision, but one that will be cemented into our society, since the current emergency is likely to be, in all practicality, a permanent emergency. But to say we are in a struggle to stamp out a terrorist threat posed by Islamic fundamentalism, and to say that “the only path to safety is the path of action,” conceals--renders invisible, a postmodernist would likely put it--an even more fundamental, and more radical, question: the allocation of power that the Court is called upon to establish is in the service of eliminating a terrorist threat to accomplish . . . what? The standard answer is, our security, which most Americans would take to mean, to avert an attack on our homeland, and thus, as it was with Lincoln, to preserve the Union. And so, we accept as obvious that our dilemma is finding the right security-liberty balance. The problem with that standard answer is two-fold. First, it glosses over the fact that we face no true existential threat, no enemy that genuinely threatens to seize control over our state apparatus and foist upon us a form of government to which we would not consent. That fact alone distinguishes our current war on terrorism from Lincoln’s quest to preserve the Union against secession.40 Second, this we-must-protect-the-Homeland answer is far too convenient as a conversation stopper. When the Bush Administration=’ National Security Strategy document avers that “the only path to safety is the path of action,” we ought to ask what global arrangements are contemplated through that “path of action.” When that document announces that “this nation will act,” it surely cannot suffice to say that the goal is merely eliminating a threat to attain security. All empires and empire-seeking nations engage in aggression under the rubric of self-defense and the deployment of noble-aims rhetoric. These justifications carry no genuine meaning but are devices of the powerful and the privileged, with the acquiescence and often encouragement by a frightened populace, to quell unsettling questions from dissenters within the society.41 Stop and think for a moment, how is it that the nation with the most formidable military might--the beneficiary of the hugest imbalance in military power ever in world history--is also the nation that professes to be the most imperiled by threats throughout the world, often threatened by impoverished peasant societies (Vietnam, Nicaragua, El Salvador, Chile, Granada, etc.)?42 An empire must always cast itself as vulnerable to attack and as constantly being under attack in order to justify its own military aggression. This is most acutely true when the empire is a democracy that must garner the consent of the populace, which explains why so much of governmental rhetoric concerning global affairs is alarmist in tone. The point is that quandaries over constitutional interpretation--ought we be prudential, or are other techniques more closely tied to the text the only legitimate mode of constitutional adjudication--may very well mask what may be the most urgent issue of all, which concerns what exactly this nation’s true identity is at this moment in world history, what it is that we are pursuing. Whereas Sanford Levinson has courageously argued that “too many people >venerate= the Constitution and use it as a kind of moral compass,”43 which leads to a certain blindness, I raise for consideration an idea that Hamdi suppresses, through its narrative techniques, which is that too many people “venerate” this nation without any genuine consideration of the particular way we have, since World War II, manifested ourselves as a nation. I join Levinson’s suspicion that our Constitution is venerated as an idea, as an abstraction, without much thought given to its particulars. It is important to be open to the possibility that the same is true with regard to our nation--the possibility that we venerate the idea of America (undoubtedly worth venerating), but remain (willfully?) ignorant of the particulars of our actual responsibility for the health of the planet and its inhabitants.44 To openly consider such issues is not anti-American--an utterly absurd locution--for to suggest that it is amounts to a denial that U.S. actions (as opposed to rhetoric that leeches off of the promise and ideal of “America”) can be measured by some yardstick of propriety that applies to all nations.45 The very idea of a “yardstick of propriety” requires a prior acceptance of two ideas: one, that we are part of something larger, that we are properly accountable to others and to that larger circumstance; and two, that it is not a betrayal or traitorous for a people within a nation to look within itself.46 Issacharoff and Pildes, the most prominent process theorists, observe that process jurisprudence may be inadequate to address the risk that we “might succumb to wartime hysteria.”47 I would broaden that observation so as to be open to the possibility that the risk goes beyond just wartime hysteria, that our desire for security and military victory, rooted in our repudiation of a genuine universal yardstick of propriety that we willingly apply to ourselves (often called American exceptionalism48)--which means that security and military victory are not ipso facto the same thing--could easily slide us into sanctioning a form of sovereignty that is dangerously outmoded and far out of proportion to what circumstances warrant. Process jurisprudence supposedly has the merit of putting the balance of security and liberty into the hands of the democratic institutions of our government. But what it cannot bring into the field of vision--and what is absolutely banished from view in Hamdi--is the possibility that the democratic institutions themselves, and perhaps even the democratic culture generally, the public sphere of that culture, have been corrupted so severely as to reduce process jurisprudence to a shell game.49 More specifically, the formal processes of governmentality responding to crisis is judicially monitored, but the mythos of our national identity, particularly the idea that every international crisis boils down to the unquestioned fact that the United States at least endeavors to act solely in self defense and to promote some benevolent goal that the entire world ought to stand behind, is manufactured and thus some hegemonic pursuit in this global “war on terror” remains not just juridically ignored, but muted and marginalized in much of our public discussions about it.50 Under process jurisprudence, it is the wording of a piece of legislation, not the decoding of the slogan national security, that ultimately matters. And under process jurisprudence, fundamental decisions have already been made--fundamental decisions concerning the nature of our global ambitions and the way we will pursue them--before the judiciary can confront the so-called security-liberty balance, which means that the analytical deck has been stacked by the time the justiciable question---that is, what we regard as the justiciable question---is posed. Stacking the analytical deck in this way reduces the Court members to the role of technicians in the service of whatever pursuit the sovereign happens to choose.51 This is why it is worth asking what many might regard as a naive, if not tendentious, question: is it true that in the case of Hamdi and other post-9/11 cases, the judiciary’s quandary over allocation of power is actually in the service of genuine security, meaning physical safety of the populace? Does the seemingly obvious answer that we seek only to protect the safety of our communities against naked violence blind us to a deeper ailment within our culture? Is it possible that the allocation of power, at bottom, is rooted in a dark side of our Enlightenment heritage, an impulse within Legality that threatens us in a way similar to the Thanatos drive Freud identified as creating civilization’s discontent?52 Perhaps Hamdi itself, as a cultural document, signals yet another capitulation to the impulse to embrace a form of means-ends rationality that supports the Enlightenment drive to control and subdue.53 Perhaps what Hamdi shows is that 9/11 has not really triggered a need to recalibrate the security-liberty balance, but has actually unleashed that which has already filtered into and corrupted our culture—Enlightenment’s dark side, as the Frankfurt School understood it54’’and is thus one among many cultural documents that ought to tell us we are not averting a new dark age, but are already in it, or at least, to borrow a phrase from Wendell Berry, that we are “leapfrogging into the dark.” 55 It is impossible, without the benefit of historical distance, to answer these questions with what amounts to comforting certitude. But they are worth confronting, since the fate of so many people depends on it, given our unrivaled ability and frightening willingness to use military force. Our culture’s inability to ask such questions in any meaningful way, as opposed to marginalizing those who plead for them to be confronted, is somewhat reminiscent of how early Enlightenment culture treated scientific endeavors. “Science,” during the rise of Enlightenment culture, rebuffed the why question, banished it as a remnant of medieval darkness, because the why-ness of a certain scientific pursuit suggested that certain domains of knowledge were bad, off-limits, taboo. The whole cultural mindset of the Enlightenment was to jettison precisely such a suggestion. That cultural mindset produced a faith all its own, that all scientific pursuits, and by extension all human quests for knowledge, will in the end promote human flourishing. It has taken the devastation of our planet to reveal the folly of that faith, a blind-spot in the Western mind. It may turn out, as a sort of silver lining on a dark cloud, that the terrorism arising from Islamic jihadists may do something similar.

#### Questioning the affs ontology is a prior question - their social relations rest on faulty epistomology and makes extinction inevitable - vote neg as a form of noncooperation with their political economy

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I. Industrial civilization is on a collision course with life itself. Facilitating its collapse is a deserved and welcomed correction, long overdue. Collapse is inevitable whether we seek to facilitate it or not. Nonetheless, whatever we do, industrial civilization, based as it is on mining and burning finite and polluting fossil fuels, cannot last because it is destroying the ecosystem and the basis of local, cooperative life itself. It knows no limits in a physically finite world and thus is unsustainable. And the numbers of our human species on earth, which have proliferated from 1.6 billion in 1900 to 7 billion today, is the consequence of mindlessly eating oil – tractors, fertilizers, pesticides, herbicides – while destroying human culture in the process. Our food system itself is not sustainable. Dramatic die-off is part of the inevitable correction in the very near future, whether we like it or not. Human and political culture has become totally subservient to a near religion of economics and market forces. Technologies are never neutral, with some being seriously detrimental. Technologies come with an intrinsic character representing the purposes and values of the prevailing political economy that births it. The Industrialism process itself is traumatic. It is likely that only when we experience an apprenticeship in nature can we be trusted with machines, especially when they capital intensive & complicated. The nation-state, intertwined more than ever with corporate industrialism, will always come to its aid and rescue. Withdrawal of popular support enables new imagination and energy for re-creating local human food sufficient communities conforming with bioregional limits. II. The United States of America is irredeemable and unreformable, a Pretend Society. The USA as a nation state, as a recent culture, is irredeemable, unreformable, an anti-democratic, vertical, over-sized imperial unmanageable monster, sustained by the obedience and cooperation, even if reluctant, of the vast majority of its non-autonomous population. Virtually all of us are complicit in this imperial plunder even as many of us are increasingly repulsed by it and speak out against it. Lofty rhetoric has conditioned us to believe in our national exceptionalism, despite it being dramatically at odds with the empirically revealed pattern of our plundering cultural behavior totally dependent upon outsourcing the pain and suffering elsewhere. We cling to living a life based on the social myth of US America being committed to justice for all, even as we increasingly know this has always served as a cover for the social secret that the US is committed to prosperity for a minority thru expansion at ANY cost. Our Eurocentric origins have been built on an extraordinary and forceful but rationalized dispossession of hundreds of Indigenous nations (a genocide) assuring acquisition of free land, murdering millions with total impunity. This still unaddressed crime against humanity assured that our eyes themselves are the wool. Our addiction to the comfort and convenience brought to us by centuries of forceful theft of land, labor, and resources is very difficult to break, as with any addiction. However, our survival, and healing, requires a commitment to recovery of our humanity, ceasing our obedience to the national state. This is the (r)evolution begging us. Original wool is in our eyes: Eurocentric values were established with the invasion by Columbus: Cruelty never before seen, nor heard of, nor read of – Bartolome de las Casas describing the behavior of the Spaniards inflicted on the Indigenous of the West Indies in the 1500s. In fact the Indigenous had no vocabulary words to describe the behavior inflicted on them (A Short Account of the Destruction of the Indies, 1552). Eurocentric racism (hatred driven by fear) and arrogant religious ethnocentrism (self-righteous superiority) have never been honestly addressed or overcome. Thus, our foundational values and behaviors, if not radically transformed from arrogance to caring, will prove fatal to our modern species. Wool has remained uncleansed from our eyes: I personally discovered the continued vigorous U.S. application of the “Columbus Enterprise” in Viet Nam, discovering that Viet Nam was no aberration after learning of more than 500 previous US military interventions beginning in the late 1790s. Our business is killing, and business is good was a slogan painted on the front of a 9th Infantry Division helicopter in Viet Nam’s Mekong Delta in 1969. We, not the Indigenous, were and remain the savages. The US has been built on three genocides: violent and arrogant dispossession of hundreds of Indigenous nations in North America (Genocide #1), and in Africa (Genocide #2), stealing land and labor, respectively, with total impunity, murdering and maiming millions, amounting to genocide. It is morally unsustainable, now ecologically, politically, economically, and socially unsustainable as well. Further, in the 20th Century, the Republic of the US intervened several hundred times in well over a hundred nations stealing resources and labor, while imposing US-friendly markets, killing millions, impoverishing perhaps billions (Genocide #3). Since 1798, the US military forces have militarily intervened over 560 times in dozens of nations, nearly 400 of which have occurred since World War II. And since WWII, the US has bombed 28 countries, while covertly intervening thousands of times in the majority of nations on the earth. It is not helpful to continue believing in the social myth that the USA is a society committed to justice for all , in fact a convenient mask (since our origins) of our social secret being a society committed to prosperity for a few through expansion at ANY cost. (See William Appleman Williams). Always possessing oligarchic tendencies, it is now an outright corrupt corporatocracy owned lock stock and barrel by big money made obscenely rich from war making with our consent, even if reluctant. The Cold War and its nuclear and conventional arms race with the exaggerated “red menace”, was an insidious cover for a war preserving the Haves from the Have-Nots, in effect, ironically preserving a western, consumptive way of life that itself is killing us. Pretty amazing! Our way of life has produced so much carbon in the water, soil, and atmosphere, that it may in the end be equivalent to having caused nuclear winter. The war OF wholesale terror on retail terror has replaced the “red menace” as the rhetorical justification for the continued imperial plunder of the earth and the riches it brings to the military-industrial-intelligence-congressional-executive-information complex. Our cooperation with and addiction to the American Way Of Life provides the political energy that guarantees continuation of U.S. polices of imperial plunder. III. The American Way Of Life (AWOL), and the Western Way of Life in general, is the most dangerous force that exists on the earth. Our insatiable consumption patterns on a finite earth, enabled by but a one-century blip in burning energy efficient liquid fossil fuels, have made virtually all of us addicted to our way of life as we have been conditioned to be in denial about the egregious consequences outsourced outside our view or feeling fields. Of course, this trend began 2 centuries earlier with the advent of the industrial revolution. With 4.6% of the world’s population, we consume anywhere from 25% to nearly half the world’s resources. This kind of theft can only occur by force or its threat, justifying it with noble sounding rhetoric, over and over and over. Our insatiable individual and collective human demands for energy inputs originating from outside our bioregions, furnish the political-economic profit motives for the energy extractors, which in turn own the political process obsessed with preserving “national (in)security”, e.g., maintaining a very class-based life of affluence and comfort for a minority of the world’s people. This, in turn, requires a huge military to assure control of resources for our use, protecting corporate plunder, and to eliminate perceived threats from competing political agendas. The U.S. War department’s policy of “full spectrum dominance” is intended to control the world’s seas, airspaces, land bases, outer spaces, our “inner” mental spaces, and cyberspaces. Resources everywhere are constantly needed to supply our delusional modern life demands on a finite planet as the system seeks to dumb us down ever more. Thus, we are terribly complicit in the current severe dilemmas coming to a head due to (1) climate instability largely caused by mindless human activities; (2) from our dependence upon national currencies; and (3) dependence upon rapidly depleting finite resources. We have become addicts in a classical sense. Recovery requires a deep psychological, spiritual, and physical commitment to break our addiction to materialism, as we embark on a radical healing journey, individually and collectively, where less and local becomes a mantra, as does sharing and caring, I call it the Neolithic or Indigenous model. Sharing and caring replace individualism and competition. Therefore, A Radical Prescription Understanding these facts requires a radical paradigmatic shift in our thinking and behavior, equivalent to an evolutionary shift in our epistemology where our knowledge/thinking framework shifts: arrogant separateness from and domination over nature (ending a post-Ice Age 10,000 year cycle of thought structure among moderns) morphs to integration with nature, i.e., an eco-consciousness felt deeply in the viscera, more powerful than a cognitive idea. Thus, we re-discover ancient, archetypal Indigenous thought patterns. It requires creative disobedience to and strategic noncooperation with the prevailing political economy, while re-constructing locally reliant communities patterned on instructive models of historic Indigenous and Neolithic villages.

### 1nc

#### CONTEST COUNTERPLAN

#### The Executive Branch of the United States should not contest habeas proceedings for detainees help under the war powers authority of the President if the detainees have been cleared for transfer or release by executive review.

#### The problem isn’t the remedy, it is that no one wins habeas since 2010-the CP resolves that.

**Frakt, Pittsburgh law professor, 2013**

(David, “Release the Cleared Guantanamo Detainees to End the Hunger Strike”, 4-30, <http://jurist.org/forum/2013/04/david-frakt-hunger-strike.php>, ldg)

One of the most vexing problems currently facing the administration of US President Barack Obama is its inability to release 85 detainees from Guantanamo Bay who were cleared for release by the Guantanamo Review Task Force (GRTF) more than three years ago. Many of these detainees are now engaged in a hunger strike, at least in part, to protest their continued, indefinite detention. Although cleared for release, politically motivated restrictions in the National Defense Authorization Act have made it virtually impossible for the administration to transfer these detainees out of Guantanamo absent a court order, such as a writ of habeas corpus from the US District Court for the District of Columbia. Unfortunately, the sole focus of the habeas review currently is on the legality of detention at the time of capture. If the US can establish that the detainee was lawfully detainable at that moment (and the standard of review created by the US Court of Appeals for the District of Columbia Circuit in Al-Adahi v. Obama makes this an easy burden for the government to meet) then the lawfulness of continued detention until the cessation of hostilities is conclusively presumed. Because the US loathes to admit that it has made a mistake and detained someone for many years without a legal basis, the US Department of Justice (DOJ) is in the awkward position of opposing habeas corpus petitions even when the GRTF has determined continued detention of the petitioner is unwarranted because he no longer poses a danger to the US. In fact, the DOJ has successfully blocked the release of eight detainees off the cleared list by opposing their habeas corpus petitions, including three cases where the detainee won the writ at the trial level and the Department of Justice won a reversal on appeal. One of those who won his petition only to have it reversed on appeal was Adnan Latif, whose resulting desperation drove him to commit suicide. In fact, no detainee has prevailed in a habeas corpus petition in three years. I have a proposed solution to this problem. I represented former detainee Mohammed Jawad (along with the ACLU) in his habeas corpus petition in 2009. After the district court judge ruled that most of the government's evidence was inadmissible, the DOJ filed a notice indicating that they were no longer treating Mohammed as detainable under the Authorization for Use of Military Force (AUMF) and would no longer oppose his habeas corpus petition. The government did not admit that Mohammed had been unlawfully detained. One month later, including a 15-day waiting period after notice of the transfer was provided to Congress, Jawad was home in Afghanistan. This proves that when the Obama administration really wants to transfer a detainee, they are quite capable of doing so. There is nothing to stop the DOJ from filing similar notices for the cleared detainees indicating that the government no longer considers them detainable and does not oppose their petitions for habeas corpus. If any explanation is required, the DOJ can inform the court that the government has revised its view of the propriety of indefinite detention of non-dangerous detainees under the laws of war, and now considers it to be inconsistent with the law of war to hold detainees indefinitely when the justification for their original detention no longer exists.

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#### BOND DA

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

Donnelly 11-5-13

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

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

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

Devins 2010

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

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

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

Spiro 2008

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

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

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

Koh and Smith 2003

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

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

### 1nc

#### AMENDMENT COUNTERPLAN

#### Text: The appropriate number of the fifty states will invoke their power under Article V of the Constitution to call a limited constitutional convention for the purpose of ordering the release of individuals in military detention who have won their habeas corpus hearing. The appropriate number of the fifty states will ratify the amendment.

#### The Counterplan solves the case and preserves court capital and legitimacy

Vermule 2004(Adrian, Professor of Law at the University of Chicago, September, "Constitutional Amendments and the Constitutional Common Law", http://www.law.uchicago.edu/files/files/73-av-amendments.pdf)

There is another side to the ledger, however. Premise (i) holds that the lower the rate of amendment, the more updating that the Court must supply; and the need to update constitutional law can itself damage the Court’ s public standing in straightforward ways. Overrulings, switches in time, creative and novel interpretation, all the tools that judges use to change the course of constitutional adjudication, them selves may draw down the Court’s political capital by fracturing the legalistic façade of constitutional interpretation. An equally plausible causal hypothesis, then, is that increasing the rate of amendments might increase the Court’s sociological legitimacy by reducing the need f o r judicial self - correction. In particular cases, legitimacy-granting publics might react poorly to judicial flip-flops, while viewing form al amendments that overturn judicial decisions as the proper legal channel for change—the very use of which assumes that the judges have done their job well, not poorly. This is rankly speculative, but the point is that (ii) is rankly speculative as well. It is hard to know about any of this in the abstract; but we cannot simply assume (ii), in the faith that a world without (nonjudicial) amendments is the best of all possible worlds to inhabit.

## JUDICIAL REVIEW

### Deference—1nc

#### Judiciary wrecks flex

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

[\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

[\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

#### Rogue states multiply and cause extinction

**Johnson, Forbes contributor and Presidential Medal of Freedom winner, 2013**

(Paul, “A Lesson For Rogue States”, 5-8, <http://www.forbes.com/sites/currentevents/2013/05/08/a-lesson-for-rogue-states/>, ldg)

Although we live in a violent world, where an internal conflict such as the Syrian civil war can cost 70,000 lives over a two-year period, there hasn’t been a major war between the great powers in 68 years. Today’s three superpowers–the U.S., Russia and China–have no conflicts of interest that can’t be resolved through compromise. All have hair-trigger nuclear alert systems, but the sheer scale of their armories has forced them to take nuclear conflict seriously. Thus, in a real sense, nuclear weapons have succeeded in abolishing the concept of a winnable war. The same cannot be said, however, for certain paranoid rogue states, namely North Korea and Iran. If these two nations appear to be prospering–that is, if their nuclear threats are winning them attention and respect, financial bribes in the form of aid and all the other goodies by which petty dictators count success–other prospective rogues will join them. One such state is Venezuela. Currently its oil wealth is largely wasted, but it is great enough to buy entree to a junior nuclear club. Another possibility is Pakistan, which already has a small nuclear capability and is teetering on the brink of chaos. Other potential rogues are one or two of the components that made up the former Soviet Union. All the more reason to ensure that North Korea and Iran are dramatically punished for traveling the nuclear path. But how? It’s of little use imposing further sanctions, as they chiefly fall on the long-suffering populations. Recent disclosures about life in North Korea reveal how effectively the ruling elite is protected from the physical consequences of its nuclear quest, enjoying high standards of living while the masses starve. Things aren’t much better in Iran. Both regimes are beyond the reach of civilized reasoning, one locked into a totalitarian vise of such comprehensiveness as to rule out revolt, the other victim of a religious despotism from which there currently seems no escape. Either country might take a fatal step of its own volition. Were North Korea to attack the South, it would draw down a retribution in conventional firepower from the heavily armed South and a possible nuclear response from the U.S., which would effectively terminate the regime. Iran has frequently threatened to destroy Israel and exterminate its people. Were it to attempt to carry out such a plan, the Israeli response would be so devastating that it would put an end to the theocracy forthwith. The balance of probabilities is that neither nation will embark on a deliberate war but instead will carry on blustering. This, however, doesn’t rule out war by accident–a small-scale nuclear conflict precipitated by the blunders of a totalitarian elite. Preventing Disaster The most effective, yet cold-blooded, way to teach these states the consequences of continuing their nuclear efforts would be to make an example of one by destroying its ruling class. The obvious candidate would be North Korea. Were we able to contrive circumstances in which this occurred, it’s probable that Iran, as well as any other prospective rogues, would abandon its nuclear aims. But how to do this? At the least there would need to be general agreement on such a course among Russia, China and the U.S. But China would view the replacement of its communist ally with a neutral, unified Korea as a serious loss. Compensation would be required. Still, it’s worth exploring. What we must avoid is a jittery world in which proliferating rogue states perpetually seek to become nuclear ones. The risk of an accidental conflict breaking out that would then drag in the major powers is too great. This is precisely how the 1914 Sarajevo assassination broadened into World War I. It is fortunate the major powers appear to have understood the dangers of nuclear conflict without having had to experience them. Now they must turn their minds, responsibly, to solving the menace of rogue states. At present all we have are the bellicose bellowing of the rogues and the well-meaning drift of the Great Powers–a formula for an eventual and monumental disaster that could be the end of us all.

### No Modeling—1nc

#### No modeling – countries are too afraid

Miguel Schor 8, Professor of Law @ Suffolk University Law School, “Judicial Review and American Constitutional Exceptionalism,” Osgoode Hall Law Journal, Vol. 46, 2008

This article questions the conventional wisdom that the logic of Marbury has conquered the world’s democracies by exploring two questions: why do social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why does such a strategy make little sense in democracies that constitutionalized rights in the late twentieth century?6 The short answer is that the United States has been both a model and an anti-model 7 in the worldwide spread of judicial review. The United States stood astride the world after the Second World War and elements of American constitutionalism such as judicial review proved irresistible to democracies around the globe.8 Polities that adopted judicial review in the late twentieth century, however, rejected the key assumption on which judicial review in the United States is founded.. American constitutionalism assumes that law is separate from politics and that courts have the power and the duty to maintain that distinction.

This assumption was rejected because other democracies learned from the American experience that courts that exercise judicial review are powerful political as well as legal actors. The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States. 9 When judicial review began to spread around the globe in the second half of the twentieth century, the hope of Marbury (the promise of constitutionalized rights) became fused with the fear of Lochner 10 (the possibility that courts might run amok). In seeking to thread a needle between Marbury and Lochner , the American assumption that a constitution is a species of law was rejected in favour of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of “political law.” 11Consequently, democracies abroad adopted stronger mechanisms by which citizens can hold constitutional courts accountable 12and which make it less likely that social forces will use appointments as a vehicle for constitutional battles. Pg. 37-38

More evidence – no modeling – empirics and data prove

Seitz-Wald 2013

Alex, reporter for the National Journal, The U.S. Needs a New Constitution—Here's How to Write It, November 2 2013 http://www.theatlantic.com/politics/archive/2013/11/the-us-needs-a-new-constitution-heres-how-to-write-it/281090/

Supreme Court Justice Ruth Bader Ginsburg was pilloried when she told Egyptian revolutionaries last year that she "would not look to the U.S. Constitution, if I were drafting a constitution in the year 2012." But her sentiment is taken for granted by anyone who has actually tried to write a constitution since politicians stopped wearing powdered wigs. "Our Constitution really has been a steady force guiding us and has been perhaps the most stable in the world," says Louis Aucoin, who has helped draft constitutions in Cambodia, East Timor, Kosovo, Rwanda, and elsewhere while working with the U.N. and other groups. "But the disadvantage to the stability is that it's old, and there are things that more-modern constitutions address more clearly." Almost nobody uses the U.S. Constitution as a model—not even Americans. When 24 military officers and civilians were given a single week to craft a constitution for occupied Japan in 1946, they turned to England. The Westminster-style parliament they installed in Tokyo, like its British forebear, has two houses. But unlike Congress, one is clearly more powerful than the other and can override the less powerful one during an impasse. The story was largely the same in defeated Nazi Germany, and more recently in Iraq and Afghanistan, which all emerged from American occupation with constitutions that look little like the one Madison and the other framers wrote. They have the same democratic values, sure, but different ways of realizing them. According to researchers who analyzed all 729 constitutions adopted between 1946 and 2006, the U.S. Constitution is rarely used as a model. What's more, "the American example is being rejected to an even greater extent by America's allies than by the global community at large," write David Law of Washington University and Mila Versteeg of the University of Virginia. That's a not a fluke. The American system was designed with plenty of checks and balances, but the Founders assumed the elites elected to Congress would sort things out. They didn't plan for the political parties that emerged almost immediately after ratification, and they certainly didn't plan for Ted Cruz. And factionalism isn't the only problem. Belgium, a country whose ethnic divisions make our partisan sparring look like a thumb war, was unable to form a governing coalition for 589 days in 2010 and 2011. Nevertheless, the government stayed open and fulfilled its duties almost without interruption, thanks to a smarter institutional arrangement. As the famed Spanish political scientist Juan Linz wrote in an influential 1990 essay, dysfunction, trending toward constitutional breakdown, is baked into our DNA. Any system that gives equally strong claims of democratic legitimacy to both the legislature and the president, while also allowing each to be controlled by people with fundamentally different agendas, is doomed to fail. America has muddled through thus far by compromise, but what happens when the sides no longer wish to compromise? "No democratic principle exists to resolve disputes between the executive and the legislature about which of the two actually represents the will of the people," Linz wrote. "There are about 30 countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception, have succumbed to the Linzian nightmare at one time or another, often repeatedly," according to Yale constitutional law professor Bruce Ackerman, who calls for a transition to a parliamentary system. By "Linzian nightmare," Ackerman means constitutional crisis—your full range of political violence, revolution, coup, and worse. But well short of war, you can end up in a state of "crisis governance," he writes. "President and house may merely indulge a taste for endless backbiting, mutual recrimination, and partisan deadlock. Worse yet, the contending powers may use the constitutional tools at their disposal to make life miserable for each other: The house will harass the executive, and the president will engage in unilateral action whenever he can get away with it." He wrote that almost a decade and a half ago, long before anyone had heard of Barack Obama, let alone the Tea Party. You can blame today's actors all you want, but they're just the product of the system, and honestly it's a wonder we've survived this long: The presidential election of 1800, a nasty campaign of smears and hyper-partisan attacks just a decade after ratification, caused a deadlock in the House over whether John Adams or Thomas Jefferson should be president. The impasse grew so tense that state militias opposed to Adams's Federalist Party prepared to march on Washington before lawmakers finally elected Jefferson on the 36th vote in the House. It's a near miracle we haven't seen more partisan violence, but it seems like tempting fate to stick with the status quo for much longer.

#### No one models the US system anymore.

Liptak 2012

Adam, New York Times, ‘We the People’ Loses Appeal With People Around the World

Sure, it is the nation’s founding document and sacred text. And it is the oldest written national constitution still in force anywhere in the world. But its influence is waning. In 1987, on the Constitution’s bicentennial, Time magazine calculated that “of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version.” 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.” “The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.” There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees relatively few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation. And the Constitution’s waning influence may be part of a general decline in American power and prestige. In an interview, Professor Law identified a central reason for the trend: the availability of newer, sexier and more powerful operating systems in the constitutional marketplace. “Nobody wants to copy Windows 3.1,” he said. In a television interview during a visit to Egypt last week, Justice Ruth Bader Ginsburg of the Supreme Court seemed to agree. “I would not look to the United States Constitution if I were drafting a constitution in the year 2012,” she said. She recommended, instead, the South African Constitution, the Canadian Charter of Rights and Freedoms or the European Convention on Human Rights. The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber. As Sanford Levinson wrote in 2006 in “Our Undemocratic Constitution,” “the U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.” (Yugoslavia used to hold that title, but Yugoslavia did not work out.) Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By odd coincidence, Thomas Jefferson, in a 1789 letter to James Madison, once said that every constitution “naturally expires at the end of 19 years” because “the earth belongs always to the living generation.” These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty. Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence and entitlement to food, education and health care. It has its idiosyncrasies. Only 2 percent of the world’s constitutions protect, as the Second Amendment does, a right to bear arms. (Its brothers in arms are Guatemala and Mexico.) The Constitution’s waning global stature is consistent with the diminished influence of the Supreme Court, which “is losing the central role it once had among courts in modern democracies,” Aharon Barak, then the president of the Supreme Court of Israel, wrote in The Harvard Law Review in 2002. Many foreign judges say they have become less likely to cite decisions of the United States Supreme Court, in part because of what they consider its parochialism. “America is in danger, I think, of becoming something of a legal backwater,” Justice Michael Kirby of the High Court of Australia said in a 2001 interview. He said that he looked instead to India, South Africa and New Zealand. Mr. Barak, for his part, identified a new constitutional superpower: “Canadian law,” he wrote, “serves as a source of inspiration for many countries around the world.” The new study also suggests that the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its American counterpart.

### 1nc demo peace

Democracy is not in retreat-global trends

Ulfelder-former research director for the U.S. Government-funded Political Instability Task Force-1/23/14

The Democratic Recession That \*Still\* Isn’t

<http://dartthrowingchimp.wordpress.com/2011/05/31/the-democratic-recession-that-isnt/>

Freedom House dropped its annual Freedom in the World report today, and its contents give me cause once more to bang a drum I’ve been banging for a while: democracy is not in retreat. Here are the numbers, are summarized by Freedom House: The number of countries designated by Freedom in the World as Free in 2013 stood at 88, representing 45 percent of the world’s 195 polities and 40 percent of the global population. The number of Free countries decreased by two from the previous year’s report. The number of countries qualifying as Partly Free stood at 59, or 30 percent of all countries assessed, and they were home to 25 percent of the world’s population. The number of Partly Free countries increased by one from the previous year. A total of 48 countries were deemed Not Free, representing 25 percent of the world’s polities. The number of people living under Not Free conditions stood at 35 percent of the global population, though China accounts for more than half of this figure. The number of Not Free countries increased by one from 2012. The number of electoral democracies rose by four to 122, with Honduras, Kenya, Nepal, and Pakistan acquiring the designation. So, summing up: the global shares of countries designated Free, Partly Free, and Not Free remained more or less unchanged from 2012, while the share of countries designated as electoral democracies increased two percentage points, from 60.5 to 62.5 percent. In its own topline judgments, Freedom House looks at the data from a different angle than I do, calling out the fact that the number of declines in scores on its Political Rights or Civil Liberties indices outstripped the number of gains for the eighth year in a row. This is factually true, but I think it’s also important to note that many of those declines are occurring in countries in the former Soviet Union and the Middle East that we already regard as authoritarian. In other words, this eight-year trend is not primarily the result of more and more democracies slipping into authoritarianism; instead, it’s more that many existing autocracies keep tightening the screws. I don’t think it’s accidental that this eight-year trend has coincided with two waves of popular uprisings in the very regions where those erosions are most pronounced—the so-called Color Revolutions and Arab Awakening. A lot of that slippage has come from autocrats made anxious by democratic ferment in their own and neighboring societies. If we notice that correlation and allow ourselves to think longer term, I think there’s actually cause to be optimistic that these erosions will not hold indefinitely, at least not across the board. Oh, and let’s not forget about China. It may also be true, as some have argued, that the quality of democracy is eroding in long-established electoral regimes in Europe and the Americas. If that is happening, though, it’s not showing up yet in Freedom House’s data. We can argue about whether those indices are sufficiently sensitive or properly tuned to pick up that kind of variation, and given the depth of concern around these issues right now, I think that’s a debate worth having. That said, the fact that these permutations don’t yet register on measures designed to compare the scope and scale of freedoms worldwide over the past 40 years should also remind us to keep those concerns in comparative perspective. On the whole, I think Larry Diamond nailed it in a recent Economist-hosted debate on this issue: Concern about the health of democracy is necessary to reform and improve it. Apathy permits the decay of democracy and could eventually bring its demise. But the fear that democracy may now be in global retreat is not simply overblown, it is wrong.

### 1NC – A/T Iraq JI

#### Multiple alt causes to Iraqi independence they can’t solve –

#### A – judicial intimidation

Pimental and Anderson 13, 1ac authors

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

Something worthy of particular attention here is a judge’s personal security, which is specifically mentioned in the UN Basic Principles as an element of judicial independence,139 and which remains a constant challenge in post-conflict Iraq.140 Early on in the occupation of Iraq, judicial security was so weak that the CPA issued an order to provide pensions to the families of judges assassinated after the start of the occupation.141 One report in August 2010 indicated that judicial security improved somewhat due to increased levels of personal security and to equipping judges with weapons and ballistic vests,142 buts judicial intimidation nonetheless remained, and remains, a serious issue.143 As recently as 2011, there were still high numbers of targeted attacks against government officials, with approximately ten per month, two-thirds of which resulted in death.144 In mid-2012, a criminal court judge was gunned down as he was returning home from work.145 As long as a significant risk remains to the health and safety of judges and their families, there is risk they are susceptible to coercion and corruption, threatening the independence of the judiciary. Judicial compensation is one issue that is addressed by the 2005 Federal Supreme Court Law.146 It notes that the members of the Court are awarded the same compensation and benefits as government ministers.147 Additionally, members are entitled to a pension equal to 80% of their monthly salary as long as they are not removed for conviction of a crime involving moral turpitude or resign without permission of the Presidency Council.148 The 2007 Draft Law would have added a detailed pay scale based on rank and providing paid leave by law.149 Term of office and tenure for members of the Federal Supreme Court is an issue that presents a great challenge to the Court’s judicial independence. The 2005 law does not specify a term of years for members of the Court, and indicates that the Court may “continue to exercise their functions without determining a maximum age limit.”150 With respect to tenure, the Constitution again calls for an implementing law, stating that “judges may not be removed except in cases specified by law.”151 The 2005 law—the only one in place—states that members of the Court may be removed, however, based on “disqualification due to conviction for a crime involving moral turpitude or corruption,”152 but it is silent on any procedural provisions for such a removal from office.153 This failure to properly adopt a law that defines the term of office and tenure, and to specify appropriate due process requirements for a judge facing removal,154 could be problematic for judicial independence. Overall, there remains considerable uncertainty about judges’ terms and conditions of service, as the system is still relying on laws that predate the Constitution. Until these conditions are defined and secured by law, and adequate personal security is provided to ensure the safety of judges and their families, judicial independence in Iraq will remain elusive.

#### B – religious and political pressure

Pimental and Anderson 13, 1ac authors

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

A concern for Iraq here is that the Constitution accords juridical significance to established provisions of Islam, which opens the door to influence from religious leaders or authorities.119 Depending on how the courts address these issues, and on whom they must rely for determinations on questions of what Islamic principles require, the courts may well be open to outside influences, seriously compromising their independence. For example, if Article 2 is interpreted to require judicial fealty to fatwas,120 then anyone authorized to issue a fatwa would have direct power to dictate outcomes in judicial cases. b. Political influence and interference In addition to this potential for religious influence, there are noted instances of political (executive) influence of the judiciary.'21 One such case that raised much controversy was the case shortly before the 2010 parliamentary elections in Iraq, when the Supreme Commission for Accountability and Justice announced that pursuant to relevant de- Ba'athificalion laws it had disqualified over 500 nominees from participating in the election.122 The Court of Cassation overturned the Commission's ruling, holding that there was not sufficient time prior to the election to complete a proper review of the claims against the nominees, and they should be allowed to participate in the election subject to post-election 123 review. The Court's decision, however, was largely unpopular with the Prime Minister and his political allies.124 Under great pressure, and after meetings with the Prime Minister and other political leaders, the Court reversed the decision and ultimately allowed only 26 candidates to stand for election.1-5 This reversal was generally perceived among Iraqis as evidence that the judiciary was susceptible to political pressure, and thus lacking independence.126 Another example came in 2011, when the Federal Supreme Court rendered a decision, authored by the Chief Justice, ruling that a series of previously powerful and independent agencies were subject to direct cabinet oversight.1" One commentator referred to this case as the Prime Minister utilizing his "increasingly pliable judiciary" to weaken oversights and empower the executive. 128 Cases like these raise serious doubts about the judiciary's ability to withstand pressure and interference from a very powerful executive. At the very least, the situation seriously undermines public confidence in the judiciary and, more particularly, in its independence.

### No Iraq Impact

#### Iraq instability doesn’t escalate

Cook 7 [Steven A. Cook and Ray Takeyh, fellows at the Council on Foreign Relations, Brookings Institution, International Herald Tribune, “Why the Iraq war won't engulf the Mideast,” 6-28-2007, 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.

Iraq's civil war is the latest tragedy of this hapless region, but still a tragedy whose consequences are likely to be less severe than both supporters and opponents of Bush's war profess.

#### And the 1AC concludes that status quo solves instability

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

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

### IndoChina

#### Deterrence and economic interdependence checks Indo-China war

Lidarev 2012

Ivan, research assistant at the Center for the National Interest, History’s Hostage: China, India and the War of 1962, The Diplomat, August 20, 2012, http://thediplomat.com/2012/08/21/historys-hostage-china-india-and-the-war-of-1962/2/

Fortunately, however, the legacy of 1962 does not mean that China and India are destined to remain adversaries, as both have a lot to lose from a confrontation. An overt armed struggle between the two will undercut bilateral trade, strengthen China’s alliance with Pakistan, stir unrest in Tibet, reduce the security of both sides, and potentially push Delhi to formally align itself with Washington, forgoing the strategic autonomy that it prizes. Nor does the war’s legacy mean that issues like Tibet and the disputed border will forever define the overall Sino-Indian relationship. After all, the expanding cooperation between the two sides and their increasing economic ties are essential parts of the Sino-Indian relationship. However, the legacy of 1962 will probably limit the extent of the bilateral relationship between India and China in the short to medium term for a number of reasons. For example, China and India cannot build a new relationship until they resolve some of their most intractable historical disputes such as the Tibet issue and the border dispute. Additionally, the inability to control these destabilizing factors ensures the relationship will remain unstable. Moreover, the memory of 1962 — the nationalist feelings it stirs and the suspicions it breeds — means that reaching a compromise on many key bilateral issues will be very difficult. Because of the mutual suspicion that exists, each government fears that making concessions will be unpopular domestically. Thus deadlock is likely to prevail for the foreseeable future. Finally, the legacy of the war enhances the inherent competition between China and India. While growing trade and cooperation mitigate this competition, a long list of factors, such as the security dilemma engendered by the militarization of disputed Sino-Indian border, keep it alive. In sum, nearly a half a decade since the brief war occurred, it continues to cast a long shadow over Sino-Indian relations. Expect it to continue to do so in the future.

## Legitimacy

### Alt Causes – 1NC

#### Providing a remedy doesn’t restore habeas-multiple other obstacles

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

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

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

### Can’t Solve – 1NC

#### One shot solutions don’t solve-problem is multifaceted

**Miller, Wilson Center distinguished scholar, 2013**

(Aaron, “Speak No Evil”, 5-28, <http://www.foreignpolicy.com/articles/2013/05/28/speak_no_evil_obama_drone_speech>, ldg)

I'll take the word of those who argue that drones are the poster child for the anger Arabs and Muslims feel toward America. I can see why. But the grievances toward the United States in this region run deep, and the source of that anger is not only drones. Don't forget: The Middle East was exasperated with Washington long before droning, and it remains eager to blame America for just about everything. The list of the Arab world's grievances go on and on: America is blamed for supporting the authoritarian Arab kings, blindly backing Israel, not talking to Hamas, not intervening militarily in Syria, intervening militarily in Iraq and Afghanistan, and, according to Egyptian liberals, for supporting Egypt's Muslim Brotherhood. And that's even before we discuss the small but determined minority of Muslims who do, in fact, hate us because of who we are -- not just because of what we do. No nuanced modulation of our approach on drone strikes or the closure of Gitmo is going to change any of that.

### Rule Breaking Not key—1NC

Breaking rules doesn’t create a legitimacy crisis

Brooks & Wohlforth 8 – Stephen G. Brooks, Assistant Professor of Government at Dartmouth, and William C. Wohlforth, Associate Professor of Government at Dartmouth, 2008, World Out of Balance: International Relations and the Challenge of American Primacy, p. 201-206

First, empirical studies find no clear relationship between U.S. rulebreaking, legitimacy, and the continued general propensity of other governments to comply with the overall institutional order. Case studies of U.S. unilateralism—that is, perceived violations of the multilateral principle underlying the current institutional order—reach decidedly mixed results.74 Sometimes unilateralism appears to impose costs on the United States that may derive from legitimacy problems; in other cases, these acts appear to win support internationally and eventually are accorded symbolic trappings of legitimacy; in yet others, no effect is discernable. Similar results are reported in detailed analyses of the most salient cases of U.S. noncompliance with international law, which, according to several studies, is as likely to result in a “new multilateral agreement and treaties [that] generally tilt towards U.S. policy preferences” as it is to corrode the legitimacy of accepted rules.75

The contestation created by the Bush administration’s “new unilateralism,” on the one hand, and the “new multilateralism” represented by other states’ efforts to develop new rules and institutions that appear to constrain the United States, on the other hand, fits the historical pattern of the indirect effect of power on law. Highlighting only the details of the struggle over each new rule or institution may deflect attention from the structural influence of the United States on the overall direction of change. For example, a focus on highly contested issues in the UN, such as the attempt at a second resolution authorizing the invasion of Iraq, fails to note how the institution’s whole agenda has shifted to address concerns (e.g., terrorism, proliferation) that the United States particularly cares about. The secretary-general’s Highlevel Panel on Threats, Challenges and Change endorsed a range of U.S.-supported positions on terrorism and proliferation.76 International legal scholars argue that the United States made measurable headway in inculcating new rules of customary law to legitimate its approach to fighting terrorism and containing “rogue states.”77 For example, UN Security Council Resolution 1373 imposed uniform, mandatory counterterrorist obligations on all member states and established a committee to monitor compliance.

That said, there is also evidence of resistance to U.S. attempts to rewrite rules or exempt itself from rules. Arguably the most salient example of this is the International Criminal Court (ICC). During the negotiations on the Rome Convention in the late 1990s, the United States explicitly sought to preserve great-power control over ICC jurisdiction. U.S. representatives argued that the United States needed protection from a more independent ICC in order to continue to provide the public good of global military intervention. When this logic failed to persuade the majority, U.S. officials shifted to purely legal arguments, but, as noted, these foundered on the inconsistency created by Washington’s strong support of war crimes tribunals for others. The Rome Convention rejected the U.S. view in favor of the majority position granting the ICC judicial panel authority to refer cases to court’s jurisdiction.78 By 2007, 130 states had signed the treaty and over 100 were full-fledged parties to it.

President Clinton signed the treaty, but declined to submit it to the Senate for ratification. The Bush administration “unsigned” it in order legally to be able to take action to undermine it. The United States then persuaded over 75 countries to enter into agreements under which they undertake not to send any U.S. citizen to the ICC without the United States’ consent; importantly, these agreements do not obligate the United States to investigate or prosecute any American accused of involvement in war crimes. This clearly undermines the ICC, especially given that about half the states that have signed these special agreements with the United States are also parties to the Rome Statute. 79 At the same time, the EU and other ICC supporters pressured governments not to sign special agreements with the United States, and some 45 have refused to do so—about half losing U.S. military assistance as a result. In April 2005, the United States chose not to veto a UN Security Council resolution referring the situation in Darfur, Sudan, to the ICC. To many observers, this suggests that inconsistency may yet undermine U.S. opposition to the court.80 If the U.S. campaign to thwart the court fails, and there is no compromise solution that meets some American concerns, the result will be a small but noticeable constraint: U.S. citizens involved in what might be construed as war crimes and who are not investigated and prosecuted by the U.S. legal system may have to watch where they travel.

The upshot as of 2007 was something of a stalemate on the ICC, demonstrating the limits of both the United States’ capability to quash a new legal institution it doesn’t like and the Europeans’ ability to legitimize such an institution without the United States’ participation. Similar stalemates characterize other high-profile arguments over other new international legal instruments, such as the Kyoto Protocol on Climate Change and the Ottawa Landmine Convention. Exactly as constructivists suggest, these outcomes lend credence to the argument that power does not translate unproblematically into legitimacy. What the larger pattern of evidence on rule breaking shows, however, is that this is only one part of the story; the other part involves rule breaking with few, if any, legitimacy costs, and the frequent use of go-it-alone power to revise or create rules.

AN EROSION OF THE ORDER?

The second general evidence pattern concerns whether fallout from the unpopular U.S. actions on ICC, Kyoto and Ottawa, Iraq, and many other issues have led to an erosion of the legitimacy of the larger institutional order. Constructivist theory identifies a number of reasons why institutional orders are resistant to change, so strong and sustained action is presumably necessary to precipitate a legitimacy crisis that might undermine the workings of the current order. While aspects of this order remain controversial among sections of the public and elite both in the United States and abroad, there is little evidence of a trend toward others opting out of the order or setting up alternatives. Recall also that the legitimacy argument works better in the economic than in the security realm. It is also in the economic realm that the United States arguably has the most to lose. Yet it is hard to make the empirical case that U.S. rule violations have undermined the institutional order in the economic realm. Complex rules on trade and investment have underwritten economic globalization. The United States generally favors these rules, has written and promulgated many of them, and the big story of the 1990s and 2000s is their growing scope and ramified nature—in a word, their growing legitimacy. On trade, the WTO represents a major strengthening of the GATT rules that the United States pushed for (by, in part, violating the old rules to create pressure for the upgrade). As of 2007, it had 149 members, and the only major economy remaining outside was Russia’s. And notwithstanding President Putin’s stated preference for an “alternative” WTO, Russian policy focused on accession.81 To be sure, constructivists are right that the WTO, like other rational-legal institutions, gets its legitimacy in part from the appearance of independence from the major powers.82 Critical analysts repeatedly demonstrate, however, that the organization’s core agenda remains powerfully influenced by the interests of the United States.83

Regarding international finance, the balance between the constraining and enabling properties of rules and institutions is even more favorable to the United States, and there is little evidence of general legitimacy costs. The United States retains a privileged position of influence within the International Monetary Fund and the World Bank. An example of how the scope of these institutions can expand under the radar screen of most legitimacy scholarship is International Center for Settlement of Investment Disputes (ICSID)—the major dispute settlement mechanism for investment treaties. Part of theWorld Bank group of institutions, it was established in 1966, and by 1991 it had considered only 26 disputes. With the dramatic growth in investment treaties in the 1990s, however, the ICSID came into its own. Between 1998 and 2004, over 121 disputes were registered with the Center.84 This increase reflects the rapidly growing scope of international investment law. And these new rules and treaties overwhelmingly serve to protect investors’ rights, in which the United States has a powerful interest given how much it invests overseas.

Looking beyond the economic realm, the evidence simply does not provide a basis for concluding that serial U.S. rule-breaking imposed general legitimacy costs sufficient to erode the existing order. On the contrary, it suggests a complex and malleable relationship between rule breaking, legitimacy, and compliance with the existing order that opens up numerous opportunities for the United States to use its power to change rules and limit the legitimacy costs of breaking rules. The evidence also suggests that just as rules do not automatically constrain power, power does not always smoothly translate into legitimacy. As our review of the ICC issue showed, the United States is not omnipotent, and its policies can run afoul of the problems of hypocrisy and inconsistency that constructivists and legal scholars identify. Indeed, neither the theory nor the evidence presented in this chapter can rule out the possibility that the United States might have enjoyed much more compliance, and had much more success promulgating its favored rules and quashing undesired rule change, had it not been such a rule breaker or had it pursued compensating strategies more energetically.

### A2: Transition war

#### Alliances are out dated, multi-polarity is stable and there is no scenario for war in a world of US decline

**Friedman et al., MIT political science PhD candidate, 2012**

(Benjamin, “Why the U.S. Military Budget is ‘Foolish and Sustainable”, Orbis, 56.2, Science Direct, ldg)

Standard arguments for maintaining the alliances come in two contradictory strains. One, drawn mostly from the run-up to World War II, says that without American protection, the ally would succumb to a rival power, either by force or threat of force, heightening the rival’s capability and danger to the United States. The other argument says that without the United States, the ally would enter a spiral of hostility with a neighbor, creating instability or war that disrupts commerce and costs America more than the protection that prevented it. The main problem with the first argument is that no hegemon today threatens to unify Europe or Asia. Europe is troubled by debt, not conquest. Russian GDP is today roughly equivalent to that of Spain and Portugal combined. Whatever Russia’s hopes, it has no ability to resurrect its Soviet Empire, beyond perhaps those nations in its near abroad that Americans have no good reason to defend. Even today, the military capabilities of Europe’s leading powers are sufficient to defend its eastern flank, and they could increase their martial exertions should a bigger threat arise. Asia is tougher case. South Korea’s military superiority over its northern neighbor is sufficient to deter it from an attempt at forcible reunification. By heightening North Korea’s security, nuclear weapons may reinforce its capacity for trouble-making, but they do not aid offensive forays. U.S. forces long ago became unnecessary to maintaining the peninsula’s territorial status quo. Chinese efforts to engage in old-fashioned conquest are unlikely, at least beyond Taiwan. Its more probable objective is a kind of Asian Monroe doctrine, meant to exclude the United States.6 China naturally prefers not to leave its maritime security at the whim of U.S. policymakers and, thus, has sought to improve its anti-access and area-denial capabilities. In the longer term, China’s leaders will likely pursue the ability to secure its trade routes by building up longer-range naval forces. They may also try to leverage military power to extract various concessions from nearby states. Washington’s defense analysts typically take those observations as sufficient to establish the necessity that U.S. forces remain in Asia to balance Chinese military power. But to justify a U.S. military presence there, one also needs to show both that Asian nations cannot or will not balance Chinese power themselves and that their failure to do so would greatly harm U.S. security. Neither is likely. Geography and economics suggest that the states of the region will successfully balance Chinese power—even if we assume that China’s economic growth allows it to continue to increase military spending.7 Bodies of water are natural defenses against offensive military operations. They allow weaker states to achieve security at relatively low cost by investing in naval forces and coastal defenses. That defensive advantage makes balances of power more stable. Not only are several of China’s Asian rivals islands, but those states have the wealth to make Chinese landings on their coast prohibitively expensive. India’s mountainous northern border creates similar dynamics. The prospects of Asian states successfully deterring future Chinese aggression will get even better if, as seems likely, threats of aggression provoke more formal security alliances. Some of that is already occurring. Note for example, the recent joint statement issued by the Philippines and Japan marking a new ‘‘strategic partnership’’ and expressing ‘‘common strategic interests’’ such as ‘‘ensuring the safety of sea lines of communication.’’8 This sort of multilateral cooperation would likely deepen with a more distant U.S. role. Alliances containing disproportionately large states historically produce free-riding; weaker alliance partners lose incentive to shore up their own defenses.9 Even if one assumes that other states in the region would fail to balance China, it is unclear exactly how U.S. citizens would suffer. China’s territorial ambitions might grow but are unlikely to span the Pacific. Nor would absorbing a few small export-oriented states slacken China’s hunger for the dollars of American consumers. The argument that U.S. alliances are necessary for stability and global commerce is only slightly more credible. One problem with this claim is that U.S. security guarantees can create moral hazard—emboldening weak allies to take risks they would otherwise avoid in their dealings with neighbors. Alliances can then discourage accommodation among neighboring states, heightening instability and threatening to pull the United States into wars facilitated by its benevolence. Another point against this argument is that even if regional balancing did lead to war, it would not obviously be more costly to the U.S. economy than the cost of the alliance said to prevent it. Neutrality historically pays.10 The larger problem with the idea that our alliances are justified by the balancing they prevent is that wars generally require more than the mutual fear that arms competition provokes. Namely, there is usually a territorial conflict or a state bent on conflict. Historical examples of arms races alone causing wars are few.11 This confusion probably results from misconstruing the causes of World War I—seeing it as a consequence of mutual fear alone rather than fear produced by the proximity of territorially ambitious states.12 Balances of power, as noted, are especially liable to be stable when water separates would-be combatants, as in modern Asia. Japan would likely increase defense spending if U.S. forces left it, and that would likely displease China. But that tension is very unlikely to provoke a regional conflagration. And even that remote scenario is far more likely than the Rube Goldberg scenario needed to argue that peace in Europe requires U.S. forces stationed there. It is not clear that European states would even increase military spending should U.S. troops depart. If they did do so, one struggles to imagine a chain of misperceived hostility sufficient to resurrect the bad old days of European history.

## 2nc

## cp

### Solvency – 2NC

#### 2. CP is better than the plan-no one has won habeas in years so a backend remedy doesn’t matter if the game is rigged

**Smith, Reprieve charity director, 2012**

(Clive, “Federal Courts Reject Virtually All Habeas Petitions from Gitmo: Study”, 5-13, <http://www.thedailybeast.com/articles/2012/05/13/federal-courts-reject-virtually-all-habeas-petitions-from-gitmo-study.html>, ldg)

Now, a decade into the sad experiment that is Guantánamo, we discover that the United States—supposedly a nation of laws—isn’t simply holding prisoners year after year without charge, but is rejecting their habeas corpus petitions almost out of hand. A new study out of Seton Hall University School of Law finds that the federal district courts in Washington, D.C., granted 56 percent of the habeas petitions filed by detainees after the Supreme Court permitted the petitions in 2008. But since July 2010, the courts have rejected all but one. The turning point was a case called Al-Adahi v. Obama, decided by the D.C. Circuit Court of Appeals. The study’s authors, two law professors, say this shows that the D.C. Circuit—generally considered the most powerful court in the country outside the Supreme Court—has made up its mind that henceforth nobody in Guantánamo Bay should be considered innocent. In Al-Adahi, the court essentially said that an error rate of 56 percent is intolerable, but rather than eliminating errors by actually eliminating them, it simply decided they didn’t exist. “After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations,” the authors write. “Now the government wins every petition.” Let’s put this in context: Normally, when someone in America is charged with a crime, the first question the judicial system seeks to answer is not how to kill him. Rather, it is whether he has, in fact, committed the crime the government alleges. Back in 2003, Donald Rumsfeld purportedly said that the prisoners in Guantánamo Bay were all captured on the Afghanistan battlefield, and were the “worst of the worst” terrorists in the world. In a totalitarian dictatorship, we might accept this as true without question; in the United States, we generally require evidence. Over the months and years, that evidence began to seep out, calling Mr. Rumsfeld’s assertions into question. First, his good friend, the Pakistan dictator General Pervez Musharraf, penned an autobiography, In the Line of Fire, bragging that fully half of the Guantánamo prisoners had not been captured in Afghanistan, let alone on a battlefield. They were Arabs who had been seized in Pakistan and sold to the U.S. for a bounty. Next, the U.S. military started making their own assessment. To date, they have released 610 of the 779 prisoners from Guantánamo—in other words, almost four out of five (78%) were no threat to the United States. Thus did the military cull Rumsfeld’s “terrorists,” presumably into a rump who he would label the “worst of the worst of the worst.” Only a very small number of the Gitmo prisoners have ever resorted to the courts for a writ of habeas corpus, a legal remedy that tests the legality of someone’s detention. In the first 34 cases, a District Court judge ruled for the prisoner 56 percent of the time. In effect, the judges were saying that, even after several years spent trying to sort the terrorist wheat from the bystander chaff, and after winnowing out hundreds of the more obviously innocent, the probability that military intelligence had identified an enemy correctly was still less than a coin-toss. So in Al-Adahi, the court set an impossible standard. Now, the district courts routinely deny habeas petitions, and when they do grant them, the circuit reverses them. The professors’ theory is that this ruling was intended to intimidate the lower court judges into curtailing their liberal nonsense. That is, the Guantánamo prisoners were getting too much justice. Unfortunately, I can attest to the correctness of the professors’ theory, as I was in court when a federal judge recently observed that he had been sent a message by his appellate brethren.

#### 3. 0 meaningful opportunity to challenge detention now-bigger internal link to their advantages than a powerless judiciary because the system is rigged against detainees.

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

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

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

#### 4. The government releases people who win eventually-the plan doesn’t speed that process up at all so they don’t do anything-the CP solves by actually giving people a chance to win

**Reprieve 2012**

(criminal justice NGO, “Why can't cleared prisoners leave Guantánamo Bay?”, 7-10, <http://www.reprieve.org.uk/publiceducation/2012_07_10_Guantanamo_public_education/>, ldg)

Guantánamo detainees can appeal to federal judges to compel the Department of Defense to release them; a federal court order would circumvent the NDAA restrictions. Under this method, detainees challenge their detention by seeking a court order of habeas corpus – essentially asking the court to declare their detention illegal. In 2008, the United States Supreme Court ruled in Boumediene v. Bush that US courts can make habeas corpus orders for non-US citizens detained at Guantánamo. (The Court specifically ruled that a Congressional Act prohibiting such orders was unconstitutional.) Following Boumediene, a number of Guantánamo detainees challenged their detention in court. Some of these habeas petitions were granted, meaning that the detainee had indeed been held illegally. The release of some of these habeas winners was not contested by the government and such prisoners returned home or to a third country willing to take them. However, since 2010, the D.C. Circuit Court has consistently decided against the detainee on appeal[1], meaning the US courts have become effectively worthless to Guantánamo prisoners. The problem was that the Supreme Court’s Boumediene opinion lacked clear guidance on the standards and procedures for Guantánamo habeas corpus review. This allowed lower (and possibly more hostile) courts to narrow and misinterpret the meaning of the Boumediene decision to a point where it became worthless. For example, the D.C. Circuit Court set the standard of evidence required of the government to oppose a release as a “preponderance of evidence” - extremely low and vague. The Court has also allowed hearsay evidence, and has even accepted the existence of simply “some evidence" as sufficient for continued detention. Furthermore, the courts now side with the government whenever it presents a 'plausible' allegation about the prisoner. In reality, this shifts the burden of proof onto the prisoner, as he must actively disprove the allegations about him, while the government may simply present them as fact. In sum, while detainees can challenge their detention in court they now have no chance of winning.

### A2: Court Remedy Key

#### Obama can easily transfer people after the CP-a court order nullifies Congressional restrictions—the plan is just a redundant order of release so if people listen to it they’ll listen to the CP

**Garcia, CRS legislative attorney, 2013**

(Michael, “Closing the Guantanamo Detention Center: Legal Issues”, 5-30, <https://www.fas.org/sgp/crs/natsec/R40139.pdf>, ldg)

Despite President Obama’s objections,74 the 2011 NDAA placed more significant restrictions on detainee transfers. The act provides that, except in cases when a detainee transfer is done to effectuate an order by a U.S. court or tribunal,75 a detainee may only be transferred to the custody or control of a foreign government or the recognized leadership of a foreign entity if, at least 30 days prior to the proposed transfer, the Secretary of Defense certifies to Congress that the foreign government or entity (1) is not a designated state sponsor of terrorism or terrorist organization; (2) maintains effective control over each detention

facility where a transferred detainee may be housed; (3) is not facing a threat likely to substantially affect its ability to control a transferred detainee; (4) has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies; (5) has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism; and (6) has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies.76 Nearly identical certification requirements are found in the 2011 CAA,77 the 2012 NDAA,78 and 2013 NDAA,79 as well as two continuing appropriations measures.80

### A2: Perm Both

#### Perm Fails---Only a risk it tanks legitimacy---political branches hate the judiciary providing remedies by releasing people. Congress would freak out at the activism and the executive would hate the judiciary going the extra step when it was moving in the right direction.

## da

### BioD impact Calc

#### Biod collapse makes extinction inevitable; earth won’t be a sustainable habitat, outweighs nuclear war, it will take way longer to recover, nuke war would be long lasting but climatic changes are permanent.

#### Nuclear war doesn’t cause extinction- bad physics

**Seitz, Harvard University Center for International Affairs visiting scholar, 6**

(Russell, "The' Nuclear Winter ' Meltdown; Photoshopping the Apocalypse," adamant.typepad.com/seitz/2006/12/preherein\_honor.html, accessed 9-25-11, mss)

The recent winter solstice witnessed a 'Carl Sagan Blog-a-thon' . So in celebration of Al Gore's pal, the late author of The Cold And The Dark there follows The Wall Street Journal's warmly cautionary Cold War reminder of how a campaign for the Nobel Peace prize on the Nuclear Freeze ticket devolved into a joke played at the expense of climate modeling's street cred on the eve of the global warming debate :The Melting of 'Nuclear Winter' All that remains of Sagan's Big Chill are curves such as this , but history is full of prophets of doom who fail to deliver, not all are without honor in their own land. The 1983 'Nuclear Winter " papers in Science were so politicized that even the eminently liberal President of The Council for a Liveable World called "The worst example of the misrepesentation of science to the public in my memory." Among the authors was Stanford President Donald Kennedy. Today he edits Science , the nation's major arbiter of climate science--and policy. Below, a case illustrating the mid-range of the ~.7 to ~1.6 degree C maximum cooling the 2006 studies suggest is superimposed in color on the Blackly Apocalyptic predictions published in Science Vol. 222, 1983 . They're worth comparing, because the range of soot concentrations in the new models overlaps with cases assumed to have dire climatic consequences in the widely publicized 1983 scenarios – "Apocalyptic predictions require, to be taken seriously,higher standards of evidence than do assertions on other matters where the stakes are not as great." wrote Sagan in Foreign Affairs , Winter 1983 -84. But that "evidence" was never forthcoming. 'Nuclear Winter' never existed outside of a computer except as air-brushed animation commissioned by the a PR firm - Porter Novelli Inc. Yet Sagan predicted "the extinction of the human species " as temperatures plummeted 35 degrees C and the world froze in the aftermath of a nuclear holocaust. Last year, Sagan's cohort tried to reanimate the ghost in a machine anti-nuclear activists invoked in the depths of the Cold War, by re-running equally arbitrary scenarios on a modern interactive Global Circulation Model. But the Cold War is history in more ways than one. It is a credit to post-modern computer climate simulations that they do not reproduce the apocalyptic results of what Sagan oxymoronically termed "a sophisticated one dimensional model." The subzero 'baseline case' has melted down into a tepid 1.3 degrees of average cooling- grey skies do not a Ragnarok make . What remains is just not the stuff that End of the World myths are made of. It is hard to exaggerate how seriously " nuclear winter "was once taken by policy analysts who ought to have known better. Many were taken aback by the sheer force of Sagan's rhetoric Remarkably, Science's news coverage of the new results fails to graphically compare them with the old ones Editor Kennedy and other recent executives of the American Association for the Advancement of Science, once proudly co-authored and helped to publicize. You can't say they didn't try to reproduce this Cold War icon. Once again, soot from imaginary software materializes in midair by the megaton , flying higher than Mount Everest . This is not physics, but a crude exercise in ' garbage in, gospel out' parameter forcing designed to maximize and extend the cooling an aeosol can generate, by sparing it from realistic attrition by rainout in the lower atmosphere. Despite decades of progress in modeling atmospheric chemistry , there is none in this computer simulation, and ignoring photochemistry further extends its impact. Fortunately , the history of science is as hard to erase as it is easy to ignore. Their past mastery of semantic agression cannot spare the authors of "Nuclear Winter Lite " direct comparison of their new results and their old. Dark smoke clouds in the lower atmosphere don't last long enough to spread across the globe. Cloud droplets and rainfall remove them. rapidly washing them out of the sky in a matter of days to weeks- not long enough to sustain a global pall. Real world weather brings down particles much as soot is scrubbed out of power plant smoke by the water sprays in smoke stack scrubbers Robock acknowledges this- not even a single degree of cooling results when soot is released at lower elevations in he models . The workaround is to inject the imaginary aerosol at truly Himalayan elevations - pressure altitudes of 300 millibar and higher , where the computer model's vertical transport function modules pass it off to their even higher neighbors in the stratosphere , where it does not rain and particles linger.. The new studies like the old suffer from the disconnect between a desire to paint the sky black and the vicissitudes of natural history. As with many exercise in worst case models both at invoke rare phenomena as commonplace, claiming it prudent to assume the worst. But the real world is subject to Murphy's lesser known second law- if everything must go wrong, don't bet on it. In 2006 as in 1983 firestorms and forest fires that send smoke into the stratosphere rise to alien prominence in the modelers re-imagined world , but i the real one remains a very different place, where though every month sees forest fires burning areas the size of cities - 2,500 hectares or larger , stratospheric smoke injections arise but once in a blue moon. So how come these neo-nuclear winter models feature so much smoke so far aloft for so long? The answer is simple- the modelers intervened. Turning off vertical transport algorithms may make Al Gore happy- he has bet on reviving the credibility Sagan's ersatz apocalypse , but there is no denying that in some of these scenarios human desire, not physical forces accounts for the vertical hoisting of millions of tons of mass ten vertical kilometers into the sky.to the level at which the models take over , with results at once predictable --and arbitrary. This is not physics, it is computer gamesmanship carried over to a new generation of X-Box.

#### Oceans and counter-force targeting check

**Zutell, Arizona Dept. of Emergency and Military Affairs, Division of Emergency Services, 88**

(Eugene, 6-19-88. http://www.fortfreedom.org/s05.htm)

To enumerate some other problems with the nuclear winter mechanism: 1. The cooling mechanism as Sagan and associates describe it, could only operate over land masses. Ocean surface water is continually supplied with heat from below. Even if sunlight were blocked for many months, the temperature at the ocean surface would remain virtually unchanged. Consequently, weather patterns would continue, with warm moisture laden air from the oceans sweeping over the land masses and as it cools, rain clouds would form and even more of the sun blocking smoke and dust particles would be washed out of the atmosphere. 2. Sagan et al indicated that at the very least, 100 million tons of smoke particles would have to be injected into the atmosphere if the nuclear winter mechanism were to be triggered. They also indicated that cities are the primary source of that smoke. They therefore proposed a nuclear war scenario in which cities are the primary targets. Since the mid 1960s, the primary targets for both U.S. and Soviet nuclear missiles and nuclear bombs have not been population centers or cities. They have been the other guy's nuclear missile launch sites, nuclear bomber bases and other military targets. If those can be eliminated, the cities will be held hostage. The current list of ten target classes ascribed to Soviet planners by DOD and FEMA, does not specifically contain any population centers. The list does of course include target classes that in many instances will be located in or adjacent to metropolitan areas. But, even in those instances, the nuclear weapons employed will not be the huge multi- megaton area destruction bombs of the late 1950s and early 1960s. ICBM systems and MIRVs are now so accurate that a target may be pin- pointed even within a metropolitan area, by a relatively small weapon. This is not in any way to say that the effects will not be catastrophic. It is to say though that the city wide firestorms necessary for the onset of nuclear winter as described by Sagan and associates, are less than predictable. In fact, they are improbable.

#### Low probability of an existential risk outweighs the magnitude of any non-existential risk---there is a chance for global recovery, can’t reverse a total die off.

### Turns Case – JI/Legitimacy

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

**Chesney, Texas law professor, 2009**

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

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

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

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

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

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

### AT: Inev

#### The court is avoiding warpower rulings because they are sensitive to the institutional costs---the plan crushes court legitimacy

Deeks 10/11/13 (Associate Professor of Law, University of Virginia Law School, “THE OBSERVER EFFECT: NATIONAL SECURITY LITIGATION, EXECUTIVE POLICY CHANGES, AND JUDICIAL DEFERENCE,” http://fordhamlawreview.org/assets/pdfs/Vol\_82/Deeks\_November.pdf)

Another goal in separating powers—and in placing all of the power to execute the laws in a single entity—is to promote the accountability of the decisionmakers to the people they represent.283 Those who favor national security deference emphasize that the president (and Congress, when it chooses to get involved in national security decisions) are far more politically accountable to the people than the courts. The executive in particular is best positioned to make the difficult decisions that protect individuals from or expose individuals to danger during times of crises. At the same time, the public may and will hold the president accountable for those decisions. Courts are less directly accountable to the people, and, according to this argument, should therefore tread carefully when invalidating executive policies established to protect the citizenry. Courts are sensitive to the reputational costs of deciding controversial cases—and cases involving wartime or emergency policies are particularly likely to be controversial. Many scholars have highlighted the institutional costs of deciding such cases.284 Judicial decisions on the merits force courts to bear certain reputational costs. The operation of the observer effect means that courts need to decide fewer such cases (or decide them in a more modest manner) than they may think in order to preserve separation of- powers values. This approach allows courts largely (though not entirely) to avoid making politically controversial decisions that might cast questions on their institutional competence, while allowing the courts on limited occasions to stake out their more popular role as defender of rights.285 At the same time, there are ways in which courts can distance themselves from the policies in question, thus ensuring that political accountability for the policy falls squarely on the executive.

### AT: NSA

#### The court has maintained deference---no rulings on the merits like the plan

Entin 12 (Jonathan L. Entin Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. “War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations,” http://law.case.edu/journals/JIL/Documents/45CaseWResJIntlL1&2.21.Article.Entin.pdf)

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive’s position, it generally has done so on relatively narrow grounds. Consider the Espionage Act cases that arose during World War I. Schenck v. United States, 63 which is best known for Justice Holmes’s announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant’s having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that “the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.” 64 The circumstances in which the speech took place affected the scope of First Amendment protection: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” 65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort66 and of Eugene Debs for a speech denouncing the war.67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, 68 but only Justice Brandeis agreed with his position.69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes’s opinions for the Court in the earlier cases.70 Similarly, the Supreme Court rejected challenges to the government’s war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs.71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts.72 In addition, the Court upheld the validity of the Japanese internment program.73 Of course, the Court did limit the scope of the program by holding that it did not apply to “concededly loyal” citizens.74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated.75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees.76 The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region.77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, 78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone.79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges.80

### Link – 2NC

#### The Court’s pursuing an incremental strategy in regards to War Powers now-the plan causes massive backlash and executive non-acquiescence

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

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

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy - declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers. n85 The 2004 rulings in Hamdi and Rasul triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful issued [\*508] press releases about the cases. n86 And while eight members of Congress signed onto amicus briefs backing administration policy, n87 Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the Hamdan case. n88 When Congress enacted the Detainee Treatment Act (DTA) in December 2005, "lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary." n89 Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President's military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of Hamdan and other pending cases. n90 Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the "Supreme Court has been shouting to us in Congress: Get involved," n91 and thereby depicted Rasul as a challenge [\*509] to Congress, n92 "asking the Senate and the House, do you intend for ... enemy combatants ... to challenge their detention [in federal courts] as if they were American citizens?" n93 Lawmakers also spoke of detainee habeas petitions as an "abuse[]" n94 of the federal courts, and warned that such petitions might unduly clog the courts, n95 thus "swamping the system" n96 with frivolous complaints. n97 Under this view, the DTA's cabining of federal court jurisdiction "respects" the Court's independence and its role in the detainee process. n98 Following Hamdan, lawmakers likewise did not challenge the Court's conclusions that the DTA did not retrospectively bar the Hamdan litigation and that the President could not unilaterally pursue his military tribunal policy. n99 Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists." n100 And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the [\*510] Congress and the president can drive to the destination together." n101 Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan's lawyers for misleading the Court about the legislative history of the DTA. n102 Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantanamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights, n103 these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have "a statutory right of habeas ... . And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is ... totally different ... and it would change in many ways what I have said." n104 Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would "clean it up," n105 and that Congress therefore should fulfill its responsibility to protect "that great writ." n106 When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA's habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of Boumediene. In the week following the decision, no member [\*511] of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor. n107 \* \* \* Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided Boumediene, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantanamo Bay. In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk. [\*512] II. Judicial Modesty or Judicial Hubris: Making Sense of the Enemy Combatant Cases From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills) n108 until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes. n109 In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers. n110 Correspondingly, the President has strong incentives to expand his war-making prerogatives. n111 For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks. n112 The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence. n113 Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim - with these decisions being labeled "stunning" (Harold [\*513] Koh), n114 "unprecedented" (John Yoo), n115 "breathtaking" (Charles Krauthammer), n116 "astounding" (Neal Katyal), n117 "sweeping and categorical" (New York Times), n118 and "historic" (Washington Post and Wall Street Journal). n119 Upon closer inspection, however, the Court's decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation's security nor elected branch non-acquiescence. n120 The Court's initial rulings placed few meaningful checks on the executive; over time, the Court - reflecting increasing public disapproval of the President - imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court's authority to play any role in national security matters. n121 This frontal assault on judicial power prompted the Court to stand up for its authority to "say what the law is." In Part III, I will talk about the Court's interest in protecting its turf - especially in cases implicating individual rights. [\*514] Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. Rasul simply held that Guantanamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation. n122 This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions. n123 Hamdi, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence." n124 The Bush administration, as John Yoo put it, saw the limited reach of Hamdi and Rasul as creating an "opportunity" for the administration to regain control over its detention policy. n125 In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status. n126 Capitalizing on Rasul's failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants. n127 The Justice Department reconvened CSRTs to reconsider the remaining three cases [\*515] and, ultimately, the remaining three were determined to be enemy combatants. n128 Hamdi and Rasul were both "narrow, incompletely theorized [minimalist] decisions." n129 And while newspapers and academics focused their attention on the Court's open-ended declaration that "a state of war is not a blank check for the President," n130 the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President's military commission initiative, n131 the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash.

n132 Moreover, by ruling that Congress had authorized the President's power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account. n133 Actions taken by the executive in response to these rulings underscore that the Court's de minimis demands neither risked national security nor executive branch non-acquiescence. None of this is to say that the 2004 decisions were without impact. Following Rasul, for example, the administration understood that it needed to make use of some type of military court review - a requirement that may have impacted the military's handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration's legal policy. n134 Instead, the Court simply carved out space for itself to review administration policy-making - without setting meaningful boundaries on what the administration could or could not do.

#### Plan is a massive break of precedent and wrecks separation of powers-they misread habeas and Boumediene-remedy is not key.

**Feith, Yale JD, 2012**

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

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

### Sustainable Development – 2NC

#### Court’s public trust doctrine is key to sustainable development. Now is the key time. We are dangerously close to planetary boundaries

**Sagarin et al., Arizona Institute of the Environment research scientist, 2012**

(Raphael, “The Public Trust Doctrine: Where Ecology Meets Natural Resources Management”, Annual Review of Environment and Resources, ScienceDirect, ldg)

We are failing to preserve ecosystems and their services on which humanity relies. Forests, freshwater sources, oceans, and the atmosphere itself are all at degraded states and may be hovering dangerously close to “planetary boundaries” (1), where they will no longer provide the services of food production, nutrient cycling, and climate regulation as they do currently. These resources are common-pool resources, meaning resources from which it is hard (i.e., costly) to exclude users but simultaneously are subject to degradation from overuse (2). It has proven difficult to devise ways of governing our sustainable use of common-pool resources. A particular legal doctrine called the public trust doctrine (PTD), which appears in several countries but initially evolved in the United States, is appealing to environmental law and policy scholars on both philosophical and practical grounds. In its most basic interpretation, it states that certain natural resources cannot be subject to private ownership and must be held in trust for the people of a State (or US state) by the government. Governments must manage trust resources for the exclusive benefit of their citizens, both current and future, and if they fail to do so, citizens can seek remedy in the courts. Philosophically, the PTD is appealing because it provides a framework for structuring the relationship among citizens, both current and future, the governments they elect, and natural resources and the services they provide. Additionally, by protecting the rights of both current and future citizens to functioning ecosystems, the PTD is tied to the important notion in international environmental governance of intergenerational equity. Practically, the PTD is appealing because it scales well from backyard creeks to international waters, and from resources with clear monetary value (e.g., fish) to those with more diffuse values (e.g., intact ecosystems). It is widely incorporated in US states’ law and has increasingly been used in other countries by their legislatures to prescribe a more accountable way forward for environmental governance and by their courts to prevent harm to trust resources or demand their restoration. Achieving laws and policies that prevent overuse of natural resources is an imperative in the enduring global effort to achieve sustainable development (3). With the current global negotiations about sustainable development, climate change, and high seas governance, not to mention ongoing environmental conflicts at every level, now is an opportune time to clarify the PTD and its potential opportunities and pitfalls as a tool for more effective and sustainable natural resources management. Depending on one’s perspective, the PTD could be a powerful tool for recognizing ecological advances in law and policy or a dangerously unwieldy cudgel that threatens democracy and property rights. Those who advocate in academic discussions, court cases, legislative debates, or as delegates to international environmental conferences for an expanded PTD need to understand the many facets of the PTD concept. The vast majority of recent PTD discussion has occurred in law review journals, which have both benefits and drawbacks. Law review articles are built on extensive knowledge of legal precedent, but because they are essentially framed as arguments, they tend to rely on judicial opinions and other articles that support the commentator’s viewpoint and relegate opposing views to an unelaborated “but see . . .” citation in the footnotes. Pg. 474-475

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## ADV 1

### Transition wars

#### Alliances are out dated, multi-polarity is stable and there is no scenario for war in a world of US decline---geography and economics gurantee balancing which will be sufficient to deter power war---that’s Friedman

#### No transition wars-disengagement doesn’t correlate with aggression

**Parent et al., Miami political science professor, 2011**

(Joseph, “The Wisdom of Retrenchment”, Foreign Affairs, November/December, ebsco, ldg)

A somewhat more compelling concern raised by opponents of retrenchment is that the policy might undermine deterrence. Reducing the defense budget or repositioning forces would make the United States look weak and embolden upstarts, they argue. "The very signaling of such an aloof intention may encourage regional bullies," Kaplan worries. This anxiety is rooted in the assumption that the best barrier to adventurism by adversaries is forward defenses--the deployment of military assets in large bases near enemy borders, which serve as tripwires or, to some eyes, a Great Wall of America. There are many problems with this position. For starters, the policies that have gotten the United States in trouble in recent years have been activist, not passive or defensive. The U.S.-led invasion of Iraq alienated important U.S. allies, such as Germany and Turkey, and increased Iran's regional power. NATO's expansion eastward has strained the alliance and intensified Russia's ambitions in Georgia and Ukraine. More generally, U.S. forward deployments are no longer the main barrier to great-power land grabs. Taking and holding territory is more expensive than it once was, and great powers have little incentive or interest in expanding further. The United States' chief allies have developed the wherewithal to defend their territorial boundaries and deter restive neighbors. Of course, retrenchment might tempt reckless rivals to pursue unexpected or incautious policies, as states sometimes do. Should that occur, however, U.S. superiority in conventional arms and its power-projection capabilities would assure the option of quick U.S. intervention.

Outcomes of that sort would be costly, but the risks of retrenchment must be compared to the risks of the status quo. In difficult financial circumstances, the United States must prioritize. The biggest menace to a superpower is not the possibility of belated entry into a regional crisis; it is the temptation of imperial overstretch. That is exactly the trap into which opponents of the United States, such as al Qaeda, want it to fall. Nor is there good evidence that reducing Washington's overseas commitments would lead friends and rivals to question its credibility. Despite some glum prophecies, the withdrawal of U.S. armed forces from western Europe after the Cold War neither doomed NATO nor discredited the United States. Similar reductions in U.S. military forces and the forces' repositioning in South Korea have improved the sometimes tense relationship between Washington and Seoul. Calls for Japan to assume a greater defense burden have likewise resulted in deeper integration of U.S. and Japanese forces. Faith in forward defenses is a holdover from the Cold War, rooted in visions of implacable adversaries and falling dominoes. It is ill suited to contemporary world politics, where balancing coalitions are notably absent and ideological disputes remarkably mild.

## Adv 2

### A2: Zivotofsky

#### Lower courts have distinguished it – it wasn’t conclusive

Goldstein 9/18/13

Samantha Goldstein, JD from Harvard, National Security Law Review, September 18, 2013, Vol. 2, Issue 2, "The Real Meaning of Zivotofsky", http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2327411

d. Nevertheless, Post-Zivotofsky, Lower Courts Are Unlikely to Ignore the Prudential Approach to the Political Question Doctrine.

Zivotofsky’s relatively weak pro-justiciability signal is unlikely to tangibly affect the lower federal courts’ approach to the political question doctrine, where most political question cases are decided.106 On the one hand, the case seems to be having a modest impact: at least some litigants and lower courts have begun citing only the first two, classical factors from Baker.107 Lower courts more zealously apply the political question doctrine – that is, they are more likely to find cases non-justiciable – than is the Supreme Court.108 And, the political question doctrine has “become an increasingly prominent defense in post-September 11 national security cases.”109 Viewed against that backdrop, one might understand Zivotofsky as sending a responsive signal to the lower courts that they should resolve skirmishes between the political branches, even in the context of foreign affairs.110

Yet, given the prevalence of the doctrine in the lower courts, it seems more likely that the relatively weak signal in Zivotofsky will not have that much of an impact there after all. Certainly, there is reason to be skeptical about the likely impact of Zivotofsky. One district court asserted that the case in no way altered existing doctrine.111 And another cited Justice Breyer’s Zivotofsky dissent for the proposition that the political branches have indefatigable primacy over the judiciary in matters relating to foreign affairs.112 Moreover, several district court cases and appellate briefs have cited Justice Sotomayor’s concurrence (which emphasizes the need to apply all six Baker factors), rather than the majority’s opinion (which only references Baker’s two classical factors).113 Other district court cases exhibit even more confusion about the scope of the political question doctrine in the wake of Zivotofsky, namely by citing Zivotofsky’s majority opinion to support the two Baker factors it mentioned, yet then applying all six Baker factors.114 Litigants – though perhaps (if not most likely) doing so opportunistically – have asserted confusion in the doctrine too.115

### A/T Judicial Interaction

#### Face to face contact doesn’t matter – they just get drunk together.

Law and Chang 2011

David S., Wen-Chen, Professor of PoliSci & Law @ Washington St Louis, Visiting Scholar NYU, THE LIMITS OF GLOBAL JUDICIAL DIALOGUE https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/1061/86WLR523.pdf?sequence=1

Unlike the citation behavior of constitutional courts, judge-to-judge dialogue—or “J2J,” in the words of one justice40—is dialogue in the literal and truest sense of the word. Actual interaction between judges, especially of the face-to-face variety that receives such emphasis in the literature, feels at once both glamorous and vaguely conspiratorial. Existing accounts of this species of judicial dialogue, cobbled together from snippets and reports of closed meetings in Bangalore,41 Johannesburg,42 and New Haven43 tantalize the reader with glimpses of something elusive and, for that very reason, seemingly important. They conjure up an image of judges trotting the globe to chart the course of constitutional law behind closed doors before returning home to impose this master scheme on their unwitting compatriots, with no one the wiser except the judges themselves and perhaps a handful of privileged legal academics located predominantly at elite law schools in the northeastern United States that have the prestige and financial wherewithal to dispatch their faculty to wherever these judicial gatherings may occur or, better yet, to host such gatherings themselves.44 The resultant sense, perhaps, is that of being privy to the inner life of opaque “judicial networks” that engage in de facto global governance, or the exercise of power without authority, as part of a “new world order.”45 The opposite and more skeptical view would be that the entire notion of J2J dialogue boils down to the unexceptional and inconsequential claim that judges enjoy a growing range of opportunities to socialize over cocktails and have also learned to e-mail one another. On this view, one might be forgiven for thinking that “the “global community of courts”46 constituted by transnational judicial dialogue is a toothless development that bears more resemblance to “a literary salon writ large”47 than an innovation in global governance capable of generating “an increasingly global constitutional jurisprudence.”48 The empirical claims that are more typically made about the practical impact of J2J interaction are somewhat vague. A common theme, however, is that dialogue of the J2J variety encourages judges to engage in comparative analysis.49 Anne-Marie Slaughter, an early and prominent champion of global judicial dialogue, identifies a number of cognitive and social effects that “all these visits and exchanges and seminars” have on judges.50 These opportunities for interaction “educate” and “cross-fertilize,” “broaden the perspectives of the participating judges,” “socialize” them as “participants in a common global judicial enterprise,”51 and ultimately foster “an increasingly global constitutional jurisprudence” across a broad range of human rights issues.52 Melissa Waters is more circumspect but ultimately makes similar claims: “‘Face-to-face’ contact among the world’s judges is increasingly frequent,” “has undoubtedly been a major factor in certain U.S. Supreme Court Justices’ increased interest” in other forms of dialogue such as comparative analysis, and “has undoubtedly played a significant role in creating an environment” in which these other forms of “dialogue can flourish.”53 The evidentiary support for these claims is anecdotal at best. There is little reason to doubt that J2J dialogue does occur and has even increased in frequency. But it is reasonable to wonder whether inclusion in the latest judicial gathering at Yale Law School has any tangible effect on the development of a nation’s constitutional jurisprudence.54 Does J2J dialogue affect the way in which judges decide actual cases, and if so, how? What are the content and consequences of this dialogue? To what extent is it substantive, and to what extent is it social or personal in nature? To the extent that it is substantive, does it furnish judges with knowledge that they would not otherwise possess or acquire? Whatever its content, does direct interaction between judges pique their curiosity about foreign law, or encourage them to cite other courts more often, as some scholars have suggested? And even assuming that dialogue of this kind does in fact increase judicial interest in foreign law, what is its importance relative to domestic institutional variables, such as the prevalence of foreign legal training or the availability of support personnel who have received such training?

### 2NC-Global Democracy Increasing

#### Global Democracy is increasing:

#### A. Extend Ulfelder-trends are positive on global democracy-retrenchment is in already autocratic regimes and will be short-lived.

B. Global democracy flourishing-long-term trends

Hans Arnold Center 14

Global Trends in the Quality and Governance of Democracy

http://www.americanacademy.de/home/program/past/global-trends-quality-and-governance-democracy

The long-term view of democracy flourishing in the world looks promising. There are a plethora of frightening headlines in our midst: the debt crisis, floods, earthquakes, Middle Eastern government crackdowns on protestors. But, then again, there is the Arab Spring, that hopeful wave of protests and revolutions that has toppled numerous entrenched dictators and become an icon of popular democratic change. If you take the longterm view, suggests Jack Goldstone, the Richard C. Holbrooke Distinguished Visitor this fall, world trends over the past three decades have been moving dramatically in the direction of democracy. Dictatorships are down. Partial and full democracies have been on the rise since the end of the Cold War. That is to say, increasing numbers of countries are moving towards the implementation of rule of law and free elections (versus the capricious whims of dictators), as well as instituting changes to protect the civil liberties of their citizens (versus having no legal protection). Things look much better in the realm of conflict, too: in fact, Goldstone notes, the number of armed conflict onsets, both civil and interstate, has declined dramatically since 1980, including even those armed conflicts in Africa, with the exception of places like Somalia.

### Iraq

Pimental and Anderson Judges are personally threatened

Pimental and Anderson 13, 1ac authors

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

A concern for Iraq here is that the Constitution accords juridical significance to established provisions of Islam, which opens the door to influence from religious leaders or authorities.119 Depending on how the courts address these issues, and on whom they must rely for determinations on questions of what Islamic principles require, the courts may well be open to outside influences, seriously compromising their independence. For example, if Article 2 is interpreted to require judicial fealty to fatwas,120 then anyone authorized to issue a fatwa would have direct power to dictate outcomes in judicial cases. b. Political influence and interference In addition to this potential for religious influence, there are noted instances of political (executive) influence of the judiciary.'21 One such case that raised much controversy was the case shortly before the 2010 parliamentary elections in Iraq, when the Supreme Commission for Accountability and Justice announced that pursuant to relevant de- Ba'athificalion laws it had disqualified over 500 nominees from participating in the election.122 The Court of Cassation overturned the Commission's ruling, holding that there was not sufficient time prior to the election to complete a proper review of the claims against the nominees, and they should be allowed to participate in the election subject to post-election 123 review. The Court's decision, however, was largely unpopular with the Prime Minister and his political allies.124 Under great pressure, and after meetings with the Prime Minister and other political leaders, the Court reversed the decision and ultimately allowed only 26 candidates to stand for election.1-5 This reversal was generally perceived among Iraqis as evidence that the judiciary was susceptible to political pressure, and thus lacking independence.126 Another example came in 2011, when the Federal Supreme Court rendered a decision, authored by the Chief Justice, ruling that a series of previously powerful and independent agencies were subject to direct cabinet oversight.1" One commentator referred to this case as the Prime Minister utilizing his "increasingly pliable judiciary" to weaken oversights and empower the executive. 128 Cases like these raise serious doubts about the judiciary's ability to withstand pressure and interference from a very powerful executive. At the very least, the situation seriously undermines public confidence in the judiciary and, more particularly, in its independence.

#### Cook says no spillover—institutions solve

### Nepal

#### The Nepal bar association is citing their OWN Consitituion which codifies JI and the UN to create precedent for independence---no reason they need the signal of the plan---if sq push is not enough nothing will be

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

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

## 1nr

## Court Capital DA

### 1NR Overview

#### Koh says treaties check warming – extinction

Don Flournoy 12, Citing Feng Hsu, PhD NASA Scientist @ the Goddard Space Flight Center and Don is a PhD and MA from UT, former Dean of the University College @ Ohio University, former Associate Dean at SUNY and Case Institute of Technology, Former Manager for University/Industry Experiments for the NASA ACTS Satellite, currently Professor of Telecommunications @ Scripps College of Communications, Ohio University, “Solar Power Satellites,” January 2012, Springer Briefs in Space Development, p. 10-11

In the Online Journal of Space Communication , Dr. Feng Hsu, a  NASA scientist at Goddard Space Flight Center, a research center in the forefront of science of space and Earth, writes, “The evidence of global warming is alarming,” noting the potential for a catastrophic planetary climate change is real and troubling (Hsu 2010 ) . Hsu and his NASA colleagues were engaged in monitoring and analyzing climate changes on a global scale, through which they received first-hand scientific information and data relating to global warming issues, including the dynamics of polar ice cap melting. After discussing this research with colleagues who were world experts on the subject, he wrote: I now have no doubt global temperatures are rising, and that global warming is a serious problem confronting all of humanity. No matter whether these trends are due to human interference or to the cosmic cycling of our solar system, there are two basic facts that are crystal clear: (a) there is overwhelming scientific evidence showing positive correlations between the level of CO2 concentrations in Earth’s atmosphere with respect to the historical fluctuations of global temperature changes; and (b) the overwhelming majority of theworld’s scientific community is in agreement about the risks of a potential catastrophic global climate change. That is, if we humans continue to ignore this problem and do nothing, if we continue dumping huge quantities of greenhouse gases into Earth’s biosphere, humanity will be at dire risk (Hsu 2010 ) . As a technology risk assessment expert, Hsu says he can show with some confidence that the planet will face more risk doing nothing to curb its fossil-based energy addictions than it will in making a fundamental shift in its energy supply. “This,” he writes, “is because the risks of a catastrophic anthropogenic climate change can be potentially the extinction of human species, a risk that is simply too high for us to take any chances” (Hsu 2010).

### 1NR A2: Capital Bulletproff

#### The aff kills institutional legitimacy and resiliency

Devins 2010

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

What is striking here, is that the Court never took more than it could get—it carved out space for itself without risking the nation’s security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain.185 Its decision to steer clear of early Obama-era disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress. I, of course, recognize that the Court’s willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary’s recent practice of steering clear of disputes tied to unilateral presidential war making.187 At the same time, I see the Court’s willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to “say what the law is.”188 The Justices, after all, have incentives to preserve the Court’s role in our system of checks and balances—especially when their decisions enhance their reputations with media and academic elites.189 This is true of the Supreme Court in general, and arguably more true of the current Court—given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court’s so-called swing Justices.190 It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in Hamdan, Justice Kennedy emphasized the importance of habeas corpus relief,191 suggesting that limitations on habeas relief would “threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive.”192

### 1NR A2: Don’t Care

#### And they care in regards to war power cases

Curry 2006

Todd, PoliSci Master’s Thesis, THE ADJUDICATION OF PRESIDENTIAL POWER IN THE U.S. SUPREME COURT: A PREDICTIVE MODEL OF INDIVIDUAL JUSTICE VOTING, University of Central Florida Summer 2006

If the predominant theory of Supreme Court decision-making, the attitudinal model, were applied to this subset of cases, despite the uniqueness of the political ramifications (which amount to direct judicial interaction with the executive branch), the balance of power issues that arise, and the distinct constitutional questions, it may be expected that justices would still simply vote their policy preferences because the attitudinal model assumes that all individual level decision-making by the Supreme Court justices is a function of ideology. This theory is too simplistic to account for the complexities that arise in separation of power cases, in particular in cases that involve presidential power. Therefore, while acknowledging the importance of a justice’s attitude in decision-making, this study postulates that there are multiple attitudinal and extra-attitudinal factors that may influence a justice’s individual level decision-making. Following the research of Yates (2002) and others, this study theorizes that, Supreme Court cases in which the president or presidential power is being adjudicated, the attitudinal model of judicial decision-making may not completely account for the justices’ individual decision-making process because in these highly salient cases, the presence of external and political cues may influence the justices because highly salient cases such as these may call into question the very legitimacy of the Court. Since there are numerous political and external factors that can affect the justices’ decision-making process in cases involving presidential power, there will be numerous hypotheses in order to test this theory.

### 1NR A2: Compart

#### Issues not compartmentalized

Clark 2009

Tom, Assistant Professor of Political Science at Emory, The Separation of Powers, Court Curbing, and Judicial Legitimacy, American Journal of Political Science, Vol. 53, No. 4, October 2009 http://userwww.service.emory.edu/~tclark7/constitutional.pdf

This theoretical model and empirical analyses presented in this article provide a new interpretation of the separation of-powers model that has been the focus of much scholarship in the area of judicial-congressional relations. The evidence from interviews with Supreme Court justices and former law clerks suggests students of Court-Congress relations must account for the role of judicial legitimacy in the Court’s decision calculus. Judicial legitimacy is an important mechanism that drives judicial sensitivity to congressional preferences. Moreover, it can be a condition that gives rise to constrained judicial decision making. Indeed, scholars have long recognized the importance of institutional legitimacy for the Supreme Court (Baum 2006; Caldeira 1987; Caldeira and Gibson 1992; Lasser 1988; see also Staton 2006; Vanberg 2005); however, this study unites this literature with scholarship on congressional constraints on judicial behavior in a previously unappreciated way. By recasting the separation-of-powers model as a strategic interaction in which responses to Supreme Court decisions are not limited to congressional overrides but also include consequences for the Court’s institutional integrity, this model of judicial independence presents a fuller, more nuanced and dynamic interpretation of the judicial decision-making environment. The analysis of judicial-congressional relations as an interaction in which concerns for institutional legitimacy are integral to the Court’s decision-calculus unites two important bodies of judicial politics scholarship, and may reorient empirical scholarship that has focused largely on the relative explanatory power of the two dominant models of judicial decision making (the attitudinal model and the SOP model). As a first step in this empirical direction, the analysis of Court curbing and its relationship to the use of judicial review to invalidate federal legislation provides promising evidence. As the analysis above demonstrates, the relationship between the frequency of judicial review and congressional hostility provides strong, direct support for the theoretical model. When the Court fears it will lose public support, it will adjust its behavior in light of congressional signals about the Court’s level of public support. However, the magnitude of that effect is mediated by the political context in which those signals are sent. Instead of responding to Court curbing more strongly when it is facing its ideological opponents, the Court responds most strongly when the Court curbing comes from its ideological allies. Moreover, the constraining effect of Court curbing increases as the Court becomes more pessimistic about its public support. Notably, these interactive relationships run against the intuition following from the conventional wisdom that Court curbing’s effect on the Court is due to its threat of enactment. They are, however, predicted by the public-Congress-Court interaction analyzed here.

### 1NR A2: Court Will Rule In Favor of Bond

#### Only we control uniqueness – court will rule against Bond

Bashman 2013

Howard J., nationally known attorney and appellate commentator, Looking Ahead: October Term 2013, Cato Supreme Court Review http://howappealing.law.com/BashmanCatoEssayFinal-091713.pdf

No lawyer worth his or her salt would ever advise a client to attempt to use dangerous chemicals to poison a rival for the romantic attention of the client’s spouse. Nevertheless, having a client who engaged in that legally prohibited conduct appears to be the recipe for periodic visits to address the justices in the Supreme Court’s courtroom—at least if you’re a superstar Supreme Court advocate. In the forthcoming term, the case captioned Bond v. United States makes its return visit to the Court.27 In its previous incarnation, the Supreme Court held that the woman charged with attempting to poison her romantic rival for her husband’s affections had standing to object to Congress’s enactment of legislation alleged to violate the Tenth Amendment’s limitations on federal power.28 On remand to the U.S. Court of Appeals for the Third Circuit, Bond argued that Congress had overstepped the bounds of its authority to make criminal the purely local poisoning attempt at the heart of the criminal charges against her. Relying on dictum from the Supreme Court’s ruling in Missouri v. Holland—which suggests that Congress has the power to enact implementing legislation in furtherance of a lawfully approved treaty even if that legislation broadens Congress’s constitutional power—the Third Circuit rejected Bond’s challenge.29 Now, on its return visit to the Supreme Court, Bond is asking the justices to hold that the federal government’s approval of a treaty— here an international chemical weapons convention—does not authorize it to assume police powers to turn what otherwise would have been an offense under state law—here, assault or attempted murder—into a federal crime. Although the structural limitations on federal power are important, as the Supreme Court recognized most recently in NFIB v. Sebelius, 30 this case appears to present an especially vexing question. State and local governments are of course powerless to enter into international treaties. Because the treaty power of necessity resides exclusively with the federal government, perhaps the states can be understood to have ceded to the federal government the ability to encroach on what would otherwise ordinarily be state prerogatives where necessary to implement a lawful treaty. Or perhaps the Supreme Court will hold that federalism principles render the federal government unable to fully implement treaties that require such encroachment on state power. One thing is for sure: the case is bound to be very well argued, as former Solicitor General Paul Clement will represent Bond in this appeal, just as he did in his client’s previous victorious visit to the Court. Although the outcome of this case is far from clear, my suspicion is that a majority consisting of the ordinarily pragmatic justices are likely to prevail in holding that the Constitution’s treaty power does give Congress the ability to encroach on state prerogatives where necessary to implement a treaty. Yet even such a holding, however broad, would do little to justify the seemingly aberrant decision of federal prosecutors to treat Mrs. Bond’s bizarre offenses as federal crimes.

## Plenary Power DA

### 1NR Overview

#### Plenary power collapse turns both of their advantages

Feere, 9

(Legal Policy Analyst-Center for Immigration Studies, “Plenary Power: Should Judges Control U.S. Immigration Policy?,” http://www.cis.org/plenarypower)

Foreign Powers Controlling U.S. Immigration Policy? One of the arguments for the political branches’ plenary power over immigration involves a focus on foreign affairs. That issue was a factor in the Zadvydas decision. Under the Constitution, it is the executive and legislative branches that direct foreign policy matters. This ensures that the U.S. relations with other countries are consistent and reliable. As explained by the dissenting justices in Zadvydas: “**judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters**.”90 The problem is that the majority effectively empowered foreign governments to control U.S. immigration policy. The dissenting justices in Zadvydas explained: “The result of the Court’s rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us.”91 Certainly, such political considerations are not on the average judge’s radar, and they shouldn’t be. Political issues are to be debated and resolved within the political branches. But the decision in Zadvydas arguably requires judges to involve the judiciary in foreign affairs. According to the dissenting justices: “One of the more alarming aspects of the Court’s new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership.”92 By **not adhering to the plenary power doctrine**, the Zadvydas majority **effectively relocates foreign policy considerations from experienced and accountable political actors to arguably less-politically astute judges while simultaneously politicizing the judiciary. The decision also puts foreign governments in the driver’s seat.**

### 1NR A2: PP = Myth

#### The plan decimates plenary powers over immigration

Kagan, 10

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

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

#### Plenary power strong but can be rolled back

Leak and Maltz 12

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

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

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

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

### 1NR A2: Go Elsewhere

#### If some aren’t released into the US they definitely don’t solve-countries won’t take enough detainees unless we take some

**Rosenberg, McClatchy Newspaper, 2011**

(Carol, “How Congress helped thwart Obama's plan to close Guantanamo”, 1-22, <http://www.mcclatchydc.com/2011/01/22/107255/how-congress-helped-thwart-obamas.html>, ldg)

Key among the factors, the cables suggest: Congress' refusal to allow any of the captives to be brought to the United States. In cable after cable sent to the State Department in Washington, American diplomats make it clear that the unwillingness of the United States to resettle a single detainee in this country — even from among 17 ethnic Muslim Uighurs considered enemies of China's communist government — made other countries reluctant to take in detainees. Europe balked and said the United States should go first. Yemen at one point proposed the United States move the detainees from Cuba to America's SuperMax prison in the Colorado Rockies. Saudi Arabia's king suggested the military plant micro-chips in Guantanamo captives before setting them free. A January 2009 cable from Paris is a case in point: France's chief diplomat on security matters insisted, the cable said, that, as a precondition of France's resettling Guantanamo captives the United States wants to let go, "the U.S. must agree to resettle some of these same LOW-RISK DETAINEES in the U.S.'' In the end, France took two. Closing the Guantanamo detention center had been a key promise of the Obama presidential campaign, and the new President Barack Obama moved quickly to fulfill it. Just two days after taking the oath of office, on Jan. 22, 2009, Obama signed an executive order instructing the military to close Guantanamo within a year. European countries were effusive in their praise. But as the second anniversary of that order passed Saturday, the prison camps remain open, and the prospects of their closure appear dim. Prosecutors are poised to ramp up the military trials that Obama once condemned, and the new Republican chairman of the House Armed Services Committee, Rep. Buck McKeon of California, last week said the U.S. should grow the population to perhaps 800 from the current 173. Many factors worked to thwart Obama's plans to close the camps — from a tangled bureaucracy to fears that released detainees would become terrorists. But Congress' prohibition on resettling any of the detainees in the United States hamstrung the administration's global search for countries willing to take the captives in. The U.S. refusal to take in the captives "comes up all the time," acknowledged a senior Obama administration official of U.S. efforts to find homes for released detainees. "Were we willing to take a couple of detainees ourselves, it would've made the job of moving detainees out of Guantanamo significantly easier,'' said the official, who agreed to speak only anonymously because of the delicacy of the diplomacy.

#### Either the detainees go nowhere because the only countries that will take them are human rights risk and the courts cannot order their release their OR they come to the US

**Wasik, Georgetown JD, 2012**

(Joanna, “When and to Where? Leaving Guantanamo after Habeas, Release, or Transfer”, 5-1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167718>, ldg)

Though the decreasing number of detainees at Guantánamo shows that the transfer and release process has been progressing for the past ten years, it remains fraught with diplomatic difficulties and humanitarian risks. First and most problematically, the fact that a detainee has at some point been cleared for release by the executive branch or granted habeas by the courts rarely means that he is physically released. For example, the Uighur detainees, members of a Muslim minority from Western China, are perhaps the most famous group at Guantánamo. DOD cleared them for release in 2004,35 and in 2008 a federal judge ruled that the U.S. did not have sufficient evidence to detain them.36 However, none of the Uighur detainees were released until 2009,37 and two were only just released in 2012.38 Three Uighurs remain at Guantánamo,39 pursuing litigation to allow them to resettle in the U.S.40 As of 2012, these three have spent a decade of their lives at Guantánamo. Second, both the Bush and Obama administrations have encountered diplomatic difficulties in attempting to resettle or transfer certain detainees. Though European countries seemed amenable to taking detainees in 2009, their willingness was predicated in part upon the expectation that the U.S. would accept some of the detainees into its own territory.41 Many countries fear accepting detainees who pose a security risk.42 This fear is fueled at least in part by the fact that the U.S. justifies continued detention of many detainees by arguing that they are dangerous.43 In addition, negotiations for transfer agreements are complicated, involving extensive discussions over the host country’s obligations upon acceptance of a detainee and continued U.S. support to facilitate the detainees’ integration.44 Third, resettlement into the U.S. has been closed off for many reasons. Many of the detainees would not accept resettlement to the country that detained them for over ten years, and, for some of them, mistreated them during this time.45 Detainees released into the U.S. might also face significant discrimination or abuse. Nor does public opinion favor the idea. A 2009 Gallup Poll revealed that Americans opposed closing Guantánamo and moving prisoners to the U.S. by almost a 2-1 margin,46 and there is no evidence to suggest that opinion has changed in recent years. In addition, domestic legislation impedes flexibility in transfer and release. The 2011 National Defense Authorization Act bans the use of defense funds to transfer detainees from Guantánamo to the U.S., and requires that the Secretary of Defense certify that certain conditions are met before defense funds may be used for transfer to other countries.47 Fourth, the process has not adequately ensured that individuals returned to their countries of origin will not face irreparable harm upon return. The U.S. relies on “diplomatic assurances” from receiving countries as guarantees that they will not torture former Guantánamo detainees.48 Diplomatic assurances may take the form of oral promises or written documents, and their specific content may vary according to the situation and the detainee.49 According to former State Department Legal Adviser John Bellinger, [I]t is … the policy of the United States not to send any person, no matter where located, to a country in which it is more likely than not that the person would be subjected to torture. This policy applies to all components of the U.S. Government and applies with respect to individuals in U.S. custody or control regardless of where they may be detained. …[I]t is of course essential that diplomatic assurances be credible. This requires direct engagement with the potential receiving country .... [W]here appropriate, the U.S. Government can change the facts on the ground by directly engaging with the receiving country regarding the treatment that a particular individual will receive and securing explicit, credible assurances that the individual will not be tortured.50 In addition to diplomatic assurances, the U.S. conducts its own assessment of whether the transfer of a detainee would result in torture. For example, cables leaked by Wikileaks in 2010 show that the U.S. resisted intense diplomatic pressure from the Tunisian and Chinese governments to transfer detainees to those countries.51 However, in some cases in which the U.S. has relied on diplomatic assurances, there is evidence that detainees have been subjected to torture, or cruel, inhuman, degrading treatment or punishment,52 while others have been imprisoned by the governments of the receiving countries.53 For example, in 2004 the U.S. repatriated seven detainees to Russia after receiving diplomatic assurances regarding their treatment.54 At the time that this assurance was received, the DOS Human Rights Reports stated that Russian law enforcement engaged in torture and violence with impunity.55 The detainees themselves assert that they asked U.S. government officials multiple times not to be sent to Russia.56 Human Rights Watch reported that, upon return to Russia, the former detainees were placed in prison, where some of them suffered severe beatings, threats to their life and families, near asphyxiation, and other inhuman treatment.57 Diplomatic assurances may also not cover actions of governments that fall short of torture but nonetheless subject former detainees to injustice. For example, two detainees were sent to Algeria in 2010 and 2011 despite their resistance and efforts to prevent the transfer in federal court.58 Though the Algerian government “had promised the U.S. that the detainees ‘would not be mistreated,’”59 investigative journalist Andy Worthington reports that one of the detainees was convicted in absentia and sentenced to 20 years in prison, while another was tried “for membership of an extremist group active overseas” and sentenced to three years.60 Thus, the primary concern of diplomatic assurances with the possibility of physical mistreatment does not obviate the risk of trumped-up charges and prison sentences upon repatriation. Transfer and release abroad continues to be a diplomatically challenging process for the U.S., and one full of risks for the detainees.

#### They’ll just end up in prison if not released into the US

**Sheth, Hampshire political theory professor, 2013**

(Falguni, “Don’t buy the spin on Guantanamo: “Closing” it doesn’t mean what you think”, 11-18, <http://www.salon.com/2013/11/18/dont_buy_the_spin_on_guantanamo_closing_it_doesnt_mean_what_you_think/>, ldg)

In fact, closing down the prison doesn’t clear up the issue of what will happen to the 164 prisoners, all of whom are foreign nationals, except that they will be “transferred,” a term that can mean whatever the President wants it to mean: relocating prisoners to another prison, releasing them to the custody of their home governments, placing them in “rehabilitation” facilities, or just simply: get them off the base. The ACLU, surprisingly, didn’t speak to that distinction when it showcased the costs of keeping Guantánamo open over the last decade. They pointed out the millions that could be allocated to other important programs by “transferring detainees” out of Guantanamo: keeping down healthcare costs for military families, fully funding assistance in transitioning U.S. veterans to civilian life, covering the military’s body armor budget, funding prosthetics research (presumably for vets who lost limbs). To be fair, the confusion can be partly attributed to the President’s waffling on the issue. He has offered several renditions of “closing down” Guantánamo: Shortly after he took office in his first term, he conceded that some of the prisoners, despite lack of sufficient evidence or due to “contaminated” evidence, could never be tried. By implication, they could never be released. Sometime after that, he toyed with the idea of relocating them to a new prison in Illinois. That plan would have allowed him, technically, to keep his promise to close Gitmo. Protests from various corners of the U.S. quickly put a kibosh on that idea. More recently, the Obama Administration has been in talks with the Yemeni government to transfer somewhere between 55 to 80 Yemeni prisoners to Sana’a, on the condition of a new Guantanamo prison rehabilitation facility of some sort being built there. It would be funded by anyone but the U.S. — most likely the Saudis, who according to the LA Times, have had a successful track record of “rehabilitating” terrorists, presumably so that they will not fight back (against governments who’ve done them harm). The U.S. has promised that the “rehab” would include “counseling, instruction in a peaceful form of Islam, and job training in Yemen before any decision on freeing them.” Still, I shudder to think which other tactics will be used. See this recent clip, which shows torture being inflicted under the watchful eye of American military personnel in Afghanistan (warning: it is extremely violent). Is it unreasonable to anticipate that that the transfer of Yemeni detainees to Sana’a will be accompanied by the transfer of torture, death, and harm to their families? Given its own track record, the Yemeni government hardly inspires confidence in the promise of ethical treatment: at times, it purports to represent the interests of the families of the Gitmo prisoners; in the same breath, it reveals itself to be a faithful servant of the U.S. by justifying or covering up U.S. drone attacks into Yemen. And now, it is engaging in negotiations with the U.S. to build a prison/halfway house to house the as-of-yet uncharged Yemenis, going so far as to offer to pay for it before rescinding its offer due to a tight government budget. It is noteworthy that the home-governments of other Gitmo prisoners have refused to imprison them again upon “transfer,” on the grounds that they have not been convicted of any crimes.

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## Legit da

**Feith, Yale JD, 2012**

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

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