

RALPH NADER RADIO HOUR EP 396 TRANSCRIPT

Steve Skrovan: Welcome to the *Ralph Nader Radio Hour*. My name is Steve Skrovan along with my co-host, David Feldman. Hello, David.

David Feldman: This is going to be an incredibly important show.

Steve Skrovan: It's going to be a great show. And David, before I even introduce Ralph, I want to remind everybody of what we're going to be doing on Sunday, October 17th, and that is the Congress Club meeting. You and I will be co-hosts with Ralph. It's going to be at 4:00 PM Eastern time, 3:00 PM Central, 1:00 PM Pacific, Sunday, October 17th. And we want to hear your stories and share strategies to keep holding Congress accountable. So if you're a Congress Club member, look out for an invitation from us. And if you're not a member, become a member. Go to the *Ralph Nader Radio Hour* website. In the top right margin, click on the button labeled Congress Club to get more information. David, I'm sure you look forward to that too.

David Feldman: Now more than ever, Congress is listening. Believe it or not.

Steve Skrovan: And the main event, person you'll be able to talk to there at virtual town hall, will be the man of the hour, Ralph Nader. Hello, Ralph.

Ralph Nader: Hello, everybody. And to our listeners, hang in there. Be patient [and] listen. This is not soundbite time.

Steve Skrovan: Yeah, it's a very heady topic. And I want to open it up by saying since the 20th century, global powers have contrived a complex system of international law that defines what is and isn't "humane warfare", what is and isn't torture, who is and isn't a civilian, what is and isn't self-defense. And we can nitpick the legitimacy of any particular military action, but no matter what, the reality is brutal. On both sides of that humane line is state sanctioned death and violence. In our efforts to make war better, where does peace fit in? Have we merely bureaucratized brutality? Does pretending we can make war humane only encourage us to make more war?

Those are some of the questions we'll ask our guest, Professor Samuel Moyn. His latest book is *Humane: How the United States Abandoned Peace and Reinvented War*. And our friend and international law expert, Bruce Fein will join us to dig into the legal foundations of humane war. Regular listeners know that Bruce is a specialist in constitutional law, both domestically and internationally, and author of several books, including *American Empire, Before the Fall*. So he'll be doing some of the questioning there too of Professor Moyn. As always, we'll check in with our intrepid Corporate Crime Reporter, Russell Mokhiber. But first, Barack Obama accepted a Nobel Peace Prize with the words "We must begin by acknowledging a hard truth. We will not eradicate violent conflict in our lifetimes." Doesn't sound very dedicated to peace, David?

David Feldman: I think they're giving out the Nobel Peace Prize this Friday. I wonder if they'll give it to Joe Biden. Samuel Moyn is a professor of jurisprudence at Yale Law School and a professor of history at Yale University. His books include *The Last Utopia[: Human Rights in History]* and *Not Enough: Human Rights in an Unequal World*. His latest book is *Humane: How the United States Abandoned Peace and Reinvented War*. Welcome to the *Ralph Nader Radio Hour*, Professor Samuel Moyn.

Samuel Moyn: Thanks so much for having me. It's a privilege.

Ralph Nader: Thank you very much, Professor Moyn; he has given us permission to call him Sam during the program. This book has been superficially and incompletely reviewed in my judgment. It's very intricate; it's very granularly. It's historically documented, but it leaves a lot of questions unanswered, which we hope to

address on this program. So let me ask you the first question. What is the thesis of your book? Take your time--three, four minutes. Tell us: what is the thesis? What were you trying to convey?

Samuel Moyn: So, one American General [William Tecumseh] Sherman famously said, "War is hell," and that's still true, but I also think that since his life, and in fact, in our lifetimes, the past 40 or so years, Americans have managed to make war more humane. And they've done so by taking seriously a set of rules called international humanitarian law. This set of rules says what you can and can't do when you're conducting hostilities in war. The most famous part of that body of law is the Geneva Conventions, which got a lot of airtime during George W. Bush's presidency. But there are also rules that tell you how many civilians you can legally kill, for example, in a drone strike.

And what I try to do in the book is basically narrate the coming of humane war, which is something new in the world after millennia of brutal war and centuries of brutal American war. And what I try to argue is that it's a good thing that Americans have accepted and been made to accept more humane war. But it's gone along with more war. And I especially worry that the main body of rules in international law, which are rules about keeping war from starting, has gotten neglected in the very same era that we've struggled to make war more humane. So I suggest that we kind of try to redress the balance. Go back to the rules that people once cared about much more, that controlled force, kept wars from starting and continuing rather than focus almost exclusively on the wars that say what you can and can't do once war is going on.

Ralph Nader: In other words, try to use the existing legal frameworks as preventing war in the first place. Is that what you're saying?

Samuel Moyn: Or stopping them once they start. Now, of course the existing legal frameworks are inadequate because they've been bent out of shape and that's especially true of our constitutional arrangements and statutes like the War Powers Resolution, which as you'll remember, was passed in 1973. But on the international law side, since every war has to be legal both under domestic law and international law, the rules have almost entirely been shredded. And that has been the case whether the American president was a Republican like Bush invading Iraq illegally, or a Democrat. And I give a lot of attention for that reason to Barack Obama, who brought this new kind of humane war online with the turn to armed drones and special forces, promising that he would deploy them humanely.

Ralph Nader: Well, I can hear some of our listeners thinking the following and I want to give you a chance to respond. Sam, what do you mean by humane? Is that casualties low on our side and the other side, the adversarial side? Civilian casualties compared to military casualties. How about prolonged devastation of Iraq, destruction of its public works, its drinking water systems, electricity, street security, leading to all kinds of morbidity mortality? And of course, the cost of these humane wars is far, far greater adjusted for inflation than the cost of less humane wars, say compare the Iraq War with Vietnam or the Korean War.

And I want to tell our listeners that on page 317, this is a key statement, so you don't misunderstand what he's saying. "The bitter truth, however, is that exposing America's illicit violence in showing that humanity is just a cover - for it has not worked. The claim that the carnage is humane in form and legally contained by rules has provided it legitimacy. Ripping off the mask and revealing ongoing magnitude of violence by government actors has changed nothing." Those are Professor Moyn's words. So, could you explain what you mean by humane immediate attacks over time, costs economically on both our sides, the US side and the side of the victims of these wars?

Samuel Moyn: It's a fantastic question, Ralph. So, you know, I'm with people who say that the very phrase "humane war" is an oxymoron. War is brutal, no matter what. However, it is changing. And the imposition of rules has changed the form of war and made it less costly in some respects. Now it's a choice for Americans to avoid exposure of our troops to harm, for example, by withdrawing from the first arenas of the war on terror, as we've done in Afghanistan and Iraq, and to go on fighting with armed drones or with small teams as special forces, which have been humongously on the rise. So what I have in mind, principally, is taking care of the

victims in the course of war. That means when the enemy is captured, prisoners of war have to be treated humanely. And there was lots of litigation around that, especially under Bush because he actually captured some alleged terrorists. And when Barack Obama responded to the stink that arose around the early war on terror, he did so by not capturing anyone; and killing them instead! But he also came out and promised that he would obey the rules that protect not soldiers but civilians, that prohibit targeting civilians and prohibit excessive collateral harm.

Now you say rightly that we should attend to all the costs of war. And our ancestors who focused on the rules that try to keep war from happening were sensitive to this point. Because remember, when a war breaks out, so much is legal, including so much violence. And it was for this reason that in the United Nations Charter at Nuremberg, which was a trial of the Nazis for starting World War II, and even in the debate that I chronicle in the Vietnam War, most of the attention was on war itself, not war crimes. Because if you stop a war from starting, you stop war crimes from happening, but the reverse isn't true. And so there has been a shift. And what I try to explore is the reasons for and the consequences of that shift.

Now on your last question, I do conclude the book by worrying that if we stick to the noble agenda of denouncing war crimes and exposing the ongoing violence, in a sense we're playing into the dynamic that I'm talking about. Because the state could respond by editing out more and more brutality while keeping the wars going. And in fact, that's what happened. There was never a fundamental challenge to the war on terror. And instead, unlike with the revelations in Vietnam of My Lai and other atrocities, the revelations of Abu Ghraib and other things in our time has led to the continuation of war in a kinder, gentler form. And Obama optimized this. So maybe we ought to change our strategy. Instead of focusing only on the carnage, focus on the war itself and stopping it.

Ralph Nader: Well, we're going to get right into that because I think the emphasis of our dialogue with you, Sam, with Bruce and me, is to focus on the issue of constitutional international law as prevention in the first place. But the last words of your book in the epilogue, and I want to quote them, "Humane war is another version of the slavery of our times and our task is to aim for a law that not only tolerates less pain, but also promotes more freedom." That's what I thought our constitution and the authority of Congress to declare war or to suspend war was all about. So let me introduce Bruce.

Bruce Fein: Thank you, Ralph. And first I'd like to compliment Sam. He has a very felicitous pen. Whether you agree or disagree with everything that he has authored, it's a delight to read and you certainly should write more. You're a model for other people to emulate in terms of style. I don't want that to get unnoticed. I think that an omission of the book is exactly what you've spoken about and what Sam has mentioned. The debate at the Constitutional Convention and insistence that, and this was a unanimous conclusion, that only Congress could take us from a state of peace to a state of war--leaving the president authority to respond to so-called sudden attacks. And the reason for that assignment was that the framers deducing from all of historical experience understood that the executive branch is inherently kinetic. And [James] Madison explained all the incentives that the executive had to concoct excuses for war to aggrandize power, fame, obelisks built after you - all the things that you can imagine are attractive politically. And that Congress requiring both the consent of the Senate and the House [of Representatives] was the body that would check gratuitous wars, if you will. And that standard, if it actually was applied today, has checked wars. In the history of the United States, there have been only five declarations of war. You can count 12 because in some of the conflicts, there was more than one declaration. But in every single declaration, Congress concluded that the United States had already been attacked and our wars were in response to self-defense. Even in my view, the case for self-defense in the Mexican American War is rather thin. The same in the Spanish American War. But anyway, Congress responded accordingly only when it was thought we were actually attacked. Even most recently when President Obama sought a declaration to attack Syria after the chemical weapons issue arose, even diehard hawks like Tom Cotton and Ted Cruz refused to go along. It's just the institutional personality of Congress is one that is highly risk averse and will not get us into wars according to the framers, which is why the Declare War Clause [Article 1 Section 8] was enacted.

And the reason, in my judgment, why wars now proliferate is they're presidential wars. Certainly, since at least the Korean War, which Harry Truman styled a so-called police action. Dean Acheson [51st US Sec of State] told him, don't ask Congress to declare war; we'll have to go to Congress in the future if we want to use the war power. And since then, in my judgment, [although] the reason is very complex, the overarching impulse has been, if you're an empire, you need a Caesar; you need unity of command; so, the Constitution gives way. And since Korea presidents have used power unilaterally. Sometimes it's wholesale delegation by Congress where they say the president can use whatever force he wants to fight whatever wars he wants. We're not going to declare war. If it goes south, we'll blame it on the president. Dianne Feinstein, the Senator from California, has explained that's the mentality of Congress. So, either they don't act at all or they give an open-ended delegation. And that's why we end up with these chronic wars that I think Sam and I and you all deplore. And until we get back to constitutional regularity, I think they will continue to persist because the executive branch is inherently kinetic, and we have now a culture of empire. Our glory is not liberty; our glory is domination of the globe. And that's, I think, an issue that needs to be addressed if we're ever going to get back from these chronic wars.

I had worked with Congressman Walter Jones and Congresswoman Tulsi Gabbard to introduce a resolution that would make a presidential war an impeachable offense. Fair warning: Don't apply it retroactively. But that's the only kind of remedy in my judgment that's going to send a message to the president. No, you can't use the armed forces offensively unless you get Congress to declare it.

Ralph Nader: Additionally, it has become overt at the presidential level--Republican and Democratic. Look what [Donald] Trump said and look what Obama declared that he could kill anybody around the globe. What's your point to those points?

Bruce Fein: Yeah. I would just -- to amplify Sam, you know that the presidents now with these targeted drone strikes say that I can play prosecutor, judge, jury, and executioner, to kill anybody in the world on my say-so based upon secret, unsubstantiated evidence. John Brennan, when he was in the White House, said he was reassured because Harold Koh [legal advisor to Department of State under Obama] would make sure that "we only killed bad people rather than good ones." But that's not very assuring since the very definition of tyranny, according to James Madison, I think, it's at Federalist 51 [Papers No.], was the combination of legislative executive and judicial power in a single person. And we also have the situations where torture does continue without any oversight. The so-called Senate Torture Report [The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program] was censored by the executive branch. We still haven't seen it; we have [only] an executive summary.

Ralph Nader: And also, Trump's declaration, which might have been an impeachable offense in and of itself and was completely without accountability by the Democrats in Congress was what?

Bruce Fein: He said in July of 2019--this is the exact quote, "Then I have Article II where I have the right to do anything I want as president." I mean, basically saying, "I'm a king."

Ralph Nader: I think the concern, Sam, is the massive systemic lawlessness that Congress has allowed to happen, whether by abdication, whether by complicity, whether by unaccountable appropriations to the executive branch, and whether by jettisoning its impeachment authority. I'll just give you two examples. The Pentagon has been violating a federal statute since 1992, which requires all government agencies and departments to provide annual budgetary data that could be audited by the Government Accountability Office of Congress. And they do it every year and no Secretary of Defense has denied it. They keep promising in three years, two years, six years, through various administrations. But it's quite clear why they don't want to provide auditable data for their budget. Number one, it's a total mess with the military industrial contracting, et cetera. And number two and most important, it covers up black budgets. [expenses and spending related to military research and covert operations] It covers up all kinds of things that are illegal, criminal and violent. And the second example I want to give is that the Congress has now almost thrown away its appropriations function. Not only do the military budgets and intelligence budgets come readymade from the executive branch, but the

annual \$50 billion appropriations for Iraq and Afghanistan didn't even go through the normal [congressional House and Senate] appropriations committee hearing process. What were they called, Bruce?

Bruce Fein: overseas contingency funds. It's a slush fund for the Pentagon to fight their wars without going to Congress.

Ralph Nader: And you know, Bruce and I go up to Capitol Hill a lot. Bruce has testified over 200 times. And it's just astonishing the underbudgeted staffs of the key committees, the lack of experience, the hesitancy and the cowardliness of even progressive members of Congress who should know better, [and] the lack of understanding of congressional plenary power as they try to pawn these conflicts over to the courts, which are interminable in terms of how long they take to make the decision. That's what we're concerned about. Congress under the Constitution is supposed to be the one institution accountable to people. They know their names, 535 of them--to stop wars or authorize only wars that are in self-defense.

And much as I looked through your book, I didn't find much about the congressional aspect of it and its intertwining with the military-industrial complex. If you'll forgive me, I usually look at detailed books by starting with the index. I didn't see anything under corporations, military-industrial complex, impeachment, or even Congress. So are we making some fair points here, Sam?

Samuel Moyn: Yeah, more than fair. I really appreciate your comments, Bruce and Ralph. And you know, there's really a question about what anyone else can add. Because I venture to say that it's well understood that congressional abstention is the central phenomenon in thinking about the continuation of American war. And of course, that is in turn bound up with the military-industrial complex. But there's a library of books on war powers and their breakdown, both more popular and more professional. I do think that there's a lot of room to study in greater detail the procurement process, the annual National Defense Authorization Act rituals, and so forth, and to bring those home to the American people. I'm part of that in a small way through my work with the Quincy Institute for Responsible Statecraft, which has tried to bring together more progressive and more conservative dissidents from the orthodoxies and their respective parties to try to get peace on the American agenda.

This book is not about that because it's well-known. And what I wanted to suggest is that in seeing the trajectory of American war, we have to also identify why it's so hard for people like you and me to draw attention to the persistence of American war. I do spend a lot of time in the book looking at the 1930s and 40s, because in my judgment, that's the moment when the really pivotal event happens in the coming of World War II, because it commits the United States to providing a European piece at the price of engaging in the kind of global war that it hasn't before, notwithstanding kind of endemic violence and war on this continent, in Latin America, [and] in the Philippines before that date. And while of course, World War II was congressionally declared, there were some events in the lead-up to it, which I narrate like in the sale of destroyers to the United Kingdom that were already signs of the erosion of the constitutional war powers that Bruce mentioned. What I emphasize is that even after World War II, when you have this new global war, the wars were brutal. And partly, that brutality, if not in Korea then in Vietnam, eventually provided a way for activists to try to contain American might. And that did happen in really the main event of restriction of presidentialism, which was the War Powers Resolution I mentioned. And after that, it's really a story of the unleashing of the president, not just before 1989, but especially after when you get more and more intervention. And so the new factor I'm trying to add, as a modest author not trying to tell the whole story, is that a revolution occurred after Vietnam. And these hitherto brutal wars were made humane, including with the consent and participation of the military itself. And that matters for some because when Obama comes to give his Nobel address, which was mentioned when he gives his National Defense University speech justifying targeted killings, the overwhelming emphasis is not on the legality of these in themselves under the Constitution, under international law, but instead their conformity with humane standards under international law. So someone cares enough that our presidents in fighting illegal wars without congressional oversight have made those wars humane that Americans accept it. They've become relatively more impervious to our demand for more constraint and oversight, for using the trillion spent on American war for better purposes. And so I submit that both of you like me have a big challenge, which is that our arguments

haven't worked so far to try to bring attention to these matters. And you know, there is this paradox, which has haunted me, which is that many of us did adopt a strategy of trying to make hay of torture or of civilian deaths in the war on terror to try to reign it in. And those were good causes. They weren't about aiding and abetting the national security state. But paradoxically, the effect was to help legitimate it over the long-term. And so, you know, every author wants to say something original, not old. And that's what I've tried to do by making that smaller last point.

Ralph Nader: Well, you talk about more humane wars as a trend, which could be completely disrupted in the following ways. If we had a formidable adversary, for example, which we really didn't have in Iraq, Afghanistan, Libya or Somalia. The second is chemical and biological warfare could break out with immense casualties. The third could be accidental or deliberate release of nuclear weaponry, which could reduce whole cities to rubble. The Trident submarine, I have been told, can in one hour destroy 200 cities in the world. And so I don't know how stable this trend is that has worried you about how more humane wars can continue the condition for perpetual wars. And then if this program was being heard in Iraq or Afghanistan, they would ask, what do you mean humane war? How about all the consequences after the firing stops such as the starvation, the marauding, the lack of security, no healthcare, no medicines, inadequate food, children dying. So that's why I think if you look into the congressional and military-industrial aspect of it, you'd have made a more formidable argument that wouldn't be so easily understood. Because already, the humane aspect of it is being caricatured by some commentators. We're dealing with such entrenched illegality and lawlessness that permits all this to happen! Presidents do whatever they want. The [Central Intelligence Agency] in your book slaughtered thousands in Vietnam. Where did that charter come from? The ability of forces in the field to do what they want, very few court marshals anymore. Military law is not very active these days. And I'll just give you two quick examples. Bruce and I tried to ask the American Bar Association to take a stand on illegal wars by the presidency. In 2005, they put out three whitepapers under the leadership of a Boston lawyer, [Michael S.] Greco, charging the Bush administration with violating the Constitution. And Bruce worked on one of them. Since then, they've been completely quiet, meaning they've been completely complicit as one administration after another destroys anything resembling the rule of law! And the second one is the NSA [National Security Agency] is a gigantic agency, far, far greater in budget than the CIA. Have you looked into how accountable that is to Congress? What is the legal framework of the NSA?

Samuel Moyn: You're raising some really important concerns, Ralph. Thanks so much. So you're right that if someone says that there has been a change in history, we know that it's not permanent by definition because nothing is. But it's still reasonable to note the change and then ask, what are the conditions in which it's likely to be durable? So if you're conceding that there has been some humanization of American war under these rules of how hostilities are supposed to be conducted, then it's totally legitimate to press me on how long will it last in what kind of wars. I think they're pretty entrenched, but you're absolutely correct that the return of great power war and of course the outbreak of nuclear war would mean, not necessarily that all bets are off. I think nuclear war is obviously not going to be humane in any version. We could imagine the initial stages of World War III with China unfolding somewhat differently, because at least now, so many years later, it is prohibited to engage in morale bombing and that's widely accepted by both sides, at least at the beginning. I think that commitment would get eroded, but it matters that war has changed at least in these tentative ways. Now, you then ask, I think, also very insightfully about the extraordinary violence that so-called humane war involves. And of course, I agree. But if we only focus on how bad the current wars are, especially of course for the victims, we may miss that part of the reason that they continue is that in the long history of war, actually they're getting less violent. And that has occurred within the war on terror itself as well as over the last 50 years. I would be the last person to trivialize the brutality and violence of the Iraq War. The violence at the battle of Fallujah was some of the most vicious in the last 50 years. But Barack Obama, and indeed Bush before him, pivoted to a second form of the war on terror, precisely in response to the crisis brought on by the brutality of the first. Victims of course have every right to note the extraordinary catastrophe that they suffer. But if we want to take the violence of the American state seriously as analysts and as critics, we have to place it in its historical context. And it can be a fact, and I think it is undeniably, that not just for Americans, but for victim communities, the brutality and violence of American war has been on the decline over the long-term. And if we place that violence in turn in a global context of the history of imperial brutality and genocide, I think the point becomes even stronger. So it's really important I think, not to homogenize all wars as if they're all equally violent and all equally illegal.

Bruce Fein: I would make this observation just with regard to the culture. You remember Madeleine Albright's famous or infamous statement on CBS' *60 Minutes* that it was okay for 500,000 Iraqi children under five years old to die.

Samuel Moyn: Of course.

Bruce Fein: Because we had to do sanctions against Saddam Hussein. And the other observation I'd make, I have a colleague whose name is Doug Macgregor. He's a general. I don't agree with him on many things. He led the warfare in the first Iraq War or the war against Kuwait. And he says that the reason why things are less lethal is fighting wars is like clubbing baby seals; that our opponents are far less formidable than the Wehrmacht [the unified armed forces of Nazi Germany] if you will, or the Red Army. And it is worth mentioning that when we do have indications that the generals who are asked what our response ought to be to China, South China Sea, resembling earlier debates over Quemoy and Matsu and Taiwan, the general said, "Even if only one American survives nuclear exchanges, it's worth it." And I surely would be the last one... Remember, Douglas MacArthur wanted to use nuclear bombs in the Korean War. He wanted to basically radiate all of North Korea so it could never survive and have any habitation for 50 years. If we in fact did have a conflict in China, I have not a shadow of a doubt we would be using every weapon conceivable, including nuclear weapons, and Hiroshima and Nagasaki would look like tea parties.

Ralph Nader: The problem we have, Sam, is that the argument of self-defense has no boundaries anymore. The Israelis have never admitted to anything other than self-defense for justifying their depredations against the Palestinians and Lebanon and others. And we're using exact same excuse. Everything was self-defense with Obama. He could be prosecutor, jury, judge, executioner anywhere in the world.

Samuel Moyn: Right.

Ralph Nader: And so there is no rule of law when there is no boundary to self-defense, which is why we both concentrate on the prevention of three phenomena. One is called Constitution, the second is called Congress, and the third is called the citizenry. Now one of the people who praised your book on the back teaches at Harvard Law School in the program on International Law and Armed Conflict [HLS PILAC]. And he said, "This book is a cry for moral and political engagement that should be very widely read." How do you advise our listeners to be morally and politically engaged using those three tools, which are the Constitution, the Congress and their citizen's sovereignty?

Samuel Moyn: So, the aspiration of the book is to try to remember that Americans used to have antiwar movements before they turned to a greater concern with atrocity in war. And indeed, I think starting with some American antislavery and pacifist reformers in the 19th century, because of the influence they exercised on world thinking, was a bid to recover some American resources for a future antiwar movement that we don't have right now. And I'd also insist that we do have to revisit that world historical turning point when Americans pivoted from a less interventionist politics to a global hegemony in the 1940s. That's what's at stake for Americans and those outside of America--not just to focus on your three Cs, but also principles of international order. And my claim is a narrow one, that we have some on the books and we could have better ones, both at the constitutional level and at the international level. But part of the problem can be the law. Because even as we've forgotten rules that try to interdict war itself, there actually has been an effort to make the law calling for humane war more effective in American conflict. And so part of the issue is where does our focus lie? But if you're asking where you get an antiwar movement, how you call it back from the dead, you've in a way been struggling on that for longer than I have. And I'm merely trying as a historian to narrate some of the kind of events that made it prominent once and have led to its obsolescence lately. And so, the grassroots is where the reform comes from. And I think it's really, in the end, some kind of cultural or spiritual reawakening that would have to happen. And in our new technological environment, how you get that done when obviously technology is mostly serving the project of war, not allowing people to band together to resist it--I'm not yet sure.

Ralph Nader: Let's look at one institution that might connect with what you're saying. The law schools of America, over 200 of them, and of course you teach at Yale and we're both graduates at Harvard. In 2011, Mr. Brennan, who was the intelligence advisor to Barack Obama, came to Harvard Law School. And it was a standing-room only reception. And he made a deliberate speech about how everything the Obama administration was doing overseas in terms of military conflict [and] drone attacks, was legal, accountable and screened case by case. And [he] didn't mention any kind of gray area, any kind of how you define self-defense by talking about preemptive war or preemptive attacks far from imminent peril. And he got a standing ovation and the dean led it. Over a year and a half, Bruce and I went up there to respond to Mr. Brennan. And there was nobody from the administration or the dean in that room, just students. Go to Yale, we have the perplex paradox of Harold Koh, the dean of Yale Law School at one time, and what he did at the State Department. The law school curriculum does not spend much time on Congress. They spend a lot of time on the administrative agencies [and] on the courts. It's like they're ignoring Congress. Bruce, do you want to pitch in on this and elaborate?

Bruce Fein: There are several occasions, Sam, when I, and sometimes with Lou Fisher; that name may be familiar. He was at the Congressional Research Service for many, many years.

Samuel Moyn: Yep.

Bruce Fein: They're expert, and he has testified on these issues. We proposed to Harvard's Dean Martha Minow, who was then the incumbent, that we wanted to teach a course on war powers and how historically the Harvard Law graduates have been foremost in discarding the Constitution. For example, John McCloy, made the infamous statement about the detention of the concentration camps for Japanese Americans in World War II, "The Constitution is just a scrap of paper when it comes to war." A Harvard Law graduate made that statement. Dean Acheson as well with regard to "no, we can't declare war in Korea because they might turn us down."

Ralph Nader: Mike Pompeo.

Bruce Fein: Yeah. Mike Pompeo was the same. Anyway, the roster is long, John Bolton as well. He's a Yale graduate, so he's the war monger from Yale. But the fact is the universities and the law schools have been totally indifferent to teaching about war powers and separation of powers and the dynamic of Congress. There's just there's no resonance at all. You just say, we've looked at it, but we just decided no. Or they don't even give you a hearing, whatsoever. And it's truly stunning since this is, as you well know, from Cicero, in times of war, the law is silent. So, you'd figure the lawyers would be the first ones to say, "Wait a minute; we've got to really enforce the law when it comes to how and when you cross the rubicon from peace to war." But there's just total and complete indifference and rejection of these proposals. And this is not by night school law people. These are those who write out an agenda, this is what we would teach. Youngstown Sheet and Tube [Company], I remember when I was in the Office of Legal Counsel, you'd always put out Curtiss-Wright Export Corporation. That was cited for every conceivable executive branch illegality that was imaginable and teach them, "Was this right or was this wrong?" Just zero interest and as Ralph has recounted, the American Bar Association, no interest either.

I attribute this, Sam, to the casting aside of what our liberty used to be our glory. Now you would take it back to the Korean War when then Senator [William] Jenner summed it off. "We are the new chosen people. It would be our duty to go abroad." It's the white man's burden to borrow from [Rudyard] Kipling and civilize these people with torture and club them into Western civilization. And when we adopted an empire mentality, it was just a matter of time that the culture would corrode the separation of powers. I say, because you got to have a Caesar to run an empire.

Ralph Nader: Can you do anything at Yale about courses on Congress and war powers and separation of powers?

Samuel Moyn: So, you know, Ralph, you may not remember, but you and I were first in touch when I published a piece in the *Chronicle of [Higher] Education* entitled “Law Schools Are Bad for Democracy” and it made the rounds and you and I had a chat about it. And I'm certainly on board with a critique of American elite formation, especially at the so-called pinnacle institutions where I happen to have taught, and of which we're the products. There are a couple of things though. So, I think there's actually lots of attention to war powers and as much to international law at these institutions for students who are interested. I think what we're dealing with is a bipartisan agreement since the 1940s to become, in Bruce's terms, an empire, a global one, not just a kind of hemispheric one or Pacific one. And since 1989, when we would have expected that to be rethought, we've actually seen more military intervention, not less, and again, on a bipartisan basis and with lots of cited rationales including humanitarian intervention, not just an increasingly elastic definition of self-defense. Where I think I probably just disagree slightly with both of you is that it's really pressing to say, we want a different understanding of the law we have, and we want different law. But the truth is that the training that these elite institutions give teaches you how to make the law compatible with a lot of different agendas. So, you can rest content in the belief that the Constitution or some other set of laws prohibits empire. But the truth I think, and as I try to narrate, including in looking at the fate of self-defense in our time, is that law is a tool of empire. And law adjusts to imperial imperatives. And so, I think you need to attack this phenomenon politically and mobilizationally. Because change is not going to come out of tweaking the curriculum at Harvard and Yale Law School. It's not a character flaw in elites. It's the fact that it serves elites to be compliant with the American state. And I think we can have some institutional forums to place more checks on the executive branch. I think we've learned in the last generation that the Office of Legal Counsel, which Bruce mentioned, and which is supposed to be independent or semi-independent, is basically a source of permission slips for the president, at least in the war setting, to do whatever he wants. Some have proposed a legislative version of the Office of Legal Counsel so at least there can be independent advice for Congress about what the Constitution means, what the War Powers Resolution means. And more broadly, I think a source of change has to be the population at large. And we've seen that. I respect everything you've said, but we can't edit out of our account that starting with Barack Obama, three presidents in a row have won by coming out selectively against American war. Obama won in the primaries against Hillary Clinton on that basis. Donald Trump, much as we might despise him, and I do, rose against his fellow Republicans by lying in February 2016, that he had always opposed the Iraq War, which was an extraordinary thing for a Republican to say at that date. And it was initially thought it would cause his defeat, but actually, it caused his victory. And then once again, I think his call for limits to American war helped him against Hillary in the general election. And finally, Joe Biden promised to end the forever war in his election campaign, even though he has shifted to a purer form of endless counter terror on the job. And so I think there's traction to be gained. And I think we're seeing in the dissent against the Yemen War, including by prominent legislators, some bipartisan interest in not pulling the plug, but introducing constraints. And that's where I would focus. Because only when politics demands it do lawyers do the right thing. But we may just differ about that [Moyn chuckles]. I'm all for critique of the law schools, but the law schools are not immoral in a void. They require a political context to change.

Ralph Nader: To be sure. Let's go down to one specific case that I think might illuminate some of the things you've been writing in your book. We've been talking with Professor Samuel Moyn, professor of law at Yale Law School, professor of history at Yale University, the author of the new book, *Humane: How the United States Abandoned Peace and Reinvented War*. Trump gave the order to the surprise of our military to kill the top Iranian General [Qasem] Soleimani when he was at the Iraq airport in Baghdad. What if the Iranians evened the score by taking the life of our top general? What do you think would have happened to this trend toward humane war? And give us the legality of what we did against General Soleimani.

Samuel Moyn: Right. So, I narrate that episode at the beginning of the epilogue, in part because Donald Trump inherited the massive war powers that we've been discussing on this podcast that Democrats and Republicans gave him by creating this all-powerful office. People actually did get upset by the Soleimani strike. And there was, I think, an unprecedented national debate, unprecedented since the Vietnam War around the legality of that strike. Not because it was brutal, but because it was illegal as such. And it clearly was. And we know that because Trump's lawyers, who were not very good, produced about 13 different justifications in the weeks that followed, and partly because the first 12 were so easily rejected. And it illustrated why our ancestors cared so much about constraints on war. Because of course, to the extent they break out, they're not just brutal, but they

escalate. Now I'm not suggesting that a regional war, had it broken out, which seemed like a near thing at the time, would have been the kind of World War III you kind of anticipated earlier, Ralph, where it would have been existential leading to nuclear exchanges and the kind of immense brutality that hasn't been seen since Vietnam or earlier Pacific wars in American history. But I do agree that that would have been an event that would have reminded us why interdicting war in the first place, keeping presidents in check, is so essential. And it raises this question: Should we revisit the emphasis that was placed on the conduct of hostilities? Because in the last 20 years, that's been the topic. Not in your podcasts and speeches and activities, but in the mainstream of debate about American war as I demonstrate in the book. So maybe in the Soleimani strike and the very different debate that arose in its aftermath, there's the hint of a road back. But in the end, I think we do have to find a mass movement that will challenge that kind of interventionism on a global basis without constraint that America kicked off starting with World War II. And how that will transpire, I don't think we're in a position to know, but I think it's a really important question on which you two have been working. And it's a really important one.

Ralph Nader: If we could use the word “stability” of the American empire, it can be completely upended by retaliation. That's the point I was asking you about. If the Iranians evened the score by taking the life of the top US general in the United States, then what happens to the analysis?

Samuel Moyn: Well, so under international law, the response to an illegal war is not belligerent reprisals. There used to be a concept, and maybe it persists in what international lawyers call countermeasures, that you could break the law in order to punish prior lawbreaking. But you know, we're in a system where you can't go to the police in the international system because the United States can always exercise its veto on the [United Nations] Security Council. It can never be deemed an aggressor in the international system. If you're talking about like where would retaliation lead, well in kind of the unfolding of a war, while as I said, I think it might well have led to a regional war, it still would have been lopsided because the Iranians don't yet have a nuclear weapon and their military pales in comparison to the one, we've built simply by spending so much on ours for so long. But America is in decline and China is on the rise. So, your question to me is really pertinent, because the kind of lawbreaking in the international system that America has been engaged in for so long, even while it has tried to make its wars more legally humane, seem to me dangerous. Because it's setting precedents for China and other future competitors to do to us what we've been doing to the world for generations now.

Ralph Nader: Well, thank you very much, Professor Samuel Moyn, who is author of the new book, widely reviewed, *Humane: How the United States Abandoned Peace and Reinvented War*. This is certainly a subject to be continued. And I would only wish that some of the public radio and public broadcasting [stations] would devote more time to the issues that we have just discussed. Thank you very much, Sam.

Samuel Moyn: Thanks for having me. It was a privilege.

Steve Skrovan: We've been speaking with Professor Samuel Moyn. We will link to his new book, *Humane*, at ralphnaderradiohour.com. Let's take a quick break and check in with our corporate crime reporter, Russell Mokhiber.

Russell Mokhiber: From the National Press Building in Washington, D.C., this is your *Corporate Crime Reporter* “Morning Minute” for Friday, October 8th, 2021; I'm Russell Mokhiber. David Strickland, who was the head of the National Highway Traffic Safety Administration [NHTSA] under President Obama and most recently was staff director of the Democratic controlled Senate Commerce Committee, is moving to General Motors [Company]. The move coincides with an announcement from NHTSA that it will open a new probe into potentially defective Takata airbags. Strickland was at NHTSA when the Takata case was percolating. “David Strickland is the grand master of Washington’s revolving door,” said Jerry Cox who blew the whistle on the Takata scandal in his book, *Killer Airbags[:The Deadly Secret Automakers Don't Want You to Know]*. “Strickland ran NHTSA when an investigation into Takata’s airbags closed before it got started. He went to work for car companies, then returned to the Senate to conduct quote ‘oversight’ of the agency he led. For the *Corporate Crime Reporter*, I'm Russell Mokhiber

Steve Skrovan: Thank you, Russel. I also want to thank our guest again, Professor Samuel Moyn. For those of you listening on the radio, that's our show. For you, podcasts listeners, stay tuned for some bonus material we call "The Wrap Up". A transcript of this show will appear on the *Ralph Nader Radio Hour* website soon after the episode is posted.

David Feldman: Subscribe to us on our *Ralph Nader Radio Hour* YouTube channel. And for Ralph's weekly column, it's free, go to nader.org. For more from Russell Mokhiber, go to corporatecrimereporter.com

Steve Skrovan: For a copy of *The Day the Rats Vetoed Congress*, go to ratsreformcongress.org. And also check out *The Ralph Nader and Family Cookbook: Classic Recipes from Lebanon and Beyond*. We will link to both of those on ralphnaderradiohour.com.

David Feldman: Remember to join us on Sunday, October 17th, at 4:00 PM Eastern time, 3:00PM Central time, 1:00 PM Pacific, for our very first virtual Congress Club meeting. We want to hear your stories and share strategies to keep holding Congress accountable. And Ralph will be there.

Steve Skrovan: That's right. So if you're a Congress Club member, look out for that invitation from us. And if you're not a member, become a member. Go to *Ralph Nader Radio Hour* website, and in the top right margin, click on the button labeled Congress Club to get more information.

David Feldman: The producers of the *Ralph Nader Radio Hour* are Jimmy Lee Wirt and Matthew Marran. Our executive producer is Alan Minsky.

Steve Skrovan: Our theme music "Stand Up, Rise Up" was written and performed by Kemp Harris. Our proofreader is Elisabeth Solomon. Our associate producer is Hannah Feldman. Our social media manager is Steven Wendt.

David Feldman: Join us next week on the *Ralph Nader Radio Hour* when we'll welcome Erik Edstrom to discuss his new book, *Un-American: A Soldier's Reckoning of Our Longest War*. Thank you, Ralph.

Ralph Nader: It's an amazing revelation coming up, listeners. And thank you, everybody. And our listeners at WPKN in Bridgeport [CT] may want to extend this conversation over at nearby Yale Law School in New Haven. The conversation with Samuel Moyn, other professors and law students. I'm sure they'll be receptive.