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NATIONAL SECURITY
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FOREWORD

This is the fifth issue of the *National Security Law Journal*, and also the fifth issue on which I have had the opportunity to work. The *Journal* has come a long way over the last two years, and I am thrilled I have been able to help shape what promises to be a strong publication for years to come.

We begin this issue by printing two sets of remarks. First, we are pleased to publish an address by former U.S. Attorney General Michael B. Mukasey, whom we welcomed to George Mason University School of Law last year to speak on the NSA, warrantless wiretapping, and the data collection program known as PRISM. Next, we are excited to partner with the Office of the Director of National Intelligence (“ODNI”) and the Brookings Institution to publish remarks by Robert S. Litt, the current General Counsel of ODNI. We then round out this issue with two professional Articles and two Comments authored by law students at George Mason.

This issue will not be without controversy. You may find what you read here to be discomfiting at times, and on a personal note, I do not agree with everything we have printed in the pages that follow. But our policy has always been that we welcome scholarship from a range of views, and we hope the diverse ideas you read here—even if you disagree—will prompt you to think and respond. National security law should not be an easy subject: it is about life and death, freedom and coercion, tranquility and war, the rights of citizens and the power of the state—and what is right and just in a world of hard choices, bounded by laws that can, at times, evolve. This journal is about generating discourse, provoking new dialogue, and pushing the boundaries of legal thinking. We support a willingness to read and think about new arguments, even when they may seem wrong. If you disagree with what you read here, and want to argue back, then please do. We would welcome your response.



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With the publication of this issue, we now transition to a new Editorial Board for the 2015-2016 academic year. I must take a moment to thank all those who worked so hard on this issue and throughout the year. This year alone, our team of student Editors and Members published 525 pages, edited 2,244 footnotes, built a network of over 780 e-mail subscribers, and hosted four successful events on the Arlington Campus of George Mason University. We became well respected within the Mason Law community and across the broader community of national security scholars and practitioners. We published quality work, and did so on time. To my fellow graduates, thank you, sincerely, for all you have done. You have made my experience working on the *National Security Law Journal* truly memorable. I will miss our work together.

To our incoming Editorial Board: I have the utmost confidence that you will do great work. I know the *National Security Law Journal* is in capable hands, and I am eager to see all you will accomplish next year.

To our many readers and supporters—at Mason Law, in the national security community, and around the world—thank you for all you have done to support our work. We would not have been successful without you.

With that, here is our longest and perhaps most controversial issue to date. Enjoy the read.

Alexander Yesnik
Editor-in-Chief



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SYMPOSIUM ADDRESS

SAFE AND SURVEILLED:

FORMER U.S. ATTORNEY GENERAL
MICHAEL B. MUKASEY ON THE NSA,
WIRETAPPING, AND PRISM

The Hon. Michael B. Mukasey*

On March 26, 2014, the National Security Law Journal at George Mason University School of Law hosted Safe and Surveilled, a symposium featuring a keynote address by former U.S. Attorney General Michael Mukasey, who spoke on the NSA, wiretapping, and the data-mining program known as PRISM. Following is an edited transcript of his remarks.

I want to thank Amy [Shepard] for having me here, and George Mason for having me here, and the *National Security Law Journal* for having me here, and Jamil [Jaffer] for that splendid introduction.¹

I'm grateful not only for the privilege of this podium but also for the fact that you're conducting this very important symposium and debate on issues that are really vital to this country—and let's face it, if we don't get this right, nothing else really matters.

* Eighty-first Attorney General of the United States, 2007-2009.

¹ This article is an edited transcript of remarks delivered on March 26, 2014, at the *Safe and Surveilled* symposium hosted by the *National Security Law Journal* at George Mason University School of Law in Arlington, Virginia.

Now a good deal of this debate is centered around two programs of the NSA—two statutes that are used to conduct the electronic surveillance that is among this country's main defenses, sometimes its only defense, against not only state adversaries but also against people who believe that it's their religious obligation to destroy our way of life. Because this is an audience principally of lawyers, I'm going to start with the laws themselves: Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act, or FISA as it's known. Then we'll examine the sources and some of the content and the criticism of these laws and the programs that they establish. The first of the two laws that I want to talk about—laws put in place after 9/11—is Section 215 of the PATRIOT Act, which allows the FBI to apply for an order from the Foreign Intelligence Surveillance Court to require the production of tangible things. It doesn't say what kinds of tangible things; it just says tangible things, and that includes business records needed for investigation to obtain foreign intelligence information about a non-U.S. person to protect the country against international terrorism.

Using that provision, the FBI has obtained a series of essentially business records orders that are renewable at 90-day intervals, which authorized the gathering of telephone metadata. The NSA, which has the technical capacity, acts on that order. It acquires the telephone metadata in bulk, and metadata—as I'm sure many or most of you know—is simply the information that [the] telephone company has on every call that's made. It's used to generate a typical telephone bill: the calling number, the number that is called, [and] the date and duration of the call. It does not include information about the content of the call. It doesn't even include information about the identity of the caller or the recipient. What the NSA does is to aggregate that data from several companies, preserving it in one place, so that it is not discarded in the normal course of business as the telephone companies sometimes do, and so it could be readily accessed.

The order, which has been approved and reapproved more than thirty-five times by at least fourteen different federal judges on the FISA court since 2006, does not allow random searching of the database, and that program has been found many times to be entirely

consistent with the Constitution and entirely lawful. When the system was in fact generating an algorithm that caused some of the few searches that were made to go beyond what was permissible, that excess was pointed out to the FISA court by the government, and the judge that heard the case and who criticized the NSA in that instance nonetheless reauthorized the program. The metadata, which after all is lawfully in the hands of the telephone companies, is not information I would suggest that is even arguably protected by the Fourth Amendment as it is actually drafted—as opposed to the Fourth Amendment as it might exist in the minds of some folks on the left and on the right.

The Fourth Amendment as drafted by the folks who did the drafting back in the day protects the rights of the people, and that means the people of this country—not people of the world over—to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The concept that is embodied here is simply the concept of a trespass. So what is protected is their persons, and their bodies, and what they are carrying on their bodies. We still have those, of course.

What is protected against is not only a knock on the door by the constabulary, but also thermal imaging of what goes on inside your house, conducted even from several blocks away; [your] papers, which are reasonably read to include electronic storage devices like thumb drives; and effects, which is simply your stuff. It does not include the business records of a third party like a telephone company that simply keeps track of when and how long you use their equipment. Now, that's not to say that the Fourth Amendment sets the limit on what privacy protection Congress may enact if it chooses to do so, nor does it set the limit on the debate over what we want or need in the way of privacy protection. That's why you're here, and that's why you're conducting this symposium; but that is the limit of what the Fourth Amendment protects.

So, what's the information useful for? If the government gets access to a suspicious number—say, a foreign terrorist cell or a safe house—it can then run that number against the database of U.S. numbers to determine whether that number has either called or been

called by a number in the United States, [and] then examine what numbers inside and outside the United States the number that was either called or made the call has been calling. Now, obviously, if there's been contact with a suspicious number overseas and a number in the United States, further investigation can be conducted. If facts are gathered that establish probable cause to believe that a crime has been or is being committed, then a warrant can be obtained to listen in on conversations on that U.S. number, but there's no listening in unless and until a warrant is issued in the same way that warrants are issued in criminal cases and by the same standard.

The database of numbers is segregated and is not accessed for any purpose beyond the specific counterterrorism program. It's accessible only by about twenty-some odd people, counting supervisors, and the government is required to follow procedures that are overseen by the FISA court to minimize any unnecessary dissemination of U.S. numbers that are generated as a result of queries to the database. As you can imagine, that can be and indeed has been a valuable tool for protecting us from foreign-based terrorists or from domestic terrorists with foreign connections, and for detecting networks of people in this country who have ties to foreign terrorists. It's virtually the only way that the government can look outward from the United States to see what's coming in from overseas, unless we rely on good fortune in discovering what's coming overseas with the cooperation of our foreign partners. At a minimum, it could tell us that a foreign group we are looking at has not contacted anyone in the United States. We don't have to waste valuable resources or alarm people unnecessarily.

Now, there's been a good deal [of] debate on whether the Section 215 program has or hasn't resulted in the breaking of terrorist plots. Let's demystify that. If what we're talking about is whether the 215 program has scored the jump shot at the buzzer that won the game, the answer is no. On the other hand, for those of you who follow basketball, there's a lot of point-scoring that goes on before the jump shot at the buzzer that wins the game, and in that regard, it has been enormously valuable. Intelligence is gathered step by step and item by item, so it is not only the jump shot at the buzzer

that counts. In addition to being subject to court approval, the valuable Section 215 metadata program is overseen by the executive branch and by Congress, specifically the foreign intelligence and judiciary committees of both houses. When Section 215 was reauthorized in 2011, the administration briefed Members of Congress, and members of those committees, on the details of the program and provided briefing documents which were asked to be made available to all Members of Congress. Those documents included the specific disclosure that under the program, NSA acquires the call detail metadata for—this is right out of the document that was given to those committees and made available to all Members of Congress—“substantially all of the telephone calls handled by the companies [meaning the providers], including both calls made between the United States and a foreign country and calls made entirely within the United States.” The committees provided briefings on those details to all those interested Members of Congress. In other words, any Member of Congress who was there in 2011 either got briefed on this, particularly if that person was a Member of either the intelligence committee or one of the judiciary committees, or had the chance to get briefed on it. They all had a chance to be briefed on it following the Snowden leaks. So if you hear that some Congressman who was actually there in 2011 has expressed surprise at this program that was reauthorized at that time, you should have the same reaction that you had if you saw the movie *Casablanca* when Louie the Prefect says he is “shocked, shocked” to see there is gambling going on at Rick’s just before his winnings are handed to him in an envelope. They are “shocked, shocked” in exactly the same way. And yet as we sit here, more accurately as I stand here, and you sit here, the President and his administration has called for legislation that would end the gathering of this information gathered by the NSA and replace it with a system whereby the telephone companies would keep this information for no legislatively required period of time. The only period of time that they are required to keep it is under FCC regulation, and that’s for eighteen months, and that of course is changeable at a moment’s notice. And when the NSA wanted to run a number, it would first go to court for a judge to review the finding that that number is suspicious, and then go around to each of the providers and get each of them to search its database of numbers, rather than having all of the numbers in one

place. We can't rely on private companies to keep this information for longer than they have to, and in fact, if the FCC gets rid of its regulation that [they] have to keep it for eighteen months, it is not hard to envision a carrier saying, "Use our service, we clean house every day."

Also being presented is another proposal from people who claim to want to protect the Section 215 program that works essentially the same way. Now, I'm not going to get into the details that distinguish one legislative proposal from another, because the point that I'm trying to make is a good deal broader. The sponsors from both the administration proposal and the alternative are urging the adoption of their proposals in part because it makes it more difficult for the NSA to gather information. That is they are competing [in] who can put more obstacles in the way of the NSA, all the while claiming that none of these roadblocks makes us any less safe. But, of course, they make it more cumbersome for the NSA to gather information about people who mean us harm, and to process that information, and all of this is being done even though there is no one who has pointed to any actual misuse of this information. Rather, what we're being protected against is the possibility that somebody could misuse it. The same logic would suggest that we should disarm the police because one of them might run amok with his gun and start shooting civilians.

The other program that's been the subject of debate is administered under Section 702 of the Foreign Intelligence Surveillance Act (FISA). That program allows the Attorney General and the Director of National Intelligence to authorize jointly, for up to a year, surveillance that's targeted at foreign persons reasonably believed to be located outside this country, provided that the FISA court approves the targeting procedures under which the surveillance occurs and the minimization procedures that govern the use of the information once it's gathered. Under this program, NSA can operate within the United States to gather the content of telephone calls and Internet traffic of people outside the United States.

How's that possible? Well, it's possible because the Internet and telephone messages that flow overseas pass through servers in

the United States, so though telephone conversation or an exchange of e-mail may be between parties located entirely outside this country, the NSA can monitor cables passing through the United States to get that information. The NSA generates specific identifiers that may include, for example, telephone numbers or e-mail addresses of foreign persons outside this country, and then use[s] those identifiers to pick out communications that it is entitled to get from the general flow. The surveillance by law may not target anyone of any nationality known to be in this country or intentionally target a U.S. person anywhere in the world. In other words, they can't do reverse targeting on U.S. persons by listening in on foreign conversations. In order to get the content of communications involving anyone in the United States or any U.S. person located anywhere in the world, it's necessary to get a warrant supported by a showing of probable cause, just as one would in an ordinary criminal case.

Now, if these programs are as apparently lawful and limited as I've described, what's so controversial about them? Well, a good deal of the controversy seems rooted in the fact that until they were disclosed—mainly but not exclusively by Edward Snowden—they were secret and necessarily had to be in order to be effective. Obviously, if people know you are interested in—people that you are interested in detecting are aware of how it is that you can detect them, they can try to take steps to avoid detection. However, because of the secrecy when they were ultimately disclosed, the message was delivered by someone with a clear desire not simply to disclose what he considered to be improper conduct—but as I think I can show as obvious—was someone who wanted to injure this country. Therefore, the disclosure was accompanied by all sorts of claims of impropriety that are entirely false.

Let's take a look at who Edward Snowden is and at what he is. I suspect that there would be a good deal less support for these heroes like Snowden and others if people were aware of who they were and what they think. So, let's look for a moment at Edward Snowden, perhaps the most celebrated of these so-called whistleblowers. Actually, what I would have liked to do at this point would be to quote extensively [from] what Snowden wrote before he

knew that the world was watching and listening, but I can't do that extensively because a lot of what he wrote is the sort of thing that you don't do in mixed company or indeed in any polite company. So, let's just do a quick fly-over. Snowden's version of the story, of course, is that he became politically aware while he was working for the CIA in Geneva in 2007, when he sees surveillance going on that he thinks is improper. He considers leaking information at that time, but decides not to because Barack Obama gets elected President and he has promised hope and change. Well, there's no change, Snowden loses hope, and starts downloading information while he was employed at Dell in 2010. Then he lands a job in Hawaii with an NSA contractor—a job he sought and accepted so he could get access to even greater quantities of information. He said that he had only the purest of motives. The NSA presented what he called “an existential threat to democracy.”

Sounds great, except it's not the truth. A more accurate account may be had in a splendid article by Sean Wilentz in the January issue of *The New Republic*, which I recommend to all of you.² Snowden is a high school dropout who developed an interest in computers, and by his own description, joined a group of what he called “alpha geeks” exploring the mysteries of sex and online gaming and sometimes firearms. At one point, he insisted—he disclosed that he had a Walther P22 that he “loved to death.” In 2004, he enlists in an Army Special Forces program, but soon afterwards was granted a medical discharge when he breaks both legs in a training accident—which is something of a curiosity, because although the accident was enough to get him out of the Army, he later developed an enthusiasm for kickboxing. He says he joined the Special Forces because he felt it was his “obligation to help free people from oppression.” His first employment by an intelligence agency was as a security guard at the CIA; he then becomes a security specialist, and in 2007 is posted to Geneva. Now, however Snowden felt about the administration that

² See Sean Wilentz, *Would You Feel Differently About Snowden, Greenwald, and Assange If You Knew What They Really Thought?*, NEW REPUBLIC, Jan. 19, 2014, available at <http://www.newrepublic.com/article/116253/edward-snowden-glenn-greenwald-julian-assange-what-they-believe>.

was then in power as late as January of 2009, he attacks *The New York Times* for exposing a plan to sabotage Iran's nuclear facility. He says the newspaper was like Wikileaks and deserved to go bankrupt. He urged that whoever leaked "classified shit"—his words, not mine—to the *Times* be "shot in the testicles" (that's not the word he used, but you get the picture). Economically, he supported Ron Paul's position that we should return to the gold standard, and urged that Social Security be abolished. He wrote that old people "wouldn't be [expletive deleted] helpless if you weren't sending them [expletive deleted] checks to sit on their asses and lay in hospitals all day." He made \$250 contributions to Ron Paul during the 2012 primaries.

Now, although Snowden claims that he got access to highly sensitive information in the NSA by working his way up, with his considerable talents, it appears that the way he got it was by tricking one or more of his coworkers into disclosing their passwords so that he could then unleash a program that would go pick through the data to which they had access, and pick out information of the type that had been written into the program for selection. Snowden's denials here are particularly illuminating. In fact, they are Clintonian. He denies that there were legions of coworkers whose passwords he stole, to which, of course, leaves open the distinct possibility of which it was only a few. He says that he never stole any classified documents, which of course meant that he allowed the program to do it for him. He denies that he disclosed any secret information, claiming that he simply disclosed it to journalists and they decided what to publish and what not, an act he considers entirely reasonable and responsible. Of course, the journalist [to] whom he leaked the information was a writer for *The Guardian* and sometime-blogger named Glenn Greenwald. Now, there's not enough time here to explore his history, except to note that he, too, journeyed through support for Ron Paul and arrived to a worldview that seemed congenial to critics of this country's national security on both the far right and the far left.

What damage has been done to our national security by Snowden's disclosure? Well, the Defense Intelligence Agency has prepared a report for the House permanent subcommittee that's classified, but what is already clear is that although press reports have

focused on NSA foreign intelligence collection, much of the information that Snowden stole actually relates to current U.S. military operations, and in the words of [House Permanent Select Committee on Intelligence] Chairman Mike Rogers, is likely to have “lethal consequences for our troops in the field.” According to the Ranking Member to the Committee Dutch Ruppersberger, we have already seen terrorists changing their methods because of Snowden’s leaks. The operations affected ranged beyond terrorism, into cybercrime, narcotics, and human trafficking. A program in Latin America that helped rescue women in that part of the world from human trafficking rings had to be abandoned because documents relating to it were leaked and the identity of informants was compromised. Vital operations for all four of our military services have been affected. The exposures as to foreign intelligence operations are potentially devastating. They include, for example, an NSA report of self-assessment in fifty aspects of counterterrorism that reveals gaps in our knowledge about the security of Pakistani nuclear material when it’s being transported; of the capabilities of China’s next generation of fighter aircraft (that includes secrets that were stolen from our own F35 planes back in 2007); of what plans Russian leaders might have to deal with destabilizing events, such as large protests or terrorists incidents. The capabilities he has disclosed, thus far, include how NSA intercepts e-mails, phone calls, and radio transmissions of Taliban fighters in Pakistan; the fact that NSA is watching the security of Pakistan’s nuclear weapons; that NSA is capable of measuring the loyalty of CIA recruits in Pakistan; [and] how NSA hacks into telephones in Honk Kong and the rest of China. Just last weekend, *The New York Times* carried another leak from the Snowden trove, a story that describes how NSA has tried—apparently successfully—to penetrate a Chinese manufacturer of electronic equipment, including communications equipment, [of] Huawei, so that it could monitor what purchasers of that equipment, including foreign governments, do with it. Right in the body of that story was the revelation that the *Times* had withheld certain technical details from the story at the request of the Obama administration, but nonetheless the Chinese government and Huawei are now on notice of the effort and can set about taking steps to guard against it.

You want to imagine the nature of the damage that he has done? Think of someone disclosing the acoustic signature of a nuclear submarine. That's among the most closely guarded of secrets that we have, because if it is disclosed, it makes that submarine—an investment of literally billions of dollars—useless. That is the nature of what he has done to a lot of our intelligence capabilities.

It is, of course, no accident that Snowden has wound up in Russia, whose geopolitical goals are consistent with weakening U.S. intelligence. Russia itself is technologically and economically and militarily a basket case, but undermining the capabilities of the United States can't help [but even] the playing field. The distortion in allocating resources is another byproduct of these disclosures. As you can imagine, if a single disclosure is made, all possible sources of damage have to be considered and mitigated to the extent possible. If means and methods are disclosed, adjustments have to be made. If human assets are disclosed, steps have to be taken to get them and others with whom they may have a relationship to safety. Two disclosures complicate the problem still further. When you have millions of documents with varied disclosures, the problem of building a protective wall around what can be salvaged in each case is one that could absorb virtually the entire resources of even the best-resourced agency. And, of course, resources devoted to damage control are not then available for the active protection of our national security. But that's just the damage within our own intelligence community.

Relationships between the United States and Europe, between European nations themselves, are undermined because confidence is undermined—and I'm not speaking of the Angela Merkel cellphone problem. In fact, for years it had been an open secret in the intelligence community [that] Angela Merkel used a conventional cell phone that could be overheard, and we were by no means the only country that overheard it. The French were quite active in that regard. Besides, even if we were the only country, if you're dealing with a country like Germany that's been champing at the bit trying to avoid sanctions on Iran for years, you would certainly want to know what the leaders of that country is saying in her less-guarded moments.

Rather, what I'm talking about is simply how seriously we can be taken by even our friends. If we can't keep secrets secure from somebody like Snowden, how willing do you think foreign intelligence agencies will be to share information with us? Because the United States is a leader in the gathering of intelligence, the result is to paralyze western intelligence capabilities and our self-defense. Snowden and his public handlers . . . have sold the public in general, and some conservatives in particular, on the idea that what they have disclosed is that the United States Government is secretly spying on all of its citizens, on their communications, and indeed on all aspects of their lives—of any electronic interaction, whether through e-mail, banking, telephone calls, card transactions, you name it. They portray Snowden as romantic and idealistic rather than self-absorbed and traitorous—as someone who more closely resembles Robin Hood or Paul Revere than Alger Hiss or Benedict Arnold. And the popular press, which has an ongoing interest in being able to continue to get stories from the Snowden trough, has gone along with the message in the way it reports information, which guarantees continued access.

What this has produced is kind of an odd coalition of the extreme left, which suspects and opposes any intelligence-gathering programs [as] an actual or potential infringement of civil liberties, and the libertarian right, which suspects any branch of government and delights in conjuring up images of Big Brother so that the narrative of a spying and intrusive government comes very natural to them. As a result, we saw in the last Congress that almost half of the House of Representatives voted to defund the programs that I described, led by a coalition of libertarian Republicans and left-wing Democrats.

Of course, this isn't the first time in our history that we've seen our intelligence agencies under attack, although this is the first time that I think it's happened on this scale. Jack Goldsmith, in an excellent book called *The Terror Presidency*, published back in 2007, described what he called "cycles of aggression and timidity" in our

intelligence community.³ As he describes it, political leaders—and he might just as well have mentioned opinion leaders, including academics and journalists—in his words, “pressure the community”—and that’s the intelligence community—“to engage in controversial action at the edges of the law, and then fail to protect it from recriminations when things go awry.”⁴ This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses in the 1960s led to the Church Committee hearings and reforms in the 1970s, which in turn led to complaints that the community had become too risk averse, which led to aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which in turn led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led—both before and after 9/11—to complaints of excessive timidity.

And, of course, after 9/11 we all remember the public hearings, the 9/11 Commission, [and] other inquiries that followed that awful day where the narratives produced were in many instances stories of missed opportunities. The subtext of these narratives—in fact, at times, the text—was that risk aversion can have grave costs. The 9/11 Commission report, for example, tells of operations against Osama Bin Laden that were contemplated but not executed; of surveillance considered but not requested; of information not shared; of so-called dots not connected.

Complaints about risk-averse national security were commonplace in the first few years following the September 11th attacks. This time around, the cycle threatens to damage not only careers of people involved in gathering intelligence—which is bad enough for the injury that it causes to talented and dedicated people we rely on to keep us safe, and the lessons that it teaches other talented and dedicated people who we should be able to rely on for

³ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 163 (2007).

⁴ *Id.*

the same purpose—but also the institutions themselves, in which those careers are pursued: to some degree, the CIA, a civilian institution; but also the NSA, the National Security Agency, a military institution. So, if you were in the intelligence gathering business, and you had a family and a mortgage, how eager would you be in the current climate of suspicion to render an opinion based on what you actually believe to be the limit of the law if you think that that limit might change? Self-censorship is a real danger. The view that the NSA is a threat to civil liberties in this country is being exploited, whether ignorantly or cynically, by politicians ranging from the self-described progressives on the left to self-described libertarians on the right.

I would suggest to you that we should not be standing with the people who are trying to weaken the national security apparatus of this country. Rather than dealing in absurd imaginary scenarios of NSA employees spending their time listening in on their fellow citizens, we should be worrying about actual abuses—for example, those at the IRS—and be able to explain to those, to our fellow citizens, that in reality there is no such thing as “the government”; it’s just a bunch of people. Some of them are dedicated and skilled and honest, and by and large, those people work at NSA and the CIA and other agencies where the one nightmare that keeps them awake is the possibility of another attack on this country. Others of whom are neither dedicated nor skilled nor honest, and a disproportionate number of those people work at the IRS. That should not be a hard message to get across, because in addition to simplicity, it has the truth going for it.

Now, I hope that I haven’t painted too depressing of a picture of what it is that we face, and I want to end where I began. If I feel anything to be optimistic about, it’s about people like you, and those you are going to hear from, who get together to discuss and debate these issues and seek the truth, because in a free country we can have no better protection than that.

Thank you very much.





REMARKS

U.S. INTELLIGENCE COMMUNITY SURVEILLANCE ONE YEAR AFTER PRESIDENT OBAMA'S ADDRESS

The Hon. Robert S. Litt*

On February 4, 2015, Mr. Litt delivered remarks on the legal framework under which the Director of National Intelligence conducts signals intelligence.¹ Following is an edited version of his prepared remarks, presented in partnership with the Office of the Director of National Intelligence and the Brookings Institution.

A year and a half ago, in July 2013, I gave a speech here about Privacy, Technology and National Security. It was just about a month after classified documents stolen by Edward Snowden began appearing in the press, at a time when people in the United States and around the world were raising questions about the legality and wisdom of our signals intelligence activities. My speech had several purposes.

First, I wanted to set out the legal framework under which we conduct signals intelligence and the extensive oversight of that activity by all three branches of Government.

* Second General Counsel of the Office of the Director of National Intelligence, 2009 to present.

¹ A video recording of these remarks is available online through the Brookings Institution at <http://www.brookings.edu/events/2015/02/04-intelligence-community-surveillance-litt-kerry>.

Second, I wanted to explain how we protect both privacy and national security in a changing technology and security environment, and in particular how we protect privacy through robust restrictions on the use we can make of the data we collect.

Third, I wanted to demystify and correct misimpressions about the two programs that had been the subject of the leaks, and to commit the Intelligence Community to greater transparency going forward.

I began by noting the huge amount of private information that we all expose today, through social media, e-commerce, and so on. But I acknowledged that government access to the same information worries us more—with good reason—because of what the government could do with that information. So I suggested we should address that problem directly. And in fact, I said, we can and do protect both privacy and national security by a regime that not only puts limits on collection but also restricts access to, and use of, the data we collect based on factors such as the sensitivity of the data, the volume of the collection, how it was collected, and the reason for which it was collected, and that backs up those restrictions with technological and human controls and auditing. This approach has largely been effective. The information that has come out since my speech, both licitly and illicitly, has validated my statement then: while there have been technological challenges and human error in our current signals intelligence activities, there has been no systematic abuse or misuse akin to the very real illegalities and abuses of the 1960s and 1970s.

Well, you may have noticed that my speech did not entirely put the public concerns to rest.

Questions have continued to be asked, and we've continued to address them. In particular, just over a year ago, President Obama gave a speech about surveillance reform, and issued Presidential Policy Directive 28 ("PPD-28"). The President reaffirmed the critical importance of signals intelligence activity to protect our national security and that of our allies against terrorism and other threats. But he took note of the concerns that had been raised and directed a

number of reforms to “give the American people greater confidence that their rights are being protected, even as our intelligence and law enforcement agencies maintain the tools they need to keep us safe,” as well as to provide “ordinary citizens in other countries . . . confidence that the United States respects their privacy, too.”²

The Intelligence Community has spent the year since the President’s speech implementing the reforms he set out, as well as many of the recommendations of the Privacy and Civil Liberties Oversight Board (“PCLOB”) and the President’s Review Group on Intelligence and Communications Technologies. And I’d note in passing that the PCLOB last week issued a report finding that we have made substantial progress towards implementing the great majority of its recommendations. We’ve consulted with privacy groups, industry, Congress, and foreign partners. In particular, we have a robust ongoing dialogue with our European allies and partners about privacy and data protection. We’ve participated in a wide variety of public events at which reform proposals have been discussed and debated. And yesterday, the Office of the Director of National Intelligence (“ODNI”) released a report detailing the concrete steps we have taken so far, along with the actual agency policies that implement some of those reforms.³ What I want to do today is drill down on what we have done in the last year, and in particular explain how we have responded to some of the concerns that have been raised in the last year and a half.

Let me begin by laying out some premises that I think are commonly agreed upon and that should frame how we think about signals intelligence. The first is that we still need to conduct signals intelligence activities. As the President said in his speech last year, “the challenges posed by threats like terrorism and proliferation and cyber-attacks are not going away any time soon.”⁴ If anything, as

² President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

³ OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SIGNALS INTELLIGENCE REFORM (2015) [hereinafter ODNI REPORT], *available at* <http://icontherecord.tumblr.com/ppd-28/>.

⁴ Obama, *supra* note 2.

recent events show, they are growing. Signals intelligence activities play an indispensable role in how we learn about and protect against these threats.

Second, to be effective, our signals intelligence activities have to take account of the changing technological and communications environment. Fifty years ago, we could more easily isolate the communications of our target: the paradigm of electronic surveillance then was two alligator clips on the target's telephone line. Today, digital communications are all mingled together and traverse the globe. The communications of our adversaries are not separate and easily identified streams, but are part of an ocean of irrelevant conversations, and that creates new challenges for us.

Third, it's critical to keep in mind that signals intelligence—like all foreign intelligence—is fundamentally different from electronic surveillance for law enforcement purposes. In the typical law enforcement context, a crime has been or is being committed, and the goal is to gather evidence about that particular crime. Intelligence, on the other hand, is often an effort to find out what is going to happen, so that we can prevent it from happening, or to keep policymakers informed. This means that we cannot limit our signals intelligence activities only to targeted collection against specific individuals whom we have already identified. We have to try to uncover threats or adversaries of which we may as yet be unaware, such as hackers seeking to penetrate our systems, or potential terrorists, or people supplying nuclear materials to proliferators. Or we may simply be seeking information to support the nation's leadership in the service of other important foreign policy interests.

Fourth, we can also agree that—in part because of these considerations—signals intelligence activities can present special challenges to privacy and civil liberties. The capacity to listen in on private conversations or read online communications, if not properly limited and constrained, could impinge upon legitimate privacy interests, and could be misused for improper purposes.

Finally, as the President also said, “for our intelligence community to be effective over the long haul, we must maintain the

trust of the American people, and people around the world.”⁵ So although we must continue to conduct signals intelligence activities to protect our national security, we need to do so in a way that is consistent with our values, that treats all people with dignity and respect, that takes account of the concerns that people have with the potential intrusiveness of these activities, and that provides reassurance to the public that they are conducted within appropriate limits and oversight.

So with these premises, let me address some of the concerns that people have raised about our signals intelligence activities.

TRANSPARENCY

I want to start with the issue of transparency, both because it is something I care about deeply and because our commitment to transparency is what enables me to explain the other changes we have made. One of the biggest challenges that we have faced in responding to the events of the past year and a half is that to a great extent our intelligence activities have to be kept secret.

The public does not know everything that is done in its name—and that has to be so. If we reveal too much about our intelligence activities we will compromise the capability of those activities to protect the nation. And I want to reiterate what I have said before—while there have been significant benefits from the recent public debate, the leaks have unquestionably caused damage to our national security, damage whose full extent we will not know for years. We have seen public postings clearly referencing the disclosures, such as an extremist who advised others to stop using a particular communications platform because the company that provided it, which had been discussed in the leaked documents, was “part of NSA.”

And yet the Intelligence Community, from the Director of National Intelligence (“DNI”) on down, recognizes that with secrecy inevitably come both suspicion and the possibility of abuse. I and

⁵ Obama, *supra* note 2.

many others in the Intelligence Community firmly believe that there would have been less public outcry from the leaks of the last year and a half if we had been more transparent about our activities beforehand. Indeed, as we have been able to release more information, it has helped to allay some of the mistaken impressions people have had about our intelligence activities.

And so we have committed ourselves to disclosing more information about our signals intelligence activities, when the public interest in disclosure outweighs the risk to national security from disclosure:

- We have declassified thousands of pages of court filings, opinions, procedures, compliance reports, congressional notifications and other documents.
- We have released summary statistics about our use of surveillance authorities, and have authorized providers to release aggregate information as well.
- Representatives of the Intelligence Community have appeared in numerous public forums—such as this one.
- We’ve also changed the way we disclose information to enable greater public access, by establishing *IContheRecord*, a tumblr account where we post declassified documents, official statements, and other materials.⁶
- Finally, we have developed and issued principles of transparency to apply to our intelligence activities going forward.

The transparency process will never move as quickly as we would like. Public interest declassification requires a meticulous review to ensure that we don’t inadvertently release information that needs to remain classified, and we have limited resources to devote to the task. The same people who review documents for discretionary declassification also have to review thousands of documents

⁶ IC ON THE RECORD, <http://icontherecord.tumblr.com/> (last visited May 15, 2015).

implicated by FOIA requests with judicial deadlines—and all this on top of their “day job” of actually working to keep us safe. But we recognize the importance of this task and are committed to continued greater transparency.

In general, our transparency efforts have focused, and will continue to focus, on enhancing the public’s overall understanding of the Intelligence Community’s mission and how we accomplish that mission, while continuing to protect specific targets of surveillance, specific means by which we conduct surveillance, specific partnerships, and specific intelligence we gather. It’s particularly important that we give the public greater insight into the laws and policies we operate under and how we interpret those authorities, into the limits we impose upon our activities, and into our oversight and compliance regime. I hope that our efforts at transparency will continue to demonstrate to the American people and the rest of the world that our signals intelligence activities are not arbitrary and are conducted responsibly and pursuant to law.

LIMITATIONS ON SURVEILLANCE

One persistent but mistaken charge in the wake of the leaks has been that our signals intelligence activity is overly broad, that it is not adequately overseen and is subject to abuse—in short, that NSA “collects whatever it wants.” This is and always has been a myth, but in addition to greater transparency we have taken a number of concrete steps to reassure the public that we conduct signals intelligence activity only within the scope of our legal authorities and applicable policy limits.

To begin with, in PPD-28, the President set out a number of important general principles that govern our signals intelligence activity:

- The collection of signals intelligence must be authorized by statute or Presidential authorization, and must be conducted in accordance with the Constitution and law.

- Privacy and civil liberties must be integral considerations in planning signals intelligence activities.
- Signals intelligence will be collected only when there is a valid foreign intelligence or counterintelligence purpose.
- We will not conduct signals intelligence activities for the purpose of suppressing criticism or dissent.
- We will not use signals intelligence to disadvantage people based on their ethnicity, race, gender, sexual orientation or religion.
- We will not use signals intelligence to afford a competitive commercial advantage to U.S. companies and business sectors.
- Our signals intelligence activity must always be as tailored as feasible, taking into account the availability of other sources of information.

The President also directed that we set up processes to ensure that we adhere to these restrictions, and that we have appropriate policy review of our signals intelligence collection. I want to spend a little time now talking about what these processes are—how we try to ensure that signals intelligence is only collected in appropriate circumstances. And you'll forgive me if I get a bit down into the weeds on this, but I think this is important for people to understand.

To begin with, neither NSA nor any other intelligence agency decides on its own what to collect. Each year, the President sets the nation's highest priorities for foreign intelligence collection after an extensive, formal interagency process. Moreover, as a result of PPD-28, the rest of our intelligence priorities are now also reviewed and approved through a high-level interagency policy process. Overall, this process ensures that all of our intelligence priorities are set by senior policymakers who are in the best position to identify our foreign intelligence requirements, and that those

policymakers take into account not only the potential value of the intelligence collection but also the risks of that collection, including the risks to privacy, national economic interests, and foreign relations.

The DNI then translates these priorities into the National Intelligence Priorities Framework, or “NIPF.” Our Intelligence Community Directive (“ICD”) about the NIPF, ICD 204, which incorporates the requirements of PPD-28, is publicly available on our website.⁷ And while the NIPF itself is classified, much of it is reflected annually in the DNI’s unclassified Worldwide Threat Assessment.

But the priorities in the NIPF are at a fairly high level of generality. They include topics such as the pursuit of nuclear and ballistic missile capabilities by particular foreign adversaries, the effects of drug cartel corruption in Mexico, and human rights abuses in specific countries. And they apply not just to signals intelligence, but to all intelligence activities. So how do the priorities in the NIPF get translated into actual signals intelligence collection?

The organization that is responsible for doing this is called the National Signals Intelligence Committee, or “SIGCOM.” (We have acronyms for everything.) It operates under the auspices of the Director of the NSA, who is designated by Executive Order 12333 as what we call the functional manager for signals intelligence, responsible for overseeing and coordinating signals intelligence across the Intelligence Community under the oversight of the Secretary of Defense and the DNI. The SIGCOM has representatives from all elements of the community and, as we fully implement PPD-28, also will have full representation from other departments and agencies with a policy interest in signals intelligence.

All departments and agencies that are consumers of intelligence submit their requests for collection to the SIGCOM. The

⁷ *Intelligence Community Directives*, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, <http://www.dni.gov/index.php/intelligence-community/ic-policies-reports/intelligence-community-directives> (last visited May 15, 2015).

SIGCOM reviews those requests, ensures that they are consistent with the NIPF, and assigns them priorities using criteria such as:

- Can SIGINT provide useful information in this case? Perhaps imagery or human sources are better or more cost-effective sources of information to address the requirement.
- How critical is this information need? If it is a high priority in the NIPF, it will most often be a high SIGINT priority.
- What type of SIGINT could be used? NSA collects three types of signals intelligence: collection against foreign weapons systems (known as “FISINT”), foreign communications (known as “COMINT”), and other foreign electronic signals such as radar (known as “ELINT”).
- Is the collection as tailored as feasible? Should there be time, focus, or other limitations?

And our signals intelligence requirements process also requires explicit consideration of other factors, namely:

- Is the target of the collection, or the methodology used to collect, particularly sensitive? If so, it will require review by senior policy makers.
- Will the collection present an unwarranted risk to privacy and civil liberties, regardless of nationality? And . . .
- Are additional dissemination and retention safeguards necessary to protect privacy or national security interests?

Finally, at the end of the process, a limited number of trained NSA personnel take the priorities validated by the SIGCOM and research and identify specific selection terms, such as telephone numbers or email addresses, that are expected to collect foreign intelligence responsive to these priorities. Any selector must be reviewed and approved by two persons before it is entered into NSA’s collection systems. Even then, however, whether and when actual collection takes place will depend in part on additional

considerations such as the availability of appropriate collection resources. And, of course, when collection is conducted pursuant to the Foreign Intelligence Surveillance Act, NSA and other agencies must follow additional restrictions approved by the court.

So that's how we ensure that signals intelligence collection targets reflect valid and important foreign intelligence needs. But, as is typically the case with our signals intelligence activities, we don't just set rules and processes at the front end; we also have mechanisms to ensure that we are complying with those rules and processes.

Cabinet officials are required to validate their SIGINT requirements each year.

NSA checks signals intelligence targets throughout the collection process to determine if they are actually providing valuable foreign intelligence responsive to the priorities, and will stop collection against targets that are not. In addition, all selection terms are reviewed by supervisors annually.

Based on a recommendation from the President's Review Group, the DNI has established a new mechanism to monitor the collection and dissemination of signals intelligence that is particularly sensitive because of the nature of the target or the means of collection, to ensure that it is consistent with the determinations of policymakers.

Finally, ODNI annually reviews the Intelligence Community's allocation of resources against the NIPF priorities and the intelligence mission as a whole. This review includes assessments of the value of all types of intelligence collection, including SIGINT, and looks both backward—how successful have we been in achieving our goals?—and forward—what will we need in the future?—and helps ensure that our SIGINT resources are applied to the most important national priorities.

The point I want to make with this perhaps excessively detailed description is that the Intelligence Community does not

decide on its own which conversations to listen to, nor does it try to collect everything. Its activities are focused on priorities set by policymakers, through a process that involves input from across the government, and that is overseen both within NSA and by the ODNI and Department of Defense. The processes put in place by PPD-28, which are described in the report we issued yesterday,⁸ have further strengthened this oversight to ensure that our signals intelligence activities are conducted for appropriate foreign intelligence purposes and with full consideration of the risks of collection as well as the benefits.

BULK COLLECTION

One of the principal concerns that has been raised both here and abroad is with bulk collection. Bulk collection is not the same thing as bulky collection; even a narrowly targeted collection program can collect a great deal of data. Rather, bulk collection generally refers to collection that is not targeted by the use of terms such as a person's phone number or email address.

We do bulk collection for a number of reasons, although like all of our intelligence activities it must always be for a valid foreign intelligence or counterintelligence purpose. In some circumstances, it may not be technically possible to target a specific person or selector. In other circumstances, we need to have a pool of relevant data to review as circumstances arise, data which might not otherwise be available because, for example, it would have been deleted or overwritten. In particular, we can use metadata that we collect in bulk to help identify targets for more intrusive surveillance. But because bulk collection is not targeted, it often involves the collection of information that is ultimately not of foreign intelligence value along with information that is, and it is therefore important that we regulate it appropriately.

We've taken a number of steps to provide appropriate and transparent limits on our bulk collection activities. First, agency procedures governing signals intelligence now explicitly provide that

⁸ ODNI REPORT, *supra* note 3.

collection should be targeted, rather than bulk, whenever practicable. Second, the President in PPD-28 required that when we do collect signals intelligence in bulk we can only use it for one of six enumerated purposes, which I can paraphrase as countering espionage and other threats from foreign powers, counterterrorism, counter-proliferation, cybersecurity, protecting our forces, and combating transnational criminal threats. We can't take information collected in bulk and trawl through it for any reason we please; we have to be able to confirm that we are using it for one of the six specified purposes. Agencies that have access to signals intelligence collected in bulk have incorporated these limitations in procedures governing their use of signals intelligence, which we released yesterday. This is not a meaningless step; it means that violations of those restrictions are subject to oversight and significant violations must be reported to the DNI.

Third, in PPD-28, the President directed my boss, the Director of National Intelligence, to study whether there were software-based solutions that could eliminate the need for bulk collection. The DNI commissioned a study from the National Academy of Sciences, which was conducted by a team of independent experts. They issued their report a few weeks ago, and it is publicly available.⁹ To summarize, they concluded that to the extent the goal of bulk collection is, as I said a moment ago, to enable us to look backwards when we discover new facts—for example, to see if a terrorist arrested overseas has ever been in contact with people in the United States—there are no software-based solutions available today that could accomplish that goal, but that we could explore ways to use technology to provide more effective limits and controls on the uses we make of bulk data and to more effectively target collection. I'll return to technology a bit later in my remarks. To be clear, this report doesn't purport to settle whether bulk collection is a good idea, or whether it is valuable; it simply concludes that present technology doesn't allow other, less intrusive ways of accomplishing the same goals we can achieve with bulk collection.

⁹ NAT'L RESEARCH COUNCIL, NAT'L ACADS., BULK COLLECTION OF SIGNALS INTELLIGENCE: TECHNICAL OPTIONS (2015), *available at* <http://www.nap.edu/catalog/19414/bulk-collection-of-signals-intelligence-technical-options>.

Finally, the President directed specific steps to address concerns about the bulk collection of telephone metadata pursuant to FISA court order under Section 215 of the USA PATRIOT Act. You'll recall that this was the program set up to fix a gap identified in the wake of 9/11, to provide a tool that can identify potential domestic confederates of foreign terrorists. I won't explain in detail this program and the extensive controls it operates under, because by now most of you are familiar with it, but there is a wealth of information about it available at *IContheRecord*.¹⁰

Some have claimed that this program is illegal or unconstitutional, though the vast majority of judges who have considered it to date have determined that it is lawful. People have also claimed that the program is useless because they say it's never stopped a terrorist plot. While we have provided examples where the program has proved valuable, I don't happen to think that the number of plots foiled is the only metric to assess it; it's more like an insurance policy, which provides valuable protection even though you may never have to file a claim. And because the program involves only metadata about communications and is subject to strict limitations and controls, the privacy concerns that it raises, while not non-existent, are far less substantial than if we were collecting the full content of those communications.

Even so, the President recognized the public concerns about this program and ordered that several steps be taken immediately to limit it. In particular, except in emergency situations, NSA must now obtain the FISA court's advance agreement that there is a reasonable articulable suspicion that a number being used to query the database is associated with specific foreign terrorist organizations. And the results that an analyst actually gets back from a query are now limited to numbers in direct contact with the query number and numbers in contact with those numbers—what we call “two hops” instead of three, as it used to be.

¹⁰ *Section 215 of the Foreign Intelligence Surveillance Act*, IC ON THE RECORD, <http://icontherecord.tumblr.com/topics/section-215> (last visited May 15, 2015).

Longer term, the President directed us to find a way to preserve the essential capabilities of this program without having the government hold the metadata in bulk. In furtherance of this direction, we worked extensively with Congress, on a bipartisan basis, and with privacy and civil liberties groups, on the USA FREEDOM Act. This was not a perfect bill. It went further than some proponents of national security would wish, and it did not go as far as some advocacy groups would wish. But it was the product of a series of compromises, and if enacted it would have accomplished the President's goal: it would have prohibited bulk collection under Section 215 and several other authorities, while authorizing a new mechanism that—based on telecommunications providers' current practice in retaining telephone metadata—would have preserved the essential capabilities of the existing program. Having invested a great deal of time in those negotiations, I was personally disappointed that the Senate failed by two votes to advance this bill, and with Section 215 sunseting on June 1 of this year, I hope that the Congress acts expeditiously to pass the USA FREEDOM Act or another bill that accomplishes the President's goal.

INCIDENTAL COLLECTION

A second set of concerns centered around the other program that was leaked, collection under Section 702 of the Foreign Intelligence Surveillance Act. Section 702 enables us to target non-U.S. persons located outside of the United States for foreign intelligence purposes with the compelled assistance of domestic communications service providers. Contrary to some claims, this is not bulk collection; all of the collection is based on identifiers, such as telephone numbers or email addresses, that we have reason to believe are being used by non-U.S. persons abroad to communicate or receive foreign intelligence information. Again, there is ample information about this program and how it operates on *IcontheRecord*.¹¹

¹¹ Section 702 of the Foreign Intelligence Surveillance Act, *IC ON THE RECORD*, <http://icontherecord.tumblr.com/topics/section-702> (last visited May 15, 2015).

Unlike the bulk telephone metadata program, no one really disagrees that Section 702 is an effective and important source of foreign intelligence information. Rather, the concerns about this statute, at least within the United States, have to do with the fact that even when we are targeting non-U.S. persons we are inevitably going to collect the communications of U.S. persons, either because U.S. persons are talking to the foreign targets, or, in some limited circumstances, because we cannot technically separate the communications we are looking for from others. This is called “incidental” collection because we aren’t targeting the U.S. persons, and I want to emphasize that when Congress passed Section 702 it fully understood that incidental collection would occur.

Some of this incidental collection may be important foreign intelligence information. To pick the most obvious example, if a foreign terrorist who we are targeting under Section 702 is giving instructions to a confederate in the U.S., we need to be able to identify that communication and follow up—even if we weren’t targeting the U.S. person herself. But people have asked: what are we allowed to do with communications that aren’t of foreign intelligence value but may be, for example, evidence of a crime? And to what extent should we be allowed to rummage through the database of communications we collect to look for communications of U.S. persons?

Part of the problem was that the general public didn’t know what the rules governing our activities under Section 702 were. And so we have declassified and released the CIA, FBI, and NSA procedures for minimizing the collection, retention, and dissemination of information about U.S. persons under Section 702.

But to address these concerns further, the President in his speech directed the Attorney General and the DNI to “institute reforms that place additional restrictions on government’s ability to retain, search, and use in criminal cases, communications between

Americans and foreign citizens incidentally collected under Section 702.”¹² We are doing so.

First, as the PCLOB recommended, agencies have new restrictions on their ability to look through 702 collection for information about U.S. persons. The agencies’ various rules are described in the report we issued yesterday.¹³ It’s important to note that different agencies in the Intelligence Community have been charged by Congress and the President with focusing on different intelligence activities. For example, NSA focuses on signals intelligence; CIA collects primarily human intelligence; and FBI has a domestic law enforcement focus. Because these agencies’ missions are different, their internal governance and their IT systems have developed differently from one another, and so the specifics of their procedures differ somewhat. But they will all ensure that information about U.S. persons incidentally collected pursuant to Section 702 is only made available to analysts and agents when appropriate.

Second, we have reaffirmed that intelligence agencies must delete communications acquired pursuant to Section 702 that are to, from, or about U.S. persons if the communications are determined to be of no foreign intelligence value, and we have strengthened oversight of this requirement.

Third, the Government will use information acquired under Section 702 as evidence against a person in a criminal case only in cases related to national security or for certain other enumerated serious crimes,¹⁴ and only when the Attorney General approves. In

¹² Obama, *supra* note 2.

¹³ ODNI REPORT, *supra* note 3.

¹⁴ In his remarks as delivered, Mr. Litt went on to describe the “enumerated serious crimes” for which the U.S. Government will use information acquired under Section 702 as evidence against a person. Under the new policy, in addition to any other limitations imposed by applicable law, including FISA, any communication to or from, or information about, a U.S. person acquired under Section 702 of FISA shall not be introduced as evidence against that U.S. person in any criminal proceeding except (1) with the prior approval of the Attorney General and (2) in (A) criminal proceedings related to national security (such as terrorism, proliferation, espionage, or cybersecurity) or (B) other prosecutions of crimes involving (i) death; (ii)

short, we have taken concrete steps to ensure that there are limits on our ability to identify and use information about U.S. persons that we incidentally collect under Section 702.

PROTECTION FOR NON-U.S. PERSONS

But one refrain that we often hear from some of our foreign partners is that our rules are focused only on protecting Americans, and that we ignore the legitimate privacy interests of other persons around the world. The fact that we have strong protections for the rights of our citizens is hardly surprising, and I'm not going to apologize for it. Indeed, the legal regimes of most if not all nations afford greater protection to their own citizens or residents than to foreigners abroad. Nonetheless, it was never true that the Intelligence Community had a sort of "open season" to spy on foreigners around the world; we have always been required to limit our activities to valid intelligence purposes, as I outlined above.

However, the President recognized that, given the power and scope of our signals intelligence activities, we need to do more to reassure the world that we treat "all persons . . . with dignity and respect, regardless of their nationality and where they might reside,"¹⁵ and that we provide appropriate protection for the "legitimate privacy interests [of all persons] in the handling of their personal information."¹⁶ And so Section 4 of PPD-28, which I think is an extraordinarily significant step, requires that we have express limits on the retention and dissemination of personal information about non-U.S. persons collected by signals intelligence, comparable to the limits we have for U.S. persons. These rules are incorporated into the agency procedures that we released yesterday, and into

kidnapping; (iii) substantial bodily harm; (iv) conduct that constitutes a criminal offense that is a specified offense against a minor as defined in 42 U.S.C. § 16911; (v) incapacitation or destruction of critical infrastructure as defined in 42 U.S.C.

§ 5195c(e); (vi) cybersecurity; (vii) transnational crimes; or (viii) human trafficking.

¹⁵ Obama, *supra* note 2.

¹⁶ *Id.*

another publicly available Intelligence Community Directive, ICD 203, governing analytic standards in reporting.¹⁷

With respect to retention, we now have explicit rules that require that personal information about non-U.S. persons that we collect through SIGINT must generally be deleted after five years unless comparable information about a U.S. person could be retained. And we have likewise prohibited the dissemination of personal information about non-U.S. persons unless comparable information about U.S. persons could be disseminated. In particular, “SIGINT information about the routine activities of a foreign person” would not be considered foreign intelligence that could be disseminated by virtue of that fact alone unless it is otherwise responsive to an authorized foreign intelligence requirement.

This last point in particular is, in my opinion, a big deal. Over the last year and a half, in defending our signals intelligence activity, we have repeatedly said that we protect personal information because we only disseminate valid foreign intelligence information. But many have expressed concerns that our limitations on dissemination are neither transparent nor enforceable. Moreover, people have noted that the definition of “foreign intelligence” includes information about “the capabilities, intentions, or activities of . . . foreign persons,” and have therefore questioned whether the foreign intelligence requirement imposed any meaningful limits to protect the privacy of foreign persons. The new procedures address this concern, by making clear that just because an Intelligence Community officer has signals intelligence information about a foreign person doesn’t mean she can disseminate it as foreign intelligence, unless there is some other basis to consider it foreign intelligence information.

In short, for the first time, we have instituted express and transparent requirements to take account of the privacy of people outside our nation in how we conduct some of our intelligence activities. These new protections are, I think, a demonstration of our

¹⁷ See *Intelligence Community Directives*, *supra* note 7.

nation's enduring commitment to respecting the personal privacy and human dignity of citizens of all countries.

OTHER ACTIVITIES/GOING FORWARD

There is much more that we have done but I am running short of time. The Administration has endorsed changes to the operation of the Foreign Intelligence Surveillance Court that were contained in the USA FREEDOM Act, not because the court is a rubber stamp as some charged—the documents we have released make clear that it is not—but in order to reassure the public. These include creation of a panel of lawyers who can advocate for privacy interests in appropriate cases, and continued declassification and release of significant court opinions. We are taking steps to limit the length of time that secrecy that can be imposed on recipients of National Security Letters. We are continuing to implement rules to protect Intelligence Community whistleblowers who report through proper channels. These steps are discussed more fully in the materials we released yesterday.

So where do we go from here? The President has directed that we report again in one year. In the interim, we will continue to implement the reforms that the President directed in PPD-28 and his speech. We will declassify and release more information, we will continue to institutionalize transparency, and we will continue our public dialogue on these issues. We will work with Congress to secure passage of the USA FREEDOM Act or something like it.

And I hope that we will be able to work together with industry to help us find better solutions to protect both privacy and national security. One of the many ways in which Snowden's leaks have damaged our national security is by driving a wedge between the government and providers and technology companies, so that some companies that formerly recognized that protecting our nation was a valuable and important public service now feel compelled to stand in opposition. I don't think that is healthy, because I think that American companies have a huge amount to contribute to how we protect both privacy and national security.

When people talk about technology and surveillance, they tend to talk either about how technology has enabled the Intelligence Community to do all sorts of scary things, or about how technology can protect you from the scary things that the Intelligence Community can do. But there's a third role that technology can play, and that is to provide protections and restrictions on the national security apparatus that can assure Americans, and people around the world, that we are respecting the appropriate limits on intelligence activities, while still protecting national security. This is where the genius and capabilities of American technology companies can provide invaluable assistance.

In this regard, I'd like to point you to the National Academy of Sciences report that I mentioned earlier.¹⁸ The last section of their report identified a number of areas where technology could help us target signals intelligence collection more effectively, and provide more robust, transparent and effective protections for privacy, including enforcing limitations on the use of data we collect. One challenge they mentioned is the spread of encryption, and in my view this is an important area where we should look to the private sector to provide solutions. And I should emphasize that I am speaking for myself here.

Encryption is a critical tool to protect privacy, to facilitate commerce, and to provide security, and the United States supports its use. At the same time, the increasing use of encryption that cannot be decrypted when we have the lawful authority to collect information risks allowing criminals, terrorists, hackers and other threats to escape detection. As President Obama recently said, "[i]f we get into a situation in which the technologies do not allow us at all to track someone that we're confident is a terrorist . . . that's a problem."¹⁹ I'm not a cryptographer, but I am an optimist: I believe that if our businesses and academics put their mind to it, they will find a solution that does not compromise the integrity of encryption

¹⁸ NAT'L RESEARCH COUNCIL, *supra* note 9.

¹⁹ President Barack Obama, Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference (Jan. 16, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/01/16/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint->.

technology but that enables both encryption to protect privacy and decryption under lawful authority to protect national security.

So with that plea for help, let me stop and take your questions.





VIOLATING THE CONSTITUTION AND
RISKING NATIONAL SECURITY:
HOW THE CHILDREN OF FOREIGN DIPLOMATS
BORN IN THE UNITED STATES BECOME U.S. CITIZENS IN
CONTRAVENTION OF THE FOURTEENTH AMENDMENT

Daniel Pines*

There are approximately 5,000 foreign diplomats and their spouses officially residing in the United States. Many of them give birth to children while serving here. The "Citizenship Clause" of the Fourteenth Amendment to the U.S. Constitution, as noted in numerous Supreme Court opinions, provides that children of foreign diplomats born in the United States are not entitled to U.S. citizenship. Nonetheless, most of those newborn children acquire citizenship because the U.S. government does not have a working mechanism in place to prevent it. This results not only in a flaunting of the Constitution (not to mention international law), but also poses a significant threat to national security. The diplomatic parents of these children are the official representatives of a foreign nation. Some of them are foreign spies. By dint of their profession, they have sworn fealty to a foreign nation, which is not necessarily a nation friendly to the United States. Nonetheless, their now-U.S. citizen children will eventually be able to sponsor their foreign representative parents for U.S. residency, which in turn can result in citizenship. Such status provides the parents with protection under the U.S. Constitution, allows them to reside in the United States, and

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permits them to enter and leave the United States at will. If these parents are spies, or even merely continue to be supportive of their home nation, we are giving both our allies and our enemies the keys to our castle. This Article will not only describe the problem, but also offer some simple, practical solutions to preclude activities that violate our most supreme law and threaten our nation.

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INTRODUCTION

The Fourteenth Amendment of the United States Constitution provides: “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States”¹ This “Citizenship Clause”² makes the United States fairly unusual in the manner in which it bestows citizenship. Most nations determine a newborn’s citizenship solely by the citizenship of its parents.³ Under the Citizenship Clause, however, the United States also grants citizenship based on birthplace—children born inside the United States or its territories are automatically U.S. citizens.

There is one exception: per the Citizenship Clause, the newborn child must also be “subject to the jurisdiction” of the United States. That phrase has created some controversy over the years. While questions concerning whether children born in the United States to American Indians and legal, foreign-national residents are considered “subject” to U.S. jurisdiction have since been resolved,⁴ many outspoken critics assert that the children of illegal aliens born in the United States should not be automatically granted U.S. citizenship, though the courts have thus far disagreed.⁵

What has never been in question is that the phrase “subject to the jurisdiction thereof” clearly and intentionally excludes foreign diplomats. The drafters of the Amendment, the Supreme Court, the U.S. government, and every serious scholar to have considered the matter have continuously and uniformly accepted that this provision precludes citizenship for children of foreign diplomats born in the United States.⁶ Yet, as a matter of practice, children born in this

¹ U.S. CONST. amend. XIV, § 1.

² Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 5 (2009) (noting this sentence of the Fourteenth Amendment is often referred to as the “Citizenship Clause”); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167, 170 (2007).

³ BLACK’S LAW DICTIONARY 941 (9th ed. 2009); William M. Stevens, Comment, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment’s Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 378 (2008) (“Most nations, including Mexico, regard the children born to their nationals living abroad to be citizens of their parent’s country.”).

⁴ See *infra* Part I.

⁵ See *infra* Parts I.A-C.

⁶ See *infra* Part I.D.

country to foreign diplomats are routinely afforded U.S. citizenship.⁷ Indeed, it appears to be the rare exception where such a child does not automatically become a U.S. citizen.⁸

One could put a positive spin on this development, arguing that providing such citizenship serves to co-opt foreign diplomats and their families, or at the very least allows them to join our American family. However, there are extremely serious concerns about granting citizenship to the children of foreign diplomats. Not only does this violate the U.S. Constitution, it also violates international law. In addition, it is unfair to the hundreds of thousands of other foreigners who go through the appropriate—and Constitutional—process to become U.S. citizens.

More concerning, the diplomatic parents of these children are, due to their profession, loyal to another nation, and not always one that is on friendly terms with the United States. Not only do these parents owe fealty to another country, but they are also expected to be amongst the most loyal the foreign nation has to offer. After all, their sovereign has enough faith in them to trust that they will effectively represent their country thousands of miles away. Further, many of these parents are actually foreign intelligence officers, assigned to the United States to spy on our government, companies, and populace.⁹ Granting citizenship to the children of these diplomats creates a U.S. national security problem, whether the parents are ordinary foreign representatives or serve some clandestine function. Once these citizen children reach adulthood, they will be able to sponsor their parents and other family members for U.S. residency and eventually U.S. citizenship, allowing those family members protection under U.S. law and the U.S. Constitution,

⁷ See *infra* Part II.

⁸ *Id.*

⁹ 22 U.S.C. § 254c-1(a) (2012) (acknowledging that there are foreign government officials in the United States who are engaged in intelligence activities and stating that their numbers “should not exceed the respective numbers, status, privileges and immunities, travel accommodations, and facilities within such country of official representatives of the United States to such country.”).

and giving such individuals the ability to enter and leave the United States almost at will.¹⁰

The granting of citizenship to children of foreign diplomats is not a nominal problem. There are approximately 5,000 foreign diplomats and their spouses in the United States.¹¹ The U.S. government does not keep official track of children of foreign diplomats,¹² which is in fact part of the problem. However, one scholar estimates that in 1995 there were 13,000 dependents of foreign diplomats in the United States.¹³ While many of these dependents were born outside the United States, large numbers of them were born in this country, and many more are born here every year.¹⁴ For example, as of late 2013, reports surfaced that 118 children of South Korean diplomats held American citizenship due to their being born in the United States during their parents' diplomatic tour.¹⁵ There are similar reports of a number of Pakistani diplomats obtaining U.S. citizenship for their children born in the United States, even though such practice violates not only our Constitution, but also an explicit ban by the Pakistani Foreign Office.¹⁶ And, of course, nothing prevents diplomats of countries antagonistic to the United States from bearing children in this country as well.

¹⁰ See *infra* Part III.E.

¹¹ *Diplomatic List*, U.S. DEP'T OF STATE, <http://www.state.gov/documents/organization/233875.pdf> (last visited Feb. 3, 2015).

¹² *Id.*

¹³ Michael B. McDonough, Note, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 487 n.75 (1997) (noting there were 18,000 people in the United States who could claim diplomatic immunity in 1995).

¹⁴ Peter Spiro, *Breaking: Children of Diplomats Getting US Citizenship!*, OPINIO JURIS (July 11, 2011, 1:41 PM), <http://opiniojuris.org/2011/07/11/breaking-children-of-diplomats-getting-us-citizenship/> (noting that there are dozens if not hundreds of newborns of diplomats being granted U.S. citizenship every year).

¹⁵ Chung Min-uck, *130 Diplomats' Children Hold Dual Citizenship*, KOREA TIMES (Oct. 10, 2013, 5:05 PM), http://www.koreatimes.co.kr/www/news/nation/2013/11/120_144108.html.

¹⁶ *Pakistani Diplomats get U.S. Nationality for Children*, PAKISTAN TODAY (Oct. 14, 2013), <http://www.pakistantoday.com.pk/2013/10/13/news/national/pakistani-diplomats-get-us-nationality-for-children/> [hereinafter *Pakistani Diplomats*].

Part I of this Article evaluates the Citizenship Clause of the Fourteenth Amendment, describing how the drafters, the courts, scholars, and the U.S. government have all determined that children of foreign nationals fall outside the provisions of the Citizenship Clause. Part II describes how newborn children of foreign diplomats nonetheless acquire U.S. citizenship due to gaps in the system. Part III depicts the serious concerns raised by this flaunting of the Citizenship Clause. Finally, Part IV offers a number of basic solutions to help resolve the problem. These include proposed mechanisms to prevent these children from acquiring U.S. citizenship in the first place, as well as procedures to strip away the citizenship status of those who have already become citizens in violation of the U.S. Constitution.

I. THE FOURTEENTH AMENDMENT SPECIFICALLY PRECLUDES
CITIZENSHIP FOR CHILDREN OF FOREIGN DIPLOMATS

The Fourteenth Amendment arose as a result of the Civil War.¹⁷ Prior to the war, only white persons born within the United States were considered U.S. citizens,¹⁸ a point driven home by the Supreme Court in 1857, with the now-vilified decision of *Dred Scott v. Sandford*.¹⁹ In *Dred Scott*, the Court held that all blacks in the United States, even free blacks, were not citizens of the United States, and a state could not make them citizens.²⁰ The Court further held that Congress could not prohibit the extension of slavery to new territories, and therefore invalidated the Missouri Compromise.²¹ Many Americans condemned the *Dred Scott* opinion almost immediately.²²

In 1865, after the conclusion of the Civil War, Congress enacted the Thirteenth Amendment, which the states quickly

¹⁷ *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 70 (1872).

¹⁸ *United States v. Wong Kim Ark*, 169 U.S. 649, 674-75 (1898).

¹⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

²⁰ *Id.* at 393-94.

²¹ *Id.* at 395-96.

²² *Slaughter-House Cases*, 83 U.S. at 73 (noting that the *Dred Scott* decision “met the condemnation of some of the ablest statesmen and constitutional lawyers of the country.”).

ratified.²³ This Amendment outlawed slavery and involuntary servitude, and gave Congress the power to enforce that prohibition via legislation.²⁴ However, a number of states in the South quickly adopted laws that sought to curb the effect of emancipation by limiting many of the civil rights of blacks in those states.²⁵ As the Supreme Court later described it in the famous *Slaughterhouse Cases*, such legislation “imposed upon [black Americans] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value”²⁶

The U.S. Congress responded by enacting the first civil rights law, the Civil Rights Act of 1866.²⁷ The purpose of the Act was twofold: to overrule the *Dred Scott* decision by making it clear that blacks were both federal and state citizens, and to guarantee that black citizens were given the same civil rights as white citizens.²⁸ Congress based its authority to pass the Civil Rights Act on the provisions of the Thirteenth Amendment.²⁹ Nonetheless, President Andrew Johnson vetoed the Act, claiming that it exceeded the Amendment’s provisions.

Congress easily overruled President Johnson’s veto and went a step further, proposing the Fourteenth Amendment to constitutionalize the Civil Rights Act.³⁰ This would not only ensure that Congress had the authority to pass such civil rights legislation, but would also protect the key provisions of the Act from being repealed by a later Congress.³¹ As the Supreme Court later noted, the purpose of the Fourteenth Amendment was “to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to

²³ Graglia, *supra* note 2, at 6.

²⁴ U.S. CONST. amend. XIII.

²⁵ Graglia, *supra* note 2, at 6.

²⁶ *Slaughter-House Cases*, 83 U.S. at 70.

²⁷ Graglia, *supra* note 2, at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 6-7; *Slaughter-House Cases*, 83 U.S. at 70-71.

³¹ Graglia, *supra* note 2, at 7; *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898).

any alien power, should be citizens of the United States and of the State in which they reside.”³² The Fourteenth Amendment was ratified in 1868.³³

The first section of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁴

The italicized sentence in the section, appropriately known as the Citizenship Clause,³⁵ lays out the two requirements for U.S. citizenship. The first requirement is that the individual must have been born (or naturalized) in the United States.³⁶ This requirement differs significantly from most other countries.³⁷ Most nations follow the principle of *jus sanguinis*, i.e., that a child’s citizenship is determined by the citizenship of his or her parents.³⁸ The United States, through the Fourteenth Amendment, adheres not only to *jus sanguinis*, but also to the principle of *jus soli*, namely that a child’s citizenship is based on his or her place of birth.³⁹ Therefore, any child born in the United States is considered a U.S. citizen, so long as

³² *Elk v. Wilkins*, 112 U.S. 94, 101 (1884).

³³ *Wong Kim Ark*, 169 U.S. at 675.

³⁴ U.S. CONST. amend. XIV, § 1 (emphasis added).

³⁵ *Id.*

³⁶ *Id.*

³⁷ BLACK’S LAW DICTIONARY 941 (9th ed. 2009).

³⁸ *Id.*; Stevens, *supra* note 3, at 378 (“Most nations, including Mexico, regard the children born to their nationals living abroad to be citizens of their parent’s country.”).

³⁹ 7 FOREIGN AFFAIRS MANUAL (FAM) 111(a)(1) (2013); BLACK’S LAW DICTIONARY 942 (9th ed. 2009). The United States also follows *jus sanguinis* to a limited degree, permitting children born abroad to U.S. citizen parents to seek U.S. citizenship. Stevens, *supra* note 3, at 354.

he or she fulfills the second requirement—being “subject to the jurisdiction” of the United States at the time of birth.⁴⁰

This second requirement of the Citizenship Clause has led to serious debate amongst scholars and the courts. The problem begins with the fact that, as the U.S. Supreme Court has noted, “[t]he Constitution nowhere defines the meaning of these words, either by way of inclusion or exclusion.”⁴¹ Concurrent and subsequent statutory law similarly provides no guidance.⁴² Additionally, as discussed below, the legislative history behind the Amendment is muddled at best. Thus, in the almost 150 years since ratification of the Amendment, court cases and scholarly writings have sought to determine whether certain categories of children—those of American Indians, foreign nationals, illegal aliens, and, of primary interest to this Article, foreign diplomats—are “subject to the jurisdiction” of the United States and therefore U.S. citizens if born in this country.

A. *American Indians*

When Congress originally proposed the language for the Citizenship Clause, it considered the issue of whether the children of American Indians born in the United States were U.S. citizens. Indeed, an amendment was offered at that time to change the proposed language of the Citizenship Clause to read: “All persons born in the United States, and subject to the jurisdiction thereof, *excluding Indians not taxed*, are citizens of the United States and of the States wherein they reside.”⁴³ This instigated a heated congressional debate as to what the term “excluding Indians not taxed” meant and whether it was necessary.⁴⁴ In the end, the proposed amendment was defeated on the ground that it was redundant, as American Indians were considered members of a foreign nation and therefore clearly not intended to be U.S. citizens.⁴⁵

⁴⁰ U.S. CONST. amend. XIV, § 1.

⁴¹ *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

⁴² *Graglia*, *supra* note 2, at 5.

⁴³ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

⁴⁴ *Id.* at 2890-97.

⁴⁵ *Id.* at 2897.

The issue came before the Supreme Court in 1884, in the case of *Elk v. Wilkins*.⁴⁶ John Elk, an American Indian who claimed that he had severed his tribal affiliation, was denied the right to vote in Nebraska under the theory that he was not a U.S. citizen under the Fourteenth Amendment.⁴⁷ The Supreme Court agreed. The Court determined that Indian tribes, though falling within the territorial limits of the United States, were considered alien nations, with whom the United States dealt via treaty or special acts of Congress.⁴⁸ They were not taxed by the United States, general acts of Congress did not apply to them unless specifically intended, and they owed their immediate allegiance to their tribe, not to the United States.⁴⁹ The Court also noted that, since ratification of the Fourteenth Amendment, Congress had passed several acts of legislation providing naturalization of certain Indian tribes, which would be superfluous if American Indians were already U.S. citizens.⁵⁰ Thus, the Court held that American Indians “not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being ‘naturalized in the United States,’ by or under some treaty or statute.”⁵¹

The Supreme Court upheld this conclusion fourteen years later in *United States v. Wong Kim Ark*,⁵² a case involving children of foreign nationals. As the Court noted in *Wong Kim Ark*, the phrase “subject to the jurisdiction thereof” in the Citizenship Clause was meant to exclude “children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law.”⁵³

This position remained in effect for decades. Finally, to overcome this interpretation of the Citizenship Clause and the Supreme Court precedent, Congress passed the Indian Citizenship

⁴⁶ *Elk v. Wilkins*, 112 U.S. 94, 94-96 (1884).

⁴⁷ *Id.*

⁴⁸ *Id.* at 98-100.

⁴⁹ *Id.* at 99-102.

⁵⁰ *Id.* at 104.

⁵¹ *Elk*, 112 U.S. at 103.

⁵² See generally *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁵³ *Id.* at 682.

Act of 1924.⁵⁴ It granted citizenship to all children of American Indians born inside the United States.⁵⁵

B. Foreign Nationals

The legislative history of the Fourteenth Amendment also contained debate about whether the children of foreign nationals, and in particular Gypsies and Chinese nationals for some reason, would be considered U.S. citizens if born in this country.⁵⁶ Though the drafters of the Citizenship Clause never came to a final conclusion on this topic,⁵⁷ the Supreme Court resolved this issue decisively in 1898 in the *Wong Kim Ark* decision,⁵⁸ referenced above.⁵⁹ Wong Kim Ark was born in San Francisco to parents who were U.S. residents of Chinese descent. When he was about 21 years old, Wong Kim Ark went on a temporary visit to China. Upon his return to the United States, he was denied entry on the grounds that he was not considered a U.S. citizen due to his parents' foreign nationality.⁶⁰ Relying on a historical analysis of the Fourteenth Amendment—including an assessment of British law, legislative history, the *Elk v. Wilkins* case, and other precedent—the Court concluded that the Citizenship Clause intended to grant U.S. citizenship to all persons born in the United States, whether children of Chinese nationals or any other nationality.⁶¹ As the Court noted, the entire purpose of the Fourteenth Amendment was to preclude discrimination based on race or nationality: “[T]he opening words [of the Citizenship Clause], ‘All persons born,’ are general, not to say

⁵⁴ Indian Citizenship Act of 1924, ch. 233, 43 Stat. 233.

⁵⁵ *Id.*; see also 8 U.S.C. § 1401(b) (2012) (“The following shall be nationals and citizens of the United States at birth . . . (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property . . .”).

⁵⁶ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2891-92 (1866).

⁵⁷ *Id.* at 2890-97.

⁵⁸ *Wong Kim Ark*, 169 U.S. 649.

⁵⁹ See *supra* text accompanying notes 48-49.

⁶⁰ *Wong Kim Ark*, 169 U.S. at 653.

⁶¹ *Id.* at 675-76, 682, 688.

universal, restricted only by place and jurisdiction, and not by color or race”⁶²

At least one critic has questioned whether this is an appropriate result in the wake of 9/11.⁶³ This critic has pointed to the fact that Yaser Hussen Hamdi, who became a militant with the Taliban before being captured and sent to Guantanamo Bay, is considered a U.S. citizen due to the fact that he was born in the United States to Saudi parents who were only temporarily residing here.⁶⁴ This critic suggests that the framers of the Fourteenth Amendment never intended to have U.S. citizenship granted to foreign national enemies of the state, such as Hamdi.⁶⁵ Nonetheless, when Hamdi filed suit against the United States over his detention at Guantanamo Bay, the Supreme Court treated him as a U.S. citizen due to his birth in the United States.⁶⁶

C. *Illegal Aliens*

The most extensive debate over the Citizenship Clause has been related to children born inside the United States to illegal or undocumented aliens.⁶⁷ A number of scholars have asserted that the phrase “subject to the jurisdiction thereof” should preclude such children from acquiring U.S. citizenship because their parents, as illegal aliens, are not “subject” to the jurisdiction of the United States, and the U.S. government has not consented to their residence in the United States.⁶⁸ These scholars note that in 1868, when the Fourteenth Amendment was ratified, neither Congress nor the states

⁶² *Id.* at 676.

⁶³ *See generally* Eastman, *supra* note 2.

⁶⁴ *Id.* at 168-69.

⁶⁵ *Id.* at 177-78.

⁶⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (“The threshold question before us is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”).

⁶⁷ Jon Feere, *Birthright Citizenship for Children of Foreign Diplomats?*, CTR. FOR IMMIGRATION STUDIES (July 2011), <http://www.cis.org/sites/cis.org/files/articles/2011/birthright-diplomats.pdf>.

⁶⁸ *See generally* Graglia, *supra* note 2; Stevens, *supra* note 3; *Citizenship Reform Act of 1997, Hearing on H.R. 7 Before the Subcomm. on Immigration and Claims of the H. Comm on the Judiciary*, 105th Cong. 53-56 (1997) (statement of Edward J. Erler, Professor of Political Sci., Cal. State Univ. at San Bernardino).

had illegal immigrants in mind.⁶⁹ This is because the concept of an “illegal” alien did not then exist in the United States as there were no restrictions on immigration to the United States in the mid-nineteenth century.⁷⁰ These scholars assert that, had Congress and the individual states considered illegal immigration at the time, they would not have extended citizenship to children of such immigrants.⁷¹ Pointing to legislative history, these scholars note that the principle authors of the relevant sections of the Citizenship Clause of the Fourteenth Amendment interpreted “subject to the jurisdiction thereof” to mean subject to the “complete” jurisdiction of the United States, and illegal immigrants are not subject solely to U.S. jurisdiction.⁷²

The problem with this argument is that it would exclude citizenship not just of illegal aliens, but of many others as well. As these scholars themselves note, it would exclude the children born to U.S. Lawful Permanent Residents (“LPR”) from automatically being granted U.S. citizenship, as LPRs are not subject solely to U.S. jurisdiction, but also usually to the jurisdiction of their home country.⁷³ Children of dual citizens might also be precluded if the parent’s foreign nation could exert some jurisdictional claim over the child, especially in a situation where the child sought dual citizenship as well. As noted in Part I(B) above, the Supreme Court has already clearly found that children of legal residents born in the United States are U.S. citizens.

The Court has made a similar determination with regard to the children of illegal aliens, though only in dicta. In 1982, the Court evaluated a Texas statute that effectively precluded public school education for illegal aliens.⁷⁴ In declaring that statute to be in violation of the Equal Protection Clause of the Fourteenth Amendment, the Court noted in a footnote the holding in *Wong Kim Ark* that children born to lawful aliens in the United States were

⁶⁹ Graglia, *supra* note 2, at 5-6.

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 5-6.

⁷² See *id.* at 7; Stevens, *supra* note 3, at 369-70.

⁷³ Graglia, *supra* note 2, at 7.

⁷⁴ See *Plyler v. Doe*, 457 U.S. 202 (1982).

deemed U.S. citizens, and found no reason that the logic of *Wong Kim Ark* should not be extended to illegal aliens as well.⁷⁵ As the Court noted:

[G]iven the historical emphasis [of the Citizenship Clause] on geographic territoriality, bounded only, if at all, by the principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.⁷⁶

Based on this analysis, even the scholars who object to citizenship for children born in the United States to illegal aliens accept that such is the current law of the land.⁷⁷ The U.S. government has similarly accepted this principle. As the State Department’s Foreign Affairs Manual (“FAM”) provides: “All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth.”⁷⁸

The impact of this interpretation of the Citizenship Clause is fairly significant. Policy-wise, it has been noted that this has created a concerning paradox—at a time when the United States has devoted extraordinary resources and focus on preventing illegal immigration, our laws have nonetheless created an enormous incentive for such immigration: namely, U.S. citizenship for the children of such immigrants born in the United States.⁷⁹ As one critic has stated, “It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry.”⁸⁰

⁷⁵ *Id.* at 211 n.10.

⁷⁶ *Id.*

⁷⁷ Graglia, *supra* note 2, at 11, 13-14; Eastman, *supra* note 2, at 178-79.

⁷⁸ 7 FAM 1117(d) (2013).

⁷⁹ Graglia, *supra* note 2, at 2; Stevens, *supra* note 3, at 346-47.

⁸⁰ Graglia, *supra* note 2, at 4.

This is not merely a theoretical concern. It is estimated that more than half of all births in Los Angeles, and almost 10 percent of all births in the United States, are to mothers who are inside the United States illegally.⁸¹ Many of these mothers have admitted that they entered the United States illegally for the sole purpose of having their child born here and thus automatically become a U.S. citizen.⁸²

Such citizenship benefits not just the newborn, but the entire family. While the U.S. government can technically deport illegal immigrants even after such immigrants have given birth in the United States, immigration judges tend not to do so. In such cases, judges typically claim that deportation of the family could deprive the child of the benefits of U.S. citizenship and thus create an “extreme hardship,” one of the bases for precluding deportation.⁸³ In addition, even if the family is deported or leaves the United States, the child as a U.S. citizen is always able to return to visit or reside.⁸⁴ Upon adulthood, if the child establishes permanent residency in the United States, he or she can also sponsor his or her once-illegal alien parents for permanent residence in the United States.⁸⁵ The parents are generally then admitted into the U.S. without regard for the usual quota limits.⁸⁶ The parents also receive the welfare and other benefits that the United States bestows on U.S. citizen children, such as that provided under the Aid to Families with Dependent Children Act (“AFDCA”).⁸⁷ One court has even stated that the U.S. government is

⁸¹ *Id.* at 2-3.

⁸² *Id.* at 3; *see also* *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring) (noting that it is estimated that 165,000 babies are born in the United States to illegal aliens and others who come to the United States solely for the purpose of giving birth to a U.S. citizen).

⁸³ Graglia, *supra* note 2, at 3. It is also worth noting that President Obama’s recent executive action on immigration will provide a legal reprieve for the undocumented parents of U.S. citizens and LPRs who have resided in the United States for at least five years. Max Ehrenfreund, *Wonkblog: Your Complete Guide to Obama’s Immigration Executive Action*, WASH. POST (Nov. 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/>.

⁸⁴ Graglia, *supra* note 2, at 3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

required to extend the benefits of the AFDCA to the siblings of U.S. citizen children.⁸⁸

D. Children of Foreign Diplomats

While, as noted above, there has been significant debate over the years whether the children of American Indians, lawful foreign national residents, and illegal aliens born in the United States are U.S. citizens, no such debate has arisen with regard to children of foreign diplomats. As one commentator describes it, “no serious scholar or immigration advocacy organization has argued that children born to foreign diplomats should be granted citizenship.”⁸⁹ The main reason is that foreign diplomats are considered extensions of their home sovereign.⁹⁰ As the Supreme Court has articulated, granting the children of foreign diplomats U.S. citizenship would mean that the diplomat “would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.”⁹¹

Indeed, the framers of the Fourteenth Amendment, while in dispute about whether the Citizenship Clause should apply to American Indians and foreign nationals, appear to have been unanimous with regard to children of foreign diplomats. As Senator Jacob Howard, one of the principal authors of the Citizenship Clause, proclaimed when moving it to the floor of the Senate, the Clause would not provide citizenship to those “who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States.”⁹² In the debate over the Citizenship Clause that followed, no member of Congress suggested otherwise.⁹³

The Supreme Court has continuously upheld this premise, noting that even before enactment of the Fourteenth Amendment, “it

⁸⁸ *Id.* (citing *Darces v. Woods*, 679 P.2d 458, 465 (Cal. 1984)).

⁸⁹ Feere, *supra* note 67, at 5.

⁹⁰ *United States v. Wong Kim Ark*, 169 U.S. 649, 684-85 (1898).

⁹¹ *Id.* at 685 (quoting *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812)).

⁹² CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

⁹³ *Id.* at 2890-97.

is beyond doubt” that children of foreign diplomats born in the United States were not considered citizens.⁹⁴ The Fourteenth Amendment merely codified that principle. In the *Slaughterhouse Cases*, just seven years after ratification of the Fourteenth Amendment, the Supreme Court noted:

The first observation we have to make on [the Citizenship Clause of the Fourteenth Amendment] is, that it puts to rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, ‘subject to its jurisdiction,’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.⁹⁵

Even in the cases subsequent to the *Slaughterhouse Cases*, cited in the sub-parts above, where the Supreme Court evaluated whether American Indians, children of foreign nationals, and illegal aliens born in the United States were or were not U.S. citizens, the Court constantly recognized that children born of diplomats were to be excluded. In *Elk v. Wilkins*, the Court held that American Indians, owing their allegiance to their tribes, should not be U.S. citizens, just like the “children born within the United States, of ambassadors or other public ministers of foreign nations.”⁹⁶ *Wong Kim Ark* emphasized that the phrase “and subject to the jurisdiction thereof” was clearly meant to preclude “children of diplomatic representatives of foreign State” from citizenship.⁹⁷ As the *Wong Kim Ark* Court noted: “The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . including all children here born of resident aliens, with

⁹⁴ *Wong Kim Ark*, 169 U.S. at 674-75.

⁹⁵ *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 73 (1873) (emphasis in original).

⁹⁶ *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

⁹⁷ *Wong Kim Ark*, 169 U.S. at 682.

the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers”⁹⁸

More recent lower court opinions have continued to affirm this principle. For example, in *Raya v. Clinton*, a district court in Virginia considered the case of Amany Mohamed Raya, who was born in 1981 at Walter Reed Army Medical Center in Washington, D.C.⁹⁹ At the time of her birth, her father was the Administrative Attaché at the Embassy of the Arab Republic of Egypt in the United States.¹⁰⁰ Twenty-three years later, Ms. Raya sought a U.S. passport, claiming that she was a U.S. citizen due to her being born in the United States.¹⁰¹ After the U.S. State Department refused to issue her a passport, she pressed her claim in federal district court.¹⁰² The District Court in the Western District of Virginia agreed with the State Department, concluding that because Ms. Raya’s father was a diplomat on the date that she was born, Ms. Raya was not a U.S. citizen and therefore not entitled to a U.S. passport.¹⁰³

Government regulations mirror this conclusion. For example, regulations issued by the Department of Homeland Security and the Department of Justice’s Executive Office for Immigration Review provide: “A person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is not subject to the jurisdiction of the United States. That person is not a United States citizen under the Fourteenth Amendment to the Constitution.”¹⁰⁴ The U.S. Citizenship and Immigration Services website provides similar guidance.¹⁰⁵

⁹⁸ *Id.* at 693.

⁹⁹ *Raya v. Clinton*, 703 F. Supp. 2d 569, 571 (W.D.Va. 2010).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 571-72.

¹⁰³ *Id.* at 578-79.

¹⁰⁴ 8 C.F.R. § 101.3(a)(1) (2013).

¹⁰⁵ U.S. CITIZENSHIP & IMMIGR. SERVICES, GREEN CARD FOR A PERSON BORN IN THE UNITED STATES TO A FOREIGN DIPLOMAT (Mar. 23, 2011) [hereinafter GREEN CARD], available at <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-person-born-foreign-diplomat-united-states/green-card-person-born-united->

The only suggestion anywhere that perhaps children of foreign diplomats might have a possible legal claim to U.S. citizenship comes, interestingly enough, from the U.S. State Department. As recently as the mid-1990s, the State Department firmly asserted in its FAM that “children born in the United States to diplomats to the United States are not subject to U.S. jurisdiction and do not acquire U.S. citizenship under the 14th Amendment or the laws derived from it.”¹⁰⁶ This echoes a statement from 1871, when then-Secretary of State Hamilton Fish asserted that the term “‘and subject to the jurisdiction thereof,’ was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality.”¹⁰⁷ Within the past few years, however, the once-clear statement in the State Department’s FAM regulations has been replaced with the following, much murkier guidance:

‘Blue List’ Cases – Children of Foreign Diplomats: 7 FAM 1100 Appendix J (under development) provides extensive guidance on the issue of children born in the United States to parents serving as foreign diplomats, consuls, or administrative and technical staff accredited to the United States, the United Nations, and specific international organizations, and whether such children are born ‘subject to the jurisdiction of the United States.’¹⁰⁸

As the citation suggests, the denoted “Appendix J” does not yet exist, and thus there is none of the promised “extensive guidance” on how to deal with children of foreign diplomats. In fact, Appendix

states-foreign-diplomat (“A person born in the United States to a foreign diplomatic officer accredited to the United States is not subject to the jurisdiction of United States law. Therefore, that person cannot be considered a U.S. citizen at birth under the 14th Amendment to the United States Constitution.”).

¹⁰⁶ 7 FAM 1116.2-2 (1995).

¹⁰⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 689-90 (1898) (quoting a letter from then-Secretary of State Fish to then-American Minister to Italy Marsh).

¹⁰⁸ 7 FAM 1111(d)(3) (2013).

J has been under development since at least 2011,¹⁰⁹ and has yet to materialize.¹¹⁰

Nonetheless, this lack of specificity from the State Department regulations is an outlier, and may prove to be nothing more than a bureaucratic place-marker while the State Department decides what language to use in its Appendix J. It is difficult to envision how the State Department would undermine the U.S. Constitution, clear legislative history, unanimous Supreme Court precedent stretching over 150 years, and uniform scholarly assessment to determine that children of foreign diplomats born in the United States are in fact entitled to citizenship.

II. HOW CHILDREN OF FOREIGN DIPLOMATS ROUTINELY ACQUIRE U.S. CITIZENSHIP IN VIOLATION OF THE FOURTEENTH AMENDMENT

With such clear and virtually uniform guidance that children of foreign nationals born in the United States are not U.S. citizens, why do such children nonetheless acquire such status as a matter of course? The reason is that children of foreign diplomats who are born in the United States are routinely given U.S. birth certificates upon birth, and shortly afterwards apply for and are provided Social Security numbers (“SSNs”).¹¹¹ This is due to the current, quirky process surrounding births in the United States.

To begin with, there are no federal requirements for hospitals to ask new parents if they are foreign diplomats.¹¹² State agencies do not typically impose such requirements on hospitals either.¹¹³ Because the general rule in the United States is that anyone born here is automatically a U.S. citizen, hospitals presume that all

¹⁰⁹ Feere, *supra* note 67 (asserting that the State Department was expecting to publish Appendix J by the end of 2011).

¹¹⁰ See generally 7 FAM 1100 *et seq.*

¹¹¹ Feere, *supra* note 67, at 1, 3.

¹¹² *Id.* at 3.

¹¹³ *Id.*

newborns fall within this ambit and issue U.S. birth certificates to anyone born in their hospital.¹¹⁴

Indeed, a senior obstetrician at a major hospital in Washington, D.C. recently described the current practice to the author. Despite the large presence of diplomats in the D.C. area, neither this obstetrician nor, to the best of his knowledge, any other doctor in his hospital inquires of the parent(s) of a newborn whether either parent is a foreign diplomat. In fact, this senior physician was not even aware that children of foreign diplomats were precluded from U.S. citizenship, believing instead that anyone born in a U.S. hospital is automatically a U.S. citizen.¹¹⁵

While the burden in this area perhaps should not be borne by doctors and other hospital staff, alternate mechanisms are not in place to resolve the problem. The forms parents fill out at U.S. hospitals in order to acquire birth certificates for their newborn children provide no solution. Though each state has its own form, most states use the standard form created by the National Center for Health Statistics (“NCHS”), Division of Vital Statistics, which is the federal agency responsible for seeking to standardize birth certificate issuance.¹¹⁶ The standard NCHS form does not ask whether either parent is a foreign diplomat.¹¹⁷ Indeed, it does not request any information about the occupations of the parents,¹¹⁸ apparently due to the belief that several states would not have the funds to code such

¹¹⁴ *Id.* at 1, 3.

¹¹⁵ Interview with a senior obstetrician at a major Washington, D.C. hospital (notes on file with author).

¹¹⁶ See *Birth Data*, CTR. FOR DISEASE CONTROL & PREVENTION [hereinafter *Birth Data*], <http://www.cdc.gov/nchs/births.htm> (last visited Feb. 2, 2015).

¹¹⁷ See *U.S. Standard Certificate of Live Birth*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/data/dvs/birth11-03final-acc.pdf> (last visited Feb. 2, 2015); see also *2003 Revisions of the U.S. Standard Certificates of Live Birth and Death and the Fetal Death Report*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/vital_certificate_revisions.htm (last visited Feb. 2, 2015) [hereinafter *Standard Certificate*] (standard certificates are typically updated and revised every 10-15 years; the 2003 version is the most recent, replacing the 1989 version).

¹¹⁸ *Standard Certificate*, *supra* note 117.

information.¹¹⁹ A number of individual state forms do request the parents' occupation, but permit parents to leave that section blank and the state will still issue the birth certificate.¹²⁰ Even if a parent were to indicate on the form that he or she was a "diplomat," there is no indication that the child would be denied a birth certificate.¹²¹ Indeed, current State Department policy appears to be that all children born in the United States, including children of diplomats, are entitled to U.S. birth certificates.¹²² The U.S. government considers a U.S. birth certificate to be sufficient proof of U.S. citizenship.¹²³

Once a child has been born in the United States, the relevant state or the child's parents send the child's information to the Social Security Administration ("SSA"), which is responsible for issuing SSNs.¹²⁴ Akin to the birth certificate form,¹²⁵ the SSN form does not ask whether either parent is a foreign diplomat.¹²⁶ Though the SSA recognizes that children of diplomats are not entitled to SSNs, it

¹¹⁹ *Report: Children of Foreign Diplomats Enjoy U.S. "Super Citizen" Status*, FOXNEWS.COM (July 11, 2011), <http://www.foxnews.com/politics/2011/07/11/children-foreign-diplomats-enjoying-us-super-citizen-status-says-report/> [hereinafter *Super Citizen*].

¹²⁰ Feere, *supra* note 67, at 3.

¹²¹ *Id.*

¹²² *Id.* at 5 (noting that in an e-mail response to the author, the State Department asserted that even children born to foreign diplomats "are entitled to [U.S.] birth certificates"); *Super Citizen*, *supra* note 120 (noting that a State Department spokesperson told the news station, "Persons born in the United States, including a child of foreign diplomats, are legally entitled to an official birth record issued by the Bureau of Vital Statistics of the state in which the child is born."); 7 FAM 1110 (2014) (noting that all persons born in the United States are entitled to a U.S. birth certificate, and not indicating any exceptions to include children of foreign diplomats).

¹²³ *Proof of U.S. Citizenship and Identification When Applying for a Job*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 3, 2010), <http://www.uscis.gov/us-citizenship/proof-us-citizenship-and-identification-when-applying-job> [hereinafter *Proof of U.S. Citizenship*], (noting "[y]our birth certificate provides proof of citizenship").

¹²⁴ Feere, *supra* note 67, at 3-4; *Learn What Documents You Need to Get a Social Security Card*, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/ssnumber/ss5doc.htm> (last visited Feb. 2, 2015).

¹²⁵ *See Standard Certificate*, *supra* note 117.

¹²⁶ *See* U.S. SOC. SEC. ADMIN., APPLICATION FOR A SOCIAL SECURITY CARD (FORM SS-5) (Aug. 2011), available at <http://www.ssa.gov/online/ss-5.pdf>.

typically issues SSNs to anyone who has a valid birth certificate because it has no mechanism in place to investigate whether requests for new SSNs are for children of foreign diplomats.¹²⁷ While possession of an SSN does not designate U.S. citizenship status, it does provide considerable benefits to its holders, as it is required in order to get a job in the United States, collect social security, and receive other government benefits, and often is necessary to open U.S. bank accounts or acquire a U.S. credit card.¹²⁸

Admittedly, the State Department does maintain a list of all foreign diplomats and their spouses inside the United States.¹²⁹ Known as the “Blue List,”¹³⁰ this list of diplomats is updated quarterly and is available online for state government agencies, the SSA, and the general public to peruse.¹³¹ However, even with the list available online, it is extremely difficult for state government agencies in charge of issuing birth certificates or the SSA to cross-check with a birth certificate or SSN request for a given child. To begin with, the list is quite lengthy: the Winter 2013 version of the Blue List, for example, runs 104 pages long and is dual columned.¹³² Given that almost four million children are born inside the United States each year,¹³³ this creates an extremely labor-intensive cross-checking issue. This is made even more difficult by the fact that the Blue List is apparently not in an easily searchable format for the SSA’s computer system,¹³⁴ and probably not compatible with state agencies’ systems either.

More importantly, a match in names would not be conclusive, or even particularly useful. Many names on the

¹²⁷ Feere, *supra* note 67, at 3.

¹²⁸ U.S. SOC. SEC. ADMIN., YOUR SOCIAL SECURITY NUMBER AND CARD (Oct. 2013), available at <http://www.ssa.gov/pubs/EN-05-10002.pdf>.

¹²⁹ *Diplomatic List*, *supra* note 11.

¹³⁰ GREEN CARD, *supra* note 105 (describing the State Department’s Diplomatic List as the “Blue List”); 7 FAM 1111(d)(3) (2013) (describing the list of diplomats in the United States as the “Blue List”).

¹³¹ *Diplomatic List*, *supra* note 11.

¹³² *Diplomatic List*, U.S. DEP’T OF STATE (Winter 2013), <http://www.state.gov/documents/organization/205353.pdf>.

¹³³ *Birth Data*, *supra* note 111.

¹³⁴ Feere, *supra* note 67.

diplomatic list are common; a match of names would hardly be definitive proof that the parent was a diplomat, and it would take extensive effort to try to weed out all the “false positives.” Further, a foreign diplomat parent might not give the same name to the hospital, or on the birth certificate form, that is listed on the Blue List. While this may be an intentional mechanism to deceive, it may also be entirely innocent. Many foreign nationals go by several names, or nicknames, or just have a different approach to “first” and “last” names than Americans.¹³⁵ In addition, even if a child of a foreign diplomat did not receive, or was even denied, a Birth Certificate or SSN at the time of birth, nothing would prevent that child from seeking such documents after his or her parent left the diplomatic service.¹³⁶ At that point, the parent would not be on the Blue List. Thus, no amount of cross-checking would preclude the child from receiving a birth certificate or an SSN if the child could prove he or she was born in the United States. Further, the SSA, and presumably most state agencies, do not maintain records of applicants who have been denied an SSN.¹³⁷

In the end, then, hospitals do not query parents of a newborn whether they hold diplomatic status, and U.S. government policy is to issue a birth certificate to a child born in the United States regardless of his or her parent’s occupation. An SSN is then issued as a matter of course. As a result, despite the fact that the government is clearly aware of the restriction on children born to diplomats, it

¹³⁵ See generally William D. Bowman, *The Story of Surnames*, 7 AMERICAN SPEECH, no. 2, 1931, at 147-50 (noting that in most Western countries, a surname is placed after a given name, but the opposite is true in many other countries, including Asian nations); 7 FAM 1300 app. C (2013) (noting the difficulty with names in passports); Feere, *supra* note 67; *Chinese Names*, TRAVELCHINAGUIDE.COM, <http://www.travelchinaguide.com/essential/chinese-name.htm> (last visited Feb. 2, 2015) (“The names of Chinese people have their own tradition and characteristics. Unlike Westerners, the family name in China is put first, followed by the given name.”).

¹³⁶ *National Vital Statistics System*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/nvss.htm> (last updated Jan. 15, 2015) (describing the process for applying for a U.S. birth certificate later in life); SOCIAL SEC. ADMIN., SSA PUB. NO. 05-10023, SOCIAL SECURITY NUMBERS FOR CHILDREN (2013), *available at* <http://www.ssa.gov/pubs/EN-05-10023.pdf> (discussing the process for acquiring a social security number for newborns, as well as for those over the age of 12).

¹³⁷ Feere, *supra* note 67.

nonetheless issues them U.S. birth certificates and SSNs—i.e., all the requisite documents for proof of U.S. citizenship—as standard practice.¹³⁸

III. THE SERIOUS PROBLEMS WITH PROVIDING U.S. CITIZENSHIP TO CHILDREN OF FOREIGN DIPLOMATS

There are numerous reasons why granting U.S. citizenship to the children of diplomats is problematic. The practice violates the U.S. Constitution, as well as international law and basic fairness. More concerning, it poses a significant national security risk to the United States.

A. *Violation of the U.S. Constitution*

As discussed in detail in Part I above, the Fourteenth Amendment provides that anyone born in the United States is considered a U.S. citizen with one and only one limitation: the person must be “subject to the jurisdiction” of the United States.¹³⁹ While there is some debate about whether that limitation applies to illegal aliens and others, it is crystal clear that the limitation applies to foreign diplomats, per the drafters of the Amendment, the Supreme Court, the U.S. government, and every significant scholar who has considered the issue.¹⁴⁰ Thus, allowing children of foreign diplomats to acquire U.S. citizenship is a blatant violation of the U.S. Constitution.

In addition, as also noted above in Part I, the courts and the U.S. government have determined that virtually every category of children born in the United States—including children of American Indians, foreign nationals and illegal aliens—are U.S. citizens. The only category that everyone agrees is precluded by the Fourteenth Amendment from U.S. citizenship is children of foreign diplomats. If such children nonetheless are permitted to become U.S. citizens, then the sole limitation in the Citizenship Clause is eliminated and

¹³⁸ See *Proof of U.S. Citizenship*, *supra* note 124 (noting that the State Department views a U.S. birth certificate as all that is needed to acquire U.S. citizenship).

¹³⁹ U.S. CONST. amend. XIV, § 1.

¹⁴⁰ See *supra* Part I.D.

the Constitutional provision “subject to the jurisdiction thereof” effectively becomes a complete nullity, a result that runs contrary to the general rule that all words and phrases in the Constitution are to have import and effect.¹⁴¹

B. *Violation of International Law*

Allowing diplomats’ children to acquire U.S. citizenship also violates international law. An entire international protocol is devoted exclusively to this one issue.¹⁴² That protocol has only one main provision: “Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.”¹⁴³ The purpose behind this protocol is fairly self-evident. It is meant to prevent host nations from co-opting foreign diplomats by offering them or their family members the opportunity to acquire nationality or citizenship status. Diplomats are supposed to owe fealty to their home nation. That loyalty can be seriously undermined if the host nation makes the diplomat, or members of his or her family, citizens of the host nation.¹⁴⁴

¹⁴¹ *Silveira v. Lockyer*, 312 F.3d 1052, 1069 n.24 (9th Cir. 2002), abrogated on other grounds by *United States v. Vongxay*, 594 F.3d 1111, 1116 (9th Cir. 2010) (noting the “well-established canon of interpretation that requires a court, wherever possible, to give force to each word in every statutory (or constitutional) provision”); *Florida Sugar Marketing and Terminal v. United States*, 220 F.3d 1331, 1337 (Fed. Cir. 2000) (“Like clauses in a statute, related clauses of the Constitution should be interpreted to avoid contradictions in the text or rendering of some part of the text superfluous.”).

¹⁴² Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Acquisition of Nationality, Apr. 18, 1961, 500 U.N.T.S. 223 [hereinafter *Optional Protocol*]. For a list of participating countries, see U.N. Treaty Collection, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-4&chapter=3&lang=en.

¹⁴³ *Optional Protocol*, *supra* note 142.

¹⁴⁴ *United States v. Wong Kim Ark*, 169 U.S. 649, 684-85 (1898); Min-uck, *supra* note 15 (noting that a number of Korean diplomats acquire U.S. citizenship for their children born in the U.S. and asking “[h]ow will the diplomats protect the national interest when they look up to the U.S. so much”).

Admittedly, the United States and other countries, including the United Kingdom and France, have refused to ratify the protocol.¹⁴⁵ However, this is not because they disagree with the overarching principle; rather, it is because they take issue with the language used.¹⁴⁶ For example, the protocol suggests that a child born in the United States should not receive U.S. citizenship if his or her father is a U.S. citizen, but his or her mother is a foreign diplomat.¹⁴⁷ There is also concern that the language of the protocol could cause statelessness if, e.g., an illegitimate child was born in the United States to a mother who was a foreign diplomat.¹⁴⁸ Nonetheless, the United States, as well as other countries that have thus far refused to ratify the protocol, continue to abide with the long-standing, broad, customary international law principle that underlies that international convention—namely that members of a foreign mission and members of their household (including newborn children) in a receiving state should not acquire the nationality of the receiving state.¹⁴⁹

C. Unfairness

As the Supreme Court has noted, “Citizenship is a most precious right”¹⁵⁰ and a “priceless treasure.”¹⁵¹ Millions of foreign nationals regularly seek U.S. citizenship and permanent residency every year through the U.S. government’s normal immigration process.¹⁵² The United States expends considerable time, effort, and

¹⁴⁵ Optional Protocol, *supra* note 142 (listing the countries which have and have not ratified the protocol).

¹⁴⁶ SATOW’S DIPLOMATIC PRACTICE 149-50 (Ivor Roberts ed., 6th ed. 2009).

¹⁴⁷ *Id.* at 149.

¹⁴⁸ *Id.* at 150.

¹⁴⁹ *Id.* at 149-50.

¹⁵⁰ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963).

¹⁵¹ Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

¹⁵² Petra Cahill et al., *Through the Obstacle Course of Immigration, Many Paths to Citizenship*, NBCNEWS.COM (Apr. 10, 2013, 3:32 PM), http://usnews.nbcnews.com/_news/2013/04/10/17675597-through-the-obstacle-course-of-immigration-many-paths-to-citizenship?lite (describing how there are 4.4 million applicants for permanent residence in the United States); Tara Bahrapour, *Number of Immigrants Applying for U.S. Citizenship Is Down 62%, Report Finds*, WASH. POST (Sept. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103727.html> (noting that 1.38 million

funds to limit the numbers of foreign nationals who are accorded citizenship status.¹⁵³ The children of foreign diplomats should not be allowed to circumvent U.S. government immigration policy and criteria merely because their nation chose their parents to work as diplomats in the United States during the period of time in which they were born. This is unfair to the United States, its current citizens, and the millions of foreign nationals who apply for U.S. citizenship through our normal, legal procedures.

D. “Super-Citizens”? Not Really

In 2011, Jon Feere from the Center for Immigration Studies published a report entitled *Birthright Citizenship for Children of Foreign Diplomats*.¹⁵⁴ Mr. Feere’s report appears to have been the first published account to raise the issue of diplomat children being accorded U.S. citizenship and to have outlined the process by which this occurs.¹⁵⁵ Mr. Feere argues that the main problem with this situation is that such children not only are accorded the privileges of U.S. citizenship, but also the benefits of diplomatic immunity.¹⁵⁶ As such, Mr. Feere labels such children “Super-Citizens,” and breathlessly proclaims the unfairness that these Super-Citizens possess more rights than standard U.S. citizens.¹⁵⁷

For thousands of years, foreign diplomats have been accorded special protection in the countries where they serve.¹⁵⁸

people applied for U.S. citizenship in 2007, but only 525,783 applied in 2008, allegedly due to an increase in the application fee).

¹⁵³ *FY 2012 Budget in Brief*, U.S. DEP’T OF HOMELAND SEC. 141, 144, available at <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf> (noting that CIS has more than 11,000 employees and its 2011 budget was more than \$3 billion); *Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/archive/archive-news/naturalization-fact-sheet> (last visited Feb. 2, 2015) (providing statistics on the number of persons naturalized each year, which averages about 680,000 annually).

¹⁵⁴ Feere, *supra* note 67.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227 [hereinafter Vienna Convention on Diplomatic Relations] (“Recalling that people of all nations from ancient times have recognized

Even ancient Greek and Roman diplomats enjoyed such protections.¹⁵⁹ Such privilege assured dignity of the sovereign, and allowed the diplomat—a representative of the foreign nation—to do his or her job without threat of reprisal from the host government. As the Supreme Court described in 1898, “without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.”¹⁶⁰

The concept of diplomatic protection was eventually codified as international law, in 1961, by the Vienna Convention on Diplomatic Relations (“Vienna Convention”),¹⁶¹ and entered into force for the United States in 1972.¹⁶² It is considered to constitute customary international law throughout the world and therefore is generally deemed binding even on the few nations that have not ratified the convention.¹⁶³

The Vienna Convention provides numerous protections for members of any diplomatic mission. The head of the mission and any members of the staff of the mission holding diplomatic rank (together referred to as “diplomatic agents”)¹⁶⁴ are exempt from

the status of diplomatic agents”); *United States v. Enger*, 472 F. Supp. 490, 504-05 (D.N.J. 1978) (providing a detailed history of diplomatic immunity).

¹⁵⁹ *Enger*, 472 F. Supp. at 504-05.

¹⁶⁰ *United States v. Wong Kim Ark*, 169 U.S. 649, 684-85 (1898) (quoting Chief Justice Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-139 (1812)); *see also* *Swarna v. Al-Awadi*, 622 F.3d 123, 137 (2d Cir. 2010) (“Sitting diplomats are accorded near-absolute immunity in the receiving state to avoid interference with the diplomat’s service for his or her government.”); *Great Socialist People’s Libyan Arab Jamahiriya v. Miski*, 683 F. Supp. 2d 1, 11 (D.D.C. 2010) (“Diplomatic immunity flows from foreign state sovereign immunity”); *Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012) (noting that diplomatic immunity serves to protect “the interests of comity and diplomacy among nations and, not incidentally, to ensure the protection of our own diplomats abroad”).

¹⁶¹ Vienna Convention on Diplomatic Relations, *supra* note 158; *Enger*, 472 F. Supp. at 505 (“[T]he law of diplomatic immunity has been codified by the Vienna Convention, the principle effect of which is to codify the customary law of diplomatic relations, including the law of diplomatic immunity.”).

¹⁶² 22 U.S.C. § 254a(4) (2012).

¹⁶³ *Enger*, 472 F. Supp. at 505.

¹⁶⁴ Vienna Convention on Diplomatic Relations, *supra* note 158, art 1.

social security provisions.¹⁶⁵ With few exceptions, they are exempt from paying any dues or taxes, whether federal, state, or local.¹⁶⁶ They are exempt from any personal service to the receiving state, as well as military obligations, to include requisitions, contributions, or billeting.¹⁶⁷ The receiving state can adopt laws exempting diplomatic agents from all customs, duties, taxes, and related charges.¹⁶⁸ Their private residences are inviolable.¹⁶⁹ Similarly inviolable are the diplomatic agent's papers, correspondence, and property.¹⁷⁰ The diplomatic agent's personal baggage is exempt from inspection, unless there are "serious grounds" for believing it does not contain articles for the mission's official use or for the personal use of the agent for his or her household, or that it contains articles that are illegal to import or export.¹⁷¹

Probably most important, and most controversial, a diplomatic agent is effectively precluded from civil litigation or criminal prosecution, or nearly anything connected to the U.S. court system.¹⁷² In compliance with the Vienna Convention, the United States has codified this exemption in U.S. statute.¹⁷³ As 22 U.S.C. § 254d provides: "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed."¹⁷⁴ This means that a current diplomatic agent enjoys "near-absolute immunity" from civil or

¹⁶⁵ *Id.* art. 33.

¹⁶⁶ *Id.* art. 34.

¹⁶⁷ *Id.* art. 35.

¹⁶⁸ *Id.* art. 36, para 1.

¹⁶⁹ *Id.* art. 30, para 1.

¹⁷⁰ Vienna Convention on Diplomatic Relations, *supra* note 158, art. 30, para 2.

¹⁷¹ *Id.* art. 36, para 2.

¹⁷² *Id.* art. 29 and 31; William G. Morris, Note, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA L. REV. 601, 601 (2007).

¹⁷³ *Montuya v. Chedid*, 779 F. Supp. 2d 60, 62 (D.D.C. 2011) (stating that "Congress enacted the Diplomatic Relations Act, 22 U.S.C. § 254d" in accordance with the Vienna Convention).

¹⁷⁴ 22 U.S.C. § 254d (2012); *see also Montuya*, 779 F. Supp. 2d at 62 ("If the Court, therefore, concludes that Defendants are entitled to diplomatic immunity, it must dismiss the action.").

criminal action.¹⁷⁵ It shields a diplomatic agent not only from ordinary lawsuits or crimes, but also from alleged violations of the United States Constitution,¹⁷⁶ and even from allegations of violations of *jus cogens*, such as torture, genocide, or extrajudicial killing.¹⁷⁷ This not only precludes the U.S. government from taking action against foreign diplomatic agents, but indeed places an affirmative duty on the U.S. government to protect such diplomats from prosecution in federal, state, and local court.¹⁷⁸

As Mr. Feere emphasizes in his study, the diplomatic immunities and privileges outlined above apply not just to diplomats, but also extend to their family members, including their newborn children.¹⁷⁹ Thus, Mr. Feere concludes that children of foreign diplomats born in the United States acquire both U.S. citizenship *and* the full and awesome benefits of diplomatic immunity.¹⁸⁰ When Mr. Feere released his study, numerous media outlets expressed outrage at the creation of such Super-Citizens.¹⁸¹ Unfortunately, Mr. Feere's

¹⁷⁵ *Baoanan v. Baja*, 627 F. Supp. 2d 155, 160 (S.D.N.Y. 2009) (stating that, under the Vienna Convention, "a current diplomatic agent enjoys near-absolute immunity from civil jurisdiction").

¹⁷⁶ *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 129 (D.D.C. 2009) ("Plaintiffs do not cite a single case, however, in which diplomatic immunity was withheld in order to provide redress for a constitutional violation. Instead, case law suggests that diplomatic immunity can shield a diplomat from liability for alleged constitutional violations.").

¹⁷⁷ *Devi v. Silva*, 861 F. Supp. 2d 135, 142 (S.D.N.Y. 2012) (noting that "[n]o United States court has recognized a *jus cogens* exception to diplomatic immunity from its civil jurisdiction," that the United States government has refused to accept a *jus cogens* exception, and that the international community has similarly not accepted such an exception); *Sabbithi*, 605 F. Supp. 2d at 129 (asserting that the United States and the international community do not recognize a *jus cogens* exception to diplomatic immunity).

¹⁷⁸ Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 ALA. C.R. & C.L. L. REV. 121, 141 (2012).

¹⁷⁹ Feere, *supra* note 67.

¹⁸⁰ *Id.*

¹⁸¹ *Super Citizen*, *supra* note 120 (asserting that "[t]he Founding Fathers and drafters of the 14th Amendment to the Constitution may just turn over in their graves" at the news); R. Cork Kirkwood, *CIS: Children of Foreign Diplomats Are Citizens*, NEW AMERICAN (July 18, 2011), <http://www.thenewamerican.com/usnews/immigration/item/2126-cis-children-of-foreign-diplomats-are-citizens> (expressing outrage over the concept of "super-citizens").

assertion is incorrect. Children of diplomats who acquire U.S. citizenship do *not* also receive the benefits of diplomatic immunity. The Vienna Convention explicitly provides that the privileges and immunities of diplomatic agents apply to the “family of a diplomatic agent forming part of his household . . . *if they are not nationals of the receiving State . . .*”¹⁸²

The United States fully comports with this requirement. U.S. law explicitly provides that family members who are entitled to diplomatic immunity are those who “form a part of [the diplomat’s] household *if they are not nationals of the United States.*”¹⁸³ The term “nationals” of the United States includes U.S. citizens born in the U.S.¹⁸⁴ Should a child of a foreign diplomat acquire U.S. citizenship or LPR status in the United States, the U.S. government provides that the child “ceases to have the rights, privileges, exemptions, or immunities which may be claimed by a foreign diplomatic officer.”¹⁸⁵ In its guide to U.S. law enforcement and courts on diplomatic immunity, the Department of State notes:

Nationals or Permanent Residents of the United States. The general rules [for diplomatic immunity] set forth above assume that the staff members of the diplomatic mission are nationals of the sending country or some third country. The United States, as a matter of policy, does not normally accept as diplomatic agents its own nationals, legal permanent residents of the United States, or others who are “permanently resident in” the United States. *The family members of diplomatic agents enjoy no privileges or immunities if they are nationals of the United States.* Members of the administrative and technical staff (including their families) and members of the service staff enjoy no privileges and immunities if they are

¹⁸² Vienna Convention on Diplomatic Relations, *supra* note 158, art. 37, para. 1 (emphasis added).

¹⁸³ 22 U.S.C. § 254a(2)(A) (2012) (emphasis added).

¹⁸⁴ 8 U.S.C. § 1401(a) (2012).

¹⁸⁵ 8 C.F.R. § 101.3(c) (2014); *see also Green Card*, *supra* note 105 (noting that children of foreign diplomats must “relinquish (give up) your rights, privileges, exemptions or immunities which are available to you as the child of a foreign diplomatic officer” in order to acquire LPR status).

U.S. nationals, legal permanent residents, or foreign nationals
“permanently resident in” the United States.¹⁸⁶

It is possible that the U.S. government is not enforcing the above provisions of the Vienna Convention, U.S. statutory law, or State Department guidance, just as it is not enforcing the overall prohibition on children of foreign diplomats acquiring U.S. citizenship in the first place. However, neither Mr. Feere nor anyone else raises this idea, nor is there any evidence to support it. Indeed, the available evidence suggests the contrary. Specifically, the Blue List, which as noted above is the official State Department list of all diplomats and their spouses in the United States, explicitly contains an asterisk next to the name of any U.S. national on the list, noting that such asterisked individuals do not enjoy immunity under the Vienna Convention.¹⁸⁷

In any case, even if the United States is granting diplomatic immunity to these diplomat children, it would probably have little actual impact. After all, newborns and even toddlers are not generally in a position, due to their age and—let’s face it—lack of mobility, to violate U.S. criminal or civil laws. Further, diplomatic immunity for family members ends when the diplomat’s tour ends.¹⁸⁸ Thus, unless a diplomat remains a member of a foreign mission to the United States for decades, it is unlikely that any child born to a diplomat in the United States will become old enough during his or her parent’s diplomatic tour to commit a crime or be sued such that diplomatic immunity would even come into play. And, even if the child became part of a court case and sought to invoke diplomatic immunity, nothing would preclude the United States or a U.S. court from determining that the child did not in fact possess such immunity due to the fact that the child possessed U.S. citizenship. Thus, Mr. Feere’s concern about Super-Citizens, while certainly alarming on its face, appears to be without much merit.

¹⁸⁶ U.S. DEP’T OF STATE, BUREAU OF DIPLOMATIC SEC., DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 5 (July 2011) [hereinafter DIPLOMATIC IMMUNITY] (emphasis added), available at <http://www.state.gov/documents/organization/150546.pdf>.

¹⁸⁷ *Diplomatic List*, *supra* note 11.

¹⁸⁸ Vienna Convention on Diplomatic Relations, *supra* note 158, art. 39(2).

E. National Security Concerns

What is extremely worrisome about diplomats' children being granted U.S. citizenship are the national security concerns this can trigger. Such children, once they obtain adulthood, can sponsor their parents and other relatives for LPR status,¹⁸⁹ also known as Green Card status, assuming the parents are no longer official members of the diplomatic corps.¹⁹⁰ As an LPR, the parent would be allowed to reside permanently in the United States,¹⁹¹ leave the United States for up to six months at a time,¹⁹² generally come and go as he or she pleases,¹⁹³ and eventually acquire U.S. citizenship himself or herself.¹⁹⁴

The problem with this scenario is that such parents, by dint of their profession, possess loyalty to their foreign nation. More specifically, as diplomats, they are considered to be so loyal and trustworthy that they can represent the sovereign and the country from afar, and therefore would be expected to have more fealty to their home country than a regular foreign national. Most concerning, the United States does not have any real choice with regard to whom a foreign country decides to designate as a foreign diplomat.¹⁹⁵ Therefore, the U.S. has less control over who is issued a foreign diplomatic visa than it does over who is issued a standard visa. This allows for the possibility of a foreign country designating an "undesirable" as a diplomat, who then bears children while

¹⁸⁹ *Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen> (last visited Feb. 2, 2015) (stating that U.S. citizens can sponsor a parent for LPR status once the citizen attains the age of 21).

¹⁹⁰ See DIPLOMATIC IMMUNITY, *supra* note 186 (noting that the United States does not generally accept foreign diplomats who possess LPR or U.S. citizen status).

¹⁹¹ *After a Green Card is Granted*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/green-card/after-green-card-granted> (last visited Feb. 2, 2015) (stating that persons possessing LPR status are entitled to work and reside in the United States).

¹⁹² 8 U.S.C. § 1101(a)(13)(C)(ii) (2012).

¹⁹³ *Id.*

¹⁹⁴ 8 U.S.C. § 1422 (2012); 8 C.F.R. § 316.2 (2014).

¹⁹⁵ Admittedly, the United States does not have to accept undesirable foreign diplomats, but it is rare for a country to refuse entry of a diplomat. See *infra* notes 201-04.

residing in the United States. Those children instantly become U.S. citizens and can later sponsor the undesirable individual for LPR status to permanently reside in the United States.

More ominous, it is well known and accepted that many foreign intelligence officers serve as “diplomats” here in the United States.¹⁹⁶ Their job usually is to spy on the U.S. government, as well as on our businesses and the general populace. Assuming such foreign intelligence officers bear children during their tour in the United States, such offspring, when they reach adulthood, could sponsor the intelligence officer for U.S. LPR status. With such status in hand, the intelligence officer would then be able to reside permanently in the United States, as well as travel in and out of the country basically at will, using his or her LPR status as a mechanism to assist in spying on our interests. Less likely, but even more chilling, foreign nations, whether knowingly or unknowingly, could nominate terrorists or narcotraffickers as diplomats, who could utilize their position for a similar long-term seeding plan.¹⁹⁷ Also possible, a foreign country could use this loophole as part of a very long-term seeding operation to have diplomats or intelligence officers purposefully bear children in the United States with the intention of developing such U.S. citizen children to become foreign intelligence officers.

While all of these long-term seeding scenarios may appear on their face to be ludicrous or the storylines of cheap spy novels, it is important to recognize that foreign nations often take a vastly longer-term approach to intelligence matters than the United States does. Russia, for example, is well known for dispatching “illegals,” spies who adopt the identities of Americans and reside in our country for years, if not decades, posing as the family next door.¹⁹⁸

¹⁹⁶ 22 U.S.C. § 254c-1(a) (2012) (noting that the number of foreign government officials in the United States who are engaged in intelligence activities “should not exceed the respective numbers, status, privileges and immunities, travel accommodations, and facilities within such country of official representatives of the United States to such country”).

¹⁹⁷ It probably would be easier for such terrorists and narcotraffickers to enter the United States illegally and have children here than utilize the foreign diplomat path.

¹⁹⁸ Ellen Barry, *‘Illegals’ Spying Ring Famed in Lore of Russian Spying*, NY TIMES (June 29, 2010), <http://www.nytimes.com/2010/06/30/world/europe/30sleepers.html>

This is the premise of the FX television show “The Americans.”¹⁹⁹ Yet this is more than just theoretical or fictional. In 2010, the U.S. government uncovered and evicted an actual spy ring made up of ten such Russian intelligence officers who had resided in the United States for more than a decade.²⁰⁰ Al Qaeda and other terrorist groups are also known for having a long-term view with regard to planning.²⁰¹ There is no indication that the Russians, or any other foreign intelligence service or terrorist organization, have utilized the U.S. citizen status of children of their diplomats in any “illegals” operation, but clearly nothing precludes them from doing so, as long as the United States continues to keep this loophole in place.

Admittedly, the United States does not have to “accept” all foreign diplomats, and could refuse the entry of undesirable foreign diplomatic officers or foreign intelligence officials, or declare them *persona non grata* (“PNG”) after they are in the country and require them to leave.²⁰² However, there are significant political reverberations attendant with refusing or expelling (often referred to as “PNGing”) a country’s diplomats. Such action can obviously harm the overall diplomatic relationship the United States has with the other country.²⁰³ Furthermore, the other nation might decide to reciprocate and PNG our diplomats resident in their country, as the United States sometimes does after our diplomats are PNGed.²⁰⁴ Due

(noting that Russian “illegals” remain undercover for “years or even decades”); Walter Pinkus, *Fine Print: Despite Arrests, Russian ‘Illegals’ Won’t Go Away*, WASH. POST (July 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071205341.html>.

¹⁹⁹ *The Americans*, FX CHANNEL, <http://www.fxnetworks.com/shows/the-americans/about>.

²⁰⁰ Mary Beth Sheridan & Andrew Higgins, *U.S. and Russia Complete Spy Swap*, WASH. POST, July 10, 2010, at A1.

²⁰¹ Catherine Herridge, *Al Qaeda Expansion in Libya Part of Long-Term Terror Vision?*, FOXNEWS.COM (Dec. 7, 2012), <http://www.foxnews.com/politics/2012/12/07/al-qaeda-expansion-in-libya-part-long-term-vision/> (describing the long-term planning conducted by Al-Qaeda).

²⁰² Vienna Convention on Diplomatic Relations, *supra* note 158, art. 9(1).

²⁰³ Howard, *supra* note 178, at 143.

²⁰⁴ See Juan Carlos Lopez & Catherine E. Shoichet, *U.S. Expels 2 Venezuelan Diplomats*, CNN.com (Mar. 11, 2013, 3:18 PM), <http://www.cnn.com/2013/03/11/us/venezuela-diplomats-expelled/> (noting the justification offered by a State Department spokesman for the U.S. expelling two Venezuelan diplomats in reaction

to this concern, very few foreign diplomats are not “accepted” by the United States.²⁰⁵ In addition, even if the United States was inclined to PNG an undesirable diplomat or foreign intelligence officer, the United States is unlikely to take such action merely because the officer or the officer’s spouse was about to give birth.

IV. RECOMMENDATIONS FOR RESOLVING THE PROBLEM

There are a number of steps that the U.S. government could take to try to resolve this problem. Certain practical solutions would hopefully diminish the number of children of foreign diplomats who are granted U.S. citizenship in the first place. Further, the U.S. government could take steps to revoke the U.S. citizenship of those diplomats’ children who have already illegally obtained such status.

A. Steps that Could Be Taken to Preclude Diplomats’ Children from Obtaining U.S. Citizenship

The U.S. government could issue guidance to hospitals requiring that they inquire into whether a child born at the hospital has a parent who is a foreign diplomat. Foreign diplomats and their family members are issued Identification Cards.²⁰⁶ The cards indicate that the bearer is entitled to full diplomatic immunity.²⁰⁷ Diplomats and their family members could be required to produce them whenever they are admitted to a U.S. hospital.

Standard birth certificate and SSN applications could also be amended to require parents to state, under penalty of perjury,

to Venezuela PNGing two U.S. diplomats: “Around the world, when our people are thrown out unjustly, we’re going to take reciprocal action. We need to do that to protect our own people.”); see also *U.S. Expels Ecuadorian Ambassador*, CNN.COM (Apr. 7, 2011, 9:14 PM), <http://www.cnn.com/2011/POLITICS/04/07/ecuador.ambassador/>.

²⁰⁵ Aoife O’Donoghue, *Persona Non Grata or How to Get Rid of Foreign Diplomats*, HUMANRIGHTS.IE (July 22, 2011), <http://humanrights.ie/international-law/international-human-rights/persona-non-grata-or-how-to-get-rid-of-foreign-diplomats/> (“Within diplomatic law [use of persona non grata] is considered a very serious censure and is rarely resorted to unless in the most serious of circumstances.”).

²⁰⁶ *Diplomatic Immunity*, *supra* note 186, at 9, 17.

²⁰⁷ *Id.* at 17.

whether either parent is a foreign diplomat.²⁰⁸ Such forms could also note that children of such parents are not entitled to U.S. citizenship. Of course, foreign diplomats could lie on such forms, knowing that they are actually immune from perjury or any other criminal sanction, per diplomatic immunity.²⁰⁹ However, diplomats usually take great strides to comply with U.S. law due to the ramifications—including being PNGed by the United States, having their diplomatic immunity waived by their home country, or being prosecuted by their own government—that could occur if the diplomat is viewed as violating our laws.²¹⁰ In addition, some foreign states explicitly preclude their diplomats from seeking U.S. citizenship for their children,²¹¹ thus imposing greater sanctions on the diplomat should he or she lie on the form. At the very least, placing such information and requirements on the forms would give diplomats and hospitals notice of the rules.

The U.S. government could also change its current position regarding the issuance of U.S. birth certificates. As noted above, the State Department's current position is that any child born in the United States is entitled to a birth certificate, and that any child with a U.S. birth certificate is automatically entitled to U.S. citizenship.²¹² The U.S. government could amend this policy to preclude the children of foreign diplomats from receiving a U.S. birth certificate. Alternatively, the government could place a specific and clear marking on birth certificates provided to diplomats' children, or even issue special birth certificates to these children, which would indicate that the bearer of the certificate, though born in the United States, is not a U.S. citizen. This would be akin to the special license plates the

²⁰⁸ Feere, *supra* note 67.

²⁰⁹ See *supra* text accompanying notes 159-65.

²¹⁰ James E. Hickey, Jr. & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 HASTINGS L.J. 351, 376-77 (1990); Vienna Convention on Diplomatic Relations, *supra* note 158, art. 32(1) (allowing a sending state to waive diplomatic immunity for its diplomatic agents), art. 31(4) (stating that diplomatic immunity does not "exempt him from the jurisdiction of the sending State), & art. 9(1) (noting that the receiving State can PNG a foreign diplomat "at any time and without having to explain its decision").

²¹¹ See *Pakistani Diplomats*, *supra* note 16.

²¹² See *Birth Data*, *supra* note 116; *Standard Certificate*, *supra* note 117.

U.S. government issues to motor vehicles operated by diplomats to differentiate them from other drivers.²¹³

The Blue List, which as noted above lists all foreign diplomats and their spouses residing in the United States,²¹⁴ could also be revised. To begin with, its electronic format could be made more compatible with other government systems so that it can be synchronized with the SSA's computer system.²¹⁵ Further, the government could ensure that the names on the Blue List correspond with the names on diplomats' identification cards.²¹⁶ In this way, when the diplomat shows his or her identification card to the hospital, and fills out any required paperwork using the name on the identification card, it would correspond to the name on the Blue List and thus be easy for the SSA to cross-reference. The SSA could then refuse to issue Social Security Numbers to these diplomats' children.²¹⁷

The Blue List could also list not only diplomats and their spouses, but also all dependents residing in the diplomats' household, including newborns. If that is too unwieldy, then an additional list could be created that contains such information. In any case, all foreign diplomats could be required to notify the State Department of any additions to their households, including newborn children. This would not prove overly burdensome to enforce, as it would be presumed that diplomats would be incentivized to have their children placed on the list in order to ensure the children receive all the benefits that accrue through diplomatic immunity. The names of any newborn children added to this list could be forwarded to the SSA to further ensure that these children are not issued Social Security Numbers.

²¹³ *Diplomatic Immunity*, *supra* note 174, at 10, 21.

²¹⁴ *See Diplomatic List*, *supra* note 7.

²¹⁵ Feere, *supra* note 67.

²¹⁶ *See DIPLOMATIC IMMUNITY*, *supra* note 186.

²¹⁷ While Social Security Numbers are issued to non-U.S. citizens, it is difficult to envision a reason to issue an SSN to a diplomat's child who will not be receiving U.S. citizenship. In addition, there is no reason why these diplomatic children should receive the benefits of an SSN, such as job and social security benefits. *See* Feere, *supra* note 67; *Super Citizen*, *supra* note 120.

Finally, as noted above, the State Department's Foreign Affairs Manual (FAM) is strangely ambiguous about whether children of foreign diplomats born in the United States are entitled to U.S. citizenship.²¹⁸ This falls contrary to the express desires of the drafters of the U.S. Constitution, extensive Supreme Court precedent, scholarly analysis, and every other statement by the U.S. government. It also creates uncertainty. The FAM therefore could be updated to make it clear that children of foreign diplomats born in this country are not entitled to U.S. citizenship.

B. Revoking U.S. Citizenship of Diplomats' Children

In addition to precluding citizenship for children of foreign diplomats, the U.S. government could also take steps to revoke the citizenship of those foreign diplomatic children who have already improperly received U.S. citizen status. Generally speaking, the courts have been adamant that, under the Fourteenth Amendment, the government cannot strip a U.S. citizen of his or her citizenship. As the Supreme Court forcefully stated:

In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power.²¹⁹

In addition, as noted above, the Fourteenth Amendment was specifically enacted to ensure that future Congresses could not strip away the rights of black (or other) Americans through subsequent legislation.²²⁰ Thus, as the Supreme Court has noted, the Government cannot frustrate the foundational intention of the

²¹⁸ See *supra* text accompanying notes 102-04.

²¹⁹ *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967); see also *Vance v. Terrazas*, 444 U.S. 252, 260-61 (1980) (reaffirming *Afroyim*).

²²⁰ See *Elk v. Wilkins*, 112 U.S. 94, 101 (1884).

Fourteenth Amendment and “rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted.”²²¹ Indeed, the Court has stated that the loss of citizenship “is more serious than a taking of one’s property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country.”²²² Thus, the courts have routinely viewed the taking of U.S. citizenship as “an extraordinarily severe penalty.”²²³

Due to the drastic nature of such a penalty, the courts have generally permitted revocation of U.S. citizenship only in cases where the U.S. citizen has formally abandoned such citizenship.²²⁴ However, courts have also permitted revocation of citizenship in situations of willful misrepresentation or circumstances of error in order to “safeguard the integrity” of U.S. citizenship.²²⁵ In the context of citizenship acquired through naturalization, the Supreme Court has noted: “[T]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship ‘illegally procured,’ and naturalization that is unlawfully procured can be set aside.”²²⁶ Thus, the Court has canceled a naturalized citizen’s citizenship when it determined that the individual, in originally seeking that citizenship, did not comply with a requirement to file a certificate with the Department of Labor.²²⁷ Similarly, the Court canceled a certificate of citizenship

²²¹ *Afroyim*, 387 U.S. at 263.

²²² *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

²²³ *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

²²⁴ *Afroyim*, 387 U.S. at 268 (holding that the government can only revoke U.S. citizenship if the citizen “voluntarily relinquishes that citizenship”).

²²⁵ *Fedoreno v. United States*, 449 U.S. 490, 506-07 (1981).

²²⁶ *Id.* at 506 (revoking the citizenship of an individual who willfully misrepresented facts on his visa application about his activities in World War II); *see also* 8 U.S.C. § 1451 (2012) (permitting revocation of naturalization if it was “illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation”).

²²⁷ *Maney v. United States*, 278 U.S. 17, 23 (1928).

where the naturalization process was not conducted in open court, as required by statute.²²⁸

The lower courts have continued this practice of revoking citizenship granted in error. In one recent Ninth Circuit case, the court revoked the citizenship of an individual who was raised in Mexico, but who apparently adopted another person's identity in order to claim to have been born in the United States.²²⁹ The Ninth Circuit not only revoked the petitioner's citizenship, but also revoked the U.S. citizenship of the petitioner's foreign-born wife and foreign-born children, who had previously claimed derivative U.S. citizenship as the spouse and children of the petitioner, pursuant to his fraudulent claim.²³⁰

In another case, the Ninth Circuit evaluated the U.S. citizenship of an individual born in the Philippines to a father who was a U.S. citizen.²³¹ The court determined that a statute in force at the time of the petitioner's birth required the father to have resided in the United States prior to petitioner's birth in order for the petitioner to acquire U.S. citizenship, and the father had not complied with this requirement.²³² The Ninth Circuit then evaluated 8 U.S.C. § 1453, which provides in pertinent part that the Attorney General "is authorized to cancel any certificate of citizenship . . . if it shall appear to the Attorney General's satisfaction that such document or record was illegally or fraudulently obtained . . ." ²³³ The court held that any errors in law or fact in obtaining a certificate of citizenship constitute "an illegality," even if the individual "had never committed any wrongful acts in obtaining his certificate, and the error . . . involved a mistake of law."²³⁴ Based on this, the Ninth

²²⁸ *United States v. Ginsberg*, 243 U.S. 472 (1917).

²²⁹ *Mondaca-Vega v. Holder*, 718 F.3d 1075 (9th Cir. 2013).

²³⁰ *Id.* at 1078, 1096 (Pregerson, J., dissenting); *see also* *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970) (considering revocation of U.S. citizenship thirty-six years after the petitioner was admitted to the United States, but ultimately holding the U.S. government did not meet its burden of showing that petitioner's citizenship was granted in error).

²³¹ *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999).

²³² *Id.* at 648.

²³³ 8 U.S.C. § 1453 (2012).

²³⁴ *Friend*, 172 F.3d at 647.

Circuit revoked petitioner's U.S. citizenship, finding that the district court "erred in holding that the mistake of law resulting in [petitioner's] receipt of a certificate or citizenship was not sufficiently serious to permit the certificate's revocation."²³⁵

While most of the cases in this area of law have involved naturalized or derivative citizenship, the same concepts should apply for birth citizenships. After all, the Citizenship Clause addresses both naturalization and birth citizenship in the same sentence and in the same manner.²³⁶ Indeed, under the U.S. Constitution, a native citizen and a naturalized citizen "stand . . . on equal footing . . . in all respects, save that for eligibility to the Presidency."²³⁷ In addition, the requirement that citizenship is granted solely to persons "subject to the jurisdiction" of the United States is a Constitutional requirement. If the courts are routinely willing to revoke or cancel naturalized or derivative citizenship that does not comply with statutory requirements, surely the courts should not have difficulty revoking birth citizenship that does not comply with the very Constitutional provision that authorized birth citizenship in the first place.

The U.S. government could therefore consider taking steps to revoke the citizenship of diplomatic children who have been granted U.S. citizenship. As noted above, Section 1453 of title 8 of the U.S. Code grants the Attorney General the power to revoke citizenship "if it shall appear to the Attorney General's satisfaction that such document or record was illegally or fraudulently obtained"²³⁸ As the courts have interpreted this provision to extend to citizenship obtained through government or other error,²³⁹

²³⁵ *Id.*; see also *Licudine v. Winter*, 603 F. Supp. 2d 129 (D.D.C. 2009) (determining that the petitioner's birth in the Philippines did not constitute birth in the United States for purposes of the 14th Amendment).

²³⁶ "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States" U.S. CONST. amend. XIV, § 1.

²³⁷ *Baumgartner v. United States*, 322 U.S. 665, 673 (1944) (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)).

²³⁸ 8 U.S.C. § 1453 (2012).

²³⁹ See generally *Magnuson v. Baker*, 911 F.2d 330 (9th Cir 1990); *Ben Huie v. INS*, 349 F.2d 1014 (9th Cir. 1985).

the Attorney General can use this provision to revoke the citizenship of diplomats' children, whether or not the diplomat purposefully sought to acquire such citizenship in violation of the U.S. Constitution.

This may prove tricky to employ in practice, though. So long as the diplomat retains his or her post, the diplomat and his or her child retain diplomatic immunity. This means that the U.S. government may be precluded from bringing the newborn and the newborn's diplomat parents (as the newborn's presumed guardians) into court to attempt to revoke the newborn's U.S. citizenship status. Of course, this only applies until the diplomat's tour has ended. Once that occurs, the U.S. government can take action to revoke the child's citizenship. This may prove complicated, however, as the child would likely reside outside the United States at that time.

Alternatively, the U.S. government could attempt to bring such cases while the diplomat remains at his or her post in order to force the diplomat to make a choice. On the one hand, the diplomat could seek to invoke diplomatic immunity. This would presumably preclude any court action, but would be tacit acknowledgement that the child was not entitled to U.S. citizenship because, as noted above, U.S. citizens cannot claim diplomatic immunity.²⁴⁰ Alternatively, the diplomat could waive diplomatic immunity²⁴¹ in order to attempt to preserve the child's U.S. citizenship status, which would permit the government to move forward against the child. If nothing else, by bringing such cases the U.S. government would raise public awareness of the issue, could preclude diplomats from seeking citizenship for their children born in the United States, and could induce foreign countries to crack down on their diplomats seeking such citizenship for their children.

V. CONCLUSION

At its base, much of the concern with regard to granting citizenship to diplomats' children born in the United States comes

²⁴⁰ See *supra* text accompanying notes 169-73.

²⁴¹ Vienna Convention on Diplomatic Relations, *supra* note 158, art. 32 (permitting waiver of diplomatic immunity).

down to consent. As the Supreme Court has noted, a significant international law principle posits that “no one can become a citizen of a nation without its consent.”²⁴² Any other option would violate the base principle of sovereignty as “[a]ll exceptions . . . to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself.”²⁴³

Yet consent is effectively lacking in this situation. The United States does not choose who is a diplomat to the United States. That decision is made by the foreign country. Admittedly, the United States can refuse to accept a diplomat’s credentials, or have him or her expelled from the country.²⁴⁴ But it is unlikely that the United States would take such a drastic step, with all of its geopolitical ramifications, merely to preclude a birth. Further, the mere failure of the U.S. government to take action to refuse or to expel a diplomat is not the same as the United States consenting to the offspring of such diplomats being automatically entitled to U.S. citizenship. The U.S. government has consented to allow foreign diplomats to represent their nations here in the United States, but such consent is only temporary. It lasts only so long as the foreign national remains in his or her position as diplomat, and is meant solely to permit that foreign national to conduct his or her job representing a foreign government. Once the diplomat’s position ends, either by decision of the foreign nation or through action by the U.S. government to expel the diplomat, then the consent for the diplomat to be in the United States ends as well.²⁴⁵ Such temporary consent to allow an official to reside in the United States to perform a job on behalf of a foreign sovereign is vastly different from the United States consenting to grant permanent citizenship to the children of that official born here during that job period. Put another way, why should a foreign country, by dint of who it chooses to be its representative, get to choose which of *its* citizens become *our* citizens?

²⁴² *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

²⁴³ *United States v. Wong Kim Ark*, 169 U.S. 649, 684 (1898).

²⁴⁴ Vienna Convention on Diplomatic Relations, *supra* note 159, art. 9(1).

²⁴⁵ *Id.* at arts. 9, 10, 43.

Thus, the undermining of sovereignty and the violation of the concept of consent are additional concerns that can be added to the list of problems raised by allowing diplomats' children born in the United States to become U.S. citizens. The fact that such action violates the Constitution is only the starting point. Violations of international law and unfairness also permeate the scenario. Finally, and perhaps most critically, the danger of having the children of foreign representatives become citizens of our country, with the ability to eventually sponsor their (potentially hostile and possibly intelligence officer) parents for LPR status or citizenship should not be underestimated. This is a critical national security loophole that our enemies can utilize, and they may already be doing so.

This is not an overwhelmingly difficult problem to resolve. Diplomats primarily reside in only two cities in the United States—Washington, D.C. and New York City.²⁴⁶ Merely providing knowledge to the hospitals in those two cities, along with fixing some gaps in birth certificate and Social Security Number issuance procedures, would go a long way towards eliminating most of the problem. Taking judicial action against those who have already illegally acquired U.S. citizenship would further diminish the potential harm. At risk is not just constitutional consistency, but also our national security.



²⁴⁶ 2013 *Diplomatic List*, *supra* note 132; David Osborne, *Can a Diplomat Get Away with Murder?*, THE INDEPENDENT (Jan. 10, 1997), <http://www.independent.co.uk/news/world/can-a-diplomat-get-away-with-murder-1282444.html>.



TRAHISON DES PROFESSEURS:[†]
THE CRITICAL LAW OF ARMED CONFLICT
ACADEMY AS AN ISLAMIST FIFTH COLUMN

William C. Bradford*

Islamist extremists allege law of war violations against the United States to undermine American legitimacy, convince Americans that the United States is an evil regime fighting an illegal and immoral war against Islam, and destroy the political will of the American people. Yet these extremists' own capacity to substantiate their claims is inferior to that of a critical cadre of American law of armed conflict academics whose scholarship and advocacy constitute information warfare that tilts the battlefield against U.S. forces. These academics argue that the Islamist jihad is a response to valid grievances against U.S. foreign policy, that civilian casualties and Abu Ghraib prove the injustice of the U.S. cause, that military action is an aggressive over-reaction, and that the United States is engaged in war crimes that breed terrorists, threaten the rule-of-law, and make us less safe. Rather than lending their prodigious talents to the service of their nation, these legal academics, for reasons ranging from the benign to the malignant, have mustered into the Islamist order of battle to direct their legal expertise against American military forces and American political will. This psychological warfare by American elites against their own people is celebrated by Islamists as a portent of U.S. weakness and the coming triumph of Islamism over the West.

[†] "Trahison des professeurs" (treason of the professors) is an homage to "trahison des clercs," the title of a work decrying early twentieth-century European intellectuals for failing to quash emotional and political arguments and make reasoned judgments about national security. JULIEN BENDA, *TRAHISON DES CLERCS* (1927).

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This Article defends these claims and then calls for a paradigmatic shift in our thoughts about the objects and purposes of the law of armed conflict and about the duties that law professors bear in conjunction with the rights they claim under academic freedom. It then examines the consequences of suffering this trahison des professeurs to exist and sketches key recommendations to attenuate its influence, shore up American political will, and achieve victory over the Islamic State and Islamist extremism more broadly.

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“[B]ehind every event of Good or Evil there is a piece of writing.
A book, an article, a manifesto, a poem, a song.”*

INTRODUCTION

The *Song of Roland* chronicles the Battle of Roncesvalles, fought on 15 August 778 A.D. between a Christian Frankish army fielded by Charlemagne and an Ibero-Islamic army bent on extending Muslim sovereignty in Europe. Although the medieval epic blames treacherous Christian nobles—who abused positions of

* ORRIANA FALLACI, THE RAGE AND THE PRIDE 23 (2002).

trust to pass military secrets to the Islamic invaders—with the near-defeat of the Frankish army, it hails the sacrifice of Roland—the rear-guard commander whose desperate last stand culminated in a timely trumpeted warning that saved Charlemagne from ambush—as exemplar of the valiant defense of Europe against Islamic dominion.¹

Twelve-plus centuries later, the *Song* might seem best heard as a romanticized account of French national origins, or of the genesis of European identity, rather than as the herald of a clash of civilizations.² Although Islam remained ascendant for a millennium, defeating the Crusaders, extending suzerainty into the Balkans, and probing the gates of Vienna, by the early twentieth century, failures to meet Western technological and intellectual challenges left the Islamic realm poor and weak, and European powers had colonized broad swaths of once-Muslim territory.³ By the 1990s, Western alliances shielded Turkey and Pakistan, defended Saudi Arabia and liberated Kuwait, and terminated genocides in Bosnia and Kosovo. As of 2015, no consortium of Islamic states, let alone the fearsome and rapacious Islamic State in Iraq and Syria (“ISIS”),⁴ can hope to stand against, let alone defeat, the West in battle.

¹ THE SONG OF ROLAND (C. K. Moncreiff trans., 1995) (*circa* 1000 A.D.).

² A “clash of civilizations” between Islam and the West references the difficulties of the former in negotiating a coexistence with the secularism, democracy, and human rights defining the latter. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER*, 36, 70-78 (1996).

³ BERNARD LEWIS, *WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* 151 (2003). Most etiologies of Islamic decline blame a lack of freedom that is a function of Islam and the cultures in which it took root, stifling innovation. *See id.* at 159 (“[A] lack of freedom underlies . . . [all] the troubles in the Muslim world.”). For Islamic sources, however, Islam is the perfect guide to public administration, and causes are exogenous to the Muslim world. *See generally id.*

⁴ ISIS, a global *jihadi* group, uses armed force, WMD, beheadings, sex slavery, and drug trafficking to extend a “Caliphate” it declared over swaths of Iraq and Syria in 2014. ISIS’ momentum, brutality, *jihadi* alliances, money, recruiting, and operational plans have Western allies scrambling to create and implement a counterstrategy. *See generally* Aaron Y. Zelin, *Colonia Caliphate: The Ambitions of the ‘Islamic State’*, WASHINGTON INST. (July 8, 2014), <http://www.washingtoninstitute.org/policy-analysis/view/colonial-caliphate-the-ambitions-of-the-islamic-state>.

Yet to conclude, based on correlations of military forces, that Islamists⁵ have abandoned an existential struggle they began in 674 A.D., when an Islamist army besieged Constantinople in a bid to subjugate *dar al-Harb* to *dar al-Islam*,⁶ would be a dire strategic error. Rather than adapt to change, Islamism has incubated an obdurate revanchisme, absolving itself of governance failures and faulting instead apostate rulers who “le[ft] Islam vulnerable to encroaching foreign powers eager to steal their land, wealth, and . . . souls”⁷ as well as the West, which “declar[ed] war on God” by “occupying” Muslim lands, establishing the “petty state”⁸ of Israel, “invent[ing] laws . . . rather than ruling by *Shari’a*,” and corrupting Islamic culture.⁹ Too many Muslims, desperate to reclaim their rightful place in God’s order, are receptive to Islamist exhortations to wage jihad until they re-create a Caliphate and impose *Shari’a* over mankind.¹⁰

To achieve this, Islamists must depose secular Arab regimes and evict the Western military forces that back them from the

⁵ The phrase “Islamists” references *only* individuals and groups who use or advocate force to recreate the Caliphate; *it does not denote all Muslims*. “Islamism” is the interpretation of Islam animating Islamists. This Article is otherwise agnostic as to whether Islamists are warriors for the Faith or heretical hijackers of a peaceful religion. See SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* 109 (2004) (“[Islamism is] precisely the vision . . . prescribed to all Muslims in the Koran[.]”). But see RAYMOND BAKER, *ISLAM WITHOUT FEAR* 2 (2003) (rejecting “criminal . . . violence disguised by Islam[.]”).

⁶ Islamic jurisprudence bisects the world into *dar al-Islam* (abode of peace), in which dwell the Muslims, and *dar al-Harb* (abode of war), the realm of unbelievers, with the former sphere commanded to wage perpetual war against the latter to spread the faith. *Dar al-Islam Definition*, ISLAMICUS.ORG, <http://Islamicus.org/dar-al-islam/> (last visited Mar. 2, 2015).

⁷ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 50 (2004).

⁸ Usama bin Ladin, *Fatwa urging Jihad against Americans* (Feb. 23, 1998), in FBIS REPORT COMPILATION OF USAMA BIN LADIN STATEMENTS 1994 – JANUARY 2004, at 56-57 (2004) [hereinafter FBIS REPORT], available at <https://www.fas.org/irp/world/para/ubl-fbis.pdf>.

⁹ *Id.* at 213.

¹⁰ See MUHAMMAD BULANDSHAHRI, *ILLUMINATING DISCOURSES ON THE NOBLE QUR’AN* 235 (1996) (specifying the Islamist goal).

Middle East.¹¹ Next, they must extend *dar al-Islam* to lands once under Islamic rule, including modern-day “Israel, Spain, Southern Italy, the Balkans, [and] southern Russia,” and convert or murder “infidel” populations.¹² Islamists can then use this foothold to project military power and submit the rest of the world. To this end, Osama bin Laden preached that “to kill the Americans and their allies . . . is an individual duty for every Muslim,”¹³ and the 9/11 hijackers were a “vanguard God ha[d] blessed . . . to destroy America.”¹⁴ Very simply, because it blocks a recreated Caliphate and resists God’s laws, the West is an evil civilization Islamists must eradicate.¹⁵

Contemporary Islamists are no less bent upon world conquest than their predecessors who battled Charlemagne, and no less pledged to wage total war than the Nazis or Communists. On 9/11, a quest for global domination begun in the 7th century entered a more violent phase, and Islamists, heartened by U.S. restraint in response to a generation of probing attacks,¹⁶ regained the offensive. All strategies that advance the Islamist goal are divinely sanctioned,¹⁷

¹¹ *A Nation Challenged: Bin Laden’s Statement: ‘The Sword Fell’*, NYTIMES.COM (Oct. 8, 2001), <http://www.nytimes.com/2001/10/08/world/a-nation-challenged-bin-laden-s-statement-the-sword-fell.html> (“I swear to God that America will not live in peace before . . . all the army of infidels depart the land of Muhammad[.]”).

¹² FBIS REPORT, *supra* note 8, at 58. Irredentist Islamist doctrine holds that once territory is governed by Islam it is permanently incorporated within *dar al Harb*, mandating reconquest if ever lost to non-Muslims. *Qur’an* 2:191 (“Slay [infidels] wheresoever ye find them and expel them from whence they have expelled you[.]”).

¹³ FBIS REPORT, *supra* note 8, at 212.

¹⁴ *Statement of Usama bin Ladin on US Strikes* (Oct. 7, 2001) in FBIS REPORT, *supra* note 8, at 183.

¹⁵ RALPH PETERS, BEYOND TERROR: STRATEGY IN A CHANGING WORLD 52 (2002) (“[Islamists must] destroy . . . a civilization [t]he[y] . . . cast as satanic[.]”).

¹⁶ The current phase began in 1979 when Iranian Islamists seized the U.S. Embassy. BERNARD LEWIS, THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR 162-63 (2002). Failure to respond with overwhelming force to the bombing of the World Trade Center (1993), Al Qaeda attacks in Somalia (1994), and the bombings of Khobar Towers (1996), U.S. embassies in Africa (1998), and USS *Cole* (2000) convinced Islamists the United States had become “degenerate and demoralized, ready to be overthrown.” *Id.*

¹⁷ A goal is “the objective toward which [a strategy] is directed[.]” Strategy is a “program . . . conceived and oriented based on available resources.” ELIYAHU M. GOLDRATT, THE GOAL (1984).

and armed force, which Islamists have employed in various forms for 1400 years on fields of struggle from Roncesvalles to Granada, Jerusalem to Vienna, New York to London, and Baghdad to Kabul, is part of this strategic portfolio. An Al Qaeda training manual boasts that “[t]he confrontation that Islam calls for does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy . . . [b]ut it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.”¹⁸ ISIS is using armed force, as well as beheadings, sex slavery, narcotrafficking, and chlorine gas, to extend a “Caliphate” it declared over swaths of Iraq and Syria in June 2014, and its ferocious momentum has the West fumbling for a counterstrategy even as ISIS fighters prepare to capture Baghdad and Damascus. Meanwhile, the Taliban gain in Afghanistan and Pakistan, secular regimes tumble in North Africa, and Iran races toward nuclear weapons.

Yet the advance of ISIS and Islamism is attributable less to bullets and bombs than to an incipient strategic adaption. Because application of traditional military power against Western armies would guarantee eradication of their vastly inferior forces,¹⁹ Islamists reconfigured their strategy to emphasize more effective modalities of battling the West that, woven together with insurgencies, maximize utility.²⁰ The analytical construct “Fourth Generation Warfare” (“4GW”), also known as “asymmetric” or “irregular” war,²¹

¹⁸ See THE AL QAEDA MANUAL, <http://www.justice.gov/sites/default/files/ag/legacy/2002/10/08/manualpart1-1.pdf> (last visited Feb. 27, 2015).

¹⁹ Traditional warfare is interstate battle between national armed forces that battle each other with conventional weapons. U.S. AIR FORCE, DOCTRINE DOCUMENT 3-2, IRREGULAR WARFARE 2 (Mar. 13, 2013).

²⁰ Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 340 (2009-2010) (noting the Islamist synergy strategy).

²¹ In “asymmetric warfare,” non-state actors shun force-on-force confrontation to direct attacks against cultures, economies, and populations of states that have difficulty identifying targets vulnerable to conventional military force. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 J. LEGAL STUD. 71, 72 (1997-1998). “Irregular warfare” is a “violent struggle among state and non-state actors for legitimacy and influence over . . . relevant populations.” IRREGULAR WARFARE, *supra* note 19, at 2.

differentiates modern war from previous generations of war²² and describes, in twelve axioms, the war Islamists are waging against the West:

- (1) Violent non-state actors (“VNSAs”) seek to collapse states and impose radically different governance regimes.²³
- (2) In wars between states and VNSAs the first party to (a) eradicate, (b) deter, or (c) defeat its enemy wins.²⁴
- (3) Eradication is unavailable: states are severely constrained in using traditional military power²⁵ and VNSAs lack sufficient military capacity.²⁶
- (4) Deterrence is unavailable: no common interests, no possible *modus vivendi*, and nothing VNSAs fear losing dissuades their attacks on states.²⁷

²² See William S. Lind, *Understanding Fourth Generation War*, 84 MIL. REV. 13 (2004) (describing three previous generations: manpower, firepower, and maneuver).

²³ Timothy J. Junio, *Military History and Fourth Generation Warfare*, 32 J. STRATEGIC STUD. 243, 245-46 (2009).

²⁴ See SUN TZU, *THE ART OF WAR* (“One need not destroy one’s enemy. One need only destroy his willingness to win.”).

²⁵ See THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* 206 (2008) (identifying, locating, and targeting fighters without fixed locations or identifying uniforms, as well as sustaining a politico-legal consensus to use necessary methods and means, are primary constraints).

²⁶ See Ayman al-Zawahiri’s Letter to Abu Musab al-Zarqawi – English Translation (July 9, 2005), available at <https://www.ctc.usma.edu/v2/wp-content/uploads/2013/10/Zawahiris-Letter-to-Zarqawi-Translation.pdf> (“[O]ur capabilities . . . will never be equal to one thousandth of the capabilities of [the United States].”).

²⁷ The Communist thesis presumed the “badness of capitalism” and its inevitable destruction. “X,” *The Sources of Soviet Conduct*, 25 FOREIGN. AFF. 566, 571 (1947). Yet while Communism built a *modus vivendi* upon residual civilizational values it shared with the West, no common values exist to temper Occident-Islamist relations.

- (5) Political will—belief in the legitimacy of, and commitment to fight for, a cause²⁸—is the “center of gravity”²⁹ that must be broken to defeat an enemy.
- (6) Breaking political will requires undermining the enemy’s willingness to fight for its political-economic system, culture, morals, and laws.³⁰
- (7) Information warfare (“IW”) uses information as a weapon to break adversarial political will.³¹
- (8) Psychological operations (“PSYOPs”) are a form of IW that on offense sow “distrust, dissidence, and disaffection” and “turn[s] a people against the cause for which it fights” and on defense support and defend political will.³²

²⁸ “Political will” is a popular commitment to overcome resistance and secure a goal and a belief in the legitimacy of the goal. Lori Post et al., *Defining Political Will*, 38 POL. & POL’Y 653 (2010). “Legitimacy” is a sense of the “legality, morality, and rightness” of an act by a political community. U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-05.130, ARMY SPECIAL OPERATIONS FORCES UNCONVENTIONAL WARFARE 3-11 (Sept. 2008). Wars perceived as illegitimate erode the political will to prosecute them. E. Margaret Phillips, *National Will from a Threat Perspective*, 84 MIL. REV. 33, 33-34 (2010). Political will to fight “unfair, inhumane, or iniquitous” wars can collapse “no matter how worthy the political objective.” Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 JOINT FORCES Q. 35 (2009).

²⁹ “Center of gravity” (“COG”) is “the hub . . . against which all energies [are] directed” to defeat an enemy. CARL VON CLAUSEWITZ, ON WAR 595-96 (Michael Howard & Peter Paret eds. & trans., 1976) (1832). Whereas in previous generations it was the enemy’s military, economy, or government, in 4GW the COG is political will.

³⁰ Colonel Pat Phelan, *Fourth Generation Warfare and its Challenges for the Military and Society*, DEF. STUD., 11:1, 96, 117 (2011).

³¹ IW consists of operations taken to “affect . . . adversary information, information-based processes, information systems, and computer-based networks” and attack the enemy COG. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, JOINT DOCTRINE FOR COMMAND AND CONTROL WARFARE (C2W) I-3 (Feb. 7, 1996), available at http://www.iwar.org.uk/rma/resources/c4i/jp3_13_1.pdf.

³² JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS ix-x (Sept. 5, 2003).

- (9) PSYOPs waged in political, economic, cultural, moral, and legal domains are the primary method of combat between states and VNSAs.³³
- (10) Military operations are combat support efforts that frame, magnify, and potentiate the effects of PSYOPs on adversarial political will.³⁴
- (11) 4GW is total war: the battlespace is everywhere, everyone is a potential combatant, and everything is a target.³⁵
- (12) The first party to make the other unwilling to fight for its political-economic system, culture, values, morals, and laws wins 4GW.³⁶

As of 2015, the West is losing the 4GW Islamism declared for three reasons. First, at the most basic level—understanding what the war is about—Islamists enjoy a near-decisive edge: whereas they are fixed on extending their religious, political, and legal domain across the world, the West quests after a fuzzy vision of a democratic, rule-of-law Islamic world where rights of confessional minorities are respected, goods and ideas are freely exchanged, and incentives to religious radicalism are diminished. Second, the West underestimates Islamist nature and resolve: although some Western leaders recognize Islamism as a vicious ideology that “follow[s] in the path of fascism, Nazism, and totalitarianism,” few publicly acknowledge the threat it poses to Western civilization, and most believe it will follow its ideological predecessors “[in]to history’s

³³ See Colonel T.X. Hammes, *Fourth Generation Warfare Evolves, Fifth Emerges*, MIL. REV. May-June 2007 at 14 (“[4GW] uses all available networks—political, economic, social, and military—to convince the enemy . . . that their . . . goals are either unachievable or too costly for the perceived benefit.”).

³⁴ See *id.* at 14 (describing a shift from “military campaigns supported by [IW] to [PSYOP] campaigns supported by [counter/insurgency].”).

³⁵ See Phelan, *supra* note 30, at 2-3 (describing 4GW as a “war of the people” in which “the distinction between war and peace . . . disappear[s.]”) (emphasis in original).

³⁶ See generally J. Boone Bartholomees, *Theory of Victory*, 38 PARAMETERS 26 (2008) (elaborating 4GW victory conditions).

unmarked grave of discarded lies.”³⁷ Third, the conflict with Islamism became a 4GW in 1979, and Western failure to adapt to the changed nature of the war is magnified by its disadvantage in PSYOP capabilities. Whereas the West remains invested in the defunct proposition that traditional instruments of power, i.e., conventional military force, that carried utility in the previous three generations of war, will suffice, Islamists know victory is political, not martial, and that they must destroy the Western will to fight. Islamists forced U.S. withdrawal without victory from Iraq and Afghanistan³⁸ because they recognized that, although their own forces could never defeat Western troops in battle, Western political will, and in particular its constituents—belief in the legitimacy of a civilization defined by democracy, individual rights, religious pluralism, and the willingness of the Western peoples to fight for the survival of this civilization—was far more vulnerable.³⁹

Islamists have been fighting a total war using information as their primary weapon, intending to destroy Western will and civilization, while the West has been fighting a limited war, primarily with military force, hoping to disrupt Islamist groups and

³⁷ Presidential Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

³⁸ The last U.S. forces withdrew from Iraq in 2011, and ISIS appears poised to defeat the Iraqi government. Rick Brennan, *Withdrawal Symptoms*, 93 FOREIGN AFFAIRS 25 (2014), available at <http://www.foreignaffairs.com/articles/142204/rick-brennan/withdrawal-symptoms>. In 2014, the U.S. announced its last combat forces would withdraw from Afghanistan by the end of 2016, despite failure of the Afghan government to develop a sustainable indigenous security capacity and a resurgence of the Taliban. Kenneth Katzman, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 22 (2015).

³⁹ For Americans, political will is a collective commitment growing out of considerations of interests and ideals and sustained by the belief that war is “right, necessary, and worth the sacrifice” in lives and treasure. SUSAN A. BREWER, *WHY AMERICA FIGHTS* 3-4 (2009). Islamists identify U.S. political will as the critically vulnerable Western COG. JOHN A. GENTRY, *HOW WARS ARE WON AND LOST: VULNERABILITY AND MILITARY POWER* 265 (2102). We “face a foe who knows that war starts with ideas and depends on them[.]” Sebastian L. v. Gorka, *The Age of Irregular Warfare: So What?* 58 JOINT FORCES Q. 32, 38 (2010). “[T]he war on terror cannot be lost on the battlefield; but it can be lost if the will of the American people falters[.]” THOMAS MCINERNEY & PAUL VALLELY, *ENDGAME: THE BLUEPRINT FOR VICTORY IN THE WAR ON TERROR* 37 (2004).

democratize the Islamic world.⁴⁰ In such a contest, Islamists need not win a single military engagement: they will prevail if they psychologically exhaust the West, inveigle its peoples into doubting the utility and morality of the war, make the price of victory exceed the costs, and compel its peoples to pressure their governments to abandon the fight. To destroy Western political will, Islamists have focused their primary attacks against the military, political, and economic leader of the West—the United States.⁴¹ More pointedly, they have targeted the most fundamental component of the American self-conception as leader of a civilization worth defending: veneration of the rule of law.

If the phrase has been drained of some meaning by “ideological abuse and . . . over-use,”⁴² the expression “rule of law” nevertheless connotes a politico-legal order in which rights are respected in the creation and application of laws; life, liberty, and property are immune from arbitrary deprivation; individuals are formally equal; judges are neutral and redress grievances based on rules and not politics; and laws govern disputes rather than human whim.⁴³ By specifying the refusal of the British monarch to uphold British laws in governing the American colonies as a ground for political separation, and by elaborating explicit constitutional prohibitions against arbitrary government and recognizing the “law of Nations” as part of U.S. law, the Founding Fathers made manifest the respect for the rule of law that is so firmly rooted in the American national character. The decision in 1776 to fight the greatest military

⁴⁰ See Michael J. Mazarr, *The Folly of “Asymmetric War,”* 31 WASH. Q. 33, 42 (and *passim*) (2008) (juxtaposing asymmetries of U.S. and Islamist goals and commitments).

⁴¹ Where Western security threats arise, “if the United States is not the solution, there is no solution.” Harold Hongju Koh, *The Law Under Stress After September 11*, 31 INT’L J. LEGAL INFO. 317, 322 (2003). A captured document from bin Ladin’s Abbottabad compound reveals that Islamists conceptualize the United States as the trunk of a tree with NATO and apostate Arab regimes its branches: “[S]aw the American trunk . . . once the tree is down, its branches will die [.]” SOCOM 2012-0000017-HT, at 2, *available at* <https://www.ctc.usma.edu/posts/letter-regarding-al-qaida-strategy-english-translation-2>.

⁴² JUDITH SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS* 21 (Stanley Hoffman ed., 1998).

⁴³ See generally Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195 (1977).

power on earth to vindicate the principle that “the law is king” rather than “the king is the law”⁴⁴ underscores the centrality of law to American cultural and political identity. Legal consciousness and a predilection for resorting to law to order affairs and resolve disputes have penetrated the American mind so deeply that law influences, even determines, the outcomes of American conflicts political and military.⁴⁵ U.S. foreign policy elites have long championed rule of law as an American export that spreads peace, order, and justice globally,⁴⁶ and it is a desideratum for which Americans have spent blood and treasure from the earliest days of the Republic. Indeed, it is part of U.S. strategy for defeating Islamism; as the National Strategy for Counterterrorism makes manifest, “commitment to the rule of law is fundamental to supporting an international [order]” that can detect, deter, and defeat Islamists.⁴⁷

Thus, for America to be chastised for violations of law, or worse, branded a rogue and anomic regime, threatens the fundament of U.S. legitimacy. Because the United States, like other democratic republics, requires public support to muster, deploy, and sustain military operations, and because allegations of law of armed conflict (“LOAC”) violations lodged against the U.S. strike at the legitimacy of a nation constituted by the rule of law and unwilling to prosecute “illegal” wars, these claims directly assault American political will.⁴⁸

⁴⁴ THOMAS PAINE, THE PROJECT GUTENBERG EBOOK OF COMMON SENSE, BY THOMAS PAINE, <https://www.gutenberg.org/files/147/147-h/147-h.htm> (last visited Feb. 28, 2015).

⁴⁵ See ALEXIS DE TOCQUEVILLE, THE PROJECT GUTENBERG EBOOK OF DEMOCRACY IN AMERICA, VOLUME 1, BY ALEXIS DE TOCQUEVILLE, ch. 16, <http://www.gutenberg.org/files/815/815-h/815-h.htm#link2HCH0038> (last visited Feb. 28, 2015) (observing that U.S. political issues are invariably framed as legal questions).

⁴⁶ See, e.g., THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 36 (2006), available at <http://nssarchive.us/NSSR/2006.pdf>.

⁴⁷ NATIONAL STRATEGY FOR COUNTERTERRORISM 6 (2011) [hereinafter USNSCT], available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

⁴⁸ CHARLES J. DUNLAP, JR., LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS 4 (2001), available at <http://people.duke.edu/~pfeaver/dunlap.pdf> (suggesting that U.S. opponents frequently try to undermine public support by making it appear that the United States is waging war in violation of the laws of war); see Thomas B. Nachbar, *Counterinsurgency, Legitimacy, and the Rule of Law*, 42 PARAMETERS 27, 37 (Spring

It matters not that Islamists repudiate all obligations to observe LOAC; what is necessary is that the U.S. will to fight them withers under allegations of American lawlessness. This is precisely why Islamist strategists have orchestrated a two-dimensioned operational plan consisting of an information element—a PSYOP campaign—supported by a military element—the unlawful use of armed force—to convince Americans that the United States is an evil regime that elected to fight an illegal war against Islam, that the United States systematically commits violations of law in prosecuting this war, that U.S. crimes erode national security and destroy core values, and that the only way the United States can restore its moral virtue, recommit to the rule of law, and protect itself, is to withdraw in defeat.

Islamists are militarily self-reliant, prosecuting jihad with methods universally regarded as grave breaches of LOAC.⁴⁹ The “Islamist Way of War”⁵⁰ uses feigned surrender and murder of

2012) (“[L]aw and legitimacy figure prominently as a means to defeat [America’s] enemies” because “legitimacy [helps] convinc[e] the population . . . to . . . sacrifice to preserve the government” and the lawfulness of U.S. policies reinforces American legitimacy); Dunlap, *supra* note 28, at 35 (“[A]ccounting for law, and . . . the fact and perception of adherence to it, in the planning and conduct of [war]” is necessary to accomplish military missions.).

⁴⁹ LOAC, or international humanitarian law [“IHL”], the norms, customs, and rules that structure legal relations during war, is distillable into basic principles: (1) noncombatants and combatants rendered *hors de combat* by wounds or surrender are immune from attack; (2) medical assistance to the wounded and sick does not violate neutrality, and the state must ensure the protection of persons in its power; (3) all persons are entitled to be free from torture; (4) methods of war are limited, and means which cause unnecessary suffering are prohibited; and (5) civilian and military targets are distinct, with only the latter subject to attack. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 61-78 (1985).

⁵⁰ An “Islamist way of war” presupposes a distinct, articulable way Islamists do battle. Adam Oler, *An Islamic Way of War*, 62 JOINT FORCES Q. 81, 82 (2011) (contains re-classified information and is now only available directly from the National Defense University Press). The “Verse of the Sword” commands Muslims to “kill [infidels] wheresoever ye find them; seize them, encompass them, and ambush them[.]” *Qur’an* 9:5. Islamism treats noncombatant immunity as “a defeasible principle . . . discarded . . . where the enemy bears moral guilt for the grievances that constitute [its] *casus belli*.” Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 452 (2007). Central to the “Islami[st] way of war” is leveraging asymmetry by “terrorism[,] propaganda, [and] subversion[.]” Andrew J. Bacevich, *The Islamic Way of War: Muslims Have Stopped Fighting on Western Terms and Have Started Winning*, AM. CONSERVATIVE (Sept. 11,

prisoners,⁵¹ suicide bombings,⁵² mosques and schools as combat platforms,⁵³ and civilians as human shields.⁵⁴ If Islamists have

2006), <http://www.theamericanconservative.com/articles/the-islamic-way-of-war/>. Whether *Islam* and LOAC are commensurable, and only *Islamism* is at war with LOAC, is a question this Article leaves open. See Abdulaziz A. Sachedina, *From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World*, in RELIGION, LAW AND THE ROLE OF FORCE 23, 30 (J.I. Coffey & Charles T. Mathewes eds., 2003) (Islam commands unrestricted war against infidels). But see Ma'n Abdul Rahman, Book Notes, *Untying the Gordian Knot: Is Jihad the Bellum Justum of Islam?* 18 EMORY INT'L L. REV. 493 (2004) (reviewing HILMI M. ZAWATI, *IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW* (2002) (Islamists violate Islam and LOAC).

⁵¹ Stephanie Nebehay, *Islamic State Committing 'Staggering' Crimes in Iraq*: U.N. Report, REUTERS (Oct. 2, 2014 1:24 PM), <http://www.reuters.com/article/2014/10/02/us-mideast-crisis-un-idUSKCN0HR0R120141002>. Feigning surrender to gain advantage constitutes "perfidy" because it raises doubt in a capturing force about the sincerity of a surrender offer. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1), *opened for signature* Dec. 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. This discourages acceptance of offers to surrender, triggering the denial of quarter—another war crime. *Id.* at art. 40. Murdering prisoners is a routine Islamist practice. See Kashmira Gander, *Isis [sic] 'Executes Hundreds of Iraqi Prisoners' in Horrific War Crime*, UN Claims, THE INDEPENDENT (Aug. 25, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-execution-of-hundreds-of-shia-prisoners-amounts-to-war-crimes-un-claims-9690176.html>.

⁵² In addition to 9/11, Islamists have conducted suicide attacks in Madrid, London, Mumbai, Tel Aviv, Baghdad, Kabul, Bali, Damascus, Sana'a, and elsewhere. See e.g., Ewen MacAskill, *Fivefold increase in terrorism fatalities since 9/11, says report*, THE GUARDIAN (Nov. 17, 2014), <http://www.theguardian.com/uk-news/2014/nov/18/fivefold-increase-terrorism-fatalities-global-index>.

⁵³ See, e.g., Mark Mazzetti & Kevin Whitelaw, *Into the Thick of Things*, U.S. NEWS & WORLD REPORT, Nov. 5, 2001, at 24 (reporting Afghan Islamists taking shelter and storing weaponry in mosques and schools); Dexter Filkins, *The Conflict in Iraq: With the Eighth Marines*, N.Y. TIMES, Nov. 10, 2004, at A1 (same by Iraqi Islamists); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279, 287 (2011) (same by Gazan Islamists).

⁵⁴ Islamists practice human shielding, defined as the "use of . . . civilians, or captured members of the adversary's forces . . . placed . . . in a way meant to deter an attack against the forces using the[m]," in every theater in which they fight. See H. VICTOR CONDE, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 114 (2d ed. 2004) (defining human shielding); Anne Barnard & Jodi Rudoren, *Israel Says Hamas Uses Civilian Shields, Reviving Debate*, N.Y. TIMES, July 23, 2014, available at <http://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html>; Gianluca Mezzofiore, *Pentagon: Isis [sic] Using Local Population in Syria as Human Shields*, INT'L BUS. TIMES, Sept. 23, 2014,

achieved no major *military* objectives since 9/11, they have inflicted casualties, fractured alliances, broken budgets, and saddled Americans with fatigue and doubt.⁵⁵

Still, fatigue and doubt do not spell defeat. Islamists must overcome Americans' residual support for the war to prevail, and thus it is the informational dimension that receives their main combat effort. Yet Islamists have assayed their capabilities and realize that destruction of U.S. political will—historically the hardest of targets, as triumphs in the Revolutionary War, Civil War, World War II, and Cold War made manifest—requires infliction of cognitive effects more destructive of American faith in the legitimacy of their government than Islamists' own ideological, cultural, and intellectual resources can generate. Of their own accord, Islamists lack the skill to navigate the information battlespace, employ PSYOPs, and beguile Americans into hostile judgments regarding the legitimacy of their cause. Destruction of American political will thus requires indigenous collaboration: Islamists' "work in America . . . in destroying Western Civilization from within" necessitates "'sabotaging' its miserable house by their [own] hands."⁵⁶

Accordingly, Islamists have identified strongpoints and force multipliers with cultural knowledge of, social proximity to, and

available at <http://www.ibtimes.co.uk/pentagon-isis-using-local-population-syria-human-shields-1466869>.

⁵⁵ Americans are sensitive to the human costs of war. See Christopher Gelpi & John Mueller, *The Cost of War*, FOREIGN AFF. (Jan./Feb. 2006), <http://www.foreignaffairs.com/articles/61222/christopher-gelpi-and-john-mueller/the-cost-of-war> (noting Islamists inflict casualties to induce the U.S. to withdraw troops). Since 9/11, U.S. operations have cost \$1.6 trillion and 52,311 U.S. military casualties including 6,839 of whom have been killed. Nese F. DeBruyne & Anne Leland, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS (2015); Amy Belasco, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2014). Many doubt accomplishments justify these sacrifices. See also *War and Sacrifice in the Post-9/11 Era*, PEW RESEARCH CTR. (Oct. 5, 2011), <http://www.pewsocialtrends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era/>.

⁵⁶ Mohamed Akram, *An Explanatory Memorandum on the General Strategic Goal for the Brotherhood in North America*, THE INVESTIGATIVE PROJECT ON TERRORISM (May 19, 1991), <http://www.investigativeproject.org/documents/misc/20.pdf>.

institutional capacity to attrit American political will.⁵⁷ These critical nodes form an interconnected “government-media-academic complex” (“GMAC”) of public officials, media, and academics who mould mass opinion on legal and security issues,⁵⁸ and, for Islamists, are sources of combat power that must be infiltrated and co-opted to shatter American perceptions of the legal and moral rectitude of the war. Whereas these institutions and intellectuals once embraced values consonant with the society in which they root, over the past half-century they have sharply diverged. Thus, Islamist PSYOPs require the capture of the triumvirate of GMAC nodes—media, government, and the academy—and the recruitment of the wielders of combat power within these nodes—journalists, officials, and law professors—who form the clerisy that alone possesses the ideological power to defend or destroy American political will.

The most transparent example of the power of elite institutions to shape popular opinion as to the legitimacy of U.S. participation in wars is the traditional media. During the Vietnam War, despite an unbroken series of U.S. battlefield victories, the media first surrendered itself over to a foreign enemy for use as a psychological weapon against Americans, not only expressing criticism of U.S. purpose and conduct but adopting an “antagonistic attitude toward everything America was and represented” and “spinning” U.S. military success to convince Americans that they

⁵⁷ Islamists apply the insights of Gramscian cultural hegemony theory, which posits that collapsing an existing political order requires gaining control not of the means of *material* production as in classical Marxism but of the “means of cultural production.” See generally Major Paul E. Swenson, *Al Qaeda, Caliphate and Antonio Gramsci: One State, One Region, Then One World?* (Apr. 2009) (unpublished Research Report, Air Command & Staff College, Air University).

⁵⁸ The Government-media-academic complex (“GMAC”) describes an information aristocracy of senior government officials, elite media members, and university faculty, which squeezes non-members from public colloquy and shapes opinion on security, military, and legal issues. See Ed Lasky, *The academic/media complex*, AM. THINKER (Sept. 8, 2004), http://www.americanthinker.com/articles/2004/09/the_academicmedia_complex.html. Entry barriers create social capital for entrants, and in exchange for commitment to its “(postulated) consensus” GMAC offers “[p]olitical, commercial, academic, and journalistic prestige and advancement[.]” George Will, *The Climate Change Travesty*, Dec. 6, 2009. GMAC squeezes non-members from public colloquy and shapes opinion on security, military, and legal issues. Lasky, *supra* this note, at 3.

were losing, and should quit, the war.⁵⁹ Subordinating reality to a “narrative,” journalistic alchemists converted victory into defeat simply by pronouncing it; Americans, sitting rapt at their televisions but lacking facts to gainsay the media version of events and as yet unaccustomed to doubting media personalities, accepted the verdict. When CBS Evening News anchor Walter Cronkite misrepresented the failed North Vietnamese Tet Offensive of January 1968—an operational win for the United States—as a Communist “victory,” the imprimatur of the “most trusted man in America” made it so.⁶⁰

Defeatism, instinctive antipathy to war, and empathy for American adversaries persist within media. Compliant journalists grant extensive coverage to Western attacks resulting in civilian casualties, but ignore terrorists’ use of those very civilians as human shields in parroting allegations of war crimes. During the Iraq War, despite historically low collateral damage and military losses, the media exaggerated civilian casualties and fixated upon military casualties to the exclusion of favorable coverage regarding mission accomplishment, creating the impression that the war was analogous to Vietnam in its (alleged) illegality, immorality, and futility.⁶¹ Rather than frame detainee abuse at Abu Ghraib as unauthorized acts of criminals judicially punished for their crimes, and contrasting it with the vastly more egregious beheadings of Westerner captives to the approbation of Islamist clerics, media coverage almost entirely centered upon the former, creating a narrative of brutish American lawlessness.⁶² Ideological proclivities of the omnipresent media are a

⁵⁹ NORMAN PODHORETZ, *WORLD WAR IV: THE LONG STRUGGLE AGAINST ISLAMOFASCISM* 84-86 (2007).

⁶⁰ For a discussion of ideological defeatism in the media, see Franz Michael, *Ideological Guerrillas*, 21 *SOC’Y* 27 (1983).

⁶¹ PODHORETZ, *supra* note 59, at 116.

⁶² Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 *ARMY LAWYER* 1, 3 (“It is apparent after any cursory review of national news that . . . the popular media have exhaustively discussed and dissected issues as disparate as prosecution of military personnel for abuses at Abu Ghairb, the legal status of detainees, the legal status of terrorists, the legality of preemptive war, and the prosecution of alleged war crimes . . .”).

crucial force multiplier, and tasking them as a weapon against U.S. political will is an Islamist operational imperative.⁶³

Government elites also occupy “high ground” for Islamists, as they set national strategy, commit U.S. forces, and bear responsibility for LOAC compliance. How agents and guardians of the people make and defend policies and decisions that implicate LOAC is influential in determining whether Americans perceive a resort to force and subsequent conduct in battle as consistent with LOAC and, in turn, legitimate. The integrity of U.S. political will is thus a function not only of objective battlefield success but also of subjective perceptions of LOAC compliance, both of which are shaped by the pronouncements of senior officials. Affirmations of LOAC fidelity reinforce American political will; accusations of U.S. military infidelity, as Senator Richard Durbin (D-IL) leveled, claiming a description of alleged mistreatment of Islamist detainees would cause a listener to “believe this must have been done by Nazis, Soviets[,] or some mad regime,”⁶⁴ and as Senator Patrick Leahy (D-VT) charged, claiming only a “truth commission” akin to the South African investigation of apartheid could uncover “U.S. crimes” in Iraq and Afghanistan,⁶⁵ effectuates Islamist ends.

The third element in the triumvirate—the academy—tills and fertilizes the intellectual soil from whence sprout crops of graduates who internalize and recycle claims that oppressive U.S.

⁶³ Letter from Zawahiri, *supra* note 26 (“[M]ore than half of this battle is taking place in the . . . media. And we are in a media battle in a race for hearts and minds of our Umma.”).

⁶⁴ 151 CONG. REC. S6594 (June 14, 2005).

⁶⁵ See Senator Patrick Leahy, Restoring Trust in the Justice System: The Senate Judiciary Committee’s Agenda in the 111th Congress, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University (Feb. 9, 2009), *available at* <http://www.truthout.org/021009K> (invoking the South African experience); see also George D. Brown, *Accountability, Liability, and the Use of Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 195-98 (2011). In 2005, Secretary of State John Kerry thundered that “[t]here is no reason young American soldiers need to be going into the homes of Iraqis in the dead of night, terrorizing kids and . . . you know, women.” FACE THE NATION (CBS), Dec. 4, 2005. Rep. John Murtha (D-Pa.) went further, accusing U.S. Marines of “killing innocent civilians in cold blood.” Jim Miklaszewski & Mike Viqueira, *Lawmaker: Marines Killed Iraqis “In Cold Blood,”* MSNBC, May 17, 2006.

institutions and policies cause the conflicts enmeshing the nation.⁶⁶ Because academic proponents of these arguments are widely, if mistakenly, regarded as neutral arbiters of truth dedicated to the pursuit of knowledge and above the American political and cultural fray, their pronouncements on all manner of subjects, including U.S. conduct in the war with Islamism, are received by the lay public as the essence of wisdom itself.

The power of GMAC is difficult to overstate: imputation of illegality to U.S. intervention in Iraq, Afghanistan, and elsewhere, and to America's conduct of military operations in these theaters, by media, government officials, and academics, is a potent source of force multiplication and combat power for Islamist PSYOP attacks against American political will.⁶⁷ Still, as influential as these organizations and institutions are, their synchronized claims are less destructive of American political will than those leveled by the GMAC cohort that possesses the greatest substantive LOAC expertise, along with the unconstrained freedom to make authoritative judgments, in highly visible traditional and new media, on the legality of every issue across the full spectrum of U.S. military operations in the war against Islamism: specifically, lawyers, and more particularly, the legal academy.

Lawyers, by dint of formal training, the centrality of law in American public life, and heavy reliance on their counsel in navigating a regulatory behemoth, reign as an intellectual aristocracy,⁶⁸ with a special warrant to "say what the law is."⁶⁹ Their

⁶⁶ Candace de Russy, *The Academy and Fourth Generation Warfare*, EDUC. MATTERS (Ass'n of Am. Educators, Cal.), Jan. 2004, at 1, *available at* <https://www.aetteachers.org/newsletters/jannews04.pdf>.

⁶⁷ See Kenneth W. Anderson, *Predators Over Pakistan*, THE WEEKLY STANDARD, Mar. 8, 2010, *available at* <http://www.weeklystandard.com/articles/predators-over-pakistan> (presenting examples).

⁶⁸ Lawyers constitute a professional caste, organizational culture, and intellectual "clique" with a seat at every table where economic, political, and military affairs are conducted. Anthony Paik, Ann Southworth & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 L. & SOC. INQUIRY 883, 883, 885 (2007). Consequently, lawyers wield "enormous influence" in American society. MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN

social power and status garners them “special opportunities to articulate, and . . . implement, solutions to the problems they perceiv[e,]”⁷⁰ and lay persons are ill-equipped to challenge their pronouncements. The strength of a claim regarding law is, if not a simple function of expertise, correlated to the base of knowledge underlying it and the (perceived) neutrality of the claimant; non-lawyers are typically deferential before superior, putatively-neutral knowledge.

Within an already exalted profession, professors of law are an aristocracy with special influence over the theorization and transformation of law: by design, their ideas exert *force majeure*.⁷¹ In the late 19th century, elite U.S. law schools sent out evangelists as faculty to lesser law schools, and encouraged them to exercise “more freedom . . . than even judges did to shape the law,” and to be the “bold and ingenious theorist[s]” who would establish the legal academy as the site of intellectual leadership and change within the legal profession.⁷² Law professors “hid . . . their elitist claims in [a] mysterious science which . . . remained unfathomable to the uninitiated,” thereby reinforcing the image of law as a rarified field inhospitable to the unlearned, and of legal faculty as the font of recondite knowledge. Legal academics styled themselves as “scientists” disinterested in partisan disputes and committed only to solving “social malfunctions[,] reduc[ing] practicing lawyers to the status of special pleaders for the parochial interests of their clients.”⁷³ By providing pedagogical leadership, leveraging academic freedom,

AMERICAN POLITICAL INSTITUTIONS 17, (1995). For a theorization of the power of lawyers in the United States, see *id.* at 2, 174.

⁶⁹ See *Marbury v. Madison*, 5 U.S. 137, 138 (1803) (Marshall, C.J.) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁷⁰ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 3 (1977).

⁷¹ See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1168 (2005) (“[L]awyers are the ‘aristocrats’ of American democracy—far more politically influential than any other profession. Law professors play an important role . . . acting as both its gatekeepers and its ‘theorists.’”).

⁷² See AUERBACH, *supra* note 70, at 74-75, 83 (discussing the causes behind rise of the legal professoriate as the elite among elites within the legal profession).

⁷³ *Id.* at 77, 85.

and cultivating a professional problem-solving approach while appearing above the fray, the legal academy crowned itself the intellectual royalty of the legal profession.

The influence of the legal academy is also a function of the centrality of the rule of law to American political institutions, coupled with the rise of the mass media. Because, as de Tocqueville discerned, every political question in America ultimately becomes a legal question, legal academics, as the class best endowed to offer opinions grounded in expert knowledge without being colored by obligations arising out of the representation of a party to a dispute, are sought out by Congress and the media for their input, a process that connects theory with practice and reinforces their status as intellectual elites. Moreover, through media appearances, op-ed articles, blogs, open letters, and amicus briefs, law professors place their *savoir faire* behind particular viewpoints to influence contentious legal and political issues, including the “impeachment of President Clinton, . . . the 2000 presidential election, affirmative action, terrorism . . . and homosexual rights,” all the while broadening and deepening their influence over other lawyers and judges in molding the law.⁷⁴ Media forays produce effects that percolate down, influencing attitudes and beliefs regarding the subjects upon which law professors pontificate in government, schools, churches, and entertainment.⁷⁵

Thus, the capacity of the legal academy to exert influence is a function of its supremacy atop a stratified profession central to the administration of a rule-of-law republic, its expertise, and its free access to media that transmit their ideas.⁷⁶ However, when legal scholars enter the battlefield of ideas, although far better armed than most, they are not neutrals, and they carry political, ideological, and psychological dispositions that color their interpretations of what law is, and give wings to their aspirations for what law should be. Legal

⁷⁴ McGinnis et al., *supra* note 71, at 1167-68, 1190-98.

⁷⁵ See, e.g., de Russy, *supra* note 66, at 55 (arguing that academia shapes “popular culture . . . , our schools and churches, and government.”).

⁷⁶ See Richard H. Pildes, *The Legal Academy and the Temptations of Power*, in *DISSENTING VOICES IN AMERICAN SOCIETY* (Austin Sarat ed., 2013) (theorizing the political power of the American legal academy).

scholarship, although invested with authorial expertise, is, like all scholarship, advocacy—even militancy:

Pure scholarly agnosticism is not conceivable. . . . We all take part in the . . . critique of any conflict we comment upon. . . . We have dreams [that] cannot be entirely refrained. Because law is not fully determinate, we cannot help project our political views in the interpretation thereof.⁷⁷

Still, because the legal academy has an official “answer” to so many questions, and can credibly offer it as dispassionate analysis free from ideological taint—the work of reason itself—rather than as but one of a number of views with which reasonable people can and do disagree, the impression of unassailable legal wisdom that must be heeded by faithful adherents to the rule of law is chiseled still deeper into the American consciousness. By asserting expertise as an excuse for collapsing positive and normative claims about law, the legal academy abuses the freedom that attends the scholarly enterprise. Worse, because the cost of disagreement with this cadre of experts is banishment from GMAC and the forums in which law and policy are made and interpreted, law professors have seized the power to draw the boundaries of what legal interpretations and conclusions may be expressed without committing the mortal civic sin of transgressing the rule of law. Most crucially, they have converted the U.S. legal academy into a cohort whose vituperative pronouncements on the illegality of the U.S. resort to force and subsequent conduct in the war against Islamism—rendered in publications, briefs *amicus curiae*, and media appearances—are a super-weapon that supports Islamist military operations by loading combat power into a PSYOP campaign against American political will. While this claim applies broadly across the legal academy, a cadre of perhaps two hundred U.S. and allied experts in LOAC—the LOAC Academy (“LOACA”)⁷⁸—possess the authority and influence as learned and

⁷⁷ Jean D’Aspremont, *The International Legal Scholar in Palestine: Hurling Stones Under the Guise of Legal Forms?*, 14 MELB. J. INT’L L. 1, 16 (2013).

⁷⁸ Before 9/11, LOAC was confined to a niche inhabited by handfuls of professors, mostly former JAG officers, at perhaps ten U.S. law schools. After 9/11, the number of legal scholars writing about, teaching, and claiming expertise in LOAC has exploded. Most lack military service but possess expertise in human rights, criminal law, international law, or other subjects with a nexus to issues arising in the 4GW

indigenous members of the civilization under assault to validate or invalidate Islamist claims about LOAC and to multiply or denature the combat power of Islamist PSYOPs.

Most pointedly, this charge is aimed at a clique of about forty contemptuously critical LOACA scholars (“CLOACA”)⁷⁹ who, by proposing that LOAC restrictions on Islamists be waived to provide unilateral advantage, that Western states face more rigorous compliance standards, and that captured Islamist militants be restored to the battlefield, effectively tilt the battlefield against U.S. forces, contribute to timorousness and lethargy in U.S. military commanders, constrain U.S. military power, enhance the danger to U.S. troops, and potentiate the cognitive effects of Islamist military operations.⁸⁰ Moreover, CLOACA, rather than make good-faith legal arguments as to what LOAC does, does not, should, and should not require, offers up politicized arguments—against evidence and reason—that the Islamist jihad is a reaction to valid grievances against U.S. foreign policy, that civilian casualties and Abu Ghraib prove the injustice of the Western cause, that law enforcement suffices and military action is a gross over-reaction, that U.S.-led interventions in Iraq and Afghanistan are illegal aggression *per se*, that the United States is engaged in a pattern of war crimes *à la* Nazi Germany, that U.S. criminality breeds more terrorists and threatens

against Islamism. The exact number is hard to fix, but perhaps two hundred U.S. professors who regularly publish or teach in LOAC, and another thirty from allied nations—Israel, EU, Australia, New Zealand, Canada, and Japan—constitute LOACA.

⁷⁹ This Article emphatically *does not* regard all LOACA scholarship critical of U.S. 4GW policies as *per se* offerings to Islamism or its authors as *ipso facto* state enemies. LOAC is susceptible to interpretation, and much conduct in war is addressed with flexible standards and not rigid rules. See D’Aspremont, *supra* note 77, at 3-6 (recognizing that all parties “[p]lay[] within the . . . windows left open by [LOAC]’s indeterminacy[.]”). Yet when a contemptuous LOACA minority systematically interprets LOAC in its scholarship in a way that aids Islamists in securing their goal and “convince[s] third parties . . . that [the Islamist] fight is just and legitimate” the inference that *these specific scholars*—“CLOACA”—abjure all pretense to truth to commend their knowledge into the service of Islamism—follows ineluctably. *Id.* Moreover, entry into and exit from CLOACA is open: LOACA academic scholars, through their scholarship, make choices that self-determine their exclusion or inclusion.

⁸⁰ See *infra* part I.

the rule of law, that U.S. leaders should be prosecuted for crimes that make Americans less safe, and that dissenters merit professional condemnation and prosecution to shame or compel them into silence.⁸¹

Thus, rather than committing its prodigious talents into the service of its nation of birth or employment, or at least serving as a dispassionate, neutral seeker of truth, CLOACA has mustered into the Islamist order of battle as a Fifth Column⁸² to direct its combat power against American military power and American political will. This radical development—employment of PSYOPs by American elites against Americans—is celebrated in the Islamic world as a portent of U.S. weakness and the coming triumph of Islamism. That a *trahison des professeurs* is responsible for the creation of the most important strategic weapon in the Islamist arsenal is a serious charge that must be developed and defended, and one at which previous scholarship has barely hinted.

Although a polylogue on the weaponization of law under the rubric of “lawfare” has emerged in the fields of strategy and LOAC, nothing in this literature connects the Islamist drive to global hegemony with the strategy of attacking American political will via a PSYOP campaign led by American legal academics. Legal literature conceives of disagreements over LOAC as internal disciplinary debates externalized into the fields of human rights and rule of law. The seriousness of the Islamist threat, the extent to which American political will is under attack, and the possibility that members of LOACA may now be *de facto* combatants are beyond its conception. At the same time, whereas politico-military scholars understand the stakes over which the war is being fought, and that PSYOPs have displaced conventional military operations as the primary

⁸¹ *Id.*

⁸² “Fifth Column,” a reference to a seditious organization within a population working on behalf of the political and military objectives of an enemy of that population, was coined by a Nationalist general during the Spanish Civil War who claimed the four columns of his forces outside the besieged city of Madrid would be augmented by a “Fifth Column” of his supporters within the city who would overthrow the government from within. FRANCIS MACDONNELL, INSIDIOUS FOES: THE AXIS FIFTH COLUMN AND THE AMERICAN HOME FRONT 3-4 (1995).

mechanism for securing strategic objectives, their analysis neither provides an enriched account of the origins and employment of Islamist combat power nor traces them to CLOACA.

Part I of this Article develops the claim that CLOACA is waging a PSYOP campaign to break American political will by convincing Americans their nation is fighting an illegal and unnecessary war against Islam that it must abandon to reclaim moral legitimacy. Part II offers explanations as to why this is so. Part III examines consequences of suffering this *trahison des professeurs* to exist. Part IV sketches recommendations to mitigate this “Fifth Column” and defeat Islamism. Part V anticipates and addresses criticisms. Part VI concludes by warning that, without a loyal and intellectually honest law of armed conflict academy, the West is imperiled and faces defeat in the ongoing Fourth Generation War against Islamism.

I. CLOACA AND ITS PSYOP CAMPAIGN AGAINST AMERICAN POLITICAL WILL

The strategic success of the Islamist PSYOP campaign is measured quite simply by whether it induces Americans to compel their government to withdraw combat forces and abandon a conflict short of victory. Thus, operational employment of PSYOPs by CLOACA consists of two aspects. The first is shaped to augment Islamist military operations against U.S. targets—the combat support function—and thereby instill doubt, temerity, and cost-consciousness, while the second—the direct application of combat power in Fourth Generation Warfare—is designed to leverage these cognitive effects, attack American legitimacy as a rule-of-law nation, and collapse American citizens’ willingness to continue to support what they are led to believe is an unlawful and unwinnable war.

A. *Combat Support: Augmentation of Islamist Military Operations*

The first attack in the PSYOP campaign is waged through *jus in bello* scholarship advocating that reciprocity is defunct and Islamist forces, by virtue of the justice of their cause or their inability

to stand in battle against U.S. forces while adhering to LOAC, are entitled to self-serving interpretations, wholesale rewriting, *ad hoc* waivers, and even unilateral disregard of the rules as necessary to gain military advantage. Meanwhile, CLOACA contends that U.S. forces are not only strictly bound by the standards specified in settled canons of LOAC, but also that by virtue of their resources and capacities they should be, and in some instances are, constrained by more rigorous strictures in issue areas such as permissible methods or means of war, who may be targeted and when, and what process and treatment are due enemy detainees. As a result, not only are the military and cognitive effects of Islamist military operations magnified, but U.S. troops and innocent civilians are subject to increased risks as the utility of U.S. counterforce is attenuated.

The following are seven tactics, in order of increasing departure from traditional conceptions of the scholarly enterprise, whereby CLOACA conducts PSYOP attacks to support Islamist military operations. The first is promotion of more rigorous rules and compliance standards for Western militaries. The second is distortion of LOAC principles to immunize Islamist combatants and render counterforce more operationally complex and legally risky. Third, CLOACA misrepresents aspirations for what LOAC *should be* as statements of fact as to what LOAC *already is*. Fourth, CLOACA degrades U.S. intelligence collection and exploitation. Fifth, it advocates restoration of Islamist detainees to the battle, and sixth, it calls for prosecution of U.S. troops for alleged LOAC violations to cause hesitancy, indecision, and reduction in military vigor. Finally, it encourages execution of direct action missions, including material support of Islamists and treasonous conduct.

1. Promotion of Differential Legal Standards

Reciprocity, a foundational principle of LOAC, specifies that belligerents are formally equal and bound to compliance with identical legal obligations; considerations as to the goals for which they fight and their relative capacities for war and compliance are irrelevant. Islamists, however, refuse to acknowledge the binding force of LOAC, and observe no limits in fighting against Western forces. Orthodox commentators in LOAC maintain that Islamists'

failure to reciprocate Western compliance should strip the former of the protection of the substantive rules of the regime and relieve the United States of obligations to continue unreciprocated compliance, or at least permit the United States to assert that its compliance is a matter of policy rather than legal obligation.⁸³ By contrast, rather than concede that Islamists' failure to reciprocate LOAC compliance strips them of protections under that regime, CLOACA contends that the United States should be obligated to observe LOAC unilaterally, and even to adhere to *more* rigorous legal standards than their Islamist foe.

One CLOACA cohort packages differential obligations as "exemplarism," premising U.S. unilateral compliance with LOAC on the assumption noncompliance will cause Islamists to "act even more ruthlessly [against U.S. prisoners of war (POWs)]" while undermining efforts to win over civilian populations in battle theaters; by this view, the U.S. exemplar gains legitimacy and influence—strategic benefits—even as unilateral compliance imposes operational disadvantages.⁸⁴ Another cadre eschews any appeal to self-interest; rather, in light of gross power disparities and near-complete compliance asymmetry, it proposes an equitable approach that reduces legal obligations to correspond with the limited capacities of have-not belligerents.⁸⁵ Both require Western forces to assume more rigorous obligations and choose tactics that shift risks onto themselves.⁸⁶ More radical ideas would grant "material assistance"⁸⁷ to Islamists. The most radical would require the United States to abjure its air power and transfer weapons and intelligence to

⁸³ See Eric Posner, Editorial, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9 (rejecting arguments favoring unilateral LOAC compliance).

⁸⁴ See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1827-28 (2009) (making this argument).

⁸⁵ David Rodin, *The Ethics of Asymmetric Warfare*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS (Richard Sorabji & David Rodin eds., 2006), 153-56.

⁸⁶ One would oblige the U.S. to "employ more precise . . . weapons [to] minimize civilian casualties[.]" Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L. J. 164, 64 (2011). Another would require U.S. forces to "assume greater risk [than LOAC requires].". *Id.* Both tacitly accept increased American casualties.

⁸⁷ *Id.* at 187-88 (describing aid potentially due from the West to Islamists and civilian populations that harbor them as including "food, healthcare, or shelter[.]").

Islamists who, exempted from compliance, could eschew insignia, use prohibited weapons, and hide among civilians.⁸⁸

These differential obligations scholars claim their proposals would provide more noncombatant protection, induce some quantum of Islamist compliance, and yield strategic gains to compensate for operational disadvantages.⁸⁹ However, schemes to “harmonize” capacity and obligation would reward noncompliant Islamists with better weaponry and information, expose civilians to greater risks of collateral damage, require U.S. troops to face greater combat and criminal exposure, increase the material and cognitive burdens of military operations on Americans, and undermine the principle of reciprocity and with it the legitimacy of LOAC, since Islamists would be held to a necessarily lower standard.

2. Distortion of Distinction and Proportionality

Many LOAC rules are expressed as absolute prohibitions, *e.g.*, those forbidding the intentional killing of civilians, use of biological weapons, and refusal to accept surrender.⁹⁰ Adjudging compliance with such imperatives is an empirical inquiry. Most rules, however, present as standards: for example, the unintended killing of civilians is not illegal provided it is not “excessive in relation to the concrete and direct military advantage anticipated,” or in executing an attack it is necessary to “take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”⁹¹ Evaluating compliance with standards allows observers,

⁸⁸ See *id.* at 164 (“[Is the] U.S. obliged to transfer . . . expensive weapons technologies to . . . Al Qaeda?”); *id.* at 188 (weighing prohibitions on state air power); *id.* at 194 (suggesting states must “share intelligence or . . . targeting technologies.”); Sitaraman, *supra* note 84, at 1832 (waiving Islamist wearing of distinguishing insignia).

⁸⁹ Blum, *supra* note 86, at 196, 209 (claiming proposal will yield greater compliance by weaker parties and “increased humanitarian welfare of [their citizens].”).

⁹⁰ API, *supra* note 51, at Art. 51(2) (forbidding intentional killing of civilians); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, April 10, 1972, 1015 U.N.T.S. 164 (1972) (prohibiting biological weapons); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T.S. 3317 [“GCIII”], at Art. 3(1) (forbidding denial of quarter).

⁹¹ API, *supra* note 51, at arts. 51(5)(b), 57(4).

interpreting in good faith the provisions of treaties and statements of custom, to reach different conclusions about what LOAC permits or prohibits. While there is broad theoretical agreement as to the existence of a core set of principles—distinction, proportionality, necessity, and humanity⁹²—that arise from customary practice and, taken together, constitute the normative basis for LOAC standards and rules, there is sharp disagreement as to what these principles require and prohibit in specific applications. Further, CLOACA—directly or obliquely—suggests that interpretations of these principles, the obligations that arise therefrom, and alleged violations thereof, should depend upon the relative capacity of belligerents. This gambit is most pronounced in regard to distinction and proportionality.

a. Distinction

The principle of “distinction,” which maintains that the only legitimate targets are enemy armed forces and military objects, imposes a categorical prohibition against deliberately targeting noncombatant personnel and civilian objects. However, while an attacker must differentiate noncombatants from combatants and civilian from military objects, the defender is additionally obliged to ensure that its combatants differentiate themselves from noncombatants in order to protect civilians and combatants *hors de combat*.⁹³ Consonant with distinction, combatants must wear uniforms or distinctive insignia and carry weapons openly, and may not use noncombatants to shield themselves from attack. In exchange for marking themselves to the enemy as persons who may lawfully be targeted, combatants earn “combatant immunity,” which insures them against prosecution for belligerent acts otherwise

⁹² Military “necessity” permits all non-prohibited actions that tend directly toward defeating an enemy. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 5 (1996).

“Humanity” requires that belligerent actions not cause unnecessary suffering and that military forces conduct themselves with compassion, fidelity, mercy, and justice. *Id.* at 3, 7. “Distinction” prohibits direct targeting of civilian personnel or objects. API, *supra* note 51, at art. 51(2). “Proportionality” provides that attacking parties ensure unintended civilian casualties are “not excessive in relation to the concrete and direct military advantage anticipated.” *Id.* at art. 57(4).

⁹³ Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765 (2012).

consistent with LOAC.⁹⁴ Thus, distinction allows all parties to know who is and is not a target, granting some protection to innocent civilians.

Still, distinction does not absolutely prohibit civilian casualties.⁹⁵ Civilians may lawfully be killed provided attacks do not deliberately target them and are not disproportionate, defined as “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁹⁶ Moreover, the protections afforded civilians by distinction are defeasible: civilians lose protection against being targeted for so long as they take a direct part in hostilities,⁹⁷ and are subject to prosecution for unlawful combatancy upon capture.⁹⁸ Similarly, when combatants cease distinguishing themselves from civilians—by failing to wear uniforms, refusing to carry weapons openly, or mingling within civilian populations⁹⁹—they lose combatant immunity, and acts once lawful can be prosecuted.¹⁰⁰

Ascertaining compliance with distinction is thus highly dependent upon a definition of “combatants,” the status of persons and objects targeted based on this definition, and an examination of

⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 125 U.N.T.S. 4 (1977) at art. 44. By wearing uniform or insignia, combatants distinguish themselves from noncombatants and earn combatant immunity on capture. William H. Ferrell, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 105-09 (2003).

⁹⁵ See Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT’L L. 255, 261-62 (2010).

⁹⁶ API, *supra* note 51, at art. 57(2)(a)(iii)-(2)(b).

⁹⁷ See *id.* at art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”).

⁹⁸ See *The Relevance of IHL in the Context of Terrorism*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (last visited Feb. 14, 2015) (elaborating on the regime governing the prosecution of unprivileged combatancy).

⁹⁹ See Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417, 1421-27 (2012).

¹⁰⁰ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-30 (2004).

the conduct of persons claiming status-based privileges. It is in these domains that CLOACA distorts the meaning of and facilitates derogation from distinction, particularly as it concerns U.S. military operations to capture and detain, and/or target and kill Islamist combatants.

i. Capture and Detention

Military forces use two methods to neutralize enemy combatants: (1) capture and detain, and (2) target and kill. Western troops have captured thousands of Islamists and detained them to “[p]revent them from returning to the battlefield and engaging in further . . . attacks.”¹⁰¹ Detention, a “fundamental incident” of waging war,¹⁰² incapacitates enemy combatants¹⁰³ while facilitating interrogations that wrest away intelligence used to prevent belligerent acts by other Islamists. The United States may detain enemy combatants without trial until “cessation of active hostilities,”¹⁰⁴ and longer in cases where detainees are subject to prosecution for, or serving a sentence imposed after conviction of, a criminal offense, whether pre- or post-capture.¹⁰⁵ Detention is meant

¹⁰¹ Matthew C. Waxman, *XII The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT’L L. STUD. 343, 344 (2009).

¹⁰² *Hamdi v. Rumsfeld*, 542 U.S. 518, 519 (2004).

¹⁰³ Preventive detention is used to protect the public against dangerous individuals—the mentally ill, sex predators, and POWs—not convicted of crimes but predisposed to commit them, or to harm others, if released. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 785 (2011). If these individuals can be indefinitely detained, “locking up [Islamists] against whom Congress . . . authorized military force based on their dangerousness should not be forbidden[.]” BENJAMIN WITTES, *LAW AND THE LONG WAR* 35 (2009).

¹⁰⁴ GCIII, *supra* note 90, at Art. 118. The U.S. asserts Art. 118 as a well-settled rule supporting detention of Islamists for the duration of the 4GW. See United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, June 29, 2005, Addendum (USA) Annex I, at 47, UN Doc. CAT/C/48/Add.3 (“[U]nder [Art. 118], the [U.S.] has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities.”), available at <http://www.state.gov/documents/organization/62175.pdf>.

¹⁰⁵ GCIII, *supra* note 90, at Art. 118 (“Prisoners of war who are subject to criminal proceedings for a crime or offence at common law may . . . be detained until the end of the proceedings, and, if need be, until the expiration of the sentence.”). Under

to incapacitate rather than punish. However, should hostilities persist, a detainee can lawfully be held until the expiration of his natural life simply by virtue of his status as a combatant loyal to an opposing belligerent whom the detaining party is entitled to prevent from returning to battle. This indefinite detention authority is independent of whether the detained enemy is a lawful combatant—a uniformed member of the organized forces of a lawful belligerent who carries arms openly under responsible chain-of-command¹⁰⁶—or an unlawful combatant—an individual who fails to meet all of these criteria and is thus disentitled to combatant immunity.¹⁰⁷

Lawful combatants are immune for pre-capture belligerent acts conforming to LOAC and, as POWs, enjoy a broad set of negative and positive rights, including retention of personal items, quarters and food equivalent to detaining party personnel, pay, recreation, and correspondence; apart from names, ages, ranks, and identification numbers, POWs may not be compelled to provide

this provision, POWs have been detained for decades. See Chris Jenks & Eric Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41 (2011) (identifying long-term detention by the United States, Israel, Malaysia, Algeria, and Morocco).

¹⁰⁶ Captured combatants are detained as POWs if they earn the combatant privilege. See GCIII, *supra* note 90, at art. 4(a)(1)-(2) (POWs are detainees who are “members of the armed forces of a Party to the conflict” who “fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with [LOAC].”).

¹⁰⁷ “Unlawful combatants” are, by Article 4(a)(1)-(2) of GCIII, civilians who engage in belligerent acts without meeting the criteria for combatant immunity. The “armed forces of a Party to a conflict” include “all organized . . . groups and units” under responsible command with an internal discipline system that enforces “compliance with [LOAC].” API, *supra* note 51, at art. 43(1). Article 43(2) declares these persons “have the right to participate directly in hostilities[.]” Article 44(1) states that “[a]ny combatant . . . in . . . the power of an adverse Party shall be a [POW].” *Id.* at arts. 43(2) & 44(1). Combatants who do not govern themselves as to be so defined under Article 43 are not entitled to POW designation as their combatancy is unlawful. DINSTEIN, *supra* note 100, at 33. The status category of unlawful combatant is incorporated in U.S. law as “unprivileged belligerent” which the statute defines as “an individual (other than a [lawful combatant]) who (A) has engaged in hostilities against the [U.S.]; (B) has purposefully and materially supported hostilities against the [U.S.]; or (C) was a part of al Qaeda at the time of the alleged offense[.]” National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 948a(7)(A)-(C), 2010.

information.¹⁰⁸ By contrast, unlawful combatants are *not* POWs and can be prosecuted for belligerent acts;¹⁰⁹ a sparse set of negative rights spares them only “cruel treatment and torture,” “humiliating and degrading treatment,” and extrajudicial punishment.¹¹⁰ Despite efforts to expand their rights,¹¹¹ unlawful combatants may be vigorously interrogated, denied privileges for failing to provide

¹⁰⁸ See generally GCIII, *supra* note 90, at sec. VI, ch. III (outlining penal and disciplinary sanctions); *id.*, at art. 17 (limiting information that must be provided to captors).

¹⁰⁹ See API, *supra* note 51, at art. 44. The foregoing applies not only to soldiers who doff uniforms but to civilians who take up arms without ever donning a uniform: the latter lose their protected status under LOAC and become unlawful combatants and legitimate targets, and subjects of post-capture judicial proceedings. Convention relative to the Protection of Civilian Persons in Time of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (stripping protections from civilians who take up arms); API, *supra* note 51, at art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”). The doctrine is firmly ensconced in the law of major military powers and writings of eminent jurists. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“[T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants,” and allows military prosecution of the latter).

¹¹⁰ See GCIII, *supra* note 90, at art. 3(1)(a)-(d) [“CA3”] (listing rights to which captured individuals not POWs are entitled). Unlawful combatants benefit from the protections of CA3. See *Military & Paramilitary Activities in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (holding that CA3 rules “in the event of international armed conflicts . . . constitute a minimum yardstick”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006). However, they are not entitled to protections afforded POWs, nor to those granted civilians. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 849 INT’L REV. RED CROSS 45, 45 (2003), available at <https://www.icrc.org/eng/resources/documents/misc/5lphbv.htm>.

¹¹¹ Concerted post-World War II efforts by CLOACA and NGOs to immunize broad categories of belligerents who do not meet requirements of combatant immunity led to inclusion of provisions in API purporting to confer additional protections upon these actors. See API, *supra* note 51, at Art. 44(3)-(4); see also Commentary on API, art. 44, available at <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d04a6a9cbbf8b28cc12563cd00433946>. Few Western states, however, allow that these instruments modify customary LOAC, and unlawful combatants remain disentitled to treatment as POWs and liable to prosecution on capture.

information, and compelled to provide information in negotiated plea agreements.¹¹²

After 9/11, the United States determined that Islamist detainees were unlawful combatants as neither Al Qaeda nor the Taliban was party to the Geneva Conventions and neither wears identifying insignia, carries arms openly, or observes LOAC.¹¹³ Thus, although the United States directs its forces as a policy matter to “treat detainees humanely” and “consistent with the [Geneva Conventions,]”¹¹⁴ it has maintained the legal right to detain indefinitely and interrogate Islamists to the limits of prohibitions on cruel and degrading treatment, and in exercising this right has developed intelligence that has disrupted Islamist operations and enabled the killing and capture of senior Islamists, including Osama bin Laden.¹¹⁵ In sum, the United States lawfully structured detainee operations to deny Islamists the benefits of their unlawful combatancy.

Despite (or because of) this, CLOACA thunders that U.S. treatment of Islamist detainees is illegal because they are immune from coercive interrogation, notwithstanding that these detainees did not meet the criteria for lawful combatancy.¹¹⁶ While some make the

¹¹² Unclassified interrogation methods have included, *inter alia*, sleep deprivation, noise stress, temperature extremes, dietary manipulation, prolonged nudity, prolonged standing, and simulated drowning. See, e.g., STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., REP. ON THE TREATMENT OF DETAINEES IN U.S. CUSTODY, vii (Comm. Print 2008).

¹¹³ See Memorandum from President George W. Bush to Vice President et al., Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002) (elaborating U.S. detainee policy).

¹¹⁴ FINAL REPORT, GUANTANAMO REVIEW TASK FORCE (Jan. 22, 2010), available at <http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>. Since 2006, as a matter of policy, the U.S. has treated Islamist detainees treatment as *de facto* POWs, despite maintaining that those who do not meet the requirements for combatant immunity are unlawful combatants who may be detained indefinitely and subjected to interrogation by methods that do not constitute cruel, inhuman, or degrading treatment because they are not *de jure* POWs. *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Margulies, *supra* note 99, at 12 (describing indefinite detention and coercive interrogation of suspected terrorist detainees as an “effort to change [LOAC]”).

narrower claim that detainees are entitled to Article 75 protections, including release from noncriminal detention “with the minimum delay possible” and significant due process if tried,¹¹⁷ for other CLOACA scholars any military detention can be *per se* unlawful regardless of the pre-capture conduct of detainees or their LOAC status, whom they assert are entitled to the full protections of the civilian criminal justice system—including rights against self-incrimination and immediate release should the United States elect not to prosecute or otherwise fail to secure a conviction.¹¹⁸ The prospect that Islamists might never go free leads some to view LOAC, and not detainees, as the enemy; one huffs that “[LOAC] simply cannot be invoked to justify these detentions when the war could go on forever.”¹¹⁹ One CLOACA bloc, misreading LOAC and the Constitution, emphatically denies that Islamists are “unlawful [enemy] combatants” and brands the designation an “illegitimate term” created solely to “mistreat” . . . detainees.¹²⁰ This school

¹¹⁷ See, e.g., David Glazier, *Playing by the Rules: Combatting al-Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1007-09 (2009). Article 75 establishes a minimum floor of protections to persons not otherwise benefiting from more favorable rules under the GCs; and provides that unlawful combatants are entitled to humane treatment, freedom from torture, and freedom from outrages upon personal dignity. API, *supra* note 51, at Art. 75.

¹¹⁸ See, e.g., Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants”*, 10 Y.B. INT’L HUM. L. 32 (2009) (contending Islamist detainees “can and should face trial” or they must be released even during the pendency of the conflict); Alec Walen, *Transcending, But Not Abandoning, the Combatant-Civilian Distinction*, 63 RUTGERS L. REV. 1149 (2010) (“[A suspected terrorist] must be released and policed like any criminal defendant who is acquitted at trial, if he is not tried and convicted of a crime.”).

¹¹⁹ Mark S. Kende, *The U.S. Supreme Court, the War on Terror, and the Need for Thick Constitutional Review*, 80 MISS. L.J. 1539, 1558 (2011). By this view, detention unlawfully segregates “unlawful enemy combatants from citizens” and leaves them “in a tomb-like, 9.5 x 5.5 foot cell until the forever war ends.” Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL’Y 299, 361 (2007).

¹²⁰ Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L. J. 82, 84 (2009). Emotion dominates reason in this skein of claims. See, e.g., Glazier, *supra* note 117, at 1007 (claiming “universal agreement on . . . [lawful] combatant and civilian categories” to the exclusion of all others); Wayne McCormack, *The War on the Rule of Law*, 36 J. NAT’L. SEC. F. 101, 108 (2010) (describing the unlawful combatant status category as contrary to LOAC because it ensures that the detainee “cease[s] to be a person within international law.”); Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 436 (2005)

contends there is no such status under LOAC, and detainees are either POWs who may not be coercively interrogated, or civilians whose indefinite detention is a serious LOAC violation,¹²¹ the remedies for which are judicially-ordered release and compensation.¹²²

Three logical inferences follow from interrelated CLOACA arguments asserting that there is no such status category as unlawful enemy combatants, that Islamist detainees are entitled to combatant immunity even when they hide weapons and wear civilian clothing before and during attacks, and that the U.S. lacks legal authority to detain and interrogate Islamists. The first is that Islamists should not observe the principle of distinction because, by wearing civilian clothing and hiding weapons until the moment of attack, they can avail themselves of the defensive advantage of blending in with civilian populations to mask their movements and gain additional protection. Additionally, Islamists acquire the offensive advantage of achieving greater surprise against U.S. forces that do not appreciate the threat posed by unmarked Islamist fighters masquerading as civilians until after the attack has commenced.

Second, to borrow Supreme Court dictum penned generations ago in response to an argument very similar to those made by CLOACA, these interpretations of distinction “put [enemy aliens] in a more protected position than our own soldiers.”¹²³ Implementing their proposals would result in a regime in which one rule would govern the conduct of honorable U.S. troops, who must wear uniforms and insignia, carry arms openly, and distinguish between combatants and noncombatants only to be detained,

(decrying the U.S. decision to label Islamist detainees “[unlawful] enemy combatants” as “puzzling” on the view that this status does not exist).

¹²¹ See, e.g., Allen & Laudan, *supra* note 103, at 1 (citing sources which claim that preventive detention is “un-American and “caustic . . . to our legal and moral values.”); Meyerstein, *supra* note 119, at 361 (describing U.S. policy as creating a “simplistic apartheid of rights-bearing and non-rights bearing individuals[.]”); Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 857 (2005) (claiming “unlawful combatant” detention violates human rights).

¹²² For a discussion of habeas actions to achieve the release of Islamist detainees, see *infra* part I.A.2.

¹²³ *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950).

interrogated, and worse, by barbaric Islamist captors whose treatment of POWs notoriously includes beheading and death. By contrast, a second rule would govern Islamist detainees, who—no matter how perfidiously they behave in battle—would be entitled to all the benefits of POW status on capture *at the very least*, and perhaps even to release from captivity *prior* to cessation of hostilities, not to mention the prospect of financial compensation for “damages” arising out of their detention.

Third, CLOACA arguments do more than simply create the legal predicate for premature release and unjust enrichment of unlawful enemy combatants. In conjunction with arguments in support of habeas litigation discussed *infra*, they also support the return of dangerous Islamists to the fight where they are free once again to target Americans.

ii. *Target and Kill*

Targeting and killing is the second method of preventing enemy combatants from engaging in future attacks. Distinction sets limits on an attacking party by categorically prohibiting the deliberate targeting of civilian personnel and objects, yet provides that enemy combatants may be targeted and killed wherever and whenever they can be found so long as attacks against them are otherwise consistent with LOAC.¹²⁴ Distinction further requires the defending party to differentiate combatant personnel from noncombatants at all times to protect the latter by clearly indicating who may and may not be targeted, and to this end prohibits defending combatants from intermingling with civilians to make it impossible for attackers to determine who fits into which status category.¹²⁵ Differentiating civilians from combatants was once a

¹²⁴ See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145,168 (2010) (“[A]ny [enemy combatant] may be targeted anytime and anywhere plausibly considered ‘a battlefield[.]’”); Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (C. Finkelstein ed., 2012) (“[A]ll bona fide combatants are . . . targetable with lethal force . . .” wherever they present themselves).

¹²⁵ See API, *supra* note 51, at art. 51(7) (“The presence or movement of the civilian population . . . shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from

simple task because most combat took place outside of heavily populated areas and warring parties, motivated by the hope for reciprocity and a mutual desire to shield civilian populations from the destructive effects of war, generally limited their attacks to military targets. In Fourth Generation War, however, Islamists deliberately attack civilians and mingle with them to shield themselves. Two skeins of scholarship would narrow—or even foreclose—the legal authority of West to target and kill Islamist fighters while making it much more difficult to distinguish them from civilians, thereby enabling Islamists to enhance their own survivability relative to allied troops at the expense of the civilian populations among whom they seek shelter.

The first concerns use of deadly force. Enemy combatants may be targeted and killed wherever they can be found if otherwise consistent with LOAC. Designation of an individual to be targeted and killed is a command decision predicated upon a factual determination that the target is a member of an enemy armed force or that his killing will reduce a threat.¹²⁶ This determination can be made instantaneously through a uniform or insignia worn by the potential target, or by prior identification through intelligence operations, or conduct past or present that establishes the potential target as allied or auxiliary to the enemy armed force. Targeting and killing uniformed members of armed forces has been a noncontroversial proposition since the origin of war. Yet Islamist combatants do not wear uniforms and purposefully intermingle within urban civilian populations, frustrating their identification and elimination.

In response, the United States turned to intelligence and unmanned aerial vehicles (“UAVs”) to find and eliminate Islamist

attacks or to shield, favor or impede military operations[.]”).

¹²⁶ See Sascha-Dominik Bachmann & Ulf Haeussler, *Targeted Killing as a Means of Asymmetric Warfare: A Provocative View and an Invitation to Debate*, 1 L., CRIME & HIST. 9, 12 (2011) (describing the legal bases for a decision to target and kill in combat or self-defense).

unlawful combatants.¹²⁷ “Targeted killing is the premeditated use of lethal force by states “against a specific individual . . . not in . . . physical custody[.]”¹²⁸ Some LOACA scholars laud this tactical approach for its efficiency in degrading Islamist violent non-state actors without risking innocent civilians or compromising sovereignty as overtly as other uses of force.¹²⁹ UAVs, though unmanned, are just a weapon system governed by “the same general principles that condition the use of armed force in self defense or conduct during war . . . ”¹³⁰ Furor over the use of UAVs in war or in self-defense in peace thus stems from policy and not legal disputes.¹³¹ Finally, UAVs, as with other weapons systems, do not require that targets of targeted killing be afforded a warning or judicial process before use.¹³² To require either, or to insist that less harmful means be employed, would create hesitancy and additional risk to U.S. forces.¹³³

Predictably, CLOACA charges that targeted killing is “no different from ‘extrajudicial killing,’ ‘assassination,’ and the use of

¹²⁷ See, e.g., JAMES IGEOE WALSH, U.S. ARMY WAR COLLEGE STRATEGIC STUDIES INSTITUTE, *THE EFFECTIVENESS OF DRONE STRIKES IN COUNTERINSURGENCY AND COUNTERTERRORISM CAMPAIGNS* *passim* (2013).

¹²⁸ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010). Targeted killing is a lawful exercise of belligerent rights in war and self-defense in peace. See *Rise of the Drones II: Hearing Before the H. Comm. on Oversight and Government Reform Subcomm. on Nat’l Sec. and Foreign Affairs*, 111th Cong. 3, n.6 (2010) (written testimony submitted by Kenneth Anderson); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 334 (2004).

¹²⁹ See E. Walker Nordan, Jr., *The Best Defense is a Good Offense: The Necessity of Targeted Killing*, SMALL WARS J., Aug. 24, 2010, at 1, 5, 10 (targeted killing reduces breaches of sovereignty occasioned by invasion); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT’L L. POL’Y 569, 572-73 (2011) (targeted killing limits civilian death and injury).

¹³⁰ Paust, *supra* note 129, at 572.

¹³¹ Anderson, *supra* note 67, at 26.

¹³² See Harold Hongju Koh, The Obama Administration and International Law, Speech Delivered to the American Society of International Law, U.S. DEP’T OF STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (denying any obligation to provide targets with “process” prior to striking).

¹³³ Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 613-14 (2013).

‘death squads’.”¹³⁴ To this cohort targeted killing denies process due even foreigners in wartime; if Islamists are denied the opportunity to surrender, their killings compromise the “values, goals, and purposes of the liberal state itself.”¹³⁵ Only a criminal justice paradigm requiring warranted arrests and trials of Islamists¹³⁶ will satisfy critics whose scholarship and litigation campaigns¹³⁷ castigate U.S. personnel who order and use UAVs as suborning “wickedness[,] cowardice and . . . perfidy.”¹³⁸ Some imply that Americans engaged

¹³⁴ See e.g., Jeremy Waldron, *Can Targeted Killing Work as a Neutral Principle?*, *passim* (N.Y.L. Sch. Law & Legal Theory Res. Paper Series, Working Paper No. 11-20, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788226. This view is endemic in CLOACA. See also Mary Ellen O’Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 454 (2003) (calling Targeted Killing “extrajudicial execution”). Yet when UAVs supported a humanitarian intervention in Libya—a mission CLOACA favored—a *volte face* occurred and an unwavering hostility toward UAVs softened. See Ken Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a “Legal Geography” of War*, in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783.

¹³⁵ Fernando Teson, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 591 (A. Altman, C. Finkelstein, & J. Ohlin eds., 2011), available at <http://www.elac.ox.ac.uk/downloads/TK%20Tes%F3n%20OUP.pdf>.

¹³⁶ CLOACA argues Islamists should be entitled to warranted arrests and trials or, if infeasible, prior judicial scrutiny and international supervision before targeted killing may be employed. See, e.g., Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. 819, 819-20 (2013); Kevin H. Govern, *Warrant-Based Targeting: Prosecution-Oriented Capture and Detention as Legal and Moral Alternatives to Targeted Killing*, 29 ARIZ. J. INT’L & COMP. L. 477, 516 (2012) (“Warrant-based targeting will . . . yield more transparent government[], while advancing the . . . rule of law . . . and promoting . . . human rights.”); Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1269-70 (2013) (“[T]he duty to attempt capture prior to [targeted killing] . . . is systematically violated[.]”).

¹³⁷ See Anderson, *supra* note 134, at 15-16 (noting lawsuits demanding classified information on targeted killing to erect prudential obstacles to its use). Emblematic of these is a suit filed by NGOs on behalf of Anwar al-Aulaqi, a U.S. citizen and Islamist cleric killed in a UAV strike in Yemen. See *Nasser Al-Aulaqi v. Barack H. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). Despite intelligence that al-Aulaqi was part of Islamist operational networks that included the Fort Hood shooter, the Christmas Day bomber, and the 9/11 hijackers, the lawsuit, mooted by his death, alleged he was on a U.S. “kill list” and in jeopardy of an “extrajudicial targeted killing.” *Id.*

¹³⁸ Anderson, *supra* note 67, at 26.

in targeted killing are themselves unlawful combatants¹³⁹ and the killing of Osama bin Laden by Naval Special Warfare teams was illegal.¹⁴⁰

Others, while acknowledging that distinction permits use of UAVs against combatants, disrupt settled law governing whom to include in this status category. Clearly, uniformed members of state armed forces are combatants and lawful targets at all times, but in Fourth Generation War the prohibited yet routine involvement of ununiformed civilians in combat or combat support on behalf of Islamist VNSAs clouds the task of distinguishing who may and may not be targeted and killed. Although civilians lose noncombatant immunity when they undertake “direct participation in hostilities,” (“DPH”)¹⁴¹ a precise definition of DPH does not exist.¹⁴² Determinations as to who may lawfully be targeted hinge upon this definition, which rests upon a judgment of when a civilian should be stripped of combatant immunity and on the basis of what acts. This judgment is invested with political considerations and unguided by settled law.

Under traditional interpretations, DPH encompasses not only uniformed military personnel and civilians carrying weapons but their entire chains-of-command and those who offer material or moral support—planners, propagandists, logisticians, and

¹³⁹ See *Rise of the Drones II*, *supra* note 128; see also Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 122, 131-32 (2010) (“[CLOACA] seem[s] fixated on the idea that there must be something illicit about combatants who . . . employ weapons that outrage those of their enemy[,]” and thus “suggests that the activities of the CIA operating drones . . . in . . . AfPak constitutes unlawful combatancy[.]”).

¹⁴⁰ See Kai Ambos & Josef Alkatout, *Has “Justice Been Done”? The Legality of Bin Laden’s Killing Under International Law*, 45 ISRAEL L. REV. 341, 341-66 (2012) (“The killing of . . . bin Laden . . . [was only] lawful if he was . . . taking a direct part in hostilities [or] in . . . self-defence[.] As [neither] situation . . . exist[ed], [it was] extrajudicial execution.”); Geoffrey S. Corn, *Self-Defense Targeting: Conflict Classification or Willful Blindness?*, 88 NAVAL WAR C. INT’L L. STUD. 57, 69 (2012) (examining similar claims).

¹⁴¹ API, *supra* note 51, at art. 51(3).

¹⁴² See, e.g., David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration*, LOY. L.A. LEGAL STUD. PAPER NO. 2010-32, available at <http://ssrn.com/abstract=1658590>.

financiers.¹⁴³ Moreover, such individuals are subject to targeting not merely during the attack phase but at all times on the ground that their unlawful combatancy or support thereof is an ongoing, comprehensive enterprise, in which attacks are episodic but recurring, and are preceded and followed by cycles of recruitment, planning, preparation, and movement directly connected to and productive of military consequences. Thus, direct participants, their chains-of-command, and combat support personnel “are directly, continuously, and actively taking part in hostilities . . . whether or not they . . . take up the gun.”¹⁴⁴ Extension of the DPH construct to “passive supporters” hinges upon the meaning of “passive;” those who merely condone or applaud unlawful combatancy might not qualify as lawful targets whereas, under the broad reading of DPH best suited to eradicating Islamist combat power, “bankers, propagandists, even farmers and cooks, c[an] be targeted . . . regardless of whether they ever held a weapon.”¹⁴⁵ In any case, DPH incorporates not only those who bear weapons but those who support and sustain them, and denies civilian immunity to those whose contributions to the generation of unlawful combat power are intermittent and furtive:¹⁴⁶ they are *de facto* members of a hostile

¹⁴³ See Faculty, The Judge Advocate General’s School, *United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters Into Force*, 1999 ARMY LAWYER 21, 27 (civilians forfeit immunity “whenever they take any action intended to cause actual harm to . . . an armed force.”) (emphasis added).

¹⁴⁴ Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 271 (2010). This interpretation addresses the revolving door problem, whereby some civilians work in civilian occupations by day but become unlawful combatants by night and would otherwise be able to claim combatant immunity some or all of the time. See *id.*

¹⁴⁵ Sitaraman, *supra* note 84, at 1788. States read DPH broadly as “[t]he only way to [eradicate Islamism] is to eliminate . . . financial support, the training bases, the safehouses.” Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT’L & COMP. L. 851, 861-62 (2004). Israel holds that “DPH” includes support personnel and voluntary human shields. See *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (2006). The United States requires only “a direct causal relationship between the activity engaged in and the harm done to the enemy[.]” MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. Treaty Doc. No. 106-37, at VII (2000).

¹⁴⁶ See, e.g., *Rise of the Drones II*, *supra* note 128 (describing the standard as not just the degree of participation “but the threat posed, immanence, and other traditional

armed force who may be targeted and killed at all times until they permanently cease hostile activities or surrender into captivity.¹⁴⁷

This traditional conception has been under assault for decades. The first wave centered upon the temporal dimension of DPH. Upon its opening for signature in 1977, Additional Protocol I included controversial provisions purporting to shield VNSA forces against targeting until they have “engaged in a military deployment preceding . . . an attack.”¹⁴⁸ Although the drafters may have intended to incentivize VNSAs to distinguish themselves in small measure from civilians, in practice this relaxed obligation has failed, predictably, to motivate even minimal adherence.¹⁴⁹ Given the right to target state armed forces at any time, these provisions, when interpreted to preclude targeting VNSAs’ fighters until “moments immediately prior to an attack” as many do, would warp the rules in VNSAs’ favor and obligate states to absorb their attacks before responding¹⁵⁰—to the detriment of the civilians distinction is meant to protect.¹⁵¹ Thus they are not widely accepted as customary LOAC

factors—including . . . ‘active self-defense,’ meaning that a threat can be assessed on the basis of a pattern of activity . . . without having to wait until a target is on the verge of acting.”); Koh, *supra* note 132 (explaining U.S. policy that, even without regard to DPH, self-defense permits killing those who afford material support to Islamists).

¹⁴⁷ See Paust, *supra* note 144, at 269 (specifying that the human right to freedom from arbitrary deprivation of life is applicable only with respect to those “within the jurisdiction, actual power or effective control of the state” and does not protect Islamist combatants against Targeted Killing unless captured and detained).

¹⁴⁸ API, *supra* note 51, at art. 44(3)(b). Further, because “there are situations in armed conflicts where . . . an armed combatant cannot so distinguish himself” from the civilian population, fighters are entitled to protection as POWs even if they do not meet any of the criteria entitling them to that status. *Id.* at art. 44(3)-(4).

¹⁴⁹ See, e.g., W. Michael Reisman, *Editorial Comment: Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L L. 852, 858 (2006) (describing the “incentive argument” as “doubtful logic”); see Margulies, *supra* note 99, at 1441 (describing it as “quixotic”).

¹⁵⁰ See Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* 33, n. 135 (Harvard Program on Humanitarian Pol’y and Conflict Res.: Occasional Paper Series, Winter 2005).

¹⁵¹ See Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. J. NAT’L SEC. 45, 64 (2010) (“[E]rr[ing] heavily on the side of civilian status” in deciding if a

by leading military states, which chose either not to ratify API or to enter reservations to these provisions on the ground they would erode distinction and decriminalize unlawful combatancy.¹⁵²

Post-9/11, renewed efforts began to undermine the traditional approach, consistent with the view that even combatants have a right to life necessitating capture rather than killing if possible¹⁵³ and that targeting unlawful combatants on a broad definition of DPH “justif[ies] the eradication of entire populations.”¹⁵⁴ In 2003, the International Committee of the Red Cross convened fifty LOAC scholars to determine (1) who is a civilian, (2) what conduct amounts to DPH, and (3) what divests immunity against direct attack. In 2008 the Interpretive Guidance on the Notion of Direct Participation in Hostilities¹⁵⁵ proposed answers that sparked intense criticism.¹⁵⁶

Per the Guidance, “[a]ll persons . . . not members of State armed forces . . . of a party to the conflict are civilians and entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”¹⁵⁷ Further, although they are not civilians, “[members of] the armed forces of a [violent non-state actor] . . . consist only of individuals whose continuous function is to take a direct part in hostilities,” with DPH defined narrowly as the commission of acts designed to and likely to cause direct harm to an

potential target is a combatant affords ununiformed enemy combatants a “free pass”).

¹⁵² See generally George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1 (1991).

¹⁵³ See, e.g., NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* *passim* (2008) (contending, under LOAC, states must capture rather than kill if possible).

¹⁵⁴ Sitaraman, *supra* note 84, at 1788.

¹⁵⁵ See *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, at 994 (2008) [hereinafter *Interpretive Guidance*].

¹⁵⁶ See Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L. & POL. 637, 638-40 (21010) (critiquing Guidance on four grounds); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 698 (2010) (“[K]ey features of the Guidance [are] highly controversial.”).

¹⁵⁷ *Interpretive Guidance*, *supra* note 155, at 1002.

enemy.¹⁵⁸ It denies altogether the possibility that combat support or service personnel can be lawfully targeted; further, it countenances the prospect that an individual can shift from civilian to combatant status and back through a “revolving door” without shedding noncombatant immunity and becoming a lawful target save “for such time as [he or she] take[s] a direct part in hostilities.” Although the Guidance suggests that while senior commanders of VNSAs do not reacquire noncombatant immunity during the period between attacks on the ground that command implies a continuous combat function committing them to perpetual DPH, their subordinates are not in continuous combat roles and thus return to civilian status with immunity from targeting once an attack concludes.¹⁵⁹ In short, it immunizes all but those in combat arms roles while ratifying the revolving door concept that partially immunizes all but the most senior Islamists. Again, asymmetrical legal obligations arise: whereas members of state armed forces are continuously vulnerable to targeting, Islamists, *per* the Guidance, are, if targetable at all, free to “choose the time and place of their vulnerability.”¹⁶⁰

A second line of scholarship would bolster the defense of unlawful combatants. Ununiformed Islamists, rejecting distinction entirely, site command and control infrastructure in civilian residential areas to frustrate efforts to identify, target, and kill them.¹⁶¹ Then, rather than eschew combatant acts while in civilian

¹⁵⁸ See *id.* at 1016 (“1. the act must be likely to adversely affect the military operations or . . . capacity of a party[;] 2. there must be a direct casual link between the act and the operation[; and] 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party[.]”).

¹⁵⁹ The *Interpretive Guidance* suggests VNSA armed forces can be targeted when taking “measures preparatory to the execution of a specific act of [DPH], as well as . . . deployment to and the return from . . . its execution,” and thus grants them civilian immunity during some band of time surrounding their combatant acts. *Id.* at 1031.

¹⁶⁰ Margulies, *supra* note 99, at 1435. LOACA scholars criticize the Guidance on this basis. See, e.g., Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 693 (2010) (criticizing this imposition award of asymmetric obligation).

¹⁶¹ See Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline and the Law of War*, 86 CALIF. L. REV. 939, 988 (1998) (noting Islamists routinely site weapons and forces in protected areas “precisely to make . . . charges of indiscriminate use of

guise and in proximity to protected persons, Islamist combatants unlawfully execute military operations from the cover of hospitals, schools, and mosques.¹⁶² Worse, Islamists use human shields—forced and voluntary—in and around concentrations of Islamist fighters, rendering it near-certain that state military operations will, even when painstakingly conducted to mitigate casualties and distinguish civilians from combatants, kill and injure the former.¹⁶³ Although Islamist conduct in siting operations and shielding themselves converts civilian objects into military targets,¹⁶⁴ deaths in putatively civilian areas are publicized to prove U.S. iniquity.¹⁶⁵

force[.]”). This practice is categorically prohibited. GCIII art. 28.

¹⁶² Defenders have affirmative duties to “remove . . . civilian[s] . . . from the vicinity of military objectives, avoid locating military objectives within or near densely populated areas, [and take] necessary precautions to protect the civilian population . . .” Additional Protocol I, *supra* note 51, at art. 58. More pointedly, LOAC prohibits using civilians to shield military objectives. *Id.* at art. 51(7). When defenders breach these obligations, they fail to remove civilians from the area of military objectives; resulting civilian casualties are attributable to this breach, which converts erstwhile civilian objects into lawful military targets. JEAN DE PICTET ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 579 (1987).

¹⁶³ Minimization requires complex legal and moral calculus regarding how many casualties are acceptable, and when and how to strike legitimate targets; the result is fewer targets are engaged than LOAC permits. See Blank, *supra* note 53, at 286 (“[Western] forces . . . wrestl[e] with difficult legal and moral questions . . . about who to target, how to target and when to target.”); see F.M. Lorenz, *Law and Anarchy in Somalia*, 23 PARAMETERS 27, 39 (1993) (describing great reluctance of U.S. to engage armed women and children). Even when U.S. military operations are conducted with such precision as to avoid civilian casualties altogether, Islamist defenders have dragged civilians killed elsewhere to attack sites to falsely claimed the deaths were the result of the U.S. attack. Wheaton, *supra* note 62, at 8.

¹⁶⁴ See Additional Protocol I, *supra* note 51, art. 52(2)-(3) (limiting attacks to “military objectives,” defined as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose . . . destruction . . . offers a definite military advantage” and requiring that doubts be resolved in favor of civilian status). However, defenders who convert civilian objects to a military use or purpose divest civilian immunity from these sites. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague art. 27, Oct. 18, 1907, 187 CTS 227.

¹⁶⁵ Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionality*, 43 CASE W. RES. J. INT’L L. 707, 710 (2010-2011).

Thus, Islamists convert U.S. LOAC compliance into a defensive weapon.¹⁶⁶

Because “existing legal constraints make lawful fighting much easier for the powerful” and Islamists “do not always have the option of engaging in combat in unpopulated areas,” CLOACA argues that distinction should be reinterpreted to impose higher legal obligations on attackers and more relaxed requirements on defenders regarding human shielding.¹⁶⁷ Some argue that to contextualize distinction when civilians and military targets are interwoven requires that proportionality be construed against states to create a rebuttable presumption that resulting civilian casualties from attacks on such targets are by definition excessive and thus unlawful.¹⁶⁸ Others go further, insisting that the presence of civilians intermingled with Islamist combatants at an intended military target renders any use of force against it *per se* excessive in relation to anticipated military advantage, and thus disproportionate and prohibited.¹⁶⁹ Unilateral constraints inconsistent with LOAC but foisted upon states by CLOACA find favor with non-governmental organizations (“NGOs”), which condemn state attackers when

¹⁶⁶ Perversion of distinction by unlawful combatants to their strategic advantage can be expressed as follows: “If you want to fight against us . . . you are going to have to fight civilians[.] Therefore, you should not fight at all, and if you do, you are the barbarians[.]”). MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 180 (4th ed. 2006).

¹⁶⁷ Blum, *supra* note 86, at 171.

¹⁶⁸ See, e.g., Valerie Epps, *The Death of the Collateral Damage Rule in Modern Warfare*, 41 GA. J. INT’L & COMP. L. REV. 307, 335-36 (2013). Whereas distinction traditionally imposed a strict prohibition against *deliberate* targeting of noncombatant, implying that *specific intent* to target either is required to prove criminal liability, CLOACA argues that the standard for criminal liability when an attacker causes collateral damage should be mere negligence, which is to be presumed a matter-of-law. See *id.* at 353.

¹⁶⁹ See Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL’Y REV. 93, 95 (2011) (citing sources).

human shields are killed but withhold criticism of Islamist defenders who employ them.¹⁷⁰

An untenable choice confronts states facing Islamists using human shields: violate distinction (and perhaps proportionality), or refrain from attacking. In the main, they choose the latter:¹⁷¹ in 2007, NATO announced it “would not fire on positions if it knew there were civilians nearby,”¹⁷² and “[i]f there is the likelihood of even one civilian casualty, we will not strike.”¹⁷³ Taken together, these unilateral constraints encourage four related consequences: (1) Islamists use human shields as a defensive tactic,¹⁷⁴ (2) fewer opportunities to target and kill Islamists present, (3) fewer still are seized, and (4) lawful attacks against Islamists kill civilians.

iii. *Summary of Distinction*

With arguments contrary to precedent that increase the risks to U.S. forces and to civilians, CLOACA abuses distinction to the benefit of Islamists by relieving them of the legal burden of their unlawful combatancy. It releases them from a regime of detention

¹⁷⁰ See, e.g., G.A. Res. S-9/1, ¶¶ 1-3, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009) (condemning alleged Israeli LOAC violations in Gaza but utterly disregarding human shielding by Hamas).

¹⁷¹ States fighting Islamists mingled with civilian populations “struggle between the requirements of . . . protect[ing] noncombatants, and . . . protecting their force[s].” Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT’L L. & POL’Y 241, 243 (2006-2007). Although LOAC permits them to attack even those Islamists who deliberately violate distinction, many states refrain, creating a *de facto* “sanctuary that the bad guys are not entitled to enjoy” under LOAC. Orde F. Kittrie, *Lawfare and U.S. National Security*, 43 CASE W. RES. J. INT’L L. 393, 400 (2010-2011).

¹⁷² Noor Khan, *Afghan Civilians Said Killed in Clash*, WASH. POST (June 30, 2007, 4:46 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR20070630000028_pf.html.

¹⁷³ Pamela Constable, *NATO Hopes to Undercut Taliban With “Surge” of Projects*, WASH. POST (Sept. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452.html>.

¹⁷⁴ See Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 122, 134 (2010-2011) (“[I]t is [un]necessary for [Islamists] to build . . . air defenses[.] [O]perating amidst civilians, they enjoy a legal sanctuary created by [attacker]-imposed restrictions . . . secure as [a] fortress bristling with anti-aircraft guns.”).

and interrogation instrumental in preventing future attacks, confers operational advantages upon them relative to U.S. troops whom they surprise and elude in battle, speeds their return to the fight, and denies the lawfulness of efficient and discriminating technology to dispatch them. It also affords absolute immunity from attack to many of their combat support personnel and significant immunity to their front-line fighters, and incentivizes them to mingle with and endanger civilians to blunt—even prevent—U.S. attacks.

b. Proportionality

The principle of “proportionality,” which derives from the Mosaic *Lex Talionis* and prescribes that an injury be requited reciprocally but not with greater injury,¹⁷⁵ does not establish a zero-tolerance or strict liability standard for civilian casualties, but requires that parties attacking military targets take “all reasonable precautions to avoid losses of civilian lives” and ensure that unintended civilian casualties are “not excessive in relation to the concrete and direct military advantage anticipated.”¹⁷⁶ The greater the concrete and direct military advantage anticipated, the more civilian casualties proportionality tolerates.¹⁷⁷

Defining exactly what proportionality requires occurs on contested legal terrain. Deciding how many civilian casualties are permitted in any given attack before the balance has tipped too far towards necessity, whether a method and means of attack are likely to cause civilian casualties in excess of that number, and whether an otherwise lawful target is immune from attack by virtue of the number of expected civilian casualties are judgments dependent on value systems that are difficult to capture and express in formal rules.¹⁷⁸ Determining whether to make allowance for defects in

¹⁷⁵ See *Exodus* 21:23-25 (King James) (“[A]n eye for an eye, a tooth for a tooth[.]”).

¹⁷⁶ Additional Protocol I, *supra* note 51, at art. 51(5), 57(4).

¹⁷⁷ SEARCHING FOR A ‘PRINCIPLE OF HUMANITY’ IN INTERNATIONAL HUMANITARIAN LAW 76 (Kjetil Mujezinovic, et al., eds., 2013) (“[E]xtensive civilian casualties may be acceptable, if they are not “excessive” in light of the . . . military advantage anticipated[.]”).

¹⁷⁸ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 273 (2010) (describing the impossibility of balancing life against necessity as the “terrible and impossible problem of proportionality.”). The malleability of proportionality is “reason to be

weather prediction, communications and intelligence failures, and mechanical malfunctions in evaluating military advantage and excessiveness, and whether to differentiate in the application of the principle as between preplanned targets and targets of opportunity are further considerations for which rules provide no answers. Moreover, these decisions are based on a weighing of costs and benefits immediate and future, and rely on assumptions, incomplete information, and guesswork. Thus, there is space to find a breach of proportionality, if one is so determined, under any circumstances.

The United States is committed “to minimizing civilian casualties.”¹⁷⁹ However, this does not imply an absolute aversion. The utilitarian interpretation reflected in state practice deems a military attack consistent with proportionality even if it causes foreseen but unintended noncombatant deaths so long as the military benefit of that attack exceeds the quantum of unintended harm it visits upon noncombatants.¹⁸⁰ The idea that some “collateral damage” is acceptable is a fixture in Western law and morality, and rests upon the belief in a profound moral difference between intended and unintended but foreseeable consequences:

To deny the distinction means that you either accept that . . . nonviolence is the only tenable position or that you are indifferent to the lives of civilians, since you are guilty of anything that happens anyway . . . [Proportionality is] the only principled way of steering between a pacifism that few of us . . . would accept, and a brutal realism that denies the . . . necessity

concerned over the . . . incipient legalization of the use of . . . force in response to [Islamist] attacks.” Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of International Legal Order*, 81 N.C. L. REV. 1, 48 (2002-2003). Because indeterminacy and interests muddy proportionality, some scholars advocate jettisoning the principle from LOAC altogether. See Jonathan F. Keiler, *The End of Proportionality*, 39 PARAMETERS 53, 63 (2009) (making this argument).

¹⁷⁹ Letter from John D. Negroponte, to the President of the U.N. Security Council (Oct. 7, 2001) (on file with the U.N. Security Council as S/2001/946), available at http://avalon.law.yale.edu/sept11/un_006.asp.

¹⁸⁰ See Gil Meron, *Israel's National Security and the Myth of Exceptionalism*, 114 POL. SCI. Q. 409, 425 (explaining the traditional interpretation of proportionality).

of even trying to distinguish between combatants and noncombatants.¹⁸¹

In keeping with Western interpretations that regard intent as a critical inquiry, the United States requires that strikes against Islamist targets be painstakingly calibrated to achieve concrete and direct military advantage such that when civilian casualties inevitably occur they are the unfortunate outcome of proportionate attacks. The plight of civilians has improved in recent years,¹⁸² substantiating U.S. arguments that intent matters and that has earned a margin of appreciation—meaning its attacks should be immune from legal challenge unless willful, wanton, or gross negligence can be proven. Such proof, by this view, requires evidence of deliberate indifference to civilian life and not merely disturbing evidence of civilian death as “[t]here is no moral equivalence between stray missiles aimed in good faith . . . and deliberate violation of the categorical rules . . . like using human shields.”¹⁸³

Further, proportionality requires more than an inquiry into the objective acts and subjective intent of an attacker. Collateral damage is also a function of where a defender situates military assets; defenders must remove civilians from the area of military objectives, locate such objectives away from densely populated areas, and take other precautions to protect civilians.¹⁸⁴ Failure to discharge these duties does not immunize an otherwise lawful military target. Further, the defender’s failure to honor its obligations does not establish that an attack was disproportionate, nor does it prove the attacker’s intent to cause resulting civilian destruction. When a defender fails to segregate civilians and military objectives, the ultimate author of civilian casualties is the defender who has greater knowledge about the nature and character of the target, greater capacity to protect, and greater responsibility under LOAC to

¹⁸¹ Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES MAG. (Apr. 13, 2003), <http://www.nytimes.com/2003/04/13/magazine/who-owns-the-rules-of-war.html>.

¹⁸² See, e.g., Taylor Seybolt, *Significant Numbers: Civilian Casualties and Strategic Peacebuilding* 3-4, available at <http://ssrn.com/abstract=1877268>.

¹⁸³ Anderson, *supra* note 181, at 6.

¹⁸⁴ API, *supra* note 51, at art. 58.

minimize civilian casualties.¹⁸⁵ *Post hoc* attack analysis that ignores defender obligations encourages legal mischaracterizations.

Despite this, CLOACA holds that (1) states must provide extensive warnings to civilians near intended targets even at the cost of mission accomplishment, (2) some mathematical formula relating military and civilian casualties is dispositive of whether an attacker has violated proportionality, (3) absolute liability rather than specific intent or culpable negligence is the standard for determining criminal breaches, and (4) disproportionate attacks are evidence of the illegality of the resort to force in the first instance.

i. Duty to Warn

States must warn of an impending attack so the enemy civilian population at an intended target can be evacuated “unless circumstances do not permit.”¹⁸⁶ The duty to warn balances necessity and humanity; attackers need not provide a warning that “seriously compromis[es] the [attack]’s chances of success.”¹⁸⁷ State practice confirms that necessity may allow unwarned attack.¹⁸⁸ The United States and NATO have withheld warnings when issuing them would have increased casualties to attacking and defending forces and to civilians.¹⁸⁹ In other operations, air superiority and poor enemy air defenses attenuated the need for surprise and enabled warnings without cost to mission accomplishment.¹⁹⁰ Israel, as a policy, warns out of humanitarian, rather than legal, obligation.¹⁹¹

¹⁸⁵ William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639 (2004).

¹⁸⁶ API, *supra* note 51, art. 57(2)(c) (“[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

¹⁸⁷ Jean-Francois Queguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. RED CROSS 793, 806-07 (2006).

¹⁸⁸ See L. OPENHEIM, *INTERNATIONAL LAW: A TREATISE* 312 (1912) (approving state derogations where “circumstances do not permit advanced warning”).

¹⁸⁹ John Embry Parkerson, *U.S. Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 48-50 (1991).

¹⁹⁰ See Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT’L REV. RED CROSS 154 (2000)

LOAC offers no concrete guidance as to the form warnings must take.¹⁹² The Goldstone Report¹⁹³ responding to alleged Israeli war crimes in Gaza, crafted a prospective standard, insisting, without referencing LOAC, that warnings must “reach those . . . in danger[,] give them sufficient time to react[,] explain what they should do to avoid harm[,] and be . . . credible and clear.”¹⁹⁴ The Report concluded that multimodal Israeli warnings were noncompliant because Israel presumably could have issued more effective warnings, Gazan civilians were uncertain as to how to seek shelter, and some shelters were struck subsequently.¹⁹⁵ The Goldstone Report is remarkable for its lack of any mooring to law, its refusal to concede the extensiveness of Israeli warnings, and its failure to credit the difference between deliberate targeting of civilians and unintended consequences of lawful attacks.

Capitalizing upon the Report’s departure from law to establish asymmetric obligations disfavoring Western states, CLOACA insists that the duty to warn is nonderogable, that it applies where *any* (rather than merely “excessive”) civilian casualties are anticipated, and that if necessity cannot be reconciled with this duty regarding a proposed target, that target must be rejected altogether.¹⁹⁶ Thus, under the grossly expanded duty advanced within CLOACA, investment of a potential target with civilians and creation of the virtual certainty that in any attack at least one civilian will be killed allows an Islamist defender to immunize that target or

(describing the rationale for U.S. and NATO warnings to Serbia in 1999 as based in allied air superiority, which dispensed with concern over forfeiting surprise).

¹⁹¹ See generally Blank, *supra* note 53, at 296-97 (characterizing Israeli warnings to Gazan civilians during Operation Cast Lead made to satisfy humanitarian, not legal, obligations).

¹⁹² A UN study concluded that a state must “take into account how [it] expect[s] the civilian population to carry out the [warning] instruction[.]” Report of Commission of Inquiry on Lebanon, S-2/1, A/HR/3/2, 23 Nov. 2006, para. 156. However, it offers nothing as to the requisite substance or process required of a compliant warning.

¹⁹³ U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report].

¹⁹⁴ Newton, *supra* note 95, at 273 (citing Goldstone Report, *supra* note 193, at para. 528).

¹⁹⁵ See generally Goldstone Report, *supra* note 193.

¹⁹⁶ See, e.g., Epps, *supra* note 168, at 30.

to level a prefabricated indictment of the disproportionality of any subsequent attack even if preceded by a long symphony of warnings. This expanded duty encourages human shielding and discourages states from providing warnings sure to be deemed inadequate, with the result that civilians are subjected to increased danger and states (as well as their leaders) to more claims of disproportionate conduct.

*ii. Mathematical Formula Relating Civilian and
Military Casualties*

Determining whether a particular attack was proportional is a subjective inquiry.¹⁹⁷ Some in CLOACA decry proportionality as “an organized deceit to persuade us that . . . permitting soldiers to kill enemy combatants” is “signing the death warrant for civilians, except ‘incidentally.’”¹⁹⁸ If attackers can invoke proportionality to immunize themselves, then, by this view, the principle needs to be narrowed by the introduction of more stringent and quantifiable standards as to just how many civilian casualties can accompany an attack before the principle is violated. The drive to develop a mathematical proportionality formula intimates that the proportionality of an attack is inferable by comparing the number of civilian dead to the number of attackers killed.¹⁹⁹ For CLOACA, “body counts” promote transparency and objectify proportionality: “[W]e need . . . a clear rule requiring states and . . . organized fighting groups to keep body counts of . . . dead and injured . . . These figures should be kept both for the injuries to the state’s (or fighting group’s) own civilian personnel . . . and also for the adversary’s [and] made public.”²⁰⁰

Evangelists of this method assume two things. First, some formula of military to civilian casualties exists against which attacks can be assessed for compliance with LOAC. Second, insufficient military deaths establish that an attack was inadequately protective of

¹⁹⁷ See Parkerson, *supra* note 189, at 59 (assessing proportionality is highly subjective and even “an . . . impossible task[.]”).

¹⁹⁸ Epps, *supra* note 168, at 309.

¹⁹⁹ See Parkerson, *supra* note 189, at 61 n.155 (decrying the use of this protocol as a “macabre and distorted method of viewing proportionality[.]”).

²⁰⁰ Epps, *supra* note 168, at 354.

civilians.²⁰¹ In short, because proportionality does not define “excessive” or provide metrics to quantify the concrete and direct military advantage anticipated in an attack that produces civilian casualties, this “body count” methodology reduces the determination of whether an attack is proportional to the answers one reaches to two questions: (1) how much, if any, force protection can an attacker employ, and (2) how much is an attacker permitted to prefer its own citizens to those of the enemy?²⁰²

Traditionally, in assessing how much force is necessary to accomplish a legitimate military objective, states, based on nationalism and necessity, may consider not only the force needed to subdue the enemy but the danger their troops face in achieving the mission, and may privilege force over civilian protection.²⁰³ Protecting one’s troops at the risk of killing enemy civilians,²⁰⁴ who by aiding and “cheer[ing] for the militants lose their mantle of innocence” and “ha[ve] it coming,”²⁰⁵ is unabashedly asserted as moral by traditional LOAC. Traditionalists further condone force

²⁰¹ See Anderson, *supra* note 67, at 33 (“[T]here is no fixed legal standard[,] no mathematical formulas, and it is disingenuous . . . to suggest . . . that . . . [there] is.”).

²⁰² See David Luban, *Risk Taking and Force Protection*, Georgetown Law Faculty Publications and Other Works, Paper 654 at 8, (2011), <http://scholarship.law.georgetown.edu/facpub/654> (“What are the . . . precautions soldiers must take to spare [enemy] civilians[?]”); Reuven Ziegler & Shai Otzari, *Do Soldiers’ Lives Matter? A View from Proportionality*, 45 ISR. L. REV. 53, 53 (2012) (“Does the principle of proportionality in IHL require an attacking state to expose its soldiers to life-threatening risks in order to minimise risks of incidental damage to enemy civilians? If such a duty exists, is it absolute or qualified?”).

²⁰³ U.N. International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1306 (June 13, 2000) [hereinafter *Final Report*].

²⁰⁴ See Asa Kasher & Amos Yadlin, *Assassinations and Preventive Killing*, 25 SAIS REV. 49, 49-51 (2005) (arguing a “combatant is a citizen in uniform” to whom his state’s obligation is greater than to enemy civilians); Iddo Porat, *Preferring One’s Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?* (U. San Diego Sch. of Law, Pub. L. & Legal Theory Research Paper Series, 2009), available at http://ssrn.com/abstract_id=1445509 (finding soldiers are entitled to employ force protection even at cost to enemy civilians).

²⁰⁵ David Luban, *War as Punishment* 4-5 (Georgetown Pub. L., Research Paper No. 11-71, 2011), available at <http://ssrn.com/abstract=1855283>.

protection on the ground that soldiers' lives are intrinsically more valuable than civilians' because the mission depends on the survival of the former—not the latter.²⁰⁶ Some demand that soldiers accept risks to benefit enemy civilians but maintain that LOAC does not compel this;²⁰⁷ risk and force protection are balanced casuistically.²⁰⁸

CLOACA scholars disagree. Some advocate “risk egalitarianism” in which civilian and military lives are equally valuable but soldiers assume significant risks to protect civilians.²⁰⁹ More “nationality-blind” members would require soldiers to assume extraordinary risks to save enemy civilians up to “the point where any further risk-taking would almost certainly doom the military venture.”²¹⁰ Some claim “soldiers’ lives . . . are irrelevant” as “a soldier [is] an instrument of military policy, whose personhood and . . . rights are suspended.”²¹¹ One scholar laments weapons and tactics that reduce the risk of “[U.S.] citizens coming home in body bags;”²¹² by inference, unless the United States risks and loses enough troops in an attack on Islamists, that attack is perfidious. Carried to its logical conclusion, CLOACA fetishism for protecting enemy civilians at the expense of compatriot soldiers, coupled with body count methodology, seems to require that either that zero enemy

²⁰⁶ See W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381 (1997) (supporting whatever force protection is necessary to preserve military strength and public morale); Benvenisti, *supra* note 20, at 354-55 (allowing considerations of “political and social accountability” to enhance force protection).

²⁰⁷ See Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 356 (2010) (finding “no legal basis for the obligation to consider other-regarding considerations in the absence of reciprocity[.]”); Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 166 (2007).

²⁰⁸ See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J.L.A. 115, 120-121 (2010) (proposing this balance of risk and force protection).

²⁰⁹ See Luban, *supra* note 202, at 7, 12, 44 (“If the . . . advantage anticipated by choosing one tactic over another . . . is saving x soldier lives, it cannot be pursued by causing more than x anticipated but unintended civilian deaths.”).

²¹⁰ WALZER, *supra* note 166, at 156-57.

²¹¹ Thomas W. Smith, *Protecting Civilians . . . or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT'L STUD. PERSP. 146 (2008).

²¹² Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J. L. INFO. & SCI. 1, 21, 26-27 (2011).

civilians or all attacking military personnel perish for an attack to be proportional.²¹³

iii. Absolute Liability

An attacker bears no legal responsibility for unintended civilian casualties resulting from otherwise lawful attacks provided it attempted in good faith to balance these deaths against the military advantage anticipated.²¹⁴ Even those operations where an attacker expects a great many civilian casualties are justifiable by the expectation they will confer great military advantages providing the requisite balance. The test is not merely whether the loss of civilian life is “excessive,” but rather whether it was “clearly excessive;” thus, specific intent to target civilians, or at least some degree of culpable negligence, is required to prove disproportionality.²¹⁵

As a result, the macabre resort to counting the dead is a blatant attempt to convert proportionality from a customary requirement that military planners make good-faith judgments in balancing necessity and humanity, into a punitive rule imposing *per se*, or absolute, criminal liability upon all those who inadvertently cause *any* civilian casualties. With all civilian casualties adduced as the foreseeable result of an intentional failure to protect them, and with any attack using sophisticated weapons against Islamists hiding among civilians likely to produce *some* civilian casualties, attackers are *ipso facto* violators of proportionality merely for the fact that they engage in attacks. Such a rule would disregard their intent and

²¹³ See generally Epps, *supra* note 168, at 345-46 (positing a number “n” of civilian casualties above which an attack violates proportionality no matter how great the advantage gained).

²¹⁴ See William J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 501 (2001), available at <http://www.ejil.org/pdfs/12/3/1529.pdf>.

²¹⁵ See Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 1, 2002, 2187 U.N.T.S. 90 (operationalizing proportionality in criminal law), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

ignore how diligently and in good faith they attempt to prevent civilian casualties.²¹⁶

iv. Evidence of Illegal War

CLOACA extrapolates allegations of disproportional attacks to impugn the legality of the initial resort to force. A staged process unfolds: “1) an attack leads to civilian deaths; 2) claims are . . . made that the attack was disproportionate because civilians died[;] and 3) . . . this disproportionate attack . . . automatically means that the entire military operation is a disproportionate use of force [and therefore unlawful].”²¹⁷ This maneuver misrepresents the law of proportionality and deliberately collapses the boundary between *jus ad bellum* and *jus in bello* to support a spurious accusation of aggressive war based solely on unintended civilian deaths.

v. Summary of Consequences to Proportionality

Proportionality is an amorphous, politically-charged construct and a legal morass. LOAC balances necessity and humanity but interpretive gambits by CLOACA destabilize this, encouraging Islamists to employ human shields and discouraging states from launching attacks that, while permissible under LOAC, would be deemed disproportionate and in bad faith. CLOACA has conferred unilateral advantage upon Islamists and induced the West to make prophylactic decisions to adhere to more onerous standards than LOAC requires, as well as to refrain from striking certain targets to guard against spurious allegations of disproportionality lodged against attacks that, had they transpired, would have been lawful notwithstanding that some civilians would have died.

²¹⁶ See, e.g., Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 409, 438-39 (2009) (“[C]ivilian deaths . . . may be incidental but no longer . . . accidental”).

²¹⁷ See Blank, *supra* note 165, at 727.

3. Misrepresentation of Aspiration as Law

International law consists of treaty-based and customary sources.²¹⁸ Treaties are express agreements manifesting state consent to be bound, while customary international law (“CIL”) evolves from state practice consistent with subjective understandings that such practice is legally obligatory.²¹⁹ Practice must be consistent, settled, and uniform to create CIL.²²⁰ LOAC has developed largely by codification of military custom, but because most hortatory declarations purporting to create or modify LOAC do not reflect state practice and no authoritative judicial pronouncement delineates its boundaries, customary LOAC is a hotly contested zone.²²¹

Misrepresentation of LOAC as CLOACA would like it to be for LOAC as it currently is disconnects LOAC from state practice.²²² CLOACA, bent on withdrawing LOAC from the reach of states, insist that an ever-expanding body of principles they “restate” constitutes binding CIL directly applicable to the battlefield.²²³ Others reinterpret existing CIL rules regarding LOAC to create more restrictive definitions rather than cut new ones from whole cloth. Yet most states have elected to incorporate, in military manuals and other sources of domestic law, only those CIL rules for which there is evidence of widespread practice; notwithstanding CLOACA pressures, states are chary of interpretations that might constrain

²¹⁸ See generally U.N. Charter.

²¹⁹ See *North Sea Continental Shelf Cases* (F.R.G. v. Neth. & Den.), 1969 I.C.J. 4, 44-45 (Feb. 20).

²²⁰ See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 434 (1983).

²²¹ See Stuart Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 145-46 (2000).

²²² See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) (describing this process as a conversion of LOAC into a “decaying *de jure* catechism”).

²²³ See Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 166, 168-69 (Thomas J. Biersteker et al eds., 2006) (describing this process).

their behavior in war.²²⁴ The question of whether and to what extent CLOACA should be able to create and interpret LOAC without state consent, and without representing their work as aspiration rather than description, remains open. What is certain is that confusion of the “ought” for the “is” renders LOAC fuzzier and more political.

4. Degradation of Intelligence Collection and Exploitation

The universe of interrogation techniques spans a coerciveness continuum from flattery and other rapport-building measures to torture. Whether or not more coercive techniques—sleep deprivation, stress positions, temperature regulation, and waterboarding—yield more or better information from detainees, “the optimal level of coercion . . . is [not] zero.”²²⁵ Coercive interrogation can protect states by developing information to interdict future VNSA attacks and conspiracies, and should arguably be available to interrogators in situations where failure to secure information might enable an attack with weapons of mass destruction. In fact, “[i]f the stakes are high enough, torture is [morally] permissible [and] [i]f torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used—and will be used—to obtain the information.”²²⁶

Even more so than the Soviets, Islamists are an “implacable enemy whose avowed objectives” may compel the abandonment of “[h]itherto accepted norms of human conduct” to defeat them.²²⁷

²²⁴ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 244 (2000) (noting human rights NGOs take “idealistic” positions on customary LOAC that LOAC experts and states find “problematic”).

²²⁵ See WITTES, *supra* note 103, at 196.

²²⁶ Richard A. Posner, *The Best Offense*, NEW REPUBLIC (Sept. 2, 2002), <http://www.newrepublic.com/article/the-best-offense> (reviewing ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002)). Others concur that torture, under extreme circumstances, is permissible. ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 144-45 (2002) (advocating judicially sanctioned torture of terrorists in extremis).

²²⁷ CENTRAL INTELLIGENCE AGENCY, REPORT # 15B, HR70-14(N), REPORT ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY

Islamist detainees are entitled to fewer protections under LOAC than POWs, and thus the U.S. government instructed interrogators to employ coercive techniques against them—a decision which yielded timely information not otherwise likely to have been divulged.²²⁸ Yet these techniques did not approach the legal term-of-art “torture” which is legally and morally distinct from “coercive interrogation.”²²⁹ The U.S. statute incorporating the Torture Convention prohibits only “intentional infliction . . . of severe physical [or mental] pain or suffering[,] administration . . . of mind-altering substances . . . calculated to disrupt profoundly the senses or the personality[,] [or] the threat of imminent death.”²³⁰ Although the military and CIA employed drugs and physical coercion in post-9/11 interrogation, no technique clearly violated the law.²³¹

Obsessed with a presidential request for guidance as to whether coercion might lawfully be used to interrogate Islamist detainees,²³² however, CLOACA alleged the Office of Legal Counsel response, which it branded the “Torture Memorandum,” employed “unprofessional legal reasoning”²³³ to “dodge criminal liability”²³⁴ for

(1954) [hereinafter Doolittle Committee] (advocating extraordinary measures to defeat the Soviets).

²²⁸ See WITTES, *supra* note 103, at 196; Dormann, *supra* note 110, at 51 (differentiating treatment due unlawful combatants from POWs).

²²⁹ See Ellen Yaroshesky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law*, 36 HOFFSTRA L. REV. 563, 583-84 (2007) (finding no definitional consensus as to “torture”).

²³⁰ 18 U.S.C. § 2340(1) (2004) (“Torture” means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession[.]”). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 18 U.S.C. § 2340(1), 1465 U.N.T.S. 85.

²³¹ See WITTES, *supra* note 103, at 29-30 (concluding both techniques fell “short of overt torture” and noting both were “approved post 9/11 for military interrogations of unlawful combatants”); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 1, at 35, 59, 86 (1978) (stress positions, sleep deprivation, and other environmental modifications are not torture).

²³² See Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), NAT’L SEC. ARCHIVE, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (last visited Feb. 10, 2015).

²³³ See, e.g., Jose Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2005); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 76-77 (2008) (charging

using techniques that were “*ipso facto* torture”²³⁵ and birthing a “murky world of disappearances” and “secret prisons.”²³⁶ For the “choir of condemners”²³⁷ the so-called “Torture Memorandum” served up a smorgasbord of legal sins, including bad-faith definitional narrowing of torture, and failure to consider cruelty and degradation short of torture.²³⁸ That the Bush administration adamantly denied implementing the “Torture Memorandum,” that its successor denied that any post-9/11 interrogation pursuant to U.S. policy approached torture,²³⁹ and that treatment at the Guantanamo

disregard of CIL and caselaw); Milan Markovic, *Advising Clients: After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 110 (2011) (castigating “one-sided legal advice[.]”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 (2006) (charging poor legal analysis); Cassandra Burke Robertson, *Beyond the Torture Memos*, 42 CASE W. RES. J. INT’L L. 389, 390 (2010) (describing analysis as “preposterous, even spectacularly bizarre.”); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT’L L. 389 (2009); Jeremy Waldron, *Torture and Positive Law*, 105 COLUM. L. REV. 1681, 1703-1709 (2005).

²³⁴ David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT’L SEC. L. & POL’Y 455, 458 (2010).

²³⁵ THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 1 (Majorie Cohn ed., 2012). The summary conclusion of a CLOACA member represents many: “[W]aterboarding is torture and . . . torture is illegal and wrong.” M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 638, 639 (2009).

²³⁶ Margulies, *supra* note 233, at 6. One CLOACA scholar claims the Torture Memo “toppled the traditional constraints on prisoner treatment[.]” McCormack, *supra* note 120, at 111.

²³⁷ See Darmer, *supra* note 235, at 2 (coining the phrase to describe a uniform, concerted, and coordinated CLOACA outcry against the TM).

²³⁸ Robertson, *supra* note 233, at 390. One excoriated Torture Memo claims that torture entails “death, organ failure, or . . . loss of significant body function” and is justifiable by necessity. Yaroshefsky, *supra* note 229, at 584. Another blasted assertions regarding the level of pain or injury associated with torture. Cole, *supra* note 234, at 457-58.

²³⁹ ANDREW C. MCCARTHY, THE GRAND JIHAD: HOW ISLAM AND THE LEFT SABOTAGE AMERICA 241 (2010)). Senator Obama campaigned on the argument that coercive interrogation constituted torture, and waterboarding senior Al Qaeda members in CIA custody under the Bush administration should be so regarded. President Obama refused to charge those who authorized or executed the technique. Charlie Savage, *Barack Obama’s Q&A*, BOSTON.COM (Dec. 20, 2007), <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>; CIA Employees Won’t Be Tried for Waterboarding, NBC.COM (Apr. 17, 2009),

Bay detention facility in Cuba (“GTMO”) was so superior to other federal prisons that detainees preferred detention there, were irrelevant;²⁴⁰ the politico-legal spell cast by CLOACA invocation of “torture” scuttled U.S. intelligence exploitation of detainees.

In a manual used to train Islamists in the entire spectrum of unlawful combatancy from deployment through detention, Al Qaeda teaches that at the beginning of legal proceedings “the brothers must insist on proving that torture was inflicted on them.”²⁴¹ Defense lawyers—including CLOACA scholars—launched media campaigns to reinforce the torture narrative and, under the guise of attorney-client privilege, provided clients detained at GTMO with literature that recapitulated portions of the manual training clients in this tactic.²⁴² By alleging torture as their commanders and lawyers instructed, detainees triggered a barrage of academic hand-wringing, media scrutiny, and litigation that “paralyz[ed] international intelligence services and military operations much more effective[ly] than bombs and rifles” even as their claims were proven factually false.²⁴³

Academic torture allegations were consequential. While appeals were pending, Congress passed the Detainee Treatment Act, obligating the Defense Department to use only the techniques delineated in Army Field Manual 2-22.3 and establishing Article 3,

http://www.nbcnews.com/id/3024987/ns/politics-white_house/t/cia-employees-wont-be-tred-waterboarding/#.VN3sKXbu5pk. He either elected to violate international law, which required the U.S. to prosecute or extradite alleged torturers, or accepted—freed from campaign hyperbole—that waterboarding was not torture.

²⁴⁰ See Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of Al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT'L L. 357, 384-88 (2011) (reporting that a Guantanamo lawyer admitted clients received CA3 treatment in conditions far superior to supermax prison—the likely alternative).

²⁴¹ See AQ Manual, *supra* note 18 (instructing detained Al Qaeda members to make false claims of torture).

²⁴² Debra Burlingame & Thomas Joscelyn, *Gitmo's Indefensible Lawyers*, WALL ST. J. (Mar. 15, 2010), <http://www.wsj.com/articles/SB10001424052748704131404575117611125872740>.

²⁴³ Lebowitz, *supra* note 240, at 358, 363-70 (citing *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (analyzing lawsuits by detainees wherein allegations of torture were judicially proven false and others where courts were left with “lingering questions concerning the credibility of [a detainee] . . . claim that he was tortured”)).

which is common to all four Geneva Conventions (“CA3”), as the minimum standard for all interrogations of detainees, including unlawful enemy combatants, unless a waiver is approved at higher echelons.²⁴⁴ A 2007 Bush executive order halted techniques construable as prohibited under CA3, extending the prohibition to CIA interrogators save for specific circumstances wherein a presidential authorization is required *a priori*.²⁴⁵ In 2009, President Obama’s first official act was to transfer detainees to civilian prisons and away from interrogators entirely; his second was to order “an end to torture,” ostensibly by terminating CIA interrogation authority.²⁴⁶ This second order suggested the CIA had routinely interrogated in violation of CA3, which CLOACA defines as the threshold below which “torture” results. Yet the CIA had already been restricted to CA3 standards, and thus Obama’s second executive order left the United States dangerously bereft of any capacity to conduct coercive interrogation at all.²⁴⁷ To the extent only coercive interrogation extracts the information necessary to prevent future attacks, the United States is less safe. Further, interrogators are left with a Hobson’s choice in which aggressiveness earns them prosecution, whereas timidity is chargeable as dereliction of duty, if investigators identify their passivity as a cause in a future attack on Americans.²⁴⁸

Secondly, while claims of torture induced the United States to self-limit coercive interrogation, they also prompted tactical adaptations, including the arguable circumvention of domestic law by rendering Islamist detainees to allied nations not so self-

²⁴⁴ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat 2680 (2005) (codified as amended 10 U.S.C. § 801 (2006); 28 U.S.C. 2241; 42 U.S.C. 2000dd (2006)) (ordering DOD personnel to adhere, save for approved exceptions, to CA3 as standard for interrogating detainees however characterized).

²⁴⁵ Exec. Order 13,440, 72 Fed. Reg. 40707, 40708 (Jul. 24, 2007).

²⁴⁶ Exec. Order 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009) (closing Guantanamo Bay); Exec. Order 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (ending CIA coercive interrogation).

²⁴⁷ See John Yoo, *Obama Made a Rash Decision on Gitmo*, WALL ST. J. (Jan. 29, 2009), <http://www.wsj.com/articles/SB123318955345726797> (decrying termination of CIA’s “special authority to interrogate terrorists”).

²⁴⁸ See WITTES, *supra* note 103, at 187-88 (describing a “terrible conundrum” for U.S. interrogators and excoriating Congress for its refusal to extricate them therefrom).

constrained.²⁴⁹ “Rendition” to foreign proxies that develop desired information with more aggressive techniques began in the 1970s after Congress stripped the CIA of many legal authorities.²⁵⁰ Because information regarding rendition operations is classified under domestic law, it is difficult to assess its frequency. Although permissible under domestic and international law as a general rule,²⁵¹ many CLOACA scholars summarily conclude recent U.S. renditions amount to conspiracy to torture.²⁵²

A predictable consequence of the claim that U.S. interrogation is tantamount to torture is that the utility of capturing Islamists is destroyed. In 2010, frustrated by continued claims of detainee torture even after it terminated coercive interrogation, the Obama administration made the tactical decision to begin killing Islamists with UAVs—a policy that, while effective and lawful, also kills any possibility of collecting information through interrogation of detainees that might prevent future attacks on U.S. interests.²⁵³

²⁴⁹ See Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the “War on Terror”* 550-560, 557 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 8-64, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311622 (describing U.S. argument that rendition is an “adaptation” to 4GW and the politics of detention that enables coercive interrogation “without running afoul of the rules”).

²⁵⁰ See WITTES, *supra* note 103, at 28-30.

²⁵¹ Under CIL, forcible rendition of a suspect in a war crime or crime against humanity committed beyond the territory of the rendering state is permissible under universal jurisdiction. See e.g., Covey Oliver, *Judicial Decisions: The Att’y-Gen. of the Gov’t of Israel v. Eichmann*, 56 AM. J. INT’L L. 805 (1962); *United States v. Best*, 304 F.3d 308 (3d Cir. 2002).

²⁵² See, e.g., Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) (concluding rendition violates LOAC); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295 (2007) (concluding, also, that rendition violates LOAC); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (concluding, again, that rendition violates LOAC).

²⁵³ See Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST (Feb. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/>

5. Restoration of Islamist Combatants to the Battlefield

Furor over Islamist detention unsettled the hoary view that only U.S. citizens are fully vested with constitutional rights and “the Constitution [does not] promise[] people so wholly outside of the American social compact as [Islamist] operatives overseas any of its benefits.”²⁵⁴ Generations ago in *Johnson v. Eisentrager*, the Supreme Court, warning that “[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to . . . divert his efforts and attention from the military offensive abroad to the legal defensive at home,” held that permitting enemy detainees—emphatically outside the U.S. polity and its territorial jurisdiction—access to civilian courts would “bring aid and comfort to the enemy.”²⁵⁵ Relying upon *Eisentrager* for the proposition that enemy combatants detained abroad could not avail themselves of the writ of habeas corpus, and upon battlefield capture data reported by the military, the United States transferred Islamists captured by military and CIA personnel in Afghanistan and Iraq to GTMO.²⁵⁶ Because it detained Islamists as unlawful combatants, the United States maintained they could be held for the duration of the war, tried for precapture crimes, and coercively interrogated to develop intelligence to prevent future attacks.²⁵⁷

The notion that citizenship and enemy status determine whether, and how much of, the panoply of constitutional rights is available to a given detainee, however, was bitterly contested. A

AR2010021303748.html (reporting that a counterterrorism policy shift from capture and detain to target and kill that commenced in 2009 was likely a calculated response to mounting claims of detainee torture).

²⁵⁴ See WITTES, *supra* note 103, at 115.

²⁵⁵ *Johnson v. Eisentrager*, 339 U.S. 763, 769 (“[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance . . . who . . . have remained with, and adhered to, enemy government.”).

²⁵⁶ See, e.g., *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (citing *Eisentrager* for the theory that Congressional authorization of armed conflict and inherent executive power combined to create authority to detain “enemy combatants” wherever captured).

²⁵⁷ See Bush Memorandum, *supra* note 113.

CLOACA cohort rejected U.S. authority to detain Islamists—even those who had engaged in combat against the United States—under any circumstances save for briefly prior to deportation or trial in civilian courts.²⁵⁸ Another demanded the United States provide detainees individualized status determinations on the pretense many were “innocent laborers, students, and relief workers” captured far from battlefields, and that even if some were Islamist fighters, the third Geneva Convention guaranteed individual hearings to determine status and rights on capture.²⁵⁹ Another argued determining detainees’ status was impossible.²⁶⁰

In response, detention proponents asserted that there was no legitimate doubt as to detainees’ status and no individualized determination was necessary beyond a finding by the president, or his delegate in the military chain-of-command, that a detainee was affiliated with an Islamist VNSA at war with the United States.²⁶¹ America maintained that preventive detention was authorized by LOAC for captured enemy combatants on the basis of their organizational ties without regard to locus, or personal conduct, at time of capture. The United States insisted further that to provide detainees with undue process—specifically, individualized status determinations in civilian forums—would harm national security, either by obligating the government to reveal intelligence sources and methods in open court and remove combat troops from the

²⁵⁸ See Gabor Rona, *A Bull in a China Shop: The War On Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 148 (2008) (denying civil detention authority except pretrial, pre-deportation, or post-conviction in civil courts); McCormack, *supra* note 120, at 108; Zayas, *supra* note 121, at 15.

²⁵⁹ WITTES, *supra* note 103, at 16. To CLOACA, locus and conduct at capture, not Islamist affiliation, is dispositive of individual detention status. MARK DENBEAUX, THE MEANING OF “BATTLEFIELD”: AN ANALYSIS OF THE GOVERNMENT’S REPRESENTATIONS OF “BATTLEFIELD” CAPTURE AND “RECIDIVISM” OF THE GUANTANAMO DETAINEES 4 (2007).

²⁶⁰ See Luban, *supra* note 202, at 1985 (stating that “no one . . . is in a position to know” the status and culpability of GTMO detainees).

²⁶¹ See Jeff Miller, *Investigating the John Adams Project*, DAILY SIGNAL (May 21, 2010), <http://dailysignal.com/2010/05/21/guest-blogger-congressman-jeff-miller-r-fl-on-investigating-the-john-adams-project/> (“You are not sent to [GTMO] unless you have directly harmed . . . American troops . . . or . . . civilians.”); WITTES, *supra* note 103, at 49 (“[LOAC] presume[s] that a captured enemy fighter is indeed a captured enemy fighter.”).

battlefield to testify as to the facts supporting detention, or by forcing it to choose protection of classified information and preservation of combat power over restraint of dangerous people sworn to attack the United States.²⁶²

CLOACA applauded, supported, and participated in a subsequent rash of lawsuits.²⁶³ In *Hamdi v. Rumsfeld*, the Supreme Court reaffirmed executive power to detain enemy combatants for the duration of the war, holding “[i]f . . . our only alternative . . . is to try enemy combatants in the civilian justice system while the war is underway, we will then have to choose between either providing our enemies with discovery that will be extremely useful to them or releasing them to return to their jihad.”²⁶⁴ However, the *Hamdi* Court provided part of the requested relief, holding detainees were entitled to individualized status determinations (without specifying a forum).²⁶⁵ In *Rasul v. Bush*, the Court further eroded *Eisentrager*, holding GTMO detainees were entitled to file habeas petitions challenging their detention.²⁶⁶ Detainee advocates launched media campaigns and litigation to disrupt military interrogations and prosecutions with spurious claims of detainee innocence: one dishonest narrative alleged that “more than 55% [of GTMO detainees] are not accused of ever having committed a single hostile

²⁶² See WITTES, *supra* note 103, at 167 (“[P]ut a substantial burden of proof on the government to justify each detention, and . . . some very dangerous people will go free[.]”).

²⁶³ Burlingame & Joscelyn, *supra* note 242, at A23. The rush by members of CLOACA to represent detainees was not motivated by “professional nobility” but by self interest: “in many . . . quarters of the legal profession it is *chic* to volunteer to represent . . . detainees[.]” Charles C. Dunlap, Jr., *Does Lawfare Need An Apologia*, 43 CASE W. RES. J. INT’L. L. 121, 139 (2010).

²⁶⁴ Andrew C. McCarthy, *Lawfare Strikes Again*, NAT’L REV. ONLINE (June 12, 2007), <http://www.nationalreview.com/article/221258/lawfare-strikes-again-andrew-c-mccarthy>.

²⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 533 (2004). In compliance with *Hamdi*, the U.S. developed Combatant Status Review Tribunals [“CSRTs”]—military hearings wherein individual status determinations were made to determine whether detainees were in fact affiliated with Al Qaeda and could thus be detained as unlawful combatants.

²⁶⁶ See *Rasul v. Bush*, 542 U.S. 466, 480-84 (2004) (holding GTMO detainees were under “effective control” of the United States and thus entitled to petition for habeas corpus).

act[,] [o]nly 8% [a]re characterized by the DOD as “al Qaeda fighters” and “[o]f the remaining detainees, [58]% have no definitive connection with [Islamists] at all.”²⁶⁷

It mattered not to CLOACA that 40% of detainees admitted Islamist status, 75% were a “demonstrated threat,”²⁶⁸ and most vowed to return to jihad if they gained release.²⁶⁹ *Ipse dixit*, the detainees—“students, farmers, and goatherds” in the wrong place at the wrong time and subjected to preventive detention, an “extreme” measure “inconsistent with . . . human autonomy and free will”²⁷⁰—were victims of Islamophobia. If the United States disagreed, it could try to prove otherwise in civilian criminal trials. NGO lawyers and a CLOACA cluster—self-styled patriots nobly representing despised pariahs²⁷¹—demanded their clients’ release and closure of GTMO, a site they analogized to World War II-era death camps. Those who gainsaid the detainee innocence and attorney heroism narrative were

²⁶⁷ *The 14 Myths of Guantanamo: Hearing Before S. Armed Services Comm.*, 110th Cong. 5-6 (2007) (Statement of Mark P. Denbeaux, Professor).

²⁶⁸ An investigative team from West Point determined that seventy-three percent of detainees constituted a “demonstrated threat” and ninety-five percent a “potential threat” to the United States. JOSEPH FELTER & JARRET BRACHMAN, CTC REPORT: AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES 30 fig. 21 (2007), available at http://www.pegc.us/archive/Organizations/CTC_csrt_rpt_20070725.pdf; see also William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, N.Y. TIMES (Nov. 3, 2008), <http://www.nytimes.com/learning/students/pop/articles/03gitmo.html> (validating these findings). Forty-two percent admitted to “significant association” with Islamist VNSAs, and many who denied association were “undoubtedly lying.” WITTES, *supra* note 103, at 85-86, 94; see also *Odah v. U.S.*, 611 F.3d 8 (D.C. Cir. 2010) (denying habeas petition by citing evidence the detainee trained at a Taliban camp and deployed in combat); *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010).

²⁶⁹ See Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, Response: *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 426-27 (2008) (“Some detainees [before CSRT hearings] make no issue of their guilt or their disposition to continue to commit hostile acts.”).

²⁷⁰ David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 696 (2009).

²⁷¹ See Marc A. Thiessen, *The ‘al-Qaeda Seven’ and Selective McCarthyism*, WASH. POST (Mar. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html> (insisting detainee lawyers were not performing their “constitutional duty”).

heretics against the U.S. rule-of-law religion. When Deputy Assistant Secretary of Defense for Detainee Affairs Charles Stimson expressed “shock” that elite law firms were “representing terrorists,”²⁷² CLOACA joined a successful campaign to have him fired for a statement the American Bar Association branded “deeply offensive to . . . the legal profession, and we hope to all Americans.”²⁷³

When the Detainee Treatment Act purported to eliminate federal jurisdiction over waves of habeas petitions by detainees,²⁷⁴ still more litigation ensued over this and related issues, including the power of Congress to define and punish pre-capture offenses in military commissions and whether detainees could be subjected to coercive interrogation. In *Hamdan v. Rumsfeld*, a detainee who had served as driver and bodyguard to Osama bin Laden and was scheduled for military prosecution on charges involving material support of terrorism failed in his challenge of Congressional power to define and punish that offense in the Military Commissions Act of 2006 (“MCA”).²⁷⁵ Worse, in 2008, the Court struck down MCA’s jurisdiction-stripping provisions and further gutted *Eisentrager* in *Boumediene v. Bush*, which read *Eisentrager* as grounded almost exclusively in the weighty burden habeas jurisdiction would have imposed on the military if federal courts were invested with jurisdiction to review military convictions of enemy combatants.²⁷⁶ The *Boumediene* Court, finding no practical burdens given military control of GTMO, held that the Combatant Status Review Tribunal (“CSRT”) system and D.C. Circuit review of CSRT determinations were unconstitutional because detainees lacked lawyers, knowledge of the charges, and power to confront witnesses.²⁷⁷ Absent

²⁷² *Top Pentagon Official Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACY NOW (Jan. 17, 2007), http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott (quoting Federal News Radio).

²⁷³ Neil A. Lewis, *Officials Attack Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), http://www.nytimes.com/2007/01/13/washington/13gitmo.html?_r=0.

²⁷⁴ DTA, *supra* note 244.

²⁷⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 567. Congress authorized military commissions to try detainees, codified triable LOAC violations and procedures, and applied DTA jurisdiction-stripping amendments to pending cases. Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600.

²⁷⁶ *Boumediene v. Bush*, 553 U.S. 723, 763, 795 (2008).

²⁷⁷ *Id.* at 783, 795.

Congressional suspension of the writ, detainees were entitled to judicial habeas review despite their foreign citizenship, the locus of capture, and detention beyond U.S. territory, and their presumptive status as unlawful enemy combatants.²⁷⁸ Federal judges stood ready to determine if detainees were Islamist VNSA affiliates, substituting theirs for military judgments.²⁷⁹

Not content to purloin powers constitutionally committed to the executive, the Court implied that detainees were entitled to lawyers in habeas proceedings²⁸⁰ and to review classified information containing sources, methods, and identities of U.S. personnel at the heart of the effort to defeat the cause for which detainees were captured while fighting.²⁸¹ *Eisentrager* established that a lawful Axis combatant was entitled to release only at the end of World War II, yet *Boumediene* subverted that rule to create a regime whereby a detainee whom the United States could prove by clear and convincing evidence was an unlawful combatant is entitled, during the pendency of the conflict, to immediate release should the government not reveal the classified evidence necessary to prove beyond a reasonable doubt his affiliation with Islamism—an enemy with whom, unlike the Nazis and Japanese, a negotiated surrender is impossible.

²⁷⁸ *Id.* at 767 (concluding CSRTs fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review”).

²⁷⁹ *Id.* at 828 (Scalia, J., dissenting) (describing the decision as “devastating” to the President’s ability to fight Islamists). The majority opinion is symptomatic of an ill-advised drift by courts [from] war, and military discretion based on intelligence, to peace and law enforcement discretion based on evidence. Matthew C. Waxman, *Dismantling Guantanamo: Facing the Challenges of Continued Detention and Repatriation: Guantanamo, Habeas Corpus, Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT’L L. 245, 266 (2009).

²⁸⁰ *Boumediene*, 553 U.S. at 767 (finding that a Personal Representative, and not a lawyer, assigned to a detainee during CSRT proceedings is constitutionally inadequate).

²⁸¹ See, e.g., S. REP. NO. 110-90, at 14 (2007) (stating that in habeas proceedings the government faces the choice of giving highly sensitive intelligence to Islamists or “foregoing the use of . . . the most important evidence against a detainee, and thus running the risk [he] will be released”); Colonel Frederic L. Borch, III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials: A Rebuttal to Military Commissions: Trying American Justice*, ARMY LAW. 10 (Nov. 2003) (examining this “choice” in depth).

Despite a result in *Boumediene* overwhelmingly favorable to detainees, because it did not clearly specify the procedures, standards of proof, or rules of evidence to govern CSRTs and military commissions,²⁸² nor resolve the question of whether detainees in Afghanistan were entitled to invoke habeas in U.S. courts, CLOACA expanded its “law-free zone” allegations²⁸³ as lawyers filed suits challenging detentions and prosecutions under subsequently revised rules.²⁸⁴ Seven years later, judges have ordered GTMO detainees released in cases where the United States could not or would not disprove torture allegations, and others were released after short prison terms.²⁸⁵ A decade-plus of judicial intervention, goaded by CLOACA, has disturbed the answers to a series of questions—*i.e.*, who can the military detain, on what basis, for how long, and under what conditions, as well as who can be prosecuted, on what charges, and in what forums—that *Eisentrager* had resolved and upon which the Bush administration relied. Islamists, and potential recruits, can

²⁸² See BENJAMIN WITTES, ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTANAMO CASES AS LAWMAKING 1-2* (2010) (analyzing habeas litigation post-*Boumediene* and finding a lack of jurisprudential clarity as to who may be detained, on what basis, whether a detainee can abandon affiliation post-capture, what evidentiary presumptions are permissible, how classified information should be protected, and admissibility of allegedly coerced statements).

²⁸³ See, e.g., David Cole, *Law-Free Zoning*, NATION (May 27, 2010), <http://www.thenation.com/article/law-free-zoning>.

²⁸⁴ See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801-07, 123 Stat. 2190 (revising rules and procedures for military prosecution of detainees); *Obaydullah v. Obama*, 609 F.3d 444 (D.C. Cir. 2010) (challenging detention and stay of habeas petition); *Khadr v. Obama*, 724 F. Supp. 2d 61 (D.D.C. July 2011) (challenging detention under the MCA and use of military commission for trial). Detainees have challenged the administrative process to determine point-of-capture status and current dangerousness. See, e.g., *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) (upholding detention of detainee attached to Taliban combat unit); *Al Maqaleh v. Gates*, 605 F.3d 84, 87-88 (D.C. Cir. 2010) (denying habeas jurisdiction over detainees in Afghanistan).

²⁸⁵ See, e.g., *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010) (holding, after suppressing evidence allegedly derived from torture, that insufficient evidence existed to justify continued detention); *United States v. Hamdan*, 800 F.Supp. 2d 1247 (CMCR 2011) (upholding military commission conviction and sentence for an act of terrorism, providing material support to a terrorist organization, and knowingly facilitating terrorism as bodyguard to Osama bin Laden).

now contemplate a swifter and surer return to the battlefield than U.S. enemies in World War II.²⁸⁶

Worse yet, after *Boumediene*, the Obama administration introduced a protocol providing periodic detention reviews and release on a determination that a detainee will not be prosecuted and no longer poses a threat to the United States.²⁸⁷ Although detainees designated too dangerous to release will remain in indefinite detention, the Obama administration, like its predecessor,²⁸⁸ freed many. This “charge or release” policy “allows . . . [Islamist] fighter[s] to game the system and return to the fight.”²⁸⁹ Dozens of liberated detainees have killed and been killed in battle, scores have been recaptured, and some are in the top command structure of ISIS.²⁹⁰ In 2011, the Director of National Intelligence testified that recidivism was 27%, with 161 detainees having resumed jihad—up from 74 in 2009 and 37 in 2008. More recent estimates suggest up to thirty percent of Islamists imprudently released due to “domestic political pressures” were back at war with the United States and its allies.²⁹¹

²⁸⁶ High-profile law firms represented Islamist detainees who, upon release, were confirmed as recidivist *jihadis* by the Department of Defense. Debra Burlingame & Thomas Joscelyn, *Gitmo's Indefensible Lawyers*, WALL ST. J., <http://www.wsj.com/articles/SB10001424052748704131404575117611125872740> (last updated Mar. 15, 2010).

²⁸⁷ DEP'T OF JUSTICE, ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE ii, 7, 25 (2010).

²⁸⁸ Before January 2009, the U.S. determined that 500 GTMO detainees were not sufficiently dangerous to justify continued detention and, because they were not amenable to prosecution, would be extradited or repatriated. Cole, *supra* note 270, at 705-06. Of these, sixty-one soon returned to acts of unlawful combatancy. *Id.*

²⁸⁹ Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Responses to Terrorism*, 60 J. LEGAL EDUC. 373, 377 (2011).

²⁹⁰ Thomas Joscelyn, *Gitmo "Poet" Now Recruiting for Islamic State*, WKLY. STANDARD (Nov. 19, 2014, 7:25 AM), http://www.weeklystandard.com/blogs/gitmo-poet-now-recruiting-islamic-state_819587.html; S. REP. NO. 110-90, at 13 (2007).

²⁹¹ Chad Pergram, *New Congressional Report Slams Bush and Obama Administrations over Gitmo Detainee Releases*, FOX NEWS POLITICS (Feb. 9, 2012), <http://www.foxnews.com/politics/2012/02/09/report-almost-30-percent-terrorists-released-from-gitmo-continued-terrorist/>; Raffaella Wakeman, *September 2013 Guantanamo Recidivism Report from DNI*, LAWFARE (Sept. 6, 2013, 9:42 AM), <http://www.lawfareblog.com/2013/09/september-2013-guantanamo-recidivism-report-from-dni/>. Even ardent detainee advocates concede many are Islamist

In sum, legal arguments developed by CLOACA in the context of status determinations and habeas litigation have undermined precedent upon which the executive was entitled to rely in discharging its constitutional duty to defend Americans, denatured the moral opprobrium that attaches to unlawful combatancy, and elevated unlawful combatants into a position superior to soldiers who obey LOAC, distinguish themselves from civilians, and earn combatant immunity. CLOACA has helped strip the executive branch of constitutional command prerogatives, transfer them to the judiciary, and deprive U.S. commanders of the full utility of the tools of detention and interrogation vital to force protection and mission achievement. Moreover, they have reduced the liberty risks to potential Islamist recruits, diminished the incentive for detainees to cooperate in preventing future attacks as a condition of release, and improved the correlation of forces against the United States by returning jihadis to the battlefield.

6. Evacuation of American Military Personnel from the Battlefield

Because much of LOAC consists not of absolute rules but of standards given practical form through a subjective balancing of principles, no military commander can be sure in advance of a planned military operation how a court called to perform a *post hoc* review of his operational decisions might judge him, and “no judge . . . could reasonably condone any course of action in advance.”²⁹² Nevertheless, LOAC has traditionally functioned as a permissive regime granting a responsible military commander a “margin of

fighters not mistakenly captured while innocently in the vicinity of combat operations. See, e.g., Margulies, *supra* note 289, at 392 (admitting the facts “make the misadventure thesis inappropriate”). Nonetheless, CLOACA support for and state practice consistent with the “catch and release” policy based on individualized dangerousness legitimates this ill-considered policy. See Barak Medina, *Regulating Anti-Terror Warfare Through the Individual Dangerousness Doctrine* (Aug. 1, 2013), <http://ssrn.com/abstract=2259158> (suggesting the practice is *lex ferenda*). The Obama administration plans to quietly release more of the 143 Islamists who remain detained at GTMO in 2015. Julian E. Barnes, *Pentagon Prepares More Guantanamo Releases*, WALL ST. J. (Nov. 27, 2014, 3:23 PM), <http://www.wsj.com/articles/pentagon-prepares-more-guantanamo-releases-1417119817>.

²⁹² Benvenisti, *supra* note 20, at 354.

appreciation”²⁹³ and evaluating his alleged breaches not based on the perfect information available *post hoc* but on what he knew or should have known *a priori* his decision to attack a target in the manner and with the means chosen.²⁹⁴ LOAC stands in his boots amid the fog of war and smoke of battle and refrains from second-guessing presumptively good-faith judgments save for where actions are demonstrably the result of, *e.g.*, a deliberate intent to kill civilians or a willful recklessness in using force excessive in relation to military advantage.²⁹⁵ Moreover, LOAC considers that command investigations are the most appropriate mechanism to investigate alleged violations of LOAC, and military justice systems routinely prosecute violations.²⁹⁶

However, NGO and CLOACA militantism, prompting advent of the International Criminal Court and aggressive assertion of universal war crimes jurisdiction, has elevated the personal risks faced by military commanders. Hailed by CLOACA as “bringing to justice” authors of “horrendous violations of LOAC”²⁹⁷ and within the tradition of prosecuting the architects of Nazi genocide,²⁹⁸ the hyperlegalization of military operations leverages motivated (mis)interpretation and redefinition of LOAC principles by

²⁹³ See, *e.g.*, H.C. 769/02, Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2005], available at http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf (“A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch’s . . . margin of appreciation.”).

²⁹⁴ See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1271-74 (2000) (elaborating standard for lawfulness of tactical command decisions under LOAC in re: proportionality and distinction).

²⁹⁵ See Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT’L L. 255, 274 (2010) (arguing for a “reasonableness standard based on [a] command[er]” making decisions “at . . . crucial moments of the operation”).

²⁹⁶ *Mor Haim v. Israeli Defence Forces*, HCJ 6208/96 (16 Sept. 1996).

²⁹⁷ See COHN, *supra* note 235, at 6 (describing litigation alleging LOAC violations as “bringing to justice” the military commanders responsible); Benjamin G. Davis, *Refluat Stercus: A Citizen’s View of Criminal Prosecution in U.S. Domestic Courts of High-Level Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN’S J. LEGAL COMMENT. 503 (2008) (advocating prosecution of authors of “horrendous violations of . . . [LOAC]”).

²⁹⁸ See COHN, *supra* note 235, at 13 (analogizing legal action against Western soldiers to the work “to prosecute, convict, and execute Adolph Eichmann”).

forwarding alleged violations to hostile international courts. Advocates would require a commander, on report of an alleged violation, to impose a ceasefire and avail criminal investigators of his personnel, weapons, and equipment while his enemies escape or reinforce.²⁹⁹ The trend away from the presumption of commanders' good faith gives Western military personnel cause to fear that, should military operations, no matter how LOAC-compliant they were viewed *a priori*, result in dead civilians, no matter how unintended, they will be removed from battlefields and prosecuted by their countries' political opponents.³⁰⁰ Civilian judicial forums and CLOACA revisionism intersect to shrink the margin of appreciation to the vanishing point, legally decapitate the military establishment, and debilitate Western combat power.³⁰¹

If CLOACA bristles at characterizations of the "bringing to justice" paradigm as a poorly-camouflaged device to achieve military results by non-military means,³⁰² the drive to fetter Western commanders and shift operational advantage to Islamists continues undaunted. During the 2003 Iraq intervention, activists lodged indictments in several states alleging war crimes by U.S. leaders, including Defense Secretary Rumsfeld and General Franks.³⁰³

²⁹⁹ Newton, *supra* note 95, at 280.

³⁰⁰ Compliance with LOAC is a commander's responsibility that burdens execution of military missions. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1831-45 (2007). Fear of prosecution for acts or omissions judged "war crimes" *post facto* by NGOs and CLOACA can prevent commanders from acting robustly and leave them feeling "worried about being second-guessed by investigators" and "surrounded by . . . law wielded by enemies[.]" Christopher Waters, *Beyond Lawfare: Juridical Oversight of Western Militaries*, 46 ALBERTA L. REV. 885, 895-96 (2009).

³⁰¹ See Phillip Carter, *Legal Combat: Are Enemies Waging War in our Courts?*, SLATE (Apr. 4, 2004), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html (describing legal "decapitation strike[s]" against commanders).

³⁰² See, e.g., Leila N. Sadat & Jing Geng, *On Legal Subterfuge and the So-Called "Lawfare" Debate*, 43 CASE W. RES. J. INT'L L. 153, 154 (2010) (posing the question, "Since when is filing a lawsuit the same as mounting violent and bloody attacks on civilians and civilian objects?").

³⁰³ See Jeffrey T. Kuhner, *Iraqis Target Gen. Franks for War Crimes Trial*, WASH. TIMES, Apr. 28, 2003, at A1.

Although attempts to impede U.S. military operations through litigation failed, the precedent invigorated CLOACA academics who invoked the specter of Nuremberg, claiming senior U.S. commanders authored “violations of [LOAC as] . . . an admitted part of a ‘common plan’ or ‘program’ . . . in response to [9/11],”³⁰⁴ ensuring that a regime of “oppression [was] loosed on the world.”³⁰⁵ For CLOACA, the U.S. response to the Islamist threat mirrors the Nazi conspiracy in adopting a program of “manifestly unlawful transfer, detention, and interrogation” that “violate[s] our common dignity, degrade[s] our military, thwart[s] our mission, . . . deflate[s] our . . . influence abroad[,] emboldens [the] enemy, serve[s] as a terrorist recruitment tool, . . . and fulfill[s] terrorist ambitions.”³⁰⁶ Further, U.S. troops bear personal responsibility for these policies and must face “prosecution here and in foreign courts.”³⁰⁷ One forum wherein CLOACA proposes their prosecution is Germany—birthplace of the Nazi conspiracy that allegedly inspired the U.S. scheme to violate LOAC.³⁰⁸

Islamist abuse of criminal process to evacuate military commanders from the battlefield and disrupt military operations, anticipated in *Eisentrager*, has drawn Congressional ire.³⁰⁹ Concern about the potential for politically-motivated prosecutions of U.S. military personnel abroad is a major reason for the United States’ refusal to join the International Criminal Court, as well as for legislation and status-of-forces agreements ensuring U.S. troops are not brought before foreign tribunals. However, relentless political and academic pressure has been brought to bear to convince the United States that it is expedient to subject its troops to courts-martial to prove that it takes allegations of LOAC violations seriously

³⁰⁴ Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCH. L. REV. 5201, 5202 (2008).

³⁰⁵ DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* 96-97 (2006).

³⁰⁶ Paust, *supra* note 304, at 5203-04.

³⁰⁷ *Id.* at 5204.

³⁰⁸ See COHN, *supra* note 235, at 9 (describing efforts to convince Germany to prosecute U.S. leaders for crimes that “shock the conscience” of the world).

³⁰⁹ See, e.g., Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES (Nov. 11, 2005), <http://www.nytimes.com/2005/11/11/politics/11detain.html>.

and that it is unnecessary to make referrals to international courts. The United States has court-martialed hundreds of personnel based on allegations of war crimes against Islamists, and several recent investigations, including on charges of murder, suggest that, even absent adequate evidence of crimes, senior U.S. military commanders will cave to political pressure and convene courts-martial as *de facto* proxies for foreign civilian judicial forums,³¹⁰ with the result that U.S. troops are removed from the battlefield, the correlation of forces tilts in favor of Islamists, and the tactic is validated as an important aspect of Islamist combat support operations.

7. Execution of Direct Action Missions

Under 18 U.S.C. § 2339A-D, also known as the “material support statute,” material support of terrorists, broadly defined as the provision of money, training, equipment, personnel, transportation, services, physical assets, and “expert advice or assistance,”³¹¹ is a criminal act. Courts have upheld the material support statute as an incidental restriction on speech and association that clearly advances an important governmental interest in divesting terrorist organizations from financial, physical, and human capital without targeting protected political speech.³¹² The prohibition against providing terrorist groups “training,” “services,” and “expert advice and assistance” includes provision of training and advice to Islamists in the use of LOAC, even where experts providing these services lack any intent to further Islamist activities, so long as the support benefits the Islamist group in fact. Training in LOAC confers upon recipients a body of “specialized knowledge” and it is “wholly foreseeable that directly training the [Islamist group] on how to use [LOAC] would provide that group with information and techniques that it could use as part of a broader strategy to promote

³¹⁰ See Alan F. Williams, *Overcoming the Unfortunate Legacy of Haditha, the Stryker Brigade “Kill Team,” and Pantano: Establishing More Effective War Crimes Accountability by the United States*, 101 Ky. L.J. 337 (2012) (analyzing political influence in courts-martial and prosecution decisions in the 4GW against Islamism).

³¹¹ 18 U.S.C. 2339A(b)(1) (2012).

³¹² *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (stating the material support statute is an incidental restriction on speech and association addressing an important government interest).

terrorism.”³¹³ While “independently advocating for a cause is different from providing a service to a group that is advocating for that cause,” the Supreme Court upheld Congressional authority to prohibit advocacy “in coordination with, or at the direction of, a terrorist organization.”³¹⁴

Yet CLOACA alleges “the greatest threat to our freedoms is . . . not [Islamists] but . . . our own government’s response,”³¹⁵ that the material support statute is an unconstitutional “form of preventive detention,”³¹⁶ and that high-profile convictions of professors and lawyers for providing “training” or “expert advice or assistance” to Islamist violent non-state actors exemplify “how out of hand things have gotten in the ‘war on terrorism.’”³¹⁷ CLOACA antipathy to the material support statute was exacerbated by the conviction of Lynne Stewart, a radical lawyer who advocates “violence directed at the institutions which perpetuate capitalism, racism and sexism”³¹⁸ and represented Omar Abdel Rahman, the “blind sheikh” who masterminded the 1993 World Trade Center bombing. Stewart provided material support to Rahman by assisting his interpreter in sending encrypted messages indicating Rahman’s approval of further Islamist attacks. Stewart also misrepresented that Rahman had been denied medical care, which the United States characterized as dissemination of a false claim to spread propaganda and thus an additional count of material support.³¹⁹ She was convicted and imprisoned for providing expert advice and assistance

³¹³ Holder v. Humanitarian Law Project, 561 U.S. 1, 5-6 (2010).

³¹⁴ *Id.* at 24.

³¹⁵ David Cole, *Enemy Aliens and American Freedoms*, NATION (Sept. 5, 2002), <http://www.thenation.com/article/enemy-aliens-and-american-freedoms>.

³¹⁶ David Cole, *Panel: Restrictions on Freedom of Association Through Material Support Prohibitions and Visa Denials*, 57 AM. U. L. REV. 1203, 1214 (2008).

³¹⁷ David Cole, *The Lynne Stewart Trial*, NATION (Feb. 17, 2005), <http://www.thenation.com/article/lynne-stewart-trial>.

³¹⁸ Joseph P. Fried, *In Muslim Cleric’s Trial, a Radical Defender*, N.Y. TIMES (June 28, 1995), <http://www.nytimes.com/1995/06/28/nyregion/muslim-cleric-s-trial-radical-defender-left-leaning-lawyer-revolutionary.html>.

³¹⁹ Press Release, Dep’t of Justice, *Superseding Indictment Adds New Charges Against Ahmed Abdel Sattar, Lynne Stewart, and Mohammed Yousry* (Nov. 19, 2003), available at http://www.justice.gov/archive/opa/pr/2003/November/03_crm_631.htm.

in conspiracy with Rahman and Al Qaeda.³²⁰ CLOACA, reading into Stewart's prosecution a "new willingness . . . to see . . . lawyers as enemy combatants," claimed she was guilty of mere violations of prison administrative regulations meriting only bar discipline.³²¹ It branded her conviction a prohibition on "all First Amendment activity in support of [terrorist] organizations"³²² and a devious twisting of the material support statute into a tool to criminalize lawyers' statements of general support on behalf of "unpopular clients."³²³

Despite this rhetoric, under professional canons governing the practice of law, practitioners may represent a client without "endors[ing] the client's political, economic, social or moral views or activities."³²⁴ Even if the client advocates or engages in terrorism in support of an ideology with which the practitioner approves, he or she may represent the client so long as he or she does not cross over into "operational solidarity" by, e.g., participating in a terrorist act as principal, aider and abettor, or accessory.³²⁵ For CLOACA scholars not bound by constraints inhering in the representation of clients, the zone of discretion is even broader, and the tenets of academic freedom insulate against attribution of criminal responsibility for statements that connote affective solidarity with Islamists. CLOACA might seem free to express opinions sympathetic to Islamist aims without violating the material support statute.

³²⁰ Julia Preston, *Lawyer, Facing 30 Years, Gets 28 Months, to Dismay of U.S.*, N.Y. TIMES (Oct. 17, 2006), <http://www.nytimes.com/2006/10/17/nyregion/17stewart.html>.

³²¹ Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 367 (2007).

³²² Cole, *supra* note 316, at 1217. CLOACA considers the material support statute as interpreted to bar verbal support for "so-called terrorist organizations[.]" Kende, *supra* note 119, at 1560.

³²³ Margulies, *supra* note 321, at 176. "[E]ven the volunteering of one's time . . . constitutes material support [under the material support statute][.]" Cole, *supra* note 315, at 1214.

³²⁴ MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (2011).

³²⁵ See Margulies, *supra* note 321, at 173-75, 177-82, 187-89 (2003) (differentiating lawyers in "affective" solidarity with clients from those in "operational solidarity").

However, the anxiety that the statute excites in CLOACA may be rooted less in concerns that the representation of Islamists will incriminate practitioners of Stewart's ilk than the prospect that their own disquisitions on LOAC may be received not as protected academic "speech" but as "services," "training," and "expertise or assistance" to Islamist organizations in violation of the statute. In *United States v. Tarek Mehanna*, an American Muslim was convicted of providing material support through "services" and "expert advice or assistance" to Al Qaeda in translating, interpreting, and distributing materials advocating, justifying, and inspiring jihad.³²⁶ Mehanna, a self-styled Islamic scholar "who provided information to others . . . less knowledgeable" in the "blessed field" of "stand[ing] up for the *Mujahidin* and . . . their ideas," claimed his work as the "media wing" of Al Qaeda was protected speech under the First Amendment.³²⁷ Disagreeing, the jury found that Mehanna, who expressed hatred of the United States and hope for its defeat, was not engaged in independent and constitutionally-protected advocacy of Islamist aims, but had in fact worked "in coordination with or at the direction of" Al Qaeda to provide services, training, expertise, and assistance in support of its terrorist mission.³²⁸

It is hard to craft a more apt description of CLOACA than "scholars" who "provide information to others . . . less knowledgeable" in the "blessed field" of "standing up for [Islamists] and their ideas." If Stewart and Mehanna are criminals for materially supporting terrorists, CLOACA scholars who contribute expert scholarship and advocacy that systematically (mis)interprets LOAC

³²⁶ See generally Superseding Indictment, *U.S. v. Mehanna*, 2010 WL 2516469 (D. Mass. 2010) (No. 09-CR-10017-GAO).

³²⁷ Government's Proffer and Memorandum in Support of Detention at 14, *United States v. Mehanna*, 2010 WL 2516469 (D. Mass. 2010) (No. 09-CR-10017-GAO) (citing Mehanna's role in "teaching others" and Steps 17 and 34 from 39 *Ways to Serve and Participate in Jihad*, a manual to incite jihad that Mehanna interpreted, translated, and compared to *Mein Kampf*).

³²⁸ Superseding Indictment, *supra* note 326, at 1-2 (alleging overt acts in furtherance of a 2339(b) conspiracy, including providing expert interpretation of Islamic texts regarding jihad, authoring and distributing recruiting materials, justifying attacks on noncombatants, serving as "media wing" of Al Qaeda, and inspiring participation in unlawful combatancy).

so as to advantage Islamist combat operations against the United States are propagandists in violation of the material support statute.

B. Combat Arms: Delegitimation of America as a Rule-of-Law Nation Worth Defending

CLOACA realizes the most direct application of its combat power through attacks on U.S. legitimacy that undermine the willingness of Americans to continue to support what they are told is an unlawful and unwinnable war. Rather than make good-faith legal arguments as to what LOAC does, does not, should, and should not require and prohibit—mindful that the continued existence of the rule-of-law civilization undergirding the capacity to make and apply LOAC depends upon U.S. victory over Islamism—these academics offer up politicized arguments that the Islamist jihad is a reaction to legitimate Muslim grievances against a Judaephilic foreign policy, that U.S.-led interventions in Iraq and Afghanistan are aggressive and unnecessary wars, that “torture” and military commissions prove Western injustice, that the United States is engaged in a government-sanctioned pattern of war crimes *à la* Nazi Germany, that U.S. civilian leaders must be prosecuted for these crimes, that U.S. criminality breeds more terrorists while threatening our values, and that intrepid dissidents who dare challenge their enterprise are jurispaths deserving to be drummed out of LOACA into prison.

1. Attribution of Islamist Casus Belli to American Foreign Policy

CLOACA blames Islamist attacks on a U.S. failure to eliminate the “root causes” of Islamism—“poverty, lack of education, and foreign occupation.”³²⁹ Islamism is thus a reaction to four aspects of U.S. foreign policy: (1) promoting socioeconomic

³²⁹ COHN, *supra* note 235, at 16. One CLOACA scholar suggests “we need to understand the reasons behind the terrifying hatred . . . and . . . not foment more[.]” Roberto J. Gonzalez, *Lynne Cheney-Joe Lieberman Group Puts Out a Blacklist*, S.J. MERC.-NEWS (Dec. 13, 2001), available at <http://globalresearch.ca/articles/GON112A.html>. For another, “[t]he only . . . way to make Americans . . . safer is to reduce the supply of terrorists.” Brian J. Tamanaha, *Are We Safer From Terrorism? (No, But We Can Be)*, 28 YALE L. & POL’Y REV. 419, 431 (2010).

“injustices” in the Islamic world via the distributional effects of U.S. capitalism,³³⁰ (2) sanctioning rogue Muslim regimes,³³¹ (3) dispatching infidel troops into “Muslim lands,” and (4) allying with Israel.³³² Those who claim “we participated in [Islamism’s] creation” insist the United States must cease “choosing militarism and global inequality over peace and global justice.”³³³ As, by this perverse view, the United States is the aggressor, any U.S. military response is counterproductive, unjust, generative of more Islamists, and illegal.³³⁴ CLOACA would thus have the U.S. terminate alliances, withdraw forces, and redistribute resources to disincent future attacks.

2. Declaration that the Armed Conflict Response is an Overreaction to a Law Enforcement Problem

Prior to 9/11, Islamist attacks, like narcotrafficking or counterfeiting, were framed as a law enforcement problem.³³⁵ This reflected the formalist notion that Islamist VNSAs, although they had global reach and engaged in levels of violence common to war, were not states and could not participate in war, which by definition

³³⁰ See, e.g., PAUL BERMAN, *TERROR AND LIBERALISM* (2002) (presenting arguments that U.S. capitalism fueled 9/11); Gonzalez, *supra* note 329 (“[I]njustices . . . lead to hatred” and “it is from the desperate . . . and bereaved that these suicide pilots came.”).

³³¹ Islamist apologists attribute the effects of economic sanctions on populations of the rogue regimes against which they are levied not to rogue regimes but to Western nations enforcing them. See John Quigley, *International Law Violations by the U.S. in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 816 (2002) (claiming sanctions against Husseinist Iraq “violate[d] the rights of states and peoples[.]”); Tamanaha, *supra* note 329, at 436-37 (“Imagine the anger in the Muslim world at knowing . . . that U.S.-led sanctions on Iraq . . . resulted in the deaths of a half million Iraqi children.”).

³³² See Quigley, *supra* note 331, at 835 (attributing Islamist attacks on U.S. interests to U.S. policies in support of Israel); Tamanaha, *supra* note 329, at 428 (“[W]e must eliminate the ultimate provocation that inflames Islami[sts] . . . [and] remove our troops from Muslim lands.”).

³³³ Mari Matsuda, *A Dangerous Place: A Response to David Cole’s “Their Liberties, Our Security,”* BOSTON REV., Dec. 2002/Jan. 2003, at 20-22.

³³⁴ See, e.g., Tamanaha, *supra* note 331, at 436 (“Muslims targeting the [U.S.] believe Muslims were attacked *first* by America, and remain under [illegal] attack.”).

³³⁵ See generally Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002) (taking this position and citing others in accord).

meant interstate armed conflict.³³⁶ Conceiving of terrorism thusly betrayed a failure to appreciate the strategic evolution of war and the centrality of violent non-state actors to Fourth Generation War. The attacks unleashed that infamous morning transformed, from the U.S. vantage point, the nature, magnitude, and definition of the Islamist danger, as well as the proper instrumentalities to employ in response. Congress delegated authority to “use all necessary . . . force” against their perpetrators³³⁷ to the president and the country, ending a decade of denial, and conceding that 9/11 had effected a general declaration of war by Islamism.³³⁸ In jettisoning law enforcement as a “very serious intellectual failure,”³³⁹ the United States resolved that future attacks were preventable only by a credible threat of punishment only the military could pose.³⁴⁰ It now avers, albeit grudgingly, that it is at “war against [Islamism].”³⁴¹

International relations, defining “war” as violence between contending polities with a minimum annual average of 1,000 combat deaths, and international law, providing that armed conflict is a “resort to armed force between States or . . . between [States] and [violent non-state actors],”³⁴² support this position. Admittedly, it is difficult to specify the geographic and temporal boundaries of Fourth Generation War with an Islamist foe that is ununiformed,

³³⁶ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 715-720 (2004) (“The paradigms of crime and conflict are challenged by acts defined as crimes under law but having the scope of violence common to war.”).

³³⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³³⁸ See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (2002) (“It has taken almost a decade for us to comprehend the true nature of this new threat.”).

³³⁹ Ruth Wedgwood, *The Law at War: How Osama Slipped Away*, 66 NAT’L INT. 69, 71-72 (2002).

³⁴⁰ See Jeffrey A. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa’eda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 343-44 (2010) (“[T]he criminal justice system was unable to deal with an ideology of religious-based hate able to recruit tens of thousands . . . and field terrorist cells [globally.]”).

³⁴¹ President George W. Bush, Remarks on Strengthening Intelligence and Aviation Security (Jan. 7, 2010).

³⁴² Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

geographically dispersed, and lacking leadership authorized to surrender. Although LOAC presumes spatial bounds on war, in that zones of combat and peace are differentiable, as well as temporal bounds, in that initiation is marked by declaration and termination by surrender,³⁴³ facts-on-the-ground create an “implied geography [and chronology].”³⁴⁴ Fourth Generation War makes it harder to ascertain, yet the inherited rubric guides the enterprise, and wherever and whenever sufficiently intense armed violence between Islamists and states occurs there is war. In social science, this is an objective inquiry; in legal frames, it is more subjective.³⁴⁵ Yet to conclude that war has been initiated and LOAC has been triggered should be uncontroversial, and post-9/11 “[o]nly a most technical and arid legalism could deny that the U.S. is in a state of war.”³⁴⁶ Because “there would have been no question” about whether a state of war existed had a rogue state executed 9/11, the fact that the perpetrators were Islamist violent non-state actors is irrelevant.³⁴⁷ Finally, even if 9/11 did not formally traverse the war threshold, LOAC entitled the United States to self-defend against the perpetrators.³⁴⁸

The determination that the United States was at war with Islamism displaced the civilian “Law of Everyday Life” in favor of LOAC³⁴⁹ and vested the United States with authority to detain and interrogate individuals indefinitely without charges and to try Islamist detainees for pre-capture crimes in military commissions.³⁵⁰ Moreover, the existence of war granted the executive the authority to use military force without warning against Islamist military forces

³⁴³ Brooks, *supra* note 336, at 725.

³⁴⁴ Anderson, *supra* note 67, at 2.

³⁴⁵ See Mary Ellen O’Connell, *Choice of Law in the War on Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 346 (2010) (arguing the subjectivity of legal judgments).

³⁴⁶ W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 81, 88 n.14 (2003).

³⁴⁷ See Anderson, *supra* note 67, at 32 (supporting state legal authority to use force in self-defense in “new places with a [VNSA], if that’s where they . . . go[.]”).

³⁴⁸ See Paust, *supra* note 129, at 3 (concluding the United States retains customary international law and Article 51 rights of armed self-defense in war and in peacetime); see also Koh, *supra* note 132.

³⁴⁹ Anderson, *supra* note 67, at 2.

³⁵⁰ See generally Addicott, *supra* note 340 (emphasizing that all of these tactics could only be employed in a time of war).

whenever and wherever they can be found. Because Islamists are globally dispersed, the power to target them under LOAC, and the geography of the battlefield, extends globally. Thus, the United States declared that the “war will be fought wherever [Islamists] hide, or run, or plan,”³⁵¹ substantiating the concept of a “Global War on Terror” in which America would kill or capture Islamists anywhere and everywhere for as long as it took to defeat them.

For CLOACA, recognition of violent non-state actors as legal subjects decriminalized their conduct and equalized their status to lawful combatants³⁵² while “superimpos[ing] the rhetoric of war” on a threat soluble with police and courts.³⁵³ The 9/11 attacks provided an insufficient predicate to trigger the applicability of LOAC, as the unfolding battle was not defined with the geographic and temporal precision of previous wars,³⁵⁴ and failure to demarcate specific place and time boundaries precluded war as a matter of law—at least beyond active theaters of traditional military operations in Afghanistan and Iraq. Thus, peacetime civilian law remained the applicable regime,³⁵⁵ and for CLOACA the United States’ declaration that the entire world is a potential battlefield, coupled with Islamists’ refusal to surrender, proves that selection of the war paradigm post-9/11 is a rhetorical ploy to “displace law and rights” globally with targeted killing, “[b]lack sites, extraordinary rendition, . . . and enhanced interrogation.”³⁵⁶ One CLOACA scholar attributes resort

³⁵¹ Laurie S. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism*, 39 GA. J. INT’L & COMP. L. 1, 19-20 (2010-2011).

³⁵² See, e.g. Drumbl, *supra* note 335 (making this argument); CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 431-32 (2006).

³⁵³ Laurie Blank, *The Consequences of a “War” Paradigm for Counterterrorism: What Impact on Basic Rights and Values?*, 46 GA. L. REV. 719, 734 (2012).

³⁵⁴ See Anderson, *supra* note 67, at 2 (describing how 4GW redefined the zone of combat, the applicable legal regime, and the determination of the “battlefield”).

³⁵⁵ See Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) (“[War] ha[s] a[n] identifiable territorial . . . dimension[.]”); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326 (2003) (denying “war” with Islamists in a strict positivist sense).

³⁵⁶ Blank, *supra* note 353, at 726. CLOACA rapidly recycled claims that applying a “war” rather than a transnational law enforcement paradigm impinged detainee rights. See, e.g., Sadat, *supra* note 252 (making this claim); see also David W. Glazier, *Full and Fair by What Measure? Identifying the International Law Regulating*

to the war paradigm to a counter-productive desire for vengeance and a “belief in the utility of military force to suppress terrorism . . . not warranted by the record;”³⁵⁷ in a candid moment, another rejects war precisely for the *opposite* reason—it is too effective at defeating Islamists: “[t]he real aim of the war is, quite simply, to kill or capture all of . . . the [Islamists], to keep on killing and killing, capturing and capturing, until they are all gone.”³⁵⁸ By implication, CLOACA would prefer that some Islamists remain alive and free to continue attacking America.

In sum, CLOACA grafts time and place analyses onto the traditional definition of armed conflict to level dispiriting allegations that the United States is prosecuting an illegal war. Inferentially, only if the United States discovers “alternatives to self-defense”³⁵⁹—in particular, the law enforcement model³⁶⁰—that proved ineffective in preventing serial attacks between 1993 and 2001—will the United States cease the systematic violation of LOAC and human rights that employing the war paradigm against Islamism entails. That it is possible to fight and win a war while upholding LOAC is dismissed out-of-hand; rather, CLOACA impales the United States on the horns of a dilemma: win a war while doing violence to the law, or suffer Islamist attacks while “enforcing” it.

Military Commission Procedure, 24 B.U. INT’L L. J. 55 (2006); Jonathan Hafetz, *The Supreme Court’s ‘Enemy Combatant’ Decisions*, 14 TEMPLE POL. & CIV. RTS. L. REV. 409 (2006); Satterthwaite, *supra* note 249.

³⁵⁷ See O’Connell, *supra* note 212, at 3, 20 (suggesting U.S. drone strikes against terrorists “may be intended for retribution or intimidation; not suppression.”).

³⁵⁸ David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHIL. & PUB. POL’Y Q. 9, 13 (2002).

³⁵⁹ Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism?*, 63 U. PITT. L. REV. 889, 908 (2002).

³⁶⁰ See Margulies, *supra* note 99, at 16 (“[C]riminal prosecution is . . . the only game in town[.]”).

3. Allegation that U.S. Military Action against Islamists is Aggressive War

Self-defense is so intrinsic to state sovereignty it “would be asserted . . . absent recognition in [LOAC].”³⁶¹ Thus, Article 2(4) of the United Nations Charter, while prohibiting aggression,³⁶² proscribes only the threat or use of force (1) prejudicial to the territorial integrity of states, (2) contrary to the political independence of states, and (3) “in any other manner inconsistent with the Purposes of the United Nations.”³⁶³ Article 51 codifies the inherent right of individual and collective self-defense³⁶⁴ in the event of an armed attack,³⁶⁵ and as such states remain free to use force to defend their territory, their political independence, and their nationals.³⁶⁶ As customary *jus ad bellum* stands codified in LOAC, provided a particular use of force in self-defense cannot legitimately be construed as challenging the territorial integrity or political independence of a state or inconsistent with international peace and security, it is *prima facie* permissible whether another state or an Islamist VNSA launches the precipitating attack.³⁶⁷

³⁶¹ Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAV. L. REV. 217, 218 (1998).

³⁶² U.N. Charter art. 2, para. 4.

³⁶³ *Id.*

³⁶⁴ “Self-defense” is “a lawful use of force . . . in response to a previous unlawful use (or, at least, a threat) of force.” DINSTEIN, *supra* note 100, at 175.

³⁶⁵ See U.N. Charter, art. 51 (“Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs[.]”).

³⁶⁶ Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93 (1989).

³⁶⁷ Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 536 (2002). The International Court of Justice (“ICJ”) intimated that to invoke self-defense a state must suffer “armed attack,” which only states can deliver as a matter of law. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 I.L.M. 1009, paras. 139, 194-95 (2004). However, because Resolutions 1368 and 1373 impliedly recognized an armed attack by a VNSA on 9/11, and the ICJ subsequently implied that LOAC “provides for a right of self-defense against . . . armed attacks by [VNSAs],” the proposition that a VNSA can execute an armed attack sufficient to permit a state to use armed force in self-defense is defensible and logical. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 ICJ 116, para. 147). For a blistering critique, see Sean D. Murphy,

Security Council Resolution 1368 recognized the inherent right of the United States to self-defend against those responsible for 9/11; Resolution 1373 reaffirmed the right of self-defense and called on member-states to “take action against the perpetrators.”³⁶⁸ Both implicitly recognized 9/11 as an “armed attack” on America within the meaning of the Charter,³⁶⁹ and, although the perpetrators were Islamist VNSAs and not states, the Security Council authorized, along with NATO,³⁷⁰ U.N. member-states to use armed force in individual and collective self-defense against them. With the imprimatur of the Security Council, and in light of the plain language of the Charter, the legality of allied armed force in self-defense against Islamists in Afghanistan, and later in Iraq, Yemen, Somalia, Syria, Libya, and elsewhere, might reasonably have been thought a settled question.

On the contrary: CLOACA alleged that the U.S.-led war against Islamists was illegal on four grounds. First, one or more fronts constituted a “war of choice” and even an act of “aggression” inasmuch as there was no linkage to 9/11. Second, 9/11 was not an armed attack and the United States was therefore not legally justified in using force in response. Third, 9/11 was an armed attack but LOAC does not permit armed force in self-defense against a violent non-state actor. Fourth, 9/11 was an armed attack, entitling the U.S. to use force in self-defense, but because U.S. conduct in the resulting

Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?, 99 AM. J. INT’L L. 62 (2005).

³⁶⁸ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (“Recognizing the inherent right of individual or collective self-defence” in response to 9/11); S.C. Res. 1373, para. 3(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

³⁶⁹ U.N. recognition of the right of self-defense in response to an attack that killed three thousand, severely damaged a U.S. military installation, and destroyed two major buildings would have been meaningless without an acknowledgement that Al Qaeda—a VNSA—had committed an “armed attack.” Moreover, the U.N. previously endorsed the view that an attack by a VNSA of sufficient magnitude could constitute an aggressive “armed attack” against which self-defense rights appertain. UNGA Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (1975), Annex, Definition of Aggression, art. 3(g).

³⁷⁰ “[T]hese attacks were [committed by] the world-wide terrorist network of Al-Qaida . . . and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty[.]” Statement of Lord Robertson, Secretary General, NATO (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

war was unlawful, the resort to force in self-defense became unlawful as well.

a. “War of Choice”

Despite Al Qaeda’s responsibility for 9/11, Article 51 of the U.N. Charter, Resolutions 1368 and 1373, and Congressional authorization, CLOACA deemed as aggression the October 2001 U.S.-led intervention in Afghanistan—the state harboring Al Qaeda³⁷¹—claiming military action, rooted in vengeance and Islamophobia, derogated from Afghanistan’s territorial integrity and political independence.³⁷² Even those who conceded the lawfulness of initial intervention claimed military operations became unlawful after the collapse of the Taliban government, as the United States no longer remained under attack or under a threat emanating from Afghanistan.³⁷³

Operation Iraqi Freedom excited still greater hostility. Whether the Hussein regime provided Al Qaeda material support is uncertain,³⁷⁴ yet U.S. justification did not rely upon an Iraqi connection or self-defense broadly, but on Iraqi material breaches of

³⁷¹ See, e.g., FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR DETERRENCE, 29 (2002) (equating U.S. intervention in Afghanistan with spurious Nazi claims of “self-defense” masking aggression); Benjamin G. Davis, *What War Does to Law* (University of Toledo Legal Studies Research Paper No. 2012-09), available at <http://ssrn.com/abstract=1931682> (2012) (“[U]nleashing an armed conflict [in Afghanistan] without the authorization of the Security Council nor a basis in Article 51 was aggressive war[.]”); Ryan T. Williams, *Dangerous Precedent: America’s Illegal War in Afghanistan*, 33 U. PA. J. INT’L L. 563, 579, 592 (2011) (concluding neither UNSCR 1368 nor 1373 authorized military force in Afghanistan and thus absent a credible self-defense claim, or consent from the Afghan government, U.S. intervention is “a giant—and illegal—military reprisal[.]”).

³⁷² See Luban, *supra* note 357, at 3-4 (describing Afghan intervention as “blaming all Muslims for *jihadi* terrorism” out of “anger and vengeance.”); MARTIN, *supra* note 134, at 248 (claiming U.S. Afghan intervention was a “punitive measure[.]” that abandoned even the appearance of self-defense).

³⁷³ See, e.g., Williams, *supra* note 371, at 565 (“[E]ven if America’s *initial* involvement in Afghanistan arguably comported with international law, its continued military activity [after the fall of the Taliban] does not comport with [LOAC]” as it is unnecessary as a self-defense measure.) (emphasis added).

³⁷⁴ STEPHEN F. HAYES, THE CONNECTION: HOW AL QAEDA’S COLLABORATION WITH SADDAM HUSSEIN HAS ENDANGERED AMERICA xxi (2004).

Resolutions 678, 687, and 1441 conditioning the 1991 Gulf War ceasefire on divestment of weapons of mass destruction.³⁷⁵ Nonetheless, CLOACA baldly denied an Iraqi connection to 9/11 and ignored ceasefire breaches to proclaim that, because “Saddam Hussein had no [WMD]” U.S.-led intervention was an immoral and illegal “war of choice.”³⁷⁶

b. 9/11 Was Not an Armed Attack

Relying upon an anachronistic notion of the concept of “armed conflict,” CLOACA argued that 9/11 did not constitute an armed attack within the meaning of the UN Charter and the United States was therefore not entitled to use armed force in self-defense.³⁷⁷ To these scholars, militaristic U.S. leaders succumbed to “temptations to conceal, distort, or mischaracterize events” in building the case for military operations against Islamists in Afghanistan, Iraq, and elsewhere, and then launched a “search for loopholes in the Charter” to enlarge the meaning of “armed attack” and “self-defense” to “multiply[] exceptions to the prohibition on the use of force and the occasions that would permit military intervention,” undermining LOAC and global order in the process.³⁷⁸

³⁷⁵ See Letter from U.N. Ambassador John Negroponte to President Mamady Traore of the Security Council (Mar. 20, 2003), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2003/03/20030321155110rennefl0.3604242.html> (justifying intervention in Iraq as an enforcement of Security Council Resolutions 678 and 1441 threatening “revived force” and “serious consequences” for material breach).

³⁷⁶ More measured critics deemed intervention unlawful because the Security Council *circa* 2003, unlike the Council *circa* 1991, had not reauthorized enforcement of the 1991 ceasefire Resolutions. See, e.g., Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1521, 1523 (2003).

³⁷⁷ See, e.g., Martin, *supra* note 143, at 2 (“[T]he US is not clearly a belligerent in an armed conflict[.]”) (discussing targeted killings); Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT’L L. 149, 165 (2006) (noting the U.N. Security Council did not explicitly authorize the use of force by the United States under Article 51 in its adoption of UNSCR 1368).

³⁷⁸ O’Connell, *supra* note 212, at 17-18.

c. *9/11 Was an Armed Attack But Self-Defense Cannot Be Employed Against a Non-State Actor*

Some CLOACA scholars argue that, even if 9/11 constituted an Article 51 attack, the use of armed force against Islamist VNSAs “undermine[s] the concept of self-defense” and “exclusive . . . Security Council [jurisdiction] to authorize the use of force”³⁷⁹ Consistent with *The Wall Case* but contrary to the Charter and a long history of state practice, for this coterie it is an article of faith that “where a state is not responsible for terrorist attacks, Article 51 may not be invoked to justify measures in self-defense” whether against the Islamist VNSA or the harboring state, so long as the latter is “making a good faith effort to stop the [Islamist VNSA.]”³⁸⁰

d. *Because Civilian Casualties Are Excessive, the Resort to Self-Defense Was Unlawful*

Because *jus ad bellum* and *jus in bello* are functionally separate subregimes, even if an attack on a particular target were inarguably disproportionate, it would have no bearing on whether the resort to force was unlawful in the first instance. The right to resort to force is determined by reference to the former regime, and conduct in war by the latter. LOAC accepts civilian casualties during armed conflicts, with numerical limits a function of the intent of the attacker, the expected military advantage associated with destruction of the target, the conduct of the defending party, and the manner in which customary LOAC principles were applied.

To CLOACA, however, even if a VNSA attack can trigger the right of armed self-defense in theory, should resulting civilian casualties exceed some arbitrary number they decide represents the maximum allowed under proportionality analysis, then *the very resort to armed self-defense was unlawful*. This flawed calculus “conflate[s] [proportionality] under *jus ad bellum* with the principle of . . . proportionality under *jus in bello*”—a deliberate erasure of an impermeable boundary between LOAC subregimes of strategic value

³⁷⁹ Martin, *supra* note 143, at 29-30.

³⁸⁰ MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE, CASES AND MATERIALS 319-320 (2004).

to Islamists who spin unintended civilian casualties of U.S. air strikes into proof of U.S. “war crimes.”³⁸¹ In short, the value of civilian casualties depends not only upon gruesome reportage but upon CLOACA to substantiate the facile arguments that LOAC is a strict liability regime and any civilian deaths whatsoever are presumptively intended and therefore criminal, along with the war itself. In so doing, CLOACA encourages Islamists to mingle with civilian populations and Americans to doubt the legality of the war.³⁸²

4. Contention that “Torture” and the Use of Military Commissions Prove the Injustice of the American Cause

By any fair standard, no interrogation technique employed pursuant to U.S. policy constituted torture, and conditions at GTMO, where the average detainee eats specially prepared halal meals, recreates on a \$750,000 soccer field, and receives his Qur’an from gloved guards “as if it were a fragile piece of delicate art,”³⁸³ are better than most federal prisons.³⁸⁴ The Obama administration deems GTMO a Geneva-compliant facility and thus, contrary to a 2009 executive order, has kept it open.³⁸⁵ However, CLOACA claims U.S. interpretations of LOAC informing detention policies were legal “travesties”³⁸⁶ that turned GTMO into a “gulag,”³⁸⁷ a “horror,” and an

³⁸¹ Blank, *supra* note 165, at 2-3, 25. Islamists purposefully increase civilian casualties to “prove” the “unlawfulness” of U.S. attacks. Dunlap, *supra* note 28, at 37.

³⁸² Civilian casualty incidents are “highly mediagenic events” that “can lead the public to weigh the morality of wars against the importance of their aims.” RAND, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime* (2006), at 71. Thus, “the [Islamist VNSA] has significant incentives to create . . . civilian casualties . . . to undermine support for the military campaign.” Blank, *supra* note 165, at 30.

³⁸³ DOD Memorandum, Camp Delta Interim SOP Modification: Inspecting/Handling Detainee Korans Standard Operating Procedure (SOP) (Jan. 19, 2003), available at <http://www.defenselink.mil/news/Jun2005/d20050601KoranSOP.pdf>; Jane Sutton, *Guantanamo commander defends \$744,000 soccer field*, REUTERS (Mar. 1, 2012, 5:14 PM), <http://www.reuters.com/article/2012/03/01/usa-guantanamo-soccer-idUSL2E8E1CC520120301>.

³⁸⁴ See Lebowitz, *supra* note 240, at 385, 388.

³⁸⁵ Exec. Order No. 13,492. 3 C.F.R. 203 (2010).

³⁸⁶ McCormack, *supra* note 120, at 102.

³⁸⁷ See Kende, *supra* note 119, at 1557 (“Nothing seems less American, and more like a Gulag, than holding people in perpetuity [. . . in GTMO].”).

“alien planet”³⁸⁸ rife with poor medical care, “sensory deprivation,” “beat[ings],” “rape,” and mock executions.³⁸⁹ Several argue that only shuttering Guantanamo and freeing detainees can “cleanse the nation of [GTMO]’s moral stain” and any resulting harm to national security is the moral price tag for having used torture.³⁹⁰ These specious claims are spun by CLOACA into a brush to tar America’s reputation, a strop to sharpen anti-U.S. sentiments, and a pick to undermine U.S. political will.³⁹¹

CLOACA also lambasts the use of Combatant Status Review Tribunals and military commissions to determine status and prosecute Islamists for pre-capture crimes. Critics label the former “kangaroo courts”³⁹² on the ground they provide allegedly insufficient guarantees against erroneous classification of ununiformed Islamists as unlawful combatants, rather than as lawful members of state armed forces, or hapless civilians mistakenly swept into detention by overzealous U.S. troops.³⁹³ However, CSRTs

³⁸⁸ Honigsberg, *supra* note 120, at 82-83.

³⁸⁹ See generally PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES (2008), available at <http://physiciansforhumanrights.org/library/reports/broken-laws-torture-report-2008.html>.

³⁹⁰ See Burlingame & Joscelyn, *supra* note 242, at 5 (quoting a Justice Department lawyer who called for release of detainees untriable in civilian courts on the ground this is an “assumption of risk” we must endure to “cleanse the nation of Guantanamo’s moral stain.”).

³⁹¹ See, e.g., Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, 35 PARAMETERS 54, 62 (Autumn 2005) (alleging U.S. detention created “angry foreign allies, a tarnishing of America’s image, and declining cooperation . . . on terrorism.”); Katherine Kerstin, Op-Ed., ‘Pro Bono,’ in *This Case, is Proterrorist*, STAR TRIBUNE (Minneapolis) (Mar. 20, 2010), <http://www.startribune.com/opinion/88683832.html>.

³⁹² See COHN, *supra* note 235, at 13; David J.R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 CASE W. RES. J. INT’L L. 335, 354 (2010) (using this epithet to describe military commissions).

³⁹³ Fiona de Londras, *Prevention, Detention, and Extraordinariness*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 127-28 (Fionnuala Ni Aolain & Oren Gross eds., 2013) (CSRTs provide insufficient guarantees against erroneous classification as an unlawful combatant); Gabor Rona & Raha Wala, *In Defense of Federal Criminal Courts for Terrorism Cases in the United States*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 142-44 (Fionnuala Ni Aolain

provide far more process than required under LOAC, which presumes the good faith of the detaining party and anticipates that status is a readily ascertainable matter-of-fact, and have validated U.S. claims that the vast majority of detainees are unlawful enemy combatants subject to indefinite detention.³⁹⁴

Law and experience urge military prosecution of Islamist detainees who, tried in civilian courts, “gouge sensitive information from the government and force it to choose between the vitality of the prosecution and other crucial interests.”³⁹⁵ Although U.S. troops accused of serious crimes are tried in courts-martial, and Article 102 of the third Geneva Convention calls for combatant trials by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,” unlawful combatants are entitled only to trial by a “regularly constituted court, affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.”³⁹⁶ While not wholly isomorphic to courts-martial,³⁹⁷ military commissions were used in previous wars to prosecute unlawful combatants,³⁹⁸ and this forum choice signifies a

& Oren Gross eds., 2013) (military commissions being applied retrospectively for domestic infractions).

³⁹⁴ See WITTES, *supra* note 103, at 62, 71 (describing that the CSRTs concluded over ninety-three percent of GTMO detainees present when CRSTs were established were, in fact, enemy combatants). Although detainees before CSRTs were entitled not to an attorney but to a “personal representative,” and although the right to present evidence and confront witnesses was more limited than at court-martial, Congress and the President provided accused unlawful enemy combatants substantive and procedural protections very similar to those provided U.S. military personnel subject to nonjudicial punishment under the Uniform Code of Military Justice. Compare CSRT regulations with Article 15, UCMJ.

³⁹⁵ WITTES, *supra* note 103, at 171. Congressional testimony explains the need for different procedures in military commissions to protect intelligence sources and methods. While prosecuting Omar Abdel Rahman in civilian court, 200 unindicted coconspirators’ names were given to the defense in discovery, and within 10 days “this information found its way to . . . bin Laden[,] . . . inform[ing] al Qaida . . . which of its agents we had uncovered.” S. REP. NO. 110-90, pt. 7, at 14-15 (2007).

³⁹⁶ GCIII, *supra* note 90, arts. 3, 102.

³⁹⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

³⁹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 592-97 (UCMJ art. 21 authority for military commissions is almost identical to art. 15 of Articles of War used as jurisdictional basis to prosecute World War II Nazi saboteurs as unlawful enemy combatants in violation of LOAC in *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942)).

political decision to comply with the third Geneva Convention by providing unlawful enemy combatants many of the substantive and procedural guarantees that inhere in courts-martial while incorporating stronger protections for evidence implicating intelligence sources and methods.³⁹⁹ That U.S. military commissions exceed obligations under Common Article 3 by providing a quantum of process greater than that available to POWs tried for pre-capture crimes under the domestic laws of many states-parties to the third Geneva Convention should dispel the “charade of justice” meme.⁴⁰⁰

The U.S. decision to convene military commissions to prosecute Islamist detainees for pre-capture crimes related to 9/11 underscores the well-grounded position that this forum is lawful.⁴⁰¹ Still, notwithstanding that all military trial-level courts, including courts-martial, are *ad hoc* forums created only when charges are referred by convening authorities, CLOACA claims that commissions, of which none were in session on 9/11, were not “regularly constituted’ or ‘previously established in accordance with pre-existing laws’ and thus lack jurisdiction,” meaning their use to try detainees for pre-capture crimes violated Common Article 3.⁴⁰² CLOACA further tars military commissions as rife with substantive and procedural insufficiencies⁴⁰³ engineered to enhance conviction rates⁴⁰⁴ by inducing Islamists to seek martyrdom through “plead[ing] guilty to horrendous things [they did not do] once they realize there

³⁹⁹ Compare 10 U.S.C. §§ 949d, 949a(a)(2) (2012) with MANUAL FOR COURTS-MARTIAL, MIL. R. EVID. 505 (2012).

⁴⁰⁰ See Michael A. Newton, *Some Observations on the Future of U.S. Military Commissions*, 42 CASE W. RES. J. INT’L L. 151 (2009) (concluding commissions “provide the full range of rights” required under LOAC after surveying state practice).

⁴⁰¹ *Hamdan*, 548 U.S. at 592-94.

⁴⁰² Brief for Jordan J. Paust, Human Rights Committee of the American Branch of the International Law Association, as Amicus Curiae Supporting Respondent, at 1, *United States v. Al Bahlul*, No. 09-001 (Ct. Mil. Comm’n Rev. Sept. 9, 2011).

⁴⁰³ See, e.g., Janet Alexander, *Military Commissions: A Place Outside the Law’s Reach*, 56 ST. LOUIS U. L.J. 1115, 1118 (2012); Glazier, *supra* note 142, at 10-11 (claiming military commissions suborn coerced confessions, tolerate resource inequalities, deny confrontation of witnesses, and charge undefined offenses).

⁴⁰⁴ See Alexander, *supra* note 403, at 1121; Glazier, *supra* note 142, at 7 (claiming commissions facilitated shortcuts that secured a higher conviction rate than would have appertained in courts-martial).

is no hope.”⁴⁰⁵ To CLOACA, the United States created a perfidious and illegal forum to hasten the post-capture demise of Islamist detainees who would have been acquitted in federal civilian courts where they were entitled to be heard.⁴⁰⁶ By this view, an adverse effect on American political will arising from the use of military commissions is a just desert for sullyng LOAC and the rule of law.

5. Accusation of Serial War Crimes

The U.S. counterattack in Afghanistan, Iraq, and elsewhere was and is lawful under good-faith interpretations of LOAC. However, CLOACA demanded the United States investigate and punish senior civilian leaders, claiming only hearings, truth commissions, and civil and criminal prosecutions can atone for a conspiracy to commit serial war crimes⁴⁰⁷ so egregious that the only historical precedent is the Nazi regime. CLOACA charged senior Bush administration officials, including Vice President Dick Cheney, National Security Adviser Condoleeza Rice, Attorney General John Ashcroft, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, White House Counsel Albert Gonzales, and CIA Director George Tenet with a “common, unifying plan” to authorize, order, and abet the commission of war crimes, including allegedly torturous interrogations, disappearances, and forcible rendition.⁴⁰⁸

⁴⁰⁵ Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88, 104 (2008).

⁴⁰⁶ See generally David Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE (Fionnuala Ni Aolain & Oren Gross eds., 2013).

⁴⁰⁷ A “war crime” is a term-of-art for a serious “violation of [LOAC] by any person[.]” U.S. ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT para. 499 (July 1956).

⁴⁰⁸ See, e.g., M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2006) (examining Bush, Cheney, and Rumsfeld’s pressure to obtain interrogation “results”); Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT’L L.J. 576 (2007) (detailing Gonzales argument that military necessity renders international law inapplicable); Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006) (explaining how lawyers’ duty to advocate may interfere with recommending

Several members focused upon the culpability of administration lawyers whom they claim “purported to immunize government officials from war crimes liability” and, like Nazi lawyers before them, are “criminally liable for participating in a common plan to violate [LOAC].”⁴⁰⁹ Merely acknowledging that Fourth Generation War is distinct from “the traditional clash between nations adhering to [LOAC],” and suggesting that LOAC drafters may not have anticipated 4GW challenges, earned Alberto Gonzales allegations of war crimes.⁴¹⁰

That accusations by a CLOACA claque claiming senior U.S. officials authored a pattern of serial war crimes on a moral par with the architects of the Holocaust are meritless does not inoculate Americans against their demoralizing effects.⁴¹¹ An accusation of war crimes, like accusations of rape, sexual harassment, and racism, imposes tremendous social stigma, and without regard to its veracity taints the reputation of the accused. Should Americans come to harbor serious doubts about whether their country engages in war crimes as an official policy, their belief in the justice of their cause will wither, along with their willingness to fight for it.

6. Accusation that U.S. Military Policy Erodes Security

CLOACA blames U.S. policies for “shattered” alliances,⁴¹² diminished influence,⁴¹³ and eroded national security.⁴¹⁴ One

complying with law); JORDAN J. PAUST, *BEYOND THE LAW* 1 (2007) (accusing many of these named individuals).

⁴⁰⁹ Paust, *supra* note 304, at 5206. “Not since the Nazi era have so many lawyers been so clearly involved in international [war] crimes[.]” Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 811 (2005).

⁴¹⁰ See COHN, *supra* note 235, at 21 (comparing Bush administration lawyers to “Nazi lawyers . . . convicted of war crimes and crimes against humanity”).

⁴¹¹ See Wheaton, *supra* note 62, at 8 (“Actual violations of [LOAC] may not be necessary . . . perceived violations can have . . . deleterious effects on U.S. . . . will.”).

⁴¹² Tamanaha, *supra* note 328, at 19-20.

⁴¹³ See Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004) (claiming U.S. military policies post-9/11 made it harder to influence allies).

⁴¹⁴ See, e.g., DAVID COLE AND JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 2 (2007) (holding as an article of faith, along with many

scholar, without empirical support, laments the “degradation of our military” allegedly wrought by coercive interrogation in particular, including “detrimental impacts upon military professionalism, honor and integrity, morale, retention, and recruitment,” as well as the increased probability U.S. troops will lose respect for LOAC and commit other war crimes *sua sponte*.⁴¹⁵ The same scholar even contends that U.S. violations of LOAC “increased violence in Afghanistan and Iraq . . . and create[d] a generation of violence in alleged revenge.”⁴¹⁶ That no alleged U.S. war crime post-9/11 can explain Islamist attacks on 9/11—the most intense use of force against Americans by Islamists to date—is ignored in specifying this charge. Still others assert that U.S. war crimes justify reciprocal abuse of U.S. POWs by Islamists;⁴¹⁷ the long pre-9/11 history of Islamist treatment of detainees, in utter disregard of LOAC, goes unmentioned. In short, Islamist violation of detainee rights is independent of U.S. detention policy, and even the most exaggerated Islamist claims of torture at the hands of U.S. interrogators pale beside the ritual butchering of hostages and POWs by Islamist captors.⁴¹⁸

in CLOACA, that the United States is less safe as a result of its 4GW policies against Islamism).

⁴¹⁵ Paust, *supra* note 304, at 5212.

⁴¹⁶ *Id.* at 5214. Another CLOACA author implores us to “[t]hink of the . . . bitterness aroused by reports of innocent civilians accidentally killed . . . by [U.S.] troops[,] or by [UAVs] shooting rockets . . . that kill whomever is in the blast zone[,] anger at the images of snapping dogs set upon naked prisoners, and repeated accounts of American infliction of torture in interrogations[.]” Tamahana, *supra* note 329, at 437.

⁴¹⁷ See, e.g., Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 31 (2008) (“[T]errorism has won a great victory . . . because . . . leading democracies have proved willing . . . to undermine the rule of law in a manner that terrorists could never have achieved by themselves[.]”); Paust, *supra* note 304, at 5215 (“[I]f illegal means are used in response to terrorism, the impermissibility of terrorist means might blur and [thus] . . . counterterrorism is pregnant with future terrorists . . .”) (internal quotations omitted).

⁴¹⁸ See, e.g., Naina Bajekal, *ISIS Mass Beheading Video Took 6 Hours to Film and Multiple Takes*, TIME (Dec. 9, 2014), <http://time.com/3624976/isis-beheading-technology-video-trac-quilliam/>.

A more serious charge is that U.S. “war crimes” recruit more Islamists than U.S. military action has killed and captured,⁴¹⁹ and that detainee recidivism results from “torture” in U.S. detention.⁴²⁰ Apart from methodological problems in substantiating this claim, attribution of responsibility for the presence of homicidal Islamists on foreign battlefields and in U.S. cities to U.S. practices post-dating 9/11, rather than to the inspiration of an evil ideology, betrays gross ignorance of the spiritual foundations of jihad and unconscionable eagerness to blame the victim. Given the sordid record of Islamist abuse of non-Muslim detainees, to charge U.S. mistreatment of Islamist detainees with so offending the sensibilities of groups that practice torture as a divinely-sanctioned stratagem of war as to create an independent basis for recruitment is unadorned foolishness. Most distressing is the contention that “even if [U.S. detention policy] has made us safer, it is an abandonment of core principles . . . and . . . we should reject it categorically.”⁴²¹ For CLOACA, far better that Americans should die than Islamists suffer discomforting interrogations that disrupt plans to kill Americans.

7. Accusation that American Military Policy Threatens Core Values

Enlarging its critique, CLOACA charges the United States with “attacking our most cherished values.”⁴²² One unsparing critic proclaims that in fighting Islamism “[t]he [United States] violated [LOAC] which [is] a ‘but-for’ cause of the terrorism [it] experiences.”⁴²³ Another decries U.S. policies as responsible for

⁴¹⁹ See Bassiouni, *supra* note 408, at 424 (“[E]ach person tortured [is] likely to . . . seek revenge[.]”); David J. R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 258 (2012) (“[U.S. policies] . . . help[ed] recruit the next generation of jihadists.”); Kende, *supra* note 119, at 1558 (“[H]olding [Islamists] in a Gulag . . . produce[s] more terrorists[.]”); Paust, *supra* note 304, at 5203 (leveling this charge).

⁴²⁰ See, e.g., Kende, *supra* note 119, at 1558 (“[Detainees] released . . . as harmless may have taken up arms against the U.S. . . . due to their Gitmo mistreatment.”).

⁴²¹ Darmer, *supra* note 235, at 644.

⁴²² Sadat & Geng, *supra* note 302, at 155.

⁴²³ Quigley, *supra* note 331, at 827.

“death and torture of innocent people.”⁴²⁴ For CLOACA, U.S. conduct post-9/11 is an episode of jurispatic auto-degradation.⁴²⁵ Not only did U.S. “war crimes” produce “effects more damaging than any imposed by our enemies,”⁴²⁶ but “[s]ome damage . . . is irreparable.”⁴²⁷ The message is clear: American veneration of the rule of law in the abstract is vastly more precious than real-world survival, and, because the United States cannot engage Islamists without further betraying LOAC, it should break off the battle whatever the consequence.

8. Demands for Prosecution of Civilian Leaders

Brandishing the principle *aut dedere aut judicare*, CLOACA would refer alleged war crimes by civilian leaders—whom they identify as the ultimate architects of LOAC violations—to international courts for prosecution.⁴²⁸ Whereas state sovereignty, various immunities, and peace and reconciliation imperatives once militated in favor of political remedies, the trend toward war crimes prosecution of senior government officials threatens not only their personal liberty but their proclivity to act with vigor and dispatch in defending national interests, even if potential charges are groundless.⁴²⁹ German indictment of Defense Secretary Rumsfeld and Italian investigations of President Bush and Prime Minister Blair for the intervention in Iraq,⁴³⁰ Spanish investigations of an Israeli

⁴²⁴ CYRA AKILA CHOUDHURY, RACE 2008: CRITICAL REFLECTIONS ON AN HISTORIC CAMPAIGN 69 (Myra Mendible ed., 2010).

⁴²⁵ Sadat & Geng *supra* note 302, at 160.

⁴²⁶ Susan W. Tiefenbrun, *Semiotic Definition of “Lawfare,”* 43 CASE W. RES. J. INT’L L. 29, 33 (2010).

⁴²⁷ SHERIFA ZUHUR, PRECISION IN THE GLOBAL WAR ON TERROR: INCITING MUSLIMS THROUGH THE WAR OF IDEAS 50 (Strategic Studies Institute 2008).

⁴²⁸ Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 5 (2011).

⁴²⁹ See Anderson, *supra* note 67, at 30 (“[T]he . . . left . . . are eager to prosecute Americans.”); Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Mobilization Strategies for Human Rights*, 57 BUFF. L. REV. 347, 347-48 (2008) (describing lawsuits against U.S. officials that bring political pressure to bear “independent of [their] judicial outcomes” and leave U.S. officials hesitant).

⁴³⁰ See Straganzeige gegen den noch amtierenden Verteidigungsminister der Vereinigten Staaten von Amerika, Donald H. Rumsfeld, et al., *available at*

defense minister and of U.S. lawyers for coercive interrogations, Italian investigation of CIA officers for renditions, and attempted Pakistani extradition of a CIA general counsel for targeted killing by way of UAV strikes⁴³¹ are but some of the campaigns waged against Western leaders.

“Counter-counter-terrorism via lawsuit”⁴³² also harries Western leaders into inaction. CLOACA forks intellectual fodder into a litigation strategy wherein “victims” file *Bivens* suits⁴³³ against U.S. officials—attorneys, CIA and FBI directors, the Attorney General, and the President—seeking damages and injunctive relief for alleged violations of constitutional rights arising from rendition, detention, torture, and targeted killing.⁴³⁴ Despite the speciousness of these cases—and courts that reach the merits find for defendants—CLOACA views *Bivens* suits less as opportunities to vindicate individual rights than as moments to foment public opposition to U.S. policies and leverage plaintiffs’ legal arguments into political attacks on those policies. If CLOACA recognizes that there is “at least a theoretical risk that *Bivens* actions will deter the

http://ccrjustice.org/files/Complaint_German_vol1.pdf (German indictment against Rumsfeld and others for war crimes); Indictment in the Central Criminal Court, <http://www.opednews.com/Diary/Tony-Blair-Indictment-For-by-Gene-Cappa-100109-469.html> (attempted Italian war crimes indictments of Bush and Blair).

⁴³¹ See *Top Israeli official blasts Spanish court's probe*, CNN, <http://www.cnn.com/2009/WORLD/europe/01/30/spain.israel.gaza.lawsuit/> (last updated Jan. 30, 2009); Peter Beaumont, *Campaigners Seek Arrest of Former CIA Legal Chief Over Pakistan Drone Attacks*, THE GUARDIAN, Jul. 15, 2011 (modified Oct. 3, 2014), <http://www.theguardian.com/world/2011/jul/15/cia-usa> (attempted extradition of CIA General Counsel to Pakistan); Mick Krever, *CIA agents who tortured are vulnerable to prosecution in 'any country in the world,' says U.N. official*, CNN (Dec. 12, 2014), <http://amanpour.blogs.cnn.com/2014/12/12/cia-agents-who-tortured-are-vulnerable-to-prosecution-in-any-country-in-the-world-says-u-n-official/> (Italian prosecution of CIA officers).

⁴³² George D. Brown, “Counter-Counter-Terrorism Via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 844 (2009).

⁴³³ *Bivens v. Six Unknown Named Narcotics Agents*, 403 U.S. 388, 397 (1971) (allowing damage suits against federal officials who violate constitutional rights).

⁴³⁴ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009) (conditions of confinement); *El-Masri v. Tenet*, 479 F.3d 296, 300-01 (4th Cir. 2007) (rendition); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 951-52 (9th Cir. 2009) (detention); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1013, 1019-20 (N.D. Cal. 2009) (interrogation); *Al-Aulaqi v. Bush*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

guardians [of national security] from doing their jobs,”⁴³⁵ it is undaunted because, short of an unlikely electoral shift to a regime that eschews detention, interrogation, and targeted killing policies altogether, preventing incumbent officials from zealously implementing these policies by dangling the specter of legal sanctions is the only way to disable them.⁴³⁶

Rather than grant a margin of appreciation to the officials in whom Americans have reposed their trust to interpret LOAC and choose policies best suited to defending their security, CLOACA substitutes its judgments for those of Congress and the executive while turning to foreign governments and unelected judges to threaten prison and fines should U.S. officials remain stalwart and steadfast in executing these policies. In so doing, it subordinates the methods and means chosen to serve the survival imperatives apprehended by a democratic political community to its own vision of law and morality. Moreover, it advances a narrative that relies for its rhetorical force upon an overt imputation of lawlessness and immorality to the United States and the risible arguments that Islamists pose little threat and are in fact the real victims of the war. Corrosive psychological effects follow: if U.S. misconduct in waging war against Islamists is so severe that government officials should be hauled before foreign criminal courts, then not only must the policies and practices that constitute this misconduct be discontinued, but also the assumption upon which these policies rest—that they are lawful and necessary—must be false. The prosecution strategy counseled by CLOACA undermines American political will by lending the imprimatur of expertise to the propositions that the United States is an immoral nation fighting an illegal war by unlawful means at the behest of a criminal leadership, and that it must abandon its policies, and better still quit the war, to regain its tarnished legitimacy.

⁴³⁵ Brown, *supra* note 432, at 855.

⁴³⁶ See generally Margulies, *supra* note 408, at 952.

9. Demonization of Intellectual Opposition

Many in CLOACA are intolerant of theories and opinions running counter to their own,⁴³⁷ and of the scholars who produce them. Attacks upon eminent LOACA scholars who support U.S. policies in the war against Islamism can take the form not merely of strident academic denunciations, social ostracism, and *ad hominem* assaults, but also of calls for professional sanctions and civil and criminal prosecution. In particular, University of California law professor and former Deputy Assistant Attorney General John Yoo, a prolific and senior LOACA scholar whose views on war powers and presidential authority are heavily-cited and referenced, absorbed a vicious stream of CLOACA vitriol for his legal advice on issues including unlawful combatancy, detention, and torture.

Yoo's response to novel legal questions, posed by an executive seeking to justify exercise of broad war powers in defense of a nation under existential threat, was received as if he had deliberately offered up a program for the systematic destruction of the rule of law. CLOACA claimed "practically everyone" believed Yoo's work "atrocious," a "slovenly mistake," "riddled with error," a "one-sided effort to eliminate any hurdles posed by [existing] law," and "intentional professional misconduct" for misrepresenting the law.⁴³⁸ Some charge that Yoo, "blinded by [conservative] ideology," abandoned his legal role to "play warrior" in foolish disloyalty to law and country.⁴³⁹ An infantilizing attack described Yoo's claim that the decision not to refer him for professional discipline was "a victory for [Americans] fighting the war" as "a bit like a child coming home with an F on his report card and telling his parents that they should

⁴³⁷ Two scholars brand criticism of CLOACA "an attack of the foundations of society." Leila N. Sadat & Jing Geng, *On Legal Subterfuge and the So-Called Lawfare Debate*, INT'L REL. & SEC. NETWORK (Apr. 19, 2013), <http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=162857&tabid=1454244677&contextid774=162857&contextid775=162992>.

⁴³⁸ Cole, *supra* note 235, at 455.

⁴³⁹ Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 110 (2009).

congratulate him for not getting suspended.”⁴⁴⁰ The most vicious demanded he be prosecuted for “war crimes.”⁴⁴¹

As the Yoo episode reveals, dissent against CLOACA is heresy meriting the academic equivalent of purification by fire.⁴⁴² Vituperation and recrimination heaped upon Yoo was intended not merely to effect *his* professional destruction. Rather, the calumny was calculated to intimidate other members of LOACA who share Yoo’s philosophies but fear professional excommunication should they renounce the orthodoxies of CLOACA’s high priests. Self-censorship is widespread within academia, and dissidents learn to repress or mitigate their views or face reputational damage, ostracism, tenure denial, ignominy, and worse.⁴⁴³ Yoo was subjected to professional assassination to reinforce self-censorship, cow contrarians, and cement the perception that CLOACA positions represent the consensus of a monolithic and “correct” intellectual community. A demonstration that challenging CLOACA was an act of martyrdom was needed to preserve its ideological coherence as an instrument of power against American political will.

C. Summary

A Fifth Column has enlisted to fight against the political will of the American people, commending its knowledge of LOAC into the service of Islamists seeking to destroy Western civilization and re-create the Caliphate. CLOACA potentiates Islamist military operations against U.S. targets—the combat support element of Fourth Generation War by promoting differentially onerous rules for the U.S. military, misapplying and distorting customary principles of LOAC to U.S. disadvantage, propounding claims as to the law governing detention and interrogation that degrade U.S. intelligence

⁴⁴⁰ Cole, *supra* note 235, at 455.

⁴⁴¹ Paust, *supra* note 304, at 5204-05.

⁴⁴² See, e.g., David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L.J. 151 (2010).

⁴⁴³ See Neal W. Hamilton, *Foreword: Symposium on Zealotry and Academic Freedom*, 22 WM. MITCHELL L. REV. 333, 343 (1996) (Failing to self-censor “to avoid . . . controversy that follows . . . dissent from fundamentalist ideology” triggers “reputational damage . . . ostracism . . . unfair treatment . . . and . . . threats to jobs.”).

collection and return Islamists to the battlefield, threatening U.S. troops with groundless prosecutions, and otherwise abusing their status and knowledge to support materially the Islamist foe. Worse still, CLOACA is engaged in direct PSYOPs against American political will—the direct application of combat power in Fourth Generation War to convince Americans that the attacks of 9/11 are their just deserts for a foreign policy that privileges Israel and subordinates Muslims, that in the course of an illegal war their country commits torture and war crimes on the order of Nazi Germany, that this illegal war is undermining national security and destroying the rule of law, and that the only way to rebuild American virtue is to end the war without victory, cede the field to Islamists, and extradite for prosecution those responsible for war policies—including their own intellectual apostates. Contrary to their claims of fidelity to law and the American people, this Fifth Column rewards Islamists for their unlawful combatancy, immunizes them against interrogation and killing, increases the physical and legal risks faced by U.S. personnel, tilts the balance of military power toward Islamists, deprives the United States of information necessary to prevent future attacks, and convinces Americans that their country is intractably an aggressive, immoral, unlawful, even evil force in the world deserving to lose a war that it is, in fact, losing. Part II offers explanations as to why CLOACA has cast its lot with the enemy.

II. ETIOLOGY OF A FIFTH COLUMN: WHY CLOACA ATTACKS AMERICAN POLITICAL WILL ON BEHALF OF ISLAMISTS

Explanations of why CLOACA serves as a Fifth Column against American political will on behalf of Islamism range across cultural, professional, ideological, psychological, political, philosophical, functional, and theological domains. Part II develops explanations along a continuum of decreasing tenability in terms of what the scholarly enterprise has traditionally been understood to embrace, and increasing venality in regard to what might be expected as part of the incidents and burdens of U.S. citizenship.

A. *Jurisphilia*

Commitment to the rule of law is the fundament upon which American legitimacy rests. A strong current of legalism runs through U.S. history, foreign policy, and battle conduct, and few dispute that Americans should “resist undermining the very virtues we are defending.”⁴⁴⁴ However, the rule of law is a means rather than an end. The survival of their Constitution, republican government, and sovereignty are objectives for which Americans have proven willing time and again to shed blood and expend treasure. The rule of law chalks the boundaries within which this struggle may be conducted, but it is not the goal for which Americans fight. In crises, extra-legal considerations enter the calculus decisionmakers perform to safeguard Americans.⁴⁴⁵ As Lincoln underscored, the rule of law, and even the Constitution itself, must, in extremis, yield to preservation of the nation.⁴⁴⁶ In grave circumstances, doctrinaire adherence to the letter of the law in neglect of its spirit spells disaster.⁴⁴⁷ The concession that “extra-legal measures” may “strengthen rather than weaken . . . long-term [C]onstitutional fidelity and commitment to the rule of law”⁴⁴⁸ admits that law is but a means. When war spawns emergencies, even a rule-of-law nation must adopt practical limits on legalism. The notion that the only way

⁴⁴⁴ S. SELECT COMM. TO STUDY GOV. OPERATIONS, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 258 (1975), *available at* <http://www.intelligence.senate.gov/pdfs94th/94465.pdf>.

⁴⁴⁵ See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y. U. L. REV. 239, 254-59 (2003).

⁴⁴⁶ See Abraham Lincoln, President, Address to a Special Joint Session of Congress (July 4, 1861), transcript *available at* <http://www.presidency.ucsb.edu/ws/?pid=69802> (“[A]re all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?”). A century later, Solzhenitsyn observed that “a society with no other scale but the legal one is not quite worthy of man[.]” Alexander Solzhenitsyn, *A World Split Apart*, Address at the Harvard Class Day Afternoon Exercises (June 8, 1978), *available at* <http://thefloatinglibrary.com/2008/10/12/solzhenitsyns-harvard-address-a-world-split-apart/#more-705>.

⁴⁴⁷ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (cautioning against “a doctrinaire textualism” in analyzing legal obligations that restrict the conduct of national security and military policy during war).

⁴⁴⁸ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003).

to remain above moral approach is to cleave to the most expansive reading of LOAC possible is extravagant indulgence.

Yet a rip current of “jurisphilia” holding law in fetishistic adoration and venerating it not as means but as goodness incarnate runs through the legal profession.⁴⁴⁹ Jurisphiles are disinterested in the consequences of law but “enchant[ed]” by a vision of it as an expression of “morality,” “virtue,” and “love . . . reflect[ing] God’s glory, will, and cosmic order.”⁴⁵⁰ The jurisphile sacralizes law and believes being legal is being right—period.⁴⁵¹ Jurisphilia so pervades the legal academy that many scholars define morality as “a matter of following rules”⁴⁵² and immorality as rule-deviation—however minor or necessary.

CLOACA, “stand[ing] tall for the rule of law,”⁴⁵³ spies the sin of de-legalization in every method or means implicating LOAC.⁴⁵⁴ It scoffs when branded “pro-terrorist” yet issues gales of protest over U.S. detention, interrogation, targeting, and prosecution policies, convinced it is a faithful servant of LOAC, battling apostates for its restoration.⁴⁵⁵ If “the most powerful weapon against terrorists is our

⁴⁴⁹ See generally Iain Scobbie, *Jurisphilia/Jurisphobia: U.S. Approaches to International Law Theory*, 100 AM. SOC’Y INT’L L. PROCEEDINGS 166 (2006).

⁴⁵⁰ Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 664 (2011). Jurisphiles reference law’s “mystery,” and credit its indeterminacy for our obedience; a rationalized law would shed this compliance pull. See, e.g., Linda L. Berger & Jack L. Sammons, *The Law’s Mystery*, 2 BRIT. J. AM. LEGAL STUD. 1 (2013).

⁴⁵¹ See Solzhenitsyn, *supra* note 446 (describing jurisphilia as the belief that “[i]f one is right from a legal point of view, nothing more is required” and observing that “a society with no other scale but the legal one is not quite worthy of man[.]”).

⁴⁵² Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 119 (2003). The term “legalism” is a rough synonym for jurisphilia.

⁴⁵³ Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 620 (2003).

⁴⁵⁴ Amos N. Guiora & David Luban, *An Exchange on Law and Israel’s Gaza Campaign*, 31 AM. BAR. ASS’N NAT’L SEC. L. REP. 1, 10 (2009). Few in CLOACA concede that “[i]t is too difficult . . . for courts to decide whether all [U.S. post- 9/11] policies are substantively correct” because “the dangers of [4GW] [are] too uncertain at this early date.” Neil Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1365-66 (2007).

⁴⁵⁵ See Frakt, *supra* note 392, at 353 (lauding himself and CLOACA for fighting on behalf of “the restoration of the rule of law” after its “compromise”).

commitment to the rule of law,⁴⁵⁶ and if the policies and personnel who design and implement them are antithetical to this commitment, it is clear why CLOACA fixates on these policies and personnel as the primary threats to the nation.

B. *Cosmopolitanism*

“American Exceptionalism” is the conviction that the United States is a divinely-chosen moral beacon to the world, objectively superior to other nations due to its canonical commitment to liberty and its global willingness to back its foreign policy with military power to defend this principle.⁴⁵⁷ American Exceptionalists—a phrase applicable to almost all American leaders throughout history—believe that when their military commits to battle it does so in pursuit of this divine mission and with purity of arms.⁴⁵⁸ American success in war has so often proven indispensable to order and liberty across the globe,⁴⁵⁹ and because theirs is a moral nation, and often the only one that will “actually go into the world and strike down evil,”⁴⁶⁰ American Exceptionalists believe the country is entitled to act unilaterally and to make, interpret, and apply LOAC in a manner that best allows it to meet God’s calling.⁴⁶¹

⁴⁵⁶ See Jessica Stern, *Execute Terrorists at Our Own Risk*, N.Y. TIMES (Feb. 28, 2001), <http://www.nytimes.com/2001/02/28/opinion/28STER.html>.

⁴⁵⁷ Koh, *supra* note 376, at 1481 n.4. American Exceptionalists believe the U.S. is a benign and redeeming force in international politics and has always used force “on the right side of history[.]” John Monten, *Primacy and Grand Strategic Beliefs in US Unilateralism*, 13 GLOBAL GOVERNANCE 119, 131 (2007).

⁴⁵⁸ See generally Nomi Maya Stolzenberg, *Facts on the Ground*, in PROPERTY AND COMMUNITY 70 (Eduardo Penalver & Gregory Alexander eds., 2010).

⁴⁵⁹ Monten, *supra* note 457, at 119-20.

⁴⁶⁰ BEVIN ALEXANDER, HOW AMERICA GOT IT RIGHT: THE U.S. MARCH TO MILITARY AND POLITICAL SUPREMACY 249 (2005). The belief that Old World nations are too corrupt, materialistic, amoral, and venal to use force to defend liberty and freedom, necessitating U.S. unilateral intervention, is central to American Exceptionalism. Monten, *supra* note 457, at 120-21.

⁴⁶¹ See Monten, *supra* note 457, at 132 (ascribing to American Exceptionalists the view that its divine mission and “benign nature” legitimize U.S. military power); Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT’L L. 1307, 1308, 1312-13 (explaining U.S. autointerpretation of LOAC).

“Cosmopolitanism”—the belief that humans form a universal community based on shared problem-solving responsibility and the irrelevance of cultural, racial, and national divides—negates exceptionalism and nationalism.⁴⁶² Cosmopolitans are power-averse and rely on global webs of institutions, treaties, and diplomacy to keep peace.⁴⁶³ Whereas American Exceptionalists believe fighting for liberty and human rights legitimates force, Cosmopolitans inhabit a “post-historical paradise” where war is an unmitigated evil threatening pacifism, multilateralism, and legal institutionalism.⁴⁶⁴ To Cosmopolitans, whose abstention from military campaigns post-9/11 is designed to prevent their nations from becoming targets,⁴⁶⁵ Islamism poses no threat, and American Exceptionalists’ history-bound lack of nuance and unsophisticated addiction to power threaten the progression of law and justice.⁴⁶⁶

With scholarship, advocacy, and appeals to “transnational norm entrepreneurs, like the Pope[,] . . . Jimmy Carter, [and] Nelson Mandela,”⁴⁶⁷ Cosmopolitans pressure LOAC to forge new restrictions

⁴⁶² Kwame Appiah, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS*, xiii-xv (2006). A central strand is cultural relativism—the belief that one religion or ideology is equal to and as valid as any other. *Id.* Because Islamism is as legitimate as Western civilization, Cosmopolitans deny the West any right to resist it at all. *Id.*

⁴⁶³ Cosmopolitanism is so antipathetic to the use of force, even in defense of human rights, that millions of Cosmopolitans worldwide marched to protest military intervention to depose Saddam Hussein in 2003. PODHORETZ, *supra* note 59, at 98.

⁴⁶⁴ See, e.g., Bardo Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 EUR. J. INT'L L. 857, 857 (2004) (noting European Cosmopolitans' belief that they are the “better peoples of the [UN]” for their pacifism, multilateralism, and formal legal institutionalism).

⁴⁶⁵ ALEXANDER, *supra* note 460, at 225. Spain cravenly withdrew troops from Iraq in response to Islamist attack in 2004. Al Goodman, *Spain Plans Quick Pullout of Iraq*, CNN.COM (Apr. 19, 2004, 5:06 AM), <http://www.cnn.com/2004/WORLD/europe/04/18/spain.withdraw/>.

⁴⁶⁶ Cosmopolitan critiques of American Exceptionalism center on the utility and morality of force, the rules governing its use, and who should make the rules. Yet it extends deeper: Cosmopolitans chastise the United States for rejecting norms regarding gun control, capital punishment, global warming, and human rights, and hope to dismantle an international order that “disempower[s] third world peoples[.]” *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* (Antony Anghie et al., eds., 2004).

⁴⁶⁷ Koh, *supra* note 376, at 1526.

to “delay, frustrate, and undermine . . . U.S. military policies.”⁴⁶⁸ Ardent Cosmopolitanism is almost a requirement for commissioning into CLOACA;⁴⁶⁹ claims that the “international community has a . . . pressing obligation to subject the [United States] to far more . . . rigorous forms of accountability,”⁴⁷⁰ that American arms should be bound to more onerous rules and standards, and that U.S. unilateralism threatens peace⁴⁷¹ are the most transparent expressions of Cosmopolitan hostility to a special American writ to use force in vindication of universal principles. Invariably, CLOACA Cosmopolitans task LOAC to the cabining of U.S. military power and bedeviling of U.S. policies in the war against Islamism.

C. End of History

The “end of history thesis” encapsulates the liberal expectancy that the collapse of bipolar enmity would end not only U.S.-Soviet geostrategic rivalry but all ideological contestation over the foundations for organizing human political communities, which peoples everywhere would now agree included democracy, rule of law, free markets, and human rights. As nationalism, religion, and ethnicity withered away to be replaced by reason, economic integration, and modernity, the end of history would yield the end of politics and the end of politics by other means—war—thereby ushering in perpetual peace.⁴⁷² With nothing left over which to fight, LOAC would become amenable to rules and interpretations constraining state power and independence.

⁴⁶⁸ Robert A. Pape, *Soft Balancing Against the United States*, 30 INT’L SEC. 1, 10 (2005).

⁴⁶⁹ In the past decade, CLOACA scholarship serially denounced American Exceptionalism. See Audio Tape: *Who Me? American Exceptionalism and International Law*, AALS Annual Meeting (Jan. 6, 2006) (on file with author); 99th Meeting, ASIL, Panel, *American Exceptionalism in Treaty Behavior*, 99 AM. SOC’Y INT’L L. PROC. 429, 441 (2005).

⁴⁷⁰ Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 294 (2011).

⁴⁷¹ See Margulies, *supra* note 289, at 373 (hailing CLOACA’s “vigorous campaign against [U.S.] unilateralism” which members regard as a threat to peace post-9/11).

⁴⁷² See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (elaborating his end of history thesis).

However, 9/11 signified that it is premature to write the obituary for the “stubborn traditions of culture, civilization, religion, and nationalism” that spawn ideological conflict.⁴⁷³ When Islamist recrudescence restarted history, intellectuals were caught in a quandary offering only two solutions: abandon faith in the end of history or deny the Islamist threat. Although the latter is utopic—even childish⁴⁷⁴—CLOACA doubled down on this wager. Its bet on the end of history did not pay off, yet as Islamism waxes ever more threatening, CLOACA stubbornly advances claims regarding the progressive modification of LOAC that, if incorporated into the practice of Western militaries, would disable efforts to engage Islamists while encouraging Islamist violence.

D. Flawed Analogy to the Civil Rights Movement

The Civil Rights Movement—a socio-legal struggle that won the full complement of constitutional, civil, and political rights for all regardless of race—was a towering achievement, yet it was a phenomenon *sui generis* and not a paradigm for vindicating every claim of systemic discrimination no matter how inapposite or a lens through which to view every conflict between social groups. Yet CLOACA analogizes the war with Islamism, and the policies crafted to win it, as a revivification of the discrimination that spawned the Civil Rights Movement, with Muslims standing in for African-Americans, reviled not for race but for their faith.⁴⁷⁵

By this view, “ordinary Muslims” are punished for the crimes of “Muslim barbarian[s]” for whom they are not responsible;⁴⁷⁶ fear and prejudice and not danger motivate detention, interrogation, and prosecution.⁴⁷⁷ One scholar decries the “racist premise” by which “being Muslim is a *de facto* source of shame . . . [and] tantamount to .

⁴⁷³ ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS*, 8 (2008).

⁴⁷⁴ See LEE HARRIS, *CIVILIZATION AND ITS ENEMIES* 142 (2004) (dismissing the belief that “the world . . . must be changed . . . to fit [my] ideals” as “childish”).

⁴⁷⁵ See Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 121-22 (drawing this analogy pre-9/11).

⁴⁷⁶ Choudhury, *supra* note 424, at 54.

⁴⁷⁷ Christina A. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WISC. L. REV. 115, 116.

. . . treason;⁴⁷⁸ another blames a “venomous narrative surrounding Islam and national security” for an “authoritarian tendency in American thought to demonize communal ‘others’ during moments of perceived threat.”⁴⁷⁹ Others analogize post-9/11 discrimination against abhorrent creedal outsiders to the “Red Scare.”⁴⁸⁰ Some discern no civilizational defense against vicious totalitarianism but rather “a permanent global war to cement [U.S.] domination” requiring “demoniz[ation]” of Muslims.⁴⁸¹ Allegations of “neo-McCarthyist” hysteria attend this critique, as do proclamations of a rising tide of Islamophobia; declarations abound that contemporary policies, including the material support statute, are re-tooled Cold War instruments criminalizing expression and association by despised ideological minorities who irk the “right-thinking” majority.⁴⁸²

What both skeins of analysis share is the conviction that Muslims are no more enemies of the United States than were other groups, whether organized around immutable characteristics such as African Americans or contrarian ideologies viz. domestic Communists. If true, this “harmlessness” presumption leads ineluctably to the conclusion that legal policies designed to counter and defeat the Islamist threat are not only unnecessary, because Islamists are Muslims and Muslims pose no threat, but are institutionalized forms of Islamophobia inimical to American principles. However, these analogies are flawed, and the harmlessness presumption is patently false. While African Americans *qua* African Americans posed no threat, and denial of their civil rights was the definition of invidious discrimination, U.S. Communists *were* part of an international organization dedicated to destroying the U.S. form of government, and limitations imposed on

⁴⁷⁸ Choudhury, *supra* note 424, at 48.

⁴⁷⁹ Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEG. ED. 433, 436, 438-39 (2010). Many in CLOACA regard the conflict with Islamism as an externalization of American antipathy to outgroups fueled by fear. See, e.g., Wells, *supra* note 477, at 171-72.

⁴⁸⁰ See, e.g., Meyerstein, *supra* note 119, at 378 (describing anti-Islamist policies as akin to “McCarthyist response[s] to the ‘[R]ed scare’”); Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

⁴⁸¹ HOROWITZ, *supra* note 317, at 122 (quoting *Social Movements’ Manifesto*).

⁴⁸² See Cole, *supra* note 316, at 1213-16 (drawing this parallel).

their freedoms of expression and association were part of a concerted effort to defeat Communism that succeeded after generations of momentous struggle. Moreover, Muslims who internalize and act in furtherance of the Islamist ideology—i.e., Islamists—are an existential threat no less menacing than Communists. Only by drawing strained comparisons, succumbing to historical amnesia, and downplaying the rapacity of a fanatical enemy can CLOACA conclude that fidelity to the Civil Rights Movement requires dismantling and disavowing the policies crafted to defeat Islamists and that national security can survive this.

E. Skepticism of Executive Power

The executive is a “creature of the Constitution,”⁴⁸³ yet presidential exercise of broad wartime powers is a custom of old vintage, and in past crises, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt underwrote policies that pressured its letter and spirit.⁴⁸⁴ The judiciary, despite claiming authority to “say what the law is” since *Marbury*,⁴⁸⁵ has been loathe to constrain the executive in national security and war because “the very nature of executive decisions as to [these matters] is political, not judicial [and] [s]uch decisions are . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.”⁴⁸⁶ Thus, the argument that the executive, as a co-equal branch of government, has some liberty in the exercise of war powers to reach its own conclusions as to what the Constitution means, even if these differ from those of the Court, enjoys support in some nooks of the legal academy.⁴⁸⁷ Arguably, Lincoln’s Emancipation Proclamation and Bush’s detainee policies were exercises of inherent authority to interpret the Constitution during war in ways that, while they advanced political objectives by directly contradicting *Dred Scott* and

⁴⁸³ Reid v. Covert, 354 U.S. 1, 6 (1957).

⁴⁸⁴ See, e.g., Margulies, *supra* note 233 (contextualizing alleged extra-constitutional acts by Lincoln (Civil War), Wilson (WWI), and FDR (WWII)).

⁴⁸⁵ *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

⁴⁸⁶ *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

⁴⁸⁷ Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 19 (2007) (“[T]he power to interpret the Constitution is . . . nowhere exclusively delegated to the courts.”).

asserting a broad theory of executive war powers, respectively, were no less entitled to legitimacy than judicial pronouncements.⁴⁸⁸ War presidents may be compelled to reject “constitutionally and/or morally erroneous”⁴⁸⁹ judicial decisions when to follow them would derogate from their duty to defend the nation. When presidents reject legally suspect or immoral interpretations of their war powers, their decisions, if in satisfaction of this duty, should “proceed untrammelled by even the threat of legal regulation and judicial review.”⁴⁹⁰ While expansive executive power in war can impinge other branches and threaten liberties, since 9/11 Americans have accepted executive authority to read the Constitution to support detaining, interrogating, trying, and killing Islamists.

Notwithstanding its democratic pedigree, executive war power is blocked by a raft of self-congratulating CLOACA scholars “standing heroically” to block its exercise.⁴⁹¹ “[F]ear of unchecked presidential power . . . [wielded by] conservative administrations”⁴⁹² may have impelled them to law school and the professoriate.⁴⁹³ CLOACA savages U.S. policies as violations of moral absolutes that fuel “[a] threat of tyrannical government . . . greater than whatever threat . . . the worst terrorists may pose.”⁴⁹⁴ Some lament that, even if an argument from necessity supports U.S. war policies, “[i]t was once an unspeakable thought that our Constitution should have lacunae-temporal discontinuities within which nation-saving steps would be taken[,] blessed . . . by the brute necessities of survival.”⁴⁹⁵ Harsher critics label the entire welter of anti-Islamist policies as an “effort to

⁴⁸⁸ See JEFFREY F. ADDICOTT, *TERRORISM LAW: THE RULE OF LAW AND THE WAR ON TERROR* 311 (2nd ed. 2004) (quoting Rehnquist, C.J., “In wartime, . . . this balance shifts to some degree . . . in favor of the government’s ability to deal with conditions that threaten the national well-being.”).

⁴⁸⁹ Schauer, *supra* note 487, at 22, 25-26.

⁴⁹⁰ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1132-33 (2009).

⁴⁹¹ David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 n.4 (2008).

⁴⁹² WITTES, *supra* note 103, at 22.

⁴⁹³ See AUERBACH, *supra* note 70, at viii (“Something about protecting against illegitimate authority drew me to law school.”).

⁴⁹⁴ WITTES, *supra* note 103, at 2-3.

⁴⁹⁵ Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1802 (2004).

[expand executive] power . . . by invoking the metaphor of war.”⁴⁹⁶ The most heated rhetoricians contend the Bush administration exploited 9/11 to erect a police state.⁴⁹⁷

Thus does CLOACA strain to bring President Bush to heel by outlawing, or rendering too politically costly, indefinite detention, coercive interrogation, and targeted killing. Although CLOACA scholars concede that thwarting U.S. policies constitutes “use of [LOAC] as a weapon against the [United States],” they unashamedly privilege what they deem “healthy democratic . . . accountability”⁴⁹⁸ over national security. Yet academics that strip away some of the most effective tools available in the battle against Islamists are deaf to the admonition of the Supreme Court regarding interference with the exercise of inherent executive powers during wartime, and gravely mistaken in concluding the imagined sins of the Bush administration exceed the real virtue of having prevented subsequent attacks. By turning to the courts in the name of civil rights to deny Americans the protections of tools devised by the executive, CLOACA has become a profoundly anti-democratic agent of an enemy that intends the destruction of the Constitution and the rights for the defense of which the executive created these very tools. The academic sport of checking the executive results in a president less well-equipped to defend Americans, Islamists less constrained by U.S. power, and Americans less safe.

F. Issue-Entrepreneurship

Issue-entrepreneurs forge professional identities by displacing orthodox theory, doctrine, and method with iconoclastic discourse.⁴⁹⁹ The more they trespass upon predecessors and contemporaries, the more they attract resources and followers.⁵⁰⁰ Issue-entrepreneurs push ideological agendas with scant

⁴⁹⁶ JONATHAN SIMON, CHOOSING OUR WARS, TRANSFORMING GOVERNANCE IN RISK AND THE WAR ON TERROR 79 (Amoore & de Goode eds., 2008).

⁴⁹⁷ Margulies & Metcalf, *supra* note 479, at 439-40.

⁴⁹⁸ Frakt, *supra* note 392, at 345.

⁴⁹⁹ Margulies, *supra* note 233, at 12, 47.

⁵⁰⁰ ERIC A. POSNER, LAW AND SOCIAL NORMS 119-33 (2000). Iconoclasm “helps issue entrepreneurs get noticed.” Margulies, *supra* note 233, at 48.

consideration of the damage to epistemologies and canons that define fields, or to third parties and the public who invest in and structure their expectations and conduct upon traditional bastions of knowledge. Legal academics have embraced this role with regard to law generally and LOAC specifically. By staking out revisionist claims at odds with the sedimented views of states and orthodox scholars, and cynically equating self-defense with aggression, interrogation with torture, targeted killing with murder, and U.S. patriots with war criminals, CLOACA issue-entrepreneurs won the badges of tenure and named chairs.⁵⁰¹

G. Professional Socialization

Professionals absorb a set of norms, a body of knowledge, and a worldview that grant them admission into exclusive societies with special status and prerogatives.⁵⁰² The enculturation of legal professionals begins in law schools,⁵⁰³ which “exert intense control by purposely influencing beliefs, values and personality characteristics of students.”⁵⁰⁴ Subsequent socialization ingrains a sense of special province, consciousness, and expectation regarding law.⁵⁰⁵ Members police this identity and province against encroachment by contrary norms and worldviews,⁵⁰⁶ and are prone to credit or dismiss evidence and argument based on identic congeniality.⁵⁰⁷ Legal professionals accord greater reliability to arguments by other legal professionals

⁵⁰¹ See Waters, *supra* note 300, at 900 (making this assertion).

⁵⁰² MILLER, *supra* note 68, at 18.

⁵⁰³ See LAWRENCE M. FRIEDMAN ET AL., *LEGAL CULTURE AND THE LEGAL PROFESSION* (1996) (describing the enculturation of legal professionals).

⁵⁰⁴ Stephen Shanfield & Andrew Benjamin, *Psychiatric Diseases in Law Students*, 35 J. LEGAL EDUC. 65, 65 (1985).

⁵⁰⁵ See LAWYERS’ IDEALS/LAWYER’S PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 5 (Robert L. Nelson et al., eds., 1992) (theorizing the professional socialization process of lawyers).

⁵⁰⁶ David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIR. PSYCHOL. SCI. 119, 119-20 (2002).

⁵⁰⁷ See Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2 (2011) (“[I]ndividuals are predisposed to fit their perceptions of policy-relevant facts to their group commitments.”).

than to those by outsiders,⁵⁰⁸ and treat law as the optimal, and even the sole, path toward social change.⁵⁰⁹ Thus, even where a particular answer to a legal question is not compelled by formal rules, and where a diversity of views in the body politic might be expected to find representation within the legal profession, a core of agreement, forged by an intuitive identic sense, shepherds legal professionals into broad consensus.⁵¹⁰

Carried too far, an orthodox professional identity creates “groupthink”—the tendency of a desire for intragroup cohesion to impel members to manifest loyalty to the theories, policies, and decisions to which their group is committed, rather than subject these to scrutiny and constructive criticism.⁵¹¹ This “dangerous tendency to form a herd”⁵¹² compromises the integrity of the legal academy by substituting politically-approved conclusions for open inquiry. After systematically excluding conservative scholars for generations,⁵¹³ the legal academy now approximates an “echo-

⁵⁰⁸ Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003).

⁵⁰⁹ See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5-9, 13 (1975) (describing a “social perspective which perceives and explains human interaction largely in terms of the rights and obligations inherent in rules” as the core of legal professional identity).

⁵¹⁰ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 59-61, 121-57, 206-08 (1960).

⁵¹¹ Groupthink—forcing the fostering of consensus by reinforcement of group identity at the expense of failure to challenge mistaken premises and faulty assumptions in making and vetting collective decisions—can yield disaster. See generally IRVING JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 174-75 (2d ed. 1982).

⁵¹² Solzhenitsyn, *supra* note 446. Legal academics can fairly be described as forming a “herd of independent minds.” See Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 177 (1999).

⁵¹³ See David Horowitz, *The Professors’ Orwellian Case*, FRONT PAGE MAG (Dec. 5, 2003), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=15136> (“[A] series of recent studies by independent researchers has shown that . . . professors to the left of the political center outnumber professors to the right . . . by a factor of 10-1 and more. At some elite schools . . . the ratio rises to 28-1 and 30-1.”). For decades, liberal law deans and faculties self-replicated, excluding conservatives from hiring and tenure. See Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, NAT’L JURIST, Nov. 2010, at 14 (“[L]aw schools . . . hir[e] more openly liberal professors than . . . conservative[s.]”).

chamber of approbation” where a tribe of like-minded liberals mutually reinforces received wisdom and earns accolades by recycling fashionable opinions.⁵¹⁴ Because contrarians face scorn, stigmatization, and even ouster,⁵¹⁵ powerful incentives exist for legal faculty, even if privately conflicted, to embrace the prevailing ideological hegemony and ape the arguments of leading scholars without regard to logic or consequence.

Dogmatists patrolling an ideological fence around a zone of “decent opinion” create a hostile environment for scholars to undertake honest and searching inquiries regarding questions to which answers are already divined. If a CLOACA consensus deems coercive interrogation torture, targeted killing murder, and U.S. leaders war criminals, how can less-senior scholars, let alone the untenured, resist these *diktats*? If endowed chairs are the rewards for preaching CLOACA dogma regarding permissible methods and means of killing, capturing, detaining, interrogating, and prosecuting Islamists, and if academic purgatory awaits apostates who support U.S. policies, the inference that debate is closed and views contrary to the CLOACA consensus are errant and illegal is easy for outsiders to draw.

H. Subject Matter Ignorance

The debasement of knowledge driven by Wikipedia, Google, and other purveyors to the *hoi polloi* beguiles many to credit the myth that it is impossible for some individuals to know vastly more about certain subjects than others,⁵¹⁶ yet expertise—the synthesis of

⁵¹⁴ Solzhenitsyn, *supra* note 446 (“In the West . . . nothing is forbidden, but what is not fashionable will hardly ever find its way into periodicals or books or be heard in colleges.”).

⁵¹⁵ See Devins, *supra* note 512, at 186 n.93 (“[T]here is a real risk of opprobrium for those who do not toe the company line[;]” scholars who adopt divergent viewpoints “find [themselves] in a hornets’ nest.”); Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J.L. & PUB. POL’Y 429, 438 (2002) (“[L]eft-leaning intellectuals push one another to extremes, and tow [sic] a . . . party line . . . through imposing reputational sanctions on those who disagree, or even ostracizing them.”).

⁵¹⁶ See Suzanna Sherry, *Democracy’s Distrust: Contested Values*, 125 HARV. L. REV. 7, 10 (2012) (“Everyone is now an expert—from the user-created content of

“talent or intelligence and a long tenure of experience in a given subject”⁵¹⁷—is real. Experts exceed non-experts in possessing substantive information but also in methodological competence: non-expert theorizing relies on induction and intuition, but experts specify a research question, employ appropriate methods, and derive logical and neutral conclusions from available evidence.⁵¹⁸ A concomitant of expertise is specialization: the more the knowledge universe expands the harder it is to assimilate developments. As law complexifies, “[l]awyers know more and more about less and less.”⁵¹⁹ Each subfield and regime is greater than the sum of its rules, norms, institutions, and procedures—it is a holistic amalgam of “craft, of acculturation, and of . . . shared . . . purpose.”⁵²⁰ A given legal subfield is foreign cultural terrain⁵²¹ to a scholar lacking expertise in it no matter how perspicacious, and the judgments he or she renders on issues arising therein will be objectively inferior to those of experts.⁵²²

The legal academic labors under the perception that he or she “possess[es] a brilliant . . . mind” but lacks “knowledge of the practical affairs of life” and conjures up “half-baked and conceited theori[es] thinking [he or she] know[s] better what law ought to be . . . than the people . . . of America.”⁵²³ But, by the bare fact of training in elite law schools and native intellect, legal academics are not experts in any subfield and earn this exalted status only through

Wikipedia to self-diagnosis of medical conditions to a website that provides do-it-yourself legal documents, we . . . find experts unnecessary and . . . faintly suspect[.]”).

⁵¹⁷ Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 879 (2012).

⁵¹⁸ See Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012) (expressing the value of legal expertise).

⁵¹⁹ Deborah L. Rohde, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1337 (2000).

⁵²⁰ Oldfather, *supra* note 517, at 872.

⁵²¹ Cultural theories maintain that each legal subfield is a distinct cultural realm replete with its own language, customs, rules, and procedures, and cultural competence therein is a requisite to expert performance. See, e.g., Leigh Greenslaw, “To Say What the Law Is”: *Learning the Practice of Legal Rhetoric*, 29 VAL. L. REV. 861, 892 (1995).

⁵²² See Oldfather, *supra* note 517, at 885-88 (describing legal experts as likely to make “superior decisions” as compared to nonexperts).

⁵²³ AUERBACH, *supra* note 70, at 91, 93-94 (quoting William Vance and Elihu Root).

sedulous research and time-intensive theory development and testing. Claims to expertise must be peer-validated. Legal academics who have not earned expert status have the duty of candor to disavow it lest they denature its meaning and discredit their profession.⁵²⁴ Those who arrogate foundationless expertise to themselves engage in fraud; “pretending to have an expert opinion on something [academics] know next to nothing about is a deception.”⁵²⁵ Legal academics who tread in subfields beyond their ken may sincerely believe they are qualified to offer informed opinions by virtue of their generalist training, erudition in other subfields, and conversations with better-versed colleagues, but they do not know what they do not know. Expertise is real. Those who write and teach on a subject should, but often do not, possess it.⁵²⁶

This is painfully true in LOAC, the subject-matter of which—war—is remote from the experience of civilians the vast majority of whom are “woefully ill-informed on . . . national security and the . . . means of maintaining it.”⁵²⁷ Only about 7% of Americans have performed military service,⁵²⁸ and the military remains “a

⁵²⁴ See Amy Gajda, *The Law Professor as Legal Commentator*, 10 J. LEGAL WRITING INST. 209, 210 (2004) (positing a standard to protect the credibility of legal academia).

⁵²⁵ Devins, *supra* note 512, at 184.

⁵²⁶ See Devins, *supra* note 511, at 166-172 (explaining academic opining on subjects beyond their expertise as a “desire to be part of the fray . . . to see their names in print, . . . to tell their families that they did something that mattered, [and] . . . for political reasons.”); Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 195-96 (1999) (conceding that legal academics often mistakenly “believe that they kn[o]w enough . . . to have a reasonably informed opinion”).

⁵²⁷ Richard H. Kohn, *Building Trust: Civil-Military Behaviors for Effective National Security*, in AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 283 (Suzanne C. Neilsen & Don M. Snider eds., 2009). Remediation of this deficiency requires “reading, travel, informal social interaction, and above all listening” to military experts. *Id.* at 284.

⁵²⁸ See U.S. Census Bureau News, U.S. DEP’T OF COMMERCE (Oct. 31, 2013), http://www.census.gov/newsroom/releases/pdf/cb13ff-27_veterans.pdf; see also *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2014*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Mar. 16, 2015) (collectively indicating that, as of 2012, there were 21.2 million veterans out of a national population of approximately 315 million at the time).

specialized society apart from civilian society.”⁵²⁹ LOAC scholarship is augmented by knowledge of military history and by experience: those with neither are more prone to advocate untenable prescriptions.⁵³⁰ Because CLOACA counts almost no one in its ranks who ever joined the brotherhood of arms, it lacks the “thorough understanding of the . . . very special ‘business’ of war” without which its “legal erudition goes for naught.”⁵³¹ Ignorant of the domain *sui generis* of war, and unable to access the decisional universe of soldiers, CLOACA disregards the salience and difficulty of developing expertise in LOAC, and, in effect, implies that war is no more alien to everyday experience than the subject-matter of family law (e.g., marriage), property (leases), or torts (car accidents). Thus does one LOACA scholar “view with extreme suspicion all theories and representations of war that equate it with any other activity in human affairs.”⁵³² This is not to deny to all non-warriors the epistemic privilege of producing and consuming LOAC scholarship: it is merely an admonition that entry costs must be paid and an attitude of “respectful humility” assumed should they endeavor to write persuasively about LOAC.⁵³³

Regrettably, many in CLOACA have rushed the disciplinary gates. A self-confessed LOAC tyro, admitting no prior study of LOAC in a thirty-five-year career and conceding its great breadth and complexity, nevertheless excoriates U.S. policies, alleging illegalities, with no foundation, resulting from “efforts to avoid th[e] application [of LOAC] . . . doctrines [regarding] the status and

⁵²⁹ *Parker v. Levy*, 417 U.S. 733, 743 (1974). Those lacking military service should heed that “[w]ar must be fought by men whose values and skills . . . are those of . . . a very ancient world, which exists in parallel with the everyday world but does not belong to it.” JOHN KEEGAN, *HISTORY OF WARFARE* xvi (1993).

⁵³⁰ See H. Wayne Elliot, *History, War, and Law*, 30 TEX. INT’L L.J. 631, 637 (1995) (“Only [with] a firm foundation in military history can one truly begin to understand the utility and limits of [LOAC].”).

⁵³¹ Dunlap, *supra* note 174, at 127-28.

⁵³² KEEGAN, *supra* note 529, at xvi.

⁵³³ Refreshingly, a CLOACA militant strident in criticizing U.S. Islamist policies openly renounces martial expertise and interest apart from those of the “ordinary citizen,” making plain his assumption that military experience and the merit value of one’s LOAC scholarship need not correlate. See generally Benjamin G. Davis, *The 9/11 Military Commission Motion Hearings: An Ordinary Citizen Looks At Comparative Legitimacy*, 37 S. ILL. U. L.J. 599 (2013).

detention of combatants[,] the limits on the use of torture or other cruel, inhuman or degrading treatment during interrogation, the . . . rendition of prisoners to countries where torture is practiced, and the use of pre-emptive . . . force.”⁵³⁴ Others with a longer portfolio of published works and tenure in the subfield, but with a similar dearth of military experience, propound prosaicisms utterly at odds with military custom, military necessity, and the imperatives of combating Islamists that betray their incognizance of war and those who wage it. At the extreme fringe, a handful bereft of experience regard the martial caste with such disdain, and the military mind with such contempt, that attempts to familiarize them might well be resented and rebuffed.⁵³⁵

There is a powerful and destructive inverse correlation between martial expertise and LOAC radicalism. One critic condemns CLOACA as a “self-aggrandizing” lot that, by “trading on their name chairs to talk about issues far outside their professional competence” and “mak[e] perfectly indefensible statements” in “high-profile forums,” has disgraced LOACA.⁵³⁶ Deriding a proposal to require arrest and preclude killing of Islamists, this critic links martial inexperience to CLOACA foolishness, discerning that its author is “not a . . . warrior of any fashion judging from her impracticality of theory.”⁵³⁷ Another, lambasting a proposal to compel public release of operational details of planned targeted killings to ensure LOAC compliance, warns “if any nation were so unwise as to provide publicly the . . . operational detail [the author] wants, . . . potential targets would ‘go to school’ on such immensely

⁵³⁴ Richard J. Wilson, *A Long, Strange Trip: Guantanamo and the Scarcity of International Law* 6-7 (American Univ., WCL Working Paper No. 2009-12), available at <http://ssrn.com/abstract=1368420>. Professor Wilson, disclaiming prior LOAC exposure, states that because he so strongly “felt that the situation of the detainees . . . cried out for application of [LOAC]” he could undertake intensive self-study sufficient to support sweeping denunciations of U.S. policies. *Id.* at 6-9. He is not alone: CLOACA numbers many lettautes who were, “[u]ntil . . . recently, [un]aware of the . . . requirements . . . for [POW status]” and ignorant of seminal LOAC cases, treaties, and customary international law. Gross, *supra* note 448, at 1016.

⁵³⁵ See, e.g., Wells, *supra* note 477, at 178.

⁵³⁶ Gajda, *supra* note 524, at 211-12.

⁵³⁷ Nordan, *supra* note 129, at 5.

valuable information so as to evade a strike[,] mandat[ing], in effect, an intelligence-gathering process [to] help . . . militants live on to carry out their reign of terror.”⁵³⁸ While venturing that naïfs may not intend harm to the United States, a LOACA bloc—most of whom are veterans—bemoans “insufficient attention to unintended consequences of well-meant positions”⁵³⁹ and warns against the dangers of uncritical acceptance of the scholarship of novitiates with no stock of martial wisdom or experience to temper or test, even heuristically, their claims.

I. *Law as Politics*

The line between law and politics is blurry. Both involve competition over “different visions of the good society.”⁵⁴⁰ In making, interpreting, and adjudicating law, legislators, judges, and scholars impose values on others, and in a predominantly positivist system, where law has few limits, legal support can be ginned up for almost any end. In pure theory, ascertaining the law that resolves a legal question is a value-neutral process requiring only discovery of relevant constitutions, statutes, judicial decisions, and other sources. In practice, legal texts neither end disputes nor differentiate law from politics. Disagreement persists over whether meanings are supplied by texts or “created by a reader according to his . . . experiences, beliefs, and purposes”⁵⁴¹ and bounded contextually.⁵⁴² If legal sources are infinitely malleable, and legal analysis is an interpretive act, then ideological preferences are injected into analysis—unconsciously by those who think themselves “doing law”⁵⁴³ or deliberately by those

⁵³⁸ Dunlap, *supra* note 174, at 133.

⁵³⁹ *Id.* at 133–34.

⁵⁴⁰ Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 8 (2011).

⁵⁴¹ Daryl J. Levinson, *The Consequences of Fish on the Consequences of Theory*, 80 VA. L. REV. 1653, 1654 (1994).

⁵⁴² See Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 637 (1978) (“A sentence is never not in a context.”).

⁵⁴³ See WARD FARNSWORTH ET AL., IMPLICIT BIAS IN LEGAL INTERPRETATION 3 (John M. Olin Program in Law and Economics Working Paper No. 577, 2011), available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1253&context=law>

who cherry-pick language and craft motivated meanings to sway others into espousing their claims.⁵⁴⁴ Compounding this ideological intrusion, “subjectively-imposed legalities”⁵⁴⁵ invariably seep into legal analysis, collapsing the boundary separating analysis from political advocacy⁵⁴⁶ with the result, for example, that legal judgments regarding whether President Clinton committed an impeachable offense correlate almost perfectly with, and are tinged by, the partisan affiliations of those who rendered them.⁵⁴⁷

Moreover, not only is the interpretation of rules politicized, but so are the facts at issue in legal disputes. Self-interested individuals argue not only questions of law but of fact because “it is impossible . . . to make ‘factual findings’ without inserting . . . policy judgments, when the factual findings *are* policy judgments.”⁵⁴⁸ Just as with questions of law, questions of fact are indefinitely debatable, and no objective standard and no authoritative fact-finder are available, as in the hard sciences, to provide resolution.⁵⁴⁹

In practice, LOAC rule indeterminacy and disagreements as to the facts at the core of contentious issues in the Islamist Fourth Generation War intersect to form a zone of acute disputation. LOAC, like other legal regimes, has gray areas that invite good-faith

and_economics (“[M]ost people deciding contentious legal questions . . . feel that they are doing law and that their adversaries are doing politics.”).

⁵⁴⁴ Greenhaw, *supra* note 521, at 867-68. Carried to an extreme, “creative misreading” of a legal text can devolve into revisionism and even misprision. See generally HAROLD BLOOM, A MAP OF MISREADING ch. 5 (1975) (discussing motivated misreading of texts).

⁵⁴⁵ Matthew Zagor, *‘I am the Law!’ – Perspectives of Legality and Illegality in the Israeli Army*, 43 ISR. L. REV. 551, 585 (2011) (Isr.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914778.

⁵⁴⁶ See Sherry, *supra* note 516, at 12 (“[L]egal academics [regularly] . . . substitute crass political [objectives] for real legal analysis.”); Fallon, *supra* note 518, at 229-30 (“assum[ing] that norms involving personal integrity and legal craft limit what [an academic] could say in support of a [legal conclusion]”).

⁵⁴⁷ See Sunstein, *supra* note 526, at 197 (conceding this point).

⁵⁴⁸ *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting).

⁵⁴⁹ Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 2-3 (1973) (contrasting hard sciences and social sciences on this basis).

jousting.⁵⁵⁰ It is folly to think that controversial questions in LOAC are amenable to resolution by scholarly acumen alone. However, CLOACA, in its writings on the resort to force, aggression, detention, interrogation, targeted killing, and other subjects, undertakes a different task: it exploits the open texture of LOAC treaties and domestic statutes, makes dubious claims regarding the applicability of controversial soft-law sources, misapprehends the import of provisions and language divorced from historical context or read in isolation, and subjugates military necessity—while denying engagement in a political project.⁵⁵¹ CLOACA cannot claim involvement in a principled academic enterprise when it ignores inconvenient facts and asserts as “truths” its politically-motivated judgments regarding U.S. policies that would prejudice American self-defense if implemented. CLOACA polemicists insist that 9/11 was a domestic crime rather than an act of war; self-defense authorized by Congress and the U.N. is aggression; detention and interrogation of avowed enemies are torture rather than legitimate intelligence measures; targeted killings by UAVs is murder rather than self-defense; and U.S. personnel who authorize precision attacks against Islamists hiding among civilians are war criminals rather than LOAC-compliant patriots.

For CLOACA, scholarship and partisanship, if not identical, inform each other, non-motivated knowledge does not exist, and LOAC is a realm in which the ability to win others over, rather than revelation of ultimate truth, is the favored currency. Heretofore, CLOACA has blithely ignored the risk of revealing itself and its enterprise as inherently political, but if in time “the press and the public come to see the[m] as essentially no different from—except, perhaps, a little bit less honest than—Karl Rove and Jim Carville,

⁵⁵⁰ Like other subfields, LOAC presents “more gray areas than black and white.” Wm. Hays Parks, *The Law of War Adviser*, 18 MIL. L. & L. WAR REV. 357, 385 (1979).

⁵⁵¹ See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y. B. INT’L HUMAN. L. 3, 56 (2011) (referencing the “obvious risk of abuse or self-serving mistakes” in interpreting law and fact in LOAC analysis), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223.

[they] will come to regard [CLOACA] not as educators but . . . as . . . political operatives.”⁵⁵²

J. Academic Narcissism

Narcissistic Personality Disorder (“Narcissism”) is a personality disorder in which the afflicted labors to mask a pervasive sense of inferiority and emptiness and be perceived as important, powerful, physically and intellectually gifted, desirable, and admirable.⁵⁵³ Maladaptive or malignant narcissists lack core values, save for a perceived entitlement to objectify and use others in support of pathologically grandiose fantasies of success, status, wealth, and fame; they are dishonest, self-absorbed, conscienceless, arrogant, envious, spiteful, vindictive, and willing to do anything to anyone to shield their true selves, which are vastly inapposite to their external personas, from exposure.⁵⁵⁴ Yet narcissism is not an “on-off” condition but a spectrum disorder: “adaptive” narcissists are less pathologically antisocial yet still project idealized selves who oversell their knowledge, capacity, and experience while hiding inadequacies or contradictory realities in order to reap adulation, prestige, and power.⁵⁵⁵ Narcissism affects individuals and groups; relative to the general population, high-status professionals who garner attention and admiration—e.g., politicians, athletes, actors, and lawyers—manifest elevated narcissism.⁵⁵⁶

⁵⁵² Amy Gajda, *The Law Professor as Legal Commentator*, 10 LEGAL WRITING J. 209, 211-12 (2004).

⁵⁵³ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 714-17 (Michael B. First et al. eds., 4th ed., 2000).

⁵⁵⁴ *Id.*

⁵⁵⁵ See generally Robert W. Hill & Gregory P. Yousey, *Adaptive and Maladaptive Narcissism Among University Faculty, Clergy, Politicians, and Librarians*, 17 CURRENT PSYCH. 163, 163-64 (1998) (differentiating “maladaptive” narcissism from “adaptive” narcissism).

⁵⁵⁶ See generally Pat MacDonald, *Narcissism in the Modern World*, 20 PSYCHODYNAMIC PRAC. 144, 144 (2014). These professions draw “adaptive narcissists” who crave attention and prestige and can make a “confident social presentation” because they are not so consumed by the maladaptive constituents of narcissism—exploitativeness of others in particular—that they are disabled occupationally. See Hill & Yousey, *supra* note 555, at 164-65.

It is no accident that lawyers are far more likely than non-lawyers to suffer mental disorders, disconnect from true or “genuine” selves, engage in dishonesty, control others and situations, and depend on external validation to relieve internal self-esteem deficiencies: many lawyers chose law as a career path because it gratifies otherwise unmet needs for social attention, wealth, prestige, and status.⁵⁵⁷ As with lawyers more generally, narcissism also guides the career paths and behaviors of judges⁵⁵⁸ and law professors.

In particular, legal academics, who “like to be the center of attention,”⁵⁵⁹ find in the legal academy golden opportunities to gratify the narcissistic persona through exercise of pedagogical and scholarly functions.⁵⁶⁰ Those for whom the “law professor image is easily as important as substance”⁵⁶¹ have structured and situated themselves within the legal academy as the “exclusive means by which students can come to understand the law,” and law students by design “look to their professor as the one and only source of light in a forbidding sea of darkness.”⁵⁶² Further, scholarship permits “professional purveyors of pretentious poppycock”⁵⁶³ to propound

⁵⁵⁷ See Lawrence S. Krieger, *What We’re Not Telling Law Students—And Lawyers—That They Really Need to Know: Some Thoughts-In-Action on Revitalizing the Profession From Its Roots*, 13 J.L. & HEALTH 1, 3-4, 8, 18, 23-24, 27 (1999).

⁵⁵⁸ See, e.g., David Lat, *Judge of the Day: William Sosnay*, ABOVE THE LAW (Jan. 9, 2008), <http://abovethelaw.com/2008/01/judge-of-the-day-william-sosnay/> (providing a particularly notorious example of judicial narcissism, Judge William Sosnay halted court for hours, angered that a veteran prosecutor appeared before him wearing an ascot rather than the preferred tie upon which the fastidious, pompadoured judge insisted).

⁵⁵⁹ Desmond Manderson & Sarah Turner, *Coffee House: Habitus and Performance Among Law Students*, 31 LAW & SOC. INQUIRY 649, 669 (2006).

⁵⁶⁰ See generally Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 9-10 (1986) (unlike other graduate schools in the United States, law professors often have an equal focus on instruction and publishing).

⁵⁶¹ Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 948 (1990).

⁵⁶² Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 49 (2010).

⁵⁶³ Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 286 (1962), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3793&context=fss_papers.

“magical insights [to] transform . . . society,”⁵⁶⁴ even if most of their publications are “slops [that] fill the law reviews”⁵⁶⁵ with contrarian and unorthodox positions designed to generate controversy, notoriety, and subsequent citations,⁵⁶⁶ and to use this scholarship as “feather[s] in [their] professional cap[s]” placed there to “impress . . . colleagues.”⁵⁶⁷

Whether CLOACA or any of its members suffer from narcissism is difficult to ascertain directly. Yet CLOACA scholarship and advocacy grants its members entrance into and status within the prestigious legal academy, public forums within which to contravene and condemn orthodox LOAC and U.S. policies as part of a transformative project, and peer and public attention and admiration. It also grants CLOACA some significant control over, even “ownership” of, LOAC.

K. Appropriation of LOAC Ownership

The Western political tradition whereby the will of the *demos* translates more or less directly into the laws that govern it is under assault. Long before the U.S. Supreme Court declared itself the final arbiter of questions of law, lawyers, by filling a seat at every table, assumed the power to make and interpret the rules that govern virtually every aspect of public and private life. The antidemocratic arrogance of the legal profession manifests not only in seizing exclusive power to “say what the law is” but also in a gambit to parlay procedural knowledge and technical superiority in making and interpreting rules into dominance over all U.S. institutions, organizations, and professions.⁵⁶⁸ Lawyers are “jack[s]-of-all-trades”

⁵⁶⁴ See Richard A. Epstein, *Let “The Fundamental Things Apply”: Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1311 (2002).

⁵⁶⁵ Lasson, *supra* note 561, at 928.

⁵⁶⁶ See Daniel A. Farber, *Gresham’s Law of Legal Scholarship*, 3 CONST. COMMENT. 307, 309 (1986), available at https://conservancy.umn.edu/bitstream/handle/11299/164693/03_02_DAF.pdf (explaining why reviews seek, and faculty submit, iconoclastic articles).

⁵⁶⁷ Lasson, *supra* note 561, at 948-49.

⁵⁶⁸ See, e.g., Miller, *supra* note 68, at 26-27 (describing lawyers’ tendency to control other social groups).

without non-legal experience or knowledge,⁵⁶⁹ yet because “[n]obody . . . knows where ‘law’ begins and ends,” every field of human endeavor and social development presents them an opportunity for aggrandizement.⁵⁷⁰ Having arrogated to themselves legal exclusivity, lawyers are indispensable agents within every discipline by virtue of their unique skill in protecting and promoting the legal interests of non-legal institutions, and this translates into power, prestige, and recompense in every field. Social dominance of lawyers, although a reinforcement to the rule of law, comes at a cost.

Whereas experts in non-legal subjects define and solve problems within the social, political, economic, and moral dimensions of their fields, everything is a legal issue for lawyers, who self-conceive as social engineers tasked to enforce compliance with the rules that best accord with and express the norms and principles *they* believe should govern human conduct.⁵⁷¹ Preoccupation with procedure over substance and with “ought” rather than “is”—disciplinary fruits of a field more analogous to religion than science—seduces lawyers into underestimating the wisdom of non-lawyers and ignoring the social externalities of imported rules.⁵⁷² CLOACA, ensconced in ivory towers, is at a great social distance from the subject matter yet exerts heavy influence on LOAC.⁵⁷³ Egos stroked by Supreme Court dictum frocking them as the “priests of

⁵⁶⁹ See Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401, 429 (2007) (“Law however, is regarded not as a discipline in its own right with something of its own to contribute to the interdisciplinary enterprise.”).

⁵⁷⁰ See Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspectives*, in *LAWYERS AND SOCIETY: COMPARATIVE THEORIES* 8-9-03 (Richard L. Abel & Phillip S. Lewis eds., 1989).

⁵⁷¹ See West, *supra* note 452, at 127 (“lawyers . . . hold out hopes for law, lawyers, procedures, and legal forms, even in circumstances where a bald commitment to [law] for the sake of [law] would be seemingly inappropriate, and even wildly so.”).

⁵⁷² See generally Fred Grünfeld, *International Law and International Relations: Norm and Reality or Vice Versa*, 3 AMSTERDAM L. F. 3, 3, 13 (2011), available at <http://amsterdamlawforum.org/article/view/233/411> (discussing epistemological limits of legal scholarship including a disconnect with reality occasioned by the normative nature of law as a field more derivative of religion than positivist science).

⁵⁷³ See Jörg Kammerhofer, *Law-Making by Scholars* 11 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182547 (identifying conditions under and reasons why international legal scholars “make” law).

our democracy” responsible for “mak[ing] responsible citizens,”⁵⁷⁴ CLOACA claims the power and duty to check the normative transgressions it reads into U.S. LOAC observance post-9/11.⁵⁷⁵

“Ownership” of LOAC, defined as primacy in determining, interpreting, and adjudicating the law governing war,⁵⁷⁶ is crucial, because LOAC, to secure compliance, must resonate within the normative universe of its owners. LOAC scholarship produced by those with a knowledge of military history and military experience best accords with the norms of soldiers and respects the utility and limits of law in war.⁵⁷⁷ However, the overwhelming majority in CLOACA are civilians bereft of an empathetic understanding of the variables that drive war and create the universe in which those who fight it live and die; their social distance from the subject compounds this lack of expertise. Unable to comprehend the decisional milieu of soldiers when judging actions in war, these CLOACA professors arguably lack the most essential data. Nonetheless, many are shamelessly undeterred: as the similarly disposed lawyer the Right Honorable Sir Joseph Porter explained through song in Gilbert and Sullivan’s *HMS Pinafore*, the normative passion and ambition that accompanied his legal training were enough to make him First Lord of the Admiralty despite a complete lack of nautical experience: “Stick close to your desk and never go to sea, And you all may be rulers of the Queen’s Navy.”⁵⁷⁸

For ages, state militaries made and interpreted LOAC, guided by the commensurable imperatives of martial honor and national security. Recently, legal absolutists in CLOACA have fed skepticism about whether professional self-regulation can secure compliance by those whose mission is to win wars rather than observe law, arguing for a paradigm in which activists and

⁵⁷⁴ *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

⁵⁷⁵ See Davis, *supra* note 371, at 8 (many legal academics “arrogantly criticize or discredit everybody, but . . . they are *untouchables*”).

⁵⁷⁶ See Anderson, *supra* note 181, at 1 (“Ownership” connotes “authority to declare, interpret, and enforce [LOAC], as well as [to] shape [LOAC] now and in the future.”).

⁵⁷⁷ Elliot, *supra* note 530, at 637.

⁵⁷⁸ GILBERT & SULLIVAN, *HMS PINAFORE* (Decca Music Group 2003) (1892).

international courts exogenously determine and enforce LOAC.⁵⁷⁹ In so doing, they claim primacy over LOAC,⁵⁸⁰ relegating military establishments to a consultancy role, and discounting their time-tested interpretations and practices.⁵⁸¹ CLOACA claims the rise of the war with Islamists triggered an obligation to “hold back the state’s lethality to assure the space of dissent . . . and . . . liberty,”⁵⁸² particularly as it concerns detention, interrogation, and targeted killing. In reality, it has commandeered LOAC and condemned orthodox prescriptions and proscriptions that state military establishments long recognized as binding. That its expropriation of LOAC results in incredible and dangerous rules unworthy of respect by state militaries, fragmentation of the regime, embitterment of academy-military relations, and delegitimation of the idea of law in war matters little to this cloister cosseted from the realities of war.

L. Lack of Political Accountability

Lawyers are accountable solely to the judicial system and their clients, and can thus engage in advocacy on behalf of despised people and causes even if this marks them as “agents of chaos” that rend the social fabric.⁵⁸³ Unaccountability is costly: since the 1970s, engagement on unpopular sides of social issues has eroded their

⁵⁷⁹ Legal absolutists typically lack military service and are disinterested in militaria generally and soldiers specifically. Cf. PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 503 (2002).

⁵⁸⁰ Legal communities “consist of people . . . bound by a shared interest in learning and sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols[,]” and claims regarding what the rules of a regime are and should be. EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* 15 (2005); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 *NYU J. INT’L L. & POL.* 1049, 1051 (2012) (“What counts as law is a function of what a particular community accepts as legitimate.”).

⁵⁸¹ Cf. Anderson, *supra* note 181, at 3 (“[CLOACA scholars] believe [LOAC] belongs to them” and “feel little obligation to acknowledge . . . the [military’s views.]”).

⁵⁸² Davis, *supra* note 370, at 12. By this view, members of CLOACA are not interlopers but “intermediaries who temper the excesses of . . . government and promote *greater* stability in the polity, by deterring the myopia that could otherwise afflict . . . decisionmakers” and “undermine democracy.” Margulies, *supra* note 288, at 390.

⁵⁸³ See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 *G.A. L. REV.* 633, 634 (1994).

prestige. Whereas the legal profession was once a respected institution, Americans now repose the greatest quantum of confidence in the military; only Congress is less trusted than lawyers.⁵⁸⁴

That the anti-democratic tendencies of lawyers are on parade in CLOACA is scant surprise. Whereas U.S. leaders waging war are politically accountable to a people for their safety, unelected Islamists and CLOACA are not.⁵⁸⁵ Without “skin in the game,”⁵⁸⁶ CLOACA has the luxury to render motivated judgments regarding the form and function of LOAC, lodge intemperate criticisms of U.S. policies and personnel,⁵⁸⁷ and “inflate [their] sense of self-importance [as to] that upon which they should . . . be heard.”⁵⁸⁸ CLOACA is just a domestic interest group attempting to leverage expertise and social capital to influence the policies that govern the war against Islamism. Yet because it can offer its condemnations with absolute immunity—legal, political, and reputational—CLOACA is free to exercise influence in a manner that too often imposes costs in American blood and treasure.

⁵⁸⁴ See Lzdia Saad, *Congress Ranks Last in Confidence in Institutions*, GALLUP (Jul. 22, 2010), <http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx> (reporting that the American public ranks the military as the institution in which they hold the greatest confidence, maintains little confidence in lawyers, and has the least trust in Congress).

⁵⁸⁵ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005).

⁵⁸⁶ Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841, 844 (2011).

⁵⁸⁷ Although the following is an example from a work of fiction, the sentiment is accurate. The view that it is preposterous for U.S. troops to be prosecuted by those for whom they have sacrificed much to protect, and judged by standards disconnected from battlefield realities, was expressed by the fictional characters Marine Colonel Nathan Jessup to Navy Lieutenant Daniel Kaffee in the film *A Few Good Men*, when Jessup, angered by Kaffee’s dogged investigation of an enlisted Marine’s death during a disciplinary action, informs Kaffee, “I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom I provide, then questions the manner in which I provide it.” *A FEW GOOD MEN* (Columbia Pictures 1992).

⁵⁸⁸ Anderson, *supra* note 586, at 859-60.

M. Human Rights Absolutism

LOAC is a permissive regime that evolved to humanize war without disabling belligerents from attempting to break adversarial political will. Wars are fought to be won, and LOAC accepts that military necessity can and does require the use of force to kill people so long as those targeted are combatants and the methods and means are consistent with proportionality, distinction, and humanity. By contrast, human rights law is a newer and more restrictive regime conceived to preserve human dignity that purports to prohibit all casualties not strictly required to safeguard human life.⁵⁸⁹ While human rights law does not prohibit all killing in war, it saddles the state with the burden of showing that lethal force was “absolutely necessary” to protect life or public order.⁵⁹⁰ To satisfy this strictest of legal tests, human rights law proclaims that states must minimize not only civilian but military casualties—including both lawful *and unlawful* combatants—and may resort to force *only* if non-lethal measures such as arrest or incapacitation would subject their armed forces to overwhelming risks and/or costs.⁵⁹¹ In short, LOAC facilitates victory through deadly force, with secondary consideration to limiting suffering, while human rights law defends life by narrowing who can be killed, and when and how, with scant concern for military missions. As such, human rights law imposes a far more protective standard than LOAC, and considers protection of human rights much more important than winning wars. It is thus unsurprising that a military commander and a human rights activist weigh military necessity and humanitarian considerations differently,

⁵⁸⁹ See, e.g., Alston Report, *supra* note 128, at 11 (“Lethal force under human rights law is legal if it is strictly and directly necessary to save life.”).

⁵⁹⁰ McKerr v. U.K., Reports of Judgments and Decisions, Eur. Ct. H.R., at 30 (2001); Human Rights Comm., General Comment No. 6, ¶ 3 HRI/GEN/1/Rev. 6 (1982).

⁵⁹¹ David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT’L L.J. 231, 260-61 (2005). Human rights law requires states to minimize all potential casualties—civilians but also lawful and unlawful combatants—when executing military operations. Isayeva v. Russia, 41 Eur. Ct. H.R. 847, ¶ 171 (2005).

or that their opposed norms and goals reflect in these divergent regimes.⁵⁹²

Further, anything can be offered up as a human right,⁵⁹³ and because discovery of human rights is a growth industry⁵⁹⁴ the boundaries of human rights law are in flux.⁵⁹⁵ Further, no clear choice-of-law rules mediate friction between subfields, which developed along different trajectories and can be deeply incompatible.⁵⁹⁶ Conflicts jurisprudence provides that, as *lex specialis*, LOAC takes precedence during war with human rights law “governing . . . lacunae in coverage.”⁵⁹⁷ However, while a “chasm still separates” LOAC and human rights law,⁵⁹⁸ a “growing Western-liberal humanitarian consciousness, which loathes war,”⁵⁹⁹ has encouraged convergence of the subfields⁶⁰⁰ by smuggling human rights norms into LOAC, privileging human rights law at the expense of LOAC, and even denying the applicability of the latter.⁶⁰¹ For human rights absolutists whose “interpretive responsibility” is the elaboration of the broadest possible human rights regime and to end

⁵⁹² See Rudolf Dolzer, *Clouds on the Horizon of Humanitarian Law?*, 28 YALE J. INT’L L. 337, 388 (2001) (differentiating value-systems).

⁵⁹³ See generally Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003) (exploring breadth and contestability of entitlements posited as “human rights”).

⁵⁹⁴ See Margulies, *supra* note 288, at 380 (referencing critics’ use of this term to label a troika of academics, NGOs, and tribunals propounding new human “rights”).

⁵⁹⁵ See Anicee Van Engeland, *Human Rights Strategies to Avoid Fragmentation of International Law as a Threat to Peace*, 5 INTERDISC. J. HUM. RTS. L. 25 (2011) (describing human rights law as suffering under “severe strain” due to “interpretations, approaches, or distortions” of entrepreneurs urging admission of new “rights”).

⁵⁹⁶ See generally RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002).

⁵⁹⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

⁵⁹⁸ Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the International War on Terror?*, 7 THEOLOGICAL INQUIRIES L. 97, 103 (2005).

⁵⁹⁹ Blum, *supra* note 86, at 174.

⁶⁰⁰ See Meron, *supra* note 224, at 243-44 (contending that transformations in war and philosophy have “drawn [LOAC] in the direction of [human rights law].”).

⁶⁰¹ See Satterthwaite, *supra* note 249, at 559 (“[M]any scholars . . . assert[] that [LOAC] is not applicable to the ‘War on Terror’ while insisting human rights law applies instead.”).

rather than regulate war, the best of all possible worlds is the utopia where no human lives are lost.⁶⁰²

Thus, because only states will accept constraints that attenuate the intensity of war and the loss of human life, human rights absolutists champion five “rules”: (1) states must comply with differentially onerous legal regimes, (2) self-defense by states attacked by Islamists is unlawful aggression, (3) states are liable *per se* for all unintended civilian casualties, (4) weapon systems advantaging states are illegal, and (5) non-injurious interrogation methods are torturous.⁶⁰³ That their folly affords Islamists strategic advantage is epiphenomenal to the project of limiting state lethality. That their “humanitarian politics” is not law but aggressive normative entrepreneurship directed against the integrity of the LOAC regime, state ownership of LOAC, and the prospects for Western victory over Islamism does not dissuade them from claiming theirs as the most authoritative interpretation of LOAC.⁶⁰⁴

N. Legal Nullification and Civil Disobedience

The dominant view is that law “resolve[s] and supersede[s]” moral conflicts and provide[s] a framework for coordinated social action in the face of persistent moral disagreement; those whom the law governs are obliged to obey provided it does in fact create a final and peaceful settlement, or at least an accommodation, of conflicts over controversial moral issues and values within this framework.⁶⁰⁵ Further, a person who sincerely believes that a law is morally wrong nevertheless has an obligation to obey it, because the law is better at

⁶⁰² See David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 45 STAN. L. REV. 1955, 1972 (1992-1993) (charging legal scholarship with an “interpretive responsibility . . . to give the best statement . . . of the meaning of human rights”); Meron, *supra* note 224, at 240 (“[H]umanization of [LOAC] [i]s a process of it put[ting] an end to all kinds of armed conflict.”).

⁶⁰³ See generally DINSTEIN, *supra* note 103; O’Connell, *supra* note 35.

⁶⁰⁴ Arguments over which regime governs war are long-settled in favor of LOAC, yet CLOACA continues to assert claims based on human rights law. Anderson, *supra* note 67, at 8.

⁶⁰⁵ See, e.g., W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 366-70 (2004).

securing an accommodation, balancing, or prioritizing among various competing values than a process of individual deliberation; it has authority for this reason.⁶⁰⁶ This duty of obedience to law even in the face of profound disagreement is particularly incumbent upon lawyers because by virtue “of his position in society, even minor violations of law by a lawyer . . . lessen public confidence in the legal profession.”⁶⁰⁷ Zealous advocacy extends no further than the boundaries of law for to permit legal professionals to transgress these would destroy social order and democratic principles.

The dominant view does not preclude legal academics and the lawyers they train, in their advocacy, from incorporating non-legal considerations, such as values, economic interests, social goals, or political preferences, nor deny to them open and notorious challenges to law through scholarship, litigation, or lobbying that make good-faith arguments for legal reform. However, it forbids covert nullification of the law, defined as the “re-introduc[tion] of contested moral values into the domain of law, either in the guise of principles of interpretation or as the basis for an ethically motivated decision to act or not to act on behalf of a client [or a cause].”⁶⁰⁸ For objections to laws they consider unjust or immoral to be consistent with professional duties, legal professionals may not deny the difference between law as it is and law as they wish it to be, and may not offer “interpretations” that do not fairly represent the substance of existing law or acknowledge the transformative nature of their projects. By this dominant view, indulgence in self-serving legal interpretation, even if motivated by noble ends, is impermissible civil disobedience.

Functionalism, by contrast, views law as a structure that embodies, promotes, and protects values.⁶⁰⁹ Law is not intrinsically entitled to respect or obedience but earns both if and only if it

⁶⁰⁶ *Id.* at 368.

⁶⁰⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT r. 8:4 (2013).

⁶⁰⁸ Wendel, *supra* note 605, at 366.

⁶⁰⁹ See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 223 (1996) (describing this alternative view of law).

protects these values;⁶¹⁰ legal professionals must disobey unjust laws and “take reasonable action to restore respect for law.”⁶¹¹ For functionalists, distinctions between law and morality dissolve, and legal professionals may (and perhaps even must) disregard the law to save a life, prevent state abuses, and advance social goals.⁶¹²

One functionalist challenge is simply to violate law through civil disobedience—indirectly as advisor or directly as “comrade.”⁶¹³ A more subtle method offers a motivated “interpretation” interposing the moral judgments of the interpreter as to what the law should be between those of the lawmakers and the interpreter’s actions subtly contravening the law—in effect “nullifying” the law while maintaining the fiction that the nullifier remains a faithful legal subject despite taking actions foreclosed by any fair reading of the law. Nullification is thus a “successful effort to alter or erase enacted law; civil disobedience [is] an [unsuccessful] effort.”⁶¹⁴ Accordingly, functionalism directs obstruction of laws legal professionals believe unjust, preferably through interpretive subterfuge, but if necessary through overt disobedience: “[i]f persuasion, argument, and conflict within the law fail to prompt the dominant society to . . . reorder

⁶¹⁰ See Heidi M. Hurd, *Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn't)*, 42 SAN DIEGO L. REV. 75, 76 (2012) (“[I]f there are weightier reasons to break the [law] than to abide by it[,] the fact that what one is breaking is a [law] is no more significant than . . . breaking . . . a stick.”); Martin Luther King, Jr., *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 84-85 (1963) (“[O]ne has a moral responsibility to disobey unjust laws [because] an unjust law is no law at all[.]”).

⁶¹¹ Yaroshefsky, *supra* note 229, at 580-81.

⁶¹² See Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 746-47 (1991) (accepting that a legal professional may violate law to advance social goals); Yaroshefsky, *supra* note 229, at 599 (advocating lawbreaking “when failure to do so results in . . . violations of . . . [LOAC].”); Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191, 195 (2001) (justifying legal disobedience to save life).

⁶¹³ See David J. Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 800 (1991) (“[A] lawyer can join the client as a comrade[.]”).

⁶¹⁴ Simon, *supra* note 609, at 231 (Functionalism theorizes “strong support in the culture . . . for . . . purposive . . . interpretation that shades into nullification.”).

principles, then . . . activity outside the law, against the law, and around the law may be required.”⁶¹⁵

CLOACA is a functionalist camp that views existing LOAC as insufficiently protective of human life and dignity, on its face or as applied by the United States. Some acknowledge existing LOAC yet disfavor it on one ground or several and make arguments calling quite openly and transparently for its modification. However, a larger corpus of CLOACA scholarship cannot fairly be characterized as anything but calls for academic nullification and even civil disobedience. CLOACA reflexively resolves differences of opinion on LOAC against the United States and its policies, and uniformly claims, contrary to facts, the plain language of legal sources, the well-settled interpretations of civil and military courts, and the practice of national militaries, that the United States was not attacked on 9/11 and cannot engage in self-defense, that there is no such thing as unlawful combatants, that stress without injury constitutes torture, and that use of a UAV in Pakistan to kill an Islamist is murder whereas the same act with a sniper rifle across the border in Afghanistan is lawful. By mulishly denying that their legal aspirations are faithful only to their political program, CLOACA commits acts of nullification.

Occasionally, in agitating for imposition of criminal liability upon the senior U.S. leaders who design and implement war policies, and by leveling malicious accusations to hector and harry these leaders into paralysis or prison, CLOACA crosses over into civil disobedience with scholarship that indicates they do not view LOAC as a universally applicable regime but rather as a set of infinitely malleable tools employed to benefit particularized interests, in particular the Islamist cause. This latter body of work owes a debt to Critical Race Theory, a paradigm in which race plays the same role as class in Marxist theory. In Critical Race Theory, existing legal structures reflect the racist society that constructed them, and racially oppressed groups are entitled to self-determine which laws are valid and worth observing and which can be disobeyed to relieve their

⁶¹⁵ Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1815-16 (1992).

subordination.⁶¹⁶ For CLOACA, religion plays the same role as race in Critical Race Theory and as class in Marxism, and Muslims, oppressed by Western political, economic, and military hegemony, are entitled to disregard any and all rules of LOAC that reinforce their military disadvantage and thus their political and economic subordination to the West.

In sum, CLOACA ignores existing LOAC, offers bad-faith interpretations where it has gaps or ambiguities, and misrepresents normative preferences for what LOAC should be as positive assessments of what LOAC is. Its failure to uphold its responsibilities under the dominant view of law, and its resort to nullification and civil disobedience rather than debate, persuasion, and dialectic synthesis, suggests that the canons, customs, and norms that instantiate CLOACA are fundamentally anomic and unprofessional.

O. Anti-Militarism

Liberalism—a philosophy that promotes individual rights, champions human perfectibility, and regards peace as man’s natural state—dominates U.S. civil government.⁶¹⁷ Conservatism—a communitarian philosophy convinced of human imperfectability and war as man’s default condition—instantiates the military.⁶¹⁸ U.S. civil-military relations thus necessitates cooperation between groups that see man, the state, and war differently, and a civil-military bargain provides that, in exchange for military nonintervention in

⁶¹⁶ See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* (2001) (postulating the core tenets of Critical Race Theory).

⁶¹⁷ See SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 89, 144 (1957). Liberalism is a “set of political, economic, religious, educational, and other social beliefs that emphasize freedom of the individual, . . . participatory government[,] tolerance[,] social progress[,] egalitarianism and [minority] rights, secular rationality[,] and positive [state] action to remedy social deficiencies.” FRED KERLINGER, *LIBERALISM AND CONSERVATISM: NATURE AND STRUCTURE OF SOCIAL ATTITUDES* 15 (1984).

⁶¹⁸ Conservatism is a “set of political, economic, religious, educational, and other social beliefs . . . emphasi[z]ing stability, religion and morality, liberty and freedom, the natural inequality of men, the uncertainty of progress, . . . distrust of human reason [and] majority rule, . . . individualism, [and] private property[.]” KERLINGER, *supra* note 617, at 63-65, 93-94.

politics, civilian government accepts military guidance in war decisions. Until the 1960s, the bargain held, and the military—the sole institution with the expertise and valor required to defend the republic—was the revered national guardian.⁶¹⁹

However, the Vietnam War convinced liberals of a martial threat to democracy, peace, and the entire liberal project.⁶²⁰ “Visceral repugnance of anything . . . military . . . began [in] the academ[y]”⁶²¹ and caused a cultural divorce between civilians and the military and Left and Right. Academics are joined in the vanguard of military vilification by leading Democratic politicians who see the troops as a “constant reproach to their own strategic amateurism and privileged absence from service.”⁶²² A popular majority, while pro-military, ratifies an arrangement whereby a tiny fraction of serving Americans “make[s] all the sacrifices to defend the nation.”⁶²³

Ignorance of and revulsion for the military is rampant in CLOACA scholarship, evincing that its authors despise the martial caste and military self-regulation. CLOACA scholarship that would subordinate military necessity to the lives of unlawful Islamist combatants, nullify and disobey LOAC to advance political preferences, dismiss military wisdom, and criminalize troops who carry into effect policies firmly grounded in existing LOAC dispenses with any pretense that its authors regard the military as national guardians. *Sub silentio* substitution of uninformed value judgments regarding what should be lawful in war imposes dangerous constraints upon the military, creating the strong inference that hatred of the military and its values drives CLOACA.

⁶¹⁹ MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER* 231 (1960).

⁶²⁰ See HUNTINGTON, *supra* note 617, at 156 (noting American liberal belief that the military is “an obstacle to . . . [liberal] aims.”).

⁶²¹ CHARLES C. MOSKOS, *THE AMERICAN ENLISTED MAN* 34, 157, 178-79 (1970).

⁶²² NIELSEN & SNIDER, *supra* note 527, at 25.

⁶²³ *Vet Views on Society and Service*, 99 *VETERANS OF FOREIGN WARS*, no. 4, 2012, at 16.

P. Pernicious Pacifism

For most Americans, “violence used to defend and protect the social order is rational and legitimate.”⁶²⁴ Even if they are not themselves physically or temperamentally suited to take up arms in their own defense,⁶²⁵ Americans approve of the use of force to defeat Islamism. A small but influential segment of the population, however, utterly disapproves of the U.S. use of force on ideological grounds.

Pacifism⁶²⁶ is a worldview that discounts the idea of enemies,⁶²⁷ condemns war,⁶²⁸ scorns soldiers as “warmonger[s],”⁶²⁹ countenances appeasement,⁶³⁰ and urges disarmament.⁶³¹ Academic

⁶²⁴ HARRIS, *supra* note 474, at 173. Negotiation backed by the threat of, and will to use, force are credited by most Americans with keeping them safe. *Id.* at xv, 66.

⁶²⁵ The metaphor of sheep, sheepdogs, and wolves to describe the masses, warriors, and evil malefactors, respectively, where the sheep are defenseless by design, the sheepdogs are capable of great violence but trained to protect the sheep, and the wolves are atavistic killers, is illustrative. See DAVID GROSSMAN, SHEEP, SHEEPDOGS, AND WOLVES (1998) (describing that most people are “kind, gentle, productive” sheep, and soldiers and other warriors are “needed to protect them” from the wolves).

⁶²⁶ See MARIAN MOLLIN, RADICAL PACIFISM IN AMERICA 3-47 (2006) (identifying “resistance to war and opposition to racism,” “social justice,” “civil rights[,]” “anti-imperialism,” and anticapitalism as subconstructs of pacifism).

⁶²⁷ See, e.g., GROSSMAN, *supra* note 625, at 1-3 (“Sheep . . . live in denial” and “do not want to believe that there is evil in the world[.]”); HARRIS, *supra* note 474, at 66 (“[Pacifists] genuinely can’t fathom ruthlessness . . . because their idealism refuses to countenance such an illiberal truth.”).

⁶²⁸ See Colin S. Gray, *How Has War Changed Since the End of the Cold War?* 35 PARAMETERS 14, 24 (2005) (pacifists believe “humankind . . . is ceasing to regard warfare as acceptable.”).

⁶²⁹ HUNTINGTON, *supra* note 617, at 115. In effect, pacifists are sheep that “do not like the sheepdog . . . [because] his fangs and . . . capacity for violence . . . [provide] a constant reminder that there are wolves in the land.” GROSSMAN, *supra* note 625. Pacifists are also free-riders who “do not feel they are in any real danger from their countries’ enemies” but know that “if push comes to shove, the 101st Airborne will ultimately ensure their safety.” Victor Davis Hanson, *The Future of Western War*, 38 IMPRIMIS, no. 11, 2009, at 5.

⁶³⁰ Pacifists appease enemies, as exemplified by the diplomatic efforts of British Prime Minister Neville Chamberlain in offering Czechoslovakia to Germany in the foolish hope the concession would sate Adolf Hitler. *On This Day, 30 September*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/30/newsid_3115000/3115476.stm (last visited Apr. 13, 2015).

pacifists regard war as a malignancy spawned by nationalism and a dearth of international dispute settlement institutions.⁶³² Despite spectacular failure in the 1930s, when confronted by Nazism and Fascism, pacifism is a state religion in Europe, and it came as scant surprise, post-9/11, that some Western states maintained low military profiles, “hop[ing] the [United States] w[ould] take care of the terrorists, or that the terrorists [would] just go away.”⁶³³ That the United States used force in a coalition-of-the-willing to self-defend, and that allied military powers relied on orthodox LOAC interpretations to defeat their enemies efficiently, was intellectually discomfiting to pacifists.

Although no membership roll exists, pacifism counts CLOACA professors in its *avant garde*, and its philosophical commitments are woven assiduously into their scholarship. On every salient issue ranging from the lawfulness of the U.S. response to 9/11 to whether a warfighting or law enforcement paradigm is appropriate, whether U.S. interpretations of LOAC sufficiently protect various status categories, whether U.S. methods of detention and interrogation comply with LOAC, and whether, where, how, when, and with what the United States and its allies may attack enemies, CLOACA takes the position that would frustrate and criminalize U.S. conduct. By illustration, in just two paragraphs of an article, a prominent CLOACA member claims the United States engaged in a conspiracy to “conceal, distort, or mischaracterize events” and “undermine international order” in responding to Islamist attacks, that it had no legitimate claim to self-defense, that its troops are murderers as it was unnecessary and immoral to engage in war at all, and that it was obliged to capture Islamists rather than kill them.⁶³⁴ Such a screed would be impossible without application of every premise of pacifism: that Islamists pose no threat, that senior

⁶³¹ “War abolitionists” pray that “reason will prevail and all international disputes will be resolved by nonviolent means.” Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY L. 3, 4 (1997).

⁶³² See HUNTINGTON, *supra* note 617, at 151 (“[Pacifists believe] all that is needed [to end war] is . . . the elimination of nationalistic . . . and bellicose propaganda” or “international . . . machinery for the pacific settlement of disputes.”).

⁶³³ ALEXANDER, *supra* note 460, at 228.

⁶³⁴ O’Connell, *supra* note 212, at 18-20.

U.S. leaders are warmongers who catalyze the conflict, and that but for U.S. policies peace with Islamists could be negotiated. That it is to those persons who join together cosmopolitanism, institutionalism, and international rule of law—namely, CLOACA—whom we must turn if we are to extricate ourselves from an illegal war follows ineluctably.

Q. Useful Idiocy

“Useful idiot,” a pejorative coined by Vladimir Lenin to label a member of the Western opinion elite who promoted the Soviet Union, providing free propaganda⁶³⁵ service even as the evil dictatorship held the Westerner in contempt for his pathological naivete in believing himself to be doing noble work,⁶³⁶ describes many in CLOACA. Useful idiocy assumes three forms.

In the first, useful idiots fabricate a history of Islamic achievement to stage Islam as the intellectual and moral equal of the West. Second, they describe the war with Islamists as a fleeting anomaly attributable to a trifling group of troublemakers breaching the tenets of their own religion rather than a divinely mandated conflict.⁶³⁷ Useful idiots separate Islam from Islamists by attributing to the former principles in common with the West, including “justice and progress” and “the dignity of all human beings,” that will facilitate return to an allegedly long relationship of “co-existence and cooperation.”⁶³⁸ That the relationship is bloody, and that by conducting *jihad* Islamists discharge their religious obligations as

⁶³⁵ “Propaganda” is the deliberate manipulation of facts, ideas, and information to convince a selected audience of the truth of a proposition and to motivate desired political action favorable to the cause of the party employing it. JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES* (Konrad Kellen trans., Vintage Books ed., 1973) (1965).

⁶³⁶ See Solzhenitsyn, *supra* note 449 (“[The] Communist regime could stand and grow due to the enthusiastic support from an enormous number of Western intellectuals who felt a kinship and refused to see Communism’s crimes.”).

⁶³⁷ For a discussion of politically motivated attempts to equate Islamic intellectual history with that of the West, see MCCARTHY, *supra* note 239, at 244.

⁶³⁸ President Barack Obama, Address in Cairo, A New Beginning (June 4, 2009), available at <http://www.whitehouse.gov/blog/NewBeginning/transcripts>.

they understand them, are inconvenient but stubborn facts.⁶³⁹ Third, useful idiots dismiss the “Green Peril” as a wildly exaggerated “*trope du jour*”⁶⁴⁰ because Islamic VNSAs are mere spiritual bands led by benign philosophers whose disunity precludes any threat to the West.⁶⁴¹ This view converts wariness of Islamism into “Islamophobia,”⁶⁴² rendering others reluctant to speak truth lest they be smeared as bigots or hounded from jobs.⁶⁴³

Self-censorship is now endemic: Western elites label Islamists “militants” or “insurgents” rather than “terrorists” or “murderers”⁶⁴⁴ and even cease noting that perpetrators of attacks are Islamists.⁶⁴⁵ If useful idiots concede any Islamist threat, they hedge, claiming it is engaged in a purely defensive struggle against “militant anti-Muslim fundamentalists”⁶⁴⁶ responsible for the poverty of Islamic lands—the result of Western economic imperialism—and the abuse of expatriate Muslims’ civil rights.⁶⁴⁷ That it is *Islam* on the

⁶³⁹ The phenomenon whereby opinion elites present a sanitized version of Islam that ignores its long *jihad* against the West predates 9/11; since the 1980s, “prominent professors of Middle Eastern studies [have] tried to wish away the growing threat of radical Islamism . . . [and have] simply refused to study extremist Muslims[.]” de Russey, *supra* note 66, at 6.

⁶⁴⁰ See Margulies & Metcalf, *supra* note 479, at 440 (using the phrase to suggest the perception of Islamism as a threat is false and manufactured for political purposes).

⁶⁴¹ See generally JOHN ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY* 411 (1992) (contending that Islamism presents no threat).

⁶⁴² Wells, *supra* note 477, at 159–68.

⁶⁴³ See Michael Mukasey, *Executive Power in Wartime*, 40 IMPRIMIS, no 10, 2011, at 1, 3–4 (“[W]e are handicapped . . . by the refusal . . . to acknowledge [Islamist] goals[.]”).

⁶⁴⁴ See Samuel Estreicher, *Privileging Asymmetric Warfare (Part III)?: The Intentional Killing of Civilians Under International Humanitarian Law*, 12 CHI. J. INT’L L. 589, 590–91 (2011–2012) (criticizing reluctance to make evaluative judgments about [Islamists] as self-censorship); *Id.* at 593 (“[Islamists] are killers, murderers.”).

⁶⁴⁵ See Bruce Hoffman, *Defining Terrorism*, 24 SOC. SCI. REV. 6, 20–34 (1986) (criticizing Western elites’ refusal to use the word “terrorism” in referencing attacks).

⁶⁴⁶ See Leon T. Hadar, *What Green Peril?* 72 FOR. AFFAIRS 27, 32 (1993).

⁶⁴⁷ See Rhaj Bhala, *Poverty, Islamic Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy—Agricultural Tariffs and Subsidies*, 2 U. ST. THOMAS L.J. 1, 10, 19 (blaming Islamism on Western economic manipulations alleged to deprive Muslims of jobs, education, and welfare); Peter Margulies, *Foreward: Risk, Deliberation, and Professional Responsibility*, 1 NAT’L SECURITY L. &

offensive, more tolerant of vast wealth disparities, and more abusive of its citizens' rights than the West, is irrelevant.⁶⁴⁸ To today's useful idiots, just as to previous generations shilling for the Soviets, the West is always to blame. The most inane CLOACA proposal advises Western withdrawal from Islamic lands and abandonment of non-Islamic regimes so a recreated Caliphate, applying *Shari'a*, can create 'legal stability' and enable coexistence.⁶⁴⁹ That this is a surrender proposal either escapes or accords with its author who, with all useful idiots, has crossed into a state of affective solidarity excusing Islamist barbarism and suffusing empathy for their goals in his work.⁶⁵⁰

In sum, useful idiots insist that envisioning Islamism as a threat is a hateful act against an entire civilization while demanding that the West terminate economic, political, and military aggression against Islam to end the war. It is difficult to conceive of these and other views developed in CLOACA scholarship as anything other than monuments to useful idiocy.

R. *Liberal Bias*

For the second time in 150 years, Americans are fighting a civil war.⁶⁵¹ Divided along ideological rather than geographical lines, and battling in universities and media rather than fields and forests, Americans lack a common core of beliefs and preferences about rights, duties, and the state. While conservatives tend to foreign policy and defense and use force to protect U.S. interests, liberals view war as evil, are consumed with eliminating domestic

POL'Y 357 (2005) ("[I]nequality . . . breed[s] violence . . . by giving [Islamist] political entrepreneurs . . . capital for their ventures[.]").

⁶⁴⁸ See Robert J. Delahunty, *Trade, War, and Terror: A Reply to Professor Bhala*, 9 U. ST. THOMAS L.J. 1, 161 (2011) (debunking Bhala and Sunstein theses). Almost forty years ago, Solzhenitsyn chided the Left, observing that "[w]hen a [Western] government starts an earnest fight against terrorism, public opinion immediately accuses it of violating the terrorists' civil rights . . . out of a benevolent concept according to which there is no evil inherent to human nature[.]" Solzhenitsyn, *supra* note 449.

⁶⁴⁹ See NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* 3 (2008).

⁶⁵⁰ See Margulies, *supra* note 321, at 174 (labeling as "affective solidarity" the "bonds of empathy" and trust that link those joined in this state of being).

⁶⁵¹ See PODHORETZ, *supra* note 59, at 14-15 (describing the Left-Right battle over LOAC and post-9/11 law and policy as "nothing less than a kind of civil war").

inequalities, and pay short shrift to external threats.⁶⁵² Whereas conservatives embrace a capitalistic order and the military that defends it,⁶⁵³ the Left views the United States as an unjust nation wherein only if elites radically remake belief systems and institutions—including the military—can poverty, sexism, racism, and war be ended.⁶⁵⁴

Liberals have staked out the academy as the prime site of cognitive transformation. Over the last half-century, universities, once “protectors of reasoned discourse” where “scholars [worked] in sylvan tranquility” to generate knowledge and develop critical thinking, have morphed into “hotbeds of radical[ism]” marked by “an aberrational form of political correctness [and] the abandonment of reliance on facts, common sense, and logic.”⁶⁵⁵ Social change, not rigorous search for truth, is the lodestar for academics dedicated to inculcating “correct” views.⁶⁵⁶ Leftist scholars do not cavil from “censor[ship] in the name of higher moralities” or excommunicating heretical students and faculty; those failing to address “appropriate” issues, ask proper questions, and reach approved conclusions have difficulty entering and remaining in the academy.⁶⁵⁷ In no field is this more deliberately orchestrated than law.

⁶⁵² NIELSEN & SNIDER, *supra* note 527, at 96, 101.

⁶⁵³ See generally J.T. Jost et al., *Ideology: The Resurgence in Social, Personality, and Political Psychology*, 3 PERSP. PSYCHOL. SCI. 126 (2008).

⁶⁵⁴ *Id.* (elaborating the liberal catechism). Liberals believe there is a “need [for elites] to lea[d] human behavior” and change beliefs. Sunstein, *supra* note 647, at 197.

⁶⁵⁵ Fallon, *supra* note 518, at 232. Liberal academics eschew traditional scholarship because they “believe it is their mission to crusade against wrongs and cure every ill the world has ever known[.]” STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME*, 10-12 (2008).

⁶⁵⁶ This practice breaches a fiduciary responsibility inasmuch as “the trust that society has placed in academics . . . [is] grounded in certain assumptions about academic conduct[.]” including a “detached cast of mind” and a willingness “to read and to think about arguments on both sides of an issue.” FISH, *supra* note 655, at 168. Many academic liberals, however, would rather “crusade against wrongs and cure every ill the world has ever known[.]” *Id.* at 10-12, 168.

⁶⁵⁷ Hamilton, *supra* note 443, at 335. An example is Middle East studies, a field where conservatives typically adopt a pro-Israel stance and liberals a pro-Palestinian, pro-Islamic outlook. Many departments “repress legitimate debate concerning Israel” and systematically exclude pro-Israeli viewpoints, students, and faculty from

A century ago, liberal elites began engineering the legal profession to rectify perceived injustices. By hiring and tenuring faculty on the basis of their commitment to the liberal project, the Left politicized and reconfigured legal education.⁶⁵⁸ By the 1970s, much of the U.S. legal academy was adamant that the purpose of law schools was to “develo[p] the theory and practice of . . . progressive interpretation of the [U.S.] constitutional tradition” and that scholars must pledge themselves “not [to] the study of dominant doctrinal results, but [to] development of creative arguments that do justice to [marginalized] persons and groups.”⁶⁵⁹ Naturally, only arguments reinforcing liberal public culture were understood to “do justice,” and liberal legal academia came to tolerate but one methodological approach to discovering knowledge (application of progressive tenets), one interpretive objective (justice for the “marginalized”), and one epistemological standard (truth is the progressive march toward social justice). As liberal legal academia waxed more potent and dedicated to doing whatever necessary to achieve its transformative project, including stripping legitimate authority from government, the military, police, courts, and law itself,⁶⁶⁰ scholarship and scholars that challenged the liberal project were anathematized to prevent the dwindling stock of conservatives in the legal academy from interfering.⁶⁶¹

Thus are many elite law schools uniformly Leftist,⁶⁶² and thus do liberals outnumber conservatives by 20:1 or more at most law schools. Although they may sincerely believe their ideology does not

participating. U.S. COMM’N ON CIVIL RIGHTS, FINDINGS AND RECOMMENDATIONS OF THE U.S. COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM (2006).

⁶⁵⁸ See AUERBACH, *supra* note 70, at ix, 4-76, 77-92 (describing liberal Progressive assertion of control of the legal academy to use law to make society more “just”).

⁶⁵⁹ Richards, *supra* note 602, at 1956, 1974.

⁶⁶⁰ See AUERBACH, *supra* note 70, at xii (describing the liberal legal academy’s antiauthoritarian activism against institutions of social control).

⁶⁶¹ McGinnis et al., *supra* note 71, at 1168. Ostracism and threats to employment are visited upon efforts by conservatives to counter liberal legal academic hegemony. See John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL ST. J., Apr. 1, 2003, at A14 (discussing these risks).

⁶⁶² See Devins, *supra* note 515, at 173 (“[M]ost law professors are left-liberal Democrats.”); McGinnis et al., *supra* note 71, at 1168; Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI. KENT L. REV. 765, 780 n.54 (1998) (less than ten percent of law faculty are conservative).

affect their work,⁶⁶³ liberal legal academics are disposed to interpret information in a manner consistent with their ideological biases, which are important determinants of their scholarship.⁶⁶⁴ A few liberal leaders of the legal academy concede their vulnerability to the charge that their scholarship is marred by “a larger trend toward highly partisan . . . left-wing activity, in which law professors do not care about truth but instead push . . . [a] political agenda.”⁶⁶⁵

Within CLOACA, the “hammer and sickle lens”⁶⁶⁶ warps the projection of issues, as well as who may project them. The few remaining conservatives are elbowed away from LOAC, and scholarship, teaching, and advocacy are politicized.⁶⁶⁷ Too often, CLOACA not only foregoes a dispassionate search for knowledge but makes no pretense of a search at all: as with other matters of faith, it is only necessary that the correct conclusions be reached and that prescribed heroes and villains be lauded or excoriated. Consider that, although CLOACA made no attempt to disguise its virulent hostility to George W. Bush or its desire that his policies of coercive interrogation, military commissions, and targeted killings fail in Iraq and other battlefields, CLOACA criticism of these policies—most of which were expanded by the Obama administration—became nuanced, sparse, and muted after Inauguration Day in January 2009.

The most cogent example that CLOACA has abandoned all neutrality is its suggestion that Islamists whom U.S. troops meet on

⁶⁶³ See Jost et al., *supra* note 653, at 126 (“[It] is difficult to see our own moral and political convictions as springing from anything other than . . . reason and . . . evidence.”).

⁶⁶⁴ See McGinnis et al., *supra* note 71, at 1169 (referencing this research); see also Michael Vitiello, *Liberal Bias in the Legal Academy*, 77 MISS. L.J. 507 (2007).

⁶⁶⁵ Sunstein, *supra* note 526, at 199. Were this not so, could Bernadine Dohrn, founder of the Leninist terror group Weather Underground, which advocated violent overthrow of the Constitution, bombed government buildings, robbed banks, and earned her a spot on the FBI Ten Most Wanted List and a series of felony convictions, become a law professor at Northwestern, or Kathy Boudin, another Underground founder and convicted murderer, be named Sheinberg Scholar-in-Residence at NYU Law School?

⁶⁶⁶ ROBERT PATTINSON, WAR CRIMES 9 (2007).

⁶⁶⁷ See McGinnis & Schwartz, *supra* note 661 (reporting that very few conservatives are permitted to teach “subjects that set the agenda for debate on the hot button issues of our time,” including LOAC).

foreign battlefields are not unlawful combatants bent on killing Americans, but merely “marginalized people,” not unlike impoverished or homosexual Americans, who deserve that CLOACA spend “the next decade [in] reflections on the policies undertaken in the name of national security [to] prob[e] . . . not just what [LOAC] should be, but how it functions and whom it serves.”⁶⁶⁸ In essence, after 9/11, the United States, facing no threat, chose to perpetuate an evil national history stained by the original sins of slavery and Indian genocide and other acts of discrimination against minorities and women by waging a racist, imperialist war against Islam. With this and other works riddled with liberal bias, CLOACA is indefensible against the charge that its ideological agenda overwhelms its duty to seek and disseminate truth regarding what LOAC is and what it permits to a nation engaged in an existential conflict.

S. *Intellectual Dishonesty*

It is one thing to lack the tools to discover truth; it is another to deny or obfuscate it in service to a confounding ideology. Intellectual honesty demands that, in conducting and disseminating research, scholars diligently consider all available evidence, evaluate competing hypotheses, rule out alternative explanations, and reach complete, defensible, and fair judgments.⁶⁶⁹ In the Fourth Generation War with Islamism, intellectual dishonesty assumes two forms.

First, contrary to history and Islamist interpretations of the *Qur'an*, CLOACA asserts that either the Islamist Way of War is compatible with LOAC or Islamists categorically breach their professed faith. Second, either to influence public policy by making “correct” arguments⁶⁷⁰ or further the Islamist cause,⁶⁷¹ they contend that the policies of the United States—a nation born in 1776—caused

⁶⁶⁸ Margulies & Metcalf, *supra* note 479, at 471.

⁶⁶⁹ See Eric Cheyfitz, *The Corporate University, Academic Freedom, and American Exceptionalism*, 108 S. ATL. Q. 701, 720 (2009).

⁶⁷⁰ See Fallon, *supra* note 518, at 37 (attributing academic temptations to “tailor . . . arguments to our audiences” to “achieve an . . . influence on public events[.]”).

⁶⁷¹ See Estreicher, *supra* note 644, at 602 (intimating that some CLOACA academics do “favor[] the merits of the underlying [Islamist] cause[.]”).

an ancient Occidental-Islamic conflict, and only U.S. disengagement will bring peace. “[I]ntellectual distortions”⁶⁷² are legion and are the work of “militant[s] disguised as [scholars] no different than [Islamists] in Afghanistan”⁶⁷³ insofar as both shred their vocational rules.

Fighters in academic garb support Islamism because their pronouncements masquerade as apolitical, detached, and expert analyses dispositive of the issues they address. If they acknowledged ideological solidarity with Islamists, disciplined and integral CLOACA scholars might produce scholarship that, although gravid with militant bias, bore some redeeming virtue. Dishonest concealment of their positional solidarity with Islamists, however, vitiates the persuasive force their works might otherwise exert.

T. Moral and Physical Cowardice

For the ancient Greeks, *thumos* was the ferocious passion in defense of family, *polis*, and justice they believed was deeply embedded in human nature and would overcome fear and base instincts toward self-preservation when these values were threatened.⁶⁷⁴ Also known as “civic courage,” *thumos* has been declining in the West at least since the late 1970s, when Alexander Solzhenitsyn warned of the catastrophic consequences of its failure at the height of the Cold War:

The Western world has lost its civil courage . . . [I]ntellectual elite[s] . . . base state policies on weakness and cowardice . . . [T]hey get tongue-tied and paralyzed when they deal

⁶⁷² See Paul Marshall, *Islamophilia*, COMMENTARY 61, 61-65 (June 2008) (reviewing NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008)) (describing a “profoundly regrettable tendency toward intellectual distortion” in a CLOACA academic’s mischaracterization of the severity of the Islamist threat).

⁶⁷³ d’Aspremont, *supra* note 77, at 16 (condemning academic “deceit, duplicity, and fraud.” CLOACA scholars can either be transparent about the “cap” they wear (scholar or militant) and keep these two functions separate or abandon the pretense to scholarship and “tak[e] to the street” and join militants in direct action. *Id.* at 17.

⁶⁷⁴ See generally Susan M. Purviance, *Thumos and the Daring Soul: Craving Justice*, 11 J. ANCIENT PHIL. 1 (2008).

with . . . terrorists . . . [F]rom ancient times decline in courage has been considered the beginning of the end.⁶⁷⁵

Although the West rallied to defeat Communism, the universal liberal civilization that followed deemed moral and physical courage unnecessary, and prior to 9/11 the ties that joined the nations of the West were already fraying. After 9/11, most Western nations either refused to do battle or, like Spain, exited once Islamists threatened their homelands. Americans, however, bifurcated into a majority strongly behind the counterattack and a liberal elite that denied the Islamists were their enemy or “hope[d] that by pretending that the enemy is simply misguided, or misunderstood, or politically immature, he will cease to be an enemy.”⁶⁷⁶ Worse, domestic blocs engaging in “ostrich politics”—burying their heads in the sand in the hope threats vanish—resented those willing to fight for exposing them as cravens desperate to disguise abstention and petrifying fear as wisdom. As liberal contempt for *thumos* infected the polity, it eroded social cohesion catalyzed by 9/11 and left the United States less self-confident and less capable of self-defense.⁶⁷⁷

Those whose cowardice impels them to recommend surrender and subordination under Islamic imperium in concession for survival either misunderstand their opponents or share their objectives.⁶⁷⁸ Among those most bereft of moral and physical courage and most contemptuous of those who possess it are CLOACA didacts who, risking nothing more life-threatening than paper cuts or eye strain, produce scholarship intended to convince Americans that the soldiers risking death and grievous bodily harm on their behalf are *not* performing valorous and sacrificial acts in defense of their *polis* because Islamists pose no threat or are nothing worse than an itch to be scratched with domestic criminal law. The inference to be drawn is that, rather than individuals deserving of

⁶⁷⁵ Solzhenitsyn, *supra* note 449.

⁶⁷⁶ HARRIS, *supra* note 474, at xiv.

⁶⁷⁷ See Chief Rabbi Sir Jonathan Saks, *How to Reverse the West's Decline*, available at <http://standpointmag.co.uk/node/4049/full> (“[W]hen a people lose the will to defend themselves” they “become easy prey[.]”).

⁶⁷⁸ See Curtis F. Doebbler, *How Can We Really Protect National Security*, 9 ILSA J. INT'L & COMP. L. 399, 405 (2003) (counseling concessions as the price of survival).

honors as noble bearers of *thumos*, U.S. troops are, at best, pitiable dupes, and at worst, moral culprits waging an unnecessary and illegal war.

U. *Anti-Americanism*

Although racial, religious, and cultural heterogeneity correlate with a global decline in nationalism,⁶⁷⁹ and despite a counterculture, born of the anti-Vietnam War movement and a post-Watergate skepticism about government, that proclaims genuine patriotism to be condemnation of the nation and its policies,⁶⁸⁰ the United States has thrice in the past century risked its blood and treasure to save the West and protect liberty and the rule of law. The American majority is still proud, self-confident, and able and willing to use force to defend national interests. Yet a chasm between mass and elite opinion is widening.

Many intellectuals ignore the virtues of their republic to focus on its vices real and imagined, and deliver demoralizing anti-American criticism as a “civic duty.”⁶⁸¹ Moderate critics huff that the country is a “pushy and preachy” nation after undeserved advantages in world affairs⁶⁸² that must abandon pretensions to hegemony and accept a graceful decline.⁶⁸³ Sharper neo-Marxist critics trumpet the basic badness of the United States and the inevitability of its destruction. “Guerrillas-with-tenure” claim the country must be defeated to eradicate racism, colonialism, militarism, Zionism, and capitalism.⁶⁸⁴ Academic extremists insist the United States deserved

⁶⁷⁹ Stanley G. Payne, *On the Heuristic Value of the Concept of Political Religion and its Application*, 6 TOTALITARIAN MOV. & POL. RELIG. 163 (2005).

⁶⁸⁰ See CITIZEN ESPIONAGE: STUDIES IN TRUST AND BETRAYAL 57 (Theodore R. Sarbin et al. eds., 1994) (describing countercultural anti-patriotism, which regards criticism, sabotage, and espionage as “higher patriotism” and love of country as “blindly jingoistic”).

⁶⁸¹ See generally Luban, *supra* note 491 (explaining patriotism as advocacy against the United States).

⁶⁸² Koh, *supra* note 376, at 1481.

⁶⁸³ See, e.g., RICHARD W. MILLER, GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER 125 (2011).

⁶⁸⁴ See generally ADRIAN GUELKE, THE NEW AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM (2008) (examining this radical critique).

9/11,⁶⁸⁵ moving one to proclaim that “[a]nyone who can blow up the Pentagon gets my vote” and another to encourage a “million Mogadishus,”⁶⁸⁶ recalling the 1993 deaths of eighteen U.S. troops hunting Al Qaeda-allied Somali warlord Muhammad Aidid. Yet another claims “the [United States] is . . . a greater threat to peace and stability in the [Middle East] than ISIS.”⁶⁸⁷

CLOACA so clearly shares this disdain for the United States that it is difficult to rebut the inference that, like scholars in cognate fields, it longs for American defeat. Two CLOACA scholars concede as much, arguing that the only just resolution to the war in Afghanistan requires the United States to withdraw forces and cede rule to the Taliban—a not-so-subtle surrender proposal.⁶⁸⁸ Although others are less voluble in their disloyalty and more temperate in their writings, their work is conducive of the same dystopic future.

V. *Islamophilia*

“Islamophilia” is a condition of pathological solidarity with Islamism brewed from anti-Semitism, mutual Leftist-Islamist enmity toward U.S. constitutional government, xenophilia, and accord with

⁶⁸⁵ PODHORETZ, *supra* note 59, at 87 (noting that, for the academy, “the ultimate cause [of 9/11] is . . . U.S. foreign policy”); James Traub, *Harvard Radical*, N.Y. TIMES (Aug. 24, 2003), <http://www.nytimes.com/2003/08/24/magazine/24SUMMERS.html> (“[M]uch of the university world took the view that the United States must in some important way have been responsible for [9/11.]”).

⁶⁸⁶ AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 105 (Philip G. Altbach et al. eds., 3rd ed. 2011); HOROWITZ, *supra* note 305, at 34. Such irresponsible criticism moved a disgusted commentator to inquire, “What country underwrites an educational system that cultivates hatred for the nation so deep that scholars openly cheer for the country’s defeat and the deaths of its soldiers?” PATTINSON, *supra* note 666, at 204.

⁶⁸⁷ Musa al-Gharbi, *How Much Moral High Ground Does the U.S. Have Over ISIS?*, TRUTHOUT.COM (Oct. 13, 2014), <http://www.truth-out.org/opinion/item/26743-how-much-moral-high-ground-does-the-us-have-over-isis>.

⁶⁸⁸ See MILLER, *supra* note 683, at 103 (“The [US] has . . . a moral duty . . . to . . . conced[e] control of [Afghanistan] to the Taliban”). An eminent CLOACA scholar concedes the “ulterior motive” of CLOACA is to hobble Western forces by “declaring some of their tactics legally off limits[.]” FELDMAN, *supra* note 649, at 461, 630.

Islamist goals.⁶⁸⁹ The afflicted Islamophile, who “reveres the invaders and slanders the defenders, absolves the delinquents and condemns the victims, weeps for [Islamists] and curses Americans,”⁶⁹⁰ absolves Islamists of systematic violations of LOAC by (1) denying violations were committed, (2) declaring, as Muslims adhere to a “religion of peace,” that any violations were committed by non-Muslims,⁶⁹¹ or (3) justifying Islamist methods and means as self-defense against a West that pathologizes Muslims and targets Islam for destruction.⁶⁹² CLOACA denies that Islamists fight outside the strictures of LOAC and that there should be consequences for doing so, questions whether the West is entitled to self-defend, and promotes a legal regime in which methods and means available to the West contract and those available to Islamists expand. One need only face facts to conclude that CLOACA is a profoundly, even proudly, Islamophilic institution.

III. EFFECTS OF THE FIFTH COLUMN: DECREASED PROBABILITY OF AMERICAN VICTORY

The Islamist foe is winning, in part because CLOACA has been effectively wielding overwhelming combat power to discourage Americans from the use of the most effective methods and means of defeating Islamists and to encourage the conclusion that the United States is an immoral and unjust nation fighting an illegal and unnecessary war against Islam that must be terminated if the country is to reclaim its domestic and international legitimacy. So paralyzing

⁶⁸⁹ Moustafa Bayoumi, *The God That Failed: The Neo-Orientalism of Today's Muslim Commentator in ISLAMOPHOBIA/ISLAMOPHILIA: BEYOND THE POLITICS OF ENEMY AND FRIEND* (Andrew Shryock ed., 2010). Ideological congruities of Leftism and Islamism abound. See DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* 177 (2006).

⁶⁹⁰ FALLACI, *supra* note 3, at 177-78.

⁶⁹¹ See, e.g., President George W. Bush, Remarks at the Islamic Center of Washington, D.C. (Sept. 17, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html> (“These acts of violence . . . violate the fundamental tenets of the Islamic faith . . . Islam is peace.”). To hold this view, one must maintain that Islamists are not Muslims, despite Islamist protestations to the contrary, because Islamist actions and intentions so contravene the *Qur'an* as to effectively write them out of the faith. This view has not generated consensus. HARRIS, *supra* note 5, at 109.

⁶⁹² ZUHUR, *supra* note 427, at 2-3.

is CLOACA's mischaracterization of this enemy as scattered bands of misguided "criminals" that many Americans assess the conflict as a law enforcement problem to be assimilated within a set of shared contemporary experiences that annoy without disrupting life as usual—along with visits to the DMV, dental appointments, jury duty, and traffic jams. If Americans have not yet surrendered, it would appear that they have not only abandoned the goal of defeating Islamists but also that they have chosen the comforting fantasy that they are not even at war. Even those Americans who know better do not, with few exceptions, intuit that the fate of the nation balances on a swordpoint, and most are so weary of this fourteen-year-old war that withdrawal of U.S. troops from conflict zones based solely on political timetables barely registers.

American political will is crumbling. The weaker side often wins asymmetric wars,⁶⁹³ and will again unless the U.S. counters a *trahison des professeurs*. The next Part recommends ways to neutralize this Fifth Column and win the Fourth Generation War with Islamism.

IV. RECOMMENDATIONS: NEUTRALIZING THE FIFTH COLUMN

A. *Admit that We are at War*

The West must admit that it is at war with undeterrable ideologues bent on erasing its civilization.⁶⁹⁴ A woefully untutored public and intellectually sclerotic leaders, too eager to pretend otherwise and unable to countenance that Islamism is evil, "[create] ambiguities and . . . [thus] much of the world's population remains

⁶⁹³ See Shannon French, *Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts*, in TERRORISM AND INTERNATIONAL JUSTICE 33-42 (James Sterba ed., 2003) (citing barbarian defeat of Rome, U.S. defeat of Great Britain, Vietnamese defeat of the United States, and Afghan defeat of Soviets).

⁶⁹⁴ Two hundred years ago, the Islamic Barbary Pirates offered the United States three options to end their depredations: (1) pay protection fees, (2) convert to Islam, or (3) wage war. JOSEPH WHEELAN, *JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801-1805* (2003). The first is no longer available. The second is surrender. The third is all honor permits.

unconvinced of the seriousness of the Islamist threat.”⁶⁹⁵ Worse, the enemy the West cannot name has not only attacked Western nations but has taken up residence within: 390,000 of the U.S. Muslim population of three million believe Islamists should attack civilian targets in the West to “defend Islam from its enemies,”⁶⁹⁶ while thousands of Islamists live quietly in the U.S. planning, training, and preparing such attacks.⁶⁹⁷ The time has long passed for comforting fictions or sweet anodynes. The West must acknowledge disturbing realities and “condemn what must be condemned, but swiftly and firmly.”⁶⁹⁸

B. Wage Total War

The West must wage total war. A counterinsurgency⁶⁹⁹ using low-intensity military force augmented by nation-building, rule-of-law development, and armed social work projects in the hope of transitioning the Islamic world to governance regimes less likely to spawn future generations of Islamists has failed.⁷⁰⁰ Total war requires far more against an enemy hostile to Western constitutional democracy and bent on conquest. *All* instruments of national power—including conventional and nuclear force and PSYOPs⁷⁰¹—

⁶⁹⁵ David Kilcullen, *Countering Global Insurgency*, SMALL WARS JOURNAL, Nov. 2004, at 40, available at <http://smallwarsjournal.com/documents/kilcullen.pdf>.

⁶⁹⁶ See MCCARTHY, *supra* note 239, at 22 (citing a 2007 Pew Research Center poll).

⁶⁹⁷ David Pace, *Al-Qaida Trained 120,000 Terrorists*, AZ. DAILY SUN (Jul. 13, 2003, 10:00 PM), http://azdailysun.com/al-qaida-trained-terrorists/article_16605f44-598e-545c-9860-00d434a35f61.html.

⁶⁹⁸ ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 235 (1960).

⁶⁹⁹ “[A counterinsurgency is] an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established . . . political authority” in which each party “aims to get the people to accept its governance . . . as legitimate.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 4.1 (15 Dec. 2006).

⁷⁰⁰ See *supra* note 38 and accompanying text.

⁷⁰¹ Threatening Islamic holy sites might create deterrence, discredit Islamism, and falsify the assumption that decadence renders Western restraint inevitable. Daniel Pipes, *Discarding War’s Rules*, N.Y. POST (July 22, 2003), <http://www.danielpipes.org/1169/lee-harris-on-why-the-us-is-discarding-wars-rules>. Yet the political climate in U.S. government, which instructs that Islamists are faithful adherents to a religion of peace and effectively countenances turning a blind eye to Islamism, is too stultifying a climate for creative strategizing; in 2012, the Chairman of the Joint Chiefs of Staff fired the instructor of a “Perspectives on

must be harnessed to win two decisive battles: (1) an offensive, to capture the hearts and minds of Islamic peoples, break their will to fight for Islamism, and leave them prepared to coexist with the West or be utterly eradicated, and (2) a defensive, to prevent Islamists from capturing the hearts and minds of peoples of the West, breaking their will to fight, and submitting the West to Islamism or eradication.

1. The Offensive Battle

Given that Western survival is at issue and Islamists are fighting a total war, self-imposed restraint is an unaffordable luxury, and the delaying action the United States and its allies have chosen to fight, using UAVs to screen their withdrawal, must give way to the use of all forms of combat power “in the way Americans used it on the fields of Virginia and Georgia, in France and on Pacific islands, and from skies over Tokyo and Dresden.”⁷⁰² The United States and allied governments have the moral duty to fight in every dimension with at least as much ferocity as was needed to defeat Nazi Germany and Imperial Japan, and to use all the methods and means crafted to deter and defeat the Soviet Union, even if it means great destruction, innumerable enemy casualties, and civilian collateral damage.⁷⁰³

LOAC is the mechanism whereby application of force to solve intractable disputes is kept from destroying the objects, norms,

Islamic Radicalism” course at the Joint Forces Staff College for developing a deterrence model built around the use of nuclear weapons to just those ends. Chris Lawrence, *Military Reviewing Training Material to Remove Anti-Islamic Content*, CNN (April 25, 2012), <http://security.blogs.cnn.com/2012/04/25/military-reviewing-training-material-to-remove-anti-islamic-content/>. Offensive PSYOPs must also be used to “destroy[] [Islamist] morale,” resolve, and “will to fight.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS para. 1-7 (15 Apr. 2005). As the U.S. envoy to the anti-ISIS coalition urges, the West must “contest” ISIS ideology on the “information battlefield” and expose it as the “un-Islamic cult it is[.]” Adam Schreck, *U.S. Official Urges Allies to Combat IS Ideology*, ASSOCIATED PRESS (Oct. 27, 2014), <http://bigstory.ap.org/article/7148d1d6039f437b9bbfeb44bd22b7cb/us-official-urges-allies-combat-ideology>.

⁷⁰² MICHAEL SCHEUER, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 241 (2004).

⁷⁰³ See Reisman, *supra* note 346, at 89 (“[A] government . . . will not last long if . . . it tells its electorate that [LOAC] prevents it from taking [necessary] action.”).

and principles constitutive of civilization. Yet LOAC was designed to govern interstate wars between parties whose reciprocal self-interest in compliance sustained the regime, and Islamist VNSAs fighting Fourth Generation War refuse to adhere to any rules whatsoever in an attempt to eradicate Western Civilization—thereby destroying the basis for LOAC.⁷⁰⁴ If it is not adjusted to facilitate eradication of jurispathic Islamists, then LOAC, if it depends for its compliance on its perceived utility and for its preservation on the continuity of Western Civilization, is endangered—in the first instance by Islamist repudiation and Western reprisals, and in the second by the existential threat Islamist victory represents to law more generally. Although neophobic tendencies to cling to “inherited arrangements” blind observers to “new arrangements [that] may better secure . . . [LOAC]’s fundamental goals,”⁷⁰⁵ a modified LOAC may better support a Western victory and the future of the regime itself. Rather than craft differential rules that benefit Islamists or interpret LOAC to advantage them as CLOACA urges, the West should consider that Islamists’ depredations disentitle them from the panoply of rights under LOAC. Failing to strip Islamists of these entitlements is unjust, as “[f]or [the Islamist] to claim that his rights remain intact in spite of the harm he has done to others is for him to claim that he deserves to be left in a better position than his victims.”⁷⁰⁶

As just desert, Islamists should be anathematized as modern-day outlaws shorn of rights and liable to attack by all means and methods at all places and times and to judicial execution post-interrogation.⁷⁰⁷ If law is only legitimate if predicated upon history, values, and survival imperatives⁷⁰⁸ and “[n]o society can afford . . . inflexible rules concerning those steps on which its ultimate fate . . .

⁷⁰⁴ Eric Posner, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 CHI. J. INT’L L. 423 (2005).

⁷⁰⁵ Reisman, *supra* note 346, at 83.

⁷⁰⁶ THE MORALITY OF TERRORISM: RELIGIOUS AND SECULAR JUSTIFICATIONS 292 (David C. Rapoport & Yonah Alexander eds., 2nd ed. 1983).

⁷⁰⁷ This approach risks conflating *jus ad bellum* and *jus in bello* and inviting other parties to engage in unrestricted warfare simply by asserting the justice of their causes. Yet the exception need not establish the rule: no future cause could ever be more just than defense of Western civilization against conquest by Islamists.

⁷⁰⁸ See PHILIP BOBBIT, THE SHIELD OF ACHILLES 6-7 (2002).

depends,”⁷⁰⁹ then outlawry of Islamists is an efficient means to hasten their demise and the sole reciprocal arrangement possible with a foe that already applies this regime to Western “infidels.” The West must shatter Islamists’ political will and eradicate those who do not renounce Islamism.⁷¹⁰ Commitment to rule of law is not only an end but also a means to an end. Every rule, doctrine, and policy must endure a rigorous justification process whereby its retention in the LOAC canon is predicated upon its contribution to victory.⁷¹¹

Fighting viciously with all methods and means does not imply the complete discard of LOAC. Morality and pragmatism endure, and some restraints can be observed with respect to lawful combatants and truly innocent civilians. However, there is intrinsic evil in Islamists and their cause, and should the West lose this war, it will lose its civilization and the laws which undergird it. Historically, where survival has been at stake, “the propensity to question and protest the morality of the means used to defeat the enemy [has been] markedly attenuated.”⁷¹² So, too, should doubts and disputes in this war be muted lest around them coalesce a new set of self-

⁷⁰⁹ WITTES, *supra* note 103, at 10.

⁷¹⁰ “With [Islamism] there is no common ground . . . on which to begin a dialogue. It can only be destroyed or utterly isolated.” 9/11 Report, *supra* note 7, at 362. The war in this the offensive battle against Islamism mirrors the war against Imperial Japan, when after the total defeat of Japanese arms, the occupation was conducted to ensure that “Japanese militaristic . . . ideology [was] . . . completely suppressed[.]” John David Lewis, “No Substitute for Victory”: *The Defeat of Islamic Totalitarianism*, 1 OBJECTIVE STANDARD 1 (2006-2007). Eradication of Islamism as the *de minimis* victory condition does not imply eradication of all Muslims. However, U.S. doctrine contemplates targeting the morale of an enemy’s civilian population to induce surrender because the civilian population bears responsibility for starting or continuing a war. Jeanne Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F.L. REV. 143, 172 (2001). If some Muslims in some places are sufficiently hospitable to Islamists that approbation of Islamist aims can be imputed to them, eradication of Islamism may require shattering the use of force to shatter the credibility of, and support for, this ideology; with and in this process, great collateral damage at those sites is likely.

⁷¹¹ See Kittrie, *supra* note 171, at 401 (“If there are ways of accomplishing . . . military objectives using law, the [United States] should . . . vigorously look for ways to . . . use law.”).

⁷¹² Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POL. 175, 187 (1975).

imposed restraints that prevent Western forces from waging war with sufficient ferocity and resolve so that either Islamism is discredited and the political will of Islamist peoples to prosecute a *jihad* collapses, or, if necessary, all who countenance or condone Islamism are dead. Fomenting Islamic Civil War, and supporting the non-Islamist side, may be the most prudent path to this objective.

Fighting total war demands a mental reconfiguration away from wishful thinking, half-measures, and handwringing over the fate of mortal enemies and toward reawakening and acculturating the necessary fighting spirit. Spartanization of the West will require the deepening of the concept of citizenship to include duties as well as rights, and in particular, the duty to fight in defense of one's nation that has been all but extinguished over the past two generations.⁷¹³ It will also require the recovery of *thumos*, without which this collective spirit to fight, to prefer one's own people and civilization over an enemy's, and to vanquish that enemy cannot be conjured.

2. The Defensive Battle

As to the second battle—defending the political will of Americans to continue the fight against an Islamist foe bent on destroying their belief in the inherent goodness of their civilization and in their duty to defend it—Americans have hardly any inkling it is even being fought. In the fractious atmosphere of 2015 where cultural conflicts over guns, gay marriage, abortion, and the welfare state balkanize people into groups battling for the helm of the state, that national unity could ever be achieved, even in the face of an existential threat, would seem the stuff of science fiction had their

⁷¹³ See Pavlos Eleftheriadis, *Citizenship and Obligation: The Philosophical Foundations of European Union Law 1* (Oxford Legal Studies Research Paper 45/2011, 2012) (charging members of a political community not merely with rights but duties, including military service), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928834. The duty to support national defense, conceived broadly, includes civil service. See President Barack Obama, Remarks at the Dedication of Abraham Lincoln Hall (Mar. 12, 2009) ("We must enlist our civilians in the same way that we enlist [military personnel]."), available at <http://www.whitehouse.gov/the-press-office/remarks-president-dedication-abraham-lincoln-hall>.

ancestors not summoned forth common cause against Nazism and Communism twice in three generations. For the Greatest Generation, that the American people would not be unified, self-assured, and bent on total war against Islamism would have been too far beyond their capacity to comprehend as to be expressed here in words. Unless another profound transformation of minds causes it to appreciate the severity of the threat and to set aside lower-order differences in favor of social cohesion, the West will be defenseless before an enemy that spins doubt and despair from communal disagreement. Just as “exhibitions of indecision, disunity and internal disintegration within th[e] [United States] ha[d] an exhilarating effect on the whole Communist movement,” so, too, do U.S. cultural conflicts, particularly those revolving around interpretation and application of LOAC, encourage Islamist adversaries.⁷¹⁴ The warning issued by George Kennan at the dawn of the Cold War is as worth heeding now as then: “It is imperative that the [United States] create . . . the impression of a country which knows what it wants, which is coping successfully with the problem of its internal life and [can] hold[] its own among the major ideological currents of the time.”⁷¹⁵

C. *Declare a Domestic Truce*

Americans must declare a truce insofar as those issues which destroy unity of purpose and introduce doubts as to their right and duty of self-defense. While such a truce does not imply agreement as to all moral and political disputes, it withdraws issues bearing on national survivability from the political arena. Absent American victory, arguments over lesser-order “social” or distributional issues of gay marriage, abortion, and the welfare state are moot. The Greatest Generation knew that a Nazi victory would radically remake post-war America in the image of the enemy, and thus in that total war domestic opposition to war entry, aims, and conduct shrank to the vanishing point. Political leaders rallied the people to fight and win, and the military “ran the war . . . the way the . . . people . . .

⁷¹⁴ See generally George Kennan, *The Sources of Soviet Conduct*, FOR. AFF. 1 (1947).

⁷¹⁵ *Id.*

wanted it run”—with precious few restraints.⁷¹⁶ So, too, would Islamist victory supplant our way-of-life and impose *Shari’a*-based prescriptions inimical to the entire Left-Right spectrum, and so, too, must Americans cohere against this outcome.

Admittedly, this truce will resolve, for the duration of this war, arguments over how to balance security and liberty in favor of security. While such a truce might be too much to ask were it broadened to include a general moral agreement as to what is “right and wrong,” confined to this set of issues it is not only reasonable but necessary, for it is not the external enemy but the Leftist proclivity to “impose liberal solutions in military affairs . . . [that] constitute[s] the gravest domestic threat to American security” and which can only be relieved “by the weakening of the security threat or the weakening of liberalism.”⁷¹⁷ Because the Left sees the military as a danger to liberty, democracy, and peace, and because only the military and a militarized civil society can defeat the Islamist threat, the hostility of the Left to the means and methods of total war, as well as to the steps necessary to promote unity, moral certainty, and will to fight, must be attenuated. Recalling the nature of the United States as a rule-of-law republic, and the effect on domestic political will of CLOACA assertions that the United States has been fighting an unlawful and unnecessary war with illegal methods and means, the critical issue-area that this truce, or internal compact, must resolve, or at the very least withdraw from cultural and political arenas, is LOAC. Three questions must be answered in ways that defend American political will, interdict and defeat Islamic attacks, and support the offensive battle against Islamism: (1) What does LOAC require and prohibit? (2) What institution has primacy in creating, interpreting, and applying LOAC? And (3) What are the roles, rights, and duties of LOACA in interpreting and applying LOAC?

D. Rationalize LOAC

Only the most otiose or doctrinaire would dispute that the answer to the first question—“*What does LOAC require and*

⁷¹⁶ HUNTINGTON, *supra* note 617, at 315.

⁷¹⁷ *Id.* at 455-57. Facing existential threat, a polity must choose liberalism or survival. See generally CARL SCHMITT, *CONCEPT OF THE POLITICAL* (1932).

prohibit?”—depends upon philosophical commitments, value preferences, and political objectives. That the U.S. answer would afford Americans the greatest quantum of protection ought to be uncontroversial. To the extent the traditional view of LOAC comports more closely with U.S. security imperatives, self-interest directs the United States to reject most of the “progressive” developments in the field over the last forty years, including rules, institutions, and scholarship that accord Islamists advantage or otherwise shackle U.S. power. Reaffirmation of orthodox interpretations of LOAC as the lawful and ethical basis for defense of Americans against Islamism should assume many forms in many fora—including an aggressive public education campaign, “robust efforts to educate the media as to what [LOAC] does—and does not—require,”⁷¹⁸ and strategic communications to counter CLOACA disinformation.

However, just as the offensive battle calls into question whether LOAC is sufficiently permissive to facilitate destruction of Islamist will, the necessities of the battle to defend American political will further impugn regime adequacy. Comprehensive rationalization is needed: LOAC is instrumental, and to the extent it does not incorporate their values and imperatives Americans must reshape it. Some may question the legitimacy of auto-interpretation of LOAC, yet survival is its own justification. In 1861, Lincoln observed that “[m]easures, otherwise un[lawful], might become lawful, by becoming indispensable to the preservation of the . . . Nation.”⁷¹⁹ The existential threat *circa* 2015 merits as wide a margin of appreciation for U.S. leaders in divining the means and methods necessary to defend Americans and in proclaiming that these, by their indispensability, are lawful.⁷²⁰ Like Lincoln, Americans must regard law in instrumental terms and answer accordingly: LOAC permits everything and prohibits nothing that secures their survival. Americans are entitled not only to political leaders who employ any and all necessary measures but to the strong presumption such

⁷¹⁸ Dunlap, *supra* note 28, at 37.

⁷¹⁹ COMPLETE WORKS OF ABRAHAM LINCOLN 297 (J. A. Nicolay & J. Hay eds., 1905).

⁷²⁰ See Gross, *supra* note 448, at 1023 (accepting that the war against Islamism may require “Extra-Legal Measures” to “protect the nation and the public in the face of calamity”).

measures are legal, and to the salutary effects of this presumption upon their belief in the virtue of their cause and their will to fight for it.

E. Restore Ownership of LOAC to the Military

The answer to the second question—“*What institution has primacy in creating, interpreting, and applying LOAC?*”—follows from the first. CLOACA unaccountably frames LOAC debates in a manner that discounts national survival imperatives and extends LOAC beyond its functional and democratic limitations. The moment has arrived for restoration: it is the military upon whom the constitutional duty to defend Americans is incumbent, and in whom Americans repose trust. The responsibility it bears must accrue to it sufficient quanta of power and autonomy to execute its mission. Only the military has the expertise to determine the strategies, operational plans, and tactics necessary to defeat Islamism, and thus it should limn the parameters of compatible legal constraints with LOACA in support.

F. Eliminate the Fifth Column

The answer to the third question—“*What are the roles, rights, and duties of LOACA in interpreting and applying LOAC?*”—must reckon with the fact that so many of its preeminent figures function as a Fifth Column within, undermining American unity, resolve, and will to battle Islamism until victory. It is difficult in the short term to reconstitute the republican virtues that during World War II bound together the nation so tightly that no Fifth Column could have hoped to defeat Americans from within, but it is possible to dismantle the most important of the intellectual foundations that encourage Islamists in the destruction of American will to fight.

That Americans should seek to counter CLOACA as part of the defensive battle against Islamism is reasonable and necessary. The specific forms this counterattack might assume range in terms of increasing coercion along the following continuum.

1. Marketplace of Ideas

First, trusting that the free marketplace of ideas will vindicate the truth about Islamism and LOAC, and that Americans are informed and discerning enough to withstand CLOACA PSYOPs alleging U.S. illegality, one option is to do nothing. The risk is that nothing resembling equality-of-arms exists within the intellectual arena of legal academia. Liberals in LOACA so outnumber conservatives that they drown (or drive) out their voices, precluding anything even approximating a fair fight. Worse, the stultifying liberal bias and professional groupthink that pervade legal academia and inform media discussion and government policymaking are so potent as to deny opportunities to discover the very existence of ongoing debates about the Islamist threat and about the law that should govern war. Americans are left with the perception that all questions and issues arising in the Fourth Generation War with Islamism are settled and that the gates to the marketplace of ideas are closed. Their technical expertise, primacy in making and interpreting law, and GMAC alliances make CLOACA far too formidable an intellectual opponent for the lay public. With no forum in which to engage them, and precious few champions to battle on their behalf, American challengers to CLOACA face an all-but-impossible task.

2. Counter-PSYOPs: Why We Fight

U.S. PSYOP efforts have been AWOL⁷²¹ and little capability to “disrupt [Islamists’] ability to project [their] message[,] and promote a greater understanding of U.S. policies . . . and an alternative to [the Islamist] vision[,] actions, and worldview”⁷²² is available. Challenging the Islamist narrative need not devolve into

⁷²¹ French defeat by Algerian proto-Islamists suggests relative PSYOP incompetence bodes ill when states face VNSAs as proficient in their use. See DAVID GALULA & BRUCE HOFFMAN, *PACIFICATION IN ALGERIA: 1956-1958* vi (2006) (“[The] field in which we were infinitely more stupid than our opponents . . . was [PSYOPs].”).

⁷²² NATIONAL STRATEGY, *supra* note 47, at 17. A decade ago, a proposal to create an office to inform Americans of the grounds for U.S. military operations fizzled under pressure from the Left. *Rumsfeld’s Roadmap to Propaganda*, National Security Archive Briefing Book No. 177 (posted Jan. 26, 2006), www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB177/. It must be implemented now.

an exercise in rank propaganda or the official distortion of truth to bury unpleasant realities in a manner similar to the Nazi and Soviet states. The United States should conduct a counter-PSYOP campaign that simply explains to Americans who their enemy is, why Americans fight, and the legality of methods and means the United States employs. This might include films, videos, and cyber content modeled after the 1940s federally-commissioned, Hollywood-produced documentary film series “Why We Fight” that countered enemy propaganda, explained the war aims of Germany and Japan, and reassured Americans of the justice of their cause.⁷²³ Along with a contemporary “Why We Fight” campaign, the United States should commission LOACA dissidents to counter the Fifth Column in scholarship and other media.⁷²⁴

Because CLOACA is devoid of pluralism, unwilling to separate knowledge-generation and dissemination from political advocacy, and is hostile to U.S. victory, more coercive solutions would reconstruct and discipline CLOACA to reclaim it from Islamists.

3. Loyalty Oaths

Educators have “extensive and peculiar opportunities to impress [their] views upon pupils in their charge”⁷²⁵ and too often their students “[cannot] withstand the poison . . . dropped into their minds.”⁷²⁶ The individual “bereft of . . . loyalty and devotion to [the

⁷²³ WHY WE FIGHT (U.S. Gov’t 1942-45); *see also* WHY WE FIGHT NOW: THE GLOBAL WAR ON TERROR (Cape Fear Filmworks 2008). The public sector must also “create, strengthen, [and] preserve conditions favorable to . . . national . . . objectives through the use of coordinated information, themes, plans, programs, and actions.” U.S. DEP’T OF DEFENSE, QDR EXECUTION ROADMAP FOR STRATEGIC COMMUNICATION 3 (2006), *available at* <http://www.defense.gov/pubs/pdfs/QDRRoadmap20060925a.pdf>.

⁷²⁴ *See* Newton, *supra* note 95, at 261 (suggesting a conservative counter-campaign). In light of past discrimination, universities might treat intellectual pluralism in LOACA as vital to the academic mission just as is racial diversity and take affirmative action in identifying, recruiting, hiring, and tenuring LOACA conservatives.

⁷²⁵ *Faxon v. Sch. Comm.*, 120 N.E.2d 772, 774 (Mass. 1954).

⁷²⁶ *Daniman v. Bd. of Educ. of New York*, 118 N.Y.S.2d 487, 492 (Sup. Ct. 1952), *aff’d*, 119 N.E.2d 373 (N.Y. 1954).

nation] is lacking in a basic qualification for teaching[,] [and] [i]n the. . . struggle for men's minds, the State is well within its province in ensuring the integrity of the educational process against those who would pervert it to subversive ends."⁷²⁷ Loyalty oaths—solemn appeals to a higher power warranting that affiants bear allegiance to the laws and goals of the state—have been part of the academy for a century.⁷²⁸ Faculty at universities that receive federal funds may be required, as a condition of employment, to pledge support for federal and state constitutions⁷²⁹ and swear “undivided allegiance to the [United States].”⁷³⁰ The Fourth Generation War with Islamism is analogous to the Cold War insofar as both place(d) the people in existential peril and require(d) the to ensure the allegiance of those in whom it reposed special trust. It asks little of CLOACA to accommodate itself to the defense of the polity that affords them safety and employment;⁷³¹ practitioners seeking admission to any state bar undergo far more extensive character and fitness exam and adhere to more restrictive behavioral standards than loyalty oaths impose. “The task of defending [LOAC] policies, as well as that of questioning the legal permissibility of those policies, falls to informed scholars, clergy, officials, journalists, and other . . . leaders.”⁷³² Federal and state governments should impose loyalty oath requirements upon LOACA. If CLOACA will not pledge loyalty, its members need not be retained in public employment.

⁷²⁷ *Thorp v. Bd. of Trustees*, 79 A2d 462, 470 (N.J. 1951), vacated as moot *per curiam*, 342 U.S. 803 (1951).

⁷²⁸ See Gabriel Chin and Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 438-42 (2003) (surveying the history of academic loyalty oaths).

⁷²⁹ *Knight v. Bd. of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd men. per curiam*, 390 U.S. 36 (1968).

⁷³⁰ IND. CODE §20-12-0.6-1(1) (now repealed).

⁷³¹ Legal academics need reminding that allegiance and loyalty are the price for status and security. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J. L. & EDUC. 445, 464-65 (2003).

⁷³² William v. O'Brien, *The Jus in Bello in International Relations Studies*, 31 AM. U. L. REV. 1011, 1022 (1982) (“A law-abiding and just belligerent, however, should not be diverted from a just cause simply because many of its citizens and external critics accept as true what are, in fact, unfounded charges of war crimes and genocide.”).

4. Terminate Disloyal Scholars

A more proactive method to suppress disloyal radicals is to fire them. Islamists are heartened by their scholarly output and regard their presence within the academy as proof of American weakness and of the inevitability of Islamist victory; stripping tenure from LOACA members who express palpable anti-American bias, give aid and comfort to Islamists, or otherwise engage in academic misprision and corruption will deny the CLOACA Fifth Column the most important institutional terrain in the defensive battle. Although the question of how precisely to demarcate the zones of loyalty and permissible dissent remains open, suffering Islamist sympathizers and propagandists to inhabit LOACA and lend their combat power to the enemy is self-defeating.

5. Charge Material Support of Terrorism

CLOACA members whose scholarship, teaching, or service substantiates the elements of criminal offenses can be prosecuted.⁷³³ In concert with federal and state law enforcement agencies, Congress can investigate linkages between CLOACA and Islamism to determine “the extent, character, and objects of un-American propaganda activities in the U.S. [that] attack the . . . form of government . . . guaranteed by our Constitution.”⁷³⁴ Because CLOACA output propagandizes for the Islamist cause, CLOACA would arguably be within the jurisdiction of a renewed version of the House Un-American Activities Committee (Committee on Internal Security) charged with investigating propaganda conducive to an Islamist victory and the alteration of the U.S. form of government this victory would necessarily entail.⁷³⁵

⁷³³ See, e.g., 18 U.S.C. 2339B (2012).

⁷³⁴ 83 CONG. REC. 7568 (1938). Similar legislation in Israel would have created a committee to investigate the activities and funding of leftist human rights lawyers that “harm the legitimacy of the IDF.” *MKs Hold Stormy Debate Over Leftist Probe*, YNETNEWS.COM (Feb 2, 2011), <http://www.ynetnews.com/articles/0,7340,L-4022354,00.html>.

⁷³⁵ A renewed and broadened Smith Act would reinforce the duty of loyalty incumbent upon CLOACA. See, e.g., Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670; 18 U.S.C. § 2385 (2012) (providing imprisonment of one who

“Material support” includes “expert advice or assistance” in training Islamist groups to use LOAC in support of advocacy and propaganda campaigns, even where experts providing such services lack intent to further illegal Islamist activity.⁷³⁶ CLOACA scholarship reflecting aspirations for a reconfigured LOAC regime it knows or should know will redound to Islamists’ benefit, or painting the United States as engaged in an illegal war, misrepresents LOAC and makes “false claims” and uses “propaganda” in a manner that constitutes support and training prohibited by the material support statute.⁷³⁷ Culpable CLOACA members can be tried in military courts: Article 104 of the Uniform Code of Military Justice provides that “[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or *other things* . . . shall suffer death or . . . other punishments as a court-martial or military commission may direct;”⁷³⁸ the Rule for Court Martial 201 creates jurisdiction over any individual for an Article 104 offense.⁷³⁹

6. Charge Treason

“Treason” occurs when an individual owing “allegiance to the United States levies war against them or adheres to their enemies.”⁷⁴⁰ National loyalty is an increasingly anachronistic

“prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the [United States] by force or violence[.]”).

⁷³⁶ Holder v. Humanitarian Law Project, 561 U.S. 1, 3, 18–20 (2010) (interpreting 18 U.S.C. §2339A(b), the material support statute).

⁷³⁷ See U.S. v. Mehanna, 2010 WL2516469 (D. Mass. 2010) (convicting a defendant for violating the material support statute by engaging in these acts on behalf of Islamists). The UK criminalizes “glorification of terrorism” and dissemination of pro-terrorist publications, and criminalizes conduct that results in prohibited effects. Terrorism Act, 2006, c. 11, § 3(8)(a) (U.K.). A similar U.S. statute would raise liberty concerns, but there is “a certain logic to using all tools at our disposal[.]” Phelan, *supra* note 30, at 115.

⁷³⁸ 10 U.S.C. § 904 (2012), UCMJ, art. 104; see also 10 U.S.C. §§ 801–946 (2012).

⁷³⁹ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(1)(A)(i) (2012) (“General courts-martial . . . may try any person for a violation of Article . . . 104[.]”).

⁷⁴⁰ 18 U.S.C. §2381 (2006).

virtue,⁷⁴¹ the crime is hard to prove, and only one treason indictment has been lodged in civilian courts since World War II. Yet in 2006, the United States indicted Adam Gadahn, an American who appeared in Al Qaeda videos urging U.S. troops to desert, claiming they were “cannon fodder” on the “losing side” of the war.⁷⁴² Disseminating propaganda manifesting an intent to betray the United States or giving aid and comfort to an enemy supports an inference of treason where the content is akin to “psychological warfare” against Americans,⁷⁴³ brands the United States an “aggressor” or employer of illegal methods and means, or casts aspersions on U.S. motives for war entry.⁷⁴⁴ Treason prosecutions shore up national unity, deter disloyalty, and reflect the seriousness with which the nation regards betrayal in war. Failure to prosecute these cases signals that the government is not fighting to win. CLOACA scholarship can be analogized to broadcasts, statements, and other communications that provided the factual predicates for previously successful treason prosecutions. Even the specter of charges might, if not transform loyalties, dampen CLOACA’s ardor.

7. Treat CLOACA Scholars as Unlawful Combatants

CLOACA scholarship and advocacy that attenuates U.S. arms and undermines American will are PSYOPs, which are combatant acts.⁷⁴⁵ Consequently, if these acts are colorable as propaganda inciting others to war crimes, such acts are prosecutable.⁷⁴⁶ CLOACA members are thus combatants who, like

⁷⁴¹ See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States*, 42 VAND. J. TRANSNAT’L L. 1443, 1453-57 (2009) (surveying historical cases and noting difficulty of proof).

⁷⁴² First Superseding Indictment, United States v. Gadahn a.k.a. Azzam al-Amriki, SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at http://www.justice.gov/sites/default/files/opa/legacy/2006/10/11/adam_indictment.pdf.

⁷⁴³ *Gillars v. U.S.*, 183 F.2d 962, 966 (1950).

⁷⁴⁴ See generally *United States v. Batchelor*, 19 C.M.R. 452 (1955) (describing allegations in wartime that constitute treasonous conduct).

⁷⁴⁵ See Peter Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) Under Public International Law*, 57 AIR FORCE L. REV. 211, 226 (2005) (reaching this conclusion after surveying *opinio juris*).

⁷⁴⁶ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, App. Judg., Nov. 28, 2007. Criminalization of propaganda

all other combatants, can be targeted at any time and place and captured and detained until termination of hostilities.⁷⁴⁷ As unlawful combatants for failure to wear the distinctive insignia of a party, CLOACA propagandists are subject to coercive interrogation, trial, and imprisonment.⁷⁴⁸ Further, the infrastructure used to create and disseminate CLOACA propaganda—law school facilities, scholars' home offices, and media outlets where they give interviews—are also lawful targets given the causal connection between the content disseminated and Islamist crimes incited.⁷⁴⁹ Shocking and extreme as this option might seem, CLOACA scholars, and the law schools that employ them, are—at least in theory—targetable so long as attacks are proportional, distinguish noncombatants from combatants, employ nonprohibited weapons, and contribute to the defeat of Islamism.

V. POTENTIAL CRITICISMS AND RESPONSES

A. *Islamophobia*

The first criticism is that the assessment of the threat Islamism poses is grossly overblown. If Islamism is not an evil, totalitarian ideology and does not spur its followers to destroy the

is of recent provenance, yet at Nuremburg the Allies executed Julius Streicher for publishing virulently anti-Semitic newspapers that incited murder of Jews, and former Reichsmarschall Hermann Goering highlighted propaganda as an “essential part of [total] warfare.” *The Trial of German Major War Criminals*, THE NIZKOR PROJECT, <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-09/tgmwc-09-82-07.shtml> (last visited Mar. 22, 2015). For a detailed discussion of propaganda as an act of unlawful combatancy, see Richard Ashby Wilson, *Inciting Genocide by Words*, 36 MICH. J. INT’L L. no. 1 (2015, forthcoming).

⁷⁴⁷ See Major Joshua E. Kastenbergh, *Tactical Level PSYOP and MILDEC Information Operations: How to Smartly and Lawfully Prime the Battlefield*, ARMY LAWYER, July 2007, at 70 (“Civilians who take part in [PSYOP] campaigns . . . lose their protected status as non-combatants.”).

⁷⁴⁸ That use by ununiformed civilians of weapons from far beyond the “technical scope of armed conflict” is *per se* unlawful combatancy is the theory CLOACA advances to conclude that civilian CIA personnel operating UAVs from U.S. locales to kill Islamists abroad are unlawful combatants. See *Rise of the Drones II*, *supra* note 128, at 11. By analogy, CLOACA faculty in civilian garb, propagandizing on behalf of Islamists from U.S. law school offices, are also unlawful combatants.

⁷⁴⁹ See *Final Report*, *supra* note 203, at para. 47-76 (suggesting media and infrastructure used to produce and disseminate propaganda are military targets).

West to make way for the Caliphate, survival as a nation and civilization is not at stake. In fact, there may well be no compelling need for unity to defeat whatever quantum of threat Islamism does represent, if any. Existing LOAC may be adequate to the task; law enforcement measures may even suffice. With skillful statecraft that encourages Islamic moderates, a path toward peaceful accommodation, coexistence, and friendship between the West and the Islamic world may be negotiable. Any talk of civilization conflict or total war is therefore rooted, ultimately, in Islamophobia, which this Article stokes.

This imprudent critique is in deliberate disregard of the malevolent words and sanguinary deeds of Islamists splashed in ink and blood across the pages and sands of history. Rampant Islamism has resumed a struggle to achieve a goal that has eluded it for 1400 years. That religion might constitute the most violent variable in international relations is hard for Western minds to assimilate. It is frightening to accept that a long respite from religious warfare is over, and Islamism may well be separable from Islam. Yet to fail to acknowledge the Islamist threat as an existential challenge to Western Civilization, and to fail to unite to defeat that threat, would be the greatest dereliction of duty in history. Admitting that a survival imperative dictates the need to marshal urgency, unity, and courage, and to seize opportunities to defeat a threat—including a rationalized LOAC befitting a Fourth Generation War that pits honorable military forces against anticivilizational atavists—is not “Islamophobic.” It is a demonstration of *thumos*, and must be hailed as such.

B. Objective Criticism is Not Disloyalty

Another criticism is that CLOACA is a non-ideological group that has preserved objectivity and fidelity to the rule of law in the best traditions of the academy and the legal profession. By this view, when CLOACA scholarship advocates for changes in LOAC, it is careful to differentiate between saying what the law is and what it should be, and it has managed the evolutionary challenges arising from the emergence of a new species of rule-disavowing combatant

in a manner that supports the continuity and integrity of LOAC.⁷⁵⁰ If in its vigilant defense of law against barbarism it criticizes U.S. policies and generates combat power in so doing, it issues criticism and wields power not in collaboration with or on behalf of Islamism, but in support of the United States. Because the will of Americans to resist the depredations of Islamism is predicated upon their belief in the essential goodness of the nation they fight to defend, and because adherence to the rule of law is a primary constituent of this belief, CLOACA—sounding the alarm when the United States strays from the path LOAC commands—draws Americans a legal and moral roadmap redirecting the nation away from danger and enhancing its ability to prevail without sacrificing core values.

However, it is undeniable that an ideological orthodoxy profoundly out-of-step with the American people and their military drives CLOACA to discover, interpret, and apply LOAC in ways that counter traditional conceptions of the law that governed war between World War II and 9/11. Whether departing so sharply from the commands of tradition, necessity, and democratic legitimacy should be regarded as a badge of humanitarianism may be, for some, open to argument. That their scholarship and advocacy, by design or effect, invariably affords Islamists material and moral advantage in their operations against U.S. forces while beguiling Americans away from unity and moral certitude is an empirical fact. Moreover, that CLOACA never proclaims modifications or interpretations of LOAC that would benefit U.S. arms or reinforce American morale, and (almost) never decries Islamist violations of LOAC so frequent, systematic, and barbarous as to only be explicable as a deliberate battle strategy, reveals a professional cohort committed to the law in war but not as objective and apolitical scholars and not to a universal regime. Rather, the ineluctable conclusion is that CLOACA has entered the arena, chosen sides, and weaponized LOAC for use against its own people.

⁷⁵⁰ See David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 460, 466 (2011) (“[CLOACA] transcend[s] politics into a more neutral, objective realm of science, law, economics, [and] philosophy [without] aiding the enemy.”); *id.* at 460 (contending that CLOACA is “disinterested” in outcomes of wars).

C. Neo-McCarthyism

A trenchant criticism is that loyalty oaths, tenure revocation, and prosecution—measures to nudge radical CLOACA scholars toward supporting the military⁷⁵¹ and buttress the political will of Americans—signal a “McCarthyist” attack on the academy.⁷⁵² The U.S. Supreme Court itself, opining on the hoary principle of academic freedom, warned that “[t]o impose any straitjacket upon the intellectual leaders in our . . . universities would imperil the future of our Nation” and that academics “must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”⁷⁵³ Strong arguments can be made that academic freedom *requires* CLOACA to engage in spirited, even sharp, criticism of U.S. policies and conduct arguably transgressive of LOAC, and in this the exercise of academic freedom CLOACA supports the United States and its rule-of-law commitments. By this view, inducting CLOACA into the U.S. order of battle would denature academic freedom. Worse, if scrutiny and sanctions that force CLOACA to serve the state would compel it to “give up . . . critical reason[ing] in the free pursuit of knowledge,”⁷⁵⁴ imperil the nation, and trigger civilizational death, then proposals to criminalize the “disloyalty” of its members are cures more virulent than the disease.

This critique profoundly misrepresents academic freedom, which is not a sacrosanct right but a social contract in which the academic agrees to search diligently for and weigh all relevant information, specify assumptions, examine competing theories, and acknowledge epistemological and methodological limitations

⁷⁵¹ Robin Barnes, *Drafting the Priests of Our Democracy to Serve the Diplomatic, Informational, Military & Economic Dimensions of Power*, 27 BUFF. PUB. INT. L. J. 131, 158 (2009) (warning that loyalty oaths could “convert the professoriate . . . into a roving band of diplomats . . .”).

⁷⁵² See Gonzalez, *supra* note 329, at 242 (relaying claims of a “New McCarthyism” gripping the academy); Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J. L. & EDUC. 445, 446 (2003) (“As we attempt to hold faculty accountable[,] claims will be made that we are violating academic freedom.”).

⁷⁵³ *Sweezy v. State of N.H.* by Wyman, 354 U.S. 234, 250, (1957).

⁷⁵⁴ Scott Jaschik, *Academic Freedom After September 11*, INSIDE HIGHER ED. (Mar. 7, 2006), <http://www.insidehighered.com/news/2006/03/07/acfree>.

mitigating the strength of conclusions.⁷⁵⁵ In exchange, the people repose trust in, and grant continued employment to, the scholar, regardless of the destination(s) to which his search for truth leads. Academic freedom carries with it a “moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent;”⁷⁵⁶ it is not a blanket grant of immunity from the consequences of politicized “scholarship” but a contractual license conferring the “freedom to say that two plus two make four.”⁷⁵⁷ Scholars who insist, in thrall to a hostile ideology, that two plus two make five are precluded from searching for truth. Just as Cold War Communist Party membership entailed uncritical repetition of Party dogma, calling into doubt whether professor-members were fit for their positions,⁷⁵⁸ so, too, does scholarship in which two plus two make five, and five benefits Islamists, suggests CLOACA should be evicted from the bunker of academic freedom. World War II-era academics complied voluntarily with restraints on scholarship to preserve the secrecy of the Manhattan Project in building the atomic bomb. That academic freedom was no more imperiled then than it would be now to obligate CLOACA to favor the United States with its intellectual gifts indicates that temporary subordination of scholastic prerogatives to exigencies of state would not portend national doom.

D. Anti-Intellectualism

Some may fear this Article targets not only ideas about LOAC but their authors, “foreshadow[ing] a totalitarian-style purge of intellectuals such as . . . in Soviet Russia, fascist Italy, and Nazi Germany.”⁷⁵⁹ CLOACA warns that the “force” of its arguments can only be deflected by destroying the messengers, requiring depiction of its members as “extremist ideologues, glib-silver-tongued

⁷⁵⁵ See Fallon, *supra* note 518, at 19-26 (discussing the “moral and ethical” obligations associated with the concept of scholarly integrity).

⁷⁵⁶ G. A. Res. 59(I) (Dec. 14, 1946).

⁷⁵⁷ GEORGE ORWELL, 1984, 324 (1949).

⁷⁵⁸ See Sidney Hook, *Should Communists Be Permitted to Teach?*, N.Y. TIMES MAG., Feb. 27, 1949, at SM7 (describing debates over fitness of Communists to teach).

⁷⁵⁹ Glenn Gendzell, *Resisting McCarthyism: To Sign or Not to Sign California's Loyalty Oath*, 3 CAL. L. HIST. 349, 349-50 (2010).

subversives who speak . . . of American values but secretly sympathize with [Islamists]” to make them “legitimate military targets.”⁷⁶⁰ Some fear their antipathy to U.S. war policies will stir the “academic security apparatus [of] the corporate university” to rain personal and professional punishments on them.⁷⁶¹ Some expect “even those who have not taken up arms or planned attacks against the country, but . . . merely tried to support its long tradition of respecting the rule of law” by voicing dissent, will be accused, tried, and detained as unlawful combatants—or worse.⁷⁶² Treating academics as combatants because their scholarship lends support to Islamist LOAC narratives is, by this critique, a “radical rupture” caused by stretching the concept of combatant past the breakpoint.⁷⁶³

This critique insists that CLOACA owes no loyalty to the American people and cannot be brought to heel via criminal law or force of arms because as an intellectual caste it is constrained only by professional obligations that transcend state authority. Taken seriously, this argument would establish an aristocracy not only above the law but also able to exploit the law as a weapon against the very society that exalts it. This cannot stand: if and when CLOACA scholars commit treason, or otherwise engage in unlawful combatancy, they must answer for their delicts just as any others do. The perversity inherent in countenancing intellectual elitism as a basis for a defense against criminal prosecution and a grant of immunity from targeting in war is astonishing. This critique suggests that those with a more enriched capacity for understanding the nature of the threat, the linkage between legal regimes and victory, and of the criticality that the nation cohere in its moral resolve be held not to a higher standard by virtue of this knowledge but to a lower one, ostensibly because the more one learns about the

⁷⁶⁰ Frakt, *supra* note 392, at 352. Some fear government efforts to “attack the end users of [LOAC],” namely CLOACA. Sadat & Geng, *supra* note 302, at 155.

⁷⁶¹ Cheyfitz, *supra* note 669, at 716.

⁷⁶² MAYER, *supra* note 115, at 366. Some CLOACA scholars believe the government regards radical legal minds as “the equivalent of enemy combatants.” Luban, *supra* note 491, at 2020-21. If it cannot silence them, the United States will charge them as terrorists under the material support statute. See generally Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651 (2005)

⁷⁶³ Frakt, *supra* note 392, at 343.

nation, the more one comes to realize it is not worth defending. This is untenable: if the United States cannot command the loyal service of its legal elites, it cannot prevail in a war in which information about LOAC is critical.

E. Jurispathic Attack on LOAC

A turn to the U.S. military for LOAC leadership and ascription to CLOACA of the malign motive of aiding Islamists in the constraint of U.S. military power may be deemed jurispathic, law-destroying acts.⁷⁶⁴ By this argument, U.S. auto-determination of LOAC is a parochial attack upon its universality, and ceding primacy to the military strips LOAC of its humanitarian *telos* and converts the remainder into a regime too weak to limit U.S. power and command respect.⁷⁶⁵

Yet only if LOAC facilitates self-preservation can the military—the institution ultimately accountable for defense of the American people—be expected to observe its constraints, and thus each and every pronouncement of CLOACA must be assessed for its effects on survival. When the West faces an existential threat from an enemy that abjures responsibility for observing LOAC and expressly aims to overthrow all regimes other than *Shari'a*, and where academic spin on the rules would render survival less likely, the insubordination of humanitarianism to efficiency and the academy to the military in determining and applying LOAC poses a much greater threat to law and the civilization it mutually reinforces than entrusting LOAC to the only institution with the capacity for and duty to defend both. CLOACA, and not the United States, has embarked on a jurispathic enterprise in articulating, interpreting, and applying LOAC. Whether Americans have the acuity to see this

⁷⁶⁴ See Luban, *supra* note 750, at 462 (noting that “legal success” for CLOACA will “constrain a state’s military forces by declaring some of their tactics legally off limits”). See generally Luban, *supra* note 442, at 151 (claiming CLOACA critics are jurispaths who undermine LOAC); McCormack, *supra* note 120, at 102.

⁷⁶⁵ See Sitaraman, *supra* note 84, at 1835 (condemning U.S. for treating LOAC as “merely another tool . . . to be changed whenever it . . . constrains strategy”); Luban, *supra* note 750, at 462 (stating that critics of CLOACA’s primacy over LOAC really want “to insinuate that law should never constrain armed might”).

and keep the faith that the U.S. remains committed to the rule of law and entitled to win will decide this war. Discouraging CLOACA aspirations for LOAC is a more forgivable sin than losing it.

F. *Proto-Fascism*

Some may harbor concerns that this Article incites authoritarianism insofar as it counsels militarization, withdraws debates over the enemy from the political arena, vilifies those who fail to acknowledge a grave threat, punishes disloyalty, and takes up law as sword and shield to defend and destroy political will. Some might quail at a perceived call to erect a police state that intimidates and propagandizes to stifle dissent⁷⁶⁶ and incorporates the worst characteristics of the enemy that sparked mobilization in the first place—disregard for the rule of law, imperialistic ambition, and subordination of rights to The Cause. Such supposition is baseless. This Article merely implores CLOACA to concede that mobilization on all fronts is as necessary a response to the current threat condition as it was during World War II. Loyalty is part of the burden of citizenship, even for dissenters as to the morality or rectitude of a given war. Rights are attended by corresponding duties, and the state may obligate citizens—even academics—to contribute to the struggle in those ways they are able.⁷⁶⁷ LOAC is an artifact fabricated to reflect and protect core values and goals, and it is fitting that it be shaped by its users to serve these values and goals. Slavish adherence to a dysfunctional rule-set is a suicide pact, and what seems illiberal today will be overdue the day after Islamists immolate U.S. cities with nuclear devices.⁷⁶⁸ The goal of the West is neither territorial nor imperial: it is simply to discredit Islamism and destroy the will of Muslims to fight on its behalf, thereby to make possible, if they allow

⁷⁶⁶ See, e.g., Luban, *supra* note 491, at 2020-21 (intimating the possibility of this criticism); Luban, *supra* note 359, at 9; MAYER, *supra* note 115, at 366.

⁷⁶⁷ See, e.g., PLATO, CRITO 43(a) (chronicling Socrates' decision to accept induction into the Athenian army to fight a war he opposed on the ground that because he had accepted the benefits of Athenian citizenship he was obligated to accept corresponding burdens, including military service).

⁷⁶⁸ A Congressional subcommittee predicts this will transpire in the near future. BOB GRAHM ET AL., WORLD AT RISK: REPORT OF THE COMMISSION ON THE PREVENTION OF WEAPONS OF MASS DESTRUCTION xv (2008).

it, a civilizational coexistence, or, if they will not, to wipe Islamism, and if need be its adherents, from the earth.

VI. CONCLUSION

The *Song of Roland* recounts that Charlemagne, victorious over Islamic forces by dint of Roland's sacrificial warning, orders treasonous Frankish courtiers arrested and their leader, Ganelon, tried. Despite the evidence, Ganelon's crafty counsel nearly sways the judges into an acquittal besmirching Roland's honor when Roland's kinsman, Thierry, interrupts to demand a judicially-sanctioned duel to ascertain guilt. When God intervenes, guiding the far-weaker Thierry in slaying Ganelon's champion, Pinabel, Roland is vindicated, and the convict Ganelon is drawn and quartered as the other traitors are hanged. The Kingdom of the Franks is saved. Yet as the *Song* concludes, the dogged Muslim remnant marches on, undaunted in its quest to extend the faith by the sword.⁷⁶⁹

History repeats. Civilizational conflict, machinations of internal enemies, sophistry perverting justice, and lionization of patriotic sacrifice are as relevant now as when the *Song* was transcribed. Just as the Islamist army could not imperil the Kingdom of the Franks but for turncoats within Charlemagne's court, so too are contemporary Islamists, incapable of destroying American political will themselves, reliant on a Western Fifth Column. CLOACA, conjuring a witches' brew from intellectual dishonesty, cowardice, anti-Americanism, and a desire for an Islamist victory among other foul ingredients, incants LOAC to trick war-weary Americans into blaming themselves for "torture," "illegal" wars, and the conflict with Islamism itself. Breaking the spell cast by this coven of academics is *sine qua non* for Western victory. Inexplicably, CLOACA, unmolested, keeps wielding scholastic arguments in a PSYOP campaign. The cumulative weight of its attacks, filtered through media and government and distilled into claims that Islamism poses no threat and to reclaim its legitimacy the United States must surrender and yield up its leaders for prosecution, has metastasized, inflicting potentially mortal damage upon U.S. political

⁷⁶⁹ SONG OF ROLAND, *supra* note 1.

will. ISIS, atrocities and terror in its wake, and recruits and weapons flooding its ranks, is poised to capture Baghdad and Damascus; Cairo is next; soon, the West? As Islamists expand into and target Africa, Asia, Europe, and the Americas, the United States and its allies, after suffering sixty thousand casualties post-9/11, withdraw from Afghanistan and return small but militarily insignificant contingents to Iraq.⁷⁷⁰ Not having chosen to win, the West is losing this war.

In a 1936 speech in Paris, future British Prime Minister Winston Churchill challenged the West to rouse from its torpor and war-weariness to confront the gathering evil of Nazism:

We must recognize that we have a great treasure to guard. The inheritance in our possession represents the prolonged achievement of the centuries . . . there is not one of our simple uncounted rights today for which better men than we are have not died on the scaffold or the battlefield. We have not only a great treasure; we have a great cause.⁷⁷¹

A half-century later, on June 6, 1984, at a ceremony on Omaha Beach marking the fortieth anniversary of the beginning of the liberation of Europe from Nazism, President Ronald Reagan, addressing assembled U.S. Army Rangers who had scaled the cliffs at Pointe du Hoc under murderous fire that fateful French morning and, despite horrific casualties and the fanatical resistance of a determined foe, seized their objective, asked and answered another question that deserves revisiting:

Why did you do it? [You] . . . had faith that what [you] were doing was right, faith that you fought for all humanity[.] It was the deep knowledge—and pray God we have not lost it—that there is a profound moral difference between the use of force for liberation and the use of force for conquest. You were here to liberate, not to conquer, and so you and those

⁷⁷⁰ See Paul McLeary, *1000 82nd Airborne Troops Iraq-Bound in January*, DEF. NEWS (Dec. 19, 2014), <http://www.defensenews.com/story/defense/policy-budget/warfare/2014/12/19/iraq-isis-deploy/20643829/> (reporting January 2015 deployment of U.S. “advisors” to Iraq).

⁷⁷¹ Sir Winston Churchill, Address at the Théâtre des Ambassadeurs, Paris (Sept. 24, 1936).

others did not doubt your cause. You all knew that some things are worth dying for . . . and you knew the people of your countries were behind you.⁷⁷²

How, then, just twenty years later in 2004, could a senior Islamist strategist acknowledge he was waging a 4GW against the West he “expected to win[?]”⁷⁷³ In 2015, do we still recognize Western civilization as a coruscant treasure worth “taking every measure within our power to defend”? Does our civilization still produce citizens who can put aside the instinct for self-preservation and risk everything in the “deep knowledge” that “there is a profound moral difference between the use of force for liberation and the use of force for conquest”? Do we have “faith that what [we are] doing [i]s right” because we fight “for all humanity”? Do we “kn[o]w that the people of [our] countries are behind [us]”? Are we brave enough to face death on battlefields and scaffolds, too? Will we marshal all resources, including our minds, in our own defense? Or have we lost our belief in the goodness of Western civilization, surrendered faith in our cause, and hardened our hearts and minds against those who risk death on our behalf? Are we incapable of discerning that Islamism is the apotheosis of evil, or so demoralized and fagged that we, too, are betting on Islamists to win this war, and have devolved into a corrupt and contemptible culture lacking claws and courage to confront what creeps before our gates?

Western civilization has been “seize[d], encompass[ed], and ambush[ed]”⁷⁷⁴ by a Fifth Column, and will be vanquished, subsumed within the Caliphate, and ruled by *Shari’a* if a *trahison des professeurs* goes unchecked. Whether and how CLOACA might be induced to defect from the Islamist cause and cease “sabotaging [our] house by their hands”⁷⁷⁵ are cardinal important questions; methods of suasion, obligation, and coercion must be considered. With a loyal and intellectually honest LOACA serving *pro patria*, Western peoples, unshakeable in the legal and moral validity of their actions

⁷⁷² President Ronald Reagan, Remarks at a United States-France Ceremony Commemorating the 40th Anniversary of the Normandy Invasion (June 6, 1984).

⁷⁷³ Hammes, *supra* note 33, at 14 (referencing internal Islamist correspondence).

⁷⁷⁴ *Qur’an* 9:5, *supra* note 50.

⁷⁷⁵ Akram, *supra* note 56.

and freed of the doubts and despairs that damp courage and will, would win the war of ideas, sweep the fields of Islamists, and claim victory. Only if we muster the fortitude to declare, in respect to LOAC, that two plus two make four and compel CLOACA to stop saying “five” can we get on with this business.

The warison sounds; the warning is sent; the assistance of the sacred and the profane is summoned. Whether once again the West will heed the call, march apace against the Islamist invaders, and deliver justice swift and sure to disloyal courtiers abasing it from within, or whether the West has become deaf to the plaintive, fading notes of one encircled knight who long ago called forth its soldiers and calls them yet again, will decide if the *Song of Roland* remains within the inheritance of future generations of its peoples. If the West will not harken now to Roland and his horn, neither it, nor its peoples, nor the law they revere will outlive the bleak day of desecration when Islamists, wielding their *Sword*,⁷⁷⁶ strike his *Song*, all it represents, and all it can teach, from history.



⁷⁷⁶ *Qur'an* 9:5, *supra* note 50.



COMMENT

NSA SURVEILLANCE, SMITH & SECTION 215: PRACTICAL LIMITATIONS TO THE THIRD-PARTY DOCTRINE IN THE DIGITAL AGE

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*In June of 2013, The Guardian reported that the National Security Agency ("NSA") was collecting telephony metadata from U.S. citizens under Section 215 of the USA PATRIOT Act. This quickly prompted questions about the legal basis of the program, including its compliance with the Fourth Amendment. In defense of the program, the Obama Administration pointed out both legislative and judicial approval of the program, and also cited a 1979 case, *Smith v. Maryland*, as precedent for the collection of telephony metadata. In *Smith*, the Court applied the third party doctrine and found that no Fourth Amendment search had occurred when the defendant voluntarily shared telephone numbers he dialed with his telephone provider, and therefore maintained no privacy interest in that information. However, rather than assuaging concerns about the Section 215 program, the government's reliance on *Smith* provoked new concerns about the application of the third party doctrine. Some of this concern is due to incredible advancements in technology that have reshaped society while the law has failed to keep pace. As individuals increasingly provide vast amounts of personal data to third parties in the course of their daily lives, the third party doctrine has become a nearly insurmountable obstacle to asserting Fourth Amendment privacy rights. A more conservative application of the third party doctrine is needed, and two recent decisions suggest the Supreme Court is open to revisiting the*

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doctrine. Drawing support from these two cases, this Comment proposes a more limited application of the third party doctrine.

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INTRODUCTION

In June of 2013, *The Guardian* reported¹ that the National Security Agency (“NSA”), the U.S. government agency responsible

¹ Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 5, 2013), www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order; Glenn Greenwald & Ewan McCaskill, *NSA Prism program taps in to user data of Apple, Google and others*, GUARDIAN (June 6,

for the collection and processing of foreign communications for intelligence and counterintelligence purposes,² was also collecting the communications of U.S. citizens.³ *The Guardian* reports described two NSA surveillance programs, only one of which will be examined here.⁴ Under the Section 215 program, NSA was collecting the call

2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

² “Foreign intelligence information” is:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

50 U.S.C. §1801(e) (2012).

³ NSA is responsible for the collection, processing, and dissemination of signals intelligence (“SIGINT”). Exec. Order No. 12,333, § 1.12(b). “SIGINT is intelligence derived from electronic signals and systems used by foreign targets, such as communications systems, radars, and weapons.” See *Signals Intelligence*, NAT’L SEC. AGENCY, <http://www.nsa.gov/sigint/>. The term “communications intelligence” (“COMINT”) has also been used to describe NSA’s responsibilities. COMINT is a division of SIGINT and “is produced by the collection and processing of foreign communications passed by electromagnetic means . . . and by the processing of foreign encrypted communications, however transmitted.” U.S. DEP’T OF DEF., DIR. 5100.20, *THE NATIONAL SECURITY AGENCY AND THE CENTRAL SECURITY SERVICE*, para. III(B) (June 24, 1991).

⁴ The second surveillance program reported by *The Guardian* is the Section 702 program, which will not be examined in this Comment. The program reportedly allowed NSA to intercept internet-based communications data (including the content of communications) of non-U.S. persons overseas, which also resulted in the incidental collection of such data from U.S. persons. NSA reportedly collected internet-based communications by “tap[ping] into the servers” of major U.S. internet providers in order to extract customers’ personal data, such as e-mails, video chats, documents, and more. *NSA slides explain the PRISM data-collection program*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/> (last updated July 10, 2013). For a thorough discussion of the Section 702 program, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL’Y 117 (2015).

detail records (also referred to as “telephony metadata”)⁵ for millions of domestic and international telephone calls pursuant to a single court order.⁶ The *Guardian*’s reports generated considerable public discussion of NSA’s activities and prompted questions about the legal basis of the Section 215 program,⁷ including how this bulk collection of telephony metadata complied with the Fourth Amendment.⁸

In the weeks following the initial disclosures of NSA’s domestic surveillance, President Obama and other executive branch officials defended the agency’s actions, noting that both the legislative and judicial branches had approved the Section 215

⁵ The terms “call detail records” and “telephony metadata” are used interchangeably by the Foreign Intelligence Surveillance Court (“FISC”) in the leaked court order, and will be used similarly throughout this Comment. See Greenwald, *supra* note 1. As used in this context, the term “metadata” refers to information about telephone calls—not the content of the calls. Metadata includes information like telephone numbers associated with calls placed and received, as well as date, time, and duration of calls. See generally ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 2-3 (Aug. 9, 2013) [hereinafter BULK COLLECTION WHITE PAPER], available at <http://perma.cc/8RJN-EDB7>; see also MEMORANDUM FROM THE OFFICE OF LEGAL COUNSEL FOR THE ATTORNEY GENERAL, RE: REVIEW OF THE LEGALITY OF THE STELLAR WIND PROGRAM 81 (May 6, 2004).

⁶ This Comment refers to this telephony metadata program as the “Section 215 program.” The name of the program is derived from its location in its authorizing legislation. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272 (codified as amended at 50 U.S.C. § 1861 (2012)). Section 215 of the Act replaced §§ 501-503, the “business records” provisions under Title V of the Foreign Intelligence Surveillance Act of 1978 (“FISA”). Congress added Title V to FISA in 1998 and has since amended it with legislation like the USA PATRIOT Act and the Intelligence Authorization Act for Fiscal Year 2002. Pub L. No. 107-108, § 314(a)(6)-(7), 115 Stat. 1402 (2001).

⁷ See, e.g., Thomas Earnest, *Balancing the Public Interest in Disclosures*, JUST SECURITY (Jan. 21, 2014), <http://justsecurity.org/6018/public-interest-disclosures-marc-thiessen/>; Jennifer Granick & Christopher Sprigman, *The Criminal N.S.A.*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html>; Julian Sanchez, *Snowden: Year One*, CATO UNBOUND (June 5, 2014), <http://www.cato-unbound.org/2014/06/05/julian-sanchez/snowden-year-one>.

⁸ A complete legal analysis of the Section 215 program is beyond the scope of this Comment.

program.⁹ Officials also cited a 1979 case, *Smith v. Maryland*, as an authority for the collection of telephony metadata that occurred under the Section 215 program.¹⁰ The Supreme Court in *Smith* determined that the government's use of a single pen register to monitor the telephone numbers dialed by the defendant did not constitute a "search" for purposes of the Fourth Amendment, and therefore, no warrant was required.¹¹ Moreover, the defendant had no "reasonable expectation of privacy" regarding the numbers he dialed, because he had voluntarily conveyed such information to a third party, his telephone company.¹² This notion that information shared with third parties has no Fourth Amendment protection is known as the "third-party doctrine."¹³ The executive branch and the Foreign Intelligence Surveillance Court ("FISC") have since relied upon *Smith's* precedent to justify the more expansive and technologically sophisticated Section 215 program.

According to the Obama administration, the data collected under the Section 215 program does not include call content, but does include telephony metadata—such as information about phone numbers dialed, calls received, and call duration—that individuals voluntarily share with phone companies.¹⁴ Consequently, collection of such information under the Section 215 program falls within the scope of the third-party doctrine and *Smith*: it is not a Fourth Amendment "search" because "persons making phone calls lack a

⁹ See, e.g., BULK COLLECTION WHITE PAPER, *supra* note 5. In 2006, the FISC stated that Section 215 was a valid legal authority for bulk collection of telephony metadata, including the metadata of U.S. persons. In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 06-05 (FISA Ct. May 24, 2006).

¹⁰ *Smith v. Maryland*, 442 U.S. 735 (1979). For examples of officials invoking the *Smith* precedent, see Defendant's Memorandum of Law in Opposition to Plaintiff's Motion Preliminary Injunction, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (13 Civ. 3994), 2013 WL 5744828. See also BULK COLLECTION WHITE PAPER, *supra* note 5.

¹¹ *Smith*, 442 U.S. at 745-46. See BULK COLLECTION WHITE PAPER, *supra* note 5, at 19.

¹² *Smith*, 442 U.S. at 738.

¹³ Fourth Amendment scholar Orin Kerr describes the doctrine as the rule that information "loses Fourth Amendment protection when it is knowingly revealed to a third party." Orin S. Kerr, *The Case for Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

¹⁴ BULK COLLECTION WHITE PAPER, *supra* note 5, at 23.

reasonable expectation of privacy in the numbers they call” and in the information voluntarily provided to a third party.¹⁵ When NSA intercepts this information, the government argues, it is not a “search” and no warrant is required.¹⁶ According to the administration, if no privacy interest is violated when the government obtains telephony metadata of one individual, no privacy interest is violated when the government obtains telephony metadata of millions of individuals.

The Obama administration’s efforts to assuage Americans’ concerns about the legality of the program instead provoked significant debate about the third-party doctrine and its application to NSA’s Section 215 program.¹⁷ Because *Smith* permitted only individualized, short-term surveillance of the phone numbers dialed by an identified suspect,¹⁸ some, including the U.S. District Court for the District of Columbia, have argued that *Smith* cannot possibly justify the bulk surveillance of millions of individuals’ call-detail records that occurs under the Section 215 program.¹⁹ In addition,

¹⁵ *Id.* at 19-20 (“A Section 215 order for the production of telephony metadata is not a ‘search’ . . . because, as the Supreme Court has expressly held, participants in telephone calls lack any reasonable expectation of privacy under the Fourth Amendment in the telephone numbers dialed.”).

¹⁶ *Id.* at 22.

¹⁷ *E.g.*, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 125 (Jan. 23, 2014) [hereinafter PCLOB Report], available at https://www.pclob.gov/Library/215-Report_on_the_Telephone_Records_Program.pdf (“As suggested by the observations of Justices Alito and Sotomayor in *United States v. Jones*, collectively representing the views of five Justices, the Supreme Court might find that the third-party doctrine, regardless of its validity as applied to traditional pen/trap devices and particularized subpoenas, does not apply to the compelled disclosure of data on a scope as broad and persistent as the NSA’s telephone records program.”).

¹⁸ *Smith v. Maryland*, 442 U.S. 735, 736-37 (1979).

¹⁹ In an opinion regarding the Section 215 program, the U.S. District Court for the District of Columbia distinguished the Section 215 program from *Smith* and concluded:

[T]he surveillance program now before me is so different from a simple pen register that *Smith* is of little value in assessing whether the Bulk Telephony Metadata Program constitutes a Fourth Amendment search. To the

societal changes and advancements in technology suggest that *Smith* may no longer represent the best approach to determining permissible invasions of privacy. As individuals increasingly provide vast amounts of personal information to third parties in the course of their everyday lives, some have questioned whether the default application of the third-party doctrine has needlessly narrowed Fourth Amendment privacy rights.²⁰ Accordingly, this Comment argues that a more restrained application of the third-party doctrine is necessary, drawing support from two recent Supreme Court decisions: *Riley v. California* and *United States v. Jones*. In these landmark Fourth Amendment cases, the Court limited the government's ability to conduct warrantless searches of cell phones and GPS information. Although neither *Jones* nor *Riley* directly involved the Section 215 program, the decisions nonetheless provide valuable insight into the Supreme Court's perception of new surveillance technologies and how they impact Fourth Amendment rights. With several cases challenging the constitutionality of the Section 215 program currently making their way through federal district and appeals courts, the Supreme Court may very well

contrary...I believe that bulk telephony metadata collection and analysis almost certainly does violate a reasonable expectation of privacy.

Klayman v. Obama, 957 F. Supp. 2d 1, 32 (D.D.C. 2013).

²⁰ E.g., David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 139 (2013) ("In the age of data aggregation, the stakes for privacy implicated by this third-party doctrine have grown dramatically. Vast reservoirs of our private data are gathered by or otherwise reside in the hands of private entities."); Lauren Elena Smith, *Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones*, 28 BERKELEY TECH. L.J. 1003, 1003 (2013) ("The evolution of surveillance technologies over the last few decades has led some observers to wonder if the Fourth Amendment will become irrelevant in the digital age. Privacy protections are eroding, as law enforcement is able to access more information that is voluntarily shared by technology-utilizing citizens."); Jennifer Granick, *Prediction: Fourth Amendment Evolves in 2014*, JUST SECURITY (Dec. 31, 2013, 4:32 PM), <http://justsecurity.org/5195/prediction-fourth-amendment-evolves-2014/>. See also 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b) (2012) (criticizing the third-party doctrine and the application of *Smith* as making a "mockery of the Fourth Amendment").

consider a challenge to some aspect of the program in the near future.²¹

Part I of this Comment provides a brief history of the Fourth Amendment, the third-party doctrine, and *Smith*. Part II distinguishes the Section 215 program from *Smith*, and in doing so, demonstrates why the third-party doctrine may be in need of some restraint. In Part III, this Comment suggests that the Court is likely to reexamine the third-party doctrine and Fourth Amendment privacy rights in the context of new technology, using *Jones* and *Riley* as examples.²² Part IV offers a proposal for a more nuanced application of the third-party doctrine. First, the Court should determine if an alternative to sharing information with a third party exists. If one does not exist, the third-party doctrine does not apply, and the Court must then consider the context and consequences of the government action to determine whether a search has taken place. The inquiry is designed to fulfill the underlying purpose of the doctrine:²³ Fourth Amendment protection is lost when information is freely made public, but individuals' privacy rights would still be protected under circumstances in which sharing information is required for participation in essential functions of daily life.²⁴

I. OVERVIEW OF THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution protects individuals and their property from warrantless government searches and seizures.²⁵ Originally, the Supreme Court confined these

²¹ See, e.g., *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); *Klayman*, 957 F. Supp. 2d at 1; *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); *First Unitarian Church v. NSA*, No. 13-3287 (N.D. Cal. filed July 16, 2013).

²² *Riley v. California*, 134 S. Ct. 2473 (2014); *United States v. Jones*, 132 S. Ct. 945, 957 (2012).

²³ The notion that there is no privacy interest in information voluntarily conveyed to third parties is based on practical considerations. If the Fourth Amendment were to be applied universally, then a warrant would likely be required for everything. This would likely lead to considerable frustration for law enforcement officials.

²⁴ *Smith v. Maryland*, 442 U.S. 735, 744 (1979) ("Because the depositor 'assumed the risk' of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.").

²⁵ U.S. CONST. amend. IV.

safeguards solely to the circumstances explicitly articulated in the text. Fourth Amendment protections applied only when physical searches or seizures of property—"persons, houses, papers, and effects"—occurred.²⁶ But interpretation of the Fourth Amendment, and, therefore, what sort of government action would be considered a search, has been influenced by technological advancements and societal changes. With the introduction of new technology, such as the telephone and wiretap, the Court has since recognized a "constitutionally protected reasonable expectation of privacy" even when no physical intrusion has occurred.²⁷

In the 19th Century, the invention of the telegraph and telephone fundamentally transformed communications, connecting individuals scattered across the nation and vastly increasing communications capabilities. As use of the telephone increased, the government capitalized upon this increase in communications, adapting existing surveillance technology to monitor these new forms of communication.²⁸ In the 1928 case of *Olmstead v. United States*, the Supreme Court upheld the use of warrantless wiretapping of a telephone conversation because no physical trespass onto the defendants' property had occurred.²⁹ When government officials suspected the defendants of running a bootlegging operation, they installed wiretaps on telephone lines located in the basement of the defendants' office building and streets outside of their homes.³⁰ But because the government had not physically intruded onto the defendants' property to install the wiretaps, the Court rejected the argument that a search (and therefore, a Fourth Amendment violation) had occurred.³¹ The Court foreclosed any possibility that Fourth Amendment privacy rights could be invoked without a physical intrusion into an individual's property, papers, or effects.

²⁶ *Olmstead v. United States*, 277 U.S. 438, 457, 464-66 (1928).

²⁷ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

²⁸ See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 225 (4th ed. 2011).

²⁹ *Olmstead*, 277 U.S. 438.

³⁰ *Id.* at 457.

³¹ See *id.* at 464 ("The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.").

In a passionate dissent, Justice Brandeis warned about the practical limitations of the Court's holding. He worried that the strict, property-based approach articulated in *Olmstead* would improperly cabin the Fourth Amendment and fail to protect individuals from non-physical government intrusions that were equally invasive:

The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.³²

Brandeis' prescient dissent forecasted how advancements in technology could alter government surveillance techniques, and in turn, impact individual expectations of privacy. Although he correctly predicted the inadequacy of *Olmstead* in addressing these changes, the Court struggled for decades to fit Fourth Amendment rights into the confines of the precedent it had established.

A. *Applying Olmstead in a Changing World*

The strict approach of *Olmstead* meant that for decades privacy rights were literally confined to the words of the Fourth Amendment. *Olmstead* faced criticism in the ensuing years, as telephone use (and, correspondingly, the use of wiretaps) increased.³³ Despite growing evidence that the physical trespass threshold was ill-equipped to protect Fourth Amendment rights in the face of new government surveillance capabilities and changes in electronic means of communication, it took nearly forty years for the Court to overturn it.³⁴ As the examples below demonstrate, the Court

³² *Id.* at 474 (Brandeis, J., dissenting).

³³ See RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43586, THE FOURTH AMENDMENT THIRD PARTY DOCTRINE 5 (2014); SOLOVE & SCHWARTZ, *supra* note 28, at 225, 313 ("Wiretapping was used to intercept telegraph communications during the Civil War and became very prevalent after the invention of the telephone. The first police wiretap occurred in the early 1890s. In the first half of the twentieth century, wiretaps proliferated . . .").

³⁴ See *Katz v. United States*, 389 U.S. 347, 353 (1967).

struggled to apply *Olmstead* to new methods and increased deployment of government surveillance in this time period.³⁵ As the dissents in these cases point out, Fourth Amendment determinations involving government surveillance frequently yielded counterintuitive outcomes and seemed to turn on relatively superficial distinctions in facts.

In the 1942 case *Goldman v. United States*, the Court determined that government agents' use of a detectaphone, without a warrant, to overhear conversations in the defendants' office next door did not violate the Fourth Amendment.³⁶ Government agents gained access to defendants' office and installed a "listening apparatus in a small aperture in the partition wall with a wire to be attached to earphones extending into the adjoining office."³⁷ But when the agents returned the next day, they realized that the listening device did not work and instead used another device, a detectaphone.³⁸ A five-justice majority applied *Olmstead* and found that the government's use of the detectaphone did not require a physical invasion of the defendants' property and that no search had taken place—despite the fact that the agents had physically entered the defendants' office in an attempt to install a listening device.³⁹ According to the Court, the use of the detectaphone from next door was no physical invasion of the defendants' property:⁴⁰ "Whatever trespass was committed was connected with the installation of the listening apparatus."⁴¹ No such trespass was associated with the use of the detectaphone next door, so no Fourth Amendment violation had occurred.

³⁵ See, e.g., *Silverman v. United States*, 365 U.S. 505, 512-13, (1961) (Douglas, J., concurring) ("My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman* . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other.").

³⁶ *Goldman v. United States*, 316 U.S. 129 (1942).

³⁷ *Id.* at 131.

³⁸ *Id.* at 131-32.

³⁹ *Id.* at 134-35.

⁴⁰ *Id.* at 134.

⁴¹ *Id.*

In a dissent advocating the overturning of *Olmstead*'s property-based approach, Justice Murphy argued that the strict reading of the Fourth Amendment had and would continue to significantly diminish the privacy rights the country's forefathers had intended to protect.⁴² He observed:

The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide . . . It is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.⁴³

Without flexibility, Murphy warned, the Fourth Amendment was in danger of becoming "obsolete, incapable of providing the people of this land adequate protection."⁴⁴ Still, *Olmstead* remained in place, and government surveillance continued to advance.

Ten years later, in *On Lee v. United States*, the Court found that use of a hidden microphone worn by an informant, which relayed conversations without the defendant's knowledge that were taking place on the defendant's property, did not violate his Fourth Amendment rights.⁴⁵ Although the undercover informant physically entered the defendant's property for the purpose of recording him, the Court rejected the notion that *Olmstead* protected the defendant's privacy rights.⁴⁶ The undercover agent had entered the defendant's property, the Court said, but it was with the consent, "if not by the implied invitation of" the defendant.⁴⁷ A frustrated Justice Frankfurter condemned the Court's application of *Olmstead* in his

⁴² *Goldman*, 316 U.S. at 138 (Murphy, J., dissenting).

⁴³ *Id.* The need for the Fourth Amendment to adapt to cover novel intrusions that the Forefathers could not have anticipated is clear. *See also* *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972) ("Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.").

⁴⁴ *Goldman*, 316 U.S. at 138 (Murphy, J., dissenting).

⁴⁵ *On Lee v. United States* 343 U.S. 747, 749, 751 (1952).

⁴⁶ *Id.* at 753-54.

⁴⁷ *Id.* at 751-52.

dissent: here a physical trespass *had* occurred, yet the Court refused to recognize this clear intrusion as a Fourth Amendment violation.⁴⁸ Frankfurter officially endorsed Murphy's *Goldman* dissent and declared that *Olmstead* must be overturned. Its inflexible approach to the Fourth Amendment undermined protections against government search and seizure. Echoing Justice Brandeis' warning in *Olmstead*, Frankfurter wrote, "The circumstances of the present case show how the rapid advances of science are made available for that police intrusion into our private lives against which the Fourth Amendment of the Constitution was set on guard."⁴⁹

By the early 1960s, the Court was openly struggling to apply *Olmstead* in the wake of new and more frequent instances of government surveillance and seemed to distance itself from a strict property-centric approach to Fourth Amendment rights. In 1961 and then again in 1967, the Court provided early hints that it might be open to reconsidering *Olmstead*. In one case, the Court held that the placement of a recording device in the defendant's office violated the Fourth Amendment, and the Court went so far as to rule unconstitutional a state statute that permitted it.⁵⁰ In another case, a unanimous Court held that the government's warrantless use of a "spike mike," a device that allowed police to listen through the defendant's walls, was also violation of the Fourth Amendment.⁵¹ In its holding, the Court declined to overturn *Olmstead* explicitly, but attempted to distance itself from the precedent's confines, saying, "In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."⁵²

⁴⁸ *Id.* at 761-62 (Frankfurter, J., dissenting).

⁴⁹ *Id.* at 759-760 (majority opinion); *Olmstead v. United States*, 277 U.S. 438, 458 (1928).

⁵⁰ *Berger v. New York*, 388 U.S. 41 (1967).

⁵¹ *Silverman v. United States*, 365 U.S. 505 (1961). The spike mike only barely intruded on the physical property—it "made contact with a heating duct serving the house" of the defendants. *Id.* at 506-07.

⁵² *Id.* at 511.

B. The Modern Fourth Amendment: A Reasonable Expectation of Privacy

Finally, in 1967, the Court adopted a far more expansive view of Fourth Amendment rights in government surveillance cases—one much more in line with the dissents in *Olmstead*, *Goldman*, and *On Lee* than the majorities. In *Katz v. United States*, the Court announced that the Fourth Amendment “protects people, not places.”⁵³ Despite the lack of physical trespass in the case, the Court found that warrantless government eavesdropping on the defendant’s conversations, which took place in a glass-enclosed, public telephone booth, was a violation of the Fourth Amendment.⁵⁴ This acknowledgement of a “constitutionally protected reasonable expectation of privacy”⁵⁵ without an accompanying physical trespass was a notable departure from the property-centric approach dictated by *Olmstead*.⁵⁶ The *Katz* majority rejected the government’s argument that the defendant lacked any Fourth Amendment protection simply because he used a public phone booth to place his calls.⁵⁷ When a person “occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call [he] is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world,” the majority wrote, continuing, “To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”⁵⁸ According to the Court, the government did not need to physically invade the defendant’s property for a Fourth Amendment violation to have taken place.

Despite the conviction of the *Katz* majority’s rhetoric, however, the opinion failed to articulate a clear test for determining when a search in violation of the Fourth Amendment has occurred.

⁵³ *Katz v. United States*, 389 U.S. 347, 389 (1967).

⁵⁴ *Id.*

⁵⁵ *Id.* at 351.

⁵⁶ *Id.* at 353 (“[A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision has rested.”).

⁵⁷ *Id.* at 352.

⁵⁸ *Id.*

In a concurring opinion, however, Justice Harlan provided guidelines that have since become the standard relied upon by courts today: a violation of Fourth Amendment rights occurs when the government intrudes upon an individual's "reasonable expectation of privacy" without a warrant.⁵⁹ A "reasonable expectation of privacy" exists when two elements have been met: (1) the individual has demonstrated "an actual (subjective) expectation of privacy," and (2) that subjective expectation of privacy is one that "society is prepared to recognize as 'reasonable.'"⁶⁰ When each of these elements has been satisfied, an individual has a reasonable expectation of privacy from warrantless government searches. When an individual has not demonstrated a legitimate expectation of privacy—for example, by sharing personal information with a third party—the Fourth Amendment does not prohibit the government from accessing that information without a warrant,⁶¹ as the next section will explore.

C. *The Third-Party Doctrine and Smith*

The third-party doctrine says that an individual maintains no reasonable expectation of privacy in information voluntarily conveyed to a third party, thereby failing the *Katz* test for determining when a Fourth Amendment violation has occurred.⁶² As a result, the government may access information shared with a third party, without a warrant, without it constituting a search under the Fourth Amendment.⁶³ One of the most significant cases in developing the doctrine occurred in 1979, when the Court

⁵⁹ See, e.g., *United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's 'reasonable expectation of privacy.'"). However, not all warrantless searches are unconstitutional. E.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

⁶⁰ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁶¹ *United States v. Miller*, 425 U.S. 435, 443 (1976).

⁶² See *Smith v. Maryland*, 442 U.S. 735, 743-44 (1989); see also *Miller*, 425 U.S. at 443-44; Kerr, *supra* note 13, at 561.

⁶³ *Smith*, 442 U.S. at 745-46.

considered *Smith v. Maryland*, the case now relied upon by the Obama administration as one authority for its Section 215 program.⁶⁴

In *Smith*, the Court upheld the government's warrantless use of a pen register to monitor the telephone numbers dialed by the defendant.⁶⁵ Police suspected Smith of repeatedly placing threatening telephone calls to a victim, and installed a pen register on Smith's phone line at the telephone company without his knowledge. The pen register recorded the numbers that Smith dialed but did not record the content of his calls, call duration, or incoming calls—in essence, telephony metadata. With the pen register in place, police found that Smith had, in fact, called the victim, and proceeded to arrest him. The defendant argued that his Fourth Amendment rights had been violated, but the Court rejected Smith's argument, explaining that the defendant had no reasonable expectation of privacy in the telephone numbers he dialed because that information was voluntarily shared with a third party—the telephone company.⁶⁶

Applying the *Katz* reasonable expectation of privacy standard, the Court first considered whether the defendant had exhibited a reasonable expectation of privacy and whether it was an expectation that society would recognize as legitimate. In a 5-4 decision, the Court found that Smith had no reasonable expectation of privacy in the numbers he dialed because he knew that information was shared with the phone company—after all, the telephone company required subscribers to dial a number in order to place and connect his calls.⁶⁷ Anyone who ever used a telephone knew that. Moreover, telephone companies kept records of their subscribers' phone calls for billing purposes—subscribers like Smith received regular billing for telephone services that contained this information.⁶⁸ Even if Smith had intended to keep this information private, the Court continued, Smith's expectation of privacy was not one that society would recognize as legitimate because the Court had previously stated that he had “no legitimate expectation of privacy in

⁶⁴ See BULK COLLECTION WHITE PAPER, *supra* note 5.

⁶⁵ *Smith*, 442 U.S. at 737.

⁶⁶ *Id.* at 735.

⁶⁷ *Id.* at 742.

⁶⁸ *Id.* at 742-43.

information he voluntarily turns over to third parties.”⁶⁹ When Smith dialed the numbers on his telephone, he knew he was sharing that information with the telephone company, and in turn, “assumed the risk that the company would reveal to police the numbers he dialed.”⁷⁰ Smith failed the *Katz* test: he had no reasonable expectation of privacy in the numbers he dialed. Even if he did, this expectation was not legitimate. Given he had no reasonable expectation of privacy, the Court concluded, the government’s use of the pen register to record the phone numbers Smith dialed did not constitute a search for Fourth Amendment purposes, and therefore did not require a warrant.⁷¹ *Smith* has since been relied on for its third-party doctrine precedent,⁷² and more than thirty years later, the government is still using *Smith* to collect telephony metadata—but in an entirely new way.

II. WHY THE THIRD-PARTY DOCTRINE MUST BE CIRCUMSCRIBED: DISTINGUISHING THE SECTION 215 PROGRAM FROM *SMITH*

Thirty-five years ago when *Smith* created the third-party doctrine, no one could have imagined that soon ninety percent of adult Americans would carry a cellular phone, the Internet would be available in nearly every home, and iPhones would sweep the market. The *Smith* era had not even anticipated the commercialization of technology that is now considered functionally obsolete, such as beepers or facsimile machines.⁷³ The general American public now owns technology that was simply unfathomable in 1979. The

⁶⁹ *Id.* at 743-44.

⁷⁰ *Id.* at 744.

⁷¹ *Smith*, 442 U.S. at 745-46.

⁷² See, e.g., Kerr, *supra* note 13, at 570. See THOMPSON II, *supra* note 33, at 15 for a line of cases invoking the third-party doctrine precedent. See Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199 (2009) (discussing how the third-party doctrine fits into other legal contexts and Fourth Amendment circumstances).

⁷³ Pew Research found that ninety percent of adult Americans own a cell phone. The numbers are even higher in the 18-29 age group, in which ninety-eight percent own a cell phone. *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited Apr. 7, 2015).

proliferation of technology was accompanied by a decline in the cost of new surveillance techniques, making surveillance more affordable and easier to conduct on a large scale.⁷⁴

Defenders of NSA's Section 215 program point to the fact that telephony metadata collection does not include collection of the *contents* of the communications, relating the telephony metadata program to the pen register used in *Smith*.⁷⁵ However, there is little evidence to suggest that the *Smith* Court envisioned its approval of the limited and specific surveillance of one individual would also sanction something like the long-term GPS tracking in *Jones*, the search of cell phone data, or the broad surveillance of millions of individuals under the Section 215 program. The *Smith* Court, in determining that no Fourth Amendment search had occurred, emphasized the limited nature of the information resulting from the pen register surveillance and the fact that law enforcement officials did not acquire the contents of Smith's calls.⁷⁶ But there are significant differences between the government surveillance approved in *Smith* and the Section 215 program: the differences in the methods of surveillance used, and the level of detail of the information derived from the surveillance in the two scenarios.

A. *The Nature of Smith Surveillance: Narrow and Primitive*

Smith involved surveillance conducted through a pen register, a small device installed at the telephone company that made a record of the numbers dialed by that specific telephone line. The pen register in *Smith* was directed at one specific person, an identified criminal suspect who was placing obscene and threatening telephone calls to a woman.⁷⁷ Police installed a pen register on the

⁷⁴ Kevin S. Bankston & Ashkan Soltani, *Tiny Constables and the Cost of Surveillance: Making Cents Out of United States v. Jones*, 123 YALE L.J. 335, 353 (2014) (demonstrating the difference in costs between new surveillance techniques and older techniques). "For example, the average cost of cell phone tracking across the three major providers is about \$1.80 per hour for twenty-eight days of tracking. Using beeper technology for the same period of time is nearly sixty times more expensive, while covert car pursuit is over 150 times more expensive." *Id.*

⁷⁵ *Smith*, 442 U.S. at 737.

⁷⁶ *Id.* at 737, 741.

⁷⁷ *Id.*

suspect's telephone line, capable only of recording the telephone numbers dialed by the defendant via electrical impulses created by the telephone's rotary dial when released.⁷⁸ It did not collect the content or length of the call, and, in fact, could not even collect information about the call's completion.⁷⁹ Unlike the information collected in the Section 215 program, the information collected from the pen register was not placed into any database, not aggregated with any other information, and did not disclose any aggregate data from any other individuals.⁸⁰ The pen register surveillance was in place for only one day before it yielded enough information for police to secure a warrant to search the suspect's home.⁸¹ In short, the method of surveillance conducted in *Smith* was both narrow in scope and primitive in its technological reach.

B. The Nature of Section 215 Surveillance: Broad and Advanced

In contrast, the surveillance undertaken by the government in the Section 215 program is both broad in scope and technologically advanced: NSA collects millions of telephone records from telecommunications providers. These records contain information such as the telephone numbers of calls placed and received, as well as the time and length of calls.⁸² The records are requested and received in bulk, and include the call records of individuals not suspected of any wrongdoing.⁸³ This call detail

⁷⁸ *Id.* at 739.

⁷⁹ *Id.* at 737.

⁸⁰ PCLOB Report, *supra* note 17, at 114.

⁸¹ *Smith v. State*, 283 Md. 156, 158-59, 389 (1978), *aff'd*, 442 U.S. 735 (1979) ("On March 17, the telephone company, at the request of the police, installed a pen register at its central offices to record the phone numbers of calls made from the telephone at Smith's residence. On March 17, a call was made from Smith's residence to the victim's home. The police thereafter obtained a search warrant to search Smith's automobile and residence. The search of the residence revealed that a page in Smith's telephone book was turned down; it contained the name and number of the victim. On March 19, the victim viewed a six-man line-up at police headquarters and identified the appellant Smith as the man who robbed her.").

⁸² See *Amended Memorandum*, In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted], No. BR 13-109, 2 n.2 (FISA Ct. Aug. 29, 2013).

⁸³ Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J. L. & PUB. POL'Y 757, 869 (2013) ("The NSA is engaging in

information is then compiled into one database and retained there for a period of up to five years.⁸⁴ According to the government, the aggregation and maintenance of the call detail records is necessary to establish a “historical repository that permits retrospective analysis.”⁸⁵ NSA analysts may access this database and query the records contained within it without a warrant or court order, in order to obtain foreign intelligence information.⁸⁶ This surveillance method has been in place for seven years, and is conducted on a continuous basis.⁸⁷

Although telephony metadata does not disclose the contents of communications, the call detail records currently collected by the government contain rich data that was unavailable for pen register collection at the time of *Smith*.⁸⁸ The Court in *Smith* had distinguished the installation of a pen register from the listening device held to have constituted a search in *Katz*, saying, “pen

bulk collection absent any reasonable suspicion that the individuals, whose telephone information is being collected, are engaged in *any* wrongdoing. To the contrary, almost all of the information obtained will bear no relationship whatsoever to criminal activity.”).

⁸⁴ PCLOB Report, *supra* note 80, at 12.

⁸⁵ See *Amended Memorandum*, In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted], No. BR 13-109, 21 (FISA Ct. Aug. 29, 2013).

⁸⁶ See *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

⁸⁷ See generally PCLOB Report, *supra* note 17, at 16.

⁸⁸ According to the PCLOB Report:

[T]he pen register approved in *Smith v. Maryland* compiled only a list of the numbers dialed from Michael Lee Smith’s telephone. It did not show whether any of his attempted calls were actually completed—thus it did not reveal whether he engaged in any telephone conversations at all. Naturally, therefore, the device also did not indicate the duration of any conversations. Furthermore, the pen register provided no information about incoming telephone calls placed to Smith’s home, only the outbound calls dialed from his telephone.

Id. at 114. Senator Dick Durbin also posed questions as to whether *Smith v. Maryland* should be revisited in light of advancements in technology and communications. *Report of the President’s Review Group on Intelligence and Communications Technologies: Hearing Before the S. Judiciary Comm.*, 113th Cong. (2014), available at <http://www.judiciary.senate.gov/meetings/hearing-on-the-report-of-the-presidents-review-group-on-intelligence-and-communications-technologies>.

registers do not acquire the contents of communications.”⁸⁹ Yet modern call detail records contain substantially more information than in the *Smith* era: they now include the times and dates of telephone calls, along with the length of the conversation and other unique identifying characteristics.⁹⁰ The aggregation of call detail records creates a database of personal information that offers substantial details about an individual’s life. This information is far more valuable to the government than information yielded from a single instance of pen register surveillance—if it were not, there would be no reason for the government to collect, compile, and retain this metadata on such a substantial scale.⁹¹ Former NSA Director General Michael Hayden has illustrated that fact, boasting that metadata evidence is so complete and reliable that it can justify the use of deadly force against an individual, once claiming: “We kill people based on metadata.”⁹² Another government official explained at a 2014 Senate hearing that “there is quite a bit of content in metadata.”⁹³ This aggregation of telephony metadata raises privacy concerns for individuals for the same reason that it carries value for

⁸⁹ *Smith v. Maryland*, 442 U.S. 735, 741 (1989) (“Yet a pen register differs significantly from the listening device employed in *Katz* . . .”).

⁹⁰ PCLOB Report, *supra* note 17, at 115 (“The NSA’s collection program, however, would show not only whether each attempted call connected but also the precise duration and time of each call. It also would reveal whether and when the other telephone number called Smith and the length and time of any such calls.”).

⁹¹ *Id.* at 112 (“Because telephone calling records can reveal intimate details about a person’s life, particularly when aggregated with other information and subjected to sophisticated computer analysis, the government’s collection of a person’s entire telephone calling history has a significant and detrimental effect on individual privacy.”).

⁹² General Michael Hayden, Speech at the Johns Hopkins University Foreign Affairs Symposium (Apr. 7, 2014), available at <https://www.youtube.com/watch?v=kV2HDM86XgI>.

⁹³ *Report of the President’s Review Group on Intelligence and Communications Technologies: Hearing Before the Senate Judiciary Committee*, 113th Cong. (2014) (statement of Michael J. Morell, Deputy Director, CIA), available at <http://www.judiciary.senate.gov/meetings/hearing-on-the-report-of-the-presidents-review-group-on-intelligence-and-communications-technologies> (“I’ll say one of the things that I learned in this process, that I came to realize in this process, Mr. Chairman, is that there is quite a bit of content in metadata. When you have the records of phone calls that a particular individual made, you can learn an awful lot about that person . . . There is not, in my mind, a sharp distinction between metadata and content.”).

the government: it can provide a highly detailed and intimate description of an individual's life.

C. Why a New Approach is Needed

What was once an infrequent and relatively minor restraint on Fourth Amendment rights has become a frequent barrier to nearly any assertion of Fourth Amendment rights. The third-party doctrine in *Smith* prevented one criminal suspect from using the Fourth Amendment to prohibit the police from monitoring the numbers he dialed. The third-party doctrine in the context of modern surveillance, such as the 215 program, prevents millions of individuals who are not criminal suspects from using the Fourth Amendment to protect themselves against government monitoring of the numbers they dial, the length of their phone calls, and the calls they receive.

In the time of *Smith*, voluntarily sharing information with a third party was an active choice, and therefore, so was the relinquishing of Fourth Amendment protections. Now it is nearly impossible to avoid conveying information to some third party on a regular basis. We no longer send letters in the mail; we send text messages and emails through our telephone company, arming the company (and the government) with rich personal data in doing so. We no longer conduct research in a library; we conduct research on the Internet, supplying a variety of websites (and the government) with our personal information as we search. We no longer rent videos at Blockbuster; we order movies through our cable provider, or stream them through a provider like Netflix or Amazon, allowing these services to monitor our preferences and habits as we watch. It is not difficult to imagine a world in which physical mail no longer exists—the U.S. Postal Service has already scaled back mail delivery services.⁹⁴ Nor is it difficult to envision a world in which physical libraries and books no longer exist—library usage has declined with the advent of technology, and funding for operating public libraries

⁹⁴ *Postal Service renews push to stop Saturday delivery*, FOXNEWS.COM (July 18, 2013), <http://www.foxnews.com/politics/2013/07/18/postal-service-renews-push-to-stop-saturday-delivery/>.

has also dropped.⁹⁵ We do not have to conceive of a world in which Blockbusters no longer exist—the video rental company announced plans to close all retail stores in 2014.⁹⁶ Landlines are quickly being replaced by cell phones, which are now used for purposes far beyond simple phone calls.

The only way for an individual to avoid sharing information with a third party is never to use any telephone at all.⁹⁷ Because avoidance is practically impossible, *Smith*'s third-party doctrine has become an almost insurmountable obstacle in asserting Fourth Amendment privacy rights in the digital age. Strict application of the third-party doctrine, when applied in an increasingly sophisticated digital context, seems to subvert the Fourth Amendment,⁹⁸ rendering extremely sensitive personal information vulnerable to government search, surveillance, collection, and analysis. And as technology advances, it becomes less necessary for the government to conduct physical searches and seizures of property, papers, and effects. If the Fourth Amendment is to provide any safeguards at all from government intrusion, the third-party doctrine cannot continue to serve as a complete bar to asserting these rights.

III. COMING SOON: A CHANGE TO THE THIRD-PARTY DOCTRINE

Fourth Amendment history discussed in Part I of this Comment demonstrated how the Court's original, strict interpretation of the Fourth Amendment failed to adequately safeguard privacy rights as technology and society changed.⁹⁹ But

⁹⁵ Press Release, American Library Association, State Funding for Many Public Libraries on Decline (Feb. 10, 2009), available at <http://www.ala.org/news/news/pressreleases2009/february2009/orcoscla>.

⁹⁶ *Blockbuster Closing All of Its Remaining Retail Stores*, HUFFINGTON POST (Nov. 6, 2013), http://www.huffingtonpost.com/2013/11/06/blockbuster-closing_n_4226735.html.

⁹⁷ Donohue, *supra* note 83, at 874.

⁹⁸ See LAFAYE, *supra* note 20, at § 2.7(b) (criticizing the third-party doctrine and the application of *Smith* as making a "mockery of the Fourth Amendment").

⁹⁹ The line of cases between *Olmstead* and *Katz* aptly illustrates the futility of a rigid interpretation of the Fourth Amendment. The Supreme Court struggled with the consequences of its strict trespass-based approach to Fourth Amendment searches in the years before adopting a more augmented approach in *Katz*. See, e.g., *Berger v. New York*, 388 U.S. 41 (1967); *Silverman v. United States*, 365 U.S. 505 (1961); On

that same history demonstrates the Court's willingness to reexamine precedent and adopt a less harsh standard in order to meet the challenges posed by technological and societal advancements.¹⁰⁰ Although it may take years, or even decades, for the Court to reach the point of revision, eventually, it does.¹⁰¹ Right now, the Court is standing on the precipice of change. Two recent Supreme Court cases suggest that the Court is open to reexamining the third-party doctrine's application to new, more invasive searches and surveillance techniques, particularly when those techniques can provide a great deal of personal information about an individual.¹⁰²

Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942).

¹⁰⁰ Often times, the Court embraced the dissenting opinions they had once dismissed. See, e.g., Katz v. United States, 389 U.S. 347, 353 (1967) ("[A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision has rested."); On Lee v. United States 343 U.S. 747 (1952) (Douglas, J., dissenting) ("The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor, is the invasion of privacy against the command of the Fourth and Fifth Amendment."); Goldman v. United States 316 U.S. 129, 138 (1942) (Murphy, J. dissenting) ("The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide."); *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting) ("When the Fourth and Fifth Amendments were adopted 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrence of the home.").

¹⁰¹ As Justice Scalia observed in 2001, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

¹⁰² *United States v. Jones* at 954, 957 (Sotomayor, J., concurring), 964 (Alito, J., concurring).

A. *United States v. Jones*

In *United States v. Jones*, the Court was asked to determine whether a Fourth Amendment search occurred when police, acting without a warrant, attached a GPS tracking device to a car and subsequently monitored the movements of the car over a period of four weeks.¹⁰³ The Court determined that the government's actions constituted a search within the meaning of the Fourth Amendment.¹⁰⁴ In doing so, the Court returned to its original Fourth Amendment threshold test from *Olmstead*, concluding that the attachment of the GPS device constituted a trespass.¹⁰⁵ Justice Scalia, citing the plain language of the Fourth Amendment,¹⁰⁶ called the trespass-focused approach an "irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs."¹⁰⁷

The concurring opinions, which deviate from the property-based approach, are more significant than the plurality because they cast doubt on the precedent of *Smith* and the third-party doctrine. Justice Alito's concurrence, in which Justices Ginsburg, Breyer, and Kagan joined, states that while short-term monitoring of an

¹⁰³ *Id.* at 948 (majority opinion).

¹⁰⁴ *Id.* at 949.

¹⁰⁵ As one analyst commented:

Without rejecting *Katz* and reasonable expectations, the *Jones* majority returned to property rights as a basis for Fourth Amendment protection. The Government physically occupied private property for the purpose of obtaining information when it attached a GPS device to a private vehicle and used it to gather information. This was a search that the government could not conduct without a valid warrant.

Jim Harper, U.S. v. Jones: A Big Privacy Win, CATO BLOG (Jan. 23, 2012), <http://www.cato.org/blog/us-v-jones-big-privacy-win> (internal quotation marks omitted). See also *Olmstead v. United States*, 277 U.S. 438, 465-67 (1928).

¹⁰⁶ *Jones*, 132 S. Ct. at 949-51 ("Katz did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring))).

¹⁰⁷ *Id.* at 953; see also *id.* at 955 (Sotomayor, J., concurring) ("Katz's reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.").

individual's movements may be in accordance with reasonable expectations of privacy, the use of longer-term GPS monitoring involved here resulted in a "degree of intrusion that a reasonable person would not have anticipated."¹⁰⁸ Justice Sotomayor's separate concurrence went further, explicitly questioning the third-party doctrine in the digital age, and stating, "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."¹⁰⁹ She added that the doctrine was not well tailored for the digital age, where information is frequently shared with third parties.¹¹⁰

B. *Riley v. California*

The *Jones* concurrences also seem to have laid the groundwork for the Court to reconsider the third-party doctrine while taking account of a changing technological landscape. In the summer of 2014, the Supreme Court, in a landmark decision for privacy rights in the twenty-first century, ruled that police could not search cell phones without a warrant.¹¹¹ The Court soundly rejected a number of government arguments that would have extended existing Fourth Amendment doctrine that allows for warrantless searches of physical items (like wallets, purses, or briefcases) found on a person when he or she is arrested to permit searches of cell phones.

Writing for a unanimous Supreme Court, Chief Justice Roberts rejected the argument that searches of data contained on cell phones were analogous to physical searches of items like wallets.¹¹² In fact, cell phone searches could contain even greater amounts of more private information than the information found in a physical search of a car or home. Information that could be ascertained from

¹⁰⁸ *Id.* at 964.

¹⁰⁹ *Id.* at 957.

¹¹⁰ *Id.*

¹¹¹ See *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone . . . is accordingly simple—get a warrant.").

¹¹² *Id.* at 2488-89.

a person's wallet or purse is rather limited, while information that could be ascertained from a person's cell phone is nearly limitless.¹¹³ Comparing the two items and the information that could be collected from each "is like saying a ride on a horseback is materially indistinguishable from a flight to the moon."¹¹⁴ The Court's message was quite clear: digital searches are a whole new frontier.

The scope of *Riley* was limited—cell phone searches incident to arrest in criminal cases—but the sweeping rhetoric of the Court's opinion suggests that it might also apply to digital searches in other legal contexts.¹¹⁵ In rejecting the government's argument that law enforcement officers should always be permitted to search a cell phone call log, the Court offered an important clue about the future of the third-party doctrine as well:

The Government relies on [*Smith*], which . . . concluded that the use of a pen register was not a "search" at all under the Fourth Amendment. There is no dispute here that the officers engaged in a search of Wurie's cell phone. *Moreover, call logs typically contain more than just phone numbers . . .*¹¹⁶

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Amy Davidson, *Four Ways the Riley Ruling Matters for the NSA*, NEW YORKER (June 29, 2014), <http://www.newyorker.com/online/blogs/closethread/2014/06/four-ways-the-riley-ruling-matters-for-the-nsa.html> ("[*Riley*] will help define the future of the Fourth Amendment, which affirms individuals' right to 'be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' in the absence of a warrant. [The decision also touches] on questions of language and technology, and the way one shapes the other."); Robert Graham, *Riley v. California: Support Cloud Privacy Too?*, ERRATA SECURITY (June 25, 2014), <http://blog.erratasec.com/2014/06/riley-v-california-support-cloud.html> (suggesting *Riley* will have a substantial impact on cloud privacy issues, while noting that the case could have been decided on "narrow grounds," rather than in the sweeping language of the opinion); Dennis Holmes, *What the SCOTUS Cell Phone Decision Means Going Forward* (June 26, 2014), PRIVACY TRACKER, https://www.privacyassociation.org/privacy_tracker/post/what_the_scotus_cell_phone_decision_means_going_forward ("This ruling will almost certainly be applied to other electronic devices such as tablets and laptop computers. There may also be the potential for this ruling to extend its privacy protection beyond the digital information stored on electronic devices to digital information generally.").

¹¹⁶ *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (emphasis added).

This last sentence suggests that the Court believes call log information contains information worthy of Fourth Amendment protection. If that is the case, the Court may be willing to reexamine whether or not metadata, such as the call detail records collected under the Section 215 program, merits some Fourth Amendment protection as well.

IV. A MORE CONSERVATIVE APPLICATION OF THE THIRD-PARTY DOCTRINE

The third-party doctrine has utility. However, where used as a default presumption, particularly in an area involving the fundamental constitutional right to be free of unreasonable government interference, the doctrine's credibility begins to falter.¹¹⁷ Assuming that the Court is willing to reexamine the broad application of the third-party doctrine in the context of new technology, this Comment suggests that a more discriminating application of the third-party doctrine is possible.

Rather than disposing of the third-party doctrine entirely, or continuing with the assumption that any and all information provided to a third party immediately loses all Fourth Amendment protections, the Court ought first to determine whether the third-party doctrine should apply at all. When an individual has no alternative to providing the information at issue to a third party, the Court should not automatically apply the doctrine as a bar to Fourth Amendment protection. The Court should next consider the nature of the government action, focusing on the context and consequences of the surveillance in order to determine whether a Fourth Amendment search has taken place. These inquiries—(a) determining if an alternative to sharing information with a third party exists, and if not, (b) evaluating the context and consequences of the government action to determine whether a search has taken place—address two categories of concern articulated by the Court in *Jones and Riley*: (a) consent, and (b) the degree of privacy subject to government intrusion.

¹¹⁷ LAFAVE, *supra* note 20, at §2.7(b).

A. *Addressing Consent: Is There An Alternative?*

In this first stage of analysis, the Court would assess whether an individual could reasonably avoid sharing the information in question with the government and/or a third party.¹¹⁸ As third party technology has become an integral aspect of our daily lives, it is becoming increasingly difficult to avoid it. So, rather than presuming every instance in which an individual has shared information with a third party is evidence that the individual has voluntarily relinquished his or her “legitimate expectation of privacy,” the Court should first ask whether the individual *could reasonably avoid* providing this information to a third party.¹¹⁹ If the answer is “yes,” the third-party doctrine applies and no Fourth Amendment concerns may be raised. But if the answer is “no,” the Court would consider the context and consequences of the surveillance, which is discussed in section B below.

The loss of privacy rights accompanying the application of the third-party doctrine is premised on the assumption of voluntary consent.¹²⁰ However, as Justice Marshall observed in his *Smith* dissent, information has not truly been “voluntarily” provided to the third party if “as a practical matter, individuals have no realistic

¹¹⁸ This first inquiry is also designed to address the “reasonable expectation of privacy” element from *Katz*. *Katz v. United States*, 389 U.S. 347, 360 (1967). (Harlan, J., concurring). Rather than assuming that sharing information with a third party defeats any reasonable expectation of privacy, the Court could instead ask, “Could the individual have reasonably avoided providing this information to a third party?” If the answer is yes, that would confirm that the individual voluntarily provided that information to a third party. He or she assumed the risk that the personal information would be shared with the government and consequently had no reasonable expectation of privacy.

¹¹⁹ Justice Marshall suggested a similar test: “whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society.” *Smith v. Maryland*, 442 U.S. 735, 750 (1979).

¹²⁰ Kerr, *supra* note 13, at 561, 565 (“Although the third-party doctrine has been framed in terms of the ‘reasonable expectation of privacy’ test, it is better understood as a consent doctrine. Disclosure to third parties eliminates protection because it implies consent.”).

alternative.”¹²¹ In *Jones*, Justice Sotomayor questioned whether true consent was possible in the digital age where individuals “reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.”¹²²

If the Court were to consider the Section 215 program, the answer to this first inquiry would likely be “no.” Individuals could not reasonably avoid providing this information to third parties, which in turn, share that information with the government. Given the scope of the Section 215 program,¹²³ the only way for an individual to avoid providing her or his information to the government is never to use any telephone at all. Even if “opting out” is a possibility, doing so would be tantamount to divesting “oneself of a role in the modern world—impacting one’s social relationships, employment, and ability to conduct financial and personal affairs.”¹²⁴ In effect, there is no alternative available to individuals who want to avoid disclosing their telephone communications to the government. The situation becomes even direr when one considers the Section 215 program not within the confines of this Comment, but in the context of other bulk intelligence collection activities, such as the surveillance program conducted under Section 702 authority, which monitors Internet communications.¹²⁵ An individual might be able

¹²¹ *Smith*, 442 U.S. at 750 (Marshall, J. dissenting). Justice Sotomayor echoed this point in her *Jones* concurrence, saying, “I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.” *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

¹²² *Id.*

¹²³ Greenwald, *supra* note 1.

¹²⁴ Laura K. Donohue, *supra* note 83, at 874.

¹²⁵ This program was enacted in its current form in July 2008. FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. § 1881a et seq. (2012)). Congress reauthorized the FAA in 2012. FAA Reauthorization Act of 2012, Pub. L. 112-238, 126 Stat. 1631 (codified at 50 U.S.C. § 1881a et seq. (2012)). Section 702 empowers the Attorney General (“AG”) and Director of National Intelligence (“DNI”) to authorize surveillance targeting non-U.S. persons “reasonably believed to be located outside the United States” with the assistance of an electronic communication service provider (e.g., Internet service provider,

to avoid using either the Internet or the telephone in some circumstances, but to opt out of using both would surely render the individual a non-participating member of society. As a matter of practicality, it is not reasonable for an individual in modern society to completely abstain from using the telephone. In this case, when third party information-sharing cannot be reasonably avoided, the Court would next consider the context and consequences of the surveillance.

B. Measuring the Degree of Privacy Invaded: Consider the Context and Consequences

After determining that the third-party doctrine does not apply, the Court should next evaluate the nature of the search or surveillance, looking at the context and consequences of the government action in order to determine if a search for Fourth Amendment purposes has taken place. Justice Marshall's *Smith* dissent suggested a similar evaluation of the surveillance: the Court should "evaluate the 'intrinsic character' of investigative practices with reference to the basic values underlying the Fourth Amendment."¹²⁶ Unlike the previous inquiry, there is no single

telephone provider, etc.) in order to "acquire foreign intelligence information." §§ 1881a(a), (b), and (g)(2)(A) (targeting of persons); §1801(i) (defining U.S. persons); § 1801a (outside of the U.S.); § 1881(b)(4) (defining electronic communication service providers); § 1881a(g)(2)(A)(vi) (acquisition of foreign intelligence will require assistance from electronic communication service provider). Although § 1881a(a) states that the targeting is intended to "acquire foreign intelligence information," the FAA section pertaining to certification requirements indicates a lower standard, noting that certifications only need to state that a "significant purpose of the acquisition is to obtain foreign intelligence information." § 1881a(a), (g)(2)(A)(v). Under § 702, the government need not seek individual orders approving individual targets for surveillance. Rather than specifying individual targets in individual FISC applications, the AG and DNI prepare annual certifications that authorize the targeting. The certification, along with AG-approved targeting procedures (measures "reasonably designed" to prevent targeting of U.S. persons and limit the acquisition of U.S. persons' communications), and minimizations procedures (guidelines that govern the collection, retention, and sharing of non-publicly available information obtained from non-consenting U.S. persons) are then presented to the FISC for review. § 1881a(d)(2); § 1881a(e)(2); § 1881a(i)(1)(A).

¹²⁶ *Smith*, 442 U.S. at 750-51 (Marshall, J., dissenting) (citing his own dissent in *California Bankers Assn. v. Shultz*, 416 U.S. 21, 95 (1974)).

question that will yield a definitive yes or no answer to aid the Court in determining whether a Fourth Amendment search has occurred. Instead, by considering the collection method and information provided (the context of the surveillance), as well as how that information could be used (the consequences of the surveillance), the Court would evaluate the intrinsic character of the surveillance method. A fact-specific inquiry, aimed at the (1) context, and (2) the consequences of permitting the search, would provide a tool that allows the Court to accommodate new technology and methods. Support for this approach can once again be found in *Jones* and *Riley*.

Although these two opinions cited different privacy-implicating factors about the nature of the *Jones* surveillance, there are two unifying and interrelated themes in both concurrences: concerns about (1) context, including the types of information collected, how the surveillance is conducted, and what the surveillance data could reveal about the individual; and (2) consequences, such as what happens to the surveillance data upon collection, how the data could be used, and what effect the surveillance could have on other constitutional rights. In both instances, it was not the mere attachment of a surveillance device, or even the act of monitoring that caused the concurring justices' trepidation. Instead, their anxiety was triggered by the collection and compilation of the data and what that data might reveal about an individual.

Justice Sotomayor focused on the level of detail provided by the GPS data, and the "record[ing] and aggregat[ing]" of the information,¹²⁷ which offered the government with a more detailed image of a person's private life. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations," she wrote in *Jones*.¹²⁸ In isolation, GPS monitoring may convey only an address or the coordinates of one's location, but when an accumulation of such information is stored and retained by the government for "years into the future" the

¹²⁷ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

¹²⁸ *Id.* at 955.

consequence is that the information may be used to deduce far more intimate personal information.¹²⁹ In his concurring opinion, Justice Alito focused on the length of time of the GPS surveillance.¹³⁰ When he stated that long-term GPS monitoring violates privacy expectations, implicit in that statement was the understanding that short-term GPS monitoring did not necessarily present the same concerns. This consequence, the more comprehensive picture of the individual created by long-term surveillance, was what seemed to raise Justice Alito's Fourth Amendment concerns.

In both opinions, considering the context of the surveillance allowed the justices to evaluate the consequences of the surveillance outside of one specific instance, looking at the totality of the circumstances. The duration of surveillance mattered a great deal to Justice Alito. Two hours' worth of GPS surveillance likely was not enough surveillance to reach the level of a search, but two months certainly was. Similarly, the size and scope of the surveillance mattered a great deal to Justice Sotomayor. A single set of GPS coordinates in isolation was not enough to reveal intimate details of a person's life, but when compiled with dozens of sets of GPS coordinates, that same surveillance took on an entirely more invasive character. Likewise, in *Riley*, the Court was concerned with both the amount of and the type of information that may be provided by a cell phone search.¹³¹

Considering the consequences of surveillance similarly allowed the Court to evaluate the realistic implications of that surveillance. In *Jones*, the future of the surveillance data was of concern to Justice Sotomayor, particularly when it would be retained for years and available for the government's use.¹³² For Justice Alito,

¹²⁹ *Id.* at 956.

¹³⁰ *Id.* at 964 (2012) (Alito, J., concurring) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.").

¹³¹ *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) ("Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form unless the phone is.").

¹³² *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring).

tracking one location, or even a series of movements over the course of one day, does not necessarily establish a fuller picture of the individual (e.g., one visit to the doctor could just be a check-up).¹³³ However, collecting or monitoring an individual's movements over a longer period of time permits patterns of behavior to emerge (e.g., several visits to the doctor over the course of a week could indicate a more serious medical issue).¹³⁴ For him, the consequence of long-term surveillance was that greater information may be gleaned than in the short term.

Considering the context and consequences of the search allows the Court to tackle the Fourth Amendment implications of the activity. Different methods of surveillance can yield a variety of data and can be exploited in different manners. One case of permissible surveillance under the Fourth Amendment—such as the use of a pen register to collect the metadata from a single phone line of a known criminal suspect—may require a less searching analysis than other cases—such as the use of more technologically advanced program that monitors millions of individual phone lines, with the capability to collect, retain, and search the resulting metadata for years into the future.¹³⁵

V. CONCLUSION

Media reports disclosing the existence of the Section 215 telephony metadata program reignited debate over the third-party doctrine's applicability in the digital age. As individuals increasingly provide vast amounts of personal data to third parties in the course of their daily lives, the third-party doctrine has become a nearly insurmountable obstacle to asserting Fourth Amendment privacy rights. A more conservative application of the third-party doctrine is needed, and two recent decisions suggest the Supreme Court is open to revisiting the doctrine.

¹³³ *Id.* at 964 (Alito, J., concurring).

¹³⁴ *Id.*

¹³⁵ See *Klayman v. Obama*, 957 F. Supp.2d 1, 32-37 (D.D.C. 2013) (contrasting the use of pen register surveillance with the Section 215 program).

If the Court has the opportunity to limit the scope of the third-party doctrine, then existing Fourth Amendment jurisprudence, including *Jones* and *Riley*, provide some guidance for how the Court may proceed. It should first conduct an inquiry as to the appropriateness of applying the doctrine. Rather than viewing the disclosure of information to a third party as evidence that an individual could have no “legitimate expectation of privacy,” the Court should ask whether the individual *could reasonably avoid* providing this information to a third party. If disclosure was unavoidable, the Court should next conduct a fact-specific inquiry into the “intrinsic character” of the surveillance, evaluating the context and consequences of the government activity in question.

As society’s reliance on technology deepens, the third-party doctrine threatens to engulf the entire Fourth Amendment. In light of this reality, a more restrained application of the third-party doctrine will be necessary to preserve the effect and meaning of the Fourth Amendment. Adopting the approach outlined above would help limit the reach of the third-party doctrine without undermining its original purpose.





COMMENT

CONFINEMENT OF U.S. SERVICE MEMBERS IN CIVILIAN PRISONS: WHY CONGRESS NEEDS TO MODIFY ARTICLE 12 OF THE UNIFORM CODE OF MILITARY JUSTICE

Coley R. Myers, III*

*Article 12 of the Uniform Code of Military Justice prohibits the confinement of service members in close proximity to foreign nationals, while Article 58 governs the treatment of service members in both military and civilian prisons. Individual branches routinely violate Article 12 in domestic confinement situations because adequate on-base facilities are not always available. Two cases before the Court of Appeals of the Armed Forces involved the conflict between Articles 12 and 58, and both cases were decided on the same day: *United States v. McPherson* and *United States v. Wilson*. These cases are significant because they illustrate statutory interpretation problems that create an ambiguity in the meaning of the statute's plain language. The same dissenting judge in both cases, adopting his *McPherson* opinion in *Wilson*, agreed with the majority's reading of the plain meaning of the statute regarding service member confinement near foreign nationals, but disagreed as to whether Article 12 applied to Article 58. This Comment proposes changes in the wording of Article 12 that resolves ambiguities with respect to Article 58. It further provides for a more flexible approach for service member confinement in both military and civilian facilities with regards to confinement in close proximity to foreign nationals.*

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INTRODUCTION

Article 12 of the Uniform Code of Military Justice (“UCMJ”) prohibits the confinement of service members in close proximity to foreign nationals.¹ While at first glance this may not seem like it would be an issue outside of combat zones, the individual military branches frequently violate this Article in domestic confinement situations due to the absence of adequate on-base facilities. Several military bases, particularly smaller ones, lack prisons, and often the nearest base with a brig is too far away to transport a service member immediately after he or she has been taken into custody by military

¹ The UCMJ is codified at 10 U.S.C. §§ 801-946 (2012). Article 12 states, “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.” UCMJ art. 12.

police for an infraction. To remedy the lack of prison facilities, the individual military branches often have agreements with local jails permitting local authorities to provide pre-trial confinement for service members.² For military personnel serving longer sentences, the Army has an agreement with the Department of Justice, Federal Bureau of Prisons (“Bureau”) to house a certain number of prisoners.³ Other military branches then send their prisoners to the Army for transfer of custody to the Bureau in accordance with the agreement.⁴ On arrival, the service member becomes part of the general prison population, members of which frequently happen to be foreign nationals.

Unless the Military Judge Advocate⁵ asks about the service member’s specific confinement situation both pre- and post-trial, the service member who is in a local or federal prison under the Army’s agreement will likely be incarcerated in close proximity to foreign nationals. This situation is a seemingly clear violation of Article 12.⁶

This violation that arises when a service member is imprisoned in a civilian institution may seem insignificant on the surface, but it reveals a conflict between two UCMJ articles that can impact the safety of pretrial service members if they are placed in contact with pretrial or sentenced foreign nationals. Article 12 prohibits confining service members with enemy combatants or foreign nationals;⁷ meanwhile, Article 58 allows the military to utilize civilian institutions to house service members when military briggs are not available.⁸ The conflict occurs when courts evaluate how Article

² Captain Joshua R. Traeger, *The Confinement of Military Members in Civilian Facilities: How a Broadening Interpretation of Article 12, UCMJ Impacts Military Justice*, 39 REPORTER 31, 32 (2012).

³ FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT 5110.16, ADMINISTRATION OF SENTENCE FOR MILITARY INMATES 1 (2011).

⁴ *Id.*

⁵ A Judge Advocate is a military legal advisor for a military command and is part of the Judge Advocate General’s Corps (JAGC) for the respective military branch. 10 U.S.C. §§ 801(1), (13) (2012).

⁶ UCMJ art. 12.

⁷ *Id.*

⁸ Article 58(a) states:

12 should be applied in the context of Article 58 confinements in civilian facilities. At present, there is a difference of opinion among the judges on the United States Court of Appeals for the Armed Forces (“CAAF”) as to whether Congress intended Article 12 to apply to Article 58,⁹ even though military courts have expanded Article 12’s meaning with regards to what constitutes proper separation while in confinement.¹⁰ Although the majority of military courts have held that the plain language of the statute is clear, and that Article 12 must apply to Article 58, a minority of courts have found the language ambiguous, and judges on those courts have conflicting interpretations of how the two Articles intersect.¹¹ Settling this conflict of interpretation will require two revisions to Article 12. The first involves specifying the types of foreign nationals with which the code is concerned; specifically, the article should allow confinement with foreign nationals that bear no ill will toward the United States. The second change should add a provision stating that Article 12 applies regardless of whether a service member is confined in a military or civilian prison, thus preventing possible radicalization of our service members, while at the same time, ensuring their safety.

Part I of this Comment examines the history of the UCMJ from its predecessor, the Articles of War, to the passage of the UCMJ

Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated.

UCMJ art. 58(a).

⁹ See, e.g., *United States v. McPherson*, 73 M.J. 393 (C.A.A.F. 2014); *United States v. Wilson*, 73 M.J. 404 (C.A.A.F. 2014).

¹⁰ See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406; see also Traeger, *supra* note 2, at 32.

¹¹ See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406.

itself. This section explains the purpose of the UCMJ as well as the legislative intent behind the articles in question. Part II of this Comment presents the evolution and expansion of Article 12 through court decisions.¹² Part III of this Comment charts the progression of related cases, culminating in two recent cases—*United States v. McPherson* and *United States v. Wilson*—that support a plain text reading of both Article 12 and Article 58.¹³ The majority in both cases concluded that as these two articles are part of the same statute, they necessarily apply to each other; however, the plain text reading in one of the two cases led to an absurd result.¹⁴ Therefore, the discussion of these cases also shows why a change to the current Article 12 language is required. Finally, Part IV of the Comment reviews several alternatives and proposes modifications to both articles that will resolve the ambiguity, provide clarification for the armed services and the courts, and bring the articles into agreement.

I. BACKGROUND

Congress enacted the UCMJ in the 1950s as a follow-up to the Selective Service Act of 1948.¹⁵ The UCMJ applies to all branches of the military, presenting a consistent approach to military trials for service members.¹⁶ To understand the current conflict between Articles 12 and 58, it is necessary to review the history and foundation of the UCMJ. At the founding of our nation, it was undisputed that discipline of military forces was directly proportional to a nation's prosperity,¹⁷ and the United States adopted the British Articles of War, which were simply a translation of the Roman Articles of War, on June 30, 1775.¹⁸ The Articles were revised

¹² See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406; see also Traeger, *supra* note 2, at 32.

¹³ See *McPherson*, 73 M.J. at 396; *Wilson*, 73 M.J. at 406.

¹⁴ See *McPherson*, 73 M.J. at 396; *Wilson*, 73 M.J. at 406 (holding solitary confinement in a civilian prison met the requirements of Article 12).

¹⁵ Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604.

¹⁶ Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173-74 (1953).

¹⁷ *The Adams Papers Digital Edition*, ROTUNDA, <http://rotunda.upress.virginia.edu/founders/ADMS-01-03-02-0016-0172> (last visited Mar. 29, 2015).

¹⁸ 96 CONG. REC. 1331, 1353-55 (1950) [hereinafter Kefauver speech]; see Morgan, *supra* note 16, at 169; *Adams Papers*, *supra* note 17.

in 1874 and 1916;¹⁹ then, in response to criticism, they were completely overhauled in 1920.²⁰ The most prominent complaint at the time concerned the “lack of uniformity in the [Army and Navy’s] systems.”²¹ Continuing criticism after World War II led the Army and Navy to introduce amendments to their governing statutes.²² But, even then, the Articles of War did not contain any requirement that service members be kept separate from enemy combatants when detained or incarcerated.²³

A. Selective Service Act of 1948 (“Elston Act”)

The provision governing separation in confinement was first introduced in the Selective Service Act of 1948, also known as the Elston Act.²⁴ Under Title II of the Elston Act, Article 16 of the Articles of War was revised to include the following: “No person subject to military law shall be confined with enemy prisoners or any other foreign nationals *outside of the continental limits* of the United States.”²⁵ While this precise wording did not exist in the first drafts or proposed bills that led to the Act,²⁶ the restriction on confinement of service members with enemy prisoners was introduced over the course of congressional hearings.²⁷ This sparked debate in Congress because one problem with the wording of this provision was that it was possible to interpret the prohibition on confinement to include a brig or building that contained prisoners of war.²⁸ The Eighty-First Congress was concerned that this would impact the ability to put

¹⁹ Kefauver speech, *supra* note 18, at 1353.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See generally Articles of War, 41 Stat. 787 (1920).

²⁴ Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604, 630.

²⁵ *Id.* (emphasis added).

²⁶ AMENDING THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, TO PROVIDE FOR MORE EFFECTIVE APPELLATE REVIEW, TO INSURE THE EQUALIZATION OF SENTENCES, AND FOR OTHER PURPOSES, H.R. REP. NO. 80-1034 (1st Sess. 1947).

²⁷ S. COMM. ON ARMED SERVICES, 80TH CONG., COURTS MARTIAL LEGISLATION: A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575); AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY (H.R. 3687; S. 1338) 12 (Comm. Print 1948).

²⁸ S. REP. NO. 81-486, at 10 (1949).

“naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel.”²⁹ Disciplinary tools might have been compromised even if there were a way to segregate the prisoners inside of the brig.³⁰ Congress, in a Committee report on the UCMJ, stated its intent that Article 12 would nevertheless allow detention within the same facility as long as prisoners were kept completely separated.³¹ Congress added the language “in immediate association” to the article so as to allow detention of service members and foreign nationals as long as they were segregated; this change went into effect when the UCMJ was enacted in 1950.³²

B. *Uniform Code of Military Justice*

Around the same time Congress passed the Elston Act, Secretary of Defense James Forrestal ordered the formation of a select subcommittee to work toward a more uniform code.³³ President Harry Truman approved the Manual for Courts Martial (“MCM”) on February 8, 1951, by Executive Order.³⁴ The MCM combined the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard in a standardized code applicable to each service.³⁵ The purpose of the UCMJ, which is contained within the MCM, was threefold. First, it would establish a consistent system of military justice that would “protect the rights of those subject to it.”³⁶ Second, it would “increase public confidence in military justice.”³⁷ Finally, it would not “impair the performance of military functions.”³⁸

In a 1950 hearing, Senator Kefauver from Tennessee supported the proposed UCMJ, and he took to the Senate floor to

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Kefauver speech, *supra* note 18, at 1353.

³⁴ Exec. Order No. 10,214, 16 Fed. Reg. 1303 (Feb. 10, 1951), *available at* <http://trumanlibrary.org/executiveorders/index.php?pid=139>.

³⁵ *Id.*

³⁶ Kefauver speech, *supra* note 18, at 1353.

³⁷ *Id.*

³⁸ *Id.*

discuss the articles in detail.³⁹ According to him, Article 12 would continue to prohibit the confinement of service members with enemy prisoners.⁴⁰ Congress proposed another revision to Article 12 in 1955.⁴¹ This provision allowed for an exception to the prohibition on confinement with foreign nationals so long as the particular foreign national was a member of a friendly foreign nation's armed forces.⁴² This proposed revision indicates that at least some members of Congress considered limited exceptions to the restriction on confinement with foreign nationals.

Article 58(a) was introduced by incorporating the Army's Articles of War 42 and the Articles for the Government of the Navy 7, and permitted prisoner transfers to Department of Justice institutions.⁴³ The armed forces desired to afford maximum support for young, rehabilitative prisoners, and to maintain their separation from hardened criminals.⁴⁴ Senator Kefauver later noted that, after consulting with each service's correctional branch, Article 58 was revised "to make available more adequate facilities for rehabilitation of offenders."⁴⁵ The purpose of the article was first, to rehabilitate a prisoner so he could return to duty, or second, to prepare the prisoner for a "successful adjustment in civil[ian] life."⁴⁶

II. THE EVOLUTION AND EXPANSION OF ARTICLE 12

A. *Important Canons of Statutory Interpretation*

Before examining how the judiciary has expanded its interpretation of Article 12, it is worth reviewing how courts might employ various canons of statutory interpretation in defining its scope. The Supreme Court has set the standard for statutory

³⁹ *Id.*

⁴⁰ *Id.* at 1358.

⁴¹ H.R. 6583, 84th Cong., at 2 (1955).

⁴² *Id.*

⁴³ S. REP. NO. 81-486, at 24-25 (1949).

⁴⁴ *Id.*

⁴⁵ Kefauver speech, *supra* note 18, at 1362.

⁴⁶ S. REP. NO. 81-486, at 25 (1949).

interpretation by first looking to the plain meaning of the statute.⁴⁷ The current language of Article 12 provides: “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.”⁴⁸ In order to evaluate the language properly, we use canons of interpretation that evaluate the language itself as well as the entire act as a whole.⁴⁹

1. The Plain Meaning Canon

The most fundamental canon of interpretation is the plain meaning canon, in which the words of the statute are given their most common, ordinary meaning unless there is a reason to believe a word should be considered in another context.⁵⁰ In Article 12, a court would analyze the words “confinement,” “immediate,” and “association” to determine what constitutes the necessary separation from enemy combatants. Confinement is defined in Black’s Law Dictionary as “the state of being imprisoned or restrained.”⁵¹ Although this definition is broad enough to include solitary confinement, it is likely not a result Congress intended.⁵² Solitary confinement may bring in constitutional concerns, and the constitutional doubt canon indicates statutes should be interpreted so that the constitutionality is not in doubt.⁵³ Similarly, “immediate”

⁴⁷ *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“In determining the scope of a statute, we look first to its language.”); see David A. Strauss, “*Why Plain Meaning?*,” 72 NOTRE DAME L. REV. 1565, 1569-70 (1997) (noting that the plain language of a statute is typically “the best indication of what the legislature intended”).

⁴⁸ UCMJ art. 12.

⁴⁹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 59 (2012) (“No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”); see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 403 (1949-1950).

⁵⁰ SCALIA & GARNER, *supra* note 49, at 69-70.

⁵¹ BLACK’S LAW DICTIONARY 340 (9th ed. 2009).

⁵² Solitary confinement is defined as “the complete isolation of a prisoner.” BLACK’S LAW DICTIONARY 1521 (9th ed. 2009).

⁵³ SCALIA & GARNER, *supra* note 49, at 247.

is defined as a lack of separation between people or things,⁵⁴ and “association” is defined as “[a] gathering of people for a common purpose” or “persons so joined.”⁵⁵ Thus, a court could read this statute to mean that some type of separation must exist when confined within the same facility.

2. The Whole-Text Canon

Another important canon is the whole-text canon, which states that “[t]he text must be construed as a whole.”⁵⁶ This canon is important when examining the UCMJ because many of the articles ought to be interpreted in relation to one another. Since Article 12 and Article 58 are part of the same statute,⁵⁷ the whole-text canon provides that each part of the statute should be construed in a way that avoids conflict with the rest.⁵⁸ In other words, to maintain the wholeness of the statute, a court should interpret Article 12 to apply to Article 58.

B. Precedent Concerning UCMJ Interpretation

Courts have established precedent concerning UCMJ interpretations and have confronted the issue of whether Article 12 applies to Article 58 on several occasions.⁵⁹ Courts have also expanded interpretations of Article 12’s language by finding, for example, that a single piece of wire can provide separation.⁶⁰ Such court determinations have been based on dictionary definitions and legislative history.⁶¹

⁵⁴ BLACK’S LAW DICTIONARY 816 (9th ed. 2009).

⁵⁵ *Id.*; see also *United States v. Wise*, 64 M.J. 468, 470 (C.A.A.F. 2007).

⁵⁶ SCALIA & GARNER, *supra* note 49, at 167.

⁵⁷ 10 U.S.C. § 47 (2012).

⁵⁸ SCALIA & GARNER, *supra* note 49, at 167.

⁵⁹ *Webber v. Bureau of Prisons*, No. 02-5113, 2002 WL 31045957, at *1 (D.C. Cir. 2002).

⁶⁰ *Wise*, 64 M.J. at 474.

⁶¹ *Id.*

1. Application of Article 12 and Article 58

The U.S. Court of Appeals for the District of Columbia Circuit noted that Article 58 explicitly mandates that service members receive the “same treatment as their civilian counterparts” when housed in a civilian prison.⁶² Because Article 58 does not specifically “create an exception concerning confinement of foreign nationals,” and because Article 12 does not insist that it applies to civilian confinement facilities, the court reasoned that Article 58 “trumps” Article 12.⁶³

2. Article 12 Applications to Pretrial Confinement

In *United States v. Palmiter*, the Court of Military Appeals reviewed a case involving a challenge to pretrial confinement where the service member “was placed in the general population of the confinement facility with sentenced prisoners.”⁶⁴ Although this case involved an Article 13 issue and not Article 12, Chief Judge Everett, in his concurrence, suggested that Article 12 prevented “commingling of pretrial detainees,” which could include pretrial foreign nationals.⁶⁵ He further stated that Article 12 seems to show “a prisoner may have a legitimate interest in being confined” separately from a “distinctively different class of prisoners,” as commingled confinement may be demeaning to the accused detainee.⁶⁶ However, the majority dismissed this argument due to lack of support in the legislative history and noted that Article 13 was silent on the issue of commingling.⁶⁷ The court correctly held Article 13 was intended to prevent “pretrial confinement as punishment without benefit of trial.”⁶⁸ However, it is unclear whether or not the commingling of prisoner types in pretrial confinement constitutes punishment, and the court’s reliance on congressional silence in

⁶² *Webber*, 2002 WL 31045957, at *1.

⁶³ *Id.* The court provided no reasoning for this position in its opinion.

⁶⁴ *United States v. Palmiter*, 20 M.J. 90, 92 (C.M.A. 1985).

⁶⁵ *Id.* at 98 (Everett, J. concurring).

⁶⁶ *Id.*

⁶⁷ *Id.* at 96 (majority opinion).

⁶⁸ *Id.*

answering this issue in the negative is problematic.⁶⁹ Chief Judge Everett's interpretation that commingling is prohibited would provide a safer environment for a pretrial service member by ensuring the service member would not be in contact with either a pretrial or sentenced foreign national.⁷⁰

3. Interpreting Article 12's "Immediate Association" Language

Some critics believe the courts have expanded the "immediate association" language of Article 12 and cite to *United States v. Towhill* as an example of this overreach.⁷¹ In that case, a service member was placed in a housing pod while awaiting transfer to another military prison.⁷² The service member had daily contact with a Spanish-speaking foreign national, nicknamed "The Mexican."⁷³ Although the two were confined separately, they had "direct and indirect interaction on numerous occasions."⁷⁴ After several weeks, the corrections officer recognized the issue and transferred the service member to a different pod.⁷⁵ Citing congressional debate that led to adoption of the "immediate association" language because of problems that could arise in overseas areas with only one jail facility, the court held that the Article 12 language meant service members could be confined in the same prison but must be separated in different cells.⁷⁶ The court, however, granted credit for the confinement time with the foreign national, not because they were confined in the same housing pod,

⁶⁹ *Id.*

⁷⁰ *Palmiter*, 20 M.J. at 98 (Everett, J. concurring).

⁷¹ See Traeger, *supra* note 2, at 32-33 (stating that "in the span of sixty-three years," Article 12's interpretation has broadened from "prohibiting 'confinement' with 'prisoners of war' . . . to granting credit for 'immediate association' in a 'housing pod' with a 'Spanish-speaking inmate'"); UCMJ art. 12.

⁷² *United States v. Towhill*, ACM 37695, 2012 WL 1059015, at *1 (A.F. Ct. Crim. App. 2012).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *2; see *United States v. Wise*, 64 M.J. 468, 475 (C.A.A.F. 2007); see also S. REP. NO. 81-486, at 10 (1949).

but because they had near daily contact, a clear violation of Article 12.⁷⁷

The courts further expanded the meaning of Article 12's "immediate association" language in *United States v. Wise*, a case where a service member was confined in the same location as Iraqi enemy prisoners.⁷⁸ The confinement area was simply a space bounded by concertina wire⁷⁹ and then subdivided into sections with additional concertina wire.⁸⁰ As concertina wire is not a solid barrier, the enemy prisoners were close enough to engage the service member in conversation.⁸¹ The service member also claimed that two of the enemy prisoners had tuberculosis and were within a distance of fifteen feet.⁸² The court noted that the "immediate association" language was "subject to multiple interpretations."⁸³ After analyzing the dictionary definitions of both "immediate" and "association," the court determined that Article 12 prohibits confinement that is "directly connected or combined."⁸⁴ The court concluded that, while one strand of concertina wire represented a "real boundary" between the service member and the enemy prisoners, it did not dispose of the issue.

The court then turned to legislative history to determine what type of separation Article 12 required.⁸⁵ Even though the court properly stated the legislative history, the court confused Congress' reasoning behind the change in wording from the Selective Service

⁷⁷ *Towhill*, 2012 WL 1059015 at *3; *see also* *United States v. Brandon*, ACM 37399, 2010 WL 4025685 at *3 (A.F. Ct. Crim. App. Mar. 22, 2010) (granting credit for Article 12 violation because service member was housed in open bay with foreign nationals); *United States v. Spinella*, ACM S31708, 2010 WL 8033026, at *3 (A.F. Ct. Crim. App. 2010) (awarding credit for service member confined with foreign nationals in open bay jail).

⁷⁸ *Wise*, 64 M.J. at 470.

⁷⁹ Concertina wire is a "high strength, spring-steel wire with multiple barbs attached at short intervals." *Id.* at 474.

⁸⁰ *Id.* at 470.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 474.

⁸⁴ *Wise*, 64 M.J. at 474.

⁸⁵ *Id.* at 475.

Act of 1948.⁸⁶ The court noted that the change in the text of the Act reflected the fact that “Congress specifically intended to avoid” that this type of situation would be a “per se violation[] of Article 12.”⁸⁷ By holding that concertina wire provided an adequate boundary, the court expanded the plain meaning of the statute.⁸⁸ Congress was clear during debate that the intent was to allow confinement in the same facility but in “different cells.”⁸⁹ It does not follow that Congress would accept a single strand of wire separating prisoners as being analogous to a different cell.⁹⁰

III. AN EXAMINATION OF TWO RECENT CASES

In the summer of 2014, CAAF heard two cases involving Article 12: *United States v. McPherson* and *United States v. Wilson*. Each case covered several issues, including the meaning of the statute’s language, whether a conflict exists between Articles 12 and 58, and whether administrative remedies must be exhausted before receiving relief for a violation of Article 12.⁹¹ The cases were decided on the same day and Chief Judge Baker adopted his *McPherson* dissent as his dissent in *Wilson*.⁹²

A. *United States v. McPherson*

During a special court-martial⁹³ in *United States v. McPherson*, a military judge convicted Senior Airman McPherson of numerous offenses, including unauthorized absence, distribution of

⁸⁶ *Id.* at 475-77; see also *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Serv.*, 81st Cong. 914-16 (1949) [hereinafter *Hearing on H.R. 2498*].

⁸⁷ *Wise*, 64 M.J. at 476.

⁸⁸ See *id.* at 474.

⁸⁹ *Hearing on H.R. 2498*, *supra* note 86, at 914.

⁹⁰ See *Wise*, 64 M.J. at 474.

⁹¹ See *United States v. McPherson*, 73 M.J. 393, 394 (C.A.A.F. 2014); *United States v. Wilson*, 73 M.J. 404, 405 (C.A.A.F. 2014).

⁹² See *McPherson*, 73 M.J. at 397 (Baker, C.J., dissenting in part); *Wilson*, 73 M.J. at 406 (Baker, C.J., dissenting).

⁹³ A special court-martial may try a service member for any non-capital offense and certain capital offenses where punishment is within the special court-martial’s authority. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 201(f)(2) (2012) [hereinafter R.C.M.].

drugs, and fraudulent enlistment.⁹⁴ He was subsequently sentenced to a bad-conduct discharge,⁹⁵ confinement for eight months, and a reduction in rank.⁹⁶ The Judge Advocate General of the Air Force, in the form of a certified question, asked CAAF to determine whether Article 12 applies to service members who are confined in state or federal facilities within the continental United States.⁹⁷ In its decision, the court also addressed whether administrative remedies must be exhausted before relief under Article 12 could be granted.⁹⁸

1. Article 12 Issues

After McPherson was sentenced, he was imprisoned at the Elmore County Detention Facility in Idaho for fifteen days.⁹⁹ During his time there, he claimed he was lodged in an open area where he had contact with a foreign national awaiting deportation.¹⁰⁰ He stated that he and the foreign national “played card games together every night.”¹⁰¹ Although McPherson knew the person was a foreign national, he never raised the issue with anyone in his chain of

⁹⁴ *McPherson*, 73 M.J. at 394.

⁹⁵ A bad-conduct discharge is less severe than a dishonorable discharge and only applies to enlisted personnel. A special court-martial may award this punishment, which is reserved for only bad conduct and not for serious offenses. See R.C.M. 1003(b)(8)(C).

⁹⁶ *McPherson*, 73 M.J. at 394.

⁹⁷ *Id.*

⁹⁸ The court specifically examined whether a service member must exhaust all administrative remedies under Article 138 when an Article 12 violation occurs before relief is granted. *Id.* at 394, 397. Relief may be granted by awarding one day of credit for each day of violation. R.C.M. 305(k). The court noted that the exhaustion of administrative requirements provides (1) that grievances will be resolved at the lowest possible level and (2) for the development of an adequate appellate record. *McPherson*, 73 M.J. at 397. Because McPherson did not raise an Article 12 issue to his chain of command or during his clemency submission, the Air Force never had the opportunity to correct the condition, and the record on appeal did not contain details of his confinement. *Id.* The author does not believe discussing the exhaustion of administrative remedies is necessary and leaves that question for a future article.

⁹⁹ *McPherson*, 73 M.J. at 394.

¹⁰⁰ *Id.* at 394-95.

¹⁰¹ *Id.* at 395.

command or with anyone at the facility.¹⁰² He was later transferred to the brig at Marine Corps Air Station (“MCAS”) Miramar.¹⁰³

The court held that “the text of Article 12 is plain on its face.”¹⁰⁴ The statute imposes no geographical limitations; therefore, the court stated it would not read any limitations into it.¹⁰⁵ Instead, the court “must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹⁰⁶ The court also held that Article 12 applies to service members in state or federal confinement.¹⁰⁷ No further inquiry is required when the text of the statute is unambiguous.¹⁰⁸

2. Article 58 Issues

The Government also argued that Article 12 is in conflict with Article 58, so the court conducted additional statutory interpretation.¹⁰⁹ Congress used the phrase “[p]ersons so confined . . . are subject to the same discipline and treatment as persons confined . . . by the courts of the United States or of the State.”¹¹⁰ The Government maintained that this implied Article 58 was more specific than Article 12,¹¹¹ reasoning that Congress intentionally omitted this language from Article 12.¹¹² In the Government’s opinion, the more specific language of Article 58 should apply to both Articles.¹¹³ But the court disagreed with the Government’s analysis, reasoning that a service member can receive the same treatment as a civilian confined in a civilian prison, and

¹⁰² *Id.*

¹⁰³ *Id.* The brig at MCAS Miramar is the Naval Consolidated Brig Miramar and is also known as Joint Regional Correctional Facility Southwest. *Naval Consolidated Brig Miramar*, NAVY PERS. COMMAND, <http://www.public.navy.mil/bupers-npc/support/correctionprograms/brigs/miramar/> (last visited Mar. 26, 2015).

¹⁰⁴ *McPherson*, 73 M.J. at 395.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 395.

¹¹⁰ *McPherson*, 73 M.J. at 396; UCMJ art. 58.

¹¹¹ *McPherson*, 73 M.J. at 396.

¹¹² *Id.*

¹¹³ *Id.*

simultaneously be confined in an area separate from any foreign nationals.¹¹⁴ The court further stated it could not create a conflict where one does not exist.¹¹⁵

Both articles were passed at the same time, and the court read them as relating to the same matter.¹¹⁶ Thus, “both apply without conflict to military members confined in state or federal institutions in the United States.”¹¹⁷ The Government next argued that the holding would generate an absurd result with respect to confinement conditions, particularly solitary confinement.¹¹⁸ The court, however, saw this as a policy matter and not a legal issue, even though some confinement conditions may have constitutional implications.¹¹⁹ According to the court, since other methods of applying Article 12 requirements exist, the plain language reading of the statute did not prescribe “absurd results.”¹²⁰

B. United States v. Wilson

United States v. Wilson, like *McPherson*, involved an Article 12 complaint and was resolved the same day as *McPherson*.¹²¹ Here, a general court-martial convicted Wilson of failing to obey orders.¹²² He was sentenced to a bad-conduct discharge, confinement for three months, and a reduction in pay grade.¹²³ He was subsequently sentenced to serve his confinement in a nearby civilian facility.¹²⁴

Because the jail did not have a process for determining which prisoners were foreign nationals, jail officers segregated Wilson from

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *McPherson*, 73 M.J. at 396.

¹¹⁸ *Id.*; see also *United States v. Wilson*, 73 M.J. 404, 406 (C.A.A.F. 2014) (holding solitary confinement in a civilian prison met the requirement of Article 12).

¹¹⁹ See *McPherson*, 73 M.J. at 396; see U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

¹²⁰ *McPherson*, 73 M.J. at 396.

¹²¹ *Wilson*, 73 M.J. at 405.

¹²² *Id.*; see also UCMJ art. 92.

¹²³ *Wilson*, 73 M.J. at 405.

¹²⁴ The civilian facility was the jail in Cook County, Georgia, near Moody Air Force Base. *Id.*

the rest of the prison population in a single cell, so he was essentially in solitary confinement.¹²⁵ The Air Force Court of Criminal Appeals held that Article 12 applies to service members “‘everyplace,’ to include confinement facilities within the continental United States.”¹²⁶ The court concluded, in accord with *McPherson*, that Article 12 does apply to a service member confined in a civilian jail; however, because Wilson was confined alone, no violation of Article 12 occurred.¹²⁷

C. *A Common Dissent*

The *Wilson* dissent adopted the *McPherson* dissent in total.¹²⁸ Both the majority and the dissent agreed that a service member, consistent with *Wise*, must exhaust all administrative remedies for an Article 12 violation before relief is granted.¹²⁹ The disagreement among the judges lay in the interpretation of Article 12, where the dissent saw a conflict with Article 58 when Article 12 is read literally.¹³⁰ The dissent’s argument in *McPherson* centered around two points: (1) legislative intent, and (2) which Article should take precedence.¹³¹

1. Legislative Intent

The dissent maintained that, based on legislative history, Congress desired Article 12 to protect service members from being confined with enemy combatants, while Article 58 allowed for the services to take advantage of the rehabilitation services of civilian institutions.¹³² There was no proposition or recommendation that would allow Article 12 to be used to circumvent Article 58.¹³³

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *Hearing on H.R. 2498*, *supra* note 86, at 914-15).

¹²⁷ *Id.* at 406.

¹²⁸ See *id.* at 406 (Baker, C.J., dissenting). Because the dissents are identical, this Comment will identify it as the *McPherson* dissent.

¹²⁹ See *McPherson*, 73 M.J. at 397-98 (Baker, C.J., concurring in part and dissenting in part).

¹³⁰ *Id.*

¹³¹ *Id.* at 398-99.

¹³² *Id.*

¹³³ *Id.*

Although the majority asserted that solitary confinement is not the only way to follow Article 12, the dissent stated the natural result is that civilian prisons will continue to place service members in solitary confinement to avoid an Article 12 conflict.¹³⁴ The majority also sidestepped the issue of how the “same discipline and treatment” language of Article 58, as well as the rehabilitative intent, can be achieved with a service member in solitary confinement.¹³⁵

The number of incarcerated foreign nationals also poses a problem. A Government Accountability Office report indicates approximately 350,000 foreign nationals are incarcerated in local, state, and federal jails and prisons.¹³⁶ Over 218,000 prisoners are housed in the Bureau of Prison system that comprises 119 institutions.¹³⁷ In total, there are approximately 2.3 million inmates for any given day in roughly 3,100 jail facilities throughout the United States.¹³⁸ This shows that foreign nationals may comprise more than 15 percent of inmates. Based on these numbers, it appears that solitary confinement may be the only viable way to conform to the statute.¹³⁹

The dissent claimed that the purpose behind Article 12, and the principal change in language from “confined with” to “in immediate association with,” was the prohibition on “confinement of a [service member] in the same cell with a foreign national, particularly one engaged in military service, in times of war.”¹⁴⁰

¹³⁴ *Id.*

¹³⁵ *McPherson*, 73 M.J. at 398-99 (Baker, C.J., concurring in part and dissenting in part).

¹³⁶ *Id.* at 400; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATION, ARRESTS, AND COSTS (2011).

¹³⁷ FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 2014, available at http://www.bop.gov/resources/pdfs/legal_guide.pdf.

¹³⁸ *Statistics of Note*, AMERICAN JAIL ASS'N, <https://members.aja.org/About/StatisticsOfNote.aspx> (last visited Mar. 26, 2015). For a detailed breakdown of prison population statistics, see LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

¹³⁹ See *McPherson*, 73 M.J. at 400 (Baker, C.J., concurring in part and dissenting in part).

¹⁴⁰ *Id.* at 400-01.

While the dissent followed a plain reading of the text, the emphasis centered on confinement with “*enemy prisoners*,” but ignored the likelihood that civilian facilities will not always house enemy prisoners.¹⁴¹ Further, congressional debate that removed the geographic restraint from Article of War 16 illustrated the intent that Article 12 would apply “everyplace.”¹⁴² Based on the fact that there was no legislative discussion of Article 12’s applicability to confinement in civilian jails or prisons, the dissent infers that Congress never intended that service members confined in a civilian institution be separated from foreign nationals “who are not enemies” or “hostile to the government.”¹⁴³ If the statute applies to service members “everyplace,”¹⁴⁴ then it would follow that civilian institutions are included as long as the plain meaning of the text is considered.

Service members’ rehabilitation facilitates their reentry into either service or civilian life and is the primary purpose behind the legislative history of Article 58’s provisions for service members incarcerated in civilian prisons.¹⁴⁵ Because military guards rotate duty assignments at regular intervals, they do not gain the experience or specialized training that their civilian counterparts have at major correctional institutions.¹⁴⁶ Thus, military members are not specifically trained in rehabilitation, and one of the primary objectives behind Article 58 is service member rehabilitation.¹⁴⁷ The dissent notes that there is no discussion in the legislative history of any priority between articles, but instead shows that the government would not, and should not, have limited options for confining a service member in a civilian institution.¹⁴⁸ Thus, the dissent argues

¹⁴¹ *Id.* at 401 (emphasis added) (internal quotes omitted).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *McPherson*, 73 M.J. at 402 (Baker, C.J., concurring in part and dissenting in part); see also S. REP. NO. 81-486, at 25 (1949).

¹⁴⁶ See *McPherson*, 73 M.J. at 402 (Baker, C.J., concurring in part and dissenting in part).

¹⁴⁷ S. REP. NO. 486, at 24-25.

¹⁴⁸ *McPherson*, 73 M.J. at 403 (Baker, C.J., concurring in part and dissenting in part).

that the majority's interpretation "defeats the purpose of Article 58," by removing its priority over Article 12.¹⁴⁹

2. Statutory Construction

The dissent argued that nothing in the legislative history indicated that Congress intended for Article 12 to impede Article 58.¹⁵⁰ The dissent relied on a decision by the U.S. Court of Appeals for the District of Columbia Circuit that concluded the two articles "could not be harmonized."¹⁵¹ That court held:

Article 58 of the Uniform Code of Military Justice states categorically that military prisoners housed in Bureau of Prisons facilities shall be subject to the same treatment as their civilian counterparts. It does not create an exception concerning confinement with foreign nationals, nor does Article 12 of the Code provide that its prohibition against such confinement survives Article 58's same-treatment rule. Thus, by its terms, Article 58 trumps Article 12, and the district court properly dismissed the complaint for failure to state a claim.¹⁵²

This does not follow if one is interpreting the text by applying the whole-text canon.¹⁵³ The Court of Appeals for the Armed Forces stated that Article 58 created no specific exception for foreign nationals, but by its own interpretation, conflict arises between the articles that the whole-text canon seeks to avoid.¹⁵⁴

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 400.

¹⁵¹ *Id.* at 399.

¹⁵² *Webber v. Bureau of Prisons*, No. 02-5113, 2002 WL 31045957, at *1 (D.C. Cir. 2002) (citations omitted).

¹⁵³ See SCALIA & GARNER, *supra* note 49, at 167.

¹⁵⁴ See *McPherson*, 73 M.J. at 399 (quoting *Webber*, 2002 WL 31045957, at *1 (citations omitted)); see also SCALIA & GARNER, *supra* note 49, at 167.

D. Policy Implications – Why it is Necessary for Article 12 to Attach to Article 58

Although the shared dissents in *Wilson* and *McPherson* argued that Article 58 trumps Article 12,¹⁵⁵ this approach creates policy implications. A Department of Defense (“DOD”) Directive provides that “[p]ost-trial confinement of military prisoners shall serve the purposes of the incapacitation, rehabilitation, deterrence, and punishment of prisoners.”¹⁵⁶ The DOD Directive further provides for “uniformity in and among the Military Services in the treatment of prisoners” as well as the Article 12 prohibition on confinement with foreign nationals.¹⁵⁷ Because there is no DOD directive to the contrary, it follows that the services are still required to ensure uniform treatment of military prisoners in civilian institutions. This flows directly from Article 58’s “same discipline and treatment” language;¹⁵⁸ however, it also follows that the respective branch should guarantee the Article 12 prohibition is honored.

The policy behind Article 12 is self-evident: safety of service members while in confinement. This is analogous to some civilian jails that offer former police officers protective custody while they are in confinement.¹⁵⁹ When foreign nationals are located in the same facility as a military prisoner, the service member’s safety is paramount. Additionally, there is a concern that a service member

¹⁵⁵ *McPherson*, 73 M.J. at 399 (Baker, C.J., concurring in part and dissenting in part).

¹⁵⁶ U.S. DEP’T OF DEF., DIR. 1325.04, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES para. 4.2 (Apr. 23, 2007).

¹⁵⁷ *Id.* at paras. 4.1, 4.3.

¹⁵⁸ UCMJ art. 58.

¹⁵⁹ See Frank Main, *When cops go to jail*, CHICAGO SUN TIMES (Jan. 12, 2011), <http://www.suntimes.com/news/metro/3430932-418/pedersen-prison-burge-law-chicago.html>; but see Trisha Bishop, *In federal prison, Baltimore cops get no breaks*, BALTIMORE SUN (Aug. 19, 2012), http://articles.baltimoresun.com/2012-08-19/news/bs-md-officers-in-prison-20120819_1_federal-prison-kickback-scheme-baltimore-cops.

could be radicalized and turned against the United States.¹⁶⁰ In fact, the Federal Bureau of Investigation has stated:

Prisons literally provide a captive audience of disaffected young men easily influenced by charismatic extremist leaders. These inmates, mostly minorities, feel that the United States has discriminated against them or against minorities and Muslims overseas. This perceived oppression, combined with a limited knowledge of Islam, makes this population vulnerable for extremists looking to radicalize and recruit.¹⁶¹

This is just one example of a type of radicalization that illustrates the necessity to maintain military prisoners separate from any potentially hostile foreign national prisoners. In order to prevent these and other types of situations, clarification of Article 12's language is required

IV. RECOMMENDED CHANGES TO RESOLVE AMBIGUITY

Changes to Article 12 are necessary to provide clarification of the legislative purpose to military judges, Judge Advocates, and service members. As long as courts adhere to precedent, the articles will be connected and solitary confinement will be an acceptable solution for military prisoners housed in civilian prisons.¹⁶² As maintaining the status quo does not appear to be a logical option, because it does not solve any of the issues stated by the dissent in *McPherson* and *Wilson*, there are two proposed alternatives: (1) return to the original Article 12 language from the Elston Act, or (2) adopt new changes to Article 12. These options will be analyzed and each approach will be weighed critically.

¹⁶⁰ See generally Dennis A. Ballas, *Prisoner Radicalization*, FBI LAW ENFORCEMENT BULL., Oct. 2010, available at <http://leb.fbi.gov/2010/october/prisoner-radicalization>.

¹⁶¹ *Id.* at 4 (citing FBI Deputy Asst. Dir. Donald Van Duyn's testimony before the Senate Committee on Homeland Security and Governmental Affairs); see also Mark S. Hamm, *Prisoner Radicalization: Assessing the Threat in U.S. Correctional Institutions*, 261 NAT'L INST. FOR JUSTICE J. 14 (2008).

¹⁶² See *United States v. Wilson*, 73 M.J. 404, 406 (C.A.A.F. 2014).

A. Return to the Original Language from the Elston Act

One option suggested for resolving the ambiguity in Article 12 is to return to the original language proposed in the Elston Act, which simply states that service members should not be confined with enemy prisoners.¹⁶³ This presents a binary approach: service members will not be where enemy prisoners are located, and vice versa.¹⁶⁴ The problem with this approach is that most detainees are located overseas or on Naval vessels in international waters.¹⁶⁵ Returning to the Elston Act language does not address the concerns Congress raised when debating the UCMJ.¹⁶⁶ Service member confinement aboard a ship of foreign base may be impossible if enemy prisoners are already housed in the same facility.¹⁶⁷ Congress was concerned that the language was too restrictive and would prohibit confinement of service members in the same building or ship where an enemy combatant was located.¹⁶⁸ Thus, returning to the Elston Act language does not solve the ambiguity problem.

B. Proposed Changes to Article 12

Because returning to the prior version carries so many problems, the language to Article 12 requires a change to resolve its current ambiguity and solidify its relationship with Article 58. Certain revisions will provide a more manageable solution to confinement in military and civilian prisons. These changes include modifying the language and adding a new section covering when the Article applies.

The first necessary change would modify the language of Article 12 as follows: “(a) No member of the armed forces may be placed in confinement in immediate association with enemy

¹⁶³ Traeger, *supra* note 2, at 34; see Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604, 630.

¹⁶⁴ See Traeger, *supra* note 2, at 34.

¹⁶⁵ *Id.*

¹⁶⁶ See S. REP. NO. 81-486, at 10 (1949).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

prisoners or other foreign nationals *hostile to the United States*.¹⁶⁹ There are several ways to determine if a prisoner is hostile to the United States. First, a prisoner is deemed hostile if they are citizens of nations the State Department has designated as state sponsors of terrorism (currently Cuba, Iran, Sudan, and Syria); likewise, people from terrorist safe havens will require extra scrutiny.¹⁷⁰ Second, a person who has lost their U.S. citizenship, or had their lawful permanent resident (LPR) status revoked, could be designated as hostile to the United States, depending on the reason for their loss of nationality or LPR status.¹⁷¹ Third, any U.S. Citizen who is suspected of or involved in international or domestic terrorism should be designated as hostile.¹⁷² Whether a foreign national is a member of a friendly nation's armed forces, or simply a visitor from a foreign country not included in the lists above, should have no bearing on confinement conditions if that foreign national displays no hostility to our country. Congress had once proposed an exception for military members of a friendly nation's armed forces,¹⁷³ and should again consider making an exception for any foreign national not hostile to the United States. If a service member is placed in prison with a person from Canada who shows no hostility to America, then there is less concern for the service member's safety. In the alternative, if a foreign national is not an enemy combatant but demonstrates hostility to the country, then the confinement restriction applies.

The second change to Article 12 would add an additional section titled part (b), to give clear guidance on its applicability to service member confinement in civilian prisons. Here, the proposed language is simply, "(b) This article applies whether a service

¹⁶⁹ See UCMJ art. 12 (where "hostile to the United States" would replace the current wording of "not members of the armed forces.").

¹⁷⁰ *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 30, 2015); see also U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013: EXECUTIVE SUMMARY 19 (Apr. 2014), available at <http://www.state.gov/documents/organization/225050.pdf>.

¹⁷¹ 8 U.S.C. § 1451(c) (2012) (providing for revocation of naturalization due to membership in certain organizations); 8 U.S.C. § 1481(a)(3), (7) (2012) (providing for loss of nationality).

¹⁷² See 18 U.S.C. § 2331 (2012) (defining international and domestic terrorism).

¹⁷³ H.R. 6583, 84th Cong., at 2 (1955).

member is confined in a military or civilian facility.” This change provides the necessary guidance to military bases that do not have confinement facilities.¹⁷⁴ While it is unlikely that an enemy combatant will be confined in a civilian prison, it is much more likely that a hostile foreign national will be confined in one. For instance, there have been numerous homegrown terrorist plots in the United States since 9/11.¹⁷⁵ In many of these, the plot involved foreign nationals living in the United States, who could be confined in local civilian institutions, not governed by the Bureau, before transferring to federal detention sites.¹⁷⁶ Furthermore, the closing of numerous military bases, along with any related confinement facilities, compels remaining bases without detention facilities to utilize civilian institutions more often.¹⁷⁷ Although Congress recently voted against another round of base closures, studies of future base closings may further impact this issue.¹⁷⁸ Although some articles have suggested that we should invest in “reestablishing military confinement facilities,”¹⁷⁹ a constrained budget affected by sequestration makes that improbable.¹⁸⁰

C. Possible Criticism for Proposed Approach

Some anticipated criticisms to the proposed language modifications are: (1) that the change is unnecessary because it may cause more confusion and do more harm than good, (2) that there is

¹⁷⁴ The Air Force frequently uses local civilian confinement facilities because it lacks facilities on base. See Traeger, *supra* note 2, at 33.

¹⁷⁵ See JESSICA ZUCKERMAN, ET AL., 60 TERRORIST PLOTS SINCE 9/11: CONTINUED LESSONS IN DOMESTIC COUNTERTERRORISM (July 22, 2013), available at <http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism>.

¹⁷⁶ *Id.*

¹⁷⁷ See generally DEF. BASE CLOSURE & REALIGNMENT COMM’N, FINAL REPORT TO THE PRESIDENT: EXECUTIVE SUMMARY (2005), available at <http://www.brac.gov/docs/final/ExecutiveSummary.pdf>.

¹⁷⁸ Jared Serbu, *DoD maintains BRAC fight, despite opposition from Congress*, FED. NEWS RADIO (June 14, 2013), <http://www.federalnewsradio.com/414/3358039/DoD-maintains-BRAC-fight-despite-opposition-from-Congress>.

¹⁷⁹ Traeger, *supra* note 2, at 34.

¹⁸⁰ See DOD Releases Report on Estimated Sequestration Impacts, U.S. DEP’T OF DEF. (Apr. 15, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=122065> [hereinafter *Sequestration Impacts*].

no path for civilian institutions that are unable to separate prisoners with the exception of solitary confinement, and (3) that the change is unnecessary because the majority opinions of the courts have consistently adhered to precedent through *stare decisis*.

While it is always possible for a statute to cause confusion, it is unlikely that would be the case here. The modifications to the statute are not major changes and would, at a minimum, cause no more confusion than exists now. Instead, they would clarify the applicability of Article 12 to Article 58. The change from “not members of the armed forces”¹⁸¹ to “hostile to the United States” would provide flexibility for both military and civilian prisons to confine military prisoners with non-hostile foreign nationals. Moreover, this proposed change would reinforce many court opinions and may reduce the number of appeals for Article 12 violations.¹⁸²

The next critique may be that it is too costly to modify civilian jails to provide separation between service members and foreign nationals. To modify every local jail to meet this requirement would indeed be cost-prohibitive. Making a small modification to the text of Article 12 is much less costly and more worthwhile. Prisoners are typically assigned custodial levels by which they are then separated.¹⁸³ Different levels of control exist corresponding to the custodial level.¹⁸⁴ Therefore, for larger facilities, separating prisoners will be an easier task. For smaller institutions that lack any system of separation besides solitary confinement, the military can make the decision to transfer the prisoner to a military prison farther away, as all military prisons accept prisoners from other military branches.¹⁸⁵ The probability that a civilian institution cannot provide separation without solitary confinement appears to be small, as only

¹⁸¹ UCMJ art. 12.

¹⁸² See, e.g., *United States v. Towhill*, ACM 37695, 2012 WL 1059015, at *3 (A.F. Ct. Crim. App. Mar. 16, 2012) (finding an Article 12 violation because the service member interacted with a Spanish-speaking foreign national).

¹⁸³ See, e.g., *Assigning Inmates to Prison*, N.C. DEP'T OF PUB. SAFETY, <http://www.doc.state.nc.us/dop/custody.htm> (last visited Mar. 30, 2015).

¹⁸⁴ *Id.*

¹⁸⁵ See DoDD 1325.04, *supra* note 156, at § 4.7.

a few cases have confronted this issue.¹⁸⁶ This may be more costly in a few instances; nonetheless, the modification of “hostile to the United States” should provide even fewer of these situations and ultimately prove to be more cost-effective. Another option is for the government to build DOD prison facilities, but this is also a costly option. In the current budget environment,¹⁸⁷ Congress could appropriate only a small amount of funds to current institutions that require these changes. Certainly, any amount Congress would appropriate for this purpose would pale in comparison to the cost of building a new DOD facility.¹⁸⁸ Further, the modification would actually ease the burden on local jails because *fewer* prisoners would require separation.

Lastly, it can be argued that change is not necessary because the courts have relied on precedent when interpreting Article 12 and Article 58. While this may be true, statutory interpretation warrants *de novo* review.¹⁸⁹ Therefore, it is possible that a future court could interpret the articles differently than precedent would suggest. *Stare decisis* and precedent are both subject to change; thus, it is better to modify the language of the statute to provide clarity. The proposed change to Article 12 removes the ambiguity over application to Article 58 and also provides a path to allow prisons to confine non-hostile foreign nationals with military prisoners.

V. CONCLUSION

Since its inception, the UCMJ has been periodically reviewed, and if needed, revised. This Comment maintains that a revision to Article 12 is now required. Although Article 12 prohibits service member confinement in close proximity to foreign nationals, this Article is frequently violated in domestic confinement situations. The purpose of Article 12 is to provide for the safety of military

¹⁸⁶ See, e.g., *United States v. Wilson*, 73 M.J. 404 (C.A.A.F. 2014) (holding solitary confinement in a civilian prison met the requirement of Article 12).

¹⁸⁷ See *Sequestration Impacts*, *supra* note 180.

¹⁸⁸ See Carol Rosenberg, *Clinic, other features add \$20M to new prison cost*, MIAMI HERALD (July 15, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/article1964349.html>.

¹⁸⁹ *United States v. Wise*, 64 M.J. 468, 470 (C.A.A.F. 2007).

prisoners. Separately, Article 58 provides for greater prisoner rehabilitation by allowing service members to be confined in both military and civilian institutions. Both purposes are impeded because of the perceived ambiguity of the relationship of the two articles as well as the conflicting interpretations of the courts.

In two recent cases before the Court of Appeals for the Armed Forces, the majority and dissent disagreed as to the meaning of Article 12's text and whether it applied to Article 58. Because of such ongoing disagreement and confusion, modifying Article 12's language solves two problems, which Congress should address at the earliest opportunity. First, courts need clarity, which would be provided by stating that Article 12 must be applied to Article 58. Second, the modification provides flexibility for both military and civilian prisons by allowing military prisoners to be confined with non-hostile foreign nationals. Although there are potential criticisms to this approach, the removal of ambiguity in the statute will provide needed long-term benefits by strengthening the underlying purpose of both articles: keeping our service members safe and providing greater opportunities for rehabilitation.

