# THE ARMY LAWYER

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## Lore of the Corps



## Articles



## Book Review

**Lore of the Corps**

**The Army Court of Military Review: The First Year (1969-1970)**

*By Fred L. Borch*
*Regimental Historian and Archivist*

On October 24, 1968, President Lyndon B. Johnson signed the Military Justice Act of 1968. This legislation, which became effective on August 1, 1969, made revolutionary changes to military criminal law.

At the trial level, judge advocates began serving as trial and defense counsel at special courts-martial; previously these duties were performed by non-lawyer line officers. Additionally, a military judge presided over the proceedings. Also, for the first time in history, it was possible for an accused to elect to be tried by military judge alone. Prior to August 1, 1969, every court-martial was heard by a panel.

At the appellate level, the Military Justice Act likewise resulted in significant changes to the military criminal legal system. In the Army, the Army Boards of Review were renamed the Army Courts of Military Review (ACMR) and the members of the new appellate court were redesignated as military judges. The newly-constituted courts were different from their predecessors in that there was now *one court* with a number of panels rather than a number of separate boards.[1] This change was designed to "foster more consistence and a higher quality of legal decision;" apparently the separate and distinct Boards of Review were not always uniform in their decision-making.[2]

What follows is a brief history of the first year of the ACMR, and the judge advocates who served on it as appellate judges.

On August 1, 1969, Major General Kenneth J. Hodson, then serving as The Judge Advocate General, appointed a total of twelve jurists to the new ACMR. Colonel (COL) George F. Westerman was appointed as the Chief Judge. The other judges on the court were: COLs Joseph L. Bailey, Joseph L. Chalk, Rodney J. Collins, John S. Folawn, Jacob Hagopian, Winchester Kelso Jr., William W. Kramer, Arthur D. Porcella, Granville I. Rouillard, and Edward L. Stevens. Rounding out the court was the lone lieutenant colonel: Abraham Nemrow.[3]

Depending on the composition of the three-judge panels, one or more of these colonels might be designated as a "Senior Judge" and cases decided by the new ACMR in August and September 1969 reflect the following served in this capacity: COLs Edward L. Stevens, Joseph L. Chalk, and Arthur D. Porcella.[4]

Members of the United States Army Court of Military Review are shown on August 1, 1970, the first anniversary of the establishment of the Court. Pictured left to right are: First row (seated): Senior Judge Marvin G. Krieger; Chief Judge George F. Westerman; Senior Judge Joseph L. Chalk. Second row (standing): Judge Zane E. Finklestein; Judge John S. Folawn; Senior Judge Winchester Kelso Jr.; Judge Abraham Nemrow; Senior Judge Arthur Arthur D. Procella; Judge Joseph L. Bailey; Judge Rodney J. Collins; Judge I. Granville Rouillard; Judge George O. Taylor Jr.

One of the first cases to be heard by the new ACMR was *United States v. Motes*.[5] In this case, decided on August 11, 1969, the court ruled that an accused could not plead guilty to, and be convicted of, eight specifications of wrongful sale of military property where those specifications had been "lined through" on the charge sheet.[6] While this was hardly an earth-shattering decision, it was the first ACMR case to be published in the Court-Martial Reports. It also was the first time that the judge advocates serving on this appellate court signed a published opinion as "Appellate Military Judges." Prior to August 1, 1969, military lawyers

[1] When enacted by Congress on May 5, 1950, Article 66, Uniform Code of Military Justice, required The Judge Advocate General (TJAG) to "constitute in his office one or more boards of review." Under the new Military Justice Act, however, Article 66 was amended so that TJAG "shall establish a Court of Military Review which shall be composed of one or more panels, and each panel shall be composed of not less than three appellate judges."

[2] JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 247 (1975).

[3] OFFICE OF THE JUDGE ADVOCATE GEN., JUDGE ADVOCATE GEN.'S CORPS (JAGC) PERSONNEL AND ACTIVITY DIRECTORY, at 4 (1969) [hereinafter JAG PUB. 1-1].

[4] *Id.*

[5] United States v. Motes, 40 C.M.R. 876 (A.C.M.R. 1969).

[6] *Id.* at 879.

serving on the Army Board of Review signed their opinions as "Judge Advocates."[7]

Between August 1, 1969 and July 31, 1970, the ACMR judges decided some 200 appellate cases, many of which resulted in published opinions. Noteworthy cases included *United States v. Averette*, in which the court ruled that a court-martial had jurisdiction over a civilian employee of a government contractor working in Saigon, Vietnam. The accused, who was the supervisor of an Army motor pool housing vehicles, had been convicted of conspiracy to steal 36,000 motor vehicle batteries.[8] Averette argued that the court-martial lacked jurisdiction over him as a civilian because the on-going armed conflict in Vietnam did not meet the "in time of war" requirement for the exercise of court-martial jurisdiction over civilians as set out in Article 2, Uniform Code of Military Justice. While the ACMR ruled against Averette in this early decision, he ultimately prevailed when the Court of Military Appeals heard his appeal the next year.[9]

Within the first twelve months of the ACMR's existence, COLs Hagopian, Kramer, and Stevens left the court. They were replaced by COLs William T. Rogers and Marvin G. Krieger, and LTC Zane E. Finklestein.[10]

More than 45 years later, the ACMR continues to perform a key role in the court-martial appellate process, albeit under its new name, the Army Court of Criminal Appeals.[11] Scores of senior judge advocates have served on this first-line appellate court during this period and will continue to serve.

*More historical information can be found at*

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

*World War II JAG School Scrapbooks now on Library of Congress Website*

In 1942, the Judge Advocate General's School opened on the campus of the University of Michigan in Ann Arbor, Michigan. Initially, the School was under the leadership of Colonel Edward H. "Ham" Young, who determined the curriculum and put together the initial staff and faculty. When Young departed for a new assignment in late 1944, he was succeeded by Colonel Reginald C. Miller, who served as Commandant until the School closed in 1946. During its operation at the University of Michigan, the School transformed hundreds of civilian lawyers into Army judge advocates. These military lawyers ultimately served as uniformed attorneys in a variety of world-wide locations, including Australia, China, England, France, Germany, India, Japan, and Morocco. These scrapbooks contain photographs, newspaper articles, graduation programs, and other documents related to the operation of the School from 1943 to 1946.

*See the scrapbooks here:*
http://www.loc.gov/rr/frd/Military_Law/Scrapbooks.html

[7] *See, e.g.*, United States v. Coonrod, 40 C.M.R. 873 (A.B.R. 1969). The *Coonrod* case was decided on July 31, 1969—the last day the Army Boards of Review existed in the military criminal legal system.

[8] United States v. Averette, 40 C.M.R. 891 (A.C.M.R. 1969).

[9] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

[10] JAG PUB 1-1 (1970), at 4.

[11] This name change, which was made by legislation effective in October 1994, did not otherwise alter the nature of the institution. *See* UCMJ art. 66 (2012).

**Is the Particularity Requirement of the Fourth Amendment Particular Enough for Digital Evidence?**

*Major Paul M. Ervasti*[*]

*The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement [of the Fourth Amendment] that much more important.*[1]

## I. Introduction

Almost ninety years ago, Judge Learned Hand said that "[i]t is a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him."[2] Today, the typical computer or cell phone contains far more private information about a person than would have ever been found in a person's house.[3] A modern cell phone will contain internet browsing history, historical Global Positioning System (GPS) information about where a person is and was located, and a wealth of application "which together can form a revealing montage of the user's life."[4] Because of this, a search of a person's cell phone would likely be much more intrusive than even the most exhaustive search of a person's home.[5] Therefore, courts have struggled to strike a balance in applying the particularity requirement of the Fourth Amendment in such a way as to allow legitimate government searches of digital evidence, while still preventing the type of general ransacking of a person's effects that the framers of the Constitution sought to prevent.

In striking that balance, courts recognize the "serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."[6] They have sought to keep the particularity requirement relevant in a digital context by imposing two different restrictions. First, some courts have required an affidavit supporting a search authorization to list the specific keywords or methods that will be used to search the numerous files and folders for evidence of a crime.[7] Second, other courts have focused on the subjective intent of the searchers. Those courts require law enforcement to obtain a new search authorization once they uncover evidence of an unrelated crime and subjectively change the focus of their search.[8]

This article first examines why digital searches are necessarily broad by their very nature. Files are easily mislabeled and hidden. Because evidence could be stored anywhere on a computer, a thorough search usually requires examining every file and folder. Next, the article analyzes the two ways courts have interpreted the particularity requirement—requiring keywords or search protocols and requiring a new warrant when the subjective intent of the searcher changes. Neither of these two methods works well in practice. Requiring law enforcement to specify keywords or search methodologies in order to prevent them from viewing files outside the scope of their search is unworkable. A searcher cannot know beforehand how files will be labeled and stored. Additionally, that level of specificity in how the search will be carried out is not mandated by the Constitution; neither should the subjective intent of the searcher matter. Since the original search usually requires examining every file on a piece of digital evidence, the scope of the search does not expand simply because an agent subjectively hopes to find evidence of an unrelated crime.

All of these inherent tensions in how the particularity requirement should be applied in a digital context were illustrated in the Navy-Marine Corps Court of Criminal Appeals in *United States v. Tienter*.[9] In *Tienter*, the court determined that the search of LCpl Tienter's cell phone was unreasonable under the Fourth Amendment because the scope of the search exceeded that which had been authorized

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[1] United States v. Burgess, 576 F.3d 1078, 1090-91 (10th Cir. 2009) (quoting United States v. Otero, 563 F.3d 1127, 1132 (10th Cir. 2009)).

[2] Riley v. California, 134 S. Ct. 2473, 2490-91 (2014) (quoting United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926)).

[3] Riley, 134 S. Ct. at 2490-91.

[4] *Id.*

[5] *Id.*

[6] United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010).

[7] *See Id.*; United States v. Carey, 172 F.3d 1268 (10th Cir. 1999); United States v. Osorio, 66 M.J. 632, 637 (A.F. Ct. Crim. App. 2008); *See also* Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J. L. & Tech. 75, 107 (1994) (advocating for an interpretation of the particularity requirement, which would require law enforcement to list keyword methods and search protocols when they apply for a warrant to search digital evidence).

[8] *See* Carey, 172 F.3d at 1275; United States v. Tienter, No. 201400205, 2014 CCA LEXIS 700 (N-M. Ct. Crim. App. Sep. 23, 2014).

[9] Tienter, 2014 CCA LEXIS 700.

in the search authorization.[10] The Criminal Investigative Division (CID) obtained authorization to seize LCpl Tienter's phone because there was probable cause to believe the phone contained text messages, which were evidence that another Marine had solicited LCpl Tienter to distribute a controlled substance.[11] The CID Special Agent said in the affidavit supporting the authorization that "search protocols directed exclusively to the identification and extraction of data within the scope of this warrant" would be used to analyze the data contained in the cell phone.[12]

LCpl Tienter was also the suspect in an unrelated sexual assault at the time CID seized his phone.[13] After the search, the government extracted the text messages on the phone into one 2,117 page Portable Document Format (PDF) file.[14] Later, the CID Special Agent (with the help of the Naval Criminal Investigative Service (NCIS) Special Agent working the sexual assault case) searched through that document using search terms associated with the sexual assault and unrelated to the drug offenses.[15]

Like in *Tienter*, most searches of computers or cell phones give law enforcement access to a vast amount of personal information unrelated to the original reason for the search. Courts have recognized that digital searches often require opening and examining many seemingly unrelated files. "The legitimate need to scoop up large quantities of data, and sift through it carefully for concealed or disguised pieces of evidence, is one we've often recognized."[16] But these broad searches raise important questions about how the particularity requirement of the Fourth Amendment, which normally limits the scope of a search, should apply in a digital context. "Because computers typically contain so much information beyond the scope of the criminal investigation, computer-related searches can raise difficult Fourth Amendment issues different from those encountered when searching paper files."[17] "For example, officers searching a computer for a telephone number may use the opportunity to rummage through financial records, written correspondence, electronic mail, or other obviously personal and irrelevant records also contained on the computer."[18]

With that in mind, when the search is for digital evidence, should law enforcement be required to specify how the search will be conducted? The Fourth Amendment requires law enforcement to specify what they are looking for and what they intend to seize. In a digital context, should they also be required to specify what search protocols and what key words they will use when they are conducting their search? Does the subjective intent of the searcher matter? For example, in LCpl Tienter's case, should it matter whether law enforcement subjectively searches for evidence of a sexual assault or whether they merely continue a methodical search for drug evidence, knowing that they are likely to find evidence of a sexual assault?

In *Tienter*, searching through the extracted data to look for evidence of a sexual assault should not have raised any additional constitutional concerns because the agents were already authorized to look at every text message within the scope of the original search. Examining that same data to look for evidence of another crime did not expand the scope of the search or involve any additional invasion of privacy.

## II. Background

### A. The Particularity Requirement of the Fourth Amendment

This section briefly explains the origin of the particularity requirement and its intended purpose. The Fourth Amendment of the Constitution of the United States protects against unreasonable searches and seizures and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[19] The drafters of the Bill of Rights intended this Amendment to prevent the issuance of writs of assistance or general search warrants.[20] The drafters, who lived under Colonial British rule, considered general search warrants to be particularly offensive to individual liberty because those types of warrants allowed the government to enter a citizen's home and go through all of the citizen's private papers and effects in search of anything that might incriminate him.[21] Thus, the requirement that a search warrant describe the place to be searched and the things to be seized with "particularity" prevents a search warrant from becoming a general warrant used to look for any incriminating evidence that might be found.[22]

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[10] *Id.* at *3, 11.

[11] *Id.* at *2-3.

[12] *Id.* at *3.

[13] *Id.* at *4-5.

[14] *Id.* at *3, 11.

[15] *Id.* at *4-5.

[16] United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010) (citing United States v. Hill, 459 F.3d 966 (9th Cir. 2006)).

[17] United States v. Hill, 459 F.3d 966, 968 (9th Cir. 2006).

[18] Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J. L. & Tech. 75, 86 (1994).

[19] U.S. CONST. amend. IV.

[20] Boyd v. United States, 116 U.S. 616, 625-26 (1886).

[21] Frank v. Maryland, 359 U.S. 360, 363-65 (1959); Boyd v. United States, 116 U.S. 616, 625-26 (1886).

[22] *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 7-9 (1977); Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

The particularity requirement works well to prevent overly broad searches when the search is of a physical space. Because the Fourth Amendment forces the government to describe with particularity what it is searching for and what it intends to seize, it therefore limits the scope of the search to places where there is probable cause to believe the evidence could be located.[23] The following quote from the Supreme Court illustrates how the particularity requirement limits the scope of a physical search:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.[24]

Thus, in a physical search context "[t]he particularity requirement ensures that a 'search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.'"[25]

B. The Particularity Requirement Applied to Digital Searches

The particularity requirement, as normally interpreted, does not limit the scope of a digital search in the same manner as a physical search, because digital evidence could be anywhere on a computer. To meet the particularity requirement in a digital search, "warrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material."[26] It is not enough for a warrant to authorize seizure of a computer without specifying that certain files on the computer are likely to contain evidence of a specific crime.[27] But doing so does not limit the scope of a search for digital evidence on a computer or cell phone in the same manner that it does during a physical search. Not only could files be stored anywhere on the computer, but they might also be intentionally hidden or mislabeled. For example, nothing prevents a savvy criminal from storing digital records of a stolen lawnmower in a folder labeled "upstairs bedroom." "Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality."[28] Because digital files are so easily mislabeled, hidden, or deleted, many courts have recognized that any thorough search for digital evidence requires "at least a cursory review of each file on the computer."[29]

But this need for at least a cursory review of each file risks turning every digital search into a general search in which law enforcement may examine every aspect of a person's life for evidence of any criminal activity.[30] Once it is established that a thorough search requires opening and looking at every file—even those that are seemingly unrelated to the object of the search—then any other unrelated incriminating evidence discovered would likely be lawfully obtained under the "plain view" doctrine.[31] An analysis of the plain view doctrine is beyond the scope of this article. However, the doctrine does create tension in a digital context that is greater than in a physical search context. If law enforcement may lawfully examine every file on a computer, then under the plain view doctrine there is no reason that they should have to turn a blind eye to evidence of other crimes that they happen to see. Courts either accept the fact that searches of digital evidence will necessarily be very broad or they find some other way to limit the scope of a search.

The way courts have struck the balance is through applying the particularity requirement differently in a digital context. They either (1) require a particular description of the types of files sought or the manner in which the search is to be conducted by requiring keywords or search protocols; or (2) decide whether the warrant sufficiently described the "things to be seized"[32] by analyzing the subjective intent of the officer. That is, they look at what the officer's subjective intent was as evidenced by the search terms and methods he used to search the computer rather than looking at whether the officer was searching in a place that the evidence was

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[23] Maryland v. Garrison, 480 U.S. 79, 84-85 (1987).

[24] United States v. Ross, 456 U.S. 798, 824 (1982).

[25] Winick, s*upra* note 18, at 86 (quoting Maryland v. Garrison, 480 U.S. 79, 84 (U.S. 1987)).

[26] United States v. Riccardi, 405 F.3d 852, 862 (10th Cir. 2005).

[27] *Id.*

[28] United States v. Williams, 592 F.3d 511, 522 (4th Cir. 2010).

[29] *Id*.; *See also* United States v. Hill, 459 F.3d 966, 978 (9th Cir. 2006) ("There is no way to know what is in a file without examining its contents . . . .").

[30] United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010) ("This pressing need of law enforcement for broad authorization to examine electronic records . . . creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant.").

[31] *See, e.g.*, United States v. Mann, 592 F.3d 779 (7th Cir. 2010) (applying plain view doctrine in digital context); United States v. Upham, 168 F.3d 532 (1st Cir. 1999) (also applying plain view doctrine in digital context); United States v. Fogg, 52 M.J. 144, 149 (C.A.A.F. 1999) (general discussion of plain view doctrine); Mil. R. Evid. 316(d)(4)(C). As will be discussed later, although some courts disagree on whether a search of digital evidence should allow the police to open and view every file or whether some limiting techniques should be used, it is undisputed that if the police do have a lawful purpose to examine a file and immediately recognize evidence of a different crime, the plain view doctrine would apply. *See infra* note 92 and accompanying text.

[32] U.S. CONST. amend. IV.

likely to be found. Both of these interpretations of the particularity requirement will now be analyzed in turn.

## III. Keywords or Other Search Protocols as a Method to Prevent General Searches

### A. The Case for Keywords—No Generalized Rummaging Allowed

#### *1. Introduction*

The Fourth Amendment "does not set forth some general 'particularity requirement.' It specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'"[33] "Although the particularity requirement compels government officials to specifically define the place to be searched and the anticipated fruits of the search, the requirement has never been applied to how the search will be carried out."[34]

But in a digital context, requiring greater specificity in how the digital evidence will be analyzed could be a way to prevent a wide-ranging generalized rummaging through a person's digital life. Requiring officers to specify how they intend to analyze the digital evidence recognizes that "over-seizing is an inherent part of the electronic search process" and that therefore searches of electronic records call for "greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures."[35] "Reinterpreting the Fourth Amendment to require ex ante search protocols in the computer search context may provide the means to safeguard the huge amounts of information stored on individual hard drives."[36]

#### *2.* Comprehensive Drug Testing, Inc.

One example of this approach is in the Ninth Circuit's case of *United States v. Comprehensive Drug Testing, Inc.*[37] In that case, the United States had a warrant to seize the drug testing records of ten Major League Baseball players from a drug testing laboratory.[38] But when agents executed the warrant, they seized the records of hundreds of other players as well as many other individuals.[39] The warrant contained "significant restrictions on how the seized data were[sic] to be handled" which were generally designed to keep law enforcement agents from viewing records of other individuals that were unrelated to the ten players for which the warrant was issued.[40] One of the restrictions in how the search was to be carried out required computer personnel to conduct a preliminary screening of the records, to see which ones were relevant, and return the unrelated records to the laboratory before they were seen by the investigating case agents.[41] However, the investigating agents did not comply with those particularized requirements that specified how to conduct the search. Instead, the investigating agents reviewed many unrelated records of other players and uncovered evidence of drug use in those unrelated records.[42] When the government later tried to argue that the evidence of the other unrelated crimes was in plain view, the court rejected that argument and found that they had exceeded the limitations in the warrant which specified how the search was to be conducted.[43] The court held that the magistrate judge's restrictions on how the search was to be conducted struck a proper balance in protecting the privacy rights of other persons whose records were stored at the laboratory, for which the government did not have probable cause.[44]

Writing in concurrence, Chief Judge Kozinski wanted to more explicitly create a future rule for how searches of digital evidence are to be conducted.[45] He wanted to require, among other things, that digital searches require greater particularity in how the search is to be conducted. "The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents."[46]

Both the majority and the concurrence in *Comprehensive Drug Testing, Inc.* recognized the danger that a digital search can turn into an overly broad general search. Simply applying a normal search paradigm to this situation does not work. It is not enough to simply say that law enforcement has probable cause to search the digital records of the laboratory for records related to ten players, and that law enforcement may look anywhere that those records could be found because the digital records of those ten players could be located in any file or folder on the

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[33] United States v. Grubbs, 547 U.S. 90, 97 (2006).

[34] Marc Palumbo, Note, *How Safe is Your Data?: Conceptualizing Hard Drives Under the Fourth Amendment*, 36 Fordham Urb. L.J. 977, 984 (2009).

[35] *Comprehensive Drug Testing, Inc.*, 621 F.3d at 1177.

[36] Palumbo, *supra* note 34.

[37] *Comprehensive Drug Testing, Inc.*, 621 F.3d at 1162.

[38] *Id.* at 1165.

[39] *Id.*

[40] *Id.* at 1168-69.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1176-77.

[44] *Id.*

[45] *Id.* at 1178-80 (Kozinski, C.J., concurring).

[46] *Id.* at 1180 (Kozinski, C.J., concurring).

laboratory's hard drives. So something more is required to "[strike] a proper balance" to protect the privacy rights of persons whose records were unrelated to the search.[47] The method that the Ninth Circuit used to strike that balance—requiring more particularity in how the search is conducted and not allowing the government to expand the scope of the search methodology—is a method particularly suited to digital searches but it is not a new approach.

*3. Comingled Records*

In many ways, the Ninth Circuit did not create new law in *Comprehensive Drug Testing, Inc.*. Rather, the court simply applied earlier case law dealing with comingled records to a new digital context. In finding that the officers exceeded the scope of the search, the court relied heavily on its own "venerable precedent" dealing with comingled paper records.[48]

In *Tamura*, the government had a warrant to seize employment records related to one individual but was forced to seize many other unrelated records involving other individuals due to the records being so intermingled that sorting through the records on site to determine which ones were relevant would not have been possible.[49] The court created a framework for situations where the government is forced to seize more records than are authorized in the warrant. In those cases, the government may seize unrelated documents under conditions that later examination of those documents will be completed in accordance with methods established by the magistrate.[50] The "essential safeguard" in these situations is the judgment of a neutral, detached magistrate who will monitor the seizure of the unrelated documents and the government's treatment of them.[51]

The Supreme Court also recognized in *Andresen v. Maryland* that the seizure of unrelated comingled documents does not necessarily turn an otherwise valid warrant into an impermissible general warrant.[52] That case dealt with the seizure of specific documents related to a fraudulent real estate transaction from a lawyer's office.[53] In dicta, the Court recognized the "grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable."[54] The Court went on to recommend a procedure similar to what the Ninth Circuit adopted in *Tamura*, where law enforcement officials conduct a cursory review of documents under a process that is supervised by a judicial officer and "conducted in a manner that minimizes unwarranted intrusions upon privacy."[55]

The challenge of digital searches is that based on the amount of private data on most computers and cell phones, every search now involves the same problems as comingled records searches. The framework for dealing with comingled records demonstrated in *Tamura* and *Comprehensive Drug Testing, Inc.* makes sense when the records are completely separate, involve different individuals, and only happen to be stored at the same location. For example, probable cause to search and seize packages belonging to a suspect that happen to be at a post office has never carried with it the authority to seize and open all the other packages of everyone else that happen to also be there. That basic assumption should not change simply because instead of packages, the relevant evidence is now digital files that happen to be stored on the same server or computer hard drive. So it seems relatively straight forward to say in *Comprehensive Drug Testing, Inc.* that when the government has probable cause to seize drug testing records from ten specific individuals, it should not open and examine the records of hundreds of other unrelated individuals simply because those records happen to be stored in the same place.

It would be a far different matter when all the evidence or records belong to the same person. For example, if law enforcement has probable cause to search a person's bedroom for a certain piece of evidence, they could search anywhere in the bedroom where the evidence could be located. No court would dictate that the searchers develop search methods and protocols that would only allow them to see the type of evidence they were looking for but nothing else. In essence, it is a far different thing to suggest that law enforcement should have to wear blinders that only allow them to see exactly what they are looking for. But Chief Judge Kozinski's concurrence in *Comprehensive Drug Testing, Inc.* would require just that: "The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents."[56] As discussed in the next section, at least some courts have agreed.

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[47] *Id.*

[48] *Id.* at 1167 (citing United States v. Tamura, 694 F.2d 591 (9th Cir. 1982)).

[49] United States v. Tamura, 694 F.2d 591, 594-96 (9th Cir. 1982).

[50] *Id.*

[51] *Id.* at 596.

[52] *See* Andresen v. Maryland, 427 U.S. 463 (1976).

[53] *Id.* at 479-83.

[54] *Id.* at 482 n.11.

[55] *Id.*

[56] United States vs. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1180 (9th Cir. 2010) (Kozinski, C.J., concurring).

*4. Requiring Greater Particularity Outside of a Comingled Records Context*

At least one district court has held that because of the privacy concerns involved in searching through a vast amount of private information on a person's computer that "prior to allowing any search of the contents of the computers, the court would require the government to provide a protocol outlining the methods it would use to ensure that its search was reasonably designed to focus on documents related to the alleged criminal activity."[57] The court required such a search protocol to prevent the search from becoming a generalized rummaging through all other private matters contained on the computer and to ensure that law enforcement instead searched for only the type of documents specified in the warrant.[58] The court reasoned that such restrictions on the manner in which the search was conducted were necessary to apply the particularity requirement to a digital context.[59]

Likewise, the Tenth Circuit also reasoned that the "storage capacity of computers requires a special approach" to the particularity requirement of the Fourth Amendment.[60] In *United States v. Carey*, the court stated that in most digital searches any "investigator reasonably familiar with computers should be able to distinguish database programs, electronic mail files, telephone lists and stored visual or audio files from each other."[61] Probable cause to search financial records contained in spreadsheets would not, under the court's view, grant any authority to view other types of files, telephone lists or word documents "absent a showing of some reason to believe that these files contain the financial records sought."[62] The court also stated that magistrates "should review the search methods proposed by the investigating officers" to prevent digital searches from becoming impermissible general searches.[63]

The court based its "special approach" to the particularity requirement in large part on a law review article by Raphael Winick.[64] Perhaps the strongest rationale for this approach comes from Winick himself:

> Once computer data is removed from the suspect's control, there is no exigent circumstance or practical reason to permit officers to rummage through all of the stored data regardless of its relevance or its relation to the information specified in the warrant. After law enforcement personnel obtain exclusive control over computer data, requiring them to specify exactly what type of files will be inspected does not present any undue burden. A neutral magistrate should determine the conditions and limitations for inspecting large quantities of computer data. A second warrant should be obtained when massive quantities of information are seized, in order to prevent a general rummaging and ensure that the search will extend to only relevant documents.[65]

At least one military court appears to have adopted this approach.[66] Whether requiring greater particularity in a warrant by requiring law enforcement personnel to specify in advance what type of files they are looking for and how the digital search will be conducted really does not present "any undue burden" is something that numerous other courts have disagreed with.

B. The Case Against Keywords—Open Every File

*1. Suspects Easily Hide or Mislabel Computer Files*

Most courts have differed from *Carey's* "special approach" to the particularity requirement in two different ways. First, they reject the idea that probable cause to search a computer could be limited to certain types of files. Second, they do not require any sort of pre-approved search protocol dictating how the search will be conducted.

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[57] In re Search of 3817 W. West End, 321 F. Supp. 2d 953, 955 (N.D. Ill. 2004).

[58] *Id.* at 954-56.

[59] *Id.* at 954 ("The degree of particularity that is required for search warrants under the Fourth Amendment in any given situation may not be determined by resorting to some simple formulaic approach, but instead varies depending on the circumstances of the case and the types of items involved. The search and seizure of a computer requires careful scrutiny of the particularity requirement."). However, at least one other district court in the same jurisdiction has since questioned whether the particularity requirement in fact demands such a description of how a digital search is to be carried out. *See* United States v. Gocha, 2007 U.S. Dist. LEXIS 58962, at *18-20 (N.D. Iowa, Aug. 10, 2007) (rejecting the reasoning in *West End* and finding that the particularity requirement does not require a description of how the electronic search will be conducted because when officers apply for authorization to search, it is often impossible for them to not know "the particular electronic format in which the evidence may be maintained by the suspect" and they therefore cannot reasonably know what search methods they will use).

[60] United States v. Carey, 172 F.3d 1268, 1275 n.7 (10th Cir. 1999).

[61] *Id.* at 1275 n.8.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1275-76 (citing Winick, *supra* note 18, at 86).

[65] Winick, *supra* note 18, at 107.

[66] United States v. Osorio, 66 M.J. 632, 637 (A.F.C.C.A. 2008) (citing *Carey* approvingly and holding that "when dealing with search warrants for computers, there must be specificity in the scope of the warrant which, in turn, mandates specificity in the process of conducting the search. Practitioners must generate specific warrants and search processes necessary to comply with that specificity and then, if they come across evidence of a different crime, stop their search and seek a new authorization.").

The court in *Carey* claimed that any reasonable investigator could differentiate between spreadsheets, word documents, and video files, and that therefore probable cause to search for financial records stored in an excel format would not constitute probable cause to open other types of files such as word documents.[67] The Ninth Circuit issued *Carey* in 1999. No doubt, the judges felt themselves computer savvy and were probably quite proud of being able to distinguish a file with a Microsoft Excel file format (.xls) extension from one with a document file format (.doc) extension. But in spite of what many judges believe, they "are not skilled computer forensic experts" and "[l]ike most lawyers, they tend to have only a vague sense of the technical details of how computers work."[68] The *Carey* court probably did not understand how easy it is to change a file to make it appear like something else.

That is why other courts have not adopted the reasoning of the court in *Carey* and imposed similar restrictions. Because digital files are so easily mislabeled, hidden, or deleted, many courts have recognized that any thorough search for digital evidence requires "at least a cursory review of each file on the computer."[69] So *Carey's* "special approach" to particularity—where probable cause to search for financial information in a spreadsheet would not allow the police to open a word document—would be similar to saying that when the police have probable cause to seize cocaine, they may not seize a "plastic bag containing a powdery white substance" simply because the suspect wrote "flour" or "talcum powder" on the bag.[70]

*2. Searching is an Art, Not a Science*

Most courts have likewise not required search warrants to contain search protocols or other particularized descriptions of how the search is to be carried out. A "search warrant itself need not contain a particularized computer search strategy."[71] That is because "[w]arrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible."[72] Although police know that they are looking for evidence of a crime on a computer, they often do not know what operating system the suspect uses, what, if any encryption is used, how the files are titled, where they are stored, or hundreds of other details that impact how they analyze the computer for evidence. This makes it nearly impossible for investigators to know the particular search process they will use when they apply for a warrant.[73]

Even if law enforcement officers could describe the particular search process they planned on using in advance, "[l]imitations on search methodologies have the potential to seriously impair the government's ability to uncover electronic evidence."[74] The use of code words, aliases, short-hand jargon, abbreviations, or even simple misspellings might prevent the police from finding relevant evidence if they are limited to searching for pre-approved keywords.[75] "Every Westlaw or LEXIS user is familiar with the difficulty of crafting search terms that find the correct case on the first try; requiring a forensic investigator to find crucial evidence with a keyword search specified prior to forensic analysis is just as impractical."[76] For that reason, the Department of Justice (DOJ) Manual recommends not placing any restrictions on the manner in which the search will be conducted in the warrant itself.[77]

Additionally, placing detailed descriptions of computer search methodologies in warrant applications forces magistrates to become computer forensics experts, a job they are poorly qualified for.[78] Rather than have magistrates dictate to the government ex parte[79] the exact search process

[67] United States v. Carey, 172 F.3d 1268, 1275 n.7 (10th Cir. 1999).

[68] Orin Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 575 (2005).

[69] United States v. Williams, 592 F.3d 511, 522 (4th Cir. 2010); *See also* United States v. Stabile, 633 F.3d 219, 237 (3rd Cir. 2011) ("[I]t is clear that because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required."); United States v. Mann, 592 F.3d 779, 782 (7th Cir. 2010) (relevant files are often hidden, mislabeled, and manipulated to conceal their contents); United States v. Burgess, 576 F.3d 1078, 1092-94 (10th Cir. 2009) (examination of most files and folders is usually required in a digital search, and this does not make the search overly broad); United States v. Hill, 459 F.3d 966, 978 (9th Cir. 2006) ("There is no way to know what is in a file without examining its contents . . . ."); United States v. Adjani, 452 F.3d 1140, 1150 (9th Cir. 2006) (evidence of financial crimes could be located anywhere on a hard drive, because files are easily concealed or mislabeled).

[70] United States v. Hill, 459 F.3d 966, 977-78 (9th Cir. 2006).

[71] United States v. Stabile, 633 F.3d 219, 238 (3rd Cir. 2011) (quoting United States v. Brooks, 427 F.3d 1246, 1251 (10th Cir. 2005)).

[72] United States v. Adjani, 452 F.3d 1140, 1147-48 (9th Cir. 2006) (quoting United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986)).

[73] Orin Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 575 (2005) ("Nor will investigators necessarily know what forensic tool the analyst may use when performing his search. Different forensic tools have different features; tasks that may be easy using one program may be hard using another. It is difficult to know what the particular search requires and what tools are best suited to find the evidence without first taking a look at the files on the hard drive. In a sense, the forensics process is a bit like surgery: the doctor may not know how best to proceed until he opens up the patient and takes a look. The ability to target information described in a warrant is highly contingent on a number of factors that are difficult or even impossible to predict ex ante.").

[74] U.S. DEP'T OF JUSTICE , CRIMINAL DIV., COMPUTER CRIME & INTELLECTUAL PROP. SECTION, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS, 3rd Ed., 79 (2009), http://www.justice.gov/criminal/cybercrime/docs/ssmanual 2009.pdf [hereinafter DOJ MANUAL].

[75] *Id.* at 79-80.

[76] *Id.* at 79.

[77] *Id.* at 79-82.

[78] Kerr, *supra* note 68, at 575-76.

[79] *Id.* (noting that the warrant application process is ex parte by nature).

it should use, it is better to have judges simply decide later after hearing from the defense as well whether the government's search methods were reasonable.[80]

## IV. Subjective Intent—Does it Matter What the Searcher is Searching For?

### A. Normally it Does Not

"[A]n investigator's subjective intent is not relevant to whether a search falls within the scope of a search warrant."[81] "Thus, the scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe it may be found."[82] The fact that an officer expects and intends to find a piece of evidence outside the scope of the warrant does not invalidate the seizure so long as the officer has not expanded the search and is searching in an area where the original evidence was likely to be found.[83]

Under this view, if the police had a warrant to search a computer for files related to drug evidence, it would not matter if police suspected that child pornography was on the computer or even if police specifically opened certain files believing that they contained child pornography. So long as they were looking in files where the drug evidence might reasonably be located (which, as discussed earlier, might be anywhere on the computer), clicking on files indicative of child pornography with the specific intent to find child pornography would not be an unreasonable expansion of the search.[84]

### B. Should Subjective Intent Matter in a Digital Context?

Recognizing the potential that this doctrine will morph every digital search into a general search, some courts and commentators have recommended overturning *Horton*[85] and reinstating the inadvertence requirement for digital searches.[86] The rationale for this approach is that it protects individual rights by ensuring that the police do not circumvent the particularity requirement of the Fourth Amendment by intentionally searching for items not particularly described in a warrant.[87]

Requiring that unrelated evidence be discovered inadvertently is one way to ensure that the search is "directed in good faith toward the objects specified in the warrant."[88] This seems to be the concern of the Navy-Marine Corps Court of Criminal Appeals in *Tienter*. The court found it fundamentally different to inadvertently stumble across incriminating evidence of the sexual assault while searching through over 2,000 pages of documents related to the drug offenses, than to use specific search words tailored to find evidence of the sexual assault in those same documents.[89]

But whether the incriminating evidence was stumbled upon should not have mattered nor would it in a typical physical search. For example, if a police officer has authorization to open 100 boxes in a person's house to search for drugs, it would not matter if the officer only sought out and opened the one box that the officer subjectively believed contained child pornography. So long as the officer was looking in a place that the warrant allowed him to look, he would not be impermissibly expanding the scope of the search. But the court in *Tienter* rightly recognized that this analogy falls apart in a digital context. For example, if instead of 100 boxes, the room contained billions of boxes and the police never intended on opening and viewing all of them without the aid of some narrowing search criteria, then the search criteria they use should have to be related to the object of the search. If the police in *Tienter* had obtained authorization to search the computer for evidence of drug crimes, but then immediately started searching the hard drive for files related to the sexual assault, then this does seem to circumvent the whole purpose of the particularity requirement. And this is true even though the police might have otherwise had authority to open every file and briefly examine it for drug evidence.

Critics of focusing on the officer's subjective intent usually point out how difficult it is to determine someone's subjective state of mind.[90] And officers may simply be trained to conduct more thorough searches.[91] For example, presumably nothing would have stopped the officer in

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[80] DOJ MANUAL *supra* note 74, at 80.

[81] United States v. Stabile, 633 F.3d 219, 238 (3rd Cir. 2011) (citing Maryland v. Garrison, 480 U.S. 79, 84 (1987)); Horton v. California, 496 U.S. 128, 138 (1990) (reasonableness of search does not depend on the subjective state of mind of the officer).

[82] Maryland v. Garrison, 480 U.S. 79, 84 (1987) (quotations omitted).

[83] *See, e.g.*, United States v. Williams, 592 F.3d 511, 522-24 (4th Cir. 2010) (rejecting the requirement that evidence outside the scope of the warrant must be found inadvertently).

[84] *Id.* at 523; Horton, 496 U.S. at 138.

[85] Horton v. California, 496 U.S. 128, 138 (1990) (holding that the reasonableness of search does not depend on the subjective state of mind of the officer).

[86] *See* Nicholas Hood, *No Requirement Left Behind: The Inadvertent Discovery Requirement—Protecting Citizens One File at a Time*, 45 Val. U.L. Rev. 1529 (2011) (advocating that in a digital context, files outside the scope of the warrant should have to be discovered inadvertently).

[87] *Id.* at 1580.

[88] United States v. Hill, 459 F.3d 966, 978 (9th Cir. 2006) (quotations omitted).

[89] United States v. Tienter, No. 201400205, 2014 CCA LEXIS 700, *7 (N-M. Ct. Crim. App. Sep. 23, 2014).

[90] Kerr, *supra* note 68, at 578.

[91] *Id.*

*Tienter* from reading all 2,000 pages of text messages and then just happening to see the texts related to the sexual assault.[92]

## V. Conclusion

Courts have struggled to strike a balance between the legitimate government need to conduct a thorough search of digital evidence with the "serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."[93] Courts have tried to strike that balance by restricting the broad nature of a search of digital evidence in two different ways. First, some courts have required an affidavit supporting a search authorization to list the specific keywords or methods that they will use to search the numerous files and folders for evidence of a crime. Second, other courts have focused on the subjective intent of the searchers and have required law enforcement to obtain a new search authorization when they uncover evidence of another crime and change the focus of their search.

In the end, neither of these two methods works particularly well. Requiring greater specificity in the warrant regarding how the search will be carried out is often impossible and does not work in practice. "Court-mandated forensic protocols are also unnecessary because investigators already operate under significant constitutional restrictions. In any search, 'the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.'"[94]

Because courts may assess whether the government's actions in conducting a search were unreasonable, there is no need to modify any of the particularity requirements of the Fourth Amendment for a digital context. The general requirement that any search be reasonable will already adequately uphold the Constitution and protect individual rights, without harming the legitimate law enforcement need for thorough digital searches.

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[92] *See* DOJ MANUAL, supra note 74, at 91. ("Arguably, [the agent] could have continued his systematic search of defendant's computer files pursuant to the first search warrant, and, as long as he was searching for the items listed in the warrant, any child pornography discovered in the course of that search could have been seized under the 'plain view' doctrine.").

[93] United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010).

[94] DOJ MANUAL, supra note 74, at 80 (quoting Dalia v. United States, 441 U.S. 238, 258 (1979)).

# American Indifference: The Lack of U.S. Response to Evolutions in the Law of Armed Conflict and How it Should be Addressed

*Lieutenant Colonel Walter E. Narramore**

## I. Introduction

We are in an unprecedented time of change for the law of armed conflict. Globalization and technology are providing non-state actors with unprecedented war-making capabilities including the ability to organize across borders and weaponry that levels the playing field with traditional state actors. These same factors allow states to combat non-state actors, and other nations for that matter, with an increasing array of tools. The consequential evolving areas of warfare create challenges for the law of armed conflict (LOAC) that threatens its relevance in the future. The law of armed conflict must evolve along with the warfare it regulates if it is to continue to serve as a viable constraint.

As a *lex specialis* of international law,[1] many factors contribute to that evolution. Certainly state practice is important, and many would say it is the most important aspect in creating customary international law.[2] In this it would seem intuitive that the United States, as one of the most significant practitioners, would have a significant influence. But state practice absent comment—without effort to explain that practice and how it complies with international law—is largely lost to history. The conversation and communication concerning the law is as important as the practice itself, both in explaining state practice and in contributing to the argument as to what is customary. The United States is currently ceding that role to others, which may ultimately produce results with which the United States does not agree. The International Committee for the Red Cross (ICRC), the United Nations, Human Rights Watch, the European Court of Human Rights, and even some nations are actively interpreting the law of armed conflict. What is striking is that these groups are largely devoid of practitioners and often skew the delicate balance between military necessity and unnecessary suffering.[3]

Three contemporary examples illustrate the on-going evolution and lack of U.S. response. First, despite being one of the most important modern statements on the law of armed conflict and despite U.S. objections to the document, [4] the United States failed to respond to the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law"[5] released in 2009. Second, the United States responded to questionable assertions by the Human Rights Council of the United Nations through its "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston"[6] concerning the targeting of enemy combatants and the use of drones[7] with a few high profile speeches by administration officials,[8] but no more lasting efforts to offer an alternative interpretation of the law. Finally, there is no on-going effort by the United States to contribute to the discussion on the impact of cyber operations on the law of armed conflict despite the obvious importance the United

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[1] INT'L AND OPERATIONAL LAW DEPT., U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 42 (2009).

[2] INTERNATIONAL COMMITTEE OF THE RED CROSS, *Customary International Law* 178-79 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) [hereinafter ICRC, *Customary International Law*] (focusing on state practice as the methodology for determining customary international law); *see also* Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 29 (June 3) (stating that it is "axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of States").

[3] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) (stating that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war"); HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 87 (2013) (concluding, for example, "that US forces are applying an overly broad definition of 'combatant' in targeted attacks, for example by designating persons as lawful targets based on their merely being members, rather than having military operational roles, in the armed group").

[4] *See, e.g.*, Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretative Guidance*, 42 N.Y.U.J. INT'L & POL. 641 (2010) (describing problems and objections to the interpretative guidance's definition and treatment of "organized armed groups").

[5] ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 9 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], http://www.icrc.org/ eng/assets /files/other/icrc-002-0990.pdf (last visited Oct. 15, 2015); *see also*, Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U.J. INT''L & POL. 831, 833 (2010).

[6] Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, U.N. DOC. A/HRC/14/24/ADD.6 (May 28, 2010) [hereinafter U.N. Study on Targeted Killings].

[7] *See, e.g., id.* at ¶77 ("Less-than-lethal measures are especially appropriate when . . . armed forces operate . . . in the context of non-international armed conflict, in which rules are less clear. In these situations, States should use graduated force and, where possible, capture rather than kill. Thus, rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain.").

[8] Eric Holder, Attorney General, Address at Northwestern University School of Law (Mar. 25, 2012).

States has placed on the development of cyber policy[9] and despite the emphasis the rest of the world is placing on it. [10]

There are valid reasons for the United States to move slowly in making formal declarations on its interpretation of international law. There are informal ways, however, that the United States can leverage to better reflect its position to the international community and participate in the on-going conversation, and ultimately influence the evolution of the law. In the United States we have many academics who study and write in this area, serving both in and out of the government.[11] Coming out of the wars in Iraq and Afghanistan, the United States also has many current practitioners who have the operational expertise and the intelligence to participate in this conversation. What the United States lacks is the proper forum to bring these groups together—one that provides some imprimatur of government authority, but is attenuated enough to allow communication without a formal process of approval; one that brings together the authoritative weight of academics and operational expertise of practitioners. In order to actively participate in influencing the direction of the LOAC, the U.S. government should support the development of a think tank at the United States Military Academy. This think tank will provide a forum for experienced academics and practitioners to discuss evolving issues and articulate legal interpretations that are indicative of U.S. policy. Part II of this article will highlight a few of the most important areas where the law of armed conflict is evolving and the problems created by a lack of U.S. engagement. In part III, a proposed solution and the justifications for that solution are presented. Ultimately, a government-supported think tank located at the United States Military Academy offers a unique opportunity to bring together the right people in the right forum and contribute significantly to this conversation in a way that benefits the United States.

## II. Evolutions in the Law of Armed Conflict: Everyone is Talking but the United States

Each of the issues discussed below has generated significant commentary in academic circles that will not be recreated here. The point is, the U.S. government has not commented in any meaningful or consistent way. It is necessary to briefly describe the issues to understand their significance in the evolution of the law of armed conflict and the importance of some type of U.S.-generated response. Their inclusion here is not intended to imply that they represent the only areas where the law is evolving, but they are certainly some of the most significant.[12]

### A. Direct Participation in Hostilities

The primary purpose of the law of armed conflict is to balance the military necessities of warring parties with the need to protect victims of armed conflict and noncombatants.[13] This is done primarily through the principle of distinction,[14] which requires parties to an armed conflict to direct their military operations only against combatants and military objectives.[15] Unfortunately, as warfare has developed, this has become increasingly difficult. The rise of conflicts with non-state groups and the increase of fighting in populated areas have led to an increased intermingling of civilians with armed actors.[16] Some belligerents, particularly when fighting a stronger military force, have used these changing circumstances to their advantage by hiding among civilian populations and recruiting part time fighters from the civilian community. The increased concern for the protection of civilians was one of the driving forces in bringing many nations together to negotiate and draft the additional protocol to the Geneva Conventions in the 1970s.[17] One of the provisions resulting from this concern was Article 51(3), which states that

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[9] *See* Cheryl Pellerin, *DOD Releases First Strategy for Operating in Cyberspace*, AMERICAN FORCES PRESS SERVICE (July 14, 2011), http://www.defense.gov/news/newsarticle.aspx?id=64686 (announcing cyberspace as a fifth domain of military operations equivalent to land, air, sea, and space and describing its significance to the U.S. government).

[10] *See, e.g.*, TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 1 (Michael Schmitt, ed., 2013) [hereinafter TALLIN MANUAL]. The NATO Cooperative Cyber Defence Centre of Excellence assembled a group of experts in Tallin, Estonia to consider the application of cyber activities to the law of war, which resulted in The TALLIN MANUAL. *Id.*

[11] *See, e.g.*, Jack Landman Goldsmith, Biography, HARVARD LAW SCHOOL, http://www.law.harvard.edu/faculty/directory/10320/Goldsmith (last visited Oct. 15, 2015); Martin S. Lederman, Our Faculty, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/lederman-martin-s.cfm (last visited Oct. 15, 2015).

[12] There are numerous other examples, both in evolving and established areas of the law of armed conflict, where statements on the U.S. position are inadequate. For example, U.S. practitioners still rely on the Matheson article from 1987 as the only authoritative statement as to what portions of AP I the United States considers customary international law. *See infra* note 15; *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987).

[13] Michael N. Schmitt, *The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 6 (2010).

[14] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82 (2004) (describing the principle of distinction as fundamental and "intransgressible" to international humanitarian law).

[15] Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts art. 48, 8 June 1977, International Committee of the Red Cross, http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument [hereinafter Additional Protocol I].

[16] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 5.

[17] CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxix (ICRC ed. 1987).

"[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[18] Unfortunately, neither the original conventions nor the additional protocol define direct participation in hostilities. As the trend toward the intermingling of combatants and non-combatants increased, the ICRC felt the need to further define direct participation. In 2003, it initiated a collaborative process to answer three questions: who is considered a civilian for the purposes of the principle of distinction; what conduct amounts to direct participation in hostilities; and what modalities govern the loss of protection against direct attack.[19] In 2008 the ICRC published an eighty-five page document titled "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law" with its answers to these questions.[20]

Over forty eminent international law attorneys, military officers, government officials, and representatives of non-governmental organizations took part in the development of the guidance, including several from the United States. Yet, the ultimate guidance proved so controversial that many of the experts asked that their names be removed as participants for fear that inclusion would indicate support.[21] Ultimately, the ICRC published its interpretative guidance with the statement that it is "an expression solely of the ICRC's views."[22] Among those objecting to the final product were Professor Michael Schmitt of the Naval War College and W. Hays Parks, then of the Department of Defense (DOD) Office of the General Counsel, along with several high ranking officials from allied nations.[23]

In a volume of the New York University (NYU) Journal of Law and Politics, Professor Schmitt and Mr. Parks, along with Professor Boothby of the British Royal Air Force and Brigadier General (Retired) Watkins of the Canadian armed forces, described the most significant objections in a series of articles. In the broad sense, U.S. practitioners and experts felt that the interpretative guidance skewed the delicate balance between military necessity and humanity toward the latter, which ultimately weakens the LOAC as states participating in an armed conflict are unlikely to accept norms that place their military success at risk.[24] More specifically, these experts raised several objections.

First, the interpretative guidance creates a new party to armed conflicts—the non-state armed group—but applies different rules to this group in comparison to state armed forces. It gives broader protection to civilians supporting the non-state armed group over those available to civilians supporting state armed forces.[25] Secondly, the interpretative guidance provides a definition of direct participation that is too narrow and fails to take into account acts that enhance the military capability of a party to the conflict, particularly actions that benefit specific operations.[26] Furthermore, it confuses the determination of direct participation by introducing a "one step" analysis for determining who is directly participating.[27] Third, the ICRC's interpretation of the temporal component contained in the phrase "for such time as" provides overly expansive protection to civilians who regularly participate in hostilities in comparison to members of opposing armed forces, who are continuously targetable.[28] Lastly, Mr. Parks makes an impassioned argument that the ICRC exceeded its mandate in Section IX of the interpretative guidance by addressing restraints on the use of force in direct attack, as this is a component of the means and methods of warfare largely codified in the Hague treaties and not part of the protections for victims of hostilities contained in the Geneva Conventions.[29] He goes on to systematically dispute the ICRC's interpretation of military necessity and the limitations it places on targeting by military forces.[30] Together, these articles expose significant problems with the ICRC interpretative guidance and better reflect U.S. practice and the United States' position concerning direct participation in hostilities.

This example highlights the gap that currently exists in the U.S. law of armed conflict discussion. First, no better forum existed for some of the premier experts in the United

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[18] Additional Protocol I, *supra* note 15.

[19] ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 13.

[20] *Id.* at 8.

[21] Schmitt, *supra* note 13, at 6.

[22] ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 6.

[23] *See* Schmitt, *supra* note 13, at 6; W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L & Pol. 769, 769 note * (2010); Biography of Kenneth Watkins, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, https://www.law.upenn.edu/live/files/3812-watkin-short-biography-oct-2014pdf (last visited Oct. 15, 2015) (describing the professional experience of Brigadier General (Retired) Ken Watkin, Queen's Counsel, including service as the Judge Advocate General for Canadian forces and as a participant in the International Committee of the Red Cross (ICRC) Interpretative Guidance study); Biography of William Boothbay, GENEVA CENTRE FOR SECURITY POLICY, http://www.gcsp.ch/News-Knowledge/Experts/Fellows/Dr-William-Boothby (last visited Oct. 15, 2015) (describing professional experience of Dr. Boothby, including service as head of the Royal Air Force legal branch and a participant in the ICRC Interpretative Guidance study). While each of these individuals were or are officials in the United States or allied governments, each one participated in the ICRC process in his personal capacity and not as a representative of the government. Biography of Kenneth Watkins, *supra*; Biography of William Boothbay, *supra*.

[24] Schmitt, *supra* note 13, at 6.

[25] Watkins, *supra* note 4, at 644.

[26] Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. Int'l L &Pol. 697, 727 (2010).

[27] *Id.* at 728.

[28] Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L & Pol. 741, 743 (2010).

[29] Parks, *supra* note 23, at 794.

[30] *Id.* at 799.

States on the law of war to express their concerns with the ICRC Interpretative Guidance than in an academic journal of a private law school. Second, there was no forum that brought together these experts with current U.S. practitioners and other academics to discuss these issues and potentially produce a leading position that would carry more weight in rebutting the position of the ICRC. Imagine the International Criminal Court surveying the law on direct participation in hostilities in some future court case. Which will be more persuasive to their determination of what is customary international law—a publication by the ICRC or a collection of articles in the NYU Journal of Law and Politics?

The United States expressed similar objections to the ICRC Customary International Law Study,[31] published in 2005. In that situation the legal advisor to the Department of State and the General Counsel to the Department of Defense sent a twenty-nine page letter to the president of the ICRC stating that they did not believe that the study followed an appropriate methodological approach to identifying customary international law.[32] While this constitutes a legitimate United States response, it was sparse in comparison to the multi-volume document produced by the ICRC and it only focused on a few key provisions. The officials asserted that the U.S. would respond more thoroughly at a later time,[33] but that response never came.

B. Targeting in the "War on Terror"

Another area of significant importance to the United States is the application of the law of armed conflict to targeting of combatants who are members of non-state groups such as al Qaeda, and are, at times, located outside of areas of ongoing hostilities. The United States has developed its approach to this issue largely through state practice over the last decade. In 2010, the Human Rights Council of the United Nations released the "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," which was antithetical to U.S. practice in several respects.[34] First, it took a very strident and pejorative tone toward U.S. practice, characterizing targeted strikes as summary executions and equating them to illegal acts.[35] The introduction asserts that "too many criminal acts have been re-characterized so as to justify addressing them with the framework of the law of armed conflict" and that targeted killings "displace[] clear legal standards with a vaguely defined license to kill."[36]

Beyond the pejorative tone, the report takes legal positions that are clearly inconsistent with the U.S. interpretation of the law. First, the United Nations (U.N.) Study on Targeted Killings asserts that both international humanitarian law (IHL) and human rights law apply during armed conflict. Specifically, the study states that "[t]o the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from guidance offered by IHL principles, it is appropriate to draw guidance from human rights law."[37] This is an assertion the United States has never accepted, particularly the latter statement.[38] It would mean that human rights law applies anytime that the LOAC[39] does not clearly resolve a difficult targeting issue. The United States adheres to the traditional view that the LOAC is a *lex specialis* and where it controls, it supplants human rights law.[40] Further, the U.N. study takes the position that the United States cannot be in a non-international armed conflict with al-Qaeda because al-Qaeda and its associated forces are too loosely linked to constitute a "party" to an armed conflict and the violence it inflicts does not rise to the level of intensity and duration required by Additional Protocol II and customary international law.[41]

Finally, the U.N. study supports one of the positions of the ICRC concerning direct participation in hostilities that the United States finds problematic and that is discussed above. It asserts that the portion of the ICRC interpretative guidance that requires the parties to a conflict to use no more force than "what is actually necessary to accomplish a legitimate military purpose"[42] is stating an uncontroversial requirement, especially when targeting civilians who directly participate in hostilities.[43] This last point is interesting, in

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[31] ICRC, *Customary International Law*, *supra* note 2.

[32] 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 (2007), http://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf.

[33] *Id.* at 444.

[34] U.N. Study on Targeted Killings, *supra* note 6.

[35] *Id.* ¶ 11.

[36] *Id.* at ¶¶ 2-3.

[37] *Id.* at ¶ 29.

[38] *See* Int'l and Operational Law Dept., U.S. Army Judge Advocate General's Legal Center & School, Operational Law Handbook 42 (2009).

[39] Human rights advocates tend to refer to the law of armed conflict as international humanitarian law (IHL). *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 239 (2000). Traditionalists tend to refer to it as law of war. *See generally*, Parks, *supra* note 23. The term "law of armed conflict" is used throughout this article, but it is recognized that all three are interchangeable references to the entire body of the law of armed conflict.

[40] JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (1975) (stating that the law of armed conflict "is valid only in the case of armed conflict while human rights are essentially applicable in peacetime"); Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L.REV. 803, 844 (2010).

[41] U.N. Study on Targeted Killings, *supra* note 6, ¶¶ 52-55.

[42] ICRC INTERPRETATIVE GUIDANCE, *supra* note 5, at 77.

[43] U.N. Study on Targeted Killings, *supra* note 6, ¶ 76.

that it provides another example of a U.N. document taking a position contrary to U.S. practice, but it also highlights the influential nature of ICRC publications and the need for a more persistent response.

In some ways the United States mounted a relatively robust response to criticism of its targeting program, particularly as it was applied to members of al-Qaeda outside of Afghanistan. This likely occurred because criticism was aimed directly at the United States. Plus, it came from more sources than just the United Nations.[44] In any case, the U.S. response came primarily through speeches by high ranking officials in the Obama administration. In March 2010, Harold Koh, the legal advisor to the U.S. Department of State, made the first of five major speeches by the Obama administration political appointees defending targeted killings by the United States.[45] In the speech he first affirms that the United States is in an armed conflict with al-Qaeda, [46] and that the United States may use force against this group under its right to self-defense.[47] Mr. Koh went on to dispute the claim that the use of drone strikes constitutes extrajudicial killing by asserting that under the law of war "a state that is engaged in an armed conflict or legitimate self-defense is not required to provide legal process before the state may use lethal force."[48]

In September 2011, John Brennan, who was President Obama's advisor on counterterrorism at the time, struck a similar tone in a speech he made at Harvard Law School.[49] There he said that:

> The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time.[50]

Brennan went on to assert that even under a more restrictive view, that only allows the use of force outside of a "hot" battlefield for the purposes of self-defense, the United States is still complying with the law of armed conflict because it only targets threats that are imminent, although modern conditions require a more flexible definition of imminence.[51] Similar speeches were made by Jeh Johnson, the General Counsel for the Department of Defense,[52] Eric Holder, the Attorney General,[53] and again by John Brennan.[54] Each reiterated the theme that the United States is in an armed conflict with al-Qaeda, the conflict extends beyond the "hot" battlefields of Iraq and Afghanistan, and the United States may target members of this group under the law of armed conflict without providing notice or some level of due process.[55]

These speeches appear to offer a clear view of the U.S. position concerning targeted killings. Unfortunately, they suffer from at least two problems. Most importantly, they all come from political appointees and each specifically asserts that they are expressing the position of the Obama Administration,[56] not the United States. In that context, their

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[44] *See, e.g.*, Human Rights Watch, *U.S.: 'Targeted Killing' Policy Disregards Human Rights Law* (May 1, 2012), http://www.hrw.org/news/2012/05/01 /us-targeted-killing-policy-disregards-human-rights-law (criticizing John Brennan's speech asserting that U.S. targeting practices were consistent with domestic and international law); Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010).

[45] Harold Koh, Legal Advisor, Dept. of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010).

[46] *Id.* ("In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qeada. . . . Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable laws, including the laws of war, in all aspects of these ongoing armed conflicts.").

[47] *Id.* (". . . [A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.").

[48] *Id.*

[49] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Harvard Law School Program on Law and Security (Sep. 16, 2011).

[50] *Id.*

[51] *Id.* ("In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define 'imminence.' We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.").

[52] Jeh Johnson, General Counsel of the Department of Defense, Address at Yale Law School (Feb. 22, 2012).

[53] Holder, *supra* note 8.

[54] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012).

[55] The Department of Justice also released a White Paper in November 2011 to address the specific issue of targeting a U.S. Citizen who is a senior operational leader of al-Qa'ida. U.S. DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (Nov. 8, 2011), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.

[56] *See, e.g.*, Brennan, *supra* note 54 ("I very much appreciate this opportunity to discuss *President Obama's counterterrorism strategy* . . . ." (emphasis added)); Koh, *supra* note 45 ("Since this is my first chance to address you as Legal Advisor, I thought I would speak to three issues. . . .

precedential value as a statement of the U.S. position is relatively limited. It is questionable whether scholars, other nations, or international organizations, would give them much weight in defining international law, particularly after this administration has left office. Second, it is telling that the highest officials in the U.S. government chose to respond to ongoing criticism to the U.S. position through speeches. It eliminates the need to overcome any type of bureaucratic process necessary to produce a more formal statement. Furthermore, it is an indication that the President did not want, or at least did not need these statements of the U.S. position to become more definitive. There are certainly reasons why a President would not want to bind himself or a future President where it is unnecessary. Unfortunately, this just lends to the concern that speeches will not be given the same level of credibility, particularly as time passes.

Speeches by important administration officials obviously have their place. However, a government sponsored law of armed conflict think tank would provide another tool to amplify the message delivered by high ranking officials. It would do this through writings by lesser government officials and academics that last beyond any one administration or one point in time. And while no one article or publication from the think tank will define the U.S. position concerning the law of war, over time it will provide pieces in a large mosaic that the world can look at to define the leading U.S. position, and thus influence the larger body of law.

### C. Cyber Warfare

Although there are other evolving areas in the law of armed conflict, the last one that this article will discuss is cyber warfare. More than any other area, this may be the most complicated in terms of applying the existing legal framework to a completely new environment. Cyber operations can produce effects similar to a kinetic strike, but they also produce many other effects that negatively impact an opposing force or support allied forces; not to mention numerous applications that may create an incidental burden or benefit for a belligerent. To make things even more complicated, every type of entity can conduct cyber operations; from an individual acting alone, up to powerful nations and everything in between. Lastly, these parties can conduct their operations from anywhere in the world, openly or in complete secrecy. This complexity creates a morass of issues in the law of armed conflict. What rules apply? When do they apply and how?

At the urging of the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence, a group of experts attempted to answer these questions by "examin[ing] how extant legal norms appl[y] to this 'new' form of warfare."[57] Their efforts produced the *Tallin Manual on the International Law Applicable to Cyber Warfare*. The manual provides ninety-five rules over 282 pages in an effort to help governments understand the international legal implications of cyber operations.[58] The problem is that the manual only scratches the surface in answering the difficult questions that cyber warfare presents. As the editor admits there are no treaty provisions that deal with cyber warfare and expressions of *opinio juris* are sparse. In determining the application of the law of armed conflict to cyber warfare the international group of experts was forced to apply principles broadly, or in some cases craft broad rules where no existing principle applied.[59] These broad principles leave many questions in the scope and application of the law. Colonel Dave Wallace and Lieutenant Colonel Shane Reeves highlight just one of these gaps in their article on the application of the cyber warfare to *levee en masse*.[60]

There is much more to be done. First, as described above, the Tallin Manual does not completely define the *lex lata*[61] in its application to cyber warfare. But even more important, if the law of armed conflict is to remain relevant in this area, nations must address the *lex ferenda*,[62] or what the law should be. Too much legal ambiguity remains, and the law of armed conflict as it exists now cannot serve its purpose in maintaining the balance between military necessity and humanity in the area of cyber operations. The United States must be a part of this conversation and currently we have limited vehicles by which to do so. Again, a government sponsored think tank cannot fill this void, but it could keep the conversation moving forward and provide a continuous voice that does not currently exist.

## III. The Potential Solution

In a perfect world the Department of State and Department of Defense would seamlessly execute an administrative process that brought government experts together to consider evolutions in the law of armed conflict and provide a consensus response that reflects the U.S. position. For many reasons this does not happen. In some cases it may be wise for the United States to refrain from publishing an *official* position in an evolving area where the

Second, to discuss the strategic vision of the international law that *we in the Obama Administration are attempting to implement*." (emphasis added)).

[57] TALLIN MANUAL, *supra* note 10, at 1.

[58] David Wallace & Shane R. Reeves, *The Law of Armed Conflict's "Wicked" Problem:* Levee en Masse *in Cyber Warfare*, 89 INT'L L. STUD. 646, 648 (2013).

[59] TALLIN MANUAL, *supra* note 10, at 5-6.

[60] Wallace & Reeves, *supra* note 58.

[61] *Lex lata* is defined as "what the law is." *See* J. Jeremy Marsh, Lex Lata *or* Lex Ferenda*? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117 (2008).

[62] *Id*.

future is uncertain. In other cases, it seems that the very idea that a document may be viewed as the *official* position of the United States creates bureaucratic catatonia. The updated Law of War Manual for the Department of Defense is a perfect example of this. Efforts to update it began in 1996 and reports indicate that it was close to completion in 2010.[63] Four years later it still languishes, and some assert that it has been torpedoed by political concerns.[64]

The result is that nothing exists to provide any type of consensus response—whether official or not—that represents the U.S. view. To the extent that it is represented, the U.S. view comes from state practice, speeches by political appointees, and certain court opinions. All of these are problematic, and insufficient to say the least. While state practice is the most significant indicator of the U.S. view of international law, if no one documents that practice and links it to United States *opinio juris*, it loses its force. Speeches by high ranking political appointees are significant, but the political nature of their position, for better or worse, weakens the strength of these statements as an enduring view of the law. The political aspects of their position calls into question whether their view of the law will survive from one administration to the next and whether it will be accepted by allies or other branches within our U.S. government. Even without the political concerns, a few speeches are not enough to establish a basis for the U.S. view.

Given the landscape, U.S. federal court opinions that interpret the law of armed conflict might be the most authoritative statement on the U.S. view.[65] For obvious reasons, these are few and far between, and do not cover the range of evolving issues. They certainly do not serve to answer opposing voices which reflect views inconsistent with U.S. practice. Furthermore, judges are generalists and we should not leave it to them to define the U.S. position on a specialized area of law such as the law of armed conflict. It should be the other way around. A consensus view that reflects the position of U.S. experts and practitioners should inform judges in resolving court cases that implicate the LOAC.

A. The Benefit of a Think Tank

Current outlets for U.S.-centric expressions of the law are insufficient. The proposed government supported think tank cannot fill the void, but could serve as one tool in the government's arsenal to influence the evolution of international law. This entity could not replace the formal processes in the Department of State or the Department of Defense, and it could not purport to provide the *official* position of the United States on issues concerning the law of armed conflict. It could, however, bring government officials, practitioners, and academics together for the express purpose of studying evolving law of armed conflict issues with the intent of developing a consensus on what the U.S. position is or should be.

While this entity could never reach consensus in all areas, it could certainly find areas of agreement in important topics such as targeting, autonomous weapons, and cyber warfare, to name a few. For example, a conference sponsored by the think tank could conclude that the United States should continue to study the use of autonomous weapon systems because the technology is still undeveloped and it is unclear whether future systems will increase or decrease compliance with the law of armed conflict. Such a statement would provide a countervailing voice to organizations like Human Rights Watch, which are calling for an outright ban.[66] In this way, the think tank could signal the U.S. position to our allies, international organizations, and human rights groups without official action by the U.S. government.

Ultimately, increased expression of the U.S. position may prevent the crystallization of international law in a manner inconsistent with U.S. practice, or at least establish a foundation for the United States to assert persistent objector status. Furthermore, the output from the think tank creates a leading position for use by policy makers in developing U.S. doctrine. The stated mission of the think tank and the fact that it is government-created provide the imprimatur of government authority, while its structure and placement outside the Pentagon and the Department of State gives it the flexibility to study and respond proactively to law of armed conflict challenges. Warfare is evolving. If we do not proactively shape the law of armed conflict to evolve with it, this body of law will become ineffective in regulating warfare, or it will move in a direction that is contrary to the realities of warfare and prejudicial to the United States.

Some in Washington, D.C., may immediately object to this idea based on concerns that it would usurp the authority of officials at the Department of State and the Department of Defense. First, moving some small modicum of authority away from Washington, D.C., would not be detrimental. But more importantly, this would not usurp that authority, but rather provide a less formal outlet that officials in the government could communicate through, without setting U.S. policy. It is a way to signal the U.S. position without binding the government to that position. Furthermore, even

[63] Edwin Williamson and W. Hays Parks, *Where Is the Law of War Manual?*, THE WEEKLY STANDARD (Jul. 22, 2013), http://www.weeklystandard.com/articles/where-law-war-manual_739267.html.

[64] *Id.*

[65] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006) (finding that Common Article 3 of the Geneva Conventions serves as a minimum standard in all armed conflicts, and thus applies to the conflict with Al Qaeda and associated forces).

[66] *See* Lieutenant Colonel Shane Reeves & Major (Promotable) William J. Johnson, *Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?* ARMY LAWYER 1-7 (Apr. 2014).

with the imprimatur of government support, it would not have the authority, prestige, or influence of Washington, D.C.

Others would argue that this type of forum already exists through such organizations as The Judge Advocate General's Legal Center and School and the Naval War College, and the accompanying publications such as *The Army Lawyer*, *The Military Law Review*, and *International Law Studies*. The Judge Advocate General's Legal Center and School is excellent at training and representing the views of practitioners. The International Law Department of the Naval War College has established a strong reputation as an academic organization that addresses the law of armed conflict on a broader international basis. This proposal, however, is different. We need an organization that brings both practitioners and academics together to focus on identifying the U.S. position in evolving areas of the law of armed conflict by examining U.S. state practice, or alternatively, arguing what the position should be in areas where it is unclear. Certainly there are many organizations and academics arguing as to how the law of armed conflict should apply to various issues, but this think tank would focus on U.S. interests and provide a proactive response that could then assist policy makers in more official settings. This is not to say that this organization would be some type of puppet to parrot views favorable to the United States. Instead, it would encourage free and open debate focused on identifying the U.S. interpretation on evolving areas in the law of armed conflict in an attempt to identify a consensus view between the academic and practitioner communities.

No other organization currently does this. The Judge Advocate General's Legal Center and School, along with *The Army Lawyer* and *Military Law Review*, have both a broader and more narrow focus. [67] They are broader in that the Legal Center and School is focused on all areas of law relevant to practice in the military, from contracts, to criminal law, to international law, including the law of armed conflict.[68] They are narrower in that the primary purpose is to build professional expertise in these various areas of law among judge advocates and civilian attorneys who work for the Department of Defense.[69] Typically, their goals are not to drive the evolution of the law, but to train practitioners on how to advise commanders on the law as it exists, and to generally take a conservative view where the law is unsettled.

The International Law Division of the Naval War College provides something closer to this model, but the emphasis is different. First, although it trains practitioners, its make-up and emphasis is more academic in nature. Most of its staff are military members or have military experience,[70] but it does not focus on bringing practitioners and government officials together with academics to study these issues.[71] Secondly, its contribution to the discussion is similar to other academic institutions in that its articles comment primarily on the view of international law from the perspective of the broader international community.[72] It does not typically, or at least purposefully, seek to describe the U.S. position. The proposed think tank is an organization whose stated goal is to study and identify the U.S. position concerning the law of armed conflict in order to provide a counter weight to the many voices who seek to shape international law in a manner inconsistent with U.S. practice.

There are many think tanks in the civilian community and similar organizations in academic institutions. These organizations do not have the specific mission of defining the U.S. position on the law of armed conflict. Typically, they are focused more on research and writing that tends towards broader discussions of the law. Furthermore, they do not draw important voices from inside the government, particularly practitioners of the law of armed conflict.

### B. The United States Military Academy at West Point (West Point) as the Perfect Location

Of course, with enough resources the government can solve almost any issue. Thus, a solution that calls for more resources, especially in a time of increasing austerity for the Department of Defense, is not much of a solution. This solution, however, calls for almost no additional resources. The expertise already exists; the U.S. military only needs an entity to bring it together. The West Point Center for the

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[67] The mission of The Judge Advocate General's Legal Center and School is to "train[] and educate[] the Judge Advocate General's Corps Team of professionals and warriors in legal and leadership skills, develop[] capabilities, conduct[] strategic planning, and gather[] lessons learned to support the proactive delivery of principled counsel and mission-focused legal services to the Army and the Nation." *The Judge Advocate General's Legal Center and School Mission / Vision*, JAGCNET (June 19, 2012 12:55;08 PM), https://www.jagcnet.army.mil/Sites/tjaglcs.nsf/homeContent.xsp?open&documentId=298ABC690B7DBF2F85257A98006CEEF7.

[68] *The Military Law Review* states that it "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 duties." Captain Laura A. O'Donnell, ed., 216 MIL. L. REV. ii, ii (2013).

[69] The notes on the inside cover of the *The Army Lawyer* state that its purpose is "to cover topics that come up recurrently and are of interest to the Army JAG Corps." Captain Marcia Reyes Steward, ed., ARMY LAW, (2014).

[70] International Law Division, *Who We Are*, NAVAL WAR COLLEGE (March 7, 2014), http://www.usnwc.edu/Research---Gaming/International-Law/Who-We-Are.aspx.

[71] International Law Division, *What We Do*, NAVAL WAR COLLEGE (Oct. 15, 2015), https://www.usnwc.edu/Departments---Colleges/International-Law/What-We-Do.aspx.

[72] *See, e.g.*, articles on International Law Studies, U.S. NAVAL WAR COLLEGE, http://stockton.usnwc.edu/ils/ (last visited Oct. 15, 2015) (providing an example of articles typically published by the International Law Division of the Naval War College).

Rule of Law,[73] which is co-located with the Department of Law, could serve as a perfect vehicle for this effort. As both a premier military institution and top-tier college, West Point is uniquely situated to facilitate a broader discussion and a comprehensive study of the law of armed conflict. West Point's novel attributes draw academics, commanders, and legal practitioners, thus providing a venue for discourse between these distinct groups. There are few organizations within the U.S. government that attract the number and quality of important leaders and thinkers in their fields for visits, conferences, lectures, and speeches.[74]

Additionally, West Point's special status in both the academic community and the U.S. military fosters an atmosphere that encourages the development of solutions to the law of armed conflict issues. One could easily imagine a conference hosting division and corps Staff Judge Advocates, members of the International Law Division of the Office of the Judge Advocate General, brigade commanders, and academic professors from around the world. In fact, this is already happening. Members of the ICRC visit each semester to speak to the cadets taking West Point's Law of Armed Conflict class. In October 2014, the Center for the Rule of Law co-hosted a conference with the Naval War College to consider the conflict in the Ukraine and implications for the law of armed conflict. The Army recently established the Army Cyber Institute at West Point,[75] which will serve as a key contributor to the discussion in the DOD on cyber operations and the law of armed conflict. Each year, faculty members both write and mentor cadets writing on LOAC issues.[76] These are just a few examples of the active engagement with the law of armed conflict that occurs at West Point. Plus, because of West Point's unique position as an academic institution, it benefits from funding sources not typically available to other DOD entities.

So how does the U.S. military get there? Under the best conditions, Congress would include language in the National Defense Authorization Act recognizing the Center for the Rule of Law at the United States Military Academy, or a similar organization, and giving it the mission of studying the evolution of the law of armed conflict for the purpose of assisting the executive branch and Congress with developing legal policy. Alternatively, the Department of Defense or the Department of the Army should assign this mission to the Center for the Rule of Law, similar to the Chief of Staff of the Army's creation of the Strategic Studies Group.[77] Again, whichever authority assigns the mission would draft the language in a such a way so as not to usurp the role of higher officials, but to clearly state that the purpose of the organization is to study the law of armed conflict and develop a consensus view for further use by the government.

If none of these is an option, The Judge Advocate General, U.S. Army, should support this organization as an entity inside the Corps that is focused on applying hard won expertise in this area to the consideration of current and future problems in the law of armed conflict. The Judge Advocate General, U.S. Army, could most easily do this by creating a LOAC fellowship within the Center for the Rule of Law at the United States Military Academy. The Judge Advocate General's Corps could fill this fellowship with a field grade officer with operational experience. This field grade officer would work with faculty members to coordinate conferences, edit material for publication, participate in scholarship, provide LOAC education to cadets, and work with entities such as the International Law Division on the DOD LOAC issues. This fellowship would be comparable to those experienced in other academic environments and the officer could complete it as the utilization tour subsequent to obtaining a Master of Laws (LL.M.) degree. Furthermore, this effort would support initiatives by the Army Chief of Staff to capitalize on operational experience[78] and expand institutional training opportunities.[79] While Congress, or even the Secretary of Defense, is not likely to address this issue anytime soon, maybe a grassroots effort by the JAG Corps could show its value and build the concept to meet the larger objective.

The U.S. military is in a unique time. Technology is driving the evolution of warfare in a manner likely unseen in history. The law of armed conflict must evolve with it and the United States needs to play an active and continuing part

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[73] West Point established the Center for the Rule of Law in 2009 to educate and promote the rule of law, including principles underlying the law of armed conflict, through conferences, programs, and experiential learning. Center for the Rule of Law, UNITED STATES MILITARY ACADEMY WEST POINT, http://www.usma.edu/crol/SitePages/Home.aspx (last visited Oct. 15, 2015).

[74] In this year alone West Point has been visited by the President of the United States, Secretary Condoleezza Rice, Congresspersons, CEOs, ambassadors, federal judges, most four-star generals in the Army, and numerous authors, journalist, and professors. *Press Releases*, West Point, http://www.westpoint.edu/news/SitePages/Press%20Releases.aspx (last visited Oct. 15, 2015).

[75] Joe Gould, *West Point to House Cyber Warfare Research Institute*, USA TODAY (April 8, 2014), http://www.usatoday.com/story/news/nation/2014/04/08/cyber-warfare-institute-west-point-academy/7463249/.

[76] *See, e.g.*, Cadet Allyson Hauptman, *Autonomous Weapons and the Law of Armed Conflict*, 218 MIL. L. REV. 170 (2013).

[77] CHIEF OF STAFF OF THE ARMY (CSA) STRATEGIC STUDIES GROUP, http://csa-strategic-studies-group.hqda.pentagon.mil/SSG_Index.html (last visited Oct. 15, 2015) ("The Strategic Studies Group (SSG) conducts independent, unconventional, and revolutionary research and analysis to generate innovative strategic and operational concepts for land forces in support of a governing theme provided by the CSA.").

[78] U.S. DEPT. OF ARMY, THE ARMY TRAINING STRATEGY: TRAINING IN A TIME OF TRANSITION, UNCERTAINTY, COMPLEXITY, AND AUSTERITY 7 (October 3, 2012) (affirming that one of the strategic goals of Army training over the next few years is to capitalize on the wealth of experience currently available in the force and apply that experience to future challenges).

[79] *Id.* at 9-11 (stating that institutional learning is one of the three pillars of leader development, that this learning must continue throughout an officer's career, and that the balance has shifted toward operational experience over the last decade and that it must shift in the other direction now that combat operations are decreasing).

in that evolution. Fortunately, the United States has an amazing pool of talent to tackle this problem. The U.S. military is at the tail end of almost fifteen years of conflict. The pool of experienced practitioners and judge advocates is unparalleled in recent history and may not be seen again for many years. The United States needs to harness this experience and use it to tackle the thorny legal issues of modern warfare. Furthermore, as one of the most experienced nations on earth in recent conflicts we need to harness this experience to add the U.S. voice to the international community as it shapes the law of armed conflict of the future.

# False Hope or Get Out of Jail Free? An Analysis of State Laws Exempting National Guard Members from Arrest

*Major Michael J. Lebowitz**

## I. Introduction

On the way to weekend drill, can a National Guard member drive like a maniac, throw an empty liquor bottle out of the car window, and perhaps start a fight without getting arrested by civilian police officers? In some states, the answer might be yes. Most states codify rules and regulations with respect to their National Guard and militia forces.[1] At least eighteen of those states, to varying degrees, afford their National Guard members "exemption from arrest" while traveling to and from military duty.[2]

Although the language varies from state to state, these statutes generally share the common language that

> [N]o person belonging to the [National Guard], [State Defense Forces] or the naval militia shall be arrested on any process issued by or from any civil officer or court, except in cases of felony or breach of the peace, while going to, remaining at or returning from any place at which he may be required to attend for military duty; nor in any case whatsoever while actually engaged in the performance of his military duties, except with the consent of his commanding officer.[3]

So what exactly does this mean? For example, can Soldiers and Airmen get out of a speeding ticket or even a reckless driving charge if the offense occurred while driving to and from home and his or her duty station? The plain language appears to suggest that National Guard members can indeed avoid arrest for many misdemeanor offenses as well as various traffic offenses if they commit such violations while on the way to or from drill.[4]

Anecdotally, National Guard judge advocates occasionally reference the respective state provisions when a Soldier faces civil arrest or traffic citation. However, national precedent is generally limited on the overall interpretation of these "exemption from arrest" laws.[5] Moreover, local courts rarely issue written precedent; consequently, the law remains open for interpretation in many states.[6] While the few published interpretations directly on point generally recognize the value and intent of "exemption from arrest" laws, in practice the laws are viewed within a particularly narrow lens.[7] This article

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[1] *See, e.g.* VA. CODE ANN., § 44 (2014); N.H. REV. STAT. ANN., § VIII (2014); CAL. MIL. & VET. CODE § 390 (2015).

[2] *See* COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); 51 PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV'T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

[3] *See, e.g.* VA. CODE ANN. § 44-97 (2014) ("No person belonging to the Virginia National Guard, Virginia State Defense Force or the naval militia shall be arrested on any process issued by or from any civil officer or court, except in cases of felony or breach of the peace, while going to, remaining at or returning from any place at which he may be required to attend for military duty; nor in any case whatsoever while actually engaged in the performance of his military duties, except with the consent of his commanding officer"); VT. STAT. ANN. tit. 20 § 884 (2014) ("Officers, noncommissioned officers, musicians and privates enrolled in this state, while under orders for service under the government of the United States or under authority of this state, except for treason, felony and breach of the peace, shall be privileged from arrest and imprisonment by civil authority, from the date of the issuing of such orders to the time of their discharge from service."); MISS. CODE ANN § 33-1-7 (2014) ("No person belonging to the military forces of this state shall be arrested by any civil authority under any civil or criminal process while going to, remaining at or returning from any place at which he may be required to attend military duty except for treason or felony. Service of any such prohibited process shall be void."); GA. CODE ANN. § 17-4-2 (2014) ("The members of the organized militia or military forces shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at drills, parades, meetings, encampments, and the election of officers and going to, during, and returning from the performance of any active duty as such members."); N.H. REV. STAT. ANN § 110-B:71 (2014) ("Members of the national guard shall, except for treason, felony or breach of the peace, be privileged from arrest and imprisonment while under orders in the active service of the state from the date of the issuing of such orders to the time when such service shall cease, or while going to, remaining at or returning from, any place at which the individual may be required to attend any military duty.").

[4] VT. STAT. ANN. tit. 20 § 884 (2014); MISS. CODE ANN § 33-1-7 (2014); N.H. REV. STAT. ANN § 110-B:71 (2014). The state codes also contain language exempting members of the National Guard from service of civil process such as civil lawsuits while traveling to, from, or during military duty.

[5] *See, e.g.*, Commonwealth v. Barnhart, 2007 PA Super 293 (Pa. Super. Ct. 2007) (noting "the absence of precedent has been confirmed by our research of the matter" and that the statute has not been cited with any frequency, "[i]n fact, there are no binding decisions from the Pennsylvania Supreme or Superior Courts addressing military exemption from arrest . . . .").

[6] *Id.*

[7] *See generally* Commonwealth v. Talierco, 1966 Pa. Dist. & Cnty. Dec. LEXIS 22 (Pa. C.P. 1966) (reversing the trial court decision on the basis that the defendant in traffic offense had not been taken into custody and immediately taken before the justice of the peace); Sanders v. Columbus, 140 Ga. App. 441 (Ga. Ct. App. 1976) (recognizing that the National Guard captain's arrest on a speeding charge was illegal pursuant to the exemption from arrest statute, but the court upheld the conviction because "in Georgia,

surveys the exemption from arrest laws codified throughout the United States. The article then examines the history and legislative purpose of these laws as well as their application with respect to members of the military.

## II. History of "Exemption from Arrest" Laws

State laws exempting militia members from arrest by civilian authorities have been on the books since at least the early nineteenth century.[8] The purpose of the statutes historically has been to prevent civil interference with the military on active duty in the performance of duty.[9] Legislators reasoned that the duties imposed on military members by the order of the governor required attendance and effort at any place of the governor's choosing; therefore, custody under civil process would manifestly interfere with the duties in which the military member was engaged.[10]

One of the earliest recorded cases of a military member using the exemption as a defense occurred in Rhode Island in 1859.[11] In that case, a surgeon in the Pawtucket Light Guard was served with a civil writ while traveling out-of-state on orders from his commanding officer.[12] The surgeon argued that under the statute, he was exempt from arrest at the time of service of the writ because he was a commissioned officer duly engaged and was going to a place which he had been ordered to attend for the performance of military duty.[13] Ultimately, the court rejected the surgeon's argument on limited factual grounds holding that "the moment that he passed out of the state and into the jurisdiction of another state, he passed beyond the jurisdiction of his commanding officer, and could not properly be said to be acting there under his orders. If not so acting, he was not within the protection of the act."[14]

A conflict between military and civilian authorities over the interpretation of a similar law in Illinois came to a head in 1915.[15] There, five uniformed National Guard members of Company E, 5th Infantry initially reported to an armory for the purpose of state encampment before leaving the armory for a night on the town.[16] The men became intoxicated and disorderly, and two of the men were arrested by the police and briefly locked up.[17] Almost immediately, the military convicted the men through summary court-martial proceedings.[18] Civilian authorities then issued arrest warrants for the purpose of prosecuting the men in the local court.[19] The National Guard unit cited the "exemption from arrest" law as a basis to quash the civilian arrest warrant.[20] Upon reaching an impasse, both parties requested a legal opinion from the Illinois attorney general.[21] In this case, Illinois Attorney General P.J. Lucey wrote that the "exemption from arrest" law contradicted the Illinois Constitution, which states that "[t]he Military shall be in strict subordination to the civil power."[22] As such, Lucey stated that "under the Constitution and laws of this State, a member of the State Militia, even when engaged in active service, is not exempt from arrest by the civil authorities for treason, felony or breach of the peace."[23] The "exemption

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a conviction could not be avoided simply because of the illegality of the arrest"); State v. Murray, 106 N.H. 71 (N.H. 1964) (distinguishing between the issuance of a summons in a traffic offense and an arrest).

[8] *See, e.g.*, Manchester v. Manchester, 6 R.I. 127 (R.I. 1859) (involving a Rhode Island exemption from arrest statute); White v. Lowther, 3 Ga. 397 (Ga. 1847) (holding a First Lieutenant liable for civil process because the officer was in the military service of the federal government and not the state).

[9] *See Sanders*, 140 Ga. App. 473 (noting that the legislative purpose of this immunity statute is to prevent civil interference with the military on active duty in the performance of duty); Andrews v. Gardiner, 185 A.D. 477, 479 (N.Y. App. Div. 1918) (stating that the purpose of the statute is to prevent interference with military duties); *Cf. White*, 3 Ga. 397, *9, *citing* Greening v. Sheffield, 1 Ala. R. 276 ("The service of a process, even for the recovery of an ordinary debt, is a circumstance calculated to excite unpleasant feelings in the bosom of a man of correct principles, and the more so, if it should occur at a moment when he is performing a public duty in the pesence (sic) of his fellow-citizens. Suppose a Sheriff… stepping up to an officer as he was about to give the word of command to his regiment or brigade, and putting a writ into his hand. Would not this be humiliating to his pride? Or even in a more stoical view of the subject, is it not an impediment and hindrance in the discharge of his duty, which he ought not to be subjected to? Or, in the case of a private, at the moment he is about to shoulder his musket in obedience to the command of his officer, to be compelled to receive a writ from a Sheriff, would it not both wound his feelings and embarrass him in the discharge of his duty? It is the duty of a wise Legislature, in subjecting the citizens of the country to the regulations of the law, to have a due regard to those honourable feelings which should be inculcated in the bosom of freemen; and this was the object of our Legislature.").

[10] *See Andrews*, 185 A.D. at 479.

[11] *See Manchester*, 6 R.I. at 127.

[12] *Id*. at 128.

[13] *Id*. at 128-29.

[14] *Id*. at 129.

[15] When Members of Nat'l Guard Subject to Arrest by Civil Authorities, 1915 Op. Atty Gen. Ill. 229.

[16] *Id*. at 3.

[17] *Id*.

[18] *Id*. at 3-4.

[19] *Id*. at 4-5.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 5.

[23] *Id*. at 10. States also provide similar exemptions from arrest for other limited groups, to include: the President and the Governor; Lieutenant Governor during attendance at sessions of the General Assembly and while going to and from such sessions; judge, grand juror, or witness required to attend any court or place; ministers of the gospel while engaged in performing religious services in a place where a congregation is assembled; voters going to, attending at, or returning from an election; and supervising physicians. *See, e.g.*, VA. CODE ANN. § 8.01-327.2 (2014); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014); MONT. CODE ANN. § 46-6-102 (2013).

from arrest" law has since been repealed from the Illinois code. New York is another state that historically codified an "exemption from arrest" statute—it became law in 1883—but has since removed the statute from the books.

## III. Modern Exemptions from Arrest

Although a majority of states and territories do not codify such exemptions, at least eighteen states continue to maintain versions of this language.[24] Each of the eighteen state statutes contain language specifically exempting members of the National Guard from arrest or civil process while going to, remaining at, or returning from any place of military duty.[25] Some states, such as Pennsylvania, South Dakota and Vermont, do not differentiate between state forces and active duty servicemembers with respect to the exemption.[26] Moreover, nine states—Maine, Virginia, Utah, Vermont, Texas, Georgia, Montana, South Carolina, and New Hampshire—carve out an exception where National Guard members are exempted from arrest "except [in cases of] treason, felony and breach of the peace."[27] The remaining nine states generally do not list exceptions pertaining to breach of the peace and felony. However, there is little precedent one way or the other with respect to the proposition that a Soldier could negate a felony arrest on the basis that he or she was traveling for military duty.[28]

Of the few available state precedents, it appears that appellate courts tend to favor upholding arrests through very narrow lenses.[29] In one case, an active Pennsylvania National Guard member was arrested for drunk driving and a seatbelt violation.[30] In upholding the conviction, the court noted that "he was out of uniform and off duty, on a purely personal mission, which had absolutely nothing to do with his active duty status as a guardsman, and was in no way carrying out any military order, duty or obligation at the time he was arrested."[31] Another Pennsylvania appellate court upheld a speeding infraction where a Pennsylvania Air National Guard captain claimed he was enroute to the Olmstead Air Force Base for military duty.[32] The court held that no arrest had taken place because the captain was not taken into custody and was not immediately taken before the justice of the peace and charged with the alleged offense.[33] However, the court added that if the captain had been taken into custody, "then it could be said authoritatively that he had been arrested," implying that there are indeed scenarios where the exemption from arrest statute could be applicable.[34]

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[24] *See* COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); 51 PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV'T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

[25] *See See* COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV'T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

[26] PA. CODE § 4104 ("No officer or enlisted person shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from, a place where he is ordered to attend for military duty."); S.D. CODIFIED LAWS § 33-6-2 ("No person belonging to the military forces may be arrested on any civil process while going to, remaining at, or returning from any drill or annual training that the member is required to attend for duty."); VT. STAT. ANN. tit. 20 § 1274 (2014) ("No officer or enlisted member of such forces shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from a place where he or she is ordered to attend for military duty. Every officer and enlisted member of such forces shall, during service therein, be exempt from service upon any posse comitatus and from jury duty.").

[27] ME. REV. STAT. ANN. tit. 37-B, § 185 (2014); VA. CODE ANN. § 44-97 (2014) (Virginia does not include "treason"); UTAH CODE ANN. § 39-1-54 (2014); VT. STAT. ANN. tit. 20 § 884 (2014); TEX. GOV'T CODE ANN. § 437.223 (2014); GA. CODE ANN. § 17-4-2 (2014); MONT. CODE ANN. § 46-6-102 (2013); N.H. REV. STAT. ANN. § 110-B:71 (2014); S.C. CODE ANN. § 25-3-120 (2013).

[28] *See generally* Commonwealth v. Barnhart, 2007 PA Super 293 (Pa. Super. Ct. 2007).

[29] *See Id.* (reversing the trial court decision on the basis that the defendant in traffic offense had not been taken into custody and immediately taken before the justice of the peace); Sanders v. Columbus, 140 Ga. App. 441 (Ga. Ct. App. 1976) (recognizing that the National Guard captain's arrest on a speeding charge was illegal pursuant to the exemption from arrest statute, but the court upheld the conviction because "in Georgia, a conviction could not be avoided simply because of the illegality of the arrest"); State v. Murray, 106 N.H. 71 (N.H. 1964) (distinguishing between the issuance of a summons in a traffic offense and an arrest).

[30] Commonwealth v. Barnhart, 2007 PA Super 293, 296 (Pa. Super. Ct. 2007).

[31] *Id*.

[32] Commonwealth v. Talierco, 1966 Pa. Dist. & Cnty. Dec. LEXIS 22, 367 (Pa. C.P. 1966).

[33] *Id*. at 369-70; *see also* State v. Murray, 106 N.H. 71, 73 (N.H. 1964). In rejecting the exemption in a speeding case, the court reasoned that "such an interpretation is consonant with the intent of this statute which is to prevent interference with the requirements of the military. We fail to see how the action taken by the officer and the fact that the defendant was required to answer to a charge of speeding at a later date would result in such interference. However we can foresee serious interference with public and private rights if members of the military were allowed to operate motor vehicles without regard to traffic regulations when no emergency or military necessity exists." *Id.*

[34] *Talierco*, 1966 Pa. Dist. & Cnty. Dec. LEXIS at 369.

In Georgia, a National Guard captain was arrested for speeding while enroute from Fort Stewart to Fort Benning as part of his military duties.[35] The appellate court noted that "[i]f the speeding was not a breach of the peace, defendant's arrest was illegal."[36] Although the court acknowledged errors in the trial court's conclusions of law, the court refused to overturn the conviction because "in Georgia, a conviction could not be avoided simply because of the illegality of the arrest."[37]

## IV. Applying an Exemption Defense

The limited case law suggests that National Guard members arrested while on their way to, from, or during military duty can conceivably use the exemptions in instances where the servicemember is actually taken into custody by civilian authorities.[38] This appears to be the case regardless of whether a state considers a traffic stop to be an arrest.[39]

But what about driving under the influence (DUI) arrests? Certainly, if a National Guardsman fails a field sobriety test while traveling under orders for military duty, the civilian police official is likely to take the servicemember into custody. A plain reading of the various state statutes could create a veritable catch-22 for civilian law enforcement.[40] On one hand, they must arrest the suspected drunk driver on what is typically a misdemeanor offense. But if the drunk driver is arrested and taken into civilian custody, the exemption statute could negate the arrest. One solution is to equate driving under the influence with breach of the peace.

In 1970, the South Carolina Highway Patrol sought guidance from the state attorney general on exactly this issue.[41] An assistant attorney general issued a legal opinion stating,

> [A] review of the legal reference works on the matter indicates that it has been universally held by the courts that operating a motor vehicle while under the influence of intoxicating liquor is a breach of the peace within the meaning of statutes or constitutional provisions exempting certain persons from arrest, except for breaches of the peace and other exceptions.[42]

Although DUI arrests are commonly regarded as a breach of the peace, the classification becomes murkier with respect to traffic offenses that do not involve intoxication.[43] In Virginia, breaches of the peace are defined as "[o]ffenses against the public peace [to] include all acts affecting public tranquility, such as assaults and batteries, riots, routs and unlawful assemblies, forcible entry and detainer, etc."[44] As such, a Virginia National Guard member traveling to military duty is not exempt from arrest if he or she stops to start a fight or commits a robbery.[45]

Determining the breach of the peace for traffic offenses is more subjective. When deciding on whether or not a traffic offense constitutes breach of the peace, courts typically analyze its egregiousness.[46] Such issues tend to

[35] Sanders v. Columbus, 140 Ga. App. 441, 474-75 (Ga. Ct. App. 1976).

[36] *Id*.

[37] *Id.*

[38] *Talierco*, 1966 Pa. Dist. & Cnty. Dec. LEXIS at 369-70.

[39] Some states list additional limits to their exemption from arrest statutes beyond treason, felony, and breach of the peace. For example, the Utah Code does not extend the privilege to arrest or citation in cases of "operation of a vehicle in a reckless manner or while under the influence of any drug or alcohol; or offenses which under state law are class A misdemeanors or greater." UTAH CODE ANN. § 39-1-54; *see also* TEX. GOV'T CODE ANN. § 437.223 ("This section does not prevent a peace officer from issuing a traffic summons or citation to appear in court at a later date that does not conflict with the member's duty hours."); R.I. GEN. LAWS § 10-10-6 ("A militia officer who is outside of the state is not within the protection of this section since he is not under the jurisdiction of his commanding officer.").

[40] *See, e.g.*, sources cited *supra* notes 3, 26; *Cf.* UTAH CODE ANN. § 39-1-54.

[41] 1970 S.C. AG LEXIS 348.

[42] *Id*.

[43] *Id*; *see also* West Virginia v. Gustke, 516 S.E. 2d 283, 291-92 (W. Va. 1999).

[44] Commonwealth v. Thompson, 69 Va. Cir. 283 (Va. Cir. Ct. 2005); *see also* Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731, 739 (Md. 1970) (breach of the peace defined as "disorderly dangerous conduct disruptive of private peace"); State v. Peer, 320 S.C. 546, 466 S.E.2d 375, 379 (S.C. App. 1996) (breach of the peace is defined as a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence); Hudson v. Commonwealth, 585 S.E.2d 583, 588 (2003) (a breach of the peace is an offense disturbing the public peace or a violation of public order or public decorum); 12 Am Jur. 2d Breach of the Peace etc. § 4 (1964) ("Throughout the various definitions appearing in the cases there runs the proposition that a breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility. Under this general definition, therefore, in laying the foundation for a prosecution for the offense of breach of the peace it is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace, is sufficient.").

[45] *Thompson*, 69 Va. Cir. 283, *6.

[46] *See, e.g. Hudson*, 585 S.E.2d at 382 (determining "dangerous conduct on a public highway" as breach of the peace where, although defendant was not intoxicated, defendant's dangerous driving (weaving all over the road and nearly running an off-duty police officer off of the road) was similar to that of an intoxicated driver); Kunkel v. State, 46 S.W. 3d 328, 331 (Tex. App. 2001) (the "lower range" of erratic driving would not generally amount to a breach of the peace); Sealed Juvenile 1, 255 F.3d 213, 218 (5th Cir. 2001) (off-duty customs official had authority under Texas law to arrest as a private citizen an individual for erratic driving of pickup truck, veering

arise in cases of citizen's arrest where drivers are arrested by law-enforcement officers operating out of their jurisdiction or off-duty.[47] Some cases are seemingly easier to determine than others. Courts are likely to rule that where an individual is driving "erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles . . . [t]he defendant clearly endangered other motorists . . . [and] driving in such a manner constitutes breach of the peace."[48] Still, there does not appear to be any sort of threshold in categorizing an offense as a breach of the peace.[49] For example, although there is danger associated with failing to drive right of center, courts have dismissed arrests by holding that the driving, "though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace . . . ."[50]

Indeed, most National Guard members traveling to, from, or during military duty are more likely to be pulled over for minor traffic offenses such as speeding or brief moments of erratic operation. Under those facts, "exemption from arrest" laws could present a valid defense.[51] In some states, courts have held that "[a] 'simple traffic violation' does not constitute a breach of the peace."[52] Generally, simple traffic violations include speeding up to 20-miles per hour over the limit and rolling stops before turning right on red.[53] As such, successful reliance on exemption laws for the typical National Guard member likely hinges on the arrest itself.[54]

As noted above, the legislative intent of exemption from arrest laws is to prevent civil interference with the military on active duty in the performance of duty.[55] Although courts have generally proven reluctant to apply such laws broadly, the exemption appears to meet the above-referenced criteria when a National Guard member is taken into custody for a seemingly minor offense.[56] As such, exemption from arrest laws could conceivably inoculate National Guard members from enduring arrest circumstances similar to those that occurred in *Atwater v. City of Lago Vista*.[57] In that case, a seatbelt violation resulted in a woman being handcuffed, placed in a squad car, and taken to the police station where

in and out of a proper lane, variously crossing the center line and moving onto the emergency shoulder of the road, because conduct was a breach of the peace which "includes all violations of public peace and order"); State v. Arroyos, 2005 NMCA 86, 137 (N.M. Ap. 2005) (reasonable person would conclude defendant committed a breach of the peace when he drove erratically at 1:30 AM, including braking constantly and crossing the center line into ongoing traffic); People v. Niedzwiedz, 268 Ill. App. 3d 119 (Ill.App. Ct. 1994) (breach of the peace when defendant drove car across center line and fog line on several occasions); Commonwealth v. Addison, 36 Va. Cir. 411, 414 (Va. Cir. Ct. 1995) (holding that defendant was driving erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles constituted breach of the peace); *but see* Commonwealth v. Borek, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005) (holding that minor offenses of speeding about 20 MPH over speed limit and making a rolling stop before turning right on red do not constitute a breach of the peace); Horn v. City of Seat Pleasant, 57 F.Supp.2d 219, 226 (D. Md. 1999) (holding that officer did not have authority to arrest outside of his jurisdiction a private citizen for speeding 75 MPH in a 55 MPH zone); United States v. Atwell, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007) (holding that defendant's driving (crossing the yellow line), though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace).

[47] *See Hudson*, 585 S.E.2d at 382 (determining "dangerous conduct on a public highway" as breach of the peace where, although defendant was not intoxicated, defendant's dangerous driving (weaving all over the road and nearly running an off-duty police officer off of the road) was similar to that of an intoxicated driver); Kunkel v. State, 46 S.W. 3d 328, 331 (Tex. App. 2001) (the "lower range" of erratic driving would not generally amount to a breach of the peace); Sealed Juvenile 1, 255 F.3d 213, 218 (5th Cir. 2001) (off-duty customs official had authority under Texas law to arrest as a private citizen an individual for erratic driving of pickup truck, veering in and out of a proper lane, variously crossing the center line and moving onto the emergency shoulder of the road, because conduct was a breach of the peace which "includes all violations of public peace and order"); State v. Arroyos, 2005 NMCA 86, 137 (N.M. Ap. 2005) (reasonable person would conclude defendant committed a breach of the peace when he drove erratically at 1:30 AM, including braking constantly and crossing the center line into ongoing traffic); People v. Niedzwiedz, 268 Ill. App. 3d 119 (Ill.App. Ct. 1994) (breach of the peace when defendant drove car across center line and fog line on several occasions); Commonwealth v. Addison, 36 Va. Cir. 411, 414 (Va. Cir. Ct. 1995) (holding that defendant was driving erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles constituted breach of the peace); *but see* Commonwealth v. Borek, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005) (holding that minor offenses of speeding about 20 MPH over speed limit and making a rolling stop before turning right on red do not constitute a breach of the peace); Horn v. City of Seat Pleasant, 57 F.Supp.2d 219, 226 (D. Md. 1999) (holding that officer did not have authority to arrest outside of his jurisdiction a private citizen for speeding 75 MPH in a 55 MPH zone); United States v. Atwell, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007) (holding that defendant's driving (crossing the yellow line), though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace).

[48] *Addison*, 36 Va. Cir. at 414.

[49] *See supra* note 47 and accompanying text.

[50] *Atwell*, 470 F.Supp. 2d at 566-67.

[51] *See supra* note 25 and accompanying text.

[52] *See* Commonwealth v. Borek, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005); *see also* Horn v. City of Seat Pleasant, 57 F.Supp.2d 219, 226 (D. Md. 1999); United States v. Atwell, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007).

[53] *See* cases cited *supra* note 52.

[54] *See, generally*, VA. CODE ANN. § 19.2-81.3 (articulating criteria for arrest without a warrant); UTAH CODE ANN. § 77-7-1 ("An arrest is an actual restraint of the person arrested or submission to custody. The person shall not be subjected to any more restraint than is necessary for his arrest and detention."); United States v. Digiovanni, 650 F.3d 498, 511 (4th Cir. 2011) (holding that investigative stops must be limited both in scope and duration); Knowles v. Iowa, 525 U.S. 113, 119 (1998) (holding that while a traffic stop is less intrusive than a formal arrest, a private citizen should not be able to intrude upon another citizen's rights in this way).

[55] *See supra* note 9 and accompanying text.

[56] *See, generally*, Lisa Ruddy, *From Seat Belts to Hancuffs: May Police Arrest for Minor Traffic Violations?*, 10 Am. U.J. Gender Soc. Pol'y & L. 479 (2002) (noting that twenty eight states permit a police officer to place otherwise law-abiding citizens under full custodial arrest (including handcuffs, a ride in the squad car, booking, and mug shots) for minor, fine-only traffic offenses); Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[57] *Atwater*, 532 U.S. at 318.

she was booked and taken before a magistrate.[58] The Supreme Court held that police officers are authorized to make custodial arrests if they have probable cause—even if it is a very minor criminal offense in the officer's presence.[59]

Hypothetically, if the woman under this general set of facts happened to be on her way to military duty as a member of the National Guard, each of the respective exemptions from arrest laws likely would have prevailed because (1) she belonged to the National Guard; (2) she was arrested; (3) the offense was neither a felony nor breach of the peace; and (4) she was going to a place in which she was required by orders to attend military duty.[60] Conversely, if civilian law enforcement pulls over a National Guard member for a minor traffic offense, but does not take the National Guard member into custody, it appears that any exemption defense will be tied to the duration and level of intrusion involved in the stop.[61] As such, a 15-minute stop may not be considered a full-custodial arrest; consequently, the law will not have interfered with military duty. However, a traffic stop that extends beyond a relatively routine citation could cross the threshold into an arrest with respect to the exemption laws.

## V. Conclusion

State laws exempting National Guard members from arrest while traveling to, from, or during military duty are not generally applied in a consistent manner. As such, despite the plain language of many of these statutes, Soldiers and Airmen are not by any means guaranteed of getting out of speeding tickets or other minor traffic offenses merely because they are pulled over while on their way to military duty. The key factor in waging a viable defense against a minor traffic offense or other relatively benign misdemeanor pertains to whether or not the law enforcement officer effectuated an arrest.

Based on the historical legislative intent associated with exemption laws, courts are likely to base their determination of a National Guard member's arrest on how much the stop interfered with the servicemember's military duty. Therefore, full custodial arrests for many misdemeanors or minor traffic offenses are generally prohibited under the respective state exemption laws when the other statutory factors are met. Detention for longer than is necessary—for example, causing a National Guard member to miss movement or otherwise be late for duty—may also trigger the exemption.[63]

Ultimately, the intended purpose of exemption from arrest laws is to prevent civil interference with the military in the performance of duty. In other words, state legislatures seemingly opted to avoid subjecting on-duty National Guard members from being exposed to the inherent delays and loss of freedom associated with arrests for comparably minor offenses such as the scenario described in the *Atwater* case.[64] As such, the laws are likely to be most useful for National Guard members who are taken into custody. With respect to typical traffic stops, the plain language of many exemption laws presents a legitimate legal defense. However, court trepidation in broadly applying exemption from arrest laws does not guarantee a successful defense.

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[58] *Id.*

[59] *Id.*

[60] *See* sources cited *supra* notes 25, 51.

[61] *See supra* notes 47, 49 and accompanying text.

[63] *But see* State v. Murray, 106 N.H. 71, 73 (N.H. 1964) (Some courts failed to see how the action taken by the officer and the fact that the defendant was required to answer to a charge of speeding at a later date would result in such interference.).

[64] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

**Moment of Battle: The Twenty Clashes that Changed the World**[1]

Reviewed by *Major Sara L. Carlson*[*]

*Battles that have piqued our interest are particularly those that still reverberate down through the ages. And that in turn has forced us to delve into the precarious game of counterfactual history. In other words, had the outcome been different, would it have turned the course of the future in substantially different directions?*[2]

## I. Introduction

Looking back at the events that shaped our world, it is easy to consider the "what ifs" of a particular situation. What if the Athenians, battered and weary from battle, did not complete the 26-mile trek from Marathon to Athens in time to deter the Persian Commander Datis from attacking the city?[3] What if Queen Elizabeth I's messenger made it to Sir Francis Drake with her orders to call off the looming attack on the Spanish Armada before he departed to meet his formidable adversary at sea?[4] What if Britain lacked the leadership of Sir Winston Churchill during World War II because the car that hit him in 1931 left him dead, not injured?[5] Undoubtedly, the course of history is paved with chance moments but which of those moments actually "turned the course of the future in substantially different directions"?[6]

In *Moment of Battle: The Twenty Clashes that Changed the World*, authors James Lacey and Williamson Murray posit that the world today would be a considerably different place if the twenty battles featured in their book ended differently. Lacey and Murray follow the footsteps of revered historian Sir Edward Creasy in attempting to distinguish important battles that had a momentous impact on the development of the world, not just the development of military history.[7] While they present some battles that are well settled in the annals of history for their contributions to the future of civilization, Lacey and Murray argue that several lesser-known clashes played a role that time has proven to be just as important. Unfortunately, Lacy and Murray fall short in many of their selections by providing unnecessary and often minute details that lack relevance to the thesis they seek to prove while simultaneously failing to provide adequate supporting facts and thoughtful analysis to establish their desired conclusions. Where the authors do succeed, however, is in the same details but for unsuspecting reasons. While the information presented does not always connect the dots to support the thesis of each selection, the level of detail provided gives the reader plenty of opportunities to find his own takeaway, often highlighting the decision-making process leading up to or during battle in addition to varied leadership responses in challenging situations. These authors succeed at regurgitating historical events but fall short of successfully arguing the impact of the battles they selected.

## II. Background

Dr. James Lacey retired from the U.S. Army after 24 years of combined active and reserve service.[8] He graduated from The Citadel with a Bachelor of Arts in History and later earned his Ph.D. in Military History from Leeds University in the United Kingdom.[9] Dr. Lacey's opinion columns have appeared in publications including the New York Post and The Weekly Standard and he also served as an embedded journalist for Time Magazine during the invasion of Iraq in 2003.[10] His previous published works include *The First Clash: The Miraculous Greek Victory at Marathon and its Impact on Western Civilization*, *Pershing: A Biography*, and *Takedown: The 3rd Infantry Division's Twenty-One Day Assault on Baghdad*.[11] Currently, Dr. Lacey serves as Director of the War Policy and Strategy Program at the Marine Corps War College in Quantico, Virginia.[12]

Dr. Williamson Murray graduated from Yale University in 1963 with a degree in history before joining the U.S. Air

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[1] JAMES LACEY & WILLIAMSON MURRAY, MOMENT OF BATTLE: THE TWENTY CLASHES THAT CHANGED THE WORLD (2013).

[2] *Id.* at xiii.

[3] *Id.* at 19.

[4] *Id.* at 146.

[5] *Id.* at 295.

[6] *Id.* at xiii.

[7] SIR EDWARD CREASY, THE FIFTEEN DECISIVE BATTLES OF THE WORLD: FROM MARATHON TO WATERLOO (Dover Publ'ns. Inc. 2001) (1851); LACEY & MURRAY, *supra* note 1, at xii–xiii.

[8] *See* Biography of James Lacey, MARINE CORPS UNIVERSITY, https://www.mcu.usmc.mil/Pages/faculty_pages/MCWAR/Dr.%20James%20Lacey.aspx (last visited Oct. 15, 2015) [hereinafter Lacey Bio].

[9] *Id.*

[10] *Id.*

[11] JAMES LACEY, THE FIRST CLASH: THE MIRACULOUS GREEK VICTORY AT MARATHON AND ITS IMPACT ON WESTERN CIVILIZATION (2011); JIM LACEY, PERSHING: A BIOGRAPHY (2008); JIM LACEY, TAKEDOWN: THE 3RD INFANTRY DIVISION'S TWENTY-ONE DAY ASSAULT ON BAGHDAD (2007).

[12] *See* Lacey Bio, *supra* note 8.

Force where he served for five years as an officer.[13] Upon completion of his military service, he returned to his alma mater where he earned his Ph.D. in military-diplomatic history.[14] Dr. Murray's previous books include *Military Adaptation in War* and *War, Strategy, and Military Effectiveness*.[15] He also co-authored *The Iraq War: A Military History* with Major General Robert H. Scales, Jr. (Ret.) and *A War to be Won: Fighting the Second World War* with Alan Millett.[16] Following an illustrious career teaching at various military and academic institutions including both the Air and Naval War Colleges, Dr. Murray presently serves as the Director of the History, Social and Strategic Ideas Program at the Potomac Institute for Policy Studies.[17]

## III. Analysis

These prominent historians begin their journey through history with a discussion of the Battle of Marathon, 490 B.C.[18] They claim that the very existence of Western civilization is attributed to the courageous fighting and success of the Athenians "who bravely went forward against overwhelming odds to victory and never-ending glory."[19] Had the Athenians fallen to the mighty hand of the Persian Army, little opposition would have remained to resist the continued expansion of the Persian Empire, especially given the weakened state of Rome at the time.[20] Unfortunately, the authors spend sixteen pages discussing in excruciating detail the tactical decisions and actions on the battlefield.[21] While this level of detail is thoroughly researched and coherently written—as expected from these distinguished historians—the authors do not provide substantial support for their claim that without the defeat of the Persian forces that fateful day, the evolution of Western civilization would have been substantially different if existing at all. Instead, the authors provide only three paragraphs of discussion to conclude their thesis; they fail to provide thoughtful analysis or pertinent facts to reach their conclusion.[22]

Unfortunately, the authors' penchant for providing tactical details of the selected battles reverberates throughout the book while they frequently fail to include sufficient discussion of the events leading up to the battle. Specifically, the authors repeat this lackluster approach in their discussions of several other battles including Gaugamela, Adrianople, Yarmuk, Midway, Kursk, and the least convincing selection in this book—the battle to secure Objective Peach.[23]

The authors propose that the battle for securing Objective Peach (the al-Qa`id Bridge) in the Iraq War was so significant that without American forces securing that bridge, the course of the world would be considerably different than it is today.[24] There is little argument that securing the bridge ensured the rapid progression of American forces to Baghdad, resulting in the collapse of Saddam's regime just days later.[25] It is not clear why the authors chose to include this battle, not only because they acknowledge that the battle may be too recent to determine its long-term impact but specifically because they offer no discussion or analysis as to why it is significant enough to have changed the world.[26] Specific to the recent Iraq conflict, some might argue that it was the second Battle of Fallujah that turned the tide in the Iraq War.[27] Others may assert that without the success of the surge, the Iraqi Government would not have been able to officially take the reins of their newly democratic country.[28] Continued disruption in the Middle East leads others to argue that in spite of the alleged success of the Iraq War, the region remains unstable in such a way that new threats emerge and threaten the regional stability and security leaving the future

[13] *See* Biography of Williamson Murray, THE OHIO STATE UNIVERSITY, https://history.osu.edu/directory/murray1 (last visited Oct. 15, 2015) [hereinafter Murray Bio].

[14] *Id.*

[15] WILLIAMSON MURRAY, MILITARY ADAPTATION IN WAR (2014); WILLIAMSON MURRAY, WAR, STRATEGY, AND MILITARY EFFECTIVENESS (2011).

[16] WILLIAMSON MURRAY & MAJOR GENERAL ROBERT H. SCALES, JR., THE IRAQ WAR: A MILITARY HISTORY (2003); WILLIAMSON MURRAY & ALAN R. MILLETT, A WAR TO BE WON: FIGHTING THE SECOND WORLD WAR (2001).

[17] *See* Murray Bio, *supra* note 13.

[18] LACEY & MURRAY, *supra* note 1, at 3.

[19] *Id.* at 20.

[20] CREASY, *supra* note 7, at 11–12, 15–16, 28–29.

[21] LACEY & MURRAY, *supra* note 1, at 20.

[22] *See id.* at 19–20.

[23] *Id.* at 21–40, 81–100, 101–15, 318–39, 340–60, 407–25.

[24] *But see* JOHN KEEGAN, THE IRAQ WAR (2008) (providing only a general mention of the river crossing sites along the Euphrates and their importance to American forces advancing into position to take Baghdad as opposed to the assertion that without the bridge, the war, and the world, would have been substantially different).

[25] *See id.* at 189–203.

[26] *See* LACEY & MURRAY, *supra* note 1, at 407–08, 425.

[27] DICK CAMP, OPERATION PHANTOM FURY: THE ASSAULT AND CAPTURE OF FALLUJAH, IRAQ (2009) (presenting a historical discussion of the events of the Iraq war leading up to and including the Second Battle of Fallujah which took place from November 7 until December 23, 2004. Dick Camp argues that the battle was not only the largest battle by the Marine Corps in the Iraq War but also the most significant battle during the occupation of Iraq).

[28] David H. Petraeus, *How We Won in Iraq: And Why All the Hard-Won Gains of the Surge are in Grave Danger of Being Lost Today*, FOREIGN POLICY (Oct. 29, 2013), http://www.foreignpolicy.com/articles/2013/10/29/david_petraeus_how_we_won_the_surge_in_iraq.

of the region in flux.[29] Ultimately, the authors do not offer sufficient evidence or analysis to support the worldly significance of securing Objective Peach.

Aside from the deficiencies mentioned above, the authors still provide opportunities for the reader to glean important takeaways from each passage. For example, the authors frequently provide considerable details about the conduct of leaders in times of battle that—perhaps unwittingly—convey important leadership lessons. For example, the discussion of the Battle of Midway shines light on what the authors refer to as "victory disease" or the arrogance of the Japanese leadership and their refusal to accept that the enemy, whom they viewed as inferior, could pose a formidable threat, reminding the reader of the dangers of over-confidence and complacency.[30] Additionally, the passage about Lieutenant General Hamdani, commander of Iraq's II Corps during the American invasion of Iraq in 2003, and his bizarre conversation with Qusay Hussein demonstrates the importance of flexibility and trusting your commanders in the field to adapt the mission to changing circumstances.[31] This selection also underscores the dangers of tyrannical leadership and highlights that fear of disagreeing with your superior often clouds sound judgment.[32]

In the midst of the scattered disappointment that this book offers, redemption soon follows as the authors provide more substantive presentations of other battles, though still somewhat lacking in terms of analytical discussion. For instance, the authors set forth a mediocre historical backdrop leading up to the battle at Dien Bien Phu in the First Indochina War. The discussion then leads to the decisions of the French and the Viet Minh in the months leading up to the battle followed by detailed discussion of the siege itself.[33] Unfortunately, the ultimate conclusion posits simply that because of the defeat of the French at Dien Bien Phu, the government collapsed in Paris ultimately leading to their departure from Vietnam.[34] Events that followed, including the division of the southern peninsula from the north, resulted in the Vietnam War and American involvement.[35] Unfortunately, the authors failed to address the long-term impact of that conflict neglecting, for example, the impact it had on the spread of communism and perhaps even the impact on Muslim radicalization in the years that followed.[36] While the authors do not develop their arguments in a manner to sufficiently convince the reader, the decision to couch it in a solid historical framework does help the reader draw conclusions on his own. The danger in this approach, however, is that the conclusion of each passage may not be as strong as the authors require to adequately support their thesis. Unfortunately, this approach is repeated in the discussions of the battles at Zama, Teutoburger Wald, the defeat of the Spanish Armada, Annus Mirablis, Trafalgar, Vicksburg, and Normandy.[37]

Lacey and Murray do not disappoint, however, in their discussions of several battles which makes it clear that the battles they selected deserve a proper place in history. For example, the discussion of the Battle of Breitenfeld showcases the level of expertise expected by Lacey and Murray. The authors assert, and establish facts to support, that the actions of Gustavus Adolphus leading up to and during the Battle at Breitenfeld revolutionized the face of war in such a manner that the future of Western warfare was forever changed.[38] Drawing on lessons learned from the ancient Romans and Maurice of Orange, Adolphus instituted sweeping reforms for the administrative and logistical support of his forces.[39] He also changed the way they trained and fought, and he instituted a command structure supported by a system of discipline that would forever change the Western face of battle.[40] The authors thoroughly support the contention that the changes Gustavus Adolphus made revolutionized the face of war for years to come and continue to effect the way countries prepare for and wage war to this day.[41] The authors demonstrate their superior knowledge and intellectual prowess in not only their passage about the Battle of Breitenfeld but also in their assessments of Hastings, Saratoga, the Marne, and the Battle of Britain.[42]

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[29] Jeffrey White, *ISIS, Iraq, and the War in Syria: Military Outlook*, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY (June 19, 2014), http://www.washingtoninstitute.org/policy-analysis/view/isis-iraq-and-the-war-in-syria-military-outlook.

[30] *See* LACEY & MURRAY, *supra* note 1, at 319–28 (discussing the tactical decisions leading up to the Battle of Midway made by Japanese commanders based on their perceived lack of threat from the American fleet in the vicinity of Midway, often disregarding their own intuition because they felt the Americans were far inferior and could not defeat the Japanese fleet).

[31] *See id.* at 415, 419–23.

[32] *See id.* at 413–22. Hamdani, fresh from battle and with knowledge of the rapidly progressing American force travelling from the south, attempted to explain to Qusay Hussein and the Minister of Defense that the situation on the ground did not comport with the actions the Iraqi forces had anticipated. *Id.* Specifically, he tried to convince them that the main thrust of the American effort would not be coming from Jordan but was actually en route to Baghdad from Kuwait, nearing the bridges needed to cross the Euphrates that would open the door for the Americans to take Baghdad. Unfortunately for the Iraqis, the meeting participants' loyalty to Saddam, or their fear of disagreeing with him, led Qusay to decide it was prudent to continue to focus forces on the non-existent American assault force that would certainly be arriving from Jordan. *Id.* The assault from Jordan never came and Baghdad fell within days. *Id.*

[33] *See id.* at 388–404.

[34] *Id.* at 404–06.

[35] *Id.*

[36] MAX BOOT, INVISIBLE ARMIES: AN EPIC HISTORY OF GUERILLA WARFARE FROM ANCIENT TIMES TO THE PRESENT (2013) 476–77, 524.

[37] LACEY & MURRAY, *supra* note 1, at 41–80, 136–61, 182–201, 225–64, 361–87.

[38] *Id.* at 179–81.

[39] *See id.* at 167–81.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 116–27, 202–24, 265–91, 292–317.

IV. Conclusion

Ultimately, Drs. Lacey and Murray write an effective summarization of the events of the twenty battles they present. Unfortunately, the book lacks a consistent approach to each of these battles by often providing facts that do not logically result in substantiating the thesis of the book and by failing to provide the analysis needed to reach those conclusions. *Moment of Battle* can be a useful book for a quick, twenty-page summarization of the battles presented but, with few exceptions, should not be sought for more than that. For the reader that enjoys the play-by-play accounts of the warfare, this would be an interesting book to read. If the reader is looking for the authors to answer the question of why each of these battles changed the course of history, he will likely be disappointed.

**No Good Men Among the Living: America, the Taliban, and the War Through Afghan Eyes**[1]

Reviewed by *Major Scott A. Wilson*[*]

*Akbar Gul knew the situation. By now everyone did. In addition to the news from his district, stories were flooding in from around the country. People were being taken away by helicopters during the night and never seen again, and there was no law on earth to protect them. Tribal elders were being sent to Guantanamo. Guns and money were ruling the land.*[2]

I. Introduction

It was only seven years ago that Anand Gopal decided to move to Kabul, Afghanistan and become a journalist.[3] He had no meaningful writing experience, no contacts within the country, and very little money.[4] Unable to afford interpreters, he taught himself Dari,[5] grew a beard, and slowly assimilated himself into the Afghan culture.[6] Gradually, he established himself as a credible reporter on the conflict in Afghanistan, writing for the *Christian Science Monitor*, the *Wall Street Journal*, *Harper's*, and *Foreign Policy*, and other publications.[7]

While traveling throughout Afghanistan from 2007 onward, he conducted extensive research on Afghan citizens who had experienced the hardships of war for decades. This research comes together in *No Good Men Among the Living* and Gopal is able to present a powerful indictment on the American war effort in Afghanistan, through a harrowing chronicle of the lives of everyday Afghans. He introduces us to a Taliban fighter, an American-backed strongman, and a female housewife from the countryside. He contradicts the traditional narrative for what went wrong in Afghanistan,[8] and instead presents a compelling case that much of the country's stalemate was a product of American missteps. It is hard for the reader to escape feeling that had the United States made different decisions during the early periods of the conflict, perhaps things could have turned out much differently in Afghanistan.

Gopal is able to make this argument by using the stories of Afghan nationals to highlight a number of mistakes made by the United States. In particular, he focuses on: (1) the United States' decision not to cooperate with surrendering Taliban figures, (2) the misguided system of incentives created by the U.S. military, and (3) the cultural blindness exhibited by the military in their execution of hostilities. The characters he presents in the book bring these mistakes to life, helping the reader appreciate how U.S. policy angered and alienated Afghans and strengthened the insurgency.

While Gopal makes a very persuasive claim regarding mistakes made by the United States, the book is not without its weaknesses. For example, he lets the Taliban off lightly, simply presenting them as a group of religious clerics that saved the people of Afghanistan from the "moral and spiritual decay [that] had dragged the country into civil war."[9] Moreover, in discussing Taliban efforts to cooperate, Gopal missed an opportunity to explain why Taliban disarmament and reintegration, which has been a failure in recent years,[10] would have worked in 2001 when the United States invaded. In spite of these weaknesses, overall, *No Good Men Among the Living* is a work that can serve as a valuable resource for the United States, especially for the military, as it seeks to avoid making the same mistakes twice.[11]

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[1] ANAND GOPAL, NO GOOD MEN AMONG THE LIVING: AMERICA, THE TALIBAN, AND THE WAR THROUGH AFGHAN EYES (2014).

[2] *Id.* at 191.

[3] Tom A. Peter, *No Good Men Among the Living Chronicles the War in Afghanistan from the Perspective of the Country's Citizens*, CHRISTIAN SCI. MONITOR (July 2, 2014), http://www.csmonitor.com/Books/Book-Reviews/2014/0702/No-Good-Men-Among-the-Living-chronicles-the-war-in-Afghanistan-from-the-perspective-of-the-country-s-citizens.

[4] *Id.*

[5] Dari is one of the two official languages of Afghanistan. *Dari*, UCLA LANGUAGE MATERIALS PROJECT, http://www.lmp.ucla.edu/Profile.aspx?LangID=191&menu=004 (last visited Oct. 15, 2015). It is used by roughly 50% of the Afghanistan population and is spoken by 7.6 million people. *Id.*

[6] Peter, *supra* note 3.

[7] *About Anand Gopal*, ANAND GOPAL, www.anandgopal.com/about (last visited Oct. 15, 2015).

[8] GOPAL, *supra* note 1, at 107 ("The American invasion of Iraq became a crucial distraction from stabilization efforts in Afghanistan, and in the resulting security vacuum the Taliban reasserted themselves.").

[9] *Id.* at 7.

[10] Deedee Derksen, *Peace Brief 168: Reintegrating Armed Groups in Afghanistan*, UNITED STATES INSTITUTE OF PEACE (March 7, 2014), http://www.usip.org/publications/reintegrating-armed-groups-in-afghanistan ("Overall the piecemeal approach targeting different armed groups [for reintegration] in different programs at different times has not worked.").

[11] *Commentary: Possible Worst Case Scenarios if War with Iraq Occurs*; *Interview with General Mike Turner*, NAT'L PUB. RADIO (March 11, 2003), http://www.npr.org/programs/morning/ transcripts/2003/mar/030311.turner.html [hereinafter *Commentary*] (discussing the U.S. military's struggle to avoid fighting "the last war").

II. Self-inflicted Wounds

One of Gopal's more convincing contentions is that the United States made a mistake in refusing to negotiate with defeated elements of the Taliban, and that these Taliban eventually reconstituted to form part of the insurgency.[12] He argues that after the invasion, the Taliban either laid down their arms or came forward willing to cooperate, to the extent that within a month of the invasion the Taliban movement had essentially ceased to exist.[13] Taliban fighters returned to their homes, while the Taliban leadership itself was willing to work with the new American-backed regime in Kabul. Gopal's evidence is quite convincing. He quotes Agha Jan Mutassim, confidant of Mullah Omar, as saying "We want to tell all people the Taliban system is no more . . . . If a stable Islamic government is established in Afghanistan, we don't intend to launch any action against it."[14] He even states that Mullah Omar himself sought immunity and surrender.[15] Among those on the most-wanted terrorist list established by the United States when the war began, twenty-seven tried to engineer deals with the new regime.[16]

In spite of this wave of Taliban efforts to cooperate, Gopal contends that the Americans were in no mood to negotiate with the Taliban regime. United States officials were actually furious when they learned of deals being brokered between the new Afghan government and ex-Taliban.[17] This U.S. policy had far-reaching consequences on both sides. For the United States, the mandate was clear: defeat terrorism. When Taliban fighters dissolved, gave up their arms, returned to their homes, or fled to Pakistan, the United States still needed someone to fight. This drove the military to continue its search for enemies, even though for all intents and purposes, none remained.[18]

For the Taliban, it quickly learned that negotiating with the new Karzai regime was futile. In order to avoid being captured or killed, many disappeared or fled across the border into Pakistan, only to later rejoin the insurgency. This very phenomenon is eloquently presented through a character known as Akbar Gul, who during the initial invasion realizes the futility of resisting the overwhelming force of the U.S. military.[19] He escapes to Pakistan and seeks a life of peace.[20] He later returns to Kabul, starts a business of his own, holding on to the hope that life would get better with American support.[21] As time passes, he finds himself driven back to the insurgency by what he sees as a predatory U.S. military bent on colonizing Afghanistan.[22] So in Gopal's mind, not only did the United States miss a golden opportunity to assimilate influential Taliban figures into the new government, but it also fueled an insurgency it would struggle against for years to come.

Another result of the policy decision regarding the Taliban was the creation of an incentive system that produced bad intelligence and benefitted only a few enterprising Afghans.[23] When the United States entered Afghanistan it needed materiel, logistics support, and intelligence. It also brought money, so Afghans were eager to assist in all three areas. Here Gopal introduces us to Jan Muhammad, a friend of Hamid Karzai who became a trusted American ally and supplier of (mostly faulty and politically motivated) intelligence.[24] Gopal highlights the perverse incentives created when the United States "brought the business of counterterrorism to the desert."[25] Muhammad and others were happy to participate, providing materiel when needed and targets where none existed.[26] This only made average Afghans resent the Karzai regime and U.S. forces.[27] Gopal thus makes a powerful argument that much of the hardship the U.S. experienced in Afghanistan was self-inflicted.[28] After all, the system it set up "did not reward stability, legitimacy, or popularity . . . it rewarded those who could serve up enemies."[29]

Essentially, Gopal's argument is that the United States was flying blind in its prosecution of the war effort, particularly in its understanding of Afghan culture and history. For example, by refusing to negotiate with Taliban elements at the outset of the conflict, the United States

[12] GOPAL, *supra* note 1, at 9.

[13] *Id.* at 104.

[14] *Id.* at 104–05.

[15] *Id.* at 47.

[16] *Id.*

[17] *Id.* at 193.

[18] *Id.* at 109.

[19] *Id.* at 17.

[20] *Id.* at 27.

[21] *Id.* at 191.

[22] *Id.* at 198.

[23] *Id.* at 130.

[24] *See id.* at 125–31 (providing examples of Jan Muhammad using his U.S. ties to eliminate rivals).

[25] *Id.* at 130.

[26] *Id.* at 109 (discussing Gul Agha Sherzai, who helped build Kandahar Airfield, created enemies where there were none, and whose "personal feuds and jealousies were repackaged as 'counterterrorism,").

[27] *Id.* at 190–91.

[28] *Id.* at 256 (highlighting the fact that the United States indirectly financed the very insurgency it was trying to eliminate, as it paid local Afghans for logistics services and support, and they in turn bought security for their services by paying off Taliban elements).

[29] *Id.* at 140.

demonstrated a misunderstanding of the culture, particularly the pragmatic nature of the Afghan people. Whether during the Soviet occupation of the 1980s or the civil war period of the 1990s, Afghans did what they needed to survive in turbulent times.[30] Gopal writes that "through decades of war, Afghans had survived by knowing where they stood, by calibrating themselves to power, the only sure bet in the frequent U-turns of Afghan history."[31]

Ignorance of Afghan pragmatism proved costly. It allowed Afghan strongmen to exploit the American's thirst for intelligence.[32] The United States needed enemies and pragmatic Afghans "eager to survive and prosper" provided just that.[33] Gopal contends that the Americans "carried out raids against a phantom enemy, happily fulfilling their mandate from Washington."[34] The victims of such raids at some point had enough and took up arms.

Gopal then brings the argument full circle, showing how this cultural insensitivity provided a powerful incentive for many to struggle against the new government in Kabul. Gopal used the example of Heela, an Afghan woman whose travails are interwoven throughout the book, to introduce the reader to some of the traditional and rigid cultural practices in Afghanistan.[35] Through her character, Gopal presents a vivid image for the reader of marauding American military unwittingly conducting operations in a religiously orthodox landscape. Through her the reader clearly sees how disrespect towards women and elders fomented animosity between Afghans and U.S. forces.[36] Raids by U.S. forces into Afghan villages and homes left their mark, creating enemies where ones did not exist before.[37] One villager would say, "If they touch our women again, we must ask ourselves why we are alive . . . we will have no choice but to fight."[38]

## III. Critiques

The above-mentioned scenarios highlight some of the key indictments made by Gopal in his critique of the U.S. war effort. They form the framework for his argument that the Taliban resurgence was a byproduct of bad policy and poor tactics on the part of the United States. In spite of his well-supported claims, his book has its shortcomings.

First of all, Gopal really takes it easy on the Taliban. He presents them as a movement trying to govern Afghanistan that was ruthlessly targeted by U.S. forces intent on bringing about punishment for the 9/11 attacks.[39] In 2001 when the invasion occurred, the Taliban was widely recognized as one of the most brutal regimes in the world in terms of human rights abuses.[40] So, it should come as no surprise that the United States was not willing to negotiate with such a regime, especially since it seized the initiative early in the conflict. Moreover, how would it have played out in the United States, shortly after September 11th, for the U.S. government to cooperate with the Taliban government guilty of harboring Osama Bin Laden and condoning wide-spread human rights atrocities? How would it have appeared to Afghans who had lived under Taliban cruelty for nearly a decade? Downplaying the Taliban's abysmal track record makes them seem more benign, which makes the United States seem more aggressive and ruthless. While this may strengthen Gopal's argument, it is a shortcoming of the book that is not only difficult for the reader to ignore, but in all honesty makes the reader cringe.

In a similar vein, Gopal fails to explain why Taliban reintegration would have been successful during the initial phases of the operation, when it has not been so for several years after. Reintegration of Taliban fighters has been a critical part of the coalition effort in Afghanistan for several years now, but the efforts have born little fruit.[41] What favorable circumstances existed in 2001 that did not exist in 2008, or 2010, or 2013? The answer to such a question may be fairly obvious. Perhaps the conduct of U.S. operations in Afghanistan so alienated the population and the Taliban that they preferred to remain with the insurgency. Or perhaps the answer lies across the border in Pakistan, which supported the U.S. mission in public, while at the same time covertly fighting to keep the Taliban insurgency alive.[42] Either way, Gopal missed an opportunity to clarify a critical element of his argument. Even Akbar Gul, the Taliban fighter whose story is told throughout the book, declined participation in one such U.S. initiative in 2009.[43] If the United States'

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[30] *Id.* at 134.

[31] *Id.*

[32] *Id.* at 109.

[33] *Id.*

[34] *Id.* at 110.

[35] *Id.* at 76–77.

[36] *Id.* at 201.

[37] *Id.* at 111 (explaining that the American military forced elders to walk around naked, shaved the beards and eyebrows off of captives, and laid their hands on women and exposed them to an outside world previously off-limits).

[38] *Id.*

[39] *Id.* at 110–14. Gopal does not completely absolve the Taliban of responsibility, as he does recognize "the mood of retribution should have been expected. After all, the Taliban's human rights record and their sorry attempt at governance inspired no sympathy." *Id.* at 195. However, the overall tone of the book is rather favorable to the Taliban. *See id.*

[40] U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, AFGHANISTAN: COUNTRY REPORTS ON HUMAN RTS. PRACTICES, (Feb. 23, 2001), http://www.state.gov/j/drl/rls/hrrpt/2000/sa/721.htm.

[41] *See Commentary*, *supra* note 11.

[42] GOPAL, *supra* note 1, at 232.

[43] *Id.*, at 235–66.

missteps contributed to the repeated failure of attempted Taliban reintegration programs, such a fact would only serve to strengthen Gopal's argument.

## IV. Lessons and Conclusion

Whatever shortcomings may plague the book, *No Good Men Among the Living* is still an immensely valuable book for the U.S. military, especially as it constantly strives to avoid fighting the last war.[44] The threats that the United States faces in the realm of terrorism are unique in history. Threats like the Taliban, Al Qaeda, or the recent Islamic State movement in Syria are "devilishly difficult to eradicate. Because they are transnational, if the insurgents are beaten down in one place, they may pop up somewhere else with new recruits and a new web of allies." [45] As the United States is certain to be fighting terrorism and insurgencies in the future, there are lessons to be gleaned from Gopal's book. The importance of cultural awareness and language skills in the military, or the viability of using (and paying) local nationals for logistics and materials support are two quick examples.

One particularly noteworthy lesson is in determining what to do with vanquished regime members during the initial phases of the conflict. This is an area ripe for examination, as the United States has found itself in this position twice in the last ten years. On both occasions, the decision to marginalize remnants of the old regime has proven to have severe consequences. In 2003, Order Number 1 of the Coalition Provisional Authority (CPA) was the de-Baathification order designed to rid the new Iraqi political system of Saddam Hussein's Baath party influence.[46] CPA Order Number 2 was promulgated to disband the Iraqi military.[47] It is widely accepted that the promulgation of these two orders directly contributed to the violent insurgency that would embroil Iraq for years.[48] Gopal made a similar argument regarding the U.S. reluctance to negotiate with the Taliban in late 2001, and how that policy decision may have contributed to the Taliban's resurgence years later.

The policy decisions made by the United States in Afghanistan in late 2001 and Iraq in 2003 were well-intentioned. Unfortunately, those decisions arguably cost the United States billions of dollars and hundreds of lives. Going forward, works like *No Good Men Among the Living* can assist the U.S. government in formulating methods to integrate members of vanquished regimes in the formation of transitional governing authorities. To be sure, such policies would entail both political and security risks. Nevertheless, the decade spent fighting insurgencies in Iraq and Afghanistan demonstrates that a new approach is warranted. The U.S. military would be remiss to ignore first-hand source material in adapting policies and devising new strategies for future conflicts. Wherever and whenever that happens, Anand Gopal's *No Good Men Among the Living* is a valuable resource.

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[44] GOPAL, *supra* note 1, at 9.

[45] Steven Metz, *U.S. Counterinsurgency Still Fighting the Last War*, WORLD POL. REV. May 8, 2013, at 1.

[46] The Coalition Provisional Authority, *Order No. 1, De-Baathification of Iraqi Society*, IRAQ COALITION (16 May 2003), http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_ of_Iraqi_Society_.pdf.

[47] The Coalition Provisional Authority, *Order Number 2, Dissolution of Entities*, IRAQ COALITION (Aug. 23, 2003), http://www.iraqcoalition.org/ regulations/200308 23_CPAORD_2_Dissolution_of_Entities_with_Annex _A.pdf.

[48] Miranda Sissons & Abdulrazzaq Al-Saiedi, Int'l Center for Transitional Justice, *Iraq: A Bitter Legacy*, Mar. 2013, http://ictj.org/sites/default/files/ ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf. "From its inception in 2003, de-Baathification was a deeply flawed process. Ineffective and incoherent, it polarized Iraqi politics and contributed to severe instability in the Iraqi military and government—not just in the first flush of regime change, but extending as far as the parliamentary elections of 2010, some seven years later." *Id.*

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