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*Prudence in International Strategy: From
'Lawyerly' to 'Post-Lawyerly'*

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Introduction

In considering the subject of how the international community should respond to the challenge of ISIS, I suspect we can all agree that it is imperative that we be informed by our recent experiences with interventions in Iraq and Afghanistan. Of course, the difficult question is how those experiences should inform us. Given my own time in Iraq and Afghanistan,¹ it is perhaps not surprising that I have a few observations from those cases that strike me as potentially relevant, to which I will turn very briefly in a moment.

But as I've already written elsewhere about some of these,² what really interests me here is what might be called the meta question of how, in general, we should learn from and integrate past experience in thinking about how best to respond to pressing present-day international challenges such as ISIS – and to big questions of international strategy defined more broadly – and considering the likely future consequences of such decisions.

Put simply, this is the question of prudence.³ While prudence has something of an archaic ring to it today and is not used as often as it once was – with the important but technical exception of the bank

¹ From 2006-7 I worked for the Treasury Department at the U.S. Embassy in Baghdad as the Financial Attaché for Iraq, and from 2010-2012 I worked for the State Department at the U.S. Embassy in Kabul as the Governance Policy Chief.

² On Iraq, see *The Treasury Approach to State-Building and Institution-Strengthening Assistance: Experience in Iraq and Broader Implications*, USIP Special Report 216, October 2008, and *The Paradox of Complexity: Embracing Its Contribution to Situational Understanding, Resisting Its Temptation in Strategy and Operational Plans*, in Christopher M. Schnaubelt, ed., *Complex Operations: NATO at War and on the Margins of War*, NATO Defense College Forum Paper 14, July 2010. On Afghanistan, see *The Rise and Fall of Afghan "Subnational" Governance in General: And The Belated Recognition of the Importance of Provincial Governance and Finance in Particular*, Saltzman Working Paper No. 25, August 2015, available at <http://www.siwps.org/wp-content/uploads/2015/08/Working-Paper-25-Pam.pdf>.

³ While the celebration of prudence as an important virtue dates to classical antiquity (notably in Aristotle's conception of *phronesis* – most commonly translated as prudence or practical wisdom – in the *Nicomachean Ethics*, 1140a24-1140b12), my own interest in prudence (and its relationship to law and lawyers) was inspired more recently by the work of Anthony Kronman, particularly his Alexander Bickel's *Philosophy of Prudence*, 94 *Yale L. J.* 1567 (1985). Kronman developed related themes in *Practical Wisdom and Professional Character*, 4 *SOC. PHIL. & POLY.* 203 (1986), *Living in the Law*, 54 *U. CHI. L. REV.* 835 (1987), and *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

regulatory context⁴ – I think its essence is both simple and of continuing relevance. My favorite description of what it entails can be seen in a wonderful 16th Century painting by the Italian Renaissance master Titian that hangs in the National Gallery in London.⁵ As described by the art historian Erwin Panofsky, in the painting we see “the countenance of a middle-aged man in full face, the profile to left of an old man, and the profile to right of a youth.”⁶ Above each of the conjoined partial portraits there is a corresponding inscription in Latin, which translated reads, “[Learning] from yesterday, today acts prudently, lest by his action he spoil tomorrow.” The title of the painting is “An Allegory of Prudence.” (See annex for a reproduction.)

In this brief article, I will make (or at least gesture towards) three points.

First, although the general quality of prudence has long been loosely associated with lawyers,⁷ I want to suggest that for a discrete period of time in American history (roughly the first two-thirds of the 20th century), one of the most distinctive contributions of a certain type of lawyer (which I will refer to in shorthand as the ‘New York lawyer-statesman’ for historical reasons that will shortly become clear) was the application of prudence not to the practice of law as such but to the broader domain of U.S. international strategy and policy. Accordingly, in the historical part of my account I focus not on the narrow lawyer’s question of what

⁴ Traditionally, “prudential” regulation has been regulation focused on the safety and soundness of individual financial institutions. More recently, and particularly since the financial crisis of 2008, financial supervisory and regulatory efforts have also been focused on protecting the financial *system’s* ability to deliver vital services to the general economy. Regulation of this sort is referred to as “macroprudential” regulation, with regulation of the older sort targeted at individual financial institutions now referred to as “microprudential.” See Dennis Lockhart, Thoughts on Prudential Regulation of Financial Firms, March 20, 2015 <https://www.frbatlanta.org/-/media/Documents/news/speeches/2015/150320-lockhart.pdf>.

⁵ The National Gallery now attributes the painting to “Titian and workshop”, see <https://www.nationalgallery.org.uk/paintings/titian-and-workshop-an-allegory-of-prudence>. I first encountered the painting as the cover illustration of John Dunn’s book *Interpreting Political Responsibility: Essays, 1981-89* (1990), and his discussion of prudence there, esp. in Chapter 12, *Reconceiving the Character and Content of Modern Political Community*, was an early influence on my thinking.

⁶ See Erwin Panofsky and Fritz Saxl, *A Late-Antique Religious Symbol in Works by Holbein and Titian*, *The Burlington Magazine for Connoisseurs*, Vol. 49, No. 283 (Oct., 1926), pp. 177-181. See also Erwin Panofsky, “Titian’s Allegory of Prudence: A Postscript,” in *Meaning in the Visual Arts* (1955).

⁷ See, e.g., Kronman: “prudence – ‘good practical wisdom’ – is and will continue to be the lawyer’s distinctive virtue....”, in Bickel’s *Philosophy of Prudence*, op. cit., at 1573 (quoting Alexander Bickel, *The Morality of Consent*, 1975, 23).

was understood as ‘lawful’, but rather on what was distinctively ‘lawyerly’ in these lawyer-statesmen’s contributions to international strategy – what I will call the quality of ‘lawyerly prudence.’

Second, the circumstances that shaped, allowed and even encouraged such contributions to international strategy by these lawyers had largely run their course by the last third of the 20th century. While other types of prominent lawyers have obviously remained extremely important in public and private affairs – for example, ‘the Washington lawyer’,⁸ or ‘the lawyer’s lawyer’ found in many cities⁹ – the specific phenomenon of New York lawyer-statesmen contributing their lawyerly prudence to international strategy that I’m describing here more or less ended as a distinctive, socially reproducing tradition, during this time. However we feel about it today, my argument goes, that ship has sailed.

Third, international strategy nonetheless remains as much in need of prudence now as ever before¹⁰ – arguably more so because of the absence from the scene for the last couple of generations of the lawyerly prudent type. But because New York lawyers can no longer serve as the primary exemplars of lawyerly prudence in this context, we now have no choice but to unpack the elements of the old lawyerly prudence and encourage their self-conscious adoption by a broader group of citizen-statespeople who have accumulated the kind of direct and relevant experience with what does and does not work in international strategy that is the necessary (but not sufficient) requirement to develop and exercise prudence of the old lawyerly kind, even though many or most of such people will not be lawyers.

In short, I want to establish the need for and preliminarily describe a new kind of ‘post-lawyerly’¹¹ prudence in international strategy. Fortunately, the international events of the last fifteen or so years have

⁸ See Edward O. Laumann, John P. Heinz, Robert L. Nelson and Robert H. Salisbury, *Washington Lawyers and Others: The Structure of Washington Representation*, *Stanford Law Review*, Vol. 37, No. 2 (Jan. 1985), pp. 465-502.

⁹ See, e.g., William Henry Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (1973).

¹⁰ See, e.g., Michael Mandelbaum, *Mission Failure: American and the World in the Post-Cold War Era* (2016)

¹¹ Note that the term ‘post-lawyerly’ is intended to capture the idea of the specified ‘lawyerly’ qualities applying to a broader population, rather than any transcendence of, let alone opposition to, the qualities themselves.

left us with a significant pool of people with experiences that make them potential candidates to exercise this post-lawyerly prudence.

II. Three Personal but Possibly Illustrative Data Points About International Strategy

Since one of the points of departure for these reflections is the future of the West's response to ISIS, I will begin with the briefest possible account of three observations from my own experience related to Iraq and Afghanistan. My intention here is not to shift the focus from today and ISIS to the past and other conflicts, but simply to provide illustrative examples of the kind of experience that I think the concept of prudence demands that we consciously integrate, along with future considerations, in deciding how to act today in response to relevant major international strategic challenges – three data points, if you will. In the interest of time I will cut to the chase and simply set out my three observations.

In 2004-5, as a lawyer in private practice with an international firm in New York, I helped advise the government of Iraq on the restructuring of Iraq's sovereign debt. The result was international agreement to cancel 80% of the country's Saddam Hussein-era debt, ultimately saving Iraq approximately \$100 billion.¹² The debt restructuring was achieved, first, through international negotiations with country creditors, and then, through international negotiations with private creditors. (And then, through yet more international negotiations with other country creditors.) By most accounts, the debt deal was a rare success of the Iraq effort.¹³ However, it is important to note that it was carried out largely outside Iraq – apart from government

¹² See Roula Khalaf, William Wallis and James Harding, Iraq debt agreement ends stand-off, *Financial Times*, November 22, 2004, p. 1, <http://www.ft.com/cms/s/0/a0174c38-3c2a-11d9-8b17-00000e2511c8.html>; Craig S. Smith, Major Creditors in Accord to Waive 80% of Iraq Debt, *New York Times*, November 22, 2004, p. 1, <http://www.nytimes.com/2004/11/22/world/middleeast/major-creditors-in-accord-to-waive-80-of-iraq-debt.html>.

¹³ See, e.g., Joanna Chung and Stephen Fidler, Why Iraqi debt is no longer a write-off, *Financial Times*, July 16, 2006: "Even though incomplete, this effort to remove an obstacle to Iraq's economic recovery has been one of the few successful projects undertaken in post-Saddam Iraq."

decisions made at pivotal junctures in Baghdad, much of the work involved took place in locations like Paris and London and Dubai and Amman, rather than on the ground in Iraq.¹⁴

Not long after, while working for the U.S. Treasury Department as the Financial Attaché for Iraq at the U.S. Embassy in Baghdad in 2006-7, I worked with others to shift Iraqi and Coalition attention away from spending U.S. money through U.S. parallel structures and towards Iraq spending Iraq's money through Iraqi institutions and processes.¹⁵ This could only be considered a success in that it involved us walking back a U.S.-centric approach that was clearly unsustainable in the medium term. However, as the current situation in Iraq underscores, it did not sufficiently strengthen Iraqi governance for Iraq to fully function as an effective state.¹⁶

Third and finally, in 2010-12 while working for the U.S. State Department as Embassy Kabul's Governance Policy Chief, I worked with others to shift Afghan and international governance efforts from a scattershot approach pursuing a wide variety of governance objectives at many levels of governance – from tens of thousands of villages to hundreds of districts to 34 provinces – to a more focused approach centered around strengthening the budgetary-governance interface between Afghanistan's central ministries and their provincial institutions.¹⁷ Again, this could only be considered a success in that it walked back international governance objectives that could not be achieved or sustained even at the height of the surge, and certainly couldn't be sustained after the drawdown. And here too, it may have been a case of 'too little, too late', as it

¹⁴ Hadi Nicholas Deeb, Project 688: The Restructuring of Iraq's Saddam-Era Debt, Cleary Gottlieb Steen & Hamilton Newsletter (Winter 2007), <https://www.clearygottlieb.com/~media/cgsh/files/publication-pdfs/cleary-gottlieb-restructuring-newsletter-winter-2007.pdf>.

¹⁵ James D. Savage, *Reconstructing Iraq's Budgetary Institutions: Coalition State Building after Saddam* (2013), pp. 202-204; Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience*, pp. 267-268; Pam, *The Treasury Approach*, *supra* n. 2; Pam, *The Paradox of Complexity*, *supra* n. 2.

¹⁶ See, e.g., Tim Arango, *With Iraq Mired in Turmoil, Some Call for Partitioning the Country*, April 28, 2016 <http://www.nytimes.com/2016/04/29/world/middleeast/with-iraq-mired-in-turmoil-some-call-for-partitioning-the-country.html>.

¹⁷ Frances Z. Brown, *The U.S. Surge and Afghan Local Governance: Lessons for Transition*, U.S. Institute of Peace Special Report 316, September 2012; Pam, *Rise and Fall of Afghan "Subnational" Governance*, *supra* n. 2

currently appears that Afghan governance has not been sufficiently strengthened for Afghanistan to fully function as an effective state yet either.¹⁸

With those contemporary points of reference in mind, let me now take a step back in history, to the early and mid-20th century.

III. The Rise of Lawyerly Prudence in International Strategy

In some respects, this is a story that has been well told elsewhere, perhaps most famously in Walter Isaacson's and Evan Thomas' book *The Wise Men*.¹⁹ Pictured on the cover of that book are Robert Lovett, John McCloy, Averell Harriman, Charles Bohlen, George Kennan and Dean Acheson: two financiers (Lovett and Harriman), two professional diplomats (Bohlen and Kennan), and two lawyers (McCloy and Acheson). But the book's preface frames them at the outset in the context of a tradition originating with McCloy and Lovett's mentor, the New York corporate lawyer Henry Stimson, and with Stimson's mentor, the New York corporate lawyer Elihu Root.²⁰ In 1899, President McKinley famously called Root to leave his practice as a very successful corporate lawyer in New York doing things like railroad reorganizations in order to come down to Washington and serve as McKinley's Secretary of War following the conclusion of the Spanish-American War and the United States' acquisition of the territories of Puerto Rico, Cuba and the Philippines.²¹

¹⁸ See, e.g., Philip Reeves, *Why Afghanistan Is Once Again On The Brink*, NPR, May 5, 2016, <http://www.npr.org/sections/parallels/2016/05/05/475928020/why-afghanistan-is-once-again-on-the-brink>; Mujib Mashal, *Afghanistan Is in Chaos. Is That What Hamid Karzai Wants?*, New York Times, August 5, 2016, <http://www.nytimes.com/2016/08/06/world/asia/afghanistan-hamid-karzai.html>.

¹⁹ *The Wise Men: Six Friends and the World They Made* (1986).

²⁰ *Id.*, pp. 28-29, 180.

²¹ Root gave his own account of receiving the offer from President McKinley in an address to the New York County Lawyers' Association on March 13, 1915. The speech was published in Elihu Root, *Addresses on Government and Citizenship* (1916), pp. 503-504, and quoted by Henry Stimson in a tribute to Root given at the Century Association, *Addresses Made in Honor of Elihu Root* (1937), pp. 24-25, and by his biographer Philip C. Jessup, *Elihu Root, Vol. 1, 1845-1909*, (1938), p. 215. Here is the key passage: "Sixteen years ago [1899], in the month of July, ... I was called to the telephone and told by one speaking for President McKinley: 'The President directs me to say to you that he wishes you to take the position of Secretary of War.' I answered 'Thank the President for me but say that it is quite absurd, I know nothing about war, I know nothing about the army.' I was told to hold the wire and in a moment there came back the reply, 'President McKinley directs me to say that he is not looking for any one who

But while the 'wise men' story is well known, two things about it have attracted less attention. First, why were so many lawyers playing prominent roles in what were clearly policy and strategy decisions? And second, what is the significance of all except Acheson having been not professionally 'native' to Washington but based instead in New York (when not serving in office) – not just originally but throughout their careers?

There are some obvious historical factors that must immediately be mentioned: Elite lawyers possessed a disproportionately large share of social/professional capital at the time;²² New York was at the time by far the most international city in the US;²³ and Washington, D.C. was not very developed prior to the New Deal and World War II.^{24 25}

knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands and you are the lawyer he wants.' Of course I had then, on the instant, to determine what kind of lawyer I wished to be, and there was but one answer to make, and so I went to perform a lawyer's duty upon the call of the greatest of all our clients, the Government of our country."

²² Using the reflexive sociology method of Pierre Bourdieu and drawing on Lauro Martines' history of lawyers in early modern Europe, *Lawyers and Statecraft in Renaissance Florence* (1968), Bryant Garth and Yves Dezalay have described a transnational pattern in the 19th and 20th centuries by which various kinds of capital (including familial, economic, learned, cosmopolitan, political, and religious) combined to create national groups of elite lawyers possessing distinctive social capital recognized as valuable in intermediating between private interests and the state. Garth and Dezalay provide a general description of this process in Chapter 2 of *Asian Legal Revivals: Lawyers in the Shadow of Empire* (2010), esp. pp. 22-23, and they apply the analytical framework to the elite American lawyers of the 20th century U.S. foreign policy establishment in their chapter "Law, Lawyers and Empire," in Michael Grossberg and Christopher Tomlin, eds., *The Cambridge History of Law in America, Vol. III: The Twentieth Century and After (1920--)* (2008).

²³ James Kurth, *Between Europe and America: The New York Foreign Policy Elite*, in Martin Shefter, ed., *Capital of the American Century: The National and International Influence of New York City* (1993), p. 73.

²⁴ At the turn of the 20th century, criticism of Washington DC's urban and aesthetic shortcomings in 1901 prompted the U.S. Senate to appoint the Senate Park Commission chaired by Senator James McMillan to make recommendations on a plan for improvements. The resulting 1902 McMillan Plan set out a comprehensive plan for the demolition of slums around the existing federal buildings, the modernization of rail facilities, the development of the Mall and the surrounding monuments and museums, and the clearance of space for future federal office buildings. However, the plan was implemented slowly over the next three decades, with major elements not completed until the 1930s and 1940s during the recovery from the Great Depression and the advent of World War II. Sue Kohler, ed., *Designing the Nation's Capital* (2007).

²⁵ It is worth noting that as this newly magisterial Washington of grand avenues, government buildings, and monuments was being realized, it was quite explicitly linked by commentators of the time to America's newly global role. Lewis Mumford was perhaps most notable among those critical of what he called Washington's new "imperial façade", and Mumford's 1924 essay of that title contained a memorable account of the relationship between Washington architecture and foreign policy. "In the restoration of the original plan of Washington, which began in 1901, the axis of the plan was so altered as to make it pass through the Washington Monument; and at the same time the place of the Lincoln Memorial, designed by the late Mr. Henry Bacon, a pupil of Mr. McKim's, was assigned. This was the first of a whole series of temples devoted to the national deities. In the Lincoln Memorial ... one feels not the living beauty of our American past, but the mortuary air of archaeology. The America that Lincoln was bred in, the homespun and humane and humorous America that he wished to preserve, has nothing in common with the sedulously classic monument that was erected to his memory. Who lives in that shrine, I wonder -- Lincoln, or the men who conceived it: the leader who beheld the mournful victory of the Civil War, or the generation that took pleasure in the mean

I have no doubt that each of these played a role. But I want to suggest that there were also at least four further elements that were also very important. I will first outline them very schematically then elaborate on them by reference to three illustrative New York lawyer-statesmen.

First, sophisticated corporate lawyers had notable experience with complexity in the real world: large, far-flung undertakings that involved dealing with multiple and competing agendas and interests, such as continental railroad mergers and reorganizations, an experience of significant practical relevance to America's new global role in the 20th century.

Second and relatedly, corporate lawyers had a heightened awareness of uncertainty inherent in undertakings with many moving parts that interact with each other and frequently produce unintended, emergent effects – perhaps the conditions of international relations *par excellence*.

Third, I think one can argue that well-educated lawyers were better prepared than many of their contemporaries in the policy elite to have some self-conscious appreciation of at least recent history as something that necessarily influences, and constrains the forms of, political change. This is one of the fundamental lessons of common law training: precedents always have to be considered (even when departing from them).

Fourth, the figures happened to live in an extraordinarily eventful time in which to gather lessons of experience, and as a result the demands of the period and the norms of the time conspired to allow them to acquire a substantial store of direct experience of strategically consequential events. These days, when we look back historically at pivotal periods of the 20th century we tend to focus most on World War II, the creation of the post-war order and institutions, and the so-called 'Greatest Generation' involved in these

triumph of the Spanish-American exploit, and placed the imperial standard in the Philippines and the Caribbean?" In Mumford, *Sticks and Stones*, 1924, pp. 64-65.

accomplishments. But I would argue that the key factor that gave rise to the tradition of lawyers acquiring and exercising prudence regarding international strategy actually started earlier, and lay with the contingent historical fact that key individual figures were the right age to be active during the two world wars (as well as during the profound economic challenges of the interwar period).

These elements can be illustrated by just the most skeletal account of three central figures, Henry Stimson (1867-1950), Elihu Root, Jr. (1881-1967), and John J. McCloy (1895-1989).

*

Born in New York City, Henry Stimson was educated at Phillips Academy in Andover, Massachusetts, Yale College (class of 1888), and Harvard Law School (class of 1890).²⁶ In 1891, he joined the prominent Wall Street legal practice of Elihu Root and Samuel Clarke. Over the course of the previous two decades, Root had earned a reputation as a brilliant and effective lawyer for some of the period's largest corporate interests, including the Havemeyer sugar refining companies (known as the Sugar Trust) and the many railway-related matters (including mergers, acquisitions and reorganizations) of William C. Whitney, Jay Gould, and E.H. Harriman. The Root & Clarke firm was among the elite group of New York law firms which, while still intimate in scale by comparison with what law firms would become in the late 20th century, were developing the sophistication to be able to focus on national and, increasingly, international business.²⁷ One of Root's biographers described his defining characteristic as having "an extraordinary talent for finding workable solutions to technical and complex problems."²⁸ And yet when Root accepted President McKinley's

²⁶ Stimson's memoir (written with the young McGeorge Bundy, son of Boston lawyer Harvey Bundy, who had been one of Stimson's key deputies at the War Department during World War II) was published in 1948 as *On Active Service in Peace and War*. See also Elting Morrison, *Turmoil and Tradition: A Study of the Life and Times of Henry L. Stimson* (1960), Godfrey Hodgson, *The Colonel: The Life and Wars of Henry Stimson, 1867-1950* (1990), and Alan Brinkley, *The Good Old Days* (review of Hodgson's *The Colonel*), *The New York Review of Books*, January 17, 1991 (collected in Brinkley, *Liberalism and Its Discontents* (1998), pp. 164-177.

²⁷ Hodgson, *op. cit.*, p. 56.

²⁸ Leopold, *op. cit.*, p. 6.

appointment as Secretary of War in 1899, he turned over primary responsibility for this sophisticated practice on behalf of extremely sophisticated business clients to Stimson and another young lawyer who had joined the firm with him, Bronson Winthrop. (In 1901, the firm would become Winthrop & Stimson.)²⁹ Stimson's mastery of a legal practice requiring an understanding not only of law but of some of the largest and most complicated business arrangements of the day – some of which, like the Sugar Trust, he subsequently encountered from the opposite side of the table when enforcing anti-trust laws while serving as the U.S. Attorney for the Southern District of New York from 1906-1909 – imbued in him an appreciation of both the complexity of national- and international-scale undertakings, and the inevitability of some irreducible uncertainty as to the outcomes of such things. This appreciation would serve him well in both his remaining legal career and in his subsequent public offices, which would include service as Secretary of War under President Taft from 1911-1913, as Governor-General of the Philippines under President Coolidge from 1927-1929, as Secretary of State under President Hoover from 1929-1933, and again as Secretary of War under Presidents Franklin Roosevelt and Truman from 1940-1945. Merely listing these offices conveys both the depth and breadth of Stimson's experience in international affairs (and we will have more to say about Stimson's second tenure as Secretary of War during WWII below).

But given his high-level roles in matters of war and peace, one anecdote is worth noting here. In April 1917, when America entered World War I, Stimson was not in public office and was once again a private lawyer and citizen, aged 49. Once war was declared, however, one of his biographers recounts, "he threw himself into the not-so-easy task of getting into uniform, and not just into uniform, but into active service abroad. For this purpose he pulled strings shamelessly. ... He got his name onto the list of officers for the artillery – his chosen branch of the service – only to have it removed personally by President Wilson's Secretary of War, Newton D. Baker.... [But] as Stimson left Baker's office after a somewhat abrasive

²⁹ Hodgson, p. 57.

encounter, the door to the office of the chief of staff, Major General Hugh Scott, was open. ... Through his intervention, Stimson found himself, on the verge of his fiftieth birthday, training ... preparatory to going to France. ... In July his battalion led the Seventy-seventh Regiment into the line with Colonel Stimson in temporary command. ... His unit was only in the line for those three weeks, but in that time, he reckoned, 'he saw enough of war and danger to be able to feel certain that he was a good soldier; this knowledge was important to him.'" In his memoir, Stimson said that of his motivations, "the basic one was that, after preaching preparedness for years and war for months, he could not in conscience remain a civilian. Though in some ways it might be quixotic for a man nearly fifty to become a soldier, it was the only way in which Stimson could feel comfortable in his mind."³⁰

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While Stimson's mentor Elihu Root was too old to be involved in both wars, Root's son Elihu Root, Jr. (born in 1881), fifteen years younger than Stimson and co-founder with Grenville Clark of his own New York law firm, Root & Clark³¹, served full-time in the WWI effort when he was already a 35-year old established lawyer, and during WWII, when he was in his 60s, played an important role advising the Army Air Forces on strategy for the European offensive. Two short anecdotes from Elihu Root, Jr.'s life will serve to illustrate the experiences that both gave rise to and embodied his lawyerly prudence in international strategy.

³⁰ Hodgson, pp. 83-85.

³¹ Elihu Root, Jr. and Grenville Clark's Root Clark law firm (later known as Root, Clark, Buckner & Howland, then as Root, Clark, Howland & Ballantine, and eventually many years later as Dewey Ballantine), was originally founded in 1909, and should not be confused with the legal practice established by the former's father after the Civil War and prior to his entry into public service, which was known around the turn of the century (after the younger Samuel B. Clarke had become a name partner) as Root & Clarke -- although Elihu Root, Jr. and Grenville Clark were happy to accept any incidental benefits from the coincidence of the two firms' names. On the origins and early history of the Root Clark firm, see Leo Gottlieb, Cleary, Gottlieb, Steen & Hamilton: The First Thirty Years (privately printed, 1983), pp. 47-53.

The first occurred shortly after Friday, May 7, 1915, when the Cunard ocean liner RMS Lusitania was torpedoed and sunk by a German U-boat off the coast of Ireland, killing some 1200 passengers, including 124 Americans. After the news made it to New York, on Sunday, May 9, the 34-year-old Root and his partner Clark were scheduled to play golf together in Westchester, NY. But rather than play golf, the two partners ended up in a long and intense conversation about what the tragedy meant for the United States' future role in the war then raging in Europe, which led them both to the conclusion that "inaction was intolerable."³² With Clark taking the lead, he, Root, and a dozen other lawyers and professional men gathered the next evening in Root Clark's downtown office to prepare a public statement. The following day a larger group of some fifty such prominent professional men met over lunch at the Harvard Club to form a more formal committee pledging support for a more internationally engaged role for the country. Finally, following consultations with the well-known Army General Leonard Wood, the group proposed that a military training camp for college students scheduled to take place that summer in Plattsburg, upstate New York, be adapted to train older professional men such as lawyers and bankers between the ages of thirty and forty (a 'Business Men's Military Training Camp') to be able to serve as the nucleus of an officer corps in the event the United States required a large-scale popular mobilization to enter World War I. In due course, the proposal of Clark, Root and their like-minded New York professional (and social) peers was accepted by the government, and the first training camp at Plattsburg took place from August 8 – September 6, 1915.³³ This novel citizen-soldier initiative (which was repeated in 1916) became known as the Plattsburg Movement and, following the Selective Service Act of 1917, it did in fact provide many of the officers mobilized for service in Europe once the U.S. entered the war. During the war Clark worked in the office of the Adjutant General responsible for mobilizing the wartime force with the rank of Lieutenant Colonel, and Root served in the American

³² Gerald T. Dunne, *Grenville Clark: Public Citizen* (1986), p. 37.

³³ John Garry Clifford, *The Citizen Soldiers: The Plattsburg Training Camp Movement, 1913-1920* (1972), pp. 54-60.

Expeditionary Force as a Major in the 304th Infantry.³⁴ (And with both Root and Clark taken away from their still young law firm by the war, Elihu Root, Sr., having recently completed his term as a U.S. Senator from New York in March 1915, gallantly volunteered to help cover the firm's business in their absence, about which Clark later said, "The truth is that the Senator pretty much set us up in business. His prestige was enormous and his kindness and interest in us beyond measure."³⁵)

The second anecdote illustrating Elihu Root, Jr.'s lawyerly prudence in international strategy came more than 25 years later, in the midst of World War II. In late 1942, the highest levels of the U.S. civilian and military war leadership were consumed with intense debates about both the relative priority that should be assigned to the different theaters of the conflict (i.e., Europe vs. the Mediterranean vs. the Pacific) and the relative effectiveness of (and thus the resources that should be devoted to) the different arms of the military (i.e., army, air forces, navy) in prosecuting a campaign in the main theaters. Perhaps the most pressing question to be resolved was the most effective way to prepare to invade and retake continental Europe. To

³⁴ "Elihu Root Jr., Lawyer, Is Dead; Statesman's Son a Civic Leader," *The New York Times*, August 28, 1967.

³⁵ Clark quote in Gottlieb, p. 48. This quote is found in Leo Gottlieb's history of the firm he and others founded in 1946, now known Cleary Gottlieb, Steen & Hamilton, because Cleary was also the direct progeny of the Root Clark firm. Five of the seven founding partners had been trained at and become partners of the Root Clark firm during the interwar period (George Cleary, Leo Gottlieb, Henry Friendly, Melvin Steen and Hugh Cox), and the remaining two (Fowler Hamilton and George Ball) had been recruited by Hugh Cox, who worked with each of them when they were serving together in government in various capacities (Hamilton in the Department of Justice's Antitrust Division and War Frauds Unit and then with the Board of Economic Warfare, including wartime intelligence service overseas, and Ball at the Lend-Lease Administration and Foreign Economic Administration, and later on the U.S. Strategic Bombing Survey). For biographical sketches of all of Cleary Gottlieb's founding partners, see Gottlieb, pp. 18-46; on the creation of Cleary Gottlieb out of Root Clark, see pp. 53-66; on the subsequent reunion in 1954 of the former Root Clark partners turned Cleary Gottlieb founders with Elihu Root, Jr. and Grenville Clark themselves, when the two senior lawyers elected to leave the firm they had founded (then in the process of transforming itself into Dewey Ballantine) and to join Cleary Gottlieb as counsel, see pp. 96-102. On Ball's WWII service, see George W. Ball, *The Past Has Another Pattern: Memoirs*, pp. 24-68; on the origins of his association with Cleary Gottlieb, see Ball, pp. 101, and James A. Bill, *George Ball: Behind the Scenes in U.S. Foreign Policy*, p. 41. On Fowler Hamilton, see also "Fowler Hamilton, 73, Is Dead, Directed A.I.D. for Kennedy," *The New York Times*, June 9, 1984; and "Lawyer Favored for Dulles Post: Fowler Hamilton Reported Choice as Head of C.I.A.," *The New York Times*, July 31, 1961. And on Hugh Cox, who left Cleary Gottlieb in 1950 for the elite Washington firm Covington & Burling because although his original understanding with the other founders of Cleary Gottlieb had been that he would relocate to New York, he could not in the end bring himself to move to New York, see the remarkable tribute to Cox published following his death in 1973 titled *The Perfect Advocate* (privately published at Christ Church, Oxford, 1976), which includes short reminiscences of Cox by, among others, five of his six original former partners in Cleary Gottlieb, former New Deal colleagues Benjamin Cohen and Thomas Corcoran, former Supreme Court Justice Abe Fortas and then-current Chief Justice Warren Burger, eminent New York lawyer Lloyd K. Garrison, poet, novelist and WWII intelligence veteran William Penn Warren, and a number of British former wartime colleagues.

help answer this question, the most senior leaders of the Army Air Forces (AAF) decided to convene a small, outside group to analyze how a sustained air campaign against strategic targets in western Europe might degrade the German war effort sufficient to enable a successful ground invasion.³⁶ Notwithstanding the existing intelligence and analytical resources already available to the AAF, the leaders were interested in getting a new perspective, and were intrigued by the nascent idea of “operations research”, which involved careful analysis of interactions within networks. They believed both that AAF personnel lacked the background to conduct such analysis and that a certain kind of civilian might be better equipped to do so. Specifically, the AAF sought “civilians with considerable experience in analyzing large, complex problems.”³⁷ Accordingly, the AAF officers charged with setting up this committee³⁸ ended up assembling a group including a disproportionate number of New York corporate lawyers, and the first person they turned to was none other than Elihu Root, Jr., then 62 years old. Also invited to join the group, which became known as the Committee of Operations Analysts (COA), were: Fowler Hamilton, the former DOJ antitrust lawyer turned “economic warfare” expert who a few years later would be among the founders of the Root Clark offshoot firm still known today as Cleary, Gottlieb, Steen & Hamilton; and Major Barton Leach, a property law expert on leave from the faculty of Harvard Law School. Rounding out the civilian members of the COA were economics professor Edward Mason from Harvard, military historian Edward Mead Earle of the Institute for Advanced Study in Princeton, and the eminent New York banker Thomas Lamont (then 73), who for some 30 years had been the international face of J.P. Morgan.

³⁶ Robert C. Ehrhart, Thomas A. Fabyanic and Robert F. Futrell, “Building an Air Intelligence Organization and the European Theater,” in John F. Kreis, ed., *Piercing the Fog: Intelligence and Army Air Forces Operations in World War II* (1996), p. 152.

³⁷ Ronald Schaffer, *Wings of Judgment: American Bombing in World War II* (1985), pp. 110-11.

³⁸ The principal staff officers involved were Colonel Byron Gates, Director of Management Control at AAF headquarters, and Gates’ executive officer, Major Guido Perera, who had been a corporate lawyer in Boston before the war.

The activities, conclusions, and impact of this Committee of Operations Analysts (which, it must be noted, also included a number of non-lawyer active duty AAF officers) are for another article.^{39 40}

But one general observation about Elihu Root, Jr.'s work on the COA is relevant to our argument. In his first-hand account of the experience, Major Perera (the Executive Officer) specifically noted Root's awareness of the inherent limitations in analysts' ability to fully predict the result of the interactions between Allied forces' successful targeting of one part of a complex system and the Axis forces' reactions to the damage done. "I recall [Mr. Root's] prophetic statement that it was impossible to determine in advance what man's ingenuity might accomplish when faced with desperate necessity. We could never conjure up all of the methods the enemy would devise to repair the damage inflicted on his vital targets, to substitute other products for those being produced there or even to manage to get along without such products." Perera also connected this awareness of inherent uncertainty that follows from interactive complexity to Root's humility:

³⁹ The AAF's nearly contemporaneous official account of the two year history of the COA (which was apparently written by Major Perera) is History of the Organization and Operations of the Committee of Operations Analysts (1944), available at <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA550760>.

⁴⁰ Such an article could also describe the periodic bureaucratic tensions between (1) the COA commissioned by HQ AAF in Washington, (2) the operations analysis section already established within the staff of Eighth Air Force in England, which was led by another Root Clark lawyer, the future Supreme Court Justice John M. Harlan II, and his deputy Leslie Arps, a younger Root Clark lawyer who would in 1948 be one of the founders of the major New York law firm now known as Skadden, Arps, Slate, Meagher & Flom, and (3) the group of mostly civilian economists assembled by the Office of Strategic Services (the wartime predecessor to the Central Intelligence Agency) as the Enemy Objectives Unit in an annex of the U.S. Embassy in London, which was headed by MIT professor Charles Kindleberger and included, among others, future National Security Advisor to President Lyndon Johnson Walt Rostow, future Deputy National Security Advisor to President Kennedy Carl Kaysen, and future Federal Reserve Bank of New York and U.S. Treasury senior official Robert Roosa. On John Harlan and the Eighth Air Force operations analysis section, see J. Edward Lumbard, "John Harlan: In Public Service 1925-1971," *Harvard Law Review*, Vol. 85, No. 2 (Dec., 1971): 372-376, pp. 373-4. On Leslie Arps, see "Leslie H. Arps Dies; A Founding Member of a Major Law Firm," *The New York Times*, July 16, 1967. On the Enemy Objectives Unit, see W.W. Rostow, "Waging Economic Warfare From London: The Enemy Objective Unit," *Studies in Intelligence* (Winter 1991), available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol35no4/html/v35i4a06p_0001.htm; and Oral History Interview with Charles P. Kindleberger, Harry S. Truman Library & Museum (July 16, 1973), available at: <https://www.trumanlibrary.org/oralhist/kindrgr.htm>.

“Elihu Root, Jr. was a very modest man but his modesty was in no sense affected; it was securely based on a thorough and penetrating intellect and a flawless character.”^{41 42 43}

In 1945, Elihu Root, Jr. was awarded the highest civilian decoration, the Medal for Merit, for his work on the Committee of Operational Analysts. In Perera’s memoir he reproduces a photo of the ceremony showing Root with Fowler Hamilton, Barton Leach and himself (all lawyers), and reprints a letter from Root to him saying “There should have been four medals or none, for if four men ever worked in complete and unstratified equality you and Bart and Fowler and I did during our years on the steering committee of the COA.”^{44 45}

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⁴¹ Guido Perera, *Leaves from My Book of Life*, Vol. 2, 1975, p. 79.

⁴² Perera also noted of Root’s younger lawyer colleague Fowler Hamilton: “It was fortunate that Fowler Hamilton was with us. ... Fowler was the model of a perfect diplomat. Had it not been for him, our relations with the civilian segment of the intelligence world would have been difficult, if not impossible. But beyond this, Fowler contributed immeasurably to the final success of the Committee’s work by his penetrating analysis of problems and good sense and judgment in conceiving solutions.” *Ibid.*, p. 87.

⁴³ Although the career of London counterparts to our New York lawyer-statesmen is beyond the scope of this article, it is worth noting here that one of Elihu Root, Jr.’s roles in his COA capacity was serving as a liaison with some exemplary London lawyers making parallel strategic contributions on the British side, perhaps most notably the distinguished lawyer, senior civil servant and, in retirement, pioneering proponent of the broad conception and use of systems thinking and operations research, Sir Geoffrey Vickers. Major Perera provided a striking account of Vickers’ and Root, Jr.’s interaction: ““One of the more amusing situations was the series of conferences between our group and Mr. Vickers [of the UK Ministry of Economic Warfare]. He and Mr. Root were perfect examples of the best of the British and American Bars. Mr. Vickers had been senior partner of Slaughter and May, one of the best-known firms of solicitors in London. He appeared as meek as a mouse but he had won the Victoria Cross in World War I. Despite his derby hat, folded umbrella and retiring manner, he was a stalwart citizen within. Conversation between Messrs. Vickers and Root consisted of hems, haws and silences broken by pungent comments.” Guido R. Perera, *Leaves from My Book of Life*, op. cit. Vol. II, p 91. See also Peter Davies, “Geoffrey Vickers and lessons from the Ministry of Economic Warfare for cold war defence intelligence,” *Intelligence and National Security*, Vol. 31, No. 6, 810-828 (2016).

⁴⁴ Perera, *Leaves from My Book of Life*, op. cit., Vol. II, p. 151.

⁴⁵ Barton Leach’s application of lawyerly prudence to international strategy was also recognized, after his death in 1971, in a touching tribute published in the *Harvard Law Review* by Gen. Lauris Norstad, who had been one of the senior AAF leaders during World War II and later served as Supreme Allied Commander, Europe (i.e., Commander of NATO). Lauris Norstad, W. Barton Leach: In His Country’s Service, 85 *Harvard L. Rev.* 4 (Feb. 1972), pp. 726-728.

John J. McCloy, the third and youngest of our exemplars of lawyerly prudence, was born in Philadelphia in 1895 to modest but proud circumstances. Here also we will satisfy ourselves with two anecdotes that illustrate how he acquired and exercised lawyerly prudence in international affairs.

Entering Amherst College in 1912, McCloy completed his junior year in May 1915 and sought out the opportunity to attend the four-week military training camp for college students at Plattsburg referred to earlier. After completing that, McCloy requested to remain for the 'Business Men's Camp' beginning the next week, where he was exposed to many of the elite lawyers and businessmen who had responded to Grenville Clark and Elihu Root's call. After graduating from Amherst in 1916, he again attended the business men's camp at Plattsburg, where he may have met first-time attendee Henry Stimson. In the fall of 1916, McCloy entered Harvard Law School, where he crossed paths with many men already on a fast track to a prominent career in law, including Dean Acheson and Leo Gottlieb, but was himself only a middling student. Over the course of his first year at the law school, news of the war in Europe became increasingly grave, and by the end of his first year, McCloy had decided to attend the Plattsburg camp for the third time in the summer of 1917 with the goal of winning a regular commission as a field artillery officer by the end of the summer.⁴⁶

He succeeded in his goal, and was invited to serve as aide-de-camp to Brigadier General Guy Preston. General Preston and Lieutenant McCoy shipped out for France with the 160th Field Artillery Brigade in July 1918. After seeing a little action before Armistice Day on November 11, 1918, McCloy was transferred to General Pershing's AEF headquarters at Chaumont, where he met many of the great leaders of the Army,

⁴⁶ Kai Bird, *The Chairman: John J. McCloy – The Making of the American Establishment* (1992)

including General John J. Pershing,⁴⁷ George C. Marshall,⁴⁸ Douglas MacArthur,⁴⁹ as well as perhaps the biggest popular hero of the war, William “Wild Bill” Donovan.⁵⁰ With most of the mission accomplished, McCloy was soon discharged, and he reentered Harvard Law School in the fall of 1919, and graduated in 1921. McCloy’s World War I experience thus constituted a precocious first step in what would be a long career of direct experience with events of great international significance.

McCloy then pursued a career as a corporate lawyer in New York, working first for the well-regarded but somewhat sleepy firm of Cadwalader, Wickersham & Taft, and then transferring after three years to city’s most advanced law firm, the Cravath firm. Cravath was then represented the vanguard of the modern “law factory”, where a small number of experienced senior lawyers each trained and put to work groups of junior associates, transmitting the firm culture of a rigid insistence on excellence.⁵¹ McCloy went on to practice at Cravath for nearly 20 years, finding both intellectually rewarding legal work and the opportunity to live and travel widely abroad – and even occasionally work on issues with an international and public dimension, as with the extended investigation he conducted into the responsibility for a notorious 1916 explosion of a U.S. arms depot on Black Tom Island in New York Harbor. In 1934 new evidence about shadowy sabotage networks during WWI allowed McCloy successfully re-open and eventually win for the Lehigh Valley Railroad

⁴⁷ Incidentally, Pershing was himself trained as a lawyer at the University of Nebraska Law School when he was assigned to the university as military instructor during the early 1890s, and at the law school formed a lifelong friendship with Charles Dawes, the prominent international banker who received the Nobel Prize in 1925 for formulating the Dawes Plan to attempt to deal with post-WWI reparations issues and went on to serve as Calvin Coolidge’s Vice President.

⁴⁸ Marshall went on to serve as President Roosevelt’s Chief of Staff of the Army throughout WWII, then as both Secretary of State and Secretary of Defense under President Truman.

⁴⁹ MacArthur served as Chief of Staff of the Army during the 1930s, commander of allied forces in the Pacific during WWII, military governor of Japan during the post-war occupation, and the initial commander of UN forces during the Korean War.

⁵⁰ Donovan, a Columbia Law School graduate who was a prominent lawyer in his hometown of Buffalo, NY, would go on during World War II to found the Office of Strategic Services.

⁵¹ However, by the time McCloy joined the Cravath firm in 1921, after founder Paul Cravath’s own WWI service as an advisor to senior U.S. and international figures who was sometimes called to operate in a quasi-diplomatic capacity, it was remarked upon that the old hard-driving and uncompromising Cravath had mellowed somewhat. His junior partner Swaine wrote that “The Cravath who returned from World War I was a much more human person than the prewar Cravath. ... He acquired tolerance. He learned that few men are unflinching in their judgements and he became less sure of his own and less insistent that everything be done his way.” Bird, *ibid.*, p. 63. See also Priscilla Roberts, Paul D. Cravath, *The First World War, and the Anglophile Internationalist Tradition*, *Australian Journal of Politics and History*: Volume 51, Number 2 (2005): 194-215, p. 199.

in 1939 a multi-million dollar award against Germany for the destruction caused by the 1916 explosion, which naturally attracted much public attention in the charged early WWII environment.

Nonetheless, when in 1940 McCloy received a call from Henry Stimson, the recently re-appointed Secretary of War⁵² to come to Washington to assist him in some War Department matters, McCloy did not hesitate to accept, shortly thereafter resigning his partnership in the Cravath firm and relocating to Washington.

It is futile for a brief article such as this to try to do justice to McCloy's WWII career as a public servant, when he was generally recognized as perhaps the most irreplaceable of Secretary Stimson's key advisors,⁵³ or to his subsequent intermittent service in important public roles after the war (including serving as the second president of the World Bank from 1947-1949, and as the first civilian U.S. High Commissioner for Germany from 1949-52); consequently, that too must be left to other articles or books.⁵⁴

⁵² The famous story goes that the origin of Stimson's second appointment as Secretary of War in 1940 (when he was 73) lay with a private conversation in May 1940 between then Supreme Court Justice Felix Frankfurter and his old Harvard Law School classmate and friend Grenville Clark about the need for a "wartime" Secretary of War (to replace Harry Woodring) given the tenor of the news from Europe at the time. Clark and Frankfurter drew up separate lists of their top choices for the post, and when Stimson's name appeared on both men's lists, they agreed immediately to promote his candidacy, with Frankfurter passing on the idea to President Roosevelt and Clark laying the groundwork with Stimson. By June 1940, Roosevelt had called Stimson to offer him the position, and Stimson accepted – with the proviso that he would be assisted in the undertaking by an immediate circle of aides including some of the sharpest younger men. These key aides turned out to be New York lawyer and judge Robert Patterson, Boston lawyer Harvey Bundy, New York banker Robert Lovett, and New York lawyer John McCloy. See Dunne, Grenville Clark, pp. 125-27.

⁵³ As Stimson's memoir discussing this period (written with Bundy in the third person) observed, "So varied were [McCloy's] labors and so catholic were his interests that they defy summary. For five years McCloy was the man who handled everything that no one else happened to be handling. He became Stimson's principal adviser in the battle for the Lend-Lease Act and it was his skillful preparation that cleared the way for the War Department's successful assumption of the whole military burden of lend-lease procurement. Later he was Stimson's chief adviser on matters connected with international relations and his agent in supervising the great work of military government. He was equally good in a complicated interdepartmental negotiation or in dealing with Congress. His energy was enormous, and his optimism was almost unquenchable. He became so knowing in the ways of Washington that Stimson sometimes wondered whether anyone in the administration ever acted without 'having a word with McCloy'...." Stimson and Bundy, *On Active Service in Peace and War* (1947), pp. 342-3. Another accomplishment worthy of note was McCloy's supervision of the construction of the new Pentagon building across the Potomac when War Department wartime needs rapidly outstripped the space available to it – an innovative project to design and build the world's most capacious office building in a record-setting short time (which was nonetheless known for a time as "McCloy's folly").

⁵⁴ As noted above, see, e.g., Kai Bird, *The Chairman: John J. McCloy and the Making of the American Establishment* (1992) and the chapter devoted to Stimson and McCloy, "Icons of the American Establishment", in Brinkley's *Liberalism and Its Discontents*

But among the things that particularly marked McCloy as exemplary, as it did Henry Stimson and Elihu Root, Jr., was McCloy's (and their) exceptional ability to move from the private practice of law at the highest levels in New York to the public practice of international strategy at the highest levels in Washington and throughout the world – and not just once, but during multiple periods of extraordinary strategic consequence. In other words, they did not begin as New York lawyers and then get pulled permanently into the Washington policy orbit, but instead, after completing their public service during periods of maximum need, returned to New York to resume exercising their lawyerly abilities in the distinctive setting of private legal practice – and all three of these figures did this at least twice (and often more than that) as they and the nation moved from WWI to the interwar period to WWII to the postwar period. By contrast, even contemporaries who also experienced these momentous events often followed a pattern of either moving permanently from their original professional base to Washington after initially being called to it by a major event like a world war, or performed a finite period of public service and then returned home for good, leaving the next crisis to subsequent generations.

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Despite the inherent interestingness of even these brief accounts of my three exemplary New York lawyer-statesmen, my point here is in many ways less about what they did than it is about when and in what changing capacities they did it. It is by no means a coincidence that I selected three New York lawyer-statesmen who each served in various capacities (reflecting in part their different ages during the key years) during both World War I and World War II – and who might thus be called members of a 'double world war generation.' One of the reasons Stimson, Root, Jr., and McCloy were able to acquire the experience they did is almost shockingly basic: they simply were born in just the right narrow window of time: the less than thirty

(1998), pp. 164-209, as well as more specialized studies such as Thomas Schwartz's *America's Germany: John J. McCloy and the Federal Republic of Germany* (1991).

years between 1867 and 1895.⁵⁵ As much as their individual qualities, it was this contingent fact that was necessary (although obviously far from sufficient) for them to see more, do more, and learn more from direct experience about what does and does not work in truly consequential international strategy than lawyer-statesmen before or since.

IV. The Fall of Lawyerly Prudence in International Strategy

It is true that one can see some continuing, partly second-hand, echoes of this rare experience in the next generation of lawyers who learned at the feet of the double world war generation.⁵⁶ Consequently one can argue that the influence continued with people born during the first decade or two of the 20th century.

⁵⁵ It goes without saying that the three I've selected as examples for this article are far from the only New York lawyers born during this window who also combined distinguished public careers spanning the two world wars with longstanding ties to New York legal practice. Among the most obvious others are John Foster Dulles (b. 1888) and Allen Dulles (b. 1893), who both practiced law in New York at Sullivan & Cromwell. See Stephen Kinzer, *The Brothers: John Foster Dulles, Allen Dulles, and Their Secret World War* (2013).

⁵⁶ The reality of, let alone the significance of, distinct "generations" in any particular context is of course a long-contested issue. Key discussions of the concept and significance of generations in the history of American foreign policy include: Arthur Schlesinger, Jr., "The Tides of American Politics," *Paths to the Present* (1952); Frank Klingberg, "The Historical Alternation of Moods in American Foreign Policy," *World Politics* 4 (January 1952): 239-373; Frank H. Denton and Warren Phillips, "Some Patterns in the History of Violence," *Journal of Conflict Resolution*, XII (June 1968); Samuel Huntington, "Paradigms of American Politics: Beyond the One, the Two, and the Many," 89 *Political Science Quarterly* 1 (March 1, 1974); Robert Jervis' chapter on "How Decision-Makers Learn from History" in *Perception and Misperception in International Politics* (1976); Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965* (1992); and Jack S. Levy, "Learning and foreign policy: sweeping a conceptual minefield," 48 *International Organization* 2 (Spring 1994): 279-312. But I want to suggest that a resolution of these particular academic debates is unnecessary for the argument of this article, which is not chiefly concerned with the lessons that different generations (however defined) may or may not have drawn from different experiences. My focus here is instead on trying to tease out a common sensibility possessed by a select group of individuals who (1) shared a common formative professional training and practice as New York corporate lawyers during a period roughly bounded by the first four decades of the 20th century and (2) were directly involved as soldiers and officials in both of the two world wars – thus allowing them, in effect, to serve as members of something like a single, unusually extended, generation. While the juxtaposition of these two pivotal sets of experiences is my own, I am greatly indebted to the work of legal historian Robert W. Gordon for my understanding of the distinctive professional ethos of elite New York legal practice of the late 19th and early 20th centuries, including the emphasis on the ideal of the "citizen lawyer". To take just one example from Gordon's many articles over the past three decades touching on this broad subject, in his 1988 article "The Independence of Lawyers," 68 *Boston Univ. Law Review* 1 (1988), Gordon describes as arguably "a true Golden Age compared to the present" the period 1900-1975 – which roughly coincides with the combined period of peak professional activity of Stimson, Root, Jr. and McCloy taken together. Other relevant works by Robert W. Gordon include "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1880- 1910," in *The New High Priests: Lawyers in Post-Civil War America* (Gerard Gawalt, ed. Greenwood Press, 1984); "The American Legal Profession, 1870-2000", in Michael Grossberg and Christopher Tomlin, eds., *The Cambridge History of Law in America, Vol. III: The Twentieth Century and After (1920--)* (2008); and "The Citizen Lawyer: A Brief Informal History of a Myth with Some Basis in Reality", 50 *William & Mary Law Review* 1169 (2009).

⁵⁷ But my sense is that the influence of the particular type of double war-learned and war-tested lawyerly prudence described here had significantly faded by the time we got to the generation whose direct strategic experience was oriented solely around WWII rather than both world wars.

I want to avoid psychoanalyzing these figures, so I will leave my comment on this generation (which might be called the 'WWII only generation' in contrast to the preceding 'double world war generation') at this: perhaps it was possible for someone to have one 'good' world war – one in which things seemed to go more or less the right way (eventually). But from my study of the experience of the double world war generation (consistent with my own lesser experience), it seems exponentially harder to have had two 'good' world wars. (Recall the sentiment attributed to Elihu Root, Jr. at the end of WWII: "it was impossible to determine in advance what man's ingenuity might accomplish when faced with desperate necessity.") Instead, that uniquely intensive degree of experience seemed to have almost inevitably underscored the difficulty of fully predicting or controlling the consequences of large-scale international actions,⁵⁸ and to have underscored the power of not only intended but also unintended consequences.⁵⁹

⁵⁷ An obvious example of a group to which this applies are the lawyers we've discussed who might be called the 'children of Root Clark' – lawyers such as George Ball (b. 1909) or Fowler Hamilton (b. 1911), who either worked directly with Root or Clark or as the close colleagues of others who had (such as the other founding partners of Cleary Gottlieb), and thus picked up through a kind of osmosis the lawyerly prudent habits of mind not only of Root and Clark and their partners, but also of the lawyers that the Root Clark lawyers themselves looked up to such as Stimson and Elihu Root, Sr., as well as the habit of thinking that they were quite capable of contributing valuable broader strategic insights and management capabilities to the world of U.S. international strategy. In an exceptional case or two this transmission mechanism might even extend to a New York lawyer born in the second decade of the 20th century, such as Cyrus Vance (b. 1917), who regarded the eminent New York lawyer John W. Davis (b. 1873) of the New York firm Davis, Polk & Wardwell as a father figure and early on worked at the New York firm of Simpson, Thacher & Bartlett. After that, however, the transmission seems to grow more faint. While many lawyers born after WWI obviously still established impressive legal practices in a proliferating number of U.S. metropolitan centers apart from New York – including Chicago, Dallas, Los Angeles and eventually most of the nation's biggest cities – by the time they came to maturity there appears to have been less of an accepted pattern of back-and-forth movement to Washington. Consequently, it became more common for ambitious lawyers either to move to Washington and not return or to simply resist the temptation of Washington in the first place.

⁵⁸ It is irresistible to quote on this proposition the unimpeachable (albeit non-lawyer) Dwight D. Eisenhower, who famously said in 1946: "I hate war as only a soldier who has lived it can, only as one who has seen its brutality, its futility, its stupidity." Address before the Canadian Club, Ottawa, Canada, January 10, 1946.

⁵⁹ The definitive description of the phenomenon of unintended consequences remains Robert K. Merton's "The Unanticipated Consequences of Purposive Social Action," *American Sociological Review*, Volume 1, Issue 6 (Dec., 1936), 894-904. See also Pam, *The Paradox of Complexity*, op. cit., at pp. 32-33. The importance of recognizing unintended consequences of public

In any case, by the 1960s the social factors that had supported a special role for lawyerly prudence in U.S. foreign and national security policy and international strategy had undergone at least four significant changes. The first was the rise of new competitors in the policy elite with their own claims to special expertise on international matters, most notably economists and political scientists.⁶⁰ Second, Washington developed as an economic and even cultural ecosystem in its own right. While Washington didn't necessarily become less dependent on importing talented lawyers (and other professionals) from New York and other major cities, the growth of the Washington economy made it both less necessary and less attractive for those imported professionals to return to where they came from after they had invested time and effort learning how government and Washington worked⁶¹. In short, what had been a 'two-way ticket' into the 1960s now increasingly became a 'one way' ticket.

Third, partly in response to the previous two factors, New York and other non-Washington lawyers tactically began to cede the territory of international policy as such to Washington, and to instead focus their public interested efforts on issues with a more explicit legal dimension. In their chapter "Law, Lawyers, and Empire," Garth and Dezelay describe the process by which New York lawyers interested in international policy issues gradually shifted their emphasis from the strategic questions over which there was now so much competition in Washington from economists, political scientists, and others, to fields such as international

policies was also a common theme in the work of the political scientist and public administration scholar Aaron Wildavsky. See, e.g., his *Introduction to Speaking Truth to Power* (2d ed., 1987).

⁶⁰ Yves Dezelay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002), and Dezelay and Garth, "Law, Lawyers, and Empire: From the Foreign Policy Establishment to Technical Legal Hegemony," *op. cit.*, p. 733.

⁶¹ In *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (2009), Robert G. Kaiser provides a rich history of the rise of the lobbying sector in Washington since WWII and particularly since the 1970s. As there has always been a high degree of overlap between lobbying and law in Washington, Kaiser's book helps explain how so many lawyers who were more traditional lawyers in their original city and perhaps originally came to Washington in order to serve in government ended up choosing to stay in Washington and join the lucrative and growing legal/lobbying sector. Among the landmarks in the creation of Washington's independent legal/lobbying sector were the establishment of notable Washington legal practices during the 1960s and early '70s by the iconic 'Washington lawyers' Clark Clifford (1906-1998), Lloyd Cutler (1917-2005), Robert Strauss (1918-2014), and Edward Bennett Williams (1920-1988).

human rights law (pp. 735-743) and international commercial arbitration (pp. 749-752) that could be more easily protected as the inherent preserve of lawyers and kept to a greater extent in New York.⁶²

Finally, the increased pace required of lawyers working for wealthy and demanding financial institution clients increased to such a degree that it increasingly required virtually all of the time of the lawyers practicing there, leaving New York lawyers working in big firms from the 1970s on little time to think big thoughts about international strategy and stand astride the Northeast corridor except on client business.⁶³ And in part to compensate for that loss of time that could be used for other things, the Wall Street legal sector became by the 1980s so remunerative that the idea of leaving it for a lower-paying government job (and uncertain prospects if one later wanted later to return) became increasingly unpopular.^{64 65} The result of all this, I want to suggest, was that by the 1980s the tradition of lawyerly prudence in international strategy had largely faded away. John McCloy died in 1989.⁶⁶

V. Conclusion: The Future of Prudence in International Strategy – From Lawyerly to Post-Lawyerly

⁶² Dezelay and Garth, "Law, Lawyers, and Empire," *op. cit.*

⁶³ Frederic S. Nathan, *Centurions in Public Service* (2010), pp. 114-5: "the size and pool of Centurions and other New Yorkers qualified for high federal posts has been decreasing because of changes in the structure and culture of the major New York law and financial firms. The enormous increases in their size and pace of work substantially reduced opportunities for their junior people to gain political experience or to be mentored toward public service."

⁶⁴ Nathan: "Not only did there become less time to be involved in public service while in private legal practice, the economic and professional leeway to take time away from New York for public service and then return to New York was generally perceived as having substantially decreased."

⁶⁵ Contrast this state of affairs with the older and more flexible expectations of legal employers and their bank clients described by Stimson in his 1948 memoir. "During my various excursions into public life I always felt that I remained a lawyer with a law firm waiting as a home behind me, to which I could return on the completion of my public task.... This feeling gave me a confidence in the performance of my public duties which was an inestimable encouragement." Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (1948).

⁶⁶ A kind of testament to the end of the old tradition can be found in Alan Brinkley's 1983 profile of McCloy, which concluded by recounting "a story making the rounds at cocktail parties in Washington and New York about an episode in the 1980 presidential campaign." As Brinkley described it, "John Anderson -- in the heat of the primaries, when it appeared he might have a chance -- called John McCloy (as political figures have been doing for forty years) and asked for some advice. He wanted the name of someone in the Stimson-Acheson-McCloy tradition, someone experienced in the corporate establishment and yet wise in international affairs, a Wall Street lawyer who might make a good secretary of state. McCloy hardly paused to think before answer: 'You won't find one. Those lawyers don't exist anymore. They're all too busy making money.'" Alan Brinkley, *Minister Without Portfolio*, Harper's, February 1983, 31-46, p. 46. Reprinted in Brinkley, *Liberalism and Its Discontents* (1998).

Let me close by returning to the specific context for the question of the contemporary utility of prudence in international strategy presented at the outset: how we should best learn from our relevant recent experiences with interventions in Iraq, Afghanistan and elsewhere in the region in deciding a current strategy for responding to the challenge of ISIS, while giving due consideration for the future. My argument has been an indirect one: that the most effective way for us to meet the ISIS challenge – or really any major challenge requiring creative solutions to strategic-level international problems, private as well as public, and economic as well as political or military – is to identify people with the right background and qualities to approach strategic challenges in a manner comparable to that which the New York lawyer-statesmen we've discussed might have used – namely, in a lawyerly prudent manner that, as in Titian's painting, learns from the experience of the past, and acts prudently in the present, to avoid spoiling tomorrow.

However, the other part of my historical argument, has been that for overdetermined reasons, the tradition of 'lawyerly prudence' in international strategy, practiced by New York (or other non-Washington) – based lawyers as I've described it here, is now, in essence, a dead letter.

Consequently, the final questions we are left with are: (1) whether any or all of the elements of lawyerly prudence are still valuable, and (2) if so, can they exist and be cultivated among a broader group of citizen-statespeople who have acquired relevant, comparably intense experience?

To answer this, recall the fundamental qualities of lawyerly prudence sketched out near the beginning of this article and illustrated through the accounts of our three New York lawyer-statesmen: (1) experience with the complexity that follows from national and international scale activity, in matters public and private, (2) a heightened awareness of the uncertainty inherent in complex (especially international) undertakings, and from that, a humble recognition that the consequences of actions cannot always be predicted or

controlled,⁶⁷ (3) appreciation of at least recent history as something that necessarily influences, and constrains the forms of, political change;⁶⁸ and (4) a substantial store of direct experience of strategically consequential events.

In fact, this last element was the spur to my first insight that eventually led to this article: that if direct experience of strategically consequential events is a necessary condition for prudence, a significant number of our contemporaries today have already accumulated quite a significant store of strategically significant experience, and done so during an even more compressed period than the double war generation (the 15 years from 2001-2016 vs. the 'double world war' generation's 30 years). To put it differently, the contingent historical fact that those of us in the relevant contemporary generations were born when we were and thus ended up in a position to be involved in the big strategic events of the last 15 years has given us the necessary store of experience during strategically significant international events to at least give us a shot at recreating a version of the old lawyerly prudence. While we haven't had two world wars, we have had two fairly large-scale (by contemporary standards) regional interventions, as well as many smaller interventions and a wide

⁶⁷ The great international relations scholar Hans Morgenthau (whose original training in Germany was as a lawyer) taught us that International relations requires no less than "cosmic humility", because "To know that states are subject to the moral law is one thing; to pretend to know what is morally required of states in a particular situation is quite another." Hans J. Morgenthau, "Another "Great Debate": The National Interest of the United States, *American Political Science Review*, Vol. 46, No. 4, 961, 983-4 (Dec 1952). See also David Wolitz's discussion of the ways uncertainty and indeterminacy leads to tragic choices where a decisionmaker must decide even while knowing that he or she lacks full knowledge of the consequences of his or her decision. "Indeterminacy, Value Pluralism, and Tragic Cases," 62 *Buff. L. Rev.* 529, 587 (2014).

⁶⁸ Note that a lawyerly appreciation of at least the recent past (because the past is one of the constraints on the future) is distinct from a true historian's detailed knowledge of history for its own sake. As such, the knowledge of the past necessary for lawyerly prudence is a much less demanding standard than sometimes suggested by eminent historians. In Ernest R. May's "Lessons" of the Past: *The Use and Misuse of History in American Foreign Policy* (1973) and Richard E. Neustadt and Ernest R. May's *Thinking in Time: The Uses of History for Decision Makers* (1986), May and Neustadt offer many examples of good and bad uses of history in foreign policy and make many useful suggestions about how to avoid common pitfalls. More recently, Graham Allison and Niall Ferguson have written an "Applied History Manifesto" and published it in the September 2016 issue of the *Atlantic* magazine. The title given the published version is "Why the U.S. President Needs a Council of Historians." Allison and Ferguson take up May and Neustadt's argument for the value of 'historian's history' being part of the policymaking process and propose to operationalize it by calling for a group of actual historians to be made a part of the White House staff. This is a thought-provoking idea, but I mention it only to make clear that the understanding of the past I have discussed here is quite explicitly the less-demanding understanding of a well-educated common lawyer rather than that of a trained historian. While knowledge of the past has inherent value and almost always has some utility, to be 'lawyerly prudent' one only has to know enough about the past to give it some consideration in seeking to avoid jeopardizing the future.

range of ongoing war-like activities. (And this is to say nothing of the potentially even more strategically consequential international financial crises in the U.S. and Europe since 2007.)

My original question was: can we take advantage of that experience? Is it possible for a critical mass of people today to also embrace the other elements of lawyerly prudence and then pull the pieces together into a coherent and self-conscious sensibility that might serve (with appropriate updates as necessary) as a kind of new (or post-) lawyerly prudence for our time?

So far, the record has not been particularly encouraging. As a final personal data point, eight years ago I gave a talk at New York Law School based on my experiences in Iraq to that point on what I thought were the mistakes and lessons of (the civilian side) of the Iraq intervention.⁶⁹ Nonetheless, just a couple of years later, I found myself in Afghanistan working with others to try to undo some strategy mistakes that sometimes seemed eerily similar.⁷⁰

Nonetheless, I think it is possible to conclude in such a way as to leave us in at least a potentially optimistic place about the future of a 'post-lawyerly prudence.' It is true that the group that exemplified these distinctive qualities in the past— namely lawyers who were products of the distinctive professional training and practice and war-time experiences recounted here – have for many reasons become since roughly the last third or quarter of the 20th century, unable to bear the same responsibility for exemplifying and exercising the qualities that they did 100 and 75 and even 50 years ago. However, it is also true that the challenging international events of the last 15 years have provided the opportunity for the creation of new groups of citizen-statespeople whose international strategic judgment, like that of their lawyer-statesmen predecessors,

⁶⁹ Jeremiah S. Pam, "State-building and the Interplay Between U.S. and Local Institutions: Lessons from Iraq." C.V. Starr Lecture at the Center for International Law, New York Law School, November 5, 2008. Notice available at: http://www.nyls.edu/center_for_international_law/cil-events/events_archive-6.h

⁷⁰ For examples, see Pam, The Rise and Fall of Afghan "Subnational" Governance in General, op. cit.

has been forged in part by a time of multiple international crises. And the direct experience of these crises has given these select citizen-statespeople some of the raw material with which it might yet be possible to self-consciously formulate a new sensibility of prudence, one that begins with the key components of the old lawyerly prudence – experience with complexity, awareness of inherent uncertainty and the related imperative of humility, appreciation of at least the recent past, and a store of hard-earned experience gained over the last fifteen years to draw on – and then adds to these any new components called for by the particularities of our own era. If we think what I've called lawyerly prudence was useful in the past, perhaps the least that can be said is that it is worth a try.

ANNEX

Titian and workshop, Allegory of Prudence, about 1550-65 (National Gallery, London)

