USE OF FORCE

POWER THROUGH CLARITY: HOW CLARIFYING THE OLD STATE-BASED LAWS CAN REVEAL THE STRATEGIC POWER OF LAW

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1. INTRODUCTION

More than seven years after the attacks of 9/11, it is perhaps difficult to remember the terrible confusion of the immediate aftermath. As I sit down to write this Article in a Pentagon office damaged by American Airlines Flight 77, I can only imagine how much these softly humming computers, neatly organized binders, and modular walls belie the horrible reality of that fall morning.

According to a former Deputy Attorney General of the Office of Legal Counsel ("OLC"), the document that legally “set the tone for all that was to come” in the so-called War on Terror was penned amidst that catastrophic confusion, a mere two weeks after the attacks.1 While “burdened with dozens of other emergency duties,” a prominent academic who possessed an expansive view of presidential power quickly drafted an OLC memo entitled, “The President’s Constitutional Authority to Conduct Military
Operations Against Terrorists and Nations Supporting Them."\(^2\)

This memo, coupled with his ideological alignment with those in the Administration devoted to a strong or unitary executive, suddenly gained him entry into the exclusive and highly influential War Council. Together with the White House Counsel, the Vice President's Counsel, and the General Counsel of the Department of Defense, he plotted the legal strategy in the war on terrorism, drafting "opinion and opinion approving every aspect of the administration's aggressive antiterrorism efforts."\(^3\)

But these memos, drafted in extraordinary times and under great pressure, proved significantly flawed as emergency ceded to the new normalcy of the post-9/11 world. While some of these key memos have been revised, and many have been completely withdrawn,\(^4\) some of the basic views on the legal status of terrorists and other non-state actors persist, causing great legal confusion.

In truth, the legal theories the War Council espoused to maximize presidential power actually concealed many potent avenues of executive authority. By regaining clarity, however, these powers can be revealed—and the key to doing so lies in understanding the crucial role of the state in the international context. As the United States takes on the violent non-state actors, whose arsenals now exceed those of many states, policymakers and leaders should not give up on those "old-fashioned" rules designed for relations among states. Many of the legal constructs developed over the past centuries, when properly clarified, are still very powerful tools for defending national security, even within what has been termed the Fourth Generation of warfare.\(^5\)

International law and constitutional law empower, not hamper, the nation's efforts to defend itself and its allies, just as they have always done.

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\(^2\) Id.

\(^3\) Id., at 23.


In a companion article, I argued that we cannot wage war against non-state actors, no matter how virulent they may be. "War" and "the enemy" connote definitive legal categories from the framing of the Constitution to the present which, if expanded beyond their original state-based understanding, swallow essential pillars of the remaining constitutional structure, render much of the existing law of war inconsistent, and make military objectives more strategically difficult to attain. However, in a brief note, I argued that we can nonetheless use military force to counter these violent non-state actors—and, at times, should.

In this Article, I expand upon that note and attempt to clarify and frame the most important legal issues affecting the planning and execution of operations against nonstate actors in the coming decades. This Article should demonstrate that while we cannot wage war against non-state actors, the U.S. Constitution and international law, when properly clarified, vigorously support forcibly engaging non-state actors who: (a) take a direct part in hostilities; (b) commit violent attacks outside the jurisdiction of any state; or (c) engage in action sufficiently hostile to warrant immediate measures in individual or unit self-defense.

While individual articles can expound on each of these points in great detail, this Article seeks instead to provide the overarching international and constitutional framework, and to make the point that embracing the law, instead of fighting against it, reveals the law’s true power. Force will not solve many of the great security challenges on its own—for national security must be a national exertion, as international security must be a global one—but, there is great cause to hope that in the next decades, a renewed embrace of the international and constitutional law of war will fully reveal the empowering abilities of both and the law’s ability to enhance the security of all.

2. CROSSING BORDERS: THE IUS AD BELLUM REQUIREMENTS

Over the past eight years, trying to argue that war cannot be legally waged against non-state actors consistently met with fierce...

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7 Id. at 209-303.

8 Id. at 301.
resistance in certain defense and national security circles. To those who believe that war can be declared against non-state actors, I would ask: Since the 9/11 hijackers planned their attacks in Germany, would it be legal for the United States to wage war against them by, say, launching cruise missiles against remaining al Qaeda terrorist cells in Hamburg without German consent or without evidence that Germany harbored or supported the hijackers?

Put another way: going after those dangerous individuals is one thing, but since warfare involves kinetic strikes, and the U.N. Charter prohibits the nonconsensual use of force against (or within) another state except in self-defense, would it be legal for the United States to invade any country in which a suspected terrorist resides, even if the state itself was doing everything it could to thwart terrorism?

To those who answer that it would, in fact, be legal, I would ask: but would it be legal for the Germans to launch a cruise missile into Miami if they had actionable intelligence that a terrorist was plotting an attack against Germany in the middle floor of a high-rise, waterfront condominium?

For the thoughtful, the response often is: well, there must be a way for the United States to defend itself militarily. And there is. But often the ideological and the intransigent cut off the discussion with their response: “well, let ’em try.”

Unfortunately, such a brawny response just shifts the question from the legal to the power-political. But as the past eight years have shown, those who pounded the neoconservative table and sought to declare “law and force as antonyms” are painfully wrong. Hopefully the next years will demonstrate that law and

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11 Nowhere is the shift away from this view and towards the strategic alignment of law and force more pronounced than in the U.S. Army/Marine Counterinsurgency Field Manual, published in December 2006 by General David Petraeus and his Marine counterpart, Lieutenant General James Amos. The Field Manual marked a radical shift in policy in Iraq, and officially noted the deleterious strategic effects of “illegitimate actions… involving the use of power without authority,” including “unlawful detention, torture, or punishment.
force are strategically aligned, especially in Fourth Generation warfare.

The way the United States can defend itself militarily from non-state actors residing in another state—holding aside Security Council enforcement action under Chapter VII or obtaining diplomatic consent—is through the inherent right of individual or collective self-defense against state complicity or a fundamental state inability to keep its house in order.

2.1. Article 51 and State Complicity

To build this greater clarity over the coming years, international lawyers, as well as constitutional lawyers, policymakers, and judges, must accept the following fact: the proscription on the threat or use of force,12 binding on the United States as a ratified treaty,13 has as its primary exception the right of self-defense,14 which only applies, and can only apply, to armed attacks by other states or their equivalent.

Of course, the plain language of Article 51 to the U.N. Charter does not expressly limit self-defense to responses to armed attack by states.15 Admittedly, while Article 2(4) explicitly states that all members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,"16 Article 51 has no such textual limitation on the source of the armed attack.17 In fact, the language


12 U.N. Charter art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

13 See U.S. CONST. art. VI, cl. 2 (providing that treaties are the supreme law of the land).

14 U.N. Charter art. 51.


16 U.N. Charter, art. 2, para. 4 (emphasis added).

17 Id. art. 51 (emphasis added). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) (separate opinion of Judge Higgins) (“There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.”).
of Article 51 initially incorporated the words armed "attack by another state," but this wording was later dropped.\(^\text{18}\)

Furthermore, the Security Council Resolution 1368, passed in response to 9/11, recognized "the inherent right of individual or collective self-defence in accordance with the Charter" in the context of international terrorism, and legitimized the United States' response in Afghanistan.\(^\text{19}\) In a later resolution, the Security Council also adopted measures to combat international terrorism under Chapter VII of the U.N. Charter, and confirmed the view that international terrorism constitutes a threat to international peace and security.\(^\text{20}\)

But international law is still primarily formed by, and based upon states, and war is still defined as conflict between them.\(^\text{21}\) The international legal community has consistently rejected the possibility that states could use the self-defense exception to interstate use of force for purely non-state actors.

In the late 1980s, the U.N. denied that Article 51 could justify the use of force or the right of self-defense as a response to terrorist attacks such as the bombing of Tripoli and Benghazi (1986) and the bombing of the Palestine Liberation Organization offices in Tunisia by Israel (1985 and 1988).\(^\text{22}\)


\(^{21}\) See e.g. 2 L. WILKINSON, INTERNATIONAL LAW: A TREATISE 67 (Ronald F. Roxburgh ed., 3rd ed. 1952) (defining war as a "contention between two or more States through their armed forces").

Additionally, in 2004, the International Court of Justice ("ICJ") indicated that an "armed attack" within the meaning of Article 51 emanates only from a state. In its advisory opinion, Legal Consequences of Construction of Wall in Occupied Palestinian Territory, the ICJ noted that: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State." For the Framers of the U.S. Constitution, "war" meant what the contemporary international theorists and philosophers meant it to be. Hugo Grotius, Samuel von Pufendorf, Emmerich de Vattel, Jean Jacques Rousseau, and Jean Jacques Burlamaqui all considered war a contest between states. Rousseau, a highly influential figure on the Framers, wrote that:

War is not therefore a relationship between one man and another, but a relationship between one state and another. In war private individuals are enemies only incidentally: not as men or even as citizens, but as soldiers . . . . [E]ach state can have as enemies only other states and not men . . ..

But perhaps more compelling than parsing international precedent and divining original constitutional understanding is a common-sense analysis. As law must be reciprocal, if we can wage war against nonstate actors located in the territory of another state,

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24 Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 139 (July 9) (emphasis added). The Court also added a second argument to its rebuttal of Israel's pleas. The Court noted that the terrorist threat invoked by Israel originated within, and not outside its territory. The situation was therefore found to be different from that "contemplated by Security Council resolutions 1368 (2001) and 1373 (2001)." Id. Therefore Israel "could not in any event invoke those resolutions" in support of its claim to be exercising a right of self-defense. Id.


what is to keep Germany from bombing nonstate actors in Miami Beach condos?

To be clear, to say that Article 51 only applies to armed attacks by states is not to limit the victim state from taking military action to defend itself. Not at all. It just means that if the attacker is residing in the territory of another state, Article 51 does not permit the United States to invade that state to get at the attacker—even if the attacker is a viable, military target. Former Secretary of Homeland Security and federal appeals judge, Michael Chertoff, argues that a state-based or "narrow conception of self-defense misses the mark." 27 "As a practical matter," he continues:

[It] ignores the increasing danger posed by nonstate actors, particularly in an age when they can obtain weapons of real destructive force. Moreover, it leaves nations helpless when an attack is threatened by a group that has created a haven within another state. 28

But he is confusing ius in bello concerns over whom to target 29 with the ius ad bellum concerns of where to target. He also does not appreciate the wealth of international law that allows states to defend themselves against terrorist havens wherever they may be.

The rule should be understood as follows: countries can invoke the self-defense exception to the general prohibition on the use or threat of force to target nonstate actors residing in another state, so long as there is evidence that the state was somehow involved in the aggressive action. Just as U.S. citizens have the right to be secure in their persons and property unless they have forfeited that right by breaking the law, nations too enjoy security from invasion unless they forfeit that right by some aggressive inter-state act, either directly, through proxies, or through a complete inability to impose law and order in their territories.

Accordingly, the acknowledgment within Security Council Resolutions 1368 and 1373 that a state may claim self-defense in response to an armed attack by a terrorist organization 30 should

28 Id.
29 See infra Section 3 for a discussion of ius in bello concerns.
30 See S.C. Res. 1368, supra note 19 ("Recognizing the inherent right of individual or collective self-defense in accordance with the Charter."); S.C. Res. 1373, supra note 20 ("Reaffirming the inherent right of individual or collective self-
not be taken too broadly. Rather, we need to interpret the Security Council’s actions in reference to the aggressive actions by Afghanistan using al Qaeda as their agents. In its 1986 decision, Nicaragua v. United States, the ICJ noted that armed attacks by non-state actors could trigger a right of self-defense provided that the non-state conduct could be attributed to a state. The standard they announced was one of “effective control.” Even if a state does not direct the actors to attack another state, so long as that state had “effective control” over the non-state actors, the victim-state’s retaliation into the offending state’s sovereign territory was justified.

This state-nexus standard animated the ICJ’s more recent decision in Congo v. Uganda as well. In that case, Uganda had launched a limited strike into the DRC to get at a terrorist faction. The ICJ found “that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC [Democratic Republic of the Congo] were not present.” Evaluating Uganda’s arguments that the terrorist attacks were attributable to the DRC, the Court found that “there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC . . .”

The effective control standard is exacting. For a state to effectively control a non-state actor, Nicaragua v. United States requires “financing, organizing, training, supplying and equipping . . . the selection of its military or paramilitary targets, and the planning of the whole of its operation.” The 1999 decision, Prosecutor v. Tadic, loosened the restriction slightly and pronounced that acts performed by members of a paramilitary group organized by a foreign state may be considered “acts of de facto State organs regardless of any specific instruction by the

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1 See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 30-41 (June 27) (discussing the international consensus on the right of self-defense).
2 Id. at 65.
4 Id.
5 Nicaragua, 1986 I.C.J. at 64.
controlling State concerning the commission of each of those acts.36 The state does not have to issue specific instructions for the direction of every individual operation, nor does it have to select concrete targets, but the non-state actor must be subject to the "overall control" of the foreign state.37

As the Italian professor Giuliana Ziccardi Capaldo argues, "[T]hese high standards stand in contrast to the 1974 Resolution of the General Assembly, which required merely 'substantial involvement.'"38 Arguing for a "less rigid" standard, Capaldo observes that "'effective control' is not easy to ascertain in concrete cases, as there is a need for 'clear evidence' of a State having exercised such a degree of control 'in all fields' so as to justify treating a non-state actor as acting on its behalf."39

I expect that with the United States playing a leading role, the international community will come to a less exacting standard; but in the meantime, those charged with U.S. policy should gather all evidence of state complicity before striking non-state actors in the otherwise inviolable sovereignty of other states. And as further evidence that international law and military strategy are often aligned, there is no requirement that the evidence be released prior to the strike.40

2.2. Article 51 and Fundamental State Inability

While so much control can amount to state complicity, the almost complete inability to control can also legitimate strikes into a state. Under the Corfu Channel case of 1949, states are required to "not . . . allow knowingly its territory to be used for acts contrary to the rights of other States."41 A state's toleration of activities of armed bands, directed against another country, is unlawful.42 According to a leading international law theorist, Yoram Dinstein,

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37 Id. ¶ 120.
38 Capaldo, supra note 22 at 107.
39 Id.
40 Although, eventually, all that evidence should be releasable.
42 See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 88 (Sept. 7) (Moore, J., dissenting) ("It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people."); see also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31-33, 44-45 (May 24) (discussing the attack on a U.S. Embassy by Iranian militants).

https://scholarship.law.upenn.edu/jil/vol30/iss4/8
a state that "does not fulfill its international obligations of 'vigilance,' and fails 'in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign government or which might endanger it the latter's security,' assumes international responsibility for this international wrongful act of omission."\(^{43}\)

Of course, assuming international responsibility for an act of omission may not always equal an imputed armed attack sufficient to suspend the offending state's right to territorial sovereignty, but it is certainly a step along that path. For example, think about Pakistan today for example. When Osama bin Laden escaped into the vast, largely ungoverned Northwest Tribal Regions of Pakistan, the place was apparently "so inviting that over the next few years he never strayed far."\(^{44}\) According to a leading authority, the seven tribal agencies that make up the area adjoining the North-Wes Frontier Province became the new base of operations for al Qaeda, from which the bomb plots in London, Madrid, Bali, Islamabad, and later Germany and Denmark were planned.\(^{15}\) Pakistan's inability to control this "terrorism central"\(^{16}\) arguably opened the door to U.S. measures in self-defense under a Corfu Channel analysis,\(^{47}\) particularly in light of the list of affirmative state obligations outlined in U.N. Security Council Resolution 1373.\(^{18}\)

So Michael Chertoff is correct in calling for a responsibility among states to contain terrorism within their own borders:

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\(^{44}\) AHMED RASHID, DESCENT INTO CHAOS 265 (2008).

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) In testimony before the Senate Armed Services Committee, Secretary of Defense Robert Gates said that it was "certainly" his view that the U.N. Charter allows a nation the right of self-defense when a foreign government is either unable or unwilling to take care of international terrorist activity inside its borders. See Paul Tighe, Pakistan Wants U.S. Intelligence to Aid Fight Against Militants, BLOOMBERG, September 24, 2008, http://www.bloomberg.com/apps/news?pid=20601091&sid=a2V3Fi7XKr2s&refer=india.

\(^{48}\) S.C. Res. 1373, supra note 20, among other things, specifies a series of state responsibilities to prevent the aiding or financing of terrorist activities and the use of state territory as terrorist bases or havens.
It is not enough for a group of nations, such as the Security Council, to pass resolutions that prohibit states from supporting terrorists. If states fail to contain transnational threats, there must be an international legal regime that subjects them to potential sanctions or even, if necessary, military intervention aimed at neutralizing those threats.\(^49\)

But we do not necessarily need a "new framework."\(^50\) Rather, we need a recognition that this obligation has existed all along. In 1884, in a case involving whether the United States could criminalize the counterfeiting of foreign currencies, the Supreme Court noted that "the law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."\(^51\) The Court further noted that:

> [E]very nation has not only the right to require the protection, as far as possible, of its own credit abroad against fraud, but the banks and other great commercial corporations which have been created within its own jurisdiction for the advancement of the public good may call on it to see that their interests are not neglected by a foreign government to whose dominion they have, in the lawful prosecution of their business, become to some extent subjected.\(^52\)

Executive practice on this point is also long-standing. For example, in a situation similar to that of bin Laden and the Northwest Tribal Region of Pakistan, President Woodrow Wilson authorized a cavalry expedition into northern Mexico against Mexican opposition leader Francisco "Pancho" Villa who had attacked the United States. The Mexican government had little control over the northern part of Mexico and was waging its own unsuccessful battle against Villa. The U.S. Secretary of State addressed a note to the Foreign Minister of the "de facto" Mexican government stating that the "United States Government cannot allow marauding bands to establish themselves upon its borders with liberty to invade and plunder United States territory with

\(^{49}\) Chertoff, supra note 27, at 144.
\(^{50}\) Id.
\(^{51}\) United States v. Arjona, 120 U.S. 479, 484 (1887).
\(^{52}\) Id. at 486.
impunity, and then, when pursued, to take refuge across the Rio Grande under protection of the plea of the integrity of the soil of the Mexican Republic." After much political and diplomatic effort, General "Black Jack" Pershing was ordered to cross into Mexico, but to withdraw to "American territory as soon as the de facto government in Mexico was able to relieve [his troops] of this work period." The President essentially justified the cross-border incursion on the principle of self-defense, but also sought tacit consent from the de facto Mexican leader, General Carranza, just as it appears President Obama is doing with Pakistan.

In the coming decades, the United States will likely take a leading role in further dusting off this obligation and fleshing out the necessary and proportional measures victim-states can use to defend themselves when one nation's inability to keep its own house in order threatens the territorial integrity and political independence of other states.

2.3. Article 51 and No State

If we put the state nexus analysis on a continuum, we go from overt and aggressive state action (such as an armed attack by a nation's armed forces), to "effective control" to the inability to control. But at each point on this continuum, the state still exists.

55 Though Secretary Lansing did not explicitly mention self-defense, he stated that the efforts were measures of "hot pursuit." NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 13 n.21 (2d ed. 2002). American commentators of the time considered such measures to be an aspect of self-defense. See Rex J. Zedalis, Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?, 25 TEN. INT'L L. 209, 243 (1990) (citing J. Moore, A Digest of International Law 18-25 (1906) (classifying the pursuit of marauders under the general heading of "Plea of Necessary Self-Defense"); Hershey, supra note 53, at 568 ("[T]here is ample precedent for the practice of 'hot pursuit' in our past relations with Mexico.").
56 President's Actions Indorsed in Senate: La Follette Resolution, Approving Use of the Army in Mexico, Adopted, N.Y. TIMES, March 15, 1916.
If a state has effectively ceased to exist, however, then it follows that there are no *ius ad bellum* concerns.

With the phenomenon of state failure unlikely to go away, it is worth questioning the legal effects of a state that has ceased to be. The Restatement (Third) of the Foreign Relations Law of the United States defines a "state" as an "entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."58

Given this definition, would Somalia, for example, be a state? It has not had an effective government for a long time, and the Ethiopian withdrawal after two years of ineffectual assistance to the transitional government has kicked off yet another scramble among warring Islamist factions to take over the country.60 Somalia itself admits to four internal secessions and claims that three-fourths of its 1990 territory has been "gripped by civil war at some point up until this date."61

On the other hand, Somalia is still listed as a Member of the United Nations, and nations around the world have entered into formal debates over whether to recognize Somalia, Somaliland, or both. In May 2006, the Transitional Parliament was formed and began to assert itself within Somalia. In March 2006, the European Union resolved to "enhance and broaden its relations with Somalia,"61 while the International Maritime Organization specifically mentions that it is "respecting fully the sovereignty, sovereign rights, jurisdiction and territorial integrity of Somalia" while it tries to deal with the scourge of piracy off its shores.62

The question of recognition is more a political than a legal question, and it need not be decided here. Suffice to say, however, that international law provides multiple avenues for a state to protect itself which correlate to the multiple obligations states have

to ensure peaceful coexistence with other states. And if a state is not really a state, yet its nominal territory is being used to threaten viable states and international peace and security, then international law should preference the rights of the viable state over the nonexistent state.

3. **Within and Beyond Borders: The Ius in Bello Requirements**

Once the United States is legally in a territory, or at war with another state regardless of the initial legality, the questions become: (a) whom can the United States target; and (b) how must the United States treat its captives. These are momentous questions that will continue to dominate the jurisprudence of war in the coming decades. But to achieve greater clarity on this question and reap the full range of benefits the law affords, we must look back to examine the relationship of the actor to a state. Despite the assault on the state that terrorists wage, and despite their power to transcend state boundaries to use globalization's miracles against the globe, when it comes to using force against terrorists in the legally and strategically appropriate way, their relationship to a state is the most important factor.

3.1. **Targeting and Detaining Those Who Take “Direct Part in Hostilities”**

It may seem obvious, but the term “enemy combatant” is made up of two words—“enemy” and “combatant.” Over the past eight years, however, many have conflated the two, or focused exclusively on the second word, causing so much of the legal and strategic confusion in this area. The time has come to take back the enemy.

The clear rule should be: a combatant who is also an enemy can be targeted and detained as a POW, and an enemy is defined as it always has been, as a person connected with a state engaged in hostilities with the United States. Only once someone is both an enemy and a combatant do we then look to see whether he is an unlawful enemy combatant.

To help bring about this empowering clarity, let's say that during the first months of the War in Afghanistan, there was a fighter known to design, build, and place improvised explosive devices on main convoy routes throughout Kabul at the direction of the Taliban. Could the military target him? What about if that
same insurgent snuck into the United States and was planning to bomb the George Washington Bridge between New York and New Jersey? What if the fighter was a Canadian bomb specialist with no direct connection to Afghanistan and was plotting to plant a bomb on the George Washington Bridge?

The first question we need to answer is: who is an enemy?

3.1.2. Question 1: Is he an enemy?

Critical evaluation and application of this legal term, "the enemy," will likely receive a substantial renaissance in the coming years. Up until 9/11, "enemy" has consistently been defined as it has been within the law of nations—as a subject of an opposing state. In Johnson v. Eisentrager, for example, Justice Robert Jackson defined "the enemy" in its "primary meaning" as the "subject of a foreign state at war with the United States."65 During the Civil War, it was defined the same way by Francis Lieber and Abraham Lincoln: "[t]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war."66

There are essentially two kinds of enemy in constitutional law, the first residential and the second directional. The latter are enemies not because they reside in or are citizens of a belligerent state as are the former, but because they are working for that state. The two landmark Supreme Court decisions of Ex Parte Quirin67 and Ex Parte Milligan68 differ from each other precisely on the basis of this state nexus requirement and state actor distinction. In Quirin, the Court granted habeas review, but upheld military commissions, for eight German saboteurs who landed along the East Coast of the United States during WWII, stashed their

65 Johnson v. Eisentrager, 339 U.S. 763, 769 n.2 (1950). Writing for the majority, Justice Jackson also wrote that "American doctrine as to effect of war upon the status of nationals or belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that "... in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such." Id. at 772 (quoting Griswold v. Waddington, 16 Johns. Cas. 438, 480 (N.Y. Sup. Ct. 1819)).
67 Ex Parte Quirin, 317 U.S. 1 (1942).
68 Ex Parte Milligan, 71 U.S. 2 (1866).
uniforms, and took steps to sabotage elements within the United States.67

In Milligan, on the other hand, the Supreme Court struck down the legality of the court martial of Lamdin Milligan who had communicated with the Confederacy, conspired to seize munitions of war, and joined a secret society for the purpose of overthrowing the Government of the United States, because Milligan lacked the necessary state affiliation.68 He never joined the Confederacy, was never directed by it, nor did he ever live in the South.69 Accordingly, the Quirin Court reaffirmed that Milligan differed from its defendants because Milligan was a "non-belligerent" and so "not subject to the law of war."70 The Quirin defendants, on the other hand, were directed by the state, while Milligan's affiliation lacked this top-down relationship. Thus, even citizens who associate themselves with the "military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts," are enemy combatants who can be detained and tried accordingly.71

Despite recent attempts to broaden the definition of the enemy beyond its state nexus,72 the traditional definition will likely hold, not only because it fits with the original understanding of the Constitution, but also because stripping "the enemy" from its state moorings causes structural contradiction and erosion in the

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67 Quirin, 317 U.S. at 1-2.
68 See Milligan, 71 U.S. at 6 (discussing Milligan's lack of personal ties to the enemy).
69 Id. at 101-2; see also Ex Parte Merryman, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487) (holding that Merryman's status as a civilian from Maryland precluded the military from exercising judicial authority over him).
70 Quirin, 317 U.S. at 45.
71 Id. at 37-38 (emphasis added).
72 See, e.g., Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy 1 (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (establishing a Combatant Status Review Tribunal); Memorandum for distribution from Sec'y of the Navy 2 (July 29, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf (regarding the implementation of the Combatant Status Review Tribunal procedures). Both these memoranda define the "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Memorandum from Paul Wolfowitz, supra, at 1; Memorandum from Sec'y of the Navy, supra, Enclosure (1), at 1.
Constitution as well as strategically deleterious decisions. While the current Supreme Court has not yet ruled on the definition of an enemy in the term "enemy combatant," it will have to eventually, and Hamdi strongly hints that it will recognize the dispositive role of the state:

The habeas petition states only that 'when seized by the United States Government, Mr. Hamdi resided in Afghanistan.' An assertion that one resided in a country in which combat operations are taking place is not a concession that one was 'captured in a zone of active combat' operations in a foreign theater of war, and certainly is not a concession that one was 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'

Therefore, as an Afghani national, our first fighter is an enemy, whether he plants the bomb in Afghanistan or in the United States. The Canadian bomb specialist, on the other hand, while a vile individual, is not a constitutional enemy since he has no directional affiliation with a state engaged in hostilities with the U.S.

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54 For example, former Bush Administration defense official, Matthew Waxman, using the Guantanamo Bay detention facility as an example, writes that the "widespread perception that it exists simply to keep detainees forever beyond the reach of the law" is "a drag on America's... global counterterrorism efforts," hampering "cooperation with our friends on such critical counterterrorism tasks as information sharing, joint military operations and law enforcement." "I know," he continues, "As a State Department official, I often spent valuable time and diplomatic capital fruitlessly defending our detention practices rather than fostering counterterrorism teamwork." Matthew Waxman, The Smart Way to Shut Gitmo Down, WASH. POST, Oct. 28, 2007, at B4.

55 Hamdi v. Rumsfeld, 542 U.S. 536, 520-27 (2004) (emphasis in original) (citations omitted). While Justice O'Connor stated that the Majority was speaking "narrowly" on the definition of an enemy combatant in this decision, there is nothing in constitutional history or practice to indicate that it could be expanded to no longer require a state affiliation. Id. at 510.
3.1.2. Question 2: Is he a combatant?

Anyone residing in the enemy state can be an enemy, even a baby. But enemies cannot be targeted unless they are also combatants.

Enemies have traditionally been subject to restrictions on commercial and legal rights, but they are generally protected from targeting. They lose that protection if they take up arms in the conflict. Article 51(3) of Additional Protocol I to the Geneva Conventions states that, "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." In other words, by taking a direct part in hostilities, enemies become enemy combatants eligible for targeting. Upon capture, however, only those enemy combatants with a top-down connection to a belligerent state can constitutionally be POWs.

To return to our hypothetical Afghani fighter, since he is taking a "direct part in hostilities" on behalf of the Taliban, he is an enemy...

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76 See, e.g., The Prize Cases, 67 U.S. 635, 687 (1862) (Nelson, J., dissenting) ("The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other ... "). See also Lamar v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies.").

77 See, e.g., The Rapid, 12 U.S. 135, 160-61 (1814) ("In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat."); see also The Prize Cases, 67 U.S. at 674 (depriving neutral ships in a Confederate port of their property rights on account of their affiliation with a belligerent nation); Jackson v. Decker, 11 Johns. 418 (N.Y. Sup. Ct. 1814) (baring an alien enemy, residing in the enemy's country, from maintaining an action of ejectment for lands during war); Bell v. Chapman, 10 Johns. 183 (N.Y. Sup. Ct. 1813) (discussing the suspension of an alien enemy's right of action during war).

78 For international armed conflicts, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(1)-(2), June 8, 1977, 1125 U.N.T.S. 31 (hereinafter Protocol I). For non-international armed conflict, see Additional Protocol II to the Geneva Conventions of August 12 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), 1123 U.N.T.S. 609. While a number of states, including the U.S. are not parties to the Additional Protocol, this aspect of the principle of distinction is customary international law, binding on all. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19-24 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., Cambridge: Cambridge University Press 2005).

79 See Protocol I, supra note 78, art. 51(3).
The framers of the Geneva Conventions adopted the following understanding of the phrase "direct part in hostilities," which the President has found indistinguishable from the direct participation standard under the law of war. It means "immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy." It does not mean "indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment."

Of course, the difficulties lie in the specifics. How do you define "hostilities," "direct part," and "for such time?" A series of Expert Meetings co-organized by the International Committee of the Red Cross ("ICRC") and the TMC Asser Institute sought to clarify these terms as the importance of them has increased dramatically with the growing involvement of civilians in hostilities. While they have generated very detailed reports, no U.S. court has yet defined Article 51(3), or sought to expand upon the understanding from the Protocols.

80 Id. arts. 4-5. See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) (concluding that there is no difference in practice between "direct" and "active" involvement in hostilities), available at http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm; The Hostages Trial (Trial of Wilhelm List and Others), U.S. Military Trib., Nuremberg July 8, 1947-Feb. 19, 1948, reprinted in 8 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 34, 38 (1949) ("We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war."). While the United States has not ratified Protocol I, it has formally endorsed this definition of a permissibly-targeted civilian in signing (in 2000) and ratifying (in 2002) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Protocols to the Conventions on the Rights of the Child, May 25, 2000, S. Treaty Doc. No. 106-37, 39 (accession by United States, Feb. 12, 2002).
81 Id.
82 Id.
83 Id.
The Israeli Supreme Court, however, in a highly renowned decision, has explained its view of “direct part in hostilities.” Judge Barak concluded that the class of civilians taking a direct part in the hostilities includes those bearing arms (openly or concealed) on their way to or from the place where they use them against the enemy. He also lists out the harder cases, including: (a) persons collecting intelligence about the enemy army; (b) persons transporting unlawful combatants to or from the place of combat; (c) persons who, wherever they are located, operate weapons to be used by the unlawful combatants, or supervise such operation, or provide service to them; (d) civilians driving trucks with ammunition to the place of combat; (e) civilians deliberately serving as a human shield to terrorists; (f) persons who enlist unlawful combatants or send them to commit hostilities and (g) civilians who decide upon or plan armed hostilities.

On the other hand, the class of civilians Judge Barak did not consider as having taken direct part in the hostilities included: (a) a civilian who “generally supports the hostilities against the army;” (b) persons who aid the unlawful combatants by general strategic analysis; as well as (c) those who give them general logistical or monetary support; or (d) those distributing propaganda for the unlawful combatants.

This survey of the Israeli opinion of “direct part in hostilities” serves as a useful starting point for what Article 51(3) could mean in practice for the U.S. In fact, the three-judge panel of the Fourth Circuit in Al-Marri v. Wright has briefly alluded to this standard, although it did not define the standard. The panel indicated that no Supreme Court precedent or Fourth Circuit opinion endorses the view that “for such time as they take a direct part in hostilities,” participants in non-international armed conflicts may, as a matter of customary international law, be placed in the formal legal category of “enemy combatant.” We should expect, and

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86 Id., ¶ 34.
87 Id., ¶ 35.
88 Id., ¶ 34-35; see also id., ¶¶ 39-40 (Barak, J.) (defining the “for such time” element).
90 Id. at 185 n.13.
hope for, much more clarification in the coming years, especially as cases like Al-Marri move to civilian, criminal courts\(^1\) and higher echelon military commanders and civilian leadership plan future engagements and provide rules of engagement to future forces on the ground.

3.1.3. Question 3: Is he a lawful or unlawful combatant?

So to take stock of where we are, enemies, properly identified as subjects of a foreign state at war with the U.S., who take a "direct part in hostilities," are legitimate targets of attack. If that affiliation is directional, as it was in Quirin, these individuals are state actors and can be classified as either lawful or unlawful enemy combatants depending on their actions. If the state is not directing their actions, these enemy individuals may be targeted for such time as they are taking direct part in hostilities. If captured, however, they cannot be constitutionally treated as POWs because they are non-state actors.

Therefore, a non-uniformed, non-state actor who sets an IED on an Afghani road loses his protected status and becomes a combatant who can be targeted, at least while he is in the process of setting the explosive.\(^2\) Because of his presence in the territory of the enemy (i.e., Afghanistan), he is also an enemy combatant. His unlawful belligerency (i.e., fighting without a uniform, etc.) strips him of protected status upon capture, and subjects him to either: (a) trial for his criminal actions against U.S. personnel; or (b) trial for espionage/sabotage.

If this non-uniformed individual is actually acting on behalf of a state and planting bombs either in Afghanistan or in the United States; the United States also has the option of detaining him as a POW\(^3\) and/or trying him via military commission.\(^4\)

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\(^2\) As discussed above, the "for such time as" element is also difficult to define. The ICRC Third Expert Meeting discussed four main approaches to targeting civilians for such time as they directly participate in hostilities: (1) the specific acts approach; (2) the affirmative disengagement approach; (3) the membership approach; and (4) the limited membership approach. See supra note 84.

\(^3\) As the Court in Hamdi explained, the purpose of detention is not punishment, but merely to prevent captured individuals from returning to the field of battle and taking up arms once again. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
If, on the other hand, the individual only affiliated *himself* with a foreign state, or a cause, but was not acting at the direction of a nation engaged in hostilities with the U.S., and he set an IED in the United States, upon capture he would be a civilian, non-state actor like Milligan (i.e., a non-enemy). Similarly, if an American, with a U.S. passport, unlawfully killed someone in France, he would be subject to French domestic laws, with no combatant immunity, and France would have no legitimate recourse against the United States within the laws of war. The exact same analysis would hold if the American had killed 3,000 Parisians.

### 3.2. Targeting and Detaining Other Non-State Actors: Piracy and Piratical Terrorism

There are additional, well-defined, and age-old categories of non-state actors who can be targeted, even without the presence of formal hostilities.

If terrorists commit violent acts on the high seas or otherwise outside the jurisdiction of any state, they are effectively pirates.\(^9\)

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\(^9\) Of course, if the United States does choose to detain him until the end of the conflict or try him via military commission, the United States must also recognize that under the Geneva Conventions, the questioning of prisoners of war is limited. According to the Third Geneva Convention, “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.” See *Geneva Convention Relative to the Treatment of Prisoners of War* art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Furthermore, “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” *Id.* If the United States values detailed interrogation over non-judicial detention, the United States may prefer prosecuting the individual for espionage or for criminal actions such as attempted murder. Plea deals can be made in exchange for ongoing cooperation, and even if the suspect invokes a lawyer during initial questioning, the interrogation can still continue so long as the Government understands that it will likely not be able to use the information derived against the suspect.

\(^9\) See *United Nations Convention on the Law of the Sea* art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (defining piracy, in part, as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State”). While the United States has not yet ratified UNCLOS, these provisions are considered customary international law. Moreover, the United States is a party to the Geneva Convention on the High Seas; Article 19 of the Convention has an identical...
whom militaries can engage. What is so often overlooked—and should no longer be—is the overlap between pirates and certain terrorists. While the Commentary to the 1958 High Seas Conventions, which also defined piracy, reports that acts committed outside the jurisdiction of any state were "chiefly" meant to include acts committed by a ship or aircraft on an island constituting "terra nullius" or on the shores of an unoccupied territory, the principle logically applies to failed states or ungoverned territories. The international community should not have to sit impotently by while violent acts against countries emanate from criminally lawless locales.

But despite the logic of this precept, many have argued that piracy cannot equal terrorism. They argue that politically motivated acts are technically immune from the Law of the Sea's piracy provision because piracy must be "for private ends." They assume that "for private ends" means that a political motive transforms a pirate into some other being. That view is based on an incorrect reading of the relevant laws and history. While the provision. Geneva Convention on the High Seas art. 19, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

66 See Geneva Convention on the High Seas, supra note 95, art. 14: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." See also id., art. 19: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.


68 See, e.g., Tina Germon, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, 27 Tul. Mar. L. J. 257 (2002) (analyzing disparate treatment of piracy and terrorism under the law of the sea); see also Erik Barrios, Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia, 28 B. C. Int'l & Comp. L. Rev. 149, 156 (stating that since UNCLOS "excludes attacks that are politically motivated," maritime crimes "committed by regional dissidents, including kidnappings of crewmen to put pressure on regional governments and environmental attacks involving hijacked oil tankers, are not punishable as piracy under UNCLOS.")

69 Similarly, there is no two-ship requirement either. The rapporteur for the International Law Commission cited Oppenheim for the "consensus of the legal opinion" that mutineers, for example, become pirates "when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use." Summary Records of the 290th Meeting, [1955] 1 Y.B. Int'l L. Comm'n 37. 42, U.N. Doc. A/CN.4/SER.A/1955

https://scholarship.law.upenn.edu/jil/vol30/iss4/8
Law of the Sea Convention does not address political activity or define "for private ends," the history of piracy, the motives behind the establishment of universal jurisdiction, and judicial precedent all demonstrate that a pirate cannot maraud without impunity merely by adopting a political cause.\(^\text{100}\)

The true meaning of "for private ends" turns on the connection of the individual to the state. Those who act for public ends are state actors, "privateers," who fall within the laws of war. Those who act with private ends are non-state actors, "pirates," who do not fall within the laws governing hostilities between states.\(^\text{101}\) According to one of the earliest Supreme Court decisions: "Whence is it that pirates have not the rights of war? Is it not because they act without authority and commission from their sovereign?"\(^\text{102}\) According to the Lieber Code, pirates and nonstate combatants are therefore close cousins:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.\(^\text{103}\)


\(^{101}\) Miller v. Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (1781).

\(^{102}\) \textit{The Lieber Code}, supra note 64, art. 82 (emphasis added).
Because pirates are targeted by military assets, but are then prosecuted by civilian courts, piracy provides powerful strategic lessons as well. It proves that warfighting and policing can coexist to combat great threats.

So, from a *ius in bello* perspective, U.S. efforts to repress non-state-affiliated al Qaeda members in Somalia could be permissible since those members’ violent actions, having been arguably committed outside the jurisdiction of any state, could be considered piracy in much the same way as Pancho Villa’s actions could have been considered piratical in President Wilson’s time.

### 3.3. Targeting and Detaining Other Non-State Actors: Individual or Unit Self-Defense

Finally, just as in any domestic law enforcement context or standard military operation, it is always worth remembering that non-state actors can be fired upon in individual or unit self-defense. Thus, if the FBI were to raid a suspected al Qaeda safehouse in New York City, it would have to attempt an arrest first, if those al Qaeda suspects were not acting at the direction of a belligerent state, unless the al Qaeda suspects were taking a direct part in hostilities at the time. Additionally, if in the course of the

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104 See, e.g., UNCLOS, supra note 95, art. 105:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.


106 See supra Section 2.3.

107 See, e.g., Chairman of the Joint Chiefs of Staff, Instruction 3121.01A, *Standing Rules of Engagement For US Forces*, A-5 (Jan. 2000) (Actions in self-defense may be taken in response to a “hostile action” or “hostile intent.” Hostile action is defined as an “attack or other use of force” and hostile intent is defined as a “threat of imminent use of force”).

arrest, the suspects committed a hostile act or exhibited an intent to do so, the FBI would be entitled to open fire in self-defense. Upon capture, however, like pirates and other violent non-state actors, the al-Qaeda suspects would be subject to criminal laws and procedures.

4. CONCLUSION

By clarifying international and constitutional law and revealing the pivotal role of the state, the United States will find itself with a powerful arsenal to combat terrorism.

Of course, power through clarity will never result in absolute perfection. There will be frustrating impediments on the tactical level and civilian rules of criminal procedure will indeed demand more from officials than do war-paradigm procedures. But as the saying goes, we should not let the perfect be the enemy of the good, especially as the legacy born of the first two weeks after 9/11 has proven far worse than the centuries-old, time-tested construct.

Additionally, through domestic legislation we can ameliorate some of the difficulties in countering twenty-first century terrorists who do not qualify for POW treatment. Rules of criminal procedure are designed to protect the underlying constitutional rights. They are prophylactic measures which can be modified. As the Court recently explained in reference to warrant requirements for domestic surveillance:

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.\textsuperscript{109}

There is no doubt that prosecuting terrorists can prove more difficult than prosecuting normal criminals. Issues of evidence collection, classified information, and calling witnesses from the battlefield are daunting. But they are far from insurmountable. Instead of taking on the whole system, it is far better to make tailored adjustments wherever possible, and to realize that clarity and restraint are strategic goods themselves.