

Question: How does the United States Government handle American citizens in combat zones? (IACs and NIACs).

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I. INTRODUCTION

- a. The modern era has witnessed a significant transformation in the dynamics of armed conflicts, particularly concerning the presence of American citizens in combat zones. Traditionally, combat zones were predominantly occupied by military personnel, but the last few decades have seen a growing number of non-military affiliated American citizens (AMCITs)² embarking on journeys to regions marked by conflict and instability, including Iraq, Syria, Ukraine, and Gaza. This evolving landscape poses profound challenges for the United States government (USG), as it grapples with the complex task of handling its citizens in these perilous environments.
 - i. Gary Faulkner³, an eccentric American construction worker who became fixated on hunting down Osama bin Laden in Pakistan, armed only with a sword and a misguided sense of purpose to Faulkner's bizarre quest, fueled by patriotism and religious conviction, captures the complexities of American citizens on the battlefield.
 - ii. *John Doe v. James Mattis*⁴: John Doe, an American citizen who joined ISIS and was captured by U.S. forces in Syria. Complexities of his situation, including questions about his citizenship, rights under the law, and the broader implications for U.S. counterterrorism efforts. Additionally, it highlights the challenges of prosecuting American citizens who have joined terrorist organizations abroad and the legal and ethical dilemmas surrounding their repatriation and trial.

¹ Disclaimer: the views and opinions expressed in this outline do not reflect the views or position of the U.S. Government, Department of Defense, U.S. Army, or other entities.

² A note on terminology: This paper uses the term AMCIT to refer to American citizens. USPER (U.S. Persons is another common acronym used to describe American citizens in hostile Areas of Responsibility (AOR).

³ Chris Health, *Gary Faulkner Hunts Osama Bin Laden*, GQ, <https://gq.com/story/gary-faulkner-hunts-osama-bin-laden> (last visited Jan. 30, 2024).

⁴ *John Doe v. James Mattis*, No. 18-5032, *United States Court of Appeals for the District of Columbia Circuit* (argued April 5, 2018; reargued April 27, 2018; decided May 7, 2018), consolidated with No. 18-5110, appeal from the *United States District Court for the District of Columbia* (No. 1:17-cv-02069).

- b. This presentation delves into the intricate web of issues surrounding the treatment of American citizens in combat zones by the USG. Our exploration will encompass a multifaceted analysis, including the legal framework, the actors involved, the diverse categories of AMCITs found in and around conflict areas, and the best practices for military advisor-attorneys tasked with navigating these challenging scenarios. This comprehensive examination provides a holistic understanding of how the United States government navigates the intricate terrain of American citizens in combat zones. Through a multidimensional analysis, we aim to shed light on the rules, actors, categories of AMCITs, and best practices that shape this complex domain, ultimately contributing to a more informed and nuanced discourse on this pressing issue.

II. CIVILIAN PROTECTIONS UNDER INTERNATIONAL LAW

- a. In the context of armed conflicts, the principles governing the treatment of civilians are rooted in international law, including conventions, treaties, customary law, and general principles. Notably, we will delve into the Geneva Convention IV (GC4)⁵ and the Additional Protocols of 1977,⁶ which form the cornerstone of civilian protection.
 - i. The United States is not a party to the Additional Protocols to the Geneva Conventions of 1949. These Additional Protocols, known as Protocol I and Protocol II, were adopted in 1977 and detail additional protections for victims of armed conflicts. While the United States participated in the negotiations leading to the adoption of the protocols, it ultimately chose not to become a party to them. However, the United States does adhere to certain principles contained in the protocols as customary international law.

⁵ *Convention IV relative to the Protection of Civilian Persons in Time of War*, opened for signature August 12, 1949, <https://ihl-databases.icrc.org/en/ihl-treatis/gciv-1949?activeTab=1949GCs-APs-and-commentaries> (last accessed December 1, 2023).

⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature June 8, 1977, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=1949GCs-APs-and-commentaries> (last accessed April 1, 2024).

- b. Within this framework, we categorize three distinct types of AMCITs found in International Armed Conflicts (IAC) or Non-International Armed Conflicts (NIAC):
 - i. AMCIT who is a "pure civilian" (e.g., a banker in Baghdad, child refuse in Al Col camp, trafficked person in the Philippines, NGO worker in Raqqa, or a combat tourist/reporter in Afghanistan).
 - ii. AMCIT participating in hostilities (e.g., an individual from Columbus, Ohio, who joins groups like ISIS, SDF, or the Ukrainian Foreign Legion).
 - iii. AMCIT accompanying the force (e.g., Department of Army civilians or contractors).⁷

III. DOMESTIC LEGAL CONTROLS ON AMERICAN CITIZENS IN WAR ZONES

- a. Understanding the U.S. legal landscape is essential to comprehend the government's authority over its citizens in war zones. We will explore related Constitutional provisions and domestic laws, including restrictions on travel (e.g., North Korea, Cuba, during times of declared war), laws against material support to designated organizations, and traveling on vessels (e.g., 1930s neutrality acts). A comparative analysis with nations like Australia, which restricts travel to active conflict zones, will also be considered.
 - i. **Australian Terror Laws.** In 2014, Australian Foreign Minister Julie Bishop for the first time used powers under terrorism laws to declare Raqqa a no-go zone and cancelling passports to stop travelers headed to Syria. Anyone entering the area could face up to 10 years in prison unless they have a legitimate reason, including family visits, journalism or aid work.⁸
 - ii. Compare to U.S. Department of State's Level 4 "Do Not Travel" Advisory to Syria. However, US Law can limit travel to certain states, e.g. Cuba (31 CFR 515.560 -- Travel-related transactions to, from, and

⁷ This paper purposefully sidesteps the "can we target, lethally and non-lethally, AMCITs who participate in hostilities" as much has been written on this topic.

⁸ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, No. 116, 2014, <https://www.legislation.gov.au/C2014A00116/latest/text>, (last accessed: March 1, 2024).

within Cuba by persons subject to U.S. jurisdiction.), where travel to Cuba for tourist activities remains prohibited by statute.⁹

IV. UNITED STATES GOVERNMENT ACTORS AND THEIR ROLES

- a. Examining the institutional framework, we will delineate the roles and responsibilities of USG actors, particularly focusing on the Department of State's (DoS) statutory charge (Title 22) vested with Art II (Section 2) powers. Additionally, we will shed light on the Department of Defense's (DoD) role in supporting the DoS, especially in the context of Noncombatant Evacuation Operations (NEO) and interagency collaboration with federal law enforcement agencies such as the Department of Justice (DoJ) and the Department of Homeland Security (DHS).
- b. An example of Department of State and Department of Defense coordination is with hostage situations.¹⁰ Where the Department of State's Office of the Special Presidential Envoy for Hostage Affairs (SPEHA) and the Bureau of Consular Affairs' Office of American Citizens Services and Crisis Management (ACS) will coordinate with the Hostage Recovery Fusion Cell (HRFC), the U.S. government's interagency team that coordinates efforts dedicated to recovering U.S. nationals held hostage abroad by non-state actors such as terrorist groups. Staffed by hostage recovery professionals from the Department of Defense, Department of State, Department of Justice, the U.S. Department of the Treasury, the FBI, and the intelligence community, the HRFC aims to improve how the government develops hostage recovery plans, tracks developments in specific cases, shares information with families, and provides information to Congress and the media. Although individuals held by a foreign government are not generally regarded as hostages, the Department of State does consult with the HRFC on certain matters through SPEHA and ACS.¹¹ The fusion cell consists of nearly 50 individuals from the FBI, the U.S. Department of Defense, the U.S. Department of State, and

⁹ 64 FR 25814, May 13, 1999, as amended at 66 FR 36688, July 12, 2001; 68 FR 14146, Mar. 24, 2003; 69 FR 33771 and 33773, June 16, 2004; 74 FR 46006, Sept. 8, 2009; 76 FR 5074, Jan. 28, 2011.

¹⁰ See 22 U.S. Code Chapter 23 – Protection of Citizens Abroad. R.S. §2001; Pub. L. 101-222, §9, Dec. 12, 1989, 103 Stat. 1900.

¹¹ See 22 U.S. Code § 1733 - Interagency Hostage Recovery Coordinator. "Not later than 60 days after November 25, 2015, the President shall designate an existing Federal official to coordinate efforts to secure the release of United States persons who are hostages held abroad. For purposes of carrying out the duties described in paragraph (2), such official shall have the title of "Interagency Hostage Recovery Coordinator". *Id.*

other agencies whose full-time job and single focus is bringing hostages home safely and sharing information with their families. A critical part of that effort is the Family Engagement Team, established at the same time as the fusion cell.

- c. **DoD's Role and Interagency Cooperation.** This section will delve deeper into DoD's role, as dictated by statute and joint doctrine, emphasizing its support to DoS and NEO events. We will explore the delicate balance between DoD's supporting role and its prominent position in interfacing between the human terrain and the USG in both IACs and NIACs. Additionally, we will discuss the role of DoD in supporting other federal agencies beyond DoS, including the DoJ (FBI, DEA, etc.) and DHS.

- i. **What happens when the war comes to a heretofore peaceful nation** (e.g., South Korea)¹²

1. A NEO is an ordered departure for personnel under chief of mission (COM) authority and assisted evacuation for other US citizens and designated personnel from a threatened area abroad that is carried out with the assistance of DOD through the use of military assets and/or existing commercial and/or chartered transportation services (as opposed to ordered departures that do not require DOD assistance).
2. US Policy. Pursuant to Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, as amended, and other related executive orders, and pursuant to procedures to be developed jointly by the Secretary of Defense (SecDef) and the Secretary of State (SECSTATE), SecDef is responsible for the deployment and use of military forces for the protection of US citizens and nationals and, in connection therewith, other designated persons or categories of persons, in support of their evacuation from threatened areas overseas.
3. The planning, coordination, command and control structure, execution, and the political and diplomatic factors involved in timing the execution of the military support of NEOs make them different from other military operations. During NEOs, the COM, and neither the combatant commander (CCDR) with a designated area of responsibility (AOR) nor the subordinate joint force commander (JFC), is the senior United States Government (USG) authority for the evacuation. Therefore, the

¹² See Noncombatant Evacuation Operations, PAM 600-300 provides guidance for all USF NCEs living in ROK. See *A/so*. Noncombatant Evacuation Operations. Joint Publication 3-68 (Department of State Direction, Department of Defense Support).

COM is ultimately responsible for the successful completion of the NEO and the safety of the evacuees. The decision to evacuate a US embassy is retained by the COM.

4. In DOD Directive 3025.14, Evacuation of US Citizens and Designated Aliens from Threatened Areas Abroad, DOD is tasked with preparing and implementing plans for the protection, evacuation, and repatriation of DOD noncombatant evacuees. Actual evacuation assistance can be provided only upon the request of SECSTATE to either SecDef or the President. Once requested, approved, and directed, the CCCR directs assigned and/or attached forces to conduct evacuation operations in support of DOS and the COM. CCCRs prepare, maintain, exercise, execute, and continually assess plans for protection and evacuation from threatened areas abroad.

ii. MEDRO (EUCOM, CENTCOM) – MEDROE. Joint Publication 4-02 [Health Service Support]

1. Doctrine allows a Geographic Combatant Command to establish medical rules of engagement (MROE). The United States Army (USA) is the primary provider of air and ground MEDEVAC assets to the GCC. The USA has dedicated assets specifically organized to provide this function. USA MEDEVAC provides forward patient movement to members of the joint force as well as HN, interagency, NGOs, detainees, and DOD and non-DOD civilians and contractors.
2. When an AMCIT is found injured by the USG, the MEDROE (or direction from POTUS / SECDEF) will determine what medical support can be provided to the individual, be it care on scene or MEDEVAC. The Department of State may need to rely upon the Department of Defense's considerable personnel and capabilities through a request to the Executive Secretariat of the Department of Defense.

V. Practical Guidance for Military Advisor-Attorneys

- a. Recognizing the intricate legal challenges AMCITs pose in conflict zones, this section will provide practical guidance for military advisor-attorneys. We will explore battle drills, policies coordinated with embassy consular affairs, and the vital role of the Bureau of Consular Affairs in assisting AMCITs, including transportation (including remains) back to the Continental United States (CONUS). What can they do, and how would the command best support connecting AMCITs to Consular Affairs? Further, we will examine the

MEDROE – looking into what can be provided, approval authorities, and amendment authorities.

VI. Other Pertinent Issues

- a. AMCIT Property – real, personal, pets – should this be treated any differently than other civilian property? DoS Consular Support through Bureau of Consular Affairs.
 - i. Consular Services are managed by the Bureau of Consular Affairs.¹³ Led by the Assistant Secretary for Consular Affairs, the Bureau of Consular Affairs' highest priority is protecting the lives and serving the interests of U.S. citizens abroad. Across the globe, they serve U.S. citizens during some of their most important moments—births, adoptions, medical emergencies, deaths, arrests, and disasters. They also help U.S. citizens connect with the world by issuing millions of U.S. passports each year.
 - ii. Additionally, the Bureau of Consular Affairs keep helps foreign nationals connect with the United States by issuing visas to qualified visitors, workers, and immigrants. Consular services range from Attorney / Firm referral lists and assistance to U.S. citizens detained, arrested, or incarcerated abroad, to repatriation to next of kin of remains and personal effects of U.S. citizens (See 22 USC 4341-43) to limited Emergency Financial Assistance to U.S. citizens.
 - iii. Sometimes, consular services are disrupted due to a real and present threat to United States diplomatic or consular personnel in the city where the post is located, and the Department of State has issued a travel advisory warning against travel by United States citizens to that city (See 22 U.S. Code § 2720—Closing of consular and diplomatic posts abroad). In such instances, such as in Syria, the nearest consular services may be in an adjacent country where the security environment is more permissive.
- b. Other Constitutional concerns.
- c. Amendment IV protections / MISO considerations
- d. Detention Operations—How do we know what type of AMCIT we are dealing with? Is this a terrorist? Do we have the authority to interrogate and detain? What rights must we provide the individual in an IAC or NIAC? What about the right to counsel?

¹³ 22 U.S. Code § 2651

- i. Ex. Two American citizens show up on your FOB in an active war zone asking for help; what can or should you do?
- ii. Ex. A U.S. special operations force in Israel, Yemen, Ukraine, etc., working with partner forces. Partner force detains suspected IRGC Quds Force leader and associates. Partner force notifies the U.S. one of the individuals traveling with the group (looks and smells like them) is an AMCIT. What do you advise? What can you do?
 1. WAMPOR
- iii. *Hamdi et al.* for cases depicting limitations on executive power in times of conflict, where the power to conduct military operations runs into due process concerns where AMCITS are participating in hostilities.
 1. “While we sustain the district court’s orders, we do so respectful of – and with appreciation for—the considerable deference owed to the Executive’s judgments in the prosecution of a war. That latitude of course extends to military decisions about what to do with enemy combatants captured overseas in a zone of active hostilities. Virtually all such decisions will be unaffected by our decision today. But when the alleged combatant – even on seized on a foreign battlefield – is an American citizen, things are different.”¹⁴

¹⁴ *Hamdi v. Rumsfeld*, 542, U.S. 507 (2004). See *Id.* At 532-33. 535-37 (plurality); *Id.* At 558-59 (Scalia, J. dissenting.), the Executives authority to wage war as it sees fit is cabined by the Supreme Court’s decision in *Hamdi*, which requires that a citizen be afforded certain guarantees before the military detains or transfers him under the law of war. *Id.* At 517, 533 (plurality); *Omar*, 646 F.3d at 24. That precedent, in our view, governs the disposition of this appeal.”