Volume 206 **Winter 2010**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

Department of Army Pamphlet 27-100-206

MILITARY LAW REVIEW

Volume 206 **Winter 2010**

CONTENTS

ARTICLES

BOOK REVIEWS

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-206, Winter 2010

MILITARY LAW REVIEW—VOLUME 206

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties.

SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are $20 each (domestic) and $28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 206 MIL. L. REV. (page number) (Winter 2010). Each issue is a complete, separately-numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service, The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

SUBMISSION OF WRITINGS: Anyone may submit for publication consideration, articles, comments, recent development notes, and book reviews in Microsoft Word format to the Senior Editor, *Military Law Review*, at TJAGLCS-MLR-Editor@conus.army.mil. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Senior Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, 22903-1781. Written submissions must be accompanied by an electronic copy on a 3 1/2 inch computer diskette or CD, preferably in Microsoft Word format.

Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010), copyrighted by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to the *Military Citation Guide* (TJAGLCS 15th ed. 2010).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title,

present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If submitting a lecture, or a paper prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the lecture or the date and source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of the Department of Defense, The Judge Advocate General, the Judge Advocate General's Corps, or any other governmental or non-governmental agency.

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department, Lieutenant Colonel Jack Ohlweiler; and the Director, Professional Communications Program, Lieutenant Colonel Jonathan Howard. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. We accept submissions from military and civilian authors, irrespective of bar passage or law school completion. In determining whether to publish an article, note, or book review, the Editorial Board considers the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When the Editorial Board accepts an author's writing for publication, the Editor of the *Military Law Review* will provide a copy of the edited text to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review*.

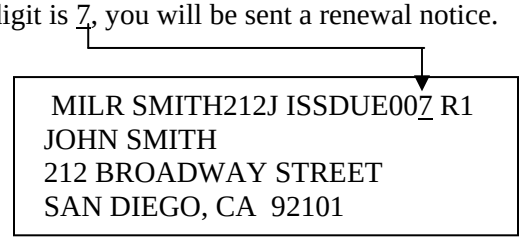
BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at TJAGLCS-Tech-Editor@conus.army.mil. Bound copies are not available and subscribers should make their own arrangements for binding, if desired.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.



The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

United States Government
INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing
Code: 5937

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the ***Army Lawyer*** (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the ***Military Law Review*** (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

MILITARY LAW REVIEW

Volume 206 **Winter 2010**

BUILDING A BETTER CYBERSECURITY ACT: EMPOWERING THE EXECUTIVE BRANCH AGAINST CYBERSECURITY EMERGENCIES

MAJOR JOHN S. FREDLAND*

I. "An Order of Magnitude Greater Economic Impact Than 9/11"[1]: Introduction

On July 19, 2008, a salvo of digital commands bombarded the official website of Georgian President Mikhail Saakashvili.[2] Bearing innocuous-sounding names like "flood http www.president.gov.ge/," "flood tcp www.president.gov.ge," and "flood icmp www.president.gov.ge," the commands rapidly rendered the presidential

* Judge Advocate, U.S. Air Force. Presently assigned as Staff Judge Advocate, National Air & Space Intelligence Center, Wright-Patterson Air Force Base, Ohio. LL.M., 2010, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D., 2000, Vanderbilt University Law School; B.A., 1997, Rice University. Previous assignments include Deputy Staff Judge Advocate, 92d Air Refueling Wing, Fairchild Air Force Base, Washington, 2007–2009; Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency, Bolling Air Force Base, D.C., 2005–2007; Area Defense Counsel, Air Force Legal Services Agency, Yokota Air Base, Japan, 2004–2005; Chief of Civil Law, 374th Airlift Wing, Yokota Air Base, Japan, 2003–2004; Chief of Legal Assistance, Operations Law and Claims, 12th Flying Training Wing, Randolph Air Force Base, Texas, 2000–2003. Member of the bars of Pennsylvania, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The author would like to thank Major Robert Barnsby for his guidance, advice, and friendship throughout the writing process. He would also like to thank Major Christopher Ford and Major Benjamin Grimes for their insightful comments. Finally, the author would like to thank his parents, John W. Fredland and Kathleen Terleski, for their love and support.

[1] Nathan Gardels, *Mike McConnell: An American Cyber Expert on Cyberwar*, http://www.boozallen.com/consulting-services/services_article/42400037 (last visited Nov. 24, 2009).

[2] Posting of Steven Adair to Shadowserver Foundation, http://www.shadowserver.org /wiki/pmwiki.php/Calendar/2008720 (July 19, 2008, 21:57 EST) (on file with author).

website inoperable.[3] A cyberattack[4] had compromised Georgia's information infrastructure.[5]

Fortunately for Tbilisi, it had allies in cyberspace. An on-line cyberwatchdog group identified a U.S.-based server[6]—most likely infected by malicious code as a precursor to the distributed-denial-of-service attack[7]—as the seemingly unwitting command and control host for the cyberattackers' offensive.[8] Apparently eager to do their part for Georgia's national security, the private owner of the pirated server blocked the cyberattackers' access, ending the attack.[9]

The July 2008 cyberattack, occurring at a time of high tension between Tbilisi and Moscow,[10] proved to be mere prelude. On August 7,

---

[3] *Id.*

[4] This article includes derivatives of the root word "cyber," such as "cyberattack," "cyberinfrastructure," and "cybersecurity." "Cyber," with roots in author William Gibson's coinage of the term "cyberspace" in the 1984 novel *Neuromancer*, is an adjective that means "relating to computers or computer networks." Consequently, a cyberattack would be an attack carried out against a computer or computer network; cyberinfrastructure would be a country's computer network systems. Definition of "Cyber," MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictiomary/cyber (last visited Jan. 12, 2010); Lieutenant Commander Matthew Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 2 n.4 (2009); David Wallis, *After Cyberoverkill Comes Cyberburnout*, N.Y. TIMES, Aug. 4, 1996, *available at* http://www.nytimes.com/1996/08/04/style/after-cyberoverkill-comes-cyberburnout.html.

[5] Posting of Steven Adair to SHADOWSERVER FOUNDATION, *supra* note 2 (on file with author).

[6] *Id.*

[7] Cyberattackers typically launch distributed-denial-of-service attacks from zombies, malicious code that entrenches itself inside a computer system and remains dormant until the attacker triggers it to action. Sklerov, *supra* note 4, at 15–16 nn.78, 85. *See infra* notes 50–54 and accompanying text (providing further discussion of denial-of-service attacks and distributed-denial-of-service attacks).

[8] Posting of Steven Adair to Shadowserver Foundation, *supra* note 2 (on file with author). Similarly, Project Grey Goose, a voluntary collaboration of cybersleuths, traced the July 2009 cyberattacks against the United States and South Korea, see *infra* notes 13–15 and accompanying text, to a Miami, Florida-based server belonging to a company called Digital Latin America, likewise without a criminal meeting of the minds between the cyberattackers and the private entity owning the hardware. *See* JEFFREY CARR, INSIDE CYBER WARFARE 78 (2010).

[9] Posting of Steven Adair to SHADOWSERVER FOUNDATION, *supra* note 2 (July 20, 2008, 13:36 EST) (on file with author).

[10] *Georgia Row Spirals as Rice Lands*, BBC NEWS, July 9, 2008, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7498340.stm (discussing tensions between Georgia and Russia that led to the South Ossetia War in August 2008).

heavy fighting erupted in and around the town of Tskhinvali in South Ossetia—the beginning of a five-day war between Georgia and Russia.[11] Almost simultaneously with the outbreak of kinetic combat, Georgian commercial and governmental websites experienced a wave of distributed-denial-of-service attacks, more substantial than the ones in July, rendering most governmental websites inoperable within two days and dramatically limiting governmental communication over the Internet.[12]

Cyberattackers have not restricted their digital barrage to Georgia. The United States' information infrastructure likewise stands as a frequent target. On a single day in 2008, the Pentagon experienced six million attacks from would-be cyberintruders.[13] Over the Independence Day weekend in 2009, distributed-denial-of-service attacks, tactically similar to those that Georgia faced in 2008, targeted several significant American governmental and commercial websites: the White House, Department of Homeland Security, Secret Service, National Security Agency, Federal Trade Commission, Department of the Treasury, Department of Defense, Department of State, New York Stock Exchange, NASDAQ Stock Market, Amazon, and Yahoo.[14] The attacks ultimately shut down the Treasury Department and Federal Trade Commission websites.[15] When the same network of fifty thousand computers targeted and shut down eleven websites of the South Korean government a few days later, military and political observers blamed North Korea for the attacks.[16]

These incidents have spurred American cyberwatchers and national security professionals to voice concerns about the potential for greater disasters involving the country's information infrastructure. Admiral Mike McConnell, former Director of National Intelligence, told an

---

[11] INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, 1 REPORT 5 (2009), *available at* http://www.ceiig.ch/IIFFMCG_Volume_I.pdf.

[12] Joshua E. Kastenberg, *Non-Intervention and Neutrality in Cyberspace: An Emerging Principle in the National Practice of International Law*, 64 A.F. L. REV. 43, 46 (2009).

[13] Ardaud de Borchgrave, *Silent Cyberwar*, WASH. TIMES, Feb. 19, 2009, *available at* http://www.washingtontimes.com/news/2009/feb/19/silent-cyberwar/.

[14] *U.S. Eyes N. Korea for "Massive" Cyber Attacks*, MSNBC.COM, July 9, 2009, http://www.msnbc.msn.com/id/31789294/ns/technology_and_science-security; MCAFEE, VIRTUAL CRIMINOLOGY REPORT 2009, at 4–5 (2009), *available at* http://resources.mcafee.com/content/NAMcAfeeCriminologyReport (last visited Mar. 4, 2010).

[15] *U.S. Eyes N. Korea for "Massive" Cyber Attacks*, *supra* note 14; MCAFEE, *supra* note 14, at 4–5.

[16] MCAFEE, *supra* note 14, at 4–6.

interviewer in 2009 that "[i]f the 19 terrorists who attacked the World Trade Center in 2001 had cyber-attacked one large New York bank and been successful in destroying the bank's data and backup data, we would have had an order of magnitude greater economic impact than 9/11 had on the world."[17] Later that year, McConnell informed *60 Minutes* that he believed that the United States's adversaries had the ability to bring down a power grid through cyberattack and that the "United States is not prepared for such an attack."[18] A Federal Bureau of Investigation (FBI) senior official testified to the Senate Judiciary Committee in 2009 that the "FBI is aware of and investigating individuals who are affiliated with or sympathetic to al Qaeda who have recognized and discussed the vulnerabilities of the U.S. infrastructure to cyber-attack."[19]

While cyberattacks represent a relatively recent addition to the United States's national security panorama, the events of the past two years demonstrate that America's foes, state and non-state alike, have the ability and inclination to attempt such attacks, with potentially severe consequences to vital security interests. Whenever the United States has faced threats to national security, policymakers and observers invariably have scrutinized the ability of the Executive Branch, the arm of Government best oriented for vigorous action in times of crisis,[20] to respond to those threats.[21] Cyberthreats warrant similar inquiry. To distill the issue to a concrete example: What power does the Executive Branch

---

[17] Gardels, *supra* note 1.

[18] *60 Minutes: Former Chief of National Intelligence Says U.S. Unprepared for Cyber Attacks* (CBS television broadcast Nov. 8, 2009) (transcript available at http://www.cbsnews/stories/2009/11/06/60minutes/main5555565.shtml). *But see* Evgeny Morozov, *Cyber-Scare*, BOSTON REV., July–Aug. 2009, *available at* http://www.boston review.net/BR34.4/morozov.php (downplaying concerns about cyberattacks by characterizing reports of cybercalamnies as being "usually richer in vivid metaphor—with fears of 'digital Pearl Harbors' and 'cyber-Katrinas'—than in factual foundation").

[19] Siobhan Gorman, *FBI Suspects Terrorists are Exploring Cyber Attacks*, WALL ST. J., Nov. 19, 2009 (discussing testimony of Mr. Steven Chabinsky, Deputy Assistant Dir. of the FBI's Cyber Div.).

[20] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 185–86 (Trade Paperback ed. 2006) ("[T]he framers aimed to infuse the executive branch with 'energy,' enabling it to master an unpredictable world by acting speedily where necessary . . . .").

[21] *See, e.g.*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 36–45 (2004) (detailing national crisis management response to 9/11 attacks); *Another War President, After All*, ECONOMIST, Jan. 7, 2010, *available at* http://www.economist.com/displaystorycfm?story_id=15213339 (discussing heightened scrutiny of U.S. intelligence and transportation security programs after attempted terrorist attempt to detonate bomb on commercial plane on Christmas 2009).

have to repel or neutralize a cybersecurity emergency of the sort that Georgia faced in 2008?

The nature of cyberspace complicates the analysis. Private industry owns most of the Internet, including network connections between various components of the U.S. Government.[22] If the United States discovered that a cyberattacker had purloined privately owned cyberinfrastructure to launch an attack, as Georgia's attackers did in July 2008, would it have to rely on the goodwill and patriotism of a private entity to stop the attack, or could it exercise its prerogative regardless of the private party's concurrence?[23]

Moreover, any potential Executive Branch action stands to raise many legal issues. Would any limits restrict the Executive Branch's power? What if its response stood to impair the free expression of an administration critic? Would the Government have to compensate the private entity for pecuniary loss? America's national security law regime for cybersecurity must contemplate these contingencies.[24]

In April 2009, Senator John D. "Jay" Rockefeller attempted to strengthen the Executive Branch's ability to protect the United States' governmental and commercial information infrastructure by introducing Senate Bill 773, the Cybersecurity Act of 2009.[25] The bill proposed, as part of a series of measures aimed at responding to cyberthreats,[26] authorizing the President to "declare a cybersecurity emergency and

---

[22] *See infra* Part II.A.

[23] *See* Todd A. Brown, *Legal Propriety of Protecting Defense Industrial Base Information Infrastructure*, 64 A.F. L. REV. 211, 244 (2009) ("[C]an the government legally impede a private network that it does not own, even if for a just purpose—protecting its networks?").

[24] Additionally, the Internet spans globally, creating many issues of international cooperation and jurisdiction. Could the United States, for example, act unilaterally if the private entity that owned the Internet hardware had citizenship in another country? *See, e.g.*, Ian MacLeod, *Canadian Producers Wary of U.S. Bills to Thwart Cyber Attacks on Power Grid*, CANADA.COM, Nov. 22, 2009, http://www.canada.com/technology/Electricity+industry+wary+bills+thwart+cyber+attacks/2253212/story.html (discussing Canadian concerns with "[f]our cyber-security bills before Congress contain[ing] either weak or no provisions requiring U.S. authorities to consult Canada before taking action to confront an imminent cyber threat to the continental network").

[25] Cybersecurity Act of 2009, S. 773, 111th Cong. (2009); *see infra* Part IV.A (discussing the specifics of the proposed Cybersecutiry Act).

[26] The measures included a cybersecurity advisory panel, security standards for Federal critical infrastructure information systems and networks, and a national licensing program for cybersecurity professionals. S. 773, § 3, at 6–7.

order the limitation or shutdown of Internet traffic to and from any compromised Federal Government or United States critical infrastructure information system or network"[27] and to "order the disconnection of any Federal Government or United States critical infrastructure information systems or networks in the interest of national security."[28] This language provoked significant public concern.[29] Five months later, reports indicated that Senator Rockefeller's staff had drafted a revised bill, replacing the controversial language of Section 18 with new language.[30]

Whether President Barack H. Obama or a successor President will have the opportunity to turn specific legislation authorizing executive action against a cyberthreat remains unknown. The 111th Congress left office without taking action on Senator Rockefeller's bill after its initial

---

[27] *Id.* § 18(2).
[28] *Id.* § 18(6).
[29] *See, e.g.*, Larry Seltzer, *What Will the Cybersecurity Act of 2009 Do to Your Job and Business?*, EWEEK.COM, Apr. 10, 2009, http://www.eweek.com/c/a/Security/What-Will-the-Cybersecurity-Act-of-2009-Do-To-Your-Job-and-Business-768836/. Seltzer expressed the concern that

> we won't know what [will qualify for federal control] until the president says. He can designate bank networks, perhaps critical common carriers, or whatever else he thinks is critical. Then, in the event of "cyber-attack," he can order those shut off or disconnected. I think Congress owes it to us to put a more solid definition in the bill so that it can be discussed in hearings, on the record, rather than letting the president decide unilaterally.

Id. See also Steve Aquino, *Should Obama Control The Internet?*, MOTHER JONES, Apr. 2, 2009, *available at* http://motherjones.com/politics/2009/04/should-obama-control-internet; Bob Chapman, *Controlling the Ability of People and Organizations to Access the Internet*, PPJ GAZETTE, Feb. 19, 2010, http://ppjg.wordpress.com/2010/02/19/controlling-the-ability-of-people-and-organizations-to-access-the-internet/ ("Sitting ominously in the Senate is the Rockefeller Bill S. 773 to take over the Internet in emergencies. As we all know, once taken over, we will never get it back the way it was before. This is what elitists have in mind for us.").
[30] Declan McCullagh, *Bill Would Give President Emergency Control of Internet*, CNET NEWS, Aug. 28, 2009, http://news.cnet.com/8301-13578_3-10320096-38.html. This new language provided that "in the event of an immediate threat to strategic national interests involving compromised Federal Government or United States critical infrastructure information system or network" the President could "declare a cybersecurity emergency." It further provided that "if [the President] finds it necessary for national defense and security, and in coordination with relevant industry sectors, [the President would] direct the national response to the cyber threat and the timely restoration of the affected critical infrastructure information system or network." *See infra* Part IV.B (discussing the reported changes).

introduction in the Senate's Committee on Commerce, Science, and Transportation.[31] Regardless of the pace, priorities, and preferences of the Legislative Branch, however, cyberthreats figure to haunt America's national security landscape throughout the foreseeable future. This backdrop renders it necessary to evaluate the Executive Branch's legal ability to respond to such threats, and to demand better legal tools if the current legal regime proves inadequate.

This article argues that the current state of the law gives the Executive Branch a poor framework for protecting governmental and commercial information infrastructure during cybersecurity emergencies. To provide background on the operational environment, Part II addresses the nature of the cybersecurity battlefield. It focuses on three aspects of the United States's governmental and commercial information infrastructure—the reliance on privately owned hardware, nature of cyberattacks, and ease of violating the sovereign prerogative of neutrality—creating a need for decisive Executive Branch action to preserve national security.

Part III examines relevant precedents, statutes, and practices to determine the Executive Branch's current legal position to respond to cyberattacks or preserve U.S. neutrality. This survey finds that a lack of directly applicable case law and other legal authority make legislative action necessary to empower the Executive. Part IV assesses the strengths and weaknesses of Senator Rockefeller's cybersecurity legislation. It concludes that the proposed Cybersecurity Act of 2009 represented an improvement over the current state of the law but suffered from significant shortcomings, specifically in oversight and compensation for aggrieved parties. Finally, Part V proposes a revised Cybersecurity Act, with safeguards similar to the Federal Intelligence Surveillance Act of 1978[32] and the War Powers Resolution.[33] Ultimately, the article concludes that the current security environment and uncertain state of legal authority render such a bold proposal necessary to address concerns about oversight and compensation, while still allowing the Executive Branch a definite legal basis for intervening in cybersecurity emergencies.

---

[31] *S.773—Cybersecurity Act of 2009*, OPEN CONGRESS, http://www.opencongress.org/bill/111-s773/actions_votes (last visited Mar. 4, 2010) (tracking progress of bill).

[32] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, §§ 103, 104(a)(7)(A)–(C), 92 Stat. 1783, 1788–89 (1978) (codified as amended at 50 U.S.C. §§ 1801–1863 (2006)).

[33] 50 U.S.C §§ 1541–1548 (2006).

II. The Cybersecurity Battlefield

A. "The Control System of Our Country"[34]: The Rise of Cyberspace

The multitude of interconnected computers, servers, routers, switches, and fiber optic cables known as cyberspace enjoys an all-pervasive position in modern life.[35] When President George W. Bush issued the United States's first *National Strategy to Secure Cyberspace* in 2003,[36] the document identified cyberspace as "the control system of our country," linking "agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemicals and hazardous materials, and postal and shipping."[37] Massive portions of the economy, both nationally and worldwide, depend on cyberspace.[38]

In the beginning, cyberspace—and its most prevalent form, the Internet—stood as the sole domain of the U.S. Government. The Pentagon's Advanced Research Projects Agency created ARPAnet in 1969 to allow computer scientists and engineers working on military contracts to share computers and other resources, regardless of their physical locations.[39] By the mid-1980s, the system, now known as the "internet," had expanded minimally, still confined to a "cloistered world"

---

[34] THE WHITE HOUSE, THE NATIONAL STRATEGY TO SECURE CYBERSPACE 1 (2003) [hereinafter CYBERSPACE NAT'L STRATEGY].

[35] *Id.* (describing components of cyberspace). *See generally* Memorandum from the Sec'y of the Air Force & the Chief of Staff, U.S. Air Force, to all Airmen, subject: Air Force Cyberspace Mission Alignment (Aug. 20, 2009), *available at* https://newafpims.afnews.af.mil/shared/media/document/AFD-090821-046.pdf (noting that cyberspace "pervades every other domain and transcends national boundaries"); Sklerov, *supra* note 4, at 3–4 (discussing the importance of the Internet).

[36] CYBERSPACE NAT'L STRATEGY, *supra* note 34.

[37] *Id.* at 1.

[38] *See, e.g.*, ANDREW COLARIK, CYBER TERRORISM: POLITICAL AND ECONOMIC IMPLICATIONS, at viii–xi (2006) (observing that trillions of dollars of electronic banking and global stock trading are conducted over the Internet each year); TRADE PROMOTION COORDINATING COMMITTEE, 2008 NATIONAL EXPORT STRATEGY (2008) (discussing the "explosive growth of the Internet and e-commerce," including a projection that business-to-consumer e-commerce in the United States will grow from $175 billion in 2007 to $335 billion in 2012).

[39] P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 52–53 (2009); Christopher Anderson, *Like a Flock of Birds: How the Internet Works Without Really Trying*, ECONOMIST, July 1, 1995, *available at* http://www.temple.edu/lawschool/dpost/accidentalsuperhighway.htm.

of military laboratories and universities.[40] Private sector network computing had experienced a relatively limited parallel development; local area networks for businesses and commercial "on-line" services had emerged but had not spread widely.[41]

Dramatic transformation, morphing cyberspace from a government undertaking into a private-sector enterprise, occurred in the late 1980s and early 1990s. By this time, the National Science Foundation (NSF) had assumed responsibility for funding and organizing the U.S. Government's network.[42] In 1988, the NSF, seeking to avoid the likelihood that separate private and public development channels would make cyberspace a piecemeal entity, allowed private organizations to join the network but restricted them from using it for commercial purposes.[43]

Over the next seven years, the U.S. Government eliminated all remaining curbs on commercial use.[44] In April 1995, the NSF finally discontinued its role as the Internet "backbone" and began to phase out the last direct federal subsidies for the network.[45] The Internet had transformed from a purely governmental enterprise to a private entity. Because of this shift, the U.S. Government now relies on countless private entities to sustain its own cyberinfrastructure; these private parties also serve as ports of entry for state and local governmental cyberinfrastructure and commercial cyberinfrastructure.[46]

---

[40] Anderson, *supra* note 39 (indicating that by "1987 the Internet had grown to include 28,000 host computers at hundreds of different universities and research labs"); *The Launch of NSFNET*, NAT'L SCI. FOUND., http://www.nsf.gov/about/history/nsf0050/internet/launch.htm (last visited Jan. 12, 2010) [hereinafter *The Launch of NSFNET*].

[41] Anderson, *supra* note 39.

[42] *Id.*

[43] *Id.*; *The Launch of NSFNET*, *supra* note 40 (quoting Steve Wolf, NSA Program Dir., as stating, "[I]t was obvious that if [commercial interests could not join the Internet] in a coordinated way, it would come in a haphazard way").

[44] Anderson, *supra* note 39.

[45] *Id.*; *An End and a Beginning*, NAT'L SCI. FOUND., http://www.nsf.gov/about/history/nsf0050/internet/anend.htm (last visited Jan. 12, 2010).

[46] *See, e.g.*, Brown, *supra* note 23, at 212 (noting private ownership of "the network connections between various components of the Air Force[], and even more broadly, the U.S. government[]"); MCAFEE, *supra* note 14, at 21 ("Creating further challenges, much of the communications, software and network infrastructure is owned and operated by the private sector.").

B. Denial-of-Service, Zombies, and Packet Sniffers: The Weapons of Cyberspace

The various private entities comprising the United States' governmental and commercial cyberinfrastructure stand vulnerable to many types of cyberattack—attacks that could, in turn, trigger the sort of national security emergency requiring the Executive Branch to compel a private entity to cease the operation of its Internet hardware. The July 2008 attack against Georgia's cyberinfrastructure, for example, involved a cyberattacker's apparently pirated use of a server owned by a U.S.-based private company as a launching point for the attacks.[47] To develop an effective legal structure for empowering the Executive Branch to respond to cyberemergencies, policymakers must first understand the nature of the threat. Students of cybersecurity have identified three main categories of cyberattacks: automated malicious software delivered over the Internet, denial-of-service (DOS) attacks, and unauthorized remote intrusions into computer systems by individuals.[48] All three may require a private entity to take action to halt a cybersecurity emergency.

Internet-delivered malicious software, or malware, generally affects computer systems through infected e-mails, engines designed to exploit vulnerabilities, or visits to infected websites.[49] Initially, malware fell into two broad classifications: viruses and worms.[50] Programmers and attackers have subsequently generated a diverse array of malicious code, including Trojan horses, rootkits, sniffers, exploits, bombs, and zombies.[51]

Denial-of-service attacks overwhelm targeted computer systems with information until the systems seize up and cannot function, preventing access by legitimate users.[52] Distributed-denial-of-service (DDOS) attacks, the sort of cyberattack that crippled Georgia's cyberinfrastructure, represent the most severe form of a DOS attack.[53] They involve launching DOS attacks simultaneously from numerous

---

[47] *See supra* notes 1–9 and accompanying text.
[48] *See* Sklerov, *supra* note 4, at 13–14 n.62 (expressing the opinion that cyberattacks can be divided into three main categories, but indicating that other authors have claimed two main categories or four main categories).
[49] *Id.* at 14.
[50] *Id.* at 14–15.
[51] *Id.* at 15–16.
[52] *Id.* at 16.
[53] *Id.*

computers; their sheer volume makes them difficult to defend.[54] Cyberattackers frequently set the stage for DDOS attacks by launching "zombies," a strain of malware that can entrench itself into computer systems until cyberattackers trigger it into action.[55] The resulting juggernaut of zombie-infected computers, harnessed into a coordinated DDOS attack, is known as a "botnet."[56]

The third type of cyberattack, a remote intrusion, involves penetration of a computer system by an unauthorized user.[57] Occurring at user access points, remote intrusions require an attacker to obtain user account names and passwords.[58] This happens through malware or by using social engineering, packet sniffers, and password cracking tools to acquire user account information.[59] Unauthorized access leaves an attacker in position to harm a system in a variety of ways, including "caus[ing] a cascading series of damages in the physical or electronic world."[60]

All three varieties of cyberattack may place private entities in the unsuspecting position of having their computer hardware facilitate a potential cyberattack. A malware worm, for example, may use an unwittingly infected server as a launching point for spreading from system to system, copying itself to any computer systems connected to the infected computer.[61] The July 2008 DDOS attack that shut down the website of the President of Georgia used a hijacked computer belonging to a private company in the United States.[62] Professor Jack Goldsmith has observed that the "United States has the most, or nearly the most, infected botnet computers [in the world] and is thus the country from which a good chunk of botnet attacks stem."[63] Having successfully accomplished a remote intrusion into a utility company's computer system, an attacker may use that base to access critical infrastructure. The legal regime governing the Executive Branch's response to such cyberemergencies should empower the Executive to take action to stop

---

[54] *Id.*
[55] *Id.* at 16 n.78.
[56] *Id.* at 16 n.85.
[57] *Id.* at 17.
[58] *Id.*
[59] *Id.*
[60] *Id.* (quoting COLARIK, *supra* note 38, at 84.) .
[61] *Id.* at 15.
[62] *See supra* notes 1–9 and accompanying text.
[63] Jack Goldsmith, *Can We Stop the Global Cyber Arms Race?*, WASH. POST, Feb. 1, 2010, at A17.

these private entities' hardware from damaging critical governmental or commercial information infrastructure, but still provide meaningful limitations on the Government's power.

C. "Such Assistance and Succor to One of the Belligerents"[64]: Cyberattacks and Neutrality

Cyberwatchers and national security professionals concerned about the operational implications of cyberspace have generally focused on a cyberattack's ability to impair critical governmental and commercial information infrastructure.[65] Emerging scholarship, however, contends that cyberattacks may also affect a state by unwittingly drawing it from a neutral position into a conflict between two other states.[66] Because international law imposes a dramatically different legal status on states that enter conflicts between other states as a belligerent, compared with states electing to remain neutral, the choice between belligerency and neutrality represents one of the most significant responsibilities for a sovereign's national security decision-making body. Because of this potential hazard of the operational realm of cyberspace, crafting a legal regime that both governs the Executive Branch's power over cyberspace and provides for vigorous action to preserve U.S. neutrality when a U.S.-based party's conduct potentially jeopardizes that neutrality is essential.

In his influential 1906 treatise on international law, the German jurist Lassa Oppenheim defined neutrality as "the attitude of impartiality towards belligerents adopted by third States and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents."[67] Specifically, Oppenheim, tracing the development of neutrality as part of international law from its inception in the sixteenth century,[68] regarded neutrality as incompatible with "such assistance and succor to one of the belligerents as is

---

[64] 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE: WAR AND NEUTRALITY 317 (1906).
[65] *See supra* notes 17–19 and accompanying text.
[66] *See* Kastenberg, *supra* note 12 (providing a full discussion of the application of the principles of neutrality to cyberspace).
[67] OPPENHEIM, *supra* note 64, at 316.
[68] *Id.* at 302. Oppenheim identified the roots of neutrality in Middle Ages treaties entered into "for the purpose of specially stipulating that the parties should be obliged not to assist in any way each other's enemies during time of war, and to prevent their subjects from doing the same." *Id.* at 316.

detrimental to the other, and further, such injuries to the one as benefit the other."[69] Moreover, he observed that international law obligated states to guard their neutrality through "active measures," with a requirement to "prevent belligerents from making use of their neutral territories and of their resources for military and naval purposes during the war."[70]

Oppenheim published his treatise a year before the 1907 Hague Convention V on "The Rights and Duties of Neutral Powers and Persons in Case of War on Land"[71] and Convention XIII on "The Rights and Duties of Neutral Powers in Naval War,"[72] the modern codification of neutrality law. Echoing Oppenheim's formulation of neutrality, Hague Convention V articulated a relatively straightforward relationship between belligerency and neutrality. Article 1 declared the territory of a neutral state to be "inviolable."[73] Articles 2–4 listed acts violating a state's neutrality; the list included routing men or materials, erecting communications devices, and recruiting forces on the territory of a neutral state.[74] Article 5, however, established the "price" of neutrality for a state seeking neutral status—the imperative to prevent any of the acts listed in Articles 2–4 from occurring on its territory.[75] This imposed a "policing burden" on states desiring neutrality.

> If a neutral is unable or unwilling to effectively enforce its right of inviolability, an aggrieved belligerent may act proportionately and as necessary to counter enemy forces' actions, including actions by enemy warships and military aircraft making unlawful use of neutral territory.

---

[69] *Id.* at 317.
[70] *Id*.
[71] Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague Convention V].
[72] Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 [hereinafter Hague Convention XIII].
[73] Hague Convention V, *supra* note 71, art. 1.
[74] *Id.* arts. 2–4. The 1907 Hague Convention V does provide a limited telecommunications exception. Article 8 dictates that a "neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus," provided that the neutral state allows all belligerents equal use of the communications facilities. *Id.* art. 8. Legal experts have questioned whether this exception applies to cyberspace and cyberattacks. *See* Kastenberg, *supra* note 12, at 56.
[75] Hague Convention V, *supra* note 71, art. 5.

> Today this right is tempered by the [United Nations] Charter in that an aggrieved belligerent must be a target of an armed attack, actual or threatened, from neutral waters to exercise this power.[76]

Of course, the architects of international law in the first decade of the twentieth century did not contemplate cyberspace or cyberattacks. More than a century after the Hague Conventions' enactment, their general conception of neutrality remains controlling law,[77] but international law does not explicitly address cyberattacks and cyberneutrality.[78] The development of the details of neutrality law has proven difficult to predict; one commentator observed that it "defies a straightforward, positivist, black-letter approach."[79] Nevertheless, commentators attempting to gauge the direction of neutrality law have applied the fundamental principles of the Hague Conventions to the cyberbattlefield and concluded that three aspects of recent cyberconflicts have threatened to compromise U.S. neutrality in international conflicts where the U.S. Government claimed an official position of neutrality.[80]

The 2008 cyberattack against Georgia exemplifies the first aspect: an attack routed across the Internet nodes of a neutral state.[81] Because approximately eighty percent of the Internet's traffic traverses the United States, America stands extremely vulnerable to having its neutrality compromised in this manner.[82] An August 2008 article by Evgeny Morozov, an Internet journalist residing in the United States, suggested an example of the second aspect: cyberattacks launched from a neutral state but uncontrolled by that neutral state.[83] The article demonstrated

---

[76] George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1145 (2000).
[77] *See id.* at 1128 ("[N]eutrality, primarily as practiced in the nineteenth century, has been modified in the Charter era, but the general concept of neutrality remains.").
[78] Kastenberg, *supra* note 12, at 53.
[79] Walker, *supra* note 76, at 1109. The American jurist Philip Jessup asserted in 1936 that neutrality law has "undergone an almost constant process of revision in detail," driven by "compromise and experience." PHILIP C. JESSUP, NEUTRALITY: TODAY AND TOMORROW 16, 156 (1936).
[80] Kastenberg, *supra* note 12, at 53; Walker, *supra* note 76, at 1079.
[81] Kastenberg, *supra* note 12, at 53.
[82] *Id.* at 43.
[83] *Id.* at 53; *see also* Evgeny Morozov, *An Army of Ones and Zeroes—How I Became a Soldier in the Georgia-Russia Cyberwar*, SLATE, Aug. 14, 2008, http://www.slate.com/id/2197514; *see also* EVGENY MORZOV, http://evgenymorozov.com/blog/?p=416 (last visited Jan. 14, 2010).

that anyone with access to the Internet could have visited a website, downloaded software, and joined the DDOS attacks against Georgia in minutes.[84]

The third neutrality-threatening aspect of recent cyberconflicts happened during the August DDOS attacks against Georgia.[85] When the cyberattacks imperiled the Georgian Government's use of its own information infrastructure, two U.S.-based private companies, Tulip Systems and Google, allowed Georgia to use their hardware for governmental Internet services.[86] Neither company attempted to obtain the U.S. Government's consent for their actions.[87] The United States did not suffer any immediate consequences, but, as a commentator asserted, "the actions of the Georgian government and a well-intentioned, patriotic [in favor of Georgia] CEO could have imperiled U.S. cyber neutrality."[88]

Because of the severe consequences of entering an international conflict as a belligerent, the United States' national security decision-makers have few responsibilities more important than determining whether America adopts a stance of belligerency or neutrality in an international conflict. The neutrality-threatening aspects of cyberconflict threaten to undermine that prerogative. All three circumstances identified in this section may require the Executive Branch to take coercive action over a private entity to maintain America's neutrality in a foreign conflict—forcing the owner of the pirated server to shut down operations, stopping the individual from launching a cyberattack from U.S. soil, and halting the efforts of a sympathetic CEO to protect another country's cyberinfrastructure, if U.S. national security interests require it. Otherwise, the actions of private parties may subject the United States to physical attack. For this reason, the United States' legal regime on cybersecurity should contemplate and facilitate action in the interest of addressing an internal threat to U.S. neutrality.

---

[84] Kastenberg, *supra* note 12, at 53. In a January 2010 speech on "Internet freedom," Secretary of State Hillary Clinton spoke approvingly of the efforts of "hacktivists," who use digital tools to fight oppressive regimes. As Professor Jack Goldsmith noted, "[s]cores of individuals and groups in the United States design or employ computer payloads to attack government websites, computer systems and censoring tools in Iran and China." Goldsmith, *supra* note 63. The international law implications of the U.S. Government's encouragement of such efforts fall outside of the scope of this article.

[85] Kastenberg, *supra* note 12, at 60–61.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 61.

III. "Zone of Twilight"[89]: The Current State of Executive Legal Authority

If the United States found itself in a similar position as Georgia in July 2008, with hijacked privately owned computer hardware enabling a cyberattack against critical governmental infrastructure or compromising an official position of neutrality, it would most likely seek the shutdown of that hardware. The U.S. Code, however, currently contains no statutes directly addressing Executive powers in a national security emergency over the private entities comprising cyberspace.[90] As a result, a President seeking to impose the coercive power of the U.S. Government under such circumstances would have to rely on some combination of the Constitution, case law, other statutes, and prior Executive Branch practice as legal authority for his actions. This article's first inquiry, then, seeks to determine the current state of Executive authority in this area.[91] It reveals a lack of directly applicable legal authority, strongly suggesting a need for congressional action.

Before considering the state of the law, it bears noting that American political philosophy does provide authority for an Executive to act notwithstanding the law in a time of national crisis. Thomas Jefferson articulated this principle in an 1810 letter to John B. Colvin.[92] In that letter, Jefferson, who had left the presidency in the previous year, indicated that "laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation" than the written law, under certain circumstances.[93]

---

[89] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[90] One recent commentator asserted that his article on the Executive Branch and cyberneutrality would "[suggest] a rubric using existing laws for exerting executive authority," but did not cite any provisions of the U.S. Code concerning Executive Branch authority. Kastenberg, *supra* note 12, at 45. In February 2010, a federal judge in Virginia granted Microsoft's request for an order to deactivate hundreds of Internet addresses that the company had linked to a botnet. Nick Wingfield & Ben Worthen, *Microsoft Battles Cyber Criminals*, WALL ST. J., Feb. 26, 2010, *available at* http://online.wsj.com/article/SB10001424052748704240004575086523786147014.html. Because the court issued its order under seal, precluding analysis of its theory of injunctive relief, this article does not consider the ruling's implications for the Executive Branch's cybersecurity efforts. *Id.*

[91] *See generally* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 138 (1993) (discussing theories and sources of Executive power).

[92] Letter from Thomas Jefferson, to John B. Colvin (Sep. 20, 1810), *available at* http://teachingamericanhistory.org/library/index.asp?document=1916.

[93] *Id.*

Jefferson postulated, however, that the Executive official would not be immune from consequences: "[T]he good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives."[94] Such a situation, of course, would be extremely undesirable; extra-legal action by government officials should remain an option of last resort.[95] In that light, it is incumbent upon the Executive Branch to find pre-existing legal authority empowering it to act coercively or to request that Congress pass appropriate legislation to provide the necessary powers.

A. *Youngstown Sheet & Tube Co. v. Sawyer*: The Steel Seizure Case

The Supreme Court's majority opinion and concurrences in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*)[96] represent the leading source of guidance on the Executive Branch's "emergency" power over the private sector[97] in the absence of congressional action authorizing the Executive to act. Employing a variety of constitutional theories and frequently stressing the ruling's narrowness, the opinions ultimately prove an inconclusive source of guidance on the state of Executive power in the event of a cyberattack. The various opinions provide material suggesting that the Executive would have some measure of coercive power over the private parties, but the extent of that power—as well as any constitutional limitations on it and the details of its implementation—remains uncertain. This suggests that legislation which expressly articulates Executive power and clarifies roles and responsibilities would be beneficial for ensuring the United States' ability to respond to cybersecurity challenges promptly, while satisfying the demands of the Constitution and republican government.

---

[94] *Id.*

[95] Whether any of the Presidents of the United States have, in fact, acted in accordance with Jefferson's "pragmatic concession to necessity" approach is unknown. One commentator has observed that "[s]ome version of the precept seems to lie behind Abraham Lincoln's suspension of provisions of the Constitution during the Civil War." Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815 (2003).

[96] 343 U.S. 579 (1952).

[97] *See, e.g.*, Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. UNIV. L. REV. 259, 259 (2009) (calling Justice Jackson's concurrence in *Youngstown* the "prevailing doctrine of presidential power").

1. "Indispensable"[98]*: Executive Order and Legal Challenge*

In April 1952, the bargaining procedures of the 1947 Taft-Hartley Act[99] failed to settle a dispute between the steel companies and their employees over the "terms and conditions that should be included in new collective bargaining agreements."[100] Consequently, the employees' representative, United Steelworkers of America, gave notice that the steelworkers would undertake a nationwide strike.[101] President Harry S. Truman responded to the impending strike by issuing an Executive Order directing the Secretary of Commerce to take possession of most of the steel mills and keep them running.[102]

Citing his own proclamation of "the existence of a national emergency" in the face of the United States's involvement in the Korean War in December 1950, President Truman's order asserted that steel was "indispensable" to U.S. national defense because of its centrality to military weapons and materials, Atomic Energy Commission programs, and the national economy.[103] Moreover, the Executive Order indicated that "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field."[104] Ultimately, President Truman invoked his authority "by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States" to authorize and direct the Secretary of Commerce "to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto . . . as he may deem necessary in the interests of national defense" and to operate the steel companies or arrange for their operation.[105]

The Secretary of Commerce then issued his own orders, directing the steel company presidents to serve as operating managers for the United

---

[98] *Steel Seizure*, 343 U.S. at 589–90.
[99] 29 U.S.C. §§ 171–188 (2006).
[100] *Steel Seizure*, 343 U.S. at 582.
[101] *Id.* at 583.
[102] *Id.*
[103] *Id.* at 589–90.
[104] *Id.* at 590–91.
[105] *Id.* at 591.

States.[106] In response, the companies asked the U.S. District Court for the District of Columbia to declare the orders of the President and Secretary invalid and to issue injunctions restraining their enforcement.[107] The District Court granted a preliminary injunction against the Executive's seizure, but the Court of Appeals for the District of Columbia Circuit stayed the injunction, prompting the Supreme Court to grant certiorari.[108]

Six Justices agreed on the opinion of the Court, as delivered by Justice Black, that President Truman did not have the authority to issue the order. Four of the concurring Justices issued separate opinions; as Justice Frankfurter noted in his own concurrence, the five opinions authored by the majority Justices demonstrated "differences in attitude" sufficient to preclude "a single opinion for the Court."[109] The variety of constitutional approaches found in these opinions, along with a general sense that the Justices based their rulings heavily on the facts of this particular presidential action, makes it difficult to determine whether a future Executive, faced with an emergency of a different color, could rely on them as a legal basis for action against a private entity.

2. "An Act of Congress or from the Constitution Itself"[110]: Opinion of the Court

Justice Black's majority opinion framed the analysis as requiring presidential seizure authority to "stem either from an act of Congress or from the Constitution itself."[111] He rapidly ruled out the possibility that a statute or act of Congress had authorized President Truman to seize the steel mills.[112] Noting that the Government made no claim that express constitutional language gave the President authority to act, Justice Black moved on to the possibility that authority stemmed from "the President's military power as Commander in Chief of the Armed Forces" or "the several constitutional provisions that grant executive power to the President."[113]

---

[106] *Id.* at 583.
[107] *Id.*
[108] *Id.* at 584.
[109] *Id.* at 583 (Frankfurter, J., concurring).
[110] *Id.* at 585 (Frankfurter, J., concurring).
[111] *Id.*
[112] *Id.* at 585–86.
[113] *Id.* at 587.

Justice Black dismissed the notion that the Commander in Chief powers supported the seizure, drawing a contrast between "military commanders engaged in day-to-day fighting in a theater of war" and taking "possession of private property in order to keep labor disputes from stopping production."[114] Likewise, Justice Black dismissed the idea that the constitutional provisions granting Executive power permitted President Truman's action. The seizure, he contended, resembled a legislative enactment, as it set "out reasons why the President believes certain policies should be adopted, proclaim[ed] these policies as rules of conduct to be followed, and again, like a statute, authorize[d] a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution."[115] Nothing in the Constitution subjected "this lawmaking power of Congress to presidential or military supervision or control," and this principle remained solid "even if other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes."[116]

3. "Could Not More Clearly and Emphatically Have Withheld Authority"[117]*: Justice Frankfurter's Concurrence*

Justice Frankfurter's concurring opinion opened with a declaration of fidelity to constitutional checks and balances and judicial minimalism, stressing a disinclination to delineate the full scope of presidential and congressional powers.[118] Turning to the facts at hand, Justice Frankfurter focused on two possible theories for finding President Truman's actions constitutional: their consistency with congressional action and their consistency with "systematic, unbroken, executive practice."[119] He concluded that neither theory sustained the seizure.

In assessing whether Congress's actions had authorized the President to act, Justice Frankfurter observed that Congress had "frequently—at least 16 times since 1916—specifically provided for Executive seizure of

---

[114] *Id.*
[115] *Id.* at 588.
[116] *Id.*
[117] *Id.* at 597–98 (Frankfurter, J., concurring).
[118] *Id.* at 597 (Frankfurter, J., concurring). Justice Frankfurter opined that the Court had an obligation to "avoid putting fetters upon the future by needless pronouncements today." *Id.* at 596.
[119] *Id.* at 610.

productions, transportation, communications, or storage facilities."[120] Justice Frankfurter surveyed these enactments and identified a set of common "limitations and safeguards" on the grants of power.[121] Justice Frankfurter then drew a contrast between this record of congressional enactments and Congress's intent regarding seizure of the steel industry. In debating the Taft-Hartley Act, Congress had rejected the idea that the Government would "[take] over property or [run] plants"[122] if a strike remained deadlocked, instead electing "not to make available in advance a remedy to which industry and labor were fiercely hostile."[123] Justice Frankfurter observed that Congress "presumably acted on experience with similar industrial conflicts" and had "evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation, and that danger warnings are sufficiently plain before the event to give ample opportunity to start the legislative process into action."[124] He concluded that Congress "could not more clearly and emphatically have withheld authority than it did in 1947."[125]

Justice Frankfurter then dismissed the claim that consistency with past Executive practice rendered President Truman's actions constitutional. He acknowledged that Executive powers could extend beyond the text of Article II of the Constitution.

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive

---

[120] *Id.* at 597–98.

[121] *Id.* at 587. Justice Frankfurter's summary of previous legislation involving executive seizure of private property, see *infra* Part IV.C.2.b, should represent, a starting point for policymakers creating legislation to address Executive action over private entities in the cybersecurity arena.

[122] *Id*. at 599 n.2 (Frankfurter, J., concurring) (quoting Senator H. Alexander Smith of the Senate Committee on Labor and Public Welfare).

[123] *Id.* at 601.

[124] *Id.* at 601–02. Justice Frankfurter characterized Congress's position as telling the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation." *Id.* at 603.

[125] *Id.* at 597–98. Furthermore, Justice Frankfurter concluded that Congress had not altered its intent to deny the President seizure powers when it passed the Defense Production Act of 1950 or its 1951 Amendments to the Defense Production Act. *Id.* at 607–09.

Power" vested in the President by § 1 of Art. II.[126]

Nevertheless, President Truman's seizure of the steel mills did not correspond with any Executive practice deemed constitutional. Unlike the executive order withdrawing public lands from settlement in *United States v. Midwest Oil*,[127] the seizure order could not count on a lineage of presidential action "over a period of 80 years and in 252 instances."[128] President Lincoln's seizures of the railroads took place "in territory where armed hostilities had already interrupted the movement of troops to the beleaguered Capital," and Congress subsequently ratified the order.[129] President Wilson's and President Roosevelt's seizures of industrial facilities—with the exception of three pre-Pearl Harbor seizures by President Roosevelt that Justice Frankfurter quickly dismissed as "isolated" and unsanctioned—happened under congressional authority or after declaration of a state of war.[130] Because of the inapplicability of the various examples of prior Executive practice, Justice Frankfurter concluded that Article II, both in text and application, failed to support President Truman's seizure.

4. "A Taking in the Constitutional Sense"[131]*: Justice Douglas' Concurrence*

Justice Douglas viewed President Truman's action as a condemnation of property—a "taking in the constitutional sense."[132] He rested his conclusion of unconstitutionality on the theory that Congress, as the only branch of the U.S. Government with the power to compensate a private party for a seizure of property, was the sole entity able to "authorize a seizure or make lawful one that the President has effected."[133] While Justice Douglas's concurrence resolved the case with a simpler approach than the other concurrences, it did offer, in footnotes, two observations with the potential to cloud matters in a future national security controversy. First, he noted that "[w]hat a President may do as a matter of expediency or extremity may never reach a definitive

[126] *Id.* at 610–11.
[127] 236 U.S. 459 (1915).
[128] *Steel Seizure*, 343 U.S. at 611 (Frankfurter, J., concurring).
[129] *Id.*
[130] *Id.* at 611–13.
[131] *Id.* at 631 (Douglas, J., concurring).
[132] *Id.*
[133] *Id.* at 631–32.

constitutional decision."[134] He further observed that "[w]artime seizures by the military in connection with military operations . . . are also in a different category."[135]

5. "A Poverty of Really Useful and Unambiguous Authority"[136]*: Justice Jackson's Concurrence*

Of the Justices in the *Steel Seizure* majority, Justice Jackson seemed the most interested in providing a framework for evaluating the constitutionality of future Executive action, rather than merely evaluating the facts before him.[137] Alluding to his own service as a government attorney during the administration of President Franklin D. Roosevelt, Justice Jackson opened the opinion by acknowledging that Supreme Court precedent provided a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[138] He then identified a "somewhat over-simplified grouping" of three types of situations involving presidential decision-making.[139]

The first situation would involve a President who "acts pursuant to an express or implied authorization of Congress"; with this type of authorization, presidential authority would be "at its maximum."[140] Justice Jackson observed that, if the Court viewed action under congressional authorization unconstitutional, "it usually means that the Federal Government as an undivided whole lacks power."[141]

The second situation involving presidential decision-making would

---

[134] *Id.* at 631 n.1.
[135] *Id.* at 631 n.2.
[136] *Id.* at 634 (Jackson, J., concurring).
[137] Whether Justice Jackson did, in fact, provide a useful framework remains open for debate. *See* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) (asserting that "Youngstown's framework has become the gold standard, perhaps because its all-things-to-all-people quality can provide arguments favoring any branch of government under many circumstances").
[138] *Steel Seizure*, 343 U.S. at 634 (Jackson, J., concurring).
[139] *Id.* at 635.
[140] *Id.*
[141] *Id.* at 636. The Supreme Court's ruling in *Clinton v. City of New York*, 524 U.S. 417 (1998), holding the Line Item Veto Act unconstitutional even though both Congress and the President had supported it is an example of this. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. UNIV. L. REV. 259, 261 n.5 (2009).

occur when "the President acts in absence of either a congressional grant or denial of authority."[142] According to Justice Jackson, this balance would implicate a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[143] The constitutionality of Executive action would be heavily dependent on the facts and circumstances of a given situation: "[A]ny actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[144]

Finally, Justice Jackson observed that presidential power would be at its lowest when it involves "measures incompatible with the expressed or implied will of Congress."[145] Courts could find such presidential actions constitutional "only by disabling the Congress from acting upon the subject."[146] Reviewing the facts of President Truman's seizure, Justice Jackson concluded that it fit into the third category, sustainable "only by holding that seizure of the strike-bound industries is within [the President's] domain and beyond control by Congress."[147] He further concluded that none of the relevant constitutional clauses, nor prior presidential practices, supported a finding of constitutionality.[148] While addressing the Solicitor General's argument that the constitutional clause designating the president as Commander in Chief authorized the seizure, Justice Jackson indicated that he would "indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[149] Instances involving "a lawful economic struggle between industry and labor," by contrast, did not warrant such judicial discretion.[150] Consequently, Justice Jackson regarded President Truman's steel seizure an appropriate instance for judicial intervention.[151]

---

[142] *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 637–38.
[147] *Id.* at 640.
[148] *Id.* at 640–51.
[149] *Id.* at 645.
[150] *Id.*
[151] Justice Burton and Justice Clark also filed concurrences, expressing views similar to the other concurring Justices. Justice Burton focused his concurrence on the seizure's incompatibility with the Labor Management Relations Act, noting that "the most significant feature of that Act is its omission of authority to seize an affected industry." *Id.* at 657 (Burton, J., concurring). As with several of the other concurrences, Justice

6. "Arguments Favoring Any Branch of Government Under Many Circumstances"[152]*: Applying* Steel Seizure *to Cybersecurity Emergencies*

While the Justices evaluating President Truman's seizure of the steel industry laced their opinions with dicta sufficient to fuel generations of debate over a wide variety of Executive actions,[153] the opinions ultimately leave the Executive Branch and other legal practitioners without clear guidance on how federal courts would handle a challenge to Executive action in the face of a cybersecurity emergency. A significant weakness limits *Steel Seizure*'s predictive value in a cybersecurity case: the legislative history, a primary focus of the Justices in *Steel Seizure*, would be dramatically different. *Steel Seizure* represents an instance of Executive action following an explicit congressional decision to deny the Executive that action.[154] Because Congress has never expressly declined to grant the Executive powers over private entities in the event of a cybersecurity emergency, the legislative history aspect of the majority opinion and concurrences—probably the greatest area of agreement among the concurring Justices—would not apply to a cybersecurity case. This difference would diminish much of *Steel Seizure*'s precedential value.

In a case with such materially different facts from *Steel Seizure*, the bulk of legal arguments, from the Executive side and other interested parties alike, would revolve around *Steel Seizure*'s dicta about Executive authority. If required to justify a seizure of privately owned hardware, the Executive Branch would probably rely on the suggestion, on the part of several of the Justices, that *Steel Seizure*'s outcome in a case of

---

Burton's concurrence indicated that the Court was not ruling on the President's powers in the face of "imminent invasion or threatened attack." *Id.* Justice Clark likewise found the seizure unconstitutional on the grounds that "Congress had prescribed methods to be followed by the President in meeting the emergency at hand" in the Labor Management Relations Act, Defense Production Act of 1950 and Selective Service Act of 1948. *Id.* at 662 (Clark, J., concurring). He stressed that the case was not controlling for all future presidential action, indicating that "in the absence of such action of Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation." *Id.*

[152] Katyal, *supra* note 137, at 99.

[153] *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of the United States' participation in the Vietnam War); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 500 (1977) (Powell, J, concurring) (whether a recently-resigned President Nixon could retrieve his presidential papers from the U.S. Government); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (amount of due process owed an "enemy combatant" post-September 11, 2001).

[154] *See supra* notes 119–125 and accompanying text.

"armed attack or imminent invasion" might have been different.[155] In response, a party opposing Executive action might cite Justice Frankfurter's attempt to find an unbroken lineage of Executive practice and claim that none existed under the circumstances. As Professor Neal Kumar Katyal has observed, Justice Jackson's opinion in *Steel Seizure*—featuring the closest that the majority Justices come to a principle of general applicability—suffers "perhaps because its all-things-to-all-people quality can provide arguments favoring any branch of government under many circumstances."[156] Given this precedential terrain, it is impossible to predict how a federal court would rule, if faced with a challenge to Executive action.

Moreover, *Steel Seizure*'s dicta provide, at best, only a basis for Executive action. They provide an even shakier foundation for divining the limitations or details of Executive power. The amount of compensation for a private party that loses revenue as a result of an Executive-mandated shutdown of its hardware, for example, would have to be determined through some other means. With *Steel Seizure* as guidance, future legal conflicts over cybersecurity would be mired in Justice Jackson's "zone of twilight."

B. Other Sources of Executive Authority Over Private Parties: National Defense Areas

Without case law or statutes to bestow the Executive Branch with

---

[155] Commentators have regarded *Youngstown Sheet & Tube Co*. as providing room for Executive action against national emergencies.

> Although Steel Seizure seems to reject the existence of any executive emergency power, a careful examination of all seven opinions filed does not support such a definitive assertion. An analysis of the concurring and dissenting opinions indicates that a majority of the justices embraced the existence of some residual presidential emergency power. They divided on the question whether Congress nonetheless had implied prohibited the President's conduct. Moreover, despite the government's argument and President Truman's statement, no emergency existed. Ample time existed for congressional action, both before and after the seizure, yet Congress did nothing. To transform political deadlock into an emergency would drain the concept of emergency of all content.

Monaghan, *supra* note 91, at 37–38.

[156] *See* Katyal, *supra* note 137, at 99.

unambiguous authority over the private entities comprising cyberspace, a President seeking to respond to a cybersecurity crisis could next turn to regulations and practices for a source of legal authority. Department of Defense (DoD) regulations recognize the authority of military commanders to establish "National Defense Areas" (NDA) to protect military installations, property and personnel. Department of Defense Directive 5200.8, *Security of DoD Installations and Resources*,[157] a regulation promulgated in 1991, stands as the highest-level articulation of the NDA concept.

Department of Defense Directive 5200.8 indicates that the "authority of a DoD installation commander to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property" includes "temporarily established 'National Defense Areas' under emergency situations such as accident sites involving federal equipment or personnel on official business."[158] The relevant service regulations do not address compensation for affected private entities, but the Air Force's summary of guidance to military commanders, *The Military Commander and the Law*, indicates that "[b]ecause the NDA effectively deprives the landowner of the use of the property during the period the NDA is in existence, the Air Force may have to compensate the landowner for the temporary 'taking' of the property."[159]

The lack of written legal authority[160]—and a severe limitation on the Executive Branch's use of NDAs as a coercive tool in cybersecurity emergencies—is a product of the DoD's practice of generally invoking the NDA principle under relatively uncontroversial circumstances, free of the complicating presence of large sums of money, potential abridgement of free expression, or other contentious matters. Ordering the shutdown of a private entity's Internet hardware, by contrast, would be more likely to implicate those sorts of sensitive issues. While the

---

[157] U.S. DEP'T OF DEF., DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES (Apr. 25, 1991).

[158] *Id.* para. 3.2; *see also* Richard Ripley, *Jackknifed Truck Carrying Missile Has Been Secured*, THE SPOKESMAN-REV., Oct. 31, 1985, at A6 (describing Air Force declaration of "National Defense Area" after a vehicle carrying a nuclear cruise missile jack-knifed and went off of the highway in Oregon).

[159] AIR FORCE JUDGE ADVOCATE GEN.'S SCHOOL, THE MILITARY COMMANDER & THE LAW 390 (2009), http://milcom.jag.af.mil/Military_CC_and_Law_2009.pdf.

[160] A search of the LEXIS "Federal Courts" database revealed no published opinions addressing the extent or limitations of the DoD's power to establish and maintain National Defense Areas (NDAs).

DoD's recent establishment of chains of command over cyberspace operations[161] raises the possibility that a commander could declare an NDA over affected private hardware, this application stands to stretch the NDA concept too far. The NDA regime would almost certainly lack the nuance necessary to handle the full array of issues arising in a cybersecurity emergency.

Ultimately, the current state of the legal authority that might allow the Executive Branch to impose its authority over the sort of hijacked private server used by Georgia's cyberattackers in July 2008 is uncertain and ambiguous. While a 2009 *Air Force Law Review* article on cyberneutrality asserted that the "U.S. Constitutional framework is more than adequate to allow for appropriate action" to enforce America's cyberneutrality, the article focused on national security doctrine—not on the Executive Branch's legal authority for coercive action against a reluctant private entity.[162] Under these circumstances, all relevant interests would best be served by legislation that clearly establishes Executive authority and procedures.

IV. The Cybersecurity Act of 2009: Empowering the Executive Response?

A. "Maintain Effective Cybersecurity Defenses Against Disruption"[163]: Senator Rockefeller's Initial Proposal

On April 1, 2009, Senator Rockefeller attempted to address the void of legal authority described in Part III of this article by introducing Senate Bill 773, the "Cybersecurity Act of 2009."[164] Co-sponsored by three senators—two Democrats and one Republican—the bill aimed to

---

[161] *See* Thom Shanker, *New Military Command for Cyberspace*, N.Y. TIMES, June 23, 2009, *available at* http://www.nytimes.com/2009/06/24/technology/24cyber.html (indicating that Robert M. Gates, the Secretary of Defense, had "ordered the creation of the military's first headquarters designed to coordinate Pentagon efforts in the emerging battlefield of cyberspace and computer-network security").

[162] Kastenberg, *supra* note 12, at 57.

[163] Cybersecurity Act of 2009, S. 773, pmbl., 111th Cong. (2009).

[164] Cybersecurity Act of 2009, S. 773, 111th Cong. (2009); *see also* Kastenberg, *supra* note 12, at 49 (discussing S. 773). On the same day, Senator Rockefeller also introduced Senate Bill 778, a bill establishing the office of National Cybersecurity Advisor within the Executive Office of the President. To Establish, Within the Executive Office of the President, the Office of the National Cybersecurity Advisor, S. 778, 111th Cong. (2009). (Notwithstanding S. 778, President Barack H. Obama appointed Howard Schmidt as the

> ensure the continued free flow of commerce within the United States and with its global trading partners through secure cyber communications, to provide for the continued development and exploitation of the Internet and intranet communications for such purposes, to provide for the development of a cadre of information technology specialists to improve and maintain effective cybersecurity defenses against disruption.[165]

The bill's "Findings" section identifies "America's failure to protect cyberspace" as "one of the most urgent national security problems facing the country."[166] To support this assertion, the section then cites a series of authorities—both governmental and private sector—on the United States' lack of readiness to face potential cyberthreats and the potential consequences that could result from such an attack.[167]

The bill proposed a series of measures to address cyberthreats. Section 3 envisions a "Cybersecurity Advisory Panel" to "advise the President on matters relating to the national cybersecurity program and strategy."[168] Section 6 tasks the National Institute of Standards and Technology with "establish[ing] measurable and auditable cybersecurity standards for all Federal Government, government contractor, or grantee critical infrastructure information systems and networks."[169] Section 7 mandates that the Secretary of Commerce "develop or coordinate and integrate a national licensing, certification, and periodic recertification program for cybersecurity professionals."[170]

White House Cybersecurity Coordinator in December 2009. Ellen Nakashima & Debbi Wilgoren, *Obama Names Howard Schmidt as Cybersecurity Coordinator*, WASH. POST, Dec. 22, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/12/21/AR2009122103055.html).

[165] S. 773, pmbl.

[166] *Id.* § 2(1).

[167] *Id.* § 2. For example, Finding (3) quotes the 2009 Annual Threat Assessment for the proposition that "a successful cyberattack against a major financial service provider could severely impact the national economy, while cyberattacks against physical infrastructure computer systems such as those that control power grids or oil refineries have the potential to disrupt services for hours or weeks." *Id.* § 2(3).

[168] *Id.* § 3.

[169] *Id.* § 6.

[170] *Id.* § 7.

Section 18 provoked the most controversy.[171] The section assigns a list of "Cybersecurity Responsibilities and Authorities" to the President.[172] In paragraph (2), the bill indicates that the President "may declare a cybersecurity emergency and order the limitation or shutdown of Internet traffic to and from any compromised Federal Government or United States critical infrastructure information system or network."[173] In paragraph (6), the bill states that the President "may order the disconnection of any Federal Government or United States critical infrastructure information systems or networks in the interest of national security."[174]

Essentially, this language proposes giving the President two tools: "limitation or shutdown" in the event of a "cybersecurity emergency" and "disconnection" in "the interest of national security." The bill includes a "Definitions" section in Section 23 but does not include definitions of "limitation or shutdown," "cybersecurity emergency," "disconnection," or "interest of national security."[175] It does, however, provide a definition of "Federal Government and United States critical infrastructure information systems and networks," namely, "Federal Government information systems and networks" and "State, local, and nongovernmental information systems and networks in the United States designated by the President as critical infrastructure information systems and networks."[176]

B. "In Coordination with Relevant Industry Sectors"[177]: Reported Changes

Five months later, CNET News reported that Senator Rockefeller's staff had drafted a revised bill.[178] The reported revision replaces the controversial language of Section 18, paragraph (2), with new language.[179] The new language specifies a precondition to presidential

---

[171] *See* McCullagh, *supra* note 30.
[172] S. 773 § 18.
[173] *Id.* § 18(2).
[174] *Id.* § 18(6).
[175] *Id.* § 23.
[176] *Id.*
[177] McCullagh, *supra* note 30, at 244.
[178] *See id.*; *see also* Brown, *supra* note 23, at 244 (discussing reported changes to the Cybersecurity Act).
[179] *See* McCullagh, *supra* note 30.

action: "in the event of an immediate threat to strategic national interests involving compromised Federal Government or United States critical infrastructure information system or network."[180] If that precondition arises, the President could "declare a cybersecurity emergency" and, "if [he or she] finds it necessary for national defense and security, and in coordination with relevant industry sectors, direct the national response to the cyber threat and the timely restoration of the affected critical infrastructure information system or network."[181]

The draft revision alters the paradigm of presidential action in the face of a cybersecurity emergency. In the original version, the President would act unilaterally—limiting, shutting down, or disconnecting the Internet, without any coordination or input from the private sector. The revised version contemplates a more cooperative Executive response; the presidential action would be "in coordination with relevant industry sectors."

C. Strengths and Weaknesses of the Proposed Cybersecurity Act

1. Strengths of the Proposed Cybersecurity Act

Senator Rockefeller's proposed Cybersecurity Act—in both incarnations—represents a significant improvement over the current state of the law, but it still suffers from substantial weaknesses. By establishing a legal basis for Executive Branch authority over private entities in a cybersecurity emergency, it will allow the Executive to bypass the obstacle of persuading the courts and the American public that the Justices' various pronouncements in *Steel Seizure* grant authority to the Executive. As the initial response to the proposal suggests,[182] some percentage of the American public will be uncomfortable with the idea of giving the Executive Branch this power in the first place. Certainly, the proposed system does not completely preclude the possibility of politically motivated abuse, such as a President invoking the Cybersecurity Act to shut down the Internet access of an administration critic. Nevertheless, the likelihood of cyberattack and the potentially severe consequences of such an attack suggest that the most prudent approach would be to craft legislation granting power to the Executive

---

[180] *Id.*
[181] *Id.*
[182] *See id.*

Branch, along with an oversight mechanism to check that power.

Moreover, the proposed Cybersecurity Act gives the Executive Branch the operational tools necessary to respond to the cybersecurity crises described in this article. In authorizing the President to shut down an affected portion of the Internet or limit traffic, Senator Rockefeller's initial proposal would allow an appropriate Executive Branch response to the DDOS attack against Georgia in July 2008, where shutting down an unwittingly hijacked privately-owned server effectively halted the attack. It would also provide the Executive Branch with a means of stopping Internet activity when that activity jeopardizes an official position of neutrality. While the reported change would replace the specifically enumerated measures of the initial proposal with more general "direct the national response" language, the Executive Branch may be able to interpret that language to include shutting down or limiting an affected portion of the Internet in the President's options.[183]

2. Weaknesses of the Proposed Cybersecurity Act

While Senator Rockefeller's proposed Cybersecurity Act offers substantial advantages over the legal regime currently governing Executive Branch actions in cybersecurity emergencies, the bill also has several shortcomings. Its lack of an oversight mechanism is its greatest weakness, especially in light of Supreme Court opinions that have regarded Executive actions under similar statutes as falling outside the purview of judicial review. Moreover, the bill leaves several significant aspects of its implementation undefined or vague. This article recommends rewriting the Cybersecurity Act to improve these deficiencies.

a. "Reviewability"[184]*:* Dakota Central *and Judicial Deference to Executive Decision-Making*

The likelihood that Executive Branch action in a cybersecurity

[183] Ultimately, a conclusive analysis of this aspect of the proposal will be impossible until the bill has been debated in Congress, which would provide an indication of congressional intent.

[184] Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1173 (2009).

emergency would affect substantial domestic interests, such as commerce or free expression, renders an oversight mechanism necessary.[185] A line of Supreme Court opinions suggests, however, that Senator Rockefeller's proposal would bar judicial review of any Executive actions that it authorizes. Both versions of the Cybersecurity Act of 2009 require the President to make certain determinations—for example, declaring that a situation represents a "cybersecurity emergency"—as a predicate to action. When evaluating the constitutionality of statutes imposing similar requirements on the Executive Branch as a precondition to action, the Supreme Court has consistently invoked a "reviewability" doctrine and declined to review whether the President had properly invoked his statutory powers, thereby precluding review of the challenged action.[186]

This judicial doctrine stems from a case involving a challenge to presidential action under a statute with similarities to both versions of the Cybersecurity Act. In 1919, the Supreme Court decided *Dakota Central Telephone Co. v. South Dakota*, a case that featured a challenge to the President's authority under a World War I joint resolution.[187] A year earlier, Congress had adopted a joint resolution authorizing the President "during the continuance of the present war . . . whenever he shall deem it necessary and for the national security or defense, to supervise or take possession and assume control of any telegraph [or] telephone . . . cable," provided just compensation was given.[188]

President Woodrow Wilson used this grant of authority in July 1918 to take possession of all telephone and telegraph systems; he then delegated the supervision of the systems to the Postmaster General.[189] The signing of the Armistice on November 11, 1918, ended World War I. Nevertheless, the Postmaster General, acting pursuant to the President's delegation, issued an order on December 18 increasing the

---

[185] Although the United States does not subject every single one of its national security decisions to a direct oversight regime, few national security decisions implicate significant domestic interests to the same extent as Executive Branch intervention in cybersecurity matters. Consequently, a prudent legal regime in this area would include some measure of direct oversight.

[186] Stack, *supra* note 184 ("[T]his doctrine operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power.").

[187] Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163 (1919).

[188] *Id.* at 181 (quoting joint resolution of July 16, 1918, 40 Stat. 904).

[189] *Id.* at 182–83 (quoting President Wilson's proclamation of July 22, 1918).

rates for intrastate calls in South Dakota.[190]

The State of South Dakota responded to the order by seeking an injunction against the Postmaster General.[191] South Dakota contended that the end of the war had quashed any conceivable connection between the intrastate phone rates and national security, thereby eliminating the Executive Branch's authority to set call rates under Congress's resolution.[192] The Court declined to review South Dakota's challenge to the President's authority on the grounds that "the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power."[193]

The Court further indicated that "the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."[194] As a commentator emphasized in a 2009 law review article, "[o]n this logic, it is difficult to imagine a circumstance in which a court would review whether the President's assertion of authority exceeded the power given."[195] While the enactment of the Administrative Procedure Act (APA) eliminated that exclusion from review for most Executive officials, the Supreme Court has held that the APA does not apply to the President.[196] Consequently, courts have continued to apply the reviewability doctrine in suits challenging the President's claims of statutory power.[197]

A shutdown or limitation of Internet use under the Cybersecurity Act will most likely implicate significant economic and free expression interests. As noted above, the proposed legislation grants the Executive Branch powers that a President could abuse, for example, to silence an administration critic. In this context, the *Dakota Central* line of precedent creates a significant shortcoming for Senator Rockefeller's proposal. If a private entity were to challenge an executive order, issued pursuant to the Cybersecurity Act, to shut down its server, the President's finding of a "cybersecurity emergency" or the "interests of

---

[190] Stack, *supra* note 184, at 1185.
[191] *Dakota Cent. Tel. Co.*, 250 U.S. at 179.
[192] Stack, *supra* note 184, at 1185.
[193] *Dakota Cent. Tel. Co.*, 250 U.S. at 184.
[194] *Id.*
[195] Stack, *supra* note 184, at 1186.
[196] *Id.* at 1173.
[197] *Id.*

national security" under the initial version, or a "cybersecurity emergency" under the second version, would serve to foreclose further judicial review. Part V, below, will discuss oversight mechanisms capable of improving this deficiency.

b. Consistency with Previous Seizure Legislation: Justice Frankfurter's Checklist

Justice Frankfurter's concurrence in *Steel Seizure*[198] summarized previous congressional legislation empowering the Executive Branch to conduct seizures in certain industries. Specifically, Justice Frankfurter noted that Congress had consistently granted the power to seize "for a limited time or for a defined emergency" or "repealed [the power] after a short period," consistently restricted the circumstances in which the President could exercise the power, imposed limitations on the period of governmental operation under the power, made Executive action dependent on specific conditions, specified the particular Executive agency entrusted with the power, and "legislated in detail" on potential compensation payment.[199] Concededly, Justice Frankfurter prepared his summary to contrast the circumstances of previous constitutionally sanctioned seizures with President Truman's unauthorized actions; his purpose was not to provide a controlling template for future legislators. Nevertheless, to ensure that any proposed cybersecurity legislation remains consistent with a judicially approved legislative tradition, Congress should draft the legislation with Justice Frankfurter's "checklist" in mind.

In general, Senator Rockefeller's proposal satisfies Justice Frankfurter's criteria. The Cybersecurity Act as drafted, either on its face or through a reasonable interpretation of legislative intent, suggests that it creates a grant of power for a defined emergency that is applicable under restricted circumstances and for a limited period of time, that is entrusted to a specific federal official, and that depends on specific conditions. All of these limitations presume the President has acted legitimately and refrained from abusing his ability to declare a cybersecurity emergency under the statute. To best address that concern, however, Congress could incorporate an oversight mechanism, especially since the "reviewability" doctrine stands to preclude judicial review.

---

[198] *See supra* Part III.A.3.
[199] *Steel Seizure*, 343 U.S. 579, 598 (1952) (Frankfurter, J., concurring).

The proposal does omit one item identified in Justice Frankfurter's survey of its antecedents: the detailed description of how the government will compensate a private entity whose property is seized under the Cybersecurity Act. An Executive dictate to shut down or limit Internet use stands to cause financial harm to a private entity with a hijacked server. Given the amount of commerce traversing the Internet, the dollar value of such harm could be astronomical.[200] Consequently, a system for compensating disadvantaged private entities should be an essential requirement in a forward-looking legal regime addressing Executive Branch action in cybersecurity emergencies.

c. Other Weaknesses

Several other areas of the proposed Cybersecurity Act are concerning. Overall, the bill suffers from many undefined terms. In the reported changes, for example, the statute leaves unanswered the identity of "relevant industry sectors," the amount and quality of coordination necessary to satisfy the statute, and the specifics on handling decision-making if the President disagrees with industry or industry sectors lack consensus. All these aspects of an Executive Branch response to a cybersecurity emergency under the Act could be contentious. The Act, when enacted, should provide a framework to handle these contingencies.

Moreover, neither version of the Act explicitly includes the compromise of U.S. neutrality as the sort of national security emergency that would allow the President to take action under the Act. As discussed above,[201] a private entity's actions in cyberspace that jeopardize a United States position of neutrality could have serious consequences that trigger a national security emergency, requiring the President to take action under the Cybersecurity Act. The Cybersecurity Act should explicitly define the compromise of the United States' neutrality as a "cybersecurity emergency" to ensure that the Executive Branch will be able to act without question in these circumstances.

---

[200] *See* COLARIK, *supra* note 38.
[201] *See supra* Part II.C.

V. Proposed Oversight Regime for Empowering Executive Branch Against Cyberemergencies

As discussed in Part IV, Senator Rockefeller's proposed legal regime for Executive Branch action in cybersecurity emergencies represents a significant improvement over the current state of the law, but it suffers from significant weaknesses. The most significant weakness, in light of the domestic interests at stake in a shutdown or limitation of Internet use, is its lack of an oversight regime.[202] To correct this deficiency, this article proposes borrowing an oversight regime from another national security arena. In the 1970s, the United States developed two legal regimes for oversight of Executive Branch actions involving national security. The first became law in 1973 when Congress passed the War Powers Resolution[203] over President Richard M. Nixon's veto. The second is the Foreign Intelligence Surveillance Act of 1978 (FISA).[204] Including an oversight mechanism in the Cybersecurity Act similar to the War Powers Resolution or FISA would ease concerns that *Dakota Central* and its progeny would allow Executive discretion under the Act to stand unchecked and unbalanced.

A. The War Powers Resolution

The first option would be a regime similar to the War Powers Resolution. Passed in the aftermath of the United States' involvement in Vietnam, the War Powers Resolution is Congress's primary means of oversight for the use of the U.S. Armed Forces in combat.[205] The most significant aspect of the War Powers Resolution for cybersecurity legislation purposes is section 1543, which requires the President to report to Congress if military force is used abroad.[206]

---

[202] *See supra* Part VI.C.2.a.

[203] 50 U.S.C §§ 1541–1548 (2006). For a more thorough discussion of the War Powers Resolution and its application to American military involvement, see generally Michael Mandel, *A License To Kill: America's Balance of War Powers and the Flaws of the War Powers Resolution*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 785 (2009).

[204] Originally enacted as the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95–511, §§ 103, 104(a)(7)(A)–(C), 92 Stat. 1783, 1788–89 (1978) (codified as amended at 50 U.S.C. §§ 1801– 1863 (2006)).

[205] 50 U.S.C § 1541(a).

[206] *Id.* § 1543. The War Powers Act also includes a requirement, in § 1542, that the President must "consult" with Congress before force is used and for the duration of such hostilities. *Id.* § 1542. Commentators contend that this provision's lack of specificity has rendered it essentially unenforceable. Mandel, *supra* note 203, at 790.

If the President introduces U.S. Armed Forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," section 1543 requires the President to submit a written report to Congress within forty-eight hours, detailing "the circumstances necessitating the introduction of . . . Armed Forces; . . . the constitutional and legislative authority under which such introduction took place; and . . . the estimated scope and duration of the conflict."[207] Subsequently, the President must submit additional reports to Congress at least once every six months.[208] The final element of the War Powers Resolution's check on Executive power comes in section 1544, which requires the President to withdraw or terminate use of military forces within a sixty-day window after the initial report, unless Congress specifically authorizes their continuing presence through a declaration of war or a specific resolution, or is physically unable to meet because of an armed attack against the United States.[209]

B. The Foreign Intelligence Surveillance Act of 1978

Congress could also opt for an oversight regime borrowing from the FISA. The FISA became law in 1978 in response to concerns, prompted by the Watergate scandal and the Church Committee's study of domestic surveillance,[210] about the need for increased oversight of the Executive Branch's use of electronic surveillance.[211] The central premise of the FISA was a compromise between national security and civil liberties aims: "authorizing secret electronic surveillance for the purpose of collecting foreign intelligence, but subjecting applications to judicial scrutiny and the entire process to congressional oversight."[212] The main mechanism for achieving that purpose was a special court, the Foreign Intelligence Surveillance Court (FISC), meeting in secret, *ex parte*.[213]

The FISC procedure imposes a series of safeguards on the Executive

---

[207] 50 U.S.C § 1543.
[208] *Id.*
[209] *Id.* § 1544; Mandel, *supra* note 203, at 791.
[210] SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94–755 (1976).
[211] *See generally* William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1216–28 (2007) (providing a detailed discussion of the historical context for FISA's passage).
[212] *Id.* at 1214–15.
[213] 50 U.S.C § 1803(a)(2).

Branch before it can conduct electronic surveillance. Applications to the FISC require cabinet-level approval and certification of the surveillance's primary purpose.[214] Only the judge determining the lawfulness of the surveillance can review the evidence.[215] The FISA prescribed time limits for the surveillance, with opportunities for the Government to request extensions.[216]

The scheme also provided for vigorous Executive action. The FISA dictated that the FISC judge "shall" issue the surveillance order upon making the required statutory findings.[217] The law included several limited-but-significant exceptions to the FISA process, including a provision permitting the Attorney General to certify that "an emergency situation exists," requiring electronic surveillance before an order from the FISC can be obtained.[218] Under this emergency authority, the Executive Branch may conduct surveillance for up to seventy-two hours from the time the Attorney General requests authorization until it obtains the information sought or until the FISC denies the application for surveillance, whichever is earlier.[219] The Executive Branch must submit an application to a judge under the emergency exception, but it is not required until seventy-two hours after the emergency authorization.[220]

C. Oversight Proposal

The War Powers Resolution and FISA offer examples of oversight regimes that Congress could incorporate into the Cybersecurity Act to serve as a check against Executive action. In over three decades of experience with both regimes, FISA has proven the more workable of the two, which suggests that it would be a superior model for the Cybersecurity Act.[221] A cybersecurity oversight regime borrowing from

---

[214] *Id.* § 1805(a) (approval by Attorney General); *id.* § 1804(a)(7)(B) (current version at 50 U.S.C. § 1804(a)(7)(B) (Supp. I 2003)) (certification requirement prior to amendment by USA PATRIOT Act in 2001).
[215] *Id.* § 1806(f).
[216] *Id.* § 1805(e).
[217] *Id.* § 1805(a).
[218] *Id.* § 1805(f)(1).
[219] *Id.* § 1805(f).
[220] *Id.*
[221] For a suggestion that a FISA-like regime be instituted to provide oversight in another national security area, see James Kitfield, *Predators*, NAT'L J. (Jan. 9, 2010), *available at* http://www.nationaljournal.com/njmagazine/cs_20100109_8396.php (application of FISA-like procedure to government program of targeted assassination of terrorists).

the FISA could facilitate a vigorous Executive Branch response to a cybersecurity emergency by allowing the Executive to present evidence justifying the Internet shutdown or limitation in secret, while allowing an emergency exception when especially prompt action is warranted. This regime could also uphold an appropriate balance between individual liberty and national security interests by ensuring that the Executive Branch would have to articulate its reason for an Internet shutdown or limitation, swear to the rationale under penalty of perjury, and persuade a judge that a cybersecurity emergency exists. Moreover, a regime with judicial oversight could also include a system for determining the amount of compensation the United States would owe to a private party suffering financial harm from Executive Branch actions in response to a cybersecurity emergency. This oversight regime would represent a substantial improvement over the proposed Cybersecurity Act.

VI. "Some Awful Calamity That Validates the Importance of the Threat"[222]: Conclusion

Because of the potentially immense consequences of a cyberattack or of a private individual's actions that compromise the nation's neutrality, the Executive Branch of the U.S. Government must be empowered to respond effectively to emergencies involving the nation's governmental and commercial cyberinfrastructure. The current state of the law provides neither definite authority nor useful limitations on that authority. Consequently, legislation defining Executive powers and specifying checks against those powers is essential.

While Senator Rockefeller's proposed Cybersecurity Act of 2009 improves the current state of the law by establishing an indisputable basis for Executive action, the Act, in both of its proposed versions, provides an inadequate legal regime. As *Dakota Central* and its progeny indicate, the Supreme Court's "reviewability" doctrine would mean that any courts reviewing challenged actions would defer to the Executive completely. In most circumstances requiring the President to invoke the Cybersecurity Act, the issue of coerciveness probably would be academic. Most likely, a U.S.-based company that learned that cyberattackers were using its hardware for an assault against the United States' governmental or commercial cyberinfrastructure would take the necessary measures to stop the attack, as the private owner of the server

[222] RICHARD A. CLARKE, AGAINST ALL ENEMIES 238–39 (1st trade paperback ed. 2004).

used in the July 2008 cyberattack on the Georgian infrastructure did. Controversy, if it existed, would probably be over whether the U.S. Government compensated the company for the seizure and, if so, how much compensation would be owed.

It is conceivable, however, that a private entity whose hardware has been hijacked might object to a seizure. This might happen if the private entity disputes that it is the gateway of an attack, or, more likely, if it were willingly compromising U.S. neutrality by assisting a sympathetic foreign power in an international conflict. In both cases, the Executive Branch would need coercive powers over the private entity to halt the attacks. By providing an oversight regime drawn from the War Powers Resolution or FISA, the improved Cybersecurity Act proposed in this article would allow for a check on the Executive while still allowing for a rapid response to cyberattacks or conduct that compromises neutrality and results in a national security emergency. Moreover, the regime would also provide a means for determining appropriate compensation for the seizure of private equipment.

Certainly, the relatively recent emergence of cyberwarfare explains one of the main difficulties in devising a legal regime for cybersecurity.[223] Legal regimes generally develop in response to real-world occurrences and aim to put policymakers in a better position than in an earlier crisis. Nevertheless, because of the potentially severe

---

[223] In this respect, cyberwarfare is similar to another nascent variety of warfare: space warfare. As Robert A. Ramey indicated in the *Air Force Law Review*,

> [T]he legal analysis of issues unique to space combat . . . cannot rely solely on analogy with legal relationships governing other combat environments. This is due in part to the relative infancy of space warfare and to the recency of its technology. To a certain extent, the international relation of space combat will evolve only *subsequent* to State action making such combat an imminent possibility. Because the law governs actual social relations and not theoretical abstractions, and because there have been no reported or anticipated cases of actual space combat, conclusions about legal restrictions on such combat must begin tentatively . . . . States faced a similar dilemma in the days leading up to World War I with aerial combat. At that time, one could hardly establish firm legal principles in the absence of State practice. As was the case in the 1910s with respect to air warfare, a great deal of original reflection on the implications of space combat is needed today.

Robert A. Ramey, *Armed Conflict on the Final Frontier*, 48 A.F. L. REV. 1, 3–4 (2000).

consequences of a cybersecurity attack, the United States must prepare to respond to the possibility.

As Richard A. Clarke observed in *Against All Enemies*, his account of America's counterterrorism failures leading up to the September 11, 2001, attacks, "America, alas, seems only to respond well to disasters, to be undistracted by warnings. Our country seems unable to do all that must be done until there has been some awful calamity that validates the importance of the threat."[224] Over the past two years, the country has received ample warnings of the consequences of cyberattacks, but the Executive Branch's legal ability to defend against such threats remains uncertain. Enacting the Cybersecurity Act outlined in this article would be a significant step toward empowering the Executive Branch to prevent such a calamity.

[224] CLARKE, *supra* note 222. The United States' experience in the aftermath of September 11, when Congress, in a six-week period, enacted a variety of previously unaddressed anti-terrorism legislation as the USA PATRIOT Act, suggests that rapid passage of Senator Rockefeller's proposal would be a likely product of a cybersecurity disaster. *See* Michael T. McCarthy, *Recent Developments: USA PATRIOT Act*, 39 HARV. J. ON LEGIS. 435, 437–39 (2002). This scenario bolsters this article's argument that Congress should enact a version of the Cybersecurity Act that improves on the deficiencies in Senator Rockefeller's bill.

NATURAL LAW AND SELF-DEFENSE

MAJOR JOHN J. MERRIAM*

There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal.[1]

If a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation.[2]

I. Introduction

The United States is currently engaged in combat and counterinsurgency operations in Iraq and Afghanistan, with over 137,000 U.S. soldiers on the ground in those two countries alone.[3] As troops have been drawn down in Iraq, they have been shifted to Afghanistan based on President Obama's decision to surge up to 30,000 additional soldiers and

---

* Judge Advocate, U.S. Army. Presently assigned as the Group Judge Advocate, 10th Special Forces Group (Airborne), Fort Carson, Colorado. LL.M., 2010, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2001, Case Western Reserve University School of Law; B.A., 1996, University of Notre Dame. Previous assignments include Brigade Judge Advocate, 12th Combat Aviation Brigade, Ansbach, Germany; Trial Defense Counsel, Fort Lewis, Washington; Brigade Judge Advocate, 1st Brigade, 25th Infantry Division, Fort Lewis, Washington and Mosul, Iraq; Chief, International and Operational Law, I Corps, Fort Lewis, Washington; Administrative Law Attorney, Fort Lewis, Washington. Member of the bar of Ohio. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The article received the Major General George S. Prugh Award for Writing Excellence in International & Operational Law, which is awarded by The Judge Advocate General's Legal Center and School for the best scholarly paper written in International & Operational Law.

[1] MARCUS TULLIUS CICERO, DE RE PUBLICA bk. 3, *quoted in* Robert N. Wilkin, *Cicero and the Law of Nature*, *in* ORIGINS OF THE NATURAL LAW 23 (Arthur L. Harding ed., 1954).

[2] THOMAS HOBBES, LEVIATHAN 345 (C.B. MacPherson ed., Penguin Classics 1985) (1651).

[3] *See* BROOKINGS INST., IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION AND SECURITY IN POST-SADDAM IRAQ 23 (2009), *available at* http://www.brookings.edu/~/media/Files/Centers/Saban/Iraq%20Index/index.pdf (indicating a total of 47,000 U.S. troops); BROOKINGS INST., AFGHANISTAN INDEX: TRACKING VARIABLES OF RECONSTRUCTION AND SECURITY IN POST-9/11 AFGHANISTAN 10 (2009) [hereinafter AFGHANISTAN INDEX], *available at* http://www.brookings.edu/~/media/Files/Programs/FP/afghanistan%20index/index.pdf (indicating a total of 90,000 U.S. troops).

Marines into Afghanistan.[4] These warriors are committed to a complex and ever-changing battlefield, in which identifying the enemy often constitutes the chief obstacle to successfully engaging him. Under such conditions, the primary rationale for the use of lethal force is quite often self-defense. Self-defense as a form of self-help is universally recognized as a legitimate basis for the use of force by states[5] and their soldiers[6] under international law. However, when, exactly, the right to self-defense is triggered has been the subject of vigorous debate.[7] The concept of anticipatory self-defense—action taken in self-defense before an "aggressor" strikes—has many critics, and even those who support its validity disagree over the exact temporal limits of its use.[8]

Debate over the validity of anticipatory self-defense has raged for decades, though the arguments were generally confined to the right of states to engage in pre-emptive military action and did not necessarily impact the immediate actions of soldiers on the battlefield. In 2005, however, the United States changed the Standing Rules of Engagement (SROE)[9] that govern its soldiers in combat.[10] While the SROE had always authorized self-defense in response to an "imminent threat," the 2005 SROE defined that term for the first time, stating that "imminent does not necessarily mean immediate or instantaneous."[11] As a result, the matter of the temporal boundaries surrounding anticipatory self-defense now directly affects individual soldiers in combat.[12] By defining "imminent" in this way, the UnitedStates has effectively opened the door to the use of force in self-defense against non-immediate threats.[13]

This article argues that the original basis for the right of self-defense is the natural law and that the natural law requires that self-defense only be used in response to an immediate threat.[14] Consequently, the U.S.

---

[4] AFGHANISTAN INDEX, *supra* note 3, at 10.
[5] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 175 (2005).
[6] Commander Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW, July 2007, at 82, 90 (arguing that "[t]he rights of nations are delegated to their agents on the battlefield").
[7] *See generally* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 703–06 (2005).
[8] *Id.*
[9] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01.B, STANDING RULES OF ENGAGEMENT (13 June 2005) [hereinafter 2005 SROE].
[10] *See infra* Part V.C.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See infra* Part II.

SROE are no longer in accord with natural law, which may result in friction in two forms.[15] First, because U.S. domestic law on self-defense draws heavily on the natural law,[16] the SROE may now allow actions that U.S. law does not.[17] Secondly, natural law consists of principles that are universally understood by all rational beings,[18] but the blurring of the definition of imminence has created enormous uncertainty over what actions may trigger a lethal response by U.S. soldiers in Iraq and Afghanistan, especially among civilians.[19] This uncertainty, in turn, undermines the perceived legitimacy of U.S. actions and hinders cooperation between U.S. forces and civilians.

Part II of this article will trace the origins of natural law theory from the Romans through Thomas Aquinas and Hugo Grotius, and will show that the natural law allows for the use of force in self-defense only in response to an immediate threat.[20] Part III will then explain the influence of natural law over international law, including the Caroline Doctrine and Article 51 of the U.N. Charter, and will argue that both Caroline and Article 51 adhere to a natural law standard and, consequently, require an immediate threat.[21] Part IV will explore the influence of natural law on the domestic law of the United States and will show that U.S. law also requires the existence of an immediate threat before self-defense is allowed.[22] In Part V, this article will demonstrate how these two strains of law—international and domestic—are synthesized in the Rules of Engagement and will explain how the 2005 changes to the SROE represented a dramatic departure from the imminent threat standard articulated by natural law.[23] Finally, Part VI will explore the friction caused by this departure from natural law and the expected consequences of it.[24] The article will conclude by arguing that the United States should abandon its expanded definition of imminence and adhere to a stricter requirement of immediacy.[25]

---

[15] *See infra* Part VI.
[16] *See infra* Parts IV & V.
[17] *See infra* Part VI.
[18] *See infra* Part II.
[19] *See infra* Part VI.
[20] *See infra* Part II.
[21] *See infra* Part III.
[22] *See infra* Part IV.
[23] *See infra* Part V.
[24] *See infra* Part VI.
[25] *See infra* Part VII.

II. Natural Law as the Origin of the Right to Self-Defense

The right of self-defense is as old as history and has long been founded on the simple notion that every rational being, no matter what society he lives in or what tradition he draws upon, must conclude that it is permissible to defend himself when his life is threatened with immediate danger. This is not a lesson that must be taught or justified on the basis of some system of positive law; rather, it is "a law . . . not written, but born with us . . . which we have taken from nature herself . . . that if our life be in danger from . . . open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable."[26] Natural law is thus "the fount of the right of self-defense."[27]

The natural law, "which we have taken from nature herself,"[28] and the logic that underlies it deeply informs both the right of individuals and the right of states to take action in the face of an immediate threat, and may therefore provide a method for discerning the degree to which the American position on self-defense is more or less legitimate. In other words, using the natural law as the baseline for the right of self-defense and comparing the degree to which a state diverges from the natural law may demonstrate where state conduct has gone astray.

To understand the justification for self-defense under the natural law, the term "natural law" must first be defined. This is by no means an easy task, as the natural law has been the subject of literally millennia of thought, debate, scholarship, and critique. For the purposes of this article, natural law is "the view that there are a number of true directives of human action [that] every person can easily formulate for himself."[29]

The natural law has several primary components.[30] First, it is universal in nature; every person can easily access it.[31] Natural law does

---

[26] Marcus Tullius Cicero, Oration for Titus Annius Milo ch. IV [hereinafter Oration for Milo], *available at* http://www.uah.edu/society/texts/latin/classical/cicero/promilone1e.html; *see also* Wilkin, *supra* note 1, at 23.
[27] DINSTEIN, *supra* note 5, at 179.
[28] Oration for Milo, *supra* note 26.
[29] Ralph McInerny, *The Principles of Natural Law*, *in* 1 NATURAL LAW 325, 326 (John Finnis ed., 1991).
[30] S.B. Drury, *H.L.A. Hart's Minimum Content Theory of Natural Law*, 9 POLITICAL THEORY 534 (1981). Drury identifies the components as

not derive from the positive law of any particular society; rather, it consists of directives that every person will always, easily understand.[32] Second, it is a rule of reason; that is, every person can formulate the dictates of the natural law.[33] It does not derive solely from instinct but from rational thought.[34] Moreover, it is a rule of human reason. Natural law is not the same as "the law of nature," when the latter term is used to denote mere instinct, though the terms have often been conflated or interchanged.[35] Natural law is a principle of ordering things that derives from human nature. It derives its essence from the particularly human capacity to reason and is in that sense distinguishable from mere animal instinct.[36] Finally, the natural law is a set of commands or directives, imposing a moral obligation to do or refrain from doing.[37]

A. Roman Natural Law

Most discussions of natural law begin with Saint Thomas Aquinas, but in fact the idea of a universal law of nature is far older. Roman jurists, influenced by Aristotle[38] and the Greek Stoics,[39] began groping toward a concept of a universal natural law that applied to all people. In his famous *Institutes*, the Emperor Justinian attempted to identify a *jus gentium* or "law of nations," that was universal and derived from

> (1) the conviction that there exists a universal justice that transcends the particular expressions of justice in any given set of positive laws; (2) that the universal principles of justice are accessible to reason and independent of human volition (i.e., they are discovered, not made by man); (3) that a positive law contrary to these universal principles is not properly speaking a law, since it lacks the moral content necessary to put us under obligation.

Id.

[31] McInerny, *supra* note 29, at 326.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, J. INST. (J. B. Moyle trans., Oxford Univ. Press 2d ed. 1889); *see also infra* notes 42–43. What Justinian defined as the "law of nations" is, in modern parlance, called "the natural law." *See* J. INST. 1.2.1.

[36] McInerny, *supra* note 29, at 326.

[37] Drury, *supra* note 30, at 534.

[38] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, ch. 10, at 132–33 (David Ross trans., Oxford Univ. Press 1991) (c. 350 BCE).

[39] For an excellent discussion of the early Greek Stoic school of natural law and the manner in which it was incorporated by Roman jurists to round out their *jus gentium*, see generally Wilkin, *supra* note 1, at 13–25.

reason.[40] "Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations."[41] Justinian also attempted to preserve a distinction between instinct and a law of reason. "The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures . . . ."[42] On the other hand, "the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required."[43]

These early Roman efforts to establish a universal natural law were important but tended to be derived empirically by observing the customs and laws of those they came in contact with.[44] Still, the Romans at least identified that human reason must lie at the source of this law of nations. Moreover, from the earliest times, the Roman conception of natural law was perhaps best exemplified in their view on self-defense. Arguably Cicero's most famous oration, his defense of Milo on a charge of murder, grounded self-defense firmly in the natural law, not on the civil law of Rome or, for that matter, on any human-created legal regime.[45]

What the Romans lacked, however, was an explicitly moral justification for their law of nations. Growing as it did out of empirical observation and common sense, the Roman concept of natural law had a certain logical force, yet it could easily be twisted to justify immoral ends. When Cicero defended Milo on the grounds of self-defense, he was defending a thuggish street-brawler who had incited and led organized and unlawful violence in the streets of Rome.[46] In that sense, the Roman

---

[40] Justinian, of course, drew on the earlier work of Roman scholars, beginning with Cicero and culminating with the work of the jurist known only as Gaius. *Id.* In his *Institutes*, written around A.D. 160, the Roman scholar Gaius grounded Roman law in two separate bodies of law. The *ius proprium* (later *ius civile*) constituted that law peculiar to the Roman people, and the *ius gentium* or *ius natural* that which "natural reason establishes among all mankind [and] is followed by all peoples alike." THE OXFORD HANDBOOK OF COMPARATIVE LAW 5 (2006) (citing G. INST. 1.55 (Francis de Zuleta trans.)).

[41] J. INST. 1.2.1.

[42] *Id.* 1.2.pr.

[43] *Id.* 1.2.2.

[44] *See* Wilkin, *supra* note 1, at 13.

[45] Oration for Milo, *supra* note 26.

[46] *See generally* TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC 280–82 (2005).

concept of natural law did much to describe law, but did very little to explain its essence by providing a moral justification for it.

B. Saint Thomas Aquinas

Thomas Aquinas, while drawing on the work of the Romans as preserved by the Roman Catholic Church during the dark ages, took the concept of natural law and rooted it firmly in a moral code in a way that impacted philosophical thought and jurisprudence in the West for centuries. In his *Summa Theologica*, Aquinas included a "Treatise on Law"[47] that succinctly and cogently argued that individuals may discern certain precepts that arise in all human beings "*per se nota*—known through themselves, not derived [but rather] self-evident."[48]

> Because this interpretation was clear-cut and exact, it served as an instrument by means of which he could refine the concept of law into its basic and essential elements. His predecessors, such as Plato, Aristotle, and Cicero, did not have such an instrument and hence their concept of law was formulated in terms of a description of law and not its essence, as Aquinas' was.[49]

1. Natural Law Reasoning

Aquinas's proof of the principle of natural law is rather lengthy, but understanding the fundamental concepts underlying it is central to appreciating its specific application to self-defense. Beginning with the notion that there are two forms of reason, speculative and practical,[50] Aquinas shows that the concept of "the good" is "the first thing to fall within the apprehension of practical reason, which is ordered toward action."[51]

---

[47] SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I.2, *quoted in* THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (Alfred J. Freddoso trans., St. Augustine's Press 2009).
[48] McInerny, *supra* note 29, at 327.
[49] Thomas E. Davitt, *St. Thomas Aquinas and the Natural Law*, *in* ORIGINS OF THE NATURAL LAW, *supra* note 1, at 31.
[50] AQUINAS, *supra* note 47, pt. I.2.94., art. 2.
[51] *Id.*

> For every agent acts for the sake of an end, which has the character of a good. And so the first principle in practical reasoning is what is founded on the notion *good*, which is the notion: the good is what all things desire. Therefore, the first precept of law is that good ought to be done and pursued and that evil ought to be avoided. And all the other precepts of the law of nature are founded upon this principle . . . . [A]ll the things to be done or avoided that practical reason naturally apprehends as human goods are such that they belong to the precepts of the law of nature.[52]

Aquinas thus argues that the natural law is that imperative, discerned rationally by all human beings, to seek the good and avoid the evil. In order to determine how that principle of practical reason applies to the world of men and human action, one must identify those things that all men accept as "goods."

Aquinas's precepts of natural law flow from certain "natural inclinations"[53] of all human beings, beginning with self-preservation.[54] "What belongs to the natural law in light of this inclination is everything through which man's life is conserved or through which what is contrary to the preservation of life is thwarted."[55] This may seem self-evident—and indeed, that is entirely the point of natural law.[56] A man's strongest inclination is the preservation of his own life, and thus the natural law compels man to do those things that preserve his life and thwart those things that would threaten it. This is the very essence of self-defense, and yet, it is not enough to form the basis of a natural law of self-defense, for self-preservation would allow many things otherwise characterized as "evils" to be done. Self-preservation is an instinct that is shared by all living beings, including animals, but it is not the only inclination that human beings are directed by their rational faculties to pursue.

---

[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] This natural law argument is powerfully echoed in the founding documents of the United States. The Declaration of Independence, for example, states "We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

What gives shape and substance to Aquinas's vision of natural law is a different category of inclinations: those that drive him "toward the good with respect to the rational nature that is proper to him,"[57] which includes the inclination to know God and the inclination "toward living in society."[58] It is this latter precept—that man is a social animal—that serves as the counterweight to the otherwise unrestrained pursuit of self-preservation. "[T]hose things that are related to this sort of inclination belong to the natural law, e.g. . . . that [man] not offend the others with whom he has to live in community . . . ."[59] For Aquinas, this "basic inclination to live in community with other men" derives from the fact that man is endowed with reason and "depends upon other men for the fulfillment of his many needs."[60]

Having defined these several "goods," Aquinas then makes clear that all goods are not equal. There is "an ordering of the precepts of the natural law that corresponds to the ordering of the natural inclinations."[61] Self-preservation is placed first because it is in the position of primacy, and the natural law is superior in the same way to positive, human law. Certainly, man is bound to seek to preserve all the goods when possible, but he must preserve his own life first and foremost. Thus "one is bound to take more care of one's own life than of another's."[62]

Finally, Aquinas laid down the proposition that natural law could not be circumvented or destroyed by the positive law. Again, in so doing, he echoed Cicero, who declared that the natural law cannot be abrogated. "To invalidate this law by human legislation is never morally right . . . and to annul it wholly is impossible."[63] Aquinas agreed, stating that "the law of nature is unchangeable with respect to its first principles."[64] If human law, or positive law (*jus positivum*), is opposed to natural law, "then it is no longer a law, but a corruption of law."[65]

---

[57] AQUINAS, *supra* note 47, pt. I.2.94, art. 2.
[58] *Id.*
[59] *Id.*
[60] Davitt, *supra* note 49, at 31.
[61] AQUINAS, *supra* note 47, pt. I.2.94, art. 2.
[62] *Id.* pt. II.2.64, art. 7.
[63] CICERO, *supra* note 1.
[64] AQUINAS, *supra* note 47, pt. I.2.94, art. 5.
[65] *Id.* pt. I.2.95, art. 2.

2. Aquinas on Self-Defense

Aquinas, therefore, defines the natural law as a command to protect the good, and his ordering of self-preservation as the highest good forms the natural law justification for the lawfulness of self-defense. But by balancing the drive for self-preservation against the need to avoid killing others, he goes further and justifies the morality of self-preservation. If one kills solely in order to protect one's life, and lacks any other alternative, the killing is not simply morally neutral, but morally good, because "moral acts take their species from what is intended, and not according to what is beside the intention."[66]

Lack of intent is a vital component of self-defense according to the natural law; it morally justifies self-defensive killing because there is no real intent to kill. Rather, the intent is to preserve one's life, and the killing is merely the way this can be accomplished. "Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible."[67] Additionally, if the killing is truly an act of necessity, there is no requirement to go to great lengths to "avoid killing the other man, since one is bound to take more care of one's own life than of another's."[68] According to Aquinas, the natural law justification for killing in self-defense is entirely predicated on the inability to choose another course while still preserving one's own life. In other words, Aquinas has stated the principle of necessity, but has given it a moral quality that it would otherwise have lacked.

While Aquinas's justification of self-defense allows for killing based on its morality, he also allows for the exigencies of war. "[I]t is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe . . . ."[69] More broadly, Aquinas distinguishes between acts of self-defense (which are moral because their intention is not to kill but to preserve life) and other just acts (particularly the waging of just war)

---

[66] *Id.* pt. II.2.64, art. 7.
[67] *Id.*
[68] *Id.*
[69] *Id.*

which can be characterized as morally neutral.[70] In other words, Aquinas divided the forms of morally acceptable killing into two broad spheres: self-defense on the one hand and a separate set of just acts of violence on the other.

Remarkably, given the fact that he was writing centuries before the formation of anything resembling modern international law, Aquinas also invoked the principle of proportionality in response to the threat.

> And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists, 'it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense.'[71]

Therefore, as early as the 13th century, Thomas Aquinas had outlined both of what would later become the two prongs of the law of self-defense: necessity and proportionality.

3. Influence of Aquinas

Aquinas's impact on juristic and philosophical thought was profound, immediate, and lasting. Moreover, it continued to pervade western jurisprudential thought even after the Reformation and the beginning of the Enlightenment. While Aquinas certainly wrote from a theological perspective, his reasoning was not inherently religious in that it was not based on some form of divine revelation. If it had been,

> then Natural Law is not natural, it is supernatural. No, the truths of the Natural Law are assented to by the human mind simply because of the evidence that is observable in man's natural inclinations: the evidence of an ordering that ultimately is recognized as a law. That

---

[70] *Id.* pt. II.2.40. For a good summary of just war theory, see Major Jennifer B. Bottoms, *When Close Doesn't Count: An Analysis of Israel's Jus ad Bellum and Jus in Bello in the 2006 Israel-Lebanon War*, ARMY LAW, Apr. 2009, at 27–30.

[71] AQUINAS, *supra* note 47, pt. II.2.64, art. 7.

> is why numerous men—from Plato, Aristotle, and Cicero on down to Hooker, Grotius, Locke, Vattel, Burlamaqui, Stammler, and many others—could hold "Natural Law" without its being related to religious faith.[72]

Natural law's foundation in human reason that is observable by every man forms the basis for its universality and for the profound effect Aquinas had on subsequent thinkers.[73]

C. Hugo Grotius

In the late medieval period, a series of thinkers operating out of nascent universities in continental Europe took Aquinas's vision and considered its application to the law of nations, as well as to the civil law of states themselves.[74] Vitoria and Suarez, scholastics from universities in Spain, wrote extensively on natural law as it related to the actions of states, and their influence began to be felt across the Continent.[75] It was not until the end of the 16th Century, however, that the idea of natural law manifested itself in such a way as to affect the formation of a true international law. In 1625, the Dutch jurist Hugo Grotius published his great work *De Jure Belli ac Pacis*,[76] which earned him the title of the "father of international law."[77] His book was published during the Thirty Years' War and quickly gained widespread acceptance; Gustavus Adolphus, the Swedish King and foremost military commander of the age, famously kept a copy beneath his pillow on campaign.[78] The Peace of Westphalia, which concluded the Thirty Years' War, resulted in the recognition of a host of petty nation-states and, in so doing, propelled the rise of the nation-state in Europe. Grotius's work "furnished the intellectual foundation for the political development"[79] of the nation-state and an international order organized around it.

---

[72] Davitt, *supra* note 49, at 39–40.
[73] *Id.*
[74] *See generally* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 7–13 (Clarendon Press 1963).
[75] *Id.*
[76] HUGO GROTIUS, DE JURE BELLI AC PACIS (1625).
[77] EDWARD DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS 58 (1969).
[78] DAVID J. HILL, *Introduction* to HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 11 (A.C. Campbell ed. & trans., M. Walter Dunne Publ. 1901).
[79] *Id.*

1. Grotius and Thomistic Natural Law

Grotius defined the natural law as "the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational structure."[80] Grotius was heavily influenced by Aquinas and the subsequent works of the late medieval scholastics who interpreted Aquinas, and he fully embraced the natural law as the great unifying source of law for mankind. For Grotius, as for Aquinas, the natural law flowed directly from man's nature as a rational being. "There is, therefore, a Natural Law, which, when properly apprehended, is perceived to be the expression and dictate of right reason. It is thus upon the nature of man as a rational intelligence that Grotius founds his system of universal law."[81]

The universality of the natural law made it the ideal basis for rules governing the conduct of men at war, and adherence to the natural law was imperative for man to retain his humanity.

> As this law of human nature is universally binding wherever men exist, it cannot be set aside by the mere circumstances of time and place . . . . Those laws which are perpetual, which spring from the nature of man as man, and not from his particular civil relations, continue even during strife and constitute the laws of war . . . . To disavow the imperative character of these perpetual laws, is to revert to barbarism.[82]

The natural law was distinct from, and superior to, the "law of nature" common to all living things. Man, unlike animals, is imbued with reason, "that part of a man, which is superior to the body,"[83] and the agreement of the principles of natural law "with reason . . . should have more weight than the impulse of appetite; because the principles of nature recommend right reason as a rule that ought to be of higher value than bare instinct."[84] This rule of right reason is universal to mankind, since "the truth of this is easily assented to by all men of sound judgment without any other demonstration."[85]

---

[80] GROTIUS, *supra* note 78.
[81] HILL, *supra* note 78, at 9.
[82] *Id.*
[83] GROTIUS, *supra* note 78, at 31.
[84] *Id.*
[85] *Id.*

2. Grotius on Self-Defense

Grotius, of course, recognized the drive for self-preservation as forming the basis of self-defense, but while the principle of self-preservation is vital to any law of self-defense, it is only one component. The law of self-defense lacks validity and force without bounds placed on the right to self-preservation by a second requirement, to protect another primary good: community or society. "Now right reason and *the nature of society* which claims the second, and indeed more important place in this inquiry, prohibit not all force, but only that which is repugnant to society, by depriving another of his right."[86] One is entitled to defend one's life but must accept limits on that right that are necessary to the preservation of peaceable society.

What are those bounds? Like Aquinas, Grotius described two concepts that would later become the basic principles of self-defense under international law: necessity and proportionality. In contrast, Grotius explicitly addressed what Aquinas had only implied: the requirement of immediacy as a component of, or precondition to, the element of necessity. "[W]hen our lives are threatened with immediate danger, it is lawful to kill the aggressor . . . ."[87] The immediate danger and the lack of alternatives make self-defensive force necessary; the obvious corollary is that if there is enough time to take an alternative course, then deadly force is not, strictly speaking, necessary.

This lack of alternatives underlies the legitimacy of self-defense. Grotius cites Aquinas for the proposition that when acting in "actual self-defense, no man can be said to be purposely killed."[88] This lack of real choice gives the act of killing the moral quality required to justify it under natural law. The temporal requirement of immediacy is simply a manifestation of the lack of alternatives that gives rise to the necessity to use deadly force. Grotius confronts this point squarely: "the danger must be immediate, which is one necessary point."[89] Presumably, when danger is not immediate, alternative courses of action may be available.

---

[86] *Id.* at 33 (emphasis added).
[87] *Id.* at 76.
[88] *Id.* at 77.
[89] *Id.*

However, Grotius also allows for the possibility of anticipatory self-defense: "Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. For in the moral as well as the natural system of things, there is no point without some breadth."[90] Yet, in allowing for anticipatory self-defense, Grotius does not sacrifice the requirement of immediacy, nor does he suggest that the mere apprehension of harm is enough to satisfy the requirements of the natural law. "They are . . . mistaken . . . who maintain that any degree of fear ought to be a ground for killing another, to prevent his supposed intention." Self-defense must still satisfy the requirement of necessity; there must truly be no other option. Advance knowledge of hostile intent, if coupled with an available alternative, requires recourse to some other measure short of killing.[91] In sum, Grotius characterizes individual self-defense as a kind of "private war, [which] may be considered as an instantaneous exercise of natural right."[92] The emphasis placed on this temporal requirement is of paramount importance; immediacy forms the core of the rule of right reason that allows for killing in self-defense.

As one would expect, given his reliance on Aquinas, Grotius also embraces other forms of just, and thus justified, violence. He accepts just war theory and holds that the natural law also favors reprisals and acts to punish wrongdoers.[93] Grotius does not characterize these acts as self-defense but rather assigns them their own sphere of legitimacy within the natural law paradigm.[94] This division is important because it provides an independent basis for legitimate uses of force based not on moral self-defense, but rather on justice. In the Thomistic tradition then, violent acts may be justified when committed in self-defense, whose morality and legitimacy are universally accepted under natural law, or when committed by the proper authority having a just cause and right intention, acts which are morally neutral but still legal, such as war, reprisal, and punishment.[95]

---

[90] *Id.*
[91] *Id.* at 78.
[92] *Id.* at 83.
[93] *See generally id.* at 31–54.
[94] *Id.*
[95] *See* Bottoms, *supra* note 70, at 27–30 (providing a good discussion of the principles of Just War Theory).

3. Summary of Self-Defense in Natural Law

The natural law theory of self-defense can be broadly characterized as having both restrictive and unrestrictive qualities. Self-defense under natural law is unrestrictive because, while it can be limited to some extent, it can never be taken away entirely; a law that purports to eliminate the right to self-defense would be unjust.[96] On the other hand, the natural law theory of self-defense is restrictive in actual application; it can only be exercised when necessary, in response to an immediate threat to life.

Immediacy is thus at the core of the natural law theory of self-defense; it is the essential component of the doctrine of necessity. Aquinas laid the philosophical groundwork for natural law jurisprudence and established the moral legitimacy of self-defensive killing.[97] Grotius then used natural law to build a framework for both the private right of self-defense and an international order that incorporated the state's right to self-defense.[98] In both cases, Thomistic reasoning justified self-defense on moral grounds, but it did so by emphasizing the lack of other options and the truly immediate nature of the threat.

III. Natural Law in International Law

Grotius wrote *De Jure Belli ac Pacis* at the height of the Protestant Reformation and consequently took great pains to emphasize that his natural law theory of self-defense did not depend on religious faith.[99] Subsequent writers essentially secularized the concept of natural law, and by the beginning of the 20th century, scholarly work on self-defense was devoid of the religious overtones that characterized Thomistic writing.[100] Positivism and its emphasis on treaty law gradually eroded the influence of natural law on international legal theory, but it never entirely

---

[96] *See supra* notes 63–65 and accompanying text.
[97] *See supra* Part II.B.2.
[98] *See supra* Part II.C.2.
[99] HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE para. 11, *available at* http://www.lonang.com/exlibris/grotius/gro-100.htm. This introductory passage is often omitted in modern texts. Grotius famously stated that his principles of natural law would remain true "even if we should concede what cannot be conceded without the utmost wickedness, that there is no God." *Id.*
[100] *See generally* BROWNLIE, *supra* note 74, at 16–50.

eliminated it.[101] In the early 20th century, the eminent scholar Hersch Lauterpacht wrote that

> [T]he second main . . . agency [after the expressed will of states found in treaties and the like] through which the objective basis of international law is given form . . . are the principles and rules of law which are due not to an ascertained direct expression of the will of States, but to the reason of the thing . . . .[102]

The continued relevance of natural law theory is perhaps nowhere more evident than on the vital matter of self-defense. Two key sources of law on the state's right to self-defense arose in the 19th and 20th centuries, respectively: the *Caroline* incident, and the establishment of the United Nations. Each of these instances provides an example of the continuing influence of the natural law on international law, and each places great importance on the requirement of immediacy.

A. The Caroline Doctrine

The modern formulation of the right to self-defense in international law is often held to be the so-called "Caroline Doctrine." The *Caroline* was a U.S.-flagged ship operating on Lake Erie in 1837 during a period of unrest known as the MacKenzie Rebellion in British Canada.[103] The steamboat *Caroline* was allegedly engaged in transporting men and materials from U.S. territory to a rebel-held island in the Niagara River.[104] After making several ineffectual protests to the government of the United States in an effort to have this supply line cut, the British learned that a merchant vessel called the *Caroline* was in the process of

---

[101] M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1096, 1100 (1951) ("Naturalism in international law has never regained the prestige and acceptance it enjoyed in the Middle Ages, although Catholic scholars have kept it vigorously alive, and in recent years it has staged an impressive comeback. The Grotians have to a lesser extent been eclipsed by the positivists.").

[102] HERSCH LAUTERPACHT, INTERNATIONAL LAW—THE GENERAL PART (1954), *reprinted in* 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 52 (E. Lauterpacht ed., 1975). Lauterpacht described these rules arising from the "reason of the thing" as being "the modern, the less controversial and probably more articulate expression of the law of nature which nurtured the growth of international law and which assisted powerfully in its development." *Id.*

[103] *See generally* DINSTEIN, *supra* note 5, at 248–49.

[104] *Id.*

ferrying arms to the insurgents. Acting on what would now be called "time-sensitive intelligence," British forces crossed the border, seized the *Caroline*, set her afire, and sent her over the Niagara Falls, killing several American citizens.[105]

The U.S. Secretary of State, Daniel Webster, wrote the British government in protest, and there followed a series of letters back and forth between U.S. and British envoys. When the British insisted that they had acted legitimately, Daniel Webster countered by asserting that the right to self-defense does not exist unless one can "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[106] Further, Webster reasoned, the British must also show that in their response they "did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[107] This formulation—necessity, proportionality, and immediacy—was ultimately accepted by the British and eventually became the classic expression of the customary right to anticipatory self-defense in international law.[108]

The Caroline Doctrine, when read against the natural law principles outlined above, appears to be almost entirely a restatement of the natural law formulation, and this should come as no surprise, given the influence of natural law on both British and American lawyers.[109] Webster was himself heavily influenced by the natural law, and it often lay at the root of his arguments in court. He famously advocated, for example, that slavery "was contrary to the law of nations because it violated natural law."[110] Webster had been trained in the same common law tradition as all other British and early American lawyers, drawing on the work of Blackstone and Coke, and influenced by the writings of Hobbes, Locke, and other political and legal thinkers.[111]

---

[105] *Id.*
[106] Letter from Sec'y of State Daniel Webster, to Lord Ashburton (Apr. 24, 1841) [hereinafter Webster Letter], *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.
[107] *Id.*
[108] DINSTEIN, *supra* note 5, at 249.
[109] *See infra* Part IV.A.
[110] ROBERT VINCENT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 183 (W.W. Norton & Co. 1997) (1921).
[111] *See infra* Part IV.A.

If it seems odd that the British should rely so heavily on Roman sources of law and on the Thomistic tradition, despite the fact that the common law of Britain evolved with scant Roman influence, it is perhaps because "English writers on international law, although closely following the practice of States, had never lost sight of what may be called the natural law foundation of international law."[112] The British and American tradition of law "had its origin in the desire to establish those principles of reason . . . which . . . could assist the cause of individual liberty against the encroachments and tyranny of the newly risen territorial national State. . . . And much indeed of the Law of Nations was due to the law of nature thus resurrected."[113]

Thus, when Webster articulated his famous formula for anticipatory self-defense in the language of the natural law, it was easily understood and accepted by his British counterparts because they drew on the same natural law tradition of self-defense. This doctrine was limited by the principles of necessity, immediacy, and proportionality but recognized that the right to self-defense was otherwise indefeasible. Caroline cannot properly be understood without grounding it in the natural law, and it should be viewed as a restatement of the Aquinas-Grotius natural law argument for self-defense.

B. U.N. Charter and the Inherent Right to Self-Defense

The United Nations was formed in the aftermath of the Second World War precisely in order to "ensure . . . that armed force shall not be used, save in the common interest."[114] The primary vehicle for achieving this end is the clear prohibition on the use of force contained in Article 2(4), which directs all Member States to "refrain in their international relations from the threat or use of force."[115] The Charter admits of only two exceptions to this general prohibition. First, after determining "the existence of any threat to the peace . . . or act of aggression,"[116] the

---

[112] HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1935), *reprinted in* 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 201 n.1 (E. Lauterpacht ed., 1975).
[113] Hersch Lauterpacht, Remarks to the Royal Institute of International Affairs, Chatham house, London (27 May 1941), *in* 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, *supra* note 112, at 50.
[114] U.N. Charter pmbl.
[115] *Id.* art. 2, para. 4.
[116] *Id.* art. 39.

Security Council may authorize the use of force by such means "as may be necessary to maintain or restore international peace and security."[117] Secondly, the Charter expressly recognizes the "inherent right of individual or collective self-defense"[118] in response to an "armed attack,"[119] at least "until the Security Council has taken measures necessary to maintain international peace and security."[120]

1. Debate Regarding Anticipatory Self-Defense

The meaning of Article 51 and the right to anticipatory self-defense are the subject of much of the scholarly dispute in the post-Charter world. There is no real disagreement that the use of force is generally illegal, with certain specific and narrow exceptions.[121] There is likewise no disagreement that states maintain a right in law to self-defense.[122] Disagreement arises on the margins of those exceptions. Specifically, if and when a right to anticipatory self-defense arises, what constitutes an armed attack? What temporal requirement governs the concept of anticipation? And how far can a state go in its armed response?[123] More broadly, many scholars continue to debate whether the *jus ad bellum* is fixed or whether it continues to evolve in response to changing circumstances and unique, particularized factual scenarios.[124]

Sean Murphy argues that there are essentially four schools of thought that address the extent to which a customary right to anticipatory self-defense still exists.[125] Those who believe the U.N. Charter has preempted

---

[117] *Id.* art. 42.
[118] *Id.* art. 51.
[119] *Id.*
[120] *Id.*
[121] *Id.* art. 2, para. 4.
[122] *Id.* art. 51.
[123] *See* Murphy, *supra* note 7, at 706.
[124] *Id.*
[125] *See generally id.* at 706–17. Murphy is careful to make clear that he has drawn these distinctions broadly and that they allow for a wide range of opinion within and between these schools of thought. *Id.* at 706. In addition to the strict constructionists, Murphy identifies several other broad groups. The "imminent threat school" allows for a right of anticipatory self-defense but insists on a strict temporal requirement of true imminence. The "qualitative threat school" changes the focus from temporality to the quality or nature of the threat, because the threats of the modern age, including terrorism and nuclear war, dictate an analysis of (1) the consequences of the threat should it become real, (2) the lack of other options short of force, and (3) the probability, rather than near-certainty, of attack. Finally, the "Charter-is-dead school" argues that widespread state

the field on the matter of self-defense, a group Murphy calls "strict constructionists,"[126] argue that "when the UN Charter was adopted in 1945, it enshrined a complete prohibition on the use of force in inter-state relations."[127] That prohibition had two exceptions: Security Council action and Article 51 self-defense in response to an armed attack. "No other exceptions . . . are permitted,"[128] whether for the rescue of nationals, humanitarian intervention, or "acting preemptively against a grave but distant threat."[129] If this view is correct, then any right of anticipatory self-defense is strictly limited by the terms of Article 51, which "would seem to preclude preventive action."[130]

This strict constructionist school [131] relies on the language of the Charter. Since "the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?"[132] Further, "even if it can be asserted that Article 51 was meant to be read as an expression of, or in accord with, customary law, should it not be that customary law in existence at the time of the Charter's adoption?"[133] In that case, whatever the customary law of self-defense may have been in earlier times, anticipatory self-defense should be interpreted according to the law as it was understood in 1945.[134] Consequently, "[i]t can only be concluded that the view that Article 51 does not permit anticipatory action is correct."[135]

---

practice in direct contravention of the prohibition on the use of force has essentially vitiated any legal affect of the Charter. It has been ignored to such an extent that, at this point, it cannot be held to still have binding legal effect in any but the most formal sense of the word. *Id.*

[126] *Id.*

[127] Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERKELEY J. INT'L L. 22 (2008).

[128] *Id.*

[129] *Id.*

[130] BROWNLIE, *supra* note 74, at 367.

[131] Murphy, *supra* note 7, at 706.

[132] BROWNLIE, *supra* note 74, at 273.

[133] *Id.* at 274.

[134] *Id.* at 275.

[135] *Id.* at 278.

On the other extreme, one group of scholars holds a more expansive view of anticipatory self-defense. This group argues that the temporal component of imminence is meaningless unless it is also coupled with consideration of the magnitude and probability of attack.[136] John Yoo, summarizing the U.S. position on anticipatory self-defense in 2003, noted that "[i]nternational law does not supply a precise or detailed definition of what it means for a threat to be sufficiently 'imminent' to justify the use of force in self-defense as necessary."[137] Given the nature of terrorism and the destructiveness of weapons of mass destruction, anticipatory self-defense should allow for the use of force well in advance of an actual armed attack because allowing a terrorist attack occur could have devastating consequences.

The middle view is held by Yoram Dinstein, one of the most pre-eminent modern writers on the law of war. Dinstein argues that the Charter has preempted customary law and that "any other interpretation of the Article would be counter-textual, counter-factual and counter-logical."[138] Dinstein, however, does not rule out anticipatory action, but would limit such action to what he calls "interceptive self-defense"[139] when an armed attack has been launched in "an ostensibly irrevocable way."[140] In so doing, Dinstein effectively calls for a self-defense regime that allows for anticipatory self-defense, but only when the immediacy component is strictly satisfied; the irrevocability of an imminent attack makes the threat truly immediate and thus makes self-defense truly necessary.

Despite the extensive scholarship on the Charter, "[t]o date . . . no authoritative decision-maker within the international community has taken a position on whether preemptive self-defense is permissible under international law, or whether it is permissible but only under certain conditions."[141] Thus, "states and scholars are left arguing its legality based principally on their interpretation of the meaning of the U.N. Charter and on state practice since the Charter's enactment."[142]

---

[136] *Id.*
[137] John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572 (2003).
[138] DINSTEIN, *supra* note 5, at 183.
[139] *Id.* at 190.
[140] *Id.* at 191.
[141] Murphy, *supra* note 7, at 702.
[142] *Id.*

2. Inherent Right as an Expression of Natural Law

What often gets lost in the debate is the fact that the language of Article 51 of the U.N. Charter appears to give continued life to the natural law; the right to self-defense is called an "inherent right,"[143] not a positive or derivative one. The term "inherent right" has clear natural law overtones.[144] The essence of natural law is the idea that there are certain first principles that cannot be abrogated, exist everywhere, and are understood by all by the operation of right reason.[145] A right arising from such principles must, therefore, be inherent.[146] If the customary right to self-defense is in fact derived from the natural law, then it must continue even in the face of the Charter's prohibition on the use of force.

Of the various arguments concerning the temporal requirement of imminence outlined above, Yoram Dinstein's "interceptive self-defense" may represent the closest expression of the type of self-defense recognized by the natural law.[147] The requirement of immediacy is satisfied by the irrevocable nature of the acts done by the aggressor.[148] Dinstein's formulation does not allow for pre-emptive self-defense, but rather strictly enforces a rule of true immediacy.[149]

Dinstein has thus restated the natural law justification of self-defense, a great irony considering that Dinstein expressly rejects the idea that the natural law is the source of Article 51's inherent right.[150] Calling such an assertion "unwarranted,"[151] Dinstein argues that the natural law

---

[143] Importantly, this terminology is not merely an accident of language. "The French expression, equally authentic, is *droit naturel* [natural right]; in Spanish it is *derecho inmanente* [inherent right]; and in Russian, *neotemlemoe pravo* (indefeasible right)." Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259 (1989). Translations of Article 51 to the UN Charter in French, Russian, and Spanish are available at http://www.un.org/fr/documents/charter/chap7.shtml, http://www.un.org/ru/documents/charter/chapter7.shtml, and http://www.un.org/es/documents/charter/chapter7.shtml, respectively.

[144] DINSTEIN, *supra* note 5, at 179.

[145] *See generally supra* Part II.

[146] See the definition of "right" in BLACK'S LAW DICTIONARY (7th ed. 1999); "inherent right" is equated to "inalienable right" and is identified with natural law.

[147] DINSTEIN, *supra* note 5, at 190.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 179–80.

[151] *Id.*

> may be conceived as an anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines. At the present time, there is not much faith in transcendental truths professed to be derived from nature. A legal right is an interest protected by law, and it must be validated within the framework of a legal system. Self-defense, as an international right, must be proved to exist within the compass of positive international law.[152]

Rather than ascribing the term "inherent right" to natural law, Dinstein adopts the position taken by the International Court of Justice that "inherent right" simply refers to the right preserved or enshrined in customary law.[153]

While many other scholars agree,[154] this interpretation does not preclude the natural law as the original basis for self-defense in international law.[155] It may well have been superseded by the operation of customary international law, but to the extent that customary law adheres to the same formula as natural law, this is a distinction without a difference.[156] Advocates of a customary right—as opposed to a natural right—to anticipatory self-defense share the basic premise that Articles 2(4) and 51 "were not intended to, and do not, restrict the right of member states to use force in self-defense within the meaning of that concept to be found in the customary law."[157] Since that customary law was heavily influenced by the natural law, the latter certainly retains its relevance in the modern era.

Criticisms like that of Dinstein are, moreover, intellectually dissatisfying. Dinstein bristles at the notion that modern lawyers could be

---

[152] *Id.* at 180.
[153] *Id.* at 181 (citing Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27)).
[154] *See, e.g.*, Weightman, *supra* note 101, at 1114 ("Despite frequent references to the 'inherent' nature of the right of self-defense, it cannot be supposed that any renaissance of natural-law thinking was implied.").
[155] *See* DINSTEIN, *supra* note 5, at 179; *see also* Schachter, *supra* note 143.
[156] Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L. J. 413, 430 (2002) ("In situations where the conditions of immediacy, necessity and proportionality, as construed in the prevalent view of customary international law, are met . . . there is no practical distinction between a natural law analysis and an analysis under customary international law.").
[157] BROWNLIE, *supra* note 74, at 269.

swayed by mysterious transcendental concepts of universal justice underlying the term "inherent right,"[158] yet he apparently sees no problem supporting the somewhat tortuous efforts to define "armed attack" broadly enough to allow for anticipatory action, however limited.[159] He also never offers a satisfactory alternative explanation for the presence of the word "inherent" in the text of the Charter.[160] In the positivist tradition, he rejects the broad basis in right reason and justice found in natural law in favor of a legalistic, textual interpretation of Article 51, which may seem over-lawyered and which further fuels the unresolved, and unresolvable, debate over the meaning of the Charter and its effect on customary law. In so doing, he ignores the great power of the natural law to provide purpose for positive law.[161]

Indeed, the primary argument raised against natural law-based self-defense is its principle of indefeasibility. Most modern scholars reject the notion contained in natural law that self-defense is both indefeasible and obligatory.[162] They do not contend that the natural law standard of necessity and immediacy is flawed. Moreover, they concede that the law as it currently exists, in both its international and domestic forms, preserves the right of self-defense.[163] Instead, they have focused their ire on the unrestrictive quality of natural law rights as inherent and indefeasible rights, without considering the virtues of its restrictive application.[164] Thus, while there is an argument that natural law is no longer truly the source of the right under international law, there is little argument that the Thomistic limitations on self-defense—necessity, immediacy, and proportionality—continue to control the exercise of the right.

---

[158] DINSTEIN, *supra* note 5, at 180.
[159] *Id.* at 190.
[160] *Id.* at 180–81. Nor does he address the use of similar terms in the various translations of the Charter, all of which seem to intend to preserve some natural or inherent, as opposed to derivative, right of self-defense. *See supra* note 143.
[161] J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE 57 (4th ed. 1949).
[162] *See* DINSTEIN, *supra* note 5, at 181 ("It is not beyond the realm of the plausible that a day may come when States will agree to dispense completely with the use of force in self-defense . . . ."); *see also* Schacter, *supra* note 143, at 259–60 ("[M]any scholars reject the idea that the right of self-defense exists independently of positive law and cannot be changed by it.").
[163] DINSTEIN, *supra* note 5, at 181.
[164] *See supra* Part II.C.3.

C. British and American Views of the Inherent Right of Self-Defense

Ever since the *Caroline* incident, the British and U.S. governments have consistently asserted the existence of a right to self-defense arising out of customary law.[165] Moreover, both governments trace this right back to the classic formulation from the *Caroline* case.[166] For example, when British forces intervened in Egypt in 1956, the British government argued that "the Charter and in particular Article 51 did not restrict the customary right of self-defense and that the customary right included action to protect nationals provided the tests of exigency laid down in the *Caroline* case were satisfied."[167] Likewise, the United States "has traditionally taken the position that a State may exercise 'anticipatory self-defense,' in response not only to a 'hostile act' but even to a 'hostile intent.'"[168] Indeed, "[i]n the past two decades, the United States has used military force in anticipatory self-defense against Libya, Panama, Iraq, Afghanistan, and the Sudan."[169]

For both states, the bounds of self-defense are outlined in the *Caroline* formulation of necessity, immediacy, and proportionality, which restates the natural law argument for self-defense. Until 2002, while periodically taking slightly different positions on the legality of specific military actions, both states shared a common stated view of the rule of *Caroline*.

---

[165] *See, e.g.*, House of Lords Debate (Apr. 21, 2004) [hereinafter House of Lords], *available at* http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text//40421-07.htm#40421-07_head0, wherein the Attorney-General of the U.K. stated,

> It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. . . . It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack."

Id.

[166] *Id.*

[167] BROWNLIE, *supra* note 74, at 265.

[168] DINSTEIN, *supra* note 5, at 182.

[169] Yoo, *supra* note 137, at 573.

In 2002, however, this shared tradition diverged dramatically. President Bush promulgated the 2002 National Security Strategy (NSS) of the United States, which "took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption."[170] According to some commentators, "the 'Bush Doctrine' of preemption basically re-casted the right of anticipatory self-defense based on a different understanding of imminence."[171] The NSS stated, "we must adapt the concept of imminent threat to the capabilities of today's adversaries"[172] and noted that the inherent uncertainty of the time and place of terrorist attacks required that we prosecute military actions in self-defense aggressively.[173]

The British did not necessarily agree with this change in position. In April 2003, in a remarkable exchange in the House of Lords, the Attorney-General of the United Kingdom appeared to reject the Bush Doctrine as an expression of the customary right to anticipatory self-defense. "It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote."[174]

At least facially, the British insistence on adhering to *Caroline* means that they hew closer to the line established by the natural law, which emphasizes immediacy; the act of self-defense is morally justified as not being the result of a true choice at all, but rather done out of pure necessity. The U.S. position, on the other hand, appears to have abandoned the inherently reactive nature of natural law-based self-defense in favor of something more expansive, such as that advocated by John Yoo.[175]

---

[170] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 6 (2009) [hereinafter OPERATIONAL LAW HANDBOOK].
[171] *Id.*
[172] WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) [hereinafter NSS], *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf.
[173] *Id.*
[174] House of Lords, *supra* note 165.
[175] *See generally* Yoo, *supra* note 137.

IV. Natural Law in the Common Law

A. The Natural Law Heritage

Natural law theory clearly played a large role in the formation of the international law of self-defense, but it also had profound influence over the common law of self-defense in the United States and Britain. William Blackstone was a proponent of a natural law right of self-defense, and his views heavily influenced common law jurisprudence in England and America; indeed, Blackstone's reasoning "constituted the preeminent authority on English law for the founding generation"[176] in the United States. The same was true of other eminent British legal thinkers such as Edward Coke and Richard Hooker. These scholars shaped the common law of the United Kingdom and, by extension, the United States. "No well-trained legal thinker fails to realize the enormous influence of Coke's *Institutes* on early American decisions. Coke and Blackstone were the authorities who educated the developing legal minds of the early nineteenth century."[177]

Blackstone called the right to self-defense "the primary law of nature, so it is not, neither can it be . . . , taken away by the law of society."[178] Thomas Hobbes presaged this formulation of the indefeasibility of the right of self-defense in *Leviathan*, writing that "[i]f a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation."[179] If a state were to make self-defense illegal, it would not prevent men from relying on it: "supposing such a Law were obligatory; yet a man would reason thus, If I doe it not, I die presently; if I doe it, I die afterwards; therefore by doing it, there is time of life gained."[180]

Political theorists like Thomas Hobbes and legal scholars such as Blackstone and Hooker had an enormous influence both in the United Kingdom and over the founders of the United States, and the natural law tradition was thus woven into the framework of early American law.[181]

---

[176] Alden v. Maine, 527 U.S. 706, 715 (1999).
[177] John S. Marshall, *Richard Hooker and the Origins of American Constitutionalism*, *in* ORIGINS OF THE NATURAL LAW, *supra* note 1, at 55.
[178] 3 WILLIAM BLACKSTON, COMMENTARIES *4.
[179] HOBBES, *supra* note 2.
[180] *Id.* at 346.
[181] *See* Marshall, *supra* note 177, at 56–57.

The Constitution[182] was itself a powerful expression of the natural law theory of rights, and while the political theory derived from Hobbes and Locke, its legal reasoning flowed from Blackstone and Coke. "In the hands of Chief Justice Marshall and his successors, the Constitution proved to be more and more a document which is essentially an expression of Edward Coke and Blackstone."[183]

However, that influence did not end with the passing of the founding generation. Far from being treated as quaintly anachronistic, Blackstone's *Commentaries* continues to influence modern jurisprudence, particularly his description of the natural law right to self-defense. Writing in the 2008 case *District of Columbia et al. v. Dick Anthony Heller*,[184] perhaps the signature case on the right to bear arms under the Second Amendment, Justice Scalia described the Founders' understanding of a right to self-defense:

> They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries . . . made clear . . . , Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury."[185]

Throughout the *Heller* opinion, Scalia repeatedly returns with approval to the Founders' understanding of the natural law right of self-defense. In

---

> The fathers of the American Revolution knew Hooker and quoted him. The authors of our Constitution did not quote Hooker, but they did work out the Constitution in terms which reflect the principles defended by Hooker, and which were mediated to them by Locke and Blackstone. Locke specifically tells us that his notion of the Constitution was derived from Hooker. Blackstone, also in the tradition of Hooker, was always in the background when the American Constitution was written, and he was used in the interpretation of what the Constitution was meant to imply.

Id.

[182] "[The Constitution] was influenced by the school of thought which interpreted the law of nature as an obvious set of principles. The French school of Natural Law reflected the seventeenth century notion that legal wisdom could be reduced to a very simple set of self-evident propositions." *Id.* at 57.

[183] *Id.*

[184] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[185] *Id.* at 2799 (internal citations omitted).

another long citation from Blackstone, Scalia quotes, "This may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible."[186] Self-defense under U.S. law is thus firmly grounded on the natural law. The right is indefeasible and yet narrowly limited. It cannot be entirely taken away but must be confined to those instances in which it is truly necessary in response to some immediate threat.

It is admittedly rare to see legal opinions that so explicitly reference natural law theory. Rather, the influence of the natural law often shows itself in the language adopted by the courts and the rules they construct to regulate it. When the common law of self-defense adheres to the basic requirements of necessity, proportionality, and immediacy, it carries forward the Thomistic tradition of self-defense.

B. Self-Defense Under the Uniform Code of Military Justice

1. Military Law in the United States

The United States has a single statutory regime, the UCMJ,[187] which provides for a body of criminal law that is distinct to the military. Because of this separation, the deployed U.S. soldier need not concern himself with varying interpretations of the law arising out of different domestic state jurisdictions; the UCMJ provides a single source of criminal law and jurisdiction over deployed soldiers.[188] Adopted in 1952 and modified by Congress several times since, the UCMJ provides a statutory and regulatory scheme, as well as establishes a system of courts-martial and appellate courts to enforce that scheme.[189] Within this military court system, the common law continues to develop, but it remains distinct from the law to be found in civilian federal courts or in the courts of the several states. The U.S. Supreme Court remains at the apex of the military court system, just as it does for the civilian system, and yet the Supreme Court has acknowledged the unique nature of the military as allowing for the development of a separate body of common

---

[186] *Id.* at 2805.
[187] Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 [hereinafter UCMJ].
[188] UCMJ art. 2 (2008).
[189] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

law.[190] The U.S. soldier then, is bound by the UCMJ, and that code is interpreted by both military courts and the Supreme Court.

Having one UCMJ system enormously simplifies the task of defining the boundaries of self-defense for U.S. soldiers. Self-defense is an affirmative defense available to an accused charged with a crime of violence.[191] Once asserted, the prosecution must prove beyond a reasonable doubt that the violent act was not done in self-defense in order to obtain a guilty verdict.[192]

Before considering the specifics of the UCMJ, it must be stressed that this law applies on the battlefield only to killings done in self-defense, not to the killing of lawful combatants during a period of international armed conflict as defined by Common Article 2 to the Geneva Conventions.[193] The latter activity has long been protected by the doctrine of combatant immunity, which allows soldiers in the performance of their duties to kill the enemy without fear of sanction.[194] When that occurs, the killing is justified and does not constitute a crime.[195] The domestic law of self-defense would only apply on the battlefield to other kinds of killings, where the decedent is not a lawful combatant but, rather, a civilian.

---

[190] Parker v. Levy, 417 U.S. 733 (1974).
[191] MCM, *supra* note 189, R.C.M. 916(a).
[192] *Id.* R.C.M. 916(b)(1).
[193] All four of the Geneva Conventions contain the same definition of international armed conflict. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[194] *See, e.g.*, United States v. Lindh 212 F. Supp. 2d 541, 553 (E.D.Va. 2002) ("Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.").
[195] *Id. See also*, *e.g.*, MCM, *supra* note 189, R.C.M. 916(c) (outlining justification as a legal excuse for killing).

2. Self-Defense Rules Under the UCMJ

The simplest explanation of the law of self-defense under the UCMJ may be the one contained in the *Military Judges' Benchbook*.[196] This document is not law but serves as a restatement of the law, and it is used by military judges to instruct members of the court-martial on the law. The *Benchbook* explains the defense of self-defense, outlined by Rule for Court-Martial (RCM) 916(e)(1) in the context of a homicide charge, as consisting of two parts, and right away one can discern the natural law requirement of immediacy.[197]

> First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on himself. . . . The test here is whether, under the same facts and circumstances present in this case, an ordinarily prudent adult person faced with the same situation would have believed that there were grounds to fear *immediate* death or serious bodily harm.[198]

Having determined the necessity of self-defense by virtue of an objective test of reasonableness, the law then analyzes the proportionality of the use of force using a subjective test. "Second, the accused must have actually believed that the amount of force he used was required to protect against death or serious bodily harm."[199] The question is whether the belief was actually and honestly held, not whether the amount of force used was objectively reasonable.[200] So long as the accused believed

---

[196] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 5-2-1 (15 Sept. 2002) [hereinafter BENCHBOOK].
[197] *Id.*
[198] *Id.* (emphasis added).
[199] *Id.*
[200] *Id.* The honesty of the belief is the key to the legitimacy of the action. *See, e.g.*, New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18, 23 (1891).

> The familiar illustration is that, if one approaches another, pointing a pistol, and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent, facts, and the honesty of belief in danger.

Id.

it was reasonable, the fact that it is later determined to be excessive is of no import.[201]

This objective-subjective test makes sense in the context of natural law, where necessity and immediacy are absolute requirements. Self-defense is only legitimate when it is truly necessary,[202] and a natural law-based theory of self-defense must, therefore, insist that the belief in its necessity is an objectively reasonable one. Necessity is predicated, in part, on the immediacy of the threat. Only when reacting to an immediate threat, without the ability to choose otherwise, can a person kill in self-defense with the moral sanction of the natural law, since in that case "no man can be said to be purposely killed."[203] Once force is reasonably believed to be necessary, however, it follows that the person facing immediate peril has "no moment for deliberation"[204] and, therefore, cannot be required to weigh to a nicety the amount of force to be used. As the famous jurist Oliver Wendell Holmes aptly put it, "detached reflection cannot be demanded in the presence of an uplifted knife."[205] Immediacy is thus a critical component of self-defense under U.S. law, because it is the factor that prevents Holmes's "detached reflection."[206]

This distinction also explains why the UCMJ rejects the concept of "imperfect self-defense."[207] Under the theory of imperfect self-defense, murder could be downgraded to some less culpable form of homicide, such as manslaughter, if the accused acted on an unreasonable belief that he faced immediate threat of death. Military courts have explicitly rejected this position.[208] Allowing imperfect self-defense would contradict the natural law, because it sanctions an inherently unreasonable act lacking the necessity that would otherwise justify it. Above all else, "right reason" forms the cornerstone of natural law,[209] and it is the inability to choose another course that makes self-defensive killing necessary and reasonable.

---

[201] *Id.*
[202] Rorie v. United States, 882 A.2d 763 (D.C. 2005) ("The law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity.").
[203] GROTIUS, *supra* note 780, at 77.
[204] Webster Letter, *supra* note 106.
[205] Brown v. United States, 256 U.S. 335, 343 (1921).
[206] *Id.*
[207] *See, e.g.*, United States v. Calley, 46 C.M.R. 1131, 1176 (C.M.R. 1973).
[208] *See id.*; United States v. Maxie, 25 C.M.R. 418, 420 (C.M.R. 1958).
[209] CICERO, *supra* note 1.

This raises the central question of this article: what exactly does "imminent threat" mean? The law clearly requires an imminent threat before self-defense is justified, but how immediate must that threat be? The U.S. military jury instruction uses the words "immediate death," whereas the actual Rule for Courts-Martial uses the phrase "that death . . . was about to be inflicted."[210] In either case, the temporal boundary clearly leans towards something instantaneous or nearly so; the threat must be truly temporally immediate. Words have meaning, and the choice of words in this case must have some import.[211] United States law seems clear that the term "immediate" is the proper definition to be used to describe "imminent danger."[212]

V. ROE as a Synthesis of Domestic and International Law

Most modern states employ some form of "Rules of Engagement" to translate the legal right of self-defense into action for their soldiers.[213] These rules, generally in the form of a lawful order to the military forces of the state, are not themselves law per se, although most are enforceable under the law, either as a military order or through some executing domestic law.[214] Rather, the ROE constitute a conscious limitation on the use of force that is constrained, at its maximum extent, by the law—both the law of armed conflict and domestic law—but which may be further constrained by concerns of a political (policy) or military nature. [215] The

---

[210] MCM, *supra* note 195, R.C.M. 916(e)(1)(A).

[211] Consider the definition from: "immediate, *adj.* 1. Occurring without delay; instant." BLACK'S LAW DICTIONARY, *supra* note 146, at 751.

[212] New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18, 23 (1891) ("[T]he law of self-defense justifies an act done in honest and reasonable belief of immediate danger.").

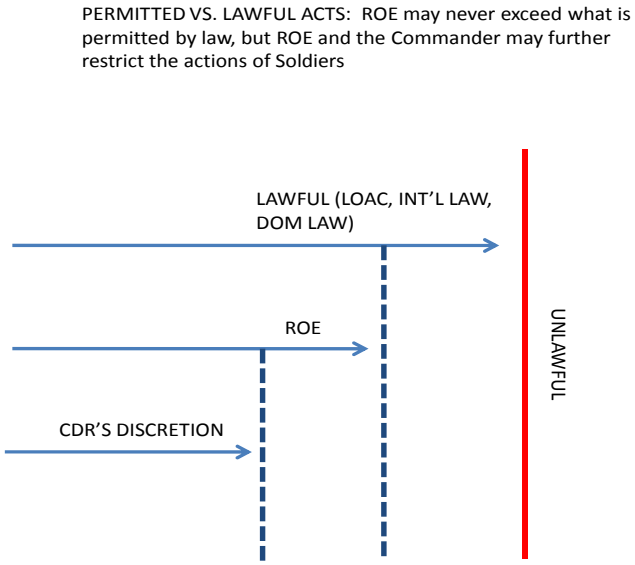
[213] *See generally* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 34–50 (1994) (discussing the historical evolution of ROE in the United States and United Kingdom).

[214] *See, e.g.*, *id.* at 62–63 (discussing the prosecution of ROE violations as a separate offense).

[215] *See, e.g.*, OPERATIONAL LAW HANDBOOK, *supra* note 170, at 73.

> ROE are the primary tools for regulating the use of force. . . . The legal factors that provide the foundation for ROE, including customary and treaty law principles regarding the right of self-defense and the laws of war, are varied and complex. However, they do not stand alone; non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE.

range of permissible actions available under the ROE may extend to the limit of the law but may also be somewhat less.[216] This distinction is perhaps made more clear by the following diagram:



ROE thus have the great virtue of providing a synthesis of both domestic and international law, as well as military and political considerations, in order to formulate one set of rules that soldiers can follow.

A. ROE for Offense and Defense

Comparing the U.S. SROE[217] with the current NATO ROE[218] highlights the effect recent changes to the U.S. SROE have had, because the two sets of rules offer dramatically different standards for anticipatory self-defense. Notably, both the United States and the NATO ROE make a critical distinction between the inherent right of self-defense and the use of force for mission accomplishment, often referred

---

Id.

[216] *Id.*

[217] 2005 SROE, *supra* note 9.

[218] NORTH ATLANTIC TREATY ORGANIZATION, NATO MC 362/1, NATO RULES OF ENGAGEMENT [hereinafter NATO ROE].

to as "offensive ROE."[219] For both, the ROE do not restrict the inherent right of self-defense.[220] There are critical differences, however, in how that right is defined. More importantly, by dividing the use of force into offensive and defensive types, the ROE echo the same division found in Aquinas and Grotius between self-defense and other just acts of violence.[221]

B. NATO ROE: Manifest, Instant, and Overwhelming

The NATO SROE restate the proposition that "[i]t is universally recognized that individuals and units have a right to defend themselves against attack or imminent attack."[222] The NATO SROE define self-defense as "the use of such necessary and proportional force . . . to defend . . . against attack or an imminent attack."[223] By including "imminent attack," the NATO ROE authorize the use of force in anticipatory self-defense. The NATO ROE go on to define what imminent means: "the need to defend is *manifest, instant, and overwhelming*."[224] Those three words—manifest, instant, and overwhelming—leave no doubt as to the temporal limits of self-defense. In particular, the word "instant" indicates that the self-defense contemplated is that which responds to a truly immediate threat.

In defining imminence in this way, the NATO ROE use terms that are remarkably consistent with those used by Webster in the *Caroline* formulation: "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[225] Thus the NATO ROE can be said to be entirely consistent with the natural law because they justify self-defensive force on the basis that the threat is so immediate that it does not allow for detached reflection. The NATO ROE authorize the use of force because time does not allow for another choice; in essence, there is no true choice available, it is either use force or face immediate death.

---

[219] 2005 SROE, *supra* note 9, at 6.b; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 170, at 74 (noting the different categories of ROE for self-defense and ROE for mission accomplishment).

[220] *Compare* 2005 SROE, *supra* note 9, para. 6.b.1 ("[C]ommanders always retain the inherent right and obligation to exercise . . . self-defense . . . ."), *with* NATO ROE, *supra* note 218, para. 1 ("ROE do not limit the inherent right of self-defence.").

[221] *See supra* notes 69–70, 93–95, and accompanying text.

[222] NATO ROE, *supra* note 218, para. 7.

[223] *Id.*

[224] *Id.* (emphasis added).

[225] Webster Letter, *supra* note 106.

C. U.S. SROE: Imminent May Not Mean Imminent Anymore

In 2005, subsequent to the newly-advanced U.S. position on anticipatory self-defense articulated in the NSS,[226] the U.S. SROE were revised. The critical changes respecting self-defense were subtle but extraordinarily important and impactful. The new SROE appeared to alter, and perhaps do away with, the temporal requirement of immediacy that had traditionally been present. Until 2005, the 2000 SROE, which defined "hostile intent" as including the threat of "imminent use of force," were in effect; however, there was no further discussion of what was meant by "imminent."[227] Presumably, the natural language and meaning of the term "imminent" controlled. Certainly, "imminent" implies some fairly immediate threat, such that a response was authorized because there was not time for consultation or deliberation. However, the term was, perhaps deliberately, left undefined.

The 2005 SROE changed that. Once again, use of force in self-defense was authorized in response to a hostile act or hostile intent. The definition of "hostile intent" likewise did not change.[228] What did change was the addition of a definition of the term "imminent," which stated that "imminent does not necessarily mean immediate or instantaneous."[229] In imminent does not really mean imminent anymore.

This definition immediately calls to mind the language used by Webster in the *Caroline* incident. Webster said that self-defense was authorized only when the need to defend was "instant" and "allowed no moment for deliberation."[230] It cannot be understated that international law is designed to prevent, where possible, the use of force.[231] Force is prohibited, unless there is an exception, and that exception must be one that is so important that it justifies derogation from the general prohibition. It must, in other words, be an emergency, and one of a particular type.

> It is . . . of the nature of the emergency . . . that action, if it is to be effective, must be immediate. . . . To wait for

---

[226] NSS, *supra* note 172.
[227] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01.A, STANDING RULES OF ENGAGEMENT (15 Jan. 2000) [hereinafter 2000 SROE].
[228] 2005 SROE, *supra* note 9, encl. A, para. 3.f.
[229] *Id.* para. 3.g.
[230] Webster Letter, *supra* note 106.
[231] U.N. Charter art. 2, para. 4.

> authority to act from any outside body may mean disaster, either for a state or for an individual, and either may have to decide *in the first instance* whether [to use force in self-defense].[232]

The United States's new definition of imminence reflects a further move towards a position on anticipatory self-defense articulated in the NSS,[233] one which our closest ally, the United Kingdom, cannot see fit to join.[234] Writing in 2005, but before the publication of the new SROE, Yoram Dinstein noted that "[i]n the past, the U.S. was careful to underscore that anticipatory self-defense—or response to hostile intent—must nevertheless relate to the 'threat of *imminent* use of force.' The emphatic use of the qualifying adjective 'imminent' is of great import."[235] The doctrine of anticipatory self-defense requires both necessity and immediacy before force in self-defense is authorized, and if imminence is defined as some more extended period of time, one has to question[236] whether either of those two prongs of the analysis have been met. Our "emphatic use of the qualifying adjective 'imminent'"[237] must not have had great import after all.

It is not clear what drove this change, but a likely explanation is the adoption of the "Bush Doctrine" in the 2002 NSS, which appeared to expand the temporal scope of "imminence."[238] A second factor was undoubtedly the perceived need to broaden soldiers' ability to use force against an enemy concealed within the civilian population. Whatever the reason, this step—to define, for the first time, the meaning of "imminent"—contains the seeds of great confusion and legal friction.

VI. The Problem of Disharmony

Comparing the U.S. SROE with the natural law highlights the fundamental problem facing the United States: There is disharmony between U.S. ROE and the natural law, as found in the international and

---

[232] BRIERLY, *supra* note 161, at 296 (emphasis in original).
[233] NSS, *supra* note 172.
[234] House of Lords, *supra* note 165.
[235] DINSTEIN, *supra* note 5, at 182 (emphasis in the original) (internal citations omitted).
[236] The British have openly questioned our new definition of imminence. *See, e.g.*, House of Lords, *supra* note 165.
[237] DINSTEIN, *supra* note 5, at 182.
[238] NSS, *supra* note 172.

domestic law that flow from it. The natural law of self-defense stresses the immediacy of the threat as a precondition to the legitimate use of self-defensive force. The U.S. SROE contradicts that immediacy requirement. Whereas the natural law favors strict immediacy as a route toward achieving the moral good identified by Aquinas, the 2005 SROE favors a looser temporal standard designed to increase the options available to soldiers on the ground. While it certainly does do that, this increase in the ability to use force in self-defense may come at some cost.

First of all, since the 2005 SROE standard does not match the standard under the UCMJ, a U.S. soldier is potentially at risk for violating the law by taking actions that do not violate the ROE. The 2005 SROE allows for the use of force in self-defense in response to an imminent threat, and yet it defines imminent as "not necessarily [meaning] immediate or instantaneous."[239] The UCMJ and military case law, on the other hand, simply require that the threat be "immediate."[240] Conceivably, a soldier could kill in self-defense in response to a threat he considers imminent, though not immediate or instantaneous, and find his judgment questioned by his commander, who charges him with a homicide. If he were to assert the affirmative defense of self-defense, a military judge would instruct the court-martial in accordance with the *Benchbook*, which requires a reasonable belief that the threat was immediate.[241]

This does not serve the United States well. One of the chief goals of the ROE is to facilitate swift decision-making on the battlefield by providing clear, concise rules that neither erode initiative through over-restrictiveness, nor allow the killing of innocents.[242] When the ROE simply allowed self-defensive force in response to an "imminent threat," without further defining that term, the ROE mirrored the law in military courts-martial. Now, however, the ROE may be applying a different standard, and that standard may subject a soldier to prosecution under a law that requires true immediacy. Our quest to expand the soldier's ability to use force may actually make it harder for him to do so, by introducing doubt over its legality.

---

[239] 2005 SROE, *supra* note 9, encl. A., para 3.g.
[240] *See supra* Part IV.B.2.
[241] BENCHBOOK, *supra* note 196.
[242] *See* Martins, *supra* note 213, at 5.

Secondly, this expansive standard for imminence may actually cause more mistaken killings and, thereby, undermine the perception of legitimacy surrounding the use of force in self-defense. The chief virtue of the natural law as a baseline by which to measure self-defense is the fact that, by definition, the natural law is understood by all people by the operation of reason.[243] In other words, an Afghan tribesman with no education in the formal, positive law, still inherently understands the legitimacy of killing in response to an immediate threat. He knows, without being taught,[244] that if he points his weapon at a U.S. soldier in a threatening manner, he may be killed immediately. More importantly, a second Afghan who observed such an encounter would also understand why the first Afghan was killed.

Conversely, as the concept of imminence slips or becomes blurred, there is an increasing likelihood that the civilian population will not understand the inherent logic underlying the use of force in self-defense. When the threat is not immediate, it may not be apparent at all, to anyone other than the soldier perceiving it. This may lead to several problems.

One problem is that civilians interacting with U.S. soldiers are not equipped to understand where the line is between threatening and non-threatening conduct. While all would agree that pointing a weapon at an armed soldier may lead to a self-defensive engagement, the same is not necessarily true with respect to driving a car towards a traffic control point, talking on a cell phone in the vicinity of a U.S. patrol, or other forms of conduct that do not obviously pose an immediate threat. Is that man digging in his fields in the middle of the night planting an IED, or is he just farming at night because daytime temperatures sometimes reach 130 degrees? Is he talking on a cell phone on a hilltop because he is targeting mortar fire or because Afghanistan is a mountainous country with no land lines and higher elevation is necessary for good cell phone reception? What may be perceived as a threat by U.S. forces may be entirely innocent conduct to a local civilian. Thus, civilians with no ill intent may find themselves engaged soldiers who perceive a threat that is "not necessarily immediate or instantaneous."[245] This may result in an increase in mistaken killings.

---

[243] *See* McInerny, *supra* note 29, at 326.
[244] Drury, *supra* note 30, at 534.
[245] 2005 SROE, *supra* note 9, at encl. A, para 3.g.

Likewise, a third party observing such an engagement may not have the same perception of the legitimacy of U.S. soldiers' actions that they might were the threat truly immediate. To such an observer, the soldiers' actions in "self-defense" may appear oppressive, violent, and aggressive. The effect of this difference of perception is obvious: more mistaken killings cause more angst and disaffection among civilians, who perceive the United States as a heavy-handed occupier rather than an agent of the common good.[246] They are less likely to form close contacts with U.S. soldiers in their area and more prone to either avoid them in order to avoid being mistakenly killed, or (much worse) actually join the insurgency against them. In other words, broadening the availability of self-defensive force may result in a decrease in close contact with the civilian population[247] and a corresponding decrease in vital intelligence.[248] The broad temporal bounds of the U.S. standard for imminent threat are directly counter to the goals of counterinsurgency warfare.[249]

---

[246] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY paras. 1-141, 1-142 (15 Dec. 2006) [hereinafter FM 3-24] (emphasizing the restrained use of force to avoid this disaffection).

[247] *Id.* para. 1-161 ("Popular support allows counterinsurgents to develop the intelligence necessary to identify and defeat insurgents.").

[248] *Id.* para. 1-149. Intelligence collected through close contact is the core of counterinsurgency warfare.

> Ultimate success in COIN is gained by protecting the populace, not the COIN force. If military forces remain in their compounds, they lose touch with the people, appear to be running scared, and cede the initiative to the insurgents. Aggressive saturation patrolling, ambushes, and listening post operations must be conducted, risk shared with the populace, and contact maintained. The effectiveness of establishing patrol bases and operational support bases should be weighed against the effectiveness of using larger unit bases. These practices ensure access to the intelligence needed to drive operations. Following them reinforces the connections with the populace that help establish real legitimacy.

Id.

[249] *Id.* para. 1-150.

> Any use of force produces many effects, not all of which can be foreseen. The more force applied, the greater the chance of collateral damage and mistakes. Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal. In contrast, using force precisely and discriminately strengthens the rule of law that needs to be established.

In contrast, the NATO ROE maintain complete harmony with the natural law. There is no real difference between "manifest, immediate and overwhelming"—the standard under the NATO ROE[250]—and the *Caroline* formula of "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[251] Neither leaves any doubt as to the meaning of imminent threat; it is a threat of such immediacy that there is no actual choice available to the soldier other than the use of force. The immediate nature of the threat means that his actions in defense of his life are morally good, because he literally had no other choice.

Some evidence suggests that the disharmony between the U.S. SROE and the natural law is already understood by battlefield commanders. The SROE do allow commanders to restrict the use of force in self-defense within limits.[252] One example of this is the Tactical Directive issued by General Stanley McChrystal, the former Commander ISAF, on 6 July 2009.[253] General McChrystal's tactical directive revealed his understanding of the importance of the perception of legitimacy. "[T]here is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take."[254] He essentially conceded that our use of force in self-defense may be excessive and, therefore, may directly undermine our operational objectives in Afghanistan. "[E]xcessive use of force resulting in an alienated population will produce far greater risks,"[255] which include the risk of "suffering strategic defeats . . . by causing civilian casualties and thus alienating the people."[256]

As a result, General McChrystal imposed a variety of controls to limit the use of force in self-defense.[257] In so doing, he acknowledged the inherent difficulty in regulating self-defense.

Id.
[250] NATO ROE, *supra* note 218.
[251] Webster Letter, *supra* note 106.
[252] 2005 SROE, *supra* note 9, para. 6.b.2(b)–(c).
[253] HEADQUARTERS, INT'L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE, 6 July 2009 [hereinafter TACTICAL DIRECTIVE], *available at* http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (describing the use of force in self-defense). General McChrystal resigned as Commander of ISAF in June 2010. *See* President Barack Obama, Statement by the President in the Rose Garden (June 23, 2010).
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*

> I cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce, so I expect our force to internalize and operate in accordance with my intent. Following this intent requires a cultural shift within our forces—and a complete understanding at every level—down to the most junior soldier.[258]

The first sentence states the age-old problem that bedevils all attempts to define self-defense: it is never possible to anticipate every possible situation, so ultimately, the discretion of the soldier or commander on the ground must come into play. The second sentence, however, is even more telling. General McChrystal saw a need for a "cultural shift within our forces."[259] In other words, the problem is not with language, but the way soldiers think, operate, react, and fight. They have been conditioned to justify every act of force as an exercise of self-defense, and this is a cultural problem that must be addressed.

General McChrystal's effort to rein in the use of force in self-defense reflects an intuitive recognition that the military has strayed from the natural law justification for self-defense, and, by doing so, has created a gulf between our forces and the Afghan population. Prior to his Tactical Directive, the battle for Afghan hearts and minds was slowly losing ground; rather than perceiving us as helping them, Afghans increasingly saw us as heavy-handed and indiscriminate.[260] The goal now must be to "respect and protect the population from coercion and violence—and operate in a manner which will win their support."[261] Only a cultural shift towards using self-defensive force only against an immediate threat will address this problem.

So far, the emphasis on restraint seems to be working. In 2009, the percentage of civilian casualties in Afghanistan caused by United States and NATO forces dropped to 22 percent from 38 percent in 2008, a decline some attributed to "concerted efforts on the part of the military to

---

[258] *Id.*
[259] *Id.*
[260] Gary Langer, *Support for U.S. Efforts Plummets Amid Afghanistan's Ongoing Strife*, ABC NEWS, Feb. 9, 2009, *available at* http://abcnews.go.com/images/PollingUnit/1083a1Afghanistan2009.pdf (describing results of a poll of Afghan adults conducted by ABC News, the BBC, and ARD German TV); *see also* Gary Langer, *Frustration with War, Problems in Daily Life Send Afghans' Support For U.S. Efforts Tumbling*, ABC NEWS, Feb. 9, 2009, http://abcnews.go.com/PollingUnit/story?id=6787686&page=1.
[261] TACTICAL DIRECTIVE, *supra* note 253.

put civilians at the fore of military planning."[262] This appears to be winning more support for both the Afghan government and the U.S. mission there.[263] However, while directly limiting the use of force through tactical orders may prove effective in the short term, the only long-term solution capable of causing a cultural shift is to return the application of self-defense under the SROE to its natural law foundations.

VII. Conclusion

The goal of this article was not to argue that the U.S. SROE violate international law. Rather, this article argues that the increasing reliance on an expanded temporal limitation for the use of force in self-defense conflicts with natural law. Aquinas and other natural law scholars justify the use of force in self-defense on moral grounds by insisting that the use of deadly force in self-defense is legitimate only when circumstances permit no other option, and temporal immediacy is the strongest indicator that no other option was available.

Because natural law stands for the idea that all men everywhere accept the use of force in self-defense by operation of reason, it provides a baseline that, if adhered to, maximizes the likelihood that the use of force in self-defense will be accepted as legitimate. This "truth" does not require legal training or cultural awareness to be understood; it is apparent simply by "the reason of the thing."[264] When force is used to respond to an immediate threat, even those who are unintentionally harmed are likely to accept that force was necessary under the circumstances. On the other hand, the farther we push the temporal boundaries of immediacy to allow force in response to arguably non-immediate threats, the more we raise questions regarding the legitimacy of our actions.

Likewise, because our domestic law standard also insists on immediacy as a component of self-defense, expanding the temporal

---

[262] Amin Jalali, *Afghans Protest Civilian Deaths in Foreign Raid*, REUTERS, Dec. 30, 2009, http://www.reuters.com/article/idUSTRE5BT11V20091230.

[263] Gary Langer, *Views Improve Sharply in Afghanistan, Though Criticisms of the U.S. Stay High*, ABC NEWS, Jan. 11, 2009, http://abcnews.go.com/PollingUnit/afghanistan-abc-news-national-survey-poll-show-support/story?id=951196 1 (last visited Jan. 15, 2010).

[264] LAUTERPACHT, *supra* note 102, at 52.

boundary places our soldiers in potential legal jeopardy. If forced to justify their acts in a court of law on self-defense grounds, they may find themselves held to a standard that is much narrower than what the ROE now allow.

If the goal is to provide soldiers with more options for the use of force against insurgents, perhaps a better course would be to refine the rules regarding the offensive, rather than defensive, use of force. The law allows for other just forms of violence, and if the offensive ROE allow U.S. forces to attack identified enemy forces, they will have all the latitude they need. The United States should shift its emphasis away from expanding self-defense beyond what is recognized by natural law, and towards designing offensive ROE measures that allow soldiers to target identified enemy fighters without overly cumbersome processes. This could take the form of a hybrid between conduct- and status-based targeting, based on direct participation in hostilities by civilians; however, the precise offensive measures that could be adopted are beyond the scope of this article.

We can easily return to a natural law-based self-defense and accomplish the cultural shift called for by battlefield commanders by simply deleting the new definition of "imminent threat" and allowing those words to mean what they traditionally have. There is little evidence that soldiers failed to understand, and exercise, their right to self-defense prior to the 2005 change to the SROE, so it is not clear what this change accomplished. "Imminent threat" ought to mean what the term itself naturally suggests: a threat of death that is "about to happen," one that is "immediate." This would return our self-defense doctrine to its natural law roots, enhance the perceived legitimacy of defensive uses of force, and bring our ROE firmly in line with our domestic law.

HOLLOW POINT BULLETS: HOW HISTORY HAS HIJACKED THEIR USE IN COMBAT AND WHY IT IS TIME TO REEXAMINE THE 1899 HAGUE DECLARATION CONCERNING EXPANDING BULLETS

MAJOR JOSHUA F. BERRY*

> *[P]ublic opinion . . . would never sanction the use of a projectile which would cause useless suffering . . . but we claim the right and we recognize the duty of furnishing our soldiers with a projectile on whose result they may rely,—a projectile which will arrest, by its shock, the charge of an enemy and put him* hors de combat *immediately.*[1]

I. Introduction

Specialist Jonas Hayes was conducting a presence patrol in Mosul with his platoon. It was mid-morning in June and the temperature was already near 100 degrees. Specialist Hayes strained underneath the weight of his equipment: an outer tactical vest loaded down with ammunition, body armor, and communications gear. Specialist Hayes was anxious; two weeks ago, the platoon was ambushed in the narrow streets of the Old City and a soldier in 2d squad was killed. Not only did the platoon lose a soldier, but one civilian was killed and two civilians were wounded by stray bullets. As Specialist Hayes's squad moved up the street through the crowded market, he noticed what appeared to be a

---

* Judge Advocate, U.S. Army. Presently assigned as Regiment Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), Fort Campbell, Kentucky. LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2005, The Ohio State University Moritz College of Law; B.S., 1998, U.S. Military Academy. Previous assignments include Trial Counsel, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas, 2008–2009; Chief of Current Operations, Office of the Staff Judge Advocate, Multi-National Corps–Iraq, 2006–2007; Operational Law Attorney, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas, 2006; 1st Battalion, 82d Field Artillery, 1st Cavalry Division, Fort Hood Texas 1999–2001 (Fire Support Officer, 1999–2000; Fire Direction Officer, 2000; Platoon Leader/Executive Officer 2000–2001); Member of the bar of Ohio. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 277 (1921) (quoting General Sir John Ardagh in a declaration before the First Commission of the Hague Peace Conference on June 22, 1899, defending the use of the "Dum Dum" bullet by the British Army).

woman in a black burqa, about fifty meters away, moving toward them. The person appeared taller than the average woman and seemed bulky around the midsection. The platoon had received an intelligence brief that al Qaeda was conducting suicide bombings in northern Iraq using men disguised as women to avoid suspicion. Specialist Hayes shouted "*Kif! Kif!*" (Stop! Stop!), but the woman kept coming toward the squad. Specialist Hayes then aimed his M-4 carbine at the woman and again yelled for her to stop, but she kept advancing and broke into a jog. Specialist Hayes now saw what appeared to be wires protruding from the woman's burqa.

Specialist Hayes felt that the woman presented a hostile threat so he fired one round, hitting the woman, but she did not stop. Specialist Hayes hesitated because there were dozens of civilians in the market, but then fired another round, staggering the woman, but she kept coming. The woman was now about thirty meters away and was still on her feet. Specialist Hayes now engaged the woman with several rounds of 5.56 millimeter (mm) ball ammunition from his M-4 carbine. The rest of the squad had also leveled their weapons on the woman and numerous bullets began zipping down the street. Time seemed to stand still as the woman finally crumpled and then the earth went white as a deafening explosion roared through the street.

Specialist Hayes blinked as he looked up at the blue sky; his ears were ringing and his body felt numb. He pulled himself up and checked his extremities. He was okay. The rest of the squad got to their feet and they were ordered to cordon the area and provide security. As the squad fanned out past the area where the bomber had attacked, Specialist Hayes saw numerous dead civilians and blood and body parts littering the street. He had seen the aftermath of a bombing before, but he was not prepared for what he saw next. As he moved about thirty meters past the bombing site, he saw civilians shouting for help and he rushed over to see what was wrong. There were two wounded women and a boy, all with apparent gunshot wounds. Specialist Hayes began to perform first aid and yelled for a medic.

Back at the forward operating base (FOB), as Specialist Hayes cleaned the blood and dirt from his hands and clothes, he could not get over what happened that day. He had survived a suicide bombing and his platoon leader was telling Hayes he was a hero for stopping the bomber. But Specialist Hayes did not feel heroic—not when he thought of the dead civilians. Even though Hayes knew the bullets he fired were

directed at a legitimate target, he could not dismiss the probability that some of those same bullets had killed innocent bystanders. Specialist Hayes did not know whether those bullets were misses, ricochets, or bullets that had passed through the bomber, but he knew he felt guilty. "Collateral damage" said his platoon sergeant. "You didn't mean to kill those people; they were collateral damage. Besides, what else were you going to do? These are the only bullets we've got to use. It's not like we're the cops back home with hollow point ammo. You've heard those ROE [rules of engagement] briefs; we aren't allowed to use hollow point." Specialist Hayes wished he could meet the people responsible for this rule and tell them what it felt like to shoot bullets that killed innocent bystanders. Maybe they could explain why he could not use a different bullet.

Although this scenario is fictional, based loosely[2] on situations American servicemembers have faced every day in Iraq and Afghanistan for the last eight years, the complaints about the effectiveness of the standard M855 5.56 mm bullet used by American forces are real.[3] The M855 has a steel penetrator core that was designed to pierce Soviet Body Armor, not "lightly clad insurgents."[4] Perhaps surprisingly, the M855 round has been described as a "weak spot in the American arsenal" that is "not lethal enough to bring down an enemy decisively" and "puts troops at risk."[5] Since the beginning of combat operations in Afghanistan and Iraq, the number of complaints about the effectiveness of the M855

---

[2] *See, e.g.*, Mudhafer Al-Husaini & Richard A. Oppel, Jr., *Suicide Bomber Is Spotted and Shot, but Kills 3 in Baghdad*, N.Y. TIMES, Feb. 18, 2008, at A4 (describing an Iraqi response to a suicide bomber).

[3] *See, e.g.*, Major Glenn Dean & Major David LaFontaine, *Small Caliber Lethality: 5.56mm Performance in Close Quarters Battle*, INFANTRY MAG., Sept.–Oct. 2006, at 26 (summarizing efforts to research and address complaints with the performance of the M855 bullet in combat); Matthew Cox, *Deadlier Round Denied*, ARMY TIMES, Mar. 8, 2010, at 18 (describing complaints about the current M855 round and why the Army will not field the new Special Operations Science and Technology (SOST) 5.56 mm round); *Do U.S. Bullets Pack Enough Punch?; Ammunition Designed for Cold War Battles Doesn't Fit Iraq Fighting*, GRAND RAPIDS PRESS, May 27, 2008, at A1 (arguing that the smaller M855 bullet was designed to kill Soviets wearing body armor at long distances, not insurgents at close ranges in urban environments); C.J. Chivers, *How Reliable Is the M-16 Rifle*, http://atwar.blogs.nytimes.com (Nov. 2, 2009, 9:29 EST) (discussing complaints with the effectiveness of the M16/M4 rifles and the possibility that the M855 bullet is to blame).

[4] Chivers, *supra* note 3; Dean & LaFontaine, *supra* note 3, at 29–32.

[5] *Do U.S. Bullets Pack Enough Punch?*, *supra* note 3. Some soldiers complain that when the M855 round strikes an enemy "wearing only a shirt it can travel through him like an ice pick." Chivers, *supra* note 3.

round prompted the U.S. Army Infantry Center and other Department of Defense (DoD) agencies to study rifle and ammunition performance.[6] Some operators complained that the M855 was not effective at close ranges, where most urban combat engagements occur, and that a different bullet was required for such combat.[7] However, the international laws of war limit the types of bullets that a nation can use in armed conflict.

Before any new ammunition is fielded in the United States, it must pass a formal legal review within the U.S. DoD for compliance with "all applicable domestic law and treaties and international agreements . . ., customary international law, and the law of armed conflict."[8] Within these legal reviews, there are "several potential legal and factual factors" to consider, but of these factors, military necessity and superfluous injury are usually the most critical.[9] In the legal analysis, "[t]he major consideration will be weighing military necessity against the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering."[10] The United States defines military necessity "as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[11] Thus, fielding hollow point bullets to U.S. forces faces its first hurdle—the well-known prohibition against the use of expanding bullets in armed conflict.

The 1899 Hague Declaration Concerning Expanding Bullets[12] prohibits "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover

---

[6] Dean & LaFontaine, *supra* note 3, at 26.

[7] *Do U.S. Bullets Pack Enough Punch?*, *supra* note 3. The U.S. Army has also "acknowledged that the M855 'has not been providing the "stopping power" the user would like at engagement ranges less than 150 yards.'" Cox, *supra* note 3, at 18.

[8] U.S. DEP'T OF DEFENSE, DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (May 12, 2003) (certified current as of Nov. 20, 2007) [hereinafter DOD DIR. 5000.01].

[9] W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 YEARBOOK OF INT'L HUMANITARIAN L. 55, 130 (2006) (describing the legal reviews of conventional weapons generally and within the United States specifically).

[10] *Id.* at 131.

[11] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3 (18 Jul. 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

[12] Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459 [hereinafter Hague Expanding Bullets Declaration].

the core or is pierced with incisions."[13] The United States never signed this treaty, but adheres to the prohibitions of the Hague Expanding Bullets Declaration.[14] However, the prohibition on expanding bullets, which includes hollow point bullets, only applies to the armed forces of nations engaged in international armed conflict and does not apply to domestic law enforcement agencies.[15] Critics of the M855 round believe it is "time to update this antiquated idea and allow U.S. military personnel to use the same proven ammunition" in combat as is used by domestic law enforcement .[16]

The major impediment to updating this "antiquated idea" is the strict prohibition against the use of expanding bullets in international armed conflict. The problem with the Hague Expanding Bullets Declaration is that the true reasons for its existence are unknown, overlooked, or ignored.[17] This article argues that the 1899 Hague Expanding Bullets

---

[13] *Id.* This article generally refers to "expanding bullets"; however, "hollow point" bullets fall under the broad category of expanding bullets.

[14] W. Hayes Parks, *Memorandum of Law—Sniper Use of Open-Tip Ammunition*, ARMY LAW., Feb. 1991, at 86, 87. Parks stated,

> The United States is not a party to [the Hague Expanding Bullets Declaration], but United States officials over the years have taken the position that the armed forces of the United States will adhere to its terms to the extent that its application is consistent with the object and purpose of article 23e of the Annex to Hague Convention IV.

Id.

[15] *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 270 (2007). *Contra* Jordan J. Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT'L L.J. 19, 23 (1977) (arguing that international law prohibits the use of hollow point bullets by law enforcement agencies in the United States).

[16] *Do U.S. Bullets Pack Enough Punch?*, *supra* note 3.

[17] *See* INGRID DETTER DE LUPIS, THE LAWS OF WAR 194 (1987) (stating the existence of the regulation against dumdum bullets without describing its historical origins); LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 21 (2d ed. 1999) (categorizing dumdum bullets as "explosive" and focusing on Britain's use of them against "fanatical savage[s]"); FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 22–23, 42 (3d ed. 2001) (describing the "horrible" wounds caused by expanding bullets and describing the passage of the ban on such bullets as the application of the "necessities of war with the laws of humanity"); HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 73 (1986) (acknowledging Britain's use of the dumdum bullet to stop "a fanatical opponent" but overlooking reasons for the ban); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 232 (2d ed. 1998) (comparing the effects of dumdum bullets to those used for hunting and explosive bullets,

Declaration was the result of a sensationalized German study on expanding bullets and the political and military motivations of Britain's European rivals. As discussed later, the prohibition against expanding bullets is so entrenched in international law that the International Committee of the Red Cross (ICRC) declared it customary international law in 2005,[18] leaving in place a legal rule that, in theory, limits unnecessary suffering, but in reality may lead to increased collateral damage.

Suggesting that a long-standing rule of international law is incorrect will undoubtedly create controversy in some circles; however, the operational environments of Iraq and Afghanistan dictate a reevaluation and close scrutiny of the ban on hollow point ammunition.[19] Part II of this article seeks to dispel the deference accorded to the 1899 Hague Expanding Bullets Declaration through a comprehensive historical overview of the ban on expanding bullets, from the 1868 St. Petersburg Declaration to the 1998 Rome Statute of the International Criminal Court. In order to comprehend how the current status of the ban on expanding bullets is susceptible to challenge, it is necessary to examine the historical underpinnings of the Hague Expanding Bullets Declaration. A close historical analysis highlights the importance that political motives, under the guise of humanitarian concerns, played in the genesis of the treaty and how confusion surrounding Britain's "dumdum" bullets helped develop the foundation for the long held belief that these rounds cause unnecessary suffering.

After questioning the legal basis for the international prohibition against expanding bullets, this analysis moves to the second component of military necessity: measures "which are indispensable for securing the complete submission of the enemy as soon as possible."[20] Part III of this article looks at the current U.S. position on hollow point bullets, examines domestic law enforcement's successful use of expanding bullets to minimize civilian casualties, and discusses why United States' armed forces need this same capability in today's armed conflicts. Specifically, in the current operational environments of Iraq and

---

but ignoring the debate behind the passage of the ban); DOCUMENTS ON THE LAWS OF WAR 39 (Adam Roberts & Richard Guelff eds., 1982) (noting, in a prefatory note on the 1899 Hague Declaration 3 Concerning Expanding Bullets, British and American objections to the ban and noting the ban's status as customary international law).

[18] HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 268–69.

[19] *See infra* Part IV.B.

[20] FM 27-10, *supra* note 11, para. 3.

Afghanistan, employing expanding bullets in urban areas would allow the United States to equip its military forces with a bullet that has a greater potential for incapacitating threats, while at the same time reducing the risk of collateral damage to innocent civilians—helping the United States to comply with the law of war principle of distinction[21] while at the same time supporting strategic counterinsurgency goals of protecting local civilian populations.[22]

Finally, in order for the U.S. military to acquire expanding bullets, a legal review must find that such bullets do not cause superfluous injury nor do they cause unnecessary suffering. Part IV of this article addresses wound ballistics—the science of how bullets wound and kill—and examines common misconceptions found in wound ballistics; misperceptions likely to arise should the United States acquire and employ expanding bullets in combat. Part IV also discusses both the United States view of unnecessary suffering under Article 23(e) of the Annex to the 1907 Hague Convention IV[23] and the prevailing international view under Article 35(1) of Additional Protocol I to the 1949 Geneva Conventions, [24] and determines that under either standard, a legal review would find that expanding bullets do not cause unnecessary suffering or superfluous injury.

Part V concludes this article with the argument that the steadfast ban on expanding bullets is actually based on fragile assumptions by international legal practitioners, and that permitting their use in armed conflict might actually better support the humanitarian underpinnings of the laws of war. Finally, Part V discusses the limitations of this paper's analysis and recommends actions the United States should take to examine the potential effectiveness of expanding bullets in combat.

---

[21] Discussed in Part IV, *infra.*
[22] Discussed in Part IV.B, *infra.*
[23] Convention Respecting the Laws and Customs of War on Land (Hague IV), art. 23e (18 October, 1907), *entered into force* January 26, 1910.
[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

II. The International Prohibition on the Use of Expanding Bullets in Combat

The international prohibition on the use of expanding bullets in armed conflict has existed for over one hundred years, dating to the 1899 Hague Expanding Bullets Declaration. In 2005, the ICRC concluded a study on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.[25] This ICRC study concluded that "bullets which expand or flatten easily in the human body" are prohibited for use by state practice under customary international law.[26] Seven years earlier, the Rome Statute of the International Criminal Court summarily outlawed hollow point ammunition because it was a "clearly established classical prohibition."[27] The widely accepted belief that the ban on hollow point ammunition is customary international law raises the question of how this ban has achieved that status. Before examining the historical foundation of the prohibition against the use of hollow point ammunition in armed conflict, scrutiny of the method the ICRC used to determine its status as customary international law is appropriate to determine just how uncontroverted and unquestioned this rule is in the international legal community.

A. Expanding Bullets and Customary International Law

The International Court of Justice states that customary international law is "a general practice accepted as law."[28] Customary international

---

[25] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 176–77 (Mar. 2005).

[26] *Id.* at 193. Henckaerts noted that the "study on customary international humanitarian law" was "undertaken by the ICRC at the request of the International Committee of the Red Cross and Red Crescent." *Id.* at 175. Dr. Jakob Kellenberger's foreword to CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 15, makes it clear that the International Committee of the Red Cross (ICRC) has institutionally adopted the findings of the study as the views of the on customary international humanitarian law. As such, this article refers to the findings of the study as the views of the ICRC. For a U.S. Government response to the ICRC study, see John B. Bellinger, III & William J. Haynes, II, *A U.S. Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INT'L REV. RED CROSS 443 (June 2007).

[27] THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE 116 (Roy S. Lee ed., 1999).

[28] Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031.

law has two required elements: state practice (*usus*) and "a belief that such practice is required, prohibited, or allowed, depending on the nature of the rule, as a matter of law" (*opinio juris*).[29] However, this definition and its exact meaning have been subject to a great deal of scholarly writing.[30] In its study of customary international humanitarian law, the ICRC examined state practice through two lenses: first, "what practice contributes to the creation of customary international law (selection of State practice)" and second, "whether this practice establishes a rule of customary international law (assessment of State practice)."[31] A state's physical and verbal actions help create customary international law.[32] In assessing state practice, such practice must be "virtually uniform, extensive, and representative."[33] The ICRC apparently struggled to evaluate *opinio juris* because it was "very difficult and largely theoretical to strictly separate elements of practice and legal conviction."[34] Nonetheless, the ICRC concluded that where state practice is "sufficiently dense, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*."[35] The ICRC also stated that treaty law is also pertinent in determining customary international law because it helps "shed light on how States view certain rules of international law."[36]

The ICRC specifically concluded that "[t]he use of bullets which expand or flatten easily in the human body is prohibited" because "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[37] The ICRC relied on the fact that during the twentieth century, thirty-four states had ratified, acceded to, or succeeded to the Hague Expanding

---

[29] Henckaerts, *supra* note 25, at 178.
[30] *Id.*
[31] *Id.* at 179.
[32] *Id.* For example, physical acts include "battlefield behaviour, the use of certain weapons and the treatment afforded to different categories of persons." *Id.* Verbal acts include "military manuals, national legislation, national case-law, instructions to armed and security forces, military communiques during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations." *Id.*
[33] *Id.* at 180.
[34] *Id.* at 182.
[35] *Id.*
[36] *Id.*
[37] HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 268.

Bullets Declaration.[38] The ICRC also identified the listing of the use of expanding bullets as a war crime in the Rome Statute as well as the prohibition against expanding bullets in various other sources such as military manuals, state legislation, and "official statements and other practice."[39]

The ICRC declared that "no State had asserted it would be lawful to use such ammunition," but that a possible exception to this rule was "the practice of the United States, although it is ambiguous."[40] The ICRC noted that several U.S. military manuals prohibit the use of expanding bullets but that three U.S. Army legal reviews of ammunition permit the use of expanding bullets when there is "a clear showing of military

---

[38] *Id.* The ICRC website lists thirty-one nations that have signed, ratified, or acceded to the Hague Expanding Bullets Declaration. State Parties and Signatories to the Hague Expanding Bullets Declaration, INT'L COMM. RED CROSS, http://www.icrc.org/IHL.nsf/WebSign?ReadForm&id=170&ps=P (last visited Jan. 17, 2010) [hereinafter State Parties and Signatories to the Hague Expanding Bullets Declaration]. Of these thirty-one listed parties, all but four had signed or ratified the Declaration by 1907. *Id.* Belarus acceded to the Declaration in 1962, Ethiopia in 1935, Fiji in 1973, and South Africa in 1978. *Id.* This hardly seems like overwhelming support for the ICRC's assertion of direct international adherence to the Declaration.

[39] HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 268–69. Rome Statute of the International Criminal Court, art. 8(b)(xix), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute forbade "[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions" and is discussed in further detail in Part II.G, *infra*. The other listed sources prohibiting expanding bullets included: INSTITUTE OF INTERNATIONAL LAW, MANUAL OF THE LAWS OF NAVAL WAR art. 16(2) (1913) [hereinafter OXFORD MANUAL]; COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON THE ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE (1919), *reprinted in* 14 AM. J. INT'L L. 95, 112–17 (1920)); U.N. Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, sec. 6.2, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999); and UNTAET Reg. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences sec. 6(1)(b)(xix) (June 6, 2000) (establishing panels with exclusive jurisdiction over serious criminal offenses in East Timor). HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 268. However, the text of all these documents are nearly verbatim restatements of the prohibitory language found in the Hague Declaration of 1899 and the Rome Statute. The citations to the "military manuals," "State legislation," and "official statements and other practice" are not specific and are not important for the purposes of this article as they likely use language identical to that found in the Hague Declaration of 1899. All of the cited materials make it clear that the Hague Declaration of 1899 is the exclusive basis for the ICRC and the U.N. prohibition against expanding bullets.

[40] HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 269.

necessity for [their] use."[41] The ICRC concluded its discussion of the United States's position by observing that during the negotiation of the Rome Statute in 1998, "the United States did not contest the criminality of the use of expanding ammunition."[42]

The ICRC further discussed the prohibition of expanding bullets in non-international armed conflicts and concluded that state practice in this realm "is in conformity" with state practice in international armed conflicts.[43] The study did mention that "several States" employ expanding bullets for domestic law-enforcement purposes,[44] and interestingly enough, the ICRC declared that "expanding bullets may be used by police" in situations "where it is necessary to confront an armed person in an urban environment or crowd of people."[45] In these situations, police may use expanding bullets "to ensure that the bullets do not pass through the body of a suspect into another person and to increase the chance that, once hit, the suspect is instantly prevented from firing back."[46]

---

[41] *Id.* While the ICRC study does not clarify which specific "United States Field Manual" prohibits the use of expanding bullets, FM 27-10 is considered the definitive source of the U.S. views on the international law of war. The ICRC stated that U.S. Army weapons reviews will "adhere to the Hague Declaration to the extent that the rule is consistent with Article 23(e) of the 1907 Hague Regulations, i.e., the prohibition of weapons causing unnecessary suffering." HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 269. Field Manual 27-10 interprets Article 23(e), declaring that "[w]hat weapons cause 'unnecessary injury' can only be determined in light of the practice of the States in refraining from the use of a given weapon because it is believed to have that effect." FM 27-10, *supra*, note 11, para. 34b. Field Manual 27-10 acknowledges that

> [u]sage has, however established the illegality of the use of . . . irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.

Id. If FM 27-10 is, indeed, the military manual, cited by the ICRC, that prohibits the use of expanding bullets, the prohibition is hardly apparent. This article addresses the U.S. Army legal review of ammunition in Part IV.A, *infra.*

[42] HENCKAERTS & DOSWALD-BECK, *supra* note 15, at 269. The Rome Statute is discussed in further detail in Part III.G, *infra*.

[43] *Id.* at 270.

[44] *Id.* The study does not mention which States employ expanding bullets for domestic law enforcement use.

[45] *Id.*

[46] *Id.*

While the ICRC failed to explain its reasoning for why the use of expanding bullets is acceptable by police in domestic law enforcement situations but not by soldiers engaged in combat, the ICRC attempted to caveat its implicit approval of expanding bullets in domestic situations by stating,

> It should be noted that expanding bullets commonly used by police in situations other than armed conflict are fired from a pistol and therefore deposit much less energy than a normal rifle bullet or a rifle bullet which expands or flattens easily. Police forces therefore do not normally use the type of expanding bullet that is prohibited for military use.[47]

This superficial distinction between the lethal effects of pistol- and rifle-fired bullets raises several questions. Does the ICRC believe that expanding bullets are permissible in international armed conflict so long as soldiers fire them from a pistol? Is the need for soldiers engaged in urban combat to reduce the "pass through" of bullets less imperative than that of law-enforcement? Do soldiers engaged in combat have any less incentive than a law-enforcement officer in ensuring that a combatant, once hit, is prevented from firing back?

One commentator noted that in today's world, the "dividing line between armed conflict and some other condition falling short of it" is filled with great "ambiguity at the margins," offering the use of expanding bullets to neutralize a suicide bomber as an example.[48] Additionally, this commentator also stated that "[i]f there is a clear need . . . to 'stop' a suicide bomber, and these weapons are necessary for that purpose, arguably they should be regarded as lawful" and that "[t]o maintain a ban on a weapon that has particularly appropriate utility, given the prevailing conditions, might prove to be unwise and the customary rule subject to challenge."[49]

The apparent dichotomy in the way the ICRC—and the international community—views the use of expanding bullets in armed conflict versus

---

[47] *Id.*
[48] Steven Haines, *Weapons, Means and Methods of Warfare*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 272 (Elizabeth Wilmshurst & Susan Breau eds., 2007).
[49] *Id.*

domestic law-enforcement—or even pistol-fired bullets versus rifle-fired bullets—begs for an examination of the history of the rule. Understanding the historical background of this prohibition is especially critical given that the rule under customary international humanitarian law relies entirely on the Hague Declaration of 1899 as the only source for the prohibition against the use of expanding bullets in combat.

B. Declaration of St. Petersburg of 1868[50]

The nineteenth century was a destructive one for the continent of Europe. Warfare in Europe was "characterized by large-scale formal battle" and sieges[51] where armies fought primarily according to linear tactics.[52] By the middle of the eighteenth century, small arms had transitioned from single-shot, muzzle-loaded guns that fired ball-shaped bullets, to rifled guns that fired repeating rounds of elongated pointed bullets, including crew-served machine guns.[53] These great advances in firepower and accuracy had far-reaching effects on tactics by the latter half of the century as armies sought to avoid "suicidal frontal assaults" on the enemy.[54] Armies became larger, and nations devoted increasing resources to equipping, moving, and sustaining their armies.[55] Within this revolution in technology, France, Britain, and Turkey battled Russia

---

[50] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, *entered into force* Nov. 29/Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297 [hereinafter Declaration of St. Petersburg of 1868].

[51] R. ERNEST DUPUY & TREVOR N. DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY 732 (2d rev. ed. 1986).

[52] *See, e.g.*, *id.* at 732–43.

[53] *Id.* at 822. There were numerous other advances in weaponry during the eighteenth century, including a transition from smoothbore, muzzle-loading cannon to rifled, breech-loading artillery pieces that fired armor-piercing and explosive shells. *Id.*

[54] *Id.* at 823.

[55] *Id.* at 820–22. The American Civil War was the first "modern war" that implemented the new technologies and increased manufacturing power created by the Industrial Revolution. *Id.* The Civil War also brought about a new concept of a "nation at war" where the national economy was fully integrated into the war effort. *Id*. Additionally, the transition from agricultural economies to industrialization allowed more men to serve in the armed forces and work in the war industry. *Id.* This transition combined with improvements in transportation, which allowed armies to be moved and supported on an increasing scale, to promote larger and larger armies. *Id.*

during the Crimean War of 1853–1856;[56] Russia lost an estimated 256,000 men.[57]

As the industrial capabilities and size of each nation's armies increased, so too did the race to develop advanced weapons technologies.[58] Against this backdrop, in 1863, the Russian military invented a bullet that exploded on contact with a solid surface.[59] In 1867, Russia modified the bullet to explode on contact with a soft surface.[60] Some sources suggest that the Russian government of Tsar Alexander II was disinclined to use the bullet because of its concerns about the humanity of the bullet.[61] Others suggest that Russia realized that her

---

[56] DUPUY & DUPUY, *supra* note 51, at 825–29.

[57] *Id.* at 829. To the west of Russia, France, Austria, and Prussia engaged in various wars from 1859–1871, culminating in the Franco-Prussian War of 1870–71. *Id.* at 829–37. Major wars during this period included the War of Austria with France and Piedmont of 1859, the Seven Weeks' War of 1866 between Austrian and Prussia, and the aforementioned Franco-Prussian War of 1870–71. *Id.* During this same time period, numerous other wars were conducted on a smaller scale. *See id.* at 838–46. To Russia's east, China and Japan were expanding and transforming themselves into military powers. *See* 3 J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD, FROM THE SEVEN DAYS BATTLE, 1862, TO THE BATTLE OF LEYTE GULF, 1944, at 136–41 (1956).

[58] *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 1–2 (1996). Rogers notes,

> It was during . . . [the second half of the eighteenth century] that some European states were developing powerful armies and navies and expanding their influence throughout the world. Some theorists, mainly German . . . advanced the view that such military power should not be restrained by the uses and customs of war."

Id. at 2.

[59] DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 95 (2d ed. 1981). The primary purpose of this bullet was to detonate on contact with ammunition wagons. *Id.*

[60] *Id.* This bullet was smaller in caliber and was fired from a handheld weapon. MCCOUBREY, *supra* note 17, at 231; Hans-Peter Gasser, *A Look at the Declaration of St. Petersburg of 1868*, 33 INT'L REV. RED CROSS, No. 297, at 511–14 (Nov.–Dec. 1993).

[61] *See* Gasser, *supra* note 60, at 511. Jakob Kellenberger, the President of the ICRC, reminded the world that the St. Petersburg Declaration prohibited a weapon that had not yet been used on the battlefield.

> It was enough to just imagine the horrific effects of exploding bullets on the human body to motivate States to sign the Declaration, recognising that a soldier should not suffer more serious injury than is necessary to put him or her out of action. The spirit of St. Petersburg to which I refer is also evident in that the initiative to prohibit these bullets came from the very State that had developed them.

"more industrialized potential enemies" (Britain, France, and Germany) could produce massive quantities of the bullet.[62] Given the conditions of the time, where nations were raising massive armies equipped with increasingly deadly weapons, the good intentions many international humanitarian lawyers ascribe to Russia and the other participating nations is suspect.[63]

Nonetheless, the Declaration of St. Petersburg of 1868, which outlawed explosive projectiles under 400 grams,[64] is widely seen as the first real attempt by states to constrain warfare.[65] The Declaration was successful in that "few if any significant violations" have occurred in the wars since the late nineteenth century.[66] Beyond the prohibition on exploding bullets, the Declaration is most often cited for the principle that the *intentional* infliction of superfluous injury and unnecessary suffering on combatants are prohibited in war.[67] While, in hindsight, the Declaration of St. Petersburg of 1868 was a milestone event in international law, it ultimately had little effect at the time on the rising tide of nationalism and the massive growth of militaries and arms in Europe.

Jakob Kellenberger, President ICRC, Speech at the International Conference on IHL Dedicated to the 140th Anniversary of the 1868 St. Petersburg Declaration (Nov. 24, 2008), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/st-petersburg-declaration-281108; KALSHOVEN & Zegveld, *supra* note 17, at 20–21 (limiting discussion of the 1868 St. Petersburg Declaration to the humanitarian concerns of that commission).

[62] MCCOUBREY, *supra* note 17, at 231.

[63] The ICRC affirmed the Declaration of St. Petersburg of 1868 was "an international initiative, prompted by humanitarian considerations, to restrict the development of new weapons of a nature to cause superfluous injury or unnecessary suffering." *125th Anniversary of the Declaration of St. Petersburg of 1868*, 33 INT'L REV. RED CROSS, No. 297, at 509 (Nov.–Dec. 1993). The Declaration "revolutionized military thinking by prohibiting, on humanitarian grounds and citing 'the laws of humanity', the use of a weapon of war developed as a result of advances in technology." *Id.* at 511.

[64] Declaration of St. Petersburg of 1868, *supra* note 50.

[65] *See* Michael Howard, *Constraints on Warfare*, *in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 5–6 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994).

[66] MCCOUBREY, *supra* note 17, at 232.

[67] *Id.*; GREEN, *supra* note 17, at 346.

C. The Hague Peace Conferences of 1899

1. From St. Petersburg to The Hague

The time period after the Declaration of St. Petersburg of 1868 saw continued wars, the transformation of nation-states into countries, treaties (both secret and open) formed, and increased competition between nations for resources and military arms. Escalating industrialization and production capacity required more raw materials, cheaper labor, and new markets.[68] Nations competed for colonies throughout the world, which led to the formation of larger navies and militaries to project and protect national power abroad.[69] By 1900, "Europe had turned into a cluster of great armed camps around the powder keg of national aggression"[70] with some asserting that the best way to guarantee peace was through the deterrent effect of weaponry, while others predicted that "the tension would explode into a total inferno unleashing all the weaponry."[71] Against this setting of international strife, on August 24, 1898, Count Michail Mouravieff, the Russian Foreign Minister, handed the ambassadors and foreign ministers posted to St. Petersburg a memorandum from Tsar Nicholas II.[72] This memorandum, or the Tsar's

---

[68] *See* ARTHUR EYFFINGER, THE 1899 PEACE CONFERENCE 10–11 (1999).

[69] *See id.* at 10–12. Britain had enjoyed unmatched global colonial domination, with control over land from Ireland to India, Egypt, and South Africa, but increased competition with Germany caused Britain to continue to look to expand its colonial influence. *Id.* at 11. After France's defeat in the Franco-Prussian War in the early 1870s, France attempted to expand its influence abroad. *Id.* At the same time, the rising national powers of Germany and Italy sought stature through colonies. *Id.* Russia also sought to project power through global influence, and by the end of the century, the Far East became a focal point as European powers—and even the United States—sought to influence China and Japan. *Id.* at 11–12.

[70] *Id.* at 12. As one author observed,

> The face of war changed in the nineteenth century . . . . Technology magnified the power of weapons in the nineteenth century, while mass propaganda demonized the intended targets. Destruction was possible on a scale wider than ever before, and this breadth of scale was matched by an increase in the size of the contesting forces.

David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 7 (2000).

[71] *Id.* at 13. It is probably difficult for one today to imagine this persistent state of tension. As David D. Caron stated, "[i]n earlier times, war—like disease—was a part of life. There existed then a fatalism about war that no doubt persists in many parts of the world today." *Id.* at 4.

[72] *Id.* at 16.

Rescript as it came to be known, proposed a peace conference to "put an end to . . . incessant armaments and to seek the means of warding off the calamities which are threatening the whole world."[73] The Tsar's Rescript was somewhat shocking to those who received it, for Tsar Nicholas in only four years as the Tsar of Russia, had developed a reputation as "the very incarnation of militarism . . . a menace to peace and progress wherever Russia had a frontier."[74]

True enough, the Tsar's apparent motivation for peace was somewhat less than genuine. In 1897, the French and German armies had developed a quick-firing gun and in 1898, the Austrian army began procuring the weapon.[75] Russia was inclined to match her competitors in this arms race, but Russia's military was facing a budget crisis; Russia had already decided to increase spending by some seven percent on the imperial fleet, as well as to increase its military presence in Siberia.[76] The initial proposal was to approach Austria and determine if the two nations could reach a bilateral agreement to avoid purchasing the quick-firing guns.[77] Count Mouravieff rejected this suggestion for several

---

[73] EYFFINGER, *supra* note 68, at 17.

[74] *See id.* at 16–17 (quoting MERZE TATE, THE DISARMAMENT ILLUSION: THE MOVEMENT FOR A LIMITATION OF ARMAMENTS TO 1907, at 169 (1942)).

[75] *Id.* at 21.

[76] *Id.* The Russians were beginning a program to respond to the growing naval power of Japan in Far East. *Id.*

[77] CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 5 (1975). The Minister of War, General Kuropatkin, had drafted a document to the Minister of Finance, Sergius Witte, explaining the dilemma of keeping pace with Austria and the difficulty in financing the acquisition. *Id.* Evidently, Witte recognized this predicament and told Count Mouravieff that

> he and Kuropatkin should not think of approaching Austria-Hungary alone, for in Vienna such a proposal would no doubt seem proof of Russian weakness. Besides, Witte doubted that an agreement not to buy new artillery could mean an important saving. To him, militarism was the enemy. Although he did not believe that any nation should disarm or leave itself "inadequately protected," he hoped for a reduction of armaments . . . [and] told Muraviev that if the Russian government were to do anything about armaments it must approach many nations . . . [Witte] saw it as "an ideal worthy of the generous initiative of the Tsar."

Id. Witte and Mouravieff had different motives. Witte saw disarmament in terms of economic survival; in 1899 Russia had a foreign debt of approximately six billion rubles. EYFFINGER, *supra* note 68, at 22. Witte was focused on a strategy to increase productivity and promote commercial and industrial development of Russia's provinces through capital investments in projects like the Trans-Siberian Railway. *Id.* In Witte's view,

reasons: because it gave France and Germany an advantage over Russia, such technological advances were inevitable, and monitoring any such agreement would be impossible.[78] Mouravieff's idea was to include all of Europe in the treaty, which would provide Russia an advantage by maintaining the status quo in military forces for a decade while Russia could focus on increasing its naval power in the Far East.[79] Ultimately, the Tsar approved the idea of a multinational conference, and despite his militant reputation, the Tsar had a genuine "concern for the horrors of war" that corresponded with his country's need to save money by reducing Russia's arms race with her rivals.[80]

After a strong reaction from most of Europe,[81] Count Mouravieff issued a Second Circular Letter on January 11, 1899 proposing eight subjects for discussion.[82] The governments of Europe received the topics proposed in the Second Circular Letter more favorably, and eventually, Russia set The Hague in the Netherlands as the venue for the conference.[83] On May 18, 1899, the birthday of Tsar Nicholas II, the conference opened with delegations from twenty-six countries in attendance.[84] At the second plenary meeting of the conference, the President of the Conference, Baron de Staal of Russia, distributed a plan that called for three commissions to work through the proposed subjects of the conference.[85] The most important commission for the purposes of this article was the work of the First Commission, specifically its military subcommission. At the first meeting of the military subcommission, Colonel Gilinsky of Russia submitted proposals on behalf of Russia to limit the size of armies for five years, to set a specific number of authorized men in the military, and to maintain the present military

---

"peace and disarmament were the keys to economic survival in the short term and prosperity in the long run." *Id.* at 23.

[78] EYFFINGER, *supra* note 68, at 22.

[79] *Id.*

[80] *Id.* at 25.

[81] *See* DAVIS, *supra* note 77, at 6–9; EYFFINGER, *supra* note 68, at 25–35.

[82] EYFFINGER, *supra* note 68, at 36–37.

[83] *See id.* at 37–40.

[84] *See* DAVIS, *supra* note 77, at 22; EYFFINGER, *supra* note 68, at 102–24; WILLIAM I. HULL, THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTION TO INTERNATIONAL LAW 10–13 (1908). For an in-depth discussion of the countries represented and their delegates, see EYFFINGER, *supra* note 68, at 126–202.

[85] EYFFINGER, *supra* note 68, at 121–23; HULL, *supra* note 84, at 28–31. The three commissions were organized as follows: I Commission, focused on arms and the use of new weapons in war; II Commission, focused on the laws and customs of war; and III Commission, focused on arbitration and other methods of preventing war between nations. *Id.* at 28–29.

budgets for five years.[86] The second and third proposals from Count Mouravieff's Second Circular were also referred to the military subcommittee, where in turn Colonel Gilinsky proposed specific restrictions on certain weapons.[87] These restrictions concerned powders and explosives, field guns, muskets, and balloons and contained proposals with specific technical limitations.[88] The Russian proposals did not mention the subject of "Dum Dum" bullets, but at the first meeting of the subcommission, during discussions concerning new weapons and methods of warfare, Colonel Künzli of Switzerland proposed banning "projectiles which aggravate wounds and increase suffering," such as the dumdum bullet.[89] A Dutch General concurred, stating that "his government had instructed him to demand the formal prohibition" of these bullets.[90] Although expanding bullets did not originally appear anywhere as a topic of discussion, the subject of dumdum bullets quickly became the most contentious item discussed in the First Commission.[91]

2. The Dumdum Bullet: The British Response to Fanatics

The dumdum bullet was so named because the British originally manufactured it at the Dum Dum arsenal, near Calcutta, India.[92] The military delegates to the subcommittee had been unable to agree on anything to that point, but the majority of the delegates were unified both in opposition to the use of the dumdum bullet and in ganging up on the British.[93] The chief British military representative, General Sir John Ardagh, soon found himself fighting against the falsities concerning the

---

[86] FREDERICK W. HOLLS, THE PEACE CONFERENCE AT THE HAGUE 72 (1914). Colonel Gilinsky also made similar proposals related to naval forces. *Id.* These proposals "failed miserably" as evidenced by the absence of any such limitations in the final Hague Regulations. EYFFINGER, *supra* note 68, at 204. For a detailed discussion on the inability of the nations to agree to limit arms, forces, or military budgets, see *id.* at 204–19.

[87] *Id.* at 98; HULL, *supra* note 84, at 170. The second and third proposals of the Second Circular are listed in EYFFINGER, *supra* note 68, at 36.

[88] HOLLS, *supra* note 86, at 98; HULL, *supra* note 84, at 170–81.

[89] HULL, *supra* note 84, at 181.

[90] *Id.*

[91] HOLLS, *supra* note 86, at 98 ("The subject of unnecessarily cruel bullets gave rise to more active debate, and developed more radical differences of opinion than any other considered by the First Committee.").

[92] *Id.* at 99.

[93] *Id.*

"notorious" dumdum bullet,[94] orchestrated by Russia in "a crusade against British rule in Africa."[95] General Ardagh argued that the bullets did not mutilate as described, but were "ordinary projectiles."[96] General Ardagh was more correct as the original dumdum, the Mark II, had only "about 1 mm of the jacket at the tip of the bullet . . . [removed, exposing] the soft lead inside."[97]

The controversy surrounding the dumdum bullets began in April 1898 when Professor von Bruns, a German surgeon, presented the results of his experiments with expanding bullets, allegedly identical to the dumdum bullet, to the Congress of German Surgeons.[98] Professor von Bruns's results were so shocking that the meeting proposed that German military authorities should ban all bullets not completely jacketed.[99] The

---

[94] CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE 114 (1962). General Sir John Ardagh initially "pretended to take little notice of" the movement to prohibit the dumdum bullet. *Id.*

[95] EYFFINGER, *supra* note 68, at 227. Dumdum bullets were defined by the Dutch as "inhuman projectiles which make incurable wounds; which have very soft points and very hard jackets, and, with a softer inner substance, explode within the body, thus causing a small hole on entering, but an enormous one on leaving, the body of the victim." HULL, *supra* note 84, at 181. Furthermore, the Dutch thought that such a ban would be in accordance with the principle of unnecessary suffering endorsed by the St. Petersburg Declaration of 1868. EYFFINGER, *supra* note 68, at 224.

[96] SCOTT, *supra* note 1, at 332.

[97] Ronald F. Bellamy & Russ Zajtchuk, *The Evolution of Wound Ballistics: A Brief History*, *in* CONVENTIONAL WARFARE: BALLISTIC, BLAST, AND BURN INJURIES 89 (Ronald F. Bellamy & Russ Zajtchuk eds., 1991). Until the middle of the nineteenth century, bullets were made of soft lead, but after the American Civil War, militaries began producing jacketed bullets "in order to increase the muzzle velocity—and thus the range—of small-arms projectiles." *Id.* However, the jacketed bullets became less effective from a military standpoint "because the wounds to nonvital areas were less severe" than unjacketed bullets. *Id.* The British also produced a bullet called a "dumdum" that was hollow pointed, called the Mark V bullet. *Id.* at 89–90. It was during the middle to late nineteenth century that surgeons began describing wounds from newer conoidal bullets as "explosive" in order to describe the effects of the expansion of the bullet. *Id.* at 87–89.

[98] Alexander Ogston, *The Peace Conference and the Dum-Dum Bullet*, 2 BRIT. MED. J. 278 (July 29, 1899). Sir Ogston's writings in the *British Medical Journal* provide an excellent overview of the debate in Europe over Professor von Bruns's experiment and an in-depth critique of von Bruns's experimental methods. The title of Professor von Bruns's presentation was "On Inhumane Military Projectiles." Alexander Ogston, *The Wounds Produced by Modern Small-Bore Bullets*, 2 BRIT. MED. J. 813 (Sept. 17, 1898).

[99] Ogston, *The Peace Conference and the Dum-Dum Bullet*, *supra* note 98, at 278. This led to Professor Friedrich von Esmarch, a famous German surgeon, to write an influential and critical letter to the *Deutsche Review* calling for a ban on dumdum bullets at the upcoming Hague Peace Conference. *Id.* at 279. Professor von Esmarch stated that the

criticism of Britain's dumdum bullets soon spread throughout Europe,[100] and as condemnation of the bullets spread through the continent, British surgeons pointed out the glaring error in the German experiments: Professor von Bruns never tested actual dumdum bullets, but instead used what he inferred was an identical bullet, the hunting bullet fired from the powerful German Mauser rifle.[101] Despite Britain's efforts in 1898 and early 1899 to respond to the falsehoods concerning the dumdum bullet, with the Peace Conference looming, Britain foresaw widespread opposition to the dumdum.[102]

At the second meeting of the military subcommission, Colonel Gilinsky and Colonel Künzli proposed language prohibiting expanding bullets.[103] The delegates generally agreed with the proposals and

---

dumdum bullet produced injuries that "exceeded the worst anticipations." Alexander Ogston, *English Rifle Bullets*, 1 BRIT. MED. J. 752, 754 (Mar. 25, 1899).

[100] *See, e.g.*, Ogston, *English Rifle Bullets*, *supra* note 99, at 755 (discussing the use of von Bruns's publication by the French press to criticize Britain's use of the dumdum bullet).

[101] Ogston, *The Wounds Produced by Modern Small-Bore Bullets*, *supra* note 98 at 814–15; Ogston, *English Rifle Bullets*, *supra* note 99, at 753–55 (including a translation of Professor von Bruns's work as well as criticism of his methods); Ogston, *The Peace Conference and the Dum-Dum Bullet*, *supra* note 98, at 278–79 (describing Mauser bullets as hunting bullets used to "shoot elephants, rhinoceros, lions, and big game" and "immensely powerful and destructive, and are at present displacing the elephant gun"). These experiments have been described as "marred by extremely emotional political considerations." Bellamy & Zajtchuk, *supra* note 97, at 97.

> Hostilities between Germany and Great Britain were intensifying, and the Germans conducted experiments to show that deforming bullets fired into long-dead cadavers caused especially massive wounds, and should therefore be banned. However, the bullets that the Germans used in these experiments had higher velocities and much more lead core exposed at the tip than the dumdum bullets did. British and American investigators countered by citing anecdotes to show that the then-new jacketed bullets caused just as much damage as the dumdums did.

Id. The biggest issue with the German experiments was that "important methodological standards—such as comparing bullets of like velocities and designs and using similar tissue stimulants in comparable experiments—were ignored." *Id.*

[102] *See* Ogston, *English Rifle Bullets*, *supra* note 99, at 755.

[103] SCOTT, *supra* note 1, at 338. The Russian proposal read,

> The use of bullets whose envelope does not entirely cover the core at the point, or is pierced with incisions, and, in general, the use of bullets which expand or flatten easily in the human body, should be

committed to submitting final drafts at the next meeting of the subcommission.[104] At the third meeting of the subcommittee, the delegates of Russia, Romania, and France offered a draft text prohibiting expanding bullets.[105] The Austrian delegate, Lieutenant Colonel von Khuepach, opined that the committee should limit itself to a more general proposal that restricted bullets that caused unnecessarily cruel wounds, making the shrewd observation that any bullet has the capacity to mutilate.[106] General Ardagh then made a statement justifying the use of expanding bullets against "savages."

> In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the

---

> prohibited, since they do not conform to the spirit of the Declaration of St. Petersburg of 1868.

Id. The Swiss proposal stated, "Prohibition of infantry projectiles such as have the point of the casing perforated or filed, and whose direct passage through the body is prevented by an empty interior or the use of soft lead." *Id.*

[104] *See id.* at 338–39. General Mounier of France proposed a more general definition for fear that later inventions would allow a nation to avoid a specific definition and asked the committee to confine itself to the use of the term "expansive bullet." *Id.* at 338. The other delegates agreed with this proposition, and Colonel Künzli withdrew his proposal and endorsed the Russian and French language. *Id*. at 339. General Mounier later proposed the wording "The use of expansive or dilatable bullets is prohibited." *Id.* Colonel Coanda of Romania, sensing apparent confusion, clarified that unjacketed "soft" bullets expanding (or dilated) through mechanical effect and proposed mentioning "non-explosive bullets." *Id.*

[105] *Id.* at 343. The joint proposal read, "The use of bullets which expand or flatten easily when penetrating the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, should be prohibited." *Id.*

[106] *Id.* Specifically, Lieutenant Colonel von Khuepach proposed a

> provision embodying a conventional restriction of the use of bullets which produce unnecessarily cruel wounds, without entering into details, especially as it would be impossible to entirely avoid mutilations; for a bullet constructed in any manner will cause such mutilations if it should be deformed by striking on a rock or other hard object before striking the human body.

Id.

> decisions of the Hague Conference, he cuts off your head.[107]

Commentators have seized this language to ridicule the British rationalization for using dumdum bullets in battle,[108] but the British understood that against particularly determined enemies, a normal bullet was not sufficient to place a determined, fanatical opponent *hors de combat*. Nonetheless, Britain's argument for using "projectiles of sufficient efficacy against savage populations" set in motion a discussion on the complications of using different types of bullets against savages and "civilized peoples."[109] Lieutenant Colonel von Khuepach then made a simple, yet brilliant proposal: "[t]he use of bullets which cause uselessly cruel wounds shall be prohibited by convention."[110] Ultimately, nineteen delegates voted in favor of the final proposal with only Great Britain voting against it and Austria-Hungary abstaining.[111]

The three subcommissions presented their reports to the full meeting of the First Commission on June 22, 1899.[112] At that meeting, General Ardagh rose to defend and clear up misunderstandings of the dumdum bullet.[113] General Ardagh thought language "describing technical details of construction [would make] the prohibition a little too general and absolute."[114] He believed the proposed language would abolish the permissible use of bullets that Britain sought to use: "the present or future construction of some projectile with shock sufficient to stop the stricken soldier and put him immediately *hors de combat*, thus fulfilling

---

[107] *Id.* at 343.

[108] *See* MCCOUBREY, *supra* note 17, at 232 (noting that the British arguments were "manifestly racist in tone and intention"); GEOFFREY BEST, HUMANITY IN WARFARE 162 (1980) (stating that the British argument "was not [edifying], inasmuch as it placed these alleged 'savages' on the same level as big game").

[109] SCOTT, *supra* note 1, at 343–44. Interestingly enough, Colonel Gilinsky conceded that "[b]y constantly diminishing the caliber [of a bullet] too small a caliber is reached [to stop an attacking enemy], and hence the necessity perhaps of using the dumdum bullet." *Id.* at 344. Colonel Gilinsky pointed out that, "[a]s to savages, they are of course not guaranteed against the use even of explosive bullets" because of a gap in the St. Petersburg Declaration that applied the Declaration only to the contracting Powers. *Id.*

[110] *Id.* It is unknown why this proposal did not advance; the official record makes no mention of further discussion on the proposal. General Mounier then modified the earlier proposal of France, Romania, and Russia by adding the term "explosive" to the definition of the prohibited bullets. *Id.* at 347.

[111] *Id.* at 276; DAVIS, *supra* note 77, at 114–15.

[112] DAVIS, *supra* note 77, at 121.

[113] SCOTT, *supra* note 1, at 276.

[114] *Id.*

the indispensable conditions of warfare without, on the other hand, causing useless suffering."[115] General Ardagh went on to describe how small-caliber, jacketed bullets were not always able to put an enemy *hors de combat*, leading to the development of the dumdum bullet.[116] General Ardagh clarified that while the dumdum bullet ordinarily put an advancing opponent out of combat, "the result is by no means designed with the aim of inflicting useless suffering."[117] General Ardagh tried to explain how the dumdum "acquired a bad reputation in Europe"—namely, through Professor von Bruns's flawed experiments with the Mauser bullet, "which did not resemble the dumdum bullets at all, either in construction or effect."[118] General Ardagh argued "it is a fact that the erroneous conception formed in Europe about the character" of the dumdum bullet "is entirely due to the wholly false idea that these two projectiles are almost identical in construction."[119] General Ardagh declared that "public opinion in England would never sanction the use of a projectile which would cause useless suffering," but as stated in the opening quote of this article, Britain claimed a right and duty to furnish her soldiers with a bullet that would immediately stop an enemy and place him *hors de combat*.[120]

The President of the First Commission, Auguste Beernaert of Belgium, stated that the proposed prohibition did not refer directly to dumdum bullets, but was rather akin to the language adopted—and approved by Britain—in the Declaration of St. Petersburg.[121] General Ardagh replied that Britain objected to the specific language: "bullets with a hard casing which does not entirely cover the core or is provided

---

[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* Ardagh conceded that Bruns's "experiment prove[d] that a bullet . . . [without a hard jacket] works in a certain sense like an explosive bullet and produces a terrible effect," but he cautioned that this could not "be accepted as evidence or proof against the dumdum bullet," which was an entirely different bullet. *Id.* at 277.
[119] *Id.* at 276.
[120] *Id.* Ardagh noted that no nation raised humanitarian concerns with the use of 20 mm, musket-fired bullets or the 12 mm bullet of the Martini musket, both of which were larger than the 8 mm bullet fired by the Lee-Metford rifle, the rifles used by the British at the time. *Id.* at 277–78. Ardagh affirmed British devotion to the humanitarian principles of the Declaration of St. Petersburg but declared that the proposal before the commission was too technical and instead proposed affirming "the principles enunciated in the Convention of St. Petersburg, that is to say, the prohibition of the use of bullets whose effect is to aggravate uselessly the sufferings of men placed *hors de combat* or to render their death inevitable" *Id.* at 278.
[121] *Id.*

with incisions."[122] Further debate continued, with Colonel Gilinsky remarking that to remove such language would strip the prohibition of its reach.[123] At this point, Captain William Crozier of the United States, agreed with General Ardagh and proposed the following language: "The employment of bullets which inflict uselessly cruel wounds, such as explosive bullets and in general every kind of bullet which exceeds the limit necessary in order to put a man *hors de combat* at once, is forbidden."[124] Colonel Gilinsky retorted that it would be too difficult to reword the proposed language and that "bullets whose casing contains incisions [causes] cruel wounds . . . . The purpose of war is to put men out of action, and ordinary bullets are sufficient for this purpose."[125]

One can sense the overt tension that must have filled the meeting room at this point. General Ardagh must have added to the fervor when he stated his regret that Colonel Gilinsky could not accept modified language and stated that there was no proof "that the dumdum bullet was uselessly cruel."[126] Colonel Gilinsky fired back that the "experience of two wars in which the dumdum bullet was used has proved that the wounds produced by this projectile are fearful."[127] As the First

---

[122] *Id.*

[123] *Id.* General Sir John Ardagh declared that he was "obliged to maintain his negative vote inasmuch as the wording amounts to a condemnation of the dumdum bullet." *Id.*

[124] *Id.* at 278–79. General Zuccari of Italy observed that Captain Crozier's proposal was similar to one made by Lieutenant Colonel von Khuepach of Austria-Hungary and stated his preference for less specific language. *Id.* at 279.

[125] *Id.*

[126] *Id.* General Sir John Ardagh stated that the Tübingen bullet—the one created by Professor von Bruns for his experiments at Tübingen—was a cruel bullet. *Id.* Colonel Gilinsky responded that "the Tübingen bullet has never been used in war." *Id.* The German delegate, Colonel Gross von Schwarzhoff, apparently took offense with the discussion of the Tübingen bullet, stating that "there is no firearm factory at Tübingen," only a "celebrated university . . . [where Professor von Bruns] has spent much of his time studying the effect of small caliber projectiles." *Id.* Colonel Gross von Schwarzhoff did not know what bullet Professor Bruns used in his experiment, but declared that "it was not the bullet of the German army. And never has there been any question of introducing therein a bullet whose core would not be completely covered by the casing." *Id.*

[127] *Id.* After some more debate, Russia moved for a vote on the original text; twenty nations confirmed the original text, with Britain and the United States voting against and Portugal abstaining. *Id.* at 279–80. Count de Macedo of Portugal declared that the "difference of opinion among technical delegates" would prevent him from voting on the issue. *Id.* General den Beer Poortugael (Netherlands), Colonel Gilinsky, and Mr. Beernaert thought that Captain Crozier's proposal was "far too vague." *Id.* The debate that day must have been contentious because at the next meeting the following day, various delegates requested that the entire record of the debate and discussion on dumdum bullets be attached to the record. *Id.* at 298.

Commission wound up business on July 17, 1899, the Reporter of the First Commission proposed a limit of five years to the three prohibitions that would go to the full conference.[128] Colonel Gilinsky insisted that the prohibition against the use of expanding bullets was meant to continue in perpetuity, as "decided several times by the subcommission and the Commission."[129]

3. Blood Is Thicker Than Water[130]: *American Opposition to the Dumdum Ban*

The full Conference considered the First Commission's work on July 21, 1899.[131] The Conference unanimously adopted the prohibition against launching projectiles from balloons[132] and the prohibition against the use of projectiles that discharge asphyxiating gases[133]—with the exceptions of Britain and the United States.[134] The next subject for vote was the prohibition against expanding bullets. Captain Crozier intervened to address the entire assembly of delegates to the Conference concerning the proposed ban, and if the contentious nature of the topic of dumdum bullets was uncertain before, Crozier's speech and the animated discussion it generated left little doubt.[135]

Crozier began by recalling the language of the Declaration of St. Petersburg, which forbade weapons which "aggravate uselessly the sufferings of men already placed *hors de combat*, or would render their

---

[128] *Id.* at 324. The Reporter believed the lack of unanimity on the three issues—expanding bullets, projectiles emitting asphyxiating gases, and dropping projectiles from balloons—required attention and felt the best way to address the anomaly was to extend the provisions of the St. Petersburg Declaration to the three issues for five years. *Id.*

[129] *Id.* at 325. The reference to perpetuity does not appear in Scott's record.

[130] DAVIS, *supra* note 70, at 174. The United States's attack on the declaration against expanding bullets and cooperation with Britain "brought wry comments." *Id.* One delegate "observed that 'blood is thicker than water.' Another laughingly responded, "Yes, the English and Americans do good business.'" *Id.*

[131] *Id.* at 79.

[132] Hague IV, Declaration I, Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, 1 Bevans 270, 26 Martens Nouveau Recueil (ser. 2) 994.

[133] Hague IV, Declaration II, Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 453.

[134] DAVIS, *supra* note 77, at 79.

[135] *Id.*

death inevitable,"[136] and then affirmed that the object of war was to weaken the enemy's military forces and to "place *hors de combat* the greatest number of men possible."[137] Crozier then once again proposed an amended prohibition on bullets: "The use of bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general all kinds of bullets which exceed the limit necessary for placing a man *hors de combat* should be forbidden."[138] Crozier went on to argue that the weakness of Russia's proposed language was that it was directed at one class of bullets: those that explode or flatten, leaving open development of other bullets that would remain outside the technical prohibitions of the language, yet still inflict unnecessarily cruel wounds that Crozier's proposal would forbid.[139] Crozier stated that if necessary to increase the "shocking power of the bullet . . . what more humane method can be imagined than to have [the bullet] simply increase its size in a regular manner?"[140]

He then addressed the dumdum bullet, averring that he had no reason to defend the dumdum bullet and knew nothing about the bullet except what he had learned at the Conference.[141] Crozier then attacked Colonel Gilinsky's claim that the dumdum bullet demonstrated its "great cruelty" in two wars and highlighted Gilinsky's failure to present any evidence to support this assertion.[142] Crozier recalled that the only evidence the Commission heard about the dumdum's potential cruelty was through discussion of the allegedly similar bullets used in Professor von Bruns's Tübingen experiments, details of which were only raised by General Ardagh to deny the cruelty of the dumdum bullet.[143] Crozier declared that his proposed language would not give the dumdum bullet a license, but would prohibit the bullet *only if* "a case can be made out against it."[144]

---

[136] SCOTT, *supra* note 1, at 79–80.
[137] *Id.* at 80.
[138] *Id.*
[139] *Id.* at 80–81. It is notable that Captain Crozier was able to discuss the characteristics of bullets in the same technical manner as is used today. For example, he observed that the advantages of smaller bullets (coinciding with the primary arguments in support of the 5.56 mm round) were a flatter trajectory, greater range, less recoil, and reduced weight. *Id.* at 80. Crozier also discussed the ability to produce a bullet that would tumble end-over-end, noting that "it is well known how easily a projectile can be made to act in this way." *Id.* at 81.
[140] *Id.* Captain Crozier was referring to expanding bullets.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

Crozier closed by asking if it would be better to secure domestic support by presenting "a case, supported by evidence, against any military practice, than to risk arousing a national sentiment in support of the practice by a condemnation of it without proof?"[145]

At this point, the main supporters of the ban of dumdum bullets—Russia, France, and the Netherlands—expressed annoyance in defense of their proposal.[146] Colonel Gilinsky reaffirmed that dumdum bullets were not specifically banned, but then stated that the desire of the ban was to prohibit "the use of a certain category of bullets which have already been manufactured."[147] Gilinsky finished by stating that the language was the result of "mature deliberations in which all the technical experts have taken part, and it would be impossible for the Conference to reverse itself."[148] Captain Crozier "riposted fervently,"[149] summarizing his objection to the proposed language with three points: the ban does not prohibit all bullets which are inhumane; the ban was overly broad in that it was possible that an expanding bullet "would not produce needlessly cruel wounds"; and the minutes of the meeting showed that at least the Dutch had specific intent to "forbid the use of the bullet called 'dumdum.'"[150] Captain Crozier then read Colonel Gilinsky's quote from

---

[145] *Id.* at 81–82.

[146] *Id.* at 82. The Netherlands began by reminding the Conference that the First Commission had already considered and rejected Crozier's proposal and that to allow the amending language would destroy the work of the First Commission. *Id*. General den Beer Poortugael continued that there was no condemnation of the dumdum bullet, for the dumdum was "a bullet that is not known." *Id.*

[147] *Id.* at 83. Colonel Gilinsky stated that

> [b]ullets of this kind inflict needlessly cruel wounds because the incision permits the lead to come out of the hard envelope and to expand; and not only do these projectiles wound, but they carry away bits of flesh. Such an effect goes beyond the aim of war which is merely to place *hors de combat.*

Id. Gilinsky declared that small caliber bullets, such as the Russian 7.5 mm round, were sufficient to place a man out of combat. *Id.* All other tales of men being shot several times without rendering them *hors de combat* were exceptions that happened "if the bullet touches only the muscles of soft parts of the body, and not the bone, which is comparatively rare." *Id.*

[148] *Id.* The Russian and Dutch insistence that the Conference could not re-examine the ban on expanding bullets indicates their unwillingness to allow the entire body of nations to engage in a factual discussion about the subject.

[149] EYFFINGER, *supra* note 68, at 250.

[150] SCOTT, *supra* note 1, at 83–84. Quoting from the minutes of the First Commission must have been a slap in the face to General den Beer Poortugael, who had just insisted

the minutes that when the caliber of a bullet is too small, it may be necessary to use dumdum bullets.[151] Crozier could not understand how a nation could propose to ban the dumdum bullet on one hand, and argue for the necessity of it on the other.[152]

What occurred next highlights the lack of parliamentary experience that existed for most of the nations represented, namely that an amendment must be voted on before the original proposition.[153] This deficiency ultimately stymied Captain Crozier's proposal as it gained momentum before the Conference and prevented the assembled nations from voting on the amended language.[154] Mr. Raffalovich of Russia moved to vote on which formula—the term used for the language of the different provisions—would receive precedence in voting.[155] The head American delegate, Andrew White, proposed sending the issue back to the First Commission to seek language agreeable to all nations.[156] The nations present rejected this proposal by a vote of twenty to five.[157] The President of the Conference, Baron de Staal of Russia, then proposed voting on the formula approved by the First Commission, to which both General Ardagh and Captain Crozier protested.[158] President de Staal then

---

before the entire Conference that there was no intent to specifically ban the dumdum bullet.

[151] *Id.* at 84.

[152] *Id.* Crozier closed this round of debate by reiterating that, when he originally introduced this language to the subcommission, the amendment was not put to a vote before that body. *Id.* Colonel Gilinsky reiterated the two months of work in the subcommission where the issue "was conscientiously studied . . . and the [language] worked out in detail." *Id.* The back and forth of this debate highlighted the lack of experience of parliamentary rules. *See* EYFFINGER, *supra* note 68, at 250–54.

[153] EYFFINGER, *supra* note 68, at 251.

[154] SCOTT, *supra* note 1, at 84–87. Originally, only Britain stood against the ban on dumdum bullets, but as discussed earlier, the United States later adopted the position. After hearing the debate, the Danish representative remarked that he was not familiar with the dumdum and was not convinced of its cruel effects. *Id.* at 85. The subsequent voting on procedural matters concerning the Crozier amendments seem to indicate that other nations were more satisfied with the general language of the proposal. *See id.* at 84–87.

[155] *Id.* at 85.

[156] *Id.* at 85–86. Ambassador White also apologized that the United States could not agree with the Commission on the language, but expressed his view that the weakness of the proposed prohibition was the ban on the specific, rather than the general, allowing the future creation of inhumane bullets not specifically prohibited by the language. *Id.* He stated, "[T]his is a case in which the letter kills and the spirit gives life". *Id.*

[157] *Id.* at 87. The United States, Denmark, Great Britain, Greece, and Portugal voted to send the issue back to the First Commission. *Id.*

[158] *Id.*

agreed "in a conciliatory spirit . . . to have a vote first on the American formula."[159] This announcement generated even more discussion among the delegates until Jonkheer van Karnebeek, First Delegate of the Netherlands, proposed settling the issue by voting to determine which formula should receive priority.[160] Eight nations voted to give priority to the American formula and seventeen voted to give priority to formula adopted by the commission.[161] Consequently, the language drafted by the Russians, French, and Dutch and approved by the First Commission, was adopted "unanimously" with Great Britain and the United States voting against, Portugal abstaining, and Luxemburg not present.[162] Thus ended the contentious debate over dumdum bullets, and the controversy surrounding this small provision of the 1899 Hague Regulations disappeared from history, save for in the work of a few commentators.

After the American delegation returned home, Secretary of State John Hay and Assistant Secretary of State David Hill studied the Hague Conventions and decided not to send the declaration against the use of expanding bullets to the Senate for ratification.[163] To this day, the Senate has never ratified that declaration. The United States ratified the arbitration convention and the declaration against throwing projectiles from balloons on February 5, 1900; the convention adapting the Geneva Convention of 1864 to maritime warfare on May 4, 1900; and the convention on the laws and customs of land warfare in March, 1902.[164]

D. The Hague Peace Conference of 1907

The attention surrounding the 1899 Peace Conference diffused rather quickly, at least in the United States.[165] The Permanent Court of Arbitration was established at The Hague[166] and heard several important cases, including the Pious Fund case, the Alaska Boundary tribunal, and

---

[159] *Id.*
[160] *Id.*
[161] *Id.* The United States, Belgium, China, Denmark, Great Britain, Greece, Portugal, and Serbia voted to give priority to Captain Crozier's amendment. *Id.* Luxemburg did not participate in the vote. *Id.*
[162] *Id.*
[163] *Id.* at 196. There is no explanation as to why Secretary Hay and Assistant Secretary Hill thought it "unwise" to send this declaration to the Senate, but it is probably attributable to Crozier and Mahan's strong opposition at the Conference. *Id.*
[164] *Id.*
[165] DAVIS, *supra* note 77, at 35.
[166] *Id.* at 35–36.

the Venezuela affair.[167] Wars continued to rage throughout the world: the United States fought a rebellion in the Philippines;[168] Britain fought the Boer War in South Africa;[169] the Boxer Rebellion broke out in China;[170] and in 1904, the Russo-Japanese War began.[171] American involvement in resolving international disputes rose during this period, and by 1904, President Theodore Roosevelt was persuaded to seek a second peace conference at The Hague to address improvements and additions to the 1899 Conventions.[172]

The happenings and discussions of The Hague Peace Conference of 1907 are beyond the concern of this article, save for the issue of expanding bullets. The program for the Second Conference included "Declarations of 1899" among the topics for discussion.[173] At the first meeting of the first subcommission of the Second Commission on July 3, 1907, Auguste Beernaert presided and noted that the declaration against expanding bullets was "still in force and it does not seem that there should be any occasion for modifying [it]."[174] Beernaert also noted that the subcommission had not yet received any communication on that subject.[175] On July 8, the United States delegation submitted a proposal declaring "[t]he use of bullets that inflict unnecessarily cruel wounds, such as explosive bullets and, in general, every kind of bullet that exceeds the limit necessary for placing a man immediately *hors de combat* should be forbidden."[176] As the meetings of the Second Commission continued, the Dutch would, much as the Russians did in 1899, thwart the effort of the United States to modify the restrictions on expanding bullets. At the fifth meeting of the subcommission on August 7, 1907, Beernaert stated,

> [A]ll discussion on the subject of [expanding bullets] must . . . be declared out of order. [This Declaration was] concluded for an indefinite period, [it] can be denounced

---

[167] *See id.* at 37–90 (providing an overview of these cases).
[168] *Id.* at 37. This rebellion lasted from February 1899 until July 1902. *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 91.
[172] *See id.* at 91–162 (providing an in-depth discussion surrounding the motives, politics, and events leading to the Second Peace Conference).
[173] HULL, *supra* note 84, at 187.
[174] 3 JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE CONFERENCES: THE CONFERENCE OF 1907, at 98 (1921).
[175] *Id.*
[176] *Id.* at 15.

> only by means of a notice given one year in advance, and no Power has expressed such an intention. Moreover, the modification or abrogation of [this Declaration] does not appear in the program and the restrictive proposal of the United States is not connected therewith.[177]

A plain reading of the minutes from the first meeting on July 3 clearly shows Beernaert never discussed this method of denouncing the Declaration. Fortunately, Brigadier General George B. Davis, The Judge Advocate General of the U.S. Army, saved the record at the next plenary meeting of the Second Commission.[178]

At the next day's meeting of the full Second Commission, General Davis addressed Beernaert's statement of the previous day. General Davis noted that on July 8, the United States had filed a proposal seeking to modify the 1899 Hague Expanding Bullets Declaration.[179] Davis declared that on July 10, "this proposal was printed and distributed in the usual manner," and stated the United States's confusion over Beernaert's claim that no one asked to revise the expanding bullet declaration.[180] Davis further explained that on July 31, the delegation of the United States was told that, because the United States was not a signatory to the declaration on expanding bullets, it was not in a position to denounce that declaration.[181] Davis expressed frustration that the United States had no way of knowing that its proposal "could not be taken into

---

[177] *Id.* at 153–54. Nowhere in the minutes of this meeting is there a discussion concerning General Davis's proposal to modify the declaration on expanding bullets.

[178] Then-Brigadier General George Breckenridge Davis graduated from the United States Military Academy in 1871. *Gen. George B. Davis Dead*, N.Y. TIMES, Dec. 17, 1914, at 13. General Davis was appointed a judge advocate in 1888 and was then assigned as Professor of Law at West Point. *Id.* General Davis received his law degree from Columbia University in 1891. *Id.* In 1901, General Davis was appointed as The Judge Advocate General of the U.S. Army. *Id.* General Davis was a delegate of the United States to the Second Hague Peace Conference, as well as an accomplished writer on international and military law. *Id.*

[179] *Id.* at 15.

[180] *Id.*

[181] *Id.* Apparently, only a power that had signed a declaration of the 1899 Hague Convention could denounce a declaration and suggest a modification, so the United States was "not in a position to denounce it in the manner and form prescribed in the Convention." *Id.*

consideration as being a modification of Declaration No. 3."[182] Davis's argument apparently did not move Beernaert.[183]

Beernaert then noted that the Russian program for the Conference of "more than a year ago" did not mention modifying the declaration on expanding bullets; he evidently forgot the first meeting on July 3, where he left open the possibility of modifying the declaration.[184] Beernaert then declared that, because no Power had denounced the Declaration, their "full obligatory force" was preserved for a year.[185] Beernaert concluded by observing that General Davis's proposal was identical to that of Captain Crozier in 1899, "which was unanimously rejected as insufficient."[186]

Beernaert's seeming misinterpretation of the denunciation provisions of the 1899 Declaration terminated the last meaningful opportunity to correct the ban on expanding bullets. Even if the United States had succeeded in getting its proposed modification before the subcommission, it is not clear that the United States could have persuaded a majority of nations to amend the Declaration; at the 1907 Peace Conference, Britain and Portugal announced they would sign the 1899 Hague Expanding Bullets Declaration.[187] The Final Act of the 1907 Peace Conference called for a Third Peace Conference to be held within

---

[182] *Id.* The full text of the 1899 Hague Expanding Bullets Declaration addresses denunciations of the Declaration:

> In the event of one of the High Contracting Parties denouncing the present Declaration, such denunciation shall not take effect until a year after the notification made in writing to the Netherlands Government, and forthwith communicated by it to all the other Contracting Powers. This denunciation shall only affect the notifying Power.

Hague Expanding Bullets Declaration, *supra* note 12. The plain language of the Declaration does not appear to prohibit a later modification to the Declaration.

[183] Beernaert responded by telling General Davis that no other delegation had opposed his exclusion of the proposal during the previous day's meeting. SCOTT, *supra* note 174, at 16. Beernaert flatly stated, "The question can therefore no longer be discussed, but [Beernaert] thinks too that it has been decided correctly." *Id.*

[184] *Id.*

[185] *Id.* As discussed in note 182, *supra*, Beernaert appears to have mistakenly interpreted the denunciation provisions of the Declaration.

[186] *Id.* The record of Captain Crozier's passionate proposal to modify the Declaration in 1899 and the debate it inspired appears to undercut the support Beernaert's accords to the Conference unanimous rejection *See* discussion at Part III.C.3, *supra*.

[187] SCOTT, *supra* note 174, at 154.

eight years,[188] but the outbreak of World War I in 1914 prevented this third conference. No successor conference to the 1907 Peace Conference has ever been held.[189]

E. Diplomatic Conferences on International Humanitarian Law, 1974–1976

Various other conferences and conventions met in the years following World War I, but other than the Geneva Protocol of 1925[190] prohibiting the use of chemical and bacteriological weapons, no real attempt was made to regulate conventional weapons until 1974.[191] After the Geneva Conventions of 1949 were held, numerous conflicts arose that were "characterized by widespread violations of the Conventions or the simple refusal of belligerents to acknowledge that the Conventions have any application to the conflict in which they are involved."[192] As a result, during the 1970s, the United Nations and the ICRC exchanged proposals for restricting new weapons systems[193] until finally, in 1974,

---

[188] Final Act of the Second Peace Conference, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3) 323, 205 Consol. T.S. 216.

[189] DAVIS, *supra* note 77, at 339.

[190] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Feb. 8, 1928, 94 L.N.T.S. 65.

[191] R.R. Baxter, *Conventional Weapons Under Legal Prohibitions*, 1 INT'L SEC. 45 (Winter 1977).

[192] R.R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1, 4 (1975). These conflicts included:

> outbreaks of violence between Israel and the Arab States, the Nigerian Civil War, the Bangladesh War of Independence, the Vietnam War, the Korean War, several wars between India and Pakistan, a conflict between India and China, the Congo operation by the United Nations, chronic violence over Cyprus, [and] civil war in the Dominican Republic.

Id.

[193] *Id.* In 1968, the United Nations held an International Conference on Human Rights in Tehran, Iran, which resolved to request a U.N. study on how to supplement the Geneva Conventions to better protect civilians and other war victims. *Id.* at 5. The United Nation's incursion into the Geneva Conventions created a conflict with the ICRC. *Id.* The ICRC had "historically considered itself the guardian of the Geneva Conventions of 1949 and of the "Geneva law" in general. *Id.* For years the ICRC "was widely regarded as highly knowledgeable about international humanitarian law and as neutral and apolitical." *Id.* However, the ICRC became more political and soon "the very neutrality and detachment of the I.C.R.C. were to be challenged." *Id.* In response, in 1971 and

the Swiss Government hosted a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, with 125 nations in attendance.[194] The Diplomatic Conference of 1974 and those that followed in 1975 and 1976 were expansive.[195] The majority of their work is beyond the scope of this article, save for the attention paid to bullets.

No specific ban on any type of bullets came of the Diplomatic Conferences or the Protocols Additional to the Geneva Conventions of 1949; however, a discussion of the efforts to restrict certain bullets during the 1970s is instructive in understanding the probable confusion, disagreement, and resulting inaction in changing the 1899 Hague Expanding Bullets Declaration. At the 1974 Conference, there was only an "Ad Hoc Committee on Weapons," and the discussion in this body was unremarkable.[196] Most of the real discussion on weapons, especially small caliber bullets, took placed at the various conferences of government experts.[197] Ultimately at the 1974 Conference, the discussion

---

1972, the ICRC hosted two Conferences of Government Experts to examine and draft new principles of international humanitarian law. Baxter, *supra* note 191, at 46. In 1972, the United Nations then adopted a resolution identifying a potential gap in the ICRC's work, one of which was the "prohibition or restriction of the use of specific weapons which are deemed to cause unnecessary suffering." *Id.* at 46–47. In 1973, the ICRC held a meeting of government experts and agreed to further examine small caliber projectiles. *Id.* at 50. The ICRC took up the task of considering the "prohibition or restriction of certain conventional weapons which cause unnecessary suffering or have indiscriminate effects." *Id.* This caused both internal and external concern at the ICRC. *Id*. For the first time, the ICRC was asked to "assist in the assessment of weapons and their effects—to move from humanitarian law to the law of combat." *Id.* At the 1973 working group of experts, it became obvious to the ICRC that "there was much to be learned about weapons—about their characteristics and their effects." *Id.*

[194] Baxter, *supra* note 191, at 47–51; Baxter, *supra* note 192, at 6–9.

[195] For example, the 1974 Conference "produced some 4.5 million pages of reports, amendments, summary records, and the like." David P. Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77, 88 (1975). The official record of the three Conferences is ten volumes long. *See* INT'L COMM. RED CROSS, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (1974–1977) (1978).

[196] Baxter, *supra* note 191, at 51. The United States "viewed the proceedings with a great deal of caution . . . [because] a number of governments, without full information or consideration of the issues, had apparently already made up their mind what weapons were lawful." *Id.*

[197] *See id.* at 51–52, 55–56. The real concern arose because nations were using small caliber bullets, like the NATO 5.56 mm round, that had high muzzle velocities, and the bullets tended to tumble in flight. *Id.* at 55. These bullets were alleged to cause wounds that were "very severe and resemble those caused by dum-dum bullets." *Id.* Because of

on bullets was "extremely technical," and even the criteria used to identify the applicable weapons and bullets were "demonstrated to be questionable."[198] Originally, some thought the problem with weapons was high muzzle velocity, but eventually small caliber bullets—that is, bullets smaller than 7.62 mm—became the focus.[199] However, numerous countries were using such bullets and felt strongly about their effectiveness.[200] This fact, coupled with the extensive differences of opinion on the characteristic and effects of these bullets and the arbitrary and highly technical nature of any prohibition on such bullets, contributed to the failure of the Diplomatic Conferences to pass any prohibitions or restrictions on small caliber bullets.[201]

F. 1977 Additional Protocols to the Geneva Convention

While the Diplomatic Conferences did not succeed in adopting a specific prohibition on any class of bullets, Article 36 of Additional Protocol I to the 1949 Geneva Conventions (Additional Protocol I) applies restrictions to new weapons systems.[202] It is noteworthy that the

---

this, some nations believed that small caliber bullets caused unnecessary suffering and sought to restrict or ban such weapons and bullets. *Id.*

[198] *Id.* at 56.

[199] *Id.*

[200] *Id.*

[201] *Id.* at 56–57. The debate over weapons was between the "haves" and the "have-nots." *Id.* at 51. Developing nations "resented the technological superiority of the major military powers and of other developed countries." *Id.* The Soviet Union was "in a difficult position throughout the negotiations. Itself a power of high military technology, the Soviet Union could not welcome placing restraints on weapons, but at the same time as the steadfast ally of Third World states," the Soviet Union could not "take a hard line against the technologically-deprived developing states." *Id.* Only the Swedish were really prepared to discuss specific language on bullets. *Id.* In 1976, the Swedish proposed a broad ban on bullets that contained arbitrary and technical language that clearly would have been difficult to enforce. *Id.* at 56. For further analysis of the discussion of small caliber bullets at the Diplomatic Conferences, see FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 175–76 (2007).

[202] Article 36 reads:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Additional Protocol I, *supra* note 24.

delegates could only agree on general language to prohibit new weapons. Some delegates had proposed creating a committee responsible for "drawing up a list of weapons or methods of use which would fall under the prohibition," but to some, this implied disarmament and "a proliferation of international bodies which would only complicate the search for a solution."[203] Article 36 is the link between weapons restrictions and the "basic rules" for weapon use outlined in Article 35.[204]

Under Article 36, the 1899 Hague Declarations are applicable to Article 35[205] thus expanding bullets are prohibited regardless of whether a nation develops the bullet Captain Crozier envisioned—one that expands uniformly—and determines that the bullet does not cause superfluous injury or unnecessary suffering. Articles 35 and 36, along with the extensive commentaries on the Diplomatic Conferences, make it clear that in the 1970s, nations could not agree on specific weapons

---

[203] INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 421–22 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOL I]. The commentaries recognized that "military or political considerations [would] necessarily elude a humanitarian forum." *Id.* at 422.

[204] Article 35 states:

> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Additional Protocol I, *supra* note24, art. 35. Article 36 requires Contracting Powers to "determine the possibly unlawful nature of a new weapon, both with regard to the provisions of the Protocol, and with regard to any other applicable rule of international law." COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 203, at 423. Nations make this determination "on the basis of normal use of the weapon as anticipated at the time of evaluation." *Id*. There is no body to monitor these determinations; rather, "the Contracting Parties have an obligation to determine themselves" whether the weapons they currently possess or "expect to produce or acquire in the future, are an object of a prohibition or not." *Id*. at 426.

[205] The commentary to Article 36 states, "Article 36 remains, together with the Hague Regulations, the only instrument in the law of armed conflict that can act as a brake on the abuses resulting from the arms race or on the possibility of future abuses, a possibility that must never be lost sight of . . . !" *Id.* at 427.

restrictions and, therefore, opted for general principles of prohibition. The inability of Sweden and other nations to impose their desired specific restrictions on small caliber bullets raises doubt that the international community, but for the blind adherence to the traditional prohibition against expanding bullets, could today approve the language of the 1899 Hague Expanding Bullets Declaration.

G. Rome Statute of the International Criminal Court

The debate over dumdum bullets was divisive in 1899, but a century later, those disagreements were forgotten history as the Rome Statute continued the unquestioned application of the 1899 Hague Expanding Bullets Declaration. The Rome Statute lists the use of expanding bullets as a war crime in Article 8(2)(b)(xix): "[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[206] Article 8(2)(b)(xx) also prohibits "[e]mploying . . . projectiles . . . which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict."[207] The language in both of these articles is identical to the language of the 1899 Hague Expanding Bullets Declaration and Article 35(2) of Additional Protocol I. What is the reasoning behind this?

The language concerning prohibited weapons was a "highly contentious issue [in the negotiations of the Rome Statute] and indeed might have derailed the Conference but for the compromise reached at the end of the Conference."[208] However, the prohibition on expanding bullets was evidently uncontroversial and was based solely on the existence of the 1899 Hague Expanding Bullets Declaration.[209] Defining the use of expanding bullets as a war crime was seen "as an extension of

---

[206] Rome Statute, *supra* note 39.
[207] *Id.*
[208] THE MAKING OF THE ROME STATUTE, *supra* note 27, at 113.
[209] Michael Bothe, *War Crimes*, *in* 1 THE ROME STATUE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 408 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); THE MAKING OF THE ROME STATUTE, *supra* note 27, at 107 ("Those provisions from the Hague Regulations . . . were generally accepted."). In Bothe's writing, the commentary on expanding bullets is under the title of "Dumdum Bullets," reflecting how the 1899 prohibition on expanding bullets is still exclusively linked to Britain's bullet. Bothe, *supra*, at 209.

the customary rule prohibiting the use of weapons which inflict unnecessarily cruel wounds,"[210] which the Rome Statute also codified in Article 8(2)(b)(xx). The real debate surrounded the inclusion of specific weapons, including controversial weapons like blinding lasers, landmines, and nuclear weapons.[211] Ultimately, the delegates approved restrictions on weapons "subject to the most clearly established classical prohibitions," which appear in paragraphs 8(2)(b)(xvii)–(xix), as well as the general principles of Article 23(e) of the Hague Convention and Article 35(2) of Additional Protocol I.[212] Thus continued the wayward journey of the prohibition on expanding bullets, from its beginning as a vigorously contested attempt to check Britain's military power, to the United States's failed attempt to modify the ban in 1907, to its established home in the land of unquestioned and highly-praised examples of international humanitarian law.

III. Current U.S. Operations and the Military Necessity of Expanding Bullets

The "savages" the British faced in India and Africa in the late 1800s were similar to the enemies the United States faces today: terrorists who do not use a "fixed distinctive sign recognizable at a distance,"[213] do not carry their arms openly,[214] and do not conduct "their operations in accordance with the laws and customs of war."[215] A combat environment that includes densely populated civilian areas and terrorists who do not distinguish themselves from civilians compounds the threat that terrorists pose to U.S. forces today. In 1899, General Ardagh argued that the British needed the "shock" power of dumdum bullets to render their enemies *hors de combat*.[216] Today, U.S. forces need a bullet that allows them to discriminate effects between "the civilian population and combatants and between civilian objects and military objectives"[217] and

---

[210] Bothe, *supra* note 209, at 408. This is interesting given that during the Diplomatic Conferences of 1974–1976, hundreds of nations could not agree on what the effects were of small caliber bullets; apparently, most nations can agree that there was a better understanding of these effects in 1899.
[211] THE MAKING OF THE ROME STATUTE, *supra* note 27, at 113–16.
[212] *Id.* at 116.
[213] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(2)(c), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[214] *Id.*
[215] *Id.* art. 4(A)(2)(d).
[216] *See* Part II.C.2, *supra*.
[217] Additional Protocol I, *supra* note 24, art. 48.

also limits excessive "incidental loss of civilian life, injury to civilians, [and] damage to civilian objects."[218] Comparing the rationales for the use of expanding bullets in the nineteenth century and the twenty-first century is not new; the U.S. Army recognized the use of expanding bullets in counterterrorist and hostage rescue situations in 1985.[219]

A. The United States's Position on Expanding Bullets in Combat

Combat against terrorists who do not distinguish themselves from civilians is not a new phenomenon. With numerous international terrorist incidents of the 1970s and the seizure of the U.S. Embassy in Tehran in 1980, the United States began to take a more comprehensive approach to counterterrorism operations.[220] In 1985, The Judge Advocate General (TJAG) of the U.S. Army issued a legal opinion discussing the use of expanding bullets by U.S. forces in counterterrorist incidents,[221] which is the most recent official statement by the United States on the use of expanding bullets in combat situations. While TJAG's opinion "acknowledged and respected [the] applicability in conventional combat operations"[222] of the 1899 Hague Expanding Bullets Declaration, TJAG ultimately concluded that the limitations on expanding bullets in combat did not apply to counterterrorist incidents.[223] The reasoning behind the opinion is instructive.

The opinion noted that the signatories to the Hague Expanding Bullets Declaration were focused on "conventional combat operations" as traditionally fought—"combat between lawful combatants on a battlefield relatively devoid of civilians, utilizing a high volume of firepower."[224] Soldiers could not rely on their individual weapons "to defeat the enemy" but, rather, on the combined effects of massed weapons: individual, crew-served, "landmines, hand grenades, and

---

[218] *Id.* art. 51(5)(b).
[219] Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents, Op. JAG, U.S. Army, DAJA-IA/No. 7026, 23 Sept. 1985, *as reprinted in* ARMY LAW., Nov. 1985, at 45 [hereinafter Op. JAG, U.S. Army, No. 7026].
[220] *See, e.g.*, Captain James K. Jackson, *Legal Aspects of Terrorism: An Overview*, ARMY LAW., Mar. 1985, at 1 (discussing Department of Defense and Army responsibilities for terrorism within the larger framework of the U.S. Government).
[221] *See* Op. JAG, U.S. Army, No. 7026, *supra* note 219.
[222] *Id.* para. 2.
[223] *Id.* para. 4.
[224] *Id.* para. 3.

artillery."[225] These "weapons and [their] ammunition were (and remain) designed for incapacitation rather than lethality"—which supported the prevailing doctrine that "wounding enemy soldiers increased the logistical burden on the enemy."[226] As opposed to conventional combat forces, terrorists usually attack civilians and civilian objects[227]—although the terrorists of today also fight against national armed forces. The opinion also distinguished terrorist attacks from conventional combat in that "[s]uch [terrorist] incidents frequently take place in the midst of populated areas or in close quarters where the lives of innocent civilians would be at risk."[228]

The Judge Advocate General's conclusion that the Hague Expanding Bullets Declaration did not apply to U.S. military forces engaged in counterterrorism incidents relied on the fact that terrorists are not members of national armed forces entitled to the protections of the laws of war.[229] While this distinction is equally applicable to the United States's current operations in Iraq and Afghanistan, the relevance of the opinion to this article is the focus on the utility of expanding bullets in situations where civilians are intermixed with the enemy.

> The purpose for utilization of expanding ammunition in such a very close life-threatening situations is to employ a projectile that deposits all of its energy in the target. This provides for high target selectivity by maximizing the disabling effect on the target while minimizing the aforementioned risk to [innocent bystanders].[230]

While some have questioned the "knock-down" power of expanding munitions,[231] TJAG's opinion recognized that because expanding bullets are less likely to pass through a target, they reduce the risk of collateral damage to civilians.[232] Additionally, as discussed in Part III.C.2, the excessive injury traditionally attributed to expanding bullets is also questionable. Nevertheless, TJAG's opinion concludes that even "[t]he

---

[225] *Id.*
[226] *See id.*
[227] *Id.* para. 4.
[228] *Id.*
[229] *Id.* The opinion also noted that most counterterrorist missions were likely not recognized as acts of war. *Id.*
[230] *Id*. para. 4b.
[231] *See* Part III.B.2, *supra*.
[232] Op. JAG, U.S. Army, No. 7026, *supra* note 219, para. 4b.

possibility of 'superfluous injury' to a terrorist is far outweighed by the humanitarian concerns for protection of the innocent civilians . . . placed at risk."[233] Similarly, in U.S. military operations in Iraq and Afghanistan, the need to reduce collateral damage to civilians is far more important than the disputable and uncertain consequences of the "excessive wounding" theory of expanding bullets.

B. Expanding Bullets and the Counterinsurgency Fight

The United States's counterinsurgency (COIN) operations in Afghanistan and Iraq further underscore the necessity of using expanding bullets in combat operations. The U.S. Army established Army doctrine for COIN in 2006 in Field Manual (FM) 3-24[234] declaring, "[a]t its core, COIN is a struggle for the population's support. The protection, welfare, and support of the people are vital to success."[235] The ability to distinguish insurgents from civilians when using force is essential when protecting the civilian population.[236] The law of war principle of distinction is found in Additional Protocol I, Article 48, which states, "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[237] Field Manual 3-24 states that "[d]iscrimination applies to the means by which combatants engage the enemy. The COIN environment requires [soldiers and Marines] to not only determine the kinds of weapons to use and how to employ them but also establish whether lethal means are desired—or even permitted."[238] Field Manual 3-24 further notes that

> [l]eaders must consider not only the first-order, desired effects of a munition or action but also possible second-

[233] *Id.* para. 5.
[234] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].
[235] *Id.* para. 1-159.
[236] *See id.* paras. 7-30 to 7-37.
[237] Additional Protocol I, *supra* note 24, art. 48. The United States has not ratified Additional Protocol I but considers Article 48 to represent customary international law. *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 113 (1990) ("Article 48 states the fundamental principle of discrimination, a principle with which there should be no disagreement.").
[238] FM 3-24, *supra* note 234, para. 7-36.

> and third-order effects—including undesired ones. . . . Fires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency's appeal—especially if the populace perceives a lack of discrimination in their use. . . . Proportionality and discrimination applied in COIN require leaders to ensure that their units employ the right tools correctly with mature discernment, good judgment and moral resolve.[239]

Unfortunately, because expanding bullets are prohibited in combat,[240] they are not even an option for commanders who wish to minimize potential second- and third-order effects.

How, then, can a commander limit unnecessary civilian injury and death when engaging an insurgent threat in a crowded civilian area with the current, high-powered jacketed rounds, like the M855, issued to conventional U.S. forces? A commander has two real options: accept risk by restricting the use of small arms fire in certain areas or situations, or rely on escalation of force procedures to identify and respond to hostile acts or demonstrations of hostile intent.[241] As previously discussed, expanding bullets could help a commander limit the effects small arms have on civilians and reduce overall collateral damage. In 2009, retired General Stanley McChrystal, then the Commander of the North Atlantic Treaty Organization's (NATO) International Security Assistance Force (ISAF) in Afghanistan, issued a Tactical Directive to all forces in Afghanistan reinforcing the absolute importance of proportionality and discrimination in COIN: "We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties

---

[239] *Id.*

[240] Though, as mentioned in the discussion of Op. JAG, U.S. Army, No. 7026, *supra* 219, it is debatable whether the provisions of the 1899 Hague Expanding Bullets Declaration prohibits the use of expanding bullets in the current conflicts in Iraq and Afghanistan; however one chooses to define those conflicts, they are no longer considered international armed conflicts. *See, e.g.*, S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1623, U.N. Doc. S/RES/1623 (Sept. 13, 2005). Additionally, neither Iraq nor Afghanistan are parties to the 1899 Hague Expanding Bullets Declaration. *See* State Parties and Signatories to the Hague Expanding Bullets Declaration, *supra* note 38.

[241] *See* State Parties and Signatories to the Hague Expanding Bullets Declaration, *supra* note 40, paras. 1-142 to 1-43, 7-22 to 7-23; *see also id.* para. 142 ("In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely . . . .").

or excessive damage and alienating the people."[242] When General David Petraeus assumed command of ISAF in 2010, he re-emphasized this principle in an updated Tactical Directive, stating: "We must continue—indeed, redouble—our efforts to reduce the loss of innocent civilian life to an absolute minimum. Every Afghan civilian death diminishes our cause. If we use excessive force or operate contrary to our counterinsurgency principles, tactical victories may prove to be strategic setbacks."[243]

Nevertheless, protecting the civilian population in urban environments like Baghdad and Kabul often requires deadly force to neutralize insurgents. For example, in early 2010, suicide bombers and other insurgents in Afghanistan attacked the Central Bank on a morning where "the streets of downtown Kabul were jammed with traffic."[244] While no U.S. forces were involved, "hundreds of Afghan commandos, soldiers and police officers surrounded Pashtunistan Square and attacked."[245] Responding to such deadly threats often requires massive amounts of firepower; in this situation "[b]ullets flew in every direction, thousands of them."[246] There is simply no telling what collateral damage thousands of these high-powered jacketed rounds caused.

In such situations where soldiers are faced with overtly hostile acts, lethal force is required, not mitigation of risk. General McChrystal's Tactical Directive instructed NATO ISAF to balance the employment of force with the risk to troops: "I recognize that the carefully controlled and disciplined employment of force entails risk to our troops—and we must work to mitigate that risk wherever possible. But excessive use of

---

[242] Memorandum from Headquarters, Int'l Sec. Assistance Force, to See Distribution, subject: Tactical Directive (6 July 2009) [hereinafter Tactical Directive Memo], *available at* http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf. While this Tactical Directive is largely concerned with the use of force from close air support (CAS), General McChrystal clearly intended that the principles encompass all uses of force, from small-arms fire to airstrikes from B-1 bombers. *See id.*

[243] Press Release, Afg. Int'l Sec. Assistance Force, General Petraeus Issues Updated Tactical Directive: Emphasizes "Disciplined Use of Force" (Aug. 4, 2010), *available at* http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html.

[244] Dexter Filkins, *Taliban Assault Rattles Capital of Afghanistan*, N.Y. TIMES, Jan. 19, 2010, at A1.

[245] *Id.*

[246] *Id.* As one Afghan commando remarked, "Either we are going to kill them, or they are going to kill us." *Id.*

force resulting in alienated population will produce far greater risks."[247] A commander's ability to use expanding bullets, might allow him to use controlled and disciplined force in a more discriminate way, while simultaneously reducing the perception that excessive force was employed. However, because no nation uses expanding bullets in combat, we must look elsewhere to determine the potential effectiveness of munitions in urban combat. Fortunately, the experience of domestic law enforcement agencies in the United States, which have used expanding bullets for decades, offers some insights.

C. Reasoning by Analogy: Domestic Use of Expanding Bullets in the United States

Domestic law enforcement agencies in the United States have employed expanding bullets for well over three decades.[248] Law enforcement agencies generally cite three advantages expanding bullets offer over normal jacketed ammunition: (1) reduction of ricochets,[249] (2) a decrease of "pass through" bullets,[250] and (3) "stopping power."[251] All three of these advantages are linked. Because hollow point bullets expand and tend to stay in the body, they are less likely to pass through a target,[252] and law enforcement officers need fewer rounds to incapacitate

---

[247] Tactical Directive Memo, *supra* note 242.

[248] *See* Paust, *supra* note 15, at 20–23.

[249] N.Y. CITY CIVILIAN COMPLAINT REV. BOARD, REPORT OF THE COMMITTEE ON HOLLOW-POINT BULLETS PRESENTED TO THE CIVILIAN COMPLAINT REVIEW BOARD ON JULY 8, 1998, at 1 (1998) [hereinafter NYC HOLLOW-POINT BULLET REPORT], *available at* http://www.nyc.gov/html/ccrb/pdf/hollow.pdf.

[250] *Id.*

[251] Tom Hester & Kinga Borondy, *Cops Recite Virtues of Hollow-Point Bullet*, THE STAR-LEDGER (Newark, N.J.), Mar. 5, 1997, at 17 (quoting N.J. State Police Capt. Carl Leisinger, who explained, "A main reason for carrying [hollow-point bullets] is that they have better incapacitating ability. When a hollow-point hits a body, the shock is more incapacitating than a solid-nose bullet"); Rocco Parascandola, *Plenty of Other Cities Already Use 'Em*, N.Y. POST, Feb. 14, 1999, at 2 ("'It increases the knockdown power,' Officer James Cypert, an LAPD spokesman, [said]. 'The [old bullets] weren't stopping the suspects'"); Matthew Teague, *Hollow-Point Police Bullets Old Hat Here*, MOBILE REG. (Ala.), July 10, 1998 , at A1 ("Because the bullets are quicker to take down a criminal, fewer shots are usually fired, therefore reducing risk to people nearby.").

[252] Mike Baird, *Police May Switch to Semi-Autos*, CORPUS CHRISTI CALLER-TIMES, Mar. 15, 2004, at B1 ("Hollow-point bullets take in fluid and tissue while tearing through a body, which causes the slug to expand and slow down. . . . Depending on the angle of the shot, distance, and how it hits, the slug often doesn't exit the body."); Hester & Borondy, *supra* note 251 ("When a bullet has a full metal jacket, it is very hard; it could over-penetrate the target . . . . It could pass through the person and hit someone standing

a subject, reducing the potential for injury to bystanders caused by inadvertent hits and ricocheting rounds.[253] These advantages are particularly important for law enforcement officers who tend to patrol in populated urban areas.[254]

Numerous law enforcement agencies currently employ hollow-point bullets as standard issue,[255] but the initial use of hollow-point bullets was controversial.[256] For example, when the Connecticut State Police decided to issue hollow-point bullets to troopers in 1974, organizations from church groups to the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) protested the "cruelty and inhumanity inherent in the use of such weapons systems."[257] When New York City decided to issue hollow-point bullets to its police officers in 1997, a similar "political storm" brewed, led by civil libertarians opposed to the alleged destructiveness of the ammunition.[258] After numerous public complaints, the New York City Civilian Complaint Review Board investigated public concerns, concluding among other things, that the use of expanding bullets was

---

behind them, or go through a wall, strike someone in their home."); Timothy Williams, *Controversy Swirls in N.Y. in Death of Immigrant*, THE STAR-LEDGER (Newark, N.J.), Feb. 14, 1999, at 37 ("Hollow-point ammunition has a much more stopping-power effect than ball ammunition, which tends to go through individuals and cause injuries to innocent civilians as well.").

[253] Parascandola, *supra* note 251 ("In San Francisco, where cops are armed with .40 caliber hollow-point bullets, the number of rounds fired per shooting incident has dropped since the department started using [hollow-point bullets] in the late 1980s."); Hester & Borondy, *supra* note 251 ("Studies conducted by the FBI and other agencies have found that in combat situations about 20 percent of bullets fired by police find their intended targets."); Teague, *supra* note 251.

[254] *See, e.g.*, NYC HOLLOW-POINT BULLET REPORT, *supra* note 249, at 1 ("Ricochet bullets were particularly problematic in the steel and concrete environments of housing project halls and subway stations. Pass-through bullets were particularly problematic in crowded urban situations."); Teague, *supra* note 251.

[255] Hester & Borondy, *supra* note 251 (noting that the U.S. Drug Enforcement Administration and U.S. Bureau of Alcohol, Tobacco, and Firearms also used hollow-point ammunition); Parascandola, *supra* note 251 ("[Hollow-point ammunition] has been standard issue in big-city police departments across America, including Los Angeles, Chicago, Boston, Dallas, San Francisco and Honolulu—as well as by the FBI and United States Marshall Service.").

[256] Paust, *supra* note 15, at 20–21 (discussing the "heated national controversy" that arose in 1974 when the Connecticut State Police Department adopted the .357 magnum revolver with hollow-point bullets as its standard issue."). Paust's article argued the illegality of domestic use of expanding bullets because they are "violative of international law." *Id.* at 23.

[257] *Id.* at 21–22.

[258] Hester & Borondy, *supra* note 251.

"consistent with modern, enlightened law enforcement judgments in a wide number of jurisdictions—both state and federal—and is a reasonable exercise of the Department's rights and responsibilities in this arena."[259] The Board also dismissed fears over "the dangerous propensities of so-called 'dum-dum' bullets," observing that "hollow-points are neither exploding dum-dums nor fragmenting bullets."[260] Ultimately, expanding bullets' ability to disable targets while reducing the risk of collateral injury to innocent bystanders has overcome the exaggerated claims of opponents, resulting in widespread use in the United States. However, the United States's use of expanding bullets in combat, rather than simply law enforcement, would undoubtedly raise excessive "humanitarian" angst—as evidenced in the 1990s by the controversy over Black Talon bullets.

In the early 1990s, Winchester Ammunition produced a bullet called the Black Talon, a bullet that "penetrate[d] soft tissue like a throwing star"[261]and that was notoriously known as a "cop killer[ ]."[262] In 1993, the bullets drew the attention of New York Senator Daniel Patrick Moynihan[263] after a man shot "twenty-three commuters, killing six," on the Long Island Railroad.[264] After the incident, the Black Talon, introduced in 1992, so inflamed anti-gun proponents that Winchester Western eventually limited their sale to law enforcement personnel in 1993.[265] The controversy over the Black Talon centered on its apparent increased ability to wound: the bullet "use[d] less powder to minimize

---

[259] NYC HOLLOW-POINT BULLET REPORT, *supra* note 249, at 2.

[260] *Id.* at 1, 2. The fact that people evoked the internationally banned—and as argued in this article, completely misunderstood—dumdum bullet as a rallying cry to ban hollow-point bullets in New York City underscores the sensationalism surrounding expanding bullets.

[261] Judy Pasternak, *Taking Aim at Exotic Bullets,* L.A. TIMES, Jan. 11, 1994, at A1.

[262] John Kifner, *Terror in Oklahoma: The Suspect; Authorities Hold a Man of "Extreme Right-Wing Views,"* N.Y. TIMES, Apr. 22, 1995, at A9. The bullets were dubbed "cop killers" because of their ability to "pierce armored vests." *Id.* Timothy McVeigh was arrested "carrying a 9-millimeter Glock semi-automatic pistol . . . partly loaded with Black Talon bullets." *Id.*

[263] Daniel Patrick Moynihan, *Guns Don't Kill People. Bullets Do.*, N.Y. TIMES, Dec. 12, 1993, at D15. Senator Moynihan described the Black Talon as "specifically designed to rip flesh." *Id.*

[264] *Id.* Colin Ferguson was ultimately convicted of killing six passengers on the Long Island Railroad in 1993. Adam Liptak, *Legal Analysis; Rights and Wrongs*, Oct. 21, 2003, at A24. Ferguson received a 200-year sentence. *Id.*

[265] Betty Barnacle, *S.J. Police Ban Cop Use of Black Talon Bullets*, SAN JOSE MERCURY NEWS, Dec. 16, 1993, at B1; Ronald Smothers, *Manufacturer to Withdraw Controversial Ammunition*, N.Y. TIMES, Nov. 23, 1993, at B9.

recoil and lower velocities so it penetrate[d] but [did] not pass through a human body. On impact it expose[d] sharp penetrating edges that burrow[ed] into soft tissue."[266] Not only were opponents concerned with the alleged cruelty of these bullets,[267] surgeons became concerned "about getting infected with HIV or hepatitis from an encounter with the jagged bits while retrieving a bullet from a wound."[268] However, the "fears associated with . . . the Black Talon . . . [did] not come to pass."[269] In 1995, the Federal Bureau of Investigation (FBI) issued a report that the Black Talon was "no more lethal than other commercially produced ammunition. And no doctors have reported cutting their fingers on its sharp edges."[270]

Similarly, if the United States began using expanding bullets in combat, it is likely that a variety of nations and non-governmental organizations will decry the alleged "cruelty and inhumanity inherent in the use of such" bullets, but, much like the relative silence that followed the widespread adoption of hollow point bullets by domestic law enforcement agencies, the United States should expect time to demonstrate the efficacy of these bullets in combat. [271]

---

[266] Barnacle, *supra* note 265.

[267] An editorial in the N.Y. TIMES described the Black Talon as "a destructive, razor-fingered bullet . . . [that] grinds up internal organs and threatens surgeons who try to remove it." *High Tech Death from Alabama*, N.Y. TIMES, Dec. 28, 1994, at A14.

[268] Pasternak, *supra* note 261; *see also* Jane Gross, *New Group Joins Battle Over Guns: Physicians*, N.Y. TIMES, Nov. 16, 1993, at A18. Doctors worried that a "surgeons glove could be easily punctured. 'It's like an Osterizer with blades,' [one surgeon] said." Pasternak, *supra* note 261.

[269] Joe Hallinan, *FBI Finds Dreaded Bullet No More Lethal Than Others*, CLEV. PLAIN DEALER, Jan. 28, 1995, at A4.

[270] *Id.*

[271] *See* Paust, *supra* note 15, at 21; *Soldiers Accused of Using 'Dum-Dum' Bullets*, COPENHAGEN POST, Sept. 30, 2009, *available at* http://www.cphpost.dk/news/international/89-international/47059-soldiers-accused-of-using-dum-dum-bullets-.html (describing an incident in Afghanistan where three Danish soldiers were found possessing "illegal ammunition" and now "face severe penalties . . . that could see them face life imprisonment"). The Danish branch of Doctors Without Borders described the case of these Danish soldiers as "completely unacceptable." *Id.*

IV. Combat Means Fighting (and Killing) the Enemy[272]

As Clausewitz recognized, the object of war has always been the "complete or partial destruction of the enemy."[273] However, as discussed earlier in Part II.B, the exponential growth in weapons technology during the nineteenth century led nations to recognize that the destructiveness of certain weapons exceeded what was required to injure or kill the enemy. As a result, various nations have gathered at different times in order to set limits on the destructiveness of certain weapons. While it is true that often times these nations were motivated more by self-interest than humanitarianism,[274] the principle of unnecessary suffering emerged as a limit on the means nations could employ against each other in combat. The primary source for this principle, The Declaration of St. Petersburg of 1868,[275] recognized that, while the object of war was to "weaken the military forces of the enemy," this objective "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."[276] Specifically, at St. Petersburg in 1868, the assembled nations acknowledged that exploding projectiles surpassed what was necessary to wound or kill the enemy (namely the impact of the projectile itself). Over the last century, some nations and groups have aggressively manipulated the principle of unnecessary suffering, both for political and humanitarian concerns, from one that limits useless destruction to one that seeks to limit any destruction.[277] As

---

[272] CARL VON CLAUSEWITZ, ON WAR 303, 304 (F.N. Maude ed., J.J. Graham trans., Pelican Books 1968) (1832). Clausewitz said:

> Combat means fighting, and in this the destruction or conquest of the enemy is the object, and the enemy, in the particular combat, is the armed force which stands opposed to us . . . What is overcoming the enemy? Invariably the destruction, of his military force, whether it be by death, or wounds, or any means; whether it be completely or only to such a degree that he can no longer continue the contest; therefore as long as we set aside all special objects of combats, we may look upon the complete or partial destruction of the enemy as the only object of all combats.

Id.

[273] *Id.*

[274] *See* discussion in Part II.B and II.C, *supra*.

[275] Declaration of St. Petersburg of 1868, *supra* note 50.

[276] *Id.*

[277] *See, e.g.*, Human Rights Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, 5, A/HRC/12/48 (15 September 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Re

discussed earlier in this article, inaccurate and untested information provided the supposed scientific basis for banning the dumdum bullet;[278] regrettably, no one has seriously questioned the underlying scientific basis for banning expanding bullets in combat. Part III above explained the military necessity for using expanding bullets; this section explores the principle of unnecessary suffering and whether expanding bullets would pass a contemporary legal review. Because an understanding of how bullets cause injuries is crucial to realizing that they might not cause superfluous injury or unnecessary suffering, the basic principles of wound ballistics are explained first.

A. Wound Ballistics: How Bullets Cause Injury and Death

Under the Standing Rules of Engagement for U.S. Forces, a soldier can use necessary force, up to and including lethal force, in response to a hostile act or demonstration of hostile intent.[279] When using force in a hostile situation, the soldier must use only the amount of force necessary to eliminate the threat and apply such force in a proportional manner.[280] When a soldier directs lethal force at a legitimate target, he or she does so with the intent to immediately incapacitate that target in order to stop a deadly threat.[281] At least within the civilian law enforcement context, "immediate incapacitation" means "the sudden physical inability to pose

---

port.pdf. Though the Law of Armed Conflict permits white phosphorous use in combat operations, see Major Shane Reeves, *The "Incendiary" Effect of White Phosphorous in Counterinsurgency Operation*, ARMY LAW., Jan. 2010, at 85–88, the Goldstone Report concludes with a recommendation that the General Assembly conduct "an urgent discussion on the future legality" of white phosphorous use "in light of the human suffering and damage" caused in the Gaza Strip.

[278] *See* discussion in Part II.B.2, *supra*, surrounding Professor Von Bruns faulty bullet experiments.

[279] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR US FORCES, at A-4 (15 Jan. 2000) [hereinafter SROE]. The current SROE is found in Chairman of the Joint Chiefs of Staff Instr. 3121.01B, *Standing Rules of Engagement for US Forces*. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT FOR US FORCES (13 June 2005). The overall classification of the current SROE is "secret," but the principles described here are found in an unclassified annex and are substantially the same as the cited 2000 SROE provisions.

[280] *Id.*

[281] *See* UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS. . . ISSUES, FACTS & FALLACIES—THE REALITIES OF LAW ENFORCEMENT'S USE OF DEADLY FORCE 57 (2005). The authors are retired agents from the Federal Bureau of Investigation.

any further risk of death or injury to others."[282] Much like in domestic law enforcement, for a soldier, immediate incapacitation—or rendering a target *hors de combat*—"is the only legitimate goal of any . . . use of deadly force."[283] For law enforcement, the ability to immediately incapacitate a subject "is the underlying rationale for decisions regarding weapons, ammunition, calibers and training."[284] Therefore, in order determine the ability of a bullet to incapacitate, it is necessary to understand how that bullet causes wounds.

1. The Mechanics of Wounding

There are four components of projectile wounding:[285]

> 1. Penetration. The tissue through which the projectile passes and disrupts or destroys in passing.
>
> 2. Permanent Cavity. This is the volume of space once occupied by tissue that has been destroyed by the passage of the projectile. It is a function of penetration and the frontal area of the projectile. Quite simply, it is the hole left by the passage of the bullet.
>
> 3. Temporary Cavity. This is the expansion of the permanent cavity by stretching due to the transfer of kinetic energy during the projectile's passage.
>
> 4. Fragmentation. Projectile pieces or secondary fragments of bone which are impelled outward from the permanent cavity and may sever muscle tissues, blood vessels, etc., apart from the permanent cavity. Fragmentation is not necessarily present in every projectile wound. It may or may not occur and should be considered a secondary effect.

Projectiles incapacitate only by damaging or destroying the central nervous system or by causing significant blood loss.[286]

---

[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.* at 58.

Bullets fired from a handgun and bullets fired from a rifle will have different wounding effects due to their differing velocities (rifle-fired bullets have higher velocities).[287] Bullets fired from a handgun will produce penetration, permanent cavity, and temporary cavity, but will not reliably cause fragmentation "due to the relatively low velocity of handgun bullets."[288] Fragmentation occurs reliably with unjacketed or hollow point bullets that have a high velocity because "the permanent cavity is stretched so far, and so fast, that tearing and rupturing can occur in tissues surrounding the wound channel that may have also been weakened by fragmentation damage."[289]

2. The Human Target: Physiological, Psychological and Physical Factors

The only way to reliably incapacitate a target immediately is with a gunshot to the brain or upper spinal cord.[290] There are many complexities with the human target, including physiological, psychological, and physical factors that are relevant to the probability of incapacitation.[291] From a physiological standpoint, the only reliable way to immediately stop a human is a gunshot causing a wound that disturbs the brain or upper spinal cord; otherwise, the only other way incapacitation occurs is through blood loss that lowers the blood pressure, inducing unconsciousness through oxygen deficits in the brain.[292]

A young, healthy adult can lose about 25% of his blood volume without a substantial effect or permanent injury through compensating mechanisms initiated during physical trauma.[293] However, the body

---

[286] *Id.*
[287] PATRICK & HALL, *supra* note 281, at 59.
[288] *Id.*
[289] *Id.* Rifle bullets that fragment can significantly increase tissue damage; however, any fragmentation caused by a handgun bullet is "inconsequential" due to the low velocity of handgun-fired bullets. *Id.* at 59–60.
[290] *Id.* at 62.
[291] *Id.*
[292] *Id.*
[293] *Id.* at 62–63. For example, the body can release hormones that cause the heart to beat faster and contract more strongly, increasing heart output. *Id.* at 63. The nervous system constricts the venous system "which contains 60% of the circulating blood volume." *Id.* When blood pressure decreases, "body fluids enter the capillaries to further replenish vascular volume." [Starting quotation marks missing here.] *Id.*

cannot compensate for blood loss beyond 25%.[294] Simply put, incapacitation through blood loss does not happen quickly; even if "the thoracic artery is severed, it will take almost five seconds at a minimum for a 20% blood loss to occur in an average sized male."[295] This discussion of blood loss does not take into consideration the oxygen in the blood already in the brain; even if "the heart stops beating and blood flow to the brain ceases, there is enough residual oxygen in the brain to support willful, voluntary action for 10 to 15 seconds."[296] Even pain is not normally incapacitating because the "fight or flight" response usually suppresses pain for some time.[297] In sum, beyond a wound to the brain or upper central nervous system, physiological factors do not account for immediate incapacitation, even for fatal wounds.[298]

Psychological factors are more important than physiological ones to immediate incapacitation, at least concerning gunshot wounds to the torso.[299] Minor wounds can cause incapacitation in this manner through "[a]wareness of the injury (often delayed by the suppression of pain); fear of injury, death, blood, or pain; intimidation by the weapon or the act of being shot; preconceived notions of what people do when they are shot; or the simple desire to quit."[300] Interestingly, "psychological factors are also the primary cause of incapacitation failures."[301] Determination, instinctual survival, "or sheer emotion such as rage or hate can keep a grievously injured individual fighting."[302] For example, there are

---

[294] *Id.*

[295] *Id.* Most gunshot wounds do not bleed this quickly because:

> (1) bullets usually do not transect (completely sever) blood vessels; (2) as blood pressure falls, the bleeding slows; (3) surrounding tissue acts as a barrier to blood loss; (4) the bullet may only penetrate smaller blood vessels; (5) bullets can disrupt tissue without hitting any major blood vessel resulting in a slow ooze rather than rapid bleeding; and (6) the above mentioned [in the text to this note] physiological compensatory mechanisms.

Id.

[296] *Id.* at 63–64; Cox, *supra* note 3, at 18 ("Even if you take the guy's heart apart, he can still shoot back at you for 15 seconds because he's still got enough oxygen in the blood in his brain to do it.").

[297] PATRICK & HALL, *supra* note 281, at 64.

[298] *Id.*

[299] *Id.* at 65.

[300] *Id.*

[301] *Id.*

[302] *Id.* at 67.

numerous examples of battlefield heroics involving soldiers who continued to fight despite mortal wounds, and all humans, whether Soldiers or terrorists, can "fight and function effectively despite horrific and even fatal wounds."[303]

Chemicals can also prevent or delay incapacitation. "Adrenaline alone can be sufficient to keep a mortally wounded adversary functioning and fighting."[304] Drugs, such as cocaine, PCP, and heroin, as well as "[s]timulants, anesthetics, painkillers, or tranquilizers can all prevent incapacitation by suppressing pain, awareness of injury, or eliminating normal inhibitions arising from a concern over the injury."[305] In short, the psychology of wounds can either contribute to or detract from the seriousness of a gunshot wound, depending on an individual's response.

Physical factors, including "energy deposit, momentum transfer, and size of the temporary cavity" are insignificant or have no effect on immediate incapacitation.[306] The belief that bullets have "knock-down" power or "shock" are false; a "bullet simply cannot knock a man down."[307] This is a proven matter of physics, which has been known for centuries.[308] A bullet deposits about as much energy on the body as getting hit by "a Major League fastball."[309] The only real physical effect a bullet has on incapacitation is tissue damage, but as stated earlier, except for wounds to the central nervous system, this damage will not cause immediate incapacitation.[310] To conclude, the only way to consistently and immediately incapacitate a human with a gunshot wound is through "the disruption or destruction of the brain or upper spinal cord. Otherwise, incapacitation is subject to a random host of

---

[303] *Id*. at 65–66.
[304] *Id.* at 67.
[305] *Id.*
[306] *Id.* at 68.
[307] *Id.* at 68–69. This fact seems to counter General Sir John Ardagh's argument that the dumdum bullet was necessary to "arrest, by its shock, the charge of an enemy and put him *hors de combat* immediately." SCOTT, *supra* note 1, at 277. However, it is likely that Ardagh meant that the greater wounding power of the dumdum bullet required fewer shots than a jacketed bullet to put an enemy out of combat. Experts have noted that "[t]here isn't a bullet in the world" that will cause an enemy to drop every time after just one shot. Cox, *supra* note 3, at 18.
[308] PATRICK & HALL, *supra* note 281, at 68–69.
[309] *Id.* at 69.
[310] *Id.*

variables, the most important of which are beyond the control of the shooter."[311]

3. Misconceptions in Wound Ballistics

A bullet's mass and velocity at impact determine a bullet's potential for damaging tissue; a bullet's shape and construction controls the degree of actual damage that this potential causes.[312] Once a bullet enters tissue, it "crushes the tissue it strikes during penetration, and it may impel the surrounding tissue outward (centrifugally) away from the missile path."[313] This concept is important because "[t]issue crush is responsible for what is commonly called the permanent cavity and tissue stretch is responsible for the so-called temporary cavity. These are the sole wounding mechanisms."[314] This tissue "crush" and "stretch" are measured in a laboratory by firing bullets into tissue stimulants.[315] Because firing bullets into live bodies, cadavers, or even animals presents obvious problems, the tissue stimulant employed is fundamental to achieving valid results; unfortunately, "[t]his requirement is frequently ignored by wound ballistics investigators."[316]

Many in the field of wound ballistics either don't understand wound ballistics or they manipulate results to suit other agendas.[317] For example,

---

[311] *Id.*

[312] Martin L. Fackler, *Wounding Patterns of Military Rifle Bullets*, 1 INT'L DEF. REV. 59, 63 (1989). Dr. Fackler retired as a colonel from the U.S. Army and is a well-known wound ballistics expert. *See, e.g.*, W. Hays Parks, *A Symposium in Honor of Edward R. Cummings*, 30 GEO. WASH. INT'L L. REV. 511, 536 (2006) (discussing Colonel Fackler's expertise as a "combat-experienced surgeon" whose "pioneering work in the field of wound ballistics through firing small arms projectiles into ten percent ballistic gel was adopted as the NATO standard, and has been accepted by other governments").

[313] M.L. Fackler, *What's Wrong with the Wound Ballistics Literature, and Why*, LETTERMAN ARMY INST. OF RESEARCH, July 1987, at 2.

[314] *Id.* (emphasis omitted).

[315] *Id.*

[316] *Id.* at 11.

[317] MARTIN L. FACKLER, EFFECTS OF SMALL ARMS ON THE HUMAN BODY 7 (n.d.) (last visited June 2, 2011), *available at* http://ammo.ar15.com/project/Fackler_Articles/effects_of_small_arms.pdf. Fackler noted,

> Both those who produce weapons and those who treat the wounds they cause need valid information on *how* projectiles affect the human body. In this regard, *both groups have been seriously misled*. The body of science in wound ballistics has been badly contaminated to the detriment of all. Some of the misconceptions have resulted

in the 1970s while the Swedes were attempting to outlaw the M16 rifle and 5.56 mm bullet, a deceptive video circulated purporting to show the horrific effects of a U.S. 5.56 mm bullet on an anesthetized pig.[318] Similarly, the type of tissue stimulant used in testing a projectile is imperative. "For validity, the stimulant must reproduce the physical effects of the projectile-tissue interaction on the projectile."[319] The two predominantly used tissue stimulants are gelatin and soap.[320] The advantages of gelatin are that its elasticity resembles human soft tissue; it is transparent, which allows for filming to show the effects of a projectile as it moves; and it is cheap.[321] The major disadvantage to gelatin is that it does not preserve the temporary cavity. The advantages of soap are that it preserves the temporary cavity created by a bullet and it is easy to handle.[322] The major criticism of soap is that it can mislead due to the "dramatic preservation of the maximum temporary cavity. Such demonstrations give a false impression that these cavities represent the potential for tissue destruction rather than the potential for tissue stretch."[323]

As Professor von Bruns showed in 1898 and Sweden demonstrated in the 1970s, one can alter the testing methods to support a desired

---

> from well-meaning attempts by those who forgot the basic precepts of scientific method, and others from politically motivated exaggerations and distortions masquerading as "science".

Id. (citations omitted).

[318] Fackler, *supra* note 313, at 1–2. In that case,

> [n]o scale or any other item was included to provide size orientation. How large was the pig? Most would assume the animal to be in the 100- to 150-kg range [220–330 pounds]. It was actually a mini-pig, weighing about one tenth that much. The exaggeration of effects so introduced is obvious.

Id. at 2.

[319] *Id.* at 11.

[320] INT'L. COMM. RED CROSS, WOUND BALLISTICS; AN INTRODUCTION FOR HEALTH, LEGAL FORENSIC, MILITARY AND LAW ENFORCEMENT PROFESSIONALS 11(2008) , *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/f00943/$FILE/wound-ballistics-brochure.pdf (last visited Feb. 18, 2010).

[321] *Id.*

[322] *Id.* The ICRC believes that the only disadvantages of soap are: it is opaque; it must be produced in a factory; and it is expensive. *Id.*

[323] Fackler, *supra* note 313, at 11.

outcome, so it is important to understand how they work.[324] If the United States were to announce its intention to use expanding bullets in combat, some nations, as well as the ICRC and other humanitarian organizations, would likely respond with test results purporting to show the incredibly inhumane effects of such bullets.[325] A familiarity with ballistics testing would be critical to evaluating and responding to that evidence.

B. In War, There Will Be Suffering

1. A Brief History of the Principle of Unnecessary Suffering

Unnecessary suffering is a "core principle"[326] of the Law of Armed Conflict (LOAC); however, the term has "not been formally defined within international law."[327] After the initial pronouncement of the principle in The St. Petersburg Declaration of 1868, the term "unnecessary suffering" explicitly entered international law during the Brussels Conference in 1874.[328] From that conference, Article 13(e) of the Brussels Declaration forbade "[t]he employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868."[329] Literature explaining the intent behind Article 13(e) is scarce, but the Brussels Declaration later served as the basis for fifty-two out of the

---

[324] W. Hays Parks argues that Sweden's objections to many U.S. weapons systems "were not entirely humanitarian." Parks, *supra* note 9, at 70. Parks also observed that Sweden's efforts to "slow North Atlantic Treaty Organization . . . adoption of it as a second calibre so that the Swedish 4.5x26R would be considered." *Id.*

[325] For example, in 1999, the ICRC challenged the 12.7 mm Raufoss Multipurpose round as a "projectile designed to explode upon impact with the human body." *Id.* at 92. After reviewing and discussing the ICRC's test results, the United States and other nations determined that the ICRC testing was fundamentally defective and rejected the ICRC challenge to the round as "both flawed and . . . unacceptable." *Id.* at 97; *see also id.* at 90–98 (providing an overview of the ICRC objection to the 12.7 mm Raufoss Multipurpose round).

[326] *See, e.g.*, GARY D. SOLIS, THE LAW OF ARMED CONFLICT 250–51, 269–72 (2010); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 10–13 (2009).

[327] Parks, *supra* note 9, at 87.

[328] *See, e.g.*, BEST, *supra* note 108, at 156. The 1874 Brussels Conference was an effort led by Russia to codify the laws of war. *Id.*

[329] Project of an International Declaration Concerning the Laws and Customs of War [Brussels Declaration], art. 13, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219.

sixty articles in the 1899 Hague Convention II,[330] including the prohibition against unnecessary suffering.[331]

Article 23(e) of the 1899 Hague Convention II prohibits the employment of "arms, projectiles, or material of a nature to cause superfluous injury."[332] Unlike dumdum bullets, the delegates to the 1899 Hague Peace Conference apparently did not find this provision controversial, as there is little discussion of the rule in the translations. The 1907 Hague Peace Conference essentially restated the 1899 language with a minor change: the new Article 23(e) forbade the employment of "arms, projectiles, or material *calculated* to cause unnecessary suffering" (emphasis added).[333] The English translation of "calculated" seems to narrow the restriction by invoking a *mens rea* requirement, a view later rejected by the ICRC in the commentary to Article 35(2) of Additional Protocol I.[334]

2. The Current Law of Unnecessary Suffering

The time period between 1907 and the 1970s saw continued advancement in weapons technology with increasing destructiveness. The ICRC noted that "[t]he discovery of a new means of attack leads to the introduction of a new means of defence, which in turn provokes the introduction of an even more powerful projectile."[335] This back and forth led to a world-wide arms race that "developed with a dizzying speed," unrestricted by "a number of [failed] attempts . . . aimed at prohibiting

---

[330] Captain Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 235–36 (1998).
[331] *Id.*
[332] Convention with Respect to the Laws and Customs of War on Land (Hague, II), art. 23e (29 July 1899), *entered into force* September 4, 1900. The ICRC translation follows the French term of "superfluous injury" whereas most English translations use the phrase "unnecessary suffering." The terms, although similar, traditionally expressed slightly different meanings. SOLIS, *supra* note 326, at 270. This article primarily uses the term "unnecessary suffering," but views both terms as synonymous.
[333] Convention Respecting the Laws and Customs of War on Land (Hague IV), art. 23e (18 October, 1907), *entered into force* January 26, 1910.
[334] INT'L. COMM. RED CROSS, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 12 (1973). The ICRC noted that, "[i]n conformity with the authoritative French text, the principle must be stated to be that—irrespective of the belligerents' intentions—any means of combat are prohibited that are *apt* to cause unnecessary suffering or superfluous injury." *Id.*
[335] COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 203, at 401.

certain weapons for disinterested humanitarian motives."[336] Nonetheless, in 1977, the ICRC and most of the world's nations, finalized the Additional Protocol I, reaffirming the core principle prohibiting unnecessary suffering, and setting the current state of the law.

With the adoption of Article 35(2) of Additional Protocol I, there is more available explanation concerning the meaning of the term unnecessary suffering. Article 35 states that: '[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." [337] Article 35 did specifically remove the "calculated to cause" language of Article 23(e) of the 1907 Hague Convention because it "was not appropriate."[338] The ICRC took the position that "any injury or suffering of the combatants in excess of that necessary to put the enemy *hors de combat*" constituted unnecessary suffering.[339] The ICRC recognized this language requires balancing "the nature of the injury or the intensity of suffering on the one hand, against the 'military necessity', on the other hand, before deciding whether there is a case of superfluous injury or unnecessary suffering as this term is understood in war."[340] Unfortunately, this balancing test provides no "bright-line rules" as to what constitutes unnecessary suffering. The Commentaries did draw a firm line as pertaining to previously restricted weapons such as dumdum bullets, poison and poisoned weapons, and bayonets with serrated edges, stating that such weapons had been prohibited in various conventions because they cause unnecessary suffering.[341]

Additional Protocol I also provides some guidance to nations on how to implement Article 35(2) in their weapons programs by way of Article 36, establishing "a link between its provisions, including those laid down in Article 35 *(Basic rules)* and the introduction of a new weapon by States."[342] Article 36 requires contracting parties to determine whether new weapons or means or methods of warfare under "study, development, acquisition or adoption" are prohibited by Additional

---

[336] *Id.*
[337] Additional Protocol I, *supra* note 24, art. 35.
[338] COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 203, at 406–07.
[339] *Id.* at 400.
[340] *Id.* at 407–08
[341] *Id.* at 404–06. As discussed in Part II.C.2, *supra*, the proof that expanding bullets cause unnecessary suffering is limited to a faulty German experiment conducted in the 1890's.
[342] *Id.* at 423.

Protocol I or "any other rule of international law."[343] The United States has not ratified Additional Protocol I and is not bound by its provisions, but does follow the guidance found in Article 36 through the legal review of weapons program instituted by the U.S. DoD.[344] The U.S. review program helps explain the U.S. view and approach to unnecessary suffering, especially as applied to weapons development.

3. Weapons Reviews and Unnecessary Suffering

The United States began a formal legal review of weapons program in 1974 as implemented by DoD Directive 5500.15, *Review of Legality of Weapons under International Law*.[345] Department of Defense Directive 5500.15 gives responsibility for legal reviews of weapons to the DoD and charges The Judge Advocate Generals of each respective military service with conducting legal reviews of all weapons acquired by their respective departments.[346] Each military department has in turn issued its own regulations for carrying out this assigned responsibility.[347] There is no authority to conduct such legal reviews below this national level.[348] In 1991, DoD integrated the requirement for a legal review into the DoD acquisition program through DoDD 5000.2, increasing awareness in the acquisition community of the necessity of incorporating the legal review early in the contracting process.[349]

In the United States, there are three primary reasons for conducting legal reviews of weapons. First, the United States has a legal obligation to implement those treaty obligations ratified in accordance with the U.S. Constitution.[350] Second, the "legal review provides the Program Manager as well as the military commander with the acknowledgement of the legality of the weapon or munition in question."[351] This allows a commander to presume that all issued weapons are legal.[352] Finally, the

---

[343] Additional Protocol I, *supra* note 24, art. 36.
[344] Parks, *supra* note 9, at 109.
[345] *Id.*
[346] *Id.*
[347] *Id.* at 113. For example, Army guidance is found in Army Regulation (AR) 27-53, *Review of Legality of Weapons under International Law* and Air Force guidance is found in Air Force Instruction 51-402, *Weapons Review*. *Id.*
[348] *Id.* at 110.
[349] *Id.* at 112–13.
[350] *Id.* at 105–6.
[351] *Id.* at 106.
[352] *Id.*

weapons review itself provides "an instant resource for responding to questions that may arise as to the legality of a particular weapon system or its ammunition."[353]

In most legal reviews, the ultimate issue is either unnecessary suffering or the principle of distinction.[354] As to unnecessary suffering, "[t]he main consideration . . . [is] weighing military necessity against the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering."[355] Military necessity is therefore, "an essential factor and important consideration in [conducting] legal reviews."[356] It is important to note that weapons that produce more serious wounding to a combatant do not necessarily cause unnecessary suffering; however, "without some legitimate military necessity, such as increased range or improved accuracy," the reviewer is unlikely to find the weapon legal.[357] Thus, in determining whether a weapon causes unnecessary suffering, the United States follows the approach outlined in the Commentaries to Article 35(2) of Additional Protocol I: (1) the United States assesses weapons for "compliance with the terms of any treaty [the United States is a party to], taking into account any reservations . . . entered upon ratification";[358] and (2) weighs the injury caused by the weapon in its "normal intended use" with the military necessity of the weapon.[359]

---

[353] *Id.* Parks cites an instance where a sniper bullet with a hollow tip raised concerns by lawyers in Iraq in 2006; the already conducted legal review allowed a quick response to silence the erroneous apprehension over the bullet. *Id.*

[354] *Id*. at 129. Parks notes that the U.S. uses the standard found in the 1907 Hague Convention because the U.S. is not a party to Additional Protocol I. *Id.*

[355] *Id.* at 131.

[356] *Id.* at 124.

[357] *Id.* at 133.

[358] *Id.* at 130.

[359] *Id.* at 130. It is important to note that, a weapon may have an "increased probability of rendering *hors de combat* enemy combatants," because of its increased effectiveness against an armored target, "increased accuracy," or "improved fragmentation design," but this does not change the unnecessary suffering analysis because the stated objective of these improvements is military necessity, not to "increase enemy combatant lethality." *Id.* at 125.

4. Use of Expanding Bullets in Combat Is Consistent with International Law

Using the methodology described above, the proposed use of expanding bullets in combat should pass legal review. Under the first prong of the analysis, the United States is not a party to the 1899 Hague Expanding Bullets Declaration, "but United States officials over the years have taken the position that the armed forces of the United States will adhere to its terms to the extent that its application is consistent with the object and purpose of article 23e of the Annex to Hague Convention IV."[360] While the "calculated to cause suffering" language of the 1907 Hague Convention is out of favor with the international community, it remains the current law for the United States. Thus, while the prohibition against the use of expanding bullets is unquestionably considered customary international law, such use would not violate any of the United States's current treaty obligations. However, because the prohibition against the use of expanding bullets is customary international law, it is binding upon all nations, including the United States (although as argued extensively in the first half of this article, the basis for the status as customary international law is questionable).[361]

The second prong of the legal analysis is weighing the injuries produced by an expanding bullet in its normal intended use with the military necessity of the weapon. The starting point for this part of the analysis is recognizing "that *necessary suffering* to combatants is lawful, and may include severe injury or loss of life."[362] This author is not aware of any publicly available testing results concerning expanding bullets, but as the discussion in Part IV.A above highlights, it is not clear that expanding bullets cause wounding that is extreme or excessive. Certainly, more data is needed in this area, but it is reasonable to believe that if numerous domestic law enforcement agencies employ such munitions, a rational assumption is that expanding bullets do not produce

---

[360] Parks, *supra* note 14, at 86–87.

[361] *See, e.g.*, *id.* at 87 ("[a]lthough the United States has made the formal decision that for military, political, and humanitarian reasons it will not become a party to Protocol I, Unites States officials have taken the position that the language of article 35(2) of [Additional] Protocol I . . . is a codification of customary international law, and therefore binding upon all nations."). *Id.*

[362] Memorandum for Office of the Project Manager, Maneuver Ammunition Systems, Picatinny Arsenal, New Jersey 07806-5000, subject: Legal Review for the 5.56MM Lead Free Ball Ammunition, M855 LFS para. 5a (23 June 2008) [hereinafter M855 LFS Legal Review] (copy on file with author).

the horrific wounds described by Professor von Bruns.[363] There is no doubt that all bullets cause some degree of suffering, but even if expanding bullets cause greater suffering than jacketed bullets, such suffering is only considered excessive if "the inevitable result of the normal use causes an injury the nature of which is considered by the governments as excessive in relation to the military advantage anticipated from employment of the weapon or ammunition."[364] Thus, the ultimate test "is whether the suffering is needless, superfluous, or manifestly disproportionate to the military advantage expected from the use of the weapon."[365]

The military advantage of using expanding bullets in some combat situations is clearly demonstrated by domestic law enforcement agencies' actual use of expanding bullets: reduction of ricochets, decrease in "pass through" bullets, and greater stopping power.[366] With bullets that are less likely to pass through a target, fewer rounds are required to render an enemy *hors de combat*;[367] fewer rounds fired means there is a reduced potential for collateral damage to innocent bystanders, both through a reduction in actual bullets fired and through a reduction in ricochets of those bullets.[368] This reduction in the number of bullets fired will allow American combat forces to better comply with the principle of distinction and to reduce collateral damage caused when engaging lawful targets. In short, as TJAG's 1985 opinion noted earlier, "[t]he possibility of 'superfluous injury' to a terrorist is far outweighed by the humanitarian concerns for protection of the innocent civilians . . ."[369] If the United States announced an intention to use expanding bullets in combat, it is likely the international humanitarian legal community would vociferously object; however, aside from the historically

---

[363] It is also important to note that the bullets Professor von Bruns tested were large caliber hunting bullets fired from a rifle, versus the smaller (*e.g.*, 9mm, 40mm, 45mm) bullets commonly employed in the pistols used by many domestic law enforcement agencies. *See, e.g.*, Ogston, *The Peace Conference and the Dum-Dum Bullet*, *supra* note 98, at 278–79.

[364] M855 LFS Legal Review, *supra* note 362, para. 5a.

[365] *Id.* (quoting M. BOTHE, K. PARTSCH, AND W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 196 (1982)).

[366] *See* discussion at Part III.C.

[367] *See, e.g.*, Baird, *supra* note 252, at B1; Hester & Borondy, *supra* note 251; Williams, *supra* note 252, at 37.

[368] *See, e.g.*, Parascandola, *supra* note 251, at 2; Hester & Borondy, *supra* note 251; Teague, *supra* note 251, at A1; NYC HOLLOW-POINT BULLET REPORT, *supra* note 249, at 1.

[369] *See* Op. JAG, U.S. Army, No. 7026, *supra* note 219.

misconstrued 1899 Hague Expanding Bullets Declaration, such use would be sound and logical under the existing principles of unnecessary suffering, military necessity, and distinction.

V. Conclusion

The ICRC categorizes the prohibition on expanding bullets in combat as customary international law, a stance that flows naturally from the historically unquestioned application of the 1899 Hague Expanding Bullets Declaration by the international community. However, as this article has argued, the ban on expanding bullets was not solely the product of humanitarian concerns, but rather, the unfortunate outcome of a concerted political effort by Britain's rivals to constrain her military power. As a result of a grievously flawed German experiment and widespread misinformation in the European court of public opinion, dumdum bullets were condemned at The Hague without even a single test or accurate report on their actual performance. Captain William Crozier recognized the overly broad language of the prohibition forbade an entire category of bullets, and, over a hundred years later, U.S. military forces remain constrained by that language.

The U.S. operations in Iraq and Afghanistan have revealed a gap in the capabilities of small caliber bullets currently in the military's arsenal. The only option U.S. forces have are high-powered, jacketed bullets that may "pass-through" their intended target, requiring additional bullets to incapacitate a threat. The need to fire additional rounds increases the probability that civilians, who are ever-present in urban combat areas, may be injured or killed. This type of collateral damage is always tragic and runs counter to the COIN objective of protecting the population.

Although the United States is not a party to Additional Protocol I, the United States recognizes many of its articles as reflecting customary international law, including the principle of distinction. The United States only fields weapons that comply with international law[370] and strives to ensure the effects of such weapons distinguish between civilians and the enemy.[371] Unfortunately, the unquestioned application of the 1899 Hague Expanding Bullets Declaration by the international

[370] *See, e.g.*, Parks, *supra* note 9, at 109–13 (describing the United States's program for legal review of new weapons and munitions).
[371] *See id.* at 128–30.

community has precluded the use of a simple bullet that could improve combatants' ability to discriminate when employing lethal force. Combat experience in the urban environments of Iraq and Afghanistan shows that it is time for the United States to lead an effort to reexamine the use of expanding bullets in certain combat scenarios. Domestic law enforcement use of these bullets has already demonstrated that in certain situations, these bullets are better at stopping criminals, reducing the number of shots fired, and lowering the risk for injury or death to bystanders.

This author does not propose to replace the existing bullet inventory of the United States' armed forces with expanding bullets. There are certainly technical reasons why expanding bullets may not be practical for all weapons systems, and commanders may not want to employ them in many tactical situations. Nevertheless, a historically misconstrued rule should not prevent a commander from outfitting his soldiers with a bullet that could more effectively stop a terrorist and limit collateral damage. While this article has been limited to an analysis of law and policy, determining whether expanding bullets in combat offers actual, practical advantages requires detailed, multi-disciplinary research and analysis.[372] If such research determines that expanding bullets do offer significant advantages, the United States should undertake a concerted reevaluation of the 1899 Hague Expanding Bullets Declaration and the actual humanitarian benefits of employing expanding bullets in combat. There can be no doubt that any such effort will cause a colossal uproar among international humanitarian legal scholars who will argue that expanding bullets cause unnecessary suffering. However, as this article argues, any rational legal review should find that expanding bullets do not cause unnecessary suffering or superfluous injury as those terms are defined under Article 35(2) of Additional Protocol I.

General Ardagh's observations in 1899 about the difficulties in fighting "savages" may seem racist to some, but he knew that fighting radicals was not the same as fighting uniformed soldiers. Continental

---

[372] For example, a Joint Services Wound Ballistics (JSWB) Integrated Product Team (IPT) convened to analyze the reported shortcomings of the M855 bullet. Dean & LaFontaine, *supra* note 3, at 26. This group consisted of "technical agencies from within the Army, Navy, and Department of Homeland Security; medical doctors, wound ballisticians, physicists, engineers from both the government and private sector; and user representatives from both the Army, U.S. Marine Corps, and U.S. Special Operations Command." *Id.* A similar collection of experts should also evaluate the potential effectiveness of expanding bullets in combat.

soldiers were likely conscripts, and a bullet wound was good reason to lie down and wait for an ambulance. In contrast, radicals were hell-bent on the destruction of their enemies and were far more likely to fight until death, without regard for the collateral consequences. This is precisely the difficulty the armed forces of the world face today: extremists who seek to kill as many as possible, with little regard for collateral damage or the laws of war. Because these terrorists and extremists often carry out attacks in heavily-populated urban environments, it is time to re-examine the traditional justification for prohibiting the use of expanding bullets in armed conflict. As General Sir John Ardagh recognized, it is the emphatic right and duty of the United States to furnish "our soldiers with a projectile on whose result they may rely," a bullet whose shock is sufficient to stop "the charge of an enemy and put him *hors de combat* immediately,"[373] while at the same time reducing useless civilian deaths.

[373] SCOTT, *supra* note 1, at 277.

Appendix

Terminology: Guns and Bullets

Any discussion of bullets requires a basic understanding of the terminology associated with them. First, "firearm" refers generally to guns, although the term "gun" is rather broad, referring to "true guns," howitzers, mortars, and recoilless rifles; obviously, this article focuses on guns in the traditional sense.[374] Guns are further divided into handguns (pistols or revolvers) and long guns (rifles or shotguns).[375] Guns are either single-shot (the user must remove and load each bullet) or they are semi-automatic or automatic (the spent bullet case ejects itself and the gun automatically loads another bullet).[376]

"Bullet," "ammunition," "projectile," and "cartridge" are all terms that are used interchangeably, although they all have different meanings. Ammunition is the complete package that a gun fires.[377] Ammunition consists of: the bullet (the actual projectile that a gun discharges from its barrel); the cartridge (the metal casing that holds the bullet, gunpowder, and primer); the gunpowder (the propellant that the primer ignites, causing an explosion and forcing the bullet to separate from the cartridge and move through the gun barrel); and the primer (when the gun's trigger is depressed, the gun's firing pin strikes the primer, setting off a small explosion that ignites the gunpowder).[378] In general, "caliber" refers to the diameter of the cartridge, and, in theory, the diameter of the gun barrel.[379] For example, the M855 cartridge used in the M16 and M4 series rifles is a 5.56 millimeter cartridge.[380]

---

[374] DONALD E. CARLUCCI & SIDNEY S. JACOBSON, BALLISTICS: THEORY AND DESIGN OF GUNS AND AMMUNITION 2 (2008). True guns are "direct-fire weapon[s] that predominantly [fire] a projectile along a relatively flat trajectory," and are either rifled or smooth-bored. *Id.*

[375] Lisa Steele, *Ballistics*, *in* SCIENCE FOR LAWYERS 7–9 (Eric Y. Drogin ed., 2008). The bore of a rifle is "rifled," meaning it has grooves that impart a twist on the bullet; shotguns do not have rifling. *Id.* at 7.

[376] *Id.* Semi-automatic weapons require the user to pull the trigger to fire each shot; automatic weapons will continue to fire while the trigger is depressed. *Id.*

[377] *Id.* at 2–6, 9–12.

[378] *See id.* at 2–12.

[379] *Id.* at 10.

[380] U.S. DEP'T. OF ARMY, FIELD MANUAL 3-22.9, RIFLE MARKSMANSHIP, M16-/M4-SERIES WEAPONS tbl.2-8 (12 Aug. 2008) [hereinafter FM 3-22.9]..

The next important term is "grain," which refers to the weight of the bullet; a grain is 1/7000 of a pound.[381] The weight of the bullet influences "how much force (kinetic energy) the bullet has when it strikes a target."[382] "Core" refers to the actual material of the bullet and is usually used as an expression when the bullet is jacketed.[383] The next principal term is "jacket" and refers to a thin covering on the bullet, usually made of copper, brass, or steel.[384] Jackets serve a few purposes: jacketed bullets travel further than unjacketed bullets;[385] the jacket prevents malfunctions caused when pieces of lead from an unjacketed bullet are deposited in the gun's chamber during high rates of fire;[386] and jackets reduce the amount of lead dust (a health concern) generated when bullets are fired.[387] Finally, "tip" refers to the nose of the bullet, and the tip can be rounded, pointed, or hollow-pointed.[388] A bullet with a pointed-tip is more aerodynamic; a rounded-tip bullet is less aerodynamic and travels slower than a pointed-tip bullet; a hollow point bullet "sometimes widens when it enters the body,"[389] thus "increasing its drag and [tending] to remain inside the target."[390]

"Ballistics" is a broad phrase that generally refers to the study of firearms, or "guns."[391] Ballistics is then generally divided into three major fields: interior ballistics, exterior ballistics, and terminal ballistics.[392] Interior ballistics deals with everything that happens with the bullet inside the gun until it leaves the gun barrel.[393] Exterior ballistics refers to what occurs with the bullet between leaving the gun and striking

---

[381] Steele, *supra* note 375, at 10. For example, the bullet in a M855 bullet weighs 62 grains. FM 3-22.9, *supra* note 380, tbl.2-8.
[382] Steele, *supra* note 375, at 10.
[383] *See id.* at 10–12. For example, the M855 bullet is a "lead alloy core bullet with a steel penetrator." FM 3-22.9, *supra* note 380, tbl.2-8. This means the lead bullet also contains a steel penetrator designed to "penetrate ceramic and metal armor plates used in tactical body armor." Steele, *supra* note 375, at 12.
[384] *Id*. at 10–11; BARBARA B. ROLLINS & MICHAEL DAHL, BALLISTICS 17 (2004).
[385] ROLLINS & DAHL, *supra* note 384, at 17.
[386] Steele, *supra* note 375, at 11.
[387] *Id.*
[388] *Id.*; ROLLINS & DAHL, *supra* note 384, at 17.
[389] ROLLINS & DAHL, *supra* note 384, at 17.
[390] Steele, *supra* note 375, at 11. Steele also notes that hollow point bullets are "less likely to go through standard building materials if [they miss] the target and more likely to be stopped by police body armor if an officer gets in the way of a round fired by another officer." *Id.*
[391] *Id.* at 1.
[392] CARLUCCI & JACOBSON, *supra* note 374, at 4.
[393] *Id*. at xi.

the target.[394] Terminal ballistics refers to the function of the bullet in the vicinity of and on the target.[395]

[394] *Id.*
[395] *Id.*

TWELFTH ANNUAL SOMMERFELD LECTURE*

JOHN A. NAGL†

* This is an edited transcript of a lecture delivered by Dr. John A. Nagl on August 2, 2010, to members of the 54th Operational Law of War Course, staff and faculty of The Judge Advocate General's Legal Center and School, and their distinguished guests at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established in 1999, the Sommerfeld Lecture series was established at The Judge Advocate General's Legal Center and School to provide a forum for discussing current issues relevant to operations law. The series is named in honor of Colonel (Ret.) Alan Sommerfeld. A graduate of the 71st Officer Basic Course, Colonel Sommerfeld's Army judge advocate career was divided between the Active and Reserve Components. After six years of active duty, he became a civilian attorney at Fort Carson, Colorado, and then at the Missile Defense Agency. He continued to serve in the Army Reserves, and on September 11, 2001, Colonel Sommerfeld was the Senior Legal Advisor in NORAD's Cheyenne Mountain Operations Center, where he served as the conduit for the rules of engagement from the Secretary of Defense to the NORAD staff. He was subsequently mobilized for two years as a judge advocate for Operation Noble Eagle and became a founding member of the U.S. Northern Command (USNORTHCOM) legal office, where he served as its Deputy Staff Judge Advocate and then interim Staff Judge Advocate. He retired from the Reserves in December 2003.

† Dr. John Nagl is the President of the Center for a New American Security. He is also a member of the Defense Policy Board, a Visiting Professor in the War Studies Department at Kings College of London, a life member of the Council on Foreign Relations and the Veterans of Foreign Wars, and a member of the International Institute of Strategic Studies. Dr. Nagl is a member of the *Joint Force Quarterly* Advisory Committee and of the Advisory Board of the *Journal of the Royal United Services Institute*, a former Young Leader of the French-American Foundation and the American Council on Germany, and a member of the American Association of Rhodes Scholars. Dr. Nagl was a Distinguished Graduate of the U.S. Military Academy Class of 1988 and served as an armor officer in the U.S. Army for twenty years, retiring with the rank of lieutenant colonel. His last military assignment was as commander of the 1st Battalion, 34th Armor at Fort Riley, Kansas, training Transition Teams that embed with Iraqi and Afghan units. He led a tank platoon in Operation Desert Storm and served as the operations officer of a tank battalion task force in Operation Iraqi Freedom. He earned his doctorate from Oxford University as a Rhodes Scholar. Nagl taught national security studies at West Point's Department of Social Sciences and in Georgetown University's Security Studies Program. He served as a Military Assistant to two Deputy Secretaries of Defense and later worked as a Senior Fellow at the Center for a New American Security. Nagl also earned a Master of the Military Arts and Sciences Degree from the Command and General Staff College, where he received the George C. Marshall Award as the top graduate. He was awarded the Combat Action Badge by General James Mattis of the United States Marine Corps, under whose leadership he fought in Al Anbar in 2004. Dr. Nagl is the author of *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* and was on the writing team that produced the U.S. Army/Marine Corps *Counterinsurgency Field Manual*. His writings have also been published in *The New York Times*, *Washington Post*, *The Wall Street Journal*, *Foreign Policy*, *Parameters*, *Military Review*, *Joint Force Quarterly*, *Armed Forces Journal*, *The Washington Quarterly*, and *Democracy*, among others. He was profiled in the *Wall Street Journal*

I'm going to talk to you today about counterinsurgency doctrine and how you develop learning organizations. That's really what my doctoral dissertation was about: learning organizations and how armies adapt to learn about counterinsurgency. I'm going to talk about the wars we're currently fighting in Iraq and Afghanistan and about the future of conflict, which I think is likely to look not too dissimilar from the wars we're currently fighting in Iraq and Afghanistan.

I'd really like to do this interactively. I gave a version of this talk last month to the Defense Science Board, which is thinking about some of these same problems, and was scheduled for an hour; we went two and didn't get through all of the slides. I'd be completely happy not to get through all of the slides if we can establish that kind of discussion. The hard part is always getting somebody to break the ice and ask the first question and turn it into an interactive discussion. Once we get that going, I think we'll be fine.

So where are we going to start? So much of all of this goes back to Vietnam and the case studies I looked at for my doctoral dissertation. I came out of West Point, went to Oxford for finishing school, and then fought in Desert Storm and came out of Desert Storm absolutely convinced that we were so good at the tank-on-tank, fighter-plane-on-fighter-plane kind of war that our enemies weren't going to fight us that way anymore. We were too good. Our conventional superiority was going to push our enemies toward the edges of the spectrum, either toward the high end to try to acquire weapons of mass destruction—as North Korea has, as Iran has in what I think is likely to be one of the major national security questions of the next year or two, and as we thought Iraq had—or toward the low end, toward insurgency and terror.

So I decided to look at that low end—at insurgency and terror—when the Army sent me back to Oxford after Desert Storm—because we all make sacrifices for national security—to get my Ph.D. If you study insurgency and counterinsurgency, you really have to look at Vietnam, so I spent a bunch of time thinking about Vietnam and could talk for a long, long time about Vietnam. Western armies, conventional armies,

---

and *The New York Times Magazine*. Dr. Nagl has appeared on *The Jim Lehrer News Hour*, *National Public Radio*, *60 Minutes*, *Washington Journal*, and *The Daily Show with Jon Stewart*. He has lectured domestically and internationally at military war colleges, the Pentagon's Joint Staff and Defense Policy Board, the Office of the Secretary of Defense, major universities, intelligence agencies, and business forums.

tend to start badly when they're fighting insurgencies; that's why insurgents fight them as insurgents. Conventional militaries are designed for conventional force-on-force kind of war, but over time, successful armies adapt and learn.

I looked at the case study of the Brits in Malaya. The Brits fought a counterinsurgency campaign in Malaya, what is today called Malaysia, from 1948 to 1960. It started badly, as you'd expect, but they adapted, they learned, and they ultimately defeated their insurgent enemies in what is today widely viewed to be the classic case of successful Western counterinsurgency in the 20th century—and it only took them twelve years. I looked at that case, and I looked at the case of the American Army in Vietnam, a conflict which also started badly as you would expect. The U.S. Army also adapted and learned but didn't learn fast enough, and we were ultimately defeated in Vietnam at enormous cost to the people of the region, the security of the nation, I would argue, and also to the military services of the United States, especially the Army, which really took a generation to recover. I came into the Army in 1984, when I started at West Point, and the Army was really just starting to recover from Vietnam.

We, as a nation, decided that we weren't going to do those kind of wars anymore. This is literally true. I did research at Leavenworth at the Combined Arms Research Library and went to the classified floor. Obviously I couldn't use anything classified in my dissertation—that would have been against the law—but sometimes it's interesting to see what's classified. I asked the nice lady who ran the classified area, "Can I see the Vietnam stuff? Where's the Vietnam stuff?" And she said, "We don't have any." I said, "I'm sorry. It was a really big war. Really, you must have something . . . ." And she said, "No. I've been here a long time. In the early '80s, there was a colonel here who said, 'Vietnam was a bad war. We're not going to study it here. Get rid of the records.'" That was really the attitude that we, as a nation, took toward Vietnam: that was a bad war; counterinsurgency is a bad way to fight a war; we're not going to do it anymore.

When the insurgencies started in Iraq and Afghanistan in this decade, we were unprepared. We were not ready to fight those kinds of wars and that meant we had to dig ourselves out of a hole and relearn a lot of old lessons—a lot of lessons that had been paid for with blood, with our blood, with the blood of our friends. There's been a gap in the intellectual development of our understanding of warfare and our

understanding of how to apply U.S. national power to achieve national objectives. That intellectual gap has cost us a great deal. And this is not just a matter for historical interest. I think these are harbingers of an era of persistent irregular conflict. I think these are the kinds of wars we're going to be fighting for the foreseeable future, and these kinds of wars require the development of special capacities and capabilities.

The first quote in the *Counterinsurgency*[1] manual is from a Special Forces friend of mine. In 2005, I sent him a note and told him I was working on counterinsurgency doctrine, and he wrote back and said, "Remember, counterinsurgency isn't just a thinking man's war; it is the graduate level of warfare," by which he meant you have to be able to do all of the usual warfare kind of stuff. You've got to be able to use artillery, direct fire, close air support, naval gunfire, all of those sorts of things, but you also have to have a whole other set of skills, ones that are much better suited to developing host nation governance and to establishing and enforcing the rule of law. It's an enormously challenging intellectual task, and it requires the integration of a large number of skill sets that we're getting better at using. But we still have, I think, a long way to go.

My dissertation looked at how the British Army adapted, how it learned, and how the American Army adapted and learned, and like any good graduate student, I didn't have any new ideas of my own. I just stole them from my friends. Richard Downie wrote his Ph.D. at the University of Southern California. His book, *Learning from Conflict*,[2] also looked at organizational adaptation, and he took the theories of John Boyd.

John Boyd, an Air Force pilot who tried to figure out why we were so successful in the Korean War in fighter-on-fighter conflict, despite the fact that, arguably, the MiG-15s were better airplanes than the airplanes we had, developed the OODA loop.[3] The idea was that the pilot who observes what's going on, orients himself to the situation, decides what

---

[1] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].

[2] RICHARD DUNCAN DOWNIE, LEARNING FROM CONFLICT (1998).

[3] Observation-Orientation-Decision-Action loop. *See* Colonel John R. Boyd, Patterns of Conflict (Dec. 1986) (unpublished lecture notes), *available at* http://www.ausairpower.net/JRB/poc.pdf. Colonel Boyd continued to develop and modify his Patterns of Conflict briefing between 1986 and 1991.

he wants to do, and acts faster than the enemy gets inside the enemy's OODA loop, or decision cycle, and that pilot wins nine times out of ten.

Downie[4] took that same idea of getting inside the enemy's OODA loop and applied it to organizations, because we seldom fight as individuals. Today, even fighter pilots are part of a much broader team, so how do you get that broader team to learn and adapt?

Downie's model of organizational learning flows clockwise, and I'm going to start here at ten o'clock. If you have an Army organized, designed, trained, and equipped for conventional tank-on-tank conflict and it suddenly finds itself fighting irregular wars—fighting enemies who won't meet it in frontal conflict, who wage war in the shadows—there are going to be individuals in the organization who pay attention to what's going on; that's always true in every organization. Those individuals are going to identify organizational performance gaps. They're going to say, "Hey, this isn't the enemy we war-gamed against. The plan ain't working." They're going to come up with new ways to do business, but this is where it gets hard—at six o'clock. The organization has to come to a sustained consensus that the old ways of doing business are insufficient and that new techniques have to be adopted. That's enormously difficult. If you're able to do that, if you're able to come to that kind of consensus, it's then comparatively easy to transmit the new interpretation by publishing doctrine that should change the way the organization acts on the ground. In a healthy organization, that cycle repeats endlessly. In a successful organization, that cycle repeats faster than the opponent's.

Increasingly the military is learning from business. Businesses do this all the time, and they reward people very, very highly, but it works really well in business because you can tell literally every day how you're doing. Dell and HP are consciously competing against each other and know literally every day who's selling more. So there's enormous pressure to find people who can identify gaps, come up with new ways to do business, and a lot of organizational consensus behind making those changes as rapidly as possible.

---

[4] Dr. Richard D. Downie. Downie currently serves as the Director of the Center for Hemispheric Defense Studies at the National Defense University and is the author of *Learning from Conflict: The U.S. Military in Vietnam, El Salvador, and the Drug War* (1998).

AUDIENCE MEMBER: Sir, how do you define a sustained consensus?

DR. NAGL: That's hard, but a really good question. Part of it, I would argue, is doctrine. Doctrine is supposed to be a generally accepted body of beliefs that an organization follows. There's an old line about the American Army from the Germans: The Americans have the best doctrine in the world—fortunately, they don't read it. But, in fact, writing it isn't enough. You have to believe it and you have to implement it. This is why we were so enormously fortunate, I would argue to have had General Petraeus, the guy who literally wrote the counterinsurgency doctrine, put the theory into practice in Iraq, a theater of war that clearly was not going well, and developed a degree of consensus behind that way forward—although by no means is there universal consensus, even inside the American Army, that the doctrine is correct. In fact, there's a raging debate among a small group of people over whether we got the counterinsurgency doctrine right and whether it works. The title of my talk is subtitled "Winning the Wars We're In," and I've been conducting a debate in the pages of *Joint Force Quarterly* with a serving colonel named Gian Gentile over whether we got this doctrine right or not.

I would argue that the outcome of Afghanistan is going to be incredibly important in determining whether there is, in fact, a sustained consensus or not. Secretary Gates has weighed in on this to an extraordinary degree. He's made programmatic changes in line with a future of irregular warfare, at least on the ground side, but even those decisions are not locked in. A lot of that's going to depend on how long Gates stays in office as Secretary of Defense and who follows him, so this is by no means a decided question. There's a cottage industry. Literally every week I get a note from somebody who's writing a doctoral dissertation on this question.

AUDIENCE MEMBER: Sir, how does the momentum of the alternatives overcome the inertia of established doctrine?

DR. NAGL: Great question. The best book on this is probably by David Ucko. Ucko just published with Georgetown Press. His book is *The New Counterinsurgency Era*,[5] which plays on a book called *The*

[5] DAVID H. UCKO, THE NEW COUNTERINSURGENCY ERA: TRANSFORMING THE U.S. MILITARY FOR MODERN WARS (2009).

Counterinsurgency Era, by Blaufarb.[6] There are a number of different schools of organizational learning, in particular in the military, and one of the big questions is how does the process happen? What does it require for organizational adaptation to take hold?

Most people agree that one of the key factors is influential sponsors who create promotion paths guaranteeing success for acolytes. Naval aviation is a great example of this at work. In the nuclear submarine force, Rickover's nuclear Navy, Admiral Rickover personally made things happen, and in my own service, armor, Patton was influential in the early years of armor. So the personage of General Petraeus is enormously important in causing all of this to happen, and, I would argue, he performed a national service two months ago by volunteering to at least nominally take a step down and take up the cause in Afghanistan at really a critical time when he could have coasted on a very well-deserved reputation for success.[7]

The Fourth Star, written by Greg Jaffe and David Cloud, looks at David Petraeus, John Abizaid, George Casey Jr., and Peter Chiarelli and goes through their intellectual histories.[8] It's really an intellectual biography of four general officers and asks the very hard question, the question we, the military, should be asking as an institution: Are we promoting the right people to positions of strategic leadership? Petraeus, one of the smartest guys on the planet, was famous in the Army not for his Ph.D., but for the fact that he could do more one-armed pushups than anybody else in any of his units. He really didn't take his intellect out from under a bushel basket until he took command at Leavenworth. Admiral Jim Stavridis, sort of the Navy's version of Petraeus, has a Ph.D. from The Fletcher School.[9] So, are we putting the right emphasis on strategic thinking, on academic thinking, as warfare changes and as we need a different kind of strategic leader to perform the functions and the strategic communication skill set that Petraeus has so well and that Stavridis, for those of you who know him, has so very well?

---

[6] DOUGLAS S. BLAUFARB, THE COUNTERINSURGENCY ERA: U.S. DOCTRINE AND PERFORMANCE, 1950 TO THE PRESENT (1977).

[7] General Petraeus assumed command of the International Security Assistance Force and U.S. Forces Afghanistan on July 4, 2010 after serving as Commander of U.S. Central Command. President Barack Obama nominated General Petraeus to the position after the resignation of the General Stanley McChrystal. *See* President Barack Obama, Statement by the President in the Rose Garden (June 23, 2010).

[8] DAVID CLOUD & GREG JAFFE, THE FOURTH STAR (2009).

[9] The Fletcher School of Law and Diplomacy, Tufts University.

AUDIENCE MEMBER: Sir, you stated that success is not obtained by merely completing the decision-making circle but by doing it quickly, and it seems to me that what you've explained so far is not going to be accomplished quickly, at least not if it's only being operated from the very top. The more junior officers—the majors and lieutenant colonels—have a lot of knowledge. They're the ones who are out there right now. They're the tank commanders. They're the squadron commanders. They're the ones who really need to get their information to the top. If the fourth star is really where all of this policy, all of these decisions, are made, how would you speed up this process?

DR. NAGL: Everything you said is true and is great. I was responding to a slightly different question, though. I was asked about solidifying it, and to come to the sustained consensus you have to have the senior leaders who believe in it and lock it down and nail it in. In any organization, you're going to have the bright, younger folks coming up with ideas, some of them good, some of them bad; that is particularly evident here.

One of the many fascinating things about this has been the role of information technology—the Internet—in enabling and accelerating the learning process. The *Small Wars Journal*[10] has an extraordinary website that pulls together sort of an *Early Bird*[11] kind of compilation of defense and national security press, but more importantly empowers and enables a really raging debate over these questions. And there were a number of more junior people whose thinking has been really important. Conrad Crane, who was the lead editor of FM 3-24,[12] was Petraeus's classmate at West Point. Dave Kilcullen, a name many of you should recognize—an Australian former infantryman—just published his new book, *Counterinsurgency*.[13] Dave's thinking is important. Jim Thomas, a young Deputy Assistant Secretary of Defense, did a lot of important driving and thinking during the Quadrennial Defense Review (QDR).

---

[10] SMALL WARS J., http://smallwarsjournal.com/blog/.

[11] *See Current News Early Bird*, OFF. OF THE SEC'Y OF DEF., http://ebird.osd.mil/index.html (last visited Jan. 28, 2011). The *Early Bird* is a "daily compilation of published items and commentary concerning significant defense and defense-related national security issues" prepared by the Current News Service of the Office of the Assistant Secretary of Defense for Public Affairs. *Id.*

[12] FM 3-24, *supra* note 1.

[13] DAVID KILCULLEN, COUNTERINSURGENCY (2010).

Every four years, Congress mandates that the Department of Defense conduct a soup-to-nuts evaluation of the strategic environment it finds itself in, its capabilities, and whether the two match up. The 2006 QDR pushed the Department hard in the direction of irregular warfare, but there were no programmatic changes, and no weapon systems were canceled as a result of it. It created the intellectual foundation for a lot of the transformation that Gates has now been doing for the broader Department of Defense. People really do matter. If Secretary Rumsfeld had not been replaced by Secretary Gates, it's hard to imagine that we could have made the changes that we made in Iraq in 2007. Gates enabled and empowered a whole lot of thinking that had been going on by an increasingly frustrated number of junior officers and junior academics from all over the place, who suddenly were nurtured by Petraeus in particular. We started writing the *Counterinsurgency* manual in November of 2005.

In February of '06, when the Iraq War really turned sharply down, the Samarra mosque bombing took place. We were at Leavenworth to review a draft of the *Counterinsurgency* manual, and we were in a room about this size. Petraeus sat in the front row for the whole two and a half-day session questioning, engaging, running sort of a seminar from the chair on how to write the book, engage in the learning process, and empower the young minds who were not happy with the direction things were going. You've got to have the bright, young minds, but they're going to get nowhere if the leadership says no, if the leadership turns into a roadblock.

Interestingly, Dave Kilcullen was pulled out of that conference to go to Iraq because of Samarra. It didn't take a long time for Kilcullen to understand what Samarra meant, but it took a long time for us, for the big organization, to understand what Samarra meant.

AUDIENCE MEMBER: Sir, earlier you talked about how, in Desert Storm, we were so good at tank-on-tank that we pushed the enemy to the edges. In an insurgency, as we get better at this loop, where do we push the enemy to? Do you believe that we go with counterinsurgency? And what's the next war going to look like?

DR. NAGL: My objective is that we become as good at irregular warfare as we are at conventional warfare, and you leave the enemy no place to run to, no place to hide. Right now there's a gap in our capability, although we've developed enormously well, and, with respect

to my two British friends in the room, I think we've taken the mantle. The Brits used to be the best in the world at counterinsurgency. I would argue that we're there now. I think that they've written some great doctrine. Recently, Colonel Alex Alderson has just stood up a counterinsurgency center for the British military. General Sir David Richards, now taking over as their version of the Chairman of the Joint Chiefs, understands this kind of war and is moving in that direction.

We've become the best in the world at it, but I would argue we're the best now. If you fight a protracted warfare strategy, you have a chance of exhausting the U.S. political will and you have a better chance of achieving your objectives. I think that that is likely to remain the case. I think we're likely to maintain our conventional advantage over any conventional opponent for at least the next two decades. One of the things the QDR panel I sat on recommended was more investments in the Navy, interestingly, as the rise of Asian powers is exposing some vulnerabilities, but we've got to find that balance. In November 2008, Gates gave a great talk at the National Defense University arguing for more investments in irregular warfare capabilities. He then published his remarks in the January/February 2009 issue of *Foreign Affairs*.[14] In response to a question, he said, "I've got plenty of spare Naval and Air Force capacity to deal with conventional threats. What I don't have is sufficient capacity to deal with irregular threats." But it's a valid critique. I don't think we've overadjusted. I don't think the pendulum has overswung. There are those who disagree. And in particular I think that there are lots and lots of skills that translate. Because counterinsurgency is the graduate level of war, you've still got to be able to do all of the killing; a good, interesting *New York Times* piece yesterday on this argued that the counterinsurgency part hasn't worked very well in Afghanistan. We've had more success with counterterrorism.

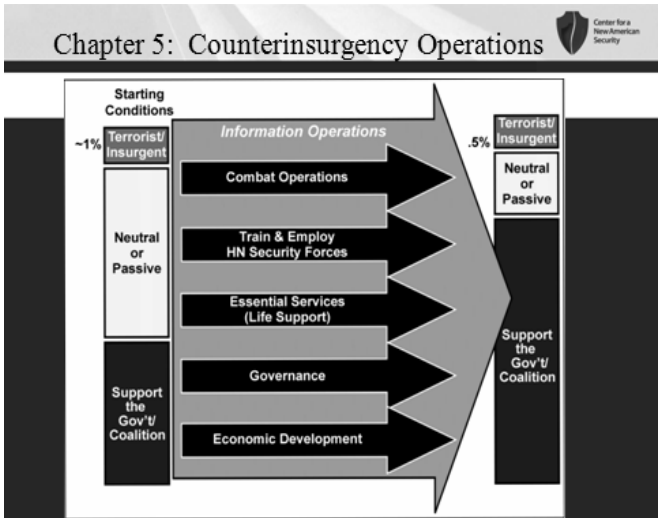
In any counterinsurgency campaign, you're fighting a fairly small number of enemies. So in the fight I know best—in al Anbar in 2003, 2004—I was responsible for a town named Khaldiya. For those of you who haven't had the pleasure, it's between Ramadi and Fallujah, so it's a pretty good neighborhood. In my sector in Khaldiya, there were about 60,000 people I was responsible for. Of those 60,000, as near as we could tell about 300—about half of one percent—were actively trying to kill me and my guys. Those 300 were stacked up against a tank battalion

[14] Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, FOREIGN AFF., Jan./Feb. 2009, at 28.

task force of 800 people and we had tanks. We had Bradleys. We had close air support. We had everything. Still, over the course of a year, they managed to kill twenty-two of us, wound 150 of us, and there were more of them, at the end of the year, than there were when we started. How could this be?

The answer is because they were enabled and empowered by the neutral or passive part of the population. The objective in a counterinsurgency campaign is not to kill or capture those guys because, believe me, we did our fair share of that. And this is the problem I have with the *New York Times* piece from yesterday, which says that counterterrorism is the answer in Afghanistan. We killed or captured way more than 300, but if you don't change the conditions, you will literally be fighting their brothers—literally their brothers—and we saw that in a number of cases. So the ultimate objective can't be just kill or capture. It has to be to increase the number of people who support the government, the coalition, to drain the swamp that supports the bad guys and bring this number down. You're never going to bring it to zero. You try to bring it down to a level where the local government, local military, local security forces can deal with the problem.

And how do you do that? We came up with six logical lines of operation.[15]



[15] DOWNIE, *supra* note 2, ch. 5.

Combat operations. Kill or capture bad guys, an inherent part of counterinsurgency. The hard part isn't killing or capturing. It's figuring out who to kill or capture.

Train and employ host nation security forces. Ultimately that is your exit strategy. "Exit strategy" isn't a good phrase; it's a victory strategy. You've got to build a host nation's capacity, so you knock some of the insurgents out to make the problem easier. You do this to increase the host nation's capacity to deal with the problem.

Provide essential services to the population. There's a lot of debate about how important that really is. You create good governance to increase support. The ability of the people to support the government or coalition only works if the government is part of the solution, not part of the problem. Probably the biggest problem we have in Afghanistan right now is the governance problem. This is where judge advocates can really help as we develop an expeditionary capacity to improve governance. We've got a long way to go as a department, as a nation, in terms of economic development to defeat the "accidental guerrillas," to use Kilcullen's phrase.

"Economic insurgents" is a phrase I use, and my model of insurgency is an onion. You've got a hard core of really committed Jihadis who have to be killed or captured, and we know how to do that. But as you get further out, you've got folks who are less committed ideologically but are doing it for other reasons—because of nationalism, because it's the most exciting thing going on in the valley that particular year. Kilcullen did some interviews of an American squad. A Special Forces team, I think, got pinned down in a valley and the insurgents just kept coming. A couple of weeks later, he got to do interviews with some of the insurgents and asked why, because they were not committed Jihadis. He asked, "Why did you go shoot at those Americans?" and the answer was, "This is the most exciting thing that's happened in my valley for five years. This is all we're going to talk about for the next five years. I'm going to be a part of it, man."

In Anbar, in my fight, we did exit interviews with insurgents we captured, and one of the metrics we tracked was how much they got paid to conduct attacks against us; in Al Anbar in 2004, we estimated unemployment at seventy percent. The one thing the former regime elements—we weren't allowed to call them insurgents then—had was lots and lots of money, and the place was just littered, literally, with

artillery shells and munitions in the streets when we initially got there in late 2003. So if you've got unemployed young men, weapons readily available, and people who are willing to pay those unemployed young men to shoot at you, you've got the recipe for a long-term insurgency but not very committed insurgents. This is why you set up employment systems to try to get them off the street, try to wean them away from the insurgency.

Which logical line of operation is the most important? Information operations was the big arrow that incorporated all of the little arrows.[16] (If I could change one thing in the book, that's what I'd change, because nobody gets that. We didn't think people wouldn't see that.) Ultimately, you're changing people's minds. You're trying to change people's attitudes. So everything you do in every one of these lines of operation should have an information operations component. And if you're really good, you should think through the information effect first before you do anything else, before you come up with the combat ops plan, before you think about how you're going to aid and mentor the government.

And anybody wants to guess which of these we're worst at?

AUDIENCE MEMBER: Information operations.

DR. NAGL: Information operations, right. I'm sure you all have your horror stories. Let me tell one of mine just quickly. Every private E-2 in my tank battalion had shoot/no shoot authority. If my private believed that there was a threat to U.S. personnel or to our allies in the field, he or she could use deadly force; that's what I told them. Shoot/no shoot authority all the way down to the private.

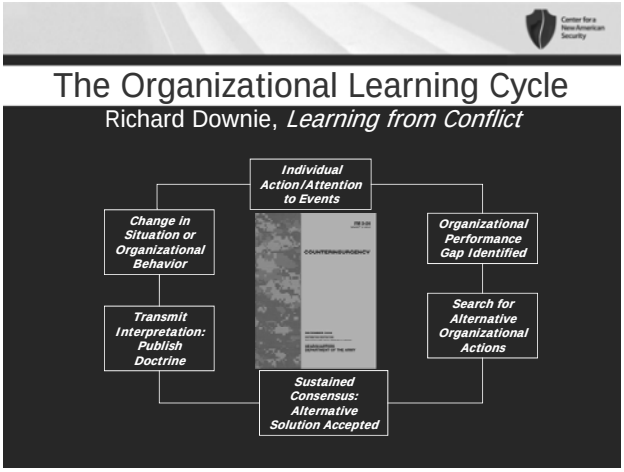
If I wanted to put out a flier that said, "Wanted: Individuals responsible for the murder of this Iraqi family, photo follows, killed by an improvised explosive device in the streets of Khaldiya at this date/time group. Reward," anybody want to guess whether I had the authority—I was a major at the time—to do that?

The two-star division commander had the authority to approve that poster. So my private can kill somebody, but the major can't put up a poster. I don't know whether that's still the case or not; I'm a little disconnected now. I will tell you that I ultimately got so frustrated that I

[16] *See* FM 3-24, *supra* note 1, fig.5-1.

decided just to do what I was doing, to post them, and simultaneously send them up for approval—that is, "I posted this at these locations, at this time. If you tell me to take them down, I will." Never got anything back.

My friend Erik Kurilla, whom some of you may know, was my West Point classmate. Erik is now commanding the Ranger Regiment. Erik did me one up. In his Strykers, he preprinted the forms in Arabic and just left blanks to put in the date/time group and to put in the picture. He had printers and laptops in the back of his Strykers and he would literally, while they were doing incident reaction, hit print and start handing out flyers to people who had gathered around, doing basic police work. We have to empower our people in the field. We have to trust our majors and give them the authority to put out flyers.



This is the heart of the manual. Those two slides, the organizational learning slide and this slide,[17] are really the heart of what I'm going to talk about today.

I'll talk about Iraq a little bit in terms of where I think we are. I mentioned the Samarra mosque bombing in 2006. The basic fundamentals of Iraq were that the Sunnis, although a minority in the country, had long held disproportionate power. When we toppled Saddam's government, we established democracy without a clear idea what that was; that essentially put the Shia in power. The Sunnis reacted

[17] DOWNIE, *supra* note 2.

badly against that, and fought an insurgency against it. Initially, at least, their objectives were in alignment with those of al-Qaeda in Iraq (AQI). Al-Qaeda in Iraq successfully revved up that Sunni-Shia split in Iraq. They did it in Al Anbar. In particular, the day the 4th Infantry Division captured Saddam Hussein will forever be, for me, the day that AQI launched a car bomb on the police station. I'll back up. I'll tell a story.

So, I get to Al Anbar in the fall of 2003, and I know how to do this stuff. I did my doctoral dissertation on counterinsurgency, and I've read a lot of books, right? So I take my best company commander because I know it's an important mission and because to succeed in counterinsurgency, ultimately, you have to have local police forces that work. So I told my best captain, "Go down to the police station, grid follows, and go on a joint patrol with the police and come back tonight and tell me how you did." Clear, simple instructions, major to captain, just the way it's supposed to go. My captain, Ben Miller, comes back to me that night and reports mission failure to me. He said, "Sir, I was unable to perform the mission of going on a joint patrol with the police," and I said, "Ben, come on. How hard could this be? I told you where they were. Did you go to this location and link up with the police?" He said, "Sir, I went to the location, but I couldn't link up with the police. They were too fast." I said, "I'm sorry?" He said, "When we pulled up, they ran away, and a bunch of them jumped out of the windows and off of the roof, and I couldn't catch any of them in time." I said, "Okay, Ben. I clearly sent a boy to do a man's job. All right, I will come with you tomorrow and we will successfully go on a joint patrol with the police in the Iraqi city of Khaldiya." We pulled up, and, sure as shootin', it was like popcorn; they were going on all over the place. But we managed to pin two of the slow ones down in a corner, and there was just an absolutely wonderful Laurel and Hardy exchange. I found an AK-47, and I'm having a discussion through an interpreter with my new friend, the Iraqi policeman, and we were fighting with the AK-47.

"You're going."

"No."

"You're going."

"No."

"You're going."

"No."

"You're going." It was probably illegal. So these two cops went on patrol with us literally at gunpoint. What I was too dumb to understand at the time but figured out only in retrospect was that my PFC's rifle barrel was a life insurance policy for this cop, that if he had been seen at that point, given the conditions in Khaldiya, to be willingly cooperating with us, his head would have been hanging from the police station the next morning. It took me a while to figure that out.

Over time, we started to develop relationships with the police, and they started working with us and it became a threat. Al Qaeda in Iraq had a significant presence in the area, you'll recall, and they launched their version of a strategic missile attack. They launched a car bomb on the police station at shift change on a Sunday morning, which killed thirty-four and wounded another forty or fifty. This was an attack with strategic effect. It was the local version of the Samarra mosque bombing and set relations back a ways. We continued to work with them.

My police chief—I was on police chief number three; as we were pulling into town, his predecessor had ingested a full clip of AK-47 rounds and been left in the town square—was a former Iraqi Republican Guard armor officer. He and I had actually fought together before—although on opposite sides, in Desert Storm. And now we got to work through all of this together. After an improvised explosive device (IED) that killed one of our lieutenants, his radio telephone operator, and two Iraqi policemen, the Iraqi police stood with us and conducted cordon and search operations and tried to help us figure out who the bad guys were. And there was an IED on my police chief in his driveway. Think about that and what that says about local support and the guts of that cop.

Then, in Fallujah in March of 2004, when the Blackwater guys were killed, we made some bad strategic choices. We went into Fallujah in a big way, and Iraq exploded. I got multiple, credible reports that my police chief was passing on some of the body armor, some of the weapons, some of the ammunition that I'd gotten for his guys to the insurgents inside Fallujah.

What do you do?

AUDIENCE MEMBER: Nothing.

DR. NAGL: Nothing? So this guy is giving weapons and ammunition to people who are fighting against your friends, literally your friends, and you're not going to do anything?

I didn't do anything; that's what I did. I didn't do anything. My analysis was that this was the least he could do and stay alive given the conditions in Iraq at that point. I had this discussion with Steve Inskeep from *Morning Edition* and said the same thing, said I did nothing. Steve did the same thing to me I just did to you, and they called back and said, "We need you to explain this again because the American people are not going to understand it." They were seriously concerned that I was going to get in big trouble when they played this on *Morning Edition*, but I ended up getting overwhelmingly positive reactions, especially from people who had actually done it.

Ultimately, it always helps to fight a dumb enemy, and AQI overreached; they did some remarkably barbaric things. There's a new book on this out by Jim Michaels, who writes for *USA Today*, called *A Chance in Hell* about the fight in Ramadi, which is really where the awakening started, with outreach to a Sunni sheik, not a major sheik, who started to turn against AQI. Al Qaeda in Iraq was doing things like cutting off fingers if somebody was smoking, forced marriages, assassinations of sheiks in the local community, those sorts of things. The sheik created sort of a local militia. This ultimately became the Sons of Iraq. His highest ambition was to meet President Bush, and when President Bush went out to Al Anbar late in his presidency, this guy, this sheik, actually sat next to him and was killed by an IED two weeks later.

An extraordinary story of enormously brave people. We go there for year-long tours, but this is their life. They go there forever, and an enormous number have paid a remarkable price. Ultimately, because of the Sons of Iraq, because a number of brave Sunnis turned against AQI because AQI made it easy to do so by being so stupid and brutal, we broke the fundamental cycle of violence, brought the Sunnis on board, made it impossible for the Sunnis we brought on board to return to the fight, with biometric IDs. Once you know somebody who has been an insurgent and you can gather indelible information on them, it's impossible for them to turn back to the insurgency, and the fundamental cycle has been broken.

One of the fundamental policies of the last administration was democracy promotion. I'm a big fan of liberal democracy, which has

protections for the rights of minorities; that requires institutions. We haven't built the institutions in a lot of places where we tried to have democracy. I think you need to build the institutions first, as, for example, we did in South Korea and Taiwan. In Iraq we, I think, went to democracy too soon, before we built the institutions, so we're having a really hard time settling who the next government of Iraq is going to be. That's a problem. It's a challenge. It's going to remain a challenge.

The drawdown is on track, as necessary. The President gave a speech on this to the, I think, the Iraq and Afghanistan Veterans of America very recently. I just read about it in the press today. We're going to draw down to 50,000 soon, by August of next year. I'm confident that when an Iraqi government is, in fact, formed, the first thing they'll do is establish a new Status of Forces Agreement with the United States. It's in Iraq's interest to have a long-term security relationship with the United States. It's in the United States's interest. It's in the region's interest. The only people whose interest it's not in is Iran's. Things that Iran doesn't like I'm generally in favor of, but Iraq has purchased M1A1 tanks. They are negotiating to purchase F-16s. Those of you who work in this sort of law work in State Department Pol-Mil and places like that. Our arrangements are not set up properly. It has taken way, way too long to cut through and sell them the F-16s that they need and that we need them to have, but the hard part isn't flying the planes; it's keeping them up in the air. It's going to take a long time for them to develop that capacity. I think there are going to be Americans in Iraq for a long, long time. I think that's okay, and, frankly, I think the American people are going to think that's okay.

Afghanistan: *The Economist* has a really good piece on WikiLeaks and what WikiLeaks shows us; probably the smartest piece I've seen. In short, *The Economist*'s argument is what WikiLeaks shows us is that we were not fighting using counterinsurgency methods in Afghanistan. What we were doing was fighting using counterterrorism methods, and it wasn't working. We were not building the institutions. We were not improving the governance. All we were doing was killing or capturing enemies, and without changing the underlying dynamics, you're just going to produce more insurgents.

That situation really started to change in 2009. President Obama has been remarkably consistent, I would argue, in what he's campaigned on versus what he's implemented. He said he was going to shift resources from Iraq to Afghanistan, and he wasn't kidding. He conducted two full policy reviews over the course of 2009. The first one doubled the number

of U.S. troops in Afghanistan, and the last one, announced on December 1st, increased U.S. troops by another 30,000. We're still building up to the total 100,000. The last of the 100,000 should be on the ground this month, but the counterinsurgency campaign hasn't really caught hold there yet.

The year 2009 was also a decisive year in Pakistan. The relationship with Pakistan has been troubled. "Troubled" doesn't half do it justice, does it, but in 2009 the Pakistani Taliban clearly became a strategic threat to the continued existence of Pakistan. This occurred when the Taliban took the Swat River Valley. Swat is to Islamabad as the Hamptons is to New York City. It's about that far away, and they use it for the same thing. It's sort of a vacation spot. The Pakistani government, you may recall, in February of 2009 came to an agreement with the Pakistani Taliban that they were going to cede control of the Swat River Valley. They were going to give that over to the Taliban. That was an extraordinarily underreported, underappreciated diplomatic offensive from the President, through Petraeus, up and down, to Admiral Mullen.

Admiral Mullen is in Pakistan once a month. The Chairman of the Joint Chiefs of Staff says that the most important thing he does is establish a personal relationship with the leadership of the Pakistani military. That is his number one priority, and if you look at where he spends his time, that's where he spends his time. Extraordinary. The Pakistani Government just renewed General Kayani for another three-year term—hugely important. The pressure we put on Kayani, on the Pakistani military, and the government led to them clearing the Swat River Valley. It wasn't pretty. They need some work in the hold-and-build phases, but they cleared the Swat River Valley.

Importantly, the vast majority of the Pakistani population is strongly opposed to the United States—strongly, strongly opposed to the de facto Pakistani alliance with the United States. That's decisive. What Pakistan decides to do will ultimately determine whether the government of Afghanistan is able to stand or not. So I applaud Admiral Mullen for the priority he places on General Kayani and on those relationships he's building. A fantastic choice.

We're also very fortunate, I think, to have General Mattis of the Marines. Mattis and Petraeus collaborated on the Army-Marine Corps counterinsurgency manual. Some think that the Army and Marines regularly collaborate on doctrine just because they fight the same kind of

fights, in the same places, against the same enemies, with a lot of the same equipment. We don't. We were able to do so only because of the personal relationship between Mattis and Petraeus, and that relationship, I think, is going to play a big role going forward now with Mattis as the new CENTCOM commander and Petraeus's nominal boss.

We've made big, hard choices. We've pulled out of some of the valleys that we've had horrific fights in. We tried to conduct counterterrorism in valleys at the ends of long supply lines and lost large numbers of our finest to, frankly, no strategic effect. We've pulled out of a number of those valleys. General McChrystal started this process, Petraeus will continue it, and we're going to put our troops now in population centers.

The effort to build the Afghan military, the Afghan security forces, what I consider to be our exit strategy, has been horribly under-resourced throughout. My last job on active duty was training MiTT teams, military transition teams, for service in Iraq and Afghanistan. It was pretty easy with the Iraq guys. JAGs wouldn't have done this by and large, except at the high level, the ministry levels. The Iraq guys, I could tell them, "This is the team you're replacing. Here are their e-mail addresses. Here are their phone numbers. Here's the VTC I've set up for you to talk with them." It was a smooth process. Folks going to Afghanistan, as they were getting on airplanes, I couldn't tell them who they were going to replace, and when they got to country, they were broken up. The sixteen-person teams I had trained were broken up into three- and four-person teams and assigned to this battalion, this kandak (Afghan battalion), this kandak, that kandak, this police station. We—the United States of America—in the summer of 2009, were manning our identified requirement for advisors to the Afghan Army at fifty percent; to the Afghan police at thirty-three percent.

It shouldn't be a big surprise that they haven't improved at a rapid rate. We literally started fixing this in November of last year, November of 2009 when Lieutenant General Bill Caldwell was assigned to take over training the Afghan security forces. He was a three-star. His predecessors had all been two-stars. We started taking the Iraqi military seriously when we assigned a three-star to it, but that was Petraeus in 2004. We're five years behind in Afghanistan where we were in Iraq; that'd be true even if Iraq and Afghanistan were equivalent. The Iraqis all knew how to read; they didn't know how to fight. The Afghans all

know how to fight but not very many of them know how to read. It's tough to teach somebody to read, so we've got a lot of work to do.

AUDIENCE MEMBER: Sir, in your opinion, why were things so calm in Afghanistan in '03, '04, and '05?

DR. NAGL: There's a number of reasons for that. One of them is we didn't have enough forces to go an awful lot of places, and we really whacked the Taliban pretty hard in 2001 and scattered them, dispersed them, pushed them back across the border into Pakistan. They grew there over a number of years. There was a lot of hope initially that the Karzai Government was going to be effective and the people were willing to give him a couple of years, but the Government didn't get better; the people's lives didn't get better; the Taliban grew stronger; and there really weren't even enough of us to see what was happening and understand what was going on.

We handed over control to NATO in 2006. NATO is not designed for this kind of fight, the NATO command structure was not well designed for this, and we weren't paying attention. Quite frankly, Iraq sucked all the oxygen out of the room, and President Obama, I think, when he was campaigning on Afghanistan as the forgotten war, didn't know how right he was. When the new administration assumed office in January 2009, there was a request for additional troops sitting on the President's desk that had been waiting there for a number of months, that the last administration hadn't acted on, and the administration didn't want to reinforce Candidate Obama's narrative that they'd been asleep at the switch in Afghanistan, but that is increasingly acknowledged to be the case.

Now there are lots and lots of questions. This is going to be a tough fight. When Petraeus took command in Iraq, things were far, far worse than they are in Afghanistan right now. The big question is whether the United States is going to have the political will to do what needs to be done in Afghanistan over the amount of time that's going to be required. My belief is that the answer is yes. It's a very interesting generational debate. There's a lot of push back from folks who are a generation senior to me; those who are still alive. Why do I think we're going to be able to do in Afghanistan what we weren't able to do in Vietnam, the single biggest difference?

AUDIENCE MEMBER: No draft.

DR. NAGL: No draft, right? All volunteer force. The all volunteer force, which was never designed to fight two protracted wars, has held up far better than anybody ever could have imagined. We're seeing the strain, in particular in my former service, in the Army. The suicide rate in the Army now exceeds that of the general population. That's never been the case. It shouldn't be the case.

It's tough to get into the Army, right. Our soldiers have to meet high standards of fitness, health, intelligence, and character to wear the cloth of the nation, so the fact that a subset of the American population that has all those advantages, that has a job, that has people who care about them is still committing suicide at the rates the U.S. Army is now seeing is a sign of cracks along the waterline. And the numbers are extraordinary. We lost more than one a day to suicides in June. In 2009, the Army lost more to suicides than it did to war in Iraq and Afghanistan combined. And General Chiarelli, who I've talked about a couple of times today, has been, I think, spectacular in grasping this bull by the horns and putting a lot of resources against it. But this is a long-term problem, I think. Dealing and caring for the wounded from this war and, in particular, those with silent wounds—the PTSD and the traumatic brain injury—is going to be hard, and it's going to take a long time.

A few lessons from these fights: IEDs aren't going to go away. It used to be that you'd engage in diplomatic relations with the state. You'd declare war, break off diplomatic relations, fight the war, and diplomatic relations would start again. That's no longer the case. Obviously, we're not fighting states anymore in our current wars, and so politics continues throughout the war. You don't negotiate with former enemies at the end of the war. You negotiate with current enemies during the course of the war, and figuring that out has been enormously difficult and enormously important. I've mentioned already strategic communications a little bit and the unfortunate case of General McChrystal, a great American, whose counterterrorism success in killing the enemy in Iraq played a much greater role in our successes there than is commonly acknowledged, because he did most of that in the shadows and, partly, because he came from that shadow world that had not grown up working with the media. When you spend most of your career working in units that we officially don't acknowledge exist, you're probably not spending a lot of time drinking beer with the press, so he was not well prepared for the challenge of the media.

At my center, Thom Shanker and Eric Schmitt are writing a history of the war on terror called *Counterstrike*. We just hired David Finkel, who wrote the wonderful book, *The Good Soldiers*, about 2/16 Infantry commanded by Ralph Kauzlarich, my West Point classmate and neighbor at Fort Riley—a fantastic book, beautiful book. Finkel is now looking at some of the long-term effects on America of the wars we're currently fighting. I don't think that our friend from *Rolling Stone* did that profession any services. I think he was playing dirty ball.

AUDIENCE MEMBER: What's your thought on negotiating with the Taliban?

DR. NAGL: Sir, I'll go back to my onion analogy and the core of the onion, the hardcore committed Jihadis—what I call the "big T" Taliban. You can't negotiate with those guys; you've got to capture or kill them. But there are "small t" Taliban. There are economic Taliban, accidental guerrillas. We can, should, and are negotiating with those guys. You peel the onion away to try to make the kill-capture problem as small as you can, and you thwack those guys. We're having far more success against the mid-level insurgents. This is something the *New York Times* piece yesterday got right. We're killing and capturing an awful lot of the mid-level Taliban folks, and it's getting to the point where Taliban are refusing to take promotions. What's the most dangerous job in the world? Number three in al-Qaeda.

The Taliban are saying, "No. I won't take that promotion." When in January, there's twelve of you, and in February there's eleven, and in March there's nine, you start to get the message. And that's literally what's happening. There are a lot more successes happening in Afghanistan than we talk about. The problem is the successes we're having we tend not to be able to talk about, and the WikiLeaks cutoff really happened before we started having those kind of successes, so we can't even get that out.

Security forces assistance. Our exit strategy, our victory strategy, is Iraqi, Afghan, Yemeni. Yemen, we haven't talked about at all. A really scary case, but fortunately a case where there is still a state. We need to improve the Yemeni security forces. There was a great *New York Times* magazine cover story on Yemen and the security challenges we face in Yemen a month ago. We need to build better capacity at the Ministry of Defense, Ministry of the Interior, and I'd put a bunch of you in places like that, all the way down to the battalions and the police stations. We

don't have the capacity we need to do that if, in fact, my picture of the future of war is correct at all.

I helped with the 2010 QDR, and there's some irony there. I work at a think tank now, the Center for a New American Security. My predecessor as the president of that place was Michele Flournoy, who is now the Under Secretary of Defense for Policy, the person responsible for the QDR. In an unofficial capacity, I helped with that, and I was then appointed to the panel to review that. One of the things the QDR didn't get right—and there's a number of reasons for that—is that it did not commit the United States to building more security forces assistance capacity, and that's something our review talks about and something I think we still need to get right. In these kind of fights, the hard part isn't killing the enemy, it's finding him.

Lieutenant Colonel Jeff Bovarnick talked about Galula in his introduction. This is the best book on counterinsurgency still—a spectacular little book. I like to say it's so short an infantryman can read it. You may recall during the run-up to Iraq, there were big, big arguments about how many troops it would take to secure Iraq after the fight, and Paul Wolfowitz, Deputy Secretary of Defense, asked in congressional testimony who could possibly think it would take more troops to secure a country than to topple its government. I like Secretary Wolfowitz, I worked for him, but he got that one wrong, because it's easier to create disorder than it is to create order. So it takes a lot of troops on the ground, a lot of boots on the ground to succeed in a counterinsurgency campaign. We fought and got that number, that historically-based number, in the manual: twenty to twenty-five counterinsurgents for every thousand in the population. In a country the size of Iraq, that's about 500,000; Afghanistan, that's about 600,000. In Iraq right now Iraqi security forces by themselves are north of 700,000; the total Afghan and allied forces in Afghanistan are somewhere between 300,000 and 400,000. So it should be no surprise that in Afghanistan we're not doing as well as we should be, and I've already talked about why, with the failure to resource the security forces assistance effort, that is.

You've got to live among the people because you've got to support the people. Without a secure environment, no permanent reforms can be implemented and disorder spreads. A quick story about that: I was trying to build an Army base inside Khaldiya, inside my town. It kept getting blown up. I'd get it halfway built; it would blow up. I'd get it halfway

built, it would blow up. After the second time it blew up, I got the message—a smarter person would have figured it out the first time—so I got together with my Iraqi battalion commander and said, "I am so saddened. I am so sorry. The station I am building, the barracks I am building for your brave troops in the center of Khaldiya to protect the good people of Khaldiya has been destroyed again by the insurgents. This is horrible. Woe is me. If only I could find a contractor who could provide security." And he said—any veterans, anybody want to guess what he said?

AUDIENCE MEMBER: "I know a person. I know a person."

DR. NAGL: "I know a person, and it's my . . . "

UNKNOWN SPEAKER: ". . . brother."

DR. NAGL: Brother. He said, "My, I wish you had said something. My brother is a contractor. He can build the barracks and my troops can protect it." And I said, "Praise Allah. It is a great day,"—and I paid for his kids to go to MIT. But I got my police station. I got my Army barracks. And they didn't get blown up. So one of the questions I have, and one of the questions you'll get faced with, has to do with "baksheesh." "Baksheesh" is the Arabic word for wetting your beak, for bribery—"bribery" is such a hard word. Give me a—

AUDIENCE MEMBER: Grease.

AUDIENCE MEMBER: Tips.

DR. NAGL: Tips. Gratuities. Grease. Grease is good. So one of the questions I got asked a lot is how much is too much? And my answer was always 12.7 percent; anything above that is gratuitous. But you'll have to figure out how you're going to work that, the fine gray lines of counterinsurgency.

AUDIENCE MEMBER: Sir, could you talk about the nature of coercion in security. For instance, in Malaya we did things which were very coercive: forceful relocation, control of rations to make people toe the line. What is your view on that?

DR. NAGL: So we did, of course, do a lot of that coercion in Iraq, and that is one of the many reasons why Iraq and Afghanistan are

different. Iraq was an urban insurgency, and we didn't relocate the population wholesale as the Brits did in Malaya and as we tried to do without success in Vietnam. In Malaya, they were called new villages, essentially concentration camps, to concentrate the people and to keep them from smuggling food out to the jungles, to the insurgents. In Baghdad, in particular, we built blast walls, and we controlled access to and from neighborhoods. We used that kind of population control to concentrate the population in areas we could control. Galula says that the first thing you do in any counterinsurgency campaign is you wall off the borders, you seal the borders. The second thing you do is take a census and provide identification papers, and then you follow on down the line. This was the lead source for the counterinsurgency manual.

We still haven't done that either in Iraq or in Afghanistan. In a lot of ways, the dispersion of technology to the insurgents has helped the insurgent more than us. One of the places where it hasn't is biometrics, but we have not made the decisions to create biometric IDs for the entire population, either in Iraq or in Afghanistan. This has been a critical error, but not an unsolvable one. It's like training police. It's nobody's job in the U.S. Government to train police, right, and therefore nobody does it. It's nobody's job in the U.S. Government to conduct a census and issue biometric IDs to populations, so nobody does it. So we have not, I don't think, used coercion as effectively as we should have in Iraq or in Afghanistan, particularly in Afghanistan where it's going to be harder because it's a rural insurgency.

UNKNOWN SPEAKER: Sir, on that point, in Afghanistan, where seventy percent of the population is not in urban centers, how do you actually go about securing the civilian population?

DR. NAGL: With Afghan security forces.

UNKNOWN SPEAKER: But in Afghanistan, where they're not used to any sort of central government control and it's a tribal and ethnic breakdown, the security forces that come into a village or a valley may not be well received. How do you go about breaking that resistance down, or are we just really spinning our wheels?

DR. NAGL: Well, I think we have really been spinning our wheels. The immediate effect of Petraeus was breaking a log jam both with the Karzai Government and with the U.S. State Department to build community defense initiatives, to build local security forces from among

the tribes. The State Department was opposed to that; Karzai was opposed to that. Within a couple of weeks, Petraeus got Karzai's signature on it and, the State Department's signature on it. We're now starting to do that at the local level to create the local security forces, and this is something the Brits did very well all over the world when they were responsible for policing their empire. Then, you have to build the tendrils to connect that to the central Government. Rather than imposing from outside, you're building it from the ground up. That's something, I would argue, the Sons of Iraq—the Sawa, the awakening—did in Iraq, and that's the kind of thing that Petraeus is going to try to empower in Afghanistan. His predecessors have not had as many cards in their hands as he has.

Fighting these kind of wars is a lot more like being a cop than it is like being a Soldier. You do social network analysis. The longest chapter in FM 3-24 is intelligence. Even then, we broke a third of the intel chapter off and put it in as an appendix on social network analysis. There's technology we can use to help with that as well, and a bunch of companies are now starting to do that more effectively. In particular—and this is another place where technology can actually help us—cell phone networks are enormously powerful. As you know, they have location tags. My own personal preference would be that we issue everybody in Afghanistan a cell phone biometrically matched to them, which would only work for them, and I think within a couple of weeks we'd have the insurgency defeated. If you know who everybody is and where they are at all times, that would be enormously helpful.

Ultimately, one of the reasons you're protecting the population is to develop local sources of intelligence. I found it easy to do that and really hard to keep them alive because of the state of the insurgency where I was. You'll have seen, I think, the *Washington Post* three-part series on Top Secret America,[18] which talked about the explosion of Top Secret clearances and of analysts and of the U.S. Government contracting out an awful lot of these responsibilities; if you haven't looked at it, you should. It's a far better use of your time than going through the WikiLeaks stuff.

[18] Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, *available at* http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/.

Have you guys read Heidi and Alvin Toffler?[19] Anybody? They say there have been three revolutions in human history. Only three in all of 5000 years of recorded history. Go ahead, back row.

AUDIENCE MEMBER: The Agrarian, the Industrial, and the Informational.

DR. NAGL: Great. Fantastic. So the three revolutions in human history are the Agricultural, the Industrial, and the Informational. Each of them has huge implications for how we fight. The Agrarian Revolution, when we domesticated plants and animals, allowed us to live in one place, accumulate a surplus—and that invariably leads to Longaberger baskets and all the stuff that we carry with us on PCS moves, right? But we also use that surplus—being the wonderful species we are—to more efficiently kill each other, and we developed agricultural age warfare. Probably the pinnacle of agricultural age warfare was Napoleon: huge, vast armies killing each other with frankly limited effectiveness. They had to get pretty close to each other to succeed.

Then there was the Industrial Revolution and the great wars of the Industrial Revolution, including here in Virginia—the U.S. Civil War all the way through, I would argue, to the Franco-Prussian War and the First World War, when we applied industry, mass production, rifling, and the railroad to warfare. How did our agricultural age military institutions do at adapting to war in the industrial age? Not so well. The Germans at the Somme described the Brits—have you heard this quote?

AUDIENCE MEMBER: Lions led by donkeys.

DR. NAGL: Lions led by donkeys, exactly where I'm going. The enormously brave British troops led by agricultural-age generals who couldn't understand that marching into machine gun fire was no way to achieve success, and it took a long time for the agriculture age military institutions to adapt to war in the industrial age. Really the people who figured that out first were, I would argue, the Brits. The thinkers were the Brits, but the people who implemented it were the Germans. They created blitzkrieg, and it took us a while to catch up.

We are now living in the information age and conducting war in the information age, and it would be surprising if industrial age generalship

[19] ALVIN TOFFLER, THE THIRD WAVE (1980).

adapted immediately to war in the information age. So, I would argue that we're living through a really fundamental shift. The first information age war was, arguably, Vietnam, where we never lost a battle but we lost the war. It used to be to win a war you had to defeat the enemy army on the battlefield; that's no longer the case. You can win the war through information media; that's the world we're living in now. Stan McChrystal was defeated not by the Taliban, not by al Qaeda, but through the mechanism of information. It's a hugely important change, I would argue.

In this kind of war, the key terrain is the people, and information, I think, is the single overriding factor. But there are a whole lot of other factors driving change in warfare. Nuclear weapons have essentially made the world safe for low intensity conflict; great powers no longer wage war against each other once they have nuclear weapons. American conventional superiority, I think, is likely to continue. Globalization—the almost instantaneous, almost free exchange of ideas around the globe—is increasing the rate of technological change. Urbanization—seventy percent of the world's population now lives in urban centers, most of them within 100 miles of the seashore. Climate change—it's increasingly hard to argue against climate change. Population growth—increasing. Resource depletion. All this adds up to another bloody century but one in which states that are too weak are the problem; "another bloody century" is Colin Gray's phrase.[20]

In the 20th century, the primary problem of international relations was states that were too strong: Germany twice and then the Soviet Union for fifty years. In this century, the 21st century, I argue that the primary problem of international relations is states that are too weak. Admiral Mullen has said, correctly, in my opinion, that the greatest threat to the United States today is Pakistan, not because Pakistan is such a big, powerful state that it's going to take us out, but because it's such a weak state that it's unable to control what happens inside its borders, that in an industrialized, globalized world, what happens in the tribal areas, the ungoverned areas of Pakistan, can affect us here.

AUDIENCE MEMBER: Sir, have you had any experience working with sector security reform?

---

[20] *See* COLIN S. GRAY, ANOTHER BLOODY CENTURY (2005).

DR. NAGL: I think that it's a step in the right direction. My big picture argument is that the Department of Defense has done a fairly remarkable job of adapting in the nick of time. We came damn close to losing in Iraq, but the Department of Defense did adapt in time in Iraq. I think it has adapted just in time in Afghanistan, but DoD is way in front of the rest of Government. We really need an expeditionary State Department. USAID[21] has been gutted. The old USAID was expeditionary, but it no longer exists. There were more USAID officers serving in Vietnam in 1968 than there are in all of USAID to cover the whole world today. In the State Department—you guys know the line—there are more members of military bands than there are foreign service officers to cover the world. Fundamentally, that says we're not serious as a nation about these security problems if we're not willing to pay for the foreign service officers that we need to cover the world, as part of globalization, in the information age we live in; we can replace the bands with iPods. If we're in such trouble as a nation that it's a choice between military bands and doubling the number of foreign service officers, let's double the number of foreign service officers. So, some of the State Department's reforms are absolutely in the right direction.

Former Senator, now Secretary, Clinton has done a good job of pushing State in the right direction, I believe, but they just don't have the resources. They are finally doing a QDDR, Quadrennial Diplomacy and Development Review. We know what the answer is going to be: we need more foreign service officers; we need more USAID. They can use that to go back to Capitol Hill and say, "Hey, Senators, we need more money for State." It's a fundamental problem. The most effective advocates we've had for increasing the resources of the State Department have been the military. Gates, in particular, has just been spectacular. We've got to get the uniforms saying, "We need more State Department," but it's going to be hard to do in the budget crisis we're facing. If I'm right, if states that are too weak are now the biggest problem, we need more foreign service officers. We need more foreign service officers even more than we need more ships—and we need more ships.

All these factors, I would argue, are making general war less likely—certainly for the United States, for the great powers of the world—but they're also making stable peace less likely. We're moving toward this middle part of the spectrum of conflict, and I think that's likely to remain the case for the remainder of your careers.

---

[21] U.S. Agency for International Development.

We still need more work in UAVs.[22] Clearly, the future is UAVs. In 2009, the Air Force for the first time ever trained more of these kind of pilots than the seat-of-the-pants kind of pilots. That trend will continue. Without a doubt we're moving to the point where we're going to be flying unmanned planes off carrier decks. It's sad; I got it. My dad was a carrier pilot for a while. It's sad. It's happening. And it gives us all sorts of capabilities.

Contracting reform—I did a big study on this over the last year at my think tank. There are more contractors than U.S. military on the ground in Iraq and in Afghanistan right now. More contractors than U.S. military. More contractors than U.S. Government personnel in both of those fights. The ratios are only going to increase in Iraq as we draw down uniforms, because the President doesn't have to brief, "I've drawn down to 20,000 U.S. Soldiers in Iraq." Nobody asks how many U.S. contractors are on the ground. That gives a lot of flexibility for foreign policy.

History shows us that smaller, irregular forces have, for centuries, found ways to harass and frustrate and sow chaos. Harassed, frustrated, and suffered from chaos—that's my definition of service both in Iraq and in Afghanistan. We can expect that this kind of warfare will remain the mainstay of the contemporary battlefield for some time. These are the kind of fights we're going to be fighting. We've gotten a lot better at them, but we still have a long way to go. This learning process and this doctrinal evolution remains very much a game in being.

You can all influence this. You are the people that commanders—knuckle draggers like I used to be—look to for intellectual stimulation, for ideas, for deep thinking. You can help, and I'd ask you to think hard. The publication of the *Counterinsurgency* manual is the second time a field manual has been published by a university press. The first was the Marine Corps *Small Wars Manual*, published by Kansas State University. This is the second, published by the University of Chicago Press, but this is the first one that I know of that has an annotated bibliography in it. The state of thinking and learning is very much a game in progress. You are all part of that learning, and I thank you very, very much for serving your country in a time of war and for your patience with me today.

---

[22] Unmanned aerial vehicles.

THE SECRETS OF ABU GHRAIB REVEALED: AMERICAN SOLDIERS ON TRIAL[1]

REVIEWED BY FRED L. BORCH III[*]

This is an important book. Its authors—a former Army Judge Advocate (JA) and a retired military police investigator—insist that their "only purpose" in writing *The Secrets of Abu Ghraib Revealed* "is to set the record straight on what occurred at Abu Ghraib during the latter half of 2003."[2] Since both men were part of the prosecution team that investigated and then court-martialed the American Soldiers who abused Iraqi detainees at Abu Ghraib,[3] the book provides an inside look at what Major General (MG) Antonio Taguba later concluded was a violation "of the Geneva Convention . . . our own principles . . . the core of our military values."[4]

The book's organization is straightforward and simple: a chronological telling of the prosecution of the Abu Ghraib accuseds. It starts with the April 2004 *60 Minutes II* television news segment that shocked the world with its broadcast of graphic photographs.[5] It then introduces the prosecution team[6] and discusses how the Army attorneys and investigators gathered the evidence needed to prosecute the soldiers

---

[*] Presently assigned as Regimental Historian and Archivist, U.S. Army, Judge Advocate General's Corps, The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia; M.A., History, 2007, University of Virginia, Charlottesville, Virginia; M.A., National Security Studies, *highest distinction*, 2001, Naval War College, Newport, Rhode Island; LL.M., 1988, TJAGLCS, Charlottesville, Virginia; LL.M., *magna cum laude*, International and Comparative Law, 1980, University of Brussels, Belgium; J.D., 1979, University of North Carolina, Chapel Hill, North Carolina; A.B., 1976, Davidson College, Davidson, North Carolina. Fred Borch is the author of a number of books and articles on legal and non-legal topics. *See, e.g.*, FRED L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA (2004). His latest book, *For Military Merit: Recipients of the Purple Heart* was published by Naval Institute Press in 2010.

[1] CHRISTOPHER GRAVELINE & MICHAEL CLEMENS, THE SECRETS OF ABU GHRAIB REVEALED: AMERICAN SOLDIERS ON TRIAL (2009).

[2] *Id.* at x.

[3] Then-Captain Chris Graveline participated as a central member of the prosecution team. *Id.* at 14–26. Then-Master Sergeant Mike Clemens served as one of the lead investigators for the prosecution. *Id.*

[4] Seymour M. Hersh, *The General's Report*, NEW YORKER, June 25, 2007, at 69.

[5] GRAVELINE & CLEMENS, *supra* note 1, at 8–16.

[6] *Id*. at 14–26.

for assault, maltreatment, dereliction of duty and other offenses.[7] The book then examines each of the cases against the twelve Soldiers ultimately court-martialed for their actions at Abu Ghraib: Lieutenant Colonel (LTC) Steven L. Jordan;[8] Staff Sergeant Ivan "Chip" Frederick;[9] Sergeants Santos Cardona,[10] Javal Davis,[11] and Michael Smith;[12] Corporal Charles Graner;[13] Specialists Megan Ambuhl,[14] Armin Cruz,[15]

---

[7] *Id*. at 103–16, 145–48.

[8] On 28 August 2007, Jordan was found not guilty of all charges and specifications related to prisoner abuse, but found guilty of disobeying an order not to discuss with others any statements he made during the course of the investigation into abuse at Abu Ghraib. The court sentenced him to be reprimanded. The convening authority subsequently disapproved both the findings and sentence. GRAVELINE & CLEMENS, *supra* note 1, at 306; Michelle Tan, *Lt. Col. Is First Officer Charged for Abu Ghraib*, ARMY TIMES, May 15, 2006, at 12; Josh White, *Army Drops More Charges in Officer's Abu Ghraib Case*, WASH. POST, Aug. 21, 2007, at A4; Josh White, *Abu Ghraib Officer Is Reprimanded*, WASH. POST, Aug. 30, 2007, at A10..

[9] Frederick pleaded guilty to assault, indecent acts and dereliction of duty. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to the grade of E-1, and ten years confinement. As a result of a pre-trial agreement, his term of imprisonment was reduced to eight years. GRAVELINE & CLEMENS, *supra* note 1, at 164–83, 306.

[10] On 1 June 2006, a military court found Cardona guilty of dereliction of duty and aggravated assault. The court sentenced him to ninety days hard labor and reduction to the grade of specialist. After his court-martial, Cardona remained in the Army and was promoted to sergeant. He subsequently left active duty and took a job as a civilian contractor in Afghanistan. He was killed there by an improvised explosive device in 2009. GRAVELINE & CLEMENS, *supra* note 1, at 305; R. Jeffrey Smith & Josh White, *Abu Ghraib Dog Handler Is Found Guilty*, WASH. POST, June 2, 2006, at A5..

[11] Davis pleaded guilty to assault, dereliction of duty, and making a false official statement on 1 February 2005. The court sentenced him to be confined for six months imprisonment, to be reduced to the lowest enlisted grade, and to receive a bad conduct discharge. GRAVELINE & CLEMENS, *supra* note 1, at 305.

[12] On 21 March 2006, a court-martial convicted Smith of a variety of offenses, including assault, dereliction of duty, and committing an indecent act. He was sentenced to be confined for 179 days, a fine and reduction to the lowest enlisted grade, and a bad conduct discharge. *Id.* at 306.

[13] A general court-martial convicted Graner of conspiracy, dereliction of duty, maltreatment of detainees, and committing an indecent act with trainees. On 14 January 2005, the court sentenced him to ten years confinement, total forfeiture of pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. *Id.* at 253–65, 305.

[14] On 30 October 2004, Ambuhl pleaded guilty to dereliction of duty at a summary court-martial. She was reduced from SPC to the lowest enlisted grade. Ambuhl later married Graner. *Id.* at 193–96, 305.

[15] Cruz pleaded guilty to conspiracy and maltreatment at a special court-martial. On 11 September 2004, the court sentenced him to be confined for eight months, reduced to the lowest enlisted grade and a bad conduct discharge. *Id.* at 148–49, 154–58, 305.

Sabrina Harman,[16] Roman Krol,[17] and Jeremy Sivits;[18] and Private First Class Lynndie England.[19] Finally, the book concludes with a very short three-page "epilogue"[20] that offers some concluding thoughts on the meaning of the Abu Ghraib cases.

The Secrets of Abu Ghraib Revealed is an important book because it tells a 'good news story' about the Army, Judge Advocates and the court-martial process—and consequently provides a much needed counter-weight to the seemingly never-ending 'bad news' reports about crime in the Army and the military justice system. First, and most importantly, the book shows that the Army lawyers involved in the Abu Ghraib cases used the military justice process as it was intended to be used. There were no shortcuts and no games and the process was never affected, much less harmed, by partisan politics, the media, or international outrage.

Second, Graveline and Clemens demonstrate conclusively that the abuse of the Iraqi detainees at Abu Ghraib resulted from the private actions of a small group of poorly led, poorly supervised, and poorly trained Soldiers. While the media suggested otherwise,[21] there were no direct orders (or guidance) from military intelligence personnel or other superiors in the chain of command to humiliate these Iraqi detainees in order to facilitate upcoming interrogation sessions. On the contrary, *The*

---

[16] The court convicted Harman of conspiracy, dereliction of duty and maltreatment. On 17 May 2005, she was sentenced to be confined for six months, to be reduced to the lowest enlisted grade, and to be discharged with a bad conduct discharge. *Id.* at 306.

[17] On 1 February 2005, Krol pleaded guilty to conspiracy and maltreatment. A special court-martial sentenced him to ten months imprisonment, reduction to the lowest enlisted grade, and a bad conduct discharge. *Id.* at 256, 306.

[18] On 19 May 2004, Sivits appeared before a special court-martial and pleaded guilty to conspiracy, maltreatment and dereliction of duty. The court sentenced him to twelve months confinement, reduction to the lowest enlisted grade and a bad conduct discharge. *Id.* at 306–07.

[19] At a general court-martial convened at Fort Hood, Texas, on 22 September 2005, England was found guilty of conspiracy, maltreatment, and committing an indecent act. On 26 September, she was sentenced to be confined for three years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. *Id.* at 254–65, 273–79, 305–06.

[20] *Id.* at 299–302.

[21] *See, e.g.*, Kelly Kennedy, *2-star's Turn on the Stand*, ARMY TIMES, June 5, 2006, at 8; Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1; Josh White, *Conflicting Portraits of Officer Charged Over Abu Ghraib*, WASH. POST, July 31, 2007, at A3; Josh White, *Top Officer Ordered to Testify on Abuse*, WASH. POST, Aug. 19, 2006, at A14..

Secrets of Abu Ghraib Revealed shows that, because none of the abused Iraqis was *ever* interrogated at *any* time by *any* U.S. personnel,[22] this means that the Iraqi victims had no intelligence value. It follows that there was no reason for any person in authority to instruct Frederick, Graner and their fellow Soldiers to maltreat Iraqis under their control for any official purpose.

Why then did the abuse occur? Clemens decided in the course of his investigation that it was mostly for entertainment value,[23] a conclusion with which this reviewer concurs. Graner, for example, in talking about abusing Iraqis said: "The Christian in me knows this is wrong, but the corrections officer in me can't help but love making a grown man piss himself."[24] But, while Graner apparently got a thrill from what he did, the motivations of the other accuseds were more ambivalent. Specialist Harman, for example, took the photograph of a hooded Iraqi, barefoot atop a box, arms outstretched, wires trailing from his fingers—an image that has become "the icon of Abu Ghraib and possibly the most recognized emblem of the war on terror after the World Trade towers."[25] But Harman could not understand the power of the photograph, much less why anyone would find it objectionable: "There's so many worse photos out there. I mean, nothing negative happened to him really. I think they thought he was being tortured, which he wasn't."[26] Ultimately, however, *why* the Soldiers did what they did, while important, is not as important as the fact that their behavior constituted a crime that merited court-martial.

The Secrets of Abu Ghraib Revealed also destroys myths and misconceptions that have persisted in the story's retelling. First, the Army knew about the abuse and had been investigating it months before CBS news showed the photographs on *60 Minutes II*. The Army opened its investigation in January 2004, after a compact disc containing hundreds of photographs of Iraqi detainee abuse was "anonymously slipped under CID's door at Abu Ghraib."[27] Since CBS did not broadcast the photographs until April 2004, those who claim that the Army was 'doing nothing' until CBS revealed the abuse are incorrect.

---

[22] GRAVELINE & CLEMENS, *supra* note 1, at 122 (emphasis added).
[23] *Id*. at 188.
[24] *Id*. at 226.
[25] Philip Gourevitch & Errol Morris, *Exposure: The Woman Behind the Camera at Abu Ghraib*, NEW YORKER, Mar. 24, 2008, at 56.
[26] *Id*.
[27] GRAVELINE & CLEMENS, *supra* note 1, at 53–54.

Second, Graveline and Clemens show persuasively that, regardless of what sort of coercive interrogation was being conducted at the behest of MG Geoffrey Miller at Guantanamo Bay, or what questioning techniques were being authorized by Secretary of Defense Donald Rumsfeld and his subordinates in the Pentagon, the Soldiers at Abu Ghraib were not affected by the practices in Cuba or decisions in Washington, D.C. because they knew nothing about them. Consequently, those who suggest that what occurred in Abu Ghraib was connected to events elsewhere are wrong.

For all its good points, *The Secrets of Abu Ghraib Revealed* is not without its shortcomings. First, it does not address the question of whether the fact that the two 'ringleaders' in the abuse scandal (Frederick and Graner) — and other high-profile accuseds (e.g. England and Harman) — were Reservists is part of the explanation for what occurred at Abu Ghraib. Stated differently: Would an active duty military police unit of Soldiers have abused Iraqi detainees in way that part-time citizen-Soldiers like England, Frederick, Graner and Harman did? Perhaps the explanation is that the Reserve unit to which most of the accuseds belonged, the 372d Military Police Company, out of Cresaptown, Maryland, was dysfunctional, and its status as a Reserve unit had nothing to do with what its members did at Abu Ghraib. Perhaps the explanation is that poor Reserve officer leadership (e.g., LTC Steven L. Jordan) —or the absence of leadership—had a role in what happened at Abu Ghraib. But Graveline and Clemens should have addressed these Army Reserve-related questions, especially as it seems unlikely that Soldiers with character flaws like Graner or Frederick could have succeeded in an active duty, full-time military police unit.

Second, and more importantly, the book ultimately reaches an inconsistent conclusion that undercuts its message. The principal theme of the book is that misconduct of the Abu Ghraib accuseds was not ordered by any superior, was not done in furtherance of some military intelligence objective, was not the result of some Pentagon directive. On the contrary, the prosecution theory of the case was that the accuseds assaulted, humiliated, and mistreated the Iraqis for their own personal entertainment and gratification, and that they alone are to blame for what they did. Yet Graveline writes the following at the end of the book:

> *Quite a winding and convoluted road. If one thing is clear from the entire mess that was Abu Ghraib, it's that neither the theory of a few bad apples nor that it was all*

ordered from the administration is correct … as always, the truth lies somewhere in between.[28]

But this isn't a true statement. The truth was not "somewhere in between"—at least Graveline and Clemens found no evidence that what occurred was anything other than what they argued at every court-martial: that each accused was guilty as charged and had no legal justification or excuse for his or her criminal acts. Why *The Secrets of Abu Ghraib Revealed* suggests otherwise is a mystery.[29]

A third and final criticism, albeit minor, is the book's use of descriptive language for individuals appearing in the pages. These references are distracting and sometimes irritating. For example, one senior Judge Advocate is described as "a spark plug of a man . . . short, sturdily built . . . with an endless store of energy. Raised in the 82d Airborne Division, he bore the telltale signs of an Airborne soldier."[30] Another attorney is "[a] tan, muscular man with slicked-back, jet-black hair and a mustache," and "donning expensive clothes."[31] Still another is "a block of a man whose graying crew cut accentuated his square facial features."[32] These descriptions are unnecessary and add little to the narrative; they are surplusage.

Two final points: Conversations that occurred between judge advocates and commanders, and which are arguably protected by attorney-client privilege, are divulged in these pages.[33] Some may argue that allowing Graveline and Clemens to reveal the substance of these conversations will cause commanders to be less than frank in their discussions with their legal counsel—because these commanders may see their words in print. While such concerns are valid, on balance, it was both wise and proper for the Army to waive any confidentiality concerns so that this accurate, insightful, and valuable story about Abu Ghraib

---

[28] *Id.* at 298 (emphasis and omission in original).
[29] *See, e.g.*, JANIS KARPINSKI, ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY (2006) (providing a commander's perspective of the incidents at Abu Ghraib); GARY S. WINKLER, TORTURED: LYNNDIE ENGLAND, ABU GHRAIB AND THE PHOTOGRAPHS THAT SHOCKED THE WORLD (2009) (recounting the events from England's perspective).
[30] GRAVELINE & CLEMENS, *supra* note 1, at 43.
[31] *Id*. at 29.
[32] *Id*. at 74.
[33] *Id*. at iv. *See also* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.6, r. 1.13 (1 May 1992) (providing information on "Confidentiality of Information" and "Army as Client").

reaches the widest public audience. Finally, the fifteen black-and-white photographs in the book are a plus, and the authors and publisher are to be commended for including them.

Since virtually all the investigative work, and most of the prosecutions, occurred in a deployed environment, *The Secrets of Abu Ghraib Revealed* proves that high-profile courts-martial can be conducted in a combat zone—and that the Uniform Code of Military Justice works in wartime. The book also shows that Judge Advocates involved in the Abu Ghraib cases never lost sight of the fact that ensuring that the military justice process worked the way it was designed to work was more important than any results at trial.

TORTURED: WHEN GOOD SOLDIERS DO BAD THINGS[1]

REVIEWED BY MAJOR MARK T. SCHNAKENBERG[*]

The war waged within the detention centers and the damage it does to both soldiers and detainees is far subtler than what happens in combat. When compared to soldiers who have had their faces melted and limbs blown off by IEDs, it is difficult to see the soldiers who worked in prisons as true victims of war.[2]

I. Introduction

In *Tortured: When Good Soldiers Do Bad Things* (*Tortured*), Justine Sharrock makes a sweeping attempt to portray all soldiers assigned to the Guantanamo Bay and Abu Ghraib detention facilities as torturers. To Sharrock, they are merely victims of a higher chain-of-command and must unquestionably follow orders. *Tortured* serves as excellent entertainment reading and even offers some insight for military criminal attorneys. However, the book ultimately fails as scholarly writing because it lacks accuracy, reliability, and legal perspective. As the following sections explore, Sharrock defeats her own thesis by taking a number of shortcuts.

II. The Vague Concept of "Torture Lite" and the Failure to Define Torture

With torture in the title of her book, any reader would expect the author to define the term with clarity and precision. The concept "torture" is admittedly difficult to define, and a universal definition has been the source of much consternation between scholars and practitioners in the United States and the international community.[3]

---

[*] Judge Advocate, U.S. Marine Corps. Student, 59th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] JUSTINE SHARROCK, TORTURED: WHEN GOOD SOLDIERS DO BAD THINGS (2010).

[2] *Id.* at 235.

[3] Torture is defined by the 1984 UN Convention against Torture as follows:

While Sharrock describes detailed examples of what she believes to be torture,[4] common sense and logic dictate that one must define torture prior to condemnation.[5]

Sharrock would have the reader believe torture encompasses almost anything if the action is taken against a detainee's will. Rather than

---

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984).

Contrastingly, torture is defined in 18 U.S.C. § (1) (2006) as follows:

> [A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; **(2)** "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from**—(A)** the intentional infliction or threatened infliction of severe physical pain or suffering; **(B)** the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; **(C)** the threat of imminent death; or **(D)** the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and **(3)** "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

[4] SHARROCK, *supra* note 1, at 5 (referring to the abandonment of a detainee in a restraint chair for days without food or water); *id*. (referring to the practice of keeping detainees standing throughout the night in a hot Conex box); *id.* at 65 (commenting on subjecting detainees to sleep deprivation, stress positions, and forced physical exercise such as jumping jacks).

[5] *Id*. at 4. According to the author, "the legal definition of torture is based on the level of intensity, a nuance the [Bush] administration, its lawyers, the military, the perpetrators, and even the general public have tried to turn into a loophole." *Id.*

explaining the necessary elements of torture, Sharrock spends infinitely more time on how torture impacts the victim and perpetrator.[6]

Instead of defining torture, Sharrock sidesteps the issue with the adoption of the undefined term "torture lite."[7] This vague concept, which literally means less than torture, allows her to conclude that nearly all detainee handling amounts to torture.[8] She cites examples of solitary confinement, short-shackling, forced standing, and even sleep deprivation to illustrate instances of torture.[9] Instead of allowing the reader to develop his or her own definition of torture (in the absence of her own definition), the author imposes the vague overly-broad term torture lite on the reader. This enables Sharrock to keep anti-torture activism relevant to any current or future conflict.

Sharrock also misses a perfect opportunity to define and expand upon appropriate detainee handling methods. The reader is left without guidance to address the treatment of unprivileged enemy belligerents. Sharrock tells us what is wrong, but cannot, or utterly fails to, define what is right.

In the end, Sharrock disappoints the reader on three fronts. She fails to provide a precise definition of torture, she provides the vague concept of torture lite which essentially encompasses everything, and then she fails to address appropriate detainee handling. The author's oversight in defining torture is compounded by her view that all soldiers are victims.

III. The Concept of Soldiers as Victims

Sharrock takes an unrealistic and uninformed perspective on military functions, roles, and customs without putting any effort into understanding the overall military culture. The result is an over-emphasis

---

[6] *Id.* ("So-called torture lite has been proven to cause complete psychological breakdowns, permanent physical ailments, and sometimes death. Forced standing, for instance causes ankles to swell to twice their size within twenty-four hours, which makes walking excruciating."); *see also id.* at 5 ("[A]s Albert Camus explained, torture is a crime that attacks the victim and the perpetrator. It has proved to be so insidious a machine that every cog—even those merely associated with it—is affected.").

[7] *Id.* at 3.

[8] *Id.* at 3–6 (explaining that torture includes "harsh techniques" to "soften up" detainees such as short shackling, solitary confinement, sleep deprivation, missing meals, and blaring foghorns throughout the night).

[9] *Id.* at 4.

on the personal human qualities of her four featured soldiers[10] and an avoidance of basic professional military skills, qualities, and responsibilities.

Sharrock's broader thesis is that America tortures,[11] the Bush Administration is the victimizer,[12] and low-level rank-and-file soldiers are the victims.[13] If this last prong of her expansive thesis falls apart, then Sharrock's entire assertion is unfounded.

In Sharrock's view, the decision to serve in the military signals the death of the human spirit, transforming a soldier into nothing more than a robot. The U.S. Government has the ability to place any man or woman into the military machine and create torturers. Soldiers are helpless against military leadership because they are required to follow orders. Sharrock never delves into instances in which U.S. soldiers reject unlawful orders, the absence of which thoroughly undermines the third prong of her argument that would characterize U.S. soldiers as pawns.

To emphasize the victimization, Sharrock repeatedly reminds us that her featured soldiers are human beings. Sharrock continually urges the reader to be sympathetic to their plight. Her over-simplistic view mirrors the humanistic approach used by military outsiders and protesters who criticize military service.

However, military service is infinitely more sophisticated than Sharrock's model. Despite its demanding requirements, the military service facilitates independent critical thinking and cultivates leaders at every level. When orders are issued, each soldier is expected to evaluate the order and the situation. It is the responsibility of each individual soldier to seek clarification when necessary and his or her obligation to disregard illegal orders.[14]

---

[10] *Id*. at 3 (referring to the author's interview subjects: "It was strange to think that these young all-American men could be counted as our country's torturers. They were run-of-the mill blue-collar folks—the guy next door, the kid in the back of your high school class room, the teenager bagging your groceries.").
[11] *Id*. at 238.
[12] *Id*. at 237–39.
[13] *Id*. at 235–36.
[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2)(a)(i) states that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."

The mere presence of whistleblowers, inspector general complaints, congressional inquiries, mast request procedures, and Article 138 complaints in the military undermines and ultimately defeats the assertion that low-level service members are helpless robotic pawns and therefore victims of so-called torture policy. Each process listed above represents a necessary check-and-balance that also contravenes the author's thesis. In the end, each soldier is trained to be a leader, and is encouraged to be an independent critical thinker with a variety of recourse methods at his or her disposal.

Sharrock's failure to define torture and her belief in the victimization of soldiers are largely based on her flawed investigative approach to this book. Sharrock broke a key rule of journalism: she became too close to her subjects.

IV. The Adoption of an Overly-Sympathetic Viewpoint

A cardinal sin of journalism is to become so attached to the subjects that the journalist loses perspective, objectivity, and therefore credibility.[15] In *Tortured*, Sharrock becomes so attached to her subjects that she assumes their respective roles and abandons her position as narrator.[16] Generally accepted principles of journalism indicate one cannot report on events and also participate in them.[17] When a journalist becomes attached to those he covers, this clouds all other tasks he must perform as a disinterested reporter.[18] Objectivity, professionalism and persuasion are diminished, and the journalist no longer holds the trust of sources or participants on each side of the issue.[19] Sharrock's tone, perspective, and agenda are so slanted that she becomes untrustworthy in the eyes of the reader.[20] Sharrock's comments about her research verify her attachment to her characters: she traveled to the various homes of her

---

[15] BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 12–13 (2001).

[16] SHARROCK, *supra* note 1, at 7. The following quotes indicate the magnitude of the author's bias on this topic and the degree to which she has stepped into the shoes of her four featured characters. "Even within war, there are certain lines that should not be crossed. In this war—and the next and the next—someone will always argue that there is a line, a moral line, that divides us from our enemies." *Id*. at 235. "The war waged within the detention centers and the damage it does to both soldiers and detainees is far subtler than what happens in combat." *Id*.

[17] KOVACH & ROSENSTIEL, *supra* note 15, at 97.

[18] *Id*.

[19] *Id*.

[20] SHARROCK, *supra* note 1, at 235.

subjects, spent weeks at a time with them and their families, asked them endless questions,[21] hung-out with them in bars, and even acted as a "wingman" to help a subject converse with a girl.[22] By telling this story through their eyes, Sharrock necessarily limited her narrative perspective.

Sharrock's literary resume also provides evidence of bias. She's an investigative journalist by trade, but her twenty-five plus articles have all been published in well established left-leaning works such as *Mother Jones*, *Alternet*, and the *San Francisco Chronicle*.[23] Ultimately, the veracity of Sharrock's work is questionable given her overly sympathetic viewpoint, loss of objectivity, and the nature of her past publications. In the discussion which follows, it is clear that poor character selection also detracts from the value of *Tortured*.

IV. Untrustworthy Cast of Characters

Sharrock's featured characters and their various agendas also diminish the quality of *Tortured*. She selected four "easy targets" that are particularly sympathetic to her position. They are the most troubled soldiers with the most moving stories.

First, she tells the story of self-proclaimed tough guy Specialist Brandon Neely, the notoriety-seeker,[24] who successfully dodged redeployment as a member of the Individual Ready Reserve.[25] Neely is the Guantanamo Bay detention facility guard-turned-activist, who

---

[21] *Id.* at vii (acknowledgements).

[22] *Id.* at 239 (referring to Sharrock's promise to play wingman for Chris Arendt as they search for a girl: "One night, Chris Arendt and his roommate, Danny, and I rode rickety bikes across Portland on our way to a bar. We were in search of a girl whom Chris had a crush on, as was often the case when hanging out with Chris. I had promised to play wingman in helping to reel her in, although it didn't seem like he would need much help.").

[23] A search of the www.lexis.com news articles database on 14 September 2010 revealed a range of twenty-five articles in the publications noted above in the text.

[24] *Id.* at 20 (referring to Brandon Neely observing a medic punch a detainee in the face twice while he blocked the line of sight from the watchtower at the Guantanamo Bay detention facility: "Finally, Brandon thought, something akin to being a tough soldier and not just a guard."). *See also id.* at 27 ("Brandon knew he was a good soldier and saw it as his responsibility to ensure that it was the Iraqis who were killed and not Americans.").

[25] *Id.* at 41 ("When Brandon was stop-lossed in May 2007 he refused to go. Despite the potential threat of prison time, he managed to hold out until his discharge date.").

administered the first detainee beating at the facility.[26] Later in life, he withdrew his Iraq Veterans Against the War membership because the organization was ironically no longer aligned with his ideals.[27]

The next character is renowned Abu Ghraib whistleblower, Specialist Joe Darby, who secretly turned over photos depicting detainee abuse to the Army Criminal Investigative Division.[28] Darby, who appears to be the most honest among this group, likely turned over the evidence in order to settle the score with some fellow soldiers or draw attention away from his weight issues and general poor military performance.[29] Darby received the John F. Kennedy Profile in Courage Award in 2005 and has been celebrated for his noble decision to turn over the evidence. At the same time, he is not a particularly bright or dedicated soldier and even refers to himself as "crooked."[30]

Sergeant Andrew Duffy, the Abu Ghraib medic from Iowa, serves as the third character in this book.[31] Duffy lacks all respect for authority and became an activist out of revenge. [32] The intolerable Duffy became so enraged about Abu Ghraib medical practices and his war experience that

---

[26] *Id*. at 17 ("Brandon had the honor of being the first soldier to get to beat up a terrorist. That night, soldiers kept coming up to him to congratulate him.").
[27] Brandon Neely, *Two more IVAW resignations* (December 1st, 2009), THIS AIN'T HELL BUT YOU CAN SEE IT FROM HERE, http://thisainthell.us/blog/?p=15854 (last visited Sept.14, 2010).
[28] SHARROCK, *supra* note 1, at 66–67.
[29] According to Colin Engelback, a Veterans of Foreign Wars post member from the unit's home town, Darby's motivations were not pure. Engelbach speculates that Darby turned over the evidence to avoid duty, go home, or receive a promotion without passing a physical fitness test. Others speculate the action was motivated by revenge against the members of his unit that picked on him and called him "fat bastard." Even Darby admits that he was partially motivated for personal reasons and his general disdain for Sabrina Harman, Charles Graner and Chip Frederick. *Id*. at 83.
[30] *Id*. at 62–63.
[31] *Id*. at 105.
[32] *Id*. at 128 ("Being so impotent in the face of authority enraged Andy, and he had a hard time keeping it bottled up inside."); *id*. at 118 (referring to his experience as an Abu Ghraib medic, "Andy was angry with his commanders and the situation in general–the living conditions were appalling, the war was a joke, they didn't have the proper medical equipment to do their job."); *id*. at 129 ("At his last stop, at Camp Victory, Andy filed an online complaint about his commander's behavior and medical negligence with the Inspector General's office. Since he was on his way out, there was a relative level of safety–by the time anyone discovered what he'd done, he would be back home."). *id*. at 144 (referring to Duffy's decision to become an anti-war activist: "Part of what motivates him is revenge. Speaking out is a way to get back at his superiors, who had put him in that position in the first place.").

he sought to publicly slander his immediate supervisors.[33] His rage affected him to such a degree that he occasionally tears yellow "support the troops" stickers and magnets off vehicles in his hometown.[34]

The final misfit is the overwhelmingly fragile[35] Specialist Chris Arendt, who primarily worked at the Detention Operations Center in Guantanamo Bay.[36] Arendt can be best described as a gross recruiting error.[37] As a member of the Michigan National Guard, he actually reported to a weekend drill with blue hair.[38] On his priority list, smoking marijuana stands above serving his country.[39] Among soldiers, Arendt solidified his spot at the bottom of the worst ten percent in the unit.[40] Anti-war activism became his final refuge because he has lacked an identity his entire life.[41]

The portrayal of Sharrock's featured characters is a major concern throughout the book. All four characters have reason to sensationalize their message to further anti-war activism. Sharrock, who has diminished journalistic integrity, takes no action to guard against bias. The author and her characters portray themselves in any fashion they choose with total subjectivity. The reader is forced to take their word at face value with no scrutiny regarding the accuracy of their statements.

V. Conclusion and Lessons for Judge Advocates

Sharrock claims that America tortures, the Bush Administration is the

---

[33] *Id*.
[34] *Id*. at 133.
[35] *Id*. at 169–70 (Fellow soldier Mike Ross refers to Arendt as unique, soft, and the type of guy that someone might get beat up. Arendt is described by the author as a "sensitive mama's boy who wanted to read and play video games.).
[36] *Id*. at 188.
[37] *Id*. at 169. "A lot of [S]oldiers simply felt sorry for Chris. He was clearly not cut out for the job." Among weekend warriors, who are generally considered a lesser class within the military, Arendt was "the biggest slacker and the least interested."
[38] *Id*.
[39] *Id*. at 161 (referring to Arendt arrival in Guantanamo Bay, Cuba, "Days earlier, Chris had been at home, consumed with thoughts of losing his virginity, making new friends at college, and getting high.").
[40] *Id*. at 169.
[41] *Id*. at 207 (referring to Arendt's new found identity with Iraq Veterans Against the War, "Some of his nonmilitary friends weren't exactly sure what to make of all this. Most of all it seemed odd that Chris had gone from trying to have nothing to do with the military to making his status as a vet his primary identity.").

victimizer, and low-level soldiers are the victims. These claims fail for a number of reasons. Sharrock neglects to sufficiently define torture, and her facts are unreliable. Additionally, she compromises her journalistic integrity as she investigated, researched, and wrote the book. Her arguments fail in part because they are an appeal to passion rather than to reason.

In spite of the author's failures, the book retains some value for judge advocates. *Tortured* is extremely informative on the manner in which a detainee abuse case may be sensationalized and dramatized by the media. This book is also enlightening in terms of case preparation for trial counsel and defense counsel. Defense counsel can use this book as a model and manual in painting their clients as victims. Although the blame-shifting may be unpersuasive, there are various examples of poor command climate, "fog of war" issues, and insufficient leadership guidance in this book. *Tortured* likewise provides instruction for trial counsel in anticipating these defense arguments and the perspective of the liberal media.

For the reader seeking factual accuracy, objectivity, and a comprehensive account of detainee operations at the Abu Ghraib and Guantanamo Bay detention facilities, *Tortured* proves to be of minimal value. Any scholar or historian would be disappointed with this book and should look elsewhere for valuable insights into the much debated aspect of torture in war.

WARRIOR KING: THE TRIUMPH AND BETRAYAL OF AN AMERICAN COMMANDER IN IRAQ[1]

REVIEWED BY MAJOR JAMES T. HILL[*]

I. Introduction

On 3 January 2004, a platoon of U.S. Soldiers detained two Iraqi males for violating curfew in Northern Samarra, Iraq.[2] The Soldiers handcuffed the two Iraqis, took them to a bridge overlooking the Tigris River, and forced them to jump.[3] Later, allegations arose that one of the Iraqis may have drowned.[4] When the brigade commander, Colonel (COL) Fred Rudesheim, became aware of the incident, he discussed it with the battalion commander, Lieutenant Colonel (LTC) Nathan Sassaman.[5] During the conversation, COL Rudesheim told LTC Sassaman, "If water was involved, soldiers are going to be court-martialed."[6] Afterward, LTC Sassaman determined "the subject of water was best omitted from any future conversations"[7] and told the Soldiers' company commander and platoon leader, "Don't say anything about the water."[8] In the months following the incident, two Soldiers would be court-martialed[9] for their involvement and LTC Sassaman would receive nonjudicial punishment, irreparably damaging his career.[10]

Nathan Sassaman, now retired, begins his tell-all autobiography, *Warrior King*, on 13 March 2004 in Tikrit, Iraq.[11] He is awaiting the arrival of Major General (MG) Raymond Odierno,[12] who will preside over Sassaman's nonjudicial punishment hearing to address an allegation

---

[*] Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 2d Brigade, 1st Armored Division, Fort Bliss, Texas.

[1] LIEUTENANT COLONEL (RET.) NATHAN SASSAMAN, WARRIOR KING: THE TRIUMPH AND BETRAYAL OF AN AMERICAN COMMANDER IN IRAQ (2008).

[2] *Id.* at 240.

[3] *Id*. at 240–41.

[4] *Id.* at 240.

[5] *Id.* at 253.

[6] *Id*.

[7] *Id*.

[8] *Id*. at 245.

[9] *Id.* at 287–90.

[10] *Id*. at 265, 269.

[11] *Id.* at 1, 5.

[12] *Id.* at 5–6.

that he impeded an investigation.[13] As Sassaman waits, he evaluates his life, beginning with his strict religious upbringing[14] through his time as a West Point football star.[15] Through this narrative, an underlying theme emerges: Sassaman hates to lose.[16] This background lays the context for the book's thesis: Sassaman implemented a winning counterinsurgency strategy in Iraq[17] and his chain of command betrayed him for his efforts.[18] To support his thesis, Sassaman seeks to convince the reader that ordering his subordinates to withhold information was born of his desire to win the war,[19] was legal, and was justified.[20]

Ironically though, Sassaman's often impassioned efforts to defend his actions are what ultimately undermine his credibility, his thesis, and reveal the most plausible reason for his downfall—leadership failure. While unconvincing, Sassaman's attempts to sway the reader make for an entertaining read, provide valuable lessons on leadership, and offer fascinating insight into the merits of differing counterinsurgency strategies.

II. Post-Invasion Iraq, 2003

Sassaman's reason for ordering his subordinates to withhold information stems from the chaos existing in post-invasion Iraq. By July 2003, U.S. forces were fighting a fledging insurgency[21] fueled by unemployed and disgruntled Iraqi males.[22] In the absence of concrete guidance on how to fight the insurgency, Sassaman implemented his own personal "formula for success."[23] A component of this approach was that "[n]o open defiance, under any conditions, of American authority was allowed."[24] Implementing this directive involved taking the fight to

---

[13] *Id*. at 267.
[14] *Id*. at 14.
[15] *See id*. at 24–38.
[16] *See generally id.* at 13–38 (discussing Sassaman's religious upbringing, development of his competitive spirit, and the moral values instilled upon West Point cadets).
[17] *Id.* at 109.
[18] *See id.* at 9, 267.
[19] *See id.* at 7, 269.
[20] *See id*. at 9, 269.
[21] *Id*. at 72.
[22] *Id*. at 85.
[23] *Id*. at 94.
[24] *Id.*

insurgents, engaging the population aggressively,[25] and holding the population accountable for insurgent attacks.[26] The philosophy underlying this formula was that there would be no lasting success in Iraq until the Iraqis feared the U.S. troops more than they did the insurgents.[27] According to Sassaman, only when this fear was firmly established could U.S. forces initiate necessary socioeconomic reforms.[28]

Despite its initial successes,[29] Sassaman's aggressive strategy put him on a direct collision course with his brigade commander, COL Rudesheim. Colonel Rudesheim preferred a less aggressive strategy Sassaman describes as akin to the "softer, gentler approach" preferred by General (GEN) David Petraeus.[30] Sassaman pejoratively characterizes COL Rudesheim's strategy as "appeasement"[31] overly concerned with "collateral damage"[32] that Sassaman says is the "cost of war."[33] Initially, COL Rudesheim merely encourages Sassaman to tone down his aggressiveness.[34] Later, their differences turn to confrontation and Sassaman develops a pattern of withholding information from COL Rudesheim.[35] The stage is then set for Sassaman to order his subordinates to withhold information regarding the incident of the two Iraqi men at the bridge.

Interwoven into the prelude and aftermath of Sassaman's decision to issue the order is his bird's-eye-view of daily life in Iraq. From moments of tranquility[36] to engaging in direct combat with insurgents,[37] Sassaman

---

[25] *See id.* at 94–95, 98.
[26] *See id.* at 183.
[27] *See id.* at 99.
[28] *Id.*
[29] *See id.* at 6, 166, 170 (citing statistics that Sassaman's battalion killed or captured over 1100 insurgents, 60% of his brigade's total, and the number and frequency of attacks dropped rapidly as the enemy began dissipating and the populace increased its trust in U.S. forces). *See also* Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES (Magazine), Oct. 23, 2005 (discussing Sassaman's triumph in holding provincial elections in Balad earlier than the rest of Iraq, and his initial warm relations with the local nationals), *available at* http:// www.nytimes.com/2005/10/23/magazine/23sassaman.html.
[30] SASSAMAN, *supra* note 1, at 162.
[31] *Id.* at 162, 201.
[32] *Id.* at 159, 234.
[33] *Id.* at 159.
[34] *See id.* at 93.
[35] *See id.* at 161, 183.
[36] *Id.* at 124.
[37] *Id.* at 136–41. *See also id.* at 282 (highlighting that the command awarded Sassaman the Bronze Star for valor after redeploying from Iraq).

keeps the reader on the edge, depicting the vivid reality of war: death, despair, and all the triumphs and setbacks in between.

III. Sassaman's Credibility

Sassaman's story is compelling but too often he drifts into anecdotal diatribe on subjects beyond his personal knowledge which distract the reader and diminish his credibility. For example, Sassaman criticizes the United States for acting unilaterally in invading Iraq.[38] He supports this conclusion based solely on his personal observation that he did not see "a German, an Englishman, or an Aussie" in Kuwait in the prelude to the war. He also addresses those who think the war was really just about "O-I-L," stating, "I spent a lot of time in Iraq, and oil never seemed that abundant or accessible."[39] The validity of his criticisms and conclusions aside, who cares what Sassaman thinks about such issues? The reader wants to hear about his personal experiences. When Sassaman drifts off that path and jumps to conclusions about subjects beyond his firsthand knowledge it raises questions about how he reaches conclusions on subjects pertinent to his thesis.

Sassaman's tendency to jump to conclusions also bleeds over to his analysis of COL Rudesheim's counterinsurgency strategy and leadership abilities. On numerous occasions he concludes COL Rudesheim's less aggressive counterinsurgency strategy is akin to "appeasement."[40] He makes an unsupported assertion that COL Rudesheim's tactics "led to the maiming and deaths of several soldiers in his brigade."[41] He also describes COL Rudesheim as a "terrible combat commander"[42] who is incompetent.[43] He even asserts that COL Rudesheim did not believe in fighting or was unwilling to fight.[44] Unfortunately, Sassaman fails to adequately explain how he reached these conclusions and resultantly he comes across as engaging in name-calling and labeling. Consequently, the narrative too often assumes the feel of an incoherent rant with Sassaman appearing more concerned with vengeance than truth-telling.

---

[38] *Id.* at 49.
[39] *Id.* at 50.
[40] *Id.* at 162, 201, 235, 255.
[41] *Id.* at 158.
[42] *Id.* at 242.
[43] *Id.* at 158.
[44] *Id*. at 161, 201, 242.

IV. Sassaman's Defense and Justification

Sassaman also appears to be uninterested in truth-telling when he attempts to defend his decision to order his subordinates to withhold information. For example, Sassaman asserts he had no reason to believe an investigation was pending when he ordered his subordinates to withhold information, in essence saying he did not violate the law.[45] But the facts demonstrate quite convincingly he did have reason to know. Colonel Rudesheim told Sassaman that his Soldiers would be court-martialed if water was involved. Also, this conversation occurred before Sassaman gave the order.[46] In fact, Sassaman cites COL Rudesheim mentioning the possibility of court-martial as the reason Sassaman gave the order in the first place.[47] Did Sassaman, an officer with nearly nineteen years of service[48] and who participated as a panel member in more than a dozen courts-martial[49] really have no reason to know an investigation could precede a court-martial? If not, he surely would have reason to believe that a court-martial could be pending for these Soldiers, in which case he would be guilty of obstructing justice.[50] Either way, Sassaman violated the law and his allusions otherwise undermine his credibility.

But even if he violated the law, was Sassaman justified in doing so under the circumstances?[51] Sassaman's penchant for shifting blame demonstrates that not even he believes ordering his subordinates to withhold information was justifiable. For example, Sassaman blames his decision to issue the order on COL Rudesheim, "undue command pressure," and on the fact he did not have a legal advisor.[52] Why does he shift blame for issuing an order he does not feel was wrongly issued in the first place?

---

[45] *See id.* at 269. Sassaman in essence argues he did not commit the crime of impeding an investigation, as the statute requires the accused have had a reason to believe an investigation was pending. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 96a.b(2) (2008) [hereinafter MCM].
[46] SASSAMAN, *supra* note 1, at 247.
[47] *Id.*
[48] *Id.* at 263.
[49] *Id.* at 8.
[50] To obstruct justice, the accused must have had "reason to believe there were or would be criminal proceedings pending." MCM, *supra* note 45, pt. IV, ¶ 96.b(2).
[51] *See* SASSAMAN, *supra* note 1, at 9.
[52] *Id.* at 247–48.

Nor does Sassaman convince the reader that ordering his subordinates to withhold information about the bridge incident was born of his desire to "win a war."[53] First, he does not logically explain the connection between his decision to order his subordinates to withhold information and his desire to win the war. Second, he does not cite any lasting achievements of his counterinsurgency strategy and in fact declared the war "unwinnable[54] before his deployment ended. If Sassaman was so determined to win,[55] why was he so quick to raise the white flag? Thus, a less lofty but more direct reason explains Sassaman's decision: to shield his men from prosecution. In fact Sassaman admits he was trying to protect his men.[56]

Major General Odierno also apparently thought Sassaman was trying to shield his men from prosecution, as illustrated by his accusing Sassaman of trying to be "one of the boys."[57] Sassaman counters MG Odierno's allegation by citing numerous instances in which he had punished Soldiers under his command.[58] But Sassaman misses the point. In the cases Sassaman cites, he obviously supports punishment. By contrast, in the case of the Soldiers involved in the bridge incident, Sassaman does not believe they even committed a crime.[59]

From Sassaman's perspective, it is easy to imagine why he would feel his Soldiers should not be prosecuted. Their actions, after all, were consistent with his personal counterinsurgency strategy—instill fear[60] and do not be overly concerned with collateral damage.[61] From his perspective, his Soldiers were just doing their job.

V. Counterinsurgency Strategy

Sassaman developed his counterinsurgency approach amidst a near twenty-year doctrinal gap in counterinsurgency strategy.[62] Thus, the only

---

[53] *Id.* at 7.
[54] *Id.*
[55] *Id.* at 93 ("My entire life has been based on winning.").
[56] *Id.* at 243.
[57] *Id.* at 248.
[58] *Id.* at 267–68.
[59] *See id.* at 246.
[60] *See id.* at 99.
[61] *Id.* at 159.
[62] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY foreword (15 Dec. 2006) [hereinafter FM 3-24] ("It has been 20 years since the Army published a field

guidance Sassaman received on how to approach the insurgency was to "secure and stabilize the region."[63] Today, however, servicemembers in Iraq are operating under an overarching doctrine with a track record that gives perspective to Sassaman's strategy.

General Petraeus is the architect of the new doctrine[64] contained in Army Field Manual (FM) 3-24. The tenets underpinning FM 3-24 are in many ways similar to the strategy COL Rudesheim preferred: focus on protecting civilians over killing the enemy, assume greater risk, and use minimum force.[65] In February 2007, GEN Petraeus took command in Iraq[66] and implemented the new doctrine. Since then, violence has fallen dramatically.[67] Today, GEN Petraeus is widely credited with pulling Iraq from the abyss.[68]

The success of the new counterinsurgency doctrine is the elephant in the room that Sassaman never discusses. It is most likely unintentional.[69] Nonetheless, it undermines his central theme that Sassaman was a visionary and COL Rudesheim was shortsighted. With the new doctrine's success, the reader cannot help but think just the opposite is true. Sassaman compounds this perception by describing COL

---

manual devoted exclusively to counterinsurgency operations.").

[63] SASSAMAN, *supra* note 1, at 94.

[64] Nathaniel C. Fick & John A. Nagl, *Counterinsurgency Field Manual: Afghanistan Edition*, FOREIGN POL'Y (Wash., D.C.), Jan.–Feb., 2009, at 42.

[65] *Id.*; *see also* FM 3-24, *supra* note 62, para. 1-150 ("The more force applied, the greater the chance of collateral damage and mistakes. Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal. In contrast, using force precisely and discriminately strengthens the rule of law that needs to be established.").

[66] Press Release, Stephen P. Kretsinger Sr., Multi-National Force Iraq, Petraeus Assumes MNF-I Command (Feb. 11, 2007), *available at* http://www.militaryconnection.com/cent com/articles/petraeus-assumes-command .html.

[67] *See* U.S. DEP'T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ, REP. TO CONG., June 2009, at 22, *available at* http://www.defenselink.mil/pubs/pdfs/9010_Report_to_ CongressJul09.pdf (illustrating month-to-month security incidents in Iraq since 2004).

[68] Fick & Nagl, *supra* note 64, at 42.

[69] The book appears to have been written before General (GEN) Petraeus's counterinsurgency strategy produced significant achievements. First, the epilogue is dated 31 January 2007, approximately twelve days before GEN Petraeus took command. SASSAMAN, *supra* note 1, at 301; Kretsinger, *supra* note 66. Second, it is difficult to believe that Sassaman would intentionally bolster Colonel (COL) Rudesheim's standing by describing COL Rudesheim's strategy as akin to GEN Petraeus's successful strategy. *See supra* note 30 and accompanying text.

Rudesheim's strategy as akin to General Petraeus's now venerated "softer, gentler approach."[70]

The success of the new counterinsurgency doctrine colors nearly every aspect of the *Warrior King*, often undermining key points. For example, despite Sassaman's declaration that the war is unwinnable,[71] violence levels have dropped dramatically since February 2007. Similarly, despite his criticism that the Army has produced a generation of poor leaders incapable of original thought,[72] this generation of leadership produced FM 3-24, a radical doctrine that rewrote the book on counterinsurgency and turned the Iraq war around.[73]

VI. Lessons in Leadership

The real leadership lesson to be learned from *Warrior King* is not that the Army produces poor leadership, but that Soldiers should trust their leadership. In the end, Sassaman's unwillingness to do so amounted to his own leadership failure and led to his downfall, a perspective shared by MG Odierno.[74] Sassaman admits he lost faith in both MG Odierno and COL Rudesheim but does not take responsibility as to why it occurred. A deeper analysis betrays Sassaman's arrogance; he thought he knew better than his leadership and therefore thought the ends justified his means. The irony is that the success of the new counterinsurgency doctrine in many ways vindicated COL Rudesheim's views and repudiated Sassaman's views.

VII. Conclusion

Sassaman utterly fails to convince the reader that he implemented a winning counterinsurgency strategy or that his chain of command betrayed him in any way. Sassaman cites no enduring achievement of his strategy and his own narrative demonstrates that he violated the law which merited punishment. In this light, Sassaman's assertion that he ordered his subordinates to withhold information out of his desire to win

---

[70] SASSAMAN, *supra* note 1, at 162.
[71] *Id.* at 7.
[72] *Id.* at 88–90, 158.
[73] Fick & Nagl, *supra* note 64, at 42.
[74] SASSAMAN, *supra* note 1, at 267 (quoting GEN Odierno: "You did not trust your leadership; you didn't trust us.").

the war seems preposterous. Worse, the later success of the new counterinsurgency doctrine undermines many of Sassaman's key points.

Despite its failures, *Warrior King* is well worth the read. First, Sassaman offers thrilling insight into military operations, battlefield engagements, and interaction with the Iraqi people. Second, the book provides a window into the mind of an infantry battalion commander. Whether or not one agrees with Sassaman's underlying philosophy, simply being privy to his thought process is insightful and particularly helpful to judge advocates who advise commanders. Lastly, *Warrior King* illustrates two competing views on counterinsurgency strategy at a time when the United States is shifting its counterinsurgency focus from Iraq to Afghanistan. On balance, *Warrior King* succeeds in keeping the reader's attention and rarely fails to be thought-provoking and entertaining.