### 2AC Hegemony

#### Drone strikes are inevitable—any wind-downs are only rhetoric

Mazzetti and Landler 8/2

[08/02/13, Mark Mazzetti and Mark Landler, “Despite Administration Promises, Few Signs of Change in Drone Wars”, http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?pagewanted=all&\_r=0]

WASHINGTON — There were more drone strikes in Pakistan last month than any month since January. Three missile strikes were carried out in Yemen in the last week alone. And after Secretary of State John Kerry told Pakistanis on Thursday that the United States was winding down the drone wars there, officials back in Washington quickly contradicted him. More than two months after President Obama signaled a sharp shift in America’s targeted-killing operations, there is little public evidence of change in a strategy that has come to define the administration’s approach to combating terrorism. Most elements of the drone program remain in place, including a base in the southern desert of Saudi Arabia that the Central Intelligence Agency continues to use to carry out drone strikes in Yemen. In late May, administration officials said that the bulk of drone operations would shift to the Pentagon from the C.I.A. But the C.I.A. continues to run America’s secret air war in Pakistan, where Mr. Kerry’s comments underscored the administration’s haphazard approach to discussing these issues publicly. During a television interview in Pakistan on Thursday, Mr. Kerry said the United States had a “timeline” to end drone strikes in that country’s western mountains, adding, “We hope it’s going to be very, very soon.” But the Obama administration is expected to carry out drone strikes in Pakistan well into the future. Hours after Mr. Kerry’s interview, the State Department issued a statement saying there was no definite timetable to end the targeted killing program in Pakistan, and a department spokeswoman, Marie Harf, said, “In no way would we ever deprive ourselves of a tool to fight a threat if it arises.” Micah Zenko, a fellow with the Council on Foreign Relations, who closely follows American drone operations, said Mr. Kerry seemed to have been out of sync with the rest of the Obama administration in talking about the drone program. “There’s nothing that indicates this administration is going to unilaterally end drone strikes in Pakistan,” Mr. Zenko said, “or Yemen for that matter.”

#### The aff only maintains the effectiveness of Boumediene—that doesn’t result in targeted killings

Vladeck 12 [10/01/12, Professor Stephen I. Vladeck of the Washington College of Law at American University, “Detention Policies: What Role for Judicial Review?”, <http://www.abajournal.com/magazine/article/detention_policies_what_role_for_judicial_review/>)]

The short chapter that follows aims to take Judge Brown’s suggestion seriously. As I explain, although Judge Brown is clearly correct that judicial review has affected the size of the detainee populations within the territorial United States and at Guantanamo, it does not even remotely follow that the jurisprudence of the past decade has precipitated a shift away from detention and toward targeted killings. To the contrary, the jurisprudence of Judge Brown’s own court has simultaneously (1) left the government with far greater detention authority than might otherwise be apparent where noncitizens outside the United States are concerned; and (2) for better or worse, added a semblance of legitimacy to a regime that had previously and repeatedly been decried as lawless. And in cases where judicial review prompted the government to release those against whom it had insufficient evidence, the effects of such review can only be seen as salutary. Thus, at the end of a decade where not a single U.S. military detainee was freed by order of a federal judge, it is more than a little ironic for Judge Brown to identify “take no prisoners” as Boumediene’s true legacy.

#### Plan’s precedent solves—deference is the legal justification of rendition

Richards 06 [Nelson, JD Cand @ Berkeley, “The Bricker Amendment and Congress’s Failure to Check the Inflation of the Executive’s Foreign Affairs Powers,” 94 Calif. L. Rev. 175, January, LN]

H. Jefferson Powell has posited that the Supreme Court has all but ceded the creation of a foreign affairs and national security legal framework to the OLC. Indeed, he goes so far as to assert that OLC legal opinions, not Supreme Court opinions, are the first sources the executive branch looks to when researching foreign affairs and national security law. Another set of John Yoo's writings support the validity of Powell's claim: the infamous memos declaring enemy combatants outside the protection of the Geneva Conventions. These, combined with the "Torture Memos," the expanding practice of "extraordinary rendition," and the current Administration's blase response to the Supreme Court's ruling that prisoners held at Guantanamo Bay are entitled to judicial access, have brought peculiar focus to the weight and seriousness of the OLC's legal authority. In the realm of foreign affairs, the Court has written off its obligation, claimed in Marbury, as the authoritative interpreter of the Constitution. While it may have reviewed some of the legal premises put forth in the above-mentioned OLC opinions, it has not curbed the OLC's claim to power over foreign affairs. The Court is more than capable of challenging the President. It has the power to send messages to the President, but it has done so only in two narrow contexts: when U.S. citizens are labeled enemy combatants (Hamdi v. Rumsfeld ) and when prisoners are held in U.S. facilities (Rasul v. Bush). The Hamdi and Rasul decisions, which amount to piecemeal restraints on the President's freedom to act, accord with the Court's general failure to check the executive's use of power abroad.

### 2AC T

Your interp is unprecedented in Supreme Court interpretation

Vaughns 13, University of Maryland School of Law professor

(Katherine L, “Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11,” 20 Asian Am. L.J. 7 (2013) http://scholarship.law.berkeley.edu/aalj/vol20/iss1/2)

As stated in the Uighurs’ certiorari petition, as a constitutional matter, “the President’s discretionary release of a prisoner is no different from his discretionary imprisonment: each proceeds from unchecked power.”245 Toview the question of release as based on sovereign prerogative in the administration of immigration law, while viewing the question of imprisonment as based on constitutional authority is, put simply, senseless and without precedent. It cannot be that the two inquiries are unrelated; they both undoubtedly implicate individual constitutional rights and the separation of powers. Having refused to resolve this matter, the Supreme Court has left the separation of powers out of balance and tilting dangerously toward unilateralism.

#### 1) Counter interpretation –

#### a) Indefinite detention is military custody without a clear time period of release

Physicians for Human Rights – June 2011, Punishment Before Justice: Indefinite Detention in the US, Executive Summary, http://www.judiciary.senate.gov/resources/transcripts/upload/022912RecordSubmission-Franken.pdf

Indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee when—if ever—the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody. The term encompasses other custody arrangements, including “preventive detention,” “executive custody,” “security detention,” “military detention,” “prolonged detention,” “administrative detention,” “conditional detention,” or, under the March 7 Executive Order, “continued law of war detention.” The US currently has approximately 170 individuals indefinitely detained at Guantánamo Bay. While only 15 of these individuals have been designated “high value detainees,”2 many of these detainees have already spent roughly 7-9 years3 in the harshest, most restrictive, and isolating conditions available4 and were subjected to torture.5 The US government also indefinitely detains thousands of refugee and nonrefugee immigrants, detentions whose purported justifications include national security, immigration, and foreign policy concerns.6 Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many non-refugee seekers have languished in detention for years vainly waiting for the day that they will finally be deported

#### b) War power is military action

David I. Lewittes - Winter 1992, Associate, Rogers & Wells, New York City; J.D., New York University School of Law, ARTICLE: CONSTITUTIONAL SEPARATION OF WAR POWERS: PROTECTING PUBLIC AND PRIVATE LIBERTY., 57 Brooklyn L. Rev. 1083, Brooklyn Law Review, LexisNexis

The next question should be: What is the executive war power?

B. The Commander-in-Chief Power Justice Frankfurter once said: "The war power is the war power." n129 This fine explanation apparently did not help Justice Jackson who, four years later, expressed puzzlement over the meaning of the constitutional provision granting the President [\*1115] the commander-in-chief power: These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

#### c) This solves their limits claims – military detention only includes people who haven’t yet had habeas hearings, have lost their habeas hearings, or have won but haven’t been released. Their examples of immigration detention don’t apply because it’s not done by the military

#### 2) The aff is not an immigration issue:

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

Vaughn and Williams 13, Law Profs at Maryland

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

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

#### b) Legal Reasoning - Their evidence speaks to what the DC Circuit court said but the court clearly got it wrong. The plan is NOT an immigration issue

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The now-controlling D.C. Circuit opinion offers one viewpoint: habeas relief, when it involves release into the continental United States, is an immigration matter where, by virtue of the branch’s plenary power, the Executive’s decisions govern. The courts, in the D.C. Circuit’s view, have no part to play because immigration issues fall squarely within the Executive’s sovereign prerogative. This approach, I believe, sanctions whatever political remedy the Executive may select—here, diplomatically negotiated resettlement outside of the United States—as a substitute for the legal remedy of release. The D.C. Circuit’s view cannot be correct, I argue, because it would mean that, although a court may find that a detainee’s imprisonment is unlawful, that court might be powerless to remedy the unlawful imprisonment. Thus, I offer a view contrary to the D.C. Circuit: in order to accord complete habeas relief particularly where, as here, relocation efforts remain long-ongoing, a habeas court must have the authority to admit foreign nationals into the interior of the United States as a remedy for their unlawful detention. Historically, “the writ of habeas corpus was conceived and used as a control against the unlawful use of executive power.”11 And traditionally, custody of the body transfers to the court in habeas proceedings so that the court may order “the immediate and non-discretionary release of an illegally detained person.”12 Such authority ensures that the courts of this country are able to act in a way that restores the rule of law, so deeply damaged in the months and years following September 11. This Article proceeds as follows. In Part I, I provide the factual and procedural history of the Kiyemba litigation. In Part II, I consider Kiyemba’s context, looking to historical perspectives on the role of courts in wartime, the Supreme Court’s post-September 11 jurisprudence, and the development of “national security fundamentalism” in the D.C. Circuit after September 11. In so doing, I discuss how, in the months and years following September 11, the Executive asserted inherent power that rendered it nearly unreviewable and that, through the acquiescence of some courts, significantly undermined the rule of law. In Part III, I reconsider Kiyemba, highlighting the illegality of indefinite detention and the right to a corresponding remedy. Contrary to the position taken by the D.C. Circuit, the rights-remedy gap is not an unreviewable facet of the Executive’s plenary power over immigration. Instead, it is a practical and necessary reality to be handled by the federal courts. The judiciary’s failure to assert its constitutional role in this area, I argue, may be the result of judicial abstention caused by political and practical influences on the Court. I staunchly believe that the habeas right is accompanied by a release remedy. Where there is no threat to the public safety, and where other release options are not available, that remedy must be release into the United States. And above all, I believe that this case is not an immigration matter subject to the prerogatives of the political branches.13 However, accepting that the practical and political influences described above may continue to prevent courts from awarding such relief, there is nonetheless a need for recognition of the damage that the political remedy of indefinite detention inflicts on the rule of law. Thus, in Part IV, I make a case for the value of an opinion dissenting from the Supreme Court’s per curiam dismissal in Kiyemba I—a reminder, however small, but unquestionably important, that the rule of law remains.

#### c) Status - War powers authority doesn’t end once they’ve been declared not enemy combatants

Vaughn and Williams 13, Law Profs at Maryland

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

In 2009, the Obama administration began to pursue fertile avenues for transferring the Uighurs into the continental interior of the United States. But, “in the face of congressional objections,” largely registered by Republican critics, reigniting fear-mongering notions about releasing terrorists into our midst,0 “the White House lost its nerve.”1 These concerns, however, are a political matter—and should not influence the courts, as I describe below. Once a habeas court has determined that detention is unlawful, political opposition to release locations should not alter the legal requirement to release them immediately, at the very least, as I have noted, pending the completion of external relocation negotiations.162 Any other result undermines Boumediene, undermines the rule of law, and affords the Executive, in contravention of the separation of powers, unreviewable discretion to control the detention of individuals captured during the War on Terror—even individuals long-ago found to be innocent of wrongdoing.

#### 3) Overlimiting - they exclude affirmative cases who argue that existing court interpretations which defer to the executive are wrong

#### a) Aff flex – too little affs left, debate gets stale and unfair. For example, there would be no armed forces into hostilities affs because the court has deferred to presidential interpretations of hostilities

#### b) Education – the most productive outcome of this topic is to train debaters to be legal advocates for change. Only defending that the court got it wrong provides that training.

### 2AC k

#### The aff is good—Second generation Guantanamo issues require a more detailed focus on the legal system—student advocacy enables us to make change

Marguiles 11, Professor of Law

[February 9, 2011, Peter Margulies is Professor of Law, Roger Williams University., “The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism”Journal of Legal Education, Vol. 60, p. 373, 2011, Roger Williams Univ. Legal Studies Paper No. 100]

If timidity in the face of government overreaching is the academy’s overarching historical narrative,1 responses to September 11 broke the mold. In what I will call the first generation of Guantánamo issues, members of the legal academy mounted a vigorous campaign against the unilateralism of Bush Administration policies.2 However, the landscape has changed in Guantánamo’s second generation, which started with the Supreme Court’s landmark decision in Boumediene v. Bush,3 affirming detainees’ access to habeas corpus, and continued with the election of Barack Obama. Second generation Guantánamo issues are murkier, without the clarion calls that marked first generation fights. This Article identifies points of substantive and methodological convergence4 in the wake of Boumediene and President Obama’s election. It then addresses the risks in the latter form of convergence. Substantive points of convergence that have emerged include a consensus on the lawfulness of detention of suspected terrorists subject to judicial review5 and a more fragile meeting of the minds on the salutary role of constraints generally and international law in particular. However, the promise of substantive consensus is marred by the peril of a methodological convergence that I call dominant doctrinalism. Too often, law school pedagogy and scholarship squint through the lens of doctrine, inattentive to the way that law works in practice.6 Novel doctrinal developments, such as the president’s power to detain United States citizens or persons apprehended in the United States, get disproportionate attention in casebooks and scholarship. In contrast, developments such as an expansion in criminal and immigration law enforcement that build on settled doctrine get short shrift, even though they have equal or greater real-world consequences. Consumers of pedagogy and scholarship are ill-equipped to make informed assessments or push for necessary changes. If legal academia is to respond adequately to second generation Guantánamo issues, as well as issues raised by any future attacks, it must transcend the fascination with doctrine displayed by both left and right, and bolster its commitment to understanding and changing how law works “on the ground.” To combat dominant doctrinalism and promote positive change, this Article asks for greater attention in three areas. First, law schools should do even more to promote clinical and other courses that give students first-hand experience in advocacy for vulnerable and sometimes unpopular clients, including the need for affirming their clients’ humanity and expanding the venue of advocacy into the court of public opinion.7 Clinical students also often discover with their clients that legal rights matter, although chastened veterans of rights battles like Joe Margulies and Hope Metcalf are correct that victories are provisional and sometimes pyrrhic.8 Second, legal scholarship and education should encourage the study of social phenomena like path dependence—the notion that past choices frame current advocacy strategies, so that lawyers recommending an option must consider the consequences of push-back from that choice. Aggressive Bush Administration lawyers unduly discounted risks flagged by more reflective colleagues on the consequences of push-back from the courts. Similarly, both the new Obama Administration and advocates trying to cope with Guantánamo’s post-Boumediene second generation failed to gauge the probability of push-back from the administration’s early announcement of plans to close the facility within a year. In each case, unexpected but reasonably foreseeable reactions skewed the implementation of legal and policy choices. Students should learn more about these dynamics before they enter the legal arena. Third, teachers need to focus more on ways in which bureaucratic structures affect policy choices. For example, terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief. Similarly, creation of the Department of Homeland Security turned a vital governmental function like disaster relief into a bureaucratic orphan, thereby paving the way for the inadequate response to Hurricane Katrina. Students need more guidance on what to look for when structure shapes substance.

#### No link to poz peace lawfare—we don’t reduce it to a single of event of legal action—we challenge the idea of emergency powers

#### Permutation: do the plan and combine legalism and politics—not mutually exclusive

#### The law is indeterminate and is no means perfect, but the alternative is worse—we should recognize the constraints of the law and use that to construct better legal strategies

Margulies and Metcalf 11, Clinical Professor of Law

(“Terrorizing Academia” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf, Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago. Margulies expresses his thanks in particular to Sid Tarrow, AzizHuq, BaherAzmy, Hadi Nicholas Deeb, Beth Mertz, Bonnie Honig, and Vicki Jackson.Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush. Metcalf expresses her thanks to Muneer Ahmad, Stella Burch Elias, Margot Mendelson, Jean Koh Peters, and Judith Resnik for their feedback, as well as to co-teachers Jonathan Freiman, RamziKassem, Harold HongjuKoh and Michael Wishnie, whose dedication to clients, students and justice continues to inspire., Journal of Legal Education, Volume 60, Number 3 (February 2011))

V. Conclusions and Implications

From the vantage of 2010, it appears the interventionist position—our position—has failed. As we see it, it failed because it was premised upon a legalistic view of rights that simply cannot be squared with the reality of the American political experience. Yet the interventionist stance holds an undeniable attraction. Of all the positions advanced since 9/11, it holds out the best promise of preserving the pluralist ideals of a liberal democracy. The challenge going forward, therefore, is to re-imagine the interventionist intellectual endeavor. To retain relevance, we must translate the lessons of the social sciences into the language of the law, which likely requires that we knock law from its lofty perch. As a beginning, scholarship should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narratives. But there is another tendency we must resist, and that is the impulse to nihilism—to throw up our hands in despair, with the lament that nothing works and repression is inevitable. Just how to integrate the political and the ideal is, of course, a problem that is at least as old as legal realism itself and one we do not purport to solve in this essay.154 Still, we are heartened by the creative work undertaken in other arenas, ranging from poverty law to gay rights, that explores how, done properly, lawyering (and even litigation) can make real differences in the lives of marginalized people.155 We hope that the next decade of reflections on the policies undertaken in the name of national security will follow their lead in probing not just what the law should be, but how it functions and whom it serves. We close this essay on a personal note. Margulies was counsel of record in Rasul v. Bush. He and his colleagues at the Center for Constitutional Rights began work on that litigation in November, 2001, not long after Alan Dershowitz first started to press his proposal for “torture warrants.” By the time this essay appears, Margulies’ uninterrupted involvement in these issues will have lasted more than nine years, with no sign of ending anytime soon. He vividly recalls the state of play when Rasul was filed in February, 2002, and when one of his co-counsel received a death threat at his home in New Orleans. With considerable regret, Margulies now looks back on Rasul as a failure. But in 2002, there was no other choice. The Bush Administration had created a prison beyond the law, Congress was a stony monolith, and the parents and family of lost prisoners pleaded that their loved ones not be abandoned. At that moment, there was no choice but to litigate. He would do it again tomorrow, were the circumstances the same. His mistake, for which he takes sole responsibility, was to believe that law, in an intensely legalistic society, was enough.

#### Legal and rights based detention strategies are a critical form of resistance—even if it fails, the act of demanding habeas rights affirms the life of detainees and provides a check on state violence

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

This Article is about the work that rights do, and the work of the lawyers who assert them on their clients‘ behalf, particularly in the face of inordinate state violence, as is the case with Guantánamo. I write this story of Guantánamo based on my experiences of nearly three years of representing a prisoner there.14 While commentators can point to an unbroken record of legal victories in Guantánamo cases at the Supreme Court,15 the view from the prisoners‘ perspective is quite different, and throws into question the claim of transformative legal practice that the Court cases might otherwise suggest. This is not to say that the lawyering has itself been a failure. Rather, I argue that instead of expecting rights-based legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance to dehumanization. Such a reframing of the Guantánamo litigation invites comparison with other forms of resistance, and helps explain both the power and the limitations of legal practice in extreme instances of state violence. When placed in a human rights frame, Guantánamo is often described in terms of the government‘s denial of rights to the prisoners, but equally important has been the denial of their humanity. Guantánamo has been a project of dehumanization, in the literal sense; it has sought to expel the prisoners—consistently referred to as ―terrorists‖— from our shared understanding of what it means to be human, so as to permit, if not necessitate, physical and mental treatment (albeit in the context of interrogation) abhorrent to human beings. This has been accomplished through three forms of erasure of the human: cultural erasure through the creation of a terrorist narrative; legal erasure through formalistic legerdemain; and physical erasure through torture. While these three dimensions of dehumanization are distinct, they are also interrelated. All are pervaded by law, and more specifically, by rights. This is to say that law has been deployed to create the preconditions for the exercise of a state power so brutal as to deprive the Guantánamo prisoners of the ability to be human. In this way, Guantánamo recalls Hannah Arendt‘s formulation of citizenship as the right to have rights.16 By this she meant that without membership in the polity, the individual stood exposed to the violence of the state, unmediated and unprotected by rights. The result of such exposure, she argued, was to reduce the person to a state of bare life, or life without humanity. What we see at Guantánamo is the inverse of citizenship: no right to have rights, a rights vacuum that enables extreme violence, so as to place Guantánamo at the center of a struggle not merely for rights, but for humanity—that state of being that distinguishes human life from mere biological existence.17 In order to better understand the work that rights do, this Article explores why prisoners‘ advocates, including myself, adopted a rights-based advocacy strategy in an environment defined explicitly by the absence of rights. Since the first prisoners arrived at Guantánamo, the Bush Administration‘s position had been that they lack any rights whatsoever, under any source of law.18 Thus did the Bush Administration attempt to define a rights-free zone, through a manipulation of rights which seemed demonstrably political. And yet, despite the overwhelming evidence of politics animating law at Guantánamo, as advocates we made a conscious decision to engage in rights-based argument, and ―rights talk‖ 19 more generally. This approach finds some support in the work of rights scholars (and critical race theorists in particular) regarding the continuing vitality of rights-based approaches and the promise of ―critical legalism‖ 20 or ―radical constitutionalism‖ 21—the very kinds of progressive constitutional optimism that the Rasul and Boumediene decisions inspire. But the subsequent litigation history demands further inquiry into the political, cultural, jurisprudential, and strategic value of arguing rights in the historical moment and place of Guantá- namo. I argue that while we might hope for rights to obtain transformative effect—to close Guantánamo, for example, or to free those who are wrongfully imprisoned—at Guantánamo and in other places of extreme state violence, rights may do the more modest work of resistance. Rather than fundamentally reconfiguring power arrangements, as rights moments aspire to do, resistance slows, narrows, and increases the costs for the state‘s exercise of violence. Resistance is a form of power contestation that works from within the structures of domination.22 While it may aspire to overturn prevailing power relations, its value derives from its means as much as from its ends. Through resistance, new political spaces may open, but even if they do not, the mere fact of resistance, the assertion of the self against the violence of the state, is self- and life-affirming. Resistance is, in short, a way of staying human. This, then, is the work that rights do: when pushed to the brink of annihilation, they provide us with a rudimentary and perhaps inadequate tool to maintain our humanity. In Part I of this Article, I discuss the cultural erasure of the Guantánamo prisoners through the creation of a post-September 11 terrorist narrative, or what I term an iconography of terror, their legal erasure through the crea-tion of the now abandoned ―enemy combatant‖ 23 category and their physical erasure through torture. I contextualize these discussions with narrative descriptions of the place and space of Guantánamo, which I argue are necessary to understand the contextual nature of rights and rights claims, and the integral connection between law and narrative. In Part II, I deepen the discussion of legal erasure through critique and analysis of my representation of a teenage Canadian Guantánamo prisoner, Omar Khadr, in military commission proceedings, and through a doctrinal analysis of the shifting meanings of core legal terms in the Guantánamo legal regime. In so doing, I suggest how the experience of lawyering in and around Guantánamo helped to prove up its lawless nature. Part III considers the tactical, strategic, and theoretical values of adopting rights-based legal approaches in the rights-free zone of Guantánamo, paying particular attention to the value of rights as recognition, and ultimately arguing the importance of rights as a mode of resistance to state violence. In Part IV, I build upon this discussion of resistance by considering direct forms of resistance in which prisoners themselves have participated. In particular, I suggest the hunger strike as a paradigmatic form of prisoner resistance, and argue the lawyers‘ rights-based litigation and the prisoners‘ hunger strikes share a conceptual understanding of the relationship between rights, violence, and humanity. I conclude by reflecting on the value and limitations of reframing the work of the Guantánamo prisoners‘ lawyers as nothing more, but also nothing less, than resistance. I suggest that neither the resistance of the lawyers nor that of the prisoners may be enough to gain the prisoners‘ freedom, but that they are nonetheless essential when, as at Guantánamo, state violence is so extreme as to attempt to extinguish the human.

#### Legal strategies are more effective than the alternative—focusing on habeas challenges enables us to mobilize attention and utilize the state to undermine its legitimacy—our evidence assumes the malleability of the law

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions;255 we argued that Omar had rights as a child, under in-ternational treaty obligations256 as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.257 In contrast, the Pentagon would have had us accept their system as is, and either persuade our clients to plead guilty (as the first defense lawyers were asked to do) or proceed to a trial governed by substandard rules and an unknown jurisprudence. This rights-based strategy might seem futile given the malleability of law and the contingency of its definitions and structures at Guantánamo, epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an ―enemy combatant‖ and what is a ―war crime‖; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.258 While all rights questions are subject to change over time, as I have argued, the legal indeterminacy at Guantánamo was especially problematic because of the novelty of its core principles, its disavowal of extant jurisprudence, and the unavailability of meaningful judicial review. Moreover, the danger of a rights-based strategy is not merely futility, but complicity in the commission‘s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me came during the first session of Omar‘s commission, in which I had made a lengthy legal argument. During a break, a presiding officer from another case thanked me for the quality of my presentation and said that I had elevated the process. Although I did not create it, I had helped to hold up the commission‘s curtain of legitimacy. The indeterminacy of rights at Guantánamo did not only render them unstable, but suggested that they were politically determined as well. Like the velvet drapes in the military commission room, it seemed clear that law and its rhetoric, structures, and trappings were serving as a cover for the operation of political power. Still, we doggedly pursued a rights-based strategy on Omar‘s behalf. The question of why one might engage in rights-based litigation in as rights-starved an environment as Guantánamo involves tactical, strategic, and theoretical considerations,259 each of which is discussed below. Rights Tactics and Rights Strategies When confronted with profound, seemingly irremediable injustice in the primary forum of contest, the lawyer‘s instinct, if not the human one, is to appeal to a higher authority. In the military commissions, that higher authority was a federal habeas court, which, unlike the commission, stood independent of the Executive and enjoyed a legitimacy to which the commission could only aspire. As a tactical matter, therefore, we sought in the commission proceedings to dramatize the irregularity of the commission, in contrast to the proceedings a criminal defendant could expect in a regular court—either a military court martial or federal district court. Rights were an effective discourse strategy for this project, for they provided instantly recognizable handles for the comparison: the right to see the evidence against you, the right to confront witnesses, and the right to competent counsel were all so familiar within the American courtroom that their invocation in the commission—not just in principle but in the language of rights—would help to cast the commission as fatally deficient in the eyes of the habeas court when they reviewed the proceedings. This recalls Rick Abel‘s insight regarding the apartheid regime in South Africa: ―Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation.‖ 260 Similarly, Abel has observed that even though a reflection of power, law nonetheless can be a source of countervailing power as well, because state power is divided among the branches and therefore potentially heterogeneous.261 Such heterogeneity creates opportunities for even nonstate actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions: the Hamdan case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.262 As a corollary to Abel‘s theorem, our invocation of rights was designed not only to appeal to the judiciary, but also to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even when recognized, unable to execute themselves without political consent, but they are nonetheless a familiar and shared discourse whose resonance carries across branches of government and across different segments of society. When we engaged in rights talk within the military commission, we knew that we were speaking to multiple au-diences simultaneously—―playing to the gallery,‖ as it is often pejoratively described—and we knew that the language of rights, as a metric of both correctness and fairness, was accessible to all. As I have discussed previously, the structure of the commissions and their early conduct convinced us that our assertions of rights would almost always fail. But claiming the language of rights forced the government to disclaim it. Each time we argued that the Geneva Conventions compelled some protection for Omar, the government was forced to argue the inapplicability of the Geneva Conventions. This was also the case when we argued constitutional due process and international human rights claims. Our hope was to dramatize, through the cumulative governmental disclaiming of rights, what Omar understood intuitively: that Guantánamo was a rightsfree zone. The fact of divided government and diffuse power263 does not, of course, compel the exercise of countervailing power. Just as the commissions rejected our rights-based arguments, so, too, could the federal courts, Congress, and the public. But the existence of multiple sources of power also permits different relationships between law and power. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience; rights may vary across space and time. Because the commissions were a creation of the Executive and housed within the cultural and command structures of the military, they were institutionally situated far differently than the Article III habeas courts and subject to different political pressures than Congress. Thus, the repeated failure of rights-based arguments in the commissions was not necessarily itself a failure if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions. In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada, Omar‘s country of citizenship. This reflects a geopolitical view that Omar‘s continued detention and his trial by military commission are partially the function of Canadian acquiescence to American power. To date, the Canadian government has not publicly criticized either Guantánamo or Omar‘s trial by military commission. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them.264 As a result of these efforts, all Britons have been released from Guantánamo,265 suggesting that international political arrangements circum-scribe Omar‘s legal predicament at Guantánamo. The political domain, then, includes not only the United States, and not only U.S.–Canada relations, but the domestic politics of Canada as well. The case of former Guantánamo prisoner David Hicks is instructive in this regard. Hicks, an Australian citizen, was one of the first Guantánamo prisoners to be charged before a military commission. Through the extraordinary work of his legal counsel and effective advocacy in Australia by his family, Hicks became a cause célèbre in Australia, and a symbol of American injustice toward an Australian citizen.266 His advocates forged a narrative according to which as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately pleaded guilty to a single charge and was transferred back to Australia267 under an agreement that was widely understood to be a political compromise between the Australian and American governments rather than the product of independent legal process.268 Thus, even if rights-based arguments fall flat in the United States, Omar‘s circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But once more we see how the value of rights can vary. Even as we worried that a post-September 11 politics had made the United States inhospitable to rights claims on behalf of terrorist suspects, we understood that in the same historical moment, rights might have greater purchase in Canada. A rightsbased strategy therefore feeds into what is essentially ongoing interlocutory review of Omar‘s case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in turn informed by broader Canadian public opinion. And so our rights-based strategy in the military commissions attempted to negotiate the uneasy relationship between law and politics, to view rights as less than self-defining but more than ―nonsense on stilts.‖ 269 We sought to subject the ―law‖ of the commissions to the scrutiny of a range of political actors. Thus, our strategy did not depend on victory in the commission itself. Indeed, the goal of demonstrating the legal emptiness of the commissions was better served by our arguments—for due process, for rules of evidence, for prohibitions on coerced testimony—failing in them. We used the commission, and its rejection of our rights-based strategy, for its political and educational value, echoing Jules Lobel‘s call for deliberate use of courts as forums for protest.270 In so doing, we ―drag[ged] the courtroom into politics.‖ 271 Clearly, not all of our tactics worked, and certainly they did not produce our ultimate goal of returning Omar to Canada. Moreover, even these tactics came at a cost of partially legitimizing the commission as a site of legal contest.272 Nonetheless, I believe the strategic potential of rights-based argument was sufficient to make our approach defensible. I must admit, however, that it was not all clear-eyed strategy that led me to the rightsbased approach, for even before I had thought through the strategic potential, I was inclined toward arguing rights. This rights tropism is the logical and predictable consequence of our professional training as lawyers. Indeed, it is an occupational hazard. I do not mean to disclaim rights wholesale, but at the same time, I am mindful, and wary, of rights as the first recourse for helping our clients achieve their goals.273 Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

#### Legalism is good and the 1AC is key—even if the law is imperfect, public discourse about legal checks makes them effective by deterring the executive and the alternative’s faith in politics fails

Cole 2011 - Professor, Georgetown University Law Center (Winter, David, “WHERE LIBERTY LIES: CIVIL SOCIETY AND INDIVIDUAL RIGHTS AFTER 9/11,” 57 Wayne L. Rev. 1203, Lexis)

D. The Role of Politics The force of ordinary electoral politics also cannot account for the shift in U.S. counterterrorism policy. None of the Bush administration's initial initiatives sparked majoritarian opposition. To the contrary, [\*1244] President Bush, who had very low approval ratings shortly before 9/11, shot up in popularity when he declared the "war on terror," and was reelected in 2004, in large measure on his promise to deliver security. n235 Apart from opposition to the war in Iraq, there was little widespread popular pressure on President Bush to rein in his security initiatives. Despite this evidence, Eric Posner and Adrian Vermeule have argued that in the modern era, political checks are all there are when it comes to restraining executive power. n236 They maintain that Congress, the courts, and the law itself cannot effectively constrain the executive, especially in emergencies, but that this need not concern us because the executive is adequately limited by political forces. At first blush, the past decade might appear to vindicate Posner and Vermeule's views, as political forces, broadly speaking, seem to have been at least as effective at checking the President as were Congress or the judiciary. n237 But there is in fact little evidence that electoral politics or majoritarian sentiment played much, if any, role in persuading President Bush to ratchet back his security initiatives. While formal judicial and legislative checks cannot tell the whole story, the alternative account is not "politics" as Posner and Vermeule define and describe it, but a much more complex interplay of civil society, law, politics, and culture: what I have called "civil society constitutionalism." [\*1245] In my view, Posner and Vermeule simultaneously underestimate the constraining force of law and overestimate the influence of political limits on executive overreaching. Sounding like Critical Legal Studies adherents, they sweepingly claim that law is so indeterminate and manipulable as to constitute only a "façade of lawfulness." n242 But in assessing law's effect, they look almost exclusively to formal indicia--statutes and court decisions. n243 That approach disregards the role that law plays without coming to a head in a judicial decision or legislative act. As the post-9/11 period illustrates, when law is reinforced and defended by civil society institutions, it can have a disciplining function long before cases reach final judgment, and even when no case is ever filed, a reality to which anyone who has worked in the executive branch will attest. n244 Executive officials generally cannot know in advance whether their actions will attract the attention of civil society watchdogs, or lead to court review. They often cannot know whether such oversight--whether by a court, a legislative committee, or a nongovernmental organization--will be strict or deferential. As long as there is some risk of such oversight, the resultant uncertainty itself is likely to have a disciplining effect on the choices they make. There are, in short, plenty of reasons why executive lawyers generally take legal limits seriously. They take an oath and are acculturated to do so. They know that claims of illegality can undermine their objectives. And they cannot predict when a legal claim will be advanced against them. Similarly, in focusing exclusively on statutes and their enforcement by courts, Posner and Vermeule disregard the considerable checking function that Congress's legal oversight role plays through means short of formal statutes, such as by holding hearings, launching investigations, requesting information about doubtful executive practices, or restricting federal expenditures. The effectiveness of these checks, moreover, will often turn on the strength of civil society. If there are significant watchdogs in the nongovernmental sector and/or the media focused on executive actions, ready to bring allegedly illegal conduct to public attention, the law will have substantial deterrent effect, with or without actual court decisions. While they are overly skeptical about law, Posner and Vermeule are unrealistically romantic about the constraining force of majoritarian politics. The political checks they identify consist solely of the fact that Presidents must worry about election returns, and must cultivate [\*1246] credibility and trust among the electorate. n245 There are several reasons to doubt that these political realities are sufficient to guard against executive overreaching. First, and most fundamentally, while the democratic process is well designed to protect the majority's rights and interests, it is poorly designed to protect the rights of minorities, and not designed at all to protect the rights of foreign nationals, who have no say in the political process. n246 In times of crisis, the executive nearly always selectively sacrifices the rights of foreign nationals, often defending its actions by claiming that "they" do not deserve the same rights that "we" do. n247 To say the law is superfluous because we have elections is to relegate foreign nationals, and minorities generally, to largely unchecked abuse. Second, the ability of the political process to police the executive is hampered by secrecy. Much of what the executive does, especially in times of crisis, is secret, and even when some aspects of executive action are public, its justifications often rest on grounds that are assertedly secret. n248 Courts and Congress have at least some ability to pierce that veil and to insist on accountability. Absent legal rights, such as those created by the Freedom of Information Act, the general public has virtually no ability to do so. n249 Third, the electoral process is a blunt-edged sword. Presidential elections occur only once every four years, and congressional elections every two years. Congressional elections will often involve an unpredictable mix of local and national matters, and there is little reason to believe they will concentrate on executive overreaching. Presidential elections also inevitably encompass a broad range of issues, most of which will have nothing to do with security and liberty. Elections are therefore unlikely to be effective at addressing specific abuses of power. Voters' concerns about abstract institutional issues such as executive power may clash with their interests on the substantive merits of particular issues, such as whether to use military force in support of Libyan rebels. There is no guarantee that citizens will separate these issues in their minds, and no reason to believe that if they do so, they will favor abstract institutional concerns over specific policy preferences at the ballot box. [\*1247] Fourth, the political process is notoriously focused on the short term, while constitutional rights and separation of powers generally serve long-term values. n250 It was precisely because ordinary politics tend to be shortsighted that the framers adopted a constitutional democracy. The Constitution identifies those values that society understands as important to preserve for the long term, but knows it will be tempted to sacrifice in the short term. n251 If ordinary politics were sufficient to protect such values, we would not need a constitution in the first place. Thus, there is little evidence in fact that majoritarian politics played a significant checking role in the aftermath of 9/11, or that such politics would generally be a sufficient checking force in times of crisis. And more generally, there is little reason to believe that political checks will be sufficient to restrain presidential abuse. The story is infinitely more complicated. As I have sought to illustrate here, in the aftermath of 9/11, the interplay of law, politics, and culture, framed and prompted by civil society organizations, was critical to rendering effective constitutional and international legal checks.

#### No endless violence—legal reforms restrain the cycle of violence and prevent error replication

Colm O’Cinneide 8, Senior Lecturer in Law at University College London, “Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat,” Ch 15 in Fresh Perspectives on the ‘War on Terror,’ ed. Miriam Gani and Penelope Mathew, <http://epress.anu.edu.au/war_terror/mobile_devices/ch15s07.html>

This ‘symbiotic’ relationship between counter-terrorism measures and political violence, and the apparently inevitable negative impact of the use of emergency powers upon ‘target’ communities, would indicate that it makes sense to be very cautious in the use of such powers. However, the impact on individuals and ‘target’ communities can be too easily disregarded when set against the apparent demands of the greater good. Justice Jackson’s famous quote in Terminiello v Chicago [111] that the United States Bill of Rights should not be turned into a ‘suicide pact’ has considerable resonance in times of crisis, and often is used as a catch-all response to the ‘bleatings’ of civil libertarians.[112] The structural factors discussed above that appear to drive the response of successive UK governments to terrorist acts seem to invariably result in a depressing repetition of mistakes.¶ However, certain legal processes appear to have some capacity to slow down the excesses of the counter-terrorism cycle. What is becoming apparent in the UK context since 9/11 is that there are factors at play this time round that were not in play in the early years of the Northern Irish crisis. A series of parliamentary, judicial and transnational mechanisms are now in place that appear to have some moderate ‘dampening’ effect on the application of emergency powers.¶ This phrase ‘dampening’ is borrowed from Campbell and Connolly, who have recently suggested that law can play a ‘dampening’ role on the progression of the counter-terrorism cycle before it reaches its end. Legal processes can provide an avenue of political opportunity and mobilisation in their own right, whereby the ‘relatively autonomous’ framework of a legal system can be used to moderate the impact of the cycle of repression and backlash. They also suggest that this ‘dampening’ effect can ‘re-frame’ conflicts in a manner that shifts perceptions about the need for the use of violence or extreme state repression.[113] State responses that have been subject to this dampening effect may have more legitimacy and generate less repression: the need for mobilisation in response may therefore also be diluted.

#### Case is a DA to the alternative—rule of law promotion is impossible with the alternative and neoliberalism would mean no intervention

#### Heg is key to decease excess American interventionism

**Kagan and Kristol, 2k** (Robert and William, “Present Dangers”, Kagan is a Senior Associate at the Carnegie Endowment for International Peace, and Kristol is the editor of The Weekly Standard, and a political analyst and commentator, page 13-14 )

http://www2.uhv.edu/fairlambh/asian/present\_dangers.htm

It is worth pointing out, though, that a foreign policy premised on American hegemony, and on the blending of principle with material interest, may in fact mean fewer, not more, overseas interventions than under the "vital interest" standard. (13). The question, then, is not whether the US should intervene everywhere or nowhere. The decision Americans need to make is whether the US should generally lean forward, as it were, or sit back. A strategy aimed at preserving American hegemony should embrace the former stance, being more rather than less inclined to weigh in when crises erupt, and preferably before they erupt. This is the standard of a global superpower that intends to shape the international environment to its own advantage. By contrast, the vital interest standard is that of a "normal" power that awaits a dramatic challenge before it rouses itself into action.

#### National security constructions have objective basis—reliance on experts is inevitable and the alternative fails—only subjecting policy to judicial review can check national security discourse

Cole 12, Professor of Law

[July 2012, David Cole is a Professor, Georgetown University Law Center; “Confronting the Wizard of Oz: National Security, Expertise, and Secrecy”, 44 Conn. L. Rev. 1617-1625 (2012)]

When I need to use the remote control for our television, I call my fifteen-year old son. It’s not exactly that I am incapable of understanding the remote (or at least I don’t think so). It’s just that he’s so much better at it, has so much more experience with it, and I use it so infrequently that I defer to his expertise. Aziz Rana’s account of the American public’s relationship to national security tells a similar story. The public, he argues, has deferred to the executive branch, and in particular to the national security agencies therein, on questions of security.1 In his view, this deference reflects an epistemological shift, from a period when we viewed knowledge about security matters to be equally accessible by everyone, to the modern period in which we have delegated responsibility to a relatively small and insulated coterie of “experts” in the executive branch.2 No constitutional concerns are implicated by my delegation of the remote to my son. But the public’s delegation of national security matters to the socalled experts, Rana maintains, has profound implications for constitutional democracy.3 Until we learn to use the remote, we will never be masters of our own destiny. Rana’s account of the epistemological underpinnings of the national security state offers an astute and novel perspective on a familiar story. Few would dispute that the national security agenda is today dominated by agencies in the executive branch.4 Other scholars have identified different causes for this development. Many have pointed to such factors as the growth of the administrative state; the increasingly interventionist role the United States plays in the world; the rise of technological threats such as nuclear, chemical, and biological weapons; the spread of international terrorism; and the risks posed by the increasing interconnectedness of the globalized world.5 But Rana adds a further dimension, attributing the evolution to a shift in how the American public thinks about national security. In his view, the modern era has erroneously accepted the view that security matters should be left to “the experts.”6 Until we successfully challenge that assumption, he contends, legal reforms addressed to the problem are doomed to fail.7 Rana is right to focus our attention on the assumptions that frame modern Americans’ conceptions about national security, but his assessment raises three initial questions. First, it seems far from clear that there ever was a “golden” era in which national security decisions were made by the common man, or “the people themselves,” as Larry Kramer might put it.8 Rana argues that neither Hobbes nor Locke would support a worldview in which certain individuals are vested with superior access to the truth, and that faith in the superior abilities of so-called “experts” is a phenomenon of the New Deal era.9 While an increased faith in scientific solutions to social problems may be a contributing factor in our current overreliance on experts,10 I doubt that national security matters were ever truly a matter of widespread democratic deliberation. Rana notes that in the early days of the republic, every able-bodied man had to serve in the militia, whereas today only a small (and largely disadvantaged) portion of society serves in the military.11 But serving in the militia and making decisions about national security are two different matters. The early days of the Republic were at least as dominated by “elites” as today. Rana points to no evidence that decisions about foreign affairs were any more democratic then than now. And, of course, the nation as a whole was far less democratic, as the majority of its inhabitants could not vote at all.12 Rather than moving away from a golden age of democratic decision-making, it seems more likely that we have simply replaced one group of elites (the aristocracy) with another (the experts). Second, to the extent that there has been an epistemological shift with respect to national security, it seems likely that it is at least in some measure a response to objective conditions, not just an ideological development. If so, it’s not clear that we can solve the problem merely by “thinking differently” about national security. The world has, in fact, become more interconnected and dangerous than it was when the Constitution was drafted. At our founding, the oceans were a significant buffer against attacks, weapons were primitive, and travel over long distances was extremely arduous and costly. The attacks of September 11, 2001, or anything like them, would have been inconceivable in the eighteenth or nineteenth centuries. Small groups of non-state actors can now inflict the kinds of attacks that once were the exclusive province of states. But because such actors do not have the governance responsibilities that states have, they are less susceptible to deterrence. The Internet makes information about dangerous weapons and civil vulnerabilities far more readily available, airplane travel dramatically increases the potential range of a hostile actor, and it is not impossible that terrorists could obtain and use nuclear, biological, or chemical weapons.13 The knowledge necessary to monitor nuclear weapons, respond to cyber warfare, develop technological defenses to technological threats, and gather intelligence is increasingly specialized. The problem is not just how we think about security threats; it is also at least in part objectively based. Third, deference to expertise is not always an error; sometimes it is a rational response to complexity. Expertise is generally developed by devoting substantial time and attention to a particular set of problems. We cannot possibly be experts in everything that concerns us. So I defer to my son on the remote control, to my wife on directions (and so much else), to the plumber on my leaky faucet, to the electrician when the wiring starts to fail, to my doctor on my back problems, and to my mutual fund manager on investments. I could develop more expertise in some of these areas, but that would mean less time teaching, raising a family, writing, swimming, and listening to music. The same is true, in greater or lesser degrees, for all of us. And it is true at the level of the national community, not only for national security, but for all sorts of matters. We defer to the Environmental Protection Agency on environmental matters, to the Federal Reserve Board on monetary policy, to the Department of Agriculture on how best to support farming, and to the Federal Aviation Administration and the Transportation Security Administration on how best to make air travel safe. Specialization is not something unique to national security. It is a rational response to an increasingly complex world in which we cannot possibly spend the time necessary to gain mastery over all that affects our daily lives. If our increasing deference to experts on national security issues is in part the result of objective circumstances, in part a rational response to complexity, and not necessarily less “elitist” than earlier times, then it is not enough to “think differently” about the issue. We may indeed need to question the extent to which we rely on experts, but surely there is a role for expertise when it comes to assessing threats to critical infrastructure, devising ways to counter those threats, and deploying technology to secure us from technology’s threats. As challenging as it may be to adjust our epistemological framework, it seems likely that even if we were able to sheer away all the unjustified deference to “expertise,” we would still need to rely in substantial measure on experts. The issue, in other words, is not whether to rely on experts, but how to do so in a way that nonetheless retains some measure of self-government. The need for specialists need not preclude democratic decision-making. Consider, for example, the model of adjudication. Trials involving products liability, antitrust, patents, and a wide range of other issues typically rely heavily on experts.14 But critically, the decision is not left to the experts. The decision rests with the jury or judge, neither of whom purports to be an expert. Experts testify, but do so in a way that allows for adversarial testing and requires them to explain their conclusions to laypersons, who render judgment informed, but not determined, by the expert testimony.

#### Their colonialism K is WRONG

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

Reflections on liberalism’s future Current international political trends are complex and still in flux. History shows that there are no iron laws of democratisation, and dominant political dynamics can prove strikingly changeable. The easy triumphalism of the liberal democracy agenda in the 1990s was misplaced. However, much criticism now risks over-shooting.18 The Bush administration provided an easy dog to kick. But its excessive awfulness skewered the nature of conceptual debate: critical theory has become as lacking in self-reflexivity as the ‘liberal imperialism’ it everywhere sees and excoriates. A nuanced view is warranted of the ‘democracy backlash’.19 We should be attentive to a lack of flexibility in the conceptualisation of democracy. The consideration of a variety of models is necessary and desirable. However, the evidence does not sustain the suggestion that the most serious problem with democracy promotion today is an excess of the ‘liberal’ in liberal democracy. Indeed, in many places quite the reverse is true. The most worrying problem is not practitioners’ lack of willingness to consider varieties of democratic institutions, but the lack of priority attached to advancing core liberal rights. As Western powers decline, this trend is likely to deepen in the future. Liberalism will increasingly be on the back foot. In this sense, those that assume that liberalism is dominant risk lagging behind the policy curve. Dahl’s definition of democracy may be partial and narrow, but can we really not say with confidence that it is better than the authoritarianism that the West is still propping up under the guise of respect for ‘local values’? Moreover, the ‘liberal overdose’ argument is curious to the extent that since the end of the 1990s a central thrust of debate common to development, security and governance circles has been ‘the rediscovery of the state’. The stress on core liberal political norms is today under- not over-played. It continues to be the centrally important area where local reformers look to the international community for support – most commonly, in vain. Deliberations over precise institutional configurations and second-generation reforms are of a lesser order of importance. Michael McFaul observes that some debates about the intricate sequencing of reform and different varieties of institutional pathways look incongruous, as the US can today do little to influence such details, but rather simply back core democratic values.20 Yet it still hesitates to do so, for all the standard commentary on US ‘liberal imperialism’. Liberal internationalism is still de-legitimised by the pervasive assumption that it is concerned primarily with mobilising military force in support of democratic values; it must be made clearer that military power is simply anathema to the standard day-to-day agenda of democracy support. There are different levels of critique, which risk elision. One thing is to argue that Western powers should support core liberal democratic principles, then from this base work to build into their policies a concern with social equality, participation, deliberation and religious identity. It would be entirely convincing to argue that, while democracy promoters have advanced, they could and should be doing more in this direction. But it is quite another thing to suggest that such aims should be supported against or instead of core liberal norms. In practice, what many critics appear to advocate is not a cumulative combination, but a dilution of the liberal component in favour of other forms. They betray a core inconsistency: they dislike democracy promotion for being overly intrusive, but then advocate modifications that would make it more, not less, intrusive. This is because most suggested ‘alternative forms of democracy’ breach the line between process and substantive policy outputs – they advocate particular ends, not just a type of policy-making means. The concrete examples of European policies demonstrate that it is hardly credible to ‘accuse’ Brussels of being an unthinking citadel of blinkered liberalism. Indeed, in this author’s experience, conversations with policy-makers reveal this to be akin to an almost unmentionable L-word. When so much doubt and ambivalence now suffuses democracy support strategies, it is unconvincing to admonish the latter for being uniformly, heavily prescriptive. Donors’ tendency to see democracy through the prism of their own political systems still often surfaces. But in terms of the way that the ‘democracy’ in democracy support is defined conceptually it would seem somewhat redundant now to warn donors of the dangers of heavily-prescriptive institutional templates. There is some evidence of the self-reflexive policy-learning on the part of democracy promotion practitioners that many critics assume is entirely lacking. Indeed, genuine doubt over the most suitable paths forward has reached the point where some actors’ policies are reduced to immobilism. The problem is that while policy-relevant knowledge has accumulated, it has done so in an ad hoc fashion and has not been systematised into common or comprehensive new approaches.21 The influences on democracy strategy of academic traditions are eclectic. If we were to trace the philosophical roots of European good governance and democracy support policies, it is simply not the case that Locke prevails over all else. The breadth of democracy assistance programmes goes way beyond the Schumpeterian. The stress on the role of the state and the existential identity-value of the political community found in many current policy initiatives finds resonance (if unconsciously) in thinking that historically stood as the antithesis to political liberalism. Such a line can be traced from Aristotle’s view of the political community as a biological organism; to Rousseau’s insistence that the general will embodies a mystical, spiritual collective identity of the political community above and beyond the will of the majority; through to Hegel’s system centred on the state as the organic embodiment of collective interests and identity, the ‘absolute’ within which the individual finds his very meaning. This is not to say any such strand of thinking would capture entirely the ideas that inform today’s foreign policies. However, the pertinent point is that the underpinnings of these policies can be seen in writers who were in combat with Lockean liberalism. The standard European discourse on equality being more important than formal political democracy has a direct echo in (politically) anti-liberal Rousseau. Concerns over the ‘tyranny of the majority’ that inform power-sharing strategies in post-conflict situations have a long line of antecedent philosophers who inveighed strongly against the will of the majority, from Aristotle through even to Kant (who was concerned with the republican separation of executive and legislation but certainly not with augmenting popular power against the aristocracy). Even Benthamite radical utilitarianism shines through, in its concern with a strong rule of law to restrain individual freedoms and ensure greater equality in the furtherance of collective interests. If any modern philosopher is the thinker of choice for today’s discerning Eurocrat it is Habermas, not the classic liberals. In general, deliberative democracy has been most widely advocated as a means of situating abstract cosmopolitan universalism within concrete and varied social settings.22 And all this is quite apart from the more obvious cases of cynical realpolitik that take their cue from the more violent illiberalism of Machiavelli and Hobbes.23 It is self-evident that liberal democracy now shares the conceptual field with rivals in a way that it did not in the 1990s. This may provide for vibrant debate and much-needed selfexamination. But it does not necessarily mean that alternatives have superior legitimacy. Allowing analytic space for a wider variety of forms and definitions of democracy does not mean that sovereign democracy, Islamic democracy, tribal democracy or Bolivarian democracy are necessarily superior or more in tune with local demands. With the West accused of being overly-prescriptive of a liberal form of democracy, it would be subversive of the critique to jump straight into advocating other pre-cooked forms. It should be remembered that a form such as social democracy is just as ‘Western’ in it origins as liberal democracy: there is no reason a priori to assume that it corresponds more closely to ‘local demands’ in the way that is routinely and rather uncritically suggested (however one may oneself desire socially democratic outcomes). If the ascendance of conceptual competitors can add usefully to the parameters of desirable political reform, it is not incompatible with this that they should at the same time sharpen the West’s defence of core liberalism. Critical theorists skate a thin line: they issue pleas for a rethinking of democracy, but scratch beneath the surface and what they really lionise is undemocratic state-led development; theirs is in fact not a genuine concern with reconceptualising democracy so much as a pretty wholesale questioning of the democracy agenda, dressed up in softened discourse. A central pivot of many such critiques is the criticism of liberalism’s teleological arrogance. But this centres too much on one influential book published at one rather distinctive moment in time24; liberalism more broadly and properly understood is not teleology. Moreover, many writers argue against teleology and prescription but then in the next breath confidently assert that social democracy must be a superior and more acceptable form of democracy outside the West and one which has a more sustainable long-term future. This may be the case, but they have no philosophical justification for saying so without replicating the very same methodological features they profess to dislike in ‘liberal’ tenets – and thus contradicting themselves. Clearly, more debate about different forms of political representation would be healthy. Allowing space for a plurality of routes to and types of political reform would sit well with the core spirit of democracy. However, while more flexibility and open mindedness are still required in democracy promotion, there is a risk of being unduly defensive about the virtues of liberal democracy’s core tenets. The problem in many places of the world is the absence of liberalism’s core values, not their excess. Vigilance in the need for democracy’s reconceptualisation is indeed merited. But it would be a muddled reasoning that took this to provide a case for the wholesale pull back from the (already anaemic) support

for liberal democracy’s notion of fundamental political rights. We need more fully to understand local demands. But there is an automatic assumption routinely made that such demands are for more diverse, anti-liberal political forms. This may in many places be the case, but the evidence must be assembled. One cannot simply assert this as if it were axiomatic to the emerging world order; there is no reason for supposing a priori that this is a natural outcome of the rebalancing of international order. The evidence that exists points, again, to a more nuanced conclusion: a demand for the essential tenets of liberal universalism, made relevant to and expressed through the language and concepts of local cultures and histories. A growing focus within political philosophy has been on ‘capabilities’: negative liberal freedoms need to be deepened but also combined with the locally-rooted capabilities that ensure their effective realisation.25 The central thrust of Locke’s liberalism was anti-dogmatism and prudence. The irony – and, for anyone concerned over democracy’s health, the tragedy – is that international support for a supposedly liberal democratic agenda is today associated with exactly the opposite of these values. It is the non-dogmatic spirit that liberalism must work to recover: liberal democracy as a system that (simply) creates space for a variety of different local choices. Advocates and opponents of liberalism are trapped in a circular debate over this matter: while core liberal freedoms are required to make such local choices, critics insist that those very liberal rights are themselves a corruption of local autonomy. The imperative is not for liberalism to cede to other creeds, but to work towards squaring the circle that has always existed at its heart: that is, liberalism is in its very essence the rejection of utopian political design, yet, if not pursued with care, it can appear as an unbending utopia. This defines its challenge: can liberalism stand convincingly as an anti-utopian creed whose own propulsion requires courageous normative conviction? Can it strike the Rawlsian balance of deepening a plurality of values without descent into relativism?