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Lore of the Corps

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Book Review

Lore of the Corps

A Deserter and a Traitor: The Story of Lieutenant Martin J. Monti, Jr., Army Air Corps

By Fred L. Borch
Regimental Historian and Archivist

On October 2, 1944, Second Lieutenant (2LT) Martin J. Monti, Jr. deserted from his unit in Karachi, India. He was apprehended thousands of miles away, in Bari, Italy, on May 14, 1945 and was court-martialed for desertion and larceny three months later. An officer panel found him guilty and sentenced Monti to fifteen years confinement at hard labor.[1]

A little more than three years later, in October 1948, Monti was indicted by a Federal grand jury for the crime of treason. In January 1949, he pleaded guilty to the offense in U.S. District Court in New York City, and was sentenced to 25 years imprisonment.[2] What follows is the amazing but true story of Monti's desertion and treason, and his trial by both court-martial and Federal civilian court.

Martin J. Monti, right, in light colored suit, is led from a federal court in Brooklyn after being sentenced to 25 years for treason.

Born near St. Louis, Missouri, in October 1921, Martin James Monti, Jr. was one of seven children. His parents, who were second generation Americans of Swiss-Italian and German ancestry, apparently raised him "in an environment later described as fervently religious, strongly anti-communist, laced with isolationist sentiments and opposed to the tenets of President Franklin D. Roosevelt's New Deal."[3] Monti's views about life, people and politics also were shaped by Father Charles Coughlin. Known as the "Radio Priest" to his millions and millions of listeners, Coughlin broadcast weekly radio sermons in which he praised the leaders of Nazi Germany and Fascist Italy while blaming President Franklin D. Roosevelt, Jews, communists and capitalists for what ailed the United States.[4] While there is no way to know whether Monti's subsequent treason was the direct result of his personal devotion to Coughlin, whom he visited in the summer of 1942, or his adherence to Coughlin's worldview, these may be the best explanation for what happened.

In late November 1942, Monti enlisted as an aviation cadet in the U.S. Army Air Forces. He reported as an air cadet to Jefferson Barracks, Missouri in February 1943 and eventually qualified as a fighter pilot in both the Lockheed P-38 Lightning and the Bell P-39 Airacobra.[5] In August 1944, now Second Lieutenant (2LT) Monti reported for duty with the 126th Replacement Depot in Karachi, India.[6]

Sometime after arriving in India, Monti decided to desert and defect to the Germans. On October 2, 1944, the now 22-year-old Monti talked his way onto a C-46 transport plane and flew from Karachi to Cairo. Although he had no official travel orders, or any paperwork indicating he was assigned to a unit in Europe, 2LT Monti managed to get another flight from Egypt to Tripoli, and then still another flight to Naples, Italy. Naples had been captured by the Allies only ten days earlier.

Lieutenant Monti then went to the nearby Foggia airfield, which was now the headquarters of the US Army Air Force's 82d Fighter Group. He reported to the commander, insisted that he wanted to fly in combat, and requested a transfer from his Karachi-based unit to the 82d. Monti received a "discouraging reply," which he concluded was equivalent of 'no.'[7]

But Monti was persistent. He now went to another airfield near Naples, where the 354th Air Service Squadron

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[1] United States v. Monti, CM 291280, Records of the Office of the Judge Advocate General, Record Group (RG) 153, National Archives and Records Administration.

[2] United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951).

[3] Ron Soodalter, *A Yank in the SS*, MILITARY HISTORY, Jan. 2017, at 40, 42.

[4] *Id.*

[5] *Monti*, *supra* note 1, at 31, U.S. War Dep't, Adj. Gen.'s Off. Form No. 115, Charge Sheet.

[6] Today, Karachi is located in Pakistan. In 1944, however, Pakistan did not exist as an independent nation.

[7] *Monti*, *supra* note 1, Statement, Captain Louis S. Wilkerson, Investigating Officer, Subject: Interrogation of 2LT Monti by U.S. CID Special Agent Anthony Cuomo, May 14, 1945.

was headquartered. This unit's mission was to repair and test aircraft before they were sent to air combat units.

Amazingly, 2LT Monti convinced the American military personnel at the 354th that he was a pilot from the nearby 82d and asked to take a Lockheed F-5E Lightning up for a "test flight." When told he would need to get permission for such a flight, Monti instead simply climbed into the cockpit of an F-5E, taxied out the runway, and took off.[8] Once in the air, Monti flew north to German-occupied Milan. He landed, surrendered to the Germans, and professed his unwavering allegiance to the Third Reich. The Germans were more than happy to have a brand-new American airplane (the F-5E was the reconnaissance version of the P-38), and the Luftwaffe removed the USAAF insignia, affixed German aircraft markings to the plane (including swastikas), and sent the plane to Germany for use there.[9]

As for Monti, while the Germans initially were suspicious of him, they soon decided that he was the 'real deal.' In November 1944, they sent Monti to Berlin, and enrolled him as an *SS-Untersturmführer* (Second Lieutenant) in *SS-Standarte Kurt Eggers*, a Waffen-SS propaganda unit.

Monti now began broadcasting English-language propaganda on the radio. Using his mother's maiden name, he identified himself as "Captain Martin Wiehaupt," and tried to persuade GIs listening to his broadcasts "all over the European theater" that the United States should be fighting with Germany against the Soviet Union, as Communist Russia was the "true enemy of world peace."[10]

After a few broadcasts, however, the Germans were so unhappy with Monti's lack of talent that "they pulled him off the air" and instead tasked him to write propaganda pamphlets destined for American POWs in German camps.[11]

In April 1945, with defeat imminent and the Wehrmacht needing all its assets on the front-lines, *SS-Untersturmführer* Monti was ordered to join a combat unit in northern Italy. A month later, Monti surrendered to the U.S. Fifth Army in Milan.

In the weeks that followed, 2LT Monti was interrogated by a series of Army intelligence agents. He freely admitted that he had left his unit in Karachi, but claimed that "he had done so in order to wage a one-man war against the Germans." Monti admitted that he had wrongfully appropriated the Lockheed F-5E Lightning, but only to take the fight to the Luftwaffe. As for the Waffen-SS uniform that he was wearing? Monti explained that he had been shot down and taken prisoner by the Germans. He claimed to have been in POW camps in Verona, Frankfurt and Wentzler. When he was being moved by train to yet another camp, he escaped. He "roamed the countryside" and received help from Italian partisans, who dressed him in a German uniform so that he could more easily travel through Axis-held territory and return to Allied lines.[12]

The Lockheed P-38 Lightning flown by Monti repainted by the Luftwaffe with Germany markings

Monti may have thought that this story would get him out of trouble, but the Army was not pleased with his antics and, on May 31, 1945, charged him with desertion from October 2, 1944 to May 14, 1945, and with "wrongfully, knowingly and willfully" misappropriating "one P-38 aircraft."[13]

On August 4, 1945, 2LT Monti was tried by a general court-martial convened by General Joseph T. McNarney, the Commanding General, Mediterranean Theater of Operations. The trial was held in Naples, Italy. At the end of a two day proceeding, Monti was found guilty of being absent without leave (instead of desertion) and wrongful appropriation. The panel of officers sentenced him to be dismissed from the service, to forfeit all pay and allowances and to be confined at hard labor for fifteen years.[14]

After Monti's sentence was approved and after a brief period of confinement in Naples, Monti returned to the United States. He was imprisoned at the Eastern Branch, U.S. Disciplinary Barracks, located in Green Haven, New York.

But Monti did not stay idle for long in Green Haven. On the contrary, he was offered the opportunity to have his sentence remitted if he re-enlisted in the Army as a private. No doubt realizing that re-joining the Army was preferable to finishing his long sentence to confinement, Monti returned to

[8] *Id.*

[9] Soodalter, *supra* note 3, at 44.

[10] *Id.*

[11] *Id.* at 46.

[12] *Monti*, *supra* note 7; Soodalter, *supra* note 3, at 46.

[13] *Monti*, *supra* note 5.

[14] Headquarters, Mediterranean Theater of Operations, Gen. Court-Martial Order No. 118 (18 Sept. 1945).

the ranks in February 1946. He was assigned to Eglin Field, Florida[15] and, two years later, was wearing sergeant's stripes.

While Monti was serving his active duty in Florida, Army intelligence personnel were going through thousands and thousands of pages of captured German documents. Soon, these men discovered references to *SS-Untersturmführer* Monti and his treasonous activities while in the Waffen-SS. With this evidence in hand, the Department of Justice moved quickly and, on October 14, 1948, Sergeant (SGT) Monti was indicted by a Federal grand jury in the Eastern District of New York for the crime of treason; the indictment alleged 21 overt acts.[16]

On November 1, 1947, the *Washington Post* revealed the story of Monti's desertion and treason and this caused the Army to immediately detain him.[17] The Army now transferred SGT Monti from Eglin Field to Mitchel Field, located on Long Island, New York. On January 26, 1948, "immediately upon his receipt of a General Discharge Under Honorable Conditions,"[18] Monti was taken into custody by U.S. civilian law enforcement authorities pursuant to a warrant of arrest for the crime of treason.[19]

On January 17, 1949, Monti appeared in U.S. District Court in Brooklyn, New York. He had previously entered a not guilty plea to the crime. Now, standing before Chief Judge Robert A. Inch, Monti withdrew this plea and informed the judge that he desired to plead guilty.[20]

The U.S. Constitution states that "No Person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on Confession in open Court."[21] Mindful of this requirement, "the defendant was advised of his rights, was duly sworn . . . took the stand, and in response to the questions propounded by the prosecuting attorney confessed in open court that he had voluntarily performed acts which constitute the crime of treason, including various of the overt acts alleged in the indictment."[22]

During his testimony, Monti also acknowledged that he had read the indictment, understood it, and had discussed its contents with his two attorneys. Prior to imposing a sentence, Chief Judge Inch asked: "Now, Mr. Monti, do you want to say anything for yourself?" The accused replied: "No, sir." The judge then sentenced Monti to twenty-five years in jail and a $10,000 fine.

Why did Monti withdraw his not guilty plea? Why did he not demand trial on the merits? It seems that Monti's counsel looked at a number of courses of action in preparing for trial, including offering psychiatric testimony about Monti's mental state at the time of his desertion and treason. Ultimately, however, his lawyers decided "that overwhelming proof was available to the government to substantiate the allegations in the indictment," starting with Monti's 102-page written confession.[23]

Monti's lawyers soon came to believe that if they went to trial, the defendant would likely be sentenced to death, or at least life imprisonment, given the facts and circumstances of the treason and the aggravating factor that Monti had been a commissioned officer in the Army. After "a consultation with the Trial Judge [Chief Judge Inch] and government counsel," Monti's two defense counsel told him that he should plead guilty and throw "himself on the mercy of the court." Such a course of action would avoid death or life imprisonment and, while Monti could expect a "severe" sentence, it would not be more than 30 years.[24] When Chief Judge Inch sentenced Monti to 25 years in jail, Monti should have understood that he had received good legal advice.

Within a short time of the trial results, and his arrival at the U.S. Penitentiary in Leavenworth, Kansas, Monti decided he was unhappy. He appealed his conviction on a variety of grounds, including a claim that he had been coerced by his lawyers to confess in open court. Monti also argued that his court-martial conviction barred his treason trial on double jeopardy grounds. His first appeal was denied in 1951[25] and a second appeal was denied in 1958.[26]

Martin James Monti was paroled from Leavenworth in 1960, after serving eleven years of his sentence. He resettled in his home state of Missouri, and died there in 2000. He was 78 years old.

The court-martial of 2LT Monti, his restoration to active duty, and his subsequent treason trial in U.S. District Court are a unique set of events in military legal history. Additionally, his trial in Federal court stands out as probably

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[15] Today's Eglin Air Force Base, located in the Florida panhandle near Panama City.

[16] *Monti*, *supra* note 2, at 209.

[17] Soodalter, s*upra* note 3, at 47.

[18] United States v. Monti, 168 F.Supp, 671, 672 (E.D.N.Y. 1958).

[19] Ex parte Monti, 79 F.Supp. 651, 652 (E.D.N.Y. 1948).

[20] Robert A. Inch (1873-1961) served as the inaugural Chief Judge of the Eastern District of New York from 1948 to 1958.

[21] U.S. CONST. art. III,§ 3.

[22] *Monti*, *supra* note 2, at 210.

[23] *Id.* at 212.

[24] *Id.* at 213.

[25] *Id.*

[26] *Id.* at 671.

the only American treason case involving a confession---the single exception to the two-witness rule in treason cases.[27]

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.

[27] For another unusual treason case arising out of World War II, see Fred L. Borch, *Tried for Treason: The Court-Martial of Private First Class Dale Maple*, ARMY LAW., Nov. 2010, at 4-6.

Operational Law in Practice: Observations from the Mission Command Training Program[1]

Lieutenant Colonel Christopher M. Ford[*]

I. Introduction

The U.S. Army Judge Advocate General's (JAG) Corps has a long and rich history of providing legal support to commanders in operational environments. Since the attacks of 9/11, the JAG Corps has seen incomparable involvement at all levels of command andommanders have come to value their Judge Advocates to an extraordinary degree. During this time of rapid expansion of Operational and International Law (OPLAW)[2], the JAG Corps responded by providing a steady stream of well-qualified Judge Advocates prepared to execute myriad legal responsibilities in theater. This response was particularly commendable considering the fairly rudimentary (compared say, to Military Justice) organizational OPLAW structure.

In the last ten years, the JAG Corps has strengthened this construct by establishing and implementing Brigade Judge Advocate positions, increasing the number of dedicated OPLAW practitioners, and developing new and constantly updated blocks of instruction at The Judge Advocate General's Legal Center and School (TJAGLCS). There are now approximately 130 Judge Advocates who practice OPLAW exclusively, and dozens more who practice the discipline on a regular basis.[3]

Another important aspect of the burgeoning OPLAW structure is Judge Advocate participation in Combined Training Center (CTC) rotations. While most Judge Advocates are familiar with the National Training Center and the Joint Readiness Training Center, many are unfamiliar with the Mission Command Training Program (MCTP). All active duty division and corps, and most functional and multi-functional brigade legal sections, will execute a MCTP rotation at least once every two years.

The intent of this article is thus two-fold. First to provide background on what a MCTP-run exercise is; how it works and what can be expected of Judge Advocates participating in the exercise. Second, this article seeks to share substantive insights gained from observing hundreds of Judge Advocates executing operational law in a multitude of scenarios and all levels of command.

This article proceeds in three sections. The first section provides a brief history of the CTC program, with particular focus on MCTP. The second section discusses Army doctrine and its relevance to the JAG Corps. These sections provide important context for the final section of the article, which discusses the major Judge Advocate related observations made over the last several years. Where possible, this article seeks to articulate broad themes that are applicable to legal sections at all echelons.

II. The Combined Arms Training Centers

The establishment of the CTCs in the 1980s signaled a sea-change in the way the Army trains. The CTCs provide Army commanders a realistic, doctrine-based training environment designed to generate unit readiness and develop leadership.[4] The CTCs have also served as a forum for the development and implementation of new doctrine.

MCTP is one of the four CTCs, the others being the National Training Center (NTC) in Fort Irwin, California; the Joint Readiness Training Center (JRTC) in Fort Polk, Louisiana; and the Joint Multinational Readiness Center (JMRC) in Grafenwoehr, Germany. Collectively, the CTCs are designed "to generate ready units and agile leaders who are confident in their ability to operate in complex environments."[5] MCTP specifically is a mobile CTC designed to create "training experiences that enable the Army's senior mission commanders to develop current, relevant, and campaign-quality, Joint and expeditionary mission command instincts and skills."[6]

MCTP executes a wide variety of exercises, including Warfighter exercises (WFX), Unified Endeavor exercises, Army Service Component Command (ASCC) exercises, culminating training exercises (CTE), and Army National

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[1] The author would like to thank Lieutenant Colonel Lance Turlington and Major Brett Farmer for their invaluable contributions to this article.

[2] For the purposes of this memorandum, operational law (OPLAW) refers to the practice of all international law issues, legal issues affecting military operations, the law of war, intelligence activities and information activities, stability operations and rule of law.

[3] This number is taken from the author's analysis of the U.S. Army Judge Advocate General's Corps *Personnel Directory*. OFF. OF THE JUDGE ADVOCATE GENERAL, JAGC PUBLICATION 1-1, PERSONNEL POLICIES (28 Aug. 2014).

[4] U.S. DEP'T OF ARMY, ARMY TRAINING STRATEGY 15 (3 October 2012).

[5] U.S. DEP'T OF ARMY, REG. 350-50, COMBAT CENTER TRAINING PROGRAM para. 1-5 (3 Apr. 2013).

[6] *Id*.

Guard (ARNG) Brigade Warfighter Exercises.[7] These exercises are distributed, simulation driven, Master Scenario Events List (MSEL) supported, multi-echelon tactical command post training events. Training audiences fight against a live, free-thinking hybrid enemy. That is, an enemy fighting with conventional weapons as well as cyber weapons and information operations. The World-Class Opposing Forces (WCOPFOR) element of MCTP facilitates the free-play component of the Warfighter Exercise simulation. The WCOPFOR can compensate for the training audience's planning and decision-making processes with human reason and intuition, not just artificial intelligence (i.e., the computer simulation).

The computer simulation takes place in an austere theater of operations necessitating forcible entry, development of logistics and lines of communication. Preparation for an exercise starts approximately a year out. The commander and primary staff meet with MCTP to discuss the design of the scenario and the commander's training objectives. MCTP then designs the exercise scenario to focus on these objectives. There are normally three planning sessions between MCTP and the unit before an exercise commences.

Training is focused on developing core war-fighting competencies in accordance with the commander's training objectives. Thus, exercises are generally oriented to force-on-force engagements, with a focus on Phase III operations. By way of example, below are the training objectives from arecent active duty division rotation:

- Conduct Mission Command (DMAIN, DTAC, BDE, and BN)
- Develop and maintain accurate Common Operating Picture
- Improve and enhance C4I systems, improving interoperability with partner units
- Knowledge Management across staff and with MSCs
- Staff coordination and synchronization with MSC and partner units.
- Plan, synchronize, and conduct Weapons of Mass Destruction – Elimination (WMD-E) operations
- Integrate geographically isolated units into Division operations[8]

For a Brigade Judge Advocate, anticipate your unit to do what it is designed to do (e.g., artillery will fire, sustainers will sustain, etc.) Once the simulation "turns on", scenario managers from MCTP and the exercise director (typically an active duty General Officer) will control the scenario to ensure the commander's training objectives are being met.

In a typical scenario, about 80% of what occurs is the computer simulation and 20% is based on scripted injects. Injects are used by MCTP to test a particular system or identify unit weaknesses; often related to communications systems. For example, if MCTP notices a unit doesn't understand the restrictions on cross-border operations, they may inject a scenario which has the unit receiving fire from a cross-border enemy. The intent is to see how the unit reacts and then use the scenario as a teaching point.

The exercise itself typically occurs over a ten day period. After the first four days, MCTP will conduct a formal, 2-hour long, after action review (AAR) with the entire unit. MCTP will conduct another, final AAR, on the tenth day of the exercise. At the mid-point and end, MCTP OPLAW conducts an informal "Green Book AAR" with only the participating legal sections.

The Observer, Coach, Trainers (OC/Ts) from MCTP OPLAW observe and discuss the legal section's functionality, horizontal and vertical unit integration, staff integration, command relationship, etc. Nothing observed or discussed during an exercise is reported to the JAG Corps leadership or outside MCTP. With coordination with the training audience's senior legal advisor, MCTP OPLAW will occasion make comments to the unit commander that relate to the legal section. For instance, such comments may concern the unit's failure to adequately equip the legal section.

III. Army Doctrine and the Judge Advocate

Exercises are grounded in Army doctrine. A Judge Advocate must have a strong understanding of JAG Corps-related doctrine, and a working knowledge of other fundamental aspects of Army Doctrine.

A. Mission Command

The concept of "mission command" is relatively new. Many Judge Advocates will be familiar with the terms "battle command" and "command and control." Due to an evolution in doctrine,[9] in 2011 the Army formally adopted mission command as both a philosophy of command (e.g., exercise of

[7] Each type of exercise has a slightly different focus and construct. For example, Vibrant Response exercises are field training exercises designed to confirm the operational and tactical capabilities of integrated elements across DoD for support to civil authorities; Unified Endeavor exercises are for Joint Task Force Component Commanders and their staffs to train at the operational level in preparation for upcoming deployments; and Army Service Component Command Exercises are typically planning only exercises, with no computer simulation.

[8] Headquarters, 2nd Infantry Division, Warpath III Training Objectives (8 Sept. 2013).

[9] In 2001, "battle command was defined as 'the exercise of command in operations against a hostile, thinking enemy.'" Michael Barbee, *The CTC*

command authority using mission orders) and as a Warfighting Function (replacing Command and Control).[10]

The philosophy of mission command is the foundation of unified land operations—the Army's *raison d'être*.[11] JAG Corps doctrine also reflects the central importance of mission command, noting that: "the practice of operational law has become an essential component of mission command"[12] In practice, however, most Judge Advocates are unfamiliar with the term and confused when their commanders talk about mission command.

The Army defines mission command as "the exercise of authority and direction by the commander using mission orders to enable disciplined initiative within the commander's intent to empower agile and adaptive leaders in the conduct of unified land operations."[13] As an organizing principle, the philosophy of mission command holds that command is exercised through "shared understanding and purpose."[14] More concisely, the mission command philosophy can be understood as the exercise of direction via mission orders to enable decentralized execution.[15] The key to this definition is the phrase "mission orders" which refers to orders "that emphasize to subordinates the results to be attained, not how they are to achieve them."[16]

Doctrine divides up "responsibility" for Mission Command between the staff and the commander. Commanders are charged with three tasks. First, commanders "drive the operations process through their activities of understanding, visualizing, describing, directing, leading, and assessing operations."[17] Second, commanders "[d]evelop teams, both within their own organizations and with joint, interagency, and multinational partners."[18] And finally, commanders conduct "[i]nform and influence audiences, inside and outside their organizations."[19] Staff, conversely, are charged with conducting the "operations process,"[20] synchronizing "information-related capabilities,"[21] and conducting "cyber electromagnetic activities."[22]

B. The Warfighting Functions

The tasks related to mission command are facilitated on most staffs by organization into warfighting functions. Warfighting functions are "a group of tasks and systems (people, organizations, information, and processes) united by a common purpose that commanders use to accomplish missions and training objectives."[23] The Army has six warfighting functions: mission command, movement and maneuver, intelligence, fires, sustainment, and protection.[24] There is also some discussion of creating a seventh warfighting function entitled "Engagement."[25] Warfighting functions are typically used to divide various staff functions within the Command Post. And while warfighting functions are a relatively new organizational principle, MCTP has seen this concept embraced by virtually all units from brigade to Army Service Component Command.

Understanding these functions and where legal services falls is imperative to properly integrating on a staff. Each unit applies the concept slightly differently, but generally warfighting functions have been used to physically divide the space within a headquarters footprint, to allocate resources, and to execute shift change briefs. Legal services are classified under the *sustainment* warfighting function.[26]

Program: Leading the March into the Future, MILITARY REVIEW, July-Aug. 2013 at 21 (quoting U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-1 (14 June 2001)). This definition proved too rigid for the increasingly nuanced and complex international environment, and in 2008 the Army introduced the concept of "mission command," which was designated as the "preferred means of battle command." U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-1 (14 June 2001)..

[10] This, in-turn, led to the change in name from *Battle* Command Training Program to the *Mission* Command Training Program.

[11] U.S. DEP'T OF THE ARMY, DOCTRINE PUBLICATION 6-0, MISSION COMMAND 1 (May 2012) [hereinafter ADP 6-0) ("Unified land operations is the Army's operational concept . . . the mission command philosophy of command is one of the foundations of unified land operations.").

[12] U.S. DEP'T OF THE ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 1-2 (18 Mar. 2013) [hereinafter FM 1-04].

[13] ADP 6-0, *supra* note 11, 1.

[14] *Id*.

[15] *Id*.

[16] *Id*. at 2-4.

[17] U.S. DEP'T OF THE ARMY, DOCTRINE REFERENCE PUB. 6-0, MISSION COMMAND v (May 2012) [hereinafter ADPR 6-0].

[18] *Id*.

[19] *Id*.

[20] *Id*. at vi.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] ADPR 3-0, *supra* note 9, 1-9.

[25] *See* U.S. DEP'T OF THE ARMY, TRAINING AND DOCTRINE COMMAND PAM. 525-8-5, U.S. ARMY FUNCTIONAL CONCEPT FOR ENGAGEMENT (24 Feb. 2015).

[26] ADRP 6-0, *supra* note 17; Legal Services are classified under the "personal services" portion of the sustainment warfighting function, which includes "sustainment functions that man and fund the force, maintain Soldier and Family readiness, promote the moral and ethical values of the nation, and enable the fighting qualities of the Army." .U.S. DEP'T OF THE ARMY, DOCTRINE REFERENCE PUB. 4-0, SUSTAINMENT 1-2 (July 2012). (The sustainment warfighting function "is the related tasks and systems that provide support and services to ensure freedom of action, extend operational reach, and prolong endurance*Id*., 1-1.

There appears, however, to be some doctrinal divergence over this classification, with some doctrine suggesting legal services are better classified as a function of mission command.[27] Field Manual 1-04 (Legal Support to Operational Army), for instance, appears to support the idea that legal services are perhaps better organized under the mission command function. FM 1-04, for instance, notes that "Soldier discipline is one component of the *mission command* warfighting function."[28] This manual further declares that "the practice of operational law has become an essential component of mission command."[29] These statements further track a passage from Army Tactics, Techniques, and Procedures (ATTP) 5-0.1, The Military Decision Making Process, which lists "Staff Judge Advocate" as a position "responsible for aspects of mission command."[30]

Given the breadth of functions performed by a unit legal office, there exists a reasonable question as to which warfighting function it is best classified under. It is unclear why legal services are considered part of the sustainment warfighting function. Presumably it is because legal services contribute to "Soldier and Family readiness, [and] promote the moral and ethical values of the nation."[31] While a portion of the legal services practice—Military Justice, Ethics, and Legal Assistance—relate to these goals, these represent only a fraction of the legal services provided to a command and staff. Operational Law, at a minimum, is likely a better fit under the mission command warfighting function.[32]

The current warfighting function doctrine creates concrete problems in an operational environment. At various MCTP exercises, Judge Advocates are virtually always assigned to the unit's Sustainment Chief—not Executive Officer—for staffing purposes. Further, legal sections are typically relegated to the Army Logistics Operations Center (ALOC), far from the command post. As the OPLAW practitioner attempts to integrate with current operations, this doctrinal ambiguity can be an obstacle.

C. Special and Personal Staff

The second doctrinal issue concerns the position of the Judge Advocate on the staff. AR 27-1;[33] FM 3-90.6;[34] ATTP 5-0.1;[35] and Joint Publication 1-04[36] all indicate the legal advisor is a member of the commander's *personal* staff. Field Manual (FM) 1-04, however, notes that the Brigade Judge Advocate is a member of the "brigade commander's personal and special staff."[37] Further complicating the question is FM 101-5 which refers to the legal advisor at times as a member of the personal staff and at other times, a member of the special staff.[38] Given the role of the Judge Advocates on a battle staff, they should perhaps be considered as members of both the personal and special staff. Regardless of the outcome of this doctrinal discussion, practitioners should be aware that some confusion exists on the issue.

IV. Observations

A. Staff Integration

As noted above, commanders *drive* the operations process, the staff *conducts* the operations process, including planning, preparation, execution, and assessment. Army-wide, one of the reoccurring issues with the conduct of the operations process is the compartmentalization of planning efforts. Deficient collaboration and cross-functional discussion leads to flaws in the planning process.

Staffs at all levels frequently fail to integrate special and personal staff sections during the planning process. The suboptimal integration is a result of two factors. First, Judge Advocates often don't understand the operations process and the role that they play. As a result, they frequently fail to attend the staff planning meetings and unit rehearsals. Further, when they do attend they are unaware of how they can be value added to the process. The flipside of this is the staff and Executive Officer (XO)/Chief of Staff (CoS) fail to understand where and how Judge Advocates can be value added. Commanders should ensure that staffs, and staff leadership, are familiar with the roles and responsibilities

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[27] U.S. DEP'T OF THE ARMY TACTICS, TECHNIQUES, AND PROCEDURES 5-0.1, THE MILITARY DECISIONMAKING PROCESS (14 Sept. 2011) [hereinafter ATTP 5-0.1]. (The mission command warfighting function is organized to "support the commander's decision making; collect, create, and maintain relevant information and prepare knowledge products to support the commander's and leaders' understanding and visualization; prepare and communicate directives; and establish the means by which commanders and leaders communicate, collaborate, and facilitate the functioning of teams.").

[28] FM 1-04, *supra* note 12.

[29] *Id.*

[30] ATTP, *supra* note 27, 4-25.

[31] ADPR 4-0, *supra* note 26, 1-2

[32] *Id.*, 9 The mission command warfighting function is defined as "the related tasks and systems that develop and integrate those activities enabling a commander to balance the art of command and the science of control in order to integrate the other warfighting functions." The purpose is to "support the commander and subordinate commanders in understanding situations, decision-making, and implementing decisions throughout the conduct of operations."

[33] U.S. DEP'T OF THE ARMY REGULATION 27-1, JUDGE ADVOCATE LEGAL SERVICES (RAR 13 Sept. 2011).

[34] U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM (Sept. 2010).

[35] ATTP, *supra* note 27.

[36] JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (17 Aug. 2011) [hereinafter JOINT PUB. 1-04].

[37] FM 1-04, *supra* note 12, 3-3.

[38] U.S. DEP'T OF THE ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

filled by legal section, and that the staff is in-fact deeply integrated.

Many Judge Advocates incorrectly assume that the role of an Operational Law attorney is simply administering the Rules of Engagement and providing advice in the targeting process. The role of the Judge Advocate in operations, however, is far broader as discussed at length below.

B. Staff Organization, Equipping, and Planning

Field Manual 1-04 tasks Judge Advocates to "[p]rovide the commander and staff with legal support and advice in decisive action-oriented operations."[39] This is accomplished in two parts: support to planning, and support to operations. In the first part—support to operational planning—Judge Advocates prepare legal estimates, design the operational legal support architecture, write legal annexes, assist in the development and training of rules of engagement, and reviewing plans and orders.[40] The key to success here is the proper organization and equipping of the legal section.

1. Staff Organization

Task organization is the "is the act of configuring an operating force, support staff, or sustainment package of specific size and composition to meet a unique task or mission."[41] It is at this stage in the planning process—perhaps months before operations commence—that units make decisions impacting the size, location, staffing, and equipping of legal sections and other staff sections. Legal sections frequently arrive at an exercise only to find themselves tucked away in the sustainment cell without any computer or means of communication. It is critical that Judge Advocates are actively engaged in the planning process in order to articulate the operational needs for the legal section. At a minimum it is recommended that every legal section have a dedicated NIPRNET, SIPRNET, DSN, SVOIP, and Command Post of the Future (CPOF)[42] system.

2. Equipping

Why not strictly and aspect of planning, it is worth noting the importance of the CPOF system. Perhaps the most consistent MCTP AAR comment received from training audiences is the lack of connectivity for the legal section. This is unsurprising given that, "the abilities to communicate and receive information represent the judge advocates primary materiel requirements to deliver timely legal support in garrison and in a deployed environment."[43] In a deployed environment, communications is focused on three systems—NIPRNET, SIPRNET, and CPOF. NIPR/SIPR are simply the unclassified and classified military internet systems, which need no special equipment or instruction. CPOF, however, is a unique operating system that is in no way intuitive. In a recent exercise, for example, all paralegals from six separate units noted the importance of CPOF training and lamented the fact that they never received CPOF training during their paralegal training.

Operations—particularly Unified Land Operations—are characterized by a dynamic environment which demands a high degree of situational awareness. In the modern Army Current Operations Integration Cell (COIC), the central system for maintaining situational awareness is the CPOF system. Having a dedicated Judge Advocate CPOF system with trained operators is important for a number of reasons. First, all significant acts (SIGACTS) are reported through the CPOF system. Legal sections must have the instant ability to see relevant SIGACTS (law of armed conflict violations, detainee issues, civilian casualties, claims incidents, etc.) and take appropriate actions.

Second, the legal section acts as the "hub" on the staff for all investigations. The legal section should have the best situational awareness of investigations throughout the unit formation. CPOF allows users to not only see all SIGACTs, but also provides the ability to graphically depict these events. The legal section is well positioned to identify trends on behalf of the commander.

Finally, among other duties of the legal section, the SJA is tasked to "provide the commander and staff with legal support and advice in decisive action-oriented operations."[44] This requirement demands real time situational awareness of the battle. Legal advisors cannot give guidance to commanders and staff on ongoing operations, troops in contact, counter-battery fire, etc. without having good battlefield situational awareness.

3. Operational Planning

Army doctrine notes that planning helps leaders to: "[u]nderstand and develop solutions to problems, [a]nticipate events and adapt to changing circumstances, [and] task-

[39] FM 1-04, *supra* note 12.

[40] *Id*.

[41] U.S. DEP'T OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 5-0, THE OPERATIONS PROCESS para. 2-2 (17 May 2012) [hereinafter ADRP 5-0] (citing U.S. DEP'T OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 3-0, UNIFIED LAND OPERATIONS (16 May 2012)).

[42] For a general discussion of CPOF, see Harry Greene et al., *Command Post of the Future: Successful Transition of a Science and Technology Initiative to a Program of Record*, DEFENSE ACQUISITION UNIVERSITY, Jan. 2010.

[43] FM 1-04, *supra* note 12.

[44] *Id*.

organize the force and prioritize efforts."[45] All three aspects occur throughout planning efforts, but it's particularly critical for Judge Advocates to understand that at the earliest stages of planning commanders and staff are focused on task organization.

It is hard to overstate the importance of Judge Advocate participation in the planning process. It is imperative that Judge Advocates understand the process and become involved early and often. Field Manual 1-04 succinctly summarizes this: "Key to effective legal support … is judge advocates who demonstrate initiative, integrate themselves into the staff, actively participate in the design and planning processes, and work to understand the operational environment."[46] For a given operation, the planning may begin months or even a year before commencement of operations.

Military operations are complex endeavors which demand formal systems designed to assist participants (e.g., commanders and staff) in "understanding a situation, envisioning a desired future, and laying out effective ways of bringing that future about."[47] Major Michael O'Connor has drafted an outstanding article articulating the role of the Judge Advocate in operations planning.[48] It is beyond the scope of the instant article to essentially recount what MAJ O'Connor has so deftly written. The intent here is to highlight the importance of the planning process and provide a brief overview of how and where Judge Advocates participate in the process.

Another good resource on this point is Joint Publication 1-04, which provides a chronological depiction of Judge Advocate support to the planning process. As opposed to Army Doctrine, Joint Doctrine breaks out the Judge Advocate role in both Crisis Action Planning and in Deliberate Planning. To wit:[49]

Deliberate Planning	**Crisis Action Planning**
Review planning documents	Develop situational awareness
Review applicable laws, policies, treaties, and Agreements	Review planning documents
Coordinate legal issues with counterparts	Review applicable laws, policies, treaties, agreements, and arrangements in all affected areas of responsibility (AORs)
Review the commander's strategic concept for compliance with law and policy and make appropriate recommendations	Summarize relevant legal considerations (authorities, restraints, and constraints) and provide them to the crisis action team, combatant commanders, and counterparts
Assist the staff judge advocates	Incorporate legal considerations and instructions for developing ROE and RUF in the combatant commander's planning guidance
Review the supported command's OPLAN for legal sufficiency and make appropriate recommendations	Review the combatant commander's estimate for compliance with law and policy and make appropriate recommendations
Crosswalk supporting plans to ensure that they are legally correct, complete, and consistent, and make appropriate recommendations	Review and validate any judge advocate joint task force joint manning document requirements and synchronize joint legal support
	Monitor operations for legal issues as required

In the first portion of the operations process—planning—it is imperative that Judge Advocates understand and aggressively involve themselves in the planning process. As FM 1-04 notes, "Judge advocates must be proactive and heavily involved in the planning phase of all operations. Judge Advocates ensure commanders fully understand and account for [legal issues] during the planning of operations."[50] This requires an understanding of the Operations Process (ADRP 5-0) and the Military Decision Making Process (MDMP). Without a working understanding of these concepts, it will be impossible for Judge Advocates to identify where and when they can provide assistance to the staff.

A useful example can be seen in the recent development of the U.S. policy regarding the use of anti-personnel landmines. In a typical exercise, landmines—anti-personnel and otherwise—play an important part in unit's plans. Recently, both the President and the Secretary of Defense made public statements indicating the U.S. "will not use anti-

[45] ADPR 5-0, *supra* note 41, para. 2-2.

[46] FM 1-04, *supra* note 12.

[47] ADRP 5-0, *supra* note 41, para. 2-1.

[48] Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5.

[49] Joint Pub. 1-04, *supra* note 36.

[50] *Id*.

personnel landmines outside the Korean Peninsula."[51] In two recent exercises, the planners were not tracking this change in policy. Had the Judge Advocates not been closely integrated with the planners, the unit would have planned an operation that they could not have executed.

C. Situational Awareness

The second portion of the operations process—the conduct of operations—has Judge Advocates maintaining situational awareness, advising and assisting with lethal and nonlethal targeting, and advising and assisting with ROE implementation, and conducting detainee operations.[52] The concept of "situational awareness" in a combat environment broadly indicates that a given member of the staff should have sufficient information in order to do their job. For the personalist, this might include knowing who and where personnel are located. For the logistician this information would include the status of classes of supply. For the Judge Advocate, situational awareness encompasses a number of aspects.

As a Military Justice practitioner, a Judge Advocate must understand the task organization of the unit and the relationship between their General Court Martial Convening Authority and affiliated units.[53] The claims practitioner, must understand where their unit is (and has been operating), the nature of the operations, and the equipment employed in those operations. An Operational Law attorney requires even greater visibility on operations, particularly current operations. When a question arises regarding the validity of a dynamic target, an Operational Law attorney does not have the luxury to go study the map, then the Operational Law Handbook, then back to the map, etc.

All attorneys in an operational environment should take several base measures to ensure they maintain maximum situational awareness. First, all should be familiar with the Base Operations Order (OPORD) under which the unit is operating. Operations Orders are, of course, modified on a regular basis by Fragmentary Orders (FRAGOs).[54] Judge Advocates and paralegals should read all FRAGOs which apply to their unit. Operational Law attorneys should further have a strong working relationship with the G/S/J3, G/S/J2, and the Fires section.

An Operational Law Judge Advocate cannot have sufficient situational awareness without having an understanding of current operations. That is, an understanding beyond OPORDs and FRAGOs that includes operations that are currently occurring and operations that will occur within the next 24 hours. This is not a Judge Advocate-specific issue. Virtually all units are eager to increase their knowledge/information management processes.[55]

Collectively, knowledge/information management seeks to provide information to staff and commanders necessary to maintain understanding and make effective decisions. One tool in facilitating knowledge/information management is the COIC which "is the integrating cell in the command post with primary responsibility for execution."[56] Within the COIC, the Common Operating Picture (COP) is the primary mechanism for disseminating knowledge/information. The COP frequently takes the form of a single display, presenting multiple staff products.[57] The unit SOP should define responsibility and frequency required for updating and maintaining the COP. The centrality of the COIC to unit operations is the reason why MCTP OPLAW strongly advocates having a Judge Advocate seat in the COIC.

Another fundamental tool in maintaining staff-wide situational awareness is the creation and maintenance of running estimates. A "running estimate is the continuous assessment of the current situation used to determine if the current operation is proceeding according to the commander's intent and if planned future operations are supportable."[58] The most successful staffs maintain running estimates within all sub-staff sections. This facilities both commander and staff visualization of "the operational and mission variables, assessments by subordinate commanders and other organizations, and relevant details gained from running estimates."[59]

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[51] News Release, U.S. Department of Defense, Statement by Pentagon Press Secretary Rear Admiral John Kirby on Landmines (Sept. 23, 2014).

[52] FM 1-04, *supra* note 12, paras. II-6, II-7.

[53] The Army utilizes myriad command relationships, including organic, assigned, attached, operational control (OPCON), tactical control (TACON), and administrative control (ADCON). The nature of the command relationship has significant implications for various aspects of the practice of law. *See generally* ADRP 5-0, *supra* note 41, paras. 2-75, 2-76, 2-77, 2-78, 2-79, 2-80, 2-81, 2-82, 2-83, 2-84.

[54] *Id.* paras. 1-4, 1-5 ("commanders describe modifications to their visualization in updated planning guidance and directives resulting in fragmentary orders that adjust the original order.").

[55] "Knowledge management facilitates the transfer of knowledge between staffs, commanders, and forces." ADRP 6-0 *supra* note 17, para. 3-5. Information management, in turn, "is the science of using procedures and information systems to collect, process, store, display, disseminate, and protect data, information, and knowledge products." *Id.* para. 3-19.

[56] ADRP 5-0, *supra* note 41, para. 4-3.

[57] ADRP 6-0, 2-14 ("staffs develop a *common operational picture* (known as a COP), a single display of relevant information within a commander's area of interest tailored to the user's requirements and based on common data and information shared by more than one command.") and ADRP 2-0, *Intelligence* (31 August 2012) 3-3.

[58] ADRP 5-0, *supra* note 41, 1-15.

[59] *Id*. para. 1-15.

That said, the practice of law doesn't lend itself to running estimates as envisioned by Army doctrine. Legal sections will frequently be pressured to maintain and provide copies of their running estimates. It is important for Judge Advocates to understand what is meant by "running estimate" in order to explain to an Executive Officer or Chief of Staff the inapplicability (largely) of the concept to legal operations. Where running estimates do fit the practice of law, it tends to be in areas of Military Justice (e.g., numbers of cases) and Administrative Law (e.g., numbers of investigations), where the information is not typically shared beyond the commander.

D. Judge Advocate Role in the Conduct of Operations

As important as understanding the military authority for a unit's given operations, it is equally important to understand the international and domestic laws under which operations are occurring. This includes application of international law such as the Hague Regulations,[60] Geneva Conventions of 1949,[61] the United Nations Convention against Torture,[62] the Chemical Weapons Convention,[63] and so forth.[64] This would also include the application of any bilateral agreements such as a Status of Forces Agreement, Visiting Forces Agreement, or other similar agreements. Such bilateral agreements have the potential to affect virtually the entire of practice of law in a deployed environment, including basing issues, claims, military justice, and combat operations.

Field Manual 1-04 provides a comprehensive discussion of Judge Advocate roles at both Division and Brigade as well as a discussion of Judge Advocate duties by Warfighting Function.[65] Utilizing guidance found in FM 1-04 and our observations at MCTP, I have provided a summary of suggested Judge Advocate responsibilities by warfighting function:

Warfighting Function	Responsibilities
Movement and Maneuver	• Assisting maneuver force in efforts to minimize collateral damage.[66] • Ensure operations are conducted in compliance with applicable law and policy.[67] • Assisting with the management of Internally Displaced Persons (IDPs), including the provision of Humanitarian Assistance and Medical Aid.[68] • Understand the basis of military operations and possibly attendant restrictions.[69]
Fires	• Review targets to ensure targets are consistent with the Law of Armed Conflict and ROE.[70] • Understand the CDE process to ensure unit is complying with regulatory requirements.[71] • Ensure the delineation of no-fire, restricted fire, and protected places.[72]

[60] Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 Consol. T.S. 263; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in the Case of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2310, 75 U.N.T.S. 31.

[61] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[62] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

[63] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, May 1993, 32 I.L.M. 800.

[64] *See, e.g.*, *Treaties in Force*, U.S. DEPARTMENT OF STATE http://www.state.gov/s/l/treaty/tif/index.htm (last visited July 7, 2016) (listing all treaties in effect with regards to the United States).

[65] FM 1-04, *supra* note 12, 2-3–2-6.

[66] Additional Protocol I, art. 51 (prohibits "indiscriminate attacks" such as those that cause "incidental loss . . . excessive . . . [to] the military advantage anticipated."); Army Tactics, Techniques, and Procedures 3-37.31, *Civilian Casualty Mitigation* (18 July 2012); *see also* e.g., Michael N. Schmitt, *Extraterritorial Lethal Targeting*: *Deconstructing the Logic of International Law*, 52 Colum. J. Transnat'l L. 77, 108 (2013) ("Once it is determined that an individual may lawfully be targeted, the impact of the attack on civilians and civilian property must be assessed and minimized. International humanitarian law requires attackers to take precautions designed to limit collateral damage. This obligation includes: doing everything feasible to verify the target; choosing available weapons or tactics that will minimize collateral damage without sacrificing military advantage; and selecting targets so as to minimize collateral damage.")

[67] U.S. DEP'T OF DEF. DIR. 2311.01E, DOD LAW OF WAR PROGRAM; CHAIRMAN,JOINT CHIEFS OF STAFF, INSTR.5810.01C, IMPLEMENTATION OF DOD LAW OF WAR PROGRAM; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10].

[68] ??

[69] This includes understanding international obligations under the Geneva Conventions, bilateral agreements that may exist (e.g., the NATO SOFA), and U.S. domestic restrictions (e.g., The Authorization for the Use of Military Force Against Terrorists, Pub. L. No. 107-40 (2002).

[70] *See generally* Geneva Conventions and Hague Regulations; see also FM 27-10, supra note 67 and CHAIRMAN,JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005).

[71] CHAIRMAN,JOINT CHIEFS OF STAFF INSTR. 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter CJCSI 3160.01]..

[72] CJCSI 3160.01, *supra* note 71.; JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING (31 Jan. 2013) [hereinafter Joint Pub. 3-60]; U.S.

	• Understand and be prepared to apply the decision authorities for various munitions.[73] • Understand and be able to apply restrictions on fires (mines, cluster munitions, etc.).[74]
Protection	• Assist the command in drafting and applying the ROE regarding US and allied forces.[75] • Understand the restrictions on the use of Riot Control Agents.[76] • Providing guidance regarding the detention of civilians.[77] • Review detention plans and operations.[78]

Warfighting Function	Responsibilities
Mission Command	• Understand units' roles and missions.[79] • Administer Military Justice.[80] • Administer claims.[81] • Ensure Office of the Staff Judge Advocate is trained and prepared to execute the mission.[82] • Man boards, centers, cells, and working groups.[83] • Draft and review command policies.
Sustainment	• Apply contracting and fiscal law including the acquisition of goods, services, construction, contingency contracting, procurement fraud oversight and Acquisition and Cross Servicing Agreements.[84] • Understand legal concerns regarding contractors and personnel accompanying the force.[85] • Provide Legal Assistance. • Serve as the unit ethics advisor.
Intelligence	• Review interrogation plans.[86] • Review of collection on US Persons. • Use of special collection measures.

DEP'T OF ARMY FIELD MANUAL 3-60, THE TARGETING PROCESS (26 Nov. 2010) [hereinafter FM 3-60].

[73] JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, JOINT FIRE SUPPORT at xv (12 Dec. 2014) ("The authority and responsibility for the expenditure of any weapon (lethal or nonlethal) rests with the supported commander. The supported commander communicates engagement criteria to the force through ROE and special instructions specific to each operational area. The supported commander may delegate target engagement authority to the lowest level of command of the supported forces."

[74] JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, JOINT FIRE SUPPORT at I-2(12 Dec. 2014) (commanders "may issue guidance on the use or restricted use of unique weapons or certain munitions types (e.g., cluster munitions or mines), and may prioritize the allocation or use of joint operations area (JOA)-wide systems like the Tomahawk missile or the Army Tactical Missile System (ATACMS) for specific purposes.").

[75] U.S. DEP'T OF DEFENSE DIR., 2311.01E, DOD LAW OF WAR PROGRAM; FM 27-10.

[76] Exec. Order No. 11,850, 3 C.F.R. (1971-1975) Comp., p. 980.

[77] *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949; U.S. DEP'T OF ARMY, FIELD MANUAL 3-39.40, INTERNMENT AND RESETTLEMENT OPERATIONS (12 FEB. 2010); U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR. 190-8].

[78] AR 190-8.

[79] There are several options for gaining a better understanding a given unit. *See e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 7-15, THE ARMY UNIVERSAL TASK LIST (29 June 2012) (providing "a comprehensive, but not all inclusive listing of Army tasks, missions, and operations"); and U.S. Dep't of the Army, Doctrine Pub. 1-02, TERMS AND MILITARY SYMBOLS (2 Feb. 2015) (providing an explanation of military terms and graphics used during operations).

[80] FM 27-10.

[81] U.S. DEP'T OF ARMY 27-20, FIELD MANUAL, CLAIMS (8 Feb. 2008).

[82] FM 1-04, *supra* note 12,.

[83] *Id.*

[84] *Id.*

[85] U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE US ARMED FORCES (20 Dec. 2011).

[86] Detainee Treatment Act of 2005, Pub. L. 109-163, 119 Stat. 3136 (2006); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3.

The operational law judge advocate supports <u>planning</u> by:

- Preparing legal estimates,
- Designing the operational legal support architecture,
- Writing legal annexes,
- Assisting in the development and training of rules of engagement,
- Reviewing plans and orders.

Staff Tasks:

- Conduct the operations process (plan, prepare, execute, and assess)
- Conduct knowledge management and information management
- Synchronize information-related capabilities
- Conduct cyber Electromagnetic activities

The operational law judge advocate supports the <u>conduct of operations</u> by:

- Maintaining situational awareness;
- Advising and assisting with lethal and nonlethal targeting;
- Advising and assisting with ROE implementation, and detainee operations

This chart further illustrates how the Judge Advocate's role nests with the staff role in the operations process

E. Fires

Legal support to fires is of such importance that it deserves individualized attention. Operational Law attorneys are encouraged to become familiar with the Collateral Damage Methodology (CDM) and the entire fires process.[87] Field Manual 3-60, *The Targeting Process*, provides a succinct summary of the role of a Brigade Judge Advocate on a fires staff. Responsibilities for the Brigade Judge Advocate include:

> • Analyzing the operations relative to the rules of engagement, United States laws, existing host nation law, and international law.
>
> • Analyzing the nominated or potential target under the law of war.
>
> • Analyzing the plans for detention operations can include evaluation for potential future criminal prosecution of a target, site exploitation, and evidence preservation.
>
> • Identifying the need for potential legal support to operations.
>
> • Provide interpretations of the rules of engagement.[88]

Notably, these responsibilities extend beyond the typical administration of the Rules of Engagement to include both broad planning and execution responsibilities.

In an article entitled "The Brigade Legal Section in Decisive Action: Issues, Trends, TTPs, and Training," MAJ Kevin Landtroop discusses at some length the observations regarding fires he had made as an Observer, Coach, Trainer at NTC. A dynamic environment creates challenges that "require the BCT to incorporate real-time proportionality

[87] CJCSI 3160.01, *supra* note 71. ; Joint Pub. 3-60, *supra* note 72. ; FM 3-60, *supra* note 72 .

[88] UFM-360 *supra* note 72 at 4-10.

analysis into dynamic targeting."[89] In such situations, he writes "[t]he staff must not only understand the ROE and assess proportionality, but they must also incorporate the brigade commander's intent with respect to targeting in populated areas."[90]

In the article MAJ Landtroop identifies several trends observed at NTC which echo observations made at MCTP. In a presentation accompanying his article, MAJ Landtroop noted that positive identification (PID) "has subsumed the concept of military objective after 12 years of COIN. Terrain denial fires, SEAD [Suppression of Enemy Air Defense], and other unobserved fires serve a valid military purpose even without PID of a specific enemy force."[91]

Observations of more than a dozen artillery brigades during MCTP rotations confirm MAJ Landtroop's observations. Commanders, staff, and Judge Advocates are fixated on the concept of PID—the idea that a target must be physically observed before it can be serviced. The common understanding of the concept of PID is inapplicable to many operations outside of COIN. Terrain denial and SEAD fires are prime examples. Judge Advocates should understand what level of identification is applicable to which situations.

Another observation shared by NTC and MCTP involves the execution of dynamic targets. In part, Judge Advocates lack the requisite technical competence. MAJ Landtroop notes,

> The overarching trend is inconsistency in application of proportionality analysis, ROE, and the commander's intent…Failure to identify critical, readily available information—such as whether an identified building is on a no-strike list—recurs frequently. Misapplication of ROE constraints at the border is also a frequent problem, as is confusing fire support coordination measures (FSCMs) with ROE restrictions.[92]

The execution of dynamic targets often further exposes communications breakdown between the legal section and other staff components, most notably the Current Operations section of the S-3 and the fires section. As discussed above and noted in FM 1-04, "[r]apport is critical for mission success—for both the JAGC and the Army."[93] With regards to fires in particular, it is imperative for Judge Advocates to have a solid working relationship with the unit fires officer, and a working understanding of the CDM.[94]

A full examination of the CDM is far beyond the scope of this article. A quick summary of the methodology is, however, useful. The CDM utilizes a Collateral Damage Estimation construct to "mitigate unintended or incidental damage or injury to civilian or noncombatant persons or property or the environment."[95] In short the CDM utilizes formulas and technical information regarding weapons systems to estimate the resulting damage caused by a given strike. The system is utilized by the fires community to provide some objective fidelity to what would otherwise be a purely subjective Law of Armed Conflict analysis. The CDM merely informs a commander and serves to provide a means to restrict release authority for certain targets.

Applying the CDM to a given target will generate a CDE level on a scale of Level 1 through 5.[96] The CDM analysis is based on a "progressively refined analysis of available intelligence, weapon types and effects, the physical environment, target characteristics and delivery scenarios with specific risk thresholds established for each of the five CDE levels."[97] The resulting CDE level reflects a balance between the risk to mission and the risk of collateral damage, where increasing from one level to the next increases both risk to mission and the risk of collateral damage.[98]

F. Technical Proficiency

Many Judge Advocates have difficulty rapidly adapting to an operational environment. This isn't indicative of their intelligence or work ethic, but rather the fact that most Judge Advocates don't practice in an operational environment on a daily basis. Indeed, common issues in a deployed environment (e.g., detention operations, targeting, contingency contracting, foreign claims, etc.) are not regularly seen at home station.

This is in contrast with other staff sections whose deployed functions largely track their home station functions (e.g., personalists track personnel, intelligence officers conduct intelligence assessments, and planers plan, etc.) Further complicating Judge Advocate integration in a deployed environment is the fact that in a home station environment, there is relatively little interaction between the OSJA and other staff sections. This in contrast with other sections (e.g., operations and intelligence) who regularly

[89] Kevin Landtroop, The Brigade Legal Section in Decisive Action: Issues, Trends, TTPs and Training, copy on file with the author.

[90] *Id.*

[91] Landtroop. *supra* note 89..

[92] *Id.*

[93] FM 1-04, *supra* note 12.

[94] U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-09, FIRES (8 Feb.2013).

[95] CJCSI 3160.01, *supra* note 71 at B.

[96] *Id*., at A-5.

[97] *Id*.

[98] *Id*.

interact with one another at home station. All these factors combine to create an environment where there exists a need for Judge Advocates to rapidly acclimate and develop underutilized proficiencies.

As with any other discipline, the key to preparing for a deployed environment—whether simulated or real—is preparation. As noted above, developing technical proficiency first requires a deep understanding of the legal and military framework in which operations are occurring. This includes international and bilateral agreements, military regulations and policies, operations orders, and fragmentary orders. Judge Advocates are also encouraged to become familiar with—in decreasing order of importance: FM 1-04, *The Operational Law Handbook*, FM 27-10, ADRP 6-0, ADRP 3-0, and ADRP 5-0.

In order to understand what a unit is doing and how it is being done, it is important to understand unit organizations; unit missions, capabilities, task, and purpose; enemy capabilities, task, and purpose; and the staff process in which a Brigade Judge Advocate must execute operations.[99]

G. Office Management

1. Office Operations

Units, missions, personnel, and leadership styles vary so widely that it is impossible to provide detailed guidance regarding the operation of a legal section. This section should be viewed more as a primer on issues to consider while developing the legal support architecture. As noted above, the size and composition of a given staff section is determined long before deployment. The sooner SJAs are involved in the planning process, the greater the chance OSJA equities will be represented.

The senior legal advisor in a command should give some thought to the relationship between their organization and lower unit Judge Advocates. Field Manual 1-04 advises that "[t]he SJA should provide brigade judge advocates with technical guidance, direction, and insight on legal issues." Senior legal advisors should look to establish expectations at the outset of operations. This can be accomplished through a number of methods, including the publication of an OSJA Standard Operating Procedure or the establishment of a published OSJA battle rhythm.[100]

Another office management issue which frequently arises during an exercise is the question of manning. How the office is actually manned is largely at the discretion of the senior legal advisor—operating perhaps under the commander's guidance that the OSJA will maintain 24 hour operations, or a similar mandate. Optimally, senior legal advisors man their office in a manner that reflects their unit and current operations. For example, a senior legal advisor to an aviation unit may decide to work the night shift because that is when the unit conducts the majority of their missions. Or, a senior legal advisor may recognize an upcoming significant operation and shift schedules to provide more robust coverage.

Regarding the issue of manning, questions frequently arose from training audiences regarding the utilization of night shift personnel. In the author's personal experience, legal sections that most effectively employ their night shifts utilized these personnel to complete actions started during day shift, read through the SIGACTS to ensure the legal section is tracking all legal actions, review the daily FRAGOs, and similar situation awareness building activities. The night shift can also use any down time to increase familiarization with CPOF and other battle systems.

2. Maintaining Consistency and Quality

One of the greatest internal concerns for a Staff Judge Advocate is ensuring their office is providing uniform advice. This is a particularly vexing problem in the practice of operational law. During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), how many Judge Advocates issued opinions on check point operations? There is no way of knowing, but it is safe to assume there were many. Where the opinions duplicative? Consistent? Again, it's impossible to know.

It is not, however, unreasonable to think inconsistent opinions were provided on some issues.

Maintaining consistency across a large, dynamic enterprise is not a new concern. In a memorandum to the entire JAG Corps in 1994, then-BG Huffman discussed the significance of the CTCs and noted the importance of "consistent and uniform training."[101] To that end, BG Huffman tasked all JAG Corps organizations to provide assistance and information to BCTP in developing a "common package of OPLAW issues/scenarios."[102]

Closely related to consistency and duplication is the issue of providing quality legal advice and training. By the very nature of the profession of law, Judge Advocates are trained to provide independent legal advice. In many of the other core legal disciplines, there are numerous checks and balances to ensure Judge Advocates are providing sound legal advice. Before a Judge Advocate can prefer charges, for example, the charge sheet would be reviewed by the Senior Trial Counsel, Chief of Justice, Deputy Staff Judge Advocate, and even

[99] See Landtroop. *supra* note 89 .

[100] U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, 1-14 (defining a battle rhythm as a "deliberate daily cycle of command, staff, and unit activities intended to synchronize current and future operations.")

[101] Memorandum from Brigadier General Walter B. Huffman to the Judge Advocate General's Corps subject: JAGC Participation in the Battle Command Training Program (29 Sept. 1994).

[102] *Id*.

sometimes the Staff Judge Advocate. Further, once charges are preferred, the Defense Counsel, Article 32 Officer, Convening Authority, Military Judge, and the appellate authority will all have the opportunity to review and/or provide advice on decisions made by the Trial Counsel.

Such a system of checks and balances does not exist in to the same degree within the practice of OPLAW. The creation of the BJA position has led to dozens of highly motivated, Judge Advocates practicing OPLAW with a high degree of independence. Further, in the present information environment, a Judge Advocate in combat operations may issue a legal opinion that has theater-wide implications, but that lacks theater-level vetting or review. A dramatic example of this can be seen in the memorandum on interrogation procedures drafted by LTC (Ret.) Diane E. Beaver.[103] The memorandum was rapidly circulated and relied upon by commands and units across the globe. As LTC (Ret.) Beaver later remarked in congressional testimony:

> I did not expect that my opinion, as a Lieutenant Colonel in the Army JAG Corps, would become the final word on interrogation policies and practices within the Department of Defense. For me, such a result was simply not foreseeable. Perhaps I was somewhat naïve, but I did not expect to be the only lawyer issuing a written opinion on this monumentally important issue.[104]

Beyond the possibility that a given memorandum might simply be misguided, out of context, or incorrect, it may also contradict other legal opinions on the same subject or issue.

V. Conclusion

This paper reflects observations made while assigned to MCTP and during a period of time where our Army transitions from counterinsurgency operations to Unified Land Operations. This transition has not been without friction. As with any institutional change, the shift to Unified Land Operations will take time and concerted efforts of the institutions leaders. Applying lessons learned from hundreds of leaders in dozens of units, hopefully this article can provide, some insight which increase the proficiency with which we practice law in Unified Land Operations.

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[103] Memorandum from Lieutenant Colonel Diane E. Beaver, Staff Judge Advocate to Commander, Joint Task Force 170, subject:Legal Review of Aggressive Interrogation Techniques (11 Oct. 2002), http://upload.wikimedia.org/wikipedia/commons/6/6f/Beaver101102mem.pdf

[104] Hearing on the Origins of Aggressive Interrogation Techniques Before the S. Committee on Armed Services, 110 Cong. 1-(2008) (statement of Lieutenant Colonel (Retired) Diane E. Beaver).

Non-Lethal Weapons and the Law of Armed Conflict: Minimizing Civilian Casualties on the Battlefield

Major Mark E. Gardner[*]

"I think the whole nature of warfare is changing"[1]

I. Introduction

There have been tens of thousands of civilian casualties in the post-September 11th, 2003 invasions of Iraq and Afghanistan. Many of these deaths have been a result of enemy action,[2] but despite exercising reasonable precautions, and with a command focus on reducing civilian casualties,[3] civilian deaths have occurred as a direct result of U.S. combat operations. In addition to the negative impact civilian casualties can have on military operations, particularly in a counterinsurgency, there are specific obligations under the Law of Armed Conflict (LOAC), and general ethical and moral obligations as practitioners of the profession of arms, to reduce civilian casualties to the fewest reasonably possible.

Non-lethal weapons[4] (NLW) technology currently available to U.S. forces (or in development) provides promise in the effort to reduce civilian casualties but has been sparingly used during armed conflict. There have been attempts at introducing modern NLW technology to the current conflicts in Iraq and Afghanistan, but their application has so far been limited for reasons that are not clear.[5] Unfortunately, the future armed conflicts that the U.S. may find itself engaged in will likely be conducted in environments more densely packed with civilians and civilian objects than ever before. The Chief of Staff of the Army's Strategic Studies Group (SSG) recently researched the growing urban phenomenon of "megacities," or those cities with a population of over ten million. The particular issues associated with these "megacities" make it likely the U.S. military will once again find itself dealing with the struggle to limit civilian casualties, while attempting to accomplish the strategic goals envisioned by our political leadership.

> Crowded megacities, beset by poor living conditions, periodic rises in the price of commodities, water shortages, and unresponsive municipal services, will be fertile petri dishes for the spread of both democracy and radicalism, even as regimes will be increasingly empowered by missiles and modern, outwardly focused militaries.[6]

The use of NLWs in coming armed conflicts, in which targeting threats with traditional lethal force will result in massive unintended civilian casualties, is not only fully consistent with the fundamental principles of the LOAC, but provides commanders with increased ability to successfully apply the principles of discrimination and proportionality. In future conflicts civilian casualties will be unavoidable, but

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[1] Rick Atkinson, *Lean, Not-So-Mean Marines Set for Somalia*, WASH. POST, Feb. 25, 1995, at A22. (discussing the use of non-lethal weapons (NLWs) by Marines during the evacuation of United Nations peacekeepers from Somalia in 1995).

[2] It is practically impossible to ascertain reliable statistics on civilian casualties resulting from armed conflict due to difficulties in researching and reporting from such areas, and the large number of sources for such statistics, all having different motivations. However, even taking the most conservative approach, civilian casualties during Operation Iraqi Freedom average hundreds per month since the beginning of operations. HANNAH FISCHER, CONG. RESEARCH, SERV., R40824, IRAQ CASUALTIES: U.S. MILITARY FORCES AND IRAQI CIVILIANS, POLICE, AND SECURITY FORCES (2010), http://fpc.state.gov/documents/organization/139351.pdf. Civilian casualties during Operation Enduring Freedom are perhaps slightly lower, but still conservatively average well over a hundred per month. SUSAN G. CHESSER, CONG. RESEARCH SERV., R41084, AFGHANISTAN CASUALTIES: MILITARY FORCES AND CIVILIANS (2012). http://fpc.state.gov/documents/organization/156522.pdf

[3] "Often, the effects of civilian casualties, though a result of tactical action, can have operational…even strategic…impact on the campaign. Commanders and leaders at all levels must ensure their units instinctively grasp the importance of protecting the civilian population and minimizing civilian casualties. Failure in this area could cost us the campaign." U.S. DEP'T OF ARMY, CTR. FOR ARMY LESSONS LEARNED HANDBOOK 12-16, AFGHANISTAN CIVILIAN CASUALTY PREVENTION (June 2012) [hereinafter CALL CIVCAS Handbook] (quoting General John Allen, commander of the International Security Assistance Force, Afghanistan).

[4] Non-lethal weapons (NLWs) are defined by the Department of Defense (DoD) as those "[w]eapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. NLW are intended to have reversible effects on personnel and materiel." U.S. DEP'T OF DEF., DIR. 3000.03E, DOD EXECUTIVE AGENT FOR NON-LETHAL WEAPONS (NLW) AND NLW POLICY (25 Apr. 2013) [hereinafter DoDD 3000.03E].

[5] Ed Cumming, *The Active Denial System: The Weapon that's a Hot Topic*, THE TELEGRAPH (Jul. 20, 2010, 11:27 AM), http://www.telegraph.co.uk/news/science/7900117/The-Active-Denial-System-the-weapon-thats-a-hot-topic.html (discussing the employment of the Active Denial System (ADS) by the U.S. Army in Afghanistan and its subsequent withdrawal before any operational use).

[6] CHIEF OF STAFF OF THE ARMY, STRATEGIC STUDIES GROUP, MEGACITIES AND THE UNITED STATES ARMY: PREPARING FOR A COMPLEX AND UNCERTAIN FUTURE (June 2014) [hereinafter SSG-Megacities] (quoting ROBERT D. KAPLAN, THE REVENGE OF GEOGRAPHY: WHAT THE MAP TELLS US ABOUT COMING CONFLICTS AND THE BATTLE AGAINST FATE (2012)).

NLWs offer promise that those casualties can be reduced to a level not previously possible, and in full accordance with the LOAC. To that end, this article will begin with a discussion of the LOAC and the principles relevant to the use of NLWs, followed by a description of some of the NLWs in use and/or being developed by the Department of Defense (DoD). This article will also address the concern of international nongovernment organizations (NGO) with the use of NLW technology, with a focus on the use of NLW as fully supported by the overarching principles and ideals of those NGOs. Concluding that the use of NLWs are consistent with the moral and ethical values that are the bedrock of the modern profession of arms as practiced by members of the U.S. military.

II. Legal Framework Governing the Use of NLWs

Humans have been engaging in the practice of killing each other and destroying things for political and/or social purposes for many millennia. Some form of regulation of those hostilities have been around for almost as long.[7] Modern LOAC derives essentially from two sources that were formerly relatively distinct although they have, for the most part, merged into one.[8] The LOAC has been described as emerging from the "Geneva tradition"[9] and the "Hague tradition,"[10] but it is important to note that because of the merger of the two strands of the LOAC in the last few decades, some concepts are found in both Hague and Geneva.[11]

A. Fundamental Law of Armed Conflict Principles

The Law of Armed Conflict (LOAC) arising from the Geneva and Hague traditions are fundamentally a legal regime designed to protect individual combatants and others who may be targeted on the battlefield (such as civilians who directly participate in hostilities)[12] from unnecessary suffering, and to safeguard those who are not taking a part in the hostilities, such as civilians. Four principles of the LOAC provide those protections and can be found in the four Geneva Conventions of 1949[13] and Additional Protocols I and II, drafted in 1977.[14]

1. Military Necessity

Military necessity can be the most difficult concept in the LOAC to understand in concrete terms. Francis Lieber, in his Code of 1863,[15] otherwise known as General Orders No. 100, defined military necessity in terms that are still used today with little change when discussing the concept, and explained a concept that provides both a wide latitude to cause death, injury, and destruction, and a definite limit to that power.[16] Article 14 of his code summarizes military necessity as consisting of "…the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[17] Article 15 goes on to add that necessity "admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war…."[18] There is a limit to the concept of military necessity, however, and it cannot be used as a

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[7] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 5 (2010). The late sixth century A.D. saw Roman Emperor Maurice order soldiers who injured a civilian make every effort to repair the injury or pay damages, and in 1139 the crossbow was banned as "deadly and odious to God" by the Catholic Second Lateran Council.

[8] This paper deals exclusively with "*jus in bello*," or the law concerned with the regulation of conduct during an armed conflict, rather than "*jus ad bellum*" which are the rules governing when a state may resort to the use of force in international relations. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. AND SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 10 (2015).

[9] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No.I), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(1), art. 51, and art. 57(2), June 8, 1977, 1125 U.N.T.S 3 [hereinafter AP I], and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(1) and art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[10] Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22 and art. 23, Oct. 18, 1907, T.S. 539. [hereinafter Hague Convention IV].

[11] *See, e.g.*, SOLIS, *supra* note 7, at 83 (discussing the adoption of the Additional Protocols of 1977 leading to a fading distinction between the Hague and Geneva traditions).

[12] U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL para 5.9 (Jun. 2015) (discussing civilians losing their protection from being attacked with lethal force when "directly participating in hostilities").

[13] *See, e.g.*, GC I, *supra* note 9, art. 12; GC IV, *supra* note 9, art. 15.

[14] *See, e.g.*, AP I, *supra* note 9, arts. 35(1), 51, 57(2); AP II, *supra* note 9, arts. 4(1), art. 13(2).

[15] U.S. War Dep't, Gen. Order No. 100 (24 Apr. 1863) [hereinafter Gen. Order 100].

[16] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 235 (2012). *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3 (18 July 1956).

[17] Gen. Order 100, *supra*, note 15.

[18] *Id*.

justification for acts that would otherwise constitute a violation of the LOAC.[19]

2. Proportionality

Proportionality, in the *jus in bello* context, is concerned solely with prospect of the incidental civilian casualties, sometimes referred to by the more innocuous term "collateral damage," caused as a result of military operations. Attacks in which civilians may be killed or injured, or damage and destruction to civilian objects occur, must be proportional to be considered lawful. Disproportionate attacks are defined in Additional Protocol I (AP I) to the Geneva Conventions[20] (although AP I uses the term "indiscriminate" rather than "disproportionate"), article 51(5)(b) as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[21] What is "excessive" when it comes to civilian death, injury, or damage to property, is not defined[22] and is dependent on the circumstances existing at the time. Commanders are required to consider proportionality when ordering an attack that may result in civilian casualties or damage.[23] Such decisions are evaluated based on what facts were known to the commander (making reasonable attempts to gather all information available) at the time of the decision.[24]

3. Unnecessary Suffering

Unnecessary suffering, also referred to as superfluous injury, is applicable to combatants or other lawful military targets, such as civilians taking an active part in hostilities[25] and prohibits the infliction of wanton or gratuitous injury on the enemy beyond what is necessary to accomplish the legitimate military objective.[26] There are no easily defined factors that make what constitutes unnecessary suffering clear, but common sense tells us that suffering by combatants is an unavoidable consequence of armed conflict. Any analysis of unnecessary suffering involves determining if the suffering caused is significantly disproportionate to the military advantage gained by the weapon or method of attack used.[27] Despite the difficulty in defining precisely what "unnecessary suffering" means, the principle has led to banning certain weapons under international law, to include what some may consider a NLW, blinding lasers.[28]

4. Discrimination/Distinction

Linked to proportionality is the concept of discrimination, sometimes called distinction[29] and is considered the foundation of the humanitarian focus of the LOAC. Additional Protocol I states "[p]arties to the conflict shall at all times distinguish between the civilian population

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[19] AP I, art. 35(1) states that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3a (18 July 1956) (noting that "[m]ilitary necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.").

[20] AP I applies in international armed conflicts (conflicts between States or "High Contracting Parties") while Additional Protocol II (AP II) to the Geneva Conventions applies to non-international armed conflicts. There is no mention of proportionality in AP II, but the International Committee of the Red Cross (ICRC), some national courts, and the International Criminal Tribunal for the former Yugoslavia (ICTY) consider proportionality to be part of customary international law in non-international armed conflict. SOLIS, *supra* note 7, at 275.

[21] The United States has not ratified AP I but generally considers article 51(5)(b) to reflect customary international law and therefore binding. *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U.J. INT'L. L.& POLICY 419 (1987) (Michael Matheson, U.S. Department of State Deputy Legal Advisor, presented at the conference and clarified those provisions of AP I the United States considered customary international law and those it did not.).

[22] W. Hays Parks points out that the concept of proportionality under U.S. domestic law would likely be considered constitutionally void for vagueness. W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 5 (1990).

[23] AP I, *supra* note 9, art. 51(5).

[24] Known as the Rendulic rule when the prosecution of Nazi General Lothar Rendulic established the principle after World War II. It was reinforced in 2003 when the ICTY stated "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement, ¶ 58 (Dec. 5, 2003) [hereinafter Galić].

[25] U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL para. 5.9 (Jun. 2015) (discussing civilians losing their protection from being attacked with lethal force when "directly participating in hostilities").

[26] AP I, *supra*, note 9, art. 35(2).

[27] SOLIS, *supra* note 7, at 272.

[28] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, October 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW]. Protocol IV (1995) of the CCW, prohibits the employment of lasers that are specifically designed to cause permanent blindness as one of their combat functions. This prohibition does not cover lawful laser systems (such as rangefinding or target designation systems) that may have an incidental or collateral effect of causing blindness during legitimate military employment of such systems. *Id. But see* DoDD 3000.03E, *supra* note 4, para. 3.c (defining NLWs as those with intended reversible effects, thereby eliminating laser weapons intended to cause permanent blindness from being considered NLWs under U.S. policy).

[29] Article 13 of AP II addresses this principle in the context of non-international armed conflicts: "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack . . . ." AP II, *supra* note 9, art. 13.

and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[30] Distinction has two aspects, one relating to the obligation to attack only military objectives and the other to ensure that combatants distinguish themselves from the civilian population by wearing a uniform or distinctive sign that indicates they are lawful targets under the LOAC.[31] This is an important characteristic of distinction as it not only directly protects civilians from being inadvertently targeted, it is also intended to remove suspicion that combatants are attempting to blend into the civilian population.[32]

B. Treaty Law

There is little in the way of formal treaties that directly address NLW technology. Although riot control agents as NLWs are not a focus of this article, it is useful to look at the one international treaty that comes the closest to directly regulating a form of NLW. In an international armed conflict, the Convention on the Prohibition of the Stockpiling and Use of Chemical Weapons and Their Destruction of 1993 (CWC) applies, which the U.S. has signed and ratified. The CWC prohibits, in part, parties to the treaty from using riot control agents (RCAs) as a method of warfare, ostensibly to avoid confusion regarding chemical weapons by keeping any chemical equipment off the battlefield entirely.[33] Executive Order (EO) 11850, signed by President Gerald Ford in 1975, is still relevant as U.S. policy regarding RCAs, despite being older than the CWC by almost twenty years. EO 11850 provides for presidential approval for use of RCAs as a defensive measure to save lives in an armed conflict in which the United States is a party, to include protecting convoys from terrorist, paramilitary groups, etc., in rear echelon areas; rescue of downed aircrew and escaping prisoners in remotely isolated areas; riots in areas of direct and distinct United States military control, to include controlling rioting enemy prisoners of war; and situations in which civilians are used to screen or mask an enemy attack and civilian loss of life can be avoided or reduced.[34] While this article does not directly address the use of chemical RCAs as contemplated by the CWC, the official policy towards their use is instructive in that the CWC prohibits the use of chemical RCAs as a "method of warfare,"[35] which will be addressed later.

Beyond the CWC there is little treaty law that directly impacts NLWs and their use in armed conflict. As previously mentioned, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons or CCW), Protocol IV, bans the use of lasers on the battlefield that are specifically designed to cause blindness.[36] However, "blinding lasers" as contemplated by the CCW, Protocol IV, do not appear to meet the criteria of a NLW under the Department of Defense definition.[37] The previously discussed optical distracters, or laser dazzlers, would not fall within the prohibitions of the CCW as the effects of these NLW are temporary.

Clearly, other than the use of RCAs in light of the CWC, there is little guidance in treaties concerning a commander's employment of NLWs on the battlefield. The question remains, however, of where NLWs fit within the LOAC principles and whether commanders can use such weapons across the spectrum of conflict without fear of criticism, or worse, that their use of NLWs is in violation of international law.

III. NLWs Increase a Commander's Ability to Adhere to the LOAC Principles

A. NLWs and the LOAC Analysis

The United States has used NLWs during military operations numerous times over the last few decades; in

[30] AP I, *supra* note 9, art. 48. Article 51(2) adds "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." *Id.* art. 51(2).

[31] SOLIS, *supra* note 7, at 251.

[32] Killing or wounding by resorting to feigning a protected status under the LOAC, known as perfidy, is considered a war crime. U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT para. 5.9 (2004) [hereinafter U.K. LOAC Manual].

[33] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 160 (2015).

[34] Exec. Order No. 11,850, 3 C.F.R. § 980 (1971-1975).

[35] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. I, ¶ 5, Jan. 13, 1993, 1974 U.N.T.S. 3 [hereinafter CWC] ("Each state party undertakes not to use riot control agents as a method of warfare.")

[36] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW]. The CCW has five protocols: Protocol I, prohibiting the use of weapons that cause injury by fragments that are undetectable by X-rays; Protocol II, prohibiting or restricting the use mines, booby traps, and other devices; Protocol III, prohibiting or restricting the use of incendiary weapons; Protocol IV, prohibiting the use of laser weapons that are designed, as a combat function, to cause blindness; and Protocol V, addressing post-conflict remedial actions regarding unexploded ordnance or "remnants of war."

[37] DODD 3000.03E, *supra* note 4 (NLW are developed and used with the intent to minimize the probability of serious injury and cause reversible effects).

Somalia,[38] in Iraq,[39] and Afghanistan.[40] While the outcomes may have been preferable to dead or severely injured civilians, the use of NLWs has not been without criticism from the international community.[41] However, the use of NLWs, as defined by the DoD,[42] is fully consistent with the principles of the LOAC.

1. Military Necessity and NLWs

As military necessity allows for the deliberate killing and/or permanent injury of combatants when necessary to accomplish military goals, and the incidental death and injury of innocent civilians, it seems a logical step to conclude that the use of NLW comports with the principle. NLWs are designed to have reversible physical effects on individuals and materiel[43] and therefore reduce death and injury overall in armed conflict.[44]

The genesis of the modern form of the LOAC was the laudable goal of reducing unnecessary death and injury, particularly to civilians, during armed conflicts.[45] NLW technology, if used properly and ethically, not only comports with the LOAC, it fundamentally advances the aspirations of the LOAC in reducing suffering among the victims of armed conflict. Any weapons technology designed to have temporary, reversible, effects can only be considered a revolution in the right direction when the trend for weapons development over the last few hundred years has been to make weapons more efficiently lethal.[46]

2. Proportionality and NLWs

NLWs would have the most utility to the commander in the field when proportionality is a concern (i.e. when potential civilians are present and intermingled with lawful targets) and can ultimately significantly limit civilian casualties while still allowing the commander to accomplish his or her mission. If the recent U.S. combat operations in Iraq and Afghanistan are any guide, the use of NLWs will provide a commander with increased freedom to act in situations where the enemy will attempt to draw us into environments in which our usually overwhelming lethal firepower becomes not only ineffective, but often counter-productive.[47] As Lt. Gen. Anthony Zinni, noted after his experience in Somalia as commander of the evacuation force for Operation United Shield, "Nonlethal weapons when properly applied . . . make the United States more formidable, not less so."[48] The aforementioned rise of megacities makes this concern much more salient as the U.S. military plans for future possible conflicts. The possibility of incidental death and injury to civilians is essentially ensured during combat operations in urban environments. A commander in an urban environment, acting reasonably based on the circumstances ruling at the time, can order an attack that may result in a high number of civilian casualties but be considered lawful under the LOAC. This is true as long as the loss of civilian life or damage to civilian property is not excessive when weighed against the concrete and direct military advantage to be gained.[49] Admittedly, this proportionality decision is one of the hardest, if not the hardest, a commander will need to make in his or her career, and there is unfortunately little guidance a commander can look to before ordering a release of munitions that will cause civilian deaths.[50]

However, weapons that cause fully reversible effects on those civilians incidentally affected fundamentally alter the proportionality assessment. As previously noted, the avoidance of civilian casualties has become a military advantage in itself, and to be sought after by commanders.[51] If a weapon is used that causes a brief feeling of intense heat with no lasting injury, such as the Active Denial System (ADS),[52] it should favorably factor into a commander's proportionality assessment. In the same way that an assessment that a strike using lethal munitions will cause acceptable civilian casualties in relation to the military advantage gained, due to any nearby civilians being outside the reasonably anticipated area of weapon effects, the use of

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[38] Atkinson, *supra* note 2.

[39] Lasers Used on Iraqi Drivers Who Won't Stop, MSNBC (May 18, 2006, 2:49 PM), http://www.nbcnews.com/id/12854973/ns/world_news-mideast_n_africa/t/lasers-used-iraqi-drivers-who-wont-stop/#.Vs0T0f4w_IU (describing the employment of dazzling lasers at checkpoints and during convoy operations).

[40] Rotifers, *Non-Lethal GLARE Laser Dazzler in Afghanistan*, YOUTUBE (Apr. 2, 2008), https://www.youtube.com/watch?v=mD_ciCZJ7q0

[41] MSNBC, *supra* note 39. *See also*, Cumming, *supra* note 5.

[42] DoDD 3000.03E, *supra* note 4.

[43] *Id.*

[44] It is necessary to recognize that NLW are, by definition, not perfect and some permanent injury or death remains a possibility with their employment. DoDD 3000.03E, *supra* note 4. It should also be noted that the current NLW technology shows a highly successful rate of fully reversible effects. The ADS has been tested over 11,000 times on more than 700 human subjects, resulting in just two instances of injuries (second degree burns) that required any medical treatment at all. Susan LeVine, *The Active Denial System: A Revolutionary Non-lethal Weapon for Today's Battlefield* (June 2009), http://ctnsp.dodlive.mil/files/2013/07/DTP-065.pdf.

[45] U.K. LOAC Manual, *supra* note 32.

[46] DAVID A. MOREHOUSE, NON-LETHAL WEAPONS: WAR WITHOUT DEATH 7-9 (1996). In the twentieth century alone, more than 160 million have died as a result of conflict, and of that number, only a small percentage, approximately 200,000 were killed as a result of nuclear weapons, considered the most destructive weapons available.

[47] CALL CIVCAS Handbook, *supra* note 3.

[48] Dennis B. Herbert, *Non-Lethal Weaponry: From Tactical to Strategic Applications*, JOINT FORCE Q. (Spring 1999).

[49] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING at A-4 (31 Jan. 2013) [hereinafter JP 3-60].

[50] Parks, *supra* note 22.

[51] CALL CIVCAS Handbook, *supra* note 3.

[52] See *infra* app.

NLW will necessarily factor into an analysis of potential collateral damage. If within a few minutes of the strike the weapon's effects are completely dissipated, the proportionality analysis is qualitatively different than one done that must consider the death or permanent severe injury of civilians. This is not to say, however, that using NLW in certain situations will obviate the need for a proportionality assessment, but that the reversible nature of NLWs' effects should have a significant positive impact on the analysis done. Depending on the concrete and direct military advantage to be gained, an attack that causes ten civilians to suffer temporary and fully reversible pain has, on its face, a more favorable proportionality assessment than an attack that is expected to cause ten civilian deaths or serious permanent injury.

3. Discrimination and NLWs

What impact does this proportionality analysis have on the principle of discrimination, or distinction, under the LOAC? If proportionality (in the jus in bello context) is concerned solely with the avoidance of death and injury to civilians as a result of military operations to the greatest extent reasonably possible, and discrimination requires that only military objectives be targeted, then the use of NLWs also fundamentally changes the dynamic of the discrimination/distinction analysis. Using NLWs against military objectives in a way that may also affect civilians, with the intent being to avoid permanent civilian injury, fully comports with the underlying concerns that motivated the discrimination principle. It is necessary to parse out precisely the wording of the AP I articles concerning civilians and discrimination or distinction. AP I, art. 49 defines "attacks" as "acts of violence against the adversary, whether in offence or defence." This language relating to attacks as a method of warfare (i.e. "whether in the offence or defence") has implications for the use of NLWs in environments, such as urban areas, where civilians are present in large numbers. Civilians are often used to cover the movement, and attacks, of an enemy who do not abide by the LOAC rules and will engage in perfidy by feigning the protected status of "civilian."[53] While this paper does not cover in depth the issues and law associated with chemical weapons, to include chemical NLWs[54], it is instructive to delve into the aforementioned law and U.S. policy surrounding RCAs.

Executive Order 11850 clearly distinguishes the use of RCAs as a "method of warfare," or more specifically using the language from AP I, "acts of violence against an adversary…"[55] from uses in which the NLW effect on the legitimate military objective is incidental to the intended (non-lethal) effect on civilians. The purpose of RCAs is to avoid civilian casualties. Unfortunately, there is not a clear definition of "method of warfare" in international law,[56] and, at least in terms of EO 11850 and the CWC, the international community has purposefully left it somewhat vague.[57]

However, a distinction should be made between using NLWs as a "method of warfare," and their use as a means to reduce civilian casualties. W. Hays Parks argues that the term "method of warfare" has a distinct meaning that does not include the uses of RCAs contemplated in EO 11850.[58] The employment of RCAs in the scenarios contemplated by EO 11850 is incidental to the military objective. For example, the use of RCAs in the rescue of downed aircrew is intended to reduce the possibility of civilian casualties rather than to directly effectuate the recovery of the crewmemembers.[59] In other words, the goal of RCAs in this scenario and others, to include when civilians are used to screen enemy attacks, is to fully distinguish between civilians and combatants. This use can be distinguished from, for example, using RCAs to flush enemy combatants out of their trenches so they may be targeted in the open with lethal weapons.[60] The avoidance of death and irreversible injury to civilians is the overarching goal of much of the LOAC.

The analysis under EO 11850 is equally valid for other non-chemically based NLWs that would not raise the question of whether they fall within the prohibitions of the CWC. The use of an ADS against targets in an urban environment, like

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[53] *Hamas Exploitation of Civilians as Human Shields: Photographic Evidence*, ISRAEL MINISTRY OF FOREIGN AFF. (Mar. 6, 2008), http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/pages/hamas%20exploitation%20of%20 civilians%20as%20human%20shields%20-%20photographic%20evidence.aspx.

[54] Many chemical NLWs have particular issues that may be difficult to overcome with the current technology and knowledge available. The variables of human physiology make it difficult to predict or control the effects of their use on individuals, and some doubt that a safe and effective chemically based NLW can be developed. DAVID A. KOPLOW, NON-LETHAL WEAPONS: THE LAW AND POLICY OF REVOLUTIONARY TECHNOLOGIES FOR THE MILITARY AND LAW ENFORCEMENT 22 (2006). *See also* David P. Fidler, *The Meaning of Moscow: Non-Lethal Weapons and International Law in the 21st Century*, INT'L REV. OF THE RED CROSS https://www.icrc.org/eng/assets/files/other/ irrc_859_fidler.pdf (discussing the Russian response to a terrorist attack and hostage taking event at a Moscow theatre in October 2002. Russian anti-terrorist forces pumped an incapacitating gas, suspected to be some form of fentanyl, into the building before storming it. It resulted in the death of over 100 hostages).

[55] SOLIS, *supra* note 7, at 251.

[56] Major Ernest Harper, *A Call for a Definition of Method of Warfare in Relation to the Chemical Weapons Convention*, 48 NAVAL L. REV. 132, 133 (2001).

[57] *Id*. at 134-40. (Describing the United States' opposition to the absolute banning of riot control agents (RCAs) in the CWC. Some nations, such as the United Kingdom, wanted an absolute prohibition on the use of RCAs, while the United States sought to retain the ability to use RCAs in certain situations. As a compromise during the negotiations, RCAs were banned as a "method of warfare" by the CWC, leaving open the interpretation of that phrase to the individual parties. President Clinton later attempted to amend EO 11850 to remove the use of RCAs during the rescue of downed aircrew and when civilians are used to screen attacks, but the Senate ratified the CWC on the condition that EO 11850 not be altered).

[58] Harper, *supra* note 56, at 154-55.

[59] *Id*. at 156.

[60] KOPLOW, *supra* note 54, at 38-39.

RCAs, has the ultimate goal of avoiding the use of lethal force that may kill or injure civilians. Moreover, non-chemically based NLWs do not raise the additional concerns of potential escalation to lethal chemical weapons that many critics have expressed about RCAs.[61]

4. Unnecessary Suffering and NLWs

The DoD must review all weapons, to include NLWs, used by the U.S. military for legality under the LOAC,[62] and unnecessary suffering is one of the principles considered during that legal review. Unnecessary suffering is weighed against military necessity principle to determine if a weapon causes superfluous injury, or injury that is disproportionate to the military advantage sought to be gained by the use of the weapon.[63] It is intended to avoid unnecessary injury inflicted on combatants rather than that which may incidentally affect civilians.[64] An analysis of whether a weapon causes unnecessary suffering cannot be done without weighing it against other weapons considered lawful on the battlefield.[65] When weighed against conventional lethal weapons that are designed to cause death or serious injury, NLWs that are designed to cause temporary, completely reversible, effects,[66] would appear to meet the standard of avoiding unnecessary suffering. A convincing example of which is the testing conducted on the ADS resulting in no serious or long-term adverse effects on human subjects.[67]

B. Non-Governmental Organizations (NGOs) and NLWs

Some commentators affiliated with NGOs have expressed some skepticism relating to any increased use of NLWs in armed conflict. Eve Massingham, an official with the Australian Red Cross, cautions that NLWs may cause a weakening in the fundamental principle of the LOAC. She notes that any reduced proportionality concerns brought about by the use of NLWs fails to take into account the unknown effects, possibly fatal, of those weapons on individuals or groups.[68] Setting aside the apparent minimal risk of fatalities resulting from some of the NLW technology in use or being developed,[69] what Ms. Massingham is proposing is an unreasonable heightened standard of care when using NLWs as opposed to traditional lethal weapons. Commanders are not required to take into account all possibilities that result from the use of any munition, to include when a weapon may malfunction or there is a unique and unknowable (to a commander who takes reasonable steps to gather as much information as possible) characteristic to the target or its surroundings.[70]

According to international law, a proportionality analysis need not incorporate the possibility of a Hellfire missile unexpectedly malfunctioning by losing its laser track and landing 500 meters away from its intended target.[71] Similarly, an unanticipated death or injury from a NLW should not be a factor that a commander must consider. However, implicit in Ms. Massingham's argument is the idea that NLWs do fundamentally alter the proportionality analysis. Her novel position that commanders should consider the unanticipated, or accidental, consequences of the use of NLWs flows logically from the fact that NLWs are designed to cause non-lethal and fully reversible effects.[72] Her argument is simply that the LOAC proportionality analysis should incorporate a new factor not previously required. However, to do so would be to hold NLW weapons to a higher standard than lethal weapons under the LOAC, and open the door for some to argue that the proportionality analysis framework varies from weapon to weapon.

Additionally, Professor David Fidler,[73] writing in the International Committee of the Red Cross's journal, *International Review of the Red Cross*, argues that Russia's experience with NLWs should cause the international community serious concerns in regards to their use in general.[74] However, while the death of over one hundred

[61] Harper, *supra* note 56, at 151-52.

[62] U.S. DEP'T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (12 May 2003) [hereinafter DODD 5000.01]. Requires a legal review of all weapon systems acquired by the United States military. *See also* U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW para. 4a (1 Jan. 1979) (Requiring legal review of all weapons to ensure compliance with applicable treaties and customary international law, to include specifically the Hague and Geneva Conventions).

[63] SOLIS, *supra* note 7, at 271.

[64] *Id.* at 270.

[65] Richard B. Jackson & Jason Ray Hutchison, *Lasers are Lawful as Non-Lethal Weapons*, ARMY LAW., Aug. 2006, at 12, 17.

[66] DoDD 3000.03E, *supra* note 4.

[67] LeVine, *supra* note 44.

[68] Eve Massingham, *Conflict Without Casualties . . . a Note of Caution: Non-Lethal Weapons and International Humanitarian Law*, https://www.icrc.org/eng/assets/files/review/2012/irrc-886-massingham.pdf

[69] LeVine, *supra* note 44.

[70] Galić, *supra* note 24.

[71] AP I, *supra* note 9, art 51(5). AP I conflates the definitions of the LOAC principles of discrimination and proportionality in art. 51, but defines as "indiscriminate" an attack that "may be *expected* to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *See also* Galić, *supra* note 24, at ¶ 58 (Stating that the proportionality standard is whether "a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.").

[72] LeVine, *supra* note 44.

[73] David P. Fidler is a Professor of Law and the Harry T. Ice Faculty Fellow, Indiana University School of Law, Bloomington, Ind.

[74] Fidler, *supra* note 54. (The Russian anti-terrorist operation in Moscow involves the law enforcement paradigm rather than an armed conlict, but is important in the context of considering NLWs' effects and how those effects influence the LOAC analysis).

hostages is tragic and should be considered a cautionary tale for future hostage-taking events, it should not be used as a basis to argue NLWs are frequently lethal. The incident in Moscow involved a gas that the Russian authorities later identified as some form of the sedative fentanyl,[75] being pumped into a public building in an uncontrolled environment. Fentanyl is an opiate that provides the basis for anesthetics used only in tightly controlled procedures in medical operating rooms, due to their tendency to dangerously suppress respiration.[76] It is, therefore, not surprising that more than one hundred hostages died as a direct result of the gas. However, this result would place that substance outside the DoD definition of NLWs.[77]

There are also concerns that the use and proliferation of NLWs will lead to their misuse by terrorist groups, criminals, totalitarian regimes, and even open democratic governments.[78] The result of increased use of NLWs, according to this argument, will be their utilization as a means of torture by regimes with little regard for human rights, or even to suppress the free exercise of political speech during peaceful demonstrations.[79] While valid concerns, they are not insurmountable obstacles and can be addressed with various existing mechanisms, such as arms trade treaties that would limit transfers of conventional weapons in such situations.[80] Moreover, any concerns of internal use of NLWs to suppress dissent in otherwise democratic societies are already countered with domestic law that reflect universal international norms.[81]

Finally, some have argued that NLW will cause soldiers to resort to the use of force (albeit non-lethal) sooner than would otherwise be necessary.[82] Moreover, there is a fear that NLWs will encourage a nation's leadership to resort to force on an international level with a belief that fewer casualties will make the use of force more palatable to its own citizens and the international community.[83] The concern over the use of force at the international level is beyond the scope of this paper, but the fear that individual soldiers will too quickly resort to non-lethal force can be effectively addressed with existing mechanisms. Command emphasis on soldiers' weapon skills in general, and the specific rules governing the use of force for a particular military operation, is crucial for the appropriate use of lethal weapons in soldiers' hands. The same approach is sufficient for the appropriate use of NLWs.

IV. Conclusion

A convoy of U.S. military vehicles, en-route to an engagement with a key local leader, slowly and methodically winds its way through rundown city streets crowded with civilian cars, motorcycles, bicycles and pedestrians. An opposition non-state armed group, using Twitter and other social media platforms, mobilizes a large group of local disaffected teens and young adults to crowd the streets and block the convoy's path. Positioned deliberately within the crowd are hard-core members of the armed group, determined to incite violence against the convoy that will elicit a lethal response from the vehicles that kill numerous civilians, all caught on cell phone video and instantly spread on the World Wide Web via YouTube, Twitter, and Facebook. The crowd starts throwing rocks and bricks at the convoy, causing the soldiers to retreat within closed vehicle doors and hatches, when one of the armed group members throws a Molotov cocktail and another fires his AK-47 at the lead vehicle. The convoy returns fire with 7.62mm machine guns, killing the shooter, and three civilians who may or may not have been throwing rocks at the convoy. The possible fallout from this scenario need not be detailed here, but would almost certainly exponentially increase the hardships faced by the U.S. military forces executing their mission.

Contrast the outcome detailed above with one that involves the convoy having access to the ADS or MPM-NLWS detailed above. If, when the convoy commander recognized the gathering threat to the convoy in the massing of angry young locals, the convoy vehicles reacted with a non-lethal response the outcome would have been significantly different. Whether a millimeter wave blast of intense heat that subsides when those affected run or seek cover, or a flash-bang munition that disorients the bad actors long enough for the convoy to move through the threat area, had been used the effects would have quickly dissipated, leaving much less fodder for the opponent's strategic messaging campaign.

> It's time for the generation who fought the war to take what they learned in the hills and valleys of a landlocked conflict, and apply it to a challenging new environment; it's time to think about the implications of the coming age of urban, networked, guerrilla war in the mega-slums and megacities of a coastal planet. It's time to

[75] KOPLOW, *supra* note 54, at 105.

[76] *Id.* at 105-06

[77] DoDD 3000.03E, *supra* note 4.

[78] NICK LEWER & STEVEN SCHOFIELD, NON-LETHAL WEAPONS: A FATAL ATTRACTION? 96-99 (1997).

[79] *Id.* at 97.

[80] *Overwhelming Majority of States in General Assembly Say 'Yes' to Arms Trade Treaty to Stave off Irresponsible Transfers that Perpetuate Conflict, Human Suffering*, UNITED NATIONS PRESS RELEASE (Apr. 2, 2013), http://www.un.org/press/en/2013/ga11354.doc.htm

[81] The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), of which most nations are a party, provides for the protection of human rights when governments come into contact with their citizens during internal disputes.

[82] KOPLOW, *supra* note 54, at 140.

[83] *Id.* at 139.

> drag ourselves – body and mind – out of the mountains.[84]

If, as David Kilcullen posits in his book and the Chief of Staff of the Army's Strategic Studies Group believes,[85] future conflicts will be centered in megacities containing tens of millions of civilians, the civilian casualty issues of the current conflict in rural Afghanistan will seem inconsequential.[86] Add in the assertion that "armies kill cities"[87] when operating in urban environments, and the utility of NLWs becomes readily apparent.

When the stated goal of the LOAC is, in part, to save civilians from suffering the consequences of armed conflict to the largest extent possible, the use of NLW should be considered a welcome addition to the options available to responsible armed forces operating where civilians may be present.

This is not to say that NLWs are the ultimate panacea to the terrible death and destruction that occurs during armed conflict. No technology is perfect, and the U.S. Department of Defense itself acknowledges that NLWs are not completely non-lethal every time.[88] Despite this, the current technology in development appears to alleviate most concerns as to the efficacy of the non-lethal part of NLWs' nomenclature.[89]

Finally, there are legitimate concerns with the spread of NLW into the hands of those who may not use them in an ethical or moral manner. The argument is that NLW could be used to suppress dissident minorities, discourage a population's right to peaceful assembly, to torture, and lead to a more rapid use of force than if only lethal weapons were available to military or police.[90] But this argument is the same one that can be levied against any new weapon or technology and the answer lies in training and command influence. The U.S. military entrusts incredibly lethal weapons to the hands of young men and women every day and relies on their training and commanders to ensure they are not used improperly. The same holds true for NLWs. In the same way that a soldier can learn not to resort to deadly force except in appropriate situations, he or she can, with the proper training and command oversight, be taught not to resort to non-lethal force until it is necessary.

The past and current conflicts faced by the United States, and the conflicts looming on the horizon, are evidence that we cannot rest on the tactics of the past. We must be prepared to incorporate technology that has, so far, been literally and figuratively sitting on a shelf. The DoD should further invest in NLW technology, train for its proper use, and educate the international community on the correct legal analysis before others attempt to disseminate a misleading narrative.

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[84] DAVID KILCULLEN, OUT OF THE MOUNTAINS: THE COMING AGE OF THE URBAN GUERRILLA 262 (2013)

[85] SSG-Megacities, *supra* note 6.

[86] CALL CIVCAS Handbook, *supra* note 3.

[87] KILCULLEN, *supra* note 84, at 109. Kilcullen describes military operations in Kingston, Jamaica; Grozy, Chechnya; and Fallujah, Iraq, as being extremely destructive, even when, in the case of Fallujah, there is a conscious effort to minimize destruction to the greatest extent possible. Quoted is a United States Army major in Vietnam discussing the 1968 battle of Ben Tre, "it became necessary to destroy the town to save it." *Id.* at 111.

[88] DoDD 3000.03E, *supra* note 4.

[89] LeVine, *supra* note 44.

[90] LEWER & SCHOFIELD, *supra* note 77, at 97.

Appendix A. Modern NLW Technology

The Joint Non-Lethal Weapons Directorate (JNLWD) at Marine Corps Base Quantico, Virginia, is the DoD's Joint Non-Lethal Weapons Program Executive Agent and coordinates the research, development, testing, and evaluation of NLWs.[91] The individual services also maintain NLW programs. The Army's proponent for NLWs is the Nonlethal Scalable Effects Center, United States Army Military Police School, at Fort Leonard Wood, Missouri.[92]

This article does not cover the entire range of NLW technology in use or in development, but will provide a brief overview of a few of the weapons currently being fielded or developed by the DoD.

A. Fielded NLW technology.

The DoD has a variety of NLW technology currently available for use across a broad range of operations, from convoy and checkpoint operations, to vessel boarding and crowd control.93 Many of these weapons have been in use for a number of years, in both military operations and domestic policing contexts.94

1. Optical Distraction Devices

These devices, also known as dazzling lasers, are lasers with reversible effects that are generally used to disorient and warn or dissuade drivers or pedestrians from approaching a unit position too closely, with a range of over 150 meters in the day and over 2000 meters at night.[95]

2. Flash Bang Munitions

Designed as counter-personnel munitions, flash bang weapons, such as the M84 Flash Bang Grenade, deliver a bright flash and loud bang, combining optical and acoustic effects, to disorient and suppress personnel in a variety of circumstances, such as checkpoints, crowd control, and building clearing operations.[96]

3. Modular Crowd Control Munition (MCCM)

The MCCM looks similar to the venerable (and lethal) M18 Claymore mine, but delivers non-lethal blunt force trauma in the form of 600 rubber balls projected at high speed to a range of almost twenty meters. The MCCM is designed for use at entry control points, defensive actions, and crowd control.[97] Similar to the MCCM, is the Stingball Grenade, which can be hand thrown or launched from a modified 12-gauge shotgun to a range of approximately seventy meters. It also uses rubber pellets to suppress personnel and can be used for force protection, crowd control, and room clearing in urban operations.[98]

4. M1006 40mm Non-Lethal Point Round

The Army currently uses the M1006, or Sponge Grenade, is fired from the M203 Grenade Launcher and is intended to deliver blunt force trauma to adults at ranges from ten to fifty meters. According to the Army's project manager for the M1006, this

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[91] *Non-Lethal Weapons Program*, U.S. DEPARTMENT OF DEFENSE, http://jnlwp.defense.gov/About/Organization.aspx (last visited Jan. 18, 2016).

[92] ARMY NONLETHAL SCALABLE EFFECTS CENTER, UNITED STATES ARMY MILITARY POLICE SCHOOL, http://www.wood.army.mil/usamps/Organizations/Nonlethal/Nonlethal.html (last visited Jan. 18, 2016).

[93] U.S. DEP'T OF DEF., JOINT NON-LETHAL WEAPONS DIRECTORATE, NON-LETHAL WEAPONS REFERENCE BOOK (2012).

[94] DAVID A. KOPLOW, NON-LETHAL WEAPONS: THE LAW AND POLICY OF REVOLUTIONARY TECHNOLOGIES FOR THE MILITARY AND LAW ENFORCEMENT 10 (2006)

[95] DOD NON-LETHAL WEAPONS PROGRAM, OVERVIEW BRIEF AND INFORMATION EXCHANGE (Jan. 15, 2015), http://jnlwp.defense.gov/Portals/50/Documents/Resources/Presentations/Overview_Presentations/Keystone%20_Brief_15Jan2015_logo_fix.pdf [hereinafter DoD NLW Brief].

[96] NON-LETHAL WEAPONS PROGRAM, U.S. DEPARTMENT OF DEFENSE, M-84 FLASH BANG GRENADE, http://jnlwp.defense.gov/CurrentNonLethalWeapons/M84FlashBangGrenade.aspx (last visited Jan. 19, 2016).

[97] NON-LETHAL WEAPONS PROGRAM, U.S. DEPARTMENT OF DEFENSE, MODULAR CROWD CONTROL MUNITION, http://jnlwp.defense.gov/CurrentNonLethalWeapons/ModularCrowdControlMunition.aspx (last visited Jan. 19, 2016).

[98] NON-LETHAL WEAPONS PROGRAM, U.S. DEPARTMENT OF DEFENSE, STINGBALL GRENADE, http://jnlwp.defense.gov/CurrentNonLethalWeapons/StingballGrenade.aspx (last visited Jan 19, 2016).

NLW can be used in a variety of situations, including crowd control, convoy protection, and use against individual threats by stunning them to enable safe detention.[99]

B. Developing NLW Technology

1. Active Denial System (ADS)

The ADS is a vehicle mounted system designed to utilize millimeter waves (often incorrectly referred to as "microwave") to cause a rapid and intense heating sensation on anyone in the ADS beam's path, at ranges out to 1000 meters. Subjects exposed to the ADS beam quickly move away from the source of the beam to avoid continued exposure. The heating effect only penetrates the skin to depths of about 1/64 inch and does not alter the cellular structure of the skin, therefore causing no burn injuries on those exposed to the millimeter beam.[100] The ADS is designed to be used for force protection, convoy operations, crowd control, and offensive and defensive operations, among others.[101]

2. Mission Payload Module—Non-lethal Weapons System (MPM-NLWS)

The MPM-NLWS is a vehicle-mounted multiple tube launcher that can deliver flash bang non-lethal munitions at ranges up to 500 meters and also transition to lethal munitions if necessary. As with other NLW, it is designed for force protection, as well as force application.[102]

These is just a portion of the NLW technology currently being used or developed by the DoD. Others, including the Distributed Sound and Light Array (DLSA), providing acoustic and visual hailing capabilities, and Portable Vehicle Arresting Barrier, which can stop moving civilian vehicles, are also in use by the DoD.[103] Clearly, there is a significant desire, if not need, by the DoD to have a wide array of NLWs at its disposal. Moreover, there is no indication that the need will remain static in the near future.[104]

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[99] PROJECT MANAGER CLOSE COMBAT SYSTEMS, PD COMBAT MUNITIONS, M1006 40MM NON-LETHAL POINT ROUND, http://www.pica.army.mil/pmccs/combatmunitions/nonlethalsys/nonlethalcapset/counterper/ 4nlc_41.htm (last visited Jan. 19, 2016).

[100] Susan LeVine, *The Active Denial System: A Revolutionary Non-lethal Weapon for Today's Battlefield* (June 2009), CTR. TECH. & NAT'L SECURITY POL'Y, http://ctnsp.dodlive.mil/files/2013/07/DTP-065.pdf.

[101] NON-LETHAL WEAPONS PROGRAM, U.S. DEPARTMENT OF DEFENSE, ACTIVE DENIAL TECHNOLOGY, http://jnlwp.defense.gov/FutureNonLethalWeapons/ActiveDenialTechnology.aspx (last visited Jan. 19, 2016).

[102] DoD NLW Brief, *supra* note 95.

[103] *Id.*

[104] Susan D. LeVine & Joseph A. Rutigliano Jr., *U.S. Military Use of Non-Lethal Weapons: Reality vs Perceptions*, 47 CASE W. RES. J. INT'L L. 239, 246 (2015).

The Billion Dollar Spy[1]

Reviewed by *Lieutenant Commander Jeffery C. Barnum*[*]

"Isn't that dangerous?" the officer asked. Tolkachev laughed. "Everything is dangerous," he said.[2]

I. Introduction

Clandestine meetings. Miniature cameras. Secret ink. Aston Martins. Long the stuff of fiction.[3] David Hoffman's *The Billion Dollar Spy* reveals that fiction is, in fact, based upon reality (except, perhaps, the ready availability of Aston Martins). Hoffman is an experienced and decorated writer,[4] and brings his experience and craft to bear on the story of Alfred Tolkachev, a Soviet scientist and one of the most valuable American spies during the Cold War. Tolkachev passed secrets of Soviet military development (or the lack thereof) to spymasters in the United States, saving years of research and development work.[5] In doing so, he enabled the United States to preserve (and press) its technological advantages.[6]

At first read, Hoffman's work tells the story of Tolkachev, his recruitment, production, and betrayal. However, a closer examination reveals that each of these areas of development offers lessons in identifying, mitigating, and managing risk–a universal topic. Tolkachev's recruitment teaches about the costs of risk-averse behavior from an organizational perspective. The details about his production as a spy instruct about personal risk and the difference between control and influence. Finally, the description of Tolkachev's betrayal reminds that the smallest of actions can still produce disastrous results, and that risk mitigation must include assessing the magnitude of potential harm.

II. Recruitment: The Costs of Risk Aversion

Although Tolkachev was very motivated to spy for the United States, it took over a year for Tolkachev to begin producing intelligence product.[7] Why was it so difficult to recruit such a valuable and prolific agent? There are certain intrinsic difficulties, but those difficulties were amplified by a risk averse mindset at the Central Intelligence Agency (CIA).

To begin with, becoming a spy is not easy. One does not fill out an online application on USAJOBS to start spying for the United States. Indeed, every contact with the foreign power brings the risk of discovery by counterintelligence agents. This is especially true for Soviet citizens offering to spy on the Motherland: The Soviet counterintelligence arm of the Komitet Gosudarstvennoy Bezopasnosti (KGB) were tenacious and pervasive, making any approach a hazardous endeavor.[8]

On the flip side, recruiting a spy in the Soviet Union is also precarious. The recruit could be a "dangle" by the KGB, which could, in the best case scenario, merely expose a CIA officer's identity and have them expelled from the Soviet Union.[9] A "dangle" could also serve as a channel for misinformation, misdirecting intelligence and military operations away from productive enterprises, providing the KGB insight as to the gaps in the CIA's knowledge, and sapping CIA officers' morale.[10] This potential threat was magnified by the CIA's counterintelligence chief, James Angleton, whose skepticism cast doubt on nearly every proposed agent inside the Soviet Union.[11]

Tolkachev's recruitment not only had to overcome these inherent barriers, but also the CIA's risk aversion to operating in Moscow, based in part on recent events at CIA's Moscow station. In the years preceding Tolkachev's approaches, the CIA offices in the American embassy caught fire (permitting KGB agents posing as firefighters to physically penetrate Moscow station),[12] and, on two separate occasions, the KGB

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[1] DAVID E. HOFFMAN, THE BILLION DOLLAR SPY (2016).

[2] HOFFMAN, *supra* note 1, at 234.

[3] *See, e.g.*, IAN FLEMING, THUNDERBALL (1961).

[4] Hoffman is a contributing editor at *The Washington Post* having previously served as the *Post*'s Moscow Bureau Chief between 1995 and 2001. David Hoffman, *The Author*, DAVIDEHOFFMAN.COM, http://www.davidehoffman.com/the-author/ (last visited Dec. 20, 2016). He also won a Pulitzer Prize for his last book, *The Dead Hand: The Untold Story of the Cold War Arms Race and Its Dangerous Legacy*. *The 2010 Pulitzer Prize Winner in General Nonfiction*, PULITZER.ORG http://www.pulitzer.org/winners/david-e-hoffman (last visited Dec. 20, 2016).

[5] HOFFMAN, *supra* note 1, at 135 ("Time saved on research and development of U.S. countermeasures to these systems has been reduced by minimum of 18 months, for one system as much as five years.").

[6] *See, e.g.*, *id.* at 104 ("This vulnerability [to cruise missiles] was one of the most important subjects in Tolkachev's reporting.").

[7] *Id.* at 77 ("Nearly a year and a half had already gone by since Tolkachev's first approach at the gas station, and they still did not have a working relationship with him.").

[8] *Id.* at 7–9.

[9] *See, e.g.*, *id.* at 43–44 (detailing the arrest and expulsion of a CIA case officer).

[10] Etienne Huygens, *Return to the Motherland: A Study on Redefection and Reemigration to Soviet Bloc Countries*, in *Federal Government's Handling of Soviet and Communist Bloc Defectors: Hearings Before the S. Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 100th Cong. 550 (1987).

[11] HOFFMAN, *supra* note 1, at 20 ("Thanks to the excessive zeal of Angleton . . . during this period [the CIA] had very few Soviet agents inside the USSR worthy of the name.").

[12] *Id.* at 52–53.

arrested American spies (and expelled their case officers).[13] These breaches of security and operational failures caused CIA director Admiral Stansfield Turner to question the operational security of the CIA's Soviet operations, leading to a complete operational halt until "the [Soviet] division could *guarantee* there would be no further compromises."[14] Certainly, no such guarantee is possible in intelligence operations (or in litigation for that matter).

Turner's "all stop" order exemplified not only a schism between headquarters and a field unit,[15] but also a clash between generations. "A younger generation of CIA case officers . . . wanted to lead the agency out of lethargy and timidity."[16] As the upstarts pushed the operational envelope, developing new techniques to meet the Eastern Bloc surveillance threat, they were greeted with skepticism.[17]

Whatever its source, the operational stand-down had both immediate and long-term consequences. Because "[e]very move of the Moscow station was coordinated with headquarters,"[18] intelligence assets withered on the vine.[19] Tolkachev himself approached the Americans on five separate occasions in 1977 without any appreciable response from the CIA. It took an external actor (the Department of Defense) to move the CIA outside its comfort zone by asking for information about Soviet aircraft electronics—Tolkachev's area of expertise. Once prodded by the Pentagon, CIA headquarters authorized contact.[20]

The costs of risk aversion are apparent in Tolkachev's recruitment, albeit magnified by hindsight. For over a year, America's most valuable intelligence resource sat idle, a significant loss of production and opportunity. As judge advocates, we often advise on the legal risks of a particular course of action. Our advice must be informed by not only the potential costs of failure but also the benefits of success, as well as the prospect of either possibility. In this assessment, it is important to examine the source of the risk aversion and objectively weigh its significance. While recruiting Tolkachev was not without its risks, the CIA's risk-averse approach cost the United States dearly. However, once Tolkachev began producing, the CIA's risk-averse approach collided with Tolkachev's own desires to produce as much actionable intelligence as possible.

III. Production: Risk Management, Spans of Control, and Spheres of Influence

Once he began spying for the United States, Tolkachev quickly became one of the country's most productive intelligence assets.[21] However, unlike other spies, Tolkachev specifically requested that he pass his "take" personally to his case officer, paradoxically eschewing dead drops (where messages are left hidden for later collection) as too risky.[22] Personal meetings offered a greater opportunity to gauge Tolkachev's psychological strain, but also required elaborate ruses (called surveillance detection runs (SDR)) to elude the KGB. Hoffman not only offers detailed descriptions of case officers' SDRs but he also delves into the backgrounds of the various officers who met with Tolkachev. While these descriptions are useful in aiding the reader to understand the tension involved with operating against the KGB in Moscow, the similarities between the meetings caused some déjà vu.

However, the detailed approach is far better than glossing over the details of each meeting as it helps reinforce the volume of information Tolkachev gathered.[23]

Once Tolkachev's production commenced in earnest, risk management of another sort commenced, specifically to maximize Tolkachev's production while minimizing his risk of detection. To do so CIA case officers and headquarters analysts (now usually working together) had to ascertain Tolkachev's motivations and ensure their demands for information didn't expose Tolkachev.

The CIA had to figure out *why* Tolkachev was taking such a big risk. Figuring out Tolkachev's motivation would not only provide an insight as to the quality of the intelligence, but also illuminate what would be the best reward.[24] In their first face-to-face meeting, Tolkachev's handler vainly

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[13] *Id.* at 42–45, 53.

[14] *Id.* at 54.

[15] This tale of differences of opinion between a superior and subordinate command is familiar to most military officers. What officer has not railed (in the privacy of their own quarters, of course) "[w]hat the hell is wrong with headquarters? . . . They have lost their mind!" *Id.* at 27.

[16] *Id.* at 20.

[17] *Id.* at 27 ("I submitted a proposal for what I thought was a valuable tradecraft tool . . . I got a response from the front office of the division, 'Risky. Dangerous. Won't work.'" (quotations omitted)).

[18] *Id.* at 39.

[19] *Id.* at 55.

[20] *Id.* at 63.

[21] *Id.* at 195. When CIA Director Turner was briefing then President-elect Reagan days before his inauguration he described the Tolkachev operation as "the jewel of all jewels," more valuable than Navy submarines tapping underwater Soviet communications cables. *Id.*

[22] *Id.* at 93

[23] The level of detail bespeaks Hoffman's depth of research and quality of his source material. Hoffman relied on 944 pages of declassified information (including cables between Moscow station and CIA headquarters), several interviews with CIA officers stationed in Moscow during the Tolkachev era, and at least one "confidential source close to the family." *Id.* at 335–73. Some of the source documents are reproduced in the book. *Id.* at xiv–xv (map), Photographs of Tolkachev, CIA Officers & others, *in id.* following p. 142. Others are available on Hoffman's website. *Documents*, DAVIDEHOFFMAN.COM, http://www.davidehoffman.com/documents/ (last visited Dec. 20, 2016).

[24] HOFFMAN, *supra* note 1, at 98–99 (noting that while "money may not be the only motivation," other extrinsic rewards, such as a commendation, may be "psychologically effective" to motivate Tolkachev (quotations omitted)).

pressed him as to his motive.[25] Although Tolkachev asked for millions of dollars, he later stated his demand was "not realistic,"[26] leaving the CIA to admit that they were "still not certain what motivated [Tolkachev] to seek us out and work for us,"[27] even though they had been working together for almost a year. Divining a motive to participate is an exercise familiar to any trial counsel working with a crime victim.[28] Is it altruism? Duty? Revenge? Identifying a particular motive can help the trial counsel (like the CIA) prepare for the pending operation.[29]

As it turns out, Tolkachev began spying with a vengeance—both literally and figuratively.[30] Once Tolkachev began stealing secrets for the Americans, his production only increased. For the CIA this was a blessing and a curse: How they could get Tolkachev to "control his risk-taking propensities and at the same time satisfy both his imperative to produce and our desire for his product?"[31] The CIA mitigated risks when able, meticulously planning each meeting with their source[32] and severely restricting dissemination of the raw intelligence product.[33] However, the CIA soon realized that they had limited control or leverage over their spy, and that "Tolkachev was ignoring their plea to be careful,"[34] This conundrum is likely familiar to trial counsel in their dealings with crime victims. While most will realize the personal risks to the victim in participating in the prosecution, the trial counsel needs the victim to participate to find success. Although a trial counsel may encourage mitigation of risks (such as being aware of one's social media presence)[35] it's ultimately up to the victim to put those strategies to use.

Whether it is discerning a motive or encouraging less risky behavior, it is important to differentiate between span of control, sphere of influence, and the external environment.[36] A span of control are those items which one has "unilateral change authority."[37] The sphere of influence includes items over which one can "influence to some degree," even if unilateral control is impractical or impossible.[38] Finally, the external environment includes items over which no influence or control is possible.[39] The tale of Tolkachev's intelligence production helps illustrate these concepts: a CIA case officer may have control over execution of his SDR, but may only be able to influence the spy to perform risk mitigation strategies. And the actions of the KGB fall outside both the span of control and the sphere of influence. For intelligence officers, judge advocates, or anyone else engaging in risk management, understanding the boundaries of each area helps focus energies on viable risk mitigation control or influence strategies.

IV. Betrayal: Risk Identification

As Secretary Rumsfeld noted, there are both known knowns and unknown unknowns, and one should capitalize on the former while mitigating the latter.[40] Tolkachev's betrayal illustrates both.

Every espionage operation must eventually come to an end. For Tolkachev, the end came one day in June 1985, while returning from his run-down dacha in the countryside.

Tolkachev was apprehended by the KGB and transported to the KGB's Moscow prison at Lefortovo.[41] Tolkachev was tried by a three-member military tribunal and sentenced to death.[42] He was executed on September 24, 1986,[43] having been betrayed by both a disgruntled employee (the known known) and a Soviet spy whose betrayal was a surprise (the unknown unknown).

Edward Lee Howard was a middling CIA employee (one supervisor described him as a "loser"); even so, he was tapped

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[25] *Id.* at 84.

[26] *Id.* at 119.

[27] *Id.* at 115. The CIA was concerned about paying these large sums of money, in part because they had never before paid an agent on that scale, but also because having that amount of money (especially in the Soviet Union) could present its own security risk. *Id.* at 114.

[28] Stacy Caplow, *What If There Is No Client: Prosecutors as Counselors of Crime Victims*, 5 CLINICAL L. REV. 1, 46 (1998) ("Motivation in the prosecutorial context can appeal to the altruistic (e.g., 'Save other people from being hurt by this defendant.'), to the psychological (e.g., 'You'll feel better with closure knowing that you saw it through.'), or to the material (e.g., 'The only way you'll get restitution is if you co-operate.').").

[29] *See, e.g.*, MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 608(c) (Supp. 2014) ("Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness . . . .").

[30] Tolkachev's mother-in-law was executed in 1937 by the Stalinist regime, though the CIA was uncertain whether revenge was a primary motivator. HOFFMAN, *supra* note 1, at 115, 212.

[31] *Id.* at 249.

[32] *Id.* at 87 ("Running a spy was undertaken with the concentration and attention to detail of a moon shot . . . .").

[33] *Id.* at 102 (describing the variety of methods used to protect Tolkachev's raw intelligence).

[34] *Id.* at 123. *See also id.* at 126–27, 150, 247.

[35] *Managing Your Social Media Accounts After Being a Victim of Violent Crime*, CHUCK CLAY & ASSOC. http://www.chuckclay.com/Blog/2016/June/Managing-Your-Social-Media-Accounts-After-Being-.aspx (June 14, 2016).

[36] H. WILLIAM DETTMER, THE LOGICAL THINKING PROCESS: A SYSTEMS APPROACH TO COMPLEX PROBLEM SOLVING 70 (2007).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, DEP'T OF DEF., http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636 (Feb. 12, 2002).

[41] HOFFMAN, *supra* note 1, at 292.

[42] *Id.* at 310.

[43] *Id.* at 311–12.

for a prestigious Moscow assignment.[44] In preparing for his Moscow assignment Howard regularly read operational cables from Moscow station, including information about the Tolkachev operation.[45] Before deploying to Moscow, he failed a routine security re-investigation and, seeing an opportunity to get rid of a "bum," the CIA fired him.[46] Howard's firing unhinged him and he eventually gave classified information to the KGB in a meeting in Vienna in April 1985, mere months before Tolkachev was arrested.[47]

As it happened, though, Howard was not the only source who identified Tolkachev. Aldrich Ames began spying for the Soviets in April 1985, and, although it is not known whether he exposed Tolkachev in his first meeting, Ames turned over mounds of classified data on the day Tolkachev was seized, potentially resolving any doubts as to his guilt.[48]

In retrospect, the decision to fire Howard—an employee with such valuable secrets— seems shortsighted. Once a risk is identified, the magnitude of the potential injury must be carefully examined. Even so, not all risks are known, making the control of those "known knowns" all the more important.

V. Conclusion

Hoffman spins a mesmerizing tale that reads like fiction, but depicts reality in all its tension and tragedy. At first blush the correlation between Cold War intelligence operatives and modern-day judge advocates seems tenuous. Yet both deal with risk—albeit risks of a different sort. Hoffman's account of the Tolkachev operation illustrates how the CIA addressed and managed risk, and, like any after-action report, provides lessons for those of us who follow.

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[44] *Id.* at 264–65, 268. This may have been the case of Howard being at the right place at the right time—he may have been a ready substitute when another agent became unavailable. *Id.* at 265.

[45] *Id.* at 266.

[46] *Id.* at 267–68.

[47] *Id.* at 264, 285–86. Howard eventually defected to the Soviet Union, dying in Moscow in 2002. *Id.* at 308–09.

[48] *Id.* at 299. Ames continued spying for many years, and was eventually arrested for espionage in 1994. *Aldrich Ames*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/history/famous-cases/aldrich-ames (last visited Dec. 20, 2016)

9 Presidents Who Screwed Up America and Four Who Tried to Save Her[1]

Reviewed by *Major Daniel M. Curley*[*]

We ask what we think the president should do in office, not what he is constitutionally permitted to do in office. The latter should be the measure of the man.[2]

I. Introduction

The founding generation of the United States of America feared a powerful executive and took substantial steps to ensure the president would not become a king.[3] Having just been liberated from the rule of King George III of England via a bloody and costly war of independence,[4] the founders placed checks on the executive branch to ensure it would not usurp the powers of the legislature and judiciary.[5] Forty-three different men have served as President of the United States.[6] Many of the most popular and well-known presidents have expanded their power and the executive branch by means and methods outside the original intent of the framers of the Constitution.[7] Instead of ranking the presidents based on popularity or the outcome of their policies, Brion McClanahan[8] ranks the presidents by how well they upheld their oath, "to preserve, protect and defend the Constitution of the United States."[9]

McClanahan judges the presidents on their ability to exercise constitutional restraint during their time in office.[10] Those who exercised restraint by neither legislating from the White House nor expanding the executive branch are awarded high marks by McClanahan.[11] Alternatively, presidents who expanded the executive branch, used the military without seeking approval from Congress, personally initiated legislation, or failed to veto unconstitutional legislation are distinctively named the "presidents who screwed up America."[12] McClanahan challenges the reader to gauge past presidents from a novel and unique perspective, ultimately turning the traditional ranking of presidents on its head.[13] Aside from proposing a questionable constitutional amendment process to repair the executive branch, *9 Presidents who Screwed up America and Four who Tried to Save Her* is a well-researched and thought provoking comparison of both our most heralded and less well-known presidents.

II. Main Points and Ideas

McClanahan does an excellent job of sticking to common denominators when evaluating the presidents. The most salient point used to judge both the best and worst presidents is whether they displayed executive restraint.[14] He views those presidents who intervened in areas that were once the sole purview of the States as the worst presidents in the history of the United States.[15] McClanahan grades the presidents who increased federal power by practicing a progressive, top-down approach to government as the worst offenders to our federal Republic.[16] Additionally, he believes the presidents who "screwed up America" were those who arbitrarily used the military without the approval of Congress, took unconstitutional measures in times of war and emergency, acted as "chief legislator," or used executive orders to circumvent Congress.[17] For these reasons, he

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[1] BRION MCCLANAHAN, 9 PRESIDENTS WHO SCREWED UP AMERICA AND FOUR WHO TRIED TO SAVE HER (2016).

[2] MCCLANAHAN, *supra* note 1, at xiv.

[3] *Id.* at xix.

[4] *Id.* at xx.

[5] *Id.* at xix, 3 (noting the Constitution limits the powers of the president and balances the power of Congress and the courts against the executive power).

[6] THE WHITE HOUSE, https://www.whitehouse.gov/1600/executive-branch (last visited Dec 20, 2016). President Barack Obama is recognized as the 44th President of the United States. However, he is only the 43rd person ever to serve as President; President Grover Cleveland served two nonconsecutive terms and is recognized as both the 22nd and the 24th President.

[7] MCCLANAHAN, *supra* note 1, at xiii, 251.

[8] Brion McClanahan is also the author of *The Politically Incorrect Guide to the Founding Fathers*, *The Founding Fathers' Guide to the Constitution*, and *The Politically Incorrect Guide to Real American Heroes*. He holds an M.A. and a Ph.D. in American history from the University of South Carolina and a B.A. in history from Salisbury University in Maryland.

[9] MCCLANAHAN, *supra* note 1, at xiv.

[10] *Id.* at xv.

[11] *Id.* at xvii.

[12] *Id.* at xvi.

[13] *Id.* at xv.

[14] *Id.* at xvii.

[15] *See generally* MCCLANAHAN, *supra* note 1, at 25–54 (discussing Abraham Lincoln and Theodore Roosevelt as presidents who usurped the states' powers); *see also id.* at 120–131 (contending Lyndon B. Johnson's war on poverty, welfare programs, education programs, and environmental regulations infringed upon areas reserved to the states).

[16] *See, e.g.*, *id.* at 57 (describing Woodrow Wilson's belief that only the central government could be trusted in the political process and that everything should be done from the top down).

[17] *See, e.g.*, *id.* at 49 (stating Theodore Roosevelt engaged in "foreign adventurism" with the United States military without the approval of Congress); *see also id.* at 144 (citing Richard Nixon's unconstitutional

contends each one of the nine presidents exploited and abused the limited power initially granted to them by the founding generation.[18]

Conversely, McClanahan commends four presidents as attempted saviors, because they displayed executive restraint, allowed Congress to legislate, vetoed unconstitutional legislation, and were anti-progressive in their policies and actions.[19]

A. The 9 Who Screwed Up America

According to McClanahan, not all of the nine presidents who "screwed up America" negatively impacted the United States in exactly the same manner, but they all displayed executive "energy" that lead to the unconstitutional usurpation of power.[20] For example, McClanahan states that Andrew Jackson established the "model for our lawless twenty-first-century executive."[21] Abraham Lincoln committed constitutional violations that "created a blueprint for more executive abuse in the future."[22] Theodore Roosevelt was the "first 'chief legislator' in American history."[23] Woodrow Wilson was "one of the worst presidents, if not the worst president, in American history."[24] Franklin Roosevelt created the "modern executive branch . . . , not the one crafted by the founding generation."[25] Harry S. Truman "perfected the art of the demagogue, used seedy and often corrupt machine politics to his advantage, and abused executive power in the same way his predecessor, Franklin Roosevelt, made famous."[26] Lyndon Johnson used "unconstitutional executive authority to force his vision on the American government, the states, and the people at large."[27] Richard Nixon "wanted to out-progressive the progressives, the Constitution and his oath to defend it be damned."[28] And Barack Obama "has become the most powerful, lawless, and the worst president in American history – according to the Constitution as ratified."[29] To his credit, McClanahan admits that many of the presidents of the founding generation were also guilty of abusing their executive powers.[30] In that regard, it is best to imagine McClanahan's rankings on a line spectrum with all presidents having a place. Those on the far left are the worst executive offenders. Those lying on the right of the spectrum are presidents who tried to practice executive restraint, albeit imperfectly.

B. The Four Who Tried to Save Her

Thomas Jefferson, John Tyler, Grover Cleveland, and Calvin Coolidge represent the four presidents who tried to save America.[31] McClanahan believes Jefferson "worked to save America from unconstitutional government," and he "provided a truly republican blueprint for future administrations."[32] McClanahan thinks Tyler might be the best president "according to the Constitution as ratified."[33] Cleveland used his executive energy to "defend the Constitution."[34] And Coolidge was a president who "used the office the way the founding generation intended," and he "did what needed to be done to safeguard the proper separation of powers."[35] By McClanahan's standards, the four presidents who tried to save America did a remarkable job exercising executive restraint and tried to adhere to the principles of the Constitution.

III. Critique of *9 Presidents Who Screwed Up America and Four Who Tried to Save Her*

McClanahan uses an oversimplified factor to rank the presidents. He partially bases his ranking on whether the presidents (1) proposed legislation, and (2) frequently exercised their veto power.[36] McClanahan's calculation fails to measure the complicity of Congress in the legislative process. If the president proposes legislation, and Congress votes to pass the president's proposed legislation, all the blame should not be attributed to the president. Similarly, if

creation of the Environmental Protection Agency in 1970 by executive order).

[18] *See id*. at xvi.

[19] *See generally id.* at 189–271 (detailing the attempts by Thomas Jefferson, John Tyler, Grover Cleveland, and Calvin Coolidge to limit expansion of executive power).

[20] MCCLANAHAN, *supra* note 1, at xvii. *But see* THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (claiming that "[e]nergy in the executive is a leading character in the definition of good government" and "[a] feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government").

[21] MCCLANAHAN, *supra* note 1, at 4.

[22] *Id*. at 34.

[23] *Id*. at 38.

[24] *Id*. at 73.

[25] *Id*. at 98.

[26] *Id*. at 99.

[27] MCCLANAHAN, *supra* note 1, at 120.

[28] *Id*. at 146.

[29] *Id*. at 180.

[30] *Id*. at 4.

[31] *See generally id*. at 189-271.

[32] *Id*. at 207.

[33] MCCLANAHAN, *supra* note 1, at 209.

[34] *Id*. at 250.

[35] *Id*. at 252.

[36] *See, e.g.*, *id*. at 75 (declaring Franklin D. Roosevelt as the "legislator-in-chief"). *See also id*. at 240 (praising Grover Cleveland for using his veto power 584 times).

Congress passes legislation and the president fails to exercise his veto power, all the blame should not lie with the president. McClanahan briefly admits that Congress is "part and parcel of the problem and would be as much affected by a reduction in federal power as the president."[37] He, too, recognizes Congress's complicity in the expansion of executive power. However, factoring whether presidents proposed legislation or frequently vetoed legislation fails to consider Congress's role in the legislative process. By not considering Congress's collusion, McClanahan uses an oversimplified factor in ranking the presidents.

In a most admirable fashion, however, McClanahan dedicates a chapter at the end of the book to propose a solution to what has become a bloated executive branch.[38] McClanahan should be applauded for offering a solution to combat the "imperial presidency" that Americans have become accustomed to. McClanahan recommends some noteworthy constitutional amendments that would, indeed, curtail executive expansion and overreach. He specifically proposes a single, six year term for every president, codification of the line item veto, and the invalidation of executive agreements, commissions, and agencies.[39] He also proposes an amendment that would prevent the president from deploying the armed forces unless the United States were attacked, and would require congressional approval for any prolonged military engagement over one month in duration.[40] Such amendments would achieve the desired effect of reducing executive power. However, McClanahan's proposed method of amending the Constitution would be difficult, if not impossible.[41]

McClanahan proposes that an Article V[42] constitutional convention be convened by the States to make amendments to the Constitution.[43] He believes this would enable the States to effectively bypass Congress in the process of amending the Constitution.[44] McClanahan further recommends that the States vote on seven separate amendments at the suggested Article V convention.[45] If three-quarters of the States agreed to the amendments, those amendments would become law.[46]

Unfortunately, this process would be more difficult than McClanahan represents. First, Congress would still have to tally the States' applications and possibly determine the subject matter to be discussed at the Article V convention, so Congress would not be excluded from the process entirely.[47] And, historically, Congress has never acted on any application for an Article V convention, even though many have been submitted.[48]

Second, it would be an immense task to convince the requisite States to apply to Congress for an Article V convention and to specifically discuss seven amendments. This could be the reason why there has never been an Article V convention in the history of the United States.[49] Third, absent a complete failure of the American political process so momentous that the States resort to desperate measures, the ability to garner three-quarters (currently thirty-eight) votes on any one proposed amendment would require a massive lobbying campaign. Regrettably, the endurable expansion of the executive branch amid a complicit Congress, Judiciary, and American populace does not sufficiently shock the conscience of the States to the point of adamantly seeking an Article V convention – no matter how dire McClanahan personally views the usurpation of power by the executive branch.[50]

According to McClanahan, if the States ever secured enough votes for an Article V convention, the States could assemble a very limited convention dedicated to discussing a single subject matter or an agenda covering specific proposed amendments.[51] This position has been refuted by constitutional law scholars.[52] McClanahan views the Article

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[37] *Id*. at 168. *See also id*. at 46 (declaring Theodore Roosevelt's public land confiscations an "unconstitutional abuse of power in which Congress was complicit"). *See also id*. at 82 (stating Congress gave Franklin D. Roosevelt "dictatorial powers").

[38] *Id*. at 273.

[39] MCCLANAHAN, *supra* note 1, at 278.

[40] *Id*. at 276.

[41] *But see id*. at 279 (claiming that such an action would be "difficult but not impossible").

[42] U.S. CONST. art. V. (stating that Congress can call a constitutional convention to propose amendments if two-thirds (currently thirty-four) of the State legislatures apply for such a convention).

[43] MCCLANAHAN, *supra* note 1, at 274.

[44] *Id*.

[45] *Id*. at 275.

[46] *Id*.

[47] *See* James Kenneth Rogers, *The Other way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1005 (2007) (asking if the convention's scope can be limited to certain subject matters, who can limit it, and how the state applications are to be tallied).

[48] *Id*.

[49] *Id*. *See also* Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837, 838 (2011).

[50] The most recent, nearly-successful attempt at convening an Article V convention occurred between 1975 and 1983 over a balanced budget amendment, not the usurpation of power by the executive branch. The push for an Article V convention over a balanced budget amendment lost support after achieving thirty-two state applications. Support waned due to fears that the convention could not be limited to a specific agenda. *See* Rogers, *supra* note 48, at 1009.

[51] MCCLANAHAN, *supra* note 1, at 275.

[52] *See* Paulsen, *supra* note 49, at 839 (interpreting Article V as prohibiting a limited constitutional convention to discuss specific amendments). *See also* Rogers, *supra* note 47, at 1009 (arguing that Congress does not have the power to limit an Article V convention). *But see* Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 723 (2011) (contending the scope of an

V convention as the best way to circumvent Congress.[53] However, Congress would still be involved in the process. While McClanahan's proposed Article V convention is probably the best course of action if executive expansion is to ever be checked, the likelihood of an Article V convention being convened to check the executive branch is doubtful.

A final, albeit more technical, critique is that the book does not provide an exhaustive list. McClanahan fails to include separate chapters for four additional presidents who were prominently mentioned along with those presidents who "screwed up America." McClanahan devotes several pages in Barack Obama's chapter to George Herbert Walker Bush, Bill Clinton, and George W. Bush, but he does not count them among the nine presidents who "screwed up America."[54] Similarly, McClanahan devotes a sizeable portion of the chapter addressing Andrew Jackson to a critique of George Washington.[55] It almost appears as if McClanahan wanted his book to include thirteen presidents who "screwed up America," but his editor limited him to nine.

IV. Conclusion

In the wake of the 2016 presidential election, *9 Presidents who Screwed up America and Four who Tried to Save Her* is a commendable book that causes Americans to reflect upon their newly elected president. Americans have come to expect a certain level of "executive energy" in their president. But will the newly elected president energetically continue on the path of executive expansion? McClanahan would contend our country needs another Grover Cleveland who will apply that energy to combat executive expansion, steadfastly preserving, protecting, and defending the Constitution of the United States.

Article V convention can be limited by the state applications requesting a convention).

[53] MCCLANAHAN, *supra* note 1, at 274.

[54] *See id*. at 163–180.

[55] *See id*. at 4–12.

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