



Calhoun: The NPS Institutional Archive

Faculty and Researcher Publications

Faculty and Researcher Publications Collection

2013-02

Roundtable Discussion Transcript: the Legal and Ethical Limits of Technological Warfare Symposium

Guiora, Amos

University of Utah

Roundtable Discussion Transcript: The Legal and Ethical Limits of Technological Warfare Symposium, February 1, 2013, University of Utah, S.J. Quinney College of Law, Utah Law



Calhoun is a project of the Dudley Knox Library at NPS, furthering the precepts and goals of open government and government transparency. All information contained herein has been approved for release by the NPS Public Affairs Officer.

Dudley Knox Library / Naval Postgraduate School
411 Dyer Road / 1 University Circle
Monterey, California USA 93943

<http://www.nps.edu/library>

ROUNDTABLE DISCUSSION TRANSCRIPT: *THE LEGAL AND ETHICAL LIMITS OF TECHNOLOGICAL WARFARE* SYMPOSIUM, FEBRUARY 1, 2013, UNIVERSITY OF UTAH, S.J. QUINNEY COLLEGE OF LAW

ROUNDTABLE MODERATOR:

AMOS GUIORA, Professor of Law; Co-Director of the Center for Global Justice, University of Utah S.J. Quinney College of Law.

ROUNDTABLE PARTICIPANTS:

HARRY SOYSTER, United States Army Lieutenant General (Ret.); former Director, Defense Intelligence Agency;
DAVID IRVINE, United States Army Brigadier General (Ret.); former Deputy Commander for the 96th Regional Readiness Command;
GEOFFREY S. CORN, Professor of Law; Presidential Research Professor, South Texas College of Law;
JAMES CARAFANO, Vice President, Foreign and Defense Policy Studies; E.W. Richardson Fellow; and Director of the Kathryn and Shelby Cullom Davis Institute for International Studies, The Heritage Foundation;
CLAIRE FINKELSTEIN, Algernon Biddle Professor of Law and Professor of Philosophy; Director of the Center for Ethics and the Rule of Law, University of Pennsylvania;
LAURIE BLANK, Director of the International Humanitarian Law Clinic, Emory University School of Law;
MONICA HAKIMI, Professor of Law; Associate Dean for Academic Programming, University of Michigan Law School;
GEORGE R. LUCAS, Professor of Ethics and Public Policy, Naval Postgraduate School;
TREVOR MORRISON, Liviu Librescu Professor of Law, Columbia Law School; and FRÉDÉRIC MÉGRET, Associate Professor of Law; Associate Dean of Research (Law); Canada Research Chair in the Law of Human Rights and Legal Pluralism, McGill University.

PROFESSOR AMOS GUIORA: Over the course of the past few hours we have obviously addressed the legal and ethical dilemmas relevant to technological warfare with drones, and it has raised a number of extraordinarily complicated questions. Amongst them, what are the limits of the laws of self-defense, what is morality in this changing paradigm, how do we define legitimate targets, how do we balance what is sovereignty, how relevant is international law moving forward, what are the rules of engagement, and what is imminence?

I teach a course called Global Perspectives on Counter Terrorism, and I have found that perhaps the most effective way to teach it is by scenario-based simulation exercises. And so to that extent, General, you're the student, I begin with you.

If there is a high value target, how are you going to define high value target? Who is responsible for organizing and directing terrorist activities, whatever that means? We know that he's traveling in a car, but with others. What degree of intelligence certainty would you recommend to the executive, the chief executive, to the President? What degree of intelligence certainty would you recommend or suggest before authorizing a drone? Note to all of the others, after I finish with the General, I will come to you all.

LIEUTENANT GENERAL (RET.) HARRY SOYSTER: The high value target to make that... I assume we're after an individual who is in a car and so forth.

GUIORA: But he is not alone in the car.

SOYSTER: Right, right. We have got to depend on a lot of previous work to understand who he is, what he has done, what it looks like he can do, and he's risen apparently with this new term of being, we're considering as to whether he's drone-worthy and whether we should take him out. The value will depend I think on what we see he has done and what we think he may be involved in, particularly for future operations, to take him out.

Who is responsible? I'm assuming that this is in a military context where the military is in control and the guy who is responsible should be the military commander in that region. Now he's going to delegate that to some level to this final guy who has to pull the trigger, and that guy has got to have all the instant intelligence that the drone is picking up as well as all the background to put that in the right context of what that means. And we may have a lot of intelligence about the individual; we may know, actually, perhaps the license number of that particular vehicle. We'll know a lot about it, hopefully, in making this decision. One of the terrible things will be: others in the car, that could be a wife and child, and then the decision gets very, very difficult. Is it worth killing the wife and child and perhaps knowing what this guy is going to do, and save the lives of a hundred people that he's about to blow up. A very, very tough decision, but all that will be considered. The intel to make it really the final bit will be the last thing. We've confirmed in advance he is a high-value target, it will be the final look by the collection capability of the drone that we've sent after him. That will be the final judgment somebody has to make. Is this the right guy, etcetera, with the final eyes on the target. To use that expression.

GUIORA: Trevor, you served in the White House for a year; based on your obviously rich experience, and based on your thoughtful comments this morning, what degree of involvement, of his involvement, would justify authorizing the drone?

PROFESSOR TREVOR MORRISON: I will answer that question, but I want to suggest that it's not anywhere near the first question.... I suppose I should first say that it's true that it was a rich and interesting time for me when I was in the White

House, but it's also true that I did not have anything to do with decisions like this when I was there—that is, targeting decisions.

So I'm going to assume some things and you should tell me if I shouldn't assume them to be true. I'm going to assume that part of what we're talking about here when we talk about a high value target is a leader of a member of a terrorist organization that we consider ourselves to be engaged in an armed conflict with. So, in the current world right now...

GUIORA: The world as it is today.

MORRISON: Presumably we're looking at an al-Qaeda affiliate that on the prevailing theories within the government right now is basically covered by AUMF authority. I'm assuming also that this is happening in a country where we either have the consent of the host government to be conducting military operations, or we think we can make a tenable argument that the host government is unwilling or unable itself to deal with this threat.

GUIORA: A or B.

MORRISON: Either one, I am assuming that one of those is true.

GUIORA: Right.

MORRISON: It's sufficient for me if either of those is true because my view is that the so-called unwilling or unable standard is a legally permissible alternative to the consent of the host government. That's not a view that everyone has, but I think it's a defensible view. And I think it's fair to say that it is the current position of the United States government.

So if those things are true, then I think it could potentially be legally permissible to direct this lethal strike. In addition, although it would not necessarily be legally required, as a prudential matter there probably would and should be some kind of inquiry into something that one might call imminence. I say prudential because it's not clear to me that the AUMF theory of lawful authority here would require imminence. In contrast, a theory of lawful authority standing apart from the AUMF, which relied on the concept of self-defense, probably would require something like imminence. My point here, though, is that whether or not an imminence analysis is legally required, I think it would be prudent to engage in it. And the question is how to think about imminence in this context. One potentially defensible way to think about it might be something like last clear chance, which is not literally what imminence means in ordinary domestic law. What last clear chance would mean in this context is something like this: We have a very high level of confidence that this individual, at some point in the proximate future, is going to be involved in a severe and hostile act against the United States, and we don't believe we'll have any opportunity as good as this one right now to stop it.

If we have a high degree of confidence in that, then I think the remaining question is really about the required evidentiary threshold. How certain must we be that the proposed target is who we think he is, in order to be able to use lethal force? I tend to think that we would need at least something equivalent to what the criminal law would call probable cause, and I might be inclined to think that we would need to believe that it is more likely than not that we are correct in our beliefs about the person. But whatever the standard in theory, it's hard to say exactly how the analysis would proceed in practice. Presumably, the lawyers are going to ask the operators, "What do you think? Based on your intelligence gathering expertise, not your experience as a prosecutor putting together a case triable before a jury, is there sufficient basis to believe this?" If we're talking about using a drone, the operators and intelligence analysts will presumably make their best effort to gather all intelligence right up until the moment the attack is launched. I think then if you have something like a probable cause level of belief in the accuracy of the information, certainly if you think it's more likely than not to be true, then that's an adequate threshold.

GUIORA: So Geoff Corn, put on your operator's hat, not your lawyer's hat, your operator's hat.

PROFESSOR GEOFFREY S. CORN: First off, you started by saying a high value target, so I'm assuming already that we've established that once we identify this person, there's an imperative need to disable him, right? That's what high value target means.

GUIORA: Right.

CORN: The operator, the commander, or the commander-in-chief is going to want to know whether this is a lawful object of attack, and that requires two things: number one, is it who we think it is; and number two, will the collateral damage, that we don't think might happen or that we know for sure will happen, be excessive in relation to the value we'll get from attacking this individual?

You started your question by asking how sure you have to be. I actually wrote an article on that because I think it's a major gap in the law. We would all agree that the commander making the decision to launch the attack has to make a reasonable judgment that this is in fact the individual we think it is, but the law doesn't define how much information, or how much certainty the commander needs for that judgment to be reasonable. I actually believe that, in the context of counterterrorism operations, it might vary depending on the location of the target. The more attenuated the target becomes from what we might call a traditional battlefield, the more demand we might put on the commander in terms of his level of certainty. So for "probable cause" in this hypothetical, if he's in Afghanistan or something, it's a fair probability. I think that's reasonable. If he's in Yemen or Ghana, I think you might say that because you lack the proximity to a traditional battle space, we might want a higher standard of certainty because that's what the

commander is going to say. I'm going to say to the commander, "You have to be reasonably certain that this is a lawful target." And the commander's going to say, "What does that mean? How certain do I have to be?" And what am I going to say? "Reasonably?"

GUIORA: Well wait, Geoff, you're the operator here.

CORN: So from the operator's perspective, everything that I've heard is pretty frustrating, right? Here's what I know: I've got a time sensitive...

GUIORA: Trevor didn't help you?

CORN: Trevor did help, and I think he raised some good points that helped me. I've got a time sensitive opportunity to strike a high value target I know. This collateral damage is not inadvertent. I know my decision will result in the death of innocent human beings. And I'm asking if it's legal. In my opinion, with the hypothetical you started with: high value target in an armed conflict. That tells me he's in some position of significant command, control, intelligence, or logistics. He's got two or three family members in the car? Shoot.

GUIORA: Claire, as the philosopher—you and George are going to be our two philosophers—yes or no?

PROFESSOR CLAIRE FINKELSTEIN: You may finally get the debate going. For me it depends on several factors. It depends on why he's a high value target. A high value target is defined as somebody whom the enemy needs to complete a mission or an operation. But how do they need him? Is it because he is a peripheral link in the chain, or is he someone without whom the mission would be impossible? And what is the amount of time that would elapse between the moment at which what looks to be a last clear chance to get him and the moment at which he is going to be essential to that operation?

It would be helpful to compare this to the law of self-defense in the domestic context, because, if someone poses an imminent danger to your life and is standing next to bystanders whom you know you would likely kill in order to kill your assailant, it is normally permissible for you to defend yourself. As long as the danger is imminent, or in Model Penal Code terms, the use of force is "immediately necessary" to save your life, it is permissible for you to proceed. Moral philosophers often disagree with this conclusion, but it does reflect the state of the criminal law. But in the kind of case we are discussing, we usually don't have either imminence or even "immediate necessity." The time pressure stems from the fact that we think we may not have as good an opportunity to kill him, and to me that puts the collateral damage issue in a very different light. Moreover, in this case, when you consider that his wife and child are traveling with him...

GUIORA: So you guys assumed that his wife and child... all I said was that there was somebody in the car.

FINKELSTEIN: We filled in that detail.

GUIORA: Oh, we filled it in?

FINKELSTEIN: Let's imagine that case: his wife and child are travelling with him and you know them to be innocent. We could address another case where we don't know the status of the people travelling with him, and they in fact may be implicated. But if you know them to be innocent—unless he poses an imminent danger to human life—I do not think you can kill him.

GUIORA: George?

PROFESSOR GEORGE R. LUCAS: I don't know. I was thinking of it from an operator's perspective in a slightly different sense. I don't know how much you talked about the technology that the operator faces, the problem of HRI—the human robot interface—which in the case of a predator is very poor: latency, the delay time, signal and human response, the soda straw problem where the camera that you look through in the best arrangement possible is like looking at the world through a straw—you only see a portion of the battle space and you don't have complete situational awareness. So that adds to the complexity of this actually. And in those contexts, the one benefit you get is that, assuming that what you mean by time sensitive is that he's in the car today and if we don't get him sometime soon, we won't get him at all, but it doesn't mean you have to get him now as opposed to a minute or ten minutes from now, then I think we've got due process as identity beyond reasonable doubt.

I would add in terms of culpability that the person needs not only to be a high level member of an enemy organization, but would have to have been known to be involved in planning and putting into motion hostile acts against America, American citizens, citizens of allies, or innocent third parties. That is, he would have to be guilty in essence, or would be capable of being found guilty, of a capital offense. In those cases, the last thing you would want to do is all due diligence and due care with regard to the people in the car. I mean, you will have known from your previous surveillance that at nine o'clock, he's driving his kids to school, but at nine-thirty, he drops them off, he picks up three operatives, and they go for coffee, and they plan the day's terrorist activities or something. I mean, you will know something about who's in there or who might be in there, and you have to exercise some due diligence, if you can, within the framework of the time sensitive parameters to try and avoid killing the kids and not worrying too much about the other operatives because they are not high value, but they are not of no value.

JAMES CARAFANO: Now this is wrong. The high-value target thing is kind of a red herring. As an ethical decision, it's really kind of irrelevant. We make a

decision about using a Predator against a high-value target because it's a \$4 million system, and it's a little difficult to justify to the American people why are you using tax dollars and the entire CIA to kill al-Qaeda's cook? I mean, it's just not an efficient use of resources. Now, where proportionality is very helpful, and where the real ethical question is, is making this distinction against using public violence against a legitimate combatant and an innocent, and their proportionality is very, very helpful. So, proportionality says you cannot intentionally target noncombatants; okay, we get that. So if you wanted to kill whoever they were in the car, if they're not the terrorist, that would be a clear violation of the law. And then there is the question: we understand that you can harm innocents incidental to that attack, but you've got some bars that you've got to reach in terms of whether it's reasonable, have you done reasonable things to try to not hurt the innocents, are there other ways you might do this, and is there a level of military necessity that justifies that level of violence? So part of that does really depend on where you are. So if it's his cousin and his brother, and they are in east Waziristan—in an area where Predators fly and everybody looks at the Predators flying around—you're in an active theater where people are killing people, you don't have a big expectation that running around with a known al-Qaeda guy is safe. There's a certain assumed risk there, right? On the other hand, if it's a family from Wisconsin that got on a bus at the Autobahn and it just happens that the chief al-Qaeda guy is in the car, well they are not in a battle zone, they don't even know this guy, they have no expectation, so they're not considered warned innocents in the way that you would be if you are in an active combat zone. So, I think the issue is, if you go through the kind of normal, rational analysis of what do you do to reasonably protect innocents on the battlefield in pursuit of legitimate combatants, then you make a decision about whether it's appropriate to use force or not, but the fact that he's a high-value target or not, that's not really an ethical question, I don't think.

MORRISON: There's a risk that we might end up speaking past each other on something. And that's whether we are speaking about a legal constraint that we think would inform this, or a policy, ethical, or moral constraint.

GUIORA: I think the answer, Trevor, is all of them together.

MORRISON: Okay, but I think it would be helpful to make it clear what we're talking about. This question of imminence—some might think it's legally required. In my view, it could be legally required if the targeting decision were not in the context of an armed conflict, so you were contemplating some kind of national version of self-defense. In that case, you would be playing out the analogy that Claire set up because the question would be how much does it have to look like imminence in the way the criminal law treats it. At the same time I think Geoff was potentially right not to include a discussion of imminence in his legal analysis. I took his analysis to take place within the armed conflict paradigm. In that paradigm, if you have confidence that the target is an active member of the enemy

fighting force, imminence isn't a legal requirement. It might be prudentially relevant for one reason or another, but not legally. There are other constraints like discrimination and proportionality and so on, but not imminence itself. To put it another way, I think the dominant legal theory under which the United States undertook the Bin Laden operation was not self-defense, but armed conflict, and I don't think that anyone thinks it was a legally relevant consideration to ask about imminence there in that sense. The other versions of the operation that were apparently contemplated included just dropping a bomb. I am not aware of any legal analysis of that option within the United States government having been heavily influenced by considerations of imminence.

FINKELSTEIN: Trevor, I think that the problem with what you're saying is that the imminence requirement arises because of the potential for collateral damage in this case. So, you're right that if there are no bystanders in the car then imminence is not the issue—the issue is whether he's a high value target—but once you put bystanders in the mix, then the justification for killing him based on status becomes problematic unless you have an extension of an immediate self-defense or defense-of-others basis for killing him and overriding the fact that there is collateral damage.

MORRISON: I agree that the presence of others in the car complicates it, but I'm not sure that imminence is the right way to take account of those complications, as opposed to proportionality and discrimination in armed conflict.

PROFESSOR MONICA HAKIMI: I agree with Trevor on how the U.S. government thinks through the question of whether it may target to kill someone. I don't think imminence plays a role in the U.S. government's legal theory on targeting because the government posits that almost all of its targets are combatants in an ongoing armed conflict. Under international humanitarian law, a combatant who is not *hors de combat* is targetable even if he does not pose an imminent threat. He is *presumed* to pose an imminent threat by virtue of the fact that he is suited up for war and licensed to kill.

Imminence does more work in the targeting analysis when someone does not qualify as a combatant and is instead a civilian. A civilian is targetable if he "directly participates" in the hostilities. And whether he directly participates depends on the nexus between his threatening conduct and the hostilities—or, one might say, on the imminence of his threat. Imminence also does work if one rejects the armed conflict paradigm and instead adopts a law enforcement paradigm under international human rights law. The law enforcement paradigm is widely understood to permit targeting only in the face of an imminent threat. The classic example is of a robber pointing a gun at the cops. The cops may kill the robber if they have a reasonable belief that he is about to shoot—that killing him is necessary to avoid his imminent threat.

No matter which of these legal paradigms applies, the purpose of the imminence requirement is to focus decisionmakers on whether the State really

needs to kill someone in order to contain his threat, or whether the State can reasonably be expected to use less intrusive alternatives to targeting, like capture and detention. In my view, this is precisely why the U.S. government claims to be constrained as a policy matter, though not as a legal matter, by some kind of imminence requirement when it acts outside a hot battlefield. The government wants to communicate that, notwithstanding its more capacious legal position, it will not target someone if there are reasonably available alternatives for containing the threat.

PROFESSOR LAURIE BLANK: A couple of points: first, I think there are a couple of considerations we haven't raised. Where is the car? Meaning, are there other incidental harms that could be caused? Is the car in the middle of a town? Are there buildings that would be harmed? Are there other people? We've only talked about the other people in the car. Is there another time it could be targeted? So I would just throw out some additional things. Within the law of war—assuming we're operating in a law-of-war paradigm, because the answer will change if we're not—I don't think imminence legally is relevant, and I would disagree that it is relevant for proportionality. Excessiveness is what is relevant for proportionality. Imminence may be relevant clearly for policy determinations, and just because the law allows something doesn't mean we should choose to do it. And the last point I would bring up with regard to policy choices versus legal parameters is we also haven't talked about the value of capture here. The law under a law of war paradigm would not require capture if the person is determined a legitimate target. However, we're talking about a counterterrorism paradigm, whether it's subsumed within a war paradigm, we're still talking about counterterrorism, and the essential component of that is intelligence. It's not just taking the guys off the battlefield, it is trying to figure out what they're going to do next. And I guess maybe there might be gals we want to take off too.

GUIORA: We'll get to the women later.

BLANK: Right. So, we haven't raised the question yet of whether it might be militarily, operationally, more valuable to attempt to detain given the possibilities of that in order to interrogate and get more intelligence.

CORN: So again, I guess trying to respond—thinking as a commander might respond. First off, the imminence issue: My attitude and my belief is once we identify this individual as a member of an enemy belligerent group, imminence is presumed. That's what that status means. You're a presumptive threat until you affirmatively separate yourself from the leadership of the opposition force, and the burden is on you to do it. I mean, does this lead to overbreadth? Of course it leads to overbreadth, but it's a rule of presumption, and rules of presumption always carry overbreadth. Number two, if I have to go through an imminence analysis, my objective in fighting an enemy in armed conflict is to efficiently bring about the enemy's submission. I shouldn't have to analyze whether I can have an

opportunity to attack the enemy again at another place or another location. Now Laurie's absolutely correct, I do have to consider precautions in the attack. So when we are talking about the harmed innocent civilians, if I can mitigate that without compromising my operational goal by changing the time of the attack, changing the weapon of the attack, or whatever the case may be, then I have an obligation to do it. But if this is an enemy operative, I'm not going to wait to see if I can attack him again later because the resources I am going to have to use to do that, I might be able to apply to attack the next enemy target. Efficiency means I have an opportunity to attack a lawful object of attack and I'm going to take that action so long as the collateral consequences are not excessive and so long as I've gone through my requirement to consider reasonable, feasible precautions. And then the other thing that struck me in the discussion: my view is that an innocent civilian is an innocent civilian. It doesn't matter whether it's an innocent civilian in the context of a hostile or hot battle zone or on the Autobahn in Germany. And as a matter of fact, I think that the law is premised on the assumption that the reason that they're protected is they don't make a choice to be in that hot battlefield, they're just there. Now I understand the suggestion, James, that if you're continually associating with someone you know is part of the enemy armed forces, you are assuming as a practical matter a higher probability of being collateral damage. That's what we tell our contractors. You are a civilian, but if you want to go work at a forward operating base, you know, the enemy is not allowed to deliberately attack you, but guess what? The argument that it was disproportionate when they attacked the base and you died, is going to be pretty hard to sustain because you put yourself in that area of risk. So I think, innocent is innocent for purposes of considering obligatory precautions and the proportionality analysis. But I don't think imminence is part of a targeting analysis in the context of armed conflict.

FINKELSTEIN: Can you possibly tell us what you consider excessive then in that case, because if you're going to put the analysis under proportionality, we have to ask: Is it excessive force to kill two people you know to be innocent civilians in order to get one high-value target?

CORN: Maybe it's my instinct when I hear "high value" from Amos. "High value" to me means a critical enemy objective. So, if it were in a conventional conflict, a high-value target would be the command post. It would be in the old days the enemy's artillery control center, so they can't do counter battery fire. Maybe part of the disconnect is: what does high value mean? I assume "high value" means a target of extremely high magnitude in terms of...

GUIORA: I didn't say extremely, I said high value. Not extremely high.

CORN: But when we designate something as a high-value target, what we're saying is, it's a high magnitude, substantial benefit to our effort to disable it. So if you take that away, then proportionality changes dramatically because you can't do

proportionality analysis until you start by weighing the value of what you are going to get by killing the target. And we really haven't done that. We're all speculating. Trevor speculated a little bit, I'm speculating instinctively, you were speculating about where he is in terms of the enemy operation or the organization. But if you're advising the commander, that's critical once you know you are going to kill civilians. What do you anticipate what you will gain from killing this individual because that's what you have to balance against the fact that you are going to knowingly kill innocent people. One, three, or ten.

PROFESSOR FRÉDÉRIC MÉGRET: The language we use is loaded, and the way the question is asked is slightly loaded. So, the question is what should we do about our high value target, and that's security language or antiterrorism language. It is not international humanitarian law language. In terms of the laws of war—and here we're not talking about the ethics of war, or the philosophy of war, or any other sort of register—there are no innocent or high-value or low-value targets, there are only combatants and noncombatants. Whether they are innocent or not (and of what) is beside the point. And the law is pretty clear, article 51 of Protocol I says that “the civilian population as such, as well as individual civilians, shall not be the object of attack” and “shall not be the object of indiscriminate attacks.” Now, of course, the law does allow for collateral damage to civilians except if it is “excessive in relation to the direct military advantage anticipated.” I would question whether *certainty* that civilians will be killed is allowed under these circumstances. Article 51 says that it is not indiscriminate if “it may be expected to cause incidental loss of civilian life,” but if you actually know that it will (because you are bombing a car), this may be going a step too far. In all of this of course we are assuming that the laws of war apply. The other possibility is we're dealing with international human rights law, in which case the only word for this is an extrajudicial execution, if you're knowingly targeting civilians—even if it's in the process of targeting high-value targets, if that's what you want to call it.

GUIORA: Alright, George, I'm going to call on you for a second before turning it to the two generals.

LUCAS: Right, well I might quibble a bit with that interpretation of the law, but I'm not a lawyer, so let me not do that. I think that in philosophy there is a distinction between knowing a thing is so and intending an outcome, and that's covered by the background of the legal principle of proportionality, the principle of double effect. And what I was arguing applies here: something more stringent, the principle of double intention. That is, you can't merely know and not intend to kill the target. You have to do everything in your power to avoid killing the noncombatants if you suspect they may be harmed by your action. That's a stronger demand. That's not one that the law clearly imposes—it's one that was first formulated by Michael Walzer in trying to understand how double effect would work. I think it would be a due care provision.

GUIORA: What does due care mean?

LUCAS: Due care: that you've taken all possible concerns or all possible measures commensurate with the situation you're in, whatever that may be.

GUIORA: Reasonable?

LUCAS: Yes, reasonable. Not all possible, all *feasible* precautions to avoid killing people who have done nothing to merit being killed.

FINKELSTEIN: But what if you know you are going to kill? I still do not think we are quite hitting the nail on the head: You know you are going to kill them, but you know they are innocent.

BLANK: That's exactly what proportionality is designed to do.

LUCAS: Right.

BLANK: It's designed to say you know that these three civilians working at the forward operating base—or the command post, or whatever else—are going to die when you take it out. The value of it is so high, I anticipate that I am going to gain this much value from it. I expect this amount of civilian harm. That is within the bounds of excessive, or you might say that is outside the bounds of excessive.

CORN: And by the way, in the discussion of morality, that is exactly why that principle of precautions in attack is so important because this commander is going to have to live with the knowledge that they knowingly, but not with purpose, killed an innocent person. And I would suggest that if they're ignorant of the fact that those civilians are at risk, that's a war crime—potentially—because they didn't gather all the information that they needed to gather to frame their decision. So the proportionality principle allows and permits the knowing killing of innocent people, but the precautions principle I think is a morally critical limit to that because it imposes on that commander the obligation to make sure that the killing of the innocent is truly a measure of last resort.

SOYSTER: I'm thinking of the concept of the time pressure. Now as everyone can see, working this out will take months. So, if we set it up for a decision of chain of command, we'd probably have to get the operative on R & R in Dubai, because he's going to be gone (laughter). And that's very important in terms of the final decision, and as a decision maker, my question would be as always, if I delay will additional information be available? So hopefully as a commander, I will get an order to do certain things with certain rules of engagement which will consider all these kinds of things because there won't be six lawyers with me and I've got to make this decision at a level where it's literally, "Fire!," to someone who's got a button to push, then I'm prepared to make that decision. I've got the latest

intelligence and so forth, and every conceivable thing that I can get and then the terrible responsibility is I've got to make the decision before he goes around that curve there and disappears and I can't see him, and so it's got to be narrowed down to a mission: this guy's a high value target, "General, kill him," and these are the rules of engagement to consider. And then I think very importantly again, as Geoff said, your bomb damages assessment becomes very important in this kind of thing to see what you did. And you live with that decision that you've made based on all of the best information you have. But you've got to make a decision, and you make it; maybe let him go. Maybe I'm not satisfied that he's the guy or I've picked up some indication that it's not his car—he always drives a 911 Porsche, and the guy's in something else—or whatever, and so I decide not to. Or I decide that's the guy and I've got a mission to kill him and I can't get any more data that's going to influence it and then you've got to make a decision because he's going around the curve.

BRIGADIER GENERAL (RET.) DAVID IRVINE: This has been a very interesting discussion, and I'm torn between my immense reverence for the Socratic method and a realization that for this distinguished group to respond to this scenario is giving us all an opportunity to engage in a round speculation about how we might approach this, or what we might do. And yet it occurs to me—and I apologize in advance for saying this—that it would probably be a dereliction, and even then negligence if we did not acknowledge that there is one person up here with a microphone who has actually had to make these kinds of decisions in Gaza for the Israeli Defense Forces, and who has received these calls at three o'clock in the morning with a request: "Colonel, we have an opportunity to perform a kill mission on this target, and we're ready to launch an operation. Can we do it?" And I'm hoping that at some point you're going to share with us, Professor Guiora—Lieutenant Colonel Guiora—the benefit of your real-life, real-time experience in that period of your career when you were making these kinds of assessments and judgments and recommendations to a commander about how he could proceed within the parameters of Israeli law and international law.

GUIORA: That's exactly why I enjoy asking the questions. So, I don't want to make the focus on me.

IRVINE: No, I'm dead serious.

GUIORA: So, when I was involved in targeted killing decisions while serving in the IDF as the legal advisor in the Gaza strip from '94 to '97, and indeed, I am the one who received the phone calls—while here they are Socratic method questions, in real life they were real questions. Much of the discussion here is what was running through my mind because at the end of the day, while the legal advisor doesn't make the decision, he's not the trigger-puller, he's in the IDF, and Geoff, I don't know how it works in the U.S. military, but in the IDF, if the legal advisor says yes, the commander pulls the trigger. If the legal advisor says no, the

commander doesn't pull the trigger. So I'm not the trigger puller, but I am the final recommender.

I had imposed on myself a criteria-based approach that was predicated on a pretty rational checklist that sought to answer these incredibly difficult questions. Not in the hour we've addressed here, but the window of opportunity was somewhere between two and three minutes. And so you're absolutely right. When we talk about this, you know, you have to decide yes or no, and it requires analyzing information extremely quickly, trying to determine whether or not the source who has provided the information is indeed reliable and credible, need to understand the commander's thinking process and capability. But at the end of the day, as is being discussed here, you have to decide. It is without a doubt—I mean this very seriously and humbly—the most extraordinary or awesome responsibility. Laurie, you said awesome earlier, but this is not awesome, this is awe-inspiring, I guess. The decision yes or no. So at the end of the day, the discussion here is, I hope, helpful to the audience. But in real life, the window of opportunity is so extraordinarily small that it has to be really quick and it has to, at least from my perspective, be a pretty sophisticated checklist that incorporates law, ethical considerations, intelligence gathering considerations, and at the end of the day the operational capability of the commander.

LUCAS: I wanted to add to General Soyster's concern for the operation itself in real time. Contrary to the fear that there would be a sort of joystick mentality about this and a moral detachment, I think all of you have probably seen enough data now on Predator operators, and so forth, to know just the opposite for the most part with a few unfortunate exceptions has been the case. They have to pull the trigger under conditions that we're describing and then watch the children's tricycles disintegrate and various other kinds of things happen, and the plane loiters above the scene to carefully record exactly what the damage will be and so forth. And then, as one would put it, I go home and have Thanksgiving dinner with my kids and it's very strange. And so the concern, the guilt, the moral concern that the operator, the true operator, the O3's junior officers at rank of Captain or Navy Lieutenant on the control panel who's pulling the trigger, is that they see more closely than anybody the consequences of their actions and have to live with that, and it has posed some difficulties.

MORRISON: I just wanted to pick up on the point the General has made, about the narrowness of the window of opportunity for a specific targeting decision. He is absolutely right about that. Maybe it's obvious to everyone, but I guess I'd want to underscore that, to me, most of the legal considerations we've been talking about here are not the sort of things that would be run through during that very narrow window of opportunity. Instead, those considerations are part of a prior, more general conversation that a rational government would have, at a pretty high interagency level, in trying to understand what its basic ground rules are. In other words, this discussion we've been having is a discussion about what kinds of questions should be asked in that narrow window of opportunity. Should you be

asking about imminence? Should you be asking about proportionality? Should you be asking about the high-value-ness of the target or just about its affiliation? A thoughtful interagency process could generate answers to those questions as part of a general framework. Those answers could then be translated into rules of engagement, and a decision-making tree for the legal advisor and the operator in the field. I don't mean to suggest that everything would be easy from that point on. I bet it's awesomely difficult to make specific decisions, because what that decision tree doesn't really do, and can't do, is to tell you how to weigh the case-specific evidence that you're examining.

But, I guess what I'm trying to say here is that although the first question we got asked in the simulation sounds quite a lot like the question one could imagine getting asked upon picking up the phone in the middle of the night, most of our conversation thus far has addressed a broader set of questions that governments should and do ask themselves. But they don't ask them anew every time there's a question whether or not to take the shot at a particular target. Instead, they're framework questions. And on the topic of framework questions, let me add one more. I've been assuming in this that there's no reason for us to believe that this high-value target is a United States citizen, but if there were a reason for us to believe that, it apparently is the position of the Obama Administration that there's a whole other set of questions that would need to be asked. In a recent speech, the Attorney General said not just that some considerations akin to due process applied to the use of lethal force against United States citizens, but that constitutional due process applies fully in the context of the lethal targeting operation against a United States citizen abroad. I'm actually not sure how due process could apply fully in a context like the Al-Alawki operation, at least not in any recognizable form of what core due process is. But setting that aside, my point here is that the fact that the target is a U.S. citizen would layer on a set of considerations that aren't dictated by the law of war and that aren't either in an armed conflict model, or in a self-defense model. It would be a set of considerations drawn from U.S. constitutional law.

GUIORA: Trevor, I just want to point out one thing. When I was involved in the decision-making process almost twenty years ago when we were just in the baby steps of implementing targeted killing, the extent to which the policy was fully articulated is an open question. So, at least from my own experience, you're right that subsequently, the legal advisor and the commander are implementers, but twenty years ago when I was involved in this—confronted in many ways with these questions as they were just unfolding—the extent to which there had been this sophisticated interagency discussion is an open question.

FINKELSTEIN: Amos, one of the things you raised in one of the stories I've heard you tell, which is so interesting, is the problem of terrorists who deliberately surround themselves with civilians in order to use them as a shield. And you've told the wonderful story, and maybe you would share it, of the difficulty you had

with the target who ran into the middle of a group of school children when school was letting out.

GUIORA: Sure, the whole human shielding question.

FINKELSTEIN: That is one of those important framework questions. I agree with Trevor that we need to have that discussion outside of the moment of decision. Does it make a difference—in terms of the way we assess the value of civilian life—whether or not the high-value target is engaging in shielding himself with civilians as part of a general policy to do that? Because in that case, you can think of the danger to the civilians as partly coming from the high-value targets in their own midst, and the causation is not entirely ours.

HAKIMI: I want to pick up two points from Trevor. The first is the importance of the executive branch having this discussion at a high level of generality before it makes any particular decision to pull the trigger. The U.S. courts and Congress have not been especially eager to participate in U.S. targeting decisions. The executive branch's internal discussions thus are the principal means by which the executive is constrained. The executive is essentially constraining itself—not with rigid rules that answer whether targeting is permissible in every case but with basic principles that guide people who actually pull the trigger.

My second point is about due process. It is true that the Attorney General claims that due process considerations come into play when the United States seeks to target a U.S. citizen abroad. But of course, the Attorney General also says that the process that is due depends heavily on the circumstances and that, in this context, the process need not be a judicial one. So, to say that U.S. citizens are afforded due process is not to define what process is due and preserves for the government considerable wiggle room to avoid the constitutional restrictions that would apply, for example, in Ohio.

BLANK: I want to pick up on that. I think what we've been trying to get at is not the big picture executive branch decision-making, but the actual operational decision-making situation here. And I think we have to keep in mind the big picture: the executive wants to maintain as much flexibility as possible on a strategic and policy level. So, while it's great to think about how useful it would be if the U.S. government or another government self-constrained or created a useful set of parameters, it's not going to happen because they want to maintain as much flexibility as possible. Look at what the U.S. has done. The U.S. has said, "We can target in the context of an armed conflict and/or in self-defense." Okay, which one is it? The consequences are played out right in this conversation as we use terms like imminence and this and that in lots of different ways. That's partly a consequence of the U.S. conflation of every possible justification and "we won't tell you which one we're using today because we might want to use a different one tomorrow." That's an effort to maintain as much flexibility as possible. So the real question here is, in the context of that overarching policy goal of flexibility: How

do the operators at a lower level operate on a ground of certainty and clarity that somehow carries out that flexible objective without mucking around with the law?

IRVINE: One of the questions that I think needs to be asked in looking at the issue of how we deal with the civilians who presumably are in this vehicle. One of the lingering problems that the targeting process keeps generating, I believe, is that the issue of how we deal with civilians in those contexts has the potential of doing us a lot of damage. I want to go back to what General Soyster mentioned about one of the challenges of engaging our armed forces in an overseas theater: We need to be aware of the degree of acceptance in the counterinsurgency or counterterrorism context of how our presence and our method of operating is going to be perceived. And I suspect that one of the principal flash points of anti-American response in Pakistan, Afghanistan, and other areas where we operate a targeted killing program is the perception on the ground. Whether it's an accurate perception or not is almost immaterial, but there is a perception that we are indiscriminate in our use of force against a civilian population or against people who might be innocent in the sense that they haven't actively accepted a combatant role. And I just go back to a basic political principle which is perception equals reality, and it doesn't matter what we say or what we create as a party line. If people perceive that we are proceeding on an indiscriminate basis without taking sufficient precaution to guarantee proportionality and protection of people who deserve protection, then we can deal with this hypothetical once or twice, but ultimately, over a sustained period of time, even though we have the capability of taking out this individual, whether he is high value or whether he's the cook, it may not be in our interest to always push the button and give the command because that issue of collateral damage is a big problem and it's a serious issue. Cumulatively, over the course of our activities overseas, it can do as much to thwart our ultimate objective as anything else.

CORN: Two points. First off, to Monica and Laurie's point, I think the level of guidance that comes from strategic level guidance ebbs and flows with how new the conflict is and also the appetite of the policymakers for that flexibility or for removing from subordinate forces the uncertainty that comes along with flexibility. So it's a double-edged sword. If you start with the assumption that you have the authority to detain unlawful enemy combatants—and what is that, well it's kind of like obscenity, you know it when you see it, right? At a strategic level that might give you flexibility because if you want to detain somebody, you haven't locked yourself into a definition, but it causes great frustration and uncertainty at the operational and tactical level. And I think what we've seen over the last decade is that as expressions of that frustration have continually been pushed up, there's been more of a willingness to provide more clarity, but it's also been an administration thing. This is just my personal observation from being on the law-of-war working group. I've seen both sides of this where we want to answer each individual question as it comes up because that way we are not restricting ourselves for the next one. Then you get the push-back which is you're not giving

us the framework we need to make rational choices, and then we feel like we are always the ones at risk in our decision-making. So I think that ebbs and flows.

And in terms of the idea that “you may but that doesn’t mean you should,” which Laurie brought up—maybe you should capture, maybe there will be second- and third-order consequences that are strategically detrimental if you’re perceived as using indiscriminate force, even if lawfully and legally you’re on high ground. You know, we have to remember that when you look at the old law-of-war treaties, the hallmark of the professional armed force is the phrase “responsible command.” That’s the duty of a commander. A commander has to make these judgments. But, the commander cannot do what’s unlawful. So the role of the legal advisor is to advise the commander: “Here are your parameters.” And then the commander has to factor in the effect on the civilian population, the effect on my ability to gather intelligence, the psychological effect on the enemy. I mean, it’s quite frequent, I believe, that commanders know they could probably capture enemy forces and they choose to attack them anyway because they make a judgment that the shock effect that will have on other enemy forces outweighs the potential intelligence value of capturing the individual. And again, I started with this today, another factor that plays into this issue of how cautious you are going to be about collateral damage is the psychological effect on your own forces. And one of the sources of battlefield stress—combat stress—is the perception that we are fighting an enemy and we are consistently restrained from using the capabilities that we’ve been equipped with and we’ve been trained to use in order to maximize the effectiveness of our operations and we’re assuming greater risk as a result of that. Now a commander can do that. That’s rules of engagement, you know. The commander can say, “wait ‘til they get to the point where you can see the whites of their eyes and then you shoot,” and that’s what responsible commanders do. But I just would suggest that there are two sides to that constraint coin. One is that you might enhance your perception with the local population that you’re being cautious, but it can also have an effect on morale and discipline and motivation of the force itself.

SOYSTER: We’ve talked about the consequences—which Geoff has articulated so well—associated with the assumption that you’ve given a command to fire. There are also other consequences. Let’s say I’m the commander and I’m going to issue the order to the trigger-puller, and I’m looking through the soda straw and all of a sudden I see behind the vehicle that I’ve been concentrating on and have all this information on another vehicle that looks exactly the same. And so all of a sudden here’s this new information. This is not information I had five seconds ago when I was almost ready to say “fire.” Now I’ve got something else, and I decide I don’t know which vehicle to target, and the two vehicles disappear. One of those vehicles goes down the road, pulls off, organizes the attack, and kills two hundred people. Believe me, you live with that consequence and it’s just the nature of being the guy that has to decide, because that consequence, that’s bad for the morale of your troops. You know the old man didn’t have any guts. He let this guy get away. And the consequences are you may have gone home for the turkey, feeling pretty

good that you let this guy go, and then you find out the other bit. So the consequences go both ways when you're stuck as the decision-maker and you say "stand down" and that guy gets away. There are consequences for that too. It's just very difficult. And the commander wants all this information and all this help: legality, morality, all those things that he needs to make the ultimate decision. So as a commander, I would welcome the advice of my attorneys and my guy that I pulled in from the outside to be the philosopher, or whatever, to try to get the ability to make the right decision.

GUIORA: It would take you five years to make a decision if you had ethicists and lawyers.

HAKIMI: I agree with Geoff and Laurie that the U.S. government's legal positions are designed to preserve as much flexibility as possible. The U.S. government claims that we are in a global armed conflict with al-Qaeda, that membership in al-Qaeda is defined by whether someone's conduct gives him a sufficient nexus to the group, and that al-Qaeda members are targetable. These legal claims are aggressive; they give the U.S. government considerable discretion in deciding whether to target someone who has associated with al-Qaeda. The claims thus shift decision-making away from the lawyers and toward the policymakers and commanders. If commanders actually want to be constrained by their lawyers, then saying "look the world is an armed conflict and anyone who is broadly associated with al Qaeda is a combatant" is not doing them a favor.

CARAFANO: See, I think the problem with the logic seems to be that you want to fight the enemy you want as opposed to the enemy you have. And the problem in war is you're stuck with the enemy you have. Geoff's comment about "because you can do something doesn't mean you should" is actually very salient. Demonstrably, in Vietnam and Afghanistan we used a lot of force, legally, which was totally appropriate, which absolutely worked against our operation goals we were trying to achieve, and was very, very destructive. And once commanders stopped doing that and realized they should do something different, they were game changers. In contrast, if you think about France in 1944, we killed a lot of French people. And as the general said the other night, in the village now they go and they kiss these veterans and they say, "Oh thank God." Why is that? Well, the French wanted to get rid of the Germans and they knew they were going to suffer in that process, but they knew there was no other way to do that, and they were willing to do that. So it's very contextual. And I actually go back to Geoff's earlier point. All these discussions about the frameworks and different systems—and I hope that the one thing you would walk away with is the notion that is you have to have two systems—there's a reason why we have a judicial-due-process system and a rule-of-war system. And if you want answers in combat that are never put in a sense of risk, never commit tragedies, never have misjudgments, never do anything wrong, well then you're never going to have a rule of war that you're comfortable with because by the nature of that environment, those things are going

to happen. And we, I think, tend to gloss over really the most important thing, which is the men and women that we ask to make these decisions, and creating a core of honorable men and women who really understand the obligations of representing their nation in armed warfare is the most important decision that we make, above and beyond anything else that we do.

GUIORA: All right, now I'm going to change the hypo. Our suspected terrorist, according to intelligence information, the suspected terrorist is responsible for the planning of a terrorist attack a few days down the road, a few days undefined. This particular individual has clearly made themselves undetainable, and the delta in the hypo is that our suspected terrorist is a woman. So I add, before turning it over to you, that in Israel, I don't know about the U.S., but in Israel we've never done a targeted killing of a woman. We've only done targeted killings of men and have never targeted women.

CARAFANO: Yes, I believe in gender equality.

GUIORA: Does the gender make a difference?

FINKELSTEIN: I don't think that it does.

SOYSTER: I think it would have at one time, but I think we're past that. With our own belief that it's okay to blow the legs off our own women, why would we hesitate today? That would have been different fifty years ago.

FINKELSTEIN: Yes, if you make it certain that this is our woman as it were. If you're unsure that this is the right person, then you go from base rates, and women plan a lot fewer of these than men, so if you have the same information about a female suspect as a male suspect, you're going to default to your base rate and assume she is not guilty.

GUIORA: Gender regardless?

CORN: No, I think the point is you gave us the assumption that we know this is in fact the operative. If we were, if there was uncertainty, I think the fact that it was a woman would be a relevant factor in the totality of the analysis.

GUIORA: We, I think we all agree, if we know for certain. If there's a level of uncertainty, is the level of uncertainty with respect to a woman going to be the same standard before you pull the trigger as the uncertainty if it's a man?

BLANK: I think that would depend on if most of the people that we're concerned about are men, so that way we're not accustomed to having a woman play this role, then yes. We would maybe want a higher level of certainty. But if you put us in a different hypo where there's an equal number of women involved

in the enemy force, terrorist group, however we're defining it, then no. It wouldn't make a difference. So the baseline would differ. What if it's an all-female terrorist group? Then the fact that she's a woman would essentially mean we'd need less certainty.

GUIORA: Sexual profiling.

BLANK: There you go.

CORN: I think it's IPB: intelligence preparation of the battlefield. You could be on a border mission and there could be the other State's border police accidentally cross over your border. The way you're going to react to that would be radically different than if one of their tanks crossed over your border because you know one represents a very different probability of threat than the other.

MÉGRET: I don't think under international law, for example, it would make a difference whether it was a man or a woman. I think the really interesting question from the point of view of international law, and maybe I'm anticipating the next question, but it would be if a person was known to be a child, but nonetheless was about to commit a terrorist act. I think the idea of a child as a combatant, there you have an inherent characteristic that's problematic from the point of view of international law in a way that gender isn't because there is often the assumption that children ought not be in combat in the first place and were probably coerced into it.

GUIORA: So, Fred, you took the words out of my mouth. Child. Thank you for that. Child.

FINKELSTEIN: What's the age?

GUIORA: Fifteen-ish.

SOYSTER: I think part of it is also understanding your enemy. We know that our enemy will use women. In fact, they have great advantage in using them, they blow up all the time. They will also use the mentally incompetent. They've done that. So we've got an enemy now that certainly does not have the same values as we do, and so the fact that a woman is involved would not be in any way strange or startling with the current enemy. They're there all the time.

GUIORA: Fifteen-year-old.

SOYSTER: They're there all the time.

GUIORA: Fifteen-year-old child?

BLANK: I don't think the law is affected by the fact that it's a child versus an adult. I think the "should" question becomes drastically different. If you take this out of the drone or terrorism context and you put it into more of an immediate combat situation where you have a child soldier, and you have a ten-year-old firing at you, you certainly can—under any legal paradigm—fire back and defend yourself. Under the law of war you can defensively shoot at them. That begs the question of whether somebody would seek almost any other possible way to deter the situation because it's a child. So I think here we would inject a lot more questions of morality, but I don't think the law would prohibit it.

GUIORA: And Claire, from an ethical perspective, would you impose on a commander a greater degree of alternative-seeking if it's a child rather than an adult, male or female?

FINKELSTEIN: Well here I agree with Laurie. I think if the child poses the same danger as the adult, whether the child has been set up to pose that danger or poses that danger of his own accord, then the proportionality requirement is satisfied and you have every right to treat that person as a status-based target.

MÉGRET: If the child soldier is in the process of targeting you and it's clearly a defensive action, I think you clearly have a situation where, under self-defense, you'd be covered. But to offensively target a child soldier, even when they're not an immediate threat—maybe this is a case where morality should take over because the law doesn't really give us answers. At least in moral terms we're convicting people for recruiting child soldiers. Would it be right for soldiers on the other side to then target children knowingly? I wonder whether this would entirely fall under international law. There might be a need for bit of creative jurisprudence to dig into this issue further.

CORN: I would speculate that most commanders, whether you could say this was an application of a legal obligation would go further in seeking alternatives or precautions knowing that their forces would be required to kill a child. Go look at cases of service members who've come out of conflict and have serious mental scarring from that—talk to the service member who knows he's killed a child. Even though it was lawful: checkpoint, car didn't stop, opened up, followed orders, and then went up and found out there were children. I think, again, it goes back to responsible command. It goes back to what McDonough was talking about. I may assume, I think this is a situation where I would say, "General, as a matter of law, I think we have the authority to attack." And I think that most generals would say, "I'm going to assume greater risk here."

GUIORA: And not do it.

CORN: And not do it.

LUCAS: Well I think that the law is a real blunt instrument here, it really doesn't help clarify the situation because women and children can and do serve as combatants, and if they are performing a combatant role legally you can defend yourself against them or attack them. I think we're clear on this. The question is whether the degree of epistemic certainty that you require about their intentions in this original scenario varies as a function of their status: female, male, child. I think female, male: no—same epistemic certainty for both. Child? From a moral standpoint, you're going to demand greater certainty that this child is truly engaged in a really serious life-threatening planning operation before you're going to want to kill them.

GUIORA: So you're imposing a higher standard?

LUCAS: Yeah, a higher standard for children.

CORN: I think this is Claire's model penal code, immediate necessity standard. I think the commander's going to want to say, "No; I absolutely will not have any other opportunity to avert this threat other than doing this right now."

LUCAS: And if he says that he's going to have to go ahead and live with the concern of killing a child.

FINKELSTEIN: So if someone is a cobelligerent by status but not by activity or imminent threat, you're saying that in the case of a child you might require more activity?

CORN: On his part.

FINKELSTEIN: On his part, rather than regard the status basis privilege as an adequate reason to kill.

GUIORA: Would you make a greater effort, Claire, to seek to detain a child than you would to detain an adult, male or female?

FINKELSTEIN: I would expect so.

GUIORA: Hang on, even if it potentially imposes an undue risk on your soldiers?

BLANK: What's undue?

FINKELSTEIN: Right, that's the same problem. Getting the proper balance.

BLANK: I want to throw in maybe a very obvious point here: the law doesn't say you have to do it. The simple fact that the law says that it would be lawful to

target the child doesn't mean it's saying go target the child. It's merely saying you're not committing a war crime; you may be committing a horrific moral act.

GUIORA: Right, but just to tweak the tweak, according to our intelligence information, the child is going to be carrying out a suicide bombing in the local market tomorrow. So again my question to you is: Are you going to impose, you as the commanders, are you going to impose on your soldiers a greater effort to seek to detain him?

CORN: Effort, yes; risk of death, no.

GUIORA: Well hang on, now to the two generals, where do you draw the line?

SOYSTER: I just hope I won't be in a position to have to draw that line anymore because it's very, very difficult. I think I agree. I think because something's lawful doesn't mean that it's morally right, and I think you do everything possible. If we know this much about her or him.

GUIORA: The child?

SOYSTER: The child, right? Why can't we pick this kid up tomorrow morning when he comes out of the house? And risk two soldiers because he might blow it then or whatever. I think you look through that.

GUIORA: You would risk the two soldiers in a way that's different from how you would risk them if it were an adult suspected terrorist?

SOYSTER: I think we do that more than we may realize. I think we do put soldiers at risk in difficult situations, put soldiers at risk who go have to go fiddle with the IED or whatever, and we put them at risk under certain circumstances because that's the best solution to the problem and it's terrible.

CARAFANO: The point is that this is not hypothetical; this happens every single day in Iraq and Afghanistan. Happens all the time.

SOYSTER: If you asked for volunteers, you'd have the whole company.

CARAFANO: I can't tell you how many anecdotes of soldiers that I've talked to that have stories. One was they were told that the people were told to not put their head outside the bus. If they stuck their head outside the bus, they were a target. The soldiers were going in a convoy. A kid stuck his head outside the bus, and he had something in his hand. They could have shot him. Turned out it was a camera. He was taking a picture. And the commander said, "stand down," and he took that risk. So this happens every single day.

IRVINE: I'm just thinking back to a lot of the people I have worked with, and I just have a very strong feeling that if I had issued a kill order focused on a child absent imminent danger to myself, my unit, the friendly forces, I'm not sure that I would have found a lot of folks who would have acted on that order. I think they would probably have, on their own initiative, tried very, very hard to find an alternative way of dealing with that target that would not be an instant pull-the-trigger environment.

GUIORA: Because it's a child

IRVINE: Yes. I don't know that there would be the same reluctance with a woman. I don't think there would. Or certainly not a male, but I think there's a really distinct moral recognition that children are unusual special cases, whatever the circumstances may be.

CARAFANO: Not to put too much of a happy face on it. That's not what happened in My Lai, where American soldiers gunned down children, knowingly gunned down children. And we also had American soldiers who knowingly risked their own lives trying to protect them. We don't have a lot of those kinds of units in our military anymore, which it goes back to the issue about the training and the competency of the people that you're handing force over to. You can never just make a presumption that people are going to be decent in battle because they're decent in peace. If they're not trained and armed and prepared for that, you don't know what you're going to get.

CORN: How the institution reacts to something like that is critical. When you listen to the pilot who landed in My Lai, the twenty-year-old pilot and told his eighteen-year-old door gunner, "Shoot the next American soldier you see who tries to shoot a civilian." That guy was vilified at first.

GUIORA: He was a hero.

CORN: He was a hero eventually, but he was vilified at first. It was a failure of responsible leadership, but I do think that one thing that all of this instinct reflects is that I think that we all know intuitively that when you cross a line once, it becomes easier to cross it again and again. And again, I think that goes back to that quote from McDonough that this visceral discomfort with the idea of deliberately killing a child, I think is as much, in my mind, because I don't want that line to be crossed because it will be easier to be crossed.

GUIORA: The next time.

CORN: Again and again. That's one we're going to struggle mightily to preserve. And I do think criminal law recognizes this. The instinct is that we look at that child as an innocent agent, an innocent instrumentality of some other

individual. Now if you told the soldiers you could find the person who was manipulating that child, I'll bet there'd be a lot of zeal to go target that house.

IRVINE: Well, I just wanted to make a comment about Jim's reference to My Lai. I think that's a different set of circumstances that I'm just going to call an atrocity of war. And there have been atrocities of war for which American forces have been responsible. Fairly limited in number, but that happens. That's a different element, I think, and that adds a different consideration which, in my view, is the degree of command discipline that applies in the military unit, and that's a commander's responsibility and function. If he or she fails to exercise that discipline, then these kinds of things happen, and we've seen some of that in Iraq and in Afghanistan as well.

CORN: In his presentation, Trevor talked about how one of the consequences of resisting the notion to use the military component of national power is that you might drive some of these actions into the hands of other agencies and then that raises the question: Did they operate under the same notion of responsible command, discipline, leadership, oversight? We would hope the answer is yes, but I'm not so sure. James talks about developing leaders who embrace this notion of morality. I think that's a real risk. Before we say this is not something the military ought to be doing because this can't be war, or you're not in the right paradigm, I think you always have to consider what the alternate course of action is, and is that a better outcome in the long run when you start thinking about all these consequences?

GUIORA: Right. Next hypo. Unfortunately, David let the cat out of the bag that I was involved in this stuff, so I'm going to use an example that I was involved in. So the phone rang, obviously I don't know why it's always at three o'clock in the morning, but that's just the way it is, right?

According to the source who provided the information to the intelligence community, the potential target was an individual who was carrying a bag. I can't tell you what was reportedly in the bag, but it was made clear to the commander by the intelligence community, and he made clear to me, that the contents of the bag posed an immediate and grave danger to Israeli national security. That's the phone call I got at three in the morning. The individual had been identified by the source who gave a pretty complete description of him. Not 100% but pretty satisfying. So one of the questions that I wrestled with was this guy was a bag carrier. That's what we knew about him, but what we did know, or what we felt, was that the opportunity to prevent him from getting to the next person—and to the next person—was now. The opportunity was now. For a variety of reasons, which I don't want to get into, it was determined that he was undetainable. So it was either go, or no go. It was a binary decision process that I was confronted with. I asked the commander, "how much time do I have for the decision?" and he said, "he's in my zone for somewhere between two to three minutes."

CORN: Could I try an analogy that I would use if I were trying to give that advice? It's the Cold War, we think the Soviets are about to launch an attack on the United States. We know that their ballistic submarines are incredibly dangerous. We know that one of them is on the surface in Vladivostok or in the Baltic, and we know it's going to submerge within two or three minutes, and we're not going to be able to see it again. What commander would not say at that point, "we have to strike"?

HAKIMI: We know that taking out that material has a very high military value. So the proportionality analysis seems to me to be relatively straightforward. Taking out the bag would have a significant military value, but one person would die. If the value of taking out the bag is sufficiently high, then the attack would be lawful.

LUCAS: I tend to agree with that. I think that's right. Unless there is some grave uncertainty either about the identity of the person or the contents of the bag.

GUIORA: How about the reliability of the source?

LUCAS: Well that's uncertainty.

GUIORA: Hang on. Wait a minute. All I told you was the source told the intelligence community that called the commander that called me.

LUCAS: Ah. So it's hearsay.

GUIORA: Oh? Really?

LUCAS: Okay. That's not what it sounded like. It sounded like clear intel that this was a guy carrying an asset.

GUIORA: Wouldn't you want to know about the source?

LUCAS: Right, you would want to. I assumed from the way you described this, nobody's going to call you at three in the morning who isn't a reliable source.

HAKIMI: I did too.

GUIORA: Just because I was told that the source is reliable—from my perspective of how I was trained in the decision-making process—that for me did not automatically mean that it freed me from the responsibility as much as I could to determine source reliability.

LUCAS: So you're saying you had a higher than comfortable degree of epistemic uncertainty about this?

GUIORA: I had an extremely high degree.

LUCAS: That is, your knowledge is not secure and reliable. You're not absolutely confident in the identity or the contents. That's a different matter.

CARAFANO: What you describe, without the question of the reliability of the intelligence, sounds like a typical episode of *24*, which I think is what we're all kind of used to, where it's just crystal clear. Oh it's an immense thing and you have to make this choice, nothing else. And often times, those are great hypotheticals, but in reality they're never that clean. We get this in torture all the time. It's the typical ticking time bomb. If we don't torture the guy we're not going to find out. But then when you start to unpack scenarios, is there ever really a ticking time bomb scenario?

HAKIMI: Again, I think the law is relatively straightforward. You have to establish a reasonable belief, given the circumstances, that the thing you believe to be a military object is in fact a military object. If the source is reliable, and you don't have the option of further investigating the facts, then I think you're okay as a legal matter.

CORN: I'll go with James and say the assumption that it's a reliable source is a little bit unrealistic. I think you're right that you might not know much about your source, that your commander has three minutes to make a decision. I still think the legal standard is a reasonable decision, right? And one thing I think we tend to lose sight of is the law of armed conflict recognizes that reasonable doesn't always mean right.

GUIORA: In my twenty years of experience in this stuff, when I was told that the source was reliable, it becomes a catch phrase.

LUCAS: So it's a third party calling you, saying, "A guy told me, and it's a reliable guy."

GUIORA: Right. I generally view that phrase, that pet phrase, "the highly reliable source," I don't know if skepticism is too strong of a word, but...

HAKIMI: That's fair, but you knew not to trust the person because of your prior dealings with him. You knew that the person who said, "this is reliable," was himself unreliable.

LUCAS: Right.

HAKIMI: Because of your past practices dealing with the person, right?

LUCAS: Right.

GUIORA: It just imposed on me the requirement to ask the questions.

IRVINE: Well, I think there's another missing piece to that. I can't speak definitively because I don't know what your experience there was. But you've got three minutes to get whatever additional information you think you need to make the correct decision, and I'm guessing that one of the factors that you weighed as you were going through this very short-fused decision process was the relationship over time that you may have had with that commander. And with the level of reliability that you personally could place on his evaluation of the credibility of that source, and again, when you use these little catch phrases, they're just very, very interesting. The contents of the bag were very significant to Israeli national security. I'm assuming that in Israel, that particular phrase means the contents of that bag could have a critical effect on the survivability of the state of Israel. Now, maybe I'm reading more into that than you're telling me.

GUIORA: If that's the case?

IRVINE: I think then you're probably going to end up, after exhausting whatever verifications you feel you've got within that window, weighing that state security issue more heavily than anything else.

FINKELSTEIN: Amos, I think one of the things that needs to be asked here is a framework question because you haven't really specified the terms of this debate. We've just said we have epistemic uncertainty. The remarks you just made suggest that the scale of epistemic uncertainty and the threshold that we need to cross in order to say, "yeah, get him," will depend on what's at stake. Of course the higher the stakes, the less your level of certainty needs to be. Now, the question is how high do the stakes have to be for you to override a great deal of doubt about whether or not this is the right target? Those are the kinds of framework questions that I think need to be asked and answered before three o'clock in the morning. You're in a position to make that two to three minute decision once you have answered those more general questions. And my guess is that you had a framework that you were operating from, and I partly know this from your work. How do you assess the balance between the gravity of evil and the degree of uncertainty? That is a crucial framework question.

MÉGRET: One thing that strikes me listening to the conversation is maybe we're assuming a little too readily that the law of armed conflict applies and so the only issue is whether the person is a combatant or not. So without disclosing anything sensitive, my question to you, at least speculatively, would be whether an armed conflict was involved? For example, presumably there was not in the case of Mordechai Vanunu even though he had betrayed significant Israeli secrets and could be seen as a threat. The issue of sending in drones to counter him wouldn't have been relevant, right? So citizenship, location, affiliation with a group that Israel is in an armed conflict with (whether it's Gaza, whether it's the West

Bank)—all of these issues would be really, really important to address. I think they frame a lot of these debates that we're having, but it's difficult to have these debates without a lot of the background information that would allow us to decide which body of law is applicable.

BLANK: To piggyback on that I wanted to throw out that it sounds like, based on the timeframe, we were really talking about the law of occupation in many ways, and that adds a layer to the law of armed conflict. But I want to raise the question of knowing the sources of your certainty or uncertainty. Obviously you can't be just dropped in; hopefully you have somewhat grown up professionally in the place where you're having to make this decision. So in Afghanistan, my understanding from talking to folks is the nature of this uncertainty could stem from somebody's name because the naming conventions are totally different there, and many, many, many, many people have the same name. And so you're told we need to get this guy because he's so-and-so and such-and-such, except that there are fifty guys with the same name, and how do you know which one of those Ahmadullah's or Nasrallah's or whichever, that you have the right one. And that's a different nature, but you have to know where is the source of your uncertainty. Is it because you don't know if the guy you're being told about is physically the same person walking across the space? Or is it because you don't know whether the name matches the name or the car matches the car? So it's a cultural aspect of uncertainty as well.

CARAFANO: I just want to point out that the only cases I can think of where vital national security worth killing everybody over where somebody was holding a case were in the movies *Ronin* and *Pulp Fiction*. And in the end the screenwriters didn't tell you what was in the case because they couldn't actually think of anything that was scary enough to put in the case. But the way you frame this piece really does go back to the issue of judgment, the issue of judgment and the judgment of the evaluator. And it reminded me of when I was teaching at West Point and I brought in our dean who was a Vietnam veteran, and I wanted to nail him with the quintessential Vietnamese ethical question which is: You have to go through the village, you're taking fire from a sniper in the village, and so your choices are do you abandon your mission or do you blow up the village? Whereupon he began to lecture me for about two and a half hours about all the different operational techniques you could use to solve that problem because it was a question of judgment. And I just think it really is such an important part of this analysis that can't be glossed over.

GUIORA: First of all, I absolutely agree with you in the context of the judgment question, which is an important piece of the puzzle, in addition to the legal questions which you all are talking about and also the ethical, moral dilemmas of saying "yes" with the understanding that, as the generals referred to earlier, saying "yes" implies directly that somebody is going to die. And that's not a decision, speaking very frankly, that one makes easily. It carries an enormous

burden. Having been there, and having struggled with this enormously, that responsibility is an awesome responsibility. I mean “awesome” not in the positive sense. But you’re absolutely right, James, in the context of a judgment, and the moral responsibility, and the accountability.

LUCAS: Amos, unless I misunderstood, the situation you described wasn’t either a law-of-armed-conflict situation or even a law of occupation. It was a covert action if you have an enemy agent, in effect, in your borders, or somebody identified as such, carrying a vital state secret.

GUIORA: Right, but I’m deliberately fudging where he was.

LUCAS: Oh, okay. So you didn’t tell. Right. Well I think it would matter. The other thing, boundary conditions are drawn, as Jim suggested, more like a *24* case than what you really faced. You probably knew who called you at three in the morning, he’d called you or she’d called you many times before and you had a relationship whether it was one of being hysterical and hyperinflating all kinds of things and having shady characters they worked with, or whether their intel was 99% reliable in the past. I think all of that makes an enormous difference as to what you’d say with this unease—you’re right in saying moral uneasiness—about whether my answer is going to kill someone.

GUIORA: You’re telling me, right? I’d be delighted to have your final comments, still the core questions we’ve discussed, both in the last two hours and reflecting back on your comments during the course of the panels.

LUCAS: Right. I’d simply say that as to the overall theme of this conference—the moral and legal limits are on warfare in light of emerging military technologies—the concerns that still give me trouble at the end of the day are the degree to which the technologies that enable greater frequency of activities that were already morally questionable. That would be one thing.

Secondly, some of the technologies themselves blur distinctions between armed conflict and use of force and other kinds of conflict that do not rise to the level of armed conflict but are low in intensity, such as espionage, or sabotage—which can be an act of war if the nation affected chooses to regard it as such. There are a host of other kinds of activities, including even domestic police operations, and criminal conspiracies, and so forth, that we tend to regard as distinct legal regimens posing unique sets of moral questions. The technologies are blurring those distinctions, and irregular warfare is blurring the functions of military personnel involved in those things. Famously, in counterinsurgency on one day in the three-block war, I’m a policeman, a security official representing the rule of law, and in the next block I’m fighting an armed conflict with enemy insurgents, and then in the next one I’m back to being a policeman again, and I have to know which is which. We throw all of those things together and you have a mix that is legally chaotic and morally fraught with ambiguity, and well, there you go, that’s

war. It's not war as we wish we could fight it. We all wish we could fight World War II again or the Gulf War I, but this is the kind of war we have now. These are not your father's wars, these are our wars, and we have to fight them with those ambiguities in mind, and the rest of us who are providing, playing a supporting role do the best we can to sort all that out for the war fighter.

HAKIMI: None of the existing legal paradigms on targeting is designed for the current security situation. Over the course of the conference, several people have talked about the difficulty of trying to define strictly a line between peace and war, or between combatants and civilians. For example, the U.S. government claims that it is targeting only combatants and has very few civilian casualties in Pakistan; Pakistanis believe that the number of civilian casualties is high. The discrepancy results from the fact that the categories of combatant and civilian are not fixed and are poorly adapted for this kind of conflict. The question then becomes: how should we work by analogy. I resist the general trend of selecting a category that was designed for an entirely different kind of conflict and then assuming that the category requires in this new context exactly what it would require in the original context. For example, most say that Yemen is not really a hot battlefield and not really like Ohio. Still, most assume that we need to adopt for Yemen either the wartime or the law enforcement paradigm, and then apply whatever law would govern in that paradigm. In my view, working by analogy instead requires looking at all of the existing but imperfect paradigms, distilling their underlying policy objectives, and then thinking about how to satisfy those objectives in this new context.

BLANK: I'm going to go in, I guess, the opposite direction from that. I don't think the law here creates quite as much uncertainty as the application of the law creates uncertainty. That might be parsing words. But I think there's a great role here to go back to the underlying principles that inform the law. This helps link up the morality question. I would be resistant a little bit at much farther down the chain to impose a greater linkage between law and morality later on in the decision-making process because I think that can introduce a lack of clarity for the one who has to make the decision. There's no doubt that morality has to play a role, but I think to interject it into the law too much can make it complicated. But if we think back to the basic principles underlying, let's take the law of war in this situation. Obviously there are other legal paradigms. They have other principles, but they offer a lot of guidance no matter what the murkiness or the complexity of the situation. Distinction, you can target; you have to distinguish between those you can target and those you can't. You still have to figure out who you're fighting against, who you're not fighting against, but nonetheless you have this basic idea that first you must make that determination. You cannot find that everybody out there is an enemy. And then you have to figure out a way to do that. That helps provide a guide that obviously comes from a moral foundation that you're not lumping everybody together, that you're distinguishing between people. I think all of these principles can help form a guide when there are what may be identified as

gaps in the law or complexities that are hard to figure out. I think there are situations in which that would be the source of reasonableness as a decision-making tool. How are you coming across reasonableness? Well I'm thinking about the object and purpose of the law, of what guides me. I'm not exactly sure how it plays out, but I'm going to follow its basic dictates. And I know that's how I have to do it here, so I'm going to try to do it here on the other side. And that's the best way I can be reasonable, and I think that offers some guidance in the complexity.

FINKELSTEIN: I guess I'll take this opportunity to respond to what I see as a theme that crops up periodically whenever philosophers are involved in this kind of discussion. And not just in this group, but everywhere in national security discussions that take place at a theoretical level. It's a refrain that goes something like this: Look, this is real life, right? Don't bother us with all this highfalutin theory because you know it when you see it. You can't analyze these decisions in terms of general principles. You try to, but in the end they're not going to help you all that much when confronted with actual cases, and moreover the theoretical cases that you debate are so purified of real life factors that they're not worth thinking about. While I understand that reaction, as a lifetime trained philosopher, I feel I have to respond in defense of injecting philosophical thought into these discussions. It is important, however, to understand what role theory is playing here—what it can do for us and what it can't do for us.

I'd like to suggest that there are three different levels of inquiry in these kinds of debates. At the most applied level there are the kinds of questions that you're posing. Here are the facts. What decision do you make? Whether you're aware of it or not, of course, when you're analyzing that kind of case, you're applying what we called "framework reasons" to that case in order to reach a decision. Part of the exercise is to tease out what that framework is, what those framework reasons are, and to think about how we're applying them. At a higher level of generality, however, we have to be able to identify which framework reasons are relevant to our decision, and that's where the higher theory comes in. So the point of the theoretical investigation is to gain clarity around first, the values that are informing the reasons that help us make our decisions, and then identifying the reasons in light of which we make those decisions, all in the service of being able to make that two-minute decision when confronted with limited facts. I'll close by making a plea to understand that no one who does theory in this area is suggesting that the theory substitutes for intuitions about real-life cases, but rather one attempts to put those intuitions into the context of both general reasons and the values that they support—in other words, the values that support those reasons—to arrive at clearer thinking on these matters.

MÉGRET: I think one of the most interesting things to surface from the debates for me is this relationship between law and morality, and it's rather perplexing. I think it's impossible to disassociate the two. The law is always relying on deeply moral notions. However much lawyers like black-letter rules, it still boils down at the end of the day to something like proportionality, and there really isn't such a

thing as a purely legal concept of proportionality. It's always based on preexisting moral ideas. One thing that did strike me is that in some cases morality can require that we do more than the law requires of us, and that's a great thing to distinguish the two in that way. For example, even though we could bomb a camp full of child soldiers under the laws of war, we may certainly be morally required not to do so. In other cases there's a tendency through ethical talk to deformalize the law and dismantle some of the law's prohibitions by talking loosely, reinventing the wheel essentially, despite the fact that there is legal consensus on some of the norms at stake.

Another thing that struck me is that we did not talk much about the importance of international norms. The debates involved are not merely intimate, individual psychological debates; they are not even just national dilemmas. And if one of our worries is that the executive is unclear about its policy and is trying to keep too many options open, then we do have international law to turn to that represents a number of community values that have been agreed to over the course of decades, if not centuries, and have, to a degree, withstood the test of time. Now I'm also aware that these may need to be updated and come with their own limitations, especially in light of the challenge of nonstate actors.

And this is the challenge for warfare in the twenty-first century. Do we give up on war as a paradigm because we don't think that nonstate actors are really interested in engaging in war with us? Or do we try to get them on board? Of course there are terrorist groups that do not want to abide by the laws of war, but there are also a variety of rebel movements in various countries that have shown to be quite interested in an initiative like the Geneva Call, which gets armed, nonstate actors to sign onto humanitarian commitments. The question remains: What do we do with nonstate actors that are really adamant that they don't want to abide by the laws of war—that is, that resist socialization into the normative apparatus of the laws of war? And I think that's one of the hardest questions of all. And really the question there is: Do we respect the laws of war because “willy nilly” we expect in the long run some kind of reciprocity, that we'll get the same treatment back? Certainly, that has been historically the model that the laws of war have tended to move away from, even between States. Or do we consider that we respect the laws of war because they are more deeply constitutive of what we do and our identities as law-abiding citizens, soldiers or nations? In that latter case, we might not target child soldiers who are not directly attacking us, even though the other side would recruit them. We would not target civilians as much as possible, even though the other side surrounds itself with civilians as shields because we think that that would be lowering ourselves to the standards of the enemies of the laws of war. So I think what I get from this is maybe the need to reinvigorate a deontological defense of the laws of war, even when confronted with an enemy that we can't expect to reciprocate.

CORN: Returning to the topic of the symposium, technology and the law of war—I'm all for technology if it increases clarity in the battle space, if it increases the amount of information available to make decisions, if it increases the precision

of kinetic strikes, if it enables you to accomplish your vital national security objective without necessarily having to cause loss of life. But this whole event has highlighted something I think we all know intuitively: the increasing and the rapidly increasing evolution of technology to enable states to achieve these goals is going to change not only the nature of conflict, but also the proclivity of states to engage in it. The perceived limits on when you can go to war have changed radically compared to when I grew up in the army after Vietnam where the assumption was that the idea of going to conflict and using that instrument of power is truly a measure of last resort. I don't think it's viewed that way anymore. Politically, in this country, barriers have been eroded. We have an all-volunteer army, no draft, the rebuttal of the assumption that the American people were adverse to casualties, that they can't stomach the idea of American soldiers being killed in battle, and now we're ten years into a conflict where it barely makes the news anymore and doesn't make the political debates. So this is reality. The best thinkers have to think about the areas of those core principles that have historically served the interests of both warring states, warriors, and innocent victims so well, and also where they are most stressed and where there are gaps. For example, one we exposed today: If a commander is obligated to make a reasonable judgment of who is or who is not a lawful object of attack, how much certainty is required for that judgment to be reasonable? That's a gap in the law. How do we define belligerent when you're dealing with a nonstate enemy? What are valid acceptable criteria we can use to make that judgment? How proximate to the end of the kill chain do you have to be before you qualify as a lawful object of attack? Should the law start contemplating something that I've called the idea of functional order combat? Basically, if you're a belligerent we can kill you and we don't have to capture you, if you're not then we have to try capture you. Are there situations where an obligation exists to exhaust capture options before using deadly force, even for belligerents? And what about the end-state of detention? Should there be a presumption termination date when you've detained a nonstate actor, kind of like declassifying information? After ten years your authority presumptively dissipates and then we impose a higher burden on the State to justify continued detention based upon a fear of future threat? I think these are all gaps in the law, and that's what we need to be thinking about because technology is not going to solve them, and technology is only going to make it more likely that States are going to use force early and often against nonstate threats. So giving the forces who are responsible for executing these missions greater clarity on these gaps is an important function of the people who really care about managing the use of State power in the future.

GUIORA: General Irvine?

IRVINE: I yield the balance of my time to my superior officer.

SOYSTER: You learned a lot when you were in the army. Well after all those great comments, I would like to simply congratulate the University of Utah School

of Law, your efforts, Amos, and your great helpers in the faculty, for having a great seminar today. And I want to thank you too, very sincerely, for including this old soldier in this discussion. I've learned a great deal today. I think it's important that academia is very much involved in these very difficult and troubling decisions that we have to make as a country. And with the brain power in this room, and universities generally, it's very important that you all work with the military to help us as a nation address these issues and come up with the best solution. So I would close by saying for the philosophers here, there was another guy by the name Plato. He's older than even I am, and he said very clearly, "Only the dead have known the end of war."

GUIORA: On that note, before we conclude, I told you eight hours ago that today we brought to the law school an extraordinary panel. I told you that the individuals, the ten of them who participated, represent truly the best of the best in terms of thinking on these incredibly complicated and complex legal and moral dilemmas. I also mentioned that what makes today so fundamentally different from other academic conferences is the active inclusion of two generals. If you reflect back on the course of the day, their contribution, their insight, and the wealth of their experience is a game changer in terms of our understanding of how better to resolve—to begin the process of addressing, if not resolving—a confluence between legal issues and morality in this extraordinarily complicated dilemma. I also told you eight hours ago that this has been a year in the making, and I want to repeat my very warm thanks to Clark. It's been an absolute pleasure working with you. I also very much want to thank my colleagues, Professor McCormack and Professor Anghie, for moderating their panels. And at the end of the day I turn to our roundtable and I cannot thank you enough for your openness, your thoughtfulness, and your insight. On behalf of all of us, thank you very much.