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Representative Sara Jacobs and Senator Dick Durbin Take Aim at the DoD Law of War Manual – and Miss

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JOURNAL ARTICLE

**Representative Sara Jacobs and Senator Dick Durbin Take Aim at
the DoD Law of War Manual – and Miss**

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Abstract:

In a letter recently sent to the Department of Defense General Counsel, two lawmakers – Representative Sara Jacobs and Senator Dick Durbin – present a number of suggested revisions to the DoD Law of War Manual. In Part I, this Article conducts a critical assessment of the substantive suggestions. By adopting an approach that emphasizes maintaining the delicate balance between humanitarian considerations and military necessity, the critical assessment concludes that the suggested revisions to the Manual are inadvisable.

Part II then considers the Jacobs-Durbin letter in the broader context of public discourse and separation of powers. This component of the inquiry determines that the letter represents an unwarranted attempt by legislators with no actual authority or apparent individual expertise to infringe upon commander in chief authority vested in the executive by virtue of Article II of the U.S. Constitution. The Article then concludes by reflecting on the proper means by which legislators interested in engaging with the DoD on matters related to the Law of War Manual should consider connecting with the General Counsel in the future.

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Brian L. Cox*

INTRODUCTION

In a recent letter addressed to Caroline Krass, General Counsel for the Department of Defense (DoD), Representative Sara Jacobs and Senator Dick Durbin suggest a number of revisions¹ to the DoD Law of War Manual.² Although the legislators draw upon an impressive array of scholarly publications to support the suggested revisions to the Manual, the letter misses the mark both in terms of analytical substance and congressional authority. This article assesses the substantive suggestions from the perspective of a former combat arms soldier and officer turned military lawyer turned legal scholar.

Although addressing the substantive proposals presented in the Jacobs-Durbin letter constitutes a constructive contribution to scholarship involving practical application of the law of armed conflict, the issue of issue of “perspective” is as important – and perhaps even more so. This is because scholarly discussions that unfold in the arena of public discourse rarely intersect with conversations that occur among military lawyers and their organizational clients in practice. This phenomenon is detrimental to both communities – of scholars, academics, and advocates engaged in public discourse and of military personnel engaged in making decisions and providing legal advice in practice.

Taking affirmative steps to alleviate this separation in dialogue would benefit both general communities, and this article is written and presented in the forum of public discourse with that goal in mind. As the substantive analysis below in Part I reveals, there is no shortage of scholarly perspectives in the public forum to suggest fundamental revisions to the guidance provided in the DoD Law of War Manual. Because I am a retired military lawyer currently actively engaged in public discourse as a professor and scholar, I approach such suggestions

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¹ Letter from Sara Jacobs, Member Cong. & Richard J. Durbin, U.S. Sen., to Caroline Krass, Dep’t Def. Gen. Couns. (Feb. 14, 2023), https://sarajacobs.house.gov/uploadedfiles/letter_to_dod_on_civilian_casualties_and_law_of_war_manual_final_for_signature.pdf.

² See OFF. GEN. COUNS., DEP’T DEF., LAW OF WAR MANUAL (3d ed. 2016), https://ogc.osd.mil/Portals/99/department_of_defense_law_of_war_manual.pdf [hereinafter DOD LAW OF WAR MANUAL].

from a perspective that does not align with what might seem to be, based on a sampling of sources available, the prevailing view regarding such suggestions.

Indeed, I remain closely connected to personnel – friends and former colleagues – who are actively engaged in *internal* discourse as military practitioners, and my own perspectives continue to be shaped by this dialogue that remains almost completely obscured from public view. Enhanced intermingling of these two broad communities – of military practitioners and of those more actively involved in public discourse – would be beneficial to both in general. However, the general matter of perspective is directly relevant to the present inquiry focused specifically on a critical assessment of the substantive revisions to the Manual developed in the Jacobs-Durbin letter as well.

This is the case because it appears from the tone of the suggestions that the lawmakers who signed the letter have been exposed to and are familiar with only an approach that emphasizes the protection of civilians in military operations – at the expense of a more balanced perspective. An approach that emphasizes humanitarian considerations, potentially at the expense of considerations related to military necessity, is prevalent in public discourse – but this is not the case for discussions that are internal to the military and that are therefore not as prevalent in the forum of public discourse. “Perspective” is a topic, then, to which I return after addressing the substantive suggestions for revising the Manual.

An additional plenary subject implicated by the Jacobs-Durbin letter involves the related topics of constitutional authority, separation of powers, and civilian-military relations. As legislators, Representative Sara Jacobs and Senator Dick Durbin have some degree of Article I constitutional authority – particularly to make rules for the military. However, this authority is in direct competition with Article II executive power as commander in chief of the military in the current context. As the inquiry below indicates, it is reasonable to expect relative experience and expertise to accompany constitutional authority to, in the present context, publish the Manual for the benefit of DoD personnel.

If Representative Jacobs and Senator Durbin exceed the degree of Article I authority vested in them by the constitution at the expense of Article II executive authority, as the inquiry below concludes in the affirmative, the acts of directing the letter to the DoD General Counsel and publishing it publicly have significant implications regarding separation of powers. If the legislators lack the degree of expertise necessary to fully appraise the matters reflected in the letter directed to the General Counsel, as the inquiry below likewise affirmatively asserts, the letter has substantial implications involving civilian control of the military as well. That the letter promotes revisions to the Manual that may not align with the interests of the DoD, while doing so invoking only the illusory *apparent* authority of unqualified and unapprised legislative signatories, the correspondence has direct implications involving the national security of the United States.

The present inquiry engages with each topic addressed above in turn. Part I is centered on the substantive revisions to the Manual suggested in the Jacobs-Durbin article. The proposals are critically evaluated from the perspective of a military practitioner in a section of Part I devoted to each individual suggested revision. Part II then expands beyond the four corners of the letter to consider matters of plenary importance. Section A of Part II begins the plenary observations by exploring the importance of perspective and approach in general. Section B then addresses the related issues of constitutional authority, separation of powers, and civilian-military relations. The inquiry then concludes by making note of the proper forum by which legislators such as Representative Sara Jacobs and Senator Dick Durbin can – and indeed should – offer suggestions

to the DoD General Counsel for revising the Manual in the future. Before addressing plenary matters raised by the Jacobs-Durbin letter, it is useful to evaluate each substantive revision suggested by the lawmakers in turn – as the present inquiry now sets out to achieve.

I. SUBSTANTIVE REVISIONS PROPOSED IN JACOBS-DURBIN LETTER

In the letter addressed to the DoD General Counsel, Representative Sara Jacobs and Senator Dick Durbin present a number of suggestions for substantive revisions to various aspects of the DoD Law of War Manual. Engaging with the role of the letter as a contribution to public discourse involving guidance related to the practical application by DoD personnel of relevant aspects of the law of armed conflict, then, calls for a critical assessment of the recommendations presented therein. This is the focus of Part I, and each substantive suggestion is evaluated by an individual section in turn.

A. *Presumption of Civilian Status*

The initial substantive suggestion presented in the letter begins with the assertion that pursuant to “customary international law, it is well established that when there is doubt as to whether a person is a civilian or a combatant, the person shall be considered a civilian.”³ On this note, the letter criticizes the Manual assertion that “no legal presumption of civilian status exists for persons or objects.”⁴ The sole source cited by the lawmakers to support this criticism is an article written by Ryan Goodman and published on *Just Security* describing the position on presumption reflected in the Manual as a “clear error.”⁵

Although Goodman’s analysis on the issue of presumption is, of course, reasonable and well researched, his is not the only compelling perspective on the topic. A few weeks after Goodman’s article was posted, a three-part series of guest posts written by U.S. Air Force Colonel Col. Ted Richard directly addressing Goodman’s analysis was published on *Lawfire*.⁶ While my own perspective on this issue generally aligns with that of Col. Richard, and of Maj. Gen. (ret.) Charlie Dunlap presented during editorial commentary introducing the guest posts, engaging in a point-by-point analysis of the *Just Security* and *Lawfire* articles is unnecessary for present purposes. What *is* important to emphasize is that the Manual revisions suggested by Rep. Jacobs and Sen. Durbin draw only on one approach to this debate – an approach that, from my perspective as a former military practitioner, tilts the balance between humanitarian protections and military necessity too far in favor of the former.

³ Jacobs & Durbin, *supra* note 1, at 2.

⁴ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.3.2.

⁵ See Ryan Goodman, *Clear Error in the Defense Department’s Law of War Manual: On Presumptions of Civilian Status*, JUST SECURITY (Feb. 9, 2022), <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status>.

⁶ See Charlie Dunlap, Col. Ted Richard “*On the Legal Presumptions of Civilian Status: A Rebuttal In Support of the DoD Manual*” (Part I), LAWFIRE (Mar. 29, 2022), <https://sites.duke.edu/lawfire/2022/03/29/col-ted-richard-on-the-legal-presumptions-of-civilian-status-a-rebuttal-in-support-of-the-dod-manual-part-i>; Charlie Dunlap, Col. Ted Richard “*On the Legal Presumptions of Civilian Status: A Rebuttal In Support of the DoD Manual* (Part II), LAWFIRE (Apr. 1, 2022), <https://sites.duke.edu/lawfire/2022/04/01/col-ted-richard-on-the-legal-presumptions-of-civilian-status-a-rebuttal-in-support-of-the-dod-manual-part-ii>; Charlie Dunlap, Col. Ted Richard “*On the Legal Presumptions of Civilian Status: A Rebuttal In Support of the DoD Manual* (Part III)”, LAWFIRE (Apr. 6, 2022), <https://sites.duke.edu/lawfire/2022/04/06/col-ted-richard-on-the-legal-presumptions-of-civilian-status-a-rebuttal-in-support-of-the-dod-manual-part-iii>.

Presumption of Civilian Status in the Context of the Kabul Drone Strike

For a practical example to illustrate this point, the Jacobs-Durbin letter suggests that target misidentification “has resulted in countless deaths of civilians who were erroneously targeted, such as the deaths of Afghan aid worker Zemari Ahmadi and nine others, including seven children, in a U.S. drone strike in Kabul on August 29, 2021.”⁷ The authors are referring here to an attack that has become referred to generally in public discourse as the “Kabul drone strike.”⁸ From my perspective as a former military practitioner, this incident demonstrates precisely why the Department of Defense should *not* adopt a presumption in favor of civilian status.

While it is undoubtedly true that the Kabul drone strike is a tragedy that resulted from target misidentification, from a practitioner’s perspective the only thing I would change about this attack is the outcome. This is a conclusion I have reached after reviewing all the material I can find that has been made available to the public from official sources as well as relevant sources of commentary in public discourse related to the attack.⁹ Based on the degree of information that has been released to the public to date, there is no question that the strike complied with the distinction and proportionality rules of the law of armed conflict (LOAC).

That is, personnel involved in the attack believed the strike would be directed against a vehicle-borne improvised explosive device (VBIED) and ISIS operatives – thus complying with the distinction rule.¹⁰ No incidental damage was expected from the attack¹¹ – thus the proportionality rule was not violated. As I have explained elsewhere regarding assessment of the proportionality rule, if at least some quantum of military advantage is expected and no incidental damage is anticipated, by definition the former cannot be “excessive in relation to” the latter and, under these circumstances, the attack cannot constitute a violation of the proportionality rule.¹²

⁷ Jacobs & Durbin, *supra* note 1, at 2.

⁸ See, e.g., *U.S. Military Releases Declassified Videos of Deadly Kabul Drone Strike*, NBC NEWS (Jan. 19, 2022), <https://www.nbcnews.com/nightly-news/video/u-s-military-releases-declassified-videos-of-deadly-kabul-drone-strike-131244101689>; *No US Troops to Be Disciplined for Kabul Drone Strike that Killed 10 Civilians*, FRANCE 24 (Dec. 14, 2021), <https://www.france24.com/en/americas/20211214-no-us-troops-to-be-disciplined-for-kabul-drone-strike-that-killed-10-civilians>.

⁹ See Brian L. Cox, *New York Times, Law of War, and Congressional Overreach in U.S. Military Operations*, CORNELL L. FAC. WORKING PAPERS NO. 129 at 36-38 (Oct. 24, 2022), https://scholarship.law.cornell.edu/clsops_papers/129 (evaluating compliance with applicable provisions of LOAC and rules of engagement).

¹⁰ Press Briefing, Gen. Kenneth F. McKenzie Jr., Commander of U.S. Cent. Command & Pentagon Press Sec’y John F. Kirby (Sep. 17, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2780738/general-kenneth-f-mckenzie-jr-commander-of-us-central-command-and-pentagon-pres> (Gen. McKenzie asserting that personnel responsible for the attack were “reasonably certain that this was a legitimate strike on [an] imminent ISIS-K [(Islamic State of Iraq & Syria-Khorasan)] threat with no indication that the strike would result in civilian casualties”).

¹¹ *Id.*

¹² See Brian Cox, *The Attack on the MSF Trauma Center in Kunduz and the Limitations of a Risk-based Approach to War Crimes Characterization (Part I)*, OPINIO JURIS (Mar. 10, 2020), <http://opiniojuris.org/2020/10/03/the-attack-on-the-msf-trauma-center-in-kunduz-and-the-limitations-of-a-risk-based-approach-to-war-crimes-characterization-part-1> (explaining that when “there is a ‘0’ entered on the ‘knowledge of incidental damage’ side of the [proportionality] equation, as long as there is at least some quantum of military advantage *anticipated* to enter on the other side, by definition the proportionality rule is not violated” (emphasis in original)).

This leaves the requirement to take feasible precautions in the attack as the central LOAC rule remaining to consider. While reasonable opinions can certainly vary, I consider actions such as observing the target vehicle for approximately 8 hours before engaging in the attack, deciding to strike the suspected VBIED while it was stationary in order to reduce the risk of unforeseen incidental harm, and delaying the fuse on the Hellfire missile in an attempt to reduce the risk to the civilian population of injury or damage due to blast and fragmentation effects from the strike¹³ to be sufficient to comply with the feasible precautions rule.

Having complied with relevant LOAC rules, a presumption of civilian status may well have ultimately led to a decision not to engage in the attack anyway. While this would be a clearly preferable outcome based only on information that has come to light *after* the attack, there is a reason this is not the standard for assessing LOAC compliance. On this point, the Manual observes with a favorable tone that “courts assessing individual responsibility under the law of war [have] declined to second-guess military decisions with the benefit of hindsight.”¹⁴

We *now* know that the target vehicle was not, in fact, a VBIED and that no ISIS operatives were present at the site. But what if that were *not* the case? Imagine the potentially catastrophic outcome to the evacuation operation and to the civilian population present at Hamid Karzai International Airport if the available intelligence had been accurate and the strike were called off due to a presumption of civilian status – notwithstanding that the proposed attack would otherwise comply with all relevant LOAC rules. Implementing a presumption of civilian status may have averted the tragedy that actually occurred, but a potentially catastrophic attack on U.S. military forces *and* the civilian population could have been permitted to take place if the available intelligence turned out to be correct and the Hellfire strike were called off due to a failure to overcome that presumption.

Presumption and the Difference Between Combatants and Civilians Taking a Direct Part in Hostilities

Aside from the factual scenario selected by the authors to illustrate the purported need for this revision to the Manual, the Jacobs-Durbin letter misrepresents LOAC terminology in a manner that demonstrates confusion regarding the actual standard of international law the authors intend to address. Even if one accepts the customary nature of the presumption of civilian status, the authors claim that the risk of civilian harm “is exacerbated when the U.S. military undertakes strikes without *clear evidence* that the targeted individuals are *combatants*.”¹⁵ This assertion is beset by two fundamental errors, both of which render this suggested revision related to presumption of civilian status inadvisable.

The first error in this quoted passage is that a “clear evidence” standard is inconsistent with a mere *presumption* of civilian status. The former calls for a much more exacting certainty requirement than the latter. Adopting a “clear evidence” standard of proof as a prerequisite before a proposed target could be determined to be a combatant would constitute an unrealistic – and therefore potentially dangerous – constraint on targeting processes in practice.

¹³ Press Briefing, *supra* note 10 (Gen. McKenzie describing these factual circumstances, in particular when recalling a by-the-minute account of the strike and relating events that reportedly occurred at “4:51 P.M.” local time on the day of the attack).

¹⁴ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.3.2 (footnote omitted).

¹⁵ Jacobs & Durbin, *supra* note 1, at 2 (emphasis added).

More fundamentally, though, is the concern regarding targeting “combatants.” Like the factual scenario of the Kabul drone strike cited by the letter, no incidental harm caused by U.S. military operations during the last twenty years or so of armed conflict has resulted from targeting combatants. This is the case because, with the exception of the very early stages of the conflicts in Iraq and Afghanistan, the United States has exclusively targeted civilians rather than combatants – that is, civilians assessed to be taking a direct part in hostilities. As Bill Boothby notes on the subject, “while there is in [the text of Additional Protocol I] a presumption of civilian status, there is at law no presumption that a civilian is not directly participating in hostilities.”¹⁶

On the presumption issue, the Manual suggests that imposing a “legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war.”¹⁷ This passage in turn refers to the paragraph in the Manual addressing the “fog of war.”¹⁸ This observation and cited cross-reference are consistent with the discussion above related to assessing the Kabul drone strike based on the *outcome* of the attack.

A legal presumption of civilian status may well have averted the tragedy that in fact occurred. However, it is equally possible that such a presumption would require a degree of certainty that does not account for the realities of war – to potentially catastrophic effect to the mission and the surrounding civilian population alike. Like any number of topics involving the conduct of hostilities, reasonable perspectives can differ regarding the presumption of civilian status and whether the guidance reflected in the Manual is accurate and advisable.

Nonetheless, the important nuances involved in this debate appear to be lost on Representative Jacobs and Senator Durbin. The commentary in their letter exclusively adopts an approach that aligns with a perspective that prioritizes humanitarian concerns at the expense of considerations related to military necessity without engaging with – or even acknowledging the existence of – references that adopt an alternate approach. This perspective is acceptable for a position paper¹⁹ or law review article²⁰ advocating for policies that align with the vision and mission of special interests such as a non-governmental advocacy group.²¹ However, it is entirely inadequate for a letter written by elected officials directed to the DoD General Counsel for the purpose of suggesting revisions to a publication intended to provide informed analysis for the benefit of military lawyers and decision makers in practice.

With the central issue of presumption of civilian status thus addressed, the present inquiry transitions now to consider the next substantive topic raised by Representative Jacobs and Senator Durbin – involving the issue of civilians taking a direct part in hostilities. Like the advocacy related to the topic of presumption presented in the letter, commentary supporting

¹⁶ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 149 (2012).

¹⁷ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.3.2.

¹⁸ *See id.* ¶ 1.4.2.2.

¹⁹ *See, e.g., Civil Society Guidance for the Civilian Harm Mitigation and Response Action Plan (CHMRAP), NGO Recommendations* (July 2020), <https://www.interaction.org/wp-content/uploads/2022/07/chmrp-recs-final-pdf.pdf>.

²⁰ *See, e.g., John Ramming Chappell, Towards Accountability: U.S. Investigations of Civilian Harm under International Law*, 29 UNIV. CAL., DAVIS J. INT’L L. & POL. 51, 75 (2022) (asserting that the Manual “does not acknowledge the international legal obligation of armed forces to presume the civilian status of targets when their status is unsure, which could result in violations of international law and contribute to targeting decisions that could constitute war crimes”).

²¹ *See, e.g., CIVIC, About Us*, <https://civiliansinconflict.org/about-us> (last visited Mar. 13, 2023) (describing the “vision & mission” of CIVIC and noting that the organization “envisions a world in which no civilian is harmed in conflict” and that the group believes “[a]rmed actors are responsible and must be held accountable for preventing and addressing civilian harm”).

other recommended revisions to the Manual, including on the topic of direct participation, draws on a narrow collection of sources for support and adopts an approach that tends to emphasize civilian protections at the expense of other considerations. This recurring deficiency renders suggested revisions related to presumption of civilian status, civilians taking a direct part in hostilities, and the subsequent suggestions inadvisable in practice.

B. Direct Participation in Hostilities

The issue of authoritatively determining the precise conditions whereby a civilian is considered to be taking a direct part in hostilities such that the civilian can be made the deliberate object of attack is the subject of a long-running debate for which consensus has remained stubbornly elusive. This section of the Jacobs-Durbin letter rather implausibly relies upon and cites exclusively²² to a frequently asked questions page²³ published by the International Committee of the Red Cross (ICRC) as the controlling authority that ostensibly establishes what conduct “does not constitute direct participation in hostilities and therefore does not lead to a loss of protection against direct attack” pursuant to international law. The cited FAQ page, in turn, summarizes and explains the ICRC position on the issue of civilians who take a direct part in hostilities (DPH) that is reflected in the Interpretive Guidance study also published in 2009 by the ICRC.²⁴

According to the FAQ page, although “the Interpretive Guidance is not legally binding, the ICRC hopes that it will be persuasive to States, non-State actors, practitioners and academics alike and that, ultimately, it will help better protect the civilian population from the dangers of warfare.”²⁵ Despite this admirable ambition, the Manual observes that the United States “has not accepted” characterizations and conclusions presented in the Interpretive Guidance.²⁶ Additionally, the methodology and central assertions reflected in the Interpretive Guidance has been criticized – often harshly – by a number of scholars and practitioners who participated in the consultative process that eventually led to its publication.²⁷

With this background in focus, the suggestion by Representative Jacobs and Senator Durbin for the DoD to “ensure the Manual definitions align with IHL [(international humanitarian law)] and prior expressions of U.S. government positions on the law”²⁸ is particularly inscrutable. There is *no* controlling definition for DPH established in international law for which the DoD to “align” its own interpretation. Illustrative examples of what conduct

²² Jacobs & Durbin, *supra* note 1, at 3.

²³ See *Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. RED CROSS (Feb. 6, 2009), <https://www.icrc.org/en/doc/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

²⁴ See NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (May 2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.

²⁵ *Direct Participation Q & A*, *supra* note 23.

²⁶ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 4.26.3 (noting that “the United States has not accepted the ICRC’s study on customary international humanitarian law nor its ‘interpretive guidance’ on direct participation in hostilities”).

²⁷ See, e.g., Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010); Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation In Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010); William Boothby, *Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance*, 1 J. INT’L HUM. L. STUD. 143 (2010).

²⁸ Jacobs & Durbin, *supra* note 1, at 3.

does and does not qualify as DPH according to the DoD interpretation that are reflected in the Manual²⁹ have been developed in light of, at the time of the latest edition to be published, nearly 15 years of institutional experience in counterinsurgency operations. With the benefit of previous and ongoing institutional experience, guidance on the subject of DPH, like many other topics, articulated in the Manual represents current understandings more accurately than “prior expressions of U.S. government positions on the law”³⁰ – not the other way around.

Even so, there is no indication from the commentary presented in the letter or the references cited therein that Representative Jacobs and Senator Durbin are familiar with the complexities of the debate regarding what conduct “does not constitute direct participation in hostilities and therefore does not lead to a loss of protection against direct attack.”³¹ Developing sufficient familiarity with the complexity of this debate would seem to be a prerequisite for an elected official requesting the General Counsel of the DoD to engage in a review of the Manual to “clarify what constitutes direct participation in hostilities.”³² As such, this substantive suggestion presented in the Jacobs-Durbin letter, for much the same reason as the suggestion related to presumption of civilian status considered above, is inadvisable.

C. Civilians’ Assumption of Risk Near Military Objectives

This section expresses concern that guidance in the Manual “currently risks leaving the false impression that civilians in or near military objectives can be heavily discounted or counted less than other civilians in pre-strike collateral damage estimates and post-strike investigations.”³³ For support, the letter cites to an article on *Just Security* written by Ryan Goodman and Gordon Dunbar.³⁴ The article by Ryan and Gordon, in turn, builds upon an earlier *Just Security* article on the topic written by Oona Hathaway, Marty Lederman, and Michael Schmitt.³⁵

The crux of the concern regarding assumption of risk involves a footnote containing illustrative examples of previous commentary the Manual presents in support of the proposition that civilians sometimes “work in or on military objectives in order to support military operations” and that these civilians may “assume a certain risk of injury.”³⁶ Concerns expressed by the relevant commentary on *Just Security* regarding some of the observations reflected in the relevant footnote are reasonable and certainly warranted. However, the *actual* guidance presented in the Manual on the topic of assumption of risk should allay these concerns.

As the Manual goes on to note in the next sentence of the main text after the relevant footnote (412) is presented, “Provided such workers are not taking a direct part in hostilities,

²⁹ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.8 (“Civilians Taking a Direct Part in Hostilities” section), ¶ 5.8.3.1 (“Examples of Taking a Direct Part in Hostilities”), ¶ 5.8.3.2 (“Examples of Acts Not Considered Taking a Direct Part in Hostilities”).

³⁰ Jacobs & Durbin, *supra* note 1, at 3.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 3.

³⁴ See Ryan Goodman & Gordon Dunbar, *Defense Dept Law of War Manual and Its Unintended Readings: On Civilians Assuming Risk of Harm*, JUST SECURITY (May 13, 2022), <https://www.justsecurity.org/81476/defense-dept-law-of-war-manual-and-its-unintended-readings-on-civilians-assuming-risk-of-harm>.

³⁵ See Oona A. Hathaway, Marty Lederman, and Michael Schmitt, Two lingering concerns about the forthcoming Law of War Manual amendments, JUST SECURITY (Nov. 30, 2016), <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments>.

³⁶ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.12.3.3.

those determining whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them.”³⁷ This subsequent sentence represents a correct articulation and application of the LOAC proportionality rule and the requirement to take feasible precautions in the attack, respectively. Even if civilians who work on or near military objectives assume a certain degree of risk, which is factually accurate, doing so does not influence a legal analysis regarding an attack that is expected to affect such civilians.

Notwithstanding reasonable concern regarding potentially misleading commentary presented in the relevant footnote and the related concern involving a hypothetical prospect of unintended readings, then, the full guidance provided in the Manual represents a correct – and rather unambiguous – statement of applicable international law. The suggestion in the Jacobs-Durbin letter for the DoD to “revise the Manual to clearly communicate that all civilians must be protected, as required under IHL, regardless of their location”³⁸ is, therefore, misdirected. Because relevant commentary in the Manual already does so, no such revision is warranted.

D. Treatment of Precautions

The primary concern expressed in this section is a matter of semantics. The Manual expresses the requirement to take “feasible precautions in the attack,”³⁹ while the relevant widely-cited provision of Additional Protocol I (AP I) describes a requirement to take “*all* feasible precautions.”⁴⁰ The omission in the Manual of the word “all” before “feasible precautions” inspires this section of the Jacobs-Durbin letter.⁴¹

Before addressing the semantic concern, it is worth emphasizing that the text of AP I is not binding on the U.S. military since the United States has not ratified the treaty. The treaty text is absolutely a useful *starting* point for discussion of what aspects of the law of armed conflict reflected therein are customary and, therefore, binding even on countries that have not ratified AP I. To support the assertion that the requirement to take “all” feasible precautions, as reflected in the text of AP I, is a customary requirement, one would have to demonstrate that the provision reflects extensive and virtually uniform state practice that is conducted out a sense of legal obligation.

On this note, the letter cites a wide collection of sources seeming to suggest that the United States *has* fairly consistently recognized the obligation to take *all* feasible precautions.⁴² If this is accurate, perhaps a case can be made that the United States has long recognized this particular aspect of AP I to reflect customary international law. Assuming this to be the case at least for the sake of argument, however, it is not entirely clear that omission of “all” reflected in the Manual actually is inconsistent with the arguably existing customary obligation.

³⁷ *Id.*

³⁸ Jacobs & Durbin, *supra* note 1, at 4.

³⁹ See DOD LAW OF WAR MANUAL, *supra* note 2, ¶¶ 5.2.3–5.2.3.2.

⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 57(2)(a)(ii), June 8, 1977, 1125 U.N.T.S. 3 (emphasis added) (requiring those who plan or decide upon an attack to take “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”) [hereinafter AP I].

⁴¹ See Jacobs & Durbin, *supra* note 1, at 4.

⁴² See *id.* at n.16.

Feasible precautions are, by definition, those determined to be reasonable or practicable under the circumstances.⁴³ If a military decision maker assesses a precaution to be feasible and nonetheless declines to implement it, doing so seems to violate *both* the “feasible precautions” *and* the “all feasible precautions” standard. If this is indeed the case, the omission in the Manual is not necessarily inconsistent with the arguably customary standard reflected in AP I.

If the articulated legal standards are consistent, the remaining concern actually does come down to semantics alone. Based on my previous experience as a military lawyer, I have found the articulation of “all” feasible precautions to encourage an unwarranted and impermissible degree of second guessing in the aftermath of an attack. The articulated post-strike assessment is usually expressed along the lines of: “Sure, the ground force commander implemented *these* feasible precautions – but not *all* feasible precautions. For example, they could have done _____.” (fill in the blank) This perspective invites a reviewer to substitute individual judgement with the benefit of hindsight to evaluate targeting operations rather than assessing what was determined by those responsible for an attack to be feasible at the time.

As the DoD Law of War Manual notes on this topic, “The requirement that military commanders and other decision-makers make decisions in good faith based on the information available to them recognizes that decisions may be made when information is imperfect or lacking, which will often be the case during armed conflict.”⁴⁴ As such, according to the Manual, “In assessing whether the obligation to take feasible precautions has been satisfied after the fact, it will be important to assess the situation that the commander confronted at the time of the decision and not to rely on hindsight.”⁴⁵ Perhaps omission of “all” feasible precautions in the Manual reflects the process of institutional learning that, in this case, favors a semantic preference for reasons that are similar to my own individual experience.

Concern expressed by Representative Jacobs and Senator Durbin that the current guidance suggests “IHL permits a commander to take just one precaution even when additional precautions would be feasible under the circumstances,”⁴⁶ then, seems rather far-fetched. In any event, this concern is certainly offered without citing any external reference to support the assertion that the “incorrect” interpretation is widely utilized in practice. The requirement to take “feasible precautions” is arguably consistent with the obligation to take “all feasible precautions,” though, as a matter of semantics, the former may well be preferable.

E. Use of Human Shields

This is a concern that is largely theoretical rather than practical, as the first of the “troubling ambiguities”⁴⁷ expressed in this section of the letter suggests. That is, the authors indicate that “it is unclear how the DoD determines whether a human shield is voluntary or involuntary.”⁴⁸ Specific intelligence gathering processes the DoD can utilize to support that determination are sensitive and, therefore, should not be disclosed to the public.

⁴³ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.3.2 (noting that feasible precautions in the attack “are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations” (footnote omitted)).

⁴⁴ *Id.* ¶ 5.3.2.

⁴⁵ *Id.* ¶ 5.2.3.2.

⁴⁶ Jacobs & Durbin, *supra* note 1, at 4.

⁴⁷ *Id.*

⁴⁸ *Id.* at 5.

However, the point is well taken that intelligence personnel, targeteers, and military decision makers very often will *not* be able to determine whether a human shield is acting voluntarily or involuntarily. This is a factor that renders this concern more theoretical than practical. As a practical matter, a person would be assessed and treated as an involuntary human shield unless available intelligence suggests otherwise. If a person *is* determined to be a voluntary human shield, an assessment that the person is taking a direct part in hostilities is rather uncontroversial.

The assertion in the Jacobs-Durbin letter that one of the “troubling ambiguities” is that the Manual “does not provide guidance on how to make such a determination” regarding voluntary human shields⁴⁹ is particularly puzzling given that the second substantive section of the letter addresses the issue of DPH. It seems reasonable to expect a reader who is unsure of the guidance regarding how to determine whether a voluntary human shield qualifies as a civilian taking a direct part in hostilities to simply refer to the provisions of the Manual that address DPH.⁵⁰ Indeed, there is no question that Representative Jacobs and Senator Durbin are aware of the existence of the DPH component since their letter raises concern regarding that topic in an earlier section.⁵¹

F. Prohibition on Indiscriminate Attacks

Like the issue of “all” feasible precautions, this concern is primarily a matter of semantics. The apparent controversy is based⁵² on a *Just Security* article written by Brian Finucane making note of “the manual’s silence regarding the prohibition on attacks not directed at specific military objectives.”⁵³ According to Brian, this silence “is perplexing and risks muddling the signals that the U.S. government sends about the imperative of protecting civilians in armed conflict.”⁵⁴

However, a focus on the semantics involved demonstrates that the Manual is not actually “silent” on this topic at all. In his article, Finucane correctly points out that the Manual explicitly addresses two of three provisions the text of AP I describes as indiscriminate attacks: namely, “those [attacks] which employ a method or means of combat which cannot be directed at a specific military objective” and “those which employ a method or means of combat the effects of which cannot be limited as required by” the treaty.⁵⁵ Nonetheless, the apparent “silence” Finucane points out involves the first of three provisions in this section, which also describes as indiscriminate “those which are not directed at a specific military objective.”⁵⁶

While the first two provisions quoted above – (b) and (c) of the relevant article of AP I – involve *only* conduct whereby munitions are directed to an identified target, the last – (a) of the relevant article – involves a combination of target *identification* and target *engagement*. As an attacker, if I fail to direct my attack against a specific military objective, then I am knowingly

⁴⁹ *Id.*

⁵⁰ See DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.8.

⁵¹ See Jacobs & Durbin, *supra* note 1, at 3.

⁵² *Id.* at 5.

⁵³ Brian Finucane, *The Prohibition on Indiscriminate Attacks: The US Position vs. the DoD Law of War Manual*, JUST SECURITY (May 3, 2022), <https://www.justsecurity.org/81351/the-prohibition-on-indiscriminate-attacks-the-us-position-vs-the-dod-law-of-war-manual>.

⁵⁴ *Id.*

⁵⁵ AP I, *supra* note 40, art. 51(4)(b) & (c).

⁵⁶ *Id.*, art. 51(4)(a).

attacking a civilian object. Although this is characterized as an indiscriminate attack by the text of AP I, targeting a civilian object can equally be described as a violation of what has become referred to as the LOAC distinction rule.

Lack of clarity and uniformity involving semantic preferences plagues the theory and practice of the law involving armed conflict, both in U.S. military practice and in scholarship related to the subject more generally. As but one prominent example, the term “proportionality” is not utilized in the text of AP I, yet the “excessive in relation to” standard reflected therein⁵⁷ has become widely referred to as the LOAC “proportionality rule.”⁵⁸ This use of proportionality joins several others that utilize the same name for other meanings, such as a proportionate use of force in self-defense⁵⁹ and in a more generalized economy of force connotation.⁶⁰

Concern related to the apparent “silence” of the Manual involving the first aspect of discrimination conveyed in the relevant provision of AP I is yet another example of confusion caused by ambiguous language. Indeed, the confusion is at least partially revealed and addressed by one of the official sources Finucane cites in his *Just Security* article. Just before the conclusion, Finucane cites⁶¹ a passage from the 2022 Commanders Handbook on the Law of Naval Operations observing that the “principle of *distinction*, combined with the principle of military necessity, prohibits *indiscriminate* attacks.”⁶²

The distinction rule addresses target identification, while the text of AP I merges this rule with two other types of conduct involving target *engagement* in the description of indiscriminate attacks. This ambiguity in terminology is likewise reflected in Section 5.5 of the Manual, entitled “*Discrimination* in Conducting Attacks.”⁶³ This section begins by observing, “Under the principle of *distinction*, combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack.”⁶⁴

It is not actually the case, as the Jacobs-Durbin letter suggests, that the Manual “is silent on the legality of indiscriminate attacks with weapons that could be used in a discriminate manner.”⁶⁵ Instead, the concern involving discrimination raised in the *Just Security* article by Brian Finucane is strictly a matter of semantics. Indeed, the particular component of the LOAC

⁵⁷ *Id.*, art. 51(5)(b).

⁵⁸ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.12 (making note of the obligation to “refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained” in a section with the title, “Proportionality – Prohibition on Attacks Expected to Cause Excessive Incidental Harm”) (footnote omitted).

⁵⁹ *See, e.g.*, Chairman of the Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces (June 13, 2005) [hereinafter CJCSI 3121.01B], Enclosure A, Standing Rules for the Use of Force ¶ 4(a)(3) (describing the “proportionality” rule in the context of “principles of self-defense), *reprinted in* OPERATIONAL LAW HANDBOOK, NAT’L SEC. L. DEP’T., JUDGE ADVOC. GEN. LEGAL CTR. & SCH. 116-130 (2022), <https://tjaglcs.army.mil/documents/35956/56931/2022+Operational+Law+Handbook.pdf/4e10836e-2399-eb81-768f-7de8f6e03dc5?t=1652119179075>.

⁶⁰ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.12.3.1 (noting that the “principle of proportionality has been viewed as a legal restatement of the military concept of economy of force”) (footnote omitted).

⁶¹ Finucane, *supra* note 53.

⁶² THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, DEP’T NAVY, ET AL. ¶ 5.3.4 (Mar. 2022), https://usnwc.libguides.com/ld.php?content_id=66281931 (emphasis added).

⁶³ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.5 (emphasis added).

⁶⁴ *Id.* (emphasis added) (quoted sentence presenting a footnote directing the reader to ¶ 5.6 (Military Objectives)).

⁶⁵ Jacobs & Durbin, *supra* note 1, at 5.

discrimination rule about which Finucane raises concern is already robustly addressed in a section of the Manual that uses the term “discrimination” in the heading but actually engages with the “distinction” rule.

An attack that is not directed at an *identified* military objective would violate the LOAC distinction rule, as the Manual already indicates, while the exact same conduct of *engaging* the target would also violate the first component of the discrimination rule articulated in the relevant provision of AP I. This concern expressed – it would seem exclusively – by Brian Finucane that is subsequently presented by Representative Jacobs and Senator Durbin as the basis for a suggested revision to the Manual misses the mark. Confusing semantics notwithstanding, guidance reflected in the Manual *already* comprehensively addresses the nature of the concern, but it does so while using different terminology.

G. Application of International Human Rights Law

This section of the Jacobs-Durbin letter asserts, without citing any reference for support, that the “DoD and U.S. government have long taken the position that *customary* international human rights law does apply extraterritorially.”⁶⁶ The claim regarding extraterritoriality precedes the suggestion for the DoD to clarify “the applicability of customary international human rights law” because doing so “would help correct misunderstandings of the human rights obligations of U.S. personnel overseas.”⁶⁷ There are a number of limitations involved in this suggested clarification.

Conceptual and Historical Considerations Relevant to the Extraterritorial Application of Human Rights Law

First, the letter makes no mention of exactly which “misunderstandings” the recommendation is intended to “correct.” Absent sufficient details regarding existing “misunderstandings,” it is difficult to substantiate the need for the DoD to implement this recommendation. This deficiency alone casts doubt on the advisability of adopting the suggested revision.

Second, the universe of truly *customary* human rights obligations is likely much smaller than many observers – including potentially Representative Jacobs and Senator Durbin – realize. Despite the apparent “universality” of the Universal Declaration of Human Rights, as a declaration the UDHR does not constitute customary international *law*. The twin foundational international human rights *treaties* – the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social, and Cultural Rights (ICESCR) – have been ratified by 113 and 111 states, respectively.⁶⁸ While this is a significant number of ratifications/accessions for each, the significant divergence in the listing of States party for both treaties – for example, the United States has not ratified the ICESCR and China has not ratified the ICCPR – casts doubt on whether *either* of these treaties truly represent *customary*

⁶⁶ *Id.* (emphasis in original).

⁶⁷ *Id.*

⁶⁸ For a current listing of States that have ratified or acceded to the ICCPR, see 999 U.N.T.S. 171, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND; for the ICESCR, see 993 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en.

international law. The same can be said for other widely – but not universally – ratified human rights law treaties as well.

Third, on the issue of extraterritorial application of the ICCPR – the foundational human rights treaty the United States *has* ratified – the Manual correctly notes that the U.S. government “has long interpreted the [Convention] not to apply abroad.”⁶⁹ The main text and the sources cited in this section of the Manual provide valuable additional historical context and interpretive guidance on the matter. Indeed, relevant material currently reflected in the Manual contradicts the unsubstantiated claim by Representative Jacobs and Senator Durbin that the “DoD and U.S. government have long taken the position that *customary* international human rights law does apply extraterritorially.”⁷⁰

Fourth, the issue of extraterritorial application of human rights law – especially in the context of armed conflict – engages a long-running and unequivocally unsettled debate regarding the connections between the law of armed conflict and international human rights law. To be sure, the current U.S. position, reflected in the Manual – that “the law of war, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims”⁷¹ – could use some clarification. Even so, the claim in the Jacobs-Durbin letter that the U.S. government has “long taken the position that *customary* international human rights law does apply extraterritorially”⁷² represents a gross oversimplification – and potentially outright misleading – characterization of an incredibly complex issue for which there is currently no widely-accepted resolution.

Standing Rules of Engagement, Standing Rules for the Use of Force, and the Extraterritorial Application of Human Rights Law

Finally, in practice there actually is no “misunderstanding” regarding extraterritorial application of human rights obligations for the Manual to “correct.” To the contrary, current DoD doctrine that exists beyond the Manual already does a decidedly remarkable job of clarifying this complex issue in the applied context. This clarity is achieved in the Chairman of the Joint Chiefs of Staff (CJCSI) 3121.01B doctrinal publication, known as the “Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces.” Enumerated Enclosures included with this publication provide more detailed guidance regarding the use of force in each context, but the applicability provisions presented in the introductory portion of CJCSI 3121.01B are sufficient for present purposes.

According to the introduction, the Standing Rules of Engagement (SROE) portion of the publication establishes “fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside U.S. territory...and outside U.S. territorial seas.”⁷³ This provision goes on to clarify that routine military functions “exclude law enforcement and security duties on DoD installations, and off installation while conducting official DoD security functions, *outside* U.S. territory and territorial seas.”⁷⁴

⁶⁹ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 1.6.3.3.

⁷⁰ Jacobs & Durbin, *supra* note 1, at 5 (emphasis in original).

⁷¹ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 1.3.2 (footnote omitted).

⁷² Jacobs & Durbin, *supra* note 1, at 5 (emphasis in original).

⁷³ CJCSI 3121.01B, *supra* note 59, ¶ 3(a).

⁷⁴ *Id.* (emphasis added).

In contrast, the Standing Rules for the Use of Force (SRUF) “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces” during routine military functions “occurring within U.S. territory or U.S. territorial seas.”⁷⁵ Additionally, the SRUF applies, among other contexts, “while conducting official DoD *security functions*, within *or outside* U.S. territory, unless otherwise directed by” the Secretary of Defense.⁷⁶

Although the SRUF does not characterize guidance related to the use of force presented therein in terms of human rights law, the relevant direction can correctly be described as pertaining to “DoD personnel performing law enforcement functions.”⁷⁷ These functions, of course, align with human rights law rather than the law of armed conflict – the latter of which corresponds instead with the SROE. Combined with the applicability provisions of the SRUF, which establish that these rules apply within *or outside* U.S. territory in the contexts articulated in the SRUF, CJCSI 3121.01B provides sufficient operational guidance regarding when U.S. forces should apply human rights law – namely, when engaged in law enforcement or similar functions, both within or outside the United States.

It is certainly the case that the *lex specialis* rule reflected in the Manual could use enhanced doctrinal and conceptual clarification. However, this does not mean, as Representative Jacobs and Senator Durbin suggest, that the Manual must be revised to “help correct misunderstandings of the human rights obligations of U.S. personnel overseas.”⁷⁸ CJCSI 3121.01B leaves little room for misunderstanding, and additional amplifying guidance provided to troops through the chain of command on an operational basis will adequately clarify any remaining ambiguity.

H. Use of Sources

From the point of view of a long-time military law practitioner, this controversy has been perplexing to me since it was apparently first raised in separate *Just Security* articles written by Marty Lederman⁷⁹ and Ryan Goodman.⁸⁰ These two articles from December 2016 are cited as examples of the controversy in the Jacobs-Durbin letter.⁸¹ Though not cited directly as a source in the letter, Goodman renews the controversy in an article co-written with Gordon Dunbar published on *Just Security* in May 2022.⁸²

⁷⁵ *Id.* ¶ 3(b).

⁷⁶ *Id.* (emphasis added).

⁷⁷ OPERATIONAL LAW HANDBOOK, *supra* note 59, at 107.

⁷⁸ Jacobs & Durbin, *supra* note 1, at 5.

⁷⁹ See Marty Lederman, Thoughts on Distinction and Proportionality in the December 2016 Revision to the Law of War Manual, JUST SECURITY (Dec. 19, 2016), <https://www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual>.

⁸⁰ See Ryan Goodman, *How to Read the Department of Defense’s Revised Law of War Manual*, JUST SECURITY (Dec. 22, 2016), <https://www.justsecurity.org/35786/read-department-defenses-revised-law-war-manual>.

⁸¹ See Jacobs & Durbin, *supra* note 1, at 5 n.24.

⁸² See Ryan Goodman & Gordon Dunbar, *Defense Dept Law of War Manual and Its Unintended Readings: On Civilians Assuming Risk of Harm*, JUST SECURITY (May 13, 2022), <https://www.justsecurity.org/81476/defense-dept-law-of-war-manual-and-its-unintended-readings-on-civilians-assuming-risk-of-harm>.

1. Use of Sources in the Context of Assumption of Risk by Civilians

Controversy involving the use of sources appears to begin with the passage in the Manual noting that, throughout the publication, it “cites sources in the footnotes to support or elaborate upon propositions in the main text.”⁸³ Furthermore, according to this guidance, “sources are cited in the footnotes to help practitioners research particular topics discussed in the main text.”⁸⁴ In explaining the “selection of sources,” the Manual goes on to note that “sources cited in the footnotes have been chosen for a *variety of reasons*,” including to provide “a particularly helpful explanation or illustration,” or “to illustrate U.S. practice or legal interpretation.”⁸⁵

However, as the text in this paragraph of the Manual notes, “Citation to a particular source should not be interpreted to mean that the cited source represents an official DoD position, or to be an endorsement of the source in its entirety.”⁸⁶ As an example, the Manual observes, “parts of a source, such as an opinion by the International Court of Justice or a commentary published by the International Committee of the Red Cross, may reflect the DoD legal interpretation, while other parts of the source may not.”⁸⁷ This paragraph then addresses related topics in separate sections, including: Use of Older Sources, Quotes Provided From Sources, Citation of Policies and Regulations, and so on.

While addressing some purported limitations with the Manual, Lederman’s 2016 article asserts that the concerns he raises “are illustrative of a broader problem with the footnotes” reflected in the publication.⁸⁸ On this point, Lederman notes, “Far too often, I think, the *Manual*’s footnotes at least *appear* to cite isolated historical actions of the U.S. government, or statements of U.S. officials, in order to suggest that because the U.S. has done or blessed something in the past, *ergo* it must not be a violation of the law of war.”⁸⁹ In the *Just Security* article published a few days after Marty’s in 2016, Goodman seizes on this footnote controversy while engaging with the substantive topic of “civilians’ assumption of risk” addressed above. As Goodman points out, a footnote accompanying the relevant discussion in the main text of the Manual, “(#412 to be exact) contains sources which suggest that civilians who choose to assume such risks may not be weighed as heavily in a proportionality analysis.”⁹⁰

When the issue is revisited several years later in 2022, also in relation to the substantive topic of assumption of risk, Goodman and Dunbar express concern that the Manual may provide the wrong impression to readers by citing to sources that do not reflect the actual DoD position on the topic. According to the authors, this misinterpretation can occur due, “in part, to the way many lawyers would ordinarily read the footnotes in interpreting the Department’s position on the law — as sources that support and further explain the legal propositions set out in the Manual’s text.”⁹¹ As Goodman and Dunbar note, DoD officials have “verbally disavowed this use of the footnotes upon issuing the revised version in 2016, but many of the Manual’s primary consumers are most likely, through no fault of their own, completely unaware of that fact.”⁹²

⁸³ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 1.2.2.

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 1.2.2.1 (emphasis added).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Lederman, *supra* note 79.

⁸⁹ *Id.* (emphasis in original).

⁹⁰ Goodman, *supra* note 80.

⁹¹ Goodman & Dunbar, *supra* note 82.

⁹² *Id.*

2. Primary Consumers and Capacity to Discern Context of Sources and Commentary

The last portion of this observation captures the essence of the apparent controversy, and it also illustrates why I find the controversy to be so perplexing. I have long been a “primary consumer” of the guidance reflected in the Manual. While I was in the military, my colleagues were primary consumers as well. Although I retired from military service in 2018, I have maintained contact with a significant proportion of my friends and former colleagues. Indeed, as a former military practitioner and current legal scholar who focuses on matters related to national security law and international law involving armed conflict, my network of contacts within the military continues to expand even now, several years after retiring.

In all this time as a primary consumer of the Manual, and in all the interactions – both while in the military and since retiring in 2018 – with other primary consumers, not once have I encountered confusion regarding the use of sources presented in the Manual. Providing the guidance now reflected in paragraph 1.2.2, “Use of Sources in This Manual,” is certainly a welcome addition in the most recent revision (December 2016). However, if a discerning reader engages in a contextual interpretation of the main text and accompanying footnotes throughout the publication, as all “primary consumers” of the Manual with whom I am familiar do, the actual use of the sources is adequately perceptible even without this clarifying guidance. To illustrate this point, I will draw on examples of footnotes that are addressed in two separate substantive sections above.

On the topic of assumption of risk by civilians, Ryan Goodman and Gordon Dunbar are correct to point out that, in the absence of any clarifying guidance, some previous assertions by U.S. government sources that are presented as sources in footnote 412 could be problematic in the absence of clarifying guidance.⁹³ The first such example suggests “civilians working within or in the immediate vicinity of a legitimate military objective assume a certain risk of injury.”⁹⁴ The remaining sources presented in footnote 412 make similar assertions. While it may well be true that civilians assume a certain degree of risk under these circumstances, this has no bearing on, say, a proportionality assessment.

Although Goodman and Dunbar summarize and cite to the views of several authors who have expressed concern regarding the potential effect the sources cited in footnote 412 could have on a proportionality analysis, the main text should adequately alleviate that concern among primary consumers of the Manual and “external” (to the DoD) readers alike. As I note while engaging with the substantive assumption of risk topic above, the sentence that follows footnote 412 in the main text confirms, “Provided such workers are not taking a direct part in hostilities, those determining whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them.”⁹⁵

This is a correct statement of relevant provisions of international law. The assumption of risk dicta and accompanying footnotes provide useful context. However, the main text then confirms that the act of assuming that risk does not affect application of the LOAC proportionality and feasible precautions in the attack rules.

Transitioning to a separate substantive topic addressed above, the Manual provides citations for a noticeably different purpose in footnotes accompanying the main text that engages

⁹³ *See id.*

⁹⁴ DOD LAW OF WAR MANUAL, *supra* note 2, at 268 n.412.

⁹⁵ *Id.* ¶ 5.12.3.3.

with the issue of extraterritorial application of the ICCPR. As I observe above on this substantive issue, the reference in the relevant footnote (here, #97) on this topic is provided in support of the assertion that the United States government “has long interpreted the ICCPR not to apply abroad.”⁹⁶ The cited reference indeed does support this assertion. Indeed, the surrounding main text along with the next footnote (a cross-reference to text in the Manual related to the connections between the law of occupation and the ICCPR) does so as well.

Comparing the use of cited material in these two examples illustrates why concern regarding potentially confusing footnotes is misplaced. As the Manual clarifies regarding the use of sources, “Citation to a particular source should not be interpreted to mean that the cited source represents an official DoD position, or to be an endorsement of the source in its entirety.”⁹⁷ The relevant main text in the assumption of risk section makes clear what the DoD position is regarding the effect on the proportionality and feasible precautions analyses.

The material cited to amplify the specific observation related to assumption of risk are examples of what the selection of sources section describes as “a particularly helpful explanation or illustration.”⁹⁸ In contrast, the main text presented on the topic of extraterritorial application of the ICCPR makes clear, again returning to guidance in the selection of sources section, is an example of a cited reference that was “chosen to illustrate U.S. practice or legal interpretation.”⁹⁹ In short, context matters.

3. “Faulty” Sources and “Better” Serving DoD Legal Practitioners

It is my experience that the “primary consumers” of the Manual – military lawyers and practitioners – are quite capable of engaging in a nuanced reading of the text and discerning, from the context, for what purpose an individual reference is being put to use in a particular citation. In any event, the Jacobs-Durbin letter is defectively reductive in expressing concern regarding the use of references in the Manual. While a discerning reader may be required to engage in a critical assessment of the purpose for material presented in footnotes, the suggestion that military personnel may “be led astray by the Manual’s continued reliance on *faulty* sources”¹⁰⁰ is unsustainable.

In their letter, Representative Jacobs and Senator Durbin declare, “Unreliable sources should be removed to better serve DoD legal practitioners.” As the guidance currently presented in the existing paragraph 1.2.2 makes abundantly clear – and indeed as it seems should be abundantly clear even without this clarifying guidance – information can be presented in footnotes for a variety of reasons. Citing information for purposes other than directly supporting a DoD position on a topic, such as providing “a particularly helpful explanation or illustration,” does not render a source “faulty.”

The sources at issue are not in fact “unreliable” at all, then, as Representative Jacobs and Senator Durbin claim in their letter to the DoD General Counsel. Indeed, removing these sources may well strip away important historical and contextual information. It therefore seems difficult

⁹⁶ *Id.* ¶ 1.6.3.3 (footnote, n.97, omitted).

⁹⁷ *Id.* ¶ 1.2.2.1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Jacobs & Durbin, *supra* note 1, at 6 (emphasis added).

to sustain the claim that the suggested review of material cited in the Manual actually would “better serve DoD legal practitioners.”¹⁰¹

II. PLENARY OBSERVATIONS RELATED TO THE JACOBS-DURBIN LETTER

With each suggested substantive revision to the Manual raised in the Jacobs-Durbin letter thus assessed in turn, it is useful now to go beyond the substance in order to consider the letter in the broader context of public discourse. The first such plenary observation regarding the letter involves the issue of perspective and approach. With this foundational topic addressed first, the subsequent section builds on the subject of approach and perspective to consider the letter in the broader context of relative constitutional authority, separation of powers, and civilian-military relations. Because the Jacobs-Durbin letter was “delivered” to the DoD GC in a decidedly public manner and because the substantive suggestions developed therein draw largely upon existing scholarly works for support, holistic engagement with the correspondence calls for an assessment of the role of the letter as a source of public discourse in its own right.

That aspect of the inquiry evokes the fundamental issue of the divergence in approach and perspective that exists between scholars and advocates who are active in the forum of public discourse as one general community and of military practitioners as another. Although this dynamic is not necessarily particularly perceptible in prevailing dialogue, accounting for the existence and causes of the divergence is vitally important in support of the endeavor to situate the letter in the broader context of existing and emerging public discourse. Consequently, the present inquiry transitions now to consider the importance of perspective and approach before then building upon that subject to consider the related topics of constitutional authority, separation of powers, and civilian-military relations.

A. The Importance of Perspective and Approach

The importance of perspective and approach is the central theme of a *Lawfare* article I recently wrote¹⁰² exploring the effect of divergent approaches in the specific context of the DoD Civilian Harm Mitigation and Response Action Plan (CHMR-AP).¹⁰³ In that article, I note that discord between the two general communities “influenced engagements between civil society advocates and military practitioners long before the CHMR-AP was published, and it will continue to shape expectations and objectives as the plan is implemented going forward.”¹⁰⁴ As the implementation of the CHMR-AP by the DoD continues to progress, topics such as those reflected in the suggested substantive revisions to the Manual presented in the Jacobs-Durbin letter will continue to inform future DoD targeting processes and civilian protection practices.

In that *Lawfare* article, I also indicate that clarifying the contours and causes of the divergence will assist with the effort of identifying “common ground that exists between the two

¹⁰¹ *Id.*

¹⁰² See Brian L. Cox, *Why Divergent Civil Society and Military Approaches Matter for CHMR-AP Implementation*, LAWFARE (Apr. 14, 2023), <https://www.lawfareblog.com/why-divergent-civil-society-and-military-approaches-matter-chmr-ap-implementation>.

¹⁰³ See DEP’T DEF., CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN (CHMR-AP) (Aug. 25, 2022), <https://media.defense.gov/2022/aug/25/2003064740/-1/-1/1/civilian-harm-mitigation-and-response-action-plan.pdf> [hereinafter DoD CHMR-AP].

¹⁰⁴ Cox, *supra* note 102.

communities.”¹⁰⁵ Doing so, in turn, will “encourage enhanced collaboration in relation to those areas of alignment while also illuminating why the Department of Defense may be reluctant to implement some specific suggestions” offered by civil society advocates.¹⁰⁶ That imperative applies to the present inquiry of assessing the suggestions presented in the Jacobs-Durbin letter just as it does to the more general topic of future implementation of the CHMR-AP.

Although each substantive suggestion presented in the Jacobs-Durbin letter refers to a *Just Security* article when a citation is provided at all, I challenge the advisability of each suggested revision in Part I above during the substantive analysis. This dynamic is due in large part to a fundamental divergence in approach that must be accounted for in order to place the Jacobs-Durbin letter in proper context. At its core, the discord between the two general communities can be attributed to a fundamental divergence regarding the manner in which members of the respective communities approach the conceptual balance between military necessity and humanity.

1. Maintaining the Balance Between Military Necessity and Humanity

Divergence in approach is a dynamic I recognized as a military lawyer, but it is only since retiring from military service and having the opportunity to study the topic in depth that I have now begun to fully appreciate the causes and implications of the divergence. This dynamic involves preserving the delicate balance between considerations involving military necessity and humanity, which is a subject Mike Schmitt explores in detail for a law review article published in 2010. During that article, Schmitt notes, “NGOs and others are even more unfettered [than international tribunals] in pushing the balance in the direction of humanity. After all, their *raison d’être* is to do so, and they pay no price for forfeiting a degree of military necessity.”¹⁰⁷

In a much more recent article that essentially builds on the first by exploring the role of normative architecture in shaping the contours of international law, Schmitt observes existing rules for interpreting international law that “occupy a place of prominence in international tribunals, scholarly writing and, at times, inter-State relations...seldom influence how legal advisers and military forces interpret IHL and apply it in the field, [especially] at the operational and tactical levels of warfare.”¹⁰⁸ These specific observations – indeed, the commentary collectively presented in the articles more broadly – resonate with my experience as an operational soldier turned military lawyer turned academic.

More importantly for present purposes, however, these observations from Schmitt provide useful context for my approach to the *Just Security* commentary involving proposed revisions to the DoD Law of War Manual. Likewise, the requirement to preserve the military necessity/humanity balance informs why the DoD General Counsel should decline to adopt any revisions presented in the Jacobs-Durbin letter. What I have learned thus far of my effort to study and understand divergences in approach on topics such as application of the law of armed conflict is that two general communities exist – one in military practice and one in scholarly discourse – and that these communities rarely interact and engage with the other.

¹⁰⁵ *Id.* [same note as immediately above]

¹⁰⁶ *Id.*

¹⁰⁷ Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 838 (2010).

¹⁰⁸ Michael N. Schmitt, *Normative Architecture and Applied International Humanitarian Law*, 104 INT’L REV. RED CROSS 2097, 2100 (2022).

This is not to suggest that perspectives within each general community are homogenous. Likewise, it would be an overstatement to suggest that the two communities *never* interact. However, the lens through which members of each community interpret the law of armed conflict is different and the communities certainly do not interact *enough*.

One prominent example of the divergence is revealed by considering the manner in which the DoD Law of War Manual and the International Committee of the Red Cross characterize the law of armed conflict. As the Manual articulates, “prohibitions on conduct in the law of war may be understood to reflect States’ determinations that such conduct is militarily unnecessary *per se*.”¹⁰⁹ The ICRC describes IHL as “a set of rules that seeks, for humanitarian reasons, to limit the effects of armed conflict.”¹¹⁰

Neither formulation is necessarily more correct than the other. Nonetheless, the latter description encourages a vision of international law that progressively weighs humanity more favorably on the military necessity/humanity balance in order to “better” limit the effects of armed conflict. Military practitioners tend not to view or apply the law in this manner.

2. Scalability and Remastering Large Scale, Full Spectrum Combat Operations

Lt. Gen. (ret.) Chuck Pede and Col. Pete Hayden raise concern in a recent article, from a military practitioner perspective, regarding the ability of the U.S. military to collectively achieve the shift in mindset that is necessary to pivot from a focus on the inherently constraining context of counterterrorism to becoming adept again at large scale combat operations.¹¹¹ The balance between military necessity and humanity is a fundamental component of this shift. Counterterrorism or counterinsurgency operations typically involve a much more restrictive application of the law of armed conflict as a matter of *policy* than is typically the case in the large scale combat context.¹¹²

In the article, Pede and Hayden make note of a “gap” that “has opened between the actual content of the law as approved and enforced by sovereign states in contrast to the more aspirational ‘evolution’ of the law championed by scholars, interest groups, and nongovernmental organizations in an *external* drumbeat of legal commentary” that now continues to expand “with every new well-intentioned blog article.”¹¹³ The authors go on to caution, “Military lawyers especially must master the law as it *is*. They must also assiduously

¹⁰⁹ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 2.2.2.1.

¹¹⁰ *Frequently Asked Questions on the Rules of War*, ICRC (Mar. 7, 2022), <https://www.icrc.org/en/document/ihl-rules-of-war-faq-geneva-conventions> (select the heading, “International humanitarian law: what are we talking about?”).

¹¹¹ See Charles Pede & Peter Hayden, *The Eighteenth Gap Preserving the Commander’s Legal Maneuver Space on “Battlefield Next”*, MIL. REV., Mar.-Apr. 2021, <https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MA-21/Pede-The-18th-Gap-3.pdf>.

¹¹² See, e.g., Gail A. Curley & Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, ARMY LAW., Sept.-Oct. 2018, <https://tjaglespublic.army.mil/documents/27431/3272313/September+October+2018.pdf/99057e1a-96e0-4db4-967d-5a293bb83283#page=25>, <https://tjaglespublic.army.mil/back-to-basics>; OPERATIONAL LAW HANDBOOK, *supra* note 59, at 105 (describing the spectrum of conflict from counterinsurgency and counterinsurgency operations to multi-domain large scale combat operations and emphasizing that military lawyers, or judge advocates, “must appreciate the spectrum of competition and armed conflict and tailoring of [rules of engagement] to assist commanders”).

¹¹³ Pede & Hayden, *supra* note 111, at 7 (emphasis in original).

understand the threat, the ‘influencers’ of the law of war, those who would see it change through aspiration or editorial.”¹¹⁴

This perspective may seem to be an outlier in the forum of public discourse. In contrast, it is decidedly routine among the less visible – though just as important – community of military law practitioners. Commentary of the sort relied upon and presented in the Jacobs-Durbin letter is precisely what Pede and Hayden have in mind as they express caution regarding the “*external* drumbeat of legal commentary.” This helps explain why the DoD perspective on topics such as, for example, presumption of civilian status or DPH criteria or taking “all” feasible precautions might diverge from well-reasoned and impeccably researched suggestions for revising the Manual presented by prolific scholars such as Ryan Goodman, Marty Lederman, Adil Haque, Brian Finucane, and many others on *Just Security*.

As Mike Schmitt notes on perceptions of the military necessity/humanity balance, “NGOs and others...pay no price for forfeiting a degree of military necessity.”¹¹⁵ An explicit or implicit attempt to universalize inherently constraining use of force practices that are typical in counterinsurgency operations represents a foundational source for prevailing divergences in approach and perspective. The U.S. military has been focused primarily on counterinsurgency operations for the past two decades or so, though a recent strategic shift in focus to great power competition calls for becoming reacquainted with the full range of the spectrum of conflict – to now include (again) large scale combat operations.¹¹⁶ As the DoD developed a coherent counterinsurgency strategy during the conflicts in Iraq and Afghanistan, rules prescribing permissible conditions for the use of force became increasingly constraining.¹¹⁷

Increased restrictions on the use of force are to be expected in counterinsurgency operations when compared to, say, large scale combat operations. This is the case because, as the primary DoD Joint Publication related to counterinsurgency notes, “the population is typically the critical aspect of successful” counterinsurgency operations.¹¹⁸ This doctrinal publication observes that in “traditional” warfare, or what is currently termed large scale combat operations,

¹¹⁴ *Id.* at 18 (emphasis in original).

¹¹⁵ Schmitt, *supra* note 107, at 838.

¹¹⁶ See, e.g., Ronald O'Rourke, *Great Power Competition: Implications for Defense—Issues for Congress*, CONG. RSCH. SERV. 6 (Version 93, updated Nov. 8, 2022), <https://sgp.fas.org/crs/natsec/R43838.pdf> (noting that the emergence of great power competition “has profoundly changed the conversation about U.S. defense issues from what it was during the post–Cold War era,” in particular that counterterrorism operations “operations and U.S. military operations in the Middle East—which had been more at the center of discussions of U.S. defense issues following the terrorist attacks of September 11, 2001—are now a less-prominent element in the conversation, and the conversation now focuses more on [topics that] relate largely to China and/or Russia”), at 25 (noting in the context of the emergence of great power competition that capabilities “for high-end conventional warfare can differ, sometimes significantly, from capabilities required or optimized for the kinds of counterterrorism or counterinsurgency operations that were more at the center of U.S. defense planning and operations following the terrorist attacks of September 11, 2001”).

¹¹⁷ See, e.g., Tactical Directive, Headquarters, International Security Assistance Force (ISAF) (July 6, 2009), <https://dserver.bundestag.de/btd/17/CD07400/Dokumente/Dokument%20049.pdf> (noting that a counterinsurgency “is different from conventional combat, and how [ISAF operates in that environment] will determine the outcome more than traditional measures, like capture of terrain or attrition of enemy forces” and that ISAF must, therefore, “avoid the trap of winning tactical victories - but suffering strategic defeats - by causing civilian casualties or excessive damage and thus alienating the people”).

¹¹⁸ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-24, COUNTERINSURGENCY III-4 (Apr. 25, 2018; validated Apr. 30, 2021), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_24.pdf.

“success is achieved primarily by destroying the enemy’s means to sustain military operations and occupying its territory.”¹¹⁹

In contrast, “Warfare that has the population as its focus of operations requires a different mindset and different capabilities than warfare that focuses on defeating a threat militarily.”¹²⁰ As a result, “the population will typically become a primary factor in the success or failure of the insurgency.”¹²¹ However, this concern does not feature as prominently for large scale combat operations.

Nonetheless, studies conducted and recommendations developed by entities external to the DoD often promote as universally preferable many use of force practices that were developed for, and are primarily suitable during, counterinsurgency operations.¹²² This includes revisions to the Manual promoted in the Jacobs-Durbin letter, many of which are in turn developed from recommendations presented in various *Just Security* articles. Meanwhile, as the DoD pivots back to full spectrum operations and simultaneously institutionalizes civilian harm mitigation and response practices, a primary strategic focus is on scalability.

That endeavor entails ensuring that civilian protection practices “are deliberately crafted to provide flexibility to commanders to adapt processes in a way that is scalable to mission requirements.”¹²³ Doing so will allow civilian harm mitigation and response practices to remain “relevant to counterterrorism operations as well as high intensity conflict”¹²⁴ that can be expected in the context of multi-domain large scale combat operations. External observers and commentators may well be inclined to favor inherently constraining use of force policies and practices of the style that became particularly prevalent during the relatively recent pivot toward counterinsurgency operations, but the more recent return of focus on full spectrum operations will render many of these “favored” counterinsurgency practices untenable – unless they are scalable across the spectrum of conflict.

Suggestions for revising the Manual presented in fora such as *Just Security*, then, are often eminently reasonable. This is most certainly true for the substantive topics addressed above and adopted by the Jacobs-Durbin letter. However, it is not necessarily the case that aspects of

¹¹⁹ *Id.* at I-5.

¹²⁰ *Id.* at III-4.

¹²¹ *Id.* at I-5.

¹²² See, e.g., OPEN SOC’Y FOUND., THE STRATEGIC COSTS OF CIVILIAN HARM APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS 59-69 (June 2016), <https://www.opensocietyfoundations.org/uploads/1168173f-13f9-4abf-9808-8a5ec0a9e4e2/strategic-costs-civilian-harm-20160622.pdf> (portraying lessons “learned” in the context of counterinsurgency operations in Afghanistan throughout the report, and presenting, in the cited page range, recommendations for expanding those lessons across the spectrum of conflict for future operational contexts); Letter from 21 Nongovernmental Organizations to U.S. Sec’y Def. Lloyd J. Austin III (Dec. 1, 2021), <https://www.amnestyusa.org/wp-content/uploads/2021/12/NGO-Letter-to-Secretary-Austin-12.1.21-1.pdf> (asserting that during “twenty years” of combat operations, which have been focused primarily on the counterinsurgency context, “the Department of Defense has failed to adopt solutions well within its grasp; learn and implement identified lessons; exercise meaningful leadership on civilian protection issues; or assign adequate resources to address civilian harm” and urging the Secretary of Defense “to robustly account for and reckon with the civilian harm of the last twenty years, and commit to finally implementing structural changes to prioritize civilian protection and accountability for civilian harm”); Chappell, *supra* note 20 (focusing on a “spectrum of harmful acts” (58) that have reportedly occurred during the past two decades of counterinsurgency operations and claiming that “United States government should consider a retrospective effort of similar scope and ambition to ensure that the U.S. military adequately investigates the legacy of civilian harm from the global war on terror and effectively incorporates lessons learned” from the proposed study (82)).

¹²³ See, e.g., DoD CHMR-AP, *supra* note 103, at 15 (Objective 5).

¹²⁴ *Id.* at 9.

the Manual are “problematic” – as the Jacobs-Durbin letter suggests¹²⁵ – simply because such provisions fail to align with seemingly convincing perspectives presented in public discourse.

Based on my own experience as a military lawyer – and on the nearly daily interactions I continue to have with friends and former colleagues now that I am retired from military service – the perspectives I present in the substantive analysis above are rather typical. This is the case even if such perspectives seem an outlier here in the public arena. In that community, suggested revisions such as those presented by Representative Jacobs and Senator Durbin are generally considered to be unconvincing and ill-advised. This recognition leads to the second plenary observation to be addressed herein: matters of constitutional authority, separation of powers, civilian-military relations, and relative expertise.

B. Constitutional Authority, Separation of Powers, and Civilian-Military Relations

Separation of governmental powers is, by intentional design, a bedrock value reflected in the U.S. Constitution.¹²⁶ Enumerated powers granted to Congress by virtue of Article I of the Constitution are specific and extensive,¹²⁷ while presidential authority vested pursuant to Article II is rather more generalized.¹²⁸ One of the few specifically enumerated powers granted to the president, however, is to serve as “Commander in Chief of the Army and Navy of the United States.”¹²⁹

This introductory observation related to separation of powers is not intended to suggest that executive authority in this domain is without limit. As Justice Robert Jackson notes in his influential *Youngstown* concurrence, commander in chief authority “is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.”¹³⁰ In recognizing the potential for constraint on presidential authority, however, Justice Jackson suggests indulging “the widest latitude of interpretation to sustain [the president’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”¹³¹

It is precisely this context of executive authority for which guidance presented in the DoD Law of War Manual is intended to address. Congress, of course, is not completely devoid of authority in the context of regulating military activity. Two enumerated legislative powers that are particularly relevant to the general context of civilian-military relations vested in the legislature by the Constitution are authority to “make Rules for the Government and Regulation

¹²⁵ Jacobs & Durbin, *supra* note 1, at 1 (asserting that the “urgency of protecting civilians in conflict is all too clear, as demonstrated by tragic accounts of civilian harm in Iraq, Syria, Afghanistan, and elsewhere” and that “[a]ddressing *problematic* aspects of the Law of War Manual is a critical part of this task” (emphasis added)).

¹²⁶ See, e.g., THE FEDERALIST NO. 47 at 298 (James Madison) (Clinton Rossiter ed., Signet Classics Printing 2003) (Penguin Group 1961) (asserting that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” and that if the then-proposed federal Constitution were “chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system”).

¹²⁷ See U.S. CONST. art I.

¹²⁸ See U.S. CONST. art. II.

¹²⁹ U.S. CONST. art II, § 2.

¹³⁰ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 645 (1952) (Jackson J. concurring).

¹³¹ *Id.* at 637.

of the land and naval Forces”¹³² and to appropriate funds – for the military specifically¹³³ and for the government in general.¹³⁴ In the current context of suggesting revisions to the DoD Law of War Manual, however, appropriations authority is not particularly relevant.

That leaves congressional authority to make rules for the land and naval (and, now, air and space) forces as the primary power to consider along with executive authority as commander in chief. Establishing the criminal code that applies primarily to military forces – since 1951, the Uniform Code of Military Justice¹³⁵ – is irrefutably closer to Article I “make Rules” authority on the spectrum of legislative-executive balance of powers than it is to Article II commander in chief authority. Providing guidance and direction for the conduct of hostilities – such as rules of engagement, tactical directives, etc. – is irrefutably closer to Article II authority on the spectrum.

Publishing the DoD Law of War Manual, with the DoD General Counsel as the institutional proponent, is situated conceptually directly adjacent to establishing rules of engagement and the like. The Manual is promulgated¹³⁶ pursuant to two DoD Directives, which are, by definition the purview of the executive. In contrast, the accompanying statutory reference simply establishes the position of the DoD General Counsel.¹³⁷ These references regarding the authority to promulgate the Manual, then, provide substantive support to the conceptual conclusion that guidance presented in the publication aligns with Article II executive authority.

1. Separation of Powers and Developing Requisite Expertise

Set against this backdrop of the constitutional separation of powers, Representative Sara Jacobs and Senator Dick Durbin have no authority to direct the DoD General Counsel to make changes to the Manual. It is undoubtedly true that the Jacobs-Durbin letter is not drafted to resemble an order. However, the legislative authors do “urge” Ms. Krass “to address the following areas of concern with the Manual [those addressed in the substantive portion of this article]” in an organizational review of the publication.¹³⁸

In closing the letter, Representative Jacobs and Senator Durbin “request an update on the timeline, the scope of the review, and [the General Counsel’s] plans to consult with civil society and legal experts, as well as how this review will address the above concerns.”¹³⁹ The legislators also express that they “look forward to” the response from the DoD GC. Likewise, the letter expresses the expectation of “working with [her] on” the issues raised in the letter.¹⁴⁰

¹³² U.S. CONST. art. I, § 8, cl. 14.

¹³³ U.S. CONST. art. I, § 8, cl. 12, 13.

¹³⁴ U.S. CONST. art. I, § 9, cl. 7.

¹³⁵ See 10 U.S.C. §§ 801-946(a).

¹³⁶ DoD LAW OF WAR MANUAL, *supra* note 2, unpaginated memorandum from DoD General Counsel, immediately following title page (p. 2 of PDF file) (June 12, 2015). The twin DoD Directives (DoDD) are DoDD 2311.01, DoD Law of War Program (July 2, 2020) (reissues DoDD 2311.01E (May 6, 2006), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>, and DoDD 5145.01, General Counsel of the Department of Defense (Dec. 2, 2013) (incorporating Change 2 (Jan. 30, 2015)), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/514501p.pdf>.

¹³⁷ See 10 U.S.C. § 140 establishing that the DoD GC shall be “appointed from civilian life by the President, by and with the advice and consent of the Senate,” (a), and that, as the chief legal counsel of the DoD, the GC “shall perform such functions as the Secretary of Defense may prescribe,” (b) (emphasis added)).

¹³⁸ Jacobs & Durbin, *supra* note 1, at 2.

¹³⁹ *Id.* at 6.

¹⁴⁰ *Id.*

This letter, then, is not written simply to raise awareness in relation to some of the substantive content presented in the DoD Law of War Manual. “Requesting” an update and expressing an expectation of a response and an opportunity to work with the DoD GC to address “concerns” raised by the authors is not presented merely as an invitation. Rather, the expressed expectations are as close to signifying a directive as one can imagine without actually characterizing the “request” as an order.

If a member of the general public with no governmental affiliation were to write the same letter and express the same concerns as Representative Jacobs and Senator Durbin, there would be no explicit or implicit expectation of a response from Ms. Krass – whether or not the concerned citizen articulated the call to action as a mere “request.” However, the letter was not written by a member of the general public. It was drafted on congressional letterhead, signed by two elected officials with at least some degree of apparent constitutional authority, and presented in a decidedly public fashion – by virtue of a press release¹⁴¹ and a social media entry¹⁴² – to the DoD GC.

The trouble is, in this context Representative Jacobs and Senator Durbin have no more *actual* authority than a member of the general public. Even so, they draft the letter and convey expectations in a manner that far exceeds their actual, nonexistent, authority. Doing so constitutes an objectionable attempt to encroach upon existing executive authority.

It is not uncommon to express that Congress exercises an “oversight” role in relation to the United States Government, including the executive,¹⁴³ or that the legislature is a “co-equal” branch alongside the executive.¹⁴⁴ These characterizations are inaccurate. The Constitution establishes relative authority of each branch of government, and any “oversight” role Congress adopts must not constitute an unwarranted infringement on the authority of the executive or judiciary.

This has always been a foundational vision inherent in the separation of powers reflected in the Constitution. James Madison related in 1788, for example, it is evident that none of the branches of government “ought to possess, directly or indirectly, an overruling influence over the

¹⁴¹ Press Release, Sara Jacobs, Rep. Sara Jacobs, Sen. Dick Durbin Push DoD to Address Areas of Concern in Law of War Manual that Could Increase Civilian Harm (Feb. 14, 2023), <https://sarajacobs.house.gov/news/documentsingle.aspx?DocumentID=689>.

¹⁴² Congresswoman Sara Jacobs (@RepSaraJacobs), TWITTER (Feb. 15, 2023, 5:26 PM), <https://twitter.com/RepSaraJacobs/status/1625984973265043457?t=quSnFvpyRKYLn2-IIZfxhw&s=19>.

¹⁴³ See, e.g., Press Release, Sara Jacobs, Resp. Sara Jacobs, Jason Crow, Ro Khanna, Andy Kim, and Tom Malinowski Launch New Caucus to Prevent and Reduce Civilian Harm (Aug. 26, 2022), <https://sarajacobs.house.gov/news/documentsingle.aspx?DocumentID=591> (announcing that the caucus was launched “to conduct oversight and advance policies that prevent, reduce, and respond to civilian harm as a result of U.S. and partners’ operations” and presenting remarks from Rep. Jacobs observing that the caucus “will focus on successfully implementing [the CHMR-AP] to address our systemic failures to limit civilian harm, conduct much-needed oversight, and push legislation to protect kids, families, and civilians in harm’s way around the world” and from Annie Shiel of CIVIC claiming that “Congress has a critical role to play in ensuring that the United States prevents, mitigates, and responds to civilian harm with transparency and accountability” while applauding “the creation of this caucus to support those efforts, conduct meaningful and necessary oversight, and champion legislation to better protect civilians affected by conflict”).

¹⁴⁴ See, e.g., Letter from Jason Crow, Sara Jacobs & Tom Malinowski, Members of Congress, to Honorable Joseph R. Biden, President (Dec. 9, 2022), https://crow.house.gov/sites/evo-subsites/crow.house.gov/files/evo-media-document/potus_targeting_letter_9dec.pdf (claiming that Congress is “a co-equal branch of government” and that legislators are therefore “charged with the responsibility to ensure the American people understand the basic criteria the government uses before it employs lethal force abroad”).

others, in the administration of their respective powers.”¹⁴⁵ On this note, Madison goes on to observe, “It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”¹⁴⁶

Asserting that Congress performs a sweeping “oversight” role, without tying a particular activity to the legislature in a manner that does not unduly infringe upon authority of the other two branches, constitutes a conceptual invitation to confer power of an encroaching nature upon the legislature. Similarly, each branch of government is only a “co-equal” with the others in that no branch ought to possess an overruling influence over the others in relation to the administration of their constitutionally mandated powers. Publishing the DoD Law of War Manual is a function inherent in Article II commander in chief authority, and the attempt by Representative Jacobs and Senator Durbin to assert legislative control over that process represents what Madison describes as an attempt to exert, “directly or indirectly, an overruling influence over” the executive branch “in the administration of” commander in chief power.

Perhaps just as important as the formal separation of powers is the issue of relative expertise that naturally accompanies the division of authority. The Department of Defense has been described as “America's largest government agency”¹⁴⁷ – and recently classified as the second largest employer in the world¹⁴⁸ – with a workforce of approximately 3.4 million military and civilian personnel. Each one of these personnel is employed in support of the DoD mission, which is “to provide the military forces needed to deter war and ensure our nation's security.”¹⁴⁹

In contrast, a member of Congress employs only a handful of staffers, typically only one of which serves as a primary foreign policy advisor.¹⁵⁰ There is, of course, no constitutional requirement for congressional candidates to have prior military experience. Neither Representative Sara Jacobs¹⁵¹ nor Senator Dick Durbin¹⁵² have served in the military, and the same appears to be true for their primary foreign policy advisors, Sophie Jones¹⁵³ and Chris Homan,¹⁵⁴ respectively. There is likewise no indication from publicly available records that these particular legislators or staffers have any specific expertise regarding the law of armed conflict.

This is not to suggest that those with no military experience or specialized LOAC expertise are wholly incapable of learning about and comprehending issues such as those raised

¹⁴⁵ FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., Signet Classics Printing 2003) (Penguin Group 1961).

¹⁴⁶ *Id.*

¹⁴⁷ Dep’t Def, *About*, <https://www.defense.gov/about> (last visited Mar. 16, 2023) (noting that the DoD “is America's largest government agency” with a total workforce of “3.4 Million Service Members & Civilians”).

¹⁴⁸ Martin Armstrong, *The World's Largest Employers*, STATISTICA (Nov. 11, 2022), <https://www.statista.com/chart/3585/the-worlds-biggest-employers>.

¹⁴⁹ Dep’t Def, *About*, *supra* note 147.

¹⁵⁰ *See, e.g.*, American International Automobile Dealers, US Senator Dick Durbin (D-IL-S01), Staff, <https://app7.vocusgr.com/webpublish/Controller.aspx?SiteName=AIADA&Definition=ViewLegislator&LegislatorID=5668> (last visited Mar. 16, 2023). This listing is presented as an example of a staff listing for Sen. Durbin, and it is not intended as a confirmed, current roster of staffers.

¹⁵¹ Sara Jacobs, *Biography*, CONGRESSWOMAN SARA JACOBS, <https://sarajacobs.house.gov/about> (last visited Mar. 16, 2023).

¹⁵² Dick Durbin, *Biography*, DICK DURBIN U.S. SEN. ILL., <https://www.durbin.senate.gov/imo/media/doc/Biography.pdf> (last visited Mar. 16, 2023).

¹⁵³ Sophie Jones, LINKEDIN (last visited Mar. 16, 2023), <https://www.linkedin.com/in/sophie-jones-3280b6115>.

¹⁵⁴ Press Release, Durbin Delivers Commencement Address at Augustana College, Dick Durbin U.S. Sen. Ill. (May 23, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-delivers-commencement-address-at-augustana-college> (Sen. Durbin summarizing professional experience of his “top foreign policy advisor in the U.S. Senate,” Chris Homan).

in the Jacobs-Durbin letter. However, returning to the first plenary observation addressed above, it is also entirely reasonable to suggest that those with no prior relevant experience *or* special expertise do not have a holistic and well-balanced view of the considerations at stake in relation to the suggested revisions. This is understandable and completely sensible, as it is not the responsibility of legislators “to provide military forces needed to deter war and ensure” America’s security.

That is the mission of the U.S. Department of Defense, America’s largest government agency. The DoD Law of War Manual is published as a “DoD-wide resource for DoD personnel – including commanders, legal practitioners, and other military and civilian personnel – on the law of war.”¹⁵⁵ As Stephen W. Preston, the DoD General Counsel when the Manual was first published, notes in the foreword, “The law of war is part of who we are.”¹⁵⁶ He goes on to note, “This manual reflects many years of labor and expertise, on the part of civilian and military lawyers from every service.”¹⁵⁷ Preston closes the forward by observing, “Understanding our duties imposed by the law of war and our rights under it is essential to our service in the nation’s defense.”¹⁵⁸

The same cannot be said of Congress. Representative Sara Jacobs, Senator Dick Durbin, and their respective staffers, do not collectively possess the “many years of labor and expertise” that is reflected in the DoD Law of War Manual. That is understandable, because the law of war is not a part of who they are, and it is not essential to America’s national defense that members of Congress and their staffs understand duties imposed on the Department of Defense by the law of armed conflict.

Expertise, perspective, and experience accompany constitutional authority. Congress has Article I authority to make rules for the armed forces, while the president is the commander in chief of the armed forces pursuant to Article II of the Constitution. Publishing and revising the DoD Law of War Manual is an executive function, and members of Congress have no authority – or expertise that accompanies that authority – on the matter.

2. Lobbyists, Lobbying Activities, and Congressional “Oversight” of Civilian Protection Practices

The matter of expertise and experience raises a significant query related to the topic of civilian-military relations that has been implied but not yet explicitly addressed thus far. If Representative Sara Jacobs and Senator Dick Durbin have no direct individual expertise or experience with interpreting or applying the law of armed conflict, who wrote the letter on their behalf and presented it to them for signature? While the letter itself bears no indication to answer this query explicitly and directly, my own independent analysis of social media activity, previous similar congressional dispatches, and examples of civil society advocacy suggests that a member of the non-governmental organization CIVIC – likely John Ramming Chappell and/or Annie Shiel – are responsible for the content of the letter.

This inference is based in part on two individual *Just Security* articles written by Annie Shiel in which she criticizes the DoD interpretation of DPH and the presumption of civilian

¹⁵⁵ DOD LAW OF WAR MANUAL, *supra* note 2, at iii.

¹⁵⁶ *Id.* at ii.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

status¹⁵⁹ as well as a separate *Just Security* article written by John Ramming Chappell in which he criticizes the presumption interpretation reflected in the Manual.¹⁶⁰ Likewise, an article written by Chappell and published in the most recent edition of the *UC Davis Journal of International Law and Policy* asserts that the presumption interpretation presented in the Manual “could result in violations of international law and contribute to targeting decisions that could constitute war crimes.”¹⁶¹

Many of the descriptions of Manual “errors” presented in the Jacobs-Durbin letter are characterized in almost precisely the same manner as the substantive points raised by Shiel and Chappell in these respective publications. Likewise, when the recently-established House “Protection of Civilians in Conflict Caucus” was announced, Annie Shiel of CIVIC noted, “Congress has a critical role to play in ensuring that the United States prevents, mitigates, and responds to civilian harm with transparency and accountability.”¹⁶² This quote from Shiel is exhibited on a page from Representative Sara Jacobs’s website presenting a press release announcing creation of the caucus.¹⁶³

In the press release, Representative Jacobs claims that “successful” implementation of the DoD Civilian Harm Mitigation and Response Action Plan would envision a role for Congress to address “systemic failures” by the DoD “to limit civilian harm, conduct much-needed oversight, and push legislation to protect kids, families, and civilians in harm’s way around the world.”¹⁶⁴ This characterization of CHMR-AP “success” closely aligns with the organizational principles of CIVIC, which include the belief that, “Armed actors are responsible and must be held accountable for preventing and addressing civilian harm.”¹⁶⁵

Connections such as these, combined with the frequent social media engagement of foreign policy advisor Sophie Jones¹⁶⁶ amplifying material from CIVIC advocates and CIVIC advocates such as Annie Shiel¹⁶⁷ and John Ramming Chappell¹⁶⁸ frequently amplifying messaging from Representative Sara Jacobs¹⁶⁹ in turn, support the inference that these CIVIC advocates are collaborating closely behind the scenes with Representative Jacobs to set the tone

¹⁵⁹ See Annie Shiel and Sarah Yager, *Congressional Action on Civilian Harm Resulting from U.S. Military Operations: Part I*, JUST SECURITY (Apr. 28, 2022), <https://www.justsecurity.org/81303/congressional-action-on-civilian-harm-resulting-from-u-s-military-operations-part-i>; Annie Shiel, *How the FY23 NDAA Can Strengthen U.S. Efforts to Prevent and Respond to Civilian Harm (Part I)*, JUST SECURITY (Aug. 25, 2022), <https://www.justsecurity.org/82829/how-the-fy23-ndaa-can-strengthen-u-s-efforts-to-prevent-and-respond-to-civilian-harm-part-i>.

¹⁶⁰ See John Ramming Chappell, *Incremental Progress on Civilian Harm in the FY2023 National Defense Bill*, JUST SECURITY (Dec. 19, 2022), <https://www.justsecurity.org/84505/incremental-progress-on-civilian-harm-in-the-fy2023-national-defense-bill>.

¹⁶¹ Chappell, *supra* note 20, at 75.

¹⁶² Press Statement, CIVIC Welcomes US Congressional Caucus on the Protection of Civilians, CIVIC (Aug. 26, 2022), <https://civiliansinconflict.org/about-us/media/civic-welcomes-us-congressional-caucus-on-the-protection-of-civilians%E2%80%9C%E2%80%9C>.

¹⁶³ See Jacobs Press Release, *supra* note 143.

¹⁶⁴ *Id.*

¹⁶⁵ CIVIC, *supra* note 21.

¹⁶⁶ See Sophie Jones (张爱玲) (@sophjonesaz), TWITTER, <https://twitter.com/sophjonesaz> (last visited Mar. 16, 2023).

¹⁶⁷ See Annie Shiel (@annieshiel), TWITTER, <https://twitter.com/annieshiel> (last visited Mar. 16, 2023).

¹⁶⁸ See John Ramming Chappell (@jwrchappell), TWITTER, <https://twitter.com/jwrchappell> (last visited Mar. 16, 2023).

¹⁶⁹ See Congresswoman Sara Jacobs (@RepSaraJacobs), TWITTER, <https://twitter.com/RepSaraJacobs> (last visited Mar. 16, 2023).

for her approach to congressional “oversight” of the DoD. Based on the similarities noted above between the Jacobs-Durbin letter and various examples of scholarship written by Annie Shiel and John Ramming Chappell, it is reasonable to conclude that this collaboration extends to contributing to – and perhaps drafting in its entirety – the letter addressed to the DoD General Counsel, Ms. Caroline Krass. If this inference is indeed accurate, the nature of this association raises a number of concerns.

The first involves potentially unregistered lobbying activities. As the relevant statute reveals, Congress finds, in part, that “responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government.”¹⁷⁰ According to this statute, the term “lobbying activities” is defined as “lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.”¹⁷¹

The statute likewise defines the term “lobbyist” and also requires lobbyists or lobbying firms to “register with the Secretary of the Senate and the Clerk of the House of Representatives” unless a valid exception to this requirement applies.¹⁷² At present, the lobbyist registries for the House¹⁷³ and the Senate,¹⁷⁴ respectively, do not return relevant entries for search terms such as “CIVIC,” “Civilians in Conflict,” “Shiel,” or “Chappell.” For any person engaged in unregistered lobbying activities, unless a valid exception applies, the relevant statute provides for a civil penalty of up to a \$200,000 fine as well as a criminal penalty of up to 5 years imprisonment for anyone found guilty of “knowingly and corruptly” failing to comply with lobbying requirements.¹⁷⁵

Beyond compliance with rules related to lobbying, if these requirements do indeed apply, is the issue of perspective. That is, advocates for groups like CIVIC can be expected to present perspectives to the public that align with their organizational mission, purpose, and vision. When such views are articulated in fora such as law journals or national security blogs, the audience is able to ascertain the presence of biases that may affect assertions and characterizations presented therein. This is especially true for readers with at least some degree of expertise related to the subject matter addressed in such publications.

As examined above, elected officials such as Representative Sara Jacobs and Senator Dick Durbin do not necessarily possess the degree of expertise necessary to engage in a balanced and thoroughly informed evaluation of assertions and characterizations presented to them by advocates who may approach issues of importance with a discernable organizational or ideological bias. In this regard, the elected official is essentially converted into a high-profile spokesperson advocating on behalf of organizations such as CIVIC that collaborate directly with legislators such as Representative Sara Jacobs, and doing so raises significant concerns in relation to civilian-military relations. Elected officials who do exercise civilian control of the military are obliged to advance, on behalf of their respective constituencies and pursuant to their

¹⁷⁰ 2 U.S.C. § 1601(1).

¹⁷¹ 2 U.S.C. § 1602(7).

¹⁷² 2 U.S.C. § 1603(a)(1).

¹⁷³ See Office of the Clerk, U.S. House of Representatives, Lobbying Disclosure, Search Registrant Information, <https://lobbyingdisclosure.house.gov/lookup.asp> (last visited Mar. 16, 2023).

¹⁷⁴ United States Senate, Lobbying Disclosure, Registrations and Quarterly Activity, https://lda.senate.gov/filings/public/filing/search/#js_searchFormTitle (last visited Mar. 16, 2023).

¹⁷⁵ 2 U.S.C. §1606.

oath of office, the interests of the United States government – rather than those of special interest groups with organizational missions that do not necessarily align with America’s national security interests.

3. Single-Interest Groups and Tipping the Scales of the Military Necessity/Humanity Balance

The unseen – and quite likely unregistered – collaborative connections described immediately above bring to mind some salient reflections that were offered by a member of Congress who was, at the time, a fairly junior senator some forty years ago when the famous Supreme Court *INS v. Chadha* decision was published. While expressing the perspective that the loss of the legislative veto pursuant to *Chadha* was not a worrisome development, the legislator noted, “In my eleven years in the Senate there has been a dramatic change in the way in which that body is lobbied.”

The author laments that “single-interest groups have multiplied” in that time and that all the groups “claim to speak in the name of the American people, but very often I have found them speaking only to the narrowest of goals, goals that are not infrequently contrary to the public interest.” As a result, the author notes that elected officials, instead of “addressing the great of the day, setting national priorities, and formulating national policies,” have found themselves “more and more often haggling with the lobbyists over their real or imagined grievances with the regulatory agencies.” This dynamic, according to the author, “has seriously eroded the once well-deserved reputation of the United States Senate as the greatest deliberative body in the world.”

The as-yet undisclosed author of this law review article published in 1984 is Senator Joseph R. Biden, Jr.¹⁷⁶ At the time, the author was the Ranking Minority Member of the Senate Judiciary Committee and a member of the Senate Foreign Relations, Budget, and Intelligence Committees.¹⁷⁷ Nearly 40 years later, of course, then-Senator Biden would go on to be elected as the 46th President of the United States. Although then-Senator Joe Biden suggests in the law review article that it is possible “the Supreme Court has saved Congress from itself” by invalidating the so-called legislative veto,¹⁷⁸ developments in the intervening four decades suggest that this prognosis may have been overly optimistic.

Lamentation regarding “single-interest groups” that speak “only to the narrowest of goals, goals that are not infrequently contrary to the public interest” is just as legitimate today as it was four decades ago – perhaps even more so now considering the seemingly unabated proliferation of these groups in the intervening years. This dynamic is apparent in the seemingly rather recent tactic whereby civil society organizations turn to Congress in pursuit of civilian protection goals that have proven unsuccessful through direct engagement with the Department of Defense alone. For example, a collective of 21 civil society organizations published a letter to the Secretary of Defense in December 2021 in which the groups claim, “Over twenty years, the Department of Defense has failed to adopt solutions well within its grasp.”¹⁷⁹

However, reluctance to adopt suggestions presented by civil society groups for “over twenty years” is not necessarily a mark of an institutional “failure.” Rather, it is equally reasonable to believe the DoD has considered suggestions on offer from civil society advocates,

¹⁷⁶ Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 SYRACUSE L. R. 685, 691-92 (1984), <https://lawreview.syr.edu/wp-content/uploads/2013/01/Biden-Jr.-on-the-Legislative-Veto.pdf>.

¹⁷⁷ *Id.* at 685.

¹⁷⁸ *Id.* at 693.

¹⁷⁹ Letter from 21 Nongovernmental Organizations, *supra* note 122.

adopted practices that are consistent with the DoD mission, and declined to implement those that do not serve DoD interests. Nonetheless, “reforms” suggested in sources such as the 2021 letter cited directly above have been adopted by legislators who are now active in the area of civilian protection¹⁸⁰ – including members of the Protection of Civilians in Conflict Caucus.¹⁸¹

It is no small wonder, then, that Annie Shiel of CIVIC would assert that “Congress has a critical role to play in ensuring that the United States prevents, mitigates, and responds to civilian harm with transparency and accountability.” If civil society groups have become dissatisfied with “progress” achieved by direct engagement with the DoD alone for the past twenty years, the legislature presents fertile ground to pursue these objectives with a group that has no direct responsibility for waging war and, therefore, no perspective by which to critically evaluate suggestions presented by civil society advocates. What these lawmakers seemingly fail to recognize is that civil society organizations such as CIVIC represent what Joe Biden described nearly forty years ago as “single-interest groups” whose narrow goals “are not infrequently contrary to the public interest.”

As Lt. Gen. (ret.) Chuck Pedde and Col. Pete Hayden warn, “in the highly complex battlefield of the future, where near-peer nations leverage confusion and obfuscation of lawful targets, soldiers will have to navigate between asymmetric targets and force-on-force threats.”¹⁸² To that end, the authors emphasize, “Commanders and their lawyers alert to the dangers of seemingly convincing ‘experts’ on the law of war must know the law as it is—and separate out the aspirations of the ‘convincing authorities.’”¹⁸³ This knowledge and expertise is expected of commanders and their lawyers – as it should be, given the mission of the Department of Defense.

The same cannot be said for members of Congress and their staffers. This realization helps explain the fairly recent shift among civilian protection advocates to specifically target lawmakers rather than continuing to pursue direct engagement with the DoD alone. To the extent that this advocacy tactic seeks to tilt actual DoD interpretations and applications of the law of armed conflict in favor of humanitarian concerns at the expense of military necessity, this behind-the-scenes collaboration between civil society and Congress constitutes a clear and present threat to America’s national security.

On this point, Pedde and Hayden caution against the gap in understanding that is driven, in part, by the “aspirational ‘evolution’ of the law championed by scholars, interest groups, and nongovernmental organizations in an *external* drumbeat of legal commentary.”¹⁸⁴ This is especially true in the current context wherein the experience of most military members, developed over the last twenty years or so of counterinsurgency operations, is laden with “assumptions that do not exist in a highly contested environment, such as conflict with a peer or near peer enemy in densely populated Europe.”¹⁸⁵ It is in this light that the revisions to the DoD Law of War Manual suggested by Representative Sara Jacobs and Senator Dick Durbin must be evaluated.

¹⁸⁰ See, e.g., Letter from 46 Members of Congress to Secretary of Defense Lloyd Austin III (Mar. 14, 2022), <https://rubengallego.house.gov/sites/evo-subsites/rubengallego.house.gov/files/evo-media-document/Letter%20to%20Sec.%20Austin%20on%20Civilian%20Casualties%203.14.22.pdf>.

¹⁸¹ See, e.g., Jacobs Press Release, *supra* note 143.

¹⁸² Pedde & Hayden, *supra* note 111, at 18.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 7 (emphasis in original).

¹⁸⁵ Curley & Golden, *supra* note 112, at 23.

4. Perspective, Approach, and the *Detailed Assessment* of the DoD Law of War Manual

Thus far, I have contested each substantive revision to the DoD law of War Manual proposed in the Jacobs-Durbin letter and challenged the expertise – and indeed authority – of legislators for publishing such suggestions. This is not to suggest, however, that I believe every assertion and every legal characterization presented in the Manual are beyond reproach. To that end, I have previously commended a book, *The Law of War: A Detailed Assessment of the U.S. Department of Defense Law of War Manual*, as “an indispensable companion to the Manual that will serve as a valuable resource for any practitioner or scholar working in the field of the law of armed conflict.”¹⁸⁶

As I indicated then, the “meticulous review on offer in the *Detailed Assessment* provides constructive commentary on each provision of the Manual while situating the perspectives in a broader practical and scholarly context.”¹⁸⁷ This is a commendation that continues to resonate even now, several years since I retired from military service and transitioned to academia. Although the authors of *Detailed Assessment* contest any number of characterizations presented in the Manual, they approach the project from the perspective of highly experienced and deeply informed scholars. This practitioner-focused approach is a hallmark of works of scholarship by Bill Boothby and Wolff von Heinegg – and the *Detailed Assessment* as a companion to the Manual is no exception.

Mention of the *Detailed Assessment* here is not offered for the purpose of endorsement, though I do commend the work to scholars and practitioners alike in the previous book review and continue to do so today. Rather, reference to that informed evaluation of the Manual is presented here in order to further emphasize the issue of perspective. Renowned and respected scholars such as Ryan Goodman, Adil Haque, Marty Lederman, Gordon Dunbar, and Brian Finucane may well present informed and reasonable suggestions for revising the DoD Law of War Manual. Distinguished scholars such as Bill Boothby and Wolff von Heinegg may well do the same.

In evaluating the advisability of these or any other suggestions, the approach and perspective of the respective authors is just as important to the evaluation of the advisability of the proposed revisions as the degree of expertise each author brings to the topic of revision. Qualifications and expertise are often far easier to discern since author biographies are generally readily available. Approach, perspective, and the potential effect of ideological bias are rather more subtle, but discerning these characteristics is just as important as assessing relative expertise.

In the current context of suggested revisions to the DoD Law of War Manual and the imperative of maintaining the balance between military necessity and humanity, it is fitting to recall the observation by Mike Schmitt that civil society advocates and others “pay no price for forfeiting a degree of military necessity.” The result, according to Schmitt, is “a frequent assertion of *lex ferenda* in the guise of purported *lex [lata]*.”¹⁸⁸ If this phenomenon is not

¹⁸⁶ Brian L. Cox, *The Law of War*, JAG REPORTER (July 18, 2019) (reviewing WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, *THE LAW OF WAR: A DETAILED ASSESSMENT OF THE U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL* (2019)), <https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2547489/the-law-of-war>.

¹⁸⁷ *Id.*

¹⁸⁸ Schmitt, *supra* note 107, at 838. Note that the text of the quoted passage is: “a frequent assertion of *lex ferenda* in the guise of purported *lex ferenda*.” The second mention of *lex ferenda* in the actual text is an apparent typographical

understood for what it is, Schmitt warns that “such efforts risk distorting the prescriptive process” of the law of armed conflict.¹⁸⁹ Maintaining that balance and evaluating whether a particular perspective tends to unduly tilt the balance in one direction or the other requires an incredible degree of nuance, awareness, and experience.

Military lawyers and the organizational personnel they advise, in contrast to civil society advocates and others, *do* stand to pay a direct and heavy price for forfeiting a degree of military necessity. The expense of unduly tipping the balance in favor of humanitarian considerations can be measured in coalition casualty reports and risks of mission failure. This approach informs the advice military lawyers provide and the institutional positions on the use of force the Department of Defense adopts.

There is no reason to believe a pair of lawmakers with no military experience and no apparent expertise related to international law involving the use of force are proficient in the highly nuanced task of evaluating whether the suggested revisions to the Manual presented in their letter unduly tip the balance in favor of humanity at the expense of military necessity. Requisite expertise can reasonably be expected to accompany relative authority. The signatories bring neither to the letter.

5. Rejecting the Call to Establish an “External Advisory Panel”

Revisions to the DoD Law of War Manual suggested in the letter sent from Representative Sara Jacobs and Senator Dick Durbin to the DoD General Counsel, Ms. Caroline Krass, are undoubtedly reasonable, but whether they are *advisable* is a matter of perspective. For the behind-the-scenes author(s) of the letter, the legislators who actually signed the letter, and the scholars whose work is cited by many of the substantive suggestions presented therein, the proposed revisions may well seem prudent and desirable. No one in this group, however, is responsible for training for and, when called upon, carrying out combat operations in support of American national security interests.

For military and civilian personnel who work on behalf of America’s largest government employer in support of the DoD mission “to provide the military forces needed to deter war and ensure our nation's security,”¹⁹⁰ it is reasonable to anticipate a different approach to an assessment of such suggestions. This is to be expected, as a person’s perspective is informed by one’s background, experience, and reason for engaging in an evaluation of the revisions. The Manual was drafted and adopted by personnel who work in support of the DoD mission, while proponents of revisions suggested in the Jacobs-Durbin letter do not.

That includes the two lawmakers whose signature the letter bears. Legislators have no actual constitutional authority to direct – or even to request – changes to the DoD Law of War Manual, and the DoD General Counsel has no obligation to respond to such “requests.” According to the foreword by then-GC Stephen Preston, the Manual “reflects many years of labor and expertise, on the part of civilian and military lawyers from every Military Service,” and it also “reflects the experience of [the DoD] in applying the law of war in actual military

error, and the replacement of *ferenda* with *lata* in brackets in the main text above presents the author’s individual deduction regarding the wording intended by Schmitt in the passage.

¹⁸⁹ *Id.*

¹⁹⁰ Dep’t Def, About, *supra* note 147.

operations.”¹⁹¹ The revisions suggested by Representative Sara Jacobs and Senator Dick Durbin bear no such reflection.

Along with requesting a response regarding the timeline and scope of a suggested organization review of the Manual, the Jacobs-Durbin letter calls for an update on “plans to consult with civil society and legal experts.”¹⁹² However, the substantive suggestions presented in the Manual do not actually warrant a review of the publication. The proposal to establish a formal, external consultation process is likewise unwarranted.

This consultation suggestion at the conclusion of the letter is presented in the context of an earlier recommendation to establish “an external advisory panel to facilitate and formalize meaningful consultation with civil society, legal experts, and academics on the Law of War Manual review process.”¹⁹³ As part of this “external advisory panel,” the legislators “also recommend that the process include the substantial involvement of other U.S. government agencies, particularly the Department of State, whose equities are impacted by DoD interpretations and applications of international law.”¹⁹⁴ Formally establishing an “external advisory panel” of the suggested composition would be a monumental mistake for the Department of Defense.

Such external “advisors” invariably approach the content of the Manual from a perspective that does not align with the mission of the DoD. As the very first substantive section of the Manual affirms in setting the tone for the remainder of the text, “The purpose of this manual is to provide information the law of war to DoD personnel responsible for implementing the law of war and executing military operations.”¹⁹⁵ Likewise, as the first sentence of the preface notes, the Manual is published to be a “DoD-wide resource for DoD personnel – including commanders, legal practitioners, and other military and civilian personnel – on the law of war.”¹⁹⁶

This purpose informs the approach of those responsible for drafting the Manual, and it is a purpose that is not shared by external advisors. Other governmental agencies – particularly the Department of State as the only external agency explicitly mentioned in the Jacobs-Durbin letter – may have “equities” that are “impacted by DoD interpretations and applications of international law,”¹⁹⁷ but the guidance reflected in the Manual is not published in support of agencies other than the DoD. If the senior leadership of the Department of State, for example, believes it is important enough to present interpretations regarding application of the law of armed conflict to members of their workforce in support of their mission, they are able to do so in their own respective manuals.¹⁹⁸

Guidance currently presented in the DoD Law of War Manual originally “benefitted greatly from consulting foreign experts and resources”¹⁹⁹ as well as from a “review that also included comments from distinguished scholars.”²⁰⁰ Likewise, preparation of the Manual

¹⁹¹ DOD LAW OF WAR MANUAL, *supra* note 2, at ii.

¹⁹² Jacobs & Durbin, *supra* note 1, at 6.

¹⁹³ *Id.* at 2.

¹⁹⁴ *Id.*

¹⁹⁵ DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 1.1.1.

¹⁹⁶ *Id.* at iii.

¹⁹⁷ Jacobs & Durbin, *supra* note 1, at 2.

¹⁹⁸ See, e.g., DEP’T STATE, FOREIGN AFFAIRS MANUAL AND ASSOCIATED HANDBOOKS, <https://fam.state.gov> (last visited Mar. 16, 2023).

¹⁹⁹ DOD LAW OF WAR MANUAL, *supra* note 2, at iv.

²⁰⁰ *Id.* at v.

“benefited significantly from the participation of experts from the Department of State, Office of the Legal Adviser, and the Department of Justice, Office of Legal Counsel, although the views in [the] manual do not necessarily reflect the views of those Departments or the U.S. Government as a whole.”²⁰¹ Perspectives from external advisors of the type suggested in the Jacobs-Durbin letter, then, were already thoroughly consulted while preparing the Manual.

However, the finished product reflects the purpose of publishing a “DoD-wide resource for DoD personnel”²⁰² in support of the mission of the Department of Defense – not that of the Department of State, other governmental agencies, or of civil society organizations such as CIVIC. For scholars and members of the public who would like to suggest revisions to the Manual, it is possible to do so by writing an op-ed, blog post, law review article, or similar contribution to public discourse. As an alternative, the preface closes by inviting “users of the DoD Law of War Manual” to submit comments and suggestions to a specified email address, which is osd.pentagon.ogc.mbx.ia-law-of-war-manual-comments@mail.mil.²⁰³

CONCLUSION

Legislators with no specific expertise are likely not particularly well qualified to offer informed contributions to public discourse by way of writing an op-ed or blog post. However, they also have no constitutional authority to publish a letter to the DoD GC and expect action – or even a reply – in response. Adopting an approach that does not prioritize humanitarian considerations at the expense of military necessity reveals the substantive revisions to the Manual suggested in the Jacobs-Durbin letter are likely not advisable in practice, as indicated by the critical assessment conducted above in Part I of the present inquiry. Characterizing legislative powers in terms of a general “oversight” role of the government rather than drawing on the actual source of that authority – the U.S. Constitution – is an invitation for Congress to infringe upon constitutional commander in chief authority vested in the executive, as Part II above asserts while considering the Jacobs-Durbin letter in the broader context of public discourse and separation of powers.

Regarding the substantive revisions suggested in the Jacobs-Durbin letter specifically and the more general context of separation of powers and relative expertise, it is fitting to draw upon a reflection presented by Ryan Goodman at the conclusion of a *Just Security* article published in December 2016, a week after the latest revision to the Manual was released to the public. After favorably making note of the invitation in the Manual for users to direct comments and suggestions to the email address provided therein, Goodman suggests to the interested reader, “Take them up on it. They’re listening.”²⁰⁴ In the absence of actual constitutional authority to command the DoD General Counsel to revise the Manual, and with no apparent individual expertise on the topic, it would be just as appropriate to direct this invitation to Representative Sara Jacobs and Senator Dick Durbin specifically as it would to the public in general.

The Department of Defense may be listening, but its agents are under no obligation to respond. Members of the defense community have the authority, responsibility, *and* expertise to determine whether any proposed revisions to the Manual actually support the mission of the Department of Defense. The same cannot be said for members of Congress.

²⁰¹ *Id.* at vi.

²⁰² *Id.* at iii.

²⁰³ *Id.* at vi.

²⁰⁴ Goodman, *supra* note 80.