Bringing the Spies in from the Cold: Legal Cosmopolitanism and Intelligence Under the Laws of War

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> *Of course it's a violation of international law, that's why it's a covert action.*
>
> —Former Vice President Al Gore[1]

Introduction

FOR THIRTY YEARS, U.S. intelligence agencies have been fighting—and losing—a battle for legal autonomy. Until recently, this battle was waged under the domestic constraints that emerged in the mid-to-late 1970s and 1980s.[2] These reforms centered around reducing "rogue" intelligence activities and putting intelligence firmly under domestic, specifically congressional, oversight.[3] Congressional concern then centered on how the activities of intelligence agencies affect people within the United States and U.S. citizens abroad.

This has begun to change, however. Recent upheavals in intelligence law are characterized by an increased concern for foreign nationals located outside the United States who have been affected by

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1. RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR 144 (2004).

2. *See* INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 (1976); *see also* Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. §§ 1801–1811 (1982).

3. For example, during the Iran-Contra affair, the United States sent aid to dissidents in Nicaragua in violation of both international law and a congressional injunction, but the hearings hardly mentioned international law. Subsequent reforms attempted to make it more difficult for executive agencies to violate Congress's will. *See* IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1988).

U.S. intelligence activities, as well as a desire to shift oversight from the political branches to the courts. This trend, "legal cosmopolitanism," has resulted in an increased application of international law to intelligence activities, and such application will almost certainly increase in the next few years. This Article seeks to address these changes. Part I defines and examines legal cosmopolitanism: the theory that legal actors in the United States, uncomfortable with the largely unregulated nature of intelligence activity, have increasingly agitated to bring more intelligence operations under an established legal framework. They have done so by arguing the conception of the U.S. demos should, first, be expanded to include foreign citizens affected by U.S. actions, and second, offer public and legal protections for these foreign citizens.

Part II surveys how intelligence has traditionally been regulated under domestic and international law. Until recently, intelligence regulation was premised on a traditional conception of the U.S. demos, i.e., citizens within the United States received the most protection, citizens abroad significantly less, and non-citizens abroad none at all. Furthermore, international law does not exist beyond those laws that prohibit or discourage the activities of "spies and saboteurs."[4]

Part III analyzes the content of these protections and, in particular, how they relate to the law of war. It argues that because there is a great demand for the international regulation of intelligence, U.S. legal actors have had to look outside the insufficient intelligence law framework towards the highly restrictive law of war framework.

Finally, Part IV concludes by addressing the two reasons why this spread of the law of war to intelligence operations may be normatively desirable. First, even though military and intelligence operations often share goals and can share methods, International Humanitarian Law ("IHL") deliberately does not include intelligence operations within its scope,[5] so these rules may not be sensitive to the differences between military and intelligence operations. Second, intelligence operations are often illegal and necessarily secret by design. If intelli-

4. *See, e.g.*, IV INT'L COMM. OF THE RED CROSS, GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 52 (Jean S. Pictet ed., Major Ronald Griffin & C.W. Dumbleton, trans., 1958) ("As soon as the subject came up for discussion at the Diplomatic Conference several delegations explained that in their opinion provision would have to be made for certain exceptions [to the protections afforded under the Geneva Conventions] in the case of spies and saboteurs.") [hereinafter ICRC, PROTECTION OF CIVILIAN PERSONS].

5. *See infra* Part II.B (discussing how the law of war penalizes intelligence activity while formally permitting it, thus leaving no legal space to develop true regulations).

gence operations can be brought as thoroughly within existing law as diplomatic or military operations, then there is no reason to maintain separate intelligence services.

I. Legal Cosmopolitanism: In Theory and In Practice

Legal cosmopolitanism is represented not only in *Boumediene v. Bush* ("*Boumediene*"),[6] which extended habeas corpus rights to Guantánamo detainees,[7] but also in a number of international decisions that both illuminate and reinforce *Boumediene*'s logic. Moreover, it has received more robust, but less effective, expression in the work of the activists who drive so much of the Global War on Terror ("GWOT") litigation. This Part briefly defines legal cosmopolitanism as a concept, and then expands on that definition by examining materials from both international cases and litigants in the United States.

A. Defining Legal Cosmopolitanism

Legal cosmopolitanism, as used here, means expanding the demos of a state to include nonresident aliens affected by the state's actions and securing these gains by replacing executive power with judicial power. Although this term closely relates to Eric Posner's concept of judicial cosmopolitanism,[8] Posner's view is more limited. In Posner's reading, *Boumediene* turned on a profound change in judicial attitude—notably "the [normative] view that judges have a constitutional obligation to protect the interests of noncitizens."[9] In Posner's conception, judicial cosmopolitanism is about both how judges see themselves and how they see the demos. Judges exist to fix "democratic failures," i.e., to correct the antidemocratic excesses of democratic systems.[10] One of these notable failures is that the law does not take into account how U.S. actions affect those overseas.[11] Thus, it

6. 128 S. Ct. 2229 (2008).

7. *Id.* at 2261.

8. Eric Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, CATO SUP. CT. REV. 23 (2008) [hereinafter Posner, *Judicial Cosmopolitanism*].

9. *Id.* at 24–25.

10. *Id.* at 35.

11. *Id.* at 38 ("A global welfarist argument for extraterritorial constitutionalism is that the political branches have no, or very weak, incentives to take account of the well-being of noncitizens because noncitizens don't vote. Democratic failure arises because the *demos* consists of the global population but only a small fraction of it—American citizens—can vote for American government officials who affect the greater *demos*. Americans have strong incentives to compel their leaders to adopt policies that effect transfers from the rest of the world to the United States.").

falls to judges, in their protective role, to correct this failure by "extending" the Constitution.

Posner's concept, however, fails to address relevant legal actions outside the courts and has little to say about how or why judges apply non-constitutional legal standards—even though both of these are critical to understanding how judicial decisions and executive action have played out both in the United States and overseas. Legal cosmopolitanism differs from judicial cosmopolitanism because it posits a more widespread feeling on the desirability of expanding the demos and a more generalized preference—beyond the constitutional—for legal standards over political ones.

The starting point behind legal cosmopolitanism is that governments in the past only concerned themselves with a limited number of people. The term often given to these people-of-concern is the demos, meaning, literally, the "people" of a certain state.[12] When used in its derivative "democracy," it implies an expanded area of concern—that not only does the state concern itself with the aristocracy, or other powerful sub-groups, but also with the common people.[13]

But when used to define in-groups and out-groups, demos tends to limit, rather than expand, the persons with whom the state concerns itself. Under the traditional definition, a state will only concern itself with its own residents. Thus, when a state acts internationally, it will not concern itself with the citizens of another state. Indeed, Robert Dahl has described inclusion in the demos, historically speaking, as reflecting the prejudices of its time—including xenophobia.[14] At its most expansive, demos might include all residents of a nation-state, but not anyone across its borders.[15] In its most limited conception, demos would exclude not only women and many minorities, but also

12. Rainer Baubock, *Political Community Beyond the Sovereign State, Supranational Federalism, and Transnational Minorities, in* CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE 113–14 (Steven Vertovec & Robin Cohen eds., 2002) ("Democratic cosmopolitanism must also ask what kind of *demos* these institutions will represent and be accountable to. One strategy might be to adopt a purely formal conception of the demos as the aggregate of persons who happen to be subject to a given political authority . . . [whereas] [t]he alternative view is that the demos not only conceptually precede the institutions that represent it, but must also correspond to a social reality: a significant status of membership, a widespread sense of belonging and a historical trajectory of community.").

13. 8 GEORGE F. MCLEAN & PATRICK J. ASPELL, ANCIENT WESTERN PHILOSOPHY: THE HELLENIC EMERGENCE 158 (1997) (describing government by the demos, in the ancient Greek understanding, as "government by the lower class," and related to but not the same as democracy).

14. ROBERT ALAN DAHL, DEMOCRACY AND ITS CRITICS 120–24 (Yale Univ. Press 1991).

15. *Id.* at 320–21.

foreign citizens resident in the state.[16] Therefore, only resident-citizens would be included.

The first premise of legal cosmopolitanism is that the demos needs to expand to include the interests of foreign citizens, including those not in the home country's territory. Dahl suggests, factually, the demos of democratic states are becoming transnational,[17] and therefore, the demos of a state ought to include all persons affected by that state's actions.[18] The second premise posits the state should limit the power and discretion of the Executive, while increasing the power of the judiciary. Such a position finds its justification in deliberative democratic theory, which emphasizes that democracy requires both the absence of coercion in political life and the inclusion of all affected parties. Therefore, legal cosmopolitanism strives to correct how the state organizes itself and distributes power. The courts play a vital role by providing a remedy against the coercion of minority groups, and by offering an avenue by which small groups might include themselves in the democratic process by getting their "fair say."[19]

B. Legal Cosmopolitanism in Practice: In the Courts and Among the Litigants

Legal cosmopolitanism is not simply a philosophical position. It reflects many real-world actions by courts, litigants, and activists when challenging the government over intelligence activities. Practically, it increases the scope of judicial inquiry by expanding jurisdiction extraterritorially and into national security matters; and, in a closely related development, replaces to some extent executive authority with judicial authority. These developments serve to expand the demos by, first, expanding the categories of people who can seek redress against a government to traditionally excluded groups like nonresidents; and, second, by expanding the classes of cases heard in the courts in a way that will generally benefit nonresidents. For that reason, since national security and military action—as opposed to criminal action—is typically against foreign persons,[20] the expansion of judicial inquiry

16. *Id.*

17. *Id.* at 318–19.

18. *Id.* at 122–24.

19. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–02 (Harv. Univ. Press 2002).

20. *See, e.g.*, Posse Comitatus Act, 18 U.S.C. § 1385 (2006) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or

and remedy into these matters will disproportionately benefit nonresidents.

1. Legal Cosmopolitanism in Foreign and International Courts

International courts have been among the most aggressive in regulating national security activity. In particular, non-U.S. courts engaged with GWOT issues (or their foreign equivalents) have discarded jurisdiction based on territory and nationality in favor of notions of practical control. As a result of these jurisdictional extensions, courts have increasingly expanded the judicial role, at the expense of the executive role, in national security.

The Inter-American Commission on Human Rights ("Inter-American Commission") has explicitly ruled that any individual person under the effective control of a state may exercise jurisdiction against that state, regardless of other circumstances such as armed conflict or physical presence in another sovereign's territory.[21] This conception of jurisdiction—tied to the individual, not to territory, with a complete disregard of formal control—seems the closest to the cosmopolitan notion that any person affected by a state's actions belongs in that state's demos.

More commonly, however, courts rule that to be subject to jurisdiction, the accused state, in addition to control over the individual, must also have control of the territory where the individual is located. Yet, like the Inter-American Commission, these tribunals have disregarded formal notions of sovereignty and territorial jurisdiction and, as a result, have aggressively reshaped national security policy in favor of the courts. The European Court of Human Rights ("ECHR") has used a doctrine of effective control to establish jurisdiction over detainees, even those captured abroad or as part of ongoing military operations. Specifically, in *Ocalan v. Turkey* ("*Ocalan*")[22] and *Ramirez-Sanchez v. France* ("*Ramirez-Sanchez*"),[23] the ECHR ruled the jurisdic-

both."); *see also* Exec. Order No. 11,905, 41 Fed. Reg. 7703, 7728 (Feb. 18, 1976), at 5(b) (addressing restrictions on collecting intelligence against U.S. citizens).

21. Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (1999), *available at* http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm (where plaintiff was in the custody of Grenadian officials, but successfully brought suit against the United States on the theory that the United States, during its military operation in Grenada, unduly influenced the authorities there).

22. Öcalan v. Turkey [GC], no. 46221/99, May 12, 2005, Eur. Ct. H.R. 2005–IV) (convention applies to Turkish terrorism suspect detained by Turkey in Kenya).

23. Ramirez-Sanchez v. France, no. 28780/95, Comm'n Decision of June 24, 1996, DR 155.

tion of the European Convention on Human Rights extended to, in the former case, a terrorist leader captured during military operations; and, in the latter, to the famed terrorist Carlos the Jackal, a Venezuelan national whom the French security services had captured in Africa.[24] As to expanding judicial power, the ECHR has taken it upon itself to outlaw cruel, inhuman, or degrading ("CID") treatment in the midst of an armed conflict[25] and to ban extraordinary rendition despite ongoing anti-terror operations.[26] The British Law Lords have taken the logic of practical control leading to jurisdiction to its conclusion, ruling that Iraqis injured by British forces within the city of (British-occupied) Basra did not have recourse against the British government, but an Iraqi inside a British-run prison in Basra did.[27]

By regulating such activities, specifically anti-terrorism activities, courts are necessarily replacing executive power with judicial power, while also increasing a state's demos. The tripartite system of government in the United States, with its unusually strong judiciary, involves a separation of powers concern that is more explicit than in international cases. In addition, whereas non-U.S. courts have regulated national security matters under human rights law, U.S. courts have applied a highly restrictive version of the law of war. Nevertheless, the international and foreign courts' preference for functional jurisdiction and expansion of the judicial role closely parallels developments in their U.S. counterparts.[28]

2. Legal Cosmopolitanism Among U.S. Litigants

One of the prime examples of legal cosmopolitanism—and the example of Posner's judicial cosmopolitanism[29]—is the Guantánamo detainee litigation.[30] The Center for Constitutional Rights ("CCR")[31]

24. *Id.*

25. Ireland v. United Kingdom, judgment of Jan. 18, 1978, Ser. A no. 25 (declaring illegal certain interrogation techniques the United Kingdom had employed against Irish citizens during the conflict in Northern Ireland).

26. Saadi v. Italy [GC], no. 37201/06, Feb. 28, 2008, Eur. Ct. H.R. 2008 (concerning deportation of terrorist to Tunisia).

27. Al-Skeini v. Sec'y of State for Defence [2007] A.C. 153, *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html.

28. *See infra* Part III.

29. *See* Posner, *Judicial Cosmopolitanism*, *supra* note 8, at 24 (Posner theorizes that *Boumediene*'s holding "turns on an implicit theory about the rights of noncitizens, a theory that is *prior* to the conception of separation of powers and is essentially about who belongs to the political community or demos. Justice Kennedy's theory is a cosmopolitan theory.")

30. *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 128 S. Ct. 2229 (2008). There are, of course, other GWOT cases—including others with which the Center for Constitutional Rights has been involved—such

has been involved in almost every significant aspect of Guantánamo litigation, including landmark decisions like *Rasul v. Bush* ("*Rasul*"),[32] *Hamdan v. Rumsfeld* ("*Hamdan*"),[33] and *Boumediene*—the three pillars of current GWOT jurisprudence—and boasts of having "filed the first case on behalf of detainees at Guantánamo" more than five years ago.[34]

The present concern, however, is how CCR might typify a legal cosmopolitan agenda in both a concern for people beyond the traditional demos and a desire to protect those people under the law. CCR's brief in *Boumediene* stops short of arguing the Constitution applies in full at Guantánamo.[35] It does, however, provide a broad claim of constitutional habeas rights and an expansive reading of *Hamdi v. Rumsfeld* ("*Hamdi*")[36] that would extend full due process rights to the Guantánamo detainees.[37] It argues that not only does habeas apply in light of recent GWOT decisions, but also that habeas applies at Guantánamo as a matter of original understanding.

Although the petitioners argued, based on *Hamdi*, the government violated the due process rights of Guantánamo detainees, they never identified that Hamdi was a U.S. citizen held on U.S. soil, while the Guantánamo detainees were neither U.S. citizens nor held on U.S. soil. This is a puzzling omission unless coupled with the unstated premise that the Constitution, at least the due process clause, applies in Guantánamo the same as it does in the continental United States.

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as *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 436 (2004). These, however, concern detainees held domestically who are not subject to international law in any strong sense, especially after *Medellin v. Texas*, 552 U.S. 491 (2008), and its presumption that non-self-executing treaties are not judicially, nor domestically, enforceable without implementing legislation.

31. CCR began its work representing rights activists in 1966. Center for Constitutional Rights, Mission and History, http://ccrjustice.org/missionhistory (last visited Apr. 4, 2010). It currently works on behalf of a broader human rights agenda using "the law as a positive force for social change" and representing Guantánamo Bay detainees as one of its main projects. *Id.*

32. 542 U.S. 466 (2004).

33. 548 U.S. 557 (2006).

34. Center for Constitutional Rights, Guantánamo and Illegal Detentions 3, *available at* http://ccrjustice.org/files/CCR_GTMO.pdf.

35. *See* Brief of Petitioner-Appellant, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195), 2007 WL 2441590.

36. 542 U.S. 507 (2004).

37. Brief of Petitioner-Appellant, *supra* note 35, at 44–50.

II. Situating Intelligence Under the Law

The defining feature of foreign intelligence might be its—sometimes assumed, sometimes real—lack of legal control.[38] Domestically, this reputation arises from three sources. First, until the 1970s, intelligence agencies labored under few legal controls. Second, since the 1970s, the Executive Branch has expended considerable effort to avoid legal restrictions. For example, the second Bush Administration argued that even restrictions on domestic intelligence gathering were unconstitutional.[39] Third, much regulation of intelligence, and many intelligence cases, are themselves secret in whole or in part.[40] Such secrecy—though eminently defensible—creates, in conjunction with the first two factors, an impression of lack of oversight, and hence a lack of legal control.

Furthermore, very little international law addresses intelligence. Indeed, beyond bilateral and multilateral intelligence-sharing treaties, which do not address intelligence methods,[41] no in-depth treatment of intelligence exists in international law. While some bodies of international law, such as the law of war or human rights law, can potentially provide for very substantial intelligence oversight, the international law of intelligence itself does not. Intelligence-as-intelligence occupies a very murky place in international law that might be characterized as either legal but discouraged,[42] or illegal but not en-

38. Recall the quote that began this Article: "Of course it's a violation of international law, that's why it's a covert action." CLARKE, *supra* note 1, at 144 (quoting then Vice President Al Gore).

39. *See, e.g.*, Barton Gellman, *Conflict over Spying Led White House to Brink*, WASH. POST, Sept. 14, 2008, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/13/AR2008091302284.html.

40. *See, e.g.*, In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (Foreign Intelligence Surveillance Court of Review, Aug. 22, 2008) (In this case—the only appellate opinion of the appeals court charged with overseeing the FISA, 50 U.S.C. §§ 1801–1811 (2006)—both the full title and a large portion of the text have been redacted for security reasons).

41. The Lombok Treaty between Australia and Indonesia is purportedly unique in the level of cooperation and intelligence sharing envisions, but still only generally speaks to its directives and only requires treaty signatories to pledge not to undermine each other but without specifiying any methods or means. *See, e.g.*, Agreement Between Australia and The Republic of Indonesia on the Framework for Security Cooperation, Austl.-Indon. Nov. 13, 2006, 2008 Austl. T.S. No. 3, *available at* http://www.dfat.gov.au/GEO/indonesia/ind-aus-sec06.html.

42. *See id.* (This agreement only addresses "Intelligence Cooperation" briefly in Article 3(12) and does not discuss intelligence methods.).

forced.[43] To the extent international intelligence law exists, it does not provide an effective mechanism for intelligence regulation.

These laws—or the lack thereof—form the background against which to view legal cosmopolitanism. Intelligence and legal cosmopolitanism proceed from completely different conceptions of the demos. Intelligence law has self-consciously limited what protections it offers based on what seems a highly traditional conception of the demos.

A. Intelligence in U.S. Law: Limiting the Demos on a Sliding Scale

1. (Relatively) Extensive Domestic Legislation

Up until the 1970s, very little domestic law applied to intelligence activities. It was believed that intelligence activities were the sort of dark, necessary activities justified by the "higher purpose" of national survival.[44] Even today, as Kenneth Anderson has noted, a great deal of the debate turns on threat assessment.[45] Proponents of, for example, the CIA's program of secret detention have characterized the threats to the United States as existential, justifying an unrestrained, supra-legal response.[46]

Legally, this argument belongs to the past. The National Security Act of 1947 has regulated the CIA since its inception.[47] The fact that foreign intelligence is regulated has not changed; rather, the changes have come from the ending of almost-exclusive executive regulatory

43. 1 L. Oppenheim, International Law, Vol. I, 862 (H. Lauterpacht ed., 8th ed. 1955) (noting the permissibility, in international law, of peacetime intelligence gathering); *see also* International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, at 564 (Yves Sandoz et al, eds. 1987) (stating that espionage during armed conflict is not prohibited, but is discouraged via the punishment of individual spies) [hereinafter ICRC Commentary on Additional Protocols].

44. Frederic F. Manget, *Intelligence and the Rise of Judicial Intervention*, CIA.gov, Apr. 14, 2007, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/96unclass/manget.htm (tracing the increased oversight roles that Congress and the courts have played in regulating intelligence since the 1970s).

45. Kenneth Anderson, *The Assumptions Behind the Assumptions in the War on Terror: Risk Assessment as an Example of Foundational Disagreement in Counterterrorism Policy*, 54 Wayne L. Rev. 505, 507 (2008).

46. Ron Suskind, The One Percent Doctrine 62 (2006) (quoting then Vice President Dick Cheney saying, "If there's a one percent chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. . . . It's not about our analysis, or finding a preponderance of evidence. . . . It's about our response."); Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, The New Yorker, Nov. 14, 2005, at 44 (giving an account of how some in the U.S. government believed it necessary to use "any means at [their] disposal" to counter the al-Qaeda threat).

47. 50 U.S.C. § 401a(4)(B) (2006).

authority and the shifting of some regulatory power to Congress and the courts. These changes, however, neither addressed nor employed international law in any capacity. Indeed, the overwhelming purpose of these laws seems to have been the protection of U.S. citizens and other people on U.S. soil. When judges did apply legal standards to the CIA and other agencies, the standards came entirely from the domestic sphere.

Some of the most important of these domestic legal standards have been, first, the Foreign Intelligence Surveillance Act ("FISA");[48] second, Executive Order 12,333, which excluded the CIA from investigation or surveillance of U.S. persons within the United States;[49] and, third, a series of domestic court decisions addressing non-core intelligence activities, such as sexual discrimination within an intelligence agency. These laws explicitly provide differing standards of regulation depending upon citizenship and territoriality. As such, they reflect the traditional conception of the demos that maintains that, as far as U.S. law is concerned, only U.S. citizens in the United States fully "count."

FISA is a notoriously complex law with many gray areas. However, the overall import of FISA is disarmingly simple: it ensures that intelligence surveillance within the United States complies with the Fourth Amendment to the Constitution. In other words, such surveillance requires a warrant, supported by probable cause. The statute defines the covered surveillance to include:

> [T]he interception of international communications to a target who is a United States person in the United States, wiretapping in the United States, interception of the microwave portions of telephone communications in the United States, and microphone, closed-circuit television, or other forms of electronic monitoring of activities in the United States, for the purpose of collecting foreign intelligence.[50]

48. FISA, 50 U.S.C. §§ 1801–1811 (2006).

49. Exec. Order No. 12,333, 3 C.F.R. § 200, at § 2.4(a)–(d) (1981 Comp.), *reprinted in* 50 U.S.C. § 401, at 548 (1982) [hereinafter Exec. Order No. 12,333] (prohibiting the CIA, and all other intelligence agencies except for intelligence units of the FBI, from conducting their activities domestically, or against United States persons overseas unless those targeted are reasonably believed to be agents of a foreign power).

50. William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97, 157 (1985). The FISA's full statutory definition of electronic surveillance is:

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

FISA defines a U.S. person to be a U.S. citizen; a lawful, permanent alien; or associations made up of these persons.[51] Thus, these people receive fairly robust protections above and beyond the "inherent authority" that presidents from Franklin D. Roosevelt[52] to George W. Bush have asserted. FISA represents the voluntary protection of U.S. persons, even though that protection could conceivably undermine national security. It signals that these persons fall within the U.S. demos, while non-citizens, those not protected by the Fourth Amendment, fall outside the demos and outside the protections of the law.

Executive Order 12,333 states its concerns even more openly and explicitly. Besides the aforementioned prohibition against conducting intelligence activities domestically,[53] a 2008 amendment to the order states:

> The United States Government has a solemn obligation, and shall continue in the conduct of intelligence activities under this order, to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law.[54]

Executive Order 12,333 further defines "United States Person" to mean a U.S. citizen or a "known" and "permanent" resident alien.[55] Except for the addition of the qualifier "known" to "permanent resi-

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> (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . . ;
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> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
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> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f)(1) (2006).

51. *Id.* § 1801(i).

52. Robert A. Dawson, *Foreign Intelligence Surveillance Act: Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1382 n.11 (1993).

53. Exec. Order No. 12,333, *supra* note 49, § 2.4(a)–(d).

54. Exec. Order No. 13,470, § 1.1(b), 73 Fed. Reg. 45325 (July 30, 2008) (amending Exec. Order No. 12,333 to update and clarify its regulation of U.S. intelligence activities) [hereinafter Exec. Order No. 13,470].

55. Exec. Order No. 12,333, *supra* note 49, § 3.4(i).

dent alien," this definition is virtually identical to that found in FISA.[56] Aliens abroad, thus, have no rights protection;[57] nonpermanent resident aliens probably receive slightly more;[58] permanent resident aliens receive most of the protections of U.S. citizens;[59] U.S. citizens abroad receive fewer protections than U.S. citizens in the country;[60] and U.S. citizens living in the United States receive a full complement of protections.[61]

Since they stem from the political branches, FISA and Executive Order 12,333 represent particularly potent expressions of the demos. They presumptively derive from the general feelings of the U.S. populace and explicitly represent the feeling of the U.S. government as an entity. That they define "United States person" in virtually identical language gives a particularly strong indication of who is believed to belong or not belong in the United States.

2. Domestic Court Decisions

Since the 1970s, lawsuits involving the CIA or another agency have mostly involved activities where the CIA or another agency caused an injury to U.S. citizens within the United States. As such, they have either applied well-established claims to distinctive intelligence activity or have simply involved intelligence agencies as litigants in lawsuits stemming from matters such as employment and discrimination.

Domestic suits stand in pointed contrast to the few cases brought by foreign employees, primarily spies, against the CIA. For example, in *Guong v. United States* ("*Guong*"),[62] the plaintiff alleged he had entered into an agreement with the CIA to help it prosecute its secret

56. FISA, 50 U.S.C. §§ 1801–1811 (2006).

57. Exec. Order No. 12,333, *supra* note 49, § 2.4(a)–(d), 3.4(i) (aliens abroad do not qualify as U.S. persons and so do not benefit from the protections of the order).

58. Exec. Order No. 12,333 does not make any heightened standard of protection explicit. However, surveillance, investigation, etc. of nonpermanent resident aliens within the United States would be much more likely to touch on the "domestic activities" of U.S. persons, and so would almost certainly be conducted with more circumspection than such activities conducted abroad. *Id.* § 2.3(b).

59. *Id.* § 3.4(i) (giving "known" and "permanent" requirements). The difference in these requirements would seem to provide intelligence agencies with a defense, or at least an excuse, if they unknowingly spied on a permanent resident alien. Given the language of the provision, though, there would not necessarily be a similar excuse for spying on a U.S. citizen. *Id.*

60. *See, e.g.*, *id.* § 2.3 (preventing intelligence collection concerning the *domestic* activities of U.S. persons, so not, presumably, the *foreign* activities of such persons).

61. *Id.* § 1.1; Exec. Order No. 13,470, *supra* note 54, § 1.3(b)(19).

62. 860 F.2d 1063 (Fed. Cir. 1988).

war behind North Vietnamese enemy lines.[63] In return, Guong would receive payment and the United States would rescue Guong if he were captured.[64] However, when the North Vietnamese captured Guong, the United States neither rescued him nor continued payment to his family.[65] After escaping and after the CIA's activities in Vietnam had become public knowledge,[66] Guong brought suit in 1986.[67] The district court ruled that Guong could not proceed with his lawsuit,[68] as the courts could not inquire into the sort of agreement Guong was alleging due to the Totten privilege[69]—a Civil War-era privilege prohibiting former agents from enforcing espionage deals against the United States.

Guong stands in stark contrast with how the courts have traditionally treated litigants from the United States. In the most famous such case, *Webster v. Doe* ("*Webster*"),[70] a "covert electronics technician," employed under a secret contract, brought suit against the government for discrimination based upon sexual orientation.[71] Although the fact and terms of the plaintiff's employment remained secret[72]—which is to say, more "secret" than the facts surrounding Guong's employment[73]—the U.S. Supreme Court ruled that Webster could proceed with his suit. As Chief Justice Rehnquist reasoned, the case would raise serious constitutional questions if Webster were denied his day in court. As A. John Radsan pointed out, even though the Court defined the CIA's interests in secrecy in the case as "extraordinary," it felt Webster's right to due process outweighed these interests.[74] Indeed,

63. *Id.* at 1064.

64. *Id.*

65. *Id.*

66. *Id.* at 1065; *see also* Ralph L. Stavins, *A Special Supplement: Kennedy's Private War*, 17 NEW YORK REVIEW OF BOOKS 1, July 22, 1971, *available at* http://www.nybooks.com/articles/10494 (describing CIA and other covert operations in North Vietnam and Laos which occurred more than a decade before the *Guong* decision).

67. *Guong*, 860 F.2d at 1064.

68. *Id.* at 1067.

69. Totten v. United States, 92 U.S. 105, 107 (1875). The *Totten* privilege is related to, but conceptually distinct from, the state secrets privilege. *See* A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA. L. REV. 1259, 1274–82 (2006) (detailing how the *Totten* privilege sometimes seems like a subset of the state secrets privilege, and sometimes seems like a separate privilege).

70. 486 U.S. 592 (1988).

71. *Id.* at 594–95.

72. *Id.*

73. *Guong*, 860 F.2d at 1064–65.

74. *Webster*, 486 U.S. at 604 (holding that "[t]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the ex-

since *Webster*, the CIA and other intelligence agencies have become liable to a wide variety of civil actions brought by their domestic employees, both overt and covert.[75]

These cases illustrate the extremely limited conception of the demos. If the United States breaks a secret agreement with a foreign person, that injury would seem just as real as that arising from, for example, employment discrimination. The easiest explanation of the difference is that courts may feel that it is somehow inappropriate for the foreign beneficiaries of secret agreements to bring suit against the United States. Additionally, part of the courts' reluctance stems from its own legitimate conception of its role, i.e. as the branch with the least power and least competence in national security affairs. However, courts have regulated national security, and have done to a very large extent in recent years. Furthermore, that conception stems directly from a legal system that gives foreign persons abroad much less legal recourse than U.S. citizens within the country. So while courts may not have led the way in creating this limited conception of the demos, they have operated in ways that very much reinforce it.

3. Applying the Constitution Abroad

In an area where courts play an almost-exclusive role—deciding where the Constitution runs—they have acted with the same sliding-scale demos as the political branches in regulating intelligence. Most importantly, courts have consistently held the Fourth Amendment applies to some situations abroad. United States citizens receive the most robust protections when abroad, while foreign citizens with no connection to the United States receive the least; and foreign citizens with substantial connections to the United States fall somewhere in between.

This sliding-scale is not absolute. First, the regulation on overseas intelligence searches of U.S. citizens is not stringent. To date, there has been only one court of appeals case addressing the overseas surveillance of a U.S. citizen for intelligence purposes and without the involvement of local authorities. In *In re Terrorist Bombings of U.S. Embassies in East Africa*,[76] the Second Circuit ruled the U.S. government, when spying on U.S. citizens abroad, need only meet the Fourth Amendment's reasonableness (as opposed to its warrant) require-

traordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission").

75. *See* Manget, *supra* note 44.

76. 552 F.3d 157 (2d Cir. 2008).

ment.[77] The Second Circuit further interpreted reasonableness as a balancing test between the government's interests in national security and the individual's privacy rights.[78] Especially since the court said it was loathe to question the government's characterization of the national security interest,[79] this test heavily favors the government.[80] The Supreme Court, in *United States v. Verdugo-Urquidez*,[81] held the Fourth Amendment imposed no restrictions on searches of non-citizens abroad even when, as in that case, the non-citizen is subsequently brought to the United States for trial.[82]

Second, the Fourth Amendment mainly applies to bar improperly gathered evidence during litigation. Intelligence agencies do not generally involve themselves in criminal prosecutions, and therefore, the information they gather rarely finds its way into courtrooms.[83] Although the Fourth Amendment provides only weak protection, it is better than the complete lack of protection traditionally afforded non-U.S. citizens abroad.

B. Intelligence in International Law: (Un)Constructive Ambiguity

The body of international law of intelligence—in both its peacetime and wartime incarnations—fails to provide meaningful regulation of intelligence. Therefore, courts have applied either the law of war or human rights law.

1. Peacetime Intelligence

Despite intelligence's ancient pedigree and arguable usefulness in maintaining peace and security,[84] it has rarely received a positive

77. *Id.* at 167.

78. *Id.* at 175.

79. *Id.* at 167.

80. *But cf.* United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (ruling that for joint U.S. and foreign intelligence operations, "reasonableness" means compliance with local law).

81. 494 U.S. 259 (1990).

82. *Id.* at 261.

83. *See, e.g.*, United States v. Bin Laden, No. S(7) 98 CR. 1023(LBS.), 2001 WL 30061, at *5 (S.D.N.Y. Jan. 2, 2001) (The government "assured the [District] Court that it d[id] not intend to offer any of this [intelligence] evidence in its case-in-chief and . . . also indicated that there [we]re 'no 'fruits' from the FISA tree with respect to [the defendant] El-Hage.'"). Furthermore, the CIA is explicitly barred from engaging in law enforcement activity under the National Security Act of 1947. *See* 50 U.S.C. § 403-4a(d)(1) (2006) (The CIA "shall have no police, subpoena, or law enforcement powers or Internal security functions.").

84. W. Hays Parks, *The International Law of Intelligence Collection*, *in* NATIONAL SECURITY LAW 433–34 (John Norton Moore & Robert F. Turner eds., 1990) ("Nations collect intelli-

treatment under international law. Instead, international law has traditionally regarded spies with something approaching disgust, while nevertheless permitting states to use them. Hugo Grotius, for example, noted the personal criminal liability of spies dates from at least Roman times, but that nations have never been punished for sending them.[85] Grotius makes the moral sentiment even more explicit. He writes, "[T]hose who avail themselves of the aid of bad men against an enemy are thought to sin before God, but not before men; that is, they are thought not to commit wrong against the law of nations, because in such cases—Custom has brought law beneath its sway . . . ."[86]

The only significant development in the international law of intelligence is that the moral sentiment that permeates Grotius has largely been dropped. Oppenheim's treatise states that, around midcentury, peaceful intelligence operations were not considered wrong "morally, politically, or legally."[87] This is also the consensus of most modern scholars.[88]

2. Wartime Intelligence

Geneva law punishes, but does not outlaw, spying.[89] It deprives spies of full POW status[90] and gives them less protection than regular

gence to deter or minimize the likelihood of surprise attack; to facilitate diplomatic, economic, and military action, in defense of a nation in the event of hostilities; and in times of 'neither peace nor war,' to deter or defend against actions by individuals, groups, or a nation that would constitute a threat to international peace and security (such as acts of terrorism).").

85. III HUGO GROTIUS, ON THE LAW OF WAR AND PEACE: *De Jure Belli ac Pacis* (Clarendon Press 1925), *available at* http://www.archive.org/stream/hugonisgrottiide02grotuoft/hugonisgrottiide02grotuoft_djvu.txt.

86. *Id.* at 655.

87. OPPENHEIM, *supra* note 43, at 862.

88. *See* Glen Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L L. 625 (2007); *see also* Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071 (2006); Commander Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217 (1999); Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321 (1996).

89. ICRC COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 43, at 564. The Red Cross Commentary to Additional Protocol I of the Geneva Conventions speaks of the "dialectic of espionage." It then goes on to state: "resorting to this method of combat is not prohibited. Yet, despite ("notwithstanding") the other provisions of the Conventions and the Protocol, any member of the armed forces who is caught while he is engaged in espionage may be deprived of his prisoner-of-war status and punished." *Id.* at 563.

90. *Id.*; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 46, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

civilians,[91] but does not deprive them of all rights.[92] Nevertheless, the Geneva Conventions explicitly punish many intelligence-type activities. They not only penalize spying and sabotage (as above), but also perfidy[93] and terrorism.[94] To the extent intelligence operations resemble non-intelligence criminal operations, intelligence operations are punished criminally. The obvious exceptions are the provisions specifically penalizing spies and saboteurs.

Thus, in war as in peace, the structure of the international law of intelligence remains the same: nations may both send their own spies and punish the spies of others. Two salient points emerge. First, such regulation more-or-less explicitly allows a nation to privilege its own nationals (or agents) over the nationals (or agents) of other nations. A nation may send the former without attracting opprobrium, while severely punishing the latter, even if both are engaged in the exact same activity. Second, because foreign intelligence activity is generally illegal within the nation in which it is carried out, there is little if any opportunity to regulate the conduct of intelligence.

3. Attempts to Regulate

International law of intelligence is actually poorly suited to regulate intelligence. Thus, much of the substantive regulation of intelligence comes from other bodies of law, specifically under either the rubric of the law of war or under human rights law.

a. Intelligence and War

The CIA and other intelligence agencies will probably not abide by the law of war until the CIA internalizes the value of IHL. Despite the CIA's inception of the Office of Strategic Services ("OSS") during

91. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 5, Aug. 12, 1949, 6.3 U.S.T. 3516, 75 U.N.T.S. 287 ("Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military necessity so requires, be regarded as having forfeited rights of communication under the present Convention.") [hereinafter Geneva Convention IV Protection of Civilian Persons].

92. *See, e.g.*, Additional Protocol I, *supra* note 90, art. 75 ("In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article . . . .").

93. *Id.* art. 37(1).

94. *Id.* art. 51(2) ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.").

World War II, IHL has only nominally applied to CIA activities.[95] These agencies, as paramilitaries, have either fought unacknowledged wars or unacknowledged parts in acknowledged wars. CIA's activities in Nicaragua during the 1980s[96] is an example of the former; while CIA activities in Laos during the Vietnam War[97] or in Afghanistan during Operation Enduring Freedom[98] are examples of the latter.

Yet these distinctions do not affect how IHL applies. Most scholars agree that a legal declaration of war[99] does not affect the existence of a state of war in international law.[100] Moreover, even if a war has begun illegally, or in secret, the law on how to conduct war, the jus in bello, applies in full.[101] In addition, the U.N. Charter—the primary law governing the initiation of hostilities—speaks of threats to "international peace and security,[102] not in terms of declared wars or acknowledged armed conflicts. As such, once an entity engages in hostilities, the law of war governs its activities.

Thus, when an intelligence agency conducts paramilitary activities, the law of war applies to it. It is difficult to find examples of courts successfully applying these laws. In *Military and Paramilitary Activities* (*Nicaragua v. United States*),[103] the International Court of Justice

95. Col. Kathryn Stone, *"All Necessary Means"—Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces* 9 (U.S. Army War College, Project Paper, 2003) ("'CIA' support to military operations originated during World War II, with the creation of the Office of Strategic Services (OSS), which built for its own use a covert paramilitary force.").

96. Nathan Hodge, *CIA's Predatory Behavior is Cause for Concern*, NEWSDAY, June 6, 2002, at A49 (noting that during the 1980s, the CIA conducted paramilitary operations in Nicaragua and elsewhere that completely bypassed the Combatant Commander of the U.S. Southern Command); *see also* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 118–19 (June 27) (wherein the International Court of Justice ruled the United States had violated Nicaragua's sovereignty by supporting paramilitaries there).

97. THOMAS L. AHERN, JR., UNDERCOVER ARMIES: CIA AND SURROGATE WARFARE IN LAOS 1961–1973, at xv (2006) (Noting the CIA both worked with native Hmong guerillas in Laos during the Vietnam war, and used its own paramilitary forces on the ground. In neither case did the United States admit this activity until well after the fact.).

98. *See* Greg Miller, *CIA Expanding Presence in Afghanistan*, L.A. TIMES, Sept. 20, 2009, *available at* http://www.latimes.com/news/nationworld/world/la-fg-afghan-intel20-2009sep20,0,6061626,full.story.

99. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war).

100. *See, e.g.*, Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT. & COMP. L.Q. 283, 283–306 (1983).

101. *Id.*

102. U.N. Charter art. 1, para., art. 2, para. 6.

103. Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 118–19 (June 27).

("ICJ") ruled that U.S. intelligence activities in Nicaragua violated Nicaraguan sovereignty and the law of war.[104] But the case had, at best, a limited effect as the United States did not accept the ICJ's jurisdiction to decide the matter[105] and did not abide by the decision. Indeed, one can question the theoretical appropriateness of applying IHL to intelligence operations in this way. Because paramilitary activities are usually both secret and illegal, it is doubtful courts could effectively apply the law of war to them until intelligence services, or their political masters, consciously decide to submit to such regulation.

The law of war provides for some regulation of intelligence activities, but only by prohibiting narrow classes of acts. Nevertheless, it offers a further possibility of regulation by eschewing any distinction in application between declared and undeclared wars, or war and other activity that threatens international peace and security.

b. Intelligence and Human Rights

Non-U.S. courts, specifically the ECHR, have regulated intelligence and counter-terrorism activities under human rights law. Most importantly, they have extended the jurisdiction of human rights instruments, such as the European Convention, to all those under the "effective control" of a subject government. Such a move has opened the way for a wide variety of human rights claims against those engaged in intelligence or counter-terrorism. As a result, these courts have banned or curtailed many intelligence practices related to rendition, detention, and interrogation.

And of course, jus cogens norms of human rights can be applied systematically to intelligence activity without much modification. Like the jus ad bellum, these rules apply to a maximum number of actions with a minimum of distinction and focus on broad prohibitions of the worst sorts of activity.[106] In particular, the fairly uncontested jus cogens prohibition on torture[107] unquestionably applies to, and

104. *Id.* at 147.

105. *Id.* at 17.

106. *But see* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (stating that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights").

107. *See, e.g.*, Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 664 (1998) (describing the prohibition on torture as a jus cogens norm of international law).

would prohibit, the dirtiest sort of intelligence activities. At the very least, it should provide an uncontested basis for regulation, but the CIA has not felt bound by the legal prohibition on torture.[108]

It is difficult to enforce jus cogens human rights norms for essentially two related reasons. First, other jus cogens norms arguably protect even some "dirty" intelligence operations. As sometimes formulated, the right of self-determination includes both a right of armed struggle against colonial oppression and a broader right to engage otherwise terrorist violence against forces deemed especially oppressive.[109] Thus, depending on how construed, these rights and exceptions actually protect otherwise illegal intelligence activity, depending on against whom that activity is directed and by whom it is conducted.

Second, determining the scope of jus cogens rules is notoriously difficult. Outside the prohibitions on torture, genocide, and slavery, few people agree on what qualifies, and no rules exist on how to reconcile conflicting peremptory norms.[110] Even within these prohibitions, courts have had difficulty in formulating enforceable rules. For

108. William Ranney Levi, *Interrogation's Law*, 118 YALE L.J. 1434, 1439 (2009) ("For the fifty years prior to 9/11, the United States consistently professed high ideals about its interrogation policies but at the same time authorized aggressive interrogation policies when the security threat seemed . . . to warrant them."). *See generally* CENTRAL INTELLIGENCE AGENCY, KUBARK COUNTERINTELLIGENCE INTERROGATION 93–95 (1963), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark (authorizing use of "electric methods" of interrogation, among other highly aggressive techniques.).

109. *See, e.g.*, Organization of the Islamic Conference, Convention on the Organization of the Islamic Conference on Combating International Terrorism art. 2(a), July 1, 1999, Annex to Resolution No. 59/26-P, *available at* http://www.unhcr.org/refworld/docid/3de5e6646.html ("Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."); Organization of African Unity, OAU Convention on the Prevention and Combating of Terrorism art 3, June 14, 1999, *available at* http://www.unhcr.org/refworld/docid/3f4b1f714.html ("Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.").

110. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (listing prohibitions on genocide, slavery, disappearances, torture and CID treatment, "prolonged arbitrary detention," systematic racial discrimination, and gross human rights violations as jus cogens). *But see* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) ("In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. . . . [I]t is one of the essential principles of contemporary international law."). *See also* Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 HUM. RTS. Q. 63 (1993) (arguing, in part, that the prohibition on gender discrimination should be recognized as a *jus cogens* right).

instance, U.S. courts are required to follow an extremely high standard of specificity in directly applying international law,[111] making the application of jus cogens standards even more problematic in the U.S. context.

C. The CIA's Legal Self-Image and Past Practices

To the extent that one can tell from public information, the CIA has not understood itself to be bound by international law, and thus has operated in a way that reflects a conception of the demos deeply at odds with legal cosmopolitanism. As a result, it has conducted its international operations outside legal constraints, except, as in cases like Iran-Contra, where those international operations had a major domestic component.[112] This is not to say that the CIA is either cruel or rogue—just that it has operated within the legal framework given to it and has taken more account of the rights of U.S. persons than of non-U.S. persons.

The CIA is relatively unique among intelligence agencies in its extensive and public self-reflection. In the past decade, the CIA has published on its website extensive, previously classified materials dealing with past operations, practices, doctrines, and internal debates. This material allows scholars to identify how the CIA understood its role and the limitations of that role. A picture emerges of an Agency that responds to domestic law and recognizes domestic legal obligations, but that gives very little thought to international law. Thus, while courts and others have attempted to apply IHL to CIA activities,[113] these efforts have barely penetrated its consciousness. This lacuna testifies to the remarkable lack of practically effective regulation of intelligence under international law.

The CIA is most blatant regarding paramilitary operations that violate the jus ad bellum, the jus in bello, or both. For example, the CIA has published the personal reminiscences of a field operative, Richard L. Holm, fighting the "secret war" in Laos during the Viet-

111. Sosa v. Alvarez-Machain, 542 U.S. 692, 723–25 (2004) ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

112. *See* IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1988).

113. *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (International Court of Justice applying IHL standards to U.S. activities in Nicaragua, including those by the CIA).

nam War.[114] He describes crossing the Laotian border, embedding himself with anti-Communist forces in that country, and carrying out operations against North Vietnam in both Laos and in Vietnam itself. Because Laos was not directly or officially involved in hostilities, Holm's actions and the larger CIA operation would run afoul of most interpretations of the U.N. Charter's prohibition on violating the territorial integrity or political independence of a state.[115] For example, Holm describes repeatedly crossing the Laotian border to help facilitate military operations[116] in that neutral country. What is more, Holm describes fighting alongside forces that likely met none of the requirements for lawful combatancy.[117] This is not to say that some entity ought to prosecute Holm, or even that, as a policy matter, the CIA should not have conducted such operations. After all, the Vietnam War grew from longstanding U.S. commitments, involved extremely high stakes, and witnessed IHL violations by enemy forces far worse than anything the U.S. perpetrated,[118] including violations of the neutrality of Laos. But it is a cornerstone of IHL that the same rules apply to all sides, regardless of past violations, or violations by

114. Richard L. Holm, *Recollections of a Case Officer in Laos, 1962–1964*, 47 STUDIES IN INTELLIGENCE 1, 1–2 (2003), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/pdf/v47i1a01p.pdf.

115. U.N. Charter art. 2, para. 4.

116. Holm, *supra* note 114, at 9 ("Early in my tour at Nakhon Phanom, I would have my team leaders come to Thailand to met [sic] with me. Then, I began making trips into Laos at night. Finally, I began to cross the river into Laos regularly during the day. I never carried a passport or other identification. No one, least of all the border officials, ever questioned me about what I was doing.").

117. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 4(A)(2), 6 U.S.T. 3316, 75 U.N.T.S 135 ("Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: . . . Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil [sic] 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 the laws and customs of war.") [hereinafter Geneva Convention Treatment of Prisoners of War]; *see also* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003) (observing, inter alia, that combatants have some flexibility in meeting these requirements that clearly extend protection beyond the regularly constituted armed forces of a recognized state).

118. *See, e.g.*, Jonathan Mahler, *The Lives They Lived; The Prisoner*, N.Y. TIMES, Dec. 25, 2005, at 39 (Magazine) ("The North Vietnamese knew they were overmatched militarily, but they figured they could at least win the propaganda war by brutalizing American P.O.W.'s until they denounced their government and 'confessed' that they had bombed schoolchildren and villagers.").

the enemy.[119] Yet not only did the CIA not abide by IHL, but also it never seems to have realized its transgression.[120]

A similar dynamic informs the CIA's treatment of interrogation. The use of torture is disclaimed because the technique is ineffective and better ones are available, not because it is immoral or illegal.[121] Unclassified CIA documents extensively discuss both interrogation[122] and the use of mind-altering drugs in interrogation,[123] both well after the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment established general international definition for torture and related treatment.[124] As with the other documents, the CIA author takes a measured and analytical approach to the question, but without interest in how the use of such drugs might violate international law by inducing the severe mental suffering characteristic of torture.[125] Moreover, none of these documents mention cruel, inhuman, or degrading treatment, or the Geneva provisions

119. Greenwood, *supra* note 100, at 289.

120. *See* Albert E. Riffice, *Intelligence and Covert Action*, 6 STUDIES IN INTELLIGENCE 73 (1962), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol6no1/pdf/v06i1a06p.pdf. Here, and in Holm's account of British military operations, the authors overwhelmingly worry about the practical success of various tactics, while international law plays no role in the analysis, and so, presumably, no part in the planning or evaluation of operations. *Id.*; Holm, *supra* note 114, at 3, 13, 16.

121. Don Compos, *The Interrogation of Suspects Under Arrest*, 2 STUDIES IN INTELLIGENCE 51, 51 (1958), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol2no3/pdf/v02i3a08p.pdf ("The recalcitrant subject of an intelligence interrogation must be 'broken' but broken for use like a riding horse, not smashed in the search for a single golden egg.").

122. GROTIUS, *supra* note 85, at 655 (Convention Against Torture was submitted for Senate ratification in 1984); *see also* Ireland v. United Kingdom, judgment of Jan. 18, 1978, Ser. A no. 25 (European Court of Human Rights case establishing highly case-specific standard for determining CID treatment. Such a case-specific standard would only raise the likelihood that a given CIA activity would violate international law.); Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 55–56.

123. Bowden, *supra* note 122, at 51 ("According to [Bowden's] intelligence sources, drugs are today sometimes used to assist in critical interrogations, and the preferred ones are methamphetamines tempered with barbiturates and cannabis."); George Bimmerle, *"Truth" Drugs in Interrogation*, 5 STUDIES IN INTELLIGENCE 2, at A1 (1961), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/pdf/v05i2a09p.pdf.

124. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted on* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (defining "'torture' [as] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . . .") [hereinafter Convention Against Torture].

125. *Id.*; *see also* Pratt v. Attorney Gen. for Jamaica, [1993] A.C. 1 (P.C.) (Privy Council decision holding that the length and conditions of confinement on death row could lead to mental suffering that would violate the ban on cruel, inhuman, or degrading treatment or punishment).

that almost certainly ban the use of such drugs.[126] Although the authors of these documents disclaim cruelty in the every day understanding of that term, they show neither knowledge of, nor concern for, techniques that might meet the legal definition of torture, CID treatment, or other prohibited conduct.

These attitudes differ markedly from the extensive Law of War program in the U.S. armed forces. Thus, unlike the uniformed military, the CIA has viewed itself as an agency separate from the concerns of international law. This separation is due in part to the strange relationship of international law to intelligence activity. Yet even where neutral, jus cogens legal standards existed, the CIA seems to have ignored them as irrelevant to its activities.

D. Intelligence, the Law, and the Demos

In view of the narrow prohibitions contained in the Geneva Conventions and the lack of effective regulation under customary IHL, the law of war does not explicitly affect most intelligence activity. Similarly, the peacetime international law of intelligence leaves most practices undisturbed. Each nation is permitted to send its own spies, while simultaneously punishing the spies of all other nations. The shape of domestic intelligence law, at least in the United States, gives some insight into this situation. The National Security Act of 1947, FISA, and Executive Order 12,333 give robust protection to U.S. citizens within the United States, but offer no protection to foreign residents abroad, who are, likely, the primary target of foreign intelligence activity.

Such a situation presents a problem for those who want to regulate foreign intelligence activity, or believe that at least some nonresident aliens deserve the protection of U.S. law. The body of intelligence law is extremely troublesome in its extremely limited conception of the demos and targeting of foreign nationals for surveillance, detention without charge, and other intelligence activities. It

126. *See* Geneva Convention Relative to the Treatment of Prisoners of War August 12, 1949, *supra* note 117, art. 13 ("Prisoners of war must at all times be humanely treated. . . . In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest."); *id.* art. 17 ("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.").

would be extraordinarily difficult, if not impossible, to reconcile one with the other in their present form.

III. Putting Intelligence Under the Laws of War

The CCR and other concerned groups have brought a number of lawsuits against the U.S. government, seeking to establish the rights of the nonresident aliens detained at Guantánamo under either a law of war or constitutional law framework. At the same time, the Executive Branch—while opposing these lawsuits—has extended the Geneva Conventions to interrogation of all detainees in U.S. custody and announced a policy regarding the targeting of terrorists that closely reflects humanitarian law.

The United States has moved a considerable way toward putting anti-terror and intelligence operations under the law of war. Even though domestic intelligence law is available, its reliance on traditional principles of territoriality and citizenship, as well as its inability to regulate certain intelligence activities, make it inadequate.

Legal cosmopolitanism asserts that intelligence activities ought to be regulated because they profoundly affect their objects, such as those interrogated or detained. However, legal cosmopolitanism does not dictate what body of law ought to regulate such activities. Intelligence is often best regulated not as intelligence, but as something else. In bits and pieces, courts have first expanded their jurisdiction and then used this new power to apply the law of war to areas to intelligence and anti-terror activities. The Executive Branch has picked up on this development and has either voluntarily instituted law of war standards of its own or used the law of war to justify ongoing policies. In any case, many of the most significant GWOT activities have come under a legal regime originally designed for the declared clash of armies on the field of battle.[127]

These laws and regulations reflect some previously seen analytical moves. Courts in Europe have tended to regulate intelligence and anti-terrorism activities under a human rights framework, while others have sought to regulate intelligence under the law of war. U.S. legal actors have unconsciously developed a hybrid procedure: The jurisdictional logic of GWOT decisions focus on an effective control test for establishing jurisdiction, similar to the European Court of Human

127. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008).

Rights,[128] while U.S. courts and the Executive, when applying substantive law, have opted for applying the law of war to intelligence. In either case, the animating concerns are a concern for the rights of Guantánamo (and now Bagram[129]) detainees, with a desire on the part of the courts to limit executive power and put matters under a more clearly legal framework.

A. Setting the Stage: *Hamdan* and *Boumediene*, Again

The U.S. Supreme Court's decisions in *Hamdan*[130] and *Boumediene*[131] have been the most celebrated, and reviled, part of GWOT jurisprudence. They have also set the stage for many of the most important developments in intelligence and anti-terrorism law in the past few years. Although the cases do not necessarily appear consistent with one another, a reading based around legal cosmopolitanism sheds light on both the internal logic of the cases and many of their peculiar analytic features. In the end, these cases not only demonstrate a deeply cosmopolitan tendency, they also reflect many of the same trends and logical maneuvers used by non-U.S. courts and agencies.

Hamdan provided one of the earliest and most prominent manifestations of cosmopolitan legal concerns. Those opposed to the Bush Administration policy have argued the Geneva Conventions should protect all Guantánamo detainees, at least under Common Article 3 of the Geneva Conventions ("CA3"), if not as full prisoners of war. The Supreme Court adopted the former position in *Hamdan*,[132] but has not yet accepted the latter. Indeed, the commentary to the Geneva Conventions seems to indicate that the Geneva Convention would not cover the al-Qaeda detainees[133] (and the Conventions

128. *See, e.g.*, Öcalan v. Turkey [GC], no. 46221/99, May 12, 2005, Eur. Ct. H.R. 2005–IV; Ramirez-Sanchez v. France, no. 28780/95, Comm'n Decision of June 24, 1996, DR 155; Ireland v. United Kingdom, judgment of Jan. 18, 1978, Ser. A no. 25; Al-Skeini v. Sec'y of State for Defence [2007] A.C. 153.

129. Anthony J. Colangelo, *"*De facto *Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 675 (2009).

130. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

131. *Boumediene*, 128 S. Ct. 2229.

132. *Hamdan*, 548 U.S. at 631.

133. Additional Protocol I, *supra* note 90, art. 44(4) ("A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 [of, primarily, carrying arms openly during combat] shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any

themselves mention only terrorism as a prohibited tactic[134] without mentioning "terrorists"). The extension of protection under CA3 in *Hamdan* thus constitutes cosmopolitanism of the first kind, i.e. an expanded demos.

The second kind—requiring more legal actors to expand the jurisdiction of the courts—can be seen in the developments from *Hamdan* to *Boumediene*. It deals with the Supreme Court's current separation-of-powers jurisprudence: a belief that all three branches should be involved in momentous decisions. This means, in practice, more legislation from Congress and more decisions from the courts. In the *Hamdan* decision, the Supreme Court faced a realm of relatively pure executive action and demanded the Executive include Congress.[135] After Congress was included, the Court then, in *Boumediene*, demanded the judiciary be included as well, in the form of extending constitutional habeas rights to the Guantánamo detain-

offences he has committed."). The Commentaries state, "[s]everal representatives [to the conference drafting Additional Protocol I] made the point that this paragraph is not, in any event, intended to protect terrorists who act clandestinely to attack the civilian population." ICRC COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 43, at 538; *see also* Geoffrey S. Corn, Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 295 (2006) ("For more than fifty years following the 1949 revision of the Geneva Conventions, legal scholars, government experts, and military practitioners understood the articles that defined when the protections of these treaties came into force—Common Articles 2 and 3—as the exclusive criteria which triggered the laws of war. From these two articles emerged an 'either/or' law-applicability paradigm: inter-state, or international, armed conflicts triggered the full corpus of the law of war, whereas intra-state, or internal, armed conflicts triggered the limited humanitarian protection reflected in the terms of Common Article 3."). Therefore, the conflict with al-Qaeda does not fit any of these paradigms because its transnational nature; therefore, the traditional criteria for determining the applicability of Common Article 3 is inapplicable. *Corn*, *supra*, at 296; Roy S. Schöndorf, *Extra-State Armed Conflict: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 4 (2004) ("Thus, in the present state of affairs—for example, in a conflict like that between the United States and [a]l-Qaeda—the usefulness of traditional [law of war] dichotomies begins to break down, and a whole array of uncertainties arises. When extra-state hostilities erupt, does international law recognize this as an armed conflict, or is the legal status of the situation still one of peace? If there is an armed conflict under international law, what kind of armed conflict is it—inter-state or intra-state? Or is it neither—that is, should international law recognize a third, more appropriate category of armed conflicts? If so, which existing laws should apply to this new category?").

134. Geneva Convention IV Protection of Civilian Persons, *supra* note 91, art. 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

135. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'").

ees.[136] On one reading of these cases, the Court has acted disingenuously, giving the Executive false signals, and partially contradicting itself. More plausibly, however, these decisions share a unifying concern with, and preference for, law and legal supervision over policy and political supervision.

In *Hamdan*, the Court purported to use the tripartite framework developed in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* ("*Youngstown*")[137] to evaluate the legality of the intelligence activities at issue in the case. The Court showed a very strong preference for *Youngstown* category one: the President acting pursuant to express congressional authorization and so receiving the highest level of deference.[138] Which is to say, even when, as here, there was ample evidence of informal congressional acquiescence (category two),[139] the Court demanded the President go back for more. Indeed, Congress had arguably formally authorized the Executive's action through the passage of the Detainee Treatment Act of 2005[140] and Military Commissions Act of 2006 ("MCA"),[141] and the President, therefore, was at the height of his national security power.[142] This decision does not show, however, that the Court acted in bad faith. Rather, it only shows that it did not read the law technically. It found that congressional approval was not sufficient; active congressional involvement and oversight was required.[143]

136. *Boumediene*, 128 S. Ct. at 2261.

137. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

138. *Id.* at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

139. *Id.* at 637 ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . . [But], congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

140. Detainee Treatment Act of 2005, 119 Stat. 2739; *see also Hamdan*, 548 U.S. at 678 (Thomas, J., dissenting) (arguing that, under a *Youngstown* analysis, the DTA, as congressional authorization for executive policies, ought to put the President at the height of his powers).

141. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

142. *Youngstown*, 343 U.S. at 636–37.

143. *See, e.g.*, Kathleen Duignan, *The Military Commissions Act of 2006: 'Play it Again, [Uncle] Sam'*, JURIST, Dec. 12, 2006, at 1, *available at* http://jurist.law.pitt.edu/forumy/2006/12/military-commissions-act-of-2006-play.php ("After the Supreme Court decided *Hamdan v. Rumsfeld* in June 2006, academics, law of war experts, military justice practitioners, and everyday concerned citizens were eagerly awaiting congressional action to cure the deficiencies in the previous system or sanction the use of courts-martial or civilian courts to try the fraction of those detained at Guantánamo awaiting trial. Instead, Congress acted politically. Instead of carefully deliberating and taking as much time as it needed to get the system right, Congress hastily created and passed the Military Commissions Act of 2006.").

Boumediene reinforces this point. Through the MCA, Congress unambiguously endorsed the President's detainee policy.[144] Many commentators characterized the MCA as a direct response to *Hamdan*, and especially Justice Breyer's concurring opinion that asserted the only deficiency in the detainee policy was a lack of congressional involvement.[145] Again, under a literal reading of *Youngstown*, the President was at the height of his national security power after the MCA, and, under a literal reading of *Hamdan*, Congress had fulfilled that opinion's conditions for approval. Nevertheless, in *Boumediene*, the Court ruled this joint presidential and congressional action inadequate.[146]

Some critics of the decision—including Chief Justice Roberts—accused the Court of a straightforward bait-and-switch.[147] Yet the practical aspects of the opinions make this unlikely. First, the same Justices comprised the majorities on both *Hamdan* and *Boumediene*.[148] Second, the *Boumediene* litigation was already in the lower courts when *Hamdan* came down, and the core question of *Boumediene*—do Guantánamo detainees have constitutional habeas rights?—had been pregnant since at least *Rasul*[149] (handed down two years before *Hamdan*[150] and four before *Boumediene*[151]) that held statutory habeas corpus rights extended to Guantánamo.[152] Thus, given a constant set of majority Justices in *Hamdan* and *Boumediene* and a clear progression of cases, it is more plausible to describe the Court's decisions as stemming from a common ongoing concern, rather than from fickleness or inepti-

144. Military Commissions Act of 2006 § 2, Pub. L. No. 109-366, 120 Stat. 2600 ("The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions . . . .").

145. *Hamdan*, 548 U.S. at 636.

146. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008) ("If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . . The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention." (internal citations omitted)).

147. *Id.* at 2285 (Roberts, Scalia, Thomas, and Alioto, JJ., dissenting) ("Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.").

148. *Hamdan*, 548 U.S. 557 (consisting of a majority comprised of Justices Stevens, Souter, Ginsburg, and Breyer); *Boumediene*, 128 S. Ct. 2229 (consisting of a majority comprised of Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer).

149. Rasul v. Bush, 542 U.S. 466 (2004).

150. *Hamdan*, 548 U.S. 557.

151. *Boumediene*, 128 S. Ct. 2229.

152. *Rasul*, 542 U.S. at 482.

tude—especially since common principles such as concern for the detainees and a strong normative preference for law and legal oversight—emerge naturally from these cases.

This preference goes beyond the *Youngstown* framework. Under that framework, the jurisdiction-stripping provisions of the MCA should have led to the strongest possible deference to the joint action from the Executive and Congress. As Justice Kennedy pointed out in his majority opinion, as a historical matter, the question of whether habeas rights extended to Guantánamo was ambiguous.[153] It was also ambiguous under the Court's past precedents.[154] This combination of ambiguous law and category one action ought to have been a victory for the Executive.[155] Because it was not, the Court was likely not using a formal *Youngstown* analysis. Reading these cases as emanations of legal cosmopolitanism, however, renders them consistent with each other and with the expressed concerns of most of the current Justices. Such a reading covers both the extension of current law (CA3) to cover Guantánamo (*Hamdan*[156]), and the belief that detainees deserve to enforce their rights through Article III courts (*Boumediene*[157]).

This outcome, and its reasoning, also reflects a similar jurisdictional framework to international cases. The U.S. Supreme Court, however, has a different substantive law: instead of international human rights law, the U.S. Supreme Court has restricted itself to jurisdictional issues,[158] while lower courts have applied not human rights law, but a restrictive version of IHL.

153. *Boumediene*, 128 S. Ct. at 2248 ("Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.").

154. *See id.* at 2254–58 (reviewing the highly ambiguous and fact-dependent way in which jurisdictions have applied U.S. law to territories under U.S. control but outside the United States).

155. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636–37 (1952).

156. Hamdan v. Rumsfeld, 548 U.S. 577, 631–32 (2006).

157. *Boumediene*, 128 S. Ct. at 2261–62.

158. Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1015 (2008) ("[M]ost of the U.S. court decisions concerning the 'war on terror' have not directly addressed these substantive rights claims. Instead, the decisions have mostly been about process: whether particular courts have jurisdiction; whether the proper branch of government has made the initial determination of policy; whether the proper procedures have been followed in implementing the policy; whether particular plaintiffs have standing; whether evidence is protected from discovery by the state secrets privilege; and so forth.").

Jurisdictionally, the Court has applied something very much like a substantive control test. In ruling that statutory and constitutional jurisdiction extend to Guantánamo Bay, the Court has repeatedly[159] emphasized[160] the complete factual control the United States exercises there. Yet the actual content of the Court's sovereignty test is still being developed and might turn on a variety of factors. Notably, the reasoning and rhetoric of *Boumediene* suggests a more formal approach than the European Court of Human Rights. But the actual *Boumediene* test and interpretation of the case by lower courts suggest an approach to jurisdiction that might be indistinguishable from international case law.

Explicating the more formal reading, Anthony Colangelo has described the Supreme Court as having developed a full de facto sovereignty doctrine, which seems to mean that where the political branches have established their control, then federal court jurisdiction will follow. He writes: "The Court must rely on political branch determinations establishing complete jurisdiction and control over a territory; but once the political branches do that, the Court can take notice of U.S. de facto sovereignty for purposes of its functional approach to habeas."[161]

Colangelo contrasts this approach with what he terms "practical sovereignty."[162] For example, the United States would generally have practical control over an overseas American military base, but the host country and its courts would generally retain sovereignty.[163] If Colangelo's analysis is correct, then U.S. courts would not properly assert jurisdiction over such a base, since the political branches would have taken care to preserve the sovereignty of the host country, usually via a status of forces agreement that preserved, for the host country, some

159. Rasul v. Bush, 542 U.S. 466, 480, 482 (2004) ("By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. . . . Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" (internal citations omitted)).

160. *Boumediene*, 128 S. Ct. at 2253 ("Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.").

161. Colangelo, *supra* note 129, at 675.

162. *Id.* at 625.

163. *Id.* at 665–66.

degree of enforceable sovereignty over the American base.[164] By contrast, a "practical sovereignty" approach would simply look at the (high) degree of control the U.S. government exercised inside the base and assert sovereignty on that basis.

Colangelo's reading is both plausible and carefully reasoned, so it should not be dismissed as a possibility. However, it takes into account neither the likely animating concerns behind the Court's GWOT jurisprudence, nor the actual test the Supreme Court laid out in *Boumediene*. Moreover, the one major GWOT jurisdiction case since *Boumediene*—*Al Maqaleh v. Gates* ("*Al Maqaleh*")[165]—has gone against Colangelo's analysis of the former.

To see the flaws in Colangelo's arguments, it helps to imagine a situation that directly confronts *Boumediene*'s jurisdictional holding: if the Obama Administration transferred a detainee from Guantánamo to Bagram Air Base, in Afghanistan, or to another overseas base, for continued internment and not for release. Under Colangelo's reading, the detainee would move from a place of de facto sovereignty, where he enjoyed habeas rights, to a place of "incomplete jurisdiction" where courts could not properly exercise their power.[166] Yet such an approach would disregard the human rights concerns that seem to underlie *Hamdan*, as well as the separation of powers concerns expressed in *Boumediene*. In the 2006 case, the majority and concurring Justices concerned themselves with the human rights of the detainees, as they extended CA3 rights to the detainees.[167] The Court also expressed more general frustration with the treatment the detainees had received. It wrote:

> The absence of any showing of impracticability [in not following standard court-martial procedures] is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. . . . Whether or not that departure technically is "contrary

164. *Id.* at 664–67.

165. 604 F. Supp. 2d 205 (D.D.C. 2009).

166. Colangelo, *supra* note 129, at 667–68 ("Based on the foregoing evaluation of U.S. jurisdiction over Guantanamo and the jurisdictional frameworks created by SOFAs covering other military installations abroad, the United States does not have complete jurisdiction over either Afghanistan or Iraq. Consequently, the United States does not have de facto sovereignty over territory in either of these countries, including military bases. Thus, if the Court continues to use the jurisdictional aspect of de facto sovereignty to inform the constitutional scope of habeas, as it did in *Boumediene*, noncitizen government-designated enemy combatants detained in Afghanistan and Iraq likely will not constitutionally have access to the writ.").

167. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).

> to or inconsistent with" the terms of the UCMJ, . . . the jettisoning of so basic a right cannot lightly be excused as "practicable."[168]

It also suggested that international human rights instruments might apply to the detainees,[169] although the federal courts have not yet developed this line of reasoning.

Boumediene confirmed such a concern, as it forced the Executive into a legally and historically novel policy—habeas rights for those interred as an incident of war—in the face of overwhelming political branch opposition.[170] Such a development is explained by concern for the detainees. The Court also, with much the same frustration, reasserted the role of the judicial branch. As the majority wrote:

> Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."[171]

Colangelo's analysis, and especially his analysis of jurisdiction in Afghanistan, does not pay attention to such underlying concerns. In his account, the Court's jurisdictional analyses seem divorced from worries over human rights or executive power, when both the cases themselves, and the development of the jurisprudence from one case to the next, reinforce these concerns. Such factors point toward the more flexible, less formal "practical sovereignty" doctrine that Colangelo eschews[172] or the "effective control" doctrine of the European Court of Human Rights.[173]

The most prominent case applying *Boumediene*'s jurisdictional framework reinforces this reading. In *Al Maqaleh*, Judge Thomas Bates of the District Court of the District of Columbia held that *Boumediene* extended habeas rights to international detainees at the facility at Bagram Air Base in Afghanistan.[174] Judge Gates noted that, practically speaking, there was not much difference in the high degree of control the United States exercised over both Bagram and Guantánamo,[175]

168. *Id.* at 624 (internal citations omitted).
169. *Id.* at 633 n.66.
170. Boumediene v. Bush, 128 S. Ct. 2229 (2008).
171. *Id.* at 2259 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
172. Colangelo, *supra* note 129, at 670–74.
173. *See supra* Part I.
174. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).
175. *Id.*; *see also id.* at 223 ("But the differences in control and jurisdiction set forth above [between Guantánamo and Bagram] do not significantly reduce the 'objective de-

plus the profiles of the detainees seemed identical.[176] Moreover, Judge Bates explained that refusing to extend habeas rights to Bagram would ignore the concerns over executive power and separation of powers that were the background of *Boumediene*.[177]

Thus, Judge Bates interpreted *Boumediene* as overwhelmingly focused on a practical or effective analysis, with a special concern to limit executive overreach. This interpretation puts *Boumediene* squarely in line with international jurisprudence. It also should, presumptively, extend habeas rights to all GWOT detainees, meaning this anti-terrorist activity has been put under a framework that is fairly new and unprecedented in U.S. law, but much more familiar internationally. It is also consistent with—indeed exemplary of—legal cosmopolitanism's practical concerns of expanding jurisdiction and limiting executive power, as well as the overarching goal of expanding the demos to include all those subject to state power.

B. New (Law of War) Regulation in the Lower Courts

This area of law began its current development with *Boumediene*, which extended constitutional habeas rights to Guantánamo detainees. The Court did not, however, promulgate the standards or guidelines under which such rights would apply.[178] Instead, the U.S. Supreme Court explicitly left this task to the lower courts, and ultimately the district courts in Washington, D.C. and the D.C. Circuit Court of Appeals.[179] Although the D.C. Circuit has issued a number of important GWOT decisions, it has yet to issue a definitive statement on Guantánamo habeas after *Boumediene*. Thus, this area of law currently consists of a number of district court opinions, some of which have become influential.

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gree of control' the United States has at Bagram. The existence of a SOFA and the presence of non-U.S. personnel does not affect the actual control the United States exercises at the Bagram detention facility, which is practically absolute.").

176. *Id.* at 209.

177. *Id.* at 216 n.7 ("This Court's concern with the unrestrained power of respondent (i.e., the Executive Branch) to determine the availability of habeas corpus simply by choosing to send a detainee to Bagram rather than Guantanamo is precisely the concern that animated the Supreme Court's separation-of-powers observations in *Boumediene*.").

178. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention.").

179. *Id.* at 2276. The Supreme Court consolidated Guantánamo habeas cases in these courts, but prior to *Boumediene* some habeas cases were already moving through the Fourth Circuit and the Eastern District of Virginia. *See, e.g.*, al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc) *vacated sub nom* al-Marri v. Spagone, 129 S. Ct. 1545 (mem).

The most important of these cases address what authority the President must assert to defeat a detainee's habeas suit. The lower courts have converged on the following answer based on the U.S. Supreme Court's reasoning in *Hamdi*:[180] the President gains his authority to detain from the Authorization for the Use of Military Force ("AUMF")[181] that followed the 9/11 attacks; and the AUMF itself grants the President authority to detain persons only according to the law of war.[182] Finally—and, here, the lower courts split slightly—under the law of war, the President can detain either those directly engaged in combat with the United States[183] or those substantially supporting the combatants directly engaged in combat with the United States.[184]

There have been approximately forty detainee habeas decisions.[185] Among these decisions, *Hamlily v. Obama* ("*Hamlily*")[186] and *Gherebi v. Obama* ("*Gherebi*")[187] have been the most influential. Both support the President's power to detain under the AUMF and the application of a restrictive Law of Armed Conflict ("LoAC") standard.[188] They differ, however, on whether the President can detain a person who has only given "substantial support" to the armed forces of al-Qaeda or the Taliban (*Gherebi*[189]), or whether the detainee must have

180. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) ("[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."); *id.* at 521 ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who [have] 'engaged in an armed conflict against the United States.'").

181. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (explaining that the President is authorized to use "all necessary and appropriate force") [hereinafter AUMF].

182. *Hamdi*, 542 U.S. at 518–21; Gherebi v. Obama, 609 F. Supp. 2d 43, 55 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63, 72 (D.D.C. 2009).

183. *Hamlily*, 616 F. Supp. 2d at 74.

184. *Gherebi*, 609 F. Supp. 2d at 67.

185. *See* Chisun Lee, *An Examination of 41 Gitmo Detainee Lawsuits*, ProPublica, July 22, 2009, updated Dec. 17, 2009, http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722; Chisun Lee, *Their Own Private Guantánamo*, N.Y. Times, July 23, 2009, at A31, *available at* http://www.nytimes.com/2009/07/23/opinion/23lee.html.

186. 616 F. Supp. 2d 63 (D.D.C. 2009).

187. 609 F. Supp. 2d 43 (D.D.C. 2009).

188. *Id.* at 55; *Hamlily*, 616 F. Supp. 2d at 72.

189. *Gherebi*, 609 F. Supp. 2d at 54.

actually been a member of those armed forces or their analogical equivalent (*Hamlily*[190]).

Although the two cases differ on this point, they substantially agree on most of the analysis behind it. Thus, since *Gherebi* was the earlier case and is cited respectfully in *Hamlily*,[191] an analysis of it yields insight into both cases, as well as the cases that cite both.[192] *Gherebi* begins, analytically, with a construction of the U.S. Supreme Court's decision in *Hamdi*, which held the President could detain a U.S. citizen in the United States under the AUMF.[193] The *Hamdi* Court reasoned that, since the AUMF authorized the targeting of enemy combatants, it also authorized their detention—so long as that detention conformed to the law of war.[194] The Court did not, however, spend much time on LoAC, except to note the President could clearly detain Hamdi under that body of law.[195] The Court also took pains to note the Constitution afforded Hamdi due process rights in detention.[196] The Court's decision seemed to rest on a classic citizen/non-citizen distinction, as well as a territorial one. In the Court's GWOT precedent, *Hamdi* remains the only case to rely on a due process rationale.

The *Gherebi* court, however, did not make such a citizen/non- distinction and ruled the President could only detain under the AUMF in accordance with LoAC[197] and held the law of war authorized only the detention of members of the enemy's armed forces engaged in combat with the United States or those substantially supporting such forces.[198] Without the first qualification, the President could potentially detain al-Qaeda members captured in the United States at Guantánamo as enemy combatants—a ruling that would be in tension with

190. *Hamlily*, 616 F. Supp. 2d at 69 ("Although this Court concurs in much of the reasoning and conclusions of *Gherebi*, it does not agree with the decision to adopt the government's framework in its entirety. Specifically, the Court rejects the concept of 'substantial support' as an independent means for detention. Likewise, the Court finds that 'directly suspecting[ing] hostilities' is not a proper basis for detention.").

191. *Id.* at 76.

192. *See* Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78, 85 (D.D.C. 2009); Al Odah v. United States, 648 F. Supp. 2d 1, 6 (D.D.C. 2009); Al Rabiah v. United States, 658 F. Supp. 2d 11, 17 (D.D.C. 2009).

193. Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004).

194. *Id.* at 554 (Souter, J., concurring in part, dissenting in part, concurring in judgment).

195. *Id.* at 515–18, 521.

196. *Id.* at 537–39.

197. Gherebi v. Obama, 609 F. Supp. 2d 43, 54–55 (D.D.C. 2009).

198. *Id.* at 52–53, 70–71.

both *Hamdi*'s grant of due process rights[199] and with lower court rulings that address the question directly. The *Hamlily* court adopted the above reasoning—except that which allowed the detention of those "substantially supporting" enemies designated under the AUMF. *Gherebi* used a combat-based rationale to justify its conclusions. That is, when engaged in combat against an enemy force, the government could detain not only those directly participating in hostilities, but also those somehow part of the "command structure" of the opposing force.[200] It is not entirely clear how the *Hamlily* standard—rejecting "substantial support"[201]—will differ in practice (under either standard, the government has proven likely to lose.)[202]

Two reasons for this restrictive standard stand out. First, the district courts have used *Hamdi* to limit distinctions between citizen and non-citizen detainees. It is not entirely clear how much the U.S. Supreme Court, in *Hamdi*, relied on a citizen, non-citizen distinction—but it clearly did to some extent[203]

On one hand, *Boumediene* erased any such distinction by extending part of the Constitution to non-citizens at Guantánamo Bay.[204] On the other hand, by its own terms, *Hamdi* applies to those detained in the United States and extends them due process rights;[205] while *Boumediene* applies to detainees held in Guantánamo and extends them habeas rights.[206] By applying *Hamdi* in Guantánamo cases, the district courts have begun extending due process rights to Guantánamo, which the U.S. Supreme Court has obviously not done, and which the development of a Guantánamo habeas standard does not require. That is, the district courts have demanded a very high degree of proof from the government[207] and impose a high evidentiary stan-

199. *Hamdi*, 542 U.S. at 553.

200. *Gherebi*, 609 F. Supp. 2d at 70 ("[T]he Court interprets the government's 'substantial support' standard to mean individuals who were members of the 'armed forces' of an enemy organization at the time of their initial detention. It is not meant to encompass individuals outside the military command structure of an enemy organization . . . .").

201. Hamlily v. Obama, 616 F. Supp. 2d 63, 70 (D.D.C. 2009).

202. *See* Lee, *supra* note 185 (noting the United States has lost approximately eighty percent of Guantánamo habeas cases).

203. *Hamdi*, 542 U.S. at 537 ("Because we conclude that due process demands some system for a citizen–detainee to refute his classification, the proposed 'some evidence' standard is inadequate.").

204. Boumediene v. Bush, 128 S. Ct. 2229, 2261 (2008).

205. *Hamdi*, 542 U.S. at 515–17.

206. *Boumediene*, 128 S. Ct. at 2261.

207. *See, e.g.*, Al Mutairi v. United States, 644 F. Supp. 2d 78, 82 (D.D.C. 2009) (petitioner ordered released even though the district court recognized his conduct was "consis-

dard[208]—perhaps higher than the U.S. Supreme Court intended.[209] The district courts have collapsed any distinction, in terms of the procedures regarded as adequate, between habeas cases against Guantánamo detainees and other habeas cases. The district courts have not done anything clearly wrong, i.e., U.S. Supreme Court precedent does not foreclose the result they have reached,[210] but they have moved toward a single legal standard for detainees in both the United States and abroad when they were not required to do so.

The district courts have also interpreted the law of war to severely limit the discretion of the detaining power in favor of an expanded judicial role. To wit, the *Gherebi* court reasoned that LoAC gives authority to detain either members of the enemy's armed forces; or, if the enemy does not have armed forces per se, such as al-Qaeda, those enemies engaged in combat against the United States.[211] However, neither U.S. Supreme Court precedent nor international law compels this reasoning. First, the U.S. Supreme Court has issued no guidance on whom the Executive may detain in the first instance[212] and has issued only very limited guidance on the standards that lower courts should apply in evaluating detainee habeas claims.[213]

Moreover, the district courts have applied a far more restrictive version of LoAC than needed in holding the Executive could only detain members of the armed forces of the enemy or those actively engaged in combat against the United States. In reaching this conclusion, the courts have relied, oddly, on the law of targeting: the AUMF authorizes the President to target certain persons, pursuant to

tent with" an al-Qaeda member, and petitioner had not offered a plausible alternative version of events).

208. *See Hamdi*, 542 U.S. at 533–44 (suggesting permissibility of the government using both hearsay evidence and a presumption of evidentiary validity to justify detention). *But see* Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. 2008) (hearsay may only be used to justify detention if the hearsay comes with significant indications of reliability); Bismullah v. Gates, 501 F.3d 178, 186 (D.C. Cir. 2007) (putting significant preconditions on the use of a presumption of validity). *See also Al Mutairi*, 644 F. Supp. 2d 78; Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009); Al Rabiah v. United States, 658 F. Supp. 2d 11, 13 (D.D.C. 2009) (disallowing a presumption in favor of the government's evidence).

209. *Hamdi*, 542 U.S. at 533–34.

210. *Boumediene*, 128 S. Ct. 2229.

211. Gherebi v. Obama, 609 F. Supp. 2d 43, 68 (D.D.C. 2009) ("[T]errorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants . . . ." (citing Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2048, 2114–15 (2005))).

212. *See Boumediene*, 128 S. Ct. 2229.

213. *Id.*

the law of war; if the President can target a person, then logically the President can also choose to detain that person.[214] Under most readings of the law of war, military forces may detain some persons whom they may not usually otherwise target. In particular, armed forces may only target members of the enemy's armed forces, or civilians directly participating in hostilities. However, those same armed forces may detain members of the enemy's armed forces, civilians directly participating in hostilities, and civilians believed to pose a security threat.[215] And, if the U.S. detentions are categorized not as part of combat operations, but as part of a military occupation, then the authority to detain is even broader.

The Australian counter-insurgency expert Lt. Col. David Kilcullen, an adviser to Gen. David Petraeus, has characterized the entire GWOT this way, i.e. a "global counterinsurgency."[216] This line of thought puts the United States in the place of an occupying power, and so the United States ought to benefit from the detention standards and quasi-police powers applicable in occupation.[217] Moreover,

214. *See, e.g.*, *Gherebi*, 609 F. Supp. 2d at 70–71.

215. *See* Geneva Convention IV Protection of Civilian Persons, *supra* note 91, art. 5 ("Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person [i.e., civilian noncombatant] is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privilege under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of the State."); *id.* art. 42 ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary."); ICRC, PROTECTION OF CIVILIAN PERSONS, *supra* note 4, at 257 ("It did not seem possible to define the expression 'security of the State' in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.").

216. Lt. Col. David Kilcullen, *Countering Global Insurgency*, SMALL WARS JOURNAL, Nov. 20, 2004, at 20, 45, *available at* http://smallwarsjournal.com/documents/kilcullen.pdf; *see also* Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009).

217. *See, e.g.*, United States v. List, *reprinted in* TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. XI., at 1244–45 (1953), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf ("The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility."); Geneva Convention IV Protection of Civilian Persons, *supra* note 91, at arts. 50, 55, 56, 58–62 (occupying power has the duty to provide education; foodstuffs and medical supplies to the civilian population; maintain medical and hospital facilities; distribute books and required articles for religious needs; and facilitate relief efforts); *id.* art. 5 ("Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military secur-

many of those detained at Guantánamo and Bagram, and who now benefit from habeas rights, are foreign fighters captured in the Afghan theater. Thus, even under a traditional understanding of "occupation," the United States would enjoy more discretion to detain such people than it has currently.[218] Which is to say, in such cases the occupying power may detain almost any person it perceives as a security threat, so long as it gives such persons recourse to a hearing in a military tribunal.[219] Reviewing detentions, therefore, by applying the law of targeting in an CA3 domestic court, is an anomalous construction of international law for at least two reasons: first, it applies a more restrictive standard regarding whom may be detained than international law requires; and, second, it does so in a tribunal that offers more process than international law says is needed.[220]

Thus, the district courts have construed the *Hamdi* and *Boumediene* decisions to erase much of the previous distinction in the legal standards that apply to domestic and foreign detainees. By a relatively narrow reading of the cases, *Hamdi* addresses when domestic persons may be detained,[221] while other cases such as *Munaf v. Geren* ("*Munaf*"),[222] that provide the Executive with much greater discretion, govern foreign detentions. District courts, however, have generally overlooked *Munaf* in order to apply *Hamdi* directly to foreign detainees.[223] And, with the same foreign detainees, the district courts have developed and applied a legal standard that severely limits the Executive's discretion. In construing the AUMF, these courts have reasoned that it only authorizes the Executive to detain persons whom the Executive could detain under the law of war. The courts have then

ity so requires, be regarded as having forfeited rights of communication under the present Convention."); *id.* arts. 41–43, 66, 68, 78 (providing for the internment of protected persons); *id.* arts. 64, 66 (An occupying power may, with limitations, promulgate new penal laws in occupied territory, and try residents of that territory in military courts, "on [the] condition that the said courts sit in the occupied country."); *id.* art. 66. Thus, courts sitting in the United States are least excessively protective of the rights of persons under occupation. *Id.* art. 64.

218. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

219. Munaf v. Geren, 128 S. Ct. 2207, 2220–27 (2008).

220. *See id.*

221. *See* Hamdi v. Rumsfeld, 542 U.S. 504, 533 (2004).

222. *Id.* at 2219 (persons detained in Iraq as part of the Iraq conflict do not enjoy access to CA3 courts).

223. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009); Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78, 85 (D.D.C. 2009); Al Odah v. United States, 648 F. Supp. 2d 1, 6 (D.D.C. 2009); Al Rabiah v. United States, 659 F. Supp. 2d 11, 17 (D.D.C. 2009).

developed a reading of the law of war, so narrow as to be inconsistent with those laws usual construal.[224]

The net result has been to flatten domestic and foreign legal standards, while limiting the discretion of the Executive. Such developments fit with the theory of legal cosmopolitanism. Like legal cosmopolitanism, these developments extend previously domestic legal standards to foreign persons. But, unlike legal cosmopolitanism as such, these district court cases do not shift power from the Executive to the courts. Rather, *Boumediene* had already accomplished this shift in power. However, the legal standard these courts developed does limit those persons whom the Executive may detain, based upon an aggressive reading of the law of war. Thus, although these cases do not entirely fit the theory of legal cosmopolitanism, they match it substantially, while evincing many of the same concerns.

C. New Regulation in the Political Branches

The political branches have focused their regulatory efforts on two areas: interrogation and targeting. Interrogation presents the most straightforward application of IHL to intelligence, while the law around targeting, although less developed, still displays cosmopolitan tendencies. The common impulse behind recent developments—to extend to GWOT detainees the same protections full prisoners of war receive and to regulate the targeting of terrorists under the law of war—seems cosmopolitan because of its concern for a group of nonresident aliens, many of whom are avowed enemies of the United States. However, this extension of rights comes from the Executive Branch voluntarily and so might represent the Executive protecting his sphere of influence and preempting a formal extension of rights. Nevertheless, the impulse behind President Obama's extension of rights to alleged GWOT enemies and the support for that extension among some substantial portion of the electorate seem clear enough and therefore represent a cosmopolitanism of a kind closer to Robert Dahl's philosophical concerns[225] and relatively further from the more lawyerly concerns of Cass Sunstein or John Ely that emphasize the importance of courts.[226] To the extent the Executive is responding to

224. *See, e.g.*, *Gherebi*, 609 F. Supp. 2d 43; *Hamlily*, 616 F. Supp. 2d 63; *Mattan*, 618 F. Supp. 2d at 26; *Al Mutairi*, 644 F. Supp. 2d at 85; *Al Odah*, 648 F. Supp. 2d at 6; *Al Rabiah*, 659 F. Supp. 2d at 17.

225. DAHL, *supra* note 14, at 120–24, 320–21.

226. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 142–43 (1994); ELY, supra note 19, at 101–02.

popular pressure on interrogation and targeting, these developments could be a sign the popular demos has already expanded, and the Executive is playing a game of catch-up.

Hamdan mandated the United States treat all detainees at Guantánamo according to CA3.[227] After *Hamdan*, the Bush Administration decided, as an informal policy, to close CIA "black sites,"[228] secret prisons located outside the United States which allegedly held high-value detainees, including those directly involved in the 9/11 attacks.[229] As a result, Guantánamo would have contained a significant number of intelligence detainees whom, because of *Hamdan*, could only be interrogated by intelligence agents according to IHL standards.[230] The Obama Administration has strengthened this policy largely by making the position official, thereby publicly binding itself in Executive Order 13,491, entitled "Ensuring Lawful Interrogation."[231]

Executive Order 13,491 repeals Bush-issued Executive Order 13,440,[232] which had brought vastly more CIA activity under the scope of federal criminal law.[233] Executive Order 13,440, although perhaps

227. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).

228. Peter Baker, *Inside Obama's War on Terrorism*, N.Y. TIMES, Jan. 4, 2010, (Magazine), *available at* http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?hp=&pagewanted=all ("By the time Obama was inaugurated, . . . Bush had ordered that the secret C.I.A. black site prisons be emptied.").

229. *See* Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, *available at* http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer.

230. *See generally* Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES, Feb. 26, 2006, *available at* http://www.nytimes.com/2006/02/26/international/26bagram.html?_r=1&sq=closing%20black%20sites&st=nyt&scp=2&pagewanted=all) (stating that after the Supreme Court granted CA3 rights to Guantánamo detainees, the Bush Administration started to send detainees to other sites, which were less protective of detainee rights).

231. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

232. Exec. Order No. 13,440, 72 Fed. Reg. 40707 (July 20, 2007).

233. 18 U.S.C. § 2441(d) (2006) (establishing violations of CA3 as violations of the War Crimes Act). As originally enacted, the War Crimes Act of 1996 prohibited activities like torture, kidnapping and other grave breaches of the Geneva and Hague Conventions—meaning that it prohibited these activities only in an international armed conflict—and, thus, prohibited neither of these activities in a non-international armed conflict. *Id.* § 2441. Therefore, the original War Crimes Act did not prohibit these activities in either conflicts like those with al-Qaeda mentioned in *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006), or other common CIA IHL violations, such as wearing civilian clothing during combat. *See* Parks, *supra* note 117, at 518 (noting that even the perfidious wearing of civilian clothing is not a grave breach). Regardless, even though the 2006 amendments to the War Crimes Act greatly expanded its reach—particularly with regard to the GWOT—the Act still does not reach jus ad bellum violations, activities outside of any armed conflict, or, as above, law of war violations that are not grave breaches. 18 U.S.C. § 2441(d) (2006); Military Commissions Act of 2006, Pub. L. No. 109-377, 129 Stat. 2600.

deliberately vague, seemed to shield the CIA from prosecution for CA3 violations by retroactively declaring that CIA detention and interrogation programs met CA3,[234] and by giving authority to the Director of Central Intelligence to determine CA3 standards.[235] By contrast, President Obama's Executive Order 13,491 has both ordered the CIA to close all remaining detention centers[236] and mandated that the CIA follow CA3 standards in all interrogations "in any armed conflict,"[237] presumably including the GWOT.[238] President Obama's Executive Order neither claims interpretive authority for itself, nor assigns interpretive authority to the intelligence bureaucracy. At the very least, such disclaiming of interpretive authority moves that authority elsewhere in the Executive Branch, for instance to the Department of Justice. The disclaimer also removes at least two obstacles in the way of courts interpreting CA3. First, if CIA officers or other interrogators had relied in good faith on executive interpretations of CA3, that would have raised at least an equitable argument against their subsequent prosecution for violating CA3 standards.[239] Second, the disclaimer would have preemptively eschewed the Executive attempting to bar courts, under a version of the political question doctrine, from issuing conflicting interpretations of CA3.[240] Not only does the Obama Executive Order apply IHL standards to most CIA activities, it

234. Exec. Order No. 13,440, *supra* note 232, § 3(b).

235. *Id.* § 3(c).

236. Exec. Order. No. 13,491, *supra* note 231, § 4(a).

237. *Id.* § 3(a).

238. *See* Mike Allen, *CIA Chief Vows to Treat Congress Better*, POLITICO.COM, Feb. 25, 2009, http://www.politico.com/news/stories/0209/19342.html (reporting, inter alia, that CIA Director Leon Panetta has stated, in relationship to the fight against terrorists, that "there is no question this is a war").

239. *See* Peter Baker, David Johnston & Mark Mazzetti, *Abuse Issue Puts the C.I.A. and Justice Dept. at Odds*, N.Y. TIMES, Aug. 27, 2009, *available at* http://www.nytimes.com/2009/08/28/us/politics/28intel.html.

240. *See, e.g.*, Atlee v. Richardson, 411 U.S. 911 (1973), *aff'd in mem* Atlee v. Laird, 347 F. Supp. 689, 692, 701, 710 (E.D. Pa., 1972) (dismissing a challenge to U.S.'s actions in Vietnam on political question grounds). To the extent that 'how to interrogate' constitutes a question on how to fight a war, one can argue the Constitution assigns this duty to sole Executive discretion. *See also* Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 214 (2006) ("Academics may continue to debate whether the President or Congress should decide whether to begin war, but once war has begun, our constitutional system has usually been content to allow the President as Commander-in-Chief to decide the best strategies and tactics to defeat the enemy."). *But see* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693 (2008) ("[E]ven when hostilities are underway, the Commander in Chief often operates in a legal environment instinct with legislatively imposed limitations.").

also provides for judicial interpretation and supervision of those standards. Thus, IHL standards now apply to the great majority of intelligence interrogations, wherever conducted, including the most politically sensitive interrogations of accused terrorists.

A similar pattern of executive action applies to the emerging law of terrorist targeting—although, here, the Executive has so far been less responsive to cosmopolitan pressures. Thus far the controversy has been over the government's targeting of al-Qaeda members outside the war zones in Iraq and Afghanistan, particularly in Pakistan and South Arabia.[241] The government has not offered a clear legal justification for its actions. However, defenders of the targeting program, such as Kenneth Anderson[242] and Eric Posner,[243] have sought to legally ground the program primarily in the post-9/11 AUMF.[244] They have offered this rationale even though both international law and the U.S. Constitution arguably provide independent justification for the controversial targeting.

The targeting controversy began as early as 2002 with the targeting of al-Qaeda operatives in Yemen.[245] Yet, it reached a head only recently with related controversies over both targeting al-Qaeda mem-

241. *See* Robert Birsel, *U.S. Missile Kills 13 in Pakistan*, REUTERS, Apr 4, 2009, http://www.reuters.com/article/idUSISL40275420090404; Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, WASH. POST, Feb. 26, 2009, at A10; Golden & Schmitt, *supra* note 230; Mayer, *supra* note 229; Mark Mazzetti & David E. Sanger, *Obama Expands Missile Strikes Inside Pakistan*, N.Y TIMES, Feb. 21, 2009, at A1; Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, N.Y. TIMES, Apr. 16, 2009, at A10; David E. Sanger & Eric Schmitt, *U.S. Weighs Taliban Strike into Pakistan*, N.Y. Times, Mar. 18, 2009, at A1; Eric Schmitt & Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. TIMES, Apr. 6, 2009, at A15; Pir Zubair Shah, *Missile Strike Kills 4 in Pakistan*, N.Y Times, Mar. 17, 2009; Pir Zubair Shah & Alan Cowell, *Missile Strike Said to Kill 10 in Pakistan*, N.Y. Times, Apr. 1, 2009, at A10; Jay Solomon, Siobhan Gorman & Matthew Rosenberg, *U.S. Plans New Drone Attacks in Pakistan*, WALL ST. J., Mar. 26, 2009; Nahal Toosi, *Suspected U.S. Missile Kills 3 in Northwest Pakistan*, ASSOC'D PRESS, Apr. 8, 2009, http://abcnews.go.com/International/wireStory?id=7285265.

242. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 8–27 (Brookings Institution, Working Paper, 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0511_counterterrorism_anderson/0511_counterterrorism_anderson.pdf; *see also* Nathan A. Sales, *Targeted Killings: Slaying al-Qaeda Leaders Is Good Policy that Stands on Firm Legal Ground*, NAT'L REV. ONLINE, Aug. 20, 2009, http://article.nationalreview.com/?q=MGZhNWIzNjdjN2ZhNWE5YzBlMWQ3YjIwMDFhZThiMTU.

243. Eric Posner, *Does Obama Have Authority to Order Military Strikes in Yemen?*, THE VOLOKH CONSPIRACY (Dec. 30, 2009, 1:09 PM), http://volokh.com/2009/12/30/does-obama-have-authority-to-order-military-strikes-in-yemen.

244. AUMF, *supra* note 181.

245. *See, e.g.*, *CIA Yemen Operation: Many See 'Assassination without Jury, Judge,'* GLOBALSECURITY.ORG, Nov. 18, 2002, http://www.globalsecurity.org/intell/library/news/2002/intell-021118-wwwh21118.htm (collecting news stories on, and editorials criticizing, the CIA's 2002 targeting of al-Qaeda leaders in Yemen).

bers in Pakistan and elsewhere with Predator drones[246] and a never-culminated CIA plan to assassinate senior al-Qaeda leaders.[247] These controversies centered on allegations of executive lawlessness and overreach,[248] including charges that the program amounts to "political assassination," in violation of Executive Order 12,333[249] (although, given how narrowly "assassination" is defined in U.S. law, this seems unlikely[250]).

These allegations are commonly justified based on restrictive readings of both the AUMF and law of war and a disregard of the more expansive assertions of mainstream authority. The program's defenders have stated—or even conceded—that it derived authority to target al-Qaeda leaders from the AUMF.[251] While the AUMF provides such authority,[252] so do other sources. The Executive could have proceeded with an argument based on the Executive's traditional

246. Birsel, *supra* note 241; DeYoung & Warrick, *supra* note 241, at A10; Mazzetti & Sanger, *supra* note 241, at A1; Perlez, *supra* note 241, at A10; Sanger & Schmitt, *supra* note 241, at A1; Schmitt & Drew, *supra* note 241, at A15; Shah, *supra* note 241; Shah & Cowell, *supra* note 241, at A10; Solomon, Gorman & Rosenberg, *supra* note 241, at A1; Toosi, *supra* note 241.

247. *See, e.g.*, Paul Kane & Joby Warrick, *House Panel to Investigate Canceled CIA Program*, WASH. POST, July 18, 2009, at A3.

248. *See, e.g.*, John Cole, *From the Shit You Already Knew Department*, BALLOON JUICE (Jul. 11, 2009), http://www.balloon-juice.com/?p=23936 (characterizing the actions of the Bush Administration, in targeting al-Qaeda leaders without informing Congress, to be part of a pattern of rampant criminality); Jonathan Turley, *Report: Cheney Ordered Concealment of Secret Program from Congress*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (Jul. 12, 2009), http://jonathanturley.org/2009/07/12/report-cheney-ordered-concealment-of-secret-program-from-congress) ("Once again, it is astonishing that Attorney General Eric Holder continues to refuse to appoint a special prosecutor to deal with the mounting allegations of criminal acts by the Bush Administration. The blocking of such investigations by the Obama Administration reaffirms the view that our intelligence services live beyond the reach of the law and that our leaders are unaccountable under the criminal laws that they apply to average citizens.").

249. Exec. Order No. 12,333, *supra* note 49, § 2.11.

250. Anderson, *supra* note 242, at 24–25 (noting a multitude of official and unofficial interpretations from both the President and Congress favoring a very narrow definition of "investment," centered around the murder of foreign political leaders, in a manner that would violate United States law). President Reagan, for example, felt sufficiently unconstrained by the ban to lob cruise missiles at President Qadaffi of Libya. *See* Seymour Hersh, *Target Qadafi*, N.Y. TIMES, Feb. 22, 1987, § 6 (Magazine). *But see* Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 331 (2003) (arguing that targeted killing is both illegal and bad policy); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 129, 132–33 (2007) (arguing that targeted killing outside an armed conflict is illegal assassination, i.e. murder).

251. *See, e.g.*, Anderson, *supra* note 242; Posner, *supra* note 243; *see also* AUMF, *supra* note 181.

252. AUMF, *supra* 181, § 2(a), *reprinted* at 50 U.S.C. § 1541 (2006) (authorizing the President to "use all necessary and appropriate force against those nations, organizations,

practices and prerogatives. In particular, the National Security Act of 1947 gives the CIA the authority to conduct covert military operations.[253] Historically, such operations were understood to fall outside traditional notions of armed conflict and beyond the reach of the law of war.[254] And, just as importantly, Congress has repeatedly acquiesced in the CIA's engaging in such activities.[255] Thus, such activities—outside the law of war, but well within historical tradition—would fall into *Youngstown* category one or two,[256] as well as receive support from other authoritative precedent, such as *Dames & Moore v. Regan*.[257]

In other words, in conducting overseas targeting of al-Qaeda leaders, the President arguably enjoys statutory support, historical support, and precedential support. Yet both President Bush and President Obama have sought support elsewhere: in more recent, and narrow, congressional authorization and the law of war.[258] Relying on these sources promises to, in the future, severely restrict executive action based upon a perceived need for congressional authorization (though Anderson has argued with some force that the President needs to clarify the legal regime that governs targeted killing, even if

or persons he determines planned, authorized, committed, or aided the terrorist attacks [of September 11]").

253. 50 U.S.C. § 403-3(d)(5) (2006) (authorizing the CIA to undertake "additional services of common concern" and "such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct"); Anderson, *supra* note 242, at 21 (relying on the work of Philip Trimble and stating that, "[d]uring the 1960s, for example, these included assistance to overthrow governments in Iran and Guatemala; assistance in attempts to 'assassinate leaders in Cuba, Chile, and Zaire;' support for 'civil wars in Iraq and Laos;' and an 'invasion of Cuba'").

254. *See supra* Parts II.A., II.C.

255. Cole, *supra* note 248; TURLEY, *supra* note 248.

256. Youngstown Tube & Sheet Co. v. Sawyer, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring).

257. 453 U.S. 654 (1981) (reasoning that because Congress had acquiesced repeatedly to a certain sort of executive action, the executive gained authority to undertake that action without congressional approval).

258. *See, e.g.*, AUMF, *supra* note 181, § 2(a); United States v. List, *reprinted in* TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. XI., at 1244–45 (1953), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf ("The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility."); Geneva Convention IV Protection of Civilian Persons, *supra* note 91, art. 66 (An occupying power may, with limitations, promulgate new penal laws in occupied territory, and try residents of that territory in military courts, "on [the] condition that the said courts sit in the occupied country.").

that regime might be fairly restrictive[259]). Putting aside any debates over legal strategy, such reliance on the AUMF shows an attitude toward the law and its subjects that is different from the attitude prior Presidents had evinced.

The CIA, and its predecessor OSS, has played a significant role in every conflict since World War II, including paramilitary operations. Yet, international law did not apply to it in any significant way, and, more importantly, the CIA never understood itself as being bound by international law.[260] Thus, it conducted illegal operations in Laos and Cambodia; developed interrogation guidelines without regard to either IHL, human rights law, or even the *jus cogens* prohibition on torture; and spoke of its activities quite openly.[261] Moreover, while the CIA has, since the 1970s, worked under significant restrictions,[262] these restrictions have until recently applied only within the traditional demos: to citizens and foreign nationals on American soil, and to American citizens abroad.[263]

The courts have extended the right to challenge detention to Guantánamo,[264] and now potentially to Bagram.[265] Moreover, President Obama has ensured that CA3 protects all GWOT detainees, no matter where held.[266] Both of these changes were aimed directly at CIA activity and the proponents of that activity in the Bush Administration.[267] The demos has been extended to cover foreign persons who, though abroad, are affected adversely by U.S. actions. And, a combination of binding court decisions and highly public, and so po-

259. Anderson, *supra* note 242, at 37 ("Many in the world of ideas and policy have already concluded that targeted killing as a category, even if proffered as self-defense, is unacceptable and indeed all but *per se* illegal. If the United States wishes to preserve its traditional powers and practices in this area, it had better assert them. Else it will find that as a practical matter they have dissipated through desuetude.").

260. *See supra* Part II.C.

261. *Id.*

262. *See supra* Part II.A.

263. *Id.*

264. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).

265. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209, 223 (D.D.C. 2009).

266. *See* Exec. Order No. 13,491, *supra* note 231.

267. *See* Memorandum from Alberto J. Mora, Gen. Counsel of the Dep't of the Navy, on Statement for the Record: Office of General Counsel Involvement in Interrogation Issues to Inspector Gen., Dep't of the Navy, July 7, 2004, *available at* http://www.newyorker.com/images/pdfs/moramemo.pdf (General Counsel of the Navy expressing extreme skepticism over the legality of aggressive GWOT techniques).

litically binding, executive orders has constrained executive action, while expanding the power of the judiciary.

D. A Counterpoint to Cosmopolitanism: The Jurisprudence of the D.C. Circuit

Not every U.S. court, most notably the Court of Appeals for the District of Columbia Circuit, which is charged with reviewing all Guantánamo habeas decisions, has followed a cosmopolitan agenda.[268] Rather, the underlying framework of its decisions would seem to be much closer to that of traditional intelligence law, with presumptions of, on the one hand, broad executive discretion, and, on the other, a limited demos (and, concomitantly, role for courts and the use of international law).[269] Both the D.C. Circuit's recent decision in *Al-Bihani v. United States* ("*Al-Bihani*")[270] and other GWOT decisions reflect this framework. Right or wrong, the U.S. Supreme Court has tended to disagree with the D.C. Circuit in this area and has reversed in three important cases: *Rasul*[271] (then *Al Odah v. United States*[272]), *Hamdan*,[273] and *Boumediene*.[274]

Among these cases, it is *Al-Bihani* that most clearly reflects the D.C. Circuit's assumptions regarding executive power and international law, while *Boumediene* speaks more clearly to the detainees' place (or lack thereof) in the demos. As to the D.C. Circuit's jurisprudence on executive power and international law, *Al-Bihani* reasons IHL does not limit the President's authority under the AUMF.[275] This removes both the substantive limit on executive power in the GWOT and the primary means by which the Guantánamo detainees had challenged their detention. Indeed, the Court construed executive authority beyond even what the Obama Administration had asked for.[276]

268. Rasal v. Bush, 542 U.S. 466, 484 (2004) (conferring jurisdiction over all habeas corpus petitions from Guantánamo Bay on the District Court for the District of Columbia).

269. *See supra* Part II.

270. 590 F.3d 866 (D.C. Cir. 2010).

271. *Rasul*, 542 U.S. 466.

272. 321 F.3d 1134 (D.C. Cir. 2003) (holding, inter alia, that plaintiffs, including Rasul and Al-Odah, did not enjoy statutory habeas rights), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004).

273. 415 F.3d 33 (D.C. Cir. 2005) (holding Hamdan's detention violated neither the Detainee Treatment Act, CA3, nor any other relevant provision), *rev'd* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

274. 476 F.3d 981 (2007) (holding, inter alia, that Boumediene did not enjoy constitutional habeas rights), *rev'd* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

275. *Al-Bihani*, 590 F.3d at 871–72.

276. *Id.* at 885 (Williams, J., concurring in part, concurring in judgment) ("Curiously, the majority's dictum goes well beyond what even the *government* has argued in this case.").

This almost certainly reflects an underlying assumption of vast executive power in national security matters.

In *Al-Bihani*, however, the D.C. Circuit spends very little time analyzing or defending this position, and instead announces its conclusion and dismisses IHL as something U.S. courts cannot implement[277] since IHL is likely too vague for reliable application.[278] This position has drawn withering criticism[279] and, though the D.C. Circuit's opinion is too conclusory to be convincing, it is not necessarily wrong if one starts from domestic law sources and traditional national security law premises. First, neither other Circuits[280] nor the U.S. Supreme Court[281] have treated the Geneva Conventions as self-executing. Second, neither *Hamdi* nor other potentially relevant U.S. Supreme Court GWOT cases like *Hamdan* mandate that the President follow IHL in detentions across the board. *Hamdi* merely uses IHL to construe the AUMF, and not necessarily to limit executive action;[282] while in *Hamdan*, the Court, when presented with a chance to apply the Geneva Conventions directly, did not do so and instead relied on statutory incorporation through the Uniform Code of Military Justice.[283]

277. *Id.* at 871 ("The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.").

278. *Id.* (referring to "vague treaty provisions and amorphous customary principles").

279. *See, e.g.*, Deborah Pearlstein, *D.C. Circuit Speaks on Gitmo Habeas Merits*, OPINIO JURIS (Jan. 5, 2010, 1:56 PM EDT), http://opiniojuris.org/2010/01/05/dc-circuit-speaks-on-gitmo-habeas-merits.

280. To the extent there has been a circuit split in this area, it has been over how to interpret *Hamdi*. The Fourth Circuit, in particular, has tended to interpret *Hamdi* as limiting presidential discretion via IHL, though it still relies on the AUMF to implant IHL into law citable in court. *See* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). *But see In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–80 (D.D.C. 2005); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *overruled by* 548 U.S. 557 (2006); United States v. Lindh, 212 F. Supp. 2d 541, 553–54 (E.D. Va. 2002) (treating provisions of the Geneva Conventions as self-executing).

281. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

282. Hamdi v. Rumsfeld, 542 U.S. 507, 517–24 (2004) (observing the law of war is helpful in determining the President's authority under the AUMF); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2088–2100 (2005) (interpreting *Hamdi* and the AUMF to mean that the President's powers are informed, but not limited, by IHL); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 305–23 (2005) (criticizing *Hamdi* for employing international norms in an unclear manner, and suggesting that courts in the future should interpret international norms as a limit on Presidential action).

283. *Hamdan*, 548 U.S. at 619–25 (treating the Uniform Code of Military Justice ("UCMJ") as incorporating CA3 requirements and, indeed, using the UCMJ requirements to define CA3 requirements).

More broadly, however, the D.C. Circuit's reasoning almost certainly rests on the proposition that *Hamdi* and the AUMF leave to the President some authority to violate IHL. Although inimical to most international law scholars, this position is not really remarkable. As this Article has demonstrated, the Executive, via the CIA, has regularly violated IHL when the national interest demanded.[284] Indeed, most paramilitary operations are covered by, but violate, IHL[285]—yet they enjoy not only historical but statutory support.[286] They have also been central to the war against al-Qaeda since its inception.[287]

The extremely broad grant of authority in the AUMF certainly covers such operations. It also does not mention IHL in any capacity, for at least one very plausible reason. Since 2001, there has been tremendous judicial and scholarly work on clarifying how IHL applies to al-Qaeda. But this work did not generally exist at the time of the AUMF. Thus, if Congress intended the AUMF to be limited by IHL, that would mean it intended the response to 9/11 to be limited in a way that was, at the time, completely unpredictable and potentially quite restrictive. This is just not plausible.

This is not to say that *Al-Bihani* is necessarily correct. As this Article has demonstrated, recent U.S. Supreme Court decisions, while not disallowing the *Al-Bihani* result, start from a very different set of premises regarding executive power.[288] However, if one presumes the President enjoys vast authority in this area, including the authority to violate international law;[289] and that the Geneva Conventions have not been incorporated domestically in a relevant way; the *Al-Bihani* result flows naturally from the broad language of the AUMF.

These Court decisions also start from a different conception of the demos. Per John Hart Ely, courts often function to bring into the

284. *See supra* Part II.C.

285. *See supra* Parts II.B–C.

286. *See, e.g.*, Paul Kane & Joby Warrick, *House Panel to Investigate Canceled CIA Program*, WASH. POST, July 18, 2009, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/17/AR2009071703232.html?wprss=rss_politics.

287. Boumediene v. Bush, 128 S. Ct. 2229, 2276 (2008) (consolidating Guantánamo habeas cases to the District Court of the District of Columbia, and the Circuit Court of Appeals for the District of Columbia); *see also* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005); Scott Shane, *The Question of Liability Stirs Concern at the CIA*, N.Y. TIMES, Sept. 16, 2006, at A12 *available at* http://www.nytimes.com/2006/09/16/washington/16legal.html.

288. *See supra* Part III.A.

289. *See* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1363–68 (2006) (arguing that the *Charming Betsy* canon of construction reserves for the President authority to violate international law).

demos groups whom the democratic process leaves outside. They expand the definition of who "counts" in the political community by expanding the law's reach.[290] Scholars have made both an observation-based and normative case for recognizing an expanding demos—one that less focused on traditional definitions of the national community.[291]

In its opinions, however, the D.C. Circuit has limited the law's reach to a more traditional conception of the demos. Perhaps the clearest example of this is the Circuit's decision in *Boumediene*.[292] As with the later, contradictory U.S. Supreme Court opinion,[293] the primary question presented was whether constitutional habeas rights extended to Guantánamo. Whereas the U.S. Supreme Court used the occasion to expand the reach of the demos, the D.C. Circuit did not. The D.C. Circuit court simply stated that constitutional habeas is limited to the extent of the writ in 1789,[294] performed a straightforward historical analysis, and concluded that because no cases of that era extended habeas in a situation like the Guantánamo detainees, habeas does not reach them now.[295] In other words, the D.C. Circuit implicitly embraced the demos—the political community within the law's protection—as it existed in 1789. What is more, the D.C. Circuit could have reasoned that, because no Constitution-era precedent addressed a situation quite like Guantánamo, the field was open to apply not a nonexistent controlling precedent, but the principles underlying habeas. This is essentially what Justice Kennedy's majority opinion did in *Boumediene*.[296] The D.C. Circuit did not and, therefore, upheld a traditional idea of the demos—that the Supreme Court then reversed.

In a string of cases, the D.C. Circuit has limited the reach of habeas or of international law[297]—of the demos and of the role of

290. ELY, *supra* note 19, at 101–02.

291. DAHL, *supra* note 14, at 121, 318–22.

292. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *overruled by* 128 S. Ct. 2229 (2008).

293. *Boumediene*, 128 S. Ct. 2229 (2008).

294. *Boumediene*, 476 F.3d at 987.

295. *Id.* at 990–91. This is also the approach Justice Scalia took in his dissent in the Supreme Court opinion. *Boumediene*, 128 S. Ct. at 2293 (Scalia, J., dissenting).

296. *Boumediene*, 128 S. Ct. at 2262 ("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel.").

297. *See, e.g.*, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *overruled by* 548 U.S. 557 (2006) (rejecting calls to apply the Geneva Conventions (including CA3) to Guantánamo reasoning, similar to the court in *Boumedience*, because the Conventions might, but do not necessarily apply to an organization like al-Qaeda, courts should defer to

courts. The U.S. Supreme Court has consistently reversed these decisions, while reasoning from a cosmopolitan basis. Given the D.C. Circuit's poor record on appeal, and that it continues to reason in a very different way from the nation's highest court, one can reasonably predict that, if the U.S. Supreme Court grants cert in *Al-Bihani*, it will reverse. Of course, this is uncertain on multiple levels, and the D.C. Circuit could have the last word. But if *Al-Bihani* remains standing, it will represent a truly striking instance of anti-cosmopolitanism in GWOT jurisprudence.

IV. Making Intelligence Comply with the Law of War

The likely future of intelligence law lies in legal cosmopolitanism. The recent GWOT U.S. Supreme Court cases and legislative and executive action have done much to import IHL into intelligence operations, particularly in the core intelligence activities of detention and interrogation. Based on the experience of other executive agencies and, in particular, the U.S. military, executive oversight will likely lead to a great deal of IHL compliance by the CIA.

A. Bureaucratic Change and Bureaucratic Momentum at the CIA

If the CIA is required to partially comply with parts of IHL, history suggests it will voluntarily comply with more than would seem to be required—even though the CIA would likely understand itself to be complying under duress.

Most basically, if law and regulation require the CIA to comply with even a partial list of law of war guidelines, the CIA, like other bureaucratic organizations, will embrace some prophylactic measures. These measures will then empower and incentivize certain people in the CIA to push compliance further than the original laws or regulations probably intended—or more benignly: the CIA will start to comply because it is forced to, and then further comply because it has internalized the values of IHL.

Both IHL and domestic legal actors will empower and incentivize certain people in the CIA to enforce compliance. Indeed, the Army Field Manual explicitly requires commanders to monitor and enforce IHL[298] and to ensure knowledge of the Geneva Conventions among

the Executive in deciding whether the Conventions do apply); *see also Boumediene*, 128 S. Ct. 2229.

298. *See, e.g.*, Department of the Army, *FM 2-22-3: Human Intelligence Collector Operations*, Sept. 6 2006, at 5-18, http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf (last visited Mar. 23, 2010) (This Field Manual states, "[a]ll persons who have knowl-

all force members.[299] *Mutatis mutandis*, CIA personnel must also undertake these same duties. President Obama's recent Executive Order on interrogations makes this point explicitly. It states the CIA needs to either submit to the same monitoring as Department of Defense components or, if that is not appropriate, create equivalent monitoring.[300]

Given this imperative, the armed forces' experience with IHL compliance provides some indication of what the CIA will need to implement. Historically, the United States has under-prosecuted law of war violations.[301] More often, where U.S. personnel have seriously violated IHL, military and civilian prosecutors have been reluctant to pursue the prosecution of these cases.[302] Despite these relatively infrequent prosecutions, the United States has developed perhaps the world's most thorough and effective law of war compliance program.[303] This can be seen as part of the gradual "lawyering up" of the military, i.e., the number of uniformed lawyers has steadily increased from a few dozen to several thousand.[304] This has both led and contributed to a great deal of caution in U.S. military operations, to the extent of uniformed lawyers sometimes playing a dominant role in target selection and mission planning.[305] Many scholars, especially those who have been uniformed lawyers, laud not only the role in military operations that individual lawyers have played, but also the broader idea of a way of war-fighting that lawyers have largely

edge of suspected or alleged violations of the Geneva Conventions are obligated by regulation to report such matters through command channels or to designated individuals, such as the SJA [Staff Judge Advocate] or IG [Inspector General].")

299. *Id.* app. at E § E-1.

300. Exec. Order No. 13,491, *supra* note 231, § 3(b).

301. *See generally* Maj. Jeffrey F. Addicott & Maj. William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 160–61 (1993) (describing how Lt. Calley and others largely responsible for the My Lai massacre received extremely light punishment, and recommending improved IHL training and increased prosecution of law of war violations by U.S. service members).

302. *See, e.g.*, *id.* at 160–61.

303. Dep't of Defense Directive 2311.01E, *Law of War Program*, May 6, 2006, http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf [hereinafter DoD Directive 2311.01E].

304. Glenn Sulmasey & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1835–47 (2007).

305. Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 483 (2004) ("Military lawyers are embedded into the targeting process to ensure every target may be legitimately attacked under the law of armed conflict, while each military target is carefully identified and vetted for the risk of collateral damage. . . . The respect demonstrated by U.S. forces for the law of war even goes so far as to constitute a disadvantage when fighting rogue states who violate these same laws to protect their combat forces.").

shaped.[306] But even if one takes the role of lawyers in wartime to be an unalloyed good, it is very difficult to dispute the role of military lawyers and the thoroughness of law of war compliance that has gone beyond what elected branches contemplated. A similar phenomenon should play out in the CIA if it is brought under IHL.

As the number of lawyers and incentives for lawyerly behavior increase, external controls on an agency or other component weaken. The military has chafed under civilian control, including the legal advice of civilian lawyers,[307] and, as a result, military lawyers have advocated for more law of war compliance than the civilian authorities.[308] Though the CIA will inevitably lawyer-up as it is required to be more IHL compliant, the effectiveness of external control will decrease. The CIA can be expected to comply with more parts of the law of war than might be directly required by statute or regulation as relatively slight or ineffective regulation has led to an unexpected amount of compliance in the military and other regulated entities.[309]

Finally, the fear of prosecution among CIA agents[310] is real and has already had effects.[311] As regulation increases, so will the fear, and so will efforts to avoid litigation at any cost—notably, by complying even more than the political branches intended, supplemented by an increasingly independent-minded and conservative legal culture. The decision of Attorney General Eric Holder to investigate the methods of CIA interrogators, in a dramatic reversal of the Bush Administration recommendations,[312] will inevitably increase these fears, and hence their effect.

Thus, the CIA can be expected to substantially comply with the law of war beyond what the Executive would force. This process is also the most likely source for regulating paramilitary CIA operations, al-

306. *See* Michael A. Newton, *Modern Military Necessity: The Role and Relevance of Military Lawyers*, 12 Roger Williams U. L. Rev. 877 (2007).

307. Sulmasy & Yoo, *supra* note 304, 1835–47 (The Article argues, in part, that a rise in the number of uniformed lawyers has led to increasing autonomy of the military from civilian leadership. Military leadership often has different policy preferences from civilian leadership and the rise in the number of uniformed lawyers has contributed to the military leadership's increasing ability to articulate, argue for, and even implement, these policy preferences.).

308. *Id.*

309. *See generally* Vandenbergh, *supra* note 287, at 2053, 2077 (detailing "overcompliance" with the law stemming from private law enforcement and monitoring mechanisms that follow the implementation of major public law initiatives).

310. Shane, *supra* note 287.

311. *Id.*

312. *See, e.g.*, David Johnston, *Justice Report Advises Pursuit of Abuse Cases*, N.Y. Times, Aug. 24, 2009, at A1.

though the effect of this process would not be limited to such regulations.

B. Finding Legal Standards for Foreign Intelligence: Growing into the Law of War

A combination of U.S. Supreme Court and executive action has put intelligence interrogation under the law of war.[313] Moreover, the CIA, largely of its own accord, is likely to thoroughly implement, and even expand, IHL standards applied to it. It is worth asking, then, what form this implementation and expansion will take. Generally, the CIA can be expected to abide by IHL when it would be inconsistent or absurd not to, given other IHL commitments. And it will probably not abide by IHL—even if pressed to abide by some legal standard—when other, non-IHL laws apply more naturally. In particular, there is a good chance the CIA will subject its paramilitary and abduction/arrest operations to IHL, while not subjecting monitoring and pure intelligence-gathering to the same standards, since these already operate under extensive domestic regulation and likely do not violate international law.

Conclusion

Increasing legal regulation of intelligence activities has moved the law toward an expanded demos protected by law—not executive policy. In particular, these developments protect non-U.S. nationals who are held outside of U.S. territory[314] and do so in at least two important ways: first, by putting U.S. intelligence activities under the law of war; and, second, by expanding the jurisdiction of U.S. courts.[315] Such developments represent a fundamentally new way of structuring intelligence law.[316]

Until the past few years, no substantial international law of intelligence existed,[317] while humanitarian law has treated intelligence op-

313. *See supra* Part III.

314. Colangelo, *supra* note 129, at 625.

315. *See supra* Part III.

316. *See supra* Part II (outlining the traditional way intelligence law has been structured); *see also supra* Part III (discussing the emerging structure of intelligence law).

317. The CIA developed during the end of a legal regime that had existed for hundreds of years. By common consent, the modern law of war began with the Civil War's Lieber Code. *See generally* Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 695 (2009) ("The first real effort to codify these constraints did not occur until the mid-nineteenth century during the American Civil War. In 1863, a German-American jurist and political philosopher, Dr.

erations either with outright hostility or with universally ineffective attempts at regulation such as the Nicaragua case.[318] Such international regulations had no measurable impact on intelligence activity and seem to have not penetrated intelligence agencies' collective consciousness.[319] Thus, intelligence has operated in what some have recently derided as a "law-free zone"[320]—due, implicitly, to either a gross oversight on the part of lawmakers or a nefarious purpose on the part of government leaders.

The U.S. government has undertaken secret, often illegal, intelligence operations since the Revolutionary War.[321] Presidents of all political parties, and in all eras, have ordered intelligence operations either outside the law or in violation of the law.[322] In the past, these operations were justified, in almost romantic terms, by the "higher purpose" of national survival. Such a sentiment seems archaic today, but should not be easily dismissed. Even if the United States today faces no existential threat on the order of the Soviet Union or Nazi Germany, it has assigned its intelligence agencies a large part of the doubtless important task of counter-terrorism, including enemy infiltration, information gathering, and occasional paramilitary attacks, such as those that have recently taken place in Pakistan[323] and those that have been taking place in Afghanistan since 2001.[324] Some of

Francis Lieber, prepared on behalf of President Abraham Lincoln a code governing the conduct of Union forces. The Lieber Code established the basis for later international conventions on the laws of war at Brussels in 1874 and at The Hague in 1899 and 1907." (footnote omitted)). Since that time, IHL has undergone almost continuous development, most recently in areas such as the 1977 Protocols Additional to the Geneva Conventions and the application of IHL standards to precision aerial bombing. *See id.* Until the past few years, these changes had little, if any, impact on intelligence operations, including the paramilitary operations to which they should have applied. *Id.*

318. *See supra* Part II.B.

319. *See supra* Part II.C.

320. *See, e.g.*, Press Release, Center for Constitutional Rights, CCR President Michael Ratner Talks About Prosecution of Bush Officials on Democracy Now! (undated) ("How did we get to a point where the United States government tried to make Guantanamo Bay a law-free zone, in order to deny accountability for our actions?").

321. ALLEN W. DULLES, THE CRAFT OF INTELLIGENCE: AMERICA'S LEGENDARY SPY MASTER ON THE FUNDAMENTALS OF INTELLIGENCE GATHERING FOR A FREE WORLD 29–37 (Lyons Press 2006).

322. *See id.*

323. *See* Birsel, *supra* note 241; DeYoung & Warrick, *supra* note 241, at A10; Mazzetti & Sanger, *supra* note 241, at A1; Perlez, *supra* note 241, at A10; Sanger & Schmitt, *supra* note 241, at A1; Schmitt & Drew, *supra* note 241, at A15; Shah, *supra* note 241; Shah & Cowell, *supra* note 241, at A10; Solomon, Gorman & Rosenberg, *supra* note 241; Toosi, *supra* note 241.

324. *See* Greg Miller, *CIA Expanding Presence in Afghanistan*, L.A. TIMES, Sept. 20, 2009, http://www.latimes.com/news/nationworld/world/la-fg-afghan-intel20-2009sep20,0,606

these operations plausibly violate international law. What is more, no intelligence agency has conducted itself under law of war regulations. As former Vice President Gore aptly observed, governments have traditionally assigned to intelligence agencies those tasks that, however necessary, are also illegal. In fact, that is a large part of the reason why one undertakes secret operations in the first place.[325]

This legal regime (or lack thereof), and the attitudes that supported it, now seem to be passing. U.S. intelligence agencies have worked under significant regulation, designed to limit their domestic power and activities, for decades. Now, for the first time, intelligence agencies are operating under either the law of war,[326] or human rights law,[327] or both. This process has wrought massive legal changes and, by its own momentum, will result in more. These changes expand the U.S. government's conception of the demos and replace political restrictions with legal restrictions i.e., give rise to a concrete legal cosmopolitanism.[328] The question now becomes: Can the CIA still do its job under these new restrictions? As the GWOT drags on, we will come to know the answer, for good or ill.

1626,full.story (describing how the activities of U.S. intelligence agencies, and the CIA in particular, spiked first in 2001 with around 150 Agency operatives in Afghanistan, 300 in 2005, and recently up to 700 operatives in the country).

325. CLARKE, *supra* note 1, at 144.

326. *See supra* Part III.B.

327. *See supra* Part I.B.1.

328. *See supra* Part I.A.