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Talking Foreign Policy

Radio Broadcasts Sept. 25, 2014, Jan. 29 and Sept. 4, 2015, Feb. 5 and Oct. 7, 2016

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Talking Foreign Policy Transcripts

In 2012, Director of the Inamori International Center for Ethics and Excellence Shannon French, joined Case Western Reserve University (CWRU) School of Law Professor Michael Scharf in launching *Talking Foreign Policy*—a radio program produced by CWRU in partnership with WCPN 90.3 ideastream.

Talking Foreign Policy (TFP) is a one-hour radio program, hosted by Michael Scharf (now co-Dean of CWRU School of Law), in which leading experts from around the nation discuss the salient foreign policy issues of the day. The premier episode (airdate: March 1, 2012) covered the controversial use of predator drones, humanitarian intervention in Syria, and responding to Iran's acquisition of nuclear weapons.

The program is designed to offer a broad expanse of views, as political positions range across the entire spectrum. The participants strive to make the show casual and sometimes humorous, even when discussing serious topics.

The program airs about every three months on Cleveland's NPR Station, and has been syndicated in North Carolina, Miami, Texas, and Maine. Since its inception, the Inamori Center's *Journal of Ethical Leadership* has published the edited transcripts of the program. Each transcript has been edited and footnotes added by the fellows of the Frederick K. Cox International Law Center.

This volume of the journal contains the transcripts from five broadcasts of *TFP*: (1) Combatting ISIS (airdate: September 24, 2014); (2) President Obama's Controversial Action on Immigration Reform (airdate: January 29, 2015); (3) The Iran Nuclear Accord (airdate: September 4, 2015); (4) National Security and the Presidential Primaries (airdate: February 5, 2016); and (5) Art, Diplomacy, and Accountability (airdate: October 7, 2016). Archived broadcasts are available for viewing in video format online at law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Talking-Foreign-Policy.

Talking Foreign Policy, September 25, 2014, broadcast¹

Participants:

Michael Scharf

Shannon French

Sandy Hodgkinson

Milena Sterio

Paul Williams

SCHARF: Welcome back to *Talking Foreign Policy*. I'm your host, Michael Scharf, interim dean of Case Western Reserve University School of Law. In today's broadcast, we'll be discussing the threat posed by the Islamic State and critiquing President Obama's plan to combat the group in Iraq and Syria. Our experts today include Sandy Hodgkinson, former deputy assistant secretary of defense,² who will be joining us from Washington D.C.'s NPR studio. She will be joined there with Paul Williams,³ one of the world's foremost peace negotiators, who just returned from peace talks in Yemen. Here in Cleveland, at the WCPN ideastream Studio, I'm joined by international law expert Milena Sterio,⁴ who is the associate dean of the Cleveland Marshall College of Law, and by ethicist Shannon French,⁵ who heads the Inamori International Center for Ethics and Excellence at Case Western Reserve University.

Let's begin our discussion with Sandy Hodgkinson. Sandy—I need some background so that I can understand exactly how we got to this point and what we're dealing with. Can you tell us a little bit about the Islamic State—this group which has all these different names, ISIS and ISIL? Well let's start by asking you, why so many names?

1. Transcript edited and footnotes added by Cox Center Fellow Kathryn Wieber.

2. U.S. DEPARTMENT OF DEFENSE, June 9, 2009, available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12735>. Sandra L. Hodgkinson served as special assistant to the deputy secretary of defense and previously served as foreign relations and defense policy manager.

3. Faculty, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, available at <http://www.wcl.american.edu/faculty/pwilliams/>. Prior to his arrival at American University, Paul Williams served as a Senior Associate with the Carnegie Endowment for International Peace and a Fulbright Research Scholar at the University of Cambridge.

4. Milena Sterio, CLEVELAND-MARSHALL COLLEGE OF LAW, available at http://facultyprofile.csuohio.edu/csufacultyprofile/detail.cfm?FacultyID=M_STERIO. Before joining Cleveland-Marshall, Milena Sterio worked as an associate at Cleary, Gottlieb, Steen & Hamilton in New York City and as an Adjunct Law Professor at Cornell.

5. Shannon E. French, Ph.D., CASE WESTERN RESERVE UNIVERSITY, available at <http://www.case.edu/provost/inamori/about/meet.html>. Prior to her involvement in CWRU School of Law, Shannon French taught ethics for eleven years at the United States Naval Academy and served as Associate Chair of the Department of Leadership, Ethics, and Law.

HODGKINSON: Sure, well first off, thanks very much Michael for having me on the show today. I'm really delighted to be here. Well there are obviously a couple different names that have been used, all in reference to this same group and this same enemy that we are now launching airstrikes to try to rout out. But the first one, ISIS, which is the one that was originally being used more frequently in the media, is the Islamic State in Iraq and Syria. So that basically references just the geographic constraint of this terrorist organization that exists in Iraq and Syria, that had moved over from originally what was just in Iraq.⁶ The State Department and the president have used it more broadly under the term Islamic State in Levant, or ISIL. Levant is a regional description that the State Department has traditionally used for the region that includes generally Syria, Lebanon, Israel, Palestine, and Jordan.⁷ So it's a broader, historical reference to the particular region of which Iraq and Syria now encompass. So that is the term that the president has used and that is the term that the US government is currently using.⁸

SCHARF: When you talk about the Islamic State, I mean, there's really two different branches of Islam, the Shi'a and the Sunni. Which branch are these militants from?

HODGKINSON: These militants are Sunni. And I want to talk a minute about exactly what the Islamic State is. The Islamic State is actually a term used by the organization itself, somewhat descriptive of what their ultimate goal is, which is to eventually create a caliphate, or a state that's led by a supreme religious and political leader known as a caliph.⁹ That is the goal of the organization, and so when they refer to themselves as the Islamic State, it really is in effort to try to give themselves credibility as something much bigger and candidly more legitimate than what they are as a terrorist organization.

6. *ISIS Fast Facts*, CNN, Oct. 9, 2014, available at <http://www.cnn.com/2014/08/08/world/isis-fast-facts/>. The Islamic State of Iraq (ISI) became known as the Islamic State in Iraq and the Levant (ISIS) in 2013 when ISI declared its absorption of al-Nusra.

7. *Levant*, ANCIENT HISTORY ENCYCLOPEDIA, Apr. 28, 2011, available at <http://www.ancient.eu/levant/>.

8. *Isis vs Islamic State vs Isil vs Daesh: What do the different names mean—and why does it matter?*, THE INDEPENDENT, Oct. 21, 2014, available at <http://www.independent.co.uk/news/world/middle-east/isis-vs-islamic-state-vs-isil-vs-daesh-what-do-the-different-names-mean-9750629.html>. The Obama administration believes that the word “Levant” and ISIL are a more accurate translation from the Arabic name.

9. *Islamic State of Iraq and ash Sham/Islamic State (Islamic State of Iraq, ISIS or ISIL, IS)*, TERRORISM RESEARCH & ANALYSIS CONSORTIUM, available at <http://www.trackingterrorism.org/group/islamic-state-iraq-islamic-state-iraq-and-sham-isis>.

SCHARF: Well is their goal beyond the bounds of Iraq and Syria?

HODGKINSON: Certainly. Their goal is broader within the region and to establish as large of an Islamic State as they can.¹⁰

SCHARF: OK, so this group began as an outgrowth of al-Qaeda in Iraq, and you were there in Iraq a decade ago as Senior Counsel to the Occupation Forces. How did the Iraqi al-Qaeda morph into this new entity?

HODGKINSON: Well first it began, obviously, as the lack of security in Iraq continued to grow and al-Qaeda in Iraq continued to get larger and larger. It ultimately merged in with other groups to form what was then known as the ISI, or the Islamic State in Iraq. So it was contained more geographically to Iraq at the time. It wasn't until about 2013 that it started to move over into Syria, taking advantage of the civil war and the instability there, and started to change its name to include the broader reference to Syria, or as they refer to themselves, al-Sham.¹¹

SCHARF: And meanwhile, in Syria, there is this other al-Qaeda group, the al-Nusra—is that right?

HODGKINSON: Yes, there is.

SCHARF: So now we have competing al-Qaeda groups? Is that the essence of what's going on there?

HODGKINSON: Well, yes. Al-Nusra has as its goal—it was formed in Syria during the civil war and it has principally the goal of trying to have an Islamic State mostly in Syria. The broader goal of ISIL is a goal to have a broader caliphate state that is more expansive than just in Syria alone—so they have similar goals, but different objectives at the end of the day.¹²

SCHARF: All right, so what should we be calling them throughout this broadcast? The Islamic State? The ISIL?

HODGKINSON: We should be calling them ISIL.

SCHARF: Okay.

HODGKINSON: ISIL, because that is right now where we are referencing the military airstrikes and the purpose of the current US government

10. *Id.*

11. Suhaib Anjarini, *The Evolution of ISIS*, AL MONITOR, Nov. 1, 2013, available at <http://www.al-monitor.com/pulse/security/2013/11/syria-islamic-state-iraq-sham-growth.html#>.

12. *Id.* The leader of ISIS, Abu Bakr al-Baghdadi, dissolved Jabhat al-Nusra and integrated its members into ISIL, making a new organization referred to as the Islamic State in Iraq and al-Sham (ISIS).

policy is focused on coming up with a solution to ISIL—and while al-Nusra continues to exist in Syria, it's not part of the legitimate purpose of these airstrikes. While there are other terms that are used for it, ISIL and "ISIL" seem to be as broadly representative of the actions that the US government will probably take to address it.

SCHARF: Now how many militant troops are there in this organization?

HODGKINSON: Well it's been a number that has continued to grow. I mean, at first we heard that it was a couple thousand, and then—now there are reports that its twenty to thirty thousand different fighters and we're seeing an increase in fighters coming from other Western countries as well—in Europe particularly—and now the count of Western fighters as part of ISIL has grown to about three thousand.¹³

SCHARF: Okay, so why in the world would someone sitting in the United Kingdom or the United States go halfway around the world to join this militant group?

HODGKINSON: Well, it's this declaration of a so-called caliphate,¹⁴ or this idea that there could be something bigger, like an Islamic State, that's more representative and larger than itself. It appeals to radicals that are living in those areas and so they see it gaining strength, they see it gaining territory, and it is attractive to people who are more radical in those areas.

SCHARF: Where are they getting all their money and their arms?

HODGKINSON: Well, the largest amount of money that they've been getting has been from taking control of oil refineries in Iraq and Syria. And they've taken control of numerous oil refineries and smuggled the oil out for international sale, so they've made most of their money off of that.¹⁵

13. Jim Sciutto et al., *Isis can 'muster' between 20,000 and 31,500 fighters, CIA says*, CNN, Sept. 12, 2014, available at <http://www.cnn.com/2014/09/11/world/meast/isis-syria-iraq/>. A CIA assessment puts the count of ISIS militants at 20,000 to 31,500 fighters across Iraq and Syria. More than 15,000 foreign fighters from more than 80 countries are involved, including 2,000 Westerners.

14. *ISIS: Creation of the Caliphate, The Islamic Caliphate*, TERRORISM RESEARCH & ANALYSIS CONSORTIUM, available at <http://www.trackingterrorism.org/content/creation-caliphate>.

15. Deborah Amos, *How The Islamic State Smuggles Oil to Fund its Campaign*, NPR, Sept. 9, 2014, available at <http://www.npr.org/blogs/parallels/2014/09/09/346844240/how-the-islamic-state-smuggles-oil-to-fund-its-campaign>. ISIS has built an extensive network supporting hundreds of black-market gas and oil refineries along the northern Syrian border as well as a network for exporting stolen crude to international markets, making millions for the militants.

But, in addition to that, they've also looted different Iraqi arms caches; they've robbed the Iraqi Central Bank and got another 425 million dollars from there.¹⁶ There are also reports of private funders that have been existing for a long time that continue to play a role in the background from international sources as well.¹⁷ So, they are, right now, estimated to have about two billion dollars in assets by most media sources, which is a lot of money to help carry out this kind of asymmetric warfare.¹⁸

SCHARF: Well Sandy, what can you tell us about their leader? This is Abu Bakr [al-]Baghdadi.

HODGKINSON: Right. Well, what we know about him is that he was born back in 1971 in Iraq. So he's an Iraqi citizen who grew up there and has degrees from the Islamic University of Baghdad.¹⁹ But after the invasion of Iraq, he really started to help form the leading terrorist opposition group there in Iraq. He did spend a little bit of time as a civilian internee held by DOD (Department of Defense) forces at Camp Bucca. And he's continued to gain strength in opposition there in Iraq over the years since then. When Osama bin Laden was killed, he put out a statement that it was his responsibility and the responsibility of other like-minded individuals to seek retaliation for that death.²⁰ And so he has continued to gain, over time, in his struggle to seize power and to become more influential in this desire to become a caliph of this self-proclaimed state.

SCHARF: So he has his terrorist cred. Would you say he is also a very charismatic figure?

16. Jack Moore, *Mosul Seized: Jihadis Loot \$429m from City's Central Bank to Make Isis World's Richest Terror Force*, INT'L BUS. TIMES, June 11, 2014, available at <http://www.ibtimes.co.uk/mosul-seized-jihadis-loot-429m-citys-central-bank-make-isis-worlds-richest-terror-force-1452190>.

17. Zachary Laub *et al.*, *Islamic State in Iraq and Syria*, COUNCIL ON FOREIGN RELATIONS, Aug. 8, 2014, available at <http://www.cfr.org/iraq/islamic-state-iraq-syria/p14811>. Though the bulk of ISIS's funding comes from smuggling, extortion, and other crime, ISIS also relies on internal recruits and even prior to taking over Mosul, ISIS extorted taxes from small and large businesses, receiving an estimated \$8 million a month.

18. Richard Galpin, *ISIS and Iraq's Oil: Lucrative Resource Eyed*, BBC News, June 18, 2014, available at <http://www.bbc.com/news/world-middle-east-27907133>.

19. Terrence McCoy, *How ISIS Leader Abu Bakr al-Baghdadi Became the World's Most Powerful Jihadist Leader*, THE WASHINGTON POST, June 11, 2014, available at <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/>.

20. *Terrorist Designation of Ibrahim Awwad Ibrahim Ali al-Badri*, US DEPT OF STATE, Oct. 4, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/10/174971.htm>. Abu Bakr al-Baghdadi, formerly known as Abu Du'a, threatened retaliation for Osama bin Laden's death in a statement eulogizing him. He later claimed responsibility for a series of attacks following bin Laden's death between March and April 2011.

HODGKINSON: Well certainly, he is. You can't rise to authority in this type of media world unless you actually have the ability to do that. And by calling himself, again, a so-called "caliph" and trying to create a self-proclaimed state, or something that is greater, he's basically making himself part of the storyline of why people should follow him. So you require some charisma to do this.

SCHARF: So let's bring Paul Williams into this conversation. Paul is the president of a Nobel Peace Prize-nominated NGO (non-governmental organization) called the Public International Law and Policy Group. And Paul, I know you've just gotten off the plane, literally yesterday, from Yemen, where you were serving as the legal advisor for the peace negotiations, which seem to have successfully worked there. Welcome back to the States!

WILLIAMS: Thanks, Michael. It's a pleasure to be here.

SCHARF: So what I need to ask you, Paul, is—it's really interesting that you've just come back from Yemen because President Obama has compared what he'd like to achieve in Syria, in particular, and also in Iraq with respect to ISIL, with the success that he perceives has broken out in Yemen.²¹ Do you see a comparison?

WILLIAMS: There is a comparison, Michael, but it's not the same comparison that the president is making. It's actually a very scary comparison. Our success against al-Qaeda in Yemen has been quite limited. It's essentially degraded their capacity and kept them distracted from planning any serious attacks on the United States or carrying out those attacks. But it has not substantially degraded, and it has certainly not destroyed al-Qaeda.²² And what's important is, in Yemen, the US government is working hand in hand with the government of Yemen, which has ground troops—ground troops which have been trained by the United States—and we're still only able to make moderate success.²³ The plan that he has for dealing with ISIL does not include, at this moment, partnering with forces as capable as the Yemeni ground forces. Of course, those forces would be the Syrian

21. President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>).

22. *Obama's "Successful" Airstrike Strategy in Yemen and Somalia Resulted in Major Increase in Terrorist Attacks*, GLOBAL RESEARCH, Sept. 11, 2014, available at <http://www.globalresearch.ca/obamas-successful-airstrike-strategy-in-yemen-and-somalia-resulted-in-major-increase-in-terrorist-attacks/5401129>.

23. *U.S. Teaming with New Yemen Government on Strategy to Combat Al Qaeda*, N.Y. TIMES, Feb. 26, 2012, available at <http://www.nytimes.com/2012/02/27/world/middleeast/us-teaming-with-yemens-new-government-to-combat-al-qaeda.html>.

opposition, but there has been very, very weak cooperation between the US government and the Syrian opposition at this point. So I'm worried if Yemen is his model.

SCHARF: All right, and let me ask you the big picture here, Paul. Sandy has given us some great background, and I feel like I understand where this group came from and how it has gotten all of its power, but do you see this organization as a serious threat to the United States?

WILLIAMS: Yes.

SCHARF: Okay. Tell us why.

WILLIAMS: Think back to what Sandy said. Sandy said this is an outgrowth of al-Qaeda, which has two billion dollars and has territory. So think of this as an amped-up, a super-charged al-Qaeda. It still has the mission of original al-Qaeda, which is to cause harm to the United States, United States' interests, and to American citizens. Now think of that, as Sandy has said, two billion dollars. Think of them as well armed. They have over fifteen hundred American-made humvees that they captured from Iraq.²⁴ They have scores of tanks. They have a tremendous number of light weapons and artillery. They have an amazing marketing plan—much better than most governments' marketing plans. And they are able to attract foreign fighters with American and European passports. This is what's scary. You take al-Qaeda and you multiply it—many, many, many times—and this is what we're facing.

SCHARF: Whoa, that's scary stuff, Paul. I know some people blame President Obama for the rise of the ISIL, specifically for his failure to negotiate a status of forces agreement with Iraq.²⁵ How do you see that situation?

WILLIAMS: Well, Michael, there are four key mistakes that President Obama has made in dealing with this evolving situation, and the reality is three of these are ongoing mistakes. So first of all, he failed to negotiate a status of forces agreement with Iraq, which would have allowed the United

24. Douglas Ernst, *ISIL Captured 52 U.S.-made Howitzers; Artillery Weapons Cost 500K Each*, THE WASHINGTON TIMES, July 15, 2014, available at <http://www.washingtontimes.com/news/2014/jul/15/isil-captured-52-us-made-howitzers-artillery-weapo/>.

25. Thomas Bishop, *Rewriting History: Conservatives Attack Obama for Withdrawing All Troops From Iraq*, MEDIA MATTERS FOR AMERICA, Aug. 10, 2014, available at <http://mediamatters.org/research/2014/08/10/rewriting-history-conservatives-attack-obama-fo/200380>.

States to keep a few thousand Americans in Iraq.²⁶ If they were there, they may not have been able to prevent the seizure of this massive amount of equipment, but they could have certainly called in airstrikes to destroy that equipment before it was seized by ISIL. Three other major mistakes that he's making—first of all—

SCHARF: Paul, let's stop here for a minute so that we can take a short break, and when we come back, you can tell us about the three other mistakes that have led to the situation. So everybody stay tuned and come right back.

Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, the interim dean of Case Western Reserve University School of Law, and we're talking today about combating the militant group known as the Islamic State, or ISIL. Our expert panel includes former Deputy Assistant Secretary of Defense Sandy Hodgkinson, Paul Williams of The Public International Law and Policy Group, Professor Milena Sterio of the Cleveland Marshall College of Law, and Dr. Shannon French from Case Western's Inamori International Center for Ethics. Just before the break, Paul was telling us about how he sees President Obama's blame for getting us in the situation where the Islamic State has become such a threat and Paul had just described the number one reason. But Paul, you said there were three others. Can you continue?

WILLIAMS: Yes. We've failed in the last three years in the Syrian conflict to literally take the field—to be engaged, to lead, to defend the people of Syria against the rampages of President Assad. Because we didn't take the field—we chose to ignore it—al-Qaeda took the field. And it has used the rallying cry of protecting the Syrians from President Assad to build ISIL, to build their caliphate, to gain territory, and now they're turning it against the people of Syria and against the people of Iraq. To a degree, we're still failing to take the field by only having—quite frankly—limited airstrikes over these past few weeks. The second, and the gravest mistake, is that we are not taking on President Assad. You have ISIL in the region because President Assad is committing crimes against humanity, brutal acts against

26. *In U.S. Exit From Iraq, Failed Efforts and Challenges*, N.Y. TIMES, Sept. 22, 2012, available at <http://www.nytimes.com/2012/09/23/world/middleeast/failed-efforts-of-americas-last-months-in-iraq.html?pagewanted=all>. The attempt to reach an agreement which would have kept a small American force in Iraq to patrol the skies never materialized, resulting in an Iraq that is less stable and internationally reliable than the United States had envisioned.

his own people. We will not defeat ISIL until we remove one of the core reasons for being, which is to stop Assad. We've been clear that we're not fighting him. That is wrong. We need to engage. The third important reason is we need to work with the Syrian opposition coalition. We haven't done it seriously in the last three years and we're not doing it seriously now. The only important government in the region not to be notified of these airstrikes was the Syrian opposition, the moderate rebels. The only group not to be consulted about this operation were the moderate rebels, our allies, our perceived boots on the ground. Those are three mistakes that we must reverse and not continue.²⁷

SCHARF: Now before we start to critique the plan that President Obama has launched, I want to turn to Shannon French, our ethicist, and ask a little bit about what we're seeing as the strategy of this terrorist organization, where they're broadcasting videos of beheadings.²⁸ I mean, what are they trying to accomplish with that? It almost seems that they're trying to draw us into the fighting.

FRENCH: Well in a word—no. They don't want powers like the US and the UK pulled into a shooting war. That's not to their advantage. However, what they have is an incredible opportunity for PR and for fundraising. We focus on the fact that in these horrifying cases where the journalists have been beheaded, the countries involved have refused to pay, like, again, the US and the UK.²⁹ But we can't forget in the background, there have been other hostage cases where countries have paid.³⁰ So part of what's going on is if you want to force the hand, or increase your power against groups

27. *Want to Defeat ISIS? Help the Syrian Opposition*, THE WALL STREET JOURNAL, Aug. 13, 2014, available at <http://online.wsj.com/articles/want-to-defeat-isis-help-the-syrian-opposition-1407971766>.

28. *Iraq Violence: UN Confirms More Than 2,000 Killed, Inured Since Early June*, UN NEWS CENTRE, June 24, 2014, available at http://www.un.org/apps/news/story.asp?NewsID=48117#.VELno_nF9yU. ISIL has broadcast over a dozen videos of beheadings and executions of soldiers, police officers, as well as targets of people based on their religious and ethnic group.

29. Rukmini Callimachi, *Before Killing James Foley, ISIS Demanded Ransom From U.S.*, N.Y. TIMES, Aug. 20, 2014, available at http://www.nytimes.com/2014/08/21/world/middleeast/isis-pressed-for-ransom-before-killing-james-foley.html?_r=0.

30. Kashmiri Gander, *Isis Hostage Threat: Which Countries Pay Ransoms to Release Their Citizens?*, THE INDEPENDENT, Oct. 23, 2014, available at <http://www.independent.co.uk/news/world/politics/isis-hostage-threat-which-countries-pay-ransoms-to-release-their-citizens-9710129.html>. Prime Minister David Cameron insists that Britain will not pay ransoms to terrorists, despite threats to Britain hostages, and aims to encourage other nations such as Germany, France, Italy, and Spain to stop funding the terrorist group in this way.

that will pay—beheading citizens of countries that don't pay is a way to make a statement.

SCHARF: So this is basically their business model?

FRENCH: A little bit, yeah. But it's much broader than just raising funds and it's a small portion of their fundraising compared to, as we heard earlier, oil and so forth. But the bigger part is on the PR and recruitment side—this is an incredible way to thumb their noses at the West, and I mean that in the strongest possible way because it's a rejection of Western values. It's saying, "Whatever power you may think you have, we can kill your citizens." It actually isn't relevant that they are journalists, or who they are individually as people to them. It is that they represent these powers, and they are trying to diminish the appearance of the reputation of those powers.

SCHARF: Well it may have been a miscalculation, because the American people don't seem to like to see those images, and I think that is what emboldened the White House to take the steps that they have. And I want to turn now to Milena Sterio. We haven't forgotten you there, our international law expert. Can you walk us through President Obama's comprehensive plan for dealing with the ISIL threat?

STERIO: Sure, Michael. The president's strategy essentially has three prongs. First, we are going to use American air power. So we've already begun a systematic campaign of airstrikes against the ISIL. Second, we're going to use surrogate military troops on the ground, and Paul already alluded to this. We're going to use groups such as, for example, the Syrian moderates. We're not going to use American ground forces; we're going to use these other surrogates. And then third, we're going to obtain, hopefully, help from a coalition of states. So we're going to work with a coalition of states on matters such as, for example, obtaining increased intelligence information, humanitarian aid, and other types of assistance.³¹ So it's a three pronged strategy that, as we'll discuss here today, may or may not work.

SCHARF: I like how you broke that up. That makes it easier for me to get my head around. And let's start with the first prong. Let's take these one at a time. So the press has reported that the United States has been using Tomahawk cruise missiles and also bombings from F-22 aircraft.³²

31. President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>)

32. Julian E. Barnes, *et al.*, S., *Syria Strikes: U.S. Reports Significant Damage in Attacks on*

This is not at all the pinprick kind of strikes you get from these predator drones that they've been using against the terrorists in the past. This is major munitions, right?

STERIO: Sure.

SCHARF: Okay, so the LA Times recently described President Obama's strategy for defeating the Islamic State as "whack-a-mole."³³ You guys know that, right? That game that you play in the arcades where you hit the thing and it keeps coming back up. So let's turn to Sandy and Paul. Sandy and Paul, what do you think? Is this going to work—this kind of "whack-a-mole" strategy? Sandy, do you want to start?

HODGKINSON: Sure, I'll start. Certainly the "whack-a-mole" strategy can be a starting step for any kind of a scaled strategy for addressing a threat like this. But it's really questionable as to how much more you need to do and how quickly. It certainly can be a first step and can't be the last step. You need to be able to scale this to broad based strikes as necessary and candidly, be prepared to scale it up all the way till putting ground troops on the ground. I mean—you put yourself in a precarious situation by ruling anything out and not being prepared to take the next steps to follow that up. But certainly we've seen that airstrikes can be effective and as part of a broader strategy, one tool that you can use.

SCHARF: Paul, what do you think?

WILLIAMS: I think it's important when we talk about defeating ISIL, that it's both a military and a political solution. We can destroy some of their American-made equipment that they captured from Iraqi allies, but if we really want to destroy ISIL, we have to destroy them politically, and this means we have to essentially take away their reason for being. And you have to have territory secured by the Kurdish forces or by the Syrian opposition, where you can begin a process of democratic transformation. That's the only thing that's going to take the steam out of ISIL, and I think that's where the American government has to be honest with the American people. This isn't an air war. This is an air war until we degrade their

Islamic State, Khorasan, THE WALL STREET JOURNAL, Sept. 24, 2014, available at http://online.wsj.com/articles/syria-strikes-u-s-reports-significant-damage-in-attacks-on-islamic-state-khorasan-1411486035?tesla=y&mod=_newsreel_5.

33. Andrew J. Bacevich, *Obama's Strategy Against Islamic State? Whack-a-mole*, L.A. TIMES, Sept. 15, 2014, available at <http://www.latimes.com/opinion/op-ed/la-oe-bacevich-isis-strategy-20140916-story.html>.

capacity, and then it's a destroy-them-war where we use our allies and as well as other military assets to destroy them. And then, to keep them from coming back—like “whack-a-mole,” where they pop up—you actually have to have a political process on the ground in the absence of conflict. That's a long and arduous process that we're embarking upon.

SCHARF: Well, does law, international or domestic, have any role to play in all of this, or is this just, “we've got a threat, we respond?” So, let's talk with Milena, our international law expert. Now under international law, as I understand it, a country can use force in the territory of another only in three situations. One is with consent. Nobody here is consenting. Well, I guess Iraq is potentially consenting—but not Syria. Number two, the Security Council can authorize, and we haven't seen any Security Council resolutions authorizing force. And number three is self-defense.³⁴ So what are the justifications that the Obama administration are relying on, Milena?³⁵

STERIO: So the Obama administration has asserted several different legal justifications. Domestically speaking, they've asserted this rationale that a law called the Authorization for Use of Military Force, which is a federal statute passed in the wake of 9/11—³⁶

SCHARF: So in 2002?

STERIO: In 2001. Exactly. This is a law that essentially authorizes the president to combat those groups that are responsible for the terrorist attacks on the United States on September 11, 2001.

SCHARF: So literally under that theory, we could invade any country where al-Qaeda is operating?

STERIO: Yeah, I mean, we've seen this a little bit with our policy of targeted killings, or drone strikes, where we essentially made this argument that wherever these terrorists are, we can strike.

SCHARF: And now we can actually do, not just pinpoint strikes as I said with predator drones, but massive carpet bombing and Tomahawk cruise missiles?

34. U.N. Charter art. 2, para. 4., U.N. Charter art. 51.

35. Christian J. Tams, *The Use of Force Against Terrorists*, 20 *Eur J Int'l Law* 359-397 (2009) The international community has increasingly recognized the right of states to use force against terrorists during the past two decades based on an expanded doctrine of self-defense.

36. 16 A.L.R. Fed. 2d 333

STERIO: Yes, well the Obama administration rationale has been that ISIL, because it's an outgrowth of al-Qaeda and the president was authorized by this law back in 2001/2002 to fight al-Qaeda, it follows then that the president is also authorized today to fight ISIL because they are, basically, a continuation and succession of al-Qaeda. Now the other option, obviously, for the president would be to go to Congress and obtain authorization to use military force from our Congress.

SCHARF: There was a congressional authorization last week, but it wasn't to use force in Syria, was it?

STERIO: No, this is actually a different kind of—what's interesting, is that this is a bipartisan authorization to our president. This doesn't happen very often, so I think this is significant. This is essentially authorization to work with the Syrian moderates, to train them.³⁷

SCHARF: That's all Congress authorized?

STERIO: It is not authorization to use ground troops in Syria or Iraq, but again, the administration position is that the president, because of the 2001/2002 law, does not need new authorization to use military force in Iraq and Syria. And then, from the standpoint of international law, your argument about self-defense—I think Iraq and Syria pose two different scenarios. I think, with respect to Iraq, you can make this argument of collective self-defense—that the moderate Shiite and Kurdish government in Iraq has essentially invited the United States to help self-defend against the Islamic State.

SCHARF: Can that argument be, “not only do you come into our territory, but these guys are going across the border and hiding, so you have to defeat them over there too in order to defend us here in Iraq?”

STERIO: Well, if you're crossing, for example, into Syrian territory, I think the argument there is a little bit different and there I think the argument is that there are these non-state actors, these terrorist groups like the ISIL, that are harming the United States from Syria and Syria is a state that is unable or unwilling to effectively fight them and that because of that, we can make this self-defense argument and go and fight them across the Syrian border.

SCHARF: How are the rest of the world, the countries of the UN, dealing with this rationale? Are they accepting it?

37. Jonathan Weisman *et al.*, *Congress Gives Final Approval to Aid Rebels in Fight with ISIS*, N.Y. TIMES, Sept. 18, 2014, available at <http://www.nytimes.com/2014/09/19/world/middleeast/senate-approves-isis-bill-avoiding-bigger-war-debate.html>.

STERIO: Well, so it's interesting that you mention the United Nations, and you said one of the instances under which international law states can use force is with Security Council authorization—I think it's extremely unlikely that Russia or China, two big veto power countries, would ever agree to this, but we have other Western democratic allies, for example France. France has already started to participate in this air campaign³⁸ and the UK has expressed some, essentially at least, theoretical agreement that this is the right thing to do.³⁹

SCHARF: UK is in a little bit of a bind because two years ago, when it turned out that Assad was using chemical weapons, their Parliament voted that they would prohibit the government from intervening.⁴⁰ And although this isn't still about toppling Assad, or stopping the chemical weapons, it's still intervening in Syria.

STERIO: I mean, I think the problem today is that for the UK, for the United States, domestically too for our president, is that I think the people of the United States, the people of the UK, just don't really have the willingness to fight another war in the Middle East with ground forces and with the risk that that carries to American and British lives. So I think the leadership, you know—here President Obama and then in the UK, certainly, David Cameron—I think they're trying to essentially persuade the public that this might be the right thing to do when at least some of the people in the US and the UK see this as just yet another war in the Middle East.

SCHARF: And maybe they're concerned about the slippery-slope phenomenon too because, while I can understand all those arguments applying to ISIL, isn't it true that the first targets weren't even ISIL, they were al-Nusra—that's the other al-Qaeda group that ISIL fights against in Syria—and also this other group that I hadn't ever really heard of before, but it's the Corazon terrorist group that's also operating in Syria?

STERIO: Yeah, so these are basically, I think Sandy mentioned this earlier in the program—that it basically almost seems that there are these splinter terrorist cells, particularly in Syria, that might be vying for control in

38. *France Launches First Airstrikes on ISIS*, N.Y. POST, Sept. 19, 2014, available at <http://nypost.com/2014/09/19/france-launches-first-airstrikes-on-isis/>.

39. Nicholas Watt *et al.*, *UK Parties Set to Recall Parliament to Approve Air Strikes Against Isis*, THE GUARDIAN, Sept. 23, 2014, available at <http://www.theguardian.com/world/2014/sep/23/uk-political-parties-recall-parliament-air-strikes-isis>.

40. Brett Logiurato, *UK Parliament Stunningly Rejects David Cameron on Syria*, BUSINESS INSIDER, Aug. 29, 2013, available at <http://www.businessinsider.com/syria-britain-david-cameron-vote-house-commons-chemical-weapons-2013-8>.

Syria. And this really, I think, feeds into Paul's point earlier, that basically when the Syrian President Assad started doing harmful, horrible things to the Syrian population that really allowed for the growth of these kinds of terrorist groups. And so, al-Nusra and the Corazon, they're just al-Qaeda terrorist type groups.

SCHARF: So it's all fair game under this legal justification?

STERIO: Under the legal justification that the United States has asserted, it would be fair game, yes—as long as there is this threat, and as long as a state is unable or unwilling to fight these terrorist non-state actors.

SCHARF: So let's go back to Sandy. You were describing, Sandy, how you think this is going to start ramping up. Is it possible that this air campaign will evolve into the enforcement of a full, all-out no-fly zone like they had in Iraq two decades ago and like they had in Libya?

HODGKINSON: Well look, I can't predict which direction exactly the administration will take this. I certainly agree with the notion that these limited air strikes are not going to be effective for long enough with an organization and enemy that is this well armed and this well-equipped, this well trained, and this motivated. And that goes across borders, which is candidly a challenge for us in managing, even as we work with the Iraqi government with their consent, and trying to work without the consent of the Syrian government and without working with them or with their opposition. So I think that this will continue to grow. I think that we will have to move to another stage. If I can predict whether it will be a full air strike corridor, no-fly zone, or how far a US-led coalition without a UN Security Council resolution will go. It will be interesting to see. But certainly, we need to be prepared to step this up a notch and to work with other international allies to make that happen, with or without the ability to use the UN Security Council.

SCHARF: Well that's a good segue to the second of the three things that Milena said are part of the Obama plan. So let's look at the surrogate ground force issue. This is, in fact, how the United States was able to topple the Taliban in Afghanistan and the government of Muammar Gaddafi in Libya. But let me ask you guys—maybe starting with Paul—is the Iraqi army a good surrogate partner? It has 250,000 troops, but are they appropriately trained and motivated to fight this war with us?⁴¹

41. *Why the Iraqi Army Can't Defeat ISIS*, VOX, June 20, 2014, available at <http://www.vox.com/2014/6/20/5824480/why-the-iraqi-army-cant-defeat-isis>.

WILLIAMS: No.

SCHARF: Haha, tell me how you really feel, Paul.

WILLIAMS: We've had over a decade of training with the Iraqi army. When thirty thousand Iraqi troops were facing eight hundred ISIL militants in Mosul, the thirty thousand fled and the eight hundred took over Mosul.⁴² That's how they captured most of the military equipment that they now have. The core of the current Iraqi army that we're relying on are Iranian-backed Shi'a militia. They're basically volunteers. They're the militia that we fought for years in Iraq and now they're our allies. It's going to be very difficult to rely upon them. I think where we really need to put our energy and our resources are in the Kurds and in the Syrian opposition, free Syrian army.

SCHARF: Okay, and the Kurds have been pretty together. They've got their act together, they have their autonomous area, they've been probably the only entity in Iraq that hasn't had infighting. So, Paul, you're suggesting they would be the best partner in Iraq, and they'll probably come out of it the biggest winners too, is that right?

WILLIAMS: Well, they're very pro-American. We have a long tradition of working very closely with them—protecting their interests, and having them protect our interests. Unfortunately, we've starved them for ammunition and equipment over the last decade as we've sought to build up the Iraqi forces. We've really minimized our engagement with the Kurds. That's changed in these last three weeks, but they're a very under-resourced ally and I think we need to be serious, and we need to be honest, and we need to place our bet on the Kurds and on the free Syrian army and do it aggressively. And manage the Iraqi army, but really work with the Kurds and free Syrian army.

SCHARF: All right, and let me ask Shannon about the other side of the border. We're supposed to be partnering with the fighters against the government—I guess they're called the opposition forces—and they're supposed to stop their fight against the Assad government and turn around and defeat the ISIL. First of all, how do we know who the good guys are in all of this and what are their capabilities as surrogates?

FRENCH: I mean I'm going to be as blunt as Paul. We don't. And I'm also going to be honest that when I first read about us deciding to arm the rebels

42. Philip Ross, *How ISIS Pulled Off A Rapid Takeover In Iraq*, INT'L BUS.TIMES, June 12, 2014, available at <http://www.ibtimes.com/how-isis-pulled-rapid-takeover-iraq-1599814>.

in this way, my initial reaction was, “Oh, cause that’s never gone wrong.” I mean, the trouble is, we have a history of arming rebels that isn’t a happy one when you look long term. And it isn’t just because of the groups we choose, it’s actually arguably more because of what we do next. And the US has a very appalling track record of arming groups to solve short term problems and then withdrawing from them after those immediate issues are resolved, and leaving those groups, often in difficult situations, at their own ends to try and develop goals, which then end up counter to US interests.

SCHARF: Yeah, I’m reminded by the fact that al-Qaeda and the Taliban began when we armed them against Russia in Afghanistan in the 1970s.⁴³

FRENCH: Oh, absolutely. I mean, I found myself thinking about, of course, Charlie Wilson and the wonderful quote—which I have to paraphrase to not say things I can’t say on the radio—but he said, “These things were glorious and they changed the world, and then we fumbled the end game.”⁴⁴ We helped make more bad guys.

SCHARF: Well, that’s probably a good place to stop for another short break. When we return, our experts will continue the critique of the Obama plan for defeating the ISIL. Please stay with us.

This is Michael Scharf and we’re back with *Talking Foreign Policy*. I’m joined today by Sandy Hodgkinson and Paul Williams in Washington D.C., and Shannon French and Milena Sterio at the WCPN ideastream Studio here in Cleveland. We’ve been talking about President Obama’s plan to defeat the Islamic State militant group known as ISIL. And Milena had told us that there were three prongs to that plan, and now I want to turn to the third of those. That’s this coalition that the United States is trying to build. Milena, who are they and what type of assistance is the United States looking for?

STERIO: Sure, so in the military strikes, which we have already launched against these ISIL targets, five Middle Eastern Arab nations have already helped us, and these nations are Jordan, Saudi Arabia, the United Arab

43. *Devotion to Duty: Afghanistan*, CIA, Dec. 8, 2010, available at <https://www.cia.gov/library/publications/additional-publications/devotion-to-duty/afghanistan.html>. With the goal of draining Soviet resources during the Soviet Union’s invasion into Afghanistan, the CIA provided the Afghan mujahidin with money, weapons, medical supplies, and communications equipment. After the Soviet withdrawal in 1989, and the US involvement with the mujahidin ceased, the Afghan resistance struggled for control, resulting in Taliban rule.

44. Charlie Wilson, Democratic Texas Congressman who was involved in assisting the rebels in Afghanistan in their war against the Soviets

Emirates, Qatar, and Bahrain.⁴⁵ There are other nations, however, that have also expressed their willingness to help us in other ways. So, for example, countries like Australia, France, Germany, the Netherlands, Canada, Turkey, and Egypt. They have all indicated a willingness to help us in other ways, such as, for example, provide humanitarian assistance, provide media-type assistance; some Arab countries like Egypt were going to broadcast news and programs basically saying negative things, horrible things about the ISIL. Canada has stated they will provide equipment and ammunition.⁴⁶ So there certainly is some form of a global willingness to help us in various ways in this effort.

SCHARF: I think one of the things they're really going to have to help with is, when you do all this bombing, you create massive flows of refugees. People are fleeing from the disaster. So somebody has to help pay for, feed, keep those people and hope that they don't become their own destabilizing—.

STERIO: And I think that's why the Obama administration has tried to engage regional countries and that is why, for example, assistance from Turkey would be key, if they would at least allow or provide humanitarian relief and allow for refugees to come in.

SCHARF: Yeah. Well, Shannon, they say wars and politics make strange bedfellows. So what's the prospect that the battle against the ISIL will bring Iran into this coalition?

FRENCH: Well, I think that Iran is quite likely to come in, but it would be handled very gingerly. It would not be a formal alliance. I think what you would see is an informal coalition that would be carefully managed through backdoor means and negotiations through allies. I think what we will not see is working with Syria—that has already been ruled out by the US and the UK, for example. And I think—I don't know if you would agree, Milena—but that that's not going to occur.

SCHARF: I understand President Assad said, "Oh we'll work with you, we'll help you solve this problem." And they said a big, "no thank you."

45. Jim Sciutto *et al.*, *U.S. Airstrikes Hit ISIS Inside Syria for First Time*, CNN, Sept. 23, 2014, available at <http://www.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/>.

46. Sebastian Payne, *What the 60-plus Members of the Anti-Islamic State Coalition are Doing*, THE WASHINGTON POST, Sept. 25, 2014, available at <http://www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/>.

But with respect to Iran, this may also be affecting our negotiations in their nuclear disarmament, because they think that we now need something more from them and now they think they have an extra card to play, is that right?

FRENCH: Well, let me take it back to this point about understanding Middle Eastern politics, because I think the concern that not everyone always understands about what is being managed by the leadership in these countries is a very tricky balance between internal and external politics. If you are seen to be working with the US, you're going to have enormous problems domestically. So any kinds of deals that are going to be made, or partnerships, do have to be made in these backdoor ways that allow a certain plausible deniability, so you don't look like you're a puppet of the US or following there. And I have to say some of the language that we use in the US doesn't help with that. You know, if we sound patronizing, or imperialistic, this doesn't help in getting them the language they need to convince people.

SCHARF: Did you think that President Obama struck the right tone in his speech at the UN yesterday, or recently?⁴⁷

FRENCH: I'm not sure about that. I think I'm not sure he got the right tone, and I think that's exactly the worry that a lot of people have. That as long as we still sound as though we are offering to save places, that that is going to create the kind of tension and offense. And there's a lot of involvement, a lot of help we are getting, particularly on the intelligence side. If that's not acknowledged sufficiently, it also sounds as if we don't appreciate the partnerships that already exist.

SCHARF: So I read this amazing quote from Thomas Friedman as a critique of the Obama plan. Let me actually read this and then ask for all of you to respond. Friedman says, "Our staying power is ambiguous, our enemy is barbarous, our regional allies are duplicitous, our European allies are feckless, and the Iraqis and Syrians that we're trying to help are fractious." He goes on to say, "There is not a straight shooter in the bunch."⁴⁸ All right, expert panel—is that a valid criticism, starting with Shannon.

47. Mark Landler, *In U.N. Speech, Obama Vows to Fight ISIS 'Network of Death,'* N.Y. TIMES, Sept. 24, 2014, available at <http://www.nytimes.com/2014/09/25/world/middleeast/obama-syria-un-isis.html>. President Obama used strong and bluntly worded language to address the dismantling of the Islamic State's "network of death" and to warn Russia that it would pay for its bullying of Ukraine.

48. Thomas L. Friedman, *What's Their Plan? Obama's Strategy for Fighting ISIS Isn't All About Us,* N.Y. TIMES, Sept. 13, 2014, available at <http://www.nytimes.com/2014/09/14/opinion/sunday/thomas-l-friedman-obamas-strategy-for-fighting-isis-isnt-all-about-us.html>.

FRENCH: Well, I'm just going to jump in. I have a lot of European friends and I have to say that idea that European allies are feckless—why wouldn't they say the same back to us? We have our disappearing red lines, we have our leading from behind in Libya, and even the West Point speech that President Obama made that sounded like he wanted to jump back to early isolationism.⁴⁹ I think it bothers me that Friedman would characterize it that way without acknowledging that it flows both ways.

SCHARF: And, to our surprise, France is flying the bombing runs right alongside of us.

FRENCH: Well, I'm actually going to point out even earlier in your own language you talked about us toppling in Libya. Really? That wasn't just us. We had a few other people actually carrying the bigger load there.

SCHARF: Paul, do you want to weigh in?

WILLIAMS: Yeah. I agree with Shannon. The European allies are feckless.

SCHARF: Haha, I think that's a disagreement.

FRENCH: Haha, that is not what I said!

SCHARF: Go ahead Paul, tell us what you think.

WILLIAMS: Michael, Michael, the reality is this is the hand we're dealt. And I think he's being honest, and what's refreshing about that is there's a lot of papering over reality. There are a lot of folks that are talking about, "Well maybe we need to partner with the Iranians, partner with the Syrians." Look, the reason we have this problem is, you have Iran, you draw an arrow to Iraq, you draw an arrow to Syria and what's happening there, and you draw an arrow to Hezbollah. It's this Iranian, Iraqi, Syrian, Hezbollah access which has led to killing two hundred thousand civilians in Syria, which led to the growth of ISIL. So before we start bantering around, "hey look we can't rely on our European allies, etc, let's partner up with the Iranians," or "hey Assad from Syria is key"—no you cannot go there. So you are left with our feckless European allies, our under-resourced Kurdish allies, and our rather fractious Syrian opposition allies. We've missed a window to pull together the Syrian opposition. We've missed a window to build upon—dare I say—French leadership in Europe to do something here.

49. President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony>).

SCHARF: Paul, I want to follow up with you because we haven't talked much about who the Syrian opposition are, who these good guys are that we're going to partner with. You actually have done a lot of work—legal work—for the Syrian opposition. Can you tell us about them?

WILLIAMS: Yes. The Syrian opposition—we've provided legal assistance to them in their negotiations in Geneva, so we've had an opportunity to meet them up close and personal. And they are, literally, the average Joes from Syria, people who have been forced to take up weapons to defend their family, their villages. They are not an organized military force, they are people who are fighting to keep their families, their way of life, from being destroyed both by the government of Syria and by the super-charged al-Qaeda, ISIL. They have a long way to go to be transformed into an effective military force. We've missed an opportunity these past three years to help them transform, but they've been phenomenal in basically scraping together what military resources they can to defend their home territory. Just as much as you can criticize their organization, their military skill, you know, President Obama calls them dentists and farmers⁵⁰—George Washington was a farmer. These are the people that we're relying on that have the real commitment. Just as ISIL is committed to doing us harm, these individuals are committed to protecting their territory and fighting the good fight, and we need to ally with them—just as they are.

SCHARF: That may be the first positive note of this whole conversation. Milena, you wanted to weigh in on the Friedman quote.

STERIO: The Friedman quote, yes, because I think this an incredibly difficult situation because on the one hand, we have a juxtaposition of al-Qaeda on the one hand and then Shiite states like Iran and Syria on the other, so when you talk about partnering with any of them, it seems really not the best thing to do. That's one problem. Another problem is that we have these states, like Iraq and Syria—we have multiple ethnic groups living together, and in some instances we've had brutal dictators who, on the one hand are horrible, but on the other hand are holding the country together

50. *Obama: Notion that Syrian Opposition Could Have Overthrown Assad with U.S. Arms a "Fantasy,"* CBS NEWS, June 20, 2014, available at <http://www.cbsnews.com/news/obama-notion-that-syrian-opposition-could-overthrow-assad-a-fantasy/>. President Obama comments, "When you get farmers dentists and folks who have never fought before going up against a ruthless opposition in Assad, the notion that they were in a position to suddenly overturn not only Assad but also ruthless, highly trained jihadists if we just sent a few arms is a fantasy."

like Saddam Hussein did for years in Iraq. And so then we remove a leader like that and then basically, chaos ensues. And so I think that's extremely difficult and I think part of our hesitation in Syria has been not to repeat another Iraq. And so, just going back to something that Paul said earlier, I think the key here is to build up a political coalition among these groups. And so I worry a little bit when we start singling out groups like the Syrian moderates. If they're only 10% of the population, they might be the best guys in the world, but they can't hold a country together on their own, so I do think that we—going back to Paul's earlier point—I think the key really is building up a political society and somehow getting participation, you know, finding moderates in all the groups, not just one.

SCHARF: So, if I had to ask you to “crystal ball,” and they are able, at some point, to defeat the ISIL, do you see also Assad's regime crumbling, or does this strengthen the Assad regime?

STERIO: Let's say that we defeat the ISIL in Syria, I think yes, there is certainly a danger that the Assad regime would be strengthened, so I think part of our strategy, and I think Paul was saying this too, I think has to be somehow transitioning the Assad regime out of power. Now, of course, that's easier said than done, but I think we need to be extremely careful, because I think if we topple ISIL in Syria, I think there's a huge danger that the Assad regime would be strengthened.

SCHARF: Now, let me return to Sandy. I know you didn't want to go here, but I need to ask you this question. If you're going to be practical about this, don't you think in the end, we're going to have to put boots on the ground?

HODGKINSON: I do think that. I recognize that when you build a campaign and you build support for something, it's a lot easier to start with a little bit and grow from there and raise awareness and understanding of the threat that we face. But look—Iraq and Syria are critical to the United States' security and making sure that they remain stable enough. And whether that stable future involves Assad or not is a part of the discussion. But nonetheless we need some stability there and considering, I think, we all agree that airstrikes alone at this point aren't going to do it. We need to have a sustained campaign, a sustained effort towards this. And at some point, I think the US will end up committing its own troops, certainly if the other methods don't turn out to be successful.

SCHARF: Is that, Sandy, going to take new congressional authorization either under the War Powers Act, or just to get funding?

HODGKINSON: I think so. I mean, look, I consider to believe that any continuing use of the AUMF from 2001⁵¹ to groups that weren't tied in any way to 9/11 is a risk. I think it's less than optimal. I think there could be challenges in a court at some point, and so it makes more sense to get something that is more appropriately tailored, even if that includes sunset clauses and other ways to cabin it so that you don't look like you're seeking never ending authority. Even the Authorization for Use of Military Force against Iraq resolution of 2002 at least had something talking about the threat of al-Qaeda in Iraq. So you begin to see some authority there, so you could seek an AUMF that is really focused principally on today's threats of ISIL and any other groups that you seek to include. But in my view, it certainly makes sense to go back and at least have this conversation with Congress.

SCHARF: Well, Sandy, how long do you think that this battle against the ISIL is going to last?

HODGKINSON: I think it's going to last a while. I wish I could say that our quick, decisive action was going to rout it out, but I don't see that as an immediate end game here. And given all of the political work that needs to be done, which you've heard today from several of our other speakers, it's going to take time. So there's plenty of time for us to have debates about this, but what's most important is that the president and his executive team here, and the executive branch, works closely with Congress to make sure they get the authorization they need, have a plan that's sustainable, and work with our allies to begin executing it because the longer we wait, the harder it will be to achieve.

SCHARF: Well let me ask our experts then about the domestic politics. I know there have been some opinion polls, and one said the American people are overwhelmingly in favor of airstrikes—they just love them—but when they asked the question about boots on the ground, the American people are overwhelmingly against.⁵² Shannon, do you think that's going

51. Military Force Authorization resolution., 115 Stat. 224,107 P.L. 40,115 Stat. 224 (2001).

52. Mark Preston, *Poll: Americans Back Airstrikes, But Oppose Use of U.S. Troops in Iraq, Syria*, CNN, Sept. 29, 2014, available at <http://www.cnn.com/2014/09/29/politics/poll-americans-back-airstrikes/>.

to change over time, or is this going to mean that the Obama administration is going to have a lot of trouble getting congressional authorization?

FRENCH: I think it's going to mean they're going to have a lot of trouble getting authorization. And I think that this lack of domestic political will for boots on the ground—you could argue that there's simply a political cowardice going on in Congress. They're not willing to make the case for it. They're checking first to see if their constituents are in favor of something and then just going along with that. That's not leadership. I'm not taking my own stand on this but if you do feel that boots on the ground is the way that you should go, then that case needs to be made by Congress and by the president, and we're not hearing that. They're just checking the temperature of the country.

STERIO: And I think I agree with Sandy, that I think boots on the ground are the next step and it might be that the president is now, you know, this is a first introductory measure, these airstrikes, and then it might be that in a few months we start using boots on the ground. But I think, as Shannon said, I think the president, even though I think he should be working with Congress, I think because he has faced so much opposition on other things, and because things have been very difficult between our executive and legislative branches over the last 7-8 years, I think that he is just skeptical of going to Congress to ask for authorization to use military force and then now he is in this position where he's using the 2001 law, the Authorization for Use of Military Force, and making this stretchy legal argument to say that ISIL is really exactly like al-Qaeda when they're not, when the proper legal position would be to go back to Congress.

SCHARF: Sandy said there could be court cases. How would that work? Who would bring such a case?

STERIO: Well, whoever has standing under the law. You know, you could have essentially congressmen going to a court and basically saying that this is an unconstitutional way that the president is using his powers.

SCHARF: Could they raise it as an impeachment issue?

STERIO: I mean, I don't think it's likely politically, but I guess anything is possible.

HODGKINSON: Well, let me jump in here, because obviously as you move to a bigger military campaign and we would get to a point where you would be either be killing or capturing members of the opposition—assuming that

you are actually killing and, or, capturing people—the moment that you capture someone, we do have a situation where these hearings in the case of some of the detainees we've been holding over the past several years have challenged the legality of that in federal court. And if they challenge the legality of a particular group of people fitting under this Authorization for Use of Military Force, a federal court judge may well determine that ISIL is outside of the scope of that somewhat temporally limited 9/11 authority. And so it's an attenuated way of getting there.

SCHARF: Well, Sandy, we're coming to the end of our broadcast. So it looks like we're standing on the edge of another protected war. The stakes are incredibly high and our experts are telling us that we may be getting ourselves into another quagmire and there may be a lot of litigation as well. If you want to weigh in on the discussion or suggest a topic for an upcoming broadcast of *Talking Foreign Policy*, please send an email to talkingforeignpolicy@case.edu. Thank you again to our panelists of experts, former Assistant Secretary of Defense Sandy Hodgkinson, Paul Williams of the Public International Law and Policy group, Professor Milena Sterio from the Cleveland Marshall College of Law, and Dr. Shannon French from the Inamori Center for Ethics and Excellence. I'm Michael Scharf and you've been listening to *Talking Foreign Policy*.

Talking Foreign Policy January 29, 2015, broadcast¹

Participants:

Michael Scharf

Austin Fragomen

David Leopold

Margaret Wong

Jenna Peyton

SCHARF: Flawed and broken. With eleven million undocumented immigrants living in the United States, that's how just about everyone would describe the US immigration system.² But for years, Congress has been unable to agree on a legislative fix. In the absence of congressional progress, President Obama recently announced a series of sweeping reforms by executive action, scheduled to go into effect this spring. Opponents are trying to block these changes through legislation and litigation. Supporters say the changes don't go far enough. I'm Michael Scharf, and this is *Talking Foreign Policy*. For this broadcast, we've assembled a panel of some of the country's leading experts on immigration law and policy. They will help us get to the bottom of the national debate on immigration reform, right after the news.

SCHARF: Welcome to *Talking Foreign Policy*. I'm your host Michael Scharf, interim dean of Case Western Reserve University School of Law. In today's broadcast, we'll be discussing President Obama's controversial executive action on immigration reform. Our expert panel today includes Austin Fragomen, head of the largest immigration law firm in the world, who is joining us from New York City. Here at the WCPN studios in Cleveland, we have David Leopold, former president of the American Immigration Lawyers Association; Margaret Wong, a local immigration expert and author of the book "The Immigrant's Way;" and Jenna Peyton, a Case Western Reserve University School of Law professor and Cleveland immigration lawyer who volunteered last summer in Artesia, New Mexico, to provide legal assistance to the thousands of mothers and children who fled to the United States from Central America. Thank you all for joining us.

1. Transcript edited and footnotes added by Kevin J. Vogel.

2. See, e.g., national and state polling collated and released by the Partnership for a New American Economy in July, 2014, at <http://www.renewoureconomy.org/uncategorized/new-poll-voters-across-country-want-immigration-reform-year/>.

PEYTON: Thank you, Michael.

SCHARF: Let's begin our discussion with Jenna Peyton. Jenna, tell us what your experience in New Mexico was like last summer.

PEYTON: Thank you for inviting me here today. Preparing for today, I couldn't quite figure out how to make my ten days in Artesia into a little snippet for the radio. It was, by far, the hardest thing I've ever been a part of in my professional career. Artesia is in the middle of nowhere and it was a facility where President Obama decided to place—away from any nonprofit legal providers—essentially barracks for mothers and children who were fleeing violence and other problems in Central America.³ Because it was so far from any free legal service providers, hundreds of immigration attorneys came and donated hours to provide legal services for the mothers and children. The average age of a child there is six years old and the only people held there are mothers with their children. We were able to successfully place the majority of those cases. Artesia was shut down, and some of the cases were transferred to other facilities in Texas.⁴ But it was an extremely challenging and difficult experience.

SCHARF: I wanted to start with you because immigration law sounds like such a wonky topic, and I wanted to remind everybody out there that this is about real people, real lives—often little kids—that really are suffering under their circumstances. So can you provide some background that will help us understand the big picture? First of all, just before the broadcast, you told me that we should use the term “undocumented aliens” rather than “illegal immigrants.” Why is that terminology so important? What's wrong with the “I” word?

PEYTON: Well, I think it encapsulates down to: no human being is illegal.⁵ That's the message we're trying to convey, that these people are the same as you or me. They don't happen to have the documentation that you or I enjoy because we just happen to have been born here. It's a derogatory

3. For a look into the Artesia immigration detention center, see Melinda Hanneberger, *When an immigration detention center comes to a small town*, *The Washington Post* (Oct. 1, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town>.

4. See David McCabe, *Administration to close immigration detention center at month's end*, *The Hill* (Nov. 18, 2014), <http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center>.

5. See Jose Antonio Vargas, *Immigration Debate: The Problem with the Word Illegal*, *Time* (Sept. 21, 2012), <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal>.

term; it refers to a criminal action and doesn't show deference and respect to these people. Honestly, many of the people that are entering our country now are fleeing. They are seeking the protections that have been provided to citizens and non-citizens in this country for centuries and upon which this country was founded.

SCHARF: Okay, so we'll use the term "undocumented aliens."

PEYTON: Thank you, Michael.

SCHARF: How many of them are living in the United States right now?

PEYTON: I did look this up and it looks like we're leveling out at around 11.2 or 11.3 million.⁶ It is shocking how many of those are long-term, meaning over ten years or over twenty years. About 62 percent of those have been here more than a decade; about 21 percent have been here more than two decades. The majority have U.S. citizen children, so we're talking about families. We're talking about neighbors.⁷

SCHARF: Okay, so eleven million, that's about 4 percent of the population. That's a large number of people. Where are they from? Which countries?

PEYTON: The majority are from Mexico. Other countries that are represented are El Salvador, Guatemala, India, Honduras, China, and the Philippines. I mean really, any country in the world, across all continents. I think that the majority, around 59 percent and that's around seven million, are from Mexico.

SCHARF: So what were their steps to citizenship before the executive action that was just taken by the president?

PEYTON: To become a citizen one must first be a permanent resident. And to obtain permanent residency—which is the same thing as a green card or an immigrant visa—one must have a family sponsor essentially, or an employment sponsor. Another way to obtain permanent residency would be through what's called the diversity visa, which is known as "the

6. Jens Manuel Krogstad and Jeffrey S. Passel, *5 facts about illegal immigration in the U.S.*, Pew Research Center (Nov. 18, 2014), <http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s>.

7. The Migration Policy Institute has compiled demographic information on the undocumented populations of 41 states and the District of Columbia, including an estimation of how many people would qualify under the expanded DACA and DAPA programs directed by the President's executive action. *Unauthorized Immigrant Population Profiles*, Migration Policy Institute, <http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/authorized-immigrant-population-profiles> (last visited Mar. 13, 2015).

lottery.” Your chances of getting that are about as good as winning the lottery. There also are investment visas and a handful of ways through the courts to gain permanent residency, such as applications for asylum or other litigation or free agencies.⁸

SCHARF: Okay, so in the meantime, before they are permanent residents and get citizenship, what are their rights and obligations? Do they pay income tax? Do they get drivers’ licenses? Do the kids get to attend public schools? Do the college students get in-state tuition?

PEYTON: It varies state by state in terms of the kids and their ability to seek education. Of course, the U.S. citizens are always entitled to any educational benefit. For the children that are undocumented, some states do provide in-state tuition. Unfortunately, Ohio is not one of those progressive states. California, Florida—I want to say a total of about eighteen, I think—do provide in-state tuition for undocumented students.⁹ In terms of taxes, if they don’t have a Social Security number, many undocumented are able to essentially provide registration of their taxes by obtaining what’s called an individual taxpayer identification number and through that, they can record their income that has been earned and therefore pay taxes on that. And the majority of the undocumented want to pay taxes.

LEOPOLD: Can I jump in there? It’s an interesting point.

SCHARF: Yes, please do. This is David Leopold.

PEYTON: Go on, David.

LEOPOLD: Jenna, I just wanted to supplement what you said, because you referred to the ITIN number, the individual tax ID number. So how do you think we know that there are 11.2 million undocumented immigrants? They’re paying taxes. We know that through the individual tax ID numbers. That’s how we get those figures.

SCHARF: So one of the biggest insights I’ve had today is that these undocumented aliens are paying taxes.

PEYTON: Yes.

SCHARF: It’s not, in fact, the case that we’re just carrying them on our backs, or that they’re all unemployed. A lot of them are employed, right?

8. The processes to obtain a Green Card are detailed on the U.S. Citizenship and Immigration Services’ website. *Green Card*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/greencard> (last visited Mar. 12, 2015).

9. *Basic Facts about In-State Tuition for Undocumented Immigrant Students*, National Immigration Law Center (June 2014), <http://www.nilc.org/basic-facts-instate.html>.

PEYTON: They are employed. They're part of our workforce. And again, they want to pay taxes, they want to contribute, they want to register their presence, they want to give back. And trust me, if they had the opportunity for a work authorization, which would give them a driver's license—all they want to do is be productive, and they want to be able to drive and otherwise contribute to our society.¹⁰

SCHARF: And David?

LEOPOLD: Yeah, and I agree with Jenna. There are many studies that show they're keeping the Social Security system afloat. And interestingly, they are paying into the Social Security system but are not going to get the benefit of it. So there's a big pot of money sitting there.¹¹

SCHARF: Along with all of this, I'm going to tell you something else that is quite surprising: many of the supporters of immigration reform had been dubbing President Obama, before his new executive actions, the "deporter-in-chief." And that's because he's been deporting—and his administration—how many would you say, Jenna?

PEYTON: I think the last number for fiscal year 2013 is four hundred thirty-eight thousand.

SCHARF: And this is more than any other president—per year.

WONG: In total.

PEYTON: And during his fifth year in office, he had already surpassed George W. Bush's eight years.

LEOPOLD: The irony, the absolute irony of that, is that he—by deporting four hundred thousand people a year—is showing that he is following the dictates of the law to the letter. The law requires the president to set enforcement priorities—I'm sure we'll get into this a little later. But Congress has only given the president enough resources to deport four hundred-plus thousand people a year. So he's using the money as it was intended. And he's earned himself, for many of his supporters, the moniker "deporter-in-chief."

10. See Leo Anchondo, *Top 10 Myths About Immigration*, Immigration Policy Center, <http://www.immigrationpolicy.org/high-school/top-10-myths-about-immigration> (last visited Mar. 12, 2015)(dispelling more commonly held myths about undocumented immigrants).

11. See Roy Germano, *Unauthorized Immigrants Paid \$100 Billion Into Social Security Over Last Decade*, VICE News (Aug. 4, 2014, 4:50 PM), <https://news.vice.com/article/unauthorized-immigrants-paid-100-billion-into-social-security-over-last-decade>.

SCHARF: Of course, at that rate, it would probably take thirty years to get through all eleven million. Let's go to New York City where we have Austin Fragomen standing by. Austin has been a leader in the immigration field for four decades—ever since graduating from Case Western Reserve Law School—and has testified before Congress on immigration reform. Austin, let me ask you if you can tell us what you consider the most urgently needed reforms in our country's immigration laws.

FRAGOMEN: Well, the most urgent need is to regularize the eleven million undocumented aliens. And that's particularly important because they don't have a path to regularizing their status, since there is a bar to changing status or becoming a resident through lawful means once you've been in the United States out-of-status for a year. In fact, there's a ten-year bar.¹² So legalization is really the most important. And whether it's a path to citizenship, meaning that one could automatically become a permanent resident after fulfilling whatever the requirements are—such as in the Senate bill that was passed last year—or whether it's just allowing persons who are without status to have a waiver of that particular provision I've just alluded to—that basically states that they're barred from changing their status or normalizing their status—that's really the most important.

Another very important provision would be to allow graduates of US universities, particularly those with advanced degrees, to remain in the United States, and to facilitate that through some mechanism, as opposed to our current system, where graduates of US universities can have PhDs or advanced degrees and are frequently forced to leave the country because of the shortage of H-1B visas for them to switch to. Which leads to the H-1B visa and the other categories that have numerical restrictions: we just need greater numbers.

SCHARF: Austin, you mentioned that the Senate passed reform legislation last year, but that wasn't enacted into law, was it? What is holding back Congress from being able to enact real legislative reform?

PANEL: (laughing)

WONG: How many hours do we have on this show?

FRAGOMEN: The same thing that's been holding it back from doing anything. We'll call it "congressional gridlock."

12. 8 U.S.C. § 1182(a)(9)(B)(i)(II)

SCHARF: With the Senate, was it the Democrats that wanted the reform and the Republicans that blocked it? Or is this a bipartisan issue?

FRAGOMEN: No, it was more complicated; it was a bipartisan issue. The bill was actually written by Senator Schumer and Senator Rubio, so you had a Republican and a Democrat. In fact, one of the partners of our firm had resigned from the firm and was the lead person for Senator Rubio, and he's certainly a conservative Republican. They came to agreement, and the bill passed 68–32.¹³

The House refused to consider the Senate bill, but rather decided that they would consider each of the issue areas covered by the Senate bill separately. That was a very laborious process. They basically made their way through four different, separate bills, which were reported by the House Judiciary Committee but never got to the House floor. Of course, now with the new Congress starting, the House and Senate will have to start all over again. But it seemed like the big problem was with the more conservative members of the Republican Party, who made this process quite difficult.

SCHARF: Okay, so we're coming to the time for our first break. I think we've got a really good scene set; people understand what the issues are. When we return, our experts are going to tell us about the executive action and critique it. We'll see what the pros and cons are, moving forward, so stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm your host Michael Scharf, interim dean of Case Western Reserve University School of Law, and we're talking today about President Obama's controversial executive action on immigration reform. Our expert panel includes Austin Fragomen, founder of the largest immigration law firm in the world; Cleveland immigration lawyers Margaret Wong and Jenna Peyton, who both teach at Case Western Reserve University School of Law; and David Leopold, past president and general counsel of the American Immigration Lawyers Association. I'd like to start this segment with David. David, I understand that when the president announced his executive action on immigration, you were there in the Roosevelt Room that day. Can you tell us how you ended up being there that day, and what that was like for you?

13. Ed O'Keefe, *Senate approves comprehensive immigration bill*, The Washington Post (June 27, 2013), http://www.washingtonpost.com/politics/senate-poised-to-approve-massive-immigration-bill/2013/06/27/87168096-df32-11e2-b2d4-ea6d8f477a01_story.html.

LEOPOLD: Well, how I ended up being there is anyone's guess. I have been privileged to work with a lot of people in Washington on some of these ideas and some of this legislation, and I ended up being there because I got an invitation the night before: "Please be in the Roosevelt Room with the president tomorrow." And when you get an invitation like that, you show up. But what I will tell you is that he was there, he had his senior aides there, and you could feel the gravity in the room.

What was going on in that room was historic: the president was going to take executive action which would, essentially, bring five million people out of the shadows—temporarily, of course, but nevertheless. And he was going to do some things that were hopefully going to move business immigration forward, was going to use some investment ideas, using the law in a creative way to make sure that entrepreneurs have a place in this country and are able to stay and build business and create jobs for US workers. So it was really a momentous occasion. You look around the room and you see all these portraits and you see the president sitting there, and you kind of pinch yourself. I felt very privileged to be a part of that.

SCHARF: Now you told me right before the broadcast not to use the word "executive order." That's what the press is calling it, but that's not actually right. Why do they have it wrong? What is really going on here?

LEOPOLD: What's going on here—and my colleagues will understand this—you said at the beginning that immigration is very "wonky," and it is. Really what happens in immigration is: we live by guidance, by interpretation of the agency. And really what's gone on technically, legally, is that the president, through the secretary [of Homeland Security], has issued a variety of memoranda. In these memoranda is where he has set forth the various programs for temporary reprieve for parents of US citizens, expansion of the program we call "DACA," the Dreamers' temporary reprieve, and various memoranda which are targeted to hopefully liberalize, or bring into the twenty-first century, some of the visa programs that we have. As Austin pointed out, we need to keep students in this country, so hopefully they are going to be expanding the practical training programs, they're going to be using the national waivers so people can be credited for the money they're going to invest. And this is all written out in memoranda, guidance to the agency. There's no "order" in place. Presumably, President Ted Cruz—excuse me, but it could happen—could, on the first day

of office, direct his new Department of Homeland Security secretary to rescind every one of those memoranda. And so it's not even an "order."¹⁴

SCHARF: Margaret Wong, you've also been to the White House—three times in the past couple of months—and met with the president. To you, what is the most important aspect of this immigration executive action?

WONG: The first time I met with the president was when Prime Minister Modi, of India, came to America. I was lucky, and I pinch myself, just like David was saying. It's like, my gosh, being a foreign-born, being an immigrant, I got to sit virtually two feet from the president. And he gave us, like, a whole one-and-a-half hours, talking about Asian importance. But the other two times in the White House were more for parties. And it's amazing, the president must read the guest list before he comes in because I was amazed that he remembered me. He said, "Oh, I promised you that I will issue executive action on that, and I did it. I did it." So it was very nice.

SCHARF: And what part of the executive action, to you, is the most important?

WONG: I think it's interesting, because I personally didn't think he went far enough. And I told him that. He did not include DACA parents, because these are the DACA kids—

SCHARF: Okay, and DACA stands for?

LEOPOLD: It stands for "Deferred Action for Childhood Arrivals."¹⁵

SCHARF: I told you immigration law was wonky. Let's try not to use the initials.

WONG: So, the parents of these children—and I went to some of these children's meetings; it's really fun. When the Dream children came in, they said, "I am undocumented. I have no papers. My parents brought me here when I was young. I want to stay in America." It's making them get up and admit it. Until we admit that we have no papers, we cannot fight for our work papers. So, they did that, and that was, like, June 15 of 2012, and then 601-A came in May of 2013. So, through the years, President Obama has made it easier.

14. See Gregory Korte, *Obama issues 'executive orders by another name,'* USA Today (Dec. 17, 2014, 1:16 PM), <http://www.usatoday.com/story/news/politics/2014/12/16/obama-presidential-memoranda-executive-orders/20191805/>.

15. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Mar. 13, 2015).

SCHARF: And “601-A” is what? We’ll go back to David for an explanation.

LEOPOLD: Let me break it down simply. Austin referred to a ten-year bar and he correctly pointed out that, when people have been in the country without documents for more than a year, if they leave the United States they’re facing a ten-year bar to return. What Margaret is referring to when she says, “601,” is that the president tweaked the regulations a couple of years ago to allow people to apply for the removal of that ban before they travel abroad. So there is a way for you to remove that ban if you can show hardship to your US citizen spouse or parent.¹⁶ But, in the old days, before Obama, you’d have to go overseas and wait. So we had people waiting in some very dangerous places—for example in Juarez, Mexico, at the height of the cartel wars. People were getting killed. And so they tweaked the regulation—just a bit—to allow people to apply for the “waiver,” we call it.

SCHARF: From the US?

LEOPOLD: Yes, from the US. So what he did on November 20, when he announced his executive action, was that he expanded that just a bit to cover lawful permanent residents. In other words, the spouse of a lawful permanent resident, who may be undocumented, can apply for that dispensation waiver before he or she travels.

SCHARF: And, Margaret, you were saying that’s one of the most important provisions to you.

WONG: Yes.

SCHARF: Jenna, what would you say was the most important provision to you?

PEYTON: I think the most important provision to me, and to my clientele, would be for the parents of the U.S. citizens, which is called “DAPA,” just for another wonky set of initials for you. Those are situations where you can have a long-term resident here, they have U.S. citizen children, they’re able to show (more likely than not) some type of good moral character—maybe by paying of taxes—and it’s a simple registration process. All you have to show is identity, and that you’ve been here, and you qualify for reprieve. And you’d also qualify for—more importantly, more tangibly—an employment authorization, which provides a Social Security Number, a driver’s license, and everything else.

16. *Provisional Unlawful Presence Waivers*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last visited Mar. 13, 2015).

SCHARF: Austin, we didn't forget about you in New York City. To you, what were the most important provisions of the executive action in November?

FRAGOMEN: Well, I mean certainly the ones that were mentioned affect the most people, so we would have to argue that they're the most important. However, I will point out that, for all practical purposes, persons who would qualify for "DAPA," the "Deferred Action for Parental Accountability," had a fairly low probability of ever being apprehended or asked to be removed from the country. So, I think maybe some of the employment provisions have been overlooked. In particular, the section relating to revolutionizing the visa system. Interestingly, the president there directed the major players in the process—the secretary of the Department of Homeland Security, and the secretary of state and whatnot, the secretary of labor—to do detailed analysis of the various processes in areas that were under their control. And I think we're going to see a lot come from that that's going to be very interesting and very helpful.

SCHARF: Let me ask you about some of the other provisions that haven't been much in the news. First of all, how will the executive action affect foreign students who want to remain in the United States for practical training after the completion of their education?

FRAGOMEN: Well, one of the sections of the executive action directs the head of USCIS—which is the US Citizenship and Immigration Services—and essentially what it does is it directs the head of that agency to take a look at the foreign student process and to come up with a way to allow an extension of the practical training of foreign students. This allows students to work either during the summer or after they graduate, and it's time-limited. So the idea is to both expand the number of fields of study for which practical training is available, while at the same time extending the total period for practical training. The reason this is so important is that the next step in the process for foreign students to remain in the US is to apply for an H-1B visa, and because the demand so far exceeds the supply—about 50% of the persons who applied last year were selected¹⁷—there is a great advantage to being able to apply more than once. By extending this period, it gives the foreign students a chance to apply several times. In

17. See Jens Manuel Krogstad, *Visa cap cuts off immigrants with advanced degrees*, USA Today (Jan. 9, 2013, 4:43 PM), <http://www.usatoday.com/story/money/business/2013/01/09/immigration-science-technology-engineering-math-jobs/1566164>.

addition, it might give the foreign students an opportunity to actually file for permanent residence. So this is a very important provision.

SCHARF: David, did you want to weigh in on that?

LEOPOLD: Yeah. I also think it's smart public policy, because we have trained these kids here. Why should we give them the degree and then put them on an airplane and send them home? I think extending practical training, with a particular focus on STEM—science, technology, engineering, and math—makes a lot of sense, and to broaden it makes a lot of sense. It's just very good public policy.

SCHARF: You all are saying that this action is actually really good for the economy. I want to go back to Austin. President Obama said that one of his major concerns was promoting research and development. I want to know if you think that the executive action enables more foreign inventors and entrepreneurs to enter the country.

FRAGOMEN: Well, if what he outlined actually comes to pass, I would say it will make a fairly significant difference. It's very difficult for someone starting up a company as an entrepreneur or an investor to qualify under our current visa system. So this could really be helpful. For the first time, inventors, researchers, and founders of start-up businesses would be able to enter the country, or to remain here. We see this often with graduates of science programs in the US—STEM graduates, like from engineering programs or computer science, things of that sort—who have some brilliant idea and want to start up a business. And it's very difficult for them to acquire a visa. This would allow them to stay here until they really had the qualifications to apply through one of the other categories.

And then there's another category that he's directed be expanded, and that's one for what we call "national interest waivers." Somebody who is doing something that is strongly in the national interest would be allowed to remain in the United States. The directive here deals specifically with inventors, researchers, and founders of start-ups. I think this should be very useful in that community and allow a number of people to remain in the U.S.

SCHARF: Jenna, can you quantify the aggregate economic impact that has been reported from these reforms?

PEYTON: Exact numbers, no. But what we're looking at is millions of dollars, easily, in terms of individuals being able to invest, not only in

houses but also in retirement accounts, etc. And again, consider the idea of someone having a driver's license and being able to purchase a car, purchase automobile insurance, on the smaller level, and then working their way up.

This could also benefit many of these blighted cities we have, which is another whole topic of discussion. But areas of certain cities, including Cleveland, have been struck with a foreclosure crisis, with houses going for little money. Those who have the ability and documentation would then be able to afford those, and help supplement the economy there.

WONG: And all the investors coming in, they'll create more jobs. They'll create more software and we'll buy more software. They'll have more things to sell in Costco that we can go buy.

SCHARF: So, with all these great economic impacts, you would think the American public would embrace this. But the Gallup organization has done some polling, and it turns out that the American people disapprove of the executive action by 51 percent to 41 percent.

WONG: They're wrong.

SCHARF: When we come back, let's look at what the downside to the executive action on immigration is, and let's explore why there is a court case working its way through the courts and what the impact of that might be. So everybody stay with us.

SCHARF: This is Michael Scharf, and we're back with *Talking Foreign Policy*. I'm joined today by four of the country's leading experts on immigration reform. I want to go to David Leopold first, who had the position, in the past, of counsel and president of the American Immigration Lawyers Association. We were talking before break about the fact that, despite the positive economic impact of the executive action on immigration reform, the American people aren't that fond of it. Certainly, the Republicans in Congress are against it. What have their policy criticisms been with regard to this reform action?

LEOPOLD: First of all, the American people are strongly in favor of immigration reform. I think every poll that has come out has shown 60-70 percent in favor of fixing this immigration system.

SCHARF: But they want Congress to do it, right?

LEOPOLD: Yes, they do want Congress to do it. But in terms of the criticism that has been pointed at the immigration actions, the claim is that

the president has gone outside of Congress and created law on his own, that technically he has violated the Take Care Clause of the United States Constitution¹⁸, which requires him to faithfully execute the law, meaning that if he gives a deportation reprieve, he is not executing the law.

The legal argument in favor of these immigration actions is not all that complicated. I mentioned the Take Care Clause. Well, the president is required by the Constitution to “take care” that the law is faithfully executed. The law, the Homeland Security Act, says that the president must set enforcement priorities, meaning he has to decide who to deport first. Is he going to go after the hardworking mother who is changing linens in Toledo or is he going to go after the drug dealer that doesn’t have citizenship? Is he going to go after the guy that’s picking lettuce, or is he going to go after somebody who has an affiliation with ISIS? That’s an enforcement priority, and I think we all know—

SCHARF: But are you really saying that, before this executive action, the people that were under the president enforcing immigration law were going after the lettuce-pickers and the housewives?

WONG: Absolutely.

LEOPOLD: Well, there were enforcement priorities in place. He’s required by law to set those priorities, and we had what were called the Morton Memos.¹⁹ So on paper, they were going after the bad guys. In reality, at least until the last couple of years, they were going after what we call the “low-hanging fruit.” It’s easier and safer to arrest the mother who is changing linens in Toledo than it is to go after the hardened criminal. So the president has been setting these enforcement priorities and has been spending the money that Congress has given him to deport everybody. They only give him enough resources to deport four hundred thousand people a year. He’s been following that, which led to “deporter-in-chief.” So he’s actually been following the law.

Now, DAPA—the Deferred Action for Parental Accountability, the one that expands to the parents of US citizens—the claim is that it’s not legal because it is a categorical grant of deferred action. The problem with that argument, first of all, is that it’s not a categorical grant; everyone gets an

18. “(The President) shall take Care that the Laws be faithfully executed.” U.S. Const. art. II § 3.

19. Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement (ICE) to ICE agents (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>

individual assessment. But the real problem with that argument, and the disingenuous part of it, is that every president back to Eisenhower has used deferred action. They didn't necessarily call it that, but starting with Eisenhower, all of them have used this. George H.W. Bush used something called the Family Fairness Program²⁰ back during the legalization following Ronald Reagan. That was very similar to what they're doing now. I don't recall the Republicans screaming and yelling at that point, so a lot of this is political.

SCHARF: It is political, and they are screaming and yelling, so let me ask Austin about the most recent legislative developments. On January 14, the House voted to reverse the president's action. Austin, do you think that a similar bill may pass the Senate, and would Congress have the votes to sustain a presidential veto? Could they force him in other ways, for example by passing immigration reform in a bill that the president needs, such as funding for Homeland Security or the Department of Defense? Does Congress have the cards to play to reverse the president's action?

FRAGOMEN: No. In fact, I would suggest that the Republicans are off on a very dangerous excursion, from a political standpoint. Right now, as you know, DHS funding expires on February 27, 2015, which was part of an agreement reached last year where they basically advanced the appropriations for the other federal agencies, but not DHS, to give them the chance to take up the executive action. I don't think that the Senate will pass a similar bill, because essentially for the Senate to pass this bill they will need 60 votes. They only have 54, and I see this as being a straight partisan issue. But even if it did pass, the president would veto the bill anyway and there wouldn't be enough votes to override his veto.

So, this is going to lead undoubtedly to a budget showdown over DHS funding, which in fact will be a proxy battle over the executive order. Right now, the administration is turning up the heat on the Republicans publicly, warning that a prolonged fight would jeopardize national security. Interestingly, defunding DHS would affect key DHS functions, such as border security and anti-terrorism, but it actually would not affect the provisions we've been talking about, like DAPA and DACA, because they're essentially funded through user fees. Therefore, they don't need a separate appropriation. I think we're going to see quite a robust debate

20. See *Reagan-Bush Family Fairness: A Chronological History*, Immigration Policy Center (Dec. 9, 2014), <http://www.immigrationpolicy.org/just-facts/reagan-bush-family-fairness-chronological-history>

going forward, and right now I couldn't exactly foresee how this impasse will be resolved.²¹

SCHARF: Well if they're not succeeding in the Congress, they could then turn to the courts. Let me ask David this: I understand that twenty-six states, including Ohio, have joined together in a court case, *Texas v. United States*, challenging the constitutionality of the president's action. Where does that case currently stand?

LEOPOLD: That case is pending decision in front of a federal district judge in Texas.²²

SCHARF: This would be Judge Andrew Hanen?

LEOPOLD: Yes, Judge Hanen. And Judge Hanen has drawn a lot of criticism because he issued a decision in which he was very critical of some of the practices of customs and border protection. But you know, I've got some hope that Judge Hanen will actually dismiss this case on standing. I'm probably the only immigration lawyer who's saying that, but if you—

SCHARF: Let's take a second to explain "standing" to those who aren't lawyers out in the listening audience.

LEOPOLD: In order to sue, you have to show some harm. If somebody breaks a contract with you, Michael, I can't sue because I'm not you; I wasn't harmed. So "standing," in this context, means these states have to show that they have been directly harmed by what the president has done.

SCHARF: And what is their argument that they have been harmed?

21. Congress passed a bill in the first week of March, funding DHS without affecting the executive actions. Kelly O'Donnell, Alex Moe, Carrie Dann, and Andrew Rafferty, *Congress Approves Homeland Security Funding Without Immigration Fight*, NBC News (Mar. 3, 2015, 10:02 AM), <http://www.nbcnews.com/politics/congress/congress-approves-homeland-security-funding-without-immigration-fight-n316341>

22. On Feb. 16, 2015, Judge Hanen issued a temporary injunction, preventing the implementation of DAPA and the expanded DACA programs. See *Understanding Initial Legal Challenges to Immigration Accountability Executive Action*, Immigration Policy Center (Mar. 12, 2015), <http://www.immigrationpolicy.org/just-facts/understanding-initial-legal-challenges-immigration-accountability-executive-action>. The attorneys representing the United States have appealed the ruling to the 5th Circuit U.S. Court of Appeals, which has not yet issued a decision on the motion. See Josh Gerstein, *Obama administration asks appeals court to block judge's immigration order*, Politico (Mar. 12, 2015 2:05 PM), <http://www.politico.com/story/2015/03/immigration-new-orleans-injunction-obama-administration-116022.html>. On April 7, 2015, Judge Hanen denied the government's request to stay his injunction pending the decision of the appeals court. *Judge Denies DOJ Request to Lift Hold of Obama Immigration Action*, Associated Press (April 8, 2015 12:23 AM), <http://www.nbcnews.com/storyline/immigration-reform/judge-denies-doj-request-lift-hold-obama-immigration-action-n337631>.

LEOPOLD: Their argument is that the president's failure to enforce the laws, as they put it, will cause an illegal migration. They point to the children that came in over the summer, the folks that Jenna was good enough to go help in Artesia, people like that. The problem with that argument is that it there is no nexus between the two, no way to show that.

And I'll tell you a true story: I was driving back from Columbus when they filed this lawsuit; I had been speaking down there to a Hispanic group. And a reporter from the Houston Chronicle called and said, "Do you mind reading this complaint and giving me a comment?" So I pulled over to the side of the road, and I thought, "Okay, I'll read this thing but it's going to take me a while." I was done reading it in about five minutes.

SCHARF: And I take it that's not typical of a court case in immigration law?

PANEL: (laughing)

LEOPOLD: No, it's like a thirty-page complaint. It didn't take me long because it didn't take long to figure out that that complaint was really a press release masquerading as a factually challenged legal document.²³

WONG: But, David, I think the reason why it was not so well-drafted was that they did it in a hurry. They announced it, and then they filed it in, like, five hours. So they couldn't have done a good job.

LEOPOLD: You may be right, Margaret. My theory is that they don't have any law and they don't have any facts, and that's why they did such a poor job. I think this case, whether it's Judge Hanen, or whether it's the Fifth Circuit—the court of appeals where the case would go if there were an appeal—or the Supreme Court if necessary, will throw this case out. I'm pretty confident. Having read the complaint, having looked at these issues, having written about this, I would be very, very surprised if this case stands.

SCHARF: Let me go back to Austin in New York and ask you this question: if the court rules against the president, what are the consequences? Let's say David is wrong, they don't throw the case out, and they actually rule on the merits against the president. What do you think would happen?

FRAGOMEN: Well, I think the greatest consequence of ruling against the president would be that there would be a great swell of political opinion supporting what he did and an outcry for some sort of legislative relief. I think that would be a very likely consequence. I think that there's actu-

23. The amended complaint is available at: <https://www.texasattorneygeneral.gov/files/epress/files/ImmigrationStatesFirstAmendedLawsuit12092014.pdf>.

ally a greater chance of having immigration legislation—notwithstanding all the gridlock—with both a Republican Senate and House. I think the more enlightened leadership of the Republican Party wants to move ahead a limited immigration bill, certainly not something as broad, perhaps, as what would be contained in the executive order. So, I think things would just move on, but I don't know that it would really make that big a difference, other than the political fallout and the massive disappointment you would have in the alien community by those who might have been granted deferred action. But don't forget that this was not solving the immigration problem; this was just allowing people to stay here and not have to worry about being removed from the country. This doesn't make anybody a permanent resident. It's not a pathway to anything.

SCHARF: David, you wanted to chime back in on this?

LEOPOLD: I think the biggest fallout from all of this, if it doesn't change soon, is going to be to the Republican Party. I think that they're facing a 2016 presidential election, and recently we've watched the hearings—at least I did, part of them—for Loretta Lynch, the nominated Attorney General. And there was all kinds of talk over the last several months that this was going to be a proxy fight over immigration, and they were going to tear her apart on immigration and where she stood on the president's action.²⁴ Probably a lot of this was because she handled herself with such grace and with such poise, and she's brilliant, but she took the Republican questions—particularly from Jeff Sessions and people like Ted Cruz, no friends of immigration and ardent anti-immigration restrictionists in the Senate—and metaphorically chewed up their questions and spit them out. She carried the day, and I think what this tells us is they don't have the facts, they don't have the law, and they don't have the politics on their side. The biggest voting bloc in this country is the Latino vote. And yes, the Democrats got hammered in the last election in 2014, but the electoral map is much different for 2016. Ask Mitt Romney what happens when you turn your back on the Latino vote.

SCHARF: One of the things I find interesting about how this litigation is playing out is that there are a majority of states—twenty-six—in favor of overturning the president's action in the courts, but you have thirty major

24. See Greg Sargent, *Morning Plum: How the Senate battle over Loretta Lynch will 'make history,'* The Washington Post (Mar. 12, 2015), <http://www.washingtonpost.com/blogs/plum-line/wp/2015/03/12/morning-plum-senate-battle-over-loretta-lynch-will-make-history>.

cities that have filed their own amicus brief together.²⁵ They represent probably a greater part of the population, and they're in many of the same states as the governors who have filed this complaint. Margaret, tell us, what do you think is the significance of these amicus briefs? And also explain what "amicus" means for our audience.

WONG: Okay, "amicus" means that another person wrote a brief, or signed a brief that maybe other people have written, and filed it with the court either in support or opposition of the action.

SCHARF: So it's literally a "friend of the court" brief.

WONG: That's right.

SCHARF: And what do you think is the significance of these amicus briefs?

WONG: I really think what happened was like a "herd mentality." Like when all the attorneys general decided to sue against the cigarette makers, suddenly one followed after another. The ones who didn't follow didn't make any money. And there's really no loss. If Mr. DeWine refused to join the suit, then if Texas won he would feel sort of left out because he is Republican and the governor is Republican. For now, though, I don't think it means that much because all these states join together for all sorts of stuff. On the other hand, though, New York, California, Chicago, they are all giving people drivers' licenses, with or without papers. And they make money from it. [Ohio Governor John] Kasich himself, in *The New York Times* last Sunday, mentioned that, when people throw you money, I don't understand why the states don't take it on Medicaid/Medicare issues. Same with all these issues. The government is going to give us money to do certain things. Why doesn't Ohio take it? It's not like we're that rich that we can afford not to accept it.

SCHARF: So David, from your point of view, you're optimistic that the case isn't going to prevail. Let me ask each of the other three: are you as optimistic as David, or do you think there is a chance that the court could issue an injunction striking down the executive action?

LEOPOLD: Before they answer, I'm talking about ultimately prevailing. I don't know what this judge is going to do. I think that there's a good chance that this judge is going to actually follow the law, and if he does follow the law, he'll boot it on standing. I'm probably in the minority on that.

25. See Paul McDaniel, *Dozens of Mayors File Brief in Support of Immigration Executive Action*, *Immigration Impact* (Jan. 27, 2015), <http://immigrationimpact.com/2015/01/27/dozens-mayors-file-brief-support-immigration-executive-action>.

SCHARF: Margaret, what do you think is going to happen with this court case, at the end of the day?

WONG: I think, at the end of the day, the president will prevail.

PEYTON: I agree.

SCHARF: Austin, how do you see the tea leaves of the Supreme Court on this?

FRAGOMEN: I think there will be a case, because even if this one gets thrown out, the Republican House would probably sue. [House Speaker John] Boehner's been talking about doing that already, and he has a much better standing argument. It's a very, very tough question. The president was actually very narrow in the group that he selected here, and that's what Margaret was frustrated about, that it should have included more people. Because it is so narrow, he might prevail.

SCHARF: This is just getting interesting, but we're coming to the end of the broadcast. One thing that I think is clear is that this country is in the midst of a constitutional conflict over immigration reform. Our experts are telling us that the next few days and weeks in the legislative branch and in the judicial branch are going to be very interesting. Austin Fragomen, David Leopold, Jenna Peyton, and Margaret Wong, thank you all so much for being on the show today. I'm Michael Scharf and you've been listening to *Talking Foreign Policy*, produced by Case Western Reserve University and WCPN 90.3 ideastream.

Talking Foreign Policy, September 4, 2015 Broadcast¹

Participants:

Michael Scharf

Milena Sterio

Avidan Cover

Paul R. Williams

Mike Newton

SCHARF: Welcome back to *Talking Foreign Policy*. I'm your host, Michael Scharf, dean of Case Western Reserve University School of Law. In today's broadcast, our expert panelists will be helping us make sense of the controversy surrounding the Iranian Nuclear Accord, which will be voted on by the Congress in mid-September. Our guests today include Milena Sterio, associate dean of Cleveland-Marshall College of Law, who is a leading expert in international law. Also with us, for the first time, is Professor Avidan Cover, director of the Institute for Global Security Law and Policy at Case Western Reserve University School of Law. Joining us from Washington, D.C., is Dr. Paul Williams, president of the Public International Law and Policy Group, who has negotiated treaties dealing with dozens of conflicts across the globe. And rounding out our panel from a studio in Nashville, Tennessee, we welcome Colonel Mike Newton, a professor at Vanderbilt Law School who is an expert on military issues. Thank you all for being with us tonight.

Let's begin our discussion by examining the history and content of the Iran Nuclear Accord. Proposals for a deal to limit Iran's nuclear capabilities go back to 2003. The current round of negotiations began in 2012 and ended with an agreement just last month. Colonel Mike Newton in Nashville, Tennessee, can you describe the context for these negotiations?

NEWTON: Well sure, Michael. We don't really have time to go back and describe the thirty plus years of contentious relations between the United States and Iran, but that of course forms a necessary backdrop. In more recent times, number one, we've seen the Russian resurgence, the Russian attempts to reach back out and aggrandize their own authority and support the Syrian Assad regime and begin to reinitiate their dialogue with the Iranians.² Two, we've seen the tremendous expenditure of diplomatic effort—principally by

1. Transcript edited and footnotes added by Katelyn Masetta-Alvarez, Kelsey Ward, and Kevin J. Vogel.

2. See, e.g., Henry Meyer et al., *Putin Defies Obama in Syria as Arms Fuel Assad Resurgence*, BloombergBusiness (Aug. 3, 2014), <http://www.bloomberg.com/news/articles/2014-04-02/putin-defies-obama-in-syria-as-arms-fuel-assad-resurgence>.

the United States with European allies, to rebuild the European sanctions against Iran, but now we've seen those sanctions begin to crumble and so in some ways the agreement reflects the inevitable. And then lastly, we've seen the Obama foreign policy priority, in the last year or couple of years, of shifting the status quo, looking for places around the world where the status quo, in their opinion, isn't serving US interests and trying to reframe those things into ways that better serve longer term US interests.

SCHARF: And Mike, at the base of all of this is the scary fact that Iran has acquired nuclear capabilities. Is that correct?

NEWTON: Well, yes, of course. They've acquired those in the face of supposedly binding UN sanctions and so their record of compliance with those things is not true. For example, one thing that's already happening is, before UN experts get into the Parchin military complex, which is permitted under the agreement, satellite imagery shows the Iranians moving in to clean up that complex and trying to hide the evidence of their research that was going on there, even in the face of binding UN sanctions.³

SCHARF: And how close would they be to acquiring nuclear bomb material to actually use against or threaten some of our allies in the region?

NEWTON: Well, on its face the agreement prohibits highly enriched uranium. The Iranian line has been all along this is just peaceful nuclear power.

SCHARF: But I'm saying, without the agreements, what's the current status of their nuclear program?

NEWTON: The White House has estimated their "break out time" to be two to three months.⁴

SCHARF: So Milena Sterio. You're an international law expert, and you've been studying this deal. Can you summarize its main provisions for us?

STERIO: Sure. So first of all, this deal was signed by Iran and six major world countries—five of which are permanent members of the Security Council, and the sixth is a representative from the European Union. In a nutshell what the deal does is it will eventually lift oil and financial sanctions on Iran—which have been crippling Iran's economy—starting

3. *Satellite Imagery Reportedly Shows Iran 'Sanitizing' Nuclear Site Days After Deal Signed*, The Jerusalem Post (Aug. 6, 2015), <http://www.jpost.com/Middle-East/Iran/Satellite-imagery-reportedly-shows-Iran-sanitizing-nuclear-site-days-after-deal-signed-411304>.

4. <https://www.whitehouse.gov/issues/foreign-policy/iran-deal>.

sometime in early 2016, in return for Iran's agreement to place limits on its nuclear production capability and fuel stockpile over the next fifteen years.⁵ Now the deal is very, very specific. It's a hundred and nine pages long and has multiple annexes. And so there are multiple provisions, very specific provisions, some of which will continue anywhere from eight to fifteen years. But after fifteen years, the deal will come to its end.

SCHARF: Okay. So basically we're just buying some time before they get to relaunch their campaign to get nuclear weapons grade materials.

STERIO: That is a downside of the deal. That is what the critics of the deal point out, that after fifteen years Iran could essentially start doing whatever it wants to do.⁶ We are buying time, but proponents of the deal say that it's crucial that we do this because, first of all, who knows what will happen in fifteen years. But second, during those fifteen years hopefully we can engage with Iran on a more diplomatic level and try to persuade Iranian leadership that this is really not in their best interest.

SCHARF: Well, during these fifteen years, how is the deal to be enforced? Is there some kind of monitoring that is allowed so that we know that they're not cheating?

STERIO: Yes. So the monitoring will be done by an international agency—the International Atomic Energy Agency—that will have a team of a hundred and fifty inspectors that are supposed to have access to multiple Iranian facilities, where they have been up to now conducting research and development, enriching uranium and doing all these things that, some of which, by the way, will be prohibited now under the terms of the deal.⁷ Now of course, the danger will be in the fact that Iran is the size of Texas. There are multiple undeclared sites and so, you know, how a hundred and fifty inspectors supposed to be able to monitor all this remains to be seen. Again, proponents of the deal say that this is the most comprehensive deal that we've ever had in terms of nuclear non-proliferation or nuclear kind of limitation type agreements.

5. *The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon*, WhiteHouse.gov, <https://www.whitehouse.gov/issues/foreign-policy/iran-deal> (last visited Nov. 6, 2015).

6. See David E. Sanger & Michael R. Gordon, *Future Risks of an Iran Nuclear Deal*, N.Y. Times (Aug. 23, 2015), http://www.nytimes.com/2015/08/24/world/middleeast/in-pushing-for-the-iran-nuclear-deal-obamas-rationale-shows-flaws.html?_r=0.

7. Iranian inspectors will play a role in these inspections. Laura Koran et al., *U.S. Acknowledges Likely Iranian Role in Nuclear Site Inspections*, CNN Politics (Aug. 20, 2015), <http://www.cnn.com/2015/08/19/politics/iran-nuclear-deal-inspections-parchin/>.

SCHARF: So let me turn to Dr. Paul Williams. This is our peace negotiator in Washington, D.C. Paul, what is the role of the US Congress in all of this? Can President Obama just unilaterally move forward with this deal or does he need congressional approval? And, even if he can move forward unilaterally, can Congress act to kill the agreement if it wants?

WILLIAMS: Well Michael, surprisingly this is not a treaty. It's simply an executive agreement and therefore, despite all of the media hoopla and attention being paid to Congress at the moment, Congress actually has a very minor role in what's playing out here as a major foreign policy development. Because it's not a treaty, the Senate and the House are put into a position of having to affirmatively pass what's called a resolution of disapproval. So with all of the Republicans opposed and many of the key Democratic Senators opposed, the Senate will be able—and so will the House—to pass this resolution of disapproval, and then President Obama will simply veto it and then the Senate will have to try to muster a two-thirds majority to override his veto and they won't be able to.⁸ So the reality is that with just barely over thirty-three percent of the elected representatives, President Obama will be able to undertake this major realignment of the status quo, as Colonel Newton pointed out.

SCHARF: All right, so just to do my math, it take two-thirds of the one hundred Senators for a veto override—that's sixty-seven votes. Right now, the Republicans have fifty-four votes to the Democrats' forty-six, normally, when they vote along partisan lines. Two Democratic Senators have already said that they're going to vote with the Republicans, so that brings them up to fifty-six. So you don't think the opponents of the deal are going to get the additional eleven votes for the override?

WILLIAMS: No. This whole process is more for an ability of the Republican Senators to put their stamp of disapproval on this and then, for a handful of Democratic Senators to, you know, protect their representative base. There is no real impact-shaping input, unfortunately, that Congress is having on the agreement and there's no real option for them to kill the agreement if they thought that was in the best interest of the United States. It's a pretty risky limb for the administration to be out on with this type of limited support.

8. David Espo, *Democrat, Republicans Differ on Iran Nuclear Deal*, The Washington Times (Jul. 21, 2015), <http://www.washingtontimes.com/news/2015/jul/21/democrat-republicans-differ-on-iran-nuclear-deal/?page=all>.

SCHARF: Now you said it's an executive agreement, though, so what happens if a Republican wins the next presidential election? Can't they just end the agreement?

WILLIAMS: Technically. If we were just talking as a group of lawyers, we could have a long discussion about that. I think politically, in reality, a year and a half from now, whatever shape the agreement has taken in its implementation phase, it will be well underway and so the conversation will not be about cancelling the agreement. The conversation will be about what's our overall strategic approach to Iran—should we be continuing containment, should we be doing constructive engagement. I think a year and a half from now, we're going to have a mess in terms of what our policy is vis-à-vis Iran. There's going to be a lot of energy focused on how to put Iran back in the box and less about cancelling an agreement.

SCHARF: Speaking of constructive engagement, President Obama has said that the Iran Nuclear Accord will provide an opportunity to begin a new, more productive chapter of Iranian relations with the West. Let's bring Professor Avidan Cover into the conversation. Avi, what's the chance, in your opinion, that the Accord will be a first step in bringing Iran "in from the cold" and spell an end to its thirty-six year experiment with extremism?

COVER: Well, there's a chance, and I think there's a better chance than without the agreement. You know, I think it's difficult to obviously forecast plenty of the internal politics of Iran and certainly, as you note, there's been thirty-six years of extremism. With that said, Iranian President Rouhani ran, for his presidency, on the position that he was going to get this deal and bring back economic reforms, revitalize the economy with the money—the assets that will be unfrozen, the sanctions that will be lifted⁹—and I'm sure we'll get into the pros and cons of that. One hope is that a lot of that money will be allocated to the economy. Iran was a country that was very much a part of the international arena with economic relations, with really all of the P5+1 members, save the United States. It's in Iran's economic interest to come out from the cold if you will, or come out from the heat perhaps, and so we'll see. Having said all of that, I think it'd be difficult to predict entirely whether it will not also continue some of its wayward extremist ways.

9. For a discussion of how the deal will affect President Rouhani, see Amir Farmanesh & Ebrahim Mohseni, *What's Next for President Rouhani in Iran?*, *The Guardian* (Jul. 14, 2015), <http://www.theguardian.com/world/iran-blog/2015/jul/14/whats-next-for-president-rouhani-in-iran>.

SCHARF: Well, I do understand that the public in Iran took to the streets to express their joy, as opposed to their protest, for once, over this agreement when it was announced.¹⁰ What do you make of that?

COVER: Well that's right, and so I think certainly that can be interpreted optimistically as a move reminiscent of the Green Revolution toward re-engagement with the West. It can also be viewed a little more cynically as a victory for Iran. Iran beat the United States, if you will, in the deal. It retained its right to enrich nuclear power and there are those, I think, who can see it from that perspective as well.

SCHARF: Mike Newton, is that your view?

NEWTON: Well, I mean, to put it in the context of a divorce setting, one party gets everything they wanted locked in on a permanent basis. The other party gets a very small fragment of what they started out wanting on a temporary basis. If you just frame it like that, from the perspective of the Iranians it's a big win, and President Rouhani is claiming it as a major victory. I think Avi's exactly right. If, in fact, they spend a good portion of that surge in income—some estimates are more than a hundred billion dollars in the short term, much more over the longer term—on their economy, there's a chance that it really does solidify the civil society [in] Iran and bring back some structure and some engagement. On the other hand, if the majority of that goes into weaponry to solidify regional hegemony and continues to fund terrorism in the region, then that's a big problem.

SCHARF: Well, with that thought, it is time for a short break. When we return, our experts will weigh the pros and cons of the Iran Nuclear Accord, so stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, Dean of Case Western Reserve University School of Law. We're talking today about the Iran Nuclear Deal, which will be voted on by Congress in mid-September. Our expert panel includes peace negotiator Dr. Paul Williams, military expert Colonel Mike Newton, international law expert Milena Sterio from Cleveland-Marshall Law School, and Professor Avidan Cover, Director of Case Western Reserve's Institute for Global Security Law and Policy.

10. See Saeed Kamali Dehghan & Ian Black, *Thousands take to Iran streets to celebrate the historic nuclear deal*, *The Guardian* (Jul. 14, 2015), <http://www.theguardian.com/world/2015/jul/14/joy-in-tehran-at-end-to-isolation-but-hardliner-reaction-to-nuclear-deal-feared>.

Before the break our experts were describing the main provisions of the Iran Nuclear Accord. In this next segment, we will provide a critique of the Accord. Let's begin with Professor Avidan Cover. Now Avi, before the broadcast began, you told us you were a proponent of the Accord. As such, what were you most pleased about in the agreement?

COVER: Sure, and I just want to qualify for a moment: while being a proponent, I think I have to say I'm a begrudging proponent. I think it's a deal that—and we can probably get into this—I don't think there are many other alternatives and I think we need to look at this deal and find what is best in it. And I think primarily, if you think about what the primary objective of all of these negotiations has been, has been to push back, has been to stop Iran's nuclear capabilities, its nuclear weapons capabilities and this deal does this. As we understand from experts, some people suggest that Iran was really just weeks away from developing a nuclear bomb, known as "breakout time." This deal will push it back to upwards of a year.¹¹ It's not a lot, some people might say, you know, we want more. Sure, we would want more, but as Milena described, this deal will last for ten to fifteen years. It buys us time. It's not perfect, but it keeps us from going over the brink. It's a step. You know, I think that we did get some more things that we wanted. As part of the deal, ninety-eight percent of the nuclear enriched stockpile will be removed. Two-thirds of the centrifuges will be removed. The inspections regime is viewed as unprecedented, the most rigorous inspections regime that we've ever had with nuclear agreements. There are plenty of problems with this deal. No one is happy about some of these sanctions being lifted and the mischief that Iran may be able to do, but if you think back to what this deal was primarily about, it will push Iran back from that breakout period. It buys us time and with that hope that things will change over that ten to fifteen-year period.

SCHARF: Well, let's go to Nashville to our military expert Mike Newton. Mike, you heard what Avidan Cover just said. Would you say President Obama delivered on what he promised?

NEWTON: Well, you have to go back and just frame it from exactly what he promised. He said many, many times, "I'm prepared to abandon

11. *Obama: Iran Will Face Longer 'Breakout Time,' Though Not Indefinitely*, NPR (Aug. 11, 2015) ("There's a general consensus that the current breakout time is around two to three months, and that would be extended to around a year under the agreement."), <http://www.npr.org/sections/parallels/2015/08/11/431652556/obama-iran-will-face-longer-breakout-time-though-not-indefinitely>.

these negotiations if we cannot get a good deal.” So, you know, if what was really going on was his goal to simply reopen dialogue to, as you said earlier, bring Iran in from the cold, then he delivered on what he promised. But if you judge us but what he has said, he said more than twenty-eight times, you know, “It’s a red line. We will not allow Iran to get a nuclear weapon.” Well, in fact, we will. He said that at the most visible time when negotiations were going on in secret, during the 2012 campaign in one of the presidential debates. He said, “While I’m president, we will not allow Iran to get a nuclear weapon.” Fine, so he just arranged it that future presidents have to deal with that. So by that measure, he kept his promise. The sanctions regime, which I know we’ll talk about, is deeply flawed. You know, over and over and over again, the energy secretary and Ben Rhodes from the national security staff and the secretary of state and the president all said, “anytime, anywhere sanctions.” Well, so what we ended up with is “sometimes, some places, by somebody, under some circumstances, after an extensive time delay.” So it’s anything but certain that the agreement, the viable parts of the agreement, will in fact be enforced. And then the last thing is, you know, there was clear discussion about the lifting of the sanctions, very often with this idea of “snapback sanctions.” And that, to me, I think is one of the most troubling parts of the deal. What we’ve done is we’ve created a setting where sanctions are already going away. The Security Council has already voted on that. That’s an irrevocable train that has left the station. So we’re forced, if at some point we do impose sanctions, to do so on a unilateral basis while the rest of the world laughs at us and enriches Iranian coffers. It’s a no-win situation just on the sanctions issue.

SCHARF: And we’ll return to the sanctions question, but let me turn to Paul Williams to provide the big picture here, the thirty thousand foot view of this. On balance, Paul, do you consider the nuclear accord to be a success for US interests in the region?

WILLIAMS: I think if you look at the nuclear accord in the context of US policy in the region it’s very, very scary. It was essentially negotiated and will probably be implemented in a policy vacuum. And we’ve talked on this interview already about an approach of containment or an approach of constructive engagement, but the reality is that, at the moment, the United States has no strategic approach to how to deal with the Iranians. So we’ve just negotiated a deal, which will allow them over a period of time to have the bomb and which will allow billions of dollars of sanctions

relief, without actually knowing how we're going to deal with the Iranian regime. They are still a state sponsor of terror. They are actively engaged in what's happening, the conflict in Yemen, the conflict in Syria. Many would argue that we have ISIS, the Islamic State, because of what the Iranians have done in Syria and in Iraq. We have no policy for dealing with them and we've negotiated this deal. I would be much more comfortable with this deal if we actually knew how we're going to approach and contain, which would be my preference, or constructively engage, which others have a preference for, but we haven't even answered.

SCHARF: This is Michael Scharf and we're back with *Talking Foreign Policy*. I'm joined today by four experts on the Iran Nuclear Accord. A recent poll indicates that the American public wants Congress to block the Iran Nuclear Accord by a margin of fifty-two percent to forty-four percent.¹² Let me ask Professor Avidan Cover, director of Case Western Reserve's Institute for Global Security Law and Policy—can Congress do that?

COVER: The short answer is “yes, theoretically.” What's known as the Iran Nuclear Agreement Review Act is really all about sanctions relief, right, which is really what comes down to what Congress's role is here. In a number of statutes, Congress had given the president authority to waive sanctions for various behavior by Iran regarding nuclear weapons. This act would give Congress the authority to disapprove that ability to waive that relief. Congress could theoretically do so. I think Paul's gone into good detail about the lack of a likelihood that Congress will be effective in doing so—

SCHARF: But they are likely to pass the law.

COVER: The law has been passed, and I think that the question is whether they will vote to disapprove the president's ability to waive those sanctions. I think that is likely too. The President will, in all likelihood, veto that and they will not be able to muster enough votes to override his veto. You know, whether this is legitimate as a matter of constitutional law—I think it is—I don't think it's a violation of separation of powers, for example. And that is in part because, as Paul noted, this is an agreement that is not a treaty. It's a non-binding executive agreement and these sorts of agreements

12. CNN & ORC International, *Cnn/Orc Poll: Obama, Iran, And The Economy 1*, 11 (released July 28, 2015), <http://www.cnn.com/2015/07/28/politics/cnn-orc-poll-data-july-28-6-am-embargo/index.html>

are conducted all the time in our foreign diplomacy. It's something that I actually have some misgivings about, but I think it doesn't seem like this constitutionally is raising ire.

SCHARF: Why does Iran trust this agreement given that, if it's an executive agreement and only the president really controls it—and we're in the middle of an election cycle—that there could be a Republican president and he or she could just decide, 'I don't want to go forward with this agreement anymore.'

COVER: There has always been that possibility, and similarly on the Iranian side. The Parliament could've put a kibosh on it on their side. This is not a treaty; it's not a binding agreement. It's called a 'joint comprehensive plan of action'¹³ and so there's a level of good faith and diplomacy that goes into all of this, but this is the way that foreign relations have been conducted for, really, centuries. You think back to Nixon's normalization of relations with China. That was done through a non-binding executive agreement. FDR's agreement with Great Britain during World War II to assist them. That was a non-binding executive agreement.

SCHARF: Okay, so let's say a year and a half from now Donald Trump or one of the other Republicans is the president and he quashes the agreement. Some say that would draw the United States into war with Iran; others say it would be the worst of both worlds—an erosion of the sanctions and an immediate escalation of the Iranian nuclear program.¹⁴ Let me ask each of our experts to weigh in: if you were the next president and you had that option, what would you do and why? Milena?

STERIO: I agree. I think going back on the agreement would be the worst of both worlds. I think, when you talk about diplomacy, any time that you're trying to entice a rogue regime to change its ways, I think you've got to have a carrot and a stick. And I think this agreement accomplishes that by providing a carrot to the Iranians, saying, 'We're going to lift the sanctions if you comply,' and then the stick [is] the sanctions. And we can debate about how well this is going to work but I think that this is, diplomatically, a very significant agreement and I think going back would be a huge step backwards. I think it would definitely escalate relations

13. U.S Department of State, Joint Comprehensive Plan of Action (July 14, 2015), <http://www.state.gov/documents/organization/245317.pdf>.

14. See Frederik Pleitgan, *What Iranians Make of the Tough Talk from Republican Candidates*, CNN News, Sept. 16, 2015, <http://www.cnn.com/2015/09/16/middleeast/iran-nuclear-deal-republican-debate>.

with Iran and I think the danger is we would wind up with another war like the Iraq War, which would, I think, entail a lot of casualties and not necessarily resolve anything in the long-term.¹⁵

SCHARF: Paul Williams, do you agree?

WILLIAMS: I think a year and a half from now, whether it's a Democratic or Republican president, the course of action will be obvious. Either the US government will come up with a strategic approach and the Iranians will choose economic development and democracy over regional hegemony and the deal would be a signal of amazing success. Or the Iranians will be running amuck in the Middle East, still being a sponsor of state terror, still seeking to have proxy wars with the Saudis to destabilize their enemies, and renege on the deal would be the worst of our problems.¹⁶ So I think a year and a half from now things will be pretty clear. It's a risky environment to be playing in and I'm not terribly optimistic.

SCHARF: But even under the worst case scenario, Mike Newton, are we talking about all-out war, or would the more likely course of action be, maybe, a proxy Israel doing some airstrikes on the nuclear facilities where Iran is building these bombs.

NEWTON: Well, I think the war-or-peace scenario is in many ways a false dichotomy because there is a proxy war and, remember, that the Iranians—in the context of activities in Iraq, in the context of funding Hamas—have already been waging a proxy war and the only real question is, to go back to your proxy question, is do we choose to reengage in that same proxy war? I think that Paul's right. In a macro sense, in a year and a half or two years, the large policy becomes pretty clear, but if we wait that long to establish things like channels for support to people that would fight a proxy war on our behalf, we've waited too long; if we begin to establish things like real military planning for how would we accomplish "x" military task, we've waited too long. We need to be thinking about those things now in the context of a larger strategy.

SCHARF: So let's say they have the nuclear bomb. I mean, Iran has had chemical weapons for a long time. They haven't used those against Israel or

15. *Id.*

16. See Brian Murphy, *Iran Nuclear Pact Stirs Hope—and Fear—of New Political Order in Mideast*, *The Washington Post* (April 3, 2015), https://www.washingtonpost.com/world/middle_east/saudi-king-give-cautious-nod-to-iran-nuclear-deal/2015/04/03/aeb04901-e608-4735-8bf3-4dfd71c4c74d_story.html.

any other country in the Middle East. What makes us think that nuclearized Iran would necessarily be any more of a threat than India or Pakistan when they got the bomb? Mike?

NEWTON: Well, that's a good question. One thing is the notable threats. On July 25th of this year, the commander of the Revolutionary Guard did a Facebook posting, and I'll just quote it because it's interesting. And the question is do you believe people when they chant "Death to America! Death to Israel!" He says, "Once the Supreme Leader orders all forces to start jihad, we can reduce Israel to dust in 24 hours."¹⁷ That's impossible right now without a deliverable nuclear weapon. In the context of a deliverable nuclear weapon, that's possible. And then some have also speculated about a larger threat to the US. Iran, for regional hegemony, does not need intercontinental ballistic missiles. And yet, there's been intelligence to indicate that they're beginning to want to acquire that technology and that the Russians and others are more than happy to facilitate that. So we really are looking at a large strategic shift and, as just a military professional, I think all military professionals out there would say that you don't wait until it's the very worst case; you get proactive and you think about, "What is the strategy?" and "What are the available military options?" and, more importantly, "How do we shape the strategic environment in ways that really do serve US interests long-term?"

SCHARF: Professor Avidan Cover.

COVER: I think it's interesting; in some ways, I think Iran has had incredible strategic power just in simply having this proximity to the capability of having nuclear weapons. I don't know that, to use your hypothetical, obtaining one nuclear weapon will change matters. Israel, by all accounts, has two hundred nuclear bombs.¹⁸ Would Iran—Iran is not ISIS—Iran, with very rational leaders—notwithstanding by any means their designs and their objectives, they are rational actors—would they really use a nuclear bomb against Israel, a weapon that they might not know will be successful, when Israel has that sort of capability and numerous other capabilities? They have had numerous other weapons and they have not used them against

17. Michael Segall, *The Nuclear Deal: No Pause in Iran's Vow to Destroy Israel*, Jerusalem Center for Public Affairs (August 16, 2015), <http://jcpa.org/article/nuclear-deal-irans-vow-destroy-israel>.

18. See Glenn Kessler, *Iran's Claim that Israel has 400 Nuclear Weapons*, The Washington Post (May 1, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/01/irans-claim-that-israel-has-400-nuclear-weapons>.

Israel, notwithstanding the proxy wars that have been going on. And so, I think you need to look at lots of game theory and these other aspects to really think how much that will change matters. In some ways, Iran has great leverage right now. I don't know if they would actually want to spoil things for themselves.

SCHARF: So, Paul Williams, you've mapped out two scenarios and you said we'll have to wait a year and a half to see which one will come about, but can't we actually look at the situation involving North Korea and its attempts to build up nuclear bombs to give us a sense of what is likely to happen here?

WILLIAMS: Yeah, I think if you look at North Korea, it bodes not terribly well for what's going to happen in the Middle East. It's not about just getting a deal and putting pen to paper. In my experience in peace negotiations, that's the fundamental mistake that parties make, the idea that they sign an agreement and then all is good. And the issues with the North Koreans—we did various agreements and then did not fully implement them. We did not have a strategic approach. Dealing with the situation in the Middle East is extremely complicated; even though it's a one hundred seven-page deal, as Milena pointed out, it's not just about signing a deal. It's about a lot of moving pieces: the Iranians, what's happening in Syria, the Yemenis, the Israelis, Saudi Arabia. I got to tell you, lately we don't have a lot of positive experience with formulating and implementing complex strategic approaches to the problems around the world. We've got a string of failures in Libya, Yemen, Iraq, Syria. I'm not seeing a whole lot right now that leads me to believe that what we're doing with the Iranians will be any different than what we've done with these other important players and important countries in the last few years, and that's what makes me very nervous.

SCHARF: So back to Avi Cover. How would you distinguish this situation from North Korea?

COVER: I agree that the North Korea example is not a terrific one, and may not bode well. That said, there are some important distinctions.¹⁹ I mean, North Korea was about as isolated a country as you could have ever had. Iran is not that country. As we've discussed, it had economic relations

19. See also George Perkovich, *Why the Iran Nuclear Deal is Not the North Korea Deal*, Carnegie Endowment for International Peace (April 28, 2015), <http://carnegieendowment.org/2015/04/28/why-iran-nuclear-deal-is-not-north-korea-deal/i7wa>.

and good relations with a number of European countries, with Russia, with China. It's not in their interest to be isolated, whereas North Korea has certainly gone that route. North Korea was further ahead in its nuclear weaponization than Iran and, frankly, could have done a lot more harm probably immediately to South Korea than could Iran to its neighbors, notwithstanding its actions. And finally, and maybe most critically, that was really a bilateral agreement just with the United States, whereas here you have a multilateral agreement. We have the P5+1, and so there's far more things, sort of really more "carrots," if you will, for Iran to adhere to it. But that said, I am a cynical idealist.

SCHARF: Milena Sterio.

STERIO: So, first of all, let me say that I agree. I would say that I am sort of cautiously optimistic and I would say the key distinction with North Korea is it goes back to what Avi just said. I think Iran is really a rational actor, whereas I would characterize the North Korean leadership as an irrational, erratic, rogue regime. Again, without praising the current Iranian leadership and notwithstanding Facebook posts that Mike Newton had mentioned, I do think that the current leadership in Iran is a lot more rational. I think they have every interest to at least try to comply with most of the terms of this agreement, and I think again that the key is it buys us time and extends that breakout time from two weeks, or two months, to up to a year.

SCHARF: I notice that there are news reports that the leader of North Korea, Kim Jong-[Un], is jealous of the Iranian agreement and he wants one, too.

STERIO: Well, I guess if he were willing to come to Geneva and Lausanne and Vienna and negotiate with the P6 and the EU, then I guess it's a possibility.

SCHARF: Let me go to another issue that we haven't talked about, but is one of concern to me. I understand there is a clause in the agreement that would remove many Iranians from the terrorist watch list.²⁰ Avi, why would the Obama administration agree to a clause to lift sanctions on individual terrorists?

20. See Ed Feulner, *Why the Iran deal makes war more likely*, The Washington Times (Aug. 10, 2015) ("The rogue's gallery includes such individuals as Mostafa Mohammad Najjar, who trained and commanded Hezbollah fighters in Lebanon at the time of the Beirut barracks bombing."), <http://www.washingtontimes.com/news/2015/aug/10/ed-feulner-iran-nuclear-deal-makes-war-more-likely>.

COVER: Well again, this evidence is perhaps the good and the bad of a multilateral agreement and I have a feeling that the Obama administration probably held its nose as it agreed to this aspect of it. As I understand it, those provisions—which indeed would ultimately, perhaps up to eight years, assuming compliance with the agreement, remove certain people who have been identified as terrorists from various lists—that all relates to an EU resolution identifying individuals as such and not US sanctions. In fact, US sanctions on individuals identified as terrorists would continue regardless, but again, this is an agreement involving various parties. I'm not entirely certain what prompted the EU leaders to insist on this provisions or agree to this provision with Iran, but it is not something that, as far as I understand it reading through the annexes of the agreement, the United States will be lifting.²¹

SCHARF: One of the other unusual aspects of this whole agreement was when Israeli Prime Minister Benjamin Netanyahu came and spoke before the US Congress and urged the Congress to kill the agreement.²² That was pretty much unprecedented. What do you think of that? Was that successful, good politics on his part?

STERIO: I mean, I really think that it had a lot to do with his own election strategy and his own political constituents. I think the vote here in the United States, in our Congress, is pretty much split among party lines. There are no Republicans that have expressed support for the deal and among the Democrats, I think there are only two thus far that are opposed. Everybody else is voting with the president, so I don't think this is changing much, really.

SCHARF: So Mike Newton, do you think it's fair to characterize the accord as a betrayal of Benjamin Netanyahu and Israel, or do you agree with Milena that it was just politics during his election?

NEWTON: Well, I go back to Henry Kissinger. Nation-states don't have friends; they only have interests. It's his job to represent Israeli interests. I

21. See Elizabeth Whitman, *What Sanctions Against Iran Won't be Lifted? Bans for Terrorism Support, Human Rights Abuses to Remain Intact*, International Business Times (July 14, 2015), <http://www.ibtimes.com/what-sanctions-against-iran-wont-be-lifted-bans-terrorism-support-human-rights-abuses-2008066>

22. For video of Netanyahu addressing Congress, *Netanyahu Rails Against Iran Nuclear Deal—in 100 Seconds*, CNN Politics (March 3, 2015), <http://www.cnn.com/videos/politics/2015/03/03/benjamin-netanyahu-speech-congress-iran-js-origwx.cnn/video/playlists/u-s---israel-relations>.

agree with Milena that may have been part of it and certainly was part of his election strategy, although it's important to note that on that issue, he and the opposition party are in perfect sync with each other and they've said that. So this really is an Israeli defense issue and I think part of what was going on there was a signal of deterrence. I think Avi's right—we will deter a nuclear-armed Iran. And the other part of what was going on, I think—and I'm reading between the lines because nobody has briefed me on this—is the progress that Israel has made in connection with regional Sunni powers in standing up to the Iranian Shiite hegemonic designs. You know, there's a lot of operation that sits quiet that, in some ways, is extraordinarily effective. I think that might have been Netanyahu speaking both to his domestic population, but also the leaders of those other countries to say that what we're doing to counter this regional menace needs to be strengthened and needs to be improved. Because he full well knows that there aren't the votes to override a veto and he knew it when he said it in the House.

SCHARF: So let's end with a look to the future. Paul Williams, haven't heard from you lately. As a former State Department official, what do you see as our next steps in our relations with Iran?

WILLIAMS: Well Mike, this deal is going to require extensive involvement of the United States in the Middle East. It's not something that we sign and we can retrench. Signing this deal, for better or for worse, is going to require the United States to be heavily engaged with the Iranians, both to hold them to the deal but also to get them into a box. Not necessarily to keep them in a box, but to get them out of other people's countries' business, to stop being a sponsor of state terrorism, to get them out of Syria, to get them out of Yemen and sort of back into Iran. And then a lot of engagement with our allies—the Israelis as you've talked about but also the Saudis, the Qataris, the UAE, others—are going to need a lot of American engagement and assistance, and I think we ought to be prepared for a decade plus of heavy American involvement in the Middle East. That's the only way we're going to reap the benefits of this deal that Avi and Milena and others have been speaking about.

SCHARF: I think that's a good place to wrap up. Paul Williams, Mike Newton, Milena Sterio, and Avi Cover, thank you all so much for providing your insights on this complex and very timely and important issue. I'm Michael Scharf. You've been listening to *Talking Foreign Policy*, produced by Case Western Reserve University and WCPN 90.3 ideastream.

Talking Foreign Policy, February 5, 2016, broadcast

Participants:

Michael Scharf

Milena Sterio

David Leopold

Gregory Noone

Timothy Webster

SCHARF: Welcome to *Talking Foreign Policy*. I'm your host, Michael Scharf, dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be critiquing the positions of the leading Republican and Democratic presidential candidates on three key national security issues: relations with China, defeating ISIS, and stemming the flow of illegal immigration. Our panelists today include Milena Sterio, associate dean at Cleveland Marshall College of Law, who's been a frequent guest on our show and she is an expert in International Law and Policy.

With us for the first time is Professor Timothy Webster, director of Asian Legal Studies at Case Western Reserve University School of Law. Also with us, joining our panel for the first time, is Navy Captain and law of war expert Dr. Gregory Noone, who heads Fairmont College's National Security and Intelligence Law Program. And finally, joining us in a few minutes will be David Leopold, the past president of the American Immigration Lawyers Association, and a distinguished alumni of Case Western Reserve University School of Law. Thank you Milena, Tim, and Greg for being on the show.

STERIO: It's good to be here, Michael.

WEBSTER: Thank you, Michael.

NOONE: My pleasure, Michael.

SCHARF: Let's begin our discussion with a general question: If national security is so important to the electorate, which quality do you think the voters should value most: Experience? Charisma? Truthfulness? Or their position on the issues? Let's begin with Captain Greg Noone, who served in the international law section at the Pentagon. Greg, how would you rank those?

NOONE: It should be experience, but the reality of it is that it's going to be the position on the issue. The voters have started to make up their minds on how to view things in this election, whether it be world events

or domestic events and so how a candidate portrays his views on the issue, his views on the position—“we’re going to defeat ISIS this way, we’re going to stop illegal immigrants coming in this way”—that’s what they are going to cling to and start adhering to and following. Experience really would be the number one thing, because truthfully the last item there—and truthfulness is that we’re willing to let our politicians be a little shady on those areas when it comes to national security, we’re willing to give up a little bit of things around the edges, willing to be lied to a little bit about what the CIA might be doing or what the military is doing over here or over there. And so really it’s positions on the issues.

SCHARF: Tim and Milena, do you agree with that?

STERIO: I absolutely agree, Greg sort of stole my answer here. Yes, I do agree and I want [to] particularly emphasize that last point about truthfulness. While in normal life, everyday life, you might say truthfulness is very important; when it comes to national security, when it comes to diplomacy, I would actually rank it as less important. And I think when it comes to diplomacy in particular, I think we want our national leaders to be able to get away with speaking about things that are not black or white, that are sort of in the grey zone. So I would say position on the issues of experience rank the highest.

SCHARF: Tim, what’s your thoughts on that?

WEBSTER: I agree with my co-panelists here. I would like to stretch the concept of experience to include the time [in] the private sector in addition to the time in the public sector; so if you go back and think about [what] Ted Cruz, for example, has been hammered for recently is his representation of a Chinese company that had infringed on U.S. copyright and on a U.S. company as well.¹ And I think that shows that Ted Cruz, when given a position, when he’s a lawyer he takes a view of China that is hospitable to what he’s doing there. Whereas now he’s very anti-China.² I think another important thing is consistency over time. So people like Hillary Clinton, who has gone back and forth, and back and forth on incredibly important issues like free trade and international economic policy, when she makes

1. TIRE ENGINEERING & DISTRIBUTION, LLC, et al., v. SHANDONG LIN-GLONG RUBBER CO., LTD., et al., Consolidated Cases Nos. 10-2271 (L), 10-2273 & 10-2321

2. Nicole Gaouette, China calls Ted Cruz bill a ‘political farce’ CNN (2016), <http://www.cnn.com/2016/02/16/politics/ted-cruz-china-embassy-dissident-street/> (last visited Feb 20, 2016)

her latest pronouncement, we want to go back five years ago and see the accords of what she said five years ago or ten years ago. And certainly we have to look at how consistent the candidate's position has been on that.

SCHARF: What about some of the candidates whose positions change weekly, is that a problem for the electorate?

NOONE: Yes, it's much more problematic. We have candidates that are changing depending on what state has the next primary, and so, what's being said in Iowa is now being said a bit differently in New Hampshire. From there the Republicans go to South Carolina, the Democrats go to Nevada and then they switch over. The Republicans then go to South Carolina and then Nevada, then the Democrats go to Nevada and South Carolina. So you're going to have candidates saying different things, and will the electorate pick up on that? The people who are really tuned in and following will, but a lot of other people, in the states coming up, will just start tuning in just before the election. So what they are seeing is the advertisements that are running in their state, that's pointed at them, and not connecting it what was said three weeks ago in Iowa.

SCHARF: So let's see how much [our] expert panelists are tuned in. I'm going to list some of the issues, the stands that the politicians have taken. I would like you to identify who you [think] said which. I'll keep a tally to see who gets the most points. I'd like to say the winner gets a big prize, but you'll just get bragging rights.

NOONE: This is actually an unfair labor practice, but go ahead.

SCHARF: Let's begin with this: which candidate endorsed the goal of eliminating all nuclear weapons in the world?

NOONE: Bernie Sanders.

SCHARF: Who do you think Tim?

WEBSTER: I'd say Bernie Sanders.

SCHARF: Actually, it was Jeb Bush.³

WEBSTER: Wow, jeez.

3. John Hudson, Jeb Bush Endorses Obama's 'Reagan-esque Goal' of a Nuclear Free World Foreign Policy Jeb Bush Endorses Obamas Reaganesque Goal of a Nuclear Free World Comments (2016), <http://foreignpolicy.com/2016/01/21/jeb-bush-endorses-obamas-reagan-esque-goal-of-a-nuclear-free-world/> (last visited Feb 20, 2016).

SCHARF: Ding! Nobody got that one. Which two candidates want to build [a] 1900 mile wall on our southern border to keep out immigrants?

STERIO: Trump and Cruz?

SCHARF: You get one half right.

NOONE: Yes, Trump is definitely there.

SCHARF: Who's the other? ... Okay, it's Rubio.

PANEL: Wow.

SCHARF: Okay, so Milena gets one half. Alright, which candidate wants to monitor all foreign visitors to the United States, like the governments of Russia and China do?

NOONE: Donald Trump.

STERIO: Trump.

WEBSTER: I would say Trump.

SCHARF: It's Ben Carson.⁴ OK.

WEBSTER: Who's that?

PANEL: (Laughing)

SCHARF: I'm sure he wouldn't like to hear you say that. Which three candidates want to impose a no fly zone over Syria?

STERIO: Hillary Clinton.

SCHARF: Okay, you got one.

STERIO: Jeb Bush.

SCHARF: Two.

STERIO: And Ted Cruz.

SCHARF: No, not Cruz. What's the third one?

NOONE: I'm going with Rubio.

SCHARF: No. It's Christie. OK. Which two candidates said there would be more stability in the Middle East if dictators in Iraq, Egypt and Libya had not been deposed by the United States and its allies?

4. Carson: U.S. needs modern version of Cold War 'air-raid drill', *The Chicago Tribune*, 8 December 2015, 27 April 2016, <http://www.chicagotribune.com/news/nationworld/politics/ct-ben-carson-cold-war-air-raid-drills-20151208-story.html>

STERIO/WEBSTER: Bernie Sanders.

SCHARF: Wrong.

NOONE: I'm going to go with Dick Gephardt.

PANEL: (Laughing)

WEBSTER: Trump?

SCHARF: Trump is one. And the other?

STERIO: Carson?

SCHARF: Trump is one, and Cruz is the other. So Tim now has one point. Which two candidates said removing Assad from power in Syria is the key to defeating ISIS?

NOONE: Rubio.

SCHARF: That's right.

NOONE: And Cruz.

STERIO: Cruz and Rubio.

SCHARF: How about the governor of the great state of Ohio?⁵

STERIO: Kasich?

SCHARF: Kasich.

NOONE: Alright.

SCHARF: So Greg gets one for Rubio. Who said we can't fight ISIS and fight Assad? So the opposite of the other one.

NOONE: Rand Paul is no longer in the race.

SCHARF/STERIO: (Laughing)

SCHARF: Alright that one's Trump.

PANEL: (Laughing)

SCHARF: Which two candidates want to ban the entry of refugees fleeing the violence in Syria?

NOONE: Christie and Trump.

5. Gov. John Kasich's plan for destroying ISIS; Does the US have the intel resources to prevent terrorism?, Fox News (2015), <http://www.foxnews.com/transcript/2015/11/20/gov-john-kasich-plan-for-destroying-isis-does-us-have-intel-resources-to/> (last visited Feb 20, 2016).

WEBSTER: Trump.

STERIO: Trump.

SCHARF: Trump is right. And?

STERIO: Cruz.

SCHARF: Cruz, alright.

NOONE: I think Christie. I'm going to launch an objection. I think Christie is going that way too.

SCHARF: You look that one up. (Laughs)

STERIO: Fact checking.

SCHARF: Which Republican candidate wants to accept thousands of refugees, escaping the Syrian civil war?

NOONE: Clinton.

SCHARF: The Republican candidate.

NOONE: Oh, I thought you said which two candidates, sorry.

STERIO: (Laughs) Carson. It's Carson.

WEBSTER: That sounds like Jeb Bush.

SCHARF: No, this is Rubio.⁶

STERIO: Oh, wow.

SCHARF: OK. Which candidate said we should carpet bomb Syria?

PANEL: Ted Cruz⁷.

SCHARF: Alright. Everybody knows that one. Which candidate said we should revoke the citizenship of any American who travels to Syria to join ISIS?

STERIO: Trump.

NOONE: Cruz.

6. Julia Hahn, Marco Rubio on Syrian Refugees: Bring in the Very Young and the Very Old—Breitbart, Breitbart News Network (2015), <http://www.breitbart.com/big-government/2015/11/22/marco-rubio-syrian-refugees-bring-young-old/> (last visited Apr 17, 2016).

7. Alan Rappenport, Eric Schmitt, "Ted Cruz's call to 'Carpet Bomb' the Islamic State draws scrutiny", First Draft, *The New York Times*, 16 Wed 2015, 27 April 2016, http://www.nytimes.com/politics/first-draft/2015/12/16/ted-cruzs-call-to-carpet-bomb-the-islamic-state-draws-scrutiny/?_r=0

WEBSTER: Carson.

NOONE: It's Cruz.

SCHARF: It's Cruz. Alright, keeping track here. Which candidate said that foreign terrorists caught overseas should receive a one-way ticket to Guantanamo Bay?

WEBSTER: Trump.

SCHARF: No.

STERIO: Cruz.

SCHARF: No.

NOONE: Christie.

SCHARF: No, it's Rubio.

STERIO: Wow.

SCHARF: Which candidate said that he would not rule out the use of torture, with respect to captured members of ISIS?

WEBSTER: Trump.

STERIO: Cruz.

NOONE: Christie.

SCHARF: I guess he wanted to follow in his brother's footsteps.

WEBSTER: Jeb?

SCHARF: Right, it's Jeb.⁸

PANEL: Wow.

SCHARF: Okay, two more questions. Which Democratic candidate is opposed to President Obama's Trans-Pacific Partnership?

NOONE: Bernie.

STERIO: Bernie

WEBSTER: I choose both.

SCHARF: (Laughs) It was a trick question. It was both. Tim's coming back! And the final question.

8. The Associated Press, Republican candidate Jeb Bush would not rule out use of torture by government CBC news (2015), <http://www.cbc.ca/news/world/republican-candidate-jeb-bush-would-not-rule-out-use-of-torture-by-government-1.3190771> (last visited Feb 20, 2016).

WEBSTER: Do I get two for that one?

SCHARF: You do. What candidate said we have a problem with ISIS but we have a bigger problem with China?

WEBSTER: Donald Trump.

SCHARF: Okay, you just came back and tied Milena, and Greg was one behind.

NOONE: I would like to lodge an objection, that you cheated on this just like Trump.

PANEL: (Laughs)

SCHARF: Okay, let's start to focus in on some of these issues. We were just speaking on China and that's a great segue into our first topic. During the Cold War, the United States electorate worried about the Soviet Union. Now, our greatest rival is China. Professor Tim Webster is one of the leading authorities on China. Tim, can you tell us what the presidential candidates have said about China?

WEBSTER: Sure, this is a really interesting topic because it's not one where [it's] left vs right, Republicans vs. Democrats. What we see [are] establishment candidates on both sides of the aisle taking one position and maybe harder edged or fringed candidates on the other side taking a similar set of positions. So, you get people like Hillary Clinton, Jeb Bush, Marco Rubio who look at China as an opportunity for economic engagement, economic opportunities; they want to continue along the trajectory that this president, President Obama, President Bush, and President Clinton carved out over the past twenty years or twenty-five years⁹. On the other hand, you have more hard edged candidates like Sanders, like Cruz and like Trump, who have been very skeptical about China, who have proposed moving away from the emphasis on foreign trade. Bernie Sanders said he wants to oppose all trade deals, he wants to radically reform trade policy.¹⁰ Ted Cruz as well has been very strong; he has accused China of committing cyber war against the U.S. last year.¹¹ And Trump of course, depending

9. FACT SHEET: U.S.–China Economic Relations, The White House Office of the Press Secretary, *the White House*, 25 September 2015, 28 April 2016, <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-us-china-economic-relations>.

10. Bernie Sanders on Trade, *FeelTheBern.org* (2016), <http://feelthebern.org/bernie-sanders-on-trade/> (last visited Feb 20, 2015).

11. Kim Chipman, Cruz Says Russia, China Have Committed Acts of 'Cyber War' Bloom-

on the week, says something outlandish about China. So, the candidate positions are somewhat similar. It's not a question of left vs right; it's kind of an establishment vs fringe understanding of what China means for the United States and U.S. policy right now.

SCHARF: So what effect do you think the China issue will have on the general election?

WEBSTER: Well, China is sort of a canvas on which the candidates can try to trump up fear or try to gain voter attention. And a way of distinguishing themselves from the other candidates. And so, Marco Rubio just recently questioned Ted Cruz's ability to be tough on China. Because as I said before, Ted Cruz had represented a Chinese company when he was a private lawyer about ten years ago. Likewise, Jeb Bush last month at the Council of Foreign Relations criticized Donald Trump's forty-five percent tariff on all Chinese goods suggestion. So, it's a way I think that the candidates can distinguish themselves at this point among their primary competitors and as we move closer to the elections. As we had Obama and Romney four years ago, China will also be a debating pointer, a spurring point to which candidates can position themselves and call their rivals.

SCHARF: So do you think that anything big will happen in respects to China that will be an October surprise foisted into the national spotlight?

WEBSTER: Yes. So, China is used to this quadrennial ritual of beating up on China. That American politicians always engage in. So, I think they are going to try and keep a low profile. Nevertheless, there is always the possibility of miscommunication. If China's economy continues to go down as it has.¹² And, if we see in this country as well some economic weakness some people have been casting, that could make the Chinese economy and the U.S.-China's economic relationship a major issue. If we have an incident in the South China Seas were two boats bump against each other or if China continues its reclamation in other activities in the South China Sea despite what it's promised to the U.S., that could also be another touch point. And, finally if the U.S. learns of another cyber-attack. You will recall last summer, originally it was thought that Chinese

berg.com (2015), <http://www.bloomberg.com/politics/articles/2015-08-07/cruz-says-russia-china-have-committed-acts-of-cyber-war-> (last visited Feb 20, 2016).

12. Why is China's economy slowing down?, World Finance (2016), <http://www.worldfinance.com/inward-investment/asia-and-australasia/why-is-chinas-economy-slowing-down> (last visited Feb 20, 2016).

hackers had stolen four million federal government employee records, then mushroomed about a month later to twenty-five million.¹³ So, it is not a question of are they hacking us, it is a question of do we the U.S. figure out or learn of this. So if we learn of another large scale attack like that I think that can possibly blow up into the headlines.

SCHARF: Alright, we will keep our eye on the issue of China. But it is time now for a short break and when we return, we are going to have our experts talk about the candidates' proposals for defeating ISIS. Stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, Dean of Case Western Reserve University School of Law. We are talking today about the National Security issues in the context of the presidential primaries. Our expert panel includes a military expert, Dr. Greg Noone, an expert on China Professor Tim Webster, an expert in International Law Milena Sterio and just joining us—walking in from the street just in time—is our expert in Immigration Law David Leopold, who was past president of the American Immigration Lawyers Association. In this segment of our program, we will be discussing the candidates' positions on defeating the terrorist organization known as ISIS. Milena Sterio, two years ago hardly anyone ever heard of ISIS. Why is ISIS now seen as such a great threat to national security?

STERIO: So ISIS is a terrorist group that emerged back in 2013 that has caused thousands of civilian losses, that has destroyed property. Basically, the reason that it has been able to thrive in both Iraq and Syria is because of instability on the ground and because of its own somewhat unpredictability [in] nature. ISIS is a non-state actor; it is a terrorist group. It is not constrained by international law; it is not constrained by state lines. Its goal is to essentially capture the biggest amount of territory that it can and to impose a caliphate. So, it is not a rational state actor that plays by the rules of the international arena.

SCHARF: Yes. But before November. I think people in the United States say, "well that's all happening way over there in the middle east. ISIS is not threatening us here at home." What happened in November to change that?

13. Mike Levine & Jack Date, 22 Million Affected by OPM Hack, Officials Say ABC News (2015), <http://abcnews.go.com/us/exclusive-25-million-affected-opm-hack-sources/story?id=32332731> (last visited Apr 20, 2016).

STERIO: So in November we saw the terrorist attacks in Paris,¹⁴ where ISIS essentially claimed responsibility for these attacks. So now the notion is that they can strike again anywhere in the world, and they are certainly saying that they will. Whether they actually will or not remains to be seen. Because they are so unpredictable and because they essentially do not care about international law—they do not care about being a member of the U.N., they do not care about sanctions, they are not a state regime—they can essentially go ahead and do that.

SCHARF: And they have a lot of money, too. Don't they?

STERIO: They have stolen a lot of money; they also run these secret oil refineries so they make a lot of money that way. Yes, so they apparently have a lot of resources.

SCHARF: Yes, so about two billion as reported¹⁵. So, we are talking about the richest terrorist organization, the most powerful terrorist organization on Earth, suddenly threatening the West. Now, let's talk about where the candidates stand, because I think the American people want to know who is best prepared to protect us from ISIS.

STERIO: Sure, so you already mentioned one of the quotes. So, Ted Cruz for example has stated that we just should carpet bomb ISIS.¹⁶ He has also said that—

SCHARF: OK. Let me stop for a second.

STERIO: Yes.

SCHARF: Carpet-bombing—that is basically what happened the last time in Vietnam, the Battle of Dresden, and World War II. That's where you blow up an entire city, you kill everybody.

STERIO: Exactly.

SCHARF: Which is very effective. You can kill every member of ISIS, but what is the percentage of ISIS to the regular population in these cities?

14. Paris attacks:What happened on the night - BBC News, *BBC News* (2015), <http://www.bbc.com/news/world-europe-34818994> (last visited Feb 20, 2016).

15. Jose Pagliery, Inside the \$2 billion Isis war machine, *CNNMoney, CNN*, 11 December 2015, 28 April 2016, <http://money.cnn.com/2015/12/06/news/isis-funding/>

16. Pamela Engel, Ted Cruz doubles down on vow to 'carpet-bomb' ISIS *Business Insider* (2016), <http://www.businessinsider.com/ted-cruz-isis-carpet-bomb-strategy-2016-1> (last visited Feb 20, 2016).

STERIO: Well, the problem with that is that if you are a state actor doing so, like the United States or like any other major power, you are going to be bound by rules of International Humanitarian Law, which will essentially prohibit you from doing that.¹⁷ So, that's really not a viable strategy for any state actor bound by international law.

SCHARF: OK. So Ted Cruz wants to carpet bomb and kill thousands of innocents.

STERIO: Then, there are other perhaps more moderate positions which call for working with people in Iraq or Syria, providing support for Iraqis or providing support for Syrians to fight ISIS. So Rand Paul, who wants to assist the Iraqi government with fighting ISIS. Marco Rubio wants to provide U.S. air support for Sunni forces on the ground and work with Iraqi forces, and essentially have them fighting ISIS.¹⁸ Donald Trump wants to bomb the oil fields in Iraq to take on ISIS, he wants to put more Iraqi boots on the ground to fight ISIS.¹⁹

SCHARF: Have any of the candidates been brave enough to say we are going to have to ultimately put American soldiers on the ground?

STERIO: Well, Donald Trump back in June 2015 talked about putting boots on the ground. I don't know that he has said that recently. But June 2015 he talked about it.

SCHARF: I can see that being an unpopular decision, but don't all the neutral experts say that in the end that is going to be the only way to defeat ISIS?

STERIO: Yes. I do think that if you honestly want to defeat ISIS. If we think it is in the best interests of the United States, then yes, I think that is the way to go. But, I certainly would not endorse that view. I think that we ought to be working with Arab states and have them fight their fight.

SCHARF: OK. Any other positions that the candidates have?

17. Horst Fischer, Carpet or Area Bombing, *Crimes of War*, 28 April 2016 <http://www.crimesofwar.org/a-z-guide/carpet-or-area-bombing/> http://www.un.org/disarmament/content/speeches/oda-ny/rydell/2011-10-NAF-Humanitarian_Disarmament.pdf

18. Nia-Malika Henderson, How Republican candidates would respond to ISIS CNN (2016), <http://www.cnn.com/2015/11/16/politics/republican-isis-2016-election/> (last visited Feb 20, 2016).

19. Nicole Gaouette, Barbara Starr, Trump is calling for 30,000 troops. Would that defeat ISIS?, *CNNPolitics*, CNN, 11 March 2016, 30 April 2016, <http://www.cnn.com/2016/03/11/politics/donald-trump-30000-troops-isis/#>

STERIO: Yes. So Bernie Sanders talked about stopping ISIS.²⁰ But only essentially in working with an international coalition, working with Arab states, working with Saudi Arabia. And have them essentially fight ISIS. And Hilary Clinton has talked about imposing a no fly zone in Syria, but no American boots on the ground.²¹

SCHARF: But, we would have to attack Russians that have violated the no fly zone—is that the controversy? Is it not?

STERIO: Exactly, it is one thing to say we are going to impose a no fly zone over Syria. We now know that Russia is involved, and that they are now flying planes over Syria. And so when it comes to enforcing the no fly zone, it might mean essentially engaging in air combat against Russian planes.

SCHARF: OK. So I want to switch over to Captain Greg Noone. Greg was the highest lawyer in the Pentagon, he knows the pros and cons of military actions. Which of these candidates' views most corresponds with what you think is the best proposal here?

NOONE: Well, it is really a “D—all of the above.” You have to have a mix of what everybody's talking about. There is no magic bullet here, there is no one thing to do that is going to defeat ISIS. This situation is getting more and more complex every day. As Milena just said, we have Russian planes in the sky, the Russians and the Turks have already run into each other up there.²² We have had meetings with Russians to go through the protocols of dealing with their planes and our planes being in proximate airspace. There is a lot of complexity here. The Saudis are starting to get more involved in the region because of their interest and protecting their interest. Iran is more involved in the region. Iraq is sort of the little brother in this scenario. But there [are] a lot of people getting involved here and it is going to get more and more complex. Splitting along the Sunni-Shia lines and then splitting along some of the old Cold War lines of the Russians

20. Judy Woodruff, Bernie Sanders, Bernie Sanders' plan to destroy ISIS, *PBS NEWSHOUR*, 23 March 2016, 30 April 2016, <http://www.pbs.org/newshour/bb/bernie-sanderss-plan-to-destroy-isis/>

21. Adam Johnson, Hillary Clinton's insane plan for a no-fly zone Hillary Clinton's Insane Plan for a No-fly Zone (2015), <http://america.aljazeera.com/opinions/2015/12/hillary-clintons-insane-plan-for-a-no-fly-zone.html> (last visited Mar 2, 2016).

22. Adam Withnall, Turkey releases graphic showing 'flight path' of Russian jet it downed over Syria The Independent (2015), <http://www.independent.co.uk/news/world/middle-east/russian-defence-ministry-confirms-turkey-shot-down-its-jet-but-claims-no-air-space-violation-a6746276.html> (last visited Mar 2, 2016).

backing Assad as their client state, because frankly they have one of their biggest bases in Syria.²³ Just like they have their biggest naval base in Libya.

SCHARF: So what about Trump's view that if we want to defeat ISIS, we have to partner with Assad and Russia? And that is going to be the price that is going to cost us to defeat ISIS.

NOONE: Somebody is going to have to make that decision. So for the Obama administration, we wanted Assad out, we wanted Assad out.²⁴ And I think that conversation died down because they realized that Assad actually represents more stability in the region [than] knocking him off.

SCHARF: A lot of this happens behind closed doors, but do you think there has been an implicit agreement between the United States and Russia to allow Assad to remain in power in order to get the Russian support for the Security Council resolution that authorized or confirmed that we were allowed to use force in Syria?

NOONE: There may be. Obviously, I do not know anything about that, I am not as high up as you said I was.

SCHARF: (Laughs).

NOONE: But the reality of it is that geopolitics matter and we have an individual with Vladimir Putin exerting his power, flexing his muscles. And then we have a United States trying to help allies, particularly in light of the Paris attacks. And you are going to get more attacks into the West. I don't know whether they will be lone wolf or inspired by, or directed by the internet, whatever it is. So people are going to continue to want to do something about ISIS, but there is no easy answer, there is no magic bullet here.

SCHARF: And meanwhile ISIS is not just in Syria anymore; they are spreading to Libya, Tunisia, Egypt and Nigeria. What do we do about the spread of ISIS beyond those boundaries?

NOONE: First of all, they have a very slick propaganda campaign. They are using multiple platforms. All over the internet, Instagram, everything.

23. Matthew Bodner, Why Russia Is Expanding Its Naval Base in Syria | Business The Moscow Times (2015), <http://www.themoscowtimes.com/business/article/why-russia-is-expanding-its-syrian-naval-base/531986.html> (last visited Mar 2, 2016).

24. Steven Mufson, 'Assad must go': These 3 little words are huge obstacle for Obama on Syria, *The Washington Post*, 19 October 2015, 1 May 2016 https://www.washingtonpost.com/business/economy/assad-must-go-these-three-little-words-present-a-huge-obstacle-for-obama-on-syria/2015/10/19/6a76baba-71ec-11e5-9cbb-790369643cf9_story.html

So they are recruiting from everywhere. They are recruiting people from their bedrooms here in the United States. Secondly, the United States is engaged with many of the states that you just mentioned on a regular basis; our military engages with other militaries and nearly every country on Earth. And so, our militaries are continually training with training of frankly, military to military diplomacy, is what we call it. Because we want to motivate, inspire and hopefully create a culture of military officers that can take on these hard challenges when faced with them in their country.

SCHARF: Alright. So you said all of the above, every single campaign proposal sounds good. Let's throw it all in there. (Laughs)

NOONE: No, now that sounds good, but I do not think we can rule anything out. Except! To carpet bomb.

SCHARF: Except to carpet bomb.

PANEL: (Laughing).

NOONE: As not only as Milena said, that not only is it against international law—funny thing when you drop bombs on people who might be your friends, they tend not to be your friends.

SCHARF: Right.

NOONE: So, yes you can wipe out consider[able] numbers of ISIS, but you are also going to wipe out a lot of people who are caught out in the middle. So, aside from the legal aspects of it, just human nature tells us that they are not going to react well to us.

SCHARF: So the candidates are trying to distinguish themselves from each other and from the Obama administration. So nobody is saying let us just do everything. Based on what the candidates are advocating who has got the best proposals? Milena?

STERIO: (Pause) That is a very, very tough question. I want to say no one. I really do not think anybody has a good proposal. Because they all selecting just one element, they are either saying do not use force from the American side at all only use our international partners. Or they are saying carpet bomb or they are saying no fly zone, and I honestly agree with Greg. I think it is really a combination of all these things that might be the most helpful.

NOONE: And these positions are not done in a vacuum, they know that the voter group that they are going for likes to hear this. So that is driving

a lot of it. So let's give Ted Cruz the benefit of doubt, that he does not actually want to carpet bomb a huge region of the world. But that is what his audience wants to hear and that helps his audience along. So I do not know how genuine many of these policies, positions actually are.

SCHARF: Alright. So let me put Tim on the spot here. So if you were just a Joe or Jane voter, who do you think could convince you that they have the best policies, experience and approach to take on ISIS and to make us all feel safer?

WEBSTER: I'm not giving an answer more committal than my colleagues here. I guess I would like to see most of all experience in the executive branch and I think there you have someone like Hillary Clinton who has serviced as secretary of state, has talked about bringing different groups, different national defense structures on board, and I think she is someone who has been a tried and true diplomat. She can go and pound the pavement, bring Saudi Arabia and bring other gulf states on board with the United States to mount a coordinated campaign, so I would have to go with political experience.

SCHARF: But her experience also includes Benghazi²⁵ and there [have] been all these hearings about Benghazi. There is a new movie out, 13 Hours; what do you think the American public would think about, well she has got experience but look how she has been portrayed about "mucking" up Benghazi, or not recognizing sufficiently the terrorist threat at that?

WEBSTER: That is certainly a claim that many Republicans have thrust at her. I'm still waiting for the smoking gun from Benghazi.

NOONE: There is not one, there is not one. There have been a considerable investigations done on this.

SCHARF: Eight hearings.

NOONE: Yes. And there is no smoking gun that ties you back to Hillary Clinton or President Obama. This movie troubles me because, unfortunately we as American's learn a lot of our history via movies, and this movie is not accurate.

SCHARF: Currently, that and the Jon Stewart show, right?

25. Clark Mindock, What Really Happened In Benghazi? The Facts Around Hillary Clinton's Handling Of The 2012 Attacks In Libya That Killed 4 Americans *International Business Times* (2015), <http://www.ibtimes.com/what-really-happened-benghazi-facts-around-hillary-clintons-handling-2012-attacks-2152398> (last visited Mar 2, 2016).

NOONE: Right.

PANEL: (Laughs)

NOONE: But this movie is not accurate. This movie portrays this fake fight between this made up CIA officer who orders them to stand down and the reality of it is, is that we the United States military, the United States of America are not in position to stage any type of rescue attempt. We had men that fought and died bravely, heroically to try to save diplomats and unfortunately we lost four Americans that day and Ambassador Chris Stevens.²⁶ Michael, you and I were in Libya, and everybody spoke glowingly of him. I don't think we met a Libyan who had not met him personally, which is exactly what our ambassadors and diplomats are supposed to be doing. They are not supposed to be hiding in the embassy, they are supposed to be out in the street. And he was there for the entire war and that man is an American hero. And unfortunately their deaths have been politicized to the point beyond grotesque. Because they died serving our country but there was no asset in place that could have gone in and helped them, and anything beyond what actually happened.

SCHARF: Milena, do you want to chime in?

STERIO: Sure, I just want to pick up on Tim's point about experience. Because I think that when it comes to defeating ISIS, or when it comes to normalizing relations with Iran or any other foreign policy in the Middle East, it cannot be just bombing or just military. It has to be coupled with excellent diplomacy. That's where I think the experience part kicks in. Just to give a quick example: our soldiers who were just detained in Iran waters were released with no harm within 24 hours.²⁷ I think that's a victory of diplomacy.

SCHARF: Now I want to bring in our immigration policy expert David Leopold. David, there has been much controversy surrounding the US plan to take in 10,000 Syrian refugees.²⁸ Opponents point to serious national

26. Clark Mindock, Who is Chris Stevens? Ambassador Hillary Clinton Asked To Serve In Benghazi At Heart Of Libya Controversy *International Business Times* (2015), <http://www.ibtimes.com/who-chris-stevens-ambassador-hillary-clinton-asked-serve-benghazi-heart-libya-2152711> (last visited Mar 2, 2016).

27. Fred Barbash, Missy Ryan, Thomas Gibbons-Neff, Iran releases captured U.S. Navy crew members, *The Washington Post*, 13 January 2015, 1 May 2016, <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/13/iran-sends-mixed-message-on-quick-release-of-u-s-navy-crews/>

28. Teresa Welsh, 8 Facts About the U.S. Program to Resettle Syrian Refugees US News

security concerns—including the threat of ISIS infiltrators—while supporters argue that America should keep its doors open to refugees in need of safe haven. How do you think the Syrian refugee question [will] impact the presidential race?

LEOPOLD: Well, you know we have seen it used as a political football. Let's back up for just a second, and let us remember that refugees coming into this country, you know Syrian or wherever else, are the most vetted of all of the incoming non-citizens, immigrants, non-immigrants, temporary visitors. Refugees go through several levels of vetting before they even get tested as to whether they are refugees under the law.²⁹ So by the time a Syrian refugee is ready to get on the plane and come to the United States, he or she, or their family has been looked at over and over again on several levels. So let us start there.

Now how does it affect the campaign? Obviously, it has been politicized like everything else. In extreme, you have Donald Trump talking about keeping out Muslims.³⁰ Which is a horrific racial slur. You have Ted Cruz and Marco Rubio who are trying to out anti-immigrate each other, all using the refugee crisis in part to talk about how tough they are going to be on border security. So that's where the impact is mostly on the Republican side; on the Democratic side, both candidates support keeping safe haven in the United States for refugees. As do both Hillary Clinton and Bernie Sanders support immigration reform in general, and a comprehensive approach to fixing immigration.

SCHARF: Now David, there [have] been some comparisons to the horrible chapter in American history of turning away Jews fleeing the Holocaust. But others would point out that Jews who settled in the United States had advocates and sponsors. Whereas these Syrians do not. Do you think it is a fair comparison or are they very distinct?

LEOPOLD: Well, I think there are some comparisons. But remember when the Jews were turned away, we think of Nazism. I am the son of a Jew immigrant and we think of Nazism, we think of Auschwitz, we think

(2015), <http://www.usnews.com/news/articles/2015/11/20/8-facts-about-the-us-program-to-resettle-syrian-refugees> (last visited Mar 2, 2016).

29. Maxwell Tani, Here's the intense, rigorous process each refugee goes through before coming to the US Business Insider (2015), <http://www.businessinsider.com/refugee-screening-process-in-us-2015-11> (last visited Mar 2, 2016).

30. Jeremy Diamond, Donald Trump: Ban all Muslim travel to U.S. CNN (2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/> (last visited Mar 2, 2016).

of Treblinka we think of the death camps. The time that they were turned away, that was not yet happening for the most part. But the analogy does not work because never in the history of this country have we ever turned away somebody based on religion. And that's what the proposal, at least by Donald Trump, appears to be. But of course we have a long and drawn out unfortunate history in this country of xenophobia. Of keeping out the other or at least advocating keeping out the other, it goes in phases. We are in a phase now ultimately; our country has proven that immigration has benefitted the United States. I think probably everybody in this room is an example of that. Most of the people listening. But, it is easy to scare people during a campaign and unfortunately, presidential politics, people respond to candidates [who] build support unfortunately through fear. You will see a lot of that on the Republican side. Not to get partisan in here, but that is where we are seeing it. I am hopeful that ultimately, saying with some of the military and carpet bombing that if a Republican candidate wins, that they won't actually do what they say they are going to do. I cannot imagine a president trying to close the door to Muslims, or to any religion.

SCHARF: Well it's time for another short break. When we return, we'll talk more about the candidates' positions on immigration policy. Back in a moment.

SCHARF: This is Michael Scharf and we're back with *Talking Foreign Policy*. I'm joined today by four national security experts and we're talking about national security and the presidential primaries. In this final segment of our show, we'll discuss the hot button issues of immigration policy. Let me turn to David Leopold, past president of the American Immigration Lawyers Association. David, the US Supreme Court has recently granted certiorari in the Texas immigration case attacking President Obama's executive actions on deportations, making a decision on the case likely by June 2016. Can you begin by summarizing the issue involved in that case?

LEOPOLD: Sure. The president's executive actions really are a memorandum, guidance from the White House, an invitation to people who have been in the country a long time and bringing US citizen children to apply for a brief reprieve from deportation, and that decision is made on a case by case basis, very discretionary. Shortly after the president announced those executive actions in November 2014,³¹ several states, led by the state of Texas, Repub-

31. Executive Actions on Immigration, USCIS (2015), <https://www.uscis.gov/immigrationaction> (last visited Mar 10, 2016).

lican attorneys general and governors, filed a lawsuit they formed; by the way, they went to a Texas judge who had made a name for himself, Andrew Hanen, federal district judge in Brownsville—who made a name for himself by excoriating the Obama administration in two of his opinions in cases that had nothing to do with immigration policy.³² So, they went to Hanen, they filed the motion to enjoin the executive actions. Hanen, predictably, granted it—it went to the fifth circuit. Remember, the fifth circuit is probably the most conservative circuit in the country; they upheld it and now it is before the Supreme Court. And the precise issue before the Supreme Court really is a very technical, narrow issue as to whether the president violated the Administrative Procedures Act.³³ But the real question, the real issue here is a question of whether the states have the right to sue. We call that standing. Do they have the right to be in court? And that is really what the Supreme Court is likely to decide this case on. My prediction is that the Supreme Court will throw this case out because the states do not have the right to walk into court and tell the president how to make political decisions. I think Justice Roberts, by no means a liberal, has made standing a very important issue in his decisions. So we will see what happens.

SCHARF: So David, in every election, there is what is known as the “October surprise”—this could be the “June surprise,” these are events in the real world that are game changers.

LEOPOLD: Yes.

SCHARF: So there are two ways the court could come out, the way you just said they might, and the other way. Tell us, whichever way it comes out, how do you think it will play in the election?

LEOPOLD: My view is that it is going to be a lose-lose for the Republicans either way. If the court reverses and allows these executive actions to go forward, you are going to have an energized Latino base. Remember, this issue is personal to Latinos. You have a brother sitting across the table or an uncle looking at deportation so it is very personal to US citizen Latinos, so it is going to energize that base if we win. If we lose, it is going to energize that base because who brought this lawsuit? The Republicans, it is a very political lawsuit, so I think it is a lose-lose for the Republicans.

32. Case 1:14-cv-00254, Document 145, United States District Court Southern District Court of Texas, 16 February 2015, 2 May 2016, <https://www.documentcloud.org/documents/1668197-hanen-opinion.html>

33. Administrative Procedure Act, 5 U.S.C. Subchapter II.

SCHARF: So what is weird is the Republicans are not staying away from immigration, they're making immigration the litmus test in the presidential primary cycle. What's behind that and how do they think it plays into their strategy to raise immigration to a high stakes poker game as you describe it?

LEOPOLD: Well, part of [it] is that, most recently, Donald Trump seized upon this issue by calling Mexicans drug dealers and whatever else he said.³⁴ But this issue was in the making long before. In 2012 after the Republicans got, frankly, shellacked, by the Latino vote—they only took in about twenty-three percent, Mitt Romney lost the Latino vote by about seventy-two, seventy-three percent, that's outstanding.³⁵ The day after the election, John Boehner, the speaker of the House at that time—you had the leader of the Senate all talking about how they are going to do immigration reform. Suddenly, that changed we passed a bill, there was a bipartisan bill that did pass in 2013 and then the House did not consider it. Then what happened between 2012 and late 2013, I think, was a feeling within the Republican Party that they do need to reach out to people of color, to continue to build or maintain their base. That what was going on was that they needed to energize white voters who simply did not vote, and that was the calculation and you saw a turnaround, a complete turnaround over the last several months, to what you have now. Everybody in the Republican Party running for president, with the exception of John Kasich, our governor of Ohio, is against a pathway to citizenship, is talking about no immigration reform. Marco Rubio, who was a sponsor of the bipartisan immigration reform bill that passed the Senate, has completely disavowed it and he is trying to out anti-amnesty Trump and Ted Cruz. And, they are all fighting for the mantle for who's the most anti-immigrant.

SCHARF: Let me ask our experts here about how we look at Donald Trump's three proposals, which have also been embraced to some extent by other candidates, and critique them. So that at least our audience knows what's at stake here. Let's begin with Trump's call for a ban on Muslims entering the United States which David mentioned. A recent poll indicated that fifty percent of voters favor this proposal, while forty-five percent

34. Hunter Walker, Donald Trump just released an epic statement raging against Mexican immigrants and 'disease' *Business Insider* (2015), <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7> (last visited Mar 10, 2016).

35. Byron York, Winning Hispanic vote would not be enough for GOP *Washington Examiner* (2016), <http://www.washingtonexaminer.com/byron-york-winning-hispanic-vote-would-not-be-enough-for-gop/article/2528730> (last visited Mar 10, 2016).

oppose it. These are all voters on both parties, and the percentages are even higher in favor when you don't associate it with the name Trump. So Milena Sterio, as an immigrant yourself, what is your critique of such a ban?

STERIO: So, just give you a tint of personal background, I emigrated in the early 1990s from the former Yugoslavia, but I am ethnically Serbian. And if you remember back in the 90s, Serbia was widely perceived by the West as the culprit for the civil wars in the Balkans. And so at the time perhaps, the Serbs were the Syrians of today. So if someone like Donald Trump had been in power at the time and had called for a ban on all Serbs perhaps, I would not be sitting in this room today. Now I would not be so arrogant to claim that the United States is a better place because of me in it. But I do think it is important for the United States to welcome immigrants from different parts of the world, based on the quality they can bring and the contribution they can bring to the U.S. economy and society. And I think while excluding large groups whether it be because of ethnicity and culture what have you is just a horrible idea.

SCHARF: Okay, secondly, Donald Trump has called for mass deportation of the estimated eleven million undocumented immigrants who are living in the United States³⁶—even going so far as to say he would dispatch special enforcement teams to get the job done within a year to eighteen months of his inauguration. So, David Leopold, is this a realistic policy proposal? Would he have the authority to deport every undocumented immigrant as he envisions? And what would be the impact of such a policy?

LEOPOLD: Well, what's standing in his way is what we call the Constitution and due process. So no. Flat out no. He couldn't do that, thank God, he couldn't do that. But what he could do is this: Congress has given the president statutory authority to set immigration enforcement priorities under the Homeland Security Act,³⁷ and President Obama has done that; he has prioritized criminals, felons, security risks, repeat immigration violators and at the bottom of that list, he's got people who are just undocumented. People's mothers, fathers, people who are working with a criminal history. What Donald Trump could do on the first day of office is reorder that,

36. Maxwell Tani, We pressed Donald Trump about the practicality of his plan to deport 11 million people, *Business Insider Politics*, *Business Insider*, 21 November 2015, 2 May 2016, <http://www.businessinsider.com/donald-trump-deportation-plan-2015-11>

37. Homeland Security Act (HSA) of 2002, (Pub.L.107–296, 116 Stat. 2135, enacted Nov 25, 2002)

and what he would probably do is say “Okay, everybody is a priority.” So what you would have is a chaotic enforcement regime. You would have raids in communities, you would have military-type raids like we saw in Postville, Iowa in 2008, where armed helicopters and armed agents surrounded this small town and arrested four hundred Guatemalan workers and tried them for identity theft and all kinds of things.³⁸ So you would have a very chaotic system, you would have fear. Rampant, in the streets, and I’m not overstating it because you have right [now] eight hundred thousand dreamers—that’s young people who came here very young as children and their parents brought them here and they have been given dispensation.

SCHARF: Just to clarify, “dreamers” is not describing that they are having dreams, but it is the initials for what?

LEOPOLD: Well, it refers to the Dream Act,³⁹ which is a bill that has been pending for almost two decades now, which gives people who were brought here as children—undocumented people brought here as children—a chance to legalize. And we refer [to] dreamers generically as young undocumented people. Basically, those who came at the hands of their parents, and many of those now about eight hundred thousand have been given dispensation, have been given work authorization, are attending college, and are working. So, Donald Trump on day number one or Ted Cruz on day number one or Marco Rubio on day number one, name them, all of them said that they would cancel executive actions that are in place for those dreamers, for those youngsters. And those people would be out of work. Can you imagine taking eight hundred thousand people from one day to the next and saying now you’re back to going into the shadows. Imagine what that would do, imagine what that would do. So this is an extremely important issue. Hopefully, if one of these Republicans does get elected, they would see this issue with a little bit more perspective than they have at least been talking about for the last several months.

SCHARF: So, third one of Donald Trump’s—and this also Rubio’s idea—is the calling for the construction of a wall on our border with Mexico to keep out illegal immigrants. Greg, is this feasible? (Laughs)

38. The Associated Press, A small town struggles after immigration raid NY Daily News (2008), <http://www.nydailynews.com/latino/small-town-struggles-immigration-raid-article-1.319256> (last visited Mar 15, 2016).

39. DREAM Act is the acronym for Development, Relief, and Education for Alien Minors. The DREAM Act, The DREAM Act (2015), <http://www.immigrationpolicy.org/issues/dream-act> (last visited Mar 20, 2016).

NOONE: No, not really.

SCHARF: How much would it cost? And would you weigh the cost and benefits of it?

NOONE: It's incalculable, number one. Number two, every nation has borders and every nation needs to secure its borders, so there needs to be a multi-phased approach that deals with everything from manpower, to surveillance, to things like tracking people that leave the country. So we track people coming in, but we have a hard time of tracking people going out. So this is multi-faced, multi-agency, multi-government level approach. The wall itself I think is more metaphoric to Donald Trump, in that he throws that line out there; he very cynically has spoken to reporters and said "when I see my crowd drifting off, I'll just throw out and we're gonna build a wall and they will all cheer."

SCHARF: And then he says that the Mexican government is going to pay for it. How is that going to work?

NOONE: I have yet to hear the answer to that one. Because I have a few student loans that I would like the Mexican government to pay for. And I don't know how to make that happen. So I would like the advice on that, but the reality of it is, is that he's saying that and it's a bigger message that it's projecting. He's projecting this idea—and it goes back to what Tim was saying about China. He's projecting this idea that your jobs are being stolen by others. Our factories are no longer here, they are in China, they are in Mexico, and that this grand theft has happened to the American dream. But really, the whole "we are going to build a wall, we're going to build it higher, we are going to build it with electricity on top," is really just the rhetoric to get to a deeper message in Donald Trump's audience polling wise: they are overwhelmingly white, overwhelmingly male, and overwhelming non-college educated. And that's who Trump's yelling too, and it's been effective.

LEOPOLD: I'd like to throw one point in there. I agree with everything you said and a couple of points. Reality check first of all: illegal immigration is down to levels that we haven't seen since the 70s, in fact it's at net zero.⁴⁰ People are going back to Mexico, so the idea that the border is not

40. Jerry Markon, Fewer immigrants are entering the U.S. illegally, and that's changed the border security debate *Washington Post* (2015), https://www.washingtonpost.com/politics/flow-of-illegal-immigration-slows-as-us-mexico-border-dynamics-evolve/2015/05/27/c5caf02c-006b-11e5-833c-a2de05b6b2a4_story.html (last visited Mar 15, 2016).

secure is simply not true. Point one. Point two, I agree with what Greg said but I would also like to throw in the component of racism: roughly 40% of the undocumented folks in the United States are not Mexican, are not Latino. And we don't hear talk about that. I mean this goes into the whole unfortunate platform of reaching out to white America, and to the exclusion of other people into the Republican Party.

NOONE: Yes, quickly, if I can add to that is that you're right when you said he's trying to re-energize that base. They have given up on trying to get the Hispanic voter and the reality of it is that in 2012, that was the first year in America where more white people died than there were born.⁴¹ Right now, one in four children under the age of five are Latino.⁴² Half the births that took place in America are of non-whites.⁴³ So the numbers are stacked against this type of orthodoxy, demography, whatever you want to call it.

SCHARF: Well, let me ask Tim this question about that. So [it] sounds like the Latino vote is going to be crucial to the ultimate winner of this election. How do you think that the candidate's policies on immigration from central to South America, play to the Latino electorate, and ultimately, to the ultimate vote?

WEBSTER: Sure, to pick on what David, said about the last election, when Obama won around seventy-five percent and Mitt Romney around twenty-three percent; after that there was some soul searching on behalf of the Republican Party, but that exercise had largely run its course by now.⁴⁴ So now I think that Hillary Clinton is viewed as more favorable by Latinos than she is by the general population; you also have significant Latino populations in big states like California, like New York that traditionally vote blue, that vote for Democrats. But you also have forty percent of

41. Carol Morello and Ted Mellnik, White deaths outnumber births for first time *Washington Post* (2013), https://www.washingtonpost.com/local/white-deaths-outnumber-births-for-first-time/2013/06/13/3bb1017c-d388-11e2-a73e-826d299ff459_story.html (last visited Mar 17, 2016).

42. Census Bureau Estimates Nearly Half of Children Under Age 5 are Minorities Estimates find nation's population growing older, more diverse, Census Bureau Estimates Nearly Half of Children Under Age 5 are Minorities (2009), <https://www.census.gov/newsroom/releases/archives/population/cb09-75.html> (last visited Mar 17, 2016).

43. Eric Kayne, Census: White majority in U.S. gone by 2043 NBC News (2013), http://usnews.nbcnews.com/_news/2013/06/13/18934111-census-white-majority-in-us-gone-by-2043 (last visited Mar 17, 2016).

44. Bryan Llenas, Obama Win Fueled by Latino Voter Muscle, FOX Exit Polls Show Fox News Latino (2012), <http://latino.foxnews.com/latino/politics/2012/11/08/obama-win-fueled-by-latino-voter-muscle-fox-exit-polls-show/> (last visited Mar 17, 2016).

Texas—that’s a sizeable part of Texas—which has been a traditionally red bastion incoherent 48.32 that may change. More importantly, you also have a number of swing states where they have significant Latino population. Not so much here in Ohio, but if you look at Virginia, North Carolina, Florida and so, a lot of these swing states will end up actually exercising or exerting outside influence on the final decision; the final presidential outcome could be strongly influenced by the presence of Latinos and there is a large Latino population in some of those states.

LEOPOLD: That’s a really good point. And back when Mitt Romney lost in 2012—or go back to when George Bush won the second term in 2004—the number you needed to win a presidential candidate of the Latino percentage was roughly forty percent—that’s gone up. Because of the size of the Latino population is forty-seven percent⁴⁵ now, with this kind of platform coming from the Republican hopefuls presidential hopefuls, the probability of any one of them beating a Democrat like you point out in the general election, given the makeup of importance of the swing states including Ohio, goes down substantially.

NOONE: Let me throw in one caveat to that: Hillary Clinton hasn’t actually energized the Latino vote. I think the Latino population feels that in many ways President Obama did not carry out what he said he would do, and if they see her, Hillary Clinton as the next Democratic president that promises this and does not carry out then if you have Latinos stay home, then you have the white voter block come out, then there is a real chance. I tell you, I would not bet any amount of money on where this race is going to go next November.

SCHARF: Milena Sterio.

STERIO: Perhaps, to throw in a non-serious note. A joke that I recently heard about Donald Trump and his position on immigration was that Donald Trump was against all immigrants unless they are coming here to marry him.

PANEL: (Laughs)

LEOPOLD: That’s a high percentage.

SCHARF: Just with the last few seconds we have left. Tim Webster, the Democrats support the so called “pathway to citizenship” for people who

45. Population estimates, July 1, 2014, (V2014), New Mexico QuickFacts from the US Census Bureau (2014), <http://www.census.gov/quickfacts/map/pst045214/35> (last visited Mar 17, 2016).

enter this country illegally. Is this, you think, a good policy? How does that play out? And we have very little time.

WEBSTER: Sure, I would say very briefly, yes it is. This, the process whereby eleven million undocumented workers in this country can, over a period of years or decades, can gain American citizenship. It is something that David talked about earlier, is widely supported by the Democratic candidates, and widely opposed by the Republicans. And I think it does a couple of things. First of all, you solve the logistical problem of deporting eleven million people, which is not feasible on a good day. But you also give these people who are living in legal limbo a fresh start. People talk about [it] as amnesty; it is not quite an amnesty, you have to come forward, have a background check, you have to pay fines, you may have to pay taxes for the years you have lived here. So there is something “punitive” about it. What it does is it instills hope, and it acknowledges the labor millions of people have contributed to this country over their time here.

SCHARF: Will there ever be congressional backing for those proposals? And can the president do it all himself, David?

LEOPOLD: Well, there was congressional backing in 2013.⁴⁶ When the bipartisan bill went through the Senate, it was killed in the House for the reasons we have discussed. I think it is possible, I think what has to happen though is that Republicans have to learn—unfortunately, I do not know how many election cycles—it is going to happen at some point. Basically because of the demographics of this country. They have to do something for the eleven million undocumented people.

SCHARF: Well, we’re coming to the end of our broadcast. Let me say, Milena Sterio, Tim Webster, David Leopold, and Greg Noone—thank you for providing your insights on the positions of the presidential candidates on national security. You have given us a lot to think about and with the Ohio primary coming up soon, you’ve given our local voters much to mull over. I’m Michael Scharf, you’ve been listening to *Talking Foreign Policy*.

46. Seung Min Kim, Senate passes immigration bill POLITICO (2013), <http://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530> (last visited Mar 17, 2016).

Talking Foreign Policy, October 7, 2016, broadcast

Participants

Michael Scharf

Paul R. Williams

Mark Ellis

Bill Schabas

Shannon French

Milena Sterio

SCHARF: Welcome to *Talking Foreign Policy*! I'm your host, Michael Scharf, Dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be discussing art, diplomacy, and accountability. Joining us remotely from a studio in Washington, D.C., is Dr. Paul Williams, President of the Public International Law & Policy Group, who has been working on issues of accountability for international crimes in Syria. Good to have you on, Paul!

WILLIAMS: Thanks, Mike. It's my pleasure.

SCHARF: Here at the WCPN ideastream studio here in Cleveland, we are joined by Dr. Mark Ellis, Executive Director of the International Bar Association, who is visiting this week from London.

ELLIS: Wonderful to be here.

SCHARF: Also with me here in the studio is Professor Bill Schabas of Middlesex University in London, a leading expert in human rights law, who has served as a commissioner on two international investigative commissions.

SCHABAS: Thank you for having me.

SCHARF: Our panelists also include Dr. Shannon French, with us on the show again. She's the Director of the Inamori International Center for Ethics and Excellence and an expert on law and morality.

FRENCH: Delighted to be here, Michael.

SCHARF: And our final panelist is Professor Milena Sterio, Associate Dean at Cleveland-Marshall College of Law. She is a frequent guest on our show and an expert on international law and policy. Thank you all for being with us today!

In our first segment, we will look into one of history's great, great art disputes, the case of the so-called "Elgin Marbles." At the British Museum,

which is just a few Tube stops from Bill Schabas' office in London, millions of people every year visit a famous collection of huge marble statues that once covered the walls of the ancient Greek Parthenon. Bill, can you tell us the story of how these statues, considered the most important examples of ancient Greek art and building design, ended up in the British Museum?

SCHABAS: Sure. Well, around 1800 the British ambassador to Turkey, because Athens and Greece was still a part of the Ottoman Empire, decided that he was going to start collecting these marbles off the Parthenon. He originally had a plan just to do drawings of them, but then he got greedier and actually just started ripping them off. He allegedly got permission from the Turkish government, although this is all kind of mired now in the fog of the archives and no one can find a document that actually gave him permission to take them down. He took them all down over a period of about ten years. He took the best of the marbles, about half of them, and shipped them to England. Originally, he was going to put them in his own castle somewhere in Scotland. Later, he sold them successfully to the British government. So now they're placed in the British Museum, about half of them. There are little bits of the marbles from the Parthenon that are in other museums around the world—there are a few pieces in the Louvre, in Paris, and in some German museums—but the bulk of them and the best part of the Parthenon are there in London.¹

SCHARF: I was always struck that they call these marbles, because it sounds like something small, but they are literally the sides of the Parthenon.² I suppose everybody in this room has been to the British Museum. They have a scale replica of the Parthenon, where the real walls of the Parthenon are. When you go up to the Acropolis in Greece, you're seeing a skeleton of the Parthenon, which used to be full, other than what Lord Elgin did. Right?

SCHABAS: Well, you know the Parthenon, which was built of course at the time of Pericles, 500 or so BCE, has been gradually withering over the years. Parts of it have been destroyed by a variety of manners³: It was

1. See also Victoria Ward, *Why Are the Elgin Marbles So Controversial—And Everything Else You Need to Know*, Telegraph (Dec. 5, 2014, 8:43 AM), <http://www.telegraph.co.uk/news/uknews/11274713/Why-are-the-Elgin-marbles-so-controversial-and-everything-else-you-need-to-know.html>.

2. A short video made by the British Museum shows the size and elegance of the statues. *Bonnie Greer on the Parthenon Sculptures at the British Museum*, Greece: Parthenon Room 18, British Museum, http://www.britishmuseum.org/explore/galleries/ancient_greece_and_rome/room_18_greece_parthenon_scu.aspx (last visited Nov. 28, 2016).

3. See Evan Hadingham, *Unlocking Mysteries of the Parthenon*, Smithsonian (Feb. 2008),

converted into a church at one point, and that involved ripping out parts of it so that they could put in the religious architecture necessary for it to be a church. Then, when the Ottomans took over, they converted it into a mosque and built a minaret. There were some bombs that went off there, some explosions (it had been used as a powder magazine). So, it was in rough shape already when Elgin got to it and he was able to go and pick off some off the pieces.

SCHARF: I suppose he could say, “Well, I’m saving it for the future.” Now Bill, our radio audience can’t see this, but you’re wearing a t-shirt with Greek wording on it—and it’s all Greek to me (I always wanted to say that). What does it say?

SCHABAS: Well, in Greek it says, “The Parthenon Museum.” I visited the Parthenon museum last week actually. I was on vacation in Greece visiting friends and went to the museum for the first time. It opened fifteen years ago or more, and it was built by the Greek government to house the sculptures and the marbles on the Parthenon. What they’ve done, in effect, is rebuild how the marbles were on the Parthenon. You can see the Parthenon from the museum, it’s just next to it, but the marbles are in better condition. And they’ve re-assembled all the pieces together with plaster casts of the parts that are in the other museums, including the parts in the British Museum. So you see the original parts that remained, about half of the pieces—not the best ones—in the original marble, then you see the plaster casts that were made. They’re not a great copy. I’m sure if you go down to the gift shop in the museum, you can buy beautiful plaster copies of the art, but I think the Greeks intentionally left them a little bit rough to make the point that these are not the original marbles, they are poor copies of the originals in London.⁴

SCHARF: Why is it so important for the Greek people and the Greek government to have the return of their marbles?

SCHABAS: Well, Greece has been claiming them back literally since it became independent. Lord Byron, who was a great supporter of Greek independence, wrote a poem condemning Elgin’s theft of the marbles at the

<http://www.smithsonianmag.com/history/unlocking-mysteries-of-the-parthenon-16621015/> (last visited Nov. 28, 2016).

4. For a photo of the Parthenon frieze, with both original and plaster cast pieces, see *The Frieze*, Acropolis Museum, <http://www.theacropolismuseum.gr/en/content/frieze-0/0> (last visited Nov. 28, 2016).

time⁵ and Greece has regularly repeated its demand to get them back. It's quite symbolic—this is the center of the great Greek classical culture. And it's very, very important for the Greeks—in a moral, philosophical sense, in terms of their own feeling of whom they are—to have those marbles there, next to them so to speak, in their capital city.

SCHARF: And I mentioned that Lord Elgin, or the British, have made the argument that they are saving the marbles for the rest of the world. Let's turn to Shannon French, our famous ethicist who is with us today. Shannon, Greece argues that because its new, high-tech Acropolis Museum makes it possible to exhibit the Elgin Marbles in Athens, in a large exhibition space (the one that was just described to us) where they can be protected and observed by everybody who comes to visit, that Britain no longer has any excuse not to return them. Now, the British Museum has their own argument. They say, "All right, it's not just about protecting them for the future. We're a better venue because we present all the cultures of the world (I guess all the places that they stole things over the years), so you can see everything in one place, and we have many more visitors, so the marbles should stay with us." As an ethicist, how do you evaluate those competing claims?

FRENCH: Well, I think this is one of the relatively rare cases where the ethical perspective is actually a little easier to nail down than maybe are the legal issues involved. I think it helps sometime to just think in terms of, "What is the decent thing to do?" To use a very simple analogy: Imagine that you heard of a village that was being overrun by some invader and you happen to be a disinterested party. You wander into the village just after the invasion, and all the villagers have been chased out and you see a beautiful, very fragile vase. If you took it out of—perhaps, let's give the benefit of the doubt—the desire to protect it for posterity. But then later, the villagers recover their village and they come back and they say, "Gosh we really want that vase back that we would have preserved." Wouldn't the decent thing to do be to return it? That doesn't seem that obscure. And I understand, because I personally love and respect the British Museum and enjoy going there, their argument about numbers of visitors, but obviously Greece is going to argue, "We will have visitors, too, especially if you give back the marbles."

5. See Panos Karagiorgos, *Lord Byron and the Elgin Marbles*, Prof. Panos Karagiorgos Blog, <http://karagiorgos.blog-net.ch/articles-and-essays/lord-byron-and-the-elgin-marbles/> (last visited Nov. 28, 2016).

SCHARF: You know, it's not really just the British Museum. The analogy you just gave, that's repeated over and over in many countries. Let me turn to Milena Sterio, our expert in international law. Milena, it's a fact of history that our great museums happen to be housed in capitals of major political and military powers, who have come into possession of certain objects through not-entirely-legitimate means, but it's also a fact that they are great museums. The British Museum, the Louvre, the Met and similar institutions, they're also part of the world's cultural heritage. So, if the Elgin Marbles are forced to be returned to Greece, could this set a restitution precedent that would empty the world's greatest museums?

STERIO: Well, Michael, I looked into this a little bit and it turns out that we already have a restitution precedent, so let me just give you a few examples. In 2014, the Los Angeles-based Getty Museum returned to Greece a Fourth Century B.C. Macedonian gold wreath and also a Sixth Century B.C. marble statue of a woman.⁶ This same museum gave back 500 ancient artifacts to Italy in 2001.⁷ The Heidelberg University of Germany gave back to Greece a small piece of the Parthenon itself actually,⁸ and in 2008 the Vatican gave back a Parthenon fragment to Greece.⁹ So we actually have several examples of restitution taking place. Now these huge museums, such as the Louvre, the Met, and the British Museum, have so many objects that even by giving back some of them—that perhaps are very famous but that deserve to be given back—I don't think we are in any danger of emptying those museums.

SCHARF: All right, so there is a precedent. Let's turn to Paul Williams down in Washington, D.C. Paul, you have helped negotiate a number of international disputes across the globe. Greece has been requesting the return of the Elgin Marbles for over 30 years. Why do you think this dispute has continued for so long without resolution if all these other museums, as Milena has said, are already returning their versions of the Elgin Marbles?

6. E.g., Hugh Eakin & Anthee Carassava, *Getty to Return Gold Wreath to Greece*, N.Y. Times (Dec. 11, 2006), <http://www.nytimes.com/2006/12/11/arts/12articnd.html> (last visited Nov. 29, 2016).

7. *Ancient Objects Return to Italy*, BBC (Nov. 14, 2001), <http://news.bbc.co.uk/2/hi/entertainment/1655673.stm> (last visited Nov. 29, 2016).

8. Hannah Cleaver, *Pressure Over Elgin Marbles as Piece of the Parthenon Goes Back to Greece*, Telegraph (Jan. 11, 2006), <http://www.telegraph.co.uk/news/worldnews/europe/greece/1507561/Pressure-over-Elgin-Marbles-as-piece-of-the-Parthenon-goes-back-to-Greece.html> (last visited Nov. 28, 2016).

9. *Vatican Sends Back Parthenon Head*, BBC (Nov. 8, 2008), <http://news.bbc.co.uk/2/hi/europe/7717269.stm> (last visited Nov. 29, 2016).

WILLIAMS: Well, Michael, I think we have to be honest here that this dispute regarding the marbles reflects a legacy and a culture of impunity for art institutions, museums, and collectors. The precedents Milena noted were decisions by the museums to return the objects; they weren't the result of litigation or obligations under international law. The law that governs the return of these types of antiquities is essentially based on the law of plunder, which was sanctioned during the colonial era. There are very difficult hurdles to overcome, seeking to litigate the return of antiquities, and there are huge jurisdictional problems. The Greeks have tried and contemplated litigation and it's been completely unsuccessful.¹⁰

SCHARF: Bill Schabas, you litigate a lot of cases—in international tribunals, in domestic tribunals, human rights cases, all kinds of things. Is there an arguable claim in a court of law somewhere that Greece can turn to, or does Greece's claim have to be resolved only in the political and diplomatic sphere?

SCHABAS: Well, you used the phrase “arguable claim.” There's certainly enough to pass what I call the “straight-face” test of litigation, where you could stand up in court and make an argument that would have some legal foundation. There's a legal opinion that was prepared about a year ago by the British barristers Geoffrey Robertson and Amal Clooney, where they set out a strategy that they proposed to the Greek government. One of them is to get a case at the International Court of Justice—the World Court—but it wouldn't be a lawsuit filed by Greece, it would have to be an advisory opinion, which would be requested by UNESCO or by the General Assembly of the United Nations. The other is to go to the European Court of Human Rights, and Greece could take the United Kingdom to the European Court of Human Rights. Both of these have difficulties, but there is an arguable claim and sometimes the threat of taking a case to court, with the uncertainties for both sides, has a way of coloring the political discussion, and that might help to turn the corner for Greece in its negotiations with the United Kingdom. The United Kingdom has been quite intransigent so far, although they've done public opinion polls in the

10. The Greek culture minister, when explaining why Greece would not sue the British Museum for return of the marbles, “suggested that the path of litigation was fraught with peril” and said, “[I]n international courts, the outcome is uncertain.” Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, N.Y. Times (May 15, 2015), <http://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html> (last visited Nov. 29, 2016).

U.K. and found that a great majority of people in the United Kingdom recognize that the marbles should go back to Greece.¹¹ There's a great way to solve it all, and that's to have proper copies of it made. I think the British have said, "Listen, you have the copies in Athens, isn't that good enough?" Well, if it's good enough for the Greeks, it should be good enough for the British too, so why don't they keep the copies and let the Greeks have the originals back?

SCHARF: Well, it's time for us to take a short break. When we return, we will discuss other controversies surrounding efforts at obtaining return of great works of art and artifacts throughout the world, from the Machu Picchu relics, to the Woman in Gold, to the recent masterpieces found in attics in Europe, so stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, Dean of Case Western Reserve University School of Law. We've been talking about international art disputes. Our expert panel includes Mark Ellis, the Executive Director of the International Bar Association; Bill Schabas, who served on two international truth commissions; Paul Williams, a former State Department official who negotiated a number of international disputes; noted ethicist Shannon French; and international law scholar Milena Sterio. Earlier in the broadcast, we were discussing the case of the Elgin Marbles. In this segment of our program, we will be discussing disputed ownership and the returning or keeping of other famous works of art throughout the world. Let's begin by talking about the case of the Machu Picchu artifacts. Paul Williams, down in Washington, D.C., you explored the ruins of the mystical, mountaintop city in Peru just this past June. Did you see any artifacts while you were there? Any pots, sculptures, carvings?

WILLIAMS: Well, actually Michael, I spent most of my time taking pictures of you posing with llamas (laughter). But when I did have a moment or two to look around at the ruins and sort of search around for some artifacts to bring home, just like Lord Elgin, I was unable to find any because I had been beaten to it by the Yale researcher and explorer, Hiram Bingham, who

11. For one such poll, see William Jordan, *British People Tend to Think Elgin Marbles Should Be Returned*, YouGov (Oct. 18, 2014, 1:19 PM), <https://yougov.co.uk/news/2014/10/18/british-people-tend-want-elgin-marbles-returned/> (last visited Nov. 29, 2016).

discovered the hidden city in 1911.¹² And, as most folks did in those days, he brought most of what he could lift and pack away back to the United States and it's been with Yale up until very recently.

SCHARF: So, after years of negotiation, Yale has recently announced that the two sides had reached an agreement. Can you tell us a little bit about that?

WILLIAMS: Essentially, there was a bit of a “name and shame” effort on the part of Peru vis-à-vis Yale and Yale officially recognized that Peru owned the cultural objects, which was no major concession to begin with. But then Yale did agree to return the objects to Peru, while also guaranteeing that it was able to retain a number of objects on a long-term loan to continue academic and scholarly research on those objects.¹³

SCHARF: So, do you think this a good blueprint to resolving the Elgin Marbles and other disputes?

WILLIAMS: Yeah, it is actually quite an impressive blueprint and one that I think should be followed by the international museums and academic institutions that have this cultural property. One of the things is, oftentimes it's very clear where this cultural property comes from and whose culture it is and it's certainly not the academic institutions' and the museums'. Coming up with some type of arrangement, as the other guests have talked about vis-à-vis the Elgin Marbles, where it's returned but there's access and maybe some residual element of the antiquities that can remain on display at Yale or the other institutions, may be a good solution. But basically getting the property back to its original owners is not only the right thing to do, it's the legal thing to do.

SCHARF: Well, it's not always easy to figure out who the owners are. Let's talk about the cases of Nazi-confiscated art, which is round-up in museums and even attics throughout Europe. One famous example is the case of the “Woman in Gold.” It's a painting of a Jewish woman named Adele Bloch-Bauer that was made by the artist Gustav Klimt in 1907.¹⁴ Let's

12. See, e.g., Richard Cavendish, *Richard Hiram Bingham Re-Discovered the 'Lost' City of the Incas on July 24th, 1911*, History Today (July 2011), <http://www.historytoday.com/richard-cavendish/discovery-machu-picchu> (last visited Nov. 29, 2016).

13. Diane Orson, *Yale Returns Machu Picchu Artifacts to Peru*, NPR (Dec. 15, 2010, 3:10 PM) <http://www.npr.org/2010/12/15/132083890/yale-returns-machu-picchu-artifacts-to-peru> (last visited Nov. 29, 2016).

14. The story of this famous painting was told in the Hollywood movie “The Woman in Gold.” See Lewis Panther, *Remarkable True Story Behind Helen Mirren's New Film The Woman in Gold*, Mirror (Apr. 4, 2014, 7:10 PM), <http://www.mirror.co.uk/news/world-news/>

bring in Mark Ellis, who has been patiently waiting, to join our conversation. Mark is the Executive Director of the International Bar Association. Mark, can you tell us about this case?

ELLIS: Michael, it's a fascinating case and perhaps the listeners would have also had an opportunity to watch the movie "Woman in Gold" last year with Helen Mirren, as you mentioned in your opening statement. Here was a situation where this famous painting was made quite early before the war and was in the Bloch-Bauer family, a prominent Jewish family in Vienna. But once Nazi Germany took over and Austria became under the rule of the Nazis, the Nazis decided to transfer this very famous painting to a museum, the National Museum in Vienna. Bloch-Bauer's niece, Ms. Altmann, had decided that actually she was in fact the heir of this painting and it belonged to her family and she began to pursue the litigation that was mentioned earlier. She decided to litigate this through the courts in Vienna and Austria and she failed, no surprise there. She then turned her attention to pursuing this litigation in the United States and that actually was ultimately successful as the case went all the way to the U.S. Supreme Court on an issue dealing with Foreign Sovereign Immunities Act. In the end, when she won that case at the Supreme Court,¹⁵ the Austrian government knew that it was in trouble and that it was going to be very difficult to prevent her from obtaining this painting. And something extraordinary happened: it didn't go from litigation, it went into arbitration and she was offered an opportunity to arbitrate the ownership of this painting, but under two caveats: One, it would be arbitrated back in Vienna, and two, if she lost, she would be prevented from pursuing any other type of litigation back in the United States. That was a big decision on her part. She made that decision, she went to Vienna and it was arbitrated there and she won. That was extraordinary, I think, for a couple of reasons. One, if you've visited Vienna, this painting still resonates with the city. We talk about something symbolic, this painting is symbolic to the city of Vienna. You wouldn't know that this painting was no longer there and yet it is now sitting in New York. So, it can occur, and rightful restitution, the ability to bring back property that was stolen to the rightful owner, worked in this case. It was the right thing to do.

SCHARF: Well, why can't Greece do that with the Elgin Marbles in the U.S. Courts?

remarkable-true-story-behind-helen-5460199.

15. Republic of Austria v. Altman, 541 U.S. 677 (2004).

ELLIS: Well, I believe that Greece, in fact, should be able to obtain those marbles back and I ultimately think that's exactly what's going to happen as well.

SCHARF: Bill, are there any procedural blocks for a country like Greece coming into a U.S. court to litigate this case between it and Britain?

SCHABAS: Oh yes, big time. I think that if there were not, someone would have done it a long time ago. I think it's a problem because it's not private litigation—between individuals, some individual who stole the painting or was in possession of it and the original owner—but you're dealing instead with governments. There's an immunity problem there that I think would be well-known and familiar to all international lawyers. I'm not disagreeing with Mark that there may be a way to get in there, but it's not obvious

ELLIS: No, and of course it wasn't obvious at the time when this case was brought up to the U.S. Supreme Court. That was a very important decision the court said about the retroactive nature of the Foreign Sovereign Immunities Act. So, you know, litigation can help and law can change and I think this is an important thing to remember.

SCHARF: So, more recently than that, in 2012, I think many people remember reading in the press that a treasure trove of paintings by Henri Matisse, Pablo Picasso, Marc Chagall and other great artists was discovered in the attic of an apartment in Munich, Germany.¹⁶ Mark, what has become of these priceless works of art, which were presumably stolen by the Nazis and then just stored in this attic for all those years?

ELLIS: Yeah, another fascinating story. You have all this precious art that no one knew existed, which was hidden in the attic of a gentleman—Mr. Gurlitt—and Mr. Gurlitt collected this art. It was assumed that this art was looted and the Austrian government authorities came in and confiscated the art. There was an interesting twist, though, in that they actually gave the art back to Mr. Gurlitt with the understanding that he would assist the authorities in identifying those paintings that in fact were looted and he would assist in getting these returned to the rightful owner.

SCHARF: And then he died, right?

16. See Melissa Eddy, *Few Answers on True Owners of Art Found in Gurlitt Trove*, N.Y. Times (Jan. 14, 2016), <http://www.nytimes.com/2016/01/15/world/europe/gurlitt-art-collection-germany.html>.

ELLIS: And then he died soon after that agreement, but he had bequeathed all of those paintings to a museum in Switzerland. So now, it's the Swiss museum that is undergoing this very long and arduous process of trying to determine which paintings in fact were taken illegally.

SCHARF: And even if all of them were looted, they can't figure out who they belong to because unlike in the movie "The Monuments Men," where you had a character keeping a log of each stolen artifact or painting, there may not be such a record in this case.

ELLIS: Well, I think that's always been a challenge on this, but you could solve it with, the same situation in "The Woman in Gold" with Mrs. Altmann who was the niece of Bloch-Bauer. The evidence that can be presented to, in fact, show that there was ownership is out there.

STERIO: There's actually an Athenian Cultural Association that sued the United Kingdom in the European Court of Human Rights, and just this past summer the European Court threw out the lawsuit, saying that it didn't have jurisdiction because this happened 200 years ago, before the court had come into existence.¹⁷ Some of these would apply, but the problem then is that they apply to objects that have been illegitimately taken or stolen and the British government has made this argument that, at least with respect to the Elgin Marbles, that those were not illegitimately taken, that Lord Elgin actually had permission to do this.

SCHARF: So these conventions are great, but really only for future situations and not for the great past ones that we've been talking about. Paul, even if there are claims for the return of some of these antiquities, in many cases the individuals and institutions that purchase them also seem to have a legal right. They're innocent purchasers for value. Why should they be forced to give up artwork and antiquities that they bought in good faith?

WILLIAMS: Well, you've identified a key point. Balancing the interests of the original owner and the good-faith purchaser of stolen property can be intensely challenging, and there are two sets of rules that address this. There's the Anglo-American approach, which is essentially that the stolen property is always stolen property no matter how many times it's changed

17. See Ian Johnston, *First-Ever Legal Bid for Return of Elgin Marbles to Greece Thrown Out by European Court of Human Rights*, Independent (July 19, 2016), <http://www.independent.co.uk/news/uk/home-news/elgin-marbles-return-greece-legal-bid-thrown-out-eu-court-human-rights-a7145216.html> (last visited Nov. 29, 2016).

hands. You can't cleanse the property of its illegal origin simply by passing it through the chain of ownership. However, on the other hand—and probably the majority rule—is that of the civil law countries, which say that if you have stolen property and someone buys it without knowing that it's stolen property, they become a good-faith purchaser and essentially the taint of that property being stolen has been erased. Then it can go from one good-faith purchaser to another good-faith purchaser and you're not able to reclaim the property. Now, the 1995 treaty that Milena mentioned attempts to deal with this issue, and essentially says that there is a right to the return of all stolen antiquities whether they were bought in good faith or not. But the catch is that the individual who was victimized, or the family that was victimized, or the country, must compensate—[*Signal Cut*]

SCHARF: Did we just lose Paul Williams in Washington, D.C.? Ok, we'll continue on until we establish that link. I think Paul was just saying that, well do you know the end of that?

FRENCH: Well, I know that what he was pointing out is that there's a push to then compensate the people who made the good-faith purchases on the argument that they were not at fault. They still have to return the items, and if you again think of that from an ethical point of view, it's quite clear. I find your stolen dog and I fall in love with it, but then you make a valid claim to it, I still have to return the dog. But we all feel empathy for me and someone might say, "Here, I'll pay the vet bills that you paid in that time."

SCHARF: Or a finder's fee or something.

FRENCH: Something, yes, but you still have to return the dog to the rightful owner.

SCHARF: One of the big problems here is that these people don't know whether they're purchasing somebody else's dog or not. Milena, do you think it'd be possible to establish some kind of an international registry of works of art and stolen works of art, and then to maybe require collectors to inform themselves about the registry and about which pieces may be stolen as a way to solve this problem?

STERIO: Sure. Some of the bigger law enforcement agencies, such as INTERPOL, the Scotland Yard, and the FBI, actually already have international databases of stolen art.¹⁸ But for law enforcement in general, this is

18. See National Stolen Art File, Federal Bureau of Investigation, <https://www.fbi.gov/>

really low-priority because although stealing artifacts and cultural objects can shock all of us, it doesn't imply the taking of lives. So law enforcement agencies in general prefer to focus their resources and manpower on what they consider to be more serious, dangerous crimes.

SCHARF: So, we could do it, but it's just not something that's important enough to do.

STERIO: Sure, and let me just mention this, there's actually a commercial company based in London called the Art Loss Register,¹⁹ which is a computerized international database which works for profit and does precisely that. It establishes a registry, tries to keep track of stolen objects, and then tries to help with the restitution—for a hefty fee. The fees are based on the percentage of the value of the stolen object. So, if we were dealing with Gustav Klimt painting that is worth, let's say, 10 million dollars, the company might charge something like five percent and so that's a very hefty fee.

SCHARF: Paul, are you back with us from D.C.?

WILLIAMS: I'm back with you guys.

SCHARF: So, let me ask you a follow-up. Especially in times of conflict, it's easy for cultural artifacts to be looted and smuggled from their country of origin. You spend a lot of time in the Middle East with your negotiating teams, so you see that first hand. Is there anything being done to prevent the current looting in Syria and Iraq so that future repatriation efforts will not be necessary?

WILLIAMS: Unfortunately, I think Milena hit the nail on the head when she said that there's essentially this culture of impunity that's developed because antiquities are not really a high priority for law enforcement. This sort of laissez-faire approach to basically putting an end to the illicit trade has led to a situation where the Islamic State—which is a terrorist organization we're all familiar with and which has targeted European as well as American interests—raises anywhere from \$200 million to \$8 billion a year through the sale of conflict antiquities. Quite frankly, you could call these “blood antiquities,” and the problem is that this regime that allows the Elgin Marbles to stay in the United Kingdom is that exact same regime that the international community is now trying to apply to ISIS to stop this trade, and they've been hugely, hugely ineffective. You essentially have these various streams,

investigate/violent-crime/art-theft/national-stolen-art-file (last visited Nov. 29, 2016).

19. The Art Loss Register, <http://www.artloss.com/en> (last visited Nov. 29, 2016).

or pathways, of trade for illegal antiquities now becoming pathways for a trade of conflict and blood antiquities that are funding terrorist organizations that are directly interested in attacking Europeans, Americans, and other citizens. So, I think we're in very desperate times and we don't have a legal regime or, quite frankly, a policing regime that's up to snuff to deal with it.

SCHARF: And without this registry that Milena was talking about, you could literally go to an auction at Sotheby's and be buying items that were looted from Palmyra and other places by ISIS, right?

WILLIAMS: And you could do it knowingly and get away with it.

SCHARF: Wow. So, with that, let's take another short break, and when we return we'll talk about international criminal responsibility for destruction of cultural objects. Stay with us.

SCHARF: This is Michael Scharf, and we're back with *Talking Foreign Policy*. I'm joined today by experts in international law and diplomacy, and we've been talking about international art disputes. In this final segment of our broadcast, we'll discuss the hurdles to achieving international criminal responsibility for destroying archeological sites and cultural artifacts. You know, in the past few years, the world has been shocked when the Taliban dynamited the 1,700-year-old giant Buddha statues carved into a mountain in Afghanistan,²⁰ when the Islamic militants destroyed historic shrines and libraries and tombs in Timbuktu, Mali,²¹ and most recently, when ISIS bulldozed ancient temple complexes in Palmyra, Syria, and apparently sold the artifacts on the black market.²² Let's start off with our international peace negotiator, Paul Williams, who is in Washington, D.C.. Paul, why is it important to seek individual accountability for the destruction of cultural artifacts in conflict zones?

WILLIAMS: Well Mike, this is a very important and a very tricky question, because when you talk about the Buddha statues, the shrines, the librar-

20. See Ahmed Rashid, *After 1,700 years, Buddhas Fall to Taliban Dynamite*, Telegraph (Mar. 12, 2001, 12:00 AM), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1326063/After-1700-years-Buddhas-fall-to-Taliban-dynamite.html> (last visited Nov. 29, 2016).

21. See Amir Ahmed, *Mali Islamists Destroy Tombs in Timbuktu*, CNN (Oct. 19, 2012, 5:28 AM), <http://www.cnn.com/2012/10/18/world/africa/mali-shrines/> (last visited Nov. 29, 2016).

22. See *Following the Trail of Syria's Looted History*, CBS News (Sept. 9, 2015, 6:57 AM), <http://www.cbsnews.com/news/isis-looted-syrian-ancient-artifacts-black-market-us-and-europe/> (last visited Nov. 29, 2016).

ies—we're all offended and traumatized, to a degree. But when you seek accountability for the individuals who destroyed these things at the same forum where we're seeking accountability for people who've committed mass torture, mass rape, possibly genocide, crimes against humanity, folks start to argue that "it's only a statue, it's only a library, it's cultural property, it's not mass rape, it's not mass torture." But the reality, Michael, is that most of these conflicts are about destroying the identity, destroying the "Other," be it ethnic, religious, cultural. And part of that effort to destroy the other group is oftentimes destroying their cultural heritage. So destroying the libraries, the shrines, the statues is part and parcel of the war crime of seeking to either exterminate or destroy or severely traumatize the other party to the conflict. It's also hugely important for reconciliation. A lot of these objects are symbols that inspire national unity. If they're destroyed, then when you do have an end to the conflict and you're seeking reconciliation and reunification, you don't have those cultural symbols, those indicators of national unity that people can rally behind. Instead, you have a legacy of anger, division, retaliation, and revenge. So there's a huge need to prosecute those who destroy cultural artifacts in conflict zones.

SCHARF: Let's turn to Mark Ellis, the Director of the International Bar Association. Mark, everything that Paul says seems so obvious. Why is it only now that we are seeing a more focused effort on prosecuting the crime of destroying cultural heritage?

ELLIS: It's been fascinating listening to this, because we're trying to distinguish between the laws that are on the book, that should prevent this type of act—and they've existed for hundreds of years, from the 1800s through the Geneva Conventions during the war, up to, Milena had mentioned, the 1954 Hague Convention on the Protection of Cultural Properties. The laws exist. But enforcing them, becoming aware of them is something different. And I think it has changed, for two reasons. One, as we often talk about, is social media. We're getting more information; we're seeing this first-hand. We're not reading about it in a report later on, we're witnessing it twenty-four hours later. And oftentimes we're witnessing—because those that are actually doing the damage, destroying the cultural property, are doing so because it's part of their ethos—they're filming it, they're putting it on YouTube. We're aware of this, and it is a massive, massive problem, as Paul Williams has just stated. And second, I think we should give credit to these emerging international criminal courts, particularly with the Interna-

tional Criminal Tribunal for the Former Yugoslavia, because they started to initiate legal proceedings, legal definitions within their statutes to allow for this accountability aspect. So, those would be the two important areas.

SCHARF: Mark, let me ask you a personal question. When I first met you, before you were Director of the IBA, you were the Director of the American Bar Association's Central European Law Initiative. And you were stationed for long periods of time in Sarajevo during the war, the Yugoslav conflict. Is that when you became aware of the impact of cultural destruction?

ELLIS: Without doubt, it was a very personal journey for me, having lived in Yugoslavia before the war, lived there after the war, and as you've just indicated lived there a time during the war. And it's interesting because Yugoslavia brought to the attention of the world this terminology of "ethnic cleansing" and clearly, we witnessed it. But, for me, the ethnic cleansing I saw was on a spectrum. You certainly had ethnic cleansing of people, but there is no doubt that during that war there was ethnic cleansing of the *identity* of people. And that was very directed and very specific and it was there to destroy the cultural aspects of a people. And by destroying their identity, you would commit this additional crime. And so yes, watching that—watching museums being destroyed on purpose, watching churches, museums, all of this—it was a part of the direction of the war.

SCHARF: And the great bridge at Mostar.

ELLIS: Mostar—the old town of Dubrovnik that was purposely bombed. I was sitting in Sarajevo during the time when the National Library, this great library in Sarajevo, was being bombed. It was being bombed from the hills of Sarajevo.²³ It wasn't for any other purpose other than to destroy the history of a people. That was it.

SCHARF: So, you mentioned the creation of the Yugoslavia tribunal. That was the first international tribunal since Nuremberg. And you were part, as many of us were in this room, of the creation of that tribunal. It's the first tribunal to actually try cases involving the destruction of cultural property. Could you tell us about some of that?

ELLIS: Well, that's exactly right. The genesis of that was what was occurring in Sarajevo, in the former Yugoslavia during the war, since we were

23. For photos of the library before and after its post-war reconstruction, see *Sarajevo Reopens Historic City Hall and Library Destroyed in War*, Telegraph (May 9, 2014, 3:43 PM), <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/10819836/Sarajevo-reopens-historic-city-hall-and-library-destroyed-in-war.html> (last visited Nov. 29, 2016).

seeing this directive of trying to eliminate the culture of a people. When the UN Security Council then created this new tribunal for Yugoslavia, to bring to account those who have committed crimes, they specifically focused on this act, on this crime, based on the conventions and regulations and declarations that came before it. And so you have within the statute of this tribunal a specific provision under war crimes that deals with this type of destruction and the court went forward with eleven important cases that focused in this area. So, a very important development in international law was what occurred by this particular tribunal because of the atrocities that were committed in the former Yugoslavia both against people and cultural property.

SCHARF: But, as I understand it, nobody was ever tried and convicted only for destruction of cultural property. It was a sort of an “and,” an additional count in these cases. Is that right?

ELLIS: That is correct. And it’s always a little bit surprising for me that that was the case, and I think this is just the process of development in law, and that is why you now have in the International Criminal Court the first case that’s focusing solely on the destruction of cultural heritage.

SCHARF: All right, let’s talk about that case. This is the case of an Islamic militant named al-Mahdi, who has been prosecuted for the destruction of ancient cultural sites in Timbuktu, Mali.²⁴ And, interestingly, al-Mahdi has entered a guilty plea. So, let’s go to Bill Schabas. Bill is one of the people on this planet who has written the most about the International Criminal Court and its proceedings. There have been a number of commentators, Bill, who have argued that the ICC prosecutor should focus on the massacre of people, rather than the destruction of property.²⁵ The al-Mahdi case seems to challenge the notion we were talking about that property is a second-rate crime. But what do you think? Should cultural property crimes be viewed as secondary or equal to crimes such as mass rape, torture, murder, and even genocide?

SCHABAS: I don’t think we have to get into deciding which one is more important or whether they’re equal or unequal. The fact is, of course the

24. See *Ahmad al-Faqi al-Mahdi: The Vandal of Timbuktu*, BBC (Sept. 27, 2016), <http://www.bbc.com/news/world-africa-37438360> (last visited Nov. 29, 2016).

25. See, e.g., Johnathan Jones, *Destroying Priceless Art is Vile and Offensive—But It Is Not a War Crime*, Guardian (Aug. 22, 2016, 9:24AM), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/aug/22/ahmad-al-mahdi-war-crimes-the-hague-destroying-mausoleums-timbuktu> (last visited Nov. 29, 2016).

prosecutor of the International Criminal Court has to focus on the loss of human life and crimes that involve violence against human dignity. That said, I think it's perfectly legitimate and important that the prosecutor also deals with crimes like the destruction of cultural property, as she's done in this case. It's very easy to second guess the prosecutor, and I've been guilty of it myself on many occasions. We look at the decisions she makes—it's a very hard job. But in this situation, she's picked one case, it was an inexpensive trial because he pleaded guilty and he was cooperative. She's made a good point with it, and I say hats off on that score to her for doing it. I wouldn't want to see that become her obsession or the sole priority of the court, but nothing wrong with doing it. I don't think people who say she shouldn't do it because it's not a serious enough have a strong argument.

SCHARF: You know, the whole concept of “Timbuktu” in the United States was a concept of a place that was far-off and exotic—what actually did they destroy? What are we talking about here?

SCHABAS: Well, the main destruction—and again, this was not even a case of ethnic cleansing, this was a case of religious fundamentalism, of a religious fundamentalist group that disagreed with the religious practices of people in Timbuktu. They're all Muslims; they're debating amongst themselves about what the significance is of these objects, which were tombs and a mosque, and that's what al-Mahdi went and destroyed. It's all been rebuilt now²⁶ and people will quarrel about whether the rebuilding—like the bridge at Mostar, by the way, which has also been rebuilt. Nobody's proposing we rebuild the Parthenon, but sometimes we rebuild them and actually they're as good as new when it's all done.

SCHARF: So, Milena, why is this al-Mahdi case a potentially significant precedent for the International Criminal Court and the world community?

STERIO: Well, sure. Bill has already talked about some of this. This case has really allowed the International Criminal Court to reposition itself as a court that's relevant, because this case took relatively little time and little resources. Within about two years, the defendant was identified, transferred to the custody of the court, and then he pled guilty, as Bill has already said, and he will be sentenced a little bit later in September 2016.²⁷ This was the

26. See *Timbuktu Mausoleums in Mali Rebuilt after Destruction*, BBC (July 19, 2015), <http://www.bbc.com/news/world-africa-33587325> (last visited Nov. 29, 2016).

27. Al-Mahdi was sentenced to nine years' imprisonment. *Al Mahdi Case*, International Criminal Court, <https://www.icc-cpi.int/mali/al-mahdi> (last visited Nov. 29, 2016).

first ever guilty plea by any ICC defendant, it was the first ever prosecution for the crime of destruction of cultural property, and it was the first ever Islamic militant that was prosecuted in the ICC. And al-Mahdi, not only has he pled guilty, but he has also promised to cooperate with the tribunal and to potentially lead the prosecutor towards other potential defendants and to reveal information about other crimes.

SCHARF: Well, why do you think he's doing that?

STERIO: Do you want to be a cynic about it, or not?

SCHARF: Yes.

STERIO: People who are cynical note that when al-Mahdi was transferred to the International Criminal Court, he was actually already imprisoned in Niger—he was sitting, serving a sentence in Niger. Some have suggested that he actually thought that serving prison time at The Hague would be much more attractive than sitting in a Niger prison. Others have also said that al-Mahdi was really the only available defendant, or the only easily available defendant to the court, and that some others who had been involved in these crimes in Timbuktu had already fled or had passed away, so he was sort-of the easy defendant. And the case, by the way, is also significant because it implied cooperation with the tribunal by not only Mali, but also Niger, where al-Mahdi had been in prison.

SCHARF: Have any of you been to the prison in Scheveningen? I've been there, too.

SCHABAS: Sure, I've been there. I mean, I went there as a visitor.

(Laughter.)

SCHARF: I'm sure that's what al-Mahdi was hoping too. Can you describe the conditions of that prison, compared to what the prison conditions might be in Niger?

SCHABAS: Well, of course it's a modern European prison, and it's well-ventilated and it's clean, and all of this.

SCHARF: They have a basketball court, right? Big screen TVs. They have an art center where you can do art and sculptures.

SCHABAS: They have all the facilities one would expect, you're quite right. It's a humane prison. It's what prison should be.

SCHARF: They have five conjugal visit sites for people to bring in—

SCHABAS: I would be careful about exaggerating the idea that this is a deluxe prison compared to what exists in Africa. Because for African defendants, it's true that the sanitary issues and all of this are much better in The Hague than they are in an African prison, but there are people who are very far from their families, the culture is different, the food is different, the environment is different. I think one could exaggerate that this is a paradise, for an African prisoner to be taken to Northern Europe and fed herring and roast potatoes.

SCHARF: A gilded cage is still a cage, is that what they say? Mark?

ELLIS: What I was going to say was—and I agree with Milena, you can see this in a cynical way, why he made that decision—but also if you read his statement in court when he was found guilty, it's actually a very moving statement. I think he's come to the recognition that he erred, and he erred in a very significant way, and he's asking for forgiveness, he wants to change his way. He knows he's not getting out of prison anytime soon, but he recognizes that he's done wrong to the people and he's asking for forgiveness. I thought it was a very powerful statement and I would hope we would see that in the future.

SCHARF: But isn't he a small fry? So, Milena, the International Criminal Court is a court of last resort; it's a court that's only supposed to prosecute the "worst of the worst." How does this guy fit into those requirements?

STERIO: Sure, so you can criticize this case on two grounds—on so-called gravity and complementarity. What you're asking about is complementarity: that the ICC is really not supposed to take over national prosecutions, it's only supposed to prosecute for countries unwilling or unable to prosecute themselves. Al-Mahdi was already detained by Niger authorities, he was already imprisoned there, and yet when the ICC made this request to have him transferred, Niger said, "Sure, you can have him." We might quibble about whether this case really satisfies the complementarity principles. On gravity issues, there's this idea that the ICC is really supposed to only look at the most serious crimes and prosecute those who are most responsible for those most serious crimes. Al-Mahdi was really not the only one involved in the destruction of these cultural, religious property. There were others, so we can question whether the crimes themselves are serious enough and whether al-Mahdi really is the one most responsible for having done these things.

SCHARF: Well, Bill Schabas then, is there an argument that he's just a scapegoat, that he's the wrong person?

SCHABAS: No, I wouldn't say that. I agree with Mark when he says that the statement and the confession and everything has the ring of being genuine. I found it quite compelling as well. I'll tell you what the real problem is with the prosecution of al-Mahdi: the Rome Statute, the legal basis for the prosecution, it actually only deals with attacks on cultural property in the context of military engagements and a battlefield context, which arguably was not the case in the al-Mahdi prosecution. Now he's pleaded guilty, so those issues have not been developed.

SCHARF: But doesn't the court have the duty to review the guilty plea and decide that it still comes within its statute?

SCHABAS: Well, they do, and we haven't seen the judgment yet. We'll see if they decide to do it, but the issue wasn't raised in the hearing.²⁸ The problem is, there's a great deal of destruction of cultural property—the cases have already been referred to, destruction by the Taliban and by al-Qaeda—that happened when they controlled territory that was far from the battlefield. You know, when I was in Athens last week, I went to another museum, where there was an exhibition by Ai Weiwei, the great Chinese artist, and it shows one of his famous works of art—it's kind of a work of art—he takes a valuable Ming vase that's 2,000 years old, and he breaks it, drops it on the floor, and it was his way of drawing attention to what happened during the Cultural Revolution in China, when there was a great deal of destruction of old—very much like what happened in Mali, where they were destroying old cultural property.

SCHARF: So this is a video of him, he buys legally—

SCHABAS: He bought it.

SCHARF:—this very expensive vase and he just throws it down and breaks it and he says, “How do you feel about that?”

SCHABAS: He's making a statement, and the problem is, that's not covered by the Rome Statute, that sort of thing. The Rome Statute is very inadequate, and it's going to be very hard to prosecute those cases. So, there's a lot more work that needs to be done developing the legal framework here in order to address these problems.

28. The ICC accepted the guilty plea and convicted Al-Mahdi. See *Al Mahdi Case*, *supra* note 28.

SCHARF: Let's turn to Shannon French. You're the author of a book called *The Code of the Warrior*, which is now coming out in a second edition, that adds a whole chapter on al-Qaeda and this whole area, right? So, you've studied military behavior, you know how the military thinks. If they give this guy the nine to eleven years the prosecutor is asking for, or even less, do you think that is going to have a deterrent effect on others, militants, in Syria and Iraq and around the world?

FRENCH: Well, first of all, as a scholar, like most of us, when I hear about the destruction of irreplaceable texts, for example, I think the punishment is much too weak, and I think it should be something medieval. But in any case, no, genuinely I don't think deterrence is the key goal here, but it never has been in the prosecution of war crimes. The key goal is to reaffirm our own values and to try to continue to build the international consensus around what is unacceptable.

SCHARF: This has been one of the most fascinating broadcasts we have had, and I'm sorry to say we're coming to the end of our time. Paul Williams, Mark Ellis, Bill Schabas, Milena Sterio, and Shannon French, thank you all so much for providing your insights on art, diplomacy, and accountability. I'm Michael Scharf. You've been listening to *Talking Foreign Policy*.