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## The Agenda

### **Call ISIL's religious war what it is: Genocide**

Ahead of a March 17 deadline, the State Department is waffling over an easy legal decision.

By ROBERT DESTRO and MARTIN NUSSBAUM | 03/15/2016 06:44 PM EDT

“The lawyers are looking at it.” That, in so many words, has been the response given by Secretary of State John Kerry and the White House every time they have been pressed on whether the State Department will call the Islamic State’s war on religious minorities “genocide.”

Kerry faces a congressionally mandated deadline on Thursday to make this determination. But already, unnamed officials have said he is unlikely to meet the deadline. On Monday, the House took the unusual step of weighing in on the issue, voting 393-0 to declare it genocide.

The administration’s lawyers are right to look carefully at ISIL’s behavior. That’s what good prosecutors do. But the implication that a genocide designation is a difficult call is simply untrue. Prosecutors have enormous discretion to investigate and indict, and they regularly file criminal charges based on far less evidence than ISIL posts daily on social media. There is no excuse for Kerry to miss Thursday’s deadline.

On March 9, we submitted a legal brief to Kerry that explains the duties of State Department lawyers to the president and secretary of state under Title 22 of the U.S. legal code and the Genocide Convention Implementation Act of 1987. Their responsibilities are indistinguishable from those of a prosecutor.

Genocide is a statutory crime under federal and international law. There is a mountain of evidence that ISIL and its leaders are engaged in murder by every available means, including beheading and crucifixion; in rape; in sex slavery; in pillage; and in possible uses of chemical weapons.

The State Department’s duty is to “collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law.” After analyzing the available evidence, the Office of the Legal Adviser is obligated to suggest to the secretary and president “what actions can be taken to ensure that ... the leaders or senior officials of [ISIL] who are responsible for crimes against humanity, genocide, slavery, or other violations of international humanitarian law ... are brought to account for such crimes in an appropriately constituted tribunal.”

In plain English, this means that all Kerry’s lawyers need to decide is whether there is “probable cause” (reasonable grounds) to believe that ISIL and its leaders are committing the well-documented murders, rapes, and kidnappings with the specific intent to destroy religious minorities “as such.” That’s it.

If the answer is “yes,” the minimum recommendation would be that the president authorize the Justice Department to open a formal criminal investigation and to work with nations in the Middle East to collect and preserve relevant evidence before it is lost. It would also mean recommending that the president authorize Samantha Power, the U.S. ambassador to the U.N., to collaborate with other nations to create and staff “an appropriately constituted tribunal” to prosecute and try these criminals.

Legally, it doesn't get any easier.

Our legal brief looks carefully at the law governing genocide and at a sample of the available evidence. It suggests there is indeed “probable cause” to believe ISIL is committing genocide as it systematically targets religious minorities for elimination, and actively seeks to bring about the destruction of entire Christian communities in Iraq and Syria and elsewhere. “Probable cause” is the lowest standard of proof. It is used at the starting point of a criminal legal process. We cannot think of a single prosecutor — anywhere — who would refuse to move ahead with a formal investigation on these facts.

We can, however, suggest a few reasons why the State Department's lawyers are reluctant to use the “G-word.” They have steadfastly refused to use it for generations.

In her 2002 book, “A Problem From Hell: America and the Age of Genocide,” Power wrote that U.S. government “responses to genocide were astonishingly similar across time, geography, ideology, and geopolitical balance. ... The personalities and geopolitical constraints influencing U.S. decision-making have shifted with time, but the United States has consistently refused to take risks in order to suppress genocide.”

Having looked at the law, the evidence in the comprehensive 280-page report submitted to the State Department by the Knights of Columbus (for which we serve as counsel), and the ethical duties of government attorneys, it is our legal opinion that the State Department's Office of Legal Adviser is legally and ethically obligated to make a determination that probable cause exists to believe that genocide is occurring. They should then declare, as a matter of law, that genocidal acts against Christians and other religious minorities will be referred for investigation and further action in an appropriate legal setting.

History is a final, and often harsh judge. Decades later, we speak of America's moral and legal failures in the genocides from World War II to Cambodia to Rwanda. The State Department's lawyers still have time to avoid a similar failure regarding ISIL's crimes in Iraq and Syria.

With the bar so low, with the law so clear, with the evidence so overwhelming, and with the international community and the House of Representatives so united in their judgment that genocide is occurring, the burden shifts to the lawyers to explain why they are exposing their clients — Secretary Kerry and President Barack Obama — to the charge that they “did nothing” in the face of evil.

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## **America's government is getting old**

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## **Innovation vs. the ants**

When cutting-edge research labs get old, they face a new kind of challenge: Upkeep is expensive, and it's not sexy.

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## **A 40-year 'conspiracy' at the VA**

By ARTHUR ALLEN

## **The little-noticed bombshell in Trump's immigration order**

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## **Obamacare, the secret jobs program**

By DAN DIAMOND

## Is Washington creating more Flints?

The untold story behind this year's water scandal is that D.C. has been turning its back on America's crucial water systems, leaving cities and states with the bill.

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## **How Vermont beat Big Food**

By JENNY HOPKINSON

## **A new Obama emissions play**

By MICHAEL GRUNWALD





## **Virtual schools are booming. Who's paying attention?**

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## **Obama's effort to 'nudge' America**

By DANNY VINIK

**THE DEBRIEF**

**FEMA head Craig Fugate explains what keeps him up at night**

## **Uber vs. Laws**

Will the “sharing economy” help kill off government regulation?

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## **Leaked: What's in Obama's trade deal**

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## **I became a wired wonk**

## **The U.S. government's predatory-lending program**

By MICHAEL GRUNWALD

Billions over budget. Two years after deadline. What's gone wrong for the 'clean coal' project that's supposed to save an industry?

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# **The anti-innovation presidency**

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# **The charter war**

By COLIN WILHELM

## **Obamacare's sinking safety net**

By PAUL DEMKO

## **Why the GOP is trying to stop the Pentagon's climate plan**

By DANNY VINIK



## **Inside the war on coal**

By MICHAEL GRUNWALD

## **The fight over fixing Puerto Rico**

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## **Inside the NSA's hunt for hackers**

By **DARREN SAMUELSOHN**

## **Obama: Time to tax oil**

By MICHAEL GRUNWALD

## **NASA chief: We could be on Mars in the 2030s**

By **DARREN SAMUELSON**

## **How to kill an agency**

Ben Carson wants to end the VA? Good luck. Here's why it's nearly impossible.

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# **Donald Trump's imaginary immigration haul**

By DANNY VINIK

# **Bank of Asphalt**

By **DARREN SAMUELSOHN**

# The Capitol is not connected to the Internet

It's true. Here's why.

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## **The Obamanomics legacy**

A Q&A with Jason Furman.



## **What Jared's office actually does**

By NANCY SCOLA



## **Congress tries to hide a submarine**

By MICHAEL GRUNWALD

## **How Trump's attack on Mexico could hurt border security**

Mexico has stepped up its cooperation—a lot. What happens when the president says it's shirking?

By DANNY VINIK

## The wrong state to have an accident

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By **RACHANA PRADHAN**

## The holes in the overtime rule

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## **Who's watching the chickens?**

By DANNY VINIK







## **Al Gore: Optimist?**

By MICHAEL GRUNWALD

## The new Obama rule that's making stockbrokers swear

Whose interest is a retirement adviser supposed to serve?

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## **The Senate's experiment with cannabis**

By **DARREN SAMUELSOHN**

## **Trade with Cuba? We already do \$300 million worth**

A look inside our little-known export pipeline suggests who might benefit when the embargo lifts.

By **DANNY VINIK**

## The government program with a 116% default rate

By MICHAEL GRUNWALD

## **Meet your robot adviser**

By **PATRICK TEMPLE-WEST**

## Under Trump, regulation slows to a crawl

The president promised a less active government. Data show something starker: It has almost ceased issuing significant rules entirely.

By DANNY VINIK

# **The trade war comes to the prairie**

By CATHERINE BOUDREAU

## **Trump's \$440 billion weapon**

By DANNY VINIK

## **Bitcoin vs. the SEC**

By **BEN SCHRECKINGER**

## **Trump's big mistake on diplomacy**

By DANNY VINIK

# **The Flint of California**

By PATRICIA LEIGH BROWN

# **The two words that rewrote American water policy**

By ANNIE SNIDER

## **The Panama Papers: Where are the Americans?**

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## **Our best frenemy**

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By JOSEPH MARKS



## **Congress just outlawed changes to the \$1 bill**

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# **The publicly funded reports you can't read**

By **DARREN SAMUELSON**

# **The Katrina disaster that hasn't ended**

By MICHAEL GRUNWALD



## **The 7-year-old government loan program that has never made a loan**

By DANNY VINIK

# **The Internet of What?**

An Agenda investigation

By **DARREN SAMUELSOHN**



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