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Lore of the Corps

Our Regimental Cannons

Fred L. Borch
Regimental Historian and Archivist

Every visitor to the Legal Center and School (LCS) must walk past two bronze cannons “guarding” the entrance to the building. These naval weapons have been “members” of our Regiment for more than fifty years, and what follows is a brief historical note on the two cannons and how they came to join our Corps in Charlottesville.



The cannons were officially presented to The Judge Advocate General’s School (TJAGSA) by Rear Admiral Chester C. Ward,¹ the Judge Advocate General of the Navy, in a ceremony on 21 February 1957. Colonel Nathaniel B. Rieger, then serving as Commandant of TJAGSA, accepted the cannons on behalf of the Corps.

The cannon on the left as one faces the building is an English-made weapon. It is a four-pounder with a 3.12 inch bore. It was captured from the Royal Navy during the War of 1812 and taken to Norfolk, Virginia. At the outbreak of the Civil War, the cannon was moved from Norfolk to the

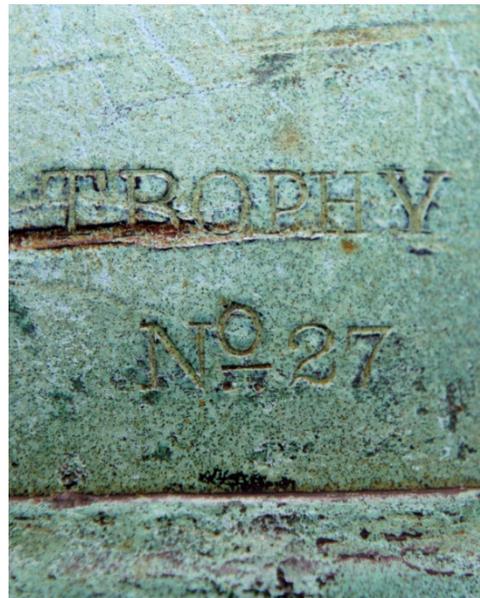
¹ Born in Washington, D.C., in 1907, Rear Admiral Chester C. Ward became a naval aviation cadet in 1927, and after receiving his wings the following year, served in a variety of naval aviation assignments until leaving active duty in 1930. He subsequently graduated from The George Washington University Law School in 1935, and then remained on the faculty, first as an instructor and then as an Assistant Professor of Law. Admiral Ward was still teaching law when he returned to active duty in 1941. During World War II, he performed Navy legal duties in a variety of assignments, including Chief, General Law Division. In that position, then Captain Ward was responsible for all admiralty, taxation, international law, legal assistance, and claims matters for the Navy. Admiral Ward remained on active duty after the war ended, and during the Korean War, served as the top legal officer on the staff of the Commander in Chief, Pacific, and Commander in Chief, U.S. Pacific Fleet. Admiral Ward took the oath as the Judge Advocate General of the Navy in August 1956. He retired four years later, at the age of fifty-two. THE JAG JOURNAL, Sept.–Oct. 1956, at 3–4.

U.S. Naval Gun Factory, Washington, D.C., so that it would not fall into Confederate hands.



Rear Admiral Chester C. Ward

The cannon on the right as one faces the building is a French bronze gun with a 3.5 inch bore. The name and date, “Frerejean Freres Lyon, 1795,” indicate that it was cast by a foundry in Lyon, France, after the Revolution of 1789—which makes sense, given the inscription “Libertie Egalité” stamped near the muzzle of the piece. It is not known how this gun came into the U.S. Navy’s possession, but it is stamped “Trophy No. 27.”



According to an undated memo in the Regimental Archives, “the cannons are symbolic, first of the traditions of

the Armed Forces which strongly influence the role of the military lawyer, and second of the close coordination between the Armed Forces in the operation of The Judge Advocate General's School."² It seems reasonable to conclude that this language was the justification for the Navy's gift of the cannons to our Regiment.

Only a few hours after the ceremony in 1957, the English cannon was "abducted" by persons unknown. It was discovered three days later on an Albemarle County estate.³ After returning to Army control at Hancock House on the main grounds of the University of Virginia (UVA), this cannon—and its French counterpart—were firmly anchored on concrete pillars. But not firmly enough: during the

Vietnam War in the early 1970s, both cannons were stolen. They were returned a few days later. While the identity of those individuals who took or returned the cannon was never discovered, members of the TJAGSA staff and faculty assumed the culprits were UVA students opposed to U.S. involvement in the war in Southeast Asia.

When TJAGSA moved to its present location on North Grounds in the mid-1970s, the cannons were transported as well—and remain on guard outside the LCS to this day.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

<https://www.jagcnet.army.mil/8525736A005BE1BE>

² THE JUDGE ADVOCATE GENERAL'S SCHOOL, HISTORICAL NOTE ON CANNONS (n.d.).

³ THE JUDGE ADVOCATE GENERAL'S SCHOOL, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1961, at 26 (1961).

Inherently Governmental Functions: A Bright Line Rule Obscured by the Fog of War

Major Jess B. Roberts*

“The ‘fog of war’ still requires a direct line of sight on contractors.”¹

I. Introduction

The concept of “inherently governmental functions” distinguishes actions that a civilian contractor can take on behalf of the U.S. government from actions that are so important that they must be performed directly by the government. A judge advocate should have a firm grasp of what is and what is not an inherently governmental function. Recent headlines in some of America’s leading newspapers hint at some of the delicate legal issues judge advocates might find themselves grappling with in the realm of contracting. For example, according to the *Washington Post*, “the U.S. military is relying on private contractors to provide and operate PC-12 spy planes in the search for Kony, the fugitive leader of the Lord’s Resistance Army, a group known for mutilating victims, committing mass rape, and enslaving children as soldiers.”² If your command asks you to render a legal opinion regarding the propriety of such an action, what law governs? Where do you look? Can the government contract for such things? Your commander will have to sign a Request for Services Contract Approval Form³ indicating that the requested contracted service is not an inherently governmental function according to the Army Federal Acquisition Regulation Supplement.⁴

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¹ STAFF, SUBCOMM. ON NAT’L SEC. & FOREIGN AFFAIRS, COMM. ON OVERSIGHT & GOV’T REFORM, U.S. HOUSE OF REPRESENTATIVES, WARLORD INC.: EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN intro. (2010) (quoting Rep. John F. Tierney, Chair).

² Craig Whitlock, *U.S. Expands Secret Intelligence Operations in Africa*, WASH. POST, June 13, 2012, http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html?wprss=rss_politics.

³ U.S. Dep’t of Army, Request for Services Contract Approval (SCA) Form (10 Aug. 2012) [hereinafter SCA Form], available at <http://www.asamra.army.mil/scra/documents/ServicesContractApprovalForm.pdf>. For easy reference, the form is also found at the Appendix (Request for SCA Form).

⁴ U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt. 5107.503(e) (Apr. 1, 2010, revision #25) [hereinafter AFARS].

Requiring officials must provide the contracting officer with a copy of the “Request for Services Contract Approval” form signed by an appropriate General Officer or Accountable member of the Senior Executive Service. Contracting officers shall not complete or sign the service contract approval form and shall not initiate any contract for service, or exercise an option, without

This article identifies the tools needed to determine whether a contracting request falls into the category of an inherently governmental function. Part II gives a historical background, discussing the issues surrounding the definition of inherently governmental functions. Part III examines the history of contractors on the battlefield and the evolving definition of inherently governmental functions. Part IV summarizes the current state of the law and discusses the recent changes to the definition. Finally, Part V of the article applies the law to a fictional operational law scenario. Knowing how to identify inherently governmental functions in daily practice benefits the command in both operational and garrison environments.

II. Background

In the past, there have been questions regarding the definition of inherently governmental functions, such as how inherently government functions are identified. A recent Office of Federal Procurement Policy (OFPP) policy letter⁵ attempts to settle the debate. The letter is applicable to all executive agencies, to include the Department of Defense.⁶ According to the policy letter, the final definition of what constitutes an inherently governmental function is built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public

an approved certification. The approval and completed worksheets shall be included in the official contract file. The accountable General Officer or Senior Executive may delegate certification authority for requirements valued less than \$100,000 in accordance with Command policy. Contracting officers shall document the contract file with a copy of the Command policy before accepting a service contract approval that is signed below the General Officer/Senior Executive level.

Id.

⁵ Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011) [hereinafter OFPP 11-01].

⁶ Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Technical Correction to Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 7609-01 (Feb.13, 2012) (“The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is making a correction to the Final Policy Letter ‘Performance of Inherently Governmental and Critical Functions’. . . to clarify that the Policy Letter applies to both Civilian and Defense Executive Branch Departments and Agencies. The original publication of the policy letter was inadvertently addressed only to the Heads of the Civilian Executive Departments and Agencies.”) (citation omitted).

Law 105-270.⁷ The FAIR Act defines an activity as inherently governmental when it is so “intimately related to the public interest as to mandate performance by Federal employees.”⁸ While this language is simple, applying it to real world situations in the operational environment is complex. One critic has sarcastically commented that trying to define what is inherently governmental is like “trying to nail Jell-O to the wall, only nailing Jell-O is easier.”⁹ While the issues seem daunting, a review of the history of warfare suggests that contractors and the complex issues they bring are no strangers to the fields of battle. Contemplating the role of the contractor in the past helps to inform our analysis of current and future problems related to contracting in a contingency environment.

III. Contractors on the Battlefield Throughout History

Today, the conflict in Afghanistan is a “war where traditional military jobs, from mess hall cooks to base guards and convoy drivers, have increasingly been shifted to the private sector. Many American generals and diplomats have private contractors for their personal bodyguards.”¹⁰ As one commentator stated, “contractors are fully integrated into U.S. national security and other government functions. To paraphrase a popular commercial about the American Express credit card, the United States cannot go to war without them.”¹¹

Contemporary society holds mixed views regarding the propriety of engaging in the act of warfare with the assistance of contractors. This is a debate that reaches back centuries. “Hiring outsiders to fight your battles is as old as war itself. Nearly every past empire, from the ancient Egyptian to the Victorian British, contracted foreign troops in some form or another.”¹² In today’s lexicon, the term mercenary is often met with disdain. However, in the past

that was not always the case. Many nations relied almost exclusively on mercenaries to achieve military objectives.

“Our general assumption of warfare is that it is engaged by public militaries, fighting for the common cause. This is an idealization. Throughout history, the participants in war were often for-profit private entities loyal to no one government.”¹³ Even the Pharaoh of ancient Egypt used mercenaries. “The battle of Kadesh (1294 B.C.E.) is the first great battle in history of which we have any detailed account. In this fight, where the Egyptians fought the Hittites, the army of Pharaoh Ramses II included units of hired Numidians.”¹⁴ Likewise, the Greeks,¹⁵ Macedonians,¹⁶ and Carthaginians¹⁷ all utilized mercenaries. One of the greatest empires in history, Rome, also employed mercenaries in their quest for an expanded empire. “Although early Rome was distinguished by its citizen army, it too was highly reliant on mercenaries. Even during the Republic period, it relied on hired units to fill such specialties as archers and cavalry.”¹⁸

After the fall of Rome, the Dark Ages set in and with it, the continued need for outsiders to assist in the dirty business of war. “Western Europe sank into the Dark Ages and any semblance of a money-based economy faltered. In a world with little or no governance capabilities, feudalism, the system of layered obligations of military service, became the mechanism by which armies were created.”¹⁹ During this period, tenants were required to perform military service for landlords.

The thirteenth century provides excellent examples of contracting for military services. The rise of contracting coincided with a rise in prosperity, especially in Italy. “Particularly important was the growth of banking. Trading companies emerged in this period, and several Italian towns

⁷ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998); see 31 U.S.C.A. § 501 editor’s note (West 2012).

⁸ OFPP Letter 11-01, *supra* note 5.

⁹ David Isenberg, *To Be, or Not to Be, Inherent: That Is the Question*, HUFFINGTON POST (Apr. 15, 2010), http://www.huffingtonpost.com/david-isenberg/to-be-or-not-to-be-inhere_b_539933.html.

¹⁰ Rod Nordland, *Risks of Afghan War Shifts from Soldiers to Contractors*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/world/asia/afghan-war-risks-are-shifting-to-contractors.html?_r=0.

¹¹ David Isenberg, *Security Contractors and U.S. Defense: Lessons Learned from Iraq and Afghanistan*, CATO INST., <http://www.cato.org/publications/commentary/security-contractors-us-defense-lessons-learned-iraq-afghanistan> (last visited Apr. 2, 2013). This article appeared in *World Politics Review* on June 14, 2011. *Id.*

¹² PETER WARREN SINGER, CORPORATE WARRIORS, THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 19 (2003).

¹³ *Id.*

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 20–21 (“Although a few of the Greek city-states, such as Sparta, relied on citizen armies, it was a general practice for ancient Greek armies to build up their forces through the hire of outside specialists.”).

¹⁶ *Id.* at 21 (“The Macedonians honed their craft fighting on behalf of the varied Greek city-states during the Peloponnesian War (431–404 B.C.E.).”).

¹⁷ *Id.* (“[T]he Carthaginian empire was almost entirely dependent on mercenary troops and saw both the benefits and the costs. At the conclusion of the First Punic War (264–241 B.C.E.), the hired army which had not been paid and was threatened with disbandment, revolted, in what was known as the Mercenary War. The rebels were only put down when the Carthaginians were able to hire other mercenary units.”).

¹⁸ *Id.*

¹⁹ *Id.* at 22.

even turned themselves over to private investors to run.”²⁰ During this time of change, the “condotta (contract) system blossomed. This arrangement, by which military services were contracted out to private units, initially was driven by business guilds that saw it as reasonable and economical to avoid mobilizing all of society and keep the most efficient citizens (themselves) from the waste of warfare.”²¹ During this point in history, the concept of contracting begins to resemble what contemporary society would today recognize as contracting out state actions.

At the conclusion of the fourteenth century, private soldiers replaced their feudal predecessors. “The way to form an army now consisted of ‘commissioning’ (the term still used today to denote the rise to an officer rank) a private individual to raise troops, clothe them, equip them, train them, and lead them.”²² “The French Revolution and ensuing Napoleonic wars (1789–1815) signaled the end of hired soldiers playing a serious role in warfare, at least for the next two centuries.”²³ Skilled generals such as Napoleon ushered in a new era in which the state became the primary purveyor of warfare.

In our own nation’s history, mercenaries appeared on the shores of America early on. Britain employed mercenaries during the American War for Independence. “The British government did not have the troops to both maintain its worldwide colonial obligations, including holding down the ever simmering Ireland, and also defeat the numerous American patriot forces.”²⁴ The troops came from the German principalities and “29,875 hired German troops crossed the Atlantic.”²⁵ However, the British did not foresee the consequences of entering into contracts with the German forces. “As history shows, the Hessian experience did not turn out as their British employers anticipated. Rather than intimidating the American rebels into submission, news of the contracts signed with the German states was one of the factors that fomented the Declaration of Independence by the colonies.”²⁶

The American forces also utilized paid military actors. Of particular note, “Baron von Steuben’s military training at Valley Forge is credited with turning the Continental Army into a true fighting force.”²⁷ General Washington’s men subsequently defeated Hessian forces in 1776 at Trenton and Princeton.²⁸ Here we see how two contracts, one drafted by the British Crown retaining the services of the Hessians and one drafted by the Continental Army retaining the services of Baron von Steuben, contributed to the outcome of the Revolutionary War. Although it would be unthinkable today to hire a European general to oversee the majority of training prior to a major offensive, during the birth of the United States, the concept of contracting out functions that would be considered inherently governmental today were woven into the fabric of our nation at an early stage.

History shows us that that a contract can do more than retain the services of foot soldiers. Charter companies, also known as joint stock companies, granted private contractors vast powers. “[J]oint stock companies were licensed to have monopoly power over all trade within a designated area, typically land newly discovered by Europeans.”²⁹ Here, the control of trade encompassed a myriad of inherently governmental acts. For example, the Dutch East India Company was given the right to trade in the Indian Ocean, a right no other Dutch citizen outside the company possessed. “While nominally under the control of their license back home, abroad, the charter ventures quickly became forces unto themselves.”³⁰ The Dutch East India Company derived great profit by building fortifications, coining money, and deploying over “140 ships and 25,000 men permanently under arms.”³¹

The “outsourcing of trade controls to private companies had unintended consequences, particularly as the firms often engaged in activities that were contrary to their home government’s national interest.”³² For example, when the English East India Company entered the Indian Ocean, it sided with the Mogul emperor against Portugal and

²⁰ *Id.* (citing PG.V. SCAMMELL, THE ENGLISH TRADING COMPANIES AND THE SEA 5 (1982)).

²¹ SINGER, *supra* note 12, at 22 (citing PHILIPPE CONTAMINE, WAR IN THE MIDDLE AGES 158 (1984)).

²² *Id.* at 23, 29 (“[T]he ‘state’ is a fairly new emergence in the overall flow of history. It was not until the seventeenth century that the use of official armies, loyal to the nation as a whole and not to the specific rulers or houses that led it, took hold in Europe.”).

²³ *Id.* at 31.

²⁴ *Id.* at 33.

²⁵ *Id.* at 32. (“Approximately two-thirds were from the Hesse-Kassel [region], so the formations were called ‘Hessians’ by the Americans.”).

²⁶ *Id.*

²⁷ *Id.* (citing ANTHONY MOCKLER, THE NEW MERCENARIES 127 (1985)) (“The war also saw the Americans commission over 800 privateers.”).

²⁸ SINGER, *supra* note 12, at 33 (“Even in the face of hostilities, it is interesting to note that many of the German Soldiers found America as a place they could call home. ‘Hessian troops found that life in America compared quite nicely to life in Germany and by the end of the war roughly a third of the force deserted.’”).

²⁹ *Id.* at 34.

³⁰ *Id.* Companies like the Dutch East India company made it their business to monopolize “trade in spices such as nutmeg, cloves, cinnamon and pepper, tea, and later, silk, Chinese porcelain, gold, and opium.” *Id.*

³¹ *Id.* at 34–35. The 25,000 men were comprised primarily of Japanese and German mercenaries. *Id.*

³² *Id.* at 36.

destroyed most of the Portuguese ships in the area, thereby securing exclusive trade rights in that area.³³ The problem with this course of action was that the British Crown had previously directed “[t]he company to avoid unprovoked attacks on the Portuguese as [the monarch] needed their alliance, but it chose the path of profits instead.”³⁴ The company made the calculated decision to opt for profits over the diplomatic mission of the monarch. This provides a lesson for modern times regarding inherently governmental functions: what is good for the bottom line of a company is not always the best thing for the sovereign.

The concept of state sovereignty ruled supreme during the twentieth century. The use of private soldiers on a large scale was no longer acceptable; thus, the “international trade in military services was marginalized and mostly pushed underground.”³⁵ Independent ex-soldiers would “hire themselves out on an informal basis, usually to rebel groups operating in weak state zones such as Latin America, China, and later Africa.”³⁶

As discussed, at various times in world history, commanding and fielding soldiers was an inherently governmental act that required soldiers be organic to the sponsoring state. At other times in history, it was perfectly acceptable to field a charter company, like the Dutch East India Company, that took on all the functions of a country through contract. During these time periods, such acts were not deemed inherently governmental.

A review of select periods of military history illustrates that “[a]t numerous times in history, governments did not possess anything approaching a monopoly on force.”³⁷ While that is not the case today, one should note that “the lines between economics and warfare were never clear cut. From a broad view, the state’s monopoly of both domestic and international force was a historical anomaly. Thus, in the future, we should not expect that organized violence would only be located in the public realm.”³⁸ As one contemplates a modern legal analysis regarding what is and is not inherently governmental in nature today, it is useful to reflect on the past to inform the decisions of the future.

³³ *Id.* at 35.

³⁴ *Id.* (“The Dutch approach was similar. They militarily eliminated Portuguese and Spanish markets and also aimed at new areas, such as what is now Indonesia. If local leaders refused to trade with them, they were punished with bombardment and invasion.”).

³⁵ *Id.* at 37.

³⁶ *Id.*

³⁷ *Id.* at 39.

³⁸ *Id.* at 39.

It is important to keep that history in mind while reviewing the government’s contemporary interpretation of what constitutes inherently governmental functions. “Since World War I, one of the primary arenas for the public/private debate and the definition of inherently governmental functions has been federal contracting.”³⁹ The next section discusses contemporary views related to inherently governmental functions and provides the current definition of the concept.

IV. Modern Developments: Inherently Governmental Functions

What constitutes an inherently governmental function affects numerous scenarios that involve everything from the ability to contract certain aspects of minting our nation’s currency, to the ability to contract command and control of combat troops. This section deals only with federal contracting and how the executive branch has dealt with the issue. “Federal contracting has been at the center of a long debate regarding what constitutes an inherently governmental act. The emphasis on public or private entities as the preferred source of goods or services has swung back and forth over the years with the change of administrations.”⁴⁰ While some administrations have done little to define inherently governmental functions, most have elected to shape the use of civilian contractors.⁴¹ A brief overview of modern presidential administrations illustrates how the concept of inherently governmental functions and the use of civilian contracts have evolved.

A. Presidential Administrations

In his effort to combat the Great Depression, President Franklin D. Roosevelt expanded the role of the federal government and moved functions from the private sector to the government sector.

President Roosevelt essentially reversed the relative use of civilian and military contractors as compared to the 1920s. Prior to World War II, the Roosevelt

³⁹ JOHN R. LUCKEY ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 4 (2009), available at <http://www.fas.org/sgp/crs/misc/R40641.pdf>.

⁴⁰ *Id.*

⁴¹ *Id.* The Administration of President Harry S. Truman was “generally a period of change and reorganization in the federal government’s procurement of goods and services” with the addition of several statutes that “greatly changed the federal procurement landscape, although they did not directly address which functions the government must perform (i.e., what is inherently governmental).” *Id.*

Administration placed renewed emphasis on the government's role and the benefits of the government performing functions for socioeconomic purposes even when doing so brought it into competition with the private sector (e.g., creation of the Civilian Conservation Corps and the Public Works Administration).⁴²

In contrast, President Dwight D. Eisenhower was the first president to state that the government should not compete with private markets, noting that "[i]t is the stated policy of the administration that the Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."⁴³ This language eventually "entered the vernacular as Office of Management and Budget's (OMB's) Circular A-76 in 1966 during the Johnson Administration,"⁴⁴ and since "has become the primary focal point for discussions of what is an inherently governmental function."⁴⁵ The administrations of President Ronald Reagan and President George H.W. Bush made clear moves toward minimizing the government's role in private citizen's lives.

President Reagan's administration battled Congress when trying to implement smaller government.⁴⁶ President Bill Clinton "was arguably on both sides of the public/private debate, sponsoring plans, such as comprehensive health care reform, that might have expanded the public sector, as well as attempting to end 'big government' with its 'reinventing government' initiative."⁴⁷ The administration of President George W. Bush held a narrow view of what was considered the appropriate role of the public sector. "Among other things, the Bush Administration proposed amending OMB Circular A-76 so that all functions were presumed commercial unless agencies justified why they were inherently governmental."⁴⁸ The Bush Administration drew fire from some critics for

"improperly contract[ing] out acquisition, armed security, and contract management functions, among others."⁴⁹

The administration of President Obama sought to provide its own guidance regarding government contracting. His "Memorandum for the Heads of Executive Departments and Agencies"⁵⁰ addressed several initiatives related to government contracting, one of which was to ensure that functions considered to be inherently governmental were not contracted out. Of particular note, the memorandum stated:

[T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.⁵¹

Based on President Obama's guidance, the Director of the Office of Management and Budget directed the OFPP to take action. On 30 March 2012, the OFPP issued a memorandum entitled "Work Reserved for Performance by Federal Government Employees."⁵² The memorandum sought to clarify when governmental outsourcing of services was appropriate consistent with section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.⁵³ Section 321 required the OMB to create a single definition for the term "inherently governmental function" and address any deficiencies in the existing definition.⁵⁴ The

⁴² *Id.* (citing JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 379-459 (2d ed. 1999)).

⁴³ *Id.* at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* ("This administration would propose or attempt to privatize particular functions, such as depot maintenance. Congress would then respond with an appropriations rider, prohibiting or conditioning the use of funds to implement the privatization, or with a substantive law declaring a function inherently governmental, among other things.")

⁴⁷ *Id.*

⁴⁸ *Id.* at 6.

⁴⁹ *Id.*

⁵⁰ Memorandum from Office of the Press Sec'y, The White House, to Heads of Exec. Dep'ts & Agencies, subject: Government Contracting (Mar. 4, 2009) [hereinafter White House Government Contracting Memo], available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government. Although not discussed in this article, there were other initiatives addressed in the memorandum besides the one that dealt with inherently governmental functions. Those initiatives included increased competition; the use of fixed-price contracts; and ensuring that the acquisition workforce could manage and oversee contracts. *Id.*

⁵¹ *Id.*

⁵² Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Policy Letter 11-01, Work Reserved for Performance by Federal Employees, 76 Fed. Reg. 16,188-02 (Mar. 31, 2010) [hereinafter Proposed OFPP 11-01].

⁵³ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).

⁵⁴ *Id.* Though not discussed in this article in great detail, note that the act also required that the OMB establish criteria to be used by agencies to identify critical functions and positions that should only be performed by federal employees and provide guidance to improve internal agency management of functions that are inherently governmental or critical. *Id.*

OFPP conducted an extensive review of current laws, regulations, policies, and reports that addressed the definition of inherently governmental functions.⁵⁵ Additionally, comments were solicited from the public and a public meeting was held regarding the definition of inherently governmental functions. During the research phase of the inquiry, the OFPP highlighted the fact that there were three main sources providing definitions for the term inherently governmental function. The “FAIR Act, FAR, and Circular A-76 each make clear that the term ‘inherently governmental function’ addresses functions that are so intimately related to the public interest as to require performance by federal government employees.”⁵⁶ While the definitions were similar, the way the sources dealt with the types of functions included in the definition were different. For example, the “FAIR Act states that the term includes activities that require the ‘exercise of discretion’ in applying ‘Federal Government authority,’ whereas the Circular speaks in terms of the exercise of ‘substantial discretion’ in applying ‘sovereign’ Federal government authority.”⁵⁷ This type of situation creates an environment rife with ambiguity; when there is ambiguity in a world of contracts measured by millions of dollars, there is a very real potential for problems to arise. The OFPP stated that “[i]t is unclear what the impact of this type of variation has been. This notwithstanding, these variations can create confusion and uncertainty.”⁵⁸

The Obama Administration ultimately cut through the confusion and uncertainty surrounding the definition of inherently governmental functions by providing a final definition. On 12 September 2012, the OFPP issued a policy letter to “provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions.”⁵⁹ The letter “clarified what functions are inherently governmental and must always

be performed by Federal employees” and “provided a single definition of inherently governmental function” built around the well-established statutory definition in the FAIR Act.⁶⁰ The policy letter provides several means to determine whether a function is inherently governmental:

1. Apply the clear language of the definition.
2. Compare the acts to those listed in Appendix A: Policy Letter 11-01, Examples of Inherently Governmental Functions.⁶¹
3. Apply the two tests set forth in Policy Letter 11-01 to determine whether an organization is dealing with an inherently governmental function.

These methods are discussed below.

B. Means to Determine Whether a Function Is Inherently Governmental

1. The Current Definition of Inherently Governmental Functions

“Inherently governmental functions” are currently defined in section 5 of the FAIR Act as functions that are so “intimately related to the public interest as to require performance by Federal Government employees.”⁶² The letter explains that “[t]he definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.”⁶³ The OFPP received public comments from over 30,000 respondents in response to the proposed definition, list of inherently governmental functions, and tests used to determine whether one is dealing with an inherently governmental function. Based on these comments and a review of the existing law and regulation, the OFPP forged a final product that appears to meet the needs of the respondents.

⁵⁵ Proposed OFPP 11-01, *supra* note 52, at 16190. The review was conducted with the assistance of an interagency team that included representatives from the Chief Acquisition Officers Council and the Chief Human Capital Officers Council. *Id.* The OFPP reviewed the definitions of inherently governmental functions in the following sources: “Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270, section 2383 of title 10 (which cites to definitions in the Federal Acquisition Regulation (FAR)), the FAR, OMB Circular A-76, OFPP Policy Letter 92-1, Inherently Governmental Functions (which was rescinded and superseded by OMB Circular A-76 in 2003) and reports by the Government Accountability Office (GAO).” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ OFPP 11-01, *supra* note 5 (“[The policy letter was] issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President’s March 4, 2009, Memorandum on Government Contracting, and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417.”)

⁶⁰ *Id.* at 56227 (citation omitted).

⁶¹ The list contains twenty-four historically and commonly accepted examples of inherently governmental functions. Some examples include: the direct conduct of criminal investigation; the determination of budget policy, guidance, and strategy; the direction and control of intelligence and counter-intelligence operations; the approval of federal licensing actions and inspections; and the administration of public trusts. *Id.* at 56240.

⁶² *Id.* at 56236.

⁶³ *Id.* at 56227 (citation omitted).

Two lines of thought emerged during the comments period. Some expressed concern about excessive outsourcing and recommended expanding the definition of inherently governmental functions. These respondents proposed changing the list of inherently governmental functions to include all security functions and intelligence activities; training for interrogation, military, and police; and maintenance and repair of weapons systems.⁶⁴ This sector was concerned about too much privatization. Senator Russ Feingold's comment to the OFPP during the comment period serves as an example of concerns surrounding too much privatization: "I urge you to amend federal regulations and policy to clarify that the following functions are inherently governmental and should not be outsourced: security services in war zones, oversight of security contractors, and the interrogation of detainees."⁶⁵ He went on to state that "[f]or the last nine years, the government has failed to establish meaningful control over security contractors in war zones, as a result, numerous civilians have been killed in both Iraq and Afghanistan, [and] the reputation of the United States has been tarnished . . ."⁶⁶ A second group of respondents had different concerns, "cautioning that the policy letter and the increased attention on having non-inherently governmental functions performed by Federal employees will inappropriately discourage Federal managers and agencies from taking full and effective advantage of the private sector and the benefits of contracting."⁶⁷ This rationale stretches back to the Eisenhower Administration and appears, in some form, in each successive presidential administration.

The use of contractors can be a good thing when it saves taxpayers' money. Indeed, at the outset of his administration's overhaul of government contracting, President Obama stated, "[W]hile inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition."⁶⁸ The challenge for the OFPP was to find a solution that balanced the differing views the public held about defining inherently governmental functions.

⁶⁴ *Id.* at 56229.

⁶⁵ Comments of Senator Russell Feingold on Proposed OFPP Policy Letter, OFPP-2010-0001-0124 (June 7, 2010), available at <http://www.regulations.gov/#!documentDetail;D=OFPP-2010-0001-0124>.

⁶⁶ *Id.* Senator Feingold's comments illustrate the concern many Americans had regarding the utilization of contractors; in sum, government officials have to be in control of sensitive issues that impact the appearance and legitimacy of the United States. *Id.*

⁶⁷ OFPP 11-01, *supra* note 5, at 56229.

⁶⁸ White House Government Contracting Memo, *supra* note 50.

In the end, the American people had the opportunity to comment on the definition, and shape the direction of contracting with the U.S. government. The OFPP coupled these comments with research on existing law and found common ground that satisfied most respondents by using the FAIR Act as the final definition of what constitutes inherently governmental functions. The OFPP charted a similar course when fashioning a list of examples of inherently governmental functions, discussed further in the next section.

2. List of Inherently Governmental Functions

As mentioned above, Appendix A of Policy Letter 11-01 lists twenty-four historically and commonly accepted examples of inherently governmental functions.⁶⁹ The OFPP reacted to respondents' comments to the proposed policy letter and not only inserted the illustrative list found in Federal Acquisition Regulation 7.5,⁷⁰ but also added new examples of functions to the policy letter. The OFPP added "all combat, security operations in certain situations connected with combat or potential combat, determination of an offer's price reasonableness, final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and selection of grant and cooperative agreement recipients."⁷¹

During the comment period, most respondents did not object to retaining a list with illustrative examples; however, some felt the list was too narrow, while others thought it too broad. Those who felt the list was too narrow suggested adding private security firms and intelligence functions that occur in hostile environments to the list.⁷² A sampling of the final list includes "[t]he direct conduct of criminal investigation,"⁷³ "[t]he control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution),"⁷⁴ and "[t]he command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role."⁷⁵ The list is not exhaustive, but does inform a practitioner of a baseline of what constitutes an inherently

⁶⁹ *See supra* note 61.

⁷⁰ FAR 7.503 (2010).

⁷¹ OFPP 11-01, *supra* note 5, at 56229.

⁷² *Id.* at 56231.

⁷³ *Id.* at 56240.

⁷⁴ *Id.*

⁷⁵ *Id.*

governmental function. If a judge advocate still has questions regarding what constitutes an inherently governmental function after reviewing the definition and the list, the final step is to apply the two tests set forth in Policy Letter 11-01.

3. Tests: Inherently Governmental Functions

During the comment period, the OFPP proposed “creat[ing] tests for agencies to use in determining whether functions not appearing on the list [would] otherwise fall within the definition of inherently governmental.”⁷⁶ For example, the OFPP stated that “[t]he nature of the function test would ask agencies to consider whether the direct exercise of sovereign power is involved. Such functions are uniquely governmental, and therefore, inherently governmental.”⁷⁷ The nature of the function test states “[f]unctions which involve the exercise of sovereign powers of the United States are governmental by their very nature.”⁷⁸ During the comment period, “[a] number of comments questioned the likely effectiveness of the proposed ‘nature of the function test,’ which would ask agencies to consider if the direct exercise of sovereign power is involved.”⁷⁹ The OFPP acknowledged the concern, stating that “[it] appreciates that the value of this test may be limited, but believes it still can contribute to an agency’s overall understanding and analysis in differentiating between functions that are inherently governmental and those that are not.”⁸⁰ The second proposed test, known as the discretion test, has its roots in OMB Circular A-76,⁸¹ and “would ask agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action.”⁸² Respondents had few concerns with regard to the use of tests and the OFPP ultimately issued the final policy letter

⁷⁶ Proposed OFPP 11-01, *supra* note 52, at 16190.

⁷⁷ *Id.*

⁷⁸ OFPP 11-01, *supra* note 5, at 56237. The definition further explains “[e]xamples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.” *Id.*

⁷⁹ *Id.* at 56231.

⁸⁰ *Id.*

⁸¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (May 29, 2003) [hereinafter OMB Cir. A-76], available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction#a.

⁸² *Id.*

featuring both the discretion test and the new nature of the function test.

The exercise of discretion test states:

A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.⁸³

The discretion test allows a practitioner to apply an assessment regarding how much individual discretion a contractor might utilize in areas where there is little guidance. This test allows unique factors to be weighed in the test and ensures that a contractor does not perform jobs that require unique assessment and discretion in areas requiring the sole judgment of a U.S. official.

Both tests allow a practitioner to consider a variety of factors in order to arrive at an informed decision as to whether something is inherently governmental. However, what is a practitioner to do if faced with a function that is closely associated with inherently governmental functions?

C. Functions Closely Associated with Inherently Governmental Functions

While not the primary focus of this article, it is prudent to briefly highlight functions that are closely related to inherently governmental functions. These legal landmines⁸⁴

⁸³ OFPP 11-01, *supra* note 5, at 56238.

⁸⁴ Additionally, personal services can be a legal landmine, as they are often confused with inherently governmental functions. Pursuant to FAR 37.104, personal services are defined by the employer-employee relationship created between the government and the contractor’s personnel. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the Civil Service laws. Obtaining personal services by contract rather than by direct hire under competitive appointment circumvents those laws unless Congress has specifically authorized acquisition of those services. FAR 37.104 (2010). Basically, contractors cannot be used to circumvent

can wreak havoc on a command. The danger with a closely related function is that when a contractor performs such a function, there is a risk that the function will morph into inherently governmental functions over time. The OFPP stated that when functions that “generally are not considered to be inherently governmental approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function, agencies must give special consideration to using Federal employees to perform these functions.”⁸⁵

The definition is daunting; fortunately, illustrative examples of closely related functions are included in Appendix B of Policy Letter 11-01, entitled “Examples of Functions Closely Associated With the Performance of Inherently Governmental Functions.” The list of closely related functions includes “performing budget preparation activities, such as workload modeling, fact finding, efficiency studies . . . undertaking activities to support agency planning and reorganization, and providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.”⁸⁶ If contractors are hired to perform similar tasks, agency management must monitor the employees closely to make certain the function does not grow into one that comprises the characteristics of inherently governmental functions. Policy Letter 11-01 provides a checklist of responsibilities in Appendix C that agencies must rely on when contractors perform such functions.⁸⁷

V. Counterintelligence Scenario

This article began by referring to an article in the *Washington Post* that reported the U.S. military is searching for the fugitive leader of the Lord’s Resistance Army with the use of spy planes provided by private contractors.⁸⁸ For

standards Congress has put in place. A judge advocate should consult Worksheet C of Request for Services Contract Form to avoid running afoul of the intent of Congress, as personal services can be easily confused with inherently governmental functions. See Appendix (Request for SCA Form).

⁸⁵ OFPP 11-01, *supra* note 5, at 56238 (“Although closely associated functions are not reserved exclusively for performance by Federal employees, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 11-8, requires civilian agencies subject to the FAIR Act to give special consideration to using Federal employees to perform these functions. Similarly, the Department of Defense is required to ensure special consideration is given to Federal employee performance consistent with the requirements of 10 U.S.C. 2463 . . .”).

⁸⁶ *Id.* at 56228.

⁸⁷ *Id.* at 56242. Appendix C of the OFPP Policy Letter 11-01 is titled, “Responsibility Checklist For Functions Closely Associated with Inherently Governmental Functions” and provides agency measures to ensure that contractors steer clear of inherently governmental functions. *Id.*

⁸⁸ Whitlock, *supra* note 2.

purposes of this article, suppose a well-known retired general has approached your commander and offered the services of his intelligence firm to assist in apprehending a fictional war criminal similar to Kony. The former general states that he will field aircraft, determine what areas to survey, and decide which intelligence is important for your commander to see. The only things he will require of your command are military pilots and several uniformed enlisted intelligence analysts whom he will supervise and direct. Your commander needs a very basic question answered: Is the general’s proposition one that falls into the realm of an inherently governmental function? As a new brigade judge advocate, you know next to nothing about this issue. Where do you look?

With limited time, the best thing to do is to first apply the tests provided by Policy Letter 11-01. Apply the nature of the functions test and ask, is this something that involves the “exercise of sovereign powers of the United States”⁸⁹ in any manner? Commanding Soldiers is a sovereign power reserved to the United States. Likewise, the retired general’s business proposition also fails the exercise of discretion test which, in short, requires a decision maker to determine a course of action when there is no clear guidance available to limit the decision and little or no oversight.⁹⁰ Deciding what intelligence will be relayed to the command fails the discretion test, as it is not a government actor who uses their discretion to determine what intelligence should be passed on. What if there is a need to cross into air space of a country that is hostile to the United States? Determining where to fly or when to fly requires the use of discretion that also runs afoul of the policy letter, as it would have the effect of committing the government to a course of action. At a minimum, the action could have dire diplomatic results and, at worst, could potentially incite armed conflict. If the tests are not clear enough, a practitioner can find additional clarification by consulting the list of inherently governmental functions provided in appendix A of Policy Letter 11-01.

The Request for Services Contract Approval Form is a twelve-page document that allows a judge advocate to review most of the applicable law in one place.⁹¹ Only the sections of the form that directly apply to the scenario will be discussed. To determine whether an action is inherently governmental, simply look to page two of the form entitled “Worksheet A (1 of 3), Inherently Governmental Functions.”⁹² This three-page worksheet features thirty-two

⁸⁹ OFPP 11-01, *supra* note 5, at 56237.

⁹⁰ *Id.* For purposes of this article, the exercise of discretion test has been summarized for application to this scenario.

⁹¹ Appendix (Request for SCA Form); SCA Form *supra* note 3.

⁹² *Id.*

questions that prompt the reader to consider whether the particular function is an inherently governmental function. While many of the questions apply to the fictional scenario, for purposes of our scenario, questions four and nine are the most relevant. Question four asks if the function “[i]nvolve[s] the command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.”⁹³ Question nine asks if the function “[i]nvolve[s] the direction and control of intelligence and counter-intelligence operations.”⁹⁴ From the above fact pattern, it is apparent that the retired general would direct and control the operations. Furthermore, the retired general wanted enlisted intelligence analysts to work for him and military pilots to fly the planes. Finally, he alone would determine what intelligence would go to the commander. Based on a comparison with the list, it appears the general’s proposition contains inherently governmental functions.

Further guidance is provided in Worksheet A, which states that the “FAIR ACT (31 United States Code Section 501), the Federal Acquisitions Regulation (FAR) Part 7.5, . . . and OFPP Policy Letter 11-01 are all applicable.”⁹⁵ The above scenario will focus only on FAR Part 7.5, which provides a nonexclusive list of inherently governmental functions. Of particular import for purposes of the scenario, FAR 7.503(c)(3) states that “the command of military forces, especially leadership of military personnel who are members of combat, combat support, or combat service support” are inherently governmental functions.⁹⁶ Likewise, FAR 7.05(c)(8) states that “the direction and control of intelligence and counter-intelligence operations”⁹⁷ are also inherently governmental functions. Again, based on the information your commander gave you, it appears that in light of the plain language of the tests listed in Policy Letter 11-01, the list provided in Appendix A of Policy Letter 11-01, and the plain language of the FAR, the proposed operation would be inherently governmental. With a firm idea of what the law is, a judge advocate can help to shape operations in a manner that does not violate federal law. The retired general’s plan will have to be scoped down and military commanders will need to take over the managerial aspects of the operation.

VI. Conclusion

In this day and age, a judge advocate is required to make initial substantive determinations on a moment’s notice when dealing with military operations. The purpose of this article is not to explore every legal issue related to the definition of inherently governmental functions. Instead, it is to give a judge advocate a quick, accurate method to vet a proposed scenario that will assist in guiding the initial planning stages of an operation. Once a judge advocate makes a determination that a proposed course of action is one that falls within the definition of an inherently governmental function, a legal course of action can be developed to give the commander’s intent effect, while staying within the now settled definition of inherently governmental functions.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ FAR 7.503(c)(3) (2013).

⁹⁷ *Id.* 7.05(c)(8).

WORKSHEET A (1 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

The following functions constitute inherently government functions and may not be legally contracted. The FAIR Act (31 United States Code Section 501); the Federal Acquisition Regulation (FAR) Part 7.5; the Department of Defense Instruction (DoDI) 1100.22, Guidance for Determining Workforce Mix; and OFPP Policy Letter 11-01 are all applicable.

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. Any "Yes" response to a function below must be performed in-house and may not be contracted.

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
1	Involve contractors providing legal advice and interpretations of regulations and statutes to Government officials?		
2	Involve the direct conduct of criminal investigations?		
3	Involve the control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution?		
4	Involve the command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role?		
5	Involve the conduct of foreign relations and the determination of foreign policy?		
6	Involve the determination of agency policy, such as—among other things—determining the content and application of regulations?		
7	Involve the determination of Federal program priorities for budget requests?		
8	Involve the direction and control of Federal employees?		
9	Involve the direction and control of intelligence and counter-intelligence operations?		
10	Involve the selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment?		
11	Involve the approval of position descriptions and performance standards for Federal employees?		
12	Involve the determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)?		
13	Involve:		
	i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);		
	ii) Participating as a voting member on any source selection boards;		
	iii) Approving any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;		

WORKSHEET A (2 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. Any "Yes" response to a function below must be performed in-house and may not be contracted.

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
	iv) Awarding contracts;		
	v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contract performance, and accepting or rejecting contractor products or services);		
	vi) Terminating contracts;		
	vii) Determining whether contract costs are reasonable, allocable, and allowable; and		
	viii) Participating as a voting member on performance evaluation boards.		
14	Involve the approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency response to the administrative appeals of denials of Freedom of Information Act requests?		
15	Involve the conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involve actions that affect matters of personal reputation or eligibility to participate in Government programs?		
16	Involve the approval of Federal licensing actions and inspections?		
17	Involve the determination of budget policy, guidance, and strategy?		
18	Involve the collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but does not include:		
	i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and		
	ii) Routine voucher and invoice examination.		
19	Involve the control of the treasury accounts?		
20	Involve the administration of public trusts?		
21	Involve the drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Account Office, or other Federal audit entity?		

WORKSHEET A (3 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. *Any "Yes" response to a function below must be performed in-house and may not be contracted.*

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
22	Require the exercise of discretion in applying Federal Government Authority?		
23	Require the making of value judgments in making decisions for the Federal Government?		
24	Require making judgments relating to monetary transactions and entitlements?		
25	Involve the interpretation and execution of the laws of the United States so as to bind the US to take or not take some action by contract, policy, regulation, authorization, order, or otherwise?		
26	Involve the interpretation and execution of the laws of the United States to determine, protect, and advance the United States' economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise?		
27	Involve the interpretation and execution of the laws of the United States to significantly affect the life, liberty, or property of private persons?		
28	Involve the interpretation and execution of the laws of the United States to commission, appoint, direct, or control officers or employees of the United States?		
29	Involve the interpretation and execution of the laws of the United States to exert ultimate control over the acquisition, use, or disposition of the property—real or personal, tangible or intangible—of the United States, including the collection, control, or disbursement of appropriated and other Federal funds?		
30	Involve security operations performed in direct support of combat as part of a larger integrated combat force, or performed in environments where there is significant potential for the security operations to evolve into combat? (Where the US military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.)		
31	Involve representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract?		
32	Involve combat?		

WORKSHEET B (1 OF 2)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

The following kinds of services are defined as "closely associated with inherently governmental functions" in 10 U.S.C. 2383(b) (3) and FAR 7.503; 10 U.S.C. 2330a(e) notes that reliance on contractors to perform closely associated with inherently governmental functions ought to be reduced "to the maximum extent practicable." Pursuant to 10 U.S.C. 2463, special consideration must be given to in-sourcing contracts performing the functions listed below. Additionally, special consideration must be given to using government employees in lieu of contractors if the answer is "No" to questions 24-26.

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. (The list below is not comprehensive, as it excludes examples from DoDI 1100.22.)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL		YES	NO
	Does the performance involve:		
1	Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.?		
2	Services that involve or relate to reorganization and planning activities?		
3	Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy?		
4	Services that involve or relate to the development of regulations?		
5	Services that involve or relate to the evaluation of another contractor's performance?		
6	Services in support of acquisition planning?		
7	Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors)?		
8	Contractors providing technical evaluation of contract proposals?		
9	Contractors providing assistance in the development of statements of work?		
10	Contractors providing support in preparing responses to Freedom of Information Act requests?		
11	Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industry Security Program described in 4.402(b))?		
12	Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses?		
13	Contractors participating in any situation where it might be assumed that they are agency employees or representatives?		
14	Contractors participating as technical advisors to a source selection board or participating as voting or non-voting members of a source evaluation board?		

WORKSHEET B (2 OF 2)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. (The list below is not comprehensive, as it excludes examples from DoDI 1100.22.)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL		YES	NO
	Does the performance involve:		
15	Contractors serving as arbitrators or providing alternative methods of dispute resolution?		
16	Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments?		
17	Contractors providing inspection services?		
18	Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details? (The direction and control of confinement facilities in areas of operations, however, is inherently governmental.)		
19	Private security contractors in operational environments overseas?		
20	Contract interrogators?		
21	Contractors providing combat and security training?		
22	Contract logistics support required for weapon systems that deploy with operational units?		
23	Do the contracted functions involve work that is at risk of becoming inherently governmental?		
24	Is there sufficient organic government expertise to oversee contractor performance of the contract?		
25	Are there sufficient control mechanisms and sufficient numbers of military and civilian employees to ensure that contractors are not performing inherently governmental functions?		
26	Is there a sufficient number of CORs appointed to ensure oversight of contract performance?		

WORKSHEET C

PERSONAL SERVICES

See rules for required use of the certification and worksheets on page 12, "Instructions."

Pursuant to FAR Part 37.104, a personal services contract is characterized by: "the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the Civil Service laws. Obtaining personal services by contract rather than by direct hire under competitive appointment circumvents those laws unless Congress has specifically authorized acquisition of those services." If a contract—by its written terms or in the way it is actually performed—involves any of the below elements, then action must be taken: the contract must be modified; the contracted functions must be performed in such a way as to avoid creating an employer-employee relationship; or the contract must be in-sourced (adapted from FAR Part 37.104(d)).

PERSONAL SERVICES		YES	NO
1	The contractor personnel are subject to the relatively continuous supervision and control of a governmental officer.		
2	The contractor personnel are performing on a government site.		
3	The principal tools and equipment are furnished by the government.		
4	The services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of an assigned function or mission.		
5	The need for the service provided can reasonably be expected to last beyond one year.		
6	The inherent nature of the service, or the manner in which it is provided, reasonably requires (directly or indirectly) Government direction or supervision of contractor employees in order to:		
	a) Adequately protect the Government's interest;		
	b) Retain control of the function involved; or		
	c) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.		
7	Comparable services meeting comparable needs are performed in this agency or similar agencies using civil-service personnel.		

Specific statutory authority for personal services is provided in 10 United States Code §129b for:

- experts or consultants where the services cannot be adequately provided by the Department;**
In general, the authority to procure personal services for experts and consultants pursuant to 10 U.S.C. §129b requires the approval of the ASA(AL&T) unless the services being acquired are covered by the delegation of authority covered in AFARS Sub Part 5137.104-90-2 (i.e. Stenographic reporting; stage, motion picture, or television productions; or legal services outside the United States). In all cases, additional procedures required by AFARS Part 5137.104-90 must be followed with appropriate approval authority.
- direct support of a defense intelligence component or counter-intelligence organization of the Department of Defense where the services are urgent or unique and cannot be practically obtained within the Department;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- direct support of special operations command where the services are urgent or unique and cannot be practically obtained within the Department;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- services provided by individuals outside the United States regardless of their nationality;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- or 10 U.S.C. §1091 for carrying out healthcare responsibilities in medical treatment facilities of the Department of Defense.**
DoDI 6025.5 limits this exception to healthcare personnel who participate in clinical patient care and does not include personnel whose duties are primarily administrative or clerical, nor personnel who provide maintenance or security services.

WORKSHEET D

See rules for required use of the certification and worksheets on page 12, "Instructions."

WORKSHEET D		YES	NO
1	Has in-sourcing been considered? Special consideration should be given to civilians in the following situations:		
	i) This function has been performed by Department of Defense civilian employees at any time during the previous ten-year period.		
	ii) The function is closely associated with the performance of an inherently governmental function (see Worksheet B).		
	iii) The function is performed pursuant to a contract awarded on a non-competitive basis.		
	iv) The contracting officer has determined that the contract has been performed poorly because of excessive costs or inferior quality.		
	v) The function is an acquisition workforce function.		
	vi) The function is a critical function (see Worksheet F).		
2	Has the contract been accurately reported in the Contractor Manpower Reporting Application (CMRA) (https://cmra.army.mil/) pursuant to Secretary of the Army policy? For new requirements, has the CMRA Requirement been included in the work statement? (CMRA reporting pursuant to Secretary of the Army policy is being used by the Department of the Army to comply with most of the reporting required by the National Defense Authorization Act for FY 2008, Section 807.)		
3	Has the contract requirement been documented in the Panel for Documentation of Contractors module of CMRA?		

WORKSHEET E

OUT-SOURCING AND CONVERSION OF FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

A "Yes" response to questions 1-4 below may make contracting this function prohibited by 10 U.S.C. Section 2461, which prohibits converting a function performed by at least one appropriated fund government employee to contract performance unless there has been a public-private competition under OMB Circular A-76. There is currently a Congressional moratorium on public-private competitions pursuant to the National Defense Authorization Act for FY 2010, Section 325. However, "conversion" of functions does not include the augmenting of civilian staff with contractors unless government employees are displaced, reassigned, subjected to a reduction in force, or otherwise adversely affected. (For additional information, please see the Government Accountability Office case John P. Santry B-402827. Agencies are recommended to discuss the issue with their employment and personnel law advisor and their contract law advisor.)

Pursuant to 10 U.S.C. 129a(f), contracting out some functions is prohibited under certain conditions. Agencies should take care to ensure that these circumstances do not arise; answering "Yes" to either or both of questions 5 and 6 below indicates that contracting is not allowed.

OUT-SOURCING AND CONVERSION OF FUNCTIONS		YES	NO
1	Will any non-temporary or non-term appropriated fund employee currently performing any functions described in the contract Statement of Work be displaced, reassigned, subjected to a reduction in force, or otherwise adversely affected as a result of the proposed contract action?		
2	Is the function proposed for contract performance meeting a requirement previously performed by a particular Army civilian position (or positions) when a program or budget decision eliminated the civilian position (whether that position was formerly documented with an authorization or was undocumented and performed by an overhire)?		
3	Is the function proposed for contract performance meeting a requirement previously approved for in-sourcing but that was never encumbered?		
4	Will the proposed contract action fundamentally change the nature of the work performed by appropriated fund employees?		
5	Is this new contract (or this increase in level of effort on a pre-existing contract) the result of the establishment of numerical goals or budgetary savings targets regarding the civilian workforce?		
6	Is this contract the result of the imposition of a civilian hiring freeze?		

WORKSHEET F

CRITICAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Pursuant to 10 U.S.C. 2463(b) and OFPP Policy Letter 11-01, special consideration should be given to in-sourcing "critical functions" to ensure that agencies have sufficient internal capability to maintain control over functions that are central to the agency's missions and operations. Agencies should have an adequate number of positions filled by Federal employees with the appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce.

One or more "Yes" responses to questions 1-3 below, and/or one or more "No" responses to questions 4-5 below, may indicate a "critical function."

CRITICAL FUNCTIONS		YES	NO
1	Is the function necessary to the agency being able to effectively perform and maintain control of its missions and operations and/or to maintain sufficient Government expertise and technical capabilities?		
2	Is the function recurring and long-term in duration?		
3	Does the performance of the function by a contractor entail operational risk (for example, if the contractor were to quit or otherwise suddenly be unable to perform their duties)?		
4	Does the agency have an adequate number of positions filled with Federal employees with the appropriate training, experience, and expertise to continue critical operations with in-house resources, another contractor, or a combination of the two in the event of contractor default?		
5	Does the agency have the capability and internal expertise to oversee and manage any contractors being used to support the Federal workforce?		

WORKSHEET G

SECURITY AND FIREFIGHTING FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Section 332 of the NDAA for FY 2003 allowed for the waiving of the prohibition—under 10 U.S.C. Section 2465(a)—on the use of contracts for the performance of security guard or firefighting functions under certain circumstances. The statutory authority to hire contract security guards was extended through FY 2012 by Section 343 of the NDAA for FY 2008 and has expired. If the answer to question 1 is "Yes" and none of the subsequently-listed exceptions apply, then contracting is prohibited.

SECURITY AND FIRE-FIGHTING FUNCTIONS		YES	NO
1	Is this contract for the performance of security guard or firefighting functions?		
	If the answer to the above question is "Yes," do any of the following exceptions apply?		
	a) The contract is to be carried out at a location outside the United States, its commonwealths, territories, possessions, and military installations, at which members of the armed forces would have to be used at the expense of unit readiness.		
	b) The contract is to be carried out on a Government-owned but privately-operated installation.		
	c) The contract (or renewal of the contract) is for the performance of a function under contract on September 24, 1983.		
	d) The contract is for a firefighting function for a period of one year or less and covers only the performance of firefighting functions that, in the absence of the contract, would have to be performed by members of the armed forces who are not readily available to perform such functions by reason of a deployment.		

INSTRUCTIONS

FOR USE OF THE REQUEST FOR SERVICES CONTRACT APPROVAL FORM

The following rules govern the required use of the certification and worksheets of this form:

1. The Request for Services Contract Approval Form is required by Army Federal Acquisition Regulation Supplement (AFARS) Subpart 5107.503(e).

2. The most current version of the form must be used and can be found at:

<http://www.asamra.army.mil/scra/documents/ServicesContractApprovalForm.pdf>

This form may not be altered in any way; local supplementation is acceptable only when such supplements are used with—and attached to—this form.

3. The form and Checklist are required and must be completed in the following circumstances:

- »Before new solicitations are issued or contracts are awarded;
- »Before options are exercised;
- »Before contracts are modified;
- »When each task order/delivery order is issued;
- »When funds are added (although the incremental funding of contracts does *not* require re-submission of the form);
- »When Army funds are being used to buy contractor labor, regardless of which organization is awarding or administering the contract;
- »When Army is the requiring activity, or is the executive agent for the mission/organization requiring the services;
- »When Army funds are being transferred to contracts outside of the Department of Defense.

This form is required for all service contracts, regardless of whether the contracts are enduring, temporary, about to end, funded in the base budget, or funded under Overseas Contingency Operations.

4. The Services Contract Approval Form is required for all service contracts (see FAR 7.502 Applicability). A “service contract” is for tasks to be performed, rather than supplies to be delivered. The following are not considered services:

- »Manufacturing/production contracts;
- »Utilities;
- »Subscriptions;
- »Off-the-shelf software;
- »Construction projects funded using Military Construction Army funds (however, repairs, maintenance, construction, and demolition projects that utilize Operations and Maintenance funds do require the Form);
- »Help desk and customer service support incidental to equipment or off-the-shelf software purchases;
- »Software licensing agreements and updates (customized software development, maintenance, and upgrades, however, *are* considered services);
- »Foreign Military sales/services;
- »Manufacturer’s warranties (extended maintenance/repair beyond the standard manufacturer’s warranty, however, *is* considered a service);
- »Delivery services incidental to a supply purchase.

5. Certification by the accountable GO/SES at the requiring activity is required.

»For a contract with a total value of less than \$100,000 (including all supplies and services, as well as all the option years combined), the accountable GO or SES in a requiring activity may delegate signature authority to a GS-15/O-6.

»For National Guard contracts, the U.S. Property and Fiscal Officer (USPFO) may approved/certify the Form.

»For services to support Courts-Martial, no approval/certification is required, but the Checklist must still be completed.

6. Checklist questions should be answered by persons in the requiring activity who know how the contract is administered, how it is performed, and who thoroughly understand the work being performed by the contractor. Checklist questions should be answered carefully, to ensure that the accountable GO/SES and the contracting officer have all relevant facts to support their decisions and/or certification.

7. If issues arise regarding the correct use or completion of the Request for Services Contract Approval Form, please contact the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) Force Management, Manpower and Resources, at 703-693-2109.

Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?

Lieutenant Colonel Shane R. Reeves* & Major William J. Johnson†

I. Introduction

On 6–7 February, the U.S. Military Academy’s Center for the Rule of Law and the International Law Division of the Naval War College¹ co-sponsored a workshop on the legal implications of Autonomous Weapon Systems.² The stated goal of the workshop was to discuss the future of the Law of Armed Conflict regarding this emerging means of warfare. Fostering communication and building bonds between the various operational attorneys, international scholars, and human rights advocacy groups interested in the topic was a secondary, but no less important, objective of the event. As contemporary warfare becomes increasingly complex—whether due to the hybridization of conflicts,³ the advent of new technologies,⁴ or the fading distinction between combatants and civilians⁵—novel legal issues will continue to arise. Only through a continuing dialogue

between scholars and practitioners on topics such as autonomous weapons will innovations in the law develop and address the unique challenges of modern warfare.⁶

II. Killer Robot or Roomba Vacuum?⁷

Autonomous weapons are those that, “once activated, can select and engage targets without further human operator involvement.”⁸ Though these weapons do not yet exist, a number of groups have recently campaigned⁹ for an absolute prohibition on research, development, and deployment of this technology.¹⁰ This coalition argues for a preemptive ban on autonomous weapons, believing the technology is immoral, violates “dictates of public conscience,”¹¹ and “may further the indiscriminate and disproportionate use of force” in warfare.¹² Holding these moral and legal arguments as unassailable truths, these anti-autonomous

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¹ The close affiliation between the U.S. Military Academy’s Center for the Rule of Law and the Naval War College’s International Law Division should in no way be construed as diminishing the importance of Beating Navy!

² A broader study on Autonomous Systems, led by the NATO Multinational Capability Development Campaign, is also ongoing. Along with the legal implications, the NATO study is researching the technological, operational, and ethical issues surrounding these new weapon systems. See North Atlantic Treaty Organization Allied Command Transformation, Vol. 3, *Innovation in Autonomous Systems: Policy, Technology, and Operations* (12 Dec. 2013) available at <https://www.act.nato.int/volume-3-innovation-in-autonomous-systems-policy-technology-and-operations>.

³ See U.S. DEP’T OF DEF. QUADRENNIAL DEFENSE REVIEW REPORT 8 (Feb. 2010) [hereinafter QDR] (“The term ‘hybrid’ has recently been used to capture the seemingly increased complexity of war, the multiplicity of actors involved, and the blurring between traditional categories of conflict.”); U.S. DEP’T OF ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY OPERATING CONCEPT 2016–2028, ¶ 2-2(a) (19 Aug. 2010) [hereinafter Army Operating Concept 2016–2028].

⁴ See, e.g., *U.S. Cyber Command: Organizing for Cyber Space Operations: Hearings Before the H. Comm. on Armed Services*, 111th Cong. 1 (2010) [hereinafter *Hearings*] (statement of Rep. Skelton, Chairman, H. Comm. on Armed Services) (discussing the various complications and risks being presented by cyber space).

⁵ See INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 7 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (last visited Apr. 7, 2014) (“[T]here is little reason to believe that the current trend towards increased civilian participation in hostilities will weaken over time.”).

⁶ See Major Shane Reeves & Major Rob Barnsby, *The New Griffin of International Law: Hybrid Armed Conflicts*, HARV. INT’L REV., Winter 2012, at 16–18 (discussing the risks associated with the law of armed conflict remaining static).

⁷ A roomba vacuum is an autonomous cleaning robot that removes dirt, dust, hair, and debris. See IROBOT ROOMBA VACUUM CLEANING ROBOT, <http://www.irobot.com/us/learn/home/roomba.aspx> (last visited Apr. 7, 2014). There have been no reported incidents of these autonomous robots attacking or killing any humans. However, in one incident, a roomba may have committed suicide. See Lee Moran, *Robot Suicide? Roomba Turns Itself on, Climbs onto Hotplate Where it Burns*, DAILY NEWS (Nov. 14, 2013, 9:56 AM), <http://www.nydailynews.com/news/world/roomba-commits-suicide-hotplate-article-1.1516652>.

⁸ U.S. DEP’T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13 (Nov. 2, 2012) [hereinafter DOD DIR. 3000.09], available at <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf>.

⁹ The most prominent group to oppose autonomous weapons is Human Rights Watch. See generally HUM. RHTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (Nov. 2012), <http://www.hrw.org/reports/2012/11/19/losing-humanity-0> [hereinafter LOSING HUMANITY].

¹⁰ See, e.g., CAMPAIGN TO STOP KILLER ROBOTS, <http://www.stopkiller-robots.org/2014/01/infographicaoav/> (last visited Apr. 7, 2014) (“Fully autonomous weapons—or killer robots—are weapons that can, without human control, detect, select and engage targets. They do not yet exist, but the rapid developments in robotics and autonomous technology indicate that it is only a matter of time before fully autonomous weapons become an inhumane reality.”); LOSING HUMANITY, *supra* note 9; Berlin Statement, International Committee for Robot Arms Control (Oct. 2010), <http://icrac.net/statements/> [hereinafter Berlin Statement].

¹¹ *Q & A on Fully Autonomous Weapons*, HUM. RHTS. WATCH, Oct. 21, 2013, <http://www.hrw.org/news/2013/10/21/qa-fully-autonomous-weapons>.

¹² Berlin Statement, *supra* note 10.

weapon advocates are vehemently working to prevent any possible future with autonomous robot weapons.¹³

Yet the “truths” these groups espouse as justification for prohibiting the future development of autonomous weapons are certainly open to debate. It is exceedingly difficult to claim a moral imperative to ban autonomous weapons¹⁴ when the technology is “simply too primitive . . . to comfortably draw conclusion[s]” as to the ethical consequences of their existence.¹⁵ In actuality, moral ambiguity surrounds discussions concerning autonomous weapons.

For example, it is possible that the advanced technology of autonomous weapons may provide increased granularity in targeting. A preemptive ban is shortsighted as this may subvert the overarching intent of the Law of Armed Conflict to protect civilians.¹⁶ In battlefields absent civilians, such as underwater or in space, autonomous weapons may reduce the suffering of combatants or even possibly eliminate the need for combatants.¹⁷ Does it not make sense to explore the possibility of reducing combatant suffering and death? Perhaps continuing to rely on human judgment and emotion versus an objective and detached machine in the decision to

use lethal force only increases the savagery of warfare.¹⁸ Should autonomous weapons be so easily dismissed if they can possibly give greater clarity during the “fog of war” and reduce tragic or emotional mistakes? These questions, and a litany of others, need to be explored without prejudice. There is simply not enough known about autonomous weapons to morally condemn their development, as there are serious humanitarian risks to prohibition and a very real possibility this technology will be “ethically preferable to alternatives.”¹⁹

Similarly, stating that autonomous weapons are categorically incapable of complying with the fundamental principles underlying the Law of Armed Conflict is clearly an overstatement.²⁰ Many believe that autonomous weapons may ultimately prove more capable of complying with the principle of distinction²¹ than currently existing weaponry.²² By extension, if autonomous weapons can decrease the risk to civilians and civilian objects, access to the technology can only help a commander comply with his obligations under the principle of proportionality.²³ Claims that autonomous

¹³ CAMPAIGN TO STOP KILLER ROBOTS, *supra* note 10 (statement of Professor Noel Sharkey, Chair of the International Committee for Robot Arms Control).

¹⁴ See Angela Kane, *Killer Robots and the Rule of Law*, WORLD POST, Jul. 7, 2013, http://www.huffingtonpost.com/A-View-from-the-United-Nations-killer-robots-and-the-rul_b_3599657.html (last visited Apr. 7, 2014) (Kane is the United Nations High Representative for Disarmament Affairs) (“We need not wait for a weapon system to emerge fully before appropriate action can be taken to understand its implications and mitigate and eliminate unacceptable risks.”).

¹⁵ Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT’L SEC. J. FEATURES 37 (2013), <http://harvardnsj.org/wp-content/uploads/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf> (“[U]nderstanding of the systems’ potential for both positive and negative ends is simply too primitive at this time to comfortably draw conclusions as to their legal, moral, and operational costs and benefits.”).

¹⁶ Protecting civilians is one of the primary goals of the law of armed conflict. See ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 4. Eliminating an autonomous weapon for humanitarian purposes, despite the possibility that the technology may help a commander adhere to his obligations under the law of armed conflict with greater precision, will contravene the very reason for the initial prohibition. See Shane R. Reeves & Jeffrey S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT’L SEC. J. FEATURES 6–9 (2013).

¹⁷ See Jeffrey S. Thurnher, *The Law That Applies to Autonomous Weapon Systems*, 17(4) ASIL INSIGHTS (Jan. 18, 2013), <http://www.asil.org/insights/volume/17/issue/4/law-applies-autonomous-weapon-systems> (“There may be situations in which an autonomous weapon system could satisfy this rule with a considerably low level ability to distinguish between civilian and military targets. Examples would include during high intensity conflicts against declared hostile forces or in battles that occur in remote regions, such as underwater, deserts, or areas like the Demilitarized Zone in Korea.”).

¹⁸ Schmitt, *supra* note 15, at 12–13 (arguing that “[i]n fact, human judgment can prove less reliable than technical indicators in the heat of battle”).

¹⁹ Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won’t Work and How the Laws of War Can*, 1, 21 (2013) (Stanford University, The Hoover Institution (Jean Perkins Task Force on National Security and Law Essay Series)), available at <http://ssrn.com/abstract=2250126> (“If all such systems are prohibited, and particularly if even research and development of relevant technologies is also prohibited, one never gets the benefits that might come from new technologies and future generations will not even be aware of the potential benefits that were given up . . .”).

²⁰ LOSING HUMANITY, *supra* note 9, at 37–42 (asserting that fully autonomous weapons will be unable to comply with fundamental principles of the Law of Armed Conflict).

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“[The principle of distinction], [i]n order to ensure respect for and protection of the civilian population and objects, [requires] the Parties to the conflict [to] at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly . . . direct their operations only against military objectives.”). Distinction is the most significant of the fundamental principles of the law of armed conflict as “[i]t is the foundation on which the codification of the laws and customs of war rests.” INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 598 (Yves Sandoz et al. eds., 1987).

²² See Anderson & Waxman, *supra* note 19, at 12.

²³ The proportionality principle holds that 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” is indiscriminate and a law of armed conflict violation. AP I, *supra* note 21, art. 51(5)(b); Art. 57(2)(b); see also U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 41 (18 July 1956) (C1, 15 July 1976). For a discussion on what defines “excessive,” see Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror*, in THE FUNDAMENTALS OF COUNTERTERRORISM LAW 21–22 (Lynne Zusman ed., 2014).

weapons cannot comply with the principle of military necessity demonstrate a lack of understanding concerning the concept.²⁴ It is unhelpful to view military necessity as a distinct principle, as the most prominent anti-autonomous weapon advocates do,²⁵ but rather as a “meta-principle” that has general applicability permeating the entirety of the Law of Armed Conflict, which is continually addressed in subsidiary positive law.²⁶ However, even under a “stand alone” analysis of military necessity, autonomous weapons “would not be unlawful *per se* because it is clear that autonomous weapon systems may be used in situations in which they are valuable militarily—that is, militarily necessary.”²⁷ By generally asserting that autonomous weapons are incapable of abiding by the Law of Armed Conflict,²⁸ opponents “melodramatically oversimplify” this important body of law while failing to recognize its strengths.²⁹

These efforts to stop “killer robots” are misguided. Autonomous weapons are a near-term reality, and it is naïve to believe that the technology will regress.³⁰ It is unrealistic to suspend all autonomous weapons testing and development until a legal and regulatory framework is created, as some have suggested, because the technological advances require a contemporaneous dialogue on the topic.³¹ The issues presented by autonomous weapons already exist; instead of

focusing on how best to obstruct this new means of warfare, emphasis should be placed on creating a partnership between scholars and practitioners to best determine the way forward on regulating autonomous weapons.³²

III. Learning from History

The importance of the form and function of the discussion on autonomous weapons cannot be overstated. Simply posing the view that autonomous weapons are inherently wrong and should not be developed will cause significant harm to the international community. How this harm may result is best illustrated through a historical analysis of the attempt to ban aerial bombardment³³ and the failure of those policies to prevent the unprecedented mass civilian casualties of World War II. This historical analysis, and particularly the failure of the anti-aerial bombardment advocates, is therefore instructive in the autonomous weapons context as contemporary activists echo the same arguments today.³⁴

Prior to 1899, the warring world had seen a few significant technological advancements that threatened to overthrow the status quo for civilized warfare. Notably, the crossbow, and its ability to penetrate a noble’s armor while being fired by an unskilled conscript, was seen as an unequivocal violation of chivalric code.³⁵ Pope Innocent II attempted to outlaw its use.³⁶ Not surprisingly, the range, accuracy, and lack of skill required for its use made the weapon too appealing for principalities to not use. The crossbow became the mainstay of feudal armies.³⁷ Similar to the crossbow, the preordained failure of the total ban-on-use approach was again demonstrated with aerial bombardment beginning in the late 18th Century.

The hot air balloon took its inaugural flight in 1783 with two innovative brothers, Joseph and Etienne Montgolfier, at

²⁴ LOSING HUMANITY, *supra* note 9, at 30 (arguing that robots would be unable to follow the rules of military necessity).

²⁵ *Id.*

²⁶ See Brian J. Bill, *The Rendulic “Rule”: Military Necessity, Commander’s Knowledge, and Methods of Warfare*, in 12 Y.B. INT’L HUMANITARIAN L. 119, 131 (2009) (“Military necessity is a meta-principle of the law of war . . . in the sense that it justifies destruction in war. It permeates all subsidiary rules.”); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 795–839 (2010); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16 (2004) (“Law of International Armed Conflict in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.”).

²⁷ Schmitt, *supra* note 15, at 22.

²⁸ LOSING HUMANITY, *supra* note 9, at 30.

²⁹ *Id.* at 8.

³⁰ Cadet Allyson Hauptman, *Autonomous Weapons and the Laws of Armed Conflict*, 1 MIL. L. REV. 170 (Winter 2013).

³¹ In April 2013, a United Nations Special Rapporteur issued a report to the UN Human Rights Council recommending a suspension of all AWS testing and development until nations can agree on a legal and regulatory framework for their use. Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013) (by Christof Heyns), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf. It is unclear whether this report includes a prohibition on research. However, it is reasonable to assume that the broad prohibition on development, production, and use of autonomous weapons advocated for by many would also include research. See, e.g., LOSING HUMANITY, *supra* note 9, at 5.

³² Hauptman, *supra* note 30, at 1.

³³ See generally RULES CONCERNING THE CONTROL OF WIRELESS TELEGRAPHY IN TIME OF WAR AND AIR WARFARE, DRAFTED BY A COMMISSION OF JURISTS AT THE HAGUE, DEC. 1922–FEB. 1923, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=B9CA3866276E91CFC12563CD002D691C&action=openDocument> (last visited Apr. 7, 2014). The draft Part II of the unsigned convention proposed specific rules for the use of aerial bombardment, but the draft never produced a binding agreement. *Id.*

³⁴ CAMPAIGN TO STOP KILLER ROBOTS, *supra* note 10, at 1.

³⁵ Paul A. Robblee, Jr., *The Legitimacy of Modern Weaponry: A Thesis Presented to the Judge Advocate General’s School, United States Army 6* (1975) (citing C. FENWICK, INTERNATIONAL LAW 667 (4th ed. 1965)); J. SPAIGHT, WAR CRIMES ON LAND 76 (1911). Pope Innocent II attempted to prohibit the use of the crossbow in 1139 at the second Lateran Council.

³⁶ Robblee, *supra* note 35, at 6.

³⁷ *Id.*

the helm.³⁸ It did not take long for the balloon to assume military use. By the Franco-Prussian War, the balloon was a useful military reconnaissance vehicle.³⁹ It was only a matter of time until military strategists envisioned the balloon as not only a means to reconnaissance, but also as a means to attack the enemy from an undisputed position of advantage. Many feared that aerial bombing from great heights would cause too much collateral damage.⁴⁰ This fear was addressed during the Hague Conferences of 1899. The current conversation on autonomous weapons mirrors that which occurred for aerial bombardment during the Hague Conference and is memorialized in Declaration IV, 1 of the 1899 Hague Convention.⁴¹

Declaration IV, 1 prohibited the use of balloons to launch projectiles. Twenty-four countries became States party to the declaration.⁴² These were significant states as well, with France, Austria-Hungary, and Germany ratifying the declaration.⁴³ The balloon in 1899 is not unlike the autonomous weapon in 2014. Military applications are clear, but the full potential of this new weapon system remains limited by the imagination and the ever-advancing threshold of technological innovation. If the balloon and the autonomous weapon system are analogous, then the anti-autonomous weapon system group should be on the cusp of an international agreement prohibiting its use. Any such belief is wholly misplaced. In fact, the subsequent history of aerial bombardment demonstrates that a prohibitive agreement is at best useless, if not damaging to the advancement of the law.

The 1899 prohibition on aerial bombardment contained a self-limiting provision—it expired after five years.⁴⁴ This is not surprising. The concept of aerial bombardment as a feasible form of attack remained in its infancy, but the risks were clearly articulable.⁴⁵ States were reluctant to sign away

their ability to employ a valuable weapon system that could hold great military advantage in the future. They were also reluctant to give up its use immediately unless potential adversaries also made the same concession.⁴⁶ In 1907, the anti-aerial bombardment regime sought to renew their 1899 victory and succeeded in doing so with Declaration XIV in 1907.⁴⁷ This second meeting and renewal of the 1899 Declaration was met with greater resistance and apprehension than the previous declaration, and its titling became narrower.⁴⁸ International apprehension regarding an all-out ban on aerial bombardment was brought on by the triumph of another pair of brothers—Orville and Wilbur Wright. In December, 1903, the Wright Brothers made the airplane a reality.⁴⁹ The clumsy balloon with its dubious strategic implications moved aside to make room for a true revolution in military affairs, the capability to deliver an explosive payload to a pre-designated target in distant lands.⁵⁰

The airplane did not make aerial bombardment less problematic under the law of armed conflict. In 1907, a bomb dropped from an airplane was no more likely to be accurate than a bomb dropped from a balloon. In fact, the bomb dropped from the balloon was probably more accurate if dropped from a stationary balloon at lower altitudes. However, the strategic importance of the method of attack took on a whole new meaning.⁵¹ States realized that not

affect accuracy. Cloud cover and ground fog directly impacted the ability to positively identify intended targets. *Id.*

⁴⁶ Balloon Declaration of 1899, *supra* note 41. “The present Declaration is only binding on the Contracting Powers in case of war between two or more of them. It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power.” *Id.*

⁴⁷ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, 36 Stat. 2439 [hereinafter Balloon Declaration of 1907].

⁴⁸ *Id.* The number of signatories dropped from twenty-six (twenty-four ratifying) in 1899 to a mere fifteen signatories in 1907. Although by 1973, the declaration had twenty signatories, the notable key missing parties were Germany and Austria. The full title of the Balloon Declaration of 1899 contained a clause prohibiting “other new methods of a similar nature,” while the 1907 Balloon Declaration removed that clause from the title. However, the declarations contained identical language in describing the prohibition: “The Contracting Powers agree to prohibit, for a term of five years [for a period extending to the close of the Third Peace Conference], the launching of projectiles and explosives from balloons, or by other new methods of similar nature.” *Id.*

⁴⁹ Gomez, *supra* note 38.

⁵⁰ Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT’L L.J. 1, 8–11 (2002). See generally Arthur K. Kuhn, *Beginnings of an Aerial Law*, 4 AM. J. INT’L L. 109, 118 (1910).

⁵¹ A hot air balloon is essentially limited to travel based upon wind and weather. The balloon pilot has only limited control over the final destination. An airplane has speed and navigation capabilities that make it a clear tool to project combat power.

³⁸ Javier Guisández Gomez, *The Law of Air Warfare*, 323 ICRC INT’L REV. 195, 347 (1998).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Declaration (IV, 1), to Prohibit, for the term of Five Years, the Launching of Projectiles and Explosives from Balloons and Other Methods of Similar Nature, The Hague 29 July 1899, 32 Stat. 1839 [hereinafter Balloon Declaration of 1899].

⁴² *Id.* The following states ratified the declaration: Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Greece, Iran, Italy, Japan, Luxembourg, Mexico, Montenegro, Netherlands, Norway, Portugal, Romania, Russia, Serbia, Spain, Sweden, Switzerland, and Thailand. Turkey and the United States both signed, but did not ratify, the declaration.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Gomez, *supra* note 38, at note 5. Many factors affected the accuracy of a bomb dropped from a balloon. The bomb was aimed simply by visual orientation. Weather, to include air temperature and winds could greatly

having the capability to fight from the air would put them at a distinct disadvantage.⁵²

The concerns of states and the positions of interested parties concerning balloons are eerily like the current conversation on autonomous weapons.⁵³ Human rights advocates want to place an absolute prohibition on autonomous weapons⁵⁴ and are seemingly gaining ground with at least a few states to create a multilateral agreement.⁵⁵ Like aerial bombardment at the turn of the twentieth century, autonomous weapons remain masked in myth and science fiction, making any such agreement for naught.

By the onset of World War II, the strategic applications of aerial bombardment came to fruition and their deadly nature continued to rapidly evolve through the war.⁵⁶ The international community knew that the potential for massive civilian casualties through the use of aerial bombardment was an undeniable reality.⁵⁷ However, attempts to regulate it away failed unequivocally.⁵⁸ The tactical and strategic advantages of aerial bombardment caused the power brokers of world politics to push back from the bargaining table to

prepare their air fleets for war.⁵⁹ The civilian casualties in that war would be unprecedented.⁶⁰

The failed attempts to regulate away bombs from the sky are a tragic and sad tale. The tragedy is all the more disheartening because it was avoidable, had the conversation focused not on prohibiting aerial bombardment, but rather on improving the technology of bombardment to prevent civilian casualties and bringing aerial bombardment into compliance with existing laws of armed conflict. Within a matter of decades following World War II, the technology of air warfare made it possible to distinguish within meters of a target and a civilian object.⁶¹ By the Kosovo air war in 1999 (only 50 years after the end of World War II), normal citizens could watch a bomb hitting a moving truck from the comfort of their living rooms.⁶² The technology for smart bombs was born out of the political sensitivity associated with the United States' attacks against Saddam Hussein's infrastructure inside the crowded city of Baghdad.⁶³ However, the efficacy of smart bombs in a conventional, total war should not be disputed.⁶⁴ Indeed, aerial bombardment has come a long way since the balloon. Unfortunately, that progress resulted in the loss of hundreds of thousands of innocent lives.

The prohibitive regime against aerial bombardment at the turn of the twentieth century likely contributed to the mass civilian casualties of World War II. The unrealistic and misguided attempt to ban aerial bombardment retarded the development of the more discriminative technology that

⁵² Lippman, *supra* note 50, at 8–11.

⁵³ See *supra* note 31.

⁵⁴ *Id.*

⁵⁵ See Brid-Aine Parnell, *Killer Robots Could Be Banned by the UN Before 2016*, FORBES, Nov. 18, 2013, available at <http://www.forbes.com/sites/bridaineparnell/2013/11/18/killer-robots-could-be-banned-by-the-un-before-2016/2/>. Ms. Parnell does not specifically cite to states that are interested in signing amendments to the Conventional Weapons Treaty governing autonomous weapons systems. However, the United Nations Human Rights Committee is interested in pursuing the topic, which increases the likelihood of a possible international agreement. The number of country signatories does not necessarily indicate the efficacy of a particular treaty. If the majority of signatories are states with little interest in the development of autonomous weapons, or are states with little capacity to contribute to the technology, then such a treaty is of little value in the development of an enforceable international legal regime. See John B. Bellinger, III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. OF THE RED CROSS, no. 866, at 443, 445–46 (2007) (Reports and Documents).

⁵⁶ Lippman, *supra* note 50, at 15–20.

⁵⁷ See Appeal of President Franklin D. Roosevelt on Aerial Bombardment of Civilian Populations (Sept. 1, 1939), available at <http://www.dannen.com/decision/int-law.html#E> (last visited Apr. 7, 2014) (“If resort is had to this form of inhuman barbarism during the period of the tragic conflagration with which the world is now confronted, hundreds of thousands of innocent human beings who have no responsibility for, and who are not even remotely participating in, the hostilities which have now broken out, will lose their lives.”).

⁵⁸ Aerial bombing against area targets culminated in World War II with the nuclear bomb attacks against Hiroshima and Nagasaki, but the use of unguided aerial bombing continued through to the Vietnam War. BARRETT TILLMAN, *WHIRLWIND: THE AIR WAR AGAINST JAPAN, 1942–1945*, at 231–45. Lippman, *supra* note 50, at 31–35.

⁵⁹ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 22–25 (2012).

⁶⁰ STEPHEN A. GARRETT, *ETHICS AND AIRPOWER IN WORLD WAR II* 1-22 (1993).

⁶¹ Richard P. Hallion, *Precision Guided Munitions and the New Era of Warfare 3* (Air Power Studies Ctr., Working Paper No. 53, 1995), available at <https://www.fas.org/man/dod-101/sys/smart/docs/paper53.htm> (last visited Apr. 7, 2014).

⁶² Commanders and human rights organizations could also review strikes for compliance with the law of armed conflict. The development of precision in aerial munitions took giant leaps forward following World War II. For instance, the accuracy (or circular error probable (CEP)) for aerial bombardment was 3.3 times better in the Korean War than it was in World War II. By the Vietnam War, the CEP was reduced to less than 1/8th of what it had been in World War II. *Id.*

⁶³ Hallion, *supra* note 61, at 3.

⁶⁴ [Precision Guided Munitions] provide density, mass per unit volume, which is a more efficient measurement of force. In short, targets are no longer massive, and neither are the aerial weapons used to neutralize them. One could argue that all targets are precision targets—even individual tanks, artillery pieces, or infantrymen. There is no logical reason why bullets or bombs should be wasted on empty air or dirt. Ideally, every shot fired should find its mark.

PHILIP S. MEILINGER, 10 PROPOSITIONS ABOUT AIR POWER 45 (1995), available at <http://www.afhso.af.mil/shared/media/document/AFD-100525-026.pdf>.

appeared shortly after the war.⁶⁵ Had the conversation been focused upon accepting the new technology as a means of warfare, and making that means more discriminating, the conversation could have pushed the technology into greater compliance with international norms. The prohibitive regime bullying itself to outlaw autonomous weapons is making the same mistake its predecessors made a century ago. Autonomous weapons will be a reality, and if their use means winning the war, they will be used. But they can be made better. The technology needs to be pushed in front of the necessity before valuable time and a purposed direction are lost.

IV. Scholars and Practitioners Unite!

Collaboration between scholars and practitioners is the most likely way to develop creative, yet pragmatic, answers to the difficult questions created by autonomous weapons. Each of these groups has a particular strength. Scholars are more likely to think beyond what the Law of Armed Conflict is in practice, or *lex lata*, and focus on *lex ferenda*, or what the law should become.⁶⁶ Practitioners inject experience, realism, and operational acumen,⁶⁷ ensuring that any solution developed is workable. In isolation, these strengths can at times become weaknesses, with scholars floundering in theory and practitioners myopically focused on current operations. But together, scholars and practitioners have the opportunity to amalgamate theory and experience into a solution that is supported by all.

Of course these are only stereotypes, with many scholars having an operational background and many practitioners being accomplished academics. Regardless of who brings what perspective to the discussion, the need for innovation couched in realism requires the traditional virtues of both the “ivory tower” and “the field.” Academics and operational attorneys must make an effort to bridge the divide between their two distinct cultures. The interaction

⁶⁵ The prohibitive regime likely worked to encourage states to assume the view that aerial bombardment fell under a different legal regime than other methods of attack. The derivative argument is as follows: If the existing law of armed conflict regime for land warfare applied to aerial bombardment, then activists would likely not need to seek a prohibitive international agreement; therefore, states are free to assume that the existing customary international law principles for land warfare do not apply in an aerial campaign. See also Lippman, *supra* note 50, at 15–20. It was not until the Additional Protocols to the Geneva Conventions of 1949 that states truly recognized that the fundamental principles of the law of land warfare apply equally to aerial bombardment.

⁶⁶ *Lex Lata* is defined as “what the law is.” See Major J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117 (2008). *Lex Ferenda* is defined as “what the law should be.” *Id.*

⁶⁷ For example, an operational law attorney’s understanding of the collateral damage estimate methodology (CDEM) would inform any discussion on autonomous weapons and proportionality. See, e.g., Schmitt, *supra* note 15, at 19–20.

created will result in relationships and eventually, effective solutions to difficult problems. Undoubtedly, creating a framework to regulate autonomous weapons will require collaborative effort between scholars and practitioners.

The need for collaboration between scholars and practitioners, however, goes beyond simply discussing autonomous weapons. Uncertainty in warfare is becoming commonplace, with ambiguity in armed conflict becoming the norm rather than the exception.⁶⁸ As the “pace of change continues to accelerate,”⁶⁹ the complexities of the modern battlefield risk overwhelming the understandings that have traditionally regulated warfare. “Increasingly, the treaties and customary laws of the past century that comprise the Law of Armed Conflict, while recognized as extremely meaningful, have proven incapable of satisfactorily resolving the myriad of legal issues arising from modern warfare.”⁷⁰ The international community cannot afford to allow the Law of Armed Conflict to become an anachronism incapable of addressing the challenges of contemporary conflicts.⁷¹ Ensuring the law does not slip into irrelevance requires a proactive and broad approach to problem-solving. Partnerships—like those being developed between scholars and practitioners to find answers to the difficulties arising from autonomous weapons—are perhaps the best hope of ensuring that the primacy of the Law of Armed Conflict remains unquestioned.

V. Conclusion

The rise of autonomous weapons understandably creates concern for the international community, as it is impossible to predict exactly what will happen with the technology. Yet the emergence of a new means of warfare is not a unique phenomenon and is assumed within the Law of Armed Conflict.⁷² The international community has seen the cost of

⁶⁸ See ARMY OPERATING CONCEPT 2016–2028, *supra* note 3, ¶ 2-2(a); QDR, *supra* note 3, at iii.

⁶⁹ QDR, *supra* note 3, at iii.

⁷⁰ Reeves & Barnsby, *supra* note 6, at 17.

⁷¹ *Id.* (discussing the ramifications if the Law of Armed Conflict becomes inconsequential due to stasis).

⁷² AP I, *supra* note 21, art. 36. Article 36 requires that “in study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.” *Id.* Though the United States has not ratified AP I, it classifies many portions of the protocol as customary international law. See generally Michael J. Matheson, *Remarks on the U.S. Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987). Article 36 is considered customary international law and therefore obligatory for all state actors. See Schmitt, *supra* note 15, at 28. For a more detailed discussion on Article 36, see Michael N. Schmitt & Jeffrey S. Thurnher, “Out of the Loop”: *Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NAT’L SEC. J. 231, 271 (2013).

prohibitive regimes that deny the reality of necessity in the development of aerial bombardment. Further, those exploring the idea of autonomous weapons are sensitive not only to their legal obligations, but also to the various ethical and moral questions surrounding the technology.⁷³ Joining the drive for technology with the drive for humanity can only improve both, while a divergence of the two could cause a repetition of past calamities. Rather than attempting to preemptively ban autonomous weapons before understanding the technology's potential, efforts should be made to pool the collective intellectual resources of scholars

and practitioners to develop a road forward. Perhaps this would be the first step to a more comprehensive and assertive approach to addressing the other pressing issues of modern warfare.

⁷³ See Reeves & Thumher, *supra* note 16, at 9 (“[S]tates recognize the unique legal implications associated with autonomous weapons and are implementing the measures they deem appropriate to manage this emerging technology. States are entitled to the time and flexibility necessary to fully examine these issues and establish responsible norms.”).

Can I Drill From Home? Telework (or the Lack Thereof) in the Army Reserve

Major T. Scott Randall*

I. Introduction

Army Reserve Soldiers perform duty in many locations throughout the world. Reserve Soldiers typically perform duty one weekend per month, called Inactive Duty Training (IDT), and two weeks per year, called Annual Training (AT).¹ The issue arises as to the extent to which these Reserve Soldiers may fulfill their training obligations from their homes or offices. To illustrate this issue, consider the following hypothetical. You are a member of the 22nd Legal Operations Detachment, Trial Defense Services, in San Antonio, Texas. You receive a call from a new client during a weekday at your office. After a long phone conversation with your client, you learn he is subject to a general officer memorandum of reprimand (GOMOR). You further learn the Soldier's response is due in two days. After receiving a series of e-mails from your client through your personal e-mail account, you assist him in drafting his GOMOR response from home. The entire action takes you approximately three hours. Can you validly receive military service credit for your representation?

On 9 December 2010, President Obama signed into law the Telework Enhancement Act of 2010 (TEA).² This legislation mandates the heads of all executive agencies, including the Department of Defense (DoD), establish telework policies for their employees.³ The intent of the TEA is for the Federal Government to reduce its energy consumption, increase job satisfaction and productivity among its employees, reduce urban transportation congestion, and increase its ability to disperse work during periods of emergency.⁴ Servicemembers are included within the definition of employees covered by the act.⁵

Under the TEA, telework is defined as a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position from an approved worksite (typically the employee's home) other than the location from which the employee would otherwise perform duty.⁶ Significantly, to be eligible for telework, the TEA mandates that each employee sign a written telework agreement outlining the terms and conditions of the employee's telework duties and receive training on telework procedures.⁷ Supervisors are called upon to emphasize that if productivity is negatively affected by teleworking or if employees otherwise fail to abide by their telework agreements, then such employees will lose their telework eligibility.⁸

The DoD implemented the TEA through DoD Instruction (DoDI) 1035.01, which "actively promotes" the adoption of teleworking policies and practices throughout military departments.⁹ Department of Defense Instruction 1035.01 specifically applies to both civilian employees and uniformed servicemembers.¹⁰ However, "servicemember eligibility is discretionary and determined by the relevant commander or supervisor, consistent with [DoDI 1035.1] and Component specific guidance."¹¹ Further, servicemember responsibilities associated with telework programs are left to the discretion of each of the DoD components.¹² Therefore, the military components are called upon to allow maximum flexibility for employees or servicemembers to telework to the extent mission readiness is not compromised.¹³

All military departments have adopted telework policies for their civilian employees.¹⁴ Telework policies have also

¹ See U.S. DEP'T OF ARMY, REG. 140-1, ARMY RESERVE MISSION, ORGANIZATION, AND TRAINING para. 3-1 (20 Jan. 2004) [hereinafter AR 140-1]. Inactive duty training (IDT) periods performed by Reserve Soldiers assigned to Reserve units, called Troop Program Units (TPUs), are called unit training assemblies (UTAs). *Id.* para. 3-4. A UTA is an authorized and scheduled training assembly of at least four hours, including roll call and rest periods. *Id.* At least one day's pay or one retirement point, or both, is authorized for each assigned or attached person who satisfactorily completes the entire UTA. *Id.* This assembly is mandatory for all TPUs. *Id.* Two or more UTAs conducted consecutively are called multiple unit training assemblies (MUTAs). *Id.* No more than two UTAs may be performed in one day. *Id.*

² See 5 U.S.C. § 6501 (2013).

³ See *id.* § 6502.

⁴ See *id.* § 6506(b)(2)(F).

⁵ See *id.* § 6501. Section 6501 refers to the definition of employee found in 5 U.S.C. § 2105, which includes servicemembers within its scope. *Id.*

⁶ See *id.* § 2105.

⁷ See *id.* § 6502.

⁸ *Id.*

⁹ See U.S. DEP'T OF DEF., INSTR. 1035.01, TELEWORK POLICY para. 4 (4 Apr. 2012) [hereinafter DoDI 1035.01].

¹⁰ See *id.* para 2.

¹¹ See *id.* encl. 3.

¹² See *id.* encl. 2.

¹³ See *id.* encl. 3.

¹⁴ See *Telework*, U.S. ARMY CIVILIAN PERSONNEL (Apr. 23, 2012), <http://cpol.army.mil/library/permis/5020.html>; *Telework*, U.S. MARINE CORPS HUMAN RESOURCES AND ORGANIZATIONAL MANAGEMENT, <http://www.hqmc.marines.mil/hrom/AdvisoryServ/EmployeeRelations/Telework.aspx> (last visited Mar. 31, 2014); *Telework*, U.S. NAVY CIVILIAN HUMAN RESOURCES, <http://www.donhr.navy.mil/Benefits/Pages/Default.aspx#worklife>, last visited (Apr. 1, 2014); U.S. DEP'T AIR FORCE POLICY DIR. 36-8 (10 Feb. 2009); *Telework*, U.S. COAST GUARD, OFFICE

been extended to military members of the Reserve Components (RCs).¹⁵ This extension brings into sharp contrast the differing cultures and missions of the seven RCs.¹⁶ All of the RCs utilize telework as a legitimate form of military duty except the Army Reserve.¹⁷

This article reviews the telework policies implemented by the RC. It then looks at the telework policy of the Army National Guard with regard to its full-time support personnel. Finally, it proposes the Army Reserve implement a telework policy for the benefit of both Reserve Soldiers and their units.

II. Teleworking Policies in the RC

Under Marine Corps Order 1001R.1K, the Commandant of the Marine Corps allows Reserve Marines to perform IDT via telecommuting.¹⁸ This policy is very narrow in that only certain forms of IDT associated with special projects and additional duties may be used in connection with telework.¹⁹ To use telework, the task, assignment, or project task must not require Reserve Marines to be present at their regular places of duty.²⁰ Therefore, the Marine Reserve telework

policy takes advantage of the Reserve Marine's availability while negating the impact of physically commuting to home station.²¹

Pursuant to Commander, Naval Reserve Forces Instruction 1001.5E, Reserve commanders are encouraged to implement telework policies for the performance of IDT.²² "Telecommuting" is the practice of performing assigned military duties at home or some other nonmilitary location.²³ For the Naval Reserve, telework is viewed as a management option meant to increase flexibility and productivity by maximizing resources, and is not to be used solely for the convenience of the Sailor.²⁴ Participants are required to sign a written agreement acknowledging their accountability and personal responsibility, including coverage by the UCMJ and other regulations concerning determinations for line of duty, injury or illness, and misconduct.²⁵ Reserve Sailors that have been authorized to perform drills via telecommuting must perform at least two drills per quarter at their assigned unit to ensure completion of organization and administrative requirements.²⁶

Under Air Force Instruction 36-2254, telework is also viewed as a management tool and "is a complementary way of doing business, which moves work and training to the people instead of moving the people to the work or training."²⁷ In general, telecommuting means working or training from an alternate location away from the official duty location.²⁸ Telecommuting may be used to allow Reserve Airmen to work/train in an official capacity for pay and/or points away from their official duty location in either an active duty or IDT status.²⁹ However, under no circumstances may Reserve Airmen perform all of their reserve duty via telework.³⁰ Air Force Instruction 36-2254 makes clear that the UCMJ applies during telecommuting,

OF CIVILIAN HUMAN RESOURCES (Feb. 7, 2014), <http://www.uscg.mil/yotf/cg121/benefits/telework.asp>.

¹⁵ See U.S. MARINE CORPS, ORDER 1001R.1K, MARINE CORPS RESERVE ADMINISTRATIVE MANAGEMENT MANUAL (22 Mar. 2009) [hereinafter MCRAMM]; U.S. DEP'T OF NAVY, COMMANDER, NAVAL RESERVE FORCE INSTR. 1001.5E, ADMINISTRATIVE PROCEDURES FOR THE DRILLING RESERVE AND PARTICIPATING MEMBERS OF THE INDIVIDUAL READY RESERVE (21 Mar. 2005) [hereinafter COMMNAVRESFOR INSTR. 1001.5E]; U.S. DEP'T OF AIR FORCE, INSTR. 36-2254, RESERVE PERSONNEL TELECOMMUTING/ADVANCED DISTRIBUTED LEARNING GUIDELINES (18 June 2010) [hereinafter AFI 36-2254]; AIR NATIONAL GUARD, INSTR. 36-8001, AIR NATIONAL GUARD TRADITIONAL GUARD MEMBER TELECOMMUTING PROGRAM (21 Jan. 2012) [hereinafter ANGI 36-8001]; U.S. COAST GUARD, COMMANDANT, INSTR. 1230.1, COAST GUARD TELECOMMUTING PROGRAM (15 July 1997) [hereinafter COMDTINST 1230.1]; Memorandum from Chief, National Guard Bureau, to State Adjutant Generals, subject: National Guard Title 32 Telework Policy Guide (23 Mar. 2010) [hereinafter NGB Title 32 Memo].

¹⁶ MCRAMM, *supra* note 15; COMMNAVRESFOR INSTR. 1001.5E; AFI 36-2254; ANGI 36-8001; COMDTINST 1230.1; NGB Title 32 Memo. The seven Reserve Components are the Army National Guard of the United States, Air National Guard of the United States, Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve. See 10 U.S.C. § 10101(2011).

¹⁷ *Id.* The Army National Guard allows their full-time support (FTS) personnel to perform duty through telework. See NGB Title 32 Memo, *supra* note 15. The FTS personnel are composed of Active Guard Reserve (AGR) Soldiers and military technicians. *Id.*

¹⁸ See MCRAMM, *supra* note 15, para. 5400.

¹⁹ *Id.* The types of IDT used for telework include additional training periods (ATP) and readiness management periods (RMP). *Id.* para. 3200. These two forms of IDT are used for special projects and duties that are in addition to the regular forty-eight IDT periods completed by all RC Marines. *Id.*

²⁰ *Id.* para. 5402.

²¹ *Id.*

²² See COMMNAVRESFOR INSTR. 1001.5E, *supra* note 15, art. 617, at 21. There is no limitation regarding the type of IDT that may be performed via telework. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* Interestingly, The Navy Judge Advocate General has adopted a specific telework policy for legal services. See U.S. DEP'T OF NAVY, JAGINST 12620, TELEWORK PROGRAM (10 Jan. 2011) [hereinafter JAGINST 12620]. Under this policy, both active duty and civilian employees of the Navy JAG Corps may perform their duties via telework. *Id.*

²⁷ See AFI 36-2254, *supra* note 15, para 1.1.

²⁸ *Id.*

²⁹ *Id.* para. 1.2.

³⁰ *Id.* para. 1.3.

line of duty procedures will be followed in the event of an injury, and a written telework agreement must be signed prior to the commencement of telecommuting.³¹

Similarly, Air Force National Guard (AFNG) Instruction 36-8001 allows Air National Guardsmen to perform both active duty and IDT via telework.³² Telecommuting, as a management tool, authorizes commanders to allow AFNG drilling status guard members to work in an official capacity for pay and/or points away from the official duty location.³³ Interestingly, AFNG judge advocates and medical doctors are specifically limited to a maximum of two drills (eight periods of IDT) and no more than five days AT in a telecommute status.³⁴ To begin a teleworking project, the telecommuter, supervisor, and approval authority must sign a written telework agreement and complete a telecommuter inspection checklist.³⁵ Telecommuters are also subject to applicable military laws, regulations, and instructions.³⁶ However, the wear of the uniform during performance of duty by telework is not required.³⁷

Under Commandant Instruction 12630.1, Coast Guard members assigned to both active and reserve billets are qualified to participate in the Coast Guard's telecommuting program.³⁸ A Coast Guard member is required to sign a written telework agreement prior to the commencement of activities and receive an orientation on organizational goals and policies regarding telework.³⁹ However, there are no specific duty limitations regarding the use of telework by either active duty or reserve Coast Guard members.⁴⁰ The Coast Guard's telework policy is consistent with DoD goals in its declaration that the use of technology via telework can help improve employee job satisfaction and quality of life, while also ameliorating transportation issues by decreasing traffic, parking congestion, energy use, and air and noise pollution.⁴¹

III. Army National Guard Telework Policy

On 23 March 2010, the Chief, National Guard Bureau (NGB) issued a memorandum to all adjutant generals regarding telework for Title 32 employees.⁴² In this memorandum, the Chief, NGB provides full support for efforts to implement telework policies throughout the Army National Guard.⁴³ Specifically, such policies help recruit and retain qualified individuals, benefit society through decreased energy consumption, pollution, and traffic, and make up a part of each state's response to a pandemic health event.⁴⁴ The memorandum also makes clear that the establishment of telework policies is the responsibility of each state's adjutant general.⁴⁵ Accordingly, the use of operations and maintenance funds administered by the NGB are authorized for telework purposes.⁴⁶

Many states have implemented telework policies for their Title 32 employees and servicemembers.⁴⁷ An example is the Arkansas Adjutant General issued policy 2010-05, which institutes a telework policy for the Arkansas National Guard.⁴⁸ This policy applies to all full-time federal employees.⁴⁹ These employees include Title 32 Active Guard Reserve (AGR) Soldiers and military technicians.⁵⁰ The policy does not cover drilling National Guard Soldiers and, consequently, does not apply to IDT or active duty with respect to these Soldiers.⁵¹ Similar to the telework policies implemented by the other RCs, the Arkansas National Guard telework policy calls for a written telework agreement to be signed by the Soldier/employee and requires telework orientation prior to beginning a telework project.⁵²

³¹ *Id.* para. 1.7.

³² See ANGI 36-8001, *supra* note 15, para. 2.

³³ *Id.*

³⁴ *Id.* para. 2.1.2.

³⁵ *Id.* para. 3.

³⁶ *Id.* para. 6.1.

³⁷ *Id.* para. 8.2.

³⁸ See COMDTINST 1230.1, *supra* note 15, para. 6.

³⁹ *Id.* para. 10.

⁴⁰ *Id.* para. 6.

⁴¹ *Id.* para. 7.

⁴² See NGB Title 32 Memo, *supra* note 15. Title 32 refers to the section of U.S. code under which National Guard Soldiers and employees serve when they are performing duties under state control, but are funded with federal funds. See 10 U.S.C. § 101(d)(6)(A) (2013).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, e.g., GEORGIA NATIONAL GUARD, TELEWORK POLICY, GEORGIA NATIONAL GUARD HUMAN RESOURCES PERSONNEL POLICY 12-01 (14 Sept. 2012); MARYLAND NATIONAL GUARD, FULL TIME SUPPORT TELEWORK PROGRAM (1 Feb. 2006); Memorandum from Ohio Adjutant Gen., to Ohio National Guard Commanders, subject: Telework Policy (8 Dec. 2011).

⁴⁸ See Memorandum from Ark. Adjutant General, to Ark. National Guard Commanders, subject: TAG Policy 2010-05, Arkansas National Guard (AR NG) Telework Policy for Full-time Federal Employees (10 June 2010) [hereinafter AR NG Telework Policy].

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Telework may be performed on a regular or recurring basis, or on a situational basis (ad hoc).⁵³ Only motivated, dependable employees may be chosen by supervisors for telework, as telework is a management tool and not a benefit of employment.⁵⁴

IV. Current Army Policy and the Need for Telework in the Army Reserve

Current Army policy does not support the use of telework for active duty or IDT for members of the Army Reserve.⁵⁵ Under Army Regulation (AR) 140-1, *Army Reserve Mission, Organization, and Training*, Soldiers performing IDT in the form of unit training assemblies (UTAs) must perform duty of at least four hours in duration including roll call and rest periods to receive credit for pay and retirement points.⁵⁶ At least one day's pay, one retirement point, or both, are authorized for each Soldier who satisfactorily completes the entire UTA.⁵⁷ Additionally, no more than two UTAs of equal duration may be conducted per day regardless of the number of hours of training conducted (time for meals is not included in the computation of minimum training periods).⁵⁸ This means that UTAs are a minimum of four hours in duration and a maximum of 12 hours.⁵⁹ Most importantly, UTAs may only be conducted at a home station, an appropriate field training area, or a special training facility.⁶⁰

Similarly, pursuant to AR 140-185, table 2-1, IDT periods pertaining to TPU Soldiers fall within the "4-hour rule" regarding the minimum number of duty hours required to earn retirement points.⁶¹ The 4-hour rule allows one point for each scheduled four-hour period of IDT performed in the form of UTAs, rescheduled training (RST), equivalent training (ET), additional training assemblies (ATA), or

make-up assemblies.⁶² A maximum of two points in one calendar day may be earned.⁶³ Interestingly, when individuals perform "certain" legal duties and are judge advocates, they may earn additional retirement points under the "2 hour/8 hour rule."⁶⁴ This rule allows Soldiers to earn one point for every two hours or greater period of duty.⁶⁵ However, the award of a second point in the same day requires additional hours to bring the day's total to a minimum of eight hours.⁶⁶ Again, a maximum of two points may be earned in one calendar day.⁶⁷ Nonetheless, Soldiers are not credited with attendance at any training (to include training for retirement points only) unless they are in the prescribed uniform of the day, are neat and soldierly in appearance, and are performing duty at home station, an appropriate field training area, or a special training facility.⁶⁸

All of the RCs except the Army Reserve recognize telework as a valuable tool for the accomplishment of their missions.⁶⁹ Both the Navy and Marines authorize IDT to be performed through telework.⁷⁰ The Marine Reserve policy is the most restrictive in that only special forms of IDT may be performed for telework purposes.⁷¹ The Navy Reserve places no limitations on the type of IDT that may be performed via telework, but excludes active duty from their program.⁷² The Air Force Reserve and Air Force National Guard both allow active duty and IDT to be performed via telework, but with limitations on the number of duty days that can be performed under their programs.⁷³ The Coast Guard Reserve is the most elastic in its telework policy by placing no restrictions on the type of duty or the number of duty days that may be performed through telework.⁷⁴ This

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See AR 140-1, *supra* note 1; *cf.* U.S. DEP'T OF ARMY, PAM. 690-8, HEADQUARTERS, DEP'T OF ARMY TELEWORK PROGRAM, (30 Oct. 2009) [hereinafter DA PAM. 690-8]. Note that rescheduled training (RST) allows a Soldier to perform UTAs from which they are absent at alternate times and locations from their TPUs. *Id.* para. 3-12. However, the performance of RST still falls under the normal IDT rules regarding the duration and place of duty. *Id.* Thus, RST should not be confused with Telework. *Id.*

⁵⁶ See AR 140-1, *supra* note 1, para. 3-4b.

⁵⁷ *Id.*

⁵⁸ *Id.* para. 3-4c.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See U.S. DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS tbl. 2-1 (15 May 1987) [hereinafter AR 140-185].

⁶² *Id.*

⁶³ *Id.* para. 2-4.

⁶⁴ *Id.* tbl. 2-1. The regulation does not define the nature and extent of "certain" legal duties, only their duration. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *id.* para. 4-5.

⁶⁸ See AR 140-1, *supra* note 1, para. 3-9h; see also AR 140-185, *supra* note 61, para. 2-4b (stating IDT must be performed in accordance with AR 140-1 for the award of retirement points).

⁶⁹ See MCRAMM, *supra* note 15; COMNAVRESFOR INSTR. 1001.5E, *supra* note 15; AFI 36-2254, *supra* note 15; ANGI 36-8001, *supra* note 15; COMDTINST 1230.1, *supra* note 15; NGB Title 32 Memo, *supra* note 15.

⁷⁰ See MCRAMM, *supra* note 15; COMNAVRESFOR INSTR. 1001.5E, *supra* note 15.

⁷¹ See MCRAMM, *supra* note 15.

⁷² See COMNAVRESFOR INSTR. 1001.5E.

⁷³ See AFI 36-2254, *supra* note 15; ANGI 36-8001, *supra* note 15.

⁷⁴ See COMDTINST 1230.1, *supra* note 15.

gives local commanders maximum flexibility in utilizing this management tool.⁷⁵

In recognition of the restraints under which Army RC personnel may perform duty, the Army National Guard only allows full-time support personnel to perform telework.⁷⁶ This means that Title 32 AGRs and dual status military technicians are allowed to perform duty via telework while drilling National Guardsmen are not.⁷⁷ Therefore, due to current policy constraints, commanders are not allowed to utilize telework for traditional Army RC personnel under even the most restrictive conditions.⁷⁸

The Army Reserve is composed of combat support and combat service support units.⁷⁹ This means there are many professionals in its ranks.⁸⁰ These are the types of Soldiers that could greatly benefit from a telework option where they could perform discrete projects from their homes. For example, Reserve judge advocates could perform legal reviews from their homes. These projects would not likely require face-to-face interactions and would produce discrete work products for their supervisors to review. With a formal telework policy, the Army Reserve could require both Soldiers and commanders to sign written telework agreements delineating the responsibilities of both parties and reiterating that Soldiers are in a military status during telework and that the UCMJ and other important administrative regulations (e.g., AR 608-100, Line of Duty) would apply. Without such formal arrangements, both Soldiers and their commands would be violating DoD policy and depriving Soldiers of potentially important benefits.

IV. Conclusion

The Army Reserve should follow the other RCs and adopt a telework policy to allow commanders to formally utilize Soldiers readily available to perform duty from their homes or offices. In an era of fiscal austerity and ubiquitous technology, telework could provide needed savings to the

Army Reserve while allowing Soldiers to earn retirement points and compensation from their homes or offices. Department of Defense Instruction 1035.01 makes clear that it is the policy of the DoD to provide opportunities to deserving servicemembers to perform duty in the most flexible manner to increase job satisfaction while improving the environment through decreased traffic and energy consumption. A telework policy in the Army Reserve would accomplish this DoD goal.

Under current Army policy, Army Reserve Soldiers may perform duty at alternate military locations and times via RST.⁸¹ However, this form of IDT does not contemplate telework.⁸² Important issues concerning UCMJ jurisdiction and line of duty considerations are all associated with performing military duty. Without a valid Telework Policy to deal with these issues, Soldiers attempting to perform duty from their homes or offices would not only be violating current policy, but be creating serious issues regarding the application of military jurisdiction and line of duty procedures.⁸³ This is unfair to Soldiers and their units.

In the hypothetical posed above, the Soldier representing her client and performing military services on his behalf would not have a mechanism under which to receive credit for her service. This is because she is performing duty from a non-military location while out of uniform and for less than the minimum four hours of service necessary to constitute an IDT period.⁸⁴ A valid telework policy promulgated by the Army Reserve could assist this Soldier in obtaining the credit she deserves for the services she performed.

⁷⁵ *Id.*

⁷⁶ See NGB Title 32 Memo, *supra* note 15.

⁷⁷ *Id.*; see also DA PAM. 690-8, *supra* note 55.

⁷⁸ See AR 140-1, *supra* note 1; DA PAM. 690-8, *supra* note 55.

⁷⁹ See *The Army Reserve Mission*, ARMY RESERVE, <http://www.usar.army.mil/ourstory/Pages/default.aspx> (last visited Mar. 31, 2014).

⁸⁰ *Id.*

⁸¹ See AR 140-1, *supra* note 1, para. 3-12. For example, a Soldier could perform RST at a local Reserve Unit that is not his unit of record while working at a summer internship during law school. *Id.*

⁸² *Id.*

⁸³ See *cf.* MCRAMM, *supra* note 15; COMNAVRESFOR INSTR. 1001.5E, *supra* note 15; AFI 36-2254, *supra* note 15; ANGI 36-8001, *supra* note 15; COMDTINST 1230.1, *supra* note 15; NGB Title 32 Memo, *supra* note 15.

⁸⁴ *Id.* The two-hour rule would also not apply to allow the officer to receive a retirement point because she was not in uniform during the military duty, and she performed duty from a non-military location. See AR 140-185, *supra* note 61, para. 2-4.

Contributions of Military Death Gratuities to Roth IRAs and Coverdell Education Savings Accounts

Captain Kurt M. VanBennekom*

This article discusses how to take advantage of significant tax savings by contributing proceeds from military death benefits to tax preferred accounts—a unique opportunity for survivors of servicemembers who qualify for military death benefits.

The Heroes Earnings Assistance and Relief Tax (HEART) Act was enacted in 2008 to provide various tax relief opportunities for servicemembers and their families.¹ Among other forms of tax relief,² the Act creates a provision that allows beneficiaries of military death benefits to contribute those proceeds to tax preferred accounts. There are two types of payments³ that survivors of servicemembers may be eligible for upon the death of a servicemember: (1) payment of a death gratuity,⁴ or (2) proceeds from a policy for Servicemembers Group Life Insurance (SGLI).⁵ Both of these payments are specifically excluded from gross income under the tax code.⁶

Congress wanted to allow survivors, who may not need the benefit proceeds at the time of the servicemember's death, to invest those benefits for future expenses, such as retirement or education.⁷ This change created a significant tax benefit for survivors of servicemembers who are not in immediate need of the payments. The Act allows recipients of such payments to contribute the proceeds to Roth Individual Retirement Accounts (IRAs) or Coverdell Education Savings Accounts.

Roth IRAs

In many respects, Roth IRAs are similar to traditional IRAs; however, there are several significant differences. Contributions toward a traditional IRA are tax deductible, but withdrawals at retirement age are taxed as ordinary income. Contributions to Roth IRAs, on the other hand, are

not tax deductible at the time of contribution, and are thus made using after-tax dollars.⁸ In addition, qualified distributions from Roth IRAs are not includable in gross income.⁹ There is also no mandatory distribution as there is for traditional IRAs,¹⁰ so the beneficiary of the Roth IRA may defer distributions to take further advantage of tax-free growth.¹¹

Beneficiaries of death gratuity and SGLI benefits can make use of the Roth IRA to generate significant retirement savings. The Act treats contributions from military death gratuity or SGLI as a “qualified rollover,” and are therefore not subject to tax prior to contribution.¹² This means that because the funds are from a death gratuity or SGLI insurance proceeds, the funds are not taxed prior to contribution, and because it is part of a Roth IRA, neither are the proceeds at the time of distribution. This results in an entirely tax-free transaction, with tax-free growth for the life of the beneficiary.

In addition to allowing a contribution of tax exempt monies, the Act provides an exception to the annual contribution limit, which is currently \$5,500.¹³ Normally, contributions made in excess of the annual limit are subject to an excise tax.¹⁴ Under the Act, however, a beneficiary could place the entire death gratuity and SGLI policy proceeds in the Roth IRA account at the same time and without penalty. A beneficiary could make a one-time deposit of up to \$500,000 (the sum of the current death gratuity and a maximum coverage SGLI policy) tax-free, watch it grow over time, and withdraw the funds at retirement tax-free.

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¹ Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008, Public Law 110-245, 122 Stat. 1624 (2008).

² The HEART Act also created an election to include combat pay as earned income for the purposes of the Earned Income Credit, and changed the treatment of differential pay to be treated as wages. *Id.*

³ Survivors of servicemembers may also be entitled to other benefits; however, the HEART Act only addresses death gratuity and Servicemembers Group Life Insurance (SGLI) payments.

⁴ 10 U.S.C. § 1477 (1998).

⁵ 38 U.S.C. § 1967 (2010).

⁶ 26 U.S.C. § 101 (2011); 26 U.S.C. § 104 (2010).

⁷ J.C.S.-1-09 NO 12 (I.R.S.), 2009.

⁸ 26 U.S.C. § 408A(c)(1).

⁹ *Id.* § 408A(d)(1). Payments that are made once the individual has attained fifty-nine-and-a-half years of age are considered qualified distributions. A distribution may also be a qualified distribution if it is made to an individual's beneficiary or estate after his death, or if distribution is attributable to the individual's disability. *Id.*

¹⁰ Traditional Individual Retirement Accounts (IRAs) require the holder to take distributions at age fifty-nine-and-a-half, reducing the principal; this makes the traditional IRA less effective as an instrument for wealth transfer at death.

¹¹ *Id.* § 408A(c)(5).

¹² *Id.* § 408A(e)(2).

¹³ *Id.* § 408A(c)(2). Contribution limits to Roth IRAs are also subject to the taxpayer's adjusted gross income. *Id.*

¹⁴ *Id.* § 408A(e)(2)(B).

The following chart shows the drastic tax advantage of contributing even a portion of these military death benefits to a Roth IRA.*

Rollover Contribution at Age 25	Balance at Age 60	Savings Compared to a Contribution to an Ordinary Taxable Savings Account
\$500,000	\$5,338,291	\$2,997,393
\$400,000	\$4,270,633	\$2,397,914
\$300,000	\$3,202,974	\$1,798,436
\$200,000	\$2,135,316	\$1,198,957
\$100,000	\$1,067,658	\$599,479

* Calculations assume no additional contributions; an annual growth rate of 7%; and a 25% marginal tax rate.

What makes this strategy ideal for tax planning is that the Act also includes a provision for relief for early withdrawals. Early withdrawals from Roth IRAs generally require inclusion as income, and are potentially subject to a 10% penalty.¹⁵ Under the Act, if a beneficiary needs access to the money, he can make withdrawals without penalty.¹⁶

Therefore, any amount of time that the contribution spends in the Roth IRA will grow without imposition of tax, and the Act treats distributions attributable to death gratuity or SGLI payments from the Roth IRA that would not otherwise be a “qualified distribution”¹⁷ as an investment in the contract.¹⁸

Coverdell Education Accounts

Coverdell Education Accounts are similar tax preferred accounts.¹⁹ Contributions to Coverdell Accounts are normally included as taxable income for the year in which the contribution is made. Distributions from Coverdell Accounts for qualified expenses are not subject to income tax upon distribution.²⁰

Contributions made from death gratuity or SGLI payments to Coverdell Education Accounts are treated in a similar manner to contributions made to Roth IRAs. Such

contributions are treated as rollover contributions.²¹ The annual limit for contributions does not apply to such contributions,²² and distributions attributable to death gratuity or SGLI payments that would be includable in gross income under section 72 of the Internal Revenue Code²³ are treated as an investment in the contract.²⁴ The primary difference is that only distributions that are used for qualified educational expenses are not subject to income tax. Distributions that are not used for qualified educational expenses may be subject to adverse tax consequences.²⁵ Care must be taken to balance the contribution with the anticipated need, since distributions used for anything other than qualified educational expenses may be subject to tax.

The total contribution is limited to the total death gratuity or SGLI payments in cases of contributions to both Roth IRAs and Coverdell Educational Accounts. Contributions may be allocated to each, but the total combined contribution cannot exceed the total SGLI and death gratuity payment.²⁶ As mentioned, care must be taken in planning, as Coverdell accounts may only be used for qualified expenses; contributions should be limited to expected costs, and any remaining contribution should be made to the Roth IRA.

It is rare for the IRS to allow taxpayers to take advantage of a provision that has such a whipsaw effect on revenue. The ability to contribute tax-free proceeds from a death gratuity or from an SGLI policy to a tax-preferred account whose distributions are also tax-free is a significant

¹⁵ *Id.* § 72(t). A 10% additional tax is imposed on distributions from qualified retirement plans that are not qualified distributions as defined in *id.* § 408A(d).

¹⁶ *Id.* § 408A(e)(2)(C). Non-qualified distributions of any amount attributable to the qualified rollover are considered an investment in the contract, or recovery of basis, and not subject to early withdrawal penalties. *Id.*

¹⁷ *Id.* § 72.

¹⁸ *Id.* § 408A(e)(2)(C).

¹⁹ *Id.* § 530(a).

²⁰ *Id.* § 530(d)(2).

²¹ *Id.* § 530(d)(9)(A).

²² *Id.* § 530(d)(9)(B).

²³ *Id.* § 72.

²⁴ *Id.* § 530(d)(9)(C).

²⁵ *Id.* § 530(d)(9)(C); I.R.S. Notice 2010-15, 2010-06 I.R.B.; 26 U.S.C. § 530(d)(2). Distributions in excess of expenses are includable in gross income and may be subject to an additional 10% tax. *Id.*

²⁶ *Id.* § 408A(e)(2)(A)(i),(ii); *Id.* § 530(d)(9)(A)(i),(ii).

opportunity for tax savings. Congress intended to afford this opportunity to servicemembers and their survivors, and it is

incumbent on judge advocates to educate Soldiers and their Families about this unique opportunity.

Double Cross: The True Story of the D-Day Spies¹

Reviewed by Major Kevin D. Kornegay*

*In wartime, truth is so precious that she should always be attended by a bodyguard of lies.*²

I. Introduction

In January 1941, Juan Pujol García,³ a twenty-nine-year-old Spaniard with no experience in espionage, visited the British embassy in Madrid and offered to spy against the Germans. Pujol, who had tried and failed at numerous careers, had most recently run a poultry farm outside Barcelona. Now, motivated by an intense dislike of Nazism, he was determined to contribute to the Allied cause. Although the British rejected his offer of assistance,⁴ Pujol was undeterred. He offered his services as a spy to the Germans. Despite the fact that he spoke no English, he was recruited by the German military intelligence service responsible for espionage: the Abwehr. The Abwehr dispatched Pujol under the codename “Arabel” to Great Britain via neutral Portugal. Once in Lisbon, Pujol renewed his offer to the British, this time as a double agent, and was again rejected. At this point, he conceived a novel plan. On 19 July 1941, Pujol sent a message to his Abwehr handler, Major Karl-Erich Kuhlenthal, from Lisbon informing him of his arrival in Great Britain. Subsequently, using only information publicly available in Lisbon, Pujol began to fabricate elaborate intelligence reports. His reports, for which he invented a network of fictitious subagents, deluded the Germans so successfully that the British ultimately felt compelled in the winter of 1941 to recruit him as a double agent to ensure that his reports would not interfere with reports being carefully fed to the Germans by agents under their control. Codenamed “Garbo,” Pujol remained a British double agent until the end of the war and played a significant

role in *Operation Fortitude*, the Allied deception operation to conceal the location of the Normandy campaign.⁵

Juan Pujol García is one of five British double agents profiled in Ben Macintyre’s *Double Cross: The True Story of the D-Day Spies*. All of the double agents have stories worthy of fiction. In addition to Pujol, Macintyre’s “D-Day spies” include “a bisexual Peruvian playgirl, a tiny Polish fighter pilot, a mercurial Frenchwoman, [and] a Serbian seducer . . .”⁶ A columnist and associate editor at the *Times* (London), Macintyre⁷ is a talented storyteller; *Double-Cross* has all the ingredients of a spy thriller, including seduction, abduction, secret ink, and microdots. However, the story of *Operation Fortitude*, the Allied deception operation for the Normandy invasion, has been told many times before. In addition to the many general accounts of espionage and intelligence operations in the Second World War and innumerable books on D-Day that discuss *Operation Fortitude*, *Double Cross* joins other specific studies of the operation,⁸ as well as biographies,⁹ autobiographies, and memoirs¹⁰ of many of the main players. Macintyre’s goal with *Double Cross* is to tell the story of *Operation Fortitude*

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¹ BEN MACINTYRE, *DOUBLE CROSS: THE TRUE STORY OF THE D-DAY SPIES* (2012).

² Winston Churchill is said to have made this remark to Joseph Stalin at the Tehran Conference in November 1943. Stalin replied, “This is what we call military cunning.” MACINTYRE, *supra* note 1, at 3.

³ *Id.* at 21–24 (for a biographical sketch of Pujol). The basic outline of Juan Pujol García’s story is available in multiple sources, including a documentary film, in addition to the book under review: TOMAS HARRIS, *GARBO: THE SPY WHO SAVED D-DAY* (2004); NIGEL WEST & JUAN PUJOL GARCÍA, *OPERATION GARBO* (2011); “AGENT GARBO,” *THE SPY WHO LIED ABOUT D-DAY*; NPR ALL THINGS CONSIDERED (July 7, 2012), <http://www.npr.org/2012/07/07/156189716/agent-garbo-the-spy-who-lied-about-d-day>; *GARBO: THE SPY* (Centuria Films, S.L. 2009).

⁴ It is not surprising that Pujol was rejected. So-called “walk-ins,” individuals that voluntarily offer to conduct espionage, may be directed by another intelligence agency and are considered particularly vulnerable to compromise by counter-intelligence. U.S. ARMY EUR., REG. 381-22, PROCESSING WALK-INS para. 3b (22 May 2003) (defining “walk-in”).

⁵ In 1944, Pujol was awarded both an Iron Cross for his work as agent Arabel and appointed MBE (Member of the Order of the British Empire) by George VI for his work as agent Garbo on *Operation Fortitude*. MACINTYRE, *supra* note 1, at 335, 343.

⁶ *Id.* at 5. The individual spies alluded to in this quotation are Elvira de la Fuente Chaudoir (Military Intelligence, Section 5 (MI5) code name “Bronx”); Roman Czerniawski (“Brutus”); Lily Sergeev (“Treasure”); and Dusan “Dusko” Popov (“Tricycle”).

⁷ A brief biography of Macintyre is available on his publisher’s website at <http://www.bloomsbury.com/author/ben-macintyre> (last visited Apr. 7, 2014). *Double Cross* is Macintyre’s third book on spying and intelligence operations in the Second World War. His earlier books are *AGENT ZIGZAG: A TRUE STORY OF NAZI ESPIONAGE, LOVE AND BETRAYAL* (2007) and *OPERATION MINCEMEAT: HOW A DEAD MAN AND A BIZARRE PLAN FOOLED THE NAZIS AND ASSURED AN ALLIED VICTORY* (2010).

⁸ MARY K. BARBIER, *D-DAY DECEPTION: OPERATION FORTITUDE AND THE NORMANDY INVASION* (2009); ANTHONY CAVE BROWN, *BODYGUARD OF LIES* (1975); ROGER HESKETH, *FORTITUDE: THE D-DAY DECEPTION CAMPAIGN* (1999); JOSHUA LEVINE, *OPERATION FORTITUDE: THE STORY OF THE OPERATION THAT SAVED D-DAY* (2011).

⁹ GEOFFREY ELLIOT, *GENTLEMAN SPYMASTER: HOW LT. COL. TOMMY ‘TAR’ ROBERTSON DOUBLE-CROSSED THE NAZIS* (2011); HARRIS, *supra* note 3; RUSSELL MILLER, *CODENAME TRICYCLE: THE TRUE STORY OF THE SECOND WORLD WAR’S MOST EXTRAORDINARY DOUBLE AGENT* (2005).

¹⁰ JOSE ANTONIO BARREIROS, *NATHALIE SERGUIES UMA AGENTE DUPLA EM LISBOA* (2006); ROMAN GABY-CZERNIAWSKI, *THE BIG NETWORK* (1961); JOHN C. MASTERMAN, *THE DOUBLE CROSS SYSTEM IN THE WAR 1939–1945* (1972); JOHN C. MASTERMAN, *ON THE CHARIOT WHEEL: AN AUTOBIOGRAPHY* (1975); DUSKO POPOV, *SPY/COUNTERSPY* (1974); WEST & GARCÍA, *supra* note 3.

“for the first time”¹¹ from the perspective of the five double agents assigned to the operation and their Military Intelligence, Section 5 (MI5)¹² handlers. Accompanied by a companion one-hour BBC documentary of the same name,¹³ *Double Cross* is a work of popular history, without the style or the trappings of an academic text. However, Macintyre’s support of the claim that the Double Cross system and *Operation Fortitude* contributed significantly to the success of the Normandy invasion has been questioned both by academic historians and by intelligence specialists.¹⁴ For military professionals, *Double Cross* provides an opportunity to consider the relative risks and rewards of deception operations, as well as the challenges in judging their effectiveness.

II. The Double Cross System

Macintyre’s title refers to the Double Cross system, the British counter-espionage and deception operation to “turn” captured German agents, who as double agents were used to feed disinformation to the German high command.¹⁵ The system was overseen by the inter-agency Twenty Committee,¹⁶ which consisted of the directors of intelligence for the armed services and representatives from Military Intelligence, Section 5 (MI5) and Military Intelligence, Section 6 (MI6).¹⁷ The committee’s chairman was John Masterman,¹⁸ an Oxford University don,¹⁹ sportsman, and

¹¹ The writing on the back of the book claims, “[Operation Fortitude] has never before been told from the perspective of the key individuals in the Double Cross system, until now.” MACINTYRE, *supra* note 1, at jacket.

¹² The Security Service, commonly known as Military Intelligence, Section 5 (MI5), is the United Kingdom’s domestic counter-intelligence and security agency. Its counterpart, the Secret Intelligence Service (SIS or MI6), is focused on foreign threats. *Id.* at 78.

¹³ *Double Cross: The True Story of the D-Day Spies* (BBC2 2012). Information about the documentary and clips can be found on the BBC2 website at <http://www.bbc.co.uk/programmes/b01ktflc/presenters/ben-macintyre> (last visited Apr. 7, 2014).

¹⁴ BARBIER, *supra* note 8; Mary K. Barbier, *Deception and Planning of D-Day, in NORMANDY 1944: SIXTY YEARS ON* (John Buckley ed., 2006); A. V. Knobelspiesse, *Masterman Revisited*, in 18 *STUDIES IN INTELLIGENCE*, available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol18no1/html/v18i1a02p_0001.htm (last visited Apr. 7, 2014).

¹⁵ Macintyre’s focus on his five “D-Day” spies means that he does not discuss the process of turning other double agents in any detail. THE SPIES WHO FOOLED HITLER (BBC Timewatch 1999) (explaining the Double Cross system, including the process of “turning” captured German agents).

¹⁶ The committee’s name is a numerical pun referring to the Roman numerals for twenty, XX, hence, “double cross.” MACINTYRE, *supra* note 1, at 42.

¹⁷ Consisting of individuals disqualified from regular military service, the Home Guard was constituted as a secondary defense in the case of an Axis invasion of the British Isles.

¹⁸ For a more complete biography of Masterman, see Knobelspiesse, *supra* note 14. This article in the Central Intelligence Agency’s professional

occasional author. While Masterman and the Twenty Committee exercised strategic control of the Double Cross system, tactical operation of the double agents was overseen by Lt. Col. Thomas A. “Tar” Robertson, a Scottish former army officer, who joined MI5 in 1933. A case agent in Robertson’s MI5 section (German Counter-Intelligence) was assigned to handle each double agent successfully turned.²⁰

Initially, the Double Cross system was used exclusively for counter-intelligence purposes to convince the German high command that they had a large and efficient network of spies operating in the United Kingdom, when they had nothing of the sort. Through the double agents, the MI5 case agents fed their Abwehr counterparts intelligence reports consisting of “chicken-feed,”²¹ a mix of banal falsehoods and harmless truths. However, Robertson became more ambitious after realizing in June 1943 that every German agent in the United Kingdom was under his section’s control. Macintyre writes, “Robertson’s team of double agents could now begin feeding the Germans not just snippets of falsehood, but a gigantic, war-changing lie.”²² Consequently, Robertson advocated for more aggressive use of the Double Cross system in the planning for *Operation Bodyguard*, the overall Allied deception campaign for the Normandy invasion.

III. Operation Fortitude

Operation Fortitude was just one component of *Operation Bodyguard*.²³ *Fortitude* itself had two separate operational objectives. The aim of *Fortitude South* was to convince the Germans that the Allies would launch their long-anticipated invasion of occupied France through Pas de Calais. The aim of *Fortitude North* was to convince the Germans that the Allies were staging a secondary invasion of occupied Norway from Scotland. *Operation Fortitude* can be contrasted with *Operation Mincemeat*, which was the British deception campaign before the Allied invasion of Sicily in July 1943 and the subject of Macintyre’s *Operation*

journal is a testament to Masterman’s legacy and influence on deception operations.

¹⁹ A “don” is a fellow or tutor at one of the collegiate universities, such as Oxford or Cambridge. Before the war, Masterman was a tutor in Modern History at Christ Church, Oxford. *Id.*

²⁰ MACINTYRE, *supra* note 1, at 43; John P. Campbell, “Robertson, Thomas Argyll,” in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, available at <http://www.oxforddnb.com/templates/article.jsp?articleid=55645&back=> (last visited Apr. 7, 2014) (for a more complete biography of Robertson).

²¹ MACINTYRE, *supra* note 1, at 67. Macintyre uses the term “chicken feed” throughout *Double Cross*, but does not indicate whether the term is his own or is derived from one of the primary sources. He gives no citation for his first use of the term.

²² *Id.* at 4.

²³ The operation’s name was a reference to Churchill’s famous statement, used as an epigraph for this review.

*Mincemeat: How a Dead Man and a Bizarre Plan Fooled the Nazis and Assured an Allied Victory.*²⁴ In *Operation Mincemeat*, in which the Double Cross system played a far smaller role, the aim of the deception was to convince the Germans that the Allies planned to launch their Italian campaign with an invasion of Sardinia and Greece, rather than Sicily, which was considered the obvious target by both the Germans and the Allies.²⁵ To accomplish this end, the British arranged for a corpse, disguised as a military courier and in possession of falsified military planning documents, to wash up on a beach in Spain, where the Allies were certain the documents would fall into the hands of German agents. The aim of *Operation Fortitude* was the reverse: to convince the Germans that the obvious target (Pas de Calais) was the real target.

Operation Fortitude employed multiple deception strategies. Shadow armies were invented. The fictitious First United States Army Group (FUSAG) was deployed in southeast England, while an equally fictitious British Fourth Army was deployed to Scotland. Dummy tanks, fighter aircraft, and landing craft were staged to give the impression of a large army preparing for an invasion. Wireless transmissions were increased in both southeast England and in Scotland to further give the impression of assembling forces. To bolster the impression that the Allies' main invasion force would deploy from southeast England to Pas de Calais, the British press reported that General George Patton was in command of FUSAG.²⁶ As D-Day approached, the Allies maintained an intensive bombing campaign in and around Pas de Calais to give the impression that they were "softening" the target in advance of an amphibious assault.

Because the British had cracked the Enigma code²⁷ and were reading intercepted German wireless traffic, MI5 was able to assess the value placed upon information passed by double agents by charting its course from the Abwehr to the German high command. Indeed, the decision to recruit Juan Pujol was based on intercepted transmissions that convinced MI5 of his influence on the Germans, in particular an incident in which the German Navy pursued a non-existent

convoy on the basis of one of Pujol's reports.²⁸ For *Operation Fortitude*, Robertson identified the five Double Cross agents that he deemed to be most reliable in German eyes: Brutus, Bronx, Treasure, Tricycle, and Garbo. In addition to their reliability, these five agents also had access to wireless transmitters: a significant fact because the postal system would be closed before the invasion. In the months and weeks preceding D-Day, these five agents and their handlers carefully laid clues in their transmissions that were designed to lead the German high command to the conclusion that an invasion of Pas de Calais was imminent. No such invasion ever came. On 6 June 1944, D-Day, *Operation Overlord* began with a massive amphibious assault directed at Normandy. Nearly three months later, on 30 August 1944, the Battle of Normandy concluded with the German retreat over the Seine.

IV. Assessment

Was *Operation Fortitude* a success and, if so, to what extent did the D-Day spies contribute to its success? As with all military operations, measurement of success depends on how success is defined. Macintyre quotes one MI5 case agent, Tommy Harris (Garbo's handler), as setting the bar for success quite low: in Harris's assessment, the deception would have been a success if it caused just "one division to hesitate 48 hours before proceeding to oppose our landing in the Cherbourg peninsula."²⁹ The assessment of the Supreme Allied Commander, General Dwight D. Eisenhower, was only slightly less modest. "'Just keep the Fifteenth Army out of my hair for the first two days,' he told the deception planners. 'That's all I ask.'"³⁰ In the conventional view, which Macintyre shares, *Operation Fortitude* was tremendously successful because the formidable German Fifteenth Army remained in the Pas de Calais throughout the Normandy landings, awaiting an invasion that would never come. This is seen as a direct consequence of *Operation Fortitude*, of which the Double Cross spies are seen as the key element. However, there is a contrary view.

Mary K. Barbier, a historian at Mississippi State University, has argued that *Operation Fortitude* did not contribute significantly to the success of the Normandy invasion. A reviewer of an essay by Barbier included in a recent volume on the 60th anniversary of D-Day summarized her revisionist argument:

Barbier reorients us to look not at the traditional process driven narrative of the Allied campaign to fool Germany, but instead at the concrete effects of this

²⁴ MACINTYRE, OPERATION MINCEMEAT, *supra* note 7.

²⁵ MACINTYRE, *supra* note 1, at 22.

²⁶ Patton was selected because it was believed that he was the Allied general most respected by Hitler. In reality, Patton was in command of the Third United States Army, which was quietly training for the upcoming invasion. Similarly, an Australian actor that resembled Field Marshal Bernard L. Montgomery, who was the Allied ground troops commander for the invasion, was trained and dispatched only days before D-Day to Gibraltar, where the British knew that a Spanish spy for the Germans would report his presence to the Abwehr. This was intended to sew further confusion regarding the imminence and location of the invasion. Macintyre devotes most of a chapter, "Monty's Double," to this part of the operation. *Id.* at 221.

²⁷ MACINTYRE, *supra* note 1, at 35.

²⁸ This incident is discussed in GARBO: THE SPY, *supra* note 3.

²⁹ MACINTYRE, *supra* note 1, at 257.

³⁰ *Id.* at 321.

deception. One finding of this very pragmatic reorientation is that the German 15th Army, firmly entrenched in the Pas de Calais throughout the battle, did not necessarily stay in place because of Allied deception operations—as long assumed by many historians—but instead stayed put because of a lack of transport to move through a heavily damaged French transportation network, and a further lack of “suitable equipment and armaments” and finally, because more than half of the infantry divisions in the 15th Army were static in nature (and training) and were thoroughly not ready for the job.³¹

Barbier argues that the myth surrounding *Operation Fortitude* has blinded historians to other more significant factors contributing to Allied success (or, framed differently, to German losses). Unfortunately, although Macintyre includes Barbier in his selected bibliography, there is not a single citation to her and the text does not indicate that he seriously engaged her argument, even if only to disagree.

If Barbier’s goal is to shift the focus of attention, Macintyre’s contribution represents a setback, not merely because it clearly elaborates the conventional, laudatory view, but also because his was written for a much wider audience. However, assuming *arguendo* that Barbier’s view is correct and that the work of the D-Day spies had limited effect, Macintyre’s book can be read not as a narrative of a brave and heroic operation that, against all odds, secured an Allied victory, but rather as an outrageously foolhardy operation that risked the entire operation for no good reason. Macintyre does not ignore the risks involved in *Operation Fortitude*; indeed, he highlights them because they give *Double Cross* its narrative tension. Agent Treasure, Lily Sergeyev, nursed a grievance against the British for the loss of her dog, Babs.³² Would she, in revenge, betray the British by using her “control signal”³³ in a message to her Abwehr handler? Johnny Jebsen, the Abwehr handler for Agent Tricycle, Dusko Popov, was an Allied sympathizer who knew that Popov was a double agent and had surmised the

extent of the Double Cross system.³⁴ When the Gestapo abducted Jebsen,³⁵ would he betray Popov and the Double Cross system under Gestapo torture? If either of these risks had come to pass, the German High Command would have had a significant strategic advantage over the Allies. Not only would they have known of the coming invasion, they would also have known that every one of their agents in Great Britain was under British control. The individual reader must decide whether the risk was worthwhile.

V. Conclusion

Double Cross is an engaging and well-written contribution to the field of narrative, popular history. For military professionals, this book provides an opportunity to consider the wisdom of deception and espionage operations through analysis of one of the most ambitious deception operations in military history. However, the serious reader will want to supplement *Double Cross* with Mary K. Barbier’s critical reassessment of the Double Cross system and *Operation Fortitude*.³⁶ Those seeking to learn from this historical precedent will need more than Macintyre’s paeans of praise.

³¹ Jeff Demers, *The Normandy Campaign: Sixty Years On*, 72 J. OF MIL. HIST. 607 (2008) (book review).

³² At the time of her recruitment by MI6, Sergeyev had insisted as a condition of her cooperation that Babs would be able to accompany her to Great Britain, in spite of strict British quarantine restrictions. It is not clear how firm the assurances given to Sergeyev were. Macintyre concludes that her MI6 contact “resorted to a very English sort of temporizing, a commitment to do what he could, when he planned to do very little and believed that nothing could be done.” MACINTYRE, *supra* note 1, at 160. What is clear is that Babs never made it to Britain and that Sergeyev blamed the British for the loss. *Id.* at 200.

³³ The agreed signal indicating that she was under the control of the British. Treasure’s control signal was the deliberate transmission of a “dash” before her call sign. *Id.* at 242.

³⁴ Popov and Jebsen became friends when they were both students at the University of Freiburg before the war. *Id.* at 7. After joining the Abwehr in 1940, Jebsen arranged for Popov’s recruitment. *Id.* at 10. Popov later claimed that Jebsen, an Anglophile with a dislike for Nazism, was aware from the beginning that Popov planned to operate as a double agent. *Id.* at 31. Subsequently, Popov persuaded the British to recruit Jebsen as agent “Artist” in 1943. *Id.* at 169. However, the British quickly came to see Jebsen as a liability because of the extent of his knowledge of the Double Cross system and because he had come under Gestapo suspicion for, among other things, improper financial transactions. *Id.* at 206.

³⁵ *Id.* at 273. Macintyre describes Jebsen, who is presumed to have died in custody, as a “hero” for his apparent failure to betray Popov when interrogated by the Gestapo. *Id.* at 358.

³⁶ MARY K. BARBIER, *D-DAY DECEPTION: OPERATION FORTITUDE AND THE NORMANDY INVASION* (2009).

Outlaw Platoon: Heroes, Renegades, Infidels, and the Brotherhood of War in Afghanistan¹

Reviewed by Major Mark W. Malcolm*

*Here are your sons, America. These are the men you've thrown into the fire. This is their story, and it is one of achievement and love, triumph and victory.*²

I. Introduction

I start with a confession: I am not a voracious reader. And although I enjoy learning about military history, rarely do I go out of my way to read books on the subject. However, in *Outlaw Platoon: Heroes, Renegades, Infidels, and the Brotherhood of War in Afghanistan*, I discovered a story that I struggled to put down and was sad to see end. Sean Parnell, with the assistance of renowned author John R. Bruning,³ crafts a riveting and remarkably detailed first-hand account of one infantry platoon's experience during Operation Enduring Freedom (OEF). Notwithstanding its slight imperfections, this tale is must-read material for anyone who seeks to understand the bonds forged by combat and the incalculable human cost of war.

II. A Brief Summary

Lieutenant Sean Parnell was a fresh-faced Army Ranger in 2006⁴ when he deployed from Fort Drum, New York, to the Bermel District of Afghanistan⁵ as the leader of Third Platoon, Bravo Company, Second Battalion, 87th Infantry Regiment.⁶ "Outlaw Platoon," as the unit nicknamed itself,⁷ spent sixteen months downrange.⁸ The unit patrolled and fought in often mountainous terrain along the Pakistani border, a spot that Parnell calls "one of the most dangerous places on the face of the planet."⁹ During this time, the platoon endured repeated hostile engagements with a smart and rugged enemy force. A partial list of awards earned by

Outlaw Platoon members during their OEF tour demonstrates the astonishing hardships they faced: seven Bronze Stars (including five for valor), twelve Army Commendation Medals for valor, and thirty-two Purple Hearts.¹⁰

The author's stated purpose in writing the book was to "chronicle [his] soldiers' incredible journey"¹¹ in Afghanistan, "to tell the world of their amazing accomplishments[,] and to secure their place in American military history."¹² "My goal," Parnell says, "was to show the world their sacrifices and, in doing so, provide readers with a much-needed window into the heart of American infantry soldiers everywhere."¹³

Parnell's account is based on his memory and interviews with his Soldiers.¹⁴ He arranges the story in generally chronological fashion, doubling (or flashing) back from time to time to offer context.¹⁵ Parnell successfully utilizes two main visual aids: a straightforward map to orient the reader to the locations that he references,¹⁶ and a set of photographs that give the reader a chance to match faces to character names.¹⁷

III. The Book's Many Strengths

The book has a myriad of strengths. A few positive points were identified above, but others merit special mention. The story is largely written in accessible prose. Parnell sweeps the reader in with vivid details about the people, places, and things he encounters.¹⁸ Naturally, because the book is about the Army, it contains a high volume of acronyms and terms of art. Parnell is wise to

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¹ SEAN PARNELL WITH JOHN R. BRUNING, *OUTLAW PLATOON: HEROES, RENEGADES, INFIDELS, AND THE BROTHERHOOD OF WAR IN AFGHANISTAN* (2012).

² *Id.* at 368.

³ *Id.* at back jacket notes (indicating that Bruning has authored or co-authored fifteen non-fiction books and that Bruning "embedded with coalition forces in Afghanistan in 2010" as part of his preparation for this book). *Id.*

⁴ *Id.* at 1, 55.

⁵ *Id.* at xi.

⁶ *Id.* at vii.

⁷ *Id.* at 83. The "Outlaw Platoon" moniker appears to have emerged from a pre-deployment bar brawl in which the unit's members prevailed. *Id.*

⁸ *Id.* at ix.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at x.

¹⁴ *Id.*

¹⁵ For example, as Parnell flies over Afghanistan in a Chinook helicopter, he starts discussing the Christmas that he had spent with his family two months before. *See id.* at 2-3.

¹⁶ *Id.* at xi. The map shows the Bermel District of Afghanistan and highlights key engagements, towns, bases, posts, and routes. *Id.*

¹⁷ *See id.* 182-83 (photographs of several prominent characters, including the author).

¹⁸ *See, e.g., id.* at 1. Parnell uses clear, vibrant imagery such as "a vast dragon's back of peaks and valleys" to describe the Afghan landscape. *Id.*

include a thorough glossary,¹⁹ which enables the layperson—including the judge advocate who lacks infantry experience—to follow along with relative ease.

The story has a you-are-there quality that envelops the reader and lends power to Parnell's message.²⁰ In particular, the biographical profiles of his platoon members are extraordinarily effective in emotionally connecting the reader to the book's colorful characters.²¹ Throughout the text, one cannot help but alternate between empathy and sympathy for the Soldiers of Outlaw Platoon, and that is a credit to Parnell's writing.

For all of the gory, frightening, and heart-rending sequences in the book, the one time that I was compelled to exclaim aloud was when Parnell learned of his unit's unexpected 120-day extension in theater.²² Parnell had so skillfully described the sense of relief, triumph, and wistfulness he felt when the helicopter arrived to start his subordinates on their journey home²³ that when he thereafter broke the news to the reader about the extension, it took the form of a literary punch to the gut. In that moment, the shock and despair that Parnell experienced was palpable.²⁴ This is a testament to Parnell's success in cultivating empathy and realism in his narrative.

Finally, through his gripping recitation of events, Parnell accomplishes three feats that should be considered acts of public service. First, he drives home the fact that the members of Outlaw Platoon have been asked to bear an immense burden for their country.²⁵ As Parnell describes, this burden revealed heroes;²⁶ spotlighted weak links;²⁷ stole youth, innocence,²⁸ and good health,²⁹ and created an eternal

connection between a group of individuals who were prepared to die for each other.³⁰ As the United States enters its thirteenth year of armed conflict in Afghanistan, Parnell unintentionally³¹ puts to the reader the hard question of whether whatever strides we have made in Afghanistan are worth the extraordinary price that he and his troops have paid.

Second, in a highly credible and articulate way, he communicates the lost understanding and lack of common ground between himself and most of those to whom he considered himself close prior to his combat experiences.³² Parnell speaks for legions of warriors who have difficulty reintegrating at home after living through the unmatched intensity, exhilaration, and horror of war.³³ Our nation will be struggling with the issue of how best to embrace and care for these veterans for years to come.

Third, Parnell forces the reader to confront the unhappy truth that so many of our alleged partners and allies in and around Afghanistan are unreliable at best, and nefarious at worst. From an apparently corrupt Afghan Border Police commander,³⁴ to an enemy spy acting as Outlaw Platoon's interpreter,³⁵ to Pakistani military forces who willingly act as human shields for the bad guys,³⁶ to Afghan villagers who fail to warn our troops of an imminent threat even after receiving American help,³⁷ the picture is grim. In some ways, it makes the reader admire and revere the sacrifices of the Outlaws all the more, but it also makes one re-evaluate the wisdom of the United States' strategic-level mission in Afghanistan as it has evolved since our initial invasion. It prompts the reader to wonder what victory in OEF looks like, and whether the efforts of Parnell and his Soldiers—however noble and super-human—get us closer to securing that victory.

¹⁹ *Id.* at 381–84.

²⁰ *See id.* at 165–206 (where Parnell renders a transfixing account of his unit's nearly six-hour battle on 10 June 2006, in which Outlaw Platoon was almost overrun).

²¹ One such profile is that of the platoon's young amateur economist and political scientist, Specialist Pinholt. *See id.* at 20–23.

²² *Id.* at 354.

²³ *Id.* at 350–53.

²⁴ *Id.* at 354–55.

²⁵ *See, e.g., id.* at 356–59 (discussing Parnell's own struggles with traumatic brain injury, Outlaws who were killed in action, and the emotional reunion with a wounded and beloved squad leader, Staff Sergeant Baldwin).

²⁶ *See id.* at 184. Doc Pantoja (a medic) treats Baldwin after Pantoja had himself suffered a ghastly facial injury, all while a seriously wounded Baldwin clamors to re-enter the fight. *Id.*

²⁷ *See id.* at 189–90 (detailing how Sergeant Waites mentally froze in battle).

²⁸ *See id.* at 363–64. Parnell feels out of place with his pre-Army friends and their trivial chatter about sports, etc. *Id.*

²⁹ *See, e.g., id.* at 356–57 (addressing the effects of Parnell's traumatic brain injury).

³⁰ *See id.* at 243, 350–53. Parnell reflects on acts of “selflessness” by his Soldiers amid life-threatening situations, and later talks about the tremendous bond that had formed within the platoon. *Id.*

³¹ *See id.* at ix (expressly stating that the book is not “a review of U.S. foreign policy in Afghanistan”).

³² *Id.* at 363–66. Parnell writes that his “circle of friends grew smaller and smaller, until only a few stayed close to [him].” *Id.* He laments the trouble he has relating to civilian pals who “had never seen a rocket or heard the sound of a [sniper rifle] echoing off mountain slopes. They'd never seen a child die either.” *Id.*

³³ *Id.* at 366–70.

³⁴ *See id.* at 37–48 (discussing Parnell's interactions with Major Ghul of the Afghan Border Police).

³⁵ *See id.* at 312–18 (addressing the discovery that Yusef, an interpreter for the Outlaws, had betrayed them).

³⁶ *Id.* at 253.

³⁷ *Id.* at 303.

IV. The Book's Few Shortcomings

Portions of the dialogue—particularly during firefights—were implausible. One stark example occurs during close combat east of Forward Operating Base (FOB) Bermel on 10 June 2006.³⁸ Parnell's company commander had just entered the scene, and the author proceeds to brief his boss on the current situation: "Half my men are down, sir. They're attacking in two elements. Two platoons plus. We're out of ammo and need to get our seriously wounded out of here."³⁹ This dire report is immediately followed by one of the nearby Outlaws laughingly telling a sergeant about how he had sustained his head wound.⁴⁰ As the latter conversation happens, the group is dodging enemy fire, and the enemy is advancing to positions "mere meters" away from the chatting Soldiers.⁴¹ Given the circumstances, it is simply inconceivable that the second exchange would have occurred in the manner in which Parnell documented it. This type of flaw in the storytelling was sometimes distracting.

Although only so much can be accomplished in less than 400 pages,⁴² glaring unresolved issues remained at the book's end. Early in the deployment, Parnell described Lieutenant Dave Taylor as a close friend and colleague.⁴³ Understandably, the relationship soured mid-tour after Taylor accused Parnell of poor leadership.⁴⁴ Parnell suspected that Taylor's accusations arose from Taylor being fed inaccurate information,⁴⁵ but there was no mention throughout the rest of the book about even an attempted reconciliation. Perhaps the resolution of this part of the story did not survive the final editorial cut. Regardless, it was an odd omission.

Also excluded was any extensive discussion of the platoon's last 120 days downrange—i.e., the period of their extension.⁴⁶ Some unit members had already returned home to their families when they learned that they were being ordered back to the fight for another four months.⁴⁷ Parnell talks about hearing this news from his battalion commander and about the severe blow that the news dealt to unit morale,⁴⁸ but notably absent is a substantial discussion of the

³⁸ *Id.* at 160.

³⁹ *Id.* at 197.

⁴⁰ *Id.* at 198.

⁴¹ *Id.*

⁴² *Id.* at 384 (the last numbered page).

⁴³ *Id.* at 5, 120.

⁴⁴ *Id.* at 222. Taylor claims that Parnell was "reckless" in battle and asks if Parnell "even care[s]" about his own Soldiers. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 354.

⁴⁷ *Id.*

⁴⁸ *Id.* at 354–55.

events that transpired on the ground during those last several weeks "in country."

Parnell's flashbacks to childhood indignities and scenes of loved ones occasionally seemed melodramatic and gratuitous.⁴⁹ Although Parnell effectively employed the device at certain times,⁵⁰ in other instances it felt contrived.⁵¹

Anyone who has spent an appreciable amount of time with combat arms leaders knows that they traditionally refer to the Soldiers of their unit as "the men" or "my men."⁵² Nevertheless, Parnell's constant use of this phrase is anachronistic and arresting. A gender-neutral term such as "Soldiers" or "troops" would do just as well, and would be more in step with a 21st-century Army.⁵³

Even more disconcerting was the pejorative—albeit fleeting—use of the word "gay."⁵⁴ At one point, Parnell says that "[j]ust hearing [a reference to love among platoon members] in my head sounded gay enough."⁵⁵ Parnell is neither the first, nor will he be the last, Soldier to reflexively use this sort of language, but to do so is flatly unacceptable.⁵⁶

V. A Weakness Turned Strong

Thankfully, Parnell acknowledges in his postscript that he had painted "fobbits"⁵⁷ with too broad a brush in the main

⁴⁹ See, e.g., *id.* at 85, 86. Parnell's initial reference to his grandfather's funeral was strangely placed smack in the middle of a firefight narrative.

⁵⁰ See, e.g., *id.* at 165–66. Parnell's invocation of his grandfather's voice—urging him to rise after being knocked unconscious—worked well in this instance. It did not break the stride of the story.

⁵¹ See, e.g., *id.* at 81–82. This is another example of the flashback technique being an irritant. Parnell abruptly starts talking about a school bus bully from his childhood during an engagement with the enemy. *Id.*

⁵² See, e.g., *id.* at x. These phrases appear throughout the book.

⁵³ Women will be serving in more combat roles in the coming years. See Craig Whitlock, *Military Plans to Open More Combat Jobs to Women by 2016*, WASH. POST (Jun. 18, 2013), http://articles.washingtonpost.com/2013-06-18/world/40044470_1_combat-jobs-men-and-women-secretary-leon-e.

⁵⁴ PARNELL, *supra* note 1, at 245.

⁵⁵ *Id.*

⁵⁶ See, e.g., Amaani Lyle, *Hagel, Obama Advisor Salute Gay, Lesbian Military Community*, U.S. DEPARTMENT OF DEFENSE (Jun. 25, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=120359> (illustrating that the highest levels of the chain of command regard gays and lesbians as vital and valued members of the military family).

⁵⁷ PARNELL, *supra* note 1, at 206. Parnell equates fobbits with "POGs (Personnel Other than Grunts)." *Id.* For another definition, see Austin Bay, *Excerpt: Embrace the Suck*, NAT'L PUBLIC RADIO (Mar. 8, 2007), <http://www.npr.org/templates/story/story.php?storyId=7457988> (defining "fobbits" as a "[d]erogatory term for soldiers who never leave a [forward operating base (FOB)]").

body of the text.⁵⁸ He received a letter from a unit supply specialist named Corey Brass with whom Parnell had served at FOB Bermel—a letter that Parnell describes as a “wake-up call.”⁵⁹ Brass was dismayed by Parnell’s almost uniformly unkind characterizations of the “fobbits” whom he encountered in Afghanistan.⁶⁰ Brass informed Parnell that Brass’s fiancée had left him after he told her that the unit’s deployment was being extended.⁶¹ “The ‘fobbits’ gave up something too,”⁶² Brass wrote. “For some it cost them their marriage and for some it cost them their life.”⁶³ Parnell was moved to include an excerpt of Brass’s letter in the book, and to state that “all of us sacrificed to be out there on the edge of the Hindu Kush.”⁶⁴ In so doing, Parnell “set right a wrong.”⁶⁵

cadre of disciplined, dedicated, close-knit professionals who stand ready to defend our nation’s interests—often at the expense of these individuals’ own, more immediate personal interests. The reader may also come away from the story struggling to discern whether our country has asked too much of the Outlaws and others like them, and whether their heroism has been properly appropriated by their government. By giving rise to weighty questions such as this, Parnell’s eloquent and engaging book has perhaps achieved more than he ever envisioned.

VI. Conclusion

Outlaw Platoon is equal parts inspiring and tragic. The reader comes away from the book buoyed by the forceful reminder that within America and its Army is a self-selected

⁵⁸ See, e.g., *id.* at 206. The author—here and elsewhere—exhibits disdain for fobbits as a group.

⁵⁹ *Id.* at 370.

⁶⁰ *Id.* at 371–72.

⁶¹ *Id.* at 371.

⁶² *Id.* at 372.

⁶³ *Id.*

⁶⁴ *Id.* at 370.

⁶⁵ *Id.*

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAА: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for all Reserve Component company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 November all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2014, will not be allowed to attend the December 2014 Phase II resident JAOAC. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations, and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised that to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer,” the “Military Law Review,” and the “Law Library.”

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt.cnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the TJAGLCS Information Technology Division at (434) 971 -3264 or DSN 521-3264.

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil.

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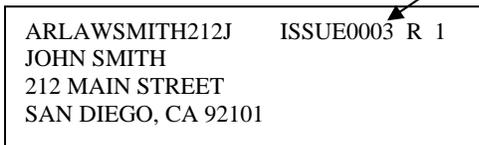
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