

THE Reporter

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Education and Outreach for The Judge Advocate General's Corps

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UNDERSTANDING THE LAW OF ARMED CONFLICT

How would you classify noncombatants who engage in activities that support ISIL?

The Reporter

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THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. **Contributions from all readers are invited.** Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps.

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On the Cover: Airman Kaylee Morin, assigned to the 90th Missile Wing at F.E. Warren Air Force Base, Wyoming, fires at a target Sept. 23, 2015, during a shooting portion of the 2015 Global Strike Challenge security forces competition. (U.S. Air Force photo/Senior Airman Brandon Valle)

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Message from The Commandant



If there is one constant in our profession it is that the law will never be static. It is always changing, receiving interpretation, and being redefined. In this edition of *The Reporter*, we explore emerging changes in the law, present new challenges to well established precedents, and offer hard won advice on best practices for those who stand on the front line of the practice of law.

In our featured articles, Lieutenant Colonel Darrin Skousen, Major Brian Mason, and Major David Cromwell explore how current operations law principles apply to the new threats presented by the Islamic State of Iraq and the Levant. Meanwhile, Major Jason DeSon reviews the Department of Defense's new Law of War Manual and ponders the implications it will have on the field of operations law. Finally, Captain Ryan Linsner, Captain Scott Taylor, Captain Carman Leone, and Staff Sergeant Natesha Champion provide advice on best practices to the field on the topics of handling street racing courts-martial and expunging DNA profiles.

In addition to our featured articles, Mr. Thomas Becker provides a thoughtful look at the professional development requirements for young Air Reserve Component FGO officers. Major Graham Bernstein rounds out this edition's leadership contribution with an article that identifies the unique character traits of President George Washington that made him such a successful and revered leader.

This edition's fields of practice section focuses on fiscal and contracts law with a primer article on defense budgeting by Major Scott Hodges and a detailed walk through of organizational conflicts of interest in contracting by Mr. Michael Farr.

Finally, our book review for this issue continues in the theme of ever changing justice with a look back to the turbulent landscape of social justice in the 1960s. Mr. Thomas Becker writes an engaging review of *The Informant: The FBI, the Ku Klux Klan, and the Murder of Viola Liuzzo*.

Thank you to those who submitted articles for this issue of *The Reporter*. And I encourage the rest of you to write and submit articles for publication. Through your efforts, the JAG Corps maintains its expertise within the ever changing world of law.

TARGETING ISIL FIGHTERS AND SUPPORTERS



BY LIEUTENANT COLONEL DARRIN M. SKOUSEN, MAJOR BRIAN C. MASON, AND MAJOR DAVID W. CROMWELL

Understanding the law of armed conflict (LOAC) and how it applies to targeting is important due to ISIL's unique status.

Coalition Airstrikes

Enable Local Forces to Fight ISIL

A U.S. Air Force F-15E Strike Eagle pops a flare while departing after refueling with a USAF KC-10 Extender aircraft over Southwest Asia in support of Operation Inherent Resolve. (U.S. Air Force photo/Staff Sergeant Sandra Welch)

As of the summer of 2015, the United States and partner forces have damaged or destroyed more than 10,000 targets in Iraq and Syria in their combined air campaign against the Islamic State of Iraq and the Levant (ISIL).¹ The volume and type of targets struck in this campaign creates a need for operations-law attorneys ready to provide candid and competent legal advice regarding the law of armed conflict (LOAC) and its relation to the joint-targeting process. It is clear that armed ISIL fighters qualify as lawful targets under LOAC. It is not so clear what to do with potential noncombatants who engage in activities that support ISIL. This article discusses basic LOAC principles that govern

¹ See U.S. DEP'T OF DEF., OPERATION INHERENT RESOLVE, http://www.defense.gov/home/features/2014/0814_iraq/ (last visited Oct. 30, 2015). The numbers are based on current battle damage assessments.

and guide commanders' decisions to characterize and target such individuals when they are directly participating in hostilities.

ISIL AND WHY IT MATTERS

Understanding LOAC and how it applies to targeting is important due to ISIL's unique status. Unlike many transnational armed groups, ISIL has taken advantage of regional turmoil to carve out its own territory and establish a self-proclaimed caliphate.² After establishing a base of operations in Ar Raqqa in eastern Syria, ISIL launched a massive campaign in the spring and summer of 2014 that resulted in the seizure of Fallujah,

² 'Amr, or authority, is an essential requirement for a caliphate. In the areas it controls, ISIL collects taxes, operates courts, and administers services such as education, health care, and sanitation. See Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (March 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/>.

Mosul, Tikrit, and other cities in Iraq.³ By the time coalition forces halted ISIL's expansion, ISIL controlled territory in Iraq and Syria comparable to the size of the United Kingdom.⁴

ISIL's "caliphate" has raised unique targeting issues that have not applied to other terrorist organizations. In some ways, ISIL's need to control its territory and desire for further expansion has simplified the targeting process by providing the U.S. and partner nations with an abundance of identifiable targets. However, ISIL's nature creates other issues with potential noncombatants (e.g., non-ISIL fighters) who engage in activities that provide direct and/or indirect support to the regime. For instance, ISIL controls critical infrastructure such as former Syrian and Iraqi oil facilities. An operations-law attorney must understand LOAC in order to properly advise on a targeted airstrike on these types of facilities because of the potential presence of civilians.

THE PRINCIPLE OF DISTINCTION

Distinction is one of the fundamental principles of LOAC. The principle of distinction, also called discrimination, requires military forces to "at all times distinguish between the civilian population and combatants and between civilian objects and military

³ Martin Chulov, *ISIS insurgents seize control of Iraqi city of Mosul*, THE GUARDIAN (June 10, 2014), <http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul>.

⁴ Raf Sanchez, *Islamic state controls area the size of Britain, US warns*, THE TELEGRAPH (Sept. 3, 2014), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11073593/Islamic-State-controls-area-the-size-of-Britain-US-warns.html>.

objectives."⁵ This important requirement is part of customary international law. It applies equally to both international and non-international armed conflicts.

The purpose of distinction is to prevent total war. As reflected in the 1868 St. Petersburg Declaration, the first formal international agreement prohibiting the use of certain weapons in war, "[t]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."⁶ This principle has been further refined over time and is currently reflected in Additional Protocol I (which governs international armed conflict) and Additional Protocol II (which governs non-international armed conflict) to the Geneva Conventions.⁷

For purposes of distinction, LOAC clearly defines who qualifies as a combatant. Combatants in an international armed conflict include all "[m]embers of the armed forces of a Party to a conflict...other than medical personnel and chaplains."⁸ In a non-international armed conflict,

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 25 [hereinafter Protocol I].

⁶ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297

⁷ See Protocol I, *supra* note 5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 1125 U.N.T.S. 515 (hereinafter Protocol II). The United States has signed but not ratified either Protocol. However, the United States accepts many of their provisions as a matter of policy or as customary international law.

⁸ Protocol I, *supra* note 5, Article 43(2).

combatants include members of a state's armed forces, dissident armed forces, or another organized armed group meeting certain criteria.⁹ LOAC does not provide such a concise definition for civilians. Under Additional Protocol I, a civilian consists of anyone who does not qualify as a lawful combatant.¹⁰ Similarly, all non-military objects are civilian objects.¹¹ If there is doubt whether the person is a civilian, "that person shall be considered a civilian."¹²

Whether or not someone is a civilian is important. U.S. forces do not intentionally target civilians or civilian objects.¹³ Both Additional Protocol I and Additional Protocol II state that "[t]he civilian population as such, as well as individual citizens, shall not be the object of attack."¹⁴ Only combatants or military objects qualify as lawful targets. Military objects are "those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or

⁹ Protocol II, *supra* note 7, Article 1(1). The other "organized armed group" must be "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement" *id.*

¹⁰ Article 50(1) of Protocol I, *supra* note 5, refers to the definition of lawful combatants in Article 43. It also references categories of person listed in Article 4 of the third Geneva Convention. See Geneva Convention for the Relative to the Treatment of Prisoners of War of the Condition of the Wounded and Sick in Armed Forces in the Field art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III].

¹¹ Protocol I, *supra* note 5, Article 52(1).

¹² *Id.*, Article 50(1).

¹³ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING A-2 (Jan. 31, 2013).

¹⁴ Protocol I, *supra* note 5, Article 51(2); Protocol II, *supra* note 7, Article 13.

partial destruction, capture, or neutralization, under the circumstances ruling at that time, offers a definite military advantage.”¹⁵ When evaluating what constitutes an “effective contribution,” the United States does not limit its assessment to activities that only provide immediate tactical or operational gains. Instead, the United States also includes the war-sustaining capability of the opposing force when assessing valid military objectives.¹⁶

An individual who has already been characterized as a combatant only enjoys protection from attack under certain limited circumstances (e.g., combatants who later become non-combatants due to wounds or injuries causing them to be “out of the fight,” or *hors de combat*). Once a force is declared hostile, any individual positively identified as a member of that force becomes a combatant and is a lawful military target as a member of that declared hostile force. An administrative clerk who is a member of the armed forces stationed far from the front line is just as valid of a military target as a pilot of an attack aircraft flying over enemy territory. Because of their status (e.g., a member of the armed forces) both individuals are lawful military targets.

DIRECT PARTICIPATION IN HOSTILITIES

The protection against direct attacks afforded to civilians by LOAC is not absolute. To qualify for protection,

¹⁵ Protocol I, *supra* note 5, Article 52(2).

¹⁶ OFFICE OF GENERAL COUNSEL, DEP’T OF DEFENSE LAW OF WAR MANUAL § 5.7.6.2 (June 2015) [hereinafter LAW OF WAR MANUAL].

civilians must refrain from directly participating in hostilities. Once civilians engage “in combat operations, singularly or as a group, [they] lose their protection against direct attack.”¹⁷ Civilians only lose their protection though “for such time as they take a direct part in the hostilities.”¹⁸ Once civilians stop participating in hostilities they regain protected status.

The source for the direct-participation-in-hostilities exception is Common Article 3 of the Geneva Conventions.¹⁹ It is also contained in Additional Protocol I and Additional Protocol II. Unfortunately, none of these international agreements (or customary international law) define what constitutes “direct participation.” Instead one must interpret the basic text for guidance.

A plain reading of the text provides three basic factors to consider when assessing whether or not a civilian directly participates in hostilities. These factors are: (1) a direct act, (2) a temporal—functional—or geospatial nexus, and (3) hostilities.²⁰ Evaluating these factors is fact dependent. The Commander’s Handbook on the Law of Naval Operations states “[c]ombatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities

¹⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, *supra* note 13, at A-2.

¹⁸ Protocol I, *supra* note 5, Article 51(3); Protocol II, *supra* note 7, Article 13.

¹⁹ See, e.g., GC III, *supra* note 10, art. 3.

²⁰ See *id.* (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”) (emphasis added).

Once a force is declared hostile, any individual positively identified as a member of that force becomes a combatant and is a lawful military target as a member of that declared hostile force.

Even if a target ultimately includes a civilian who retains their protected status (e.g., they are not directly participating in hostilities), that does not mean a particular target is immune from attack.

based on the person's behavior, location, attire, and other information available at the time."²¹

While there appears to be general consensus regarding the basic criteria to use, there is disagreement over how "direct" the participation must be for the civilian to lose protected status. At a minimum, a civilian's conduct that by its nature or purpose is intended to cause actual harm to the enemy qualifies as direct participation.²² So are acts that are "an integral part of combat operations."²³ The United States also includes acts that "effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations."²⁴ This does not encompass general support that "members of the civilian population provide to their State's war effort, such as by buying war bonds."²⁵ The U.S. approach is broader than the one advocated by the International Committee of the Red Cross (ICRC).

The ICRC's view limits "direct participation" to only those acts that cause or intend to cause actual harm, within "one causal step," to the opposing force.²⁶ Under the ICRC view, general war-sustaining activities are too indirect to qualify. This means, for example, a civilian

who smuggles parts for, assembles, or stores improvised explosive devices (IEDs) retains protected status under an ICRC analysis because that activity does not cause the actual harm. Instead, such persons only lose their protected status if they plant or detonate the device.²⁷ The ICRC guidance matters because the U.S. often operates as part of a coalition. Partner nations may well follow this more restrictive approach.

THE PRINCIPLE OF PROPORTIONALITY

Even if a target ultimately includes a civilian who retains their protected status (e.g., they are not directly participating in hostilities), that does not mean a particular target is immune from attack. LOAC only prohibits intentional and direct attacks on civilians. A military target remains legitimate even if a strike might cause incidental injury or collateral damage to civilians or civilian objects. An attack only becomes off-limits when it fails to comply with the principle of proportionality.²⁸

The principle of proportionality requires parties to the conflict to refrain from launching attacks that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects,

²¹ OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DEP'T OF THE NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.2.2 (Jul. 2007).

²² LAW OF WAR MANUAL, *supra* note 16, § 5.9.3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, at 58 (2009).

²⁷ *Id.* at 54.

²⁸ See LAW OF WAR MANUAL, *supra* note 16, § 5.12.4 ("Under the proportionality rule, the potential attack against the military objective is prohibited only when the expected incidental harm is excessive compared to the military advantage to be gained.")

or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁹ This means commanders must weigh the anticipated gain of a military operation against the reasonably foreseeable consequences to civilians or civilian objects. When assessing the military advantage, commanders are not limited to just the immediate tactical gain. They may also consider the overarching strategy for the respective operation or campaign.³⁰

Within reason, a commander has discretion in determining whether or not an attack is proportionate. Unless limited by applicable rules of engagement (ROE), such as a limit on the amount or extent of acceptable collateral damage, there are no set criteria for determining how many civilian casualties are excessive. Instead, commanders must consider the anticipated gain and available precautionary measures that may mitigate the risk of collateral harm. The greater the gain, the more risk of harm a commander may accept.

A PRACTICAL APPLICATION

With this basic understanding of LOAC in mind, we can now advise on the general legal concerns associated with the targeting of ISIL oil infrastructure. Almost immediately after the air campaign began, the United States began targeting ISIL-controlled oil facilities in Syria. From

²⁹ See Protocol I, *supra* note 5, Article 57(2)(a)(iii).

³⁰ See LAW OF WAR MANUAL, *supra* note 16, § 5.12.5 (“military advantage” is not restricted to immediate tactical gains, but may be assessed in the full context of war strategy”).

then until now, the Department of Defense has reported that coalition airstrikes have damaged or destroyed 196 “oil infrastructure” targets.³¹ Assuming that these targets are valid military objectives, let us consider how the principles of distinction and proportionality factor into the targeting decision.³²

Consistent with the principle of distinction, we must first determine whether the workers at these oil-production facilities are civilians. Without more information to the contrary, we must presume they are. Oil-production facilities require technical expertise. This suggests ISIL may hire skilled workers (i.e., not fighters) to operate the oil fields it controls.³³ If so, then coalition airstrikes cannot target these individuals unless their conduct qualifies as direct participation in hostilities. It also means the U.S. must consider these potentially civilian workers in any proportionality assessment.

Even if ISIL employs civilians, that does not mean that every facility has civilians present. This is why military intelligence is so important. It is quite possible that one facility may employ civilians while another only uses ISIL fighters. Or civilians may work in the facility only during

³¹ See *supra* note 1.

³² For an analysis of the legality of targeting ISIL oil facilities, see Kenneth Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INT’L L. STUD. 499 (2014).

³³ Matthew Levitt, *Countering ISIL Financing: A Realistic Assessment*, WASHINGTON INSTITUTE FOR NEAR EAST POLICY (Feb 2, 2015), <https://www.washingtoninstitute.org/uploads/Documents/other/LevittStatement20150202-v3.pdf>.

Commanders must weigh the anticipated gain of a military operation against the reasonably foreseeable consequences to civilians or civilian objects.

Additional Thoughts

MORE

A Legal Map on Airstrikes in Syria

MORE

Targeting ISIL Oil Transport Trucks

MORE

Targeting Tankers and Their Drivers

daylight hours. Any facility operated solely by ISIL fighters, or vacant of any civilians, plainly satisfies the principle of distinction.

The analysis does not end there. If these civilians are directly participating in hostilities, then they are just as valid a military target as ISIL fighters. That means they do not factor into the proportionality assessment. To lose their protected status, the civilians must directly participate in hostilities. Whether an act qualifies as taking a direct part in hostilities depends on the context.

A factor to consider in determining whether a civilian, who works in a critical infrastructure field that provides war-sustaining material to ISIL, directly participates in hostilities is his or her close geographic or temporal proximity to combat operations.³⁴ It is generally accepted that civilians who work in a factory far from the front line retain their protected status even if the factory supplies weapons and other war-sustaining material to armed forces.³⁵ That is because the support they provide is too indirect to overcome their protected status. The closer the factory gets to the action, geographically and temporally, the more likely it becomes that the civilian worker is directly participating in hostilities. However, the civilian's specific activity still matters. Civilians who work in an oil production facility that simply generates revenue,

³⁴ See LAW OF WAR MANUAL, *supra* note 16, § 5.9.3.1 (examples of acts generally considered taking a direct part in hostilities).

³⁵ See *id.*, § 5.9.3.2 (examples of acts generally not considered taking a direct part in hostilities).

regardless of its locality, are unlikely to lose their protected status because their participation in hostilities is too indirect. Each case is different. The result will depend on the specific type and extent of support each civilian provides to military operations.

Even if the civilian workers retain their protected status because their connection to hostilities is too indirect, under the principle of proportionality commanders may still order coalition airstrikes to target the facility if the military gain achieved by its destruction outweighs the expected harm to civilians. Here, the civilians are not the object of attack. Instead, it is their decision to work in a targetable facility that exposes them to incidental harm. Based on the anticipated benefit of destroying a specific target, commanders may choose to accept an increased risk of collateral damage. This benefit is not limited to just the immediate tactical gain of destroying that single facility. Commanders may also consider the significance of limiting ISIL's ability to raise revenue or provide fuel for future operations as it relates to the overall campaign strategy.³⁶

When making a proportionality assessment, commanders shall also consider employing precautionary measures to mitigate the risk. There is no requirement to remove all risk. Instead, the precautionary measures simply aid the commander in deter-

³⁶ See LAW OF WAR MANUAL, *supra* note 16, § 5.12.5 (commanders may assess the "military advantage" of a strike as it relates to the overall war strategy).

mining whether the attack complies with the principle of proportionality. In relation to the oil facilities, commanders may try to reduce the risk of harm by trying different weaponeering solutions or only targeting certain portions of the facility. Using a specific strike window could also make a difference. Perhaps the civilian workers are only there during the day, making a night strike more reasonable. Providing advance notice or a warning to the civilian workers of a pending strike is another option.

The targeting analysis becomes even more complicated when we shift attention to the distribution network. As an armed terrorist group, ISIL relies on an extensive smuggling network to generate its oil revenue.³⁷ This network presents a very desirable target if the goal is to degrade ISIL's ability to generate revenue. But what portions of that network are targetable under LOAC? Does it include just the infrastructure, or can we target the individual smugglers? At what point, if any, do the smugglers lose their protected status by directly participating in hostilities? Does the smuggler need to be at the oil production facility fueling his truck, or does it include villagers who use irrigation piping to smuggle oil beneath the Turkish/Syrian border?

Even under the more encompassing U.S. approach, there is a limit to how far commanders can reach. The nexus requirement provides that limit.

³⁷ This smuggling network provides ISIL with an estimated \$30 million a month. See Levitt, *supra* note 33.

The further removed the smuggling activity is from ISIL (temporally, functionally or geospatially), the more indirect the participation becomes. On one hand, it is highly unlikely any villager at the Turkish border loses his or her protected status by piping oil into Turkey. This activity is too far removed from the original transaction with ISIL. On the other hand, the closer we get to ISIL and the original transaction, the stronger the connection becomes.

Just because oil smugglers contribute to ISIL's ability to engage in hostile acts does not mean they automatically forfeit their protected status. Their actions must still qualify as direct participation in hostilities. Whether a smuggler loses his or her protected status by providing funds to ISIL is questionable, but it is not without precedent. In Afghanistan, the United States temporarily targeted 50 drug traffickers whose activities helped fund the Taliban.³⁸ A commander may see this as no different. The challenge is determining what specific activities will constitute sufficient participation in hostilities, as smuggling is usually not tied directly to ongoing hostilities.

Assuming the oil smuggler retains his or her status, that does not provide de facto immunity for the oil facilities. Just as with the civilians who may operate the facilities, oil smugglers who enter the facility become

³⁸ James Risen, *U.S. to Hunt Down Afghan Drug Lords Tied to Taliban*, N.Y. TIMES (Aug. 9, 2009), http://www.nytimes.com/2009/08/10/world/asia/10afghan.html?_r=1&.

a collateral concern to consider when making the proportionality assessment. They do not confer their protected status onto the facility. If the anticipated (not actual) gain outweighs the reasonably foreseeable harm to civilians or civilian objects, the facility remains a valid target unless the ROEs direct otherwise.

CONCLUSION

None of this analysis is easy. Rarely is there a black or white answer. Each situation is different. The slightest change in the facts may significantly alter the outcome. Ultimately the decision to strike any target, and not just an ISIL oil facility and its distribution network, will depend on the intelligence that supports the characterization of the individuals involved. The legal analysis is obviously simplified if intelligence shows that the oil facilities are operated and controlled by armed ISIL fighters. But that does not mean the facility is completely off-limits if the intelligence tells us otherwise. Other factors must also be considered. That is why it is absolutely critical for an operations law attorney to understand the protections afforded to civilians under LOAC and how certain conduct may cause them to lose that protected status thereby potentially altering the proportionality assessment. It is only with this knowledge in hand that an attorney can properly render candid and competent advice to the respective target engagement authority and-or decision-makers. **R**



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SPEAKING SOFTLY WITHOUT A BIG STICK?

THE NEW DOD LAW OF WAR MANUAL AT A GLANCE

BY MAJOR JASON S. DESON

[Click here for the PDF version of the DoD Manual](#)



*The law of war is of fundamental importance to the Armed Forces of the United States. The law of war is part of who we are.*¹

On June 12, 2015, the Department of Defense (DoD) quietly issued “the first-ever DoD-wide Law of War Manual [hereinafter, the “Manual”].”² According to the DoD press release, “The [M]anual is the product of a

multi-year effort by military and civilian lawyers from across the Defense Department to develop a department-wide resource for military commanders, legal practitioners, and other military and civilian personnel on the international law principles governing armed conflict.”³ At 1,204 pages in length, the Manual is nothing short of imposing in addition to being wide-ranging.

While the military legal community continues to digest the contents of the Manual and incorporate its provisions into their training and guidance, an initial “fly by” to get a

10,000 foot view of the Manual itself should be helpful. This article does just that. First, this article explores the Manual’s place amongst the existing corpus of laws and publications. Second, the scope of the Manual is discussed by looking at the various subjects covered. Third, the significance of the Manual is explored by discussing the Manual’s development and its potential impact on customary international law applicable in armed conflict. Finally, reactions to the Manual by the media and academia are surveyed, with a particular focus on those provisions governing cyber operations, direct participation in hostilities (DPH), and treatment of journalists. These areas have generated

¹ OFFICE OF THE GEN. COUNSEL, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015), available at www.dod.mil/dodgc/images/law_war_manual15.pdf [hereinafter, DoD MANUAL].

² Press Release No: NR-232-15, Dep’t of Def., DoD Announces New Law of War Manual (Jun. 12, 2015), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17335>.

³ *Id.*

some discussion in their own right, but they are also illustrative of the overall thesis of this article—that the Manual may have said too much in some areas and too little in others—the result being a Manual that speaks softly without carrying a big stick.⁴

WHY A NEW MANUAL?

Section 1.1.1 of the Manual states that its purpose “is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.”⁵ This has generated some discussion as to whether the manual is authoritative in nature at all.⁶ Indeed, prior to the Manual’s release, each of the services had their own publications on the law of war. Army guidance was found primarily in Field Manual 27-10, *The Law of Land Warfare*, last updated in 1976.⁷ Navy guidance was found pri-

⁴ Paraphrasing the famous phrase from Theodore Roosevelt. See Letter from Theodore Roosevelt, 33rd Governor of N.Y., to Henry L. Sprague, N.Y. State Assemblyman (Jan. 26, 1900) (this letter is thought to contain the first use of the phrase, “speak softly and carry a big stick,” by Roosevelt, a phrase later attributed to his approach to foreign policy), available at <http://www.loc.gov/exhibits/treasures/trm139.html>.

⁵ DoD MANUAL, *supra* note 1, § 1.1.1.

⁶ See generally Eric Jensen, *Law of War Manual: Information or Authoritative Guidance?* JUST SECURITY BLOG (Jul. 1, 2015, 10:37 AM), <https://www.justsecurity.org/24332/law-war-manual-information-authoritative-guidance/> (arguing that the Manual is informational based on its size, accessibility (i.e., intended audience), and its stated intent to not serve as an official statement on the U.S. government position on the law of war). See also, John Dehn, *The DoD Law of War Manual’s Potential Contribution to International Law*, JUST SECURITY BLOG (Jul. 16, 2015, 9:10 AM), <http://justsecurity.org/24675/dod-law-war-manuals-potential-contribution-international-law/> (noting the Manual’s stated limited purpose and discussing its potential to have broader impact on customary international law of war).

⁷ See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (Jul. 18, 1956 incorporating Change 1, Jul. 15, 1976)

marily in Naval Warfare Publication 1-14M, *Commander’s Handbook on the Law of Naval Warfare*, last updated in 2007.⁸ Air Force guidance was previously found in Air Force Pamphlet (AFP) 110-31 *International Law—The Conduct of Armed Conflict and Air Operations* and AFP 110-34, *Commander’s Handbook on the Law of Armed Conflict*, both long rescinded.⁹ In addition, various other handbooks and manuals like the Army’s *Operational Law Handbook* and the *Air Force Operations and the Law* have been promulgated to the field.¹⁰ So where does the Manual fit within this existing rubric of service-specific guidance?

The Manual itself is silent on the question of whether it is intended to replace service-specific guidance to the field. It is clear that the Manual “reflects the views of the Department of Defense, rather than the views of any particular person or DoD component.”¹¹ However, since it is “not a definitive explanation of all law

[hereinafter FM]. This publication is expected to be replaced by a new publication (FM 6-27) later this year.

⁸ See U.S. DEP’T OF NAVY, NAVAL WARFARE PUBL’N 1-14M, COMMANDERS HANDBOOK ON THE LAW OF NAVAL WARFARE, (Jul. 2007) [hereinafter NWP]. This publication is also a Marine Corps and Coast Guard publication. An Annotated Supplement to the Handbook was also released.

⁹ U.S. DEP’T OF AIR FORCE, AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW – THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (Nov. 19, 1976) (Rescinded) [hereinafter AFPAM]. See also, AFPAM 110-34, COMMANDER’S HANDBOOK ON THE LAW OF ARMED CONFLICT (Jul. 25, 1980) (Rescinded).

¹⁰ See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2014). See also, U.S. DEP’T AIR FORCE, THE JUDGE ADVOCATE GEN.’S SCH., AIR FORCE OPERATIONS AND THE LAW (3d ed., 2014).

¹¹ DoD MANUAL, *supra* note 1, v.

The Manual states that its purpose “is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.” This has generated some discussion as to whether the manual is authoritative in nature at all.

The Pentagon (photo previous page)
Stock Photo © iStock.com/David B. Gleason

of war issues,”¹² it is unlikely that it was designed to completely supplant service-specific guidance to the field.¹³ Further, at 1,204 pages, the Manual is not a practical resource for commanders and operators to learn about their legal responsibilities under the law of war. Service-specific guidance can help provide narrowly-tailored information, consistent with Manual provisions, to the operational force. So, do not throw away those copies of the *Operational Law Handbook* or *Air Force Operations and the Law* just yet!

The best way to understand the purpose and use of the Manual is to consider what Stephen W. Preston, the now-former DoD General Counsel, writes in the forward to the Manual: “It reflects the experience of this Department in applying the law of war in actual military operations, and it will help us remember the hard-learned lessons from the past.”¹⁴ In other words, the Manual is designed to *aggregate* several different sources explaining *how* the DoD has applied the law of war—especially through its heavy use of footnotes¹⁵

¹² *Id.* at 1.

¹³ See David Glazier, *The DoD Law of War Manual: What Is It Good For?*, JUST SECURITY BLOG (Jul. 28, 2015, 10:19 AM), <https://www.justsecurity.org/24977/dod-law-war-manual-good-for/>. This blog post from Professor David Glazier of Loyola Law School, and a retired U.S. Navy surface warfare officer, notes that unlike service-specific guidance, the Manual was not issued within the chain of command or as a “recognized military publication type,” thus creating confusion over whether it constitutes authoritative guidance to operational military forces. *Id.*

¹⁴ DoD MANUAL, *supra* note 1, ii.

¹⁵ The Manual contains 6,838 footnotes, however, many of those are cross-references to other portions of the manual.

—with the intention of guiding how that law will be applied in the future. In other words, it is still not a “one-stop shop” for all law of war issues, but it is yet another helpful resource for the field to better advise their clients and future service-specific guidance should not contradict it.

“It reflects the experience of this Department in applying the law of war in actual military operations, and it will help us remember the hard-learned lessons from the past.”

WHAT IS IN THE MANUAL?

The Manual focuses on the law governing the conduct of hostilities and the protection of war victims—also known as *jus in bello*.¹⁶ This law applies in times of international armed conflict, non-international armed conflict, and belligerent occupation.¹⁷ The Manual treats *jus in bello* as the *lex specialis*, or controlling body of law, for the conduct of hostilities and protection of war victims.¹⁸ This is an important

¹⁶ *Id.* at § 1.1.2. The Manual defines this Latin phrase as the “law concerning conduct during war.” *Id.* at § 1.11.

¹⁷ *Id.* at § 1.3.

¹⁸ See *id.* at § 1.3.2. “Although there are different approaches and although the ultimate resolution may depend on specific rules and context, the law of war, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.” *Id.*

distinction between the U.S. and the emerging international approach to the applicable body of law in times of armed conflict, namely that international human rights law (a separate body of international law in the U.S. view) also applies during armed conflicts and occupations.¹⁹ A brief overview of *jus ad bellum*, or the “law concerning the resort to force” is also provided in the Manual.²⁰ However, the Manual makes clear that these issues are often addressed by legal advice at the national-level and do not otherwise affect the application of *jus in bello* principles during an armed conflict, thus only a small portion of the Manual is dedicated to it.²¹

Overall, the Manual contains 19 chapters, the last of which serves as a documentary appendix.²² It begins with background, including the DoD definition of the law of war,²³ its

¹⁹ This has been of particular concern in the United Kingdom, where the European Court of Human Rights has issued several rules applying international human rights law to its military activities. See e.g., RICHARD EKINS, ET AL., CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT (2015), available at <http://www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf>. This recent report from the United Kingdom discusses the negative impact that application of human rights law by British courts and the European Court on Human Rights (ECHR) has had on the British armed forces fighting in Iraq and Afghanistan.

²⁰ DoD MANUAL, *supra* note 1, at § 1.11.

²¹ *Id.*

²² The Documentary Appendix “provides background information about certain treaties and other documents” and “is intended to describe DoD views and practice relating to those documents as of the date of publication” of the manual. DoD MANUAL, *supra* note 1, at § 19.1.

²³ “For the purposes of this manual, the *law of war* is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international

sources in the law, and its relationship with other “certain topics.”²⁴ It continues with chapters on: the law of war principles; application of the law of war; classes of persons; conduct of hostilities; weapons; wounded, sick, shipwrecked, dead, and the medical services; detention; prisoners of war; civilians in the hands of a party to a conflict; military occupation; non-hostile relations between belligerents; naval warfare; air and space warfare; the law of neutrality; cyber operations; non-international armed conflict; and implementation and enforcement of the law of war. The Manual is currently available electronically as a secured Adobe PDF document with the chapters and cross-references linked for ease of access. At the time of this writing, there is no indication that it will be published in hard copy.

IS THE MANUAL A NEW SOURCE OF LAW?

Not really. The Manual is nonetheless significant to the legal community writ large for many reasons, but primarily because it represents the first DoD-wide statement on the law of war. It is also significant in that so many players took part in its creation. Not only was the Manual

armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States.” *Id.* at § 1.3.

²⁴ *Id.* at § 1.6. “The law of war may be distinguished from the following topics: (1) operational law; (2) arms control; (3) human rights treaties; (4) the Just War Tradition; (5) rules of engagement; and (6) the Code of Conduct for U.S. Armed Forces.” *Id.* This is an important section as it clearly delineates between the rules that apply in war and those that apply outside war (i.e., human rights law). *Id.*

drafted by a DoD Law of War Working Group, which included representatives from all the armed services, but it was also reviewed by other departments and agencies within the Federal government, representatives from allied nations, and distinguished scholars.²⁵ Despite that widespread contribution, the Manual is careful to note that it does *not* “necessarily reflect the views of those Departments or the U.S. Government as a whole.”²⁶ This statement is significant for a very important reason. To understand that reason, it is necessary to quickly review from where the international law that governs armed conflict comes.

International law comes primarily from two sources: treaties; and customary international law.²⁷ Treaty law should be familiar to most attorneys, but customary international law is not quite as straightforward. Put simply, it is “an unwritten form of law” that comes from state practice followed out of a sense of legal obligation (i.e., *opinio juris*).²⁸ Since the Manual does not necessarily represent the views of *all* the departments of the U.S. government, it should follow that it is not a source of what the U.S. officially considers to be the customary international law applicable in armed conflict.²⁹ This is

²⁵ *Id.* at iv.

²⁶ *Id.* at vi.

²⁷ *Id.* at § 1.3.

²⁸ *Id.* at § 1.8.

²⁹ It should also be noted (as the Manual elaborates) that a military manual is not a good

a potential point of frustration to the international community.

Practitioners new to international and operational law are often surprised to learn that the United States is not a party to several treaties governing armed conflict, particularly the 1977 Additional Protocols to the Geneva Conventions (hereinafter, “AP I and AP II”). Although, the U.S. signed these treaties, they are not ratified. However, certain provisions are considered binding on the U.S. because those provisions are (in the U.S. view) customary international law or otherwise followed by U.S. policy.³⁰ Even though the Manual does not purport to be a definitive statement on the customary international law binding on the U.S., it does contain several provisions that are of great significance to operational law attorneys. Some of these provisions will be discussed in more detail in the next section as they have already drawn the attention of the public and academia.

source of customary international law since it does not necessarily state positions expressed out of a sense of customary legal obligation, but rather specific requirements under treaty law or national policy. This was one of the U.S. concerns with the International Committee of the Red Cross (ICRC) attempt to capture all current customary international law applicable to armed conflict. *See id.* at § 1.8.3.1. *See also, id.* at § 19.25 (discussing the U.S. position on the 2005 ICRC Study on Customary International Humanitarian Law).

³⁰ *See, id.* at § 19.20. This section spanning two and a half pages of the Manual gives a summation of the complex relationship between the U.S. and the provisions of AP I.

WAS THE MANUAL WELL RECEIVED?

Not really. Shortly after its release, the Manual was criticized in the media for some of its provisions. The first criticism to appear online related to the treatment of journalists as possible combatants.³¹ *Popular Science* posted an article entitled, “New Pentagon War Law Manual Is Totally Cool with CIA-Style Drone Attacks.”³² That article went so far as to suggest in its subtitle that such drone attacks were, “More Okay than Poisonous Gas and Herbicide.”³³ Academia soon followed with its own take on some of the Manual’s provisions. Major General (Ret.) Charles J. Dunlap, Jr., former Deputy Judge Advocate General of the Air Force and currently a law professor at Duke Law School, led the

³¹ See Rowan Scarborough, *New Pentagon Manual Declares Journalists Can Be Enemy Combatants*, THE WASHINGTON TIMES, June 21, 2015, available at <http://www.washingtontimes.com/news/2015/jun/21/military-manual-declares-war-on-spies-propagandist/?page=all>. See also, Raven Clabough, *DoD Manual Outlines Laws of War, Labels Journalists Possible Targets*, THE NEW AMERICAN, Jun. 24, 2015, available at <http://www.thenewamerican.com/usnews/item/21127-dod-manual-outlines-laws-of-war-labels-journalists-possible-targets>.

³² See, Kelsey D. Atherton, *New Pentagon War Law Manual Is Totally Cool With CIA-Style Drone Attacks: More Okay Than Poisonous Gas and Herbicide*, POPULAR SCIENCE, Jun. 15, 2015, available at <http://www.popsoci.com/new-pentagon-war-law-manual-totally-cool-drones>. The problem with this piece is that the cited provision of the Manual (§ 6.5.8.) discusses the law related to the legality of the weapon system itself, not its use, which is separate legal issue. Further, the article uses the footnote to § 6.5.8. to suggest that the legality of targeted killing can be inferred by the fact that the source (John Brennan) is now the director of the CIA, one of the organizations allegedly carrying out these attacks. But he was not the director of the CIA when he gave the speech cited in the manual and he is not the only source cited for the assertion. See DoD MANUAL *supra* note 1, 328, fn. 98.

³³ *Id.*

way when he examined the Manual’s chapter on cyberspace operations with a detailed post on the *Lawfare* blog.³⁴

Beginning in late June 2015, the *Just Security* blog started a “mini forum” on the Manual where several legal experts began discussing some of the more contentious provisions of the Manual.³⁵ At the time of this writing, there are several posts in the forum on various topics including: (1) the law of war principles;³⁶ (2) human shields;³⁷ (3) precaution to minimize civilian harm;³⁸ (3) cybersecurity and cyber conflict;³⁹ (4) targeting;⁴⁰ and

³⁴ Major General Charles J. Dunlap, Jr., USAF (ret.), *Cyber Operations and the New Defense Department Law of War Manual: Initial Impressions*, LAWFARE (Jun. 15, 2015, 3:00 PM), <http://lawfareblog.com/cyber-operations-and-new-defense-department-law-war-manual-initial-impressions>.

³⁵ See Sean Watts, *The DoD Law of War Manual’s Return to Principles*, JUST SECURITY BLOG (Jun. 30, 2015, 9:12 AM), <http://justsecurity.org/24270/dod-law-war-manuals-return-principles/>.

³⁶ *Id.* See also, Rachel VanLandingham, *The Law of War is Not About Chivalry*, JUST SECURITY BLOG (Jul. 20, 2015, 9:13 AM), <https://www.justsecurity.org/24773/laws-war-chivalry/>.

³⁷ Adil Ahmad Haque, *The Defense Department’s Indefensible Position on Killing Human Shields*, JUST SECURITY BLOG (Jun. 22, 2015, 2:11 PM), <http://justsecurity.org/24077/human-shields-law-war-manual/>.

³⁸ Geoffrey S. Corn, *Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War*, JUST SECURITY BLOG (Jul. 8, 2015, 11:26 AM), <http://justsecurity.org/tag/law-of-war-manual-forum/>.

³⁹ Kristen Eichensehr, *The OPM Hack and the New DoD Law of War Manual*, JUST SECURITY BLOG (Jun. 17, 2015, 9:37 AM), <http://justsecurity.org/23960/opm-hack-dod-law-war-manual/#more-23960>. The author suggests that the Manual “implies” that the OPM Hack may have been legal espionage that the U.S. itself may also have carried out in cyberspace. *Id.* Colonel Gary Brown, USAF (ret.), *Cyber Conflict in DoD’s Law of War Manual*, JUST SECURITY BLOG (Jul. 27, 2015, 11:15 AM) <https://www.justsecurity.org/24950/cyber-conflict-dods-law-war-manual/>.

⁴⁰ Adil Ahmad Haque, *The Defense Department*

(5) the authoritative nature (or lack thereof) of the Manual itself;⁴¹ (6) hollow point ammunition;⁴² and (7) command responsibility.⁴³ Each of the areas merits further discussion and debate, but would be beyond the scope of this article. Instead, the remainder of this article will focus on three issues in the Manual: (1) the provisions relating to cyber operations; (2) civilians directly participating in hostilities (DPH); and (3) treatment of journalists. As noted at the start of this article, these areas help shed light on some of the issues with the Manual and its use by the field as a definitive reference on the laws of war.

DOES THE MANUAL SAY ENOUGH ABOUT CYBER?

Not really. General Dunlap writes that the Manual “contains no-earth shattering legal propositions” in the cyber area, but also noted that “it does a good job at gathering, organizing, and articulating views already

Stands Alone on Target Selection, JUST SECURITY BLOG, Jun. 29, 2015, 2:11 PM, available at <http://justsecurity.org/24264/dod-stands-alone-target-selection/>. See also, Major General Charles J. Dunlap, Jr., USAF (ret.), *Let’s Balance the Argument About the DoD Law of War Manual and Targeting*, JUST SECURITY BLOG (Jul. 10, 2015, 11:30 AM), <http://justsecurity.org/24542/lets-balance-argument-dod-law-war-manual-targeting/>.

⁴¹ Glazier, *supra* note 13.

⁴² Joshua Berry, *The DoD Law of War Manual Returns Hollow Point Bullets to Armed Conflict*, JUST SECURITY BLOG (Aug. 4, 2015, 12:28 PM), <https://www.justsecurity.org/25200/dod-law-war-manual-returns-hollow-point-bullets-armed-conflict/>.

⁴³ Major Patrick Walsh, Army National Guard, *The DoD Law of Manual and Command Responsibility: Is it Time for a ‘Necessary and Reasonable’ Change to the UCMJ?* JUST SECURITY BLOG (Aug. 19, 2015, 9:30 AM), <https://www.justsecurity.org/tag/law-of-war-manual-forum/>.

on-the-record in DoD and elsewhere in the U.S. government.”⁴⁴ Colonel (Ret.) Gary Brown writes, “Law of cyber warfare practitioners surely breathed a sigh of relief when they found that only 15 of the 1,176 pages in [the Manual].”⁴⁵ He argues that this dearth of information may reflect the DoD’s view that the law in this area “is still developing (or perhaps, not developing)” or that the chapter may become immaterial if it tried to “capture” all the law in this area.⁴⁶

One area of confusion on cyber in the Manual may be in the title of the cyber chapter itself. Curiously, the chapter is labeled, “Cyber Operations.”⁴⁷ This is distinct from other chapters dealing with the other operational domains with titles like “Air and Space Warfare”⁴⁸ and “Naval Warfare.”⁴⁹ While the terminology is consistent with its usage in joint doctrine⁵⁰ and DoD strategic guidance⁵¹, it still seems out of place in a law of *war* manual. The problem is that the term “Cyber Operations” often connotes more than just wartime activities involving the use of force.⁵² Indeed, one section of the

chapter addresses the potential role of intelligence and counterintelligence authorities that may also play a part in the cyber domain.⁵³ Outside of that, the focus is almost entirely on use of force issues. Even with that focus, however, the list of potential cyber operations in § 16.1.2.1 would seem to add more complexity with its discussion of cyber reconnaissance and other “advance force operations” that may or may not give rise to the level of war. Yes, there is a bigger cyber legal framework here that governs *all* of cyber operations, but that framework is only hinted at in the Manual. Perhaps that is for good reason given the Manual’s limited application to *warfare*. Regardless, the Manual should not be the only place a cyber attorney turns to for authorities governing cyber *operations*.

Even with the focus on warfare, one glaring omission in this section of the Manual (as pointed out by both General Dunlap and Colonel Brown) is any reference to the 2013 *Tallinn Manual on International Law Applicable to Cyber Warfare*. That document produced by the NATO Cooperative Cyber Defence Centre for Excellence has been “generally well-regarded”⁵⁴ and considered “quite authoritative by most international cyberlaw experts.”⁵⁵ Nonetheless, there is no reference

cyber capabilities such as computers, software tools, or networks; and (2) have a primary purpose of achieving objectives or effects in or through cyberspace.” *Id.* at § 16.1.2.

⁵³ *Id.* at § 16.3.2.

⁵⁴ Brown, *supra* note 39.

⁵⁵ Dunlap, *supra* note 44.

to it. This seems strange considering there is a reference to another similar manual, the *HPCR Manual on the International Law Applicable to Air and Missile Warfare*.⁵⁶ Reference to the *HPCR Manual* would seem to defeat the argument that the chapter was designed to rely solely on U.S. sources of law. So why omit the *Tallinn Manual*?

One argument for the omission may be that DoD is attempting to avoid bestowing legitimacy on the *Tallinn Manual* and certain others like it. For example, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* is only mentioned fleetingly in a footnote quote.⁵⁷ Professors Michael Schmitt and Sean Watts at the Naval War College have warned that “States have not kept pace with the ever-increasing flow of non-State international legal commentary; the volume and frequency of the latter drowns out what little comment and reaction States have offered.”⁵⁸ Thus, they argue, there is “diminished influence on the content and application of [international humanitarian law].”⁵⁹ The relatively small portion of the Manual devoted to cyberspace operations may play right into this concern. As Colonel Brown concludes, “The final product

⁵⁶ DoD MANUAL, *supra* note 1, 1001, fn. 52.

⁵⁷ *Id.* at 460, fn. 320.

⁵⁸ Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Law Pluralism,” 91 INT’L L. STUD. 171, 198 (2015). “It is no exaggeration to say that jurists, NGOs, scholars and other non-State actors presently have greater influence on the interpretation and development of IHL than do States.” *Id.*

⁵⁹ *Id.* at 177.

⁴⁴ Dunlap, *supra* note 40.

⁴⁵ Brown, *supra* note 39.

⁴⁶ *Id.*

⁴⁷ General Dunlap also noted this distinction in chapter titles, noting that it was “studiously less belligerent (and more expansive) appellation than *warfare*.” See Dunlap, *supra* note 40.

⁴⁸ DoD Manual, *supra* note 1, 900.

⁴⁹ *Id.* at 860.

⁵⁰ See, JOINT CHIEFS OF STAFF, JOINT PUB. 3-12R, CYBERSPACE OPERATIONS (Feb. 5, 2013).

⁵¹ See generally, U.S. DEP’T OF DEF., DoD CYBER STRATEGY (April 2015).

⁵² The Manual states, “Cyber operations: (1) use

Civilians are to be protected from attack, absent a showing that they have taken a direct part in hostilities. Where the United States and the international community have parted company is when exactly civilians lose their protection.

strikes a balance between saying too little and saying too much in an area of law that is fast evolving.”⁶⁰ The irony is that by not saying *enough*, this area of the law may evolve without much DoD input. Time will tell.

DOES THE MANUAL ADD CLARITY TO DIRECT PARTICIPATION IN HOSTILITIES?

Not Really. One of the most important (and anticipated) provisions in the Manual for operational law attorneys governs civilians taking a direct part in hostilities (DPH). Just as with cyber, this is another area of the law that non-governmental organizations, like the International Committee of the Red Cross (ICRC) have attempted to shape and influence. In 2009, the ICRC released its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. The Manual notes that the United States has not accepted this interpretive guidance.⁶¹ However, rather than clarifying the U.S. view on DPH, the Manual confusingly addresses this topic in two separate places with different terminology. The first involves the class of persons identified as “Private Persons Who Engage in Hostilities.”⁶² The second focuses on the conduct of hostilities itself in a section labeled, “Civilians Taking a Direct Part in Hostilities.”⁶³ The first section looks at the activities that “in

a broad sense” refer to any actions that might cause a person to lose one or more protections of the law.”⁶⁴ Thus, it is more concerned with the *status* question—arguing that these so-called private persons are actually *unprivileged belligerents*—a third category of persons that U.S. forces may encounter on the battlefield.⁶⁵ The latter provisions focus on the *conduct* that causes a civilian to lose their protection *from being made the object of attack*.⁶⁶

Why *private persons* are not labeled as *civilians* may seem counterintuitive absent an understanding of the development of the *unprivileged belligerent* category—and its poor reception by the ICRC and other IHL experts.⁶⁷ The traditional view of battlefield status holds that there are two types of people in war: combatants and

⁶⁰ Brown, *supra* note 39.

⁶¹ DoD MANUAL, *supra* note 1, § 4.26.3; *See also id.* at § 5.9.1.2.

⁶² *Id.* at § 4.18.

⁶³ *Id.* at § 5.9.

⁶⁴ *Id.* at § 4.18.1.

⁶⁵ This is a “third” class of persons that is generally unrecognized by other nations and particularly the International Committee of the Red Cross (ICRC), who see only two classes of individuals on the battlefield: (1) combatants; and (2) civilians. *See* Marco Sassoli, et al., “Combatants and POWs: Introductory Text,” in *How Does the Law Protect in War?*, INT’L COMM. RED CROSS, 1 Jan. 14.

⁶⁶ *Id.* Note the slight difference in terminology usage here between direct *part* and *participation*. “This usage does not mean that the United States has adopted the direct *participation* in hostilities rule that is expressed in Article 51 of AP I.” *Id.* at § 5.9.1.

⁶⁷ This is true even despite the explanation given in §4.18.1 on the Manual itself. *See* Sassoli, et al., *supra* note 65. *See also*, Marty Lederman, *The unresolved problems with the DoD Directive definition of ‘unprivileged belligerency’: A response to Ryan Vogel [Updated]*, JUST SECURITY BLOG (Sept. 18, 2014, 8:49 AM), <https://www.justsecurity.org/15106/problems-dod-directive-definition-unprivileged-belligerency-response-ryan-vogel/> (discussing the term in relation to detention, but does it raise the additional concern that this category of person may also be subject to targeting).

civilians. Civilians are to be protected from attack, absent a showing that they have taken a direct part in hostilities. Where the United States and the international community have parted company is *when* exactly civilians lose their protection. The U.S. believes that certain civilians who routinely take direct part in hostilities (but still do not meet the definition of a combatant) are members of a third category of persons that can be targeted based on their *status* rather than their *conduct* per se. However, there are many negative connotations that follow if the U.S. were to say that it is intentionally targeting such *civilians* in an armed conflict.⁶⁸ This is most likely why the authors of the Manual chose to replace the word *civilians* with *private persons*. Words matter in IHL, but instead of adding clarity, these words may have only bred more confusion.

All is not lost with the concept of DPH in the Manual. Section 5.9.3.1 lists some examples of acts that might be considered taking part in hostilities.⁶⁹ Section 5.9.4 discusses

⁶⁸ One need look no further than the recent airstrike on a Doctors Without Borders medical facility in Kunduz, Afghanistan for an example of this. While not an example of intentional targeting of civilians, the mere fact that innocent persons were killed has raised the specter of war crimes allegations against the U.S. See Lisa Ferdinando, *Carter, Campbell Comment on Tragic Kunduz Strike*, DoD News, Oct. 6, 2015, available at <http://www.defense.gov/News-Article-View/Article/622064/carter-campbell-comment-on-tragic-kunduz-strike>. “[General] Campbell emphasized during his appearance before the Senate panel today that ‘no military in history has done more to avoid harming innocents. We readily assume greater risks to our own forces in order to protect non-combatants.’” *Id.*

⁶⁹ These include: (1) “taking up or bearing arms against the opposing party, or otherwise personally trying to kill, injure, or capture

the more controversial concept of *duration of liability to attack* in DPH.⁷⁰ A post on the *Lawfare* blog compellingly compares the Manual’s approach to the so-called “revolving door” protection—or lack thereof—with certain provisions found in the Lieber Code, the first formal codification of the laws of war approved by President Lincoln during the American Civil War.⁷¹ This connection is compelling because it shows an inherently *American* concept of DPH that seems to have historical underpinnings dating back to the American Civil War—proving that this is not a recent development in American interpretation of the law. Without a doubt, DPH is of prime importance in current U.S. military operations against non-state actors, such as the targeted airstrikes against the Islamic State in Iraq and the Levant, where the enemy does not necessarily fit within the traditional dichotomy of lawful combatants or civilians protected from attack. But

personnel or damage material belonging to the opposing party;” (2) “preparing for combat and returning from combat;” (3) “planning, authorizing, or implementing a combat operation against the opposing party, even if that person does not personally use weapons or otherwise employ destructive force in connection with the operation;” (4) “providing or relaying information of immediate use in combat operations;” (5) “supplying weapons and ammunition, whether to conventional armed forces or non-state armed groups, or assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use.” DoD MANUAL, *supra* note 1, at § 5.9.3.1.

⁷⁰ DoD MANUAL, *supra* note 1, at § 5.9.4. “There has been a range of views about the duration for which civilians who have taken a direct part in hostilities forfeit protection from being made the object of attack.” *Id.*

⁷¹ See Quinta Jurecic, *Throwback Thursday: The Lieber Code*, LAWFARE BLOG (Jul. 23, 2015, 4:17 PM), <http://www.lawfareblog.com/throwback-thursday-lieber-code>.

the U.S. position on DPH was not born in this conflict or any other recent conflict since 9/11—and it certainly was not born in this Manual. While the Manual’s approach may be confusing, it is better than leaving the issue open for continued debate without any DoD input.

DOES THE MANUAL REALLY LABEL JOURNALISTS AS “UNPRIVILEGED BELLIGERENTS?”

Surprise...not really. On August 10, 2015, the *New York Times* published an editorial calling for the repeal of the guidelines governing the treatment of journalists arguing that they would make “their work more dangerous, cumbersome and subject to censorship.”⁷² While this was not the first news source to criticize the so-called *guidelines*, (recall the *Washington Times* story in June mentioned earlier), it was certainly the first to get mainstream attention. Within a few days, articles were posted on the *Huffington Post*⁷³ and *The Guardian*⁷⁴ echoing the concerns expressed by the editorial. One can certainly understand the personal

⁷² *The Pentagon’s Dangerous Views on the Wartime Press*, NEW YORK TIMES, Aug. 10, 2015, available at <http://mobile.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html?r=1&referrer>.

⁷³ Wendy Behaminson, *New DoD Manual Allows Journalists To Be Held As ‘Unprivileged Belligerents’*, HUFFINGTON POST, Aug. 26, 2015, available at http://www.huffingtonpost.com/entry/new-dod-manual-journalists_55dd6b14e4b0a40aa3acc576.

⁷⁴ Alan Yuhas, *Pentagon Needs to Rethink Calling War Journalists ‘Belligerents’, Says Watchdog*, THE GUARDIAN, Aug. 11, 2015, available at <http://www.theguardian.com/media/2015/aug/11/pentagon-war-reporters-unprivileged-belligerents-spies>.

While the Manual may not ultimately serve as the best source of authoritative guidance to the operational forces, it should certainly serve as an important resource for Judge Advocates.

interest of the press in these particular guidelines in the Manual. The question is whether the criticism was really warranted.

The *guidelines* in question are found in § 4.24 of the Manual. Interestingly, the Manual begins by saying, “In general, journalists are *civilians* [emphasis added].”⁷⁵ The *New York Times* may have glossed over this sentence. Moreover, the Manual adds in § 4.24.2 that “independent journalists and other media representatives are regarded as civilians; [citation omitted] *i.e.*, journalism does not constitute taking a direct part in hostilities such that such a person would be deprived of protection from being made the object of attack.”⁷⁶ Did anyone in the media read this section?

So when does a journalist become an “unprivileged belligerent?” The Manual’s language use of the “relaying of information (such as providing information of immediate use in combat operations)”⁷⁷ seems to be a

⁷⁵ DoD MANUAL, *supra* note 1, at § 4.24.

⁷⁶ The citations in this section of the Manual point to AP I, art. 79 which the U.S. supports and respects. That article also notes that journalists are protected as civilians “provided they take no action adversely affecting their status as civilians....” See DoD MANUAL, *supra* note 1, at 174, fn. 471.

⁷⁷ DoD MANUAL, *supra* note 1, at § 4.24.3.

reasonable restriction on press activity that could cross the line and become an action *likely to cause actual harm*⁷⁸ to the armed forces. Arguably, any reporting of such intelligence would be of prime interest to the enemy. But the concern over relaying information is actually raised in a section that addresses *risks* to journalists. There is nothing explicit or implicit in that section that would suggest that such a risk would necessarily come from U.S. forces. This is likewise the case with the possible treatment of journalists as spies⁷⁹ or the censure of their reporting,⁸⁰ should they have information about an impending attack that could put friendly forces in danger. This is not a statement of the U.S. position (or “standard” to use the *New York Times* words), but rather a legal analysis of such activity based on the existing state of international law. The U.S. has simply identified a potential risk. Should the U.S. have kept quiet and let those other “authoritarian leaders” that the *New York Times* fears figure it out on their own? By the way, would a despot be violating international law in doing so? Maybe not. That is the point of this section. The bottom line

⁷⁸ *Id.* at § 5.9.3.

⁷⁹ *Id.* at § 4.24.4.

⁸⁰ *Id.* at § 4.24.5.

is that there is nothing *new* in these sections of the Manual. Instead, in trying to give meaning to previously vague language, the Manual may have said too much for its own good.

What may be most ironic about the *New York Times* editorial is its suggestion that the language in the Manual should be replaced with more sensible language found in the U.S. Army Judge Advocate General’s Legal Center and School’s *Law of Armed Conflict Deskbook* that states, *in full*, that journalists are, “Given protection as ‘civilians,’ provided they take no action adversely affecting their status as civilians. (AP I, art. 79; considered customary international law by the U.S.).”⁸¹ What is the difference between this *sensible* guidance and that found in the Manual? Put simply, the only difference is that the Manual takes the next step in actually identifying potential *actions* that might adversely affect a journalist’s status as a civilian. Ultimately, what really seems amiss is the editorial’s assertion that commanders will point “to the manual when they might find it convenient to silence the press.”⁸²

⁸¹ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN’S LEGAL CTR. & SCH., *LAW OF ARMED CONFLICT DESKBOOK*, 2015, 140. (The *New York Times* cites to the 2012 edition of this deskbook, but the language is identical).

⁸² *The Pentagon’s Dangerous Views on the*

What would stop commanders from doing the same if it merely had vague language from the *Law of Armed Conflict Deskbook*?

Unlike cyber operations, this is one part of the Manual where it may have been better to speak softly. Given the controversy over the concept of *unprivileged belligerency* discussed earlier, it may have been more prudent to avoid connecting the concept with journalists taking a direct part in hostilities—even though the analysis is legally correct. Still, based on its overall size, it is highly unlikely that a commander is going to seek answers from it as the *New York Times* fears.

Ultimately, this may just be yet another “battle” in the ages-long conflict between the military and the press. Again, there is really nothing new in this section of the Manual. General William Tecumseh Sherman thought that the press were spies during the American Civil War and famously quipped that if he had killed them all, he would have news from Hell by breakfast.⁸³ To paraphrase Sherman, no matter what is written to explain how a journalist may lose his or her protected status as

Wartime Press, *supra* note 72.

⁸³ William Tecumseh Sherman Quotes, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/w/williamtec_106238.html (last visited Oct. 19, 2015). It is also worth noting that the *New York Times* itself reported on Sherman's belief of the press as spies, which may have left them a little sour when it came time to review the Manual. See James Barron, *Sherman Letters Show Civil War General Regarded Reporters as 'Spies'*, NEW YORK TIMES, JUN. 21, 1987, available at <http://www.nytimes.com/1987/06/21/us/sherman-letters-show-civil-war-general-regarded-reporters-as-spies.html>.

a civilian, there will probably be a complaint about it before breakfast.

SO WHAT IS THE FUTURE OF THIS MANUAL?

At this point, it is still too early to judge the overall impact of the Manual on the field of international and operational law beyond its immediate impact on the DoD itself and some of the initial reactions from the public and academia highlighted here. Despite its gargantuan length (and the equally colossal amount of time and effort it took to complete), the Manual is not perfect, as this article has attempted to show. One source of anticipated commentary will be that of the ICRC, which has yet to make any public statement at the time of this writing. In the meantime, operational attorneys should nonetheless add the Manual to their list of resources to consult before advising on any law of armed conflict issue.

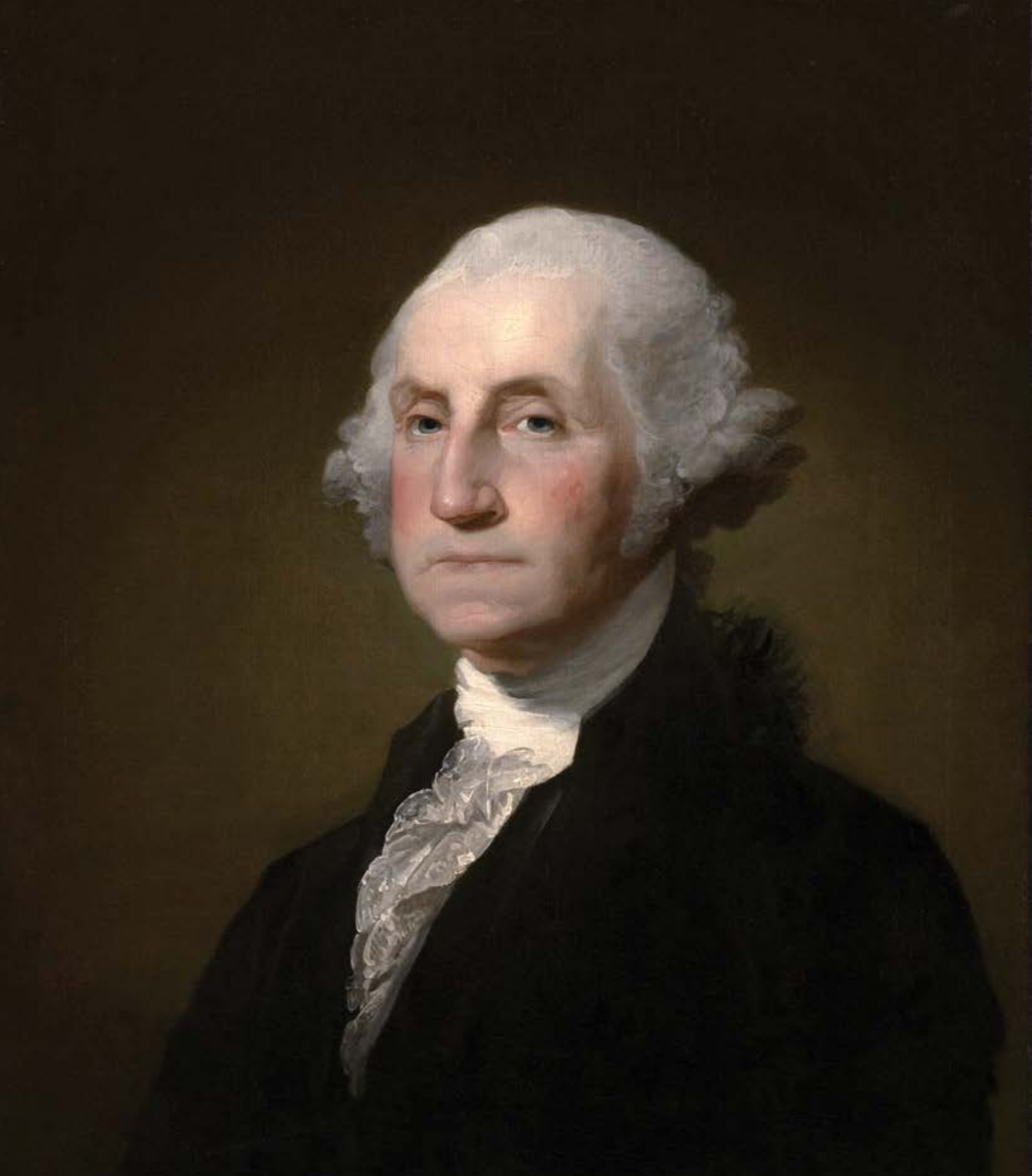
That final recommendation may come as a surprise given that this article began with the premise that the Manual speaks softly without carrying a big stick. In certain areas, like cyber operations, the Manual may say too little, while in others, like treatment of journalists, the Manual may say too much—even if what it says is not wrong *per se*. This may be the inevitable consequence of a document that purports to be the authoritative document on the DoD's view of the law of war. The Manual was not released with much fanfare and was quick to be criticized. And what may be its biggest Achilles'

heel—its size—may well preclude it from being the go-to source for commanders—and quite possibly some of their lawyers. That is a shame. While the Manual may not ultimately serve as the best source of authoritative guidance to the operational forces, it should certainly serve as an important resource for Judge Advocates. It does not give all the answers, which will prove frustrating to some—especially in the international and academic communities—but it is still a good place to start looking for answers when commanders look to their Judge Advocates for guidance. Despite the fears of the critics, it is not the Manual that will count, it will be the competent advice of counsel, informed by this Manual and their own judgment and interpretation of the law of war. **R**



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Portrait of George Washington (courtesy of Wikipedia)

LESSONS IN LEADERSHIP

from George Washington

BY MAJOR GRAHAM H. BERNSTEIN

George Washington is one of the most significant and well-known figures in American history. He has been referred to as “the father of his country and the chief artificer of its independence.”¹ Frequently described as a reluctant leader and humble servant, Washington readily admitted his skill set was far out shadowed by members of his peer group, including Thomas Jefferson, Benjamin Franklin, Sam Adams, Alexander Hamilton, and James Madison.² Specifically, he conceded that these men were better educated, smarter, and more well-bred than he.³ If George Washington had so many self-proclaimed flaws and failings, what led to him being revered as the premiere founding father of the United States in a way that “almost transcends the limitations of a properly republican apotheosis”?⁴

¹ *George Washington: First Amongst Equals*, *Economist*, Oct. 21, 2010, available at <http://www.economist.com/node/17305470>.

² Richard C. Stazesky, Presentation to the George Washington Club, Ltd at Wilmington, DE, “George Washington, Genius in Leadership” (Feb. 22, 2000), available at <http://gwpapers.virginia.edu/history/articles/george-washington-genius-in-leadership/>.

³ *Id.*; *George Washington: The Dignified Founder*, *Economist*, Apr. 28, 2005, available at <http://www.economist.com/node/3909367>; Mitchell B. Reiss, *Timeless Leadership Lessons From a Young George Washington*, *Forbes*, Feb. 14, 2014, available at <http://www.forbes.com/sites/forbesleadershipforum/2014/02/14/timeless-leadership-lessons-from-a-young-george-washington/>.

⁴ *George Washington: First Amongst Equals*, *supra* note 1.

George Washington rose from the lower ranks of the Virginia militia to Commander-in-Chief of the colonial forces and eventually, to the first President of the United States. In the turbulent days of pre-revolutionary colonial America, leadership was needed more than academic prowess or tactical acumen. Washington excelled at the art for many reasons, but primarily because he possessed the leadership competencies of integrity and vision, which he implemented as a servant-leader.

Washington readily admitted his skill set was far out shadowed by members of his peer group

BACKGROUND

George Washington was born in Westmoreland County, Virginia on February 22, 1732.⁵ History first took note of Washington in 1753 when a 21-year-old Major Washington of the Virginia militia took the French outpost at Fort Duquesne and started the French and Indian War.⁶ Washington fought with the British

⁵ JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* ch. 1 (2005), *Kindle edition*.

⁶ *Id.*; George Washington – Biography, *Biography.com*, <http://www.biography.com/people/george-washington-9524786> (last visited Oct. 1, 2015).

army throughout the war.⁷ It wasn't until 1769 that George Washington took a public stand against British rule when he introduced legislation calling for Virginia to boycott British goods.⁸ Six years later at the Second Continental Congress, Washington was appointed Major General and Commander-in-Chief of the colonial forces against Great Britain.⁹ Washington led the continental forces for eight years culminating in victory at the battle of Yorktown on October 19, 1781, which precipitated the British surrender.¹⁰

In 1787, George Washington was unanimously chosen to preside over the Constitutional Convention.¹¹ However, throughout the entire convention Washington spoke on a point of substance only once. After the Constitution was ratified, Washington was elected the first President of the United States by a second unanimous vote.¹² President Washington served two terms in office and concentrated on establishing and organizing the executive branch of the new govern-

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Mt. Vernon Ladies' Association, *Biography*, GEORGE WASHINGTON'S MOUNT VERNON, <http://www.mountvernon.org/george-washington/biography> (last visited Oct. 1, 2015).

¹¹ *Id.*

¹² *Id.*

ment.¹³ In 1793, George Washington returned to the life of a private citizen and lived the remainder of his life at Mount Vernon until his death on December 14, 1799.¹⁴

LEADERSHIP COMPETENCIES

Washington possessed a set of impressive natural advantages that aided his ascent to greatness, such as his impressive size and stature. He was described as having “so much martial dignity in his deportment that you would distinguish him to be a general and a soldier from among ten thousand people.”¹⁵ Physical endowments were an asset Washington leveraged, but those physical traits alone do not explain Washington’s incredible accomplishments.¹⁶

Leadership competencies are skill-sets and behaviors that contribute to superior leadership performance.¹⁷ George Washington possessed a multitude of leadership competencies, but the most dominant and critical to his success were integrity and vision.

INTEGRITY

Integrity, commonly defined as the quality of being honest and having strong moral principles,¹⁸ is

¹³ *Id.*

¹⁴ *Id.*

¹⁵ ELLIS, *supra* note 5.

¹⁶ *Are Leaders Born or Made? And Do Leaders Develop?* in THE NATURE OF LEADERSHIP 111-12 (David V. Day & John Antonakis, eds., 2012).

¹⁷ *Leadership Competencies*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <http://www.shrm.org/research/articles/articles/pages/leadershipcompetencies.aspx> (last visited Oct. 1, 2015).

¹⁸ *Integrity Definition*, MERRIAM-WEBSTER DICTIONARY, available at <http://www.merriam->

a critical component of leadership, especially in a military setting. For the military leader, integrity is more than personal honesty and morality. It is also necessary to developing trust between the leader and followers, which is grounded upon the bedrock of a commitment to organizational values.¹⁹ Leaders with integrity inspire members of an organization to follow willfully as “organizational patriots,” internalizing both the leader’s and organization’s values, rather than as “organizational mercenaries,” who merely respond in order to secure rewards or avoid punishment.²⁰

During his early career, George Washington established himself as an honorable and moral gentleman. However, it was his demonstrated practice of placing civic duty before personal interest that truly inspired his compatriots and his soldiers to follow his lead.²¹ One example was his refusal to accept any pay during his time of public service beginning with his appointment as Commander of the colonial forces against Great Britain in 1775 through his two-term

webster.com/dictionary/integrity.

¹⁹ GEN MARTIN E. DEMPSEY, AMERICA’S MILITARY – A PROFESSION OF ARMS: US GOVERNMENT WHITE PAPER 4; Christopher Kolenda, Editor’s *Preface to LEADERSHIP: THE WARRIOR’S ART* 6 (2001).

²⁰ *Id.*; Col George Aldridge, *Are You Leading a Company of Organizational Mercenaries or Organizational Patriots?* (Sep. 4, 2014) (unpublished manuscript, Air University) (on file with author). Defining an organizational patriot to be a follower who works for more than money and will do whatever it takes to achieve the goals of the organization, whereas organizational mercenaries are defined as individuals who will do the right thing only to achieve reward or avoid punishment.

²¹ *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3; Stazesky, *supra* note 2.

Presidency ending in 1797, despite the great financial hardship this caused him.²² Another example was Washington’s tireless commitment to his troops; he remained with his soldiers throughout the eight year war and did not take leave once during the conflict. Furthermore, he routinely stood alongside and suffered through the same arduous conditions as his men.²³ Washington’s integrity compelled his countrymen to trust him and accept his vision for the future of their fledgling country, which transformed his force into an army of national patriots.

VISION

Vision, in the context of leadership, can be defined broadly to mean a “realistic, credible, attractive future for [an] organization.”²⁴ Former Chairman of the Joint Chiefs of Staff, General Martin Dempsey, further explains that vision can be used to help “understand a problem, envision the end state, and visualize the nature and design of the operation.”²⁵ Fostering a clear, consistent, and well-advertised vision is an essential leadership competency because it attracts commitment, energizes followers, creates meaning,

²² *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3.

²³ WILLIAM WYATT, GEORGE WASHINGTON’S LIFE CHANGING LESSONS: GEORGE WASHINGTON ON LEADERSHIP, PERSUASION AND HOW TO CHANGE THE WORLD ch. 2 (2014), *Kindle edition*; *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3.

²⁴ BURT NANUS, VISIONARY LEADERSHIP: CREATING A COMPELLING SENSE OF DIRECTION FOR YOUR ORGANIZATION 8 (1992).

²⁵ GEN MARTIN E. DEMPSEY, MISSION COMMAND: U.S. GOVERNMENT WHITE PAPER.

and inspires a standard of excellence while bridging the present into the future.²⁶ George Washington showed he had a clear vision for the direction of our infant nation as early as 1769, when he introduced legislation to the Virginia House of Burgesses calling for the boycott of British goods.²⁷ Later in 1775, Washington appeared at the second Continental Congress in full military regalia declaring by his presence to all who saw him that war with Great Britain was inevitable.²⁸

Washington's vision was threefold: (1) the war must be won, no matter how long it took, (2) the war was for independence and liberty, and (3) the war must result in the establishment of a republican and constitutional government.²⁹ Clearly articulating this vision through his words, actions, and appearance inspired his countrymen to extraordinary feats at his request. For example, just after the battle at Trenton, New Jersey in 1776, Washington's army was scheduled to drastically shrink in size due to expiring enlistments.³⁰ General Washington persuaded his men to continue to serve in the colonial army beyond their enlistments with no guarantee of additional pay because of the well-defined and well-understood cause for which they were fighting.³¹ Without Washington's clear vision,

²⁶ NANUS, *supra* note 24.

²⁷ George Washington, *supra* note 6.

²⁸ RON CHERNOW, *WASHINGTON: A LIFE 183* (2010).

²⁹ Stazesky, *supra* note 2.

³⁰ *Id.*

³¹ *Id.*

George Washington possessed a multitude of leadership competencies, but the most dominant and critical to his success were integrity and vision.



George Washington full-length portrait (courtesy of Library of Congress)

the revolution may have been lost through troop attrition.³²

Washington's vision, coupled with his integrity, allowed him to command great sacrifice from his soldiers in the quest to accomplish seemingly unattainable goals. However, Washington's successful leadership was also derived from his visible service to the American people. While he asked for much from the people, it was obvious he did so for their benefit. In other words, George Washington was the epitome of a servant-leader.

LEADERSHIP THEORY

Servant-leadership theory is often defined as leadership through service to the leader's followers.³³ Servant-leaders are not motivated by the desire to lead, but rather by the desire to serve.³⁴ George Washington was often referred to as a reluctant leader.³⁵ He protested being chosen to command the colonial forces against Great Britain and becoming the first President.³⁶ His reluctance to accept power tempered his seemingly meteoric rise to greatness and cultivated his image as the humble servant.³⁷ Admittedly, many historians believe the reason for some of Washington's humbleness was political "postured reticence," but

³² *Id.*

³³ R. BOLDEN, ET AL., UNIV. OF EXETER CTR. FOR LEADERSHIP STUDIES, A REVIEW OF LEADERSHIP THEORY AND COMPETENCY FRAMEWORKS 12 (2003).

³⁴ *Id.*

³⁵ *George Washington: The Dignified Founder*, *supra* note 3.

³⁶ ELLIS, *supra* note 5 at ch. 2, 4.

³⁷ CHERNOW, *supra* note 28 at 64.

most also conclude there was truth to his self-abnegations.³⁸ Despite some political showmanship, George Washington's acceptance of powerful positions seems rooted in his desire to affect civic change through service of the American people.³⁹

Servant-leaders often display an emphasis on collaboration, trust, foresight, listening, and the ethical use of power,⁴⁰ all characteristics that George Washington exhibited. Washington engendered trust from his followers through personal integrity and through a clear vision for America.⁴¹ He also portrayed the servant-leader traits of listening,⁴² collaboration,⁴³ and ethical use of power.⁴⁴ Notably, he gathered the best minds of the day to staff his first presidential cabinet.⁴⁵ A lesser leader may have been too intimidated to appoint these intelligent and ambitious political giants, but Washington saw collaboration as necessary to achieve their shared

³⁸ ELLIS, *supra* note 5 at ch. 2, 4; *George Washington: The Dignified Founder*, *supra* note 3; *George Washington, Politician*, ECONOMIST, Jun. 1, 2013.

³⁹ *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3.

⁴⁰ R. BOLDEN, *supra* note 33 at 13; LARRY C. SPEARS, GREENLEAF CTR. FOR SERVANT LEADERSHIP, ON CHARACTER AND SERVANT-LEADERSHIP: TEN CHARACTERISTICS OF EFFECTIVE, CARING LEADERS 61-62 (2002).

⁴¹ See Section III(a) and (b), *supra*.

⁴² PAUL K. LONGMORE, THE INVENTION OF GEORGE WASHINGTON 213-25 (1998).

⁴³ Stazesky, *supra* note 2. "[George Washington] was a recognized leader who was skillful in reconciling various views."

⁴⁴ *Id.*

⁴⁵ *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3. Citing Washington's appointment of Jefferson, Hamilton, and Jay to the first presidential cabinet.

vision of a democratic republic.⁴⁶ Moreover, Washington was determined to establish civilian control of military power and military respect for the civilian populace they served.⁴⁷ He famously exhibited ethical use of power through his willful abdication of that power. General George Washington freely surrendered his commission and military authority to Congress on 23 December 1783.⁴⁸ Then, once elected President, he promptly began constructing a system that required him to relinquish the office of President.⁴⁹ Finally, George Washington had two very real opportunities to become a King, but he remained true to his personal morality and vision for a democratic republic.⁵⁰

LEADERSHIP LESSONS & FLAWS

Despite George Washington's legendary accomplishments and enviable leadership skills, he was not perfect. In fact, most of Washington's leadership skills were learned over a lifetime of mistakes and triumphs.⁵¹

LESSONS

Having earned only a grade school equivalent education during his younger years, Washington never received formal leadership training.⁵²

⁴⁶ *Id.*

⁴⁷ Stazesky, *supra* note 2.

⁴⁸ Mt. Vernon Ladies' Association, *supra* note 10.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Stazesky, *supra* note 2.

⁵² ELLIS, *supra* note 5, at ch. 1. The exception to Washington's lack of formal legal education may have been "110 Rules of Civility & Decent Behavior in Company and Conversation," a

Rather, Washington obtained his education through a series of increasingly challenging crucible events that provided what has been described as a “trial by fire.”⁵³ Early testaments to his dedication to civic service, a strong moral compass, and personal religious beliefs⁵⁴ include his memorization of the “110 Rules of Civility & Decent Behavior in Company and Conversation.”⁵⁵ Other, more painful lessons came later when, as commander and chief of the colonial forces against Great Britain, he suffered a series of stunning defeats,⁵⁶ most of which were attributable to his overconfidence and aggressive personality.⁵⁷ Through these defeats, Washington learned to trust the advice of his Lieutenants, who often had more military experience than he.⁵⁸ Through their counsel, Washington eventually transitioned from a strategy of direct confrontation to one of containment, the strategy that ultimately won the war.⁵⁹ Later, President Washington used this same lesson to surround himself with the most capable advisors of the day.⁶⁰

book Washington committed to memory in his youth. Some scholars attribute this book to the beginnings of Washington’s famous morality and civility in later life.

⁵³ *Id.* at ch. 3; Stazesky, *supra* note 2.

⁵⁴ PAUL F. BOLLER JR., *GEORGE WASHINGTON & RELIGION* (1963).

⁵⁵ ELLIS, *supra* note 5, at ch. 1.

⁵⁶ Mt. Vernon Ladies’ Association, *supra* note 10.

⁵⁷ ELLIS, *supra* note 5, at ch. 3.

⁵⁸ *Id.*

⁵⁹ *Id.*; George Washington – Biography, *supra* note 6; Mt. Vernon Ladies’ Association, *supra* note 10.

⁶⁰ *Timeless Leadership Lessons From a Young George Washington*, *supra* note 3. Citing Washington’s appointment of Jefferson, Hamilton, and Jay to the first presidential cabinet.

FLAWS

George Washington was not perfect. One of the most troubling hypocrisies of a life dedicated to establishing a democratic republic was Washington’s lifelong ownership of slaves.⁶¹ George Washington was a slave owner by his 11th birthday,⁶² and he owned 316 slaves at the time of his death.⁶³ It is clear Washington understood the immorality of slave ownership as he made arrangements to free his slaves upon his death.⁶⁴ Unfortunately, he appears to have compartmentalized the immorality of slavery and kept it separate from his overall vision of a democratic republic.⁶⁵ His indifference towards slavery is exemplified by his proclamation to a white employee at Mount Vernon (where he held hundreds of slave workers), “I never did, nor ever shall, wish to retain any person in my employ contrary to their inclinations.”⁶⁶ Slavery is a stain on George Washington’s legacy that stands in stark contrast to the fundamental leadership competencies and techniques that he implemented.

⁶¹ Mt. Vernon Ladies’ Association, *supra* note 10.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *George Washington: First Amongst Equals*, *supra* note 1.

⁶⁵ *George Washington, Politician*, *supra* note 38.

⁶⁶ *George Washington: First Amongst Equals*, *supra* note 1.

CONCLUSION

Even with George Washington’s flaws and shortcomings, he has rightfully been crowned the father of the United States. Washington may not have been the most intelligent, most tactical, or the best politician, but he distinguished himself through brilliant leadership. His success rested primarily upon his leadership competencies of integrity and vision, his demonstrated servant-leadership, and his willingness to surround himself with fellow leaders in order to achieve the common goal of establishing this nation. **R**



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TRANSITIONING TO NEW LEADERS

THOUGHTS ON THE PROFESSIONAL DEVELOPMENT OF AIR RESERVE COMPONENT JUDGE ADVOCATE GENERAL CORPS MAJORS

BY MR. TOM G. BECKER AND MAJOR JAMIE L. MENDELSON

***Editor's Note:** At the 2014 Annual Survey of the Law, attended by more than 600 Air Reserve Component judge advocates and paralegals, Mr. Becker (with the assistance of Major Mendelson) conducted a "Transitioning to New Leaders" session with all JAG attendees in the grade of major. This article is the product of that collaboration. Mr. Becker's duties at the JAG School include supervision of Reserve attorney faculty. He has also supervised Reservists as a staff judge advocate at two installations. Maj Mendelson is a Reserve faculty member of the JAG School with prior Reserve service at the Appellate Government Division and Active Duty service as an assistant staff judge advocate and area defense counsel.*

THE GATEWAY FROM WORKER BEE TO LEADER

There's a reason the Judge Advocate General (JAG) Corps' leadership course for Active Duty JAG majors is named Gateway. Promotion to major means you're no longer just a staff attorney; you're expected to be a leader for the junior JAGs and paralegals with whom you serve. A JAG Corps major is at the peak of his or her subject-matter expertise – trust me, it's downhill from there. As you gain more leadership responsibilities, and less of your job involves having legal cites on the tip of your tongue, you'll find that "Professional Legal Knowledge" and "Legal Skill Sets" become less important and you need to start developing expertise in the "Universal Skills" and "Professional

Situational Awareness" that go with the transition.¹ It's no different for Air Reserve Component (ARC) majors. Subject matter expertise remains important. But when you're the Staff Judge Advocate (SJA) for a Reserve unit, Category A or Category B, Air National Guard unit, someone's Individual Mobilization Assistant (IMA) or Reserve Coordinator, you need to be more than just a good

¹These four JAG Corps Knowledge Areas – Professional Legal Knowledge, Legal Skill Sets, Universal Skills, and Professional Situational Awareness – were developed by TJAG's Strategic Policy and Requirements Directorate, in collaboration with The Judge Advocate General's School, as part of TJAG's requirements-based training initiative. The Universal Skills and Professional Situational Awareness areas include leadership, communication, teaching / training skills, mission focus, orientation to the geopolitical objectives of the United States, and appreciation of your service, command, unit, and individual roles in achieving those objectives.

lawyer. This article—written with the help of a few hundred of our closest friends attending the 2014 Annual Survey of the Law (ASoL)—proposes a handful of humble suggestions to help the ARC JAG major successfully transition to a role where leadership is paramount.

JAG CORPS CULTURE AND THE ARC

First, let's take a candid look at the ARC's place in JAG Corps culture. Half the JAG Corps is in the Air Force Reserve (CAT A or B) and the ANG—half! They are immense resources, especially among the more experienced (e.g., ARC majors), and we can maintain those resources at a fraction of the cost of their Active Duty counterparts. Yet, traditionally, we haven't done that great of a job keeping ARC JAGs trained up. Which brings us to a big question—what should ARC JAGs be able to do? If we can answer that question, we should then be able to figure out how to keep them trained. But, as we learned in our ASoL discussions, it depends a lot on what type of ARC JAG you are.

Category A Reserve majors at ASoL were divided on the question of what reservists should be trained to do. While most saw themselves as generalists, capable of doing whatever the Air Force needed, a significant minority took the view that their expertise was tied to their specific units. These folks noted that many CAT A JAGs stayed with a particular unit for their entire career, were

not looking to move around, and would not be able to use any training beyond that needed to support their unit's mission.



There were similar views among the ANG JAG majors in our group. They saw their required competencies as related to helping their unit, whether they were in Title 10 or Title 32 status. To them, it was important to develop long-term relationships with current commanders and up-and-coming ANG officers likely to assume commander roles in the future. While being prepared for federal service is important, an ANG JAG must always keep laser focus on the state mission, as the majority of the ANG JAG's time is in Title 32 or State Active Duty status.

Category B Reservists—and these are the ones that Active Duty JAGs most often encounter—rightly saw themselves as true generalists. As with the Active Duty force, mobility is important to professional development of CAT B Reservists. They have to be

able to do lots of things and obtain the broadest experience possible, both in performing their current duties and preparing themselves for increased responsibilities elsewhere. Wherever a CAT B Reservist finds him/herself assigned, the goal is to integrate fully into the office and make a meaningful impact. CAT B Reservists must be ready to step in and perform the mission of an assigned Active Duty JAG.

What's the common denominator among all ARC JAGs? Easy. It's the same as your Active Duty counterparts: you have to be ready to do the job today and also prepare yourself for the future, whatever that future might look like. Therein lies the lesson for ARC JAGs—especially the more senior JAGs, like the majors who participated in our discussion, and their supervisors and colleagues. ARC JAGs can't exclusively rely on others to take care of their professional development. They must fight for it. The more senior JAGs, like ARC majors, must carry water for the junior JAGs, even if they aren't their normal supervisors.

BEST AND WORST PRACTICES

Taking responsibility for junior ARC JAGs professional development involves doing your best to make the right things happen and avoiding the wrong things. ARC JAG Corps majors are in an excellent position to influence professional development in a positive way. If you're not the SJA of a CAT A or ANG unit, you're still near the top and in a position to weigh in. Same in the CAT B

ARC JAGs need to own, and fight for, their own professional development.

world—if you're not the IMA, you're perhaps the Reserve Coordinator or otherwise engaged with the ARC and Active Duty leadership in your office. Here are lists of best and worst practices our ASoL discussion group produced. As an ARC major, you have an opportunity to accentuate the positive and eliminate the negative.²

BEST PRACTICES

Let's start with the good stuff. How many of these have you seen in your office?

- Advance scheduling and centrally assigned work waiting for the Reservist.
- Unit financial support for school and special tours.
- Using Reservists to train Active Duty members of your office.
- Special efforts to connect the Reservist with your office, unit, and JAG Corps resources such as Field Support Centers and higher headquarters. In particular, scheduling duty or inviting

locally available Reservists for Article 6 inspections, staff assistance visits, and office social events.

- Dedicated office space for visiting Reservists, as available. That includes equipping the space properly—functioning computer, common resources like the *Manual for Courts-Martial* and *The Military Commander and the Law* at hand, and decorating it professionally.
- Maintaining a current continuity binder and keeping it in the dedicated Reserve office.
- For CAT A and ANG JAGs: marketing your services to your wing so commanders know you're there and what you can do for them and their troops.
- For CAT B: using IMAs just like Active Duty JAGs—taking them to meetings, having them brief commanders, conduct newcomers briefings, etc.
- **And the Number One Best Practice:** engage with your office and unit leadership in all things. For a major, that includes taking the lead on behalf of other ARC JAGs.

² Acknowledgement to Johnny Mercer.

More on Reserve Categories

MORE

Want to be a Reserve JAG?

MORE

WORST PRACTICES

Our discussion group came up with a list of these, too. How many of these have you seen?

- Bad communication. Not including Reservists on office email lists, not informing them of staff meetings or other all-hands events, not including them in social invitations, etc.
- Lack of coordination with ARC office leadership on matters of interest to ARC staff members.
- Failure to submit OPRs in a timely manner and, in some cases, at all.
- Failure to submit Reservists for appropriate awards and decorations.
- Forgetting that a Reservist is scheduled for duty, not having office space ready, and having to figure out work assignments on the fly.
- Using Reservists only for “as needed” tasks (e.g., legal assistance) without regard to training in tasks that a Reservist may be required to do if called to extended Active Duty.

- **And the Worst of the Worst:** lack of respect. This usually manifests in the form of negative rhetoric like “she’s *only* a Reservist,” “he’s a *typical* Reservist,” or similar themes. Some in our discussion group were quick to point out that there are Reservists who invite such commentary by not paying attention to their uniforms, fitness, training requirements, and the like. In my experience, there are few of those these days. As leaders, ARC JAG majors need to take the lead in nipping such commentary in the bud by setting an exemplary example for junior ARC JAGs and not waiting for the Active Duty leadership to deal with lack of respect issues.

LEADING FROM THE FRONT

So, what’s the key takeaway here? Put another way, what role do ARC JAG majors play in shaping the JAG Corps’ culture regarding ARC attorneys? Understand it’s a shared responsibility between Active Duty and ARC leaders. ARC JAGs need to own, and fight for, their own professional development. A Junior JAG may not be able to do that effectively, but a JAG major is another story, not only for your own benefit, but for the benefit of all ARC JAGs in your unit. It’s amazing how much smarter and stronger you get when you trade tracks for oak leaves. That’s true on both the Active Duty and ARC sides of the JAG Corps. Never pass up a chance to make a difference. **R**



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STREET RACING

CASES IN THE AIR FORCE

BY CAPTAIN RYAN P. LINSNER AND CAPTAIN SCOTT A. TAYLOR

How should the Air Force respond when confronted with a fatal car crash resulting from high speed racing on a public roadway?

Every base likely has Airmen enamored with the street-racing culture. Drive through the parking lot of any dorm and you will surely see high-powered vehicles belonging to young Airmen who do not have the experience to handle them at high rates of speed. When those same young Airmen encounter like-minded individuals on the road, it seems pre-ordained that races can and will occur. Whether the races are the typical drag races we all see in the movies—an impromptu race at a stop light—or a race on the highway, they are dangerous and potentially fatal. How should the Air Force respond when confronted with a fatal car crash resulting from high

speed racing on a public roadway? Not long ago, Vandenberg Air Force Base dealt with this very issue. In the process of prosecuting a street-racing case, we learned the importance of charging the offense under an aiding and abetting theory rather than just negligent homicide or involuntary manslaughter. This article explores the various challenges posed in crafting an appropriate legal response to street-racing cases in the United States Air Force.

WHO IS RESPONSIBLE?

When there is a fatality involving an Airman, the initial reaction is always a desire to do a root-cause analysis, identify the perpetrators, and hold

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them accountable. So who is responsible for the death of an Airman in a single-car collision that occurred as a result of a street-race? The driver of the vehicle involved in the fatal crash is the obvious choice. The danger of getting behind the wheel and racing another car at high speeds is predictable. What about the driver of the other car? If the driver of the other vehicle involved performed perfectly; did not swerve, bump, hit, or otherwise affect the driving of the crashed vehicle, is that driver responsible? The dispositive question is whether the vehicle that crashed would have been traveling at such a high rate of speed had it not been for the actions of the other car involved in the race. In other words, but for the race, would the crash have occurred?

SHOULD THE OTHER DRIVER BE HELD RESPONSIBLE?

Like most legal questions, the answer is often “it depends.” Preferring charges on an Airman who made a single tragic mistake by letting hormones and immaturity overcome his usually sound judgment is very different than an Airman who has shown a pattern of immaturity and continues to race his vehicle at high speeds. Good order and discipline is not necessarily served by the courts-martial of everyone involved. Taking a long look at the totality of the circumstances will either justify a court-martial or call for a lesser forum. When choosing how to proceed, you should know full well that you will have a factual causation problem to overcome in the courtroom. Lawyers generally understand proximate causation

and alternate sources of causation. However, it is asking a lot for your panel to grasp those foreign legal concepts and apply them to a fact pattern where an accused did not alter the driving behavior of the deceased driver—other than by encouraging reckless and dangerous speed.

NEGLIGENT HOMICIDE VS. INVOLUNTARY MANSLAUGHTER

How does the law hold someone responsible for a death which was never intended? A charge of involuntary manslaughter or negligent homicide might be appropriate. The elements of involuntary manslaughter under Article 119, Uniform Code of Military Justice (UCMJ) are:

- (1) That a certain named or described person is dead;
- (2) That the death resulted from the act or omission of the accused;
- (3) That the killing was unlawful; and
- (4) That this act or omission of the accused constituted culpable negligence.¹

“Culpable negligence” is defined as “a degree of carelessness greater than simple negligence.”² It is “a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission.”³

¹MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 44(b)(2) (2012) [hereinafter MCM].

²*Id.* at ¶ 44(c)(2)(a)(i).

³*Id.*

The elements of negligent homicide under Article 134, UCMJ, are:

- (1) That a certain person is dead;
- (2) That his death resulted from the act or failure to act of the accused;
- (3) That the killing by the accused was unlawful;
- (4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and
- (5) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.⁴

“Simple negligence” is defined as “the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety to others which a reasonably careful person would have exercised under the same or similar circumstances.”⁵ When making this charging decision, the difference comes down to a very fact-specific determination. Is the alleged negligence simple or culpable?

PROXIMATE CAUSATION

Another legal challenge is the issue of proximate causation. If two vehicles are involved in an alleged street race

⁴*Id.* at ¶ 85.

⁵*Id.* at (c)(2).

and one of the vehicles crashes resulting in a fatality, one of the most difficult questions to answer is whether or not the acts or omissions of the other driver involved proximately resulted in the vehicle crashing and the death of the deceased driver. Trial counsel must be aware that defense can easily point to the culpable behavior of the driver who crashed, or some mechanical defect which caused the crash. But those do not necessarily excuse the behavior of the other driver. It is possible for the conduct of two or more persons to contribute, each as a proximate or direct cause, to the death of another.⁶

Proximate cause is a question of fact resolved by the trier of fact⁷ and generally hinges on the question of objective⁸ foreseeability.⁹ In the context of a negligent homicide or involuntary manslaughter case, to be proximate, an act need not be the sole cause of death, nor must it be the immediate cause—the latest in time and space preceding death, it must simply be a contributing cause.¹⁰ A “contributing cause is

⁶ See *United States v. Lonergan*, 2000 CCA LEXIS 422 (A. Ct. Crim. App. 2000) (stating that in making a determination of proximate cause, the accused’s culpable negligence must be a cause, but not the sole cause).

⁷ *Exxon Co. v. Sofec*, 517 U.S. 830, 841 (1996).

⁸ *United States v. Romero*, 1 M.J. 227, 230 (C.M.A. 1975).

⁹ *United States v. Stanley*, 60 M.J. 622, 625-26 (A.F. Ct. Crim. App. 2004) quoting *United States v. Henderson*, 23 M.J. 77, 80 (C.M.A. 1986) (stating that the test for foreseeability is an objective one and requires a determination of “whether a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his [or her] acts.”)

¹⁰ *Stanley*, 60 M.J. at 625-26.

deemed proximate only if it plays a material role in the victim’s decease.”¹¹

According to the Military Judges’ Benchbook,

[i]f the accused’s conduct was a proximate or direct cause of the victim’s death the accused will not be relieved of criminal responsibility just because some other person’s conduct was also a proximate or direct cause of the death. The accused will, however, be relieved of criminal responsibility for the death of the victim if the death was the result of some unforeseeable, independent, intervening cause which did not involve the accused. If the victim died only because of the independent, intervening cause, then the act of the accused was not the proximate cause of the death, and the accused cannot be found guilty of negligent homicide. The burden is on the prosecution to establish beyond a reasonable doubt that there was no independent, intervening cause and that the accused’s negligence was a proximate cause of the death of the victim.¹²

¹¹ *Romero*, 1 M.J. at 230. In *Romero*, the defendant assisted the deceased by injecting heroin into his arm. *Id.* The court found that “the tragic end was a natural and foreseeable consequence of the appellant’s negligent act, and therefore proximately caused by it. *Id.*”

¹² U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, 3-44-2, Note 1 (10 Sept. 2014) [hereinafter BENCHBOOK].

In examining street racing cases, an additional consideration is the acts and/or omissions of the deceased.¹³ Even assuming an accused was criminally negligent, “it is possible for the negligence of the deceased or another to intervene between his conduct and the fatal result in such a manner as to constitute a superseding cause, thereby eliminating the defendant’s conduct as a proximate cause. This is true only in situations in which the second act of negligence looms so large in comparison with the first that the first is not to be regarded as a substantial factor in the final result.”¹⁴ To better illustrate this point, consider a helicopter suddenly crashing onto a public roadway during a street-race that results in one racer subsequently crashing their vehicle. The helicopter would likely loom so large in this scenario that it would be considered a superseding cause.¹⁵

¹³ *United States v. Cooke*, 18 M.J. 152, 154 (C.M.A. 1984) quoting R. BOYCE AND R. PERKINS, CRIMINAL LAW, 698-701 (2D ED. 1969).

¹⁴ *Cooke*, 18 M.J. at 154.

¹⁵ Although no military courts have ruled on the issue of proximate cause in a street racing case, several state courts have grappled with this very issue. For instance, in Ohio, the 10th District Appellate Court stated, “The direct, normal, and reasonably foreseeable consequences of a drag race is that contact can occur between two vehicles, which contact at such high rate of speed can cause one of the drivers to lose control of their vehicle. It is also reasonable to conclude that there is a high likelihood that when a driver loses control of a vehicle while traveling 80 to 100 MPH, the occupants in that vehicle, as well as others in the immediate vicinity, may suffer injuries severe enough to cause death.” *State v. Buterbaugh*, 1999 Ohio App. LEXIS 4233 (Oh. 10th Dist. Ct. App. 1999).

PARTICIPANT VS. NON PARTICIPANT

A key distinction which is important to a proximate cause analysis is whether the deceased was participating in the race or not. Courts around the country have drawn a line in holding drivers proximately responsible based upon the participation of the victim. Policy considerations appear to be driving this distinction, but it is largely a question of protecting the innocent. For example, a racer involved in a fatal collision with an innocent motorist¹⁶ has a higher degree of culpability than when that same racer fatally collides with another racer.¹⁷ This example represents black and white extremes, but the distinction holds true for a passenger who is helping with the stick shift versus a passenger who is surfing the internet on their phone. The general lesson is that if you participate in a drag race, your death is foreseeable, and your participation will serve to act as a superseding cause relieving an accused of criminal liability.

STREET RACING—AIDING AND ABETTING

To prove proximate causation in a fatal street racing case, trial counsel must be prepared to introduce evidence that the fatality was a foreseeable consequence of the accused's criminal conduct, that the accused's criminal conduct played a material role in causing the death, and

¹⁶ *Jacobs v. State*, 184 So. 2d 711 (Fla. Dist. Ct. App. 1966).

¹⁷ *Velasquez v. State*, 561 So. 2d 347, 352 (Fla. Dist. Ct. App. 1990).

there was no intervening conduct as to supersede the accused's criminal conduct from the proximal cause of the crash. As expected, this is more burdensome in practice than on paper.

Given the inherent difficulties of proving the conduct of driver one proximately caused driver two to crash his car, killing the non-participant passenger, it is worth exploring the idea of charging driver one under an aiding and abetting theory of liability. Under Article 77 of the UCMJ, for driver one to be a principal and thus be found guilty of the offense committed by the driver two, he must (1) "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense"; and (2) "share in the criminal purpose of design."¹⁸ Case law requires an affirmative step on the part of the accused.¹⁹

According to the Military Judge's Benchbook,

Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime as something (he)

¹⁸ *United States v. Thompson*, 50 M.J. 257, 259 (C.A.A.F. 1999).

¹⁹ *Id.*; MCM at ¶ 1(b)(2)(b).

Given the inherent difficulties of proving the conduct of driver one proximately caused driver two to crash his car, killing the non-participant passenger, it is worth exploring the idea of charging driver one under an aiding and abetting theory of liability.

Additional Thoughts

MORE

Why I Quit Street Racing

(she) wishes to bring about and must aid, encourage, or incite the person to commit the criminal act.²⁰

The saying “it takes two to tango” is incredibly relevant in street racing cases and the application of an aiding and abetting theory of liability. When driver one encourages driver two to increase speeds and engage in a speed contest, driver one can be a principal to those resulting offenses committed by driver two. This is important in those cases where driver two loses control, crashes, and kills one of the non-participant passengers. Instead of charging driver one with negligent homicide or involuntary manslaughter and facing the uphill proximate cause battle, it may be appropriate to charge driver one under an aiding and abetting theory of liability. This is another way to hold the driver responsible for the death of a non-participant passenger.

Several states, to include California,²¹ Florida,²² and Ohio²³ have held an aiding and abetting theory of liability to be proper in street racing cases. However, as was discussed in the context of proximate causation, states will not hold a driver criminally responsible if a deceased was a participant in the street race.²⁴ A

²⁰ BENCHBOOK, 7-1-1.

²¹ *People v. Canizalez*, 197 Cal.App.4th 832 (Cal. Dist. Ct. App. 2011).

²² *Jacobs*, 184 So. 2d 711.

²³ *In re Williams*, 2011 Ohio App. LEXIS 3614 (Oh. Dist. App. Ct. 2011).

²⁴ *Velasquez*, 561 So. 2d 347 at 352; *Pineta v. State*, 98 Md. App. 614, 626 (Md. Ct. Spec. App. 1993).

Florida appellate court held this to be a superseding and intervening cause, thereby eradicating the proximal connection.²⁵

Although military appellate courts have not ruled on the aiding and abetting theory of liability, Article 77 of the UCMJ, the Military Judge’s Benchbook, and the applicable case law parallels the prevailing view amongst the states. If you elect to pursue either a negligent homicide charge or involuntary manslaughter charge, below are examples of ways in which trial counsel can meet its prima facie case. However, an aiding and abetting theory of liability may be the trick to a successful prosecution.

NEGLIGENT HOMICIDE

If you charge negligent homicide, you can meet the elements by showing:

- (1) That a certain person is dead.²⁶

This should be the easiest element you have to prove;

- (2) That the death resulted from the act or failure to act of the accused.²⁷

As discussed above, causation and, specifically, proximate causation is where the bulk of the advocacy from both sides comes into play. The government has the burden of proving causation, essentially arguing that street racing is inherently dangerous

²⁵ *Velasquez*, 561 So. 2d 347 at 352.

²⁶ MCM. at ¶ 85(b)(1).

²⁷ *Id.* at ¶ 85(b)(2).

and the accused should be found guilty under an aiding and abetting theory, which you should consider charging in order to receive the vicarious liability instruction. Basically, but for the accused egging on the other vehicle, the other driver would not have engaged in a speed contest and driven recklessly;

- (3) That the killing by the accused was unlawful.²⁸

This will likely only be proven if you can prove the street race or some other extreme behavior occurred. Accidents are common on roadways and unfortunately fatalities are often-times caused by vehicle accidents. However, the difference between a death resulting from a vehicle accident and a death resulting from two vehicles engaged in a speed contest is the criminal conduct associated with the street race;

- (4) That the act or failure to act of the accused which caused the death amounted to simple negligence.²⁹

While on the road, a driver has a duty to exercise a reasonable duty of care in the operation of their vehicle. This duty of care extends to any passengers, others on the roadway, and any other foreseeable persons who are within the foreseeable zone of danger. It is entirely foreseeable that driving at excessive speeds or racing on public

²⁸ *Id.* at 85(b)(3).

²⁹ *Id.* at 85(b)(4).

or crowded streets could result in a serious injury or fatality; and

- (5) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.³⁰

Street racing is something visible in the community, and the case can certainly be made that doing so is service discrediting. Failing to hold violators accountable degrades good order and discipline.

INVOLUNTARY MANSLAUGHTER

If you charge involuntary manslaughter, you can meet the elements by proving:

- (1) That a certain named or described person is dead.³¹

This is likely the easiest element to make;

- (2) That the death resulted from the act or omission of the accused.³²

You encounter the same causation element inherent in these street racing cases. Holding the accused responsible without additional facts to show the accused caused the crash outside of seeding is going to be a challenge unless you charge the accused with aiding and abetting so you can receive the aiding and abetting instruction;³³

³⁰ *Id.* at 85(b)(5).

³¹ *Id.* at ¶ 44(b)(2)(a).

³² *Id.* at ¶ 44(b)(2)(b).

³³ BENCHBOOK, 7-1-1.

- (3) That the killing was unlawful.³⁴

If you can prove the race, you are more likely able to prove the unlawfulness of the accused's actions;

- (4) That this act or omission of the accused constituted culpable negligence.³⁵

In order to justify an involuntary manslaughter conviction as opposed to negligent homicide, you will need additional facts beyond the race itself. The reason for this is because negligent homicide requires only simple negligence as opposed to culpable negligence. You will need more egregious facts. You will likely need an accused swerving, or bumping, or doing something beyond speeding and racing in order to prove the careless disregard of foreseeable consequences.

CONCLUSION

Realistically, the bystanders of a street race may be unwilling to admit there was a race out of fear of consequences for their failure to intervene and be a good wingman. Ironically, if they lie convincingly to protect a friend, they do more harm than they imagine. By a bystander maintaining that there was no race, a deceased participant is more likely perceived as a non-participant, which exposes an accused to negligent homicide or manslaughter charges. This tendency amongst young Airmen will end up aiding the government in overcoming a proxi-

³⁴ MCM at ¶ (b)(2)(c).

³⁵ *Id.* at ¶ (b)(2)(d).

mate cause challenge. The causation issues that are most likely going to be the focus of the case can be overcome by charging with an aiding and abetting theory. Street racing amongst airmen at every base is potentially a major issue. A pervasive racing culture exists in our country where the fastest and most powerful cars are obtainable with a signing bonus in the hands of an inexperienced driver. Fortunately, cases involving Airman fatalities are few and far between, but they do happen. When they do occur, legal offices need to respond effectively to hold the responsible parties accountable. **R**



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EXPUNGING DNA PROFILES

WHAT EVERY LEGAL DEFENSE TEAM NEEDS TO KNOW

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Federal law requires the Department of Defense (DoD) to collect Deoxyribonucleic Acid (DNA) samples from all active duty members who have been convicted of certain crimes.¹ Specifically, it requires a DNA sample to be collected from all members convicted of any Uniform Code of Military Justice (UCMJ) offense that carries a maximum sentence of confinement of one year or more.² In addition to taking DNA from convicted members, the DoD has made it a policy to also collect DNA from those who are under investigation, have had court-martial charges preferred

against them, or have been placed in pretrial confinement.³ In each of these situations, the DNA profile of the member is ultimately deposited in the Federal Bureau of Investigation's (FBI) Combined DNA Index System (CODIS) database, which currently houses over ten million samples belonging to United States citizens.⁴

³ DEP'T OF DEF. INSTR. 5505.14, DEOXYRIBONUCLEIC ACID (DNA) COLLECTION REQUIREMENTS FOR CRIMINAL INVESTIGATIONS, ENCLOSURE 3, ¶ 3, May 27, 2010 (INCORPORATING CHANGE 1, Apr. 24, 2012) (hereinafter DoDI 5505.14).

⁴ As of October 2014, the National DNA Index System (NDIS), one part of CODIS, contained over 11,219,527 offender profiles, 2,065,806 arrestee profiles and 590,079 forensic profiles. See *People v. Buza*, 231 Cal. Ct. App. 4th 1446, 1455 n.3 (Cal. Ct. App. 2014). All 50 states require the collection of DNA from felony convicts; 28 states and the Federal Government authorize collection of DNA from some or all arrestees. *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013).

Because the vast majority of offenses under the UCMJ qualify for DNA collection, and because many investigators collect DNA at the time fingerprints are collected during the early stages of a case, it is more likely than not that an accused will have his or her DNA sample collected by law enforcement prior to a final disposition following the investigation.⁵ This is important because while DNA

⁵ DoDI 5505.14 authorizes DNA collection in no less than 81 offenses enumerated in the punitive articles of the UCMJ. Compare DoDI 5505.14, *supra* note 3, at enclosure 3, ¶ 3(a) (authorizing collection of DNA during investigation from members who are investigated for qualifying offenses at the time fingerprints are taken if probable cause exists) with DoDI 5505.11, FINGERPRINT CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS, ENCLOSURE 2, Jul. 21, 2014 (INCORPORATING CHANGE 1, Oct. 31, 2014), (listing the specific offenses under suspicion of which a member's fingerprints may be seized if probable cause exists).

¹ 10 U.S.C. § 1565(a)(1).

² *Id.* § 1565(d)(1).

collection usually occurs during an investigators' first contact with the accused, the matter being investigated may ultimately result in an acquittal at court-martial or in some disposition other than a conviction at a special or general court-martial (i.e., negotiating a special court-martial (SPCM) down to a summary court-martial (SCM)) much later in time.⁶

In such cases, accused members are entitled under federal law to have their DNA samples expunged from CODIS as well as any other federal database currently housing their DNA profiles.⁷ For the reasons discussed below, this is an important step that must not be overlooked by either the accused or the defense team assisting the client. Defense teams, both attorneys and paralegals, may be instrumental in assisting clients accomplish this goal.

This article will explain the process and authorization by which law enforcement may legally take DNA during the course of an investigation into qualifying offenses. It will discuss the dangers and potential ramifications of having DNA stored in federally-controlled databases. Further, it will provide a practical step-by-step approach for all defense teams to implement in order to help clients expunge their DNA records from these databases.

⁶ A conviction at summary court-martial qualifies a member for DNA expungement. DoDI 5505.14, *supra* note 3, at enclosure 3, ¶ 4. The Supreme Court of the United States has held that because accused have neither Sixth nor Fifth Amendment rights, the consequences of a conviction at a Summary Court-Martial is not equal to that at a Special or General-Court martial. *See Middendorf v. Henry*, 426 U.S. 25, 32-33, 48 (1976).

⁷ 10 U.S.C. § 1565(e).

DNA COLLECTION: ANALYSIS OF PROCESS AND PURPOSE

PROCESS

DoDI 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations*, implements the federal law requiring collection of DNA from active duty members accused of certain offenses. This regulation requires Air Force Office of Special Investigations (AFOSI) and Security Forces Squadron (SFS) to collect DNA from suspects investigated for a qualifying offense at any one of four points during the course of the life of the case. First, DNA may be collected in connection with the investigation at the time an investigator concludes there is probable cause to believe that the subject had committed the offense under investigation.⁸

⁸ DoDI 5505.14, *supra* note 3, at enclosure 3, ¶ 3(a). This provision of the regulation cautions

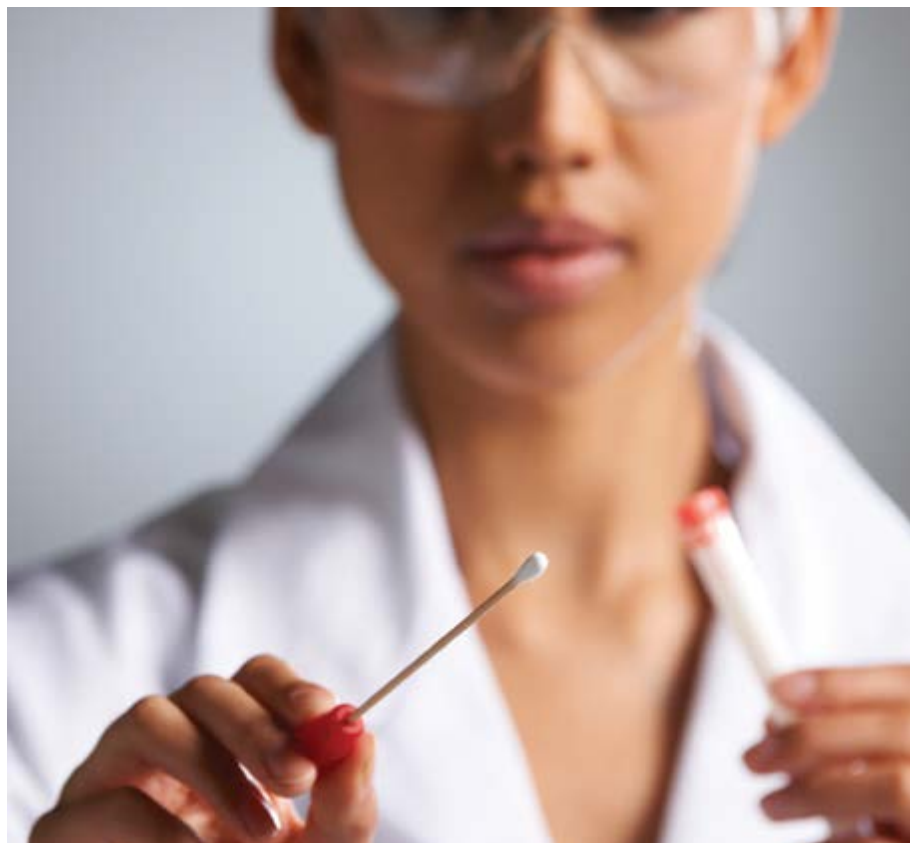
Investigators have the option of collecting a DNA sample when court-martial charges are preferred in accordance with Rule for Court-Martial (R.C.M.) 307.⁹ Alternatively, if a member is ordered into pre-trial confinement, DNA may be collected after the commander completes the 72-hour memorandum.¹⁰ Finally, if collected at no other point, DNA may be collected upon the member's entry into confinement pursuant conviction at a Special or General Court-Martial.¹¹

that the investigator must consult with a judge advocate prior to making a probable-cause determination, and that samples may be collected, but not forwarded, prior to consultation. *Id.* It is also interesting to note that this paragraph also requires DNA to be taken from all drug offenders other than those who were arrested or detained for offenses of simple possession and personal use, unless such offenses result in a referral or conviction at a Special or General Court-Martial. *Id.*

⁹ *Id.* ¶ 3(b).

¹⁰ *Id.* ¶ 3(c).

¹¹ *Id.* ¶ 3(d).



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Investigators use the “buccal swab” method to collect DNA samples. To administer a buccal swab, investigators will gently rub a small piece of filter paper or cotton swab against the subject’s inner cheek.¹² The gentle rubbing will transfer cells contained in the inner cheek to the item used. The procedure is quick and painless. The swabs investigators use come from kits provided by the United States Army Criminal Investigation Laboratory (USACIL) CODIS Branch.¹³ Once collected, investigators will forward the DNA samples to USACIL, which then coordinates with the FBI to ensure the samples are added to the National DNA Index System (NDIS), the subset of CODIS which houses DNA of individuals who fall under federal jurisdiction.¹⁴

PURPOSE

Once DNA is taken, investigators are required to give the subject a one-page printed sheet containing a Privacy Act disclosure statement and an explanation for what the DNA will be used.¹⁵ The statement explains that “[t]he purpose of the Department of Defense’s collection of a sample of an individual’s DNA is to allow for positive identification and to provide or generate evidence to solve crimes through database searches of potentially matching samples.”¹⁶ The

¹² See King, 133 S. Ct. at 1967-68.

¹³ DoDI 5505.14, *supra* note 3, at enclosure 3, ¶ 2.

¹⁴ FEDERAL BUREAU OF INVESTIGATION FEDERAL DNA DATABASE UNIT, <http://www.fbi.gov/about-us/lab/biometric-analysis/federal-dna-database> (last visited 15 February 2015) (hereinafter FDDU).

¹⁵ *Id.* see also DoDI 5505.14, *supra* note 3, at Appendix to enclosure 3.

¹⁶ DoDI 5505.14, *supra* note 3, at Appendix to

statement goes on to explain that it is illegal to refuse to give a sample when requested in accordance with this collection procedure.¹⁷

The use of DNA samples taken involuntarily from arrestees and those who have not yet been convicted of any crime has been hotly contested in federal and state courts.

The purpose of DNA collection by the DoD matches that of state and federal civilian jurisdictions. Namely, it permits the FBI’s Federal DNA Database Unit (FDDU) to aid state and federal investigations by comparing DNA collected from individuals under policies like the DoD’s described above with DNA found at crime scenes of unsolved cases.¹⁸ If any known DNA sample achieves a “hit” with the DNA in the unsolved-crimes collection, FDDU will release a “hit letter” which provides the information about the offender, including the name and last known whereabouts, to the casework laboratory with the intent that it be used as an investigative aid in the agency’s case.¹⁹

enclosure 3.

¹⁷ *Id.*

¹⁸ FDDU, *supra* note 14.

¹⁹ *Id.*

THE CONCERN OVER USE OF ARRESTEE DNA SAMPLES, DANGER OF ABUSE AND RISKS TO CLIENTS

The use of DNA samples taken involuntarily from arrestees and those who have not yet been convicted of any crime has been hotly contested in federal and state courts. Specifically, courts have analyzed whether seizure of DNA of arrestees without a search warrant violates a suspect’s Fourth Amendment rights. In February 2013, the Supreme Court of the United States held in the 5-4 decision of *Maryland v. King* that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”²⁰

In *King*, Alonzo King was arrested in Maryland and charged with assault for menacing a group of people with a shotgun.²¹ Police administered a buccal swab on King to collect his DNA as part of the routine booking procedure following his arrest, in accordance with Maryland law.²² When King’s DNA record was uploaded to the Maryland DNA database, his DNA profile matched the DNA sample collected in an

²⁰ King, 133 S. Ct. at 1980. Despite the holding of *Maryland v. King*, one court in California has refused to apply *King* as binding precedent, acknowledging that unlike the Federal Constitution, the California Constitution expressly recognizes a right to privacy, which extends to the information contained in a DNA sample. *Buza*, 231 Cal. App. 4th at 1498 (“we conclude that the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees’ expectation of privacy and is invalid under article I, section 13 of the [California] Constitution.”).

²¹ King, 133 S. Ct. at 1965.

²² *Id.*

unsolved rape case dating back to 2003.²³ Detectives used the match as a basis to obtain a search warrant, where detectives obtained a second sample of DNA from King, which again matched the DNA found on evidence from the rape.²⁴ A grand jury indicted King for rape, after which he was tried, convicted, and sentenced to life in prison without the possibility of parole.²⁵

Justice Kennedy, writing for the majority, explained that an arrestee's expectation of privacy is not offended by the minor intrusion of a buccal swab.²⁶ Further, he noted that there are significant state interests in identifying an arrestee and determining whether pretrial custody is necessary.²⁷ Justice Kennedy explained that collecting DNA from arrestees is akin to collecting fingerprints, which has been long-established as a constitutional pre-conviction procedure.²⁸ He also compared collecting DNA to "matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene."²⁹ Finally, the Court explained that the expectations of privacy of an individual taken into police custody are diminished because both the person

²³ *Id.* at 1966.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *King*, 133 S. Ct. at 1966.

²⁸ *Id.* at 1972.

²⁹ *Id.*

and the property may be searched upon arrest.³⁰

Justice Scalia—writing for the dissent joined by Justice Ginsburg, Justice Sotomayer, and Justice Kagan—opined that using the DNA samples collected from arrestees during the routine booking procedure in order to help solve cold cases violates the Fourth Amendment because it amounts to a suspicionless search.³¹ Justice Scalia explained that "suspicionless searches are *never* allowed if the principal end is ordinary crime-solving,"³² which is what the FBI's website unapologetically announces as its principal aim in collecting DNA samples of arrestees at booking.³³ He maintains that despite any lowered expectation of privacy an individual may have upon arrest, an individual's expectation of privacy is never removed altogether.³⁴ Justice Scalia also distinguishes fingerprint identification and use from the use and capability of DNA identification, ultimately concluding that "[s]olving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches."³⁵

³⁰ *Id.* at 1978.

³¹ *Id.* at 1980 (Scalia, J., dissenting).

³² *Id.* at 1982 (Scalia, J., dissenting).

³³ FDDU, *supra* note 14.

³⁴ *King*, 133 S. Ct. at 1982 (explaining that the objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest) (Scalia, J., dissenting).

³⁵ *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting). A related but separate criticism of suspicionless seizure of DNA samples from arrestees is that the very existence of DNA databases

Other critics of the ever-expanding body of individuals subject to DNA collection have written about related concerns underlying use of DNA data. A common concern is that with technological advances, law enforcement bodies may be able to use DNA in the future to determine "an individual's ancestry, addictive behaviors, sexual orientation, temperament, and other personal information from the genetic markers" noted in DNA samples stored in CODIS.³⁶ Although there are penalties associated with misuse of DNA profiles, there are several documented cases of abuse of investigators who have used the DNA profiles in these databases to gather information for personal interests such as love, revenge, legal or political reasons.³⁷

Finally, some critics fear that permanent DNA profiles may lead to "familial searching" techniques by law enforcement.³⁸ Familial searching

violates the fundamental tenet of "presumption of innocence" because it renders the persons whose DNA is maintained in these databases as perpetual suspects for all future crimes. See Tania Simoncelli, *Forensic Database Expansion: Dangerous Exclusions: The Case Against Expanding Forensic DNA Databases to Innocent Persons*, 34 J.L. MED. & ETHICS 390, 390-91 (2006).

³⁶ See, e.g., Karen J. Maschke, *DNA and Law Enforcement*, in *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, 45-50 (2008), available at <http://thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2168>.

³⁷ Simoncelli, *supra* note 35, at 392. Simoncelli explains that in 2001, more than 90 known cases involved police abusing their DNA databases over a five-year span. *Id.*

³⁸ See Maschke, *supra* note 36. Not all jurisdictions permit law enforcement to use DNA collected incident to arrest for familial searches. For example, the Maryland law at issue in *King* explicitly prohibited use of arrestee's DNA for such purposes. See *King*, 133 S. Ct. at 1967. Maryland, incidentally, is the only state that categorically bans familial searching. DNA FORENSICS: NEWS AND INFORMATION ABOUT DNA

A common concern is that with technological advances, law enforcement bodies may be able to use DNA in the future to determine “an individual’s ancestry, addictive behaviors, sexual orientation, temperament, and other personal information from the genetic markers” noted in DNA samples stored in CODIS.

is the process by which investigators match known DNA to DNA found at the scene of an unsolved crime.³⁹ A partial match rules out the owner of the DNA itself, but it suggests that the DNA found at the crime scene came from a genetic relative.⁴⁰ Not only will the partial-match DNA narrow the pool of suspects to a genetic relative of the person who provided the DNA profile, but it could also strain the pool of suspects even more selectively by race and even disease susceptibility—like asthma or hypertension.⁴¹

HOW TO EXPUNGE DNA FROM CODIS

Members qualify to have their DNA expunged from CODIS when the case in which they were investigated or charged results in an acquittal or in some disposition other than a conviction at a Special or General Court-Martial.⁴² Best practice includes briefing clients of the option to request expungement of his DNA from CODIS once it is clear the member qualifies for expungement.

Qualifying members who have had their DNA collected may submit a written request for the expungement of their DNA records.⁴³ The request

must include proof that either the charge(s) did not result in a federal conviction or that the case was disposed of in some manner not resulting in prefferal of charges.⁴⁴ Appendix A to this article provides a template for such a request, which conforms to the requirements outlined in applicable regulations.

The member must submit the request directly to the squadron commander as long as the commander is in the grade of O-4 or above.⁴⁵ The squadron commander will review and confirm the information and consult with the servicing Staff Judge Advocate (SJA) about the request for expungement.⁴⁶ Once the legal office reviews and approves, the commander will submit the request to the investigating agency that collected the DNA from the member, who will then verify that the member has no convictions that would otherwise prohibit expungement.⁴⁷

Once complete, the investigative agency will send the member’s request to USACIL. USACIL requires very specific information to be submitted at the time the member’s request is submitted.⁴⁸ To ensure all required information is submitted, ensure your investigative agency representative uses Appendix B as a sample forwarding memorandum

DATABASES, <http://www.dnaforensics.com/StatesAndFamilialSearches.aspx> (last visited 15 February 2015) (hereinafter DNA Forensics). Four states have pioneered the legality of the use of familial searches: California, Colorado, New York and Florida. *Id.*

³⁹ See MASCHKE, *supra* note 36.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² DoDI 5504.14, *supra* note 3, at enclosure 3, ¶ 4.

⁴³ *Id.* ¶ 4(a).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ U.S. DEP’T OF AIR FORCE, INSTR. 51-201, Administration of Military Justice, ¶ 13.21.4. (Jun. 6 2013) (hereinafter AFI 51-201).

⁴⁷ DoDI 5504.14, enclosure 3, paragraph 4(b).

⁴⁸ *Id.* ¶ 4(c).

Additional Thoughts

Debating DNA Collection

MORE

DNA & Law Enforcement

MORE

to submit along with the member's request. Consider drafting the forwarding memorandum for the investigating agent to ensure no errors occur. Once USACIL receives all required information, it will then coordinate with appropriate agencies in expunging the DNA records from CODIS.⁴⁹ Ultimately, USACIL will notify the member when the process is complete.⁵⁰

CONCLUDING THOUGHTS

Securing an acquittal or negotiating a deal for your client that results in a disposition other than a federal conviction may be considered a success, but it is important that defense teams consider taking one final step in eradicating DNA samples from national databases. Such samples, if left in CODIS, may be used against the client or relatives of the client to solve cold cases in the future. Even without intending to do so, a client may ultimately be responsible for leading investigators directly to suspects who are related to the client through familial matching.

Of course, there may be situations where advising a client on whether to request removal of DNA may not be so obvious. Take, for example, a scenario where dozens of men are summoned en masse to be questioned

⁴⁹ See *id.* ¶ 4(d), ¶ 5(c).

⁵⁰ *Id.* ¶ 4(d). Expungement cases involving retired service members who qualify for assistance pursuant to AFLOA OI No.1, Table 1, who were not convicted of a qualifying military offense would submit their requests to the Military Department Clerk of Court along with pertinent proof of the case disposition. If approved, USACIL would work with the FBI to expunge the DNA profile(s) from the CODIS database.

by AFOSI about a rape case with an unknown perpetrator. Suppose each member has his DNA collected via buccal swab and subsequently released. Months pass and the vast majority of members who were summoned and swabbed are never formally named as suspects. If any one of these members seek advice asking to have DNA expunged, what should he be instructed?

In such a scenario, a cost-benefit analysis must be employed. Specifically, the defense team must determine whether the case progressed to a point where a suspect or suspects have been identified. If not, consider the inherent danger in having a client draw attention to himself in the throes of a cold case in the name of expunging DNA from a database. Per regulations, it is unclear at this point whether the DNA samples collected were forwarded to USACIL or simply collected and maintained locally. There is no clear answer on how to advise a client in such a situation; best practice is to advise of the pros and cons of any particular path and allow the client to choose the most appropriate way forward.

What is clear is that as technology continues to develop, the use of DNA broadens. Technological advances have ushered in an era of DNA use today that was unfathomable two decades ago. Indefinite retention of DNA in CODIS poses a privacy risk and creates temptation for abusing the data for impermissible purposes by law enforcement. Indefinite DNA retention could ultimately implicate

a member in a future crime at the click of a mouse, decades after DNA is collected. With the exception of the “en masse” collection of samples, if a member qualifies to have his DNA expunged from CODIS, it will most likely benefit the member to request expungement. **R**



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APPENDIX A: SAMPLE EXPUNGEMENT REQUEST

[DATE]

MEMORANDUM FOR [SQUADRON COMMANDER]⁵¹
[STAFF JUDGE ADVOCATE]

FROM: [CLIENT]
[ADDRESS]

SUBJECT: Request for Expungement of DNA Sample

1. This memorandum is a request to have my DNA sample removed from any investigative/police/law enforcement database—to include, but not limited to USACIL and CODIS—in accordance with AFI 51-201, paragraph 13.21.4 and DoDI 5505.14, Enclosure 3, section 4.

2. My DNA and fingerprint samples were taken by [INVESTIGATIVE AGENCY] on [DATE], during an investigation. The investigation and apprehension ultimately resulted in [DISPOSITION OTHER THAN CONVICTION AT SPCM/GCM]. According to AFI 51-201, paragraph 13.21.4,

[w]hen a court-martial results in an acquittal of all charged offenses, or findings of guilty are disapproved or set aside, or the case is disposed of by referral to summary court-martial, Article 15, or administrative action, the SJA will advise commanders and military criminal investigators whether expungement is authorized, if a member submits a request for expungement.

3. DoDI 5505.14, Enclosure 3, paragraph 4(b) explains:

[r]equests for expungement shall be forwarded through the first commanding officer in the grade of major or lieutenant commander, or higher, in the member's chain of command. Such requests shall include adequate proof that the charges have been dismissed, withdrawn, disposed of in a manner not resulting in preferral of charges pursuant to RCM 307 of Reference (k), or otherwise have not or will not result in a conviction of any offense (including proof of any action by a general or special court-martial convening authority that has the effect of a full acquittal).

4. Because the investigation for which I was fingerprinted and had DNA collected resulted in [DISPOSITION OTHER THAN CONVICTION AT SPCM/GCM], I request that this information be expunged from any/all databases in which it is stored, including those maintained by USACIL or the FBI (i.e., CODIS). I respectfully request notification if there is a determination that expungement is not authorized, as recommended under DODI 5505.14, Enclosure 3, paragraph 4(e).

⁵¹ Note: The squadron commander must be a grade of O-4 or above to accept the request for expungement. If not O-4 or above, the client should submit to the Group Commander.

5. Thank you for your consideration.

Respectfully submitted,

[SIGNATURE]

[CLIENT NAME]

[SSN]

[MAILING ADDRESS]

3 Attachments:

1. Proof of Qualifying Disposition Entitling Expungement
2. Notice of DNA and Fingerprint sample collection
3. Form 40 – DNA/Fingerprint collection

APPENDIX B: SAMPLE FORWARDING MEMO FOR EXPUNGEMENT REQUEST

[OFFICIAL LETTERHEAD OF INVESTIGATIVE AGENCY]

[DATE]

MEMORANDUM FOR DEFENSE FORENSIC SCIENCE CENTER – USACIL
ATTN: CODIS BRANCH
4930 North 31st Street
Forest Park, GA 30297

FROM: [INVESTIGATIVE AGENCY]

SUBJECT: Request for DNA Expungement from CODIS

1. On [DATE] we received a request for [CLIENT]'s DNA sample to be expunged from CODIS in accordance with DODI 5505.14 and AFI 51-201 because the offense for which [HE/SHE] was investigated, [CITE COMMON NAME OF OFFENSE AND UCMJ ARTICLE], resulted in a disposition other than a conviction at Special or General Court-Martial. Specifically, it resulted in [DISPOSITION].
2. Upon reviewing the matters submitted by [CLIENT] (attached), it appears as though the member is entitled to expungement.
3. Per DODI 5505.14, paragraph 4(d), the member's information you will need to process this request is as follows:

FULL NAME:

SSN:

MAILING ADDRESS:

Very Respectfully,

[SIGNATURE]

[NAME OF AGENT/LE OFFICER]

[TITLE]

[TELEPHONE NUMBER]

Attachment:

Request for Expungement of DNA Package



ORGANIZATIONAL CONFLICTS OF INTEREST (OCIS)

What Every Contract Law Attorney Needs to Know

BY MR. MICHAEL J. FARR

This article outlines the key OCI concepts you need to know to help the contracting office identify, analyze, and appropriately resolve OCI situations.

You're just returning to your office after an exciting two weeks at the Contract Attorneys' Course at the Army Judge Advocate General's Legal Center and School in beautiful Charlottesville, Virginia, and are eager to put to good use all the knowledge you've gained at that course in your new position as Chief of Contract Law. As you grab your first morning cup of coffee and settle into your office chair to catch up on e-mails, the phone rings. It's Lt Col Johnson, the base contracting squadron commander, with whom you were scheduled for a "meet and greet" later that afternoon. He needs you to come over in an hour to discuss an Organizational Conflict of Interest (OCI) situation that's come

up on the solicitation for the new contract for base operating support services with him and the contracting officer (CO), Mr. Jones. You vaguely recall hearing the term OCI mentioned during the two-week course, but can't remember much beyond that. With very little time before your meeting, what can you do to get ready? That's where this article comes in. Its goal is to give you the key OCI concepts you need to know to help the contracting office identify, analyze, and appropriately resolve OCI situations.

WHAT EXACTLY IS AN OCI?

OCIs are organizational conflicts of interest, which the Federal Acquisition Regulation (FAR) defines

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One example of an OCI is where a contractor helps the Government prepare the statement of work for an upcoming acquisition and then wants to compete for the contract to be awarded in that acquisition.

as a situation where, “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance to the Government, or the person’s objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage.”¹ For purposes of this definition, “person” will usually be some type of business entity.

One example of an OCI is where a contractor helps the Government prepare the statement of work for an upcoming acquisition and then wants to compete for the contract to be awarded in that acquisition. In that case, the contractor would have an unfair competitive advantage, since it would be in a position to skew the statement of work’s requirements in its favor. Another example is where a contract would require a contractor to evaluate the services it or one of its affiliates or competitors provides to the Government under another contract. In that situation, the value of the contractor’s services to the Government would be seriously degraded, since the contractor would not be in a position to provide objective, unbiased evaluation services. Yet another example is where a contractor obtains additional nonpublic information from the Government that gives it a “leg up” on the other companies competing for an upcoming contract award.

While FAR 2.101 includes a definition of the term OCI, the FAR’s sub-

¹ FAR 2.101 (2015).

stantive guidance on OCIs is located in FAR Subpart 9.5, *Organizational and Consultant Conflicts of Interest*. That Subpart sets forth responsibilities, general rules, and procedures for identifying, evaluating, and resolving OCIs, and provides examples to assist COs in applying those rules and procedures to individual contracting situations.²

FAR 9.505 describes four general situations where OCIs often arise.

These include

- (1) Providing systems engineering and technical direction;³
- (2) Preparing specifications or work statements;⁴
- (3) Providing evaluation services;⁵ and
- (4) Obtaining access to proprietary information.⁶

For example, a contractor who obtains access to other companies’ proprietary information in performing a contract to provide advisory and assistance services to the Government could gain an unfair competitive advantage against those companies in an upcoming acquisition unless there are restrictions in place regarding its use and disclosure of the information. It would be critical for those restrictions to prohibit the contractor from

² FAR 9.500(a)-(b).

³ FAR 9.505-1.

⁴ FAR 9.505-2.

⁵ FAR 9.505-3.

⁶ FAR 9.505-4.

using the information for any purpose other than performing the contract and to prohibit it from sharing the information with its personnel working to prepare a proposal for an upcoming acquisition.

FAR 9.508 also lists a number of examples of situations in which OCIs may occur. However, OCIs can arise in situations not expressly covered in FAR 9.505 or in the examples in FAR 9.508.⁷ Consequently, each individual contracting situation must be examined on the basis of its particular facts and the nature of the proposed contract, keeping in mind the following two overarching principles:

- (1) Preventing the existence of conflicting roles that might bias a contractor's judgment;⁸ and
- (2) Preventing unfair competitive advantage.⁹

Although not clearly delineated in the FAR, case law lays out three main categories of OCIs. In a frequently cited 1995 decision,¹⁰ the U.S. Government Accountability Office (GAO) outlined three basic types of OCIs:

- (1) Unequal access to information;
- (2) Biased ground rules; and
- (3) Impaired objectivity.

⁷ FAR 9.505.

⁸ FAR 9.505(a).

⁹ FAR 9.505(b).

¹⁰ *Aetna Gov't Health Plans, Inc., et al.*, Comp. Gen. B-254397, Jul. 27, 1995, 95-2 CPD ¶ 129.

An ***unequal access to information*** OCI occurs when a contractor's access to nonpublic information, such as source selection or proprietary information, gained as a result of performing on a Government contract or obtained from a current or former Government official without proper authorization, may give it an unfair advantage in future competitions. For this type of OCI concern to apply, the nonpublic information in question must be competitively useful.¹¹ It's not enough for the Government to simply state that the information in question is competitively useful, for example, the information gained by the contractor in working on a Government implementation plan related to the services the contractor would provide under an upcoming contract.¹² Rather, the Government must specifically explain how the contractor's access to the information would give it an unfair competitive advantage.

If the contractor receives the nonpublic information from a former Government employee who goes to work for it, the contracting officer must identify specific nonpublic information the former Government employee might have accessed and which could have provided the contractor with an unfair competitive advantage.¹³ If the former

¹¹ *NikSoft Sys. Corp.*, Comp. Gen. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104; *VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268; *Health Net Fed. Servs., LLC*, Comp. Gen. B-401652.3; B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220.

¹² *NikSoft Sys. Corp.*, Comp. Gen. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104.

¹³ *VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21,

Government employee who helped the awardee preparing its proposal had access to the protester's nonpublic proprietary information regarding its performance of the incumbent contract for the services being acquired, the GAO will presume that an unfair competitive advantage exists and will sustain a protest based on an unequal access to information OCI, unless the contracting officer does a thorough investigation and reasonably concludes that an unfair competitive advantage did not exist.¹⁴ Also, if the contractor receives the nonpublic information from some other way, such as from a former employee of a competitor, there is no unequal access to information OCI.¹⁵ As with other types of OCIs, there is a requirement for the CO to meaningfully investigate the existence of an unequal access to information OCI.¹⁶

A ***biased ground rules*** OCI occurs when a contractor's involvement in defining requirements, preparing work statements, developing business cases, or similar activities could skew a competition in its own favor and/or give it an unfair advantage in the competition for a contract to supply the products or services covered by those requirements. The concern is that the contractor can gain an unfair advantage by writing the statement of work in a manner that favors the

2011, 2011 CPD ¶ 268.

¹⁴ *Health Net Fed. Servs., LLC*, Comp. Gen. B-401652.3; B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220.

¹⁵ *The GEO Grp., Inc.*, Comp. Gen. B-405012, July 26, 2011, 2011 CPD ¶ 153.

¹⁶ See, e.g., *Int'l Res. Grp.*, B-409346.2; B-409346.6; B-409346.9, 2014 U.S. Comp. Gen. LEXIS 368 (Dec. 11, 2014).

capabilities of its own products or services, or that disfavors the capabilities of its competitors' products or services. However, this type of OCI concern would not preclude a contractor who has participated in development and design work on an item from competing for award of a contract to supply the item.¹⁷ Involvement in preparing the work statement also would not prevent a contractor from competing where more than one contractor has participated in preparing the work statement.¹⁸

An **impaired objectivity** OCI arises when a contractor's judgment or objectivity in performing on one contract may be impaired because that performance could affect the award or performance of a second contract. For example, if a contractor in performing one contract is evaluating the services it or one of its affiliates or competitors provides to the Government under another contract, the contractor is not in a position to provide objective, unbiased evaluation services to the Government. Rather, the contractor has a financial incentive and bias to provide a more favorable evaluation of its own or its affiliate's services, and a less favorable evaluation of its competitor's services.

¹⁷ FAR 9.505-2(b)(1)(ii); *Alliant Techsystems, Inc.*, Comp. Gen. B-410036, Oct. 14 2014, 2014 CPD ¶ 324.

¹⁸ FAR 9.505(b)(1)(iii).

WHAT ARE THE CO'S RESPONSIBILITIES REGARDING OCIS?

The CO's responsibilities are two-fold: (1) Identify and evaluate potential OCIs as early in the acquisition process as possible;¹⁹ and (2) Avoid, neutralize, or mitigate significant potential OCIs before contract award.²⁰ Further, if a particular acquisition involves a significant potential OCI, the CO must, before issuing the solicitation, submit for approval by the chief of the contracting office a written analysis with a recommended course of action for avoiding, neutralizing, or mitigating the conflict, a draft solicitation provision, and, if appropriate, a proposed contract clause.²¹

HOW SHOULD THE CO PROCEED IN CARRYING OUT THESE OCI-RELATED RESPONSIBILITIES?

COs must exercise common sense, good judgment, and sound discretion, both in deciding whether a significant potential OCI exists, and if it does, on the appropriate means of resolving it.²² The identification of OCIs and evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.²³ However, in carrying out these responsibilities, the CO should not act as a lone ranger. On the contrary,

¹⁹ FAR 9.504(a)(1).

²⁰ FAR 9.504(a)(2). *Overlook Sys. Techs., Inc.*, Comp. Gen. B-298099.4; B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185; *NETSTAR-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (Fed. Cl. 2011), *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012).

²¹ FAR 9.506(b).

²² FAR 9.505.

²³ *Axiom Res. Mgmt. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009).

the CO is highly encouraged to obtain the advice of counsel and assistance from appropriate technical specialists from the Government requiring activity, such as program managers and engineers.²⁴ If information concerning prospective contractors is necessary to identify and evaluate potential OCIs or to develop recommended actions, COs should first seek the information from within the Government or other readily available sources.²⁵ Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities, and offices concerned with contract financing.²⁶ Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.²⁷

WHAT STANDARD DO THE GAO AND THE COURTS HOLD THE CO TO IN CARRYING OUT THESE OCI-RELATED RESPONSIBILITIES?

Where the record shows that an agency has given meaningful consideration to whether an OCI exists, the GAO and the courts will not substitute their judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable.²⁸ Also, an agency may

²⁴ FAR 9.504(b).

²⁵ FAR 9.506(a).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Axiom Res. Mgmt.*, 564 F.3d at 1374; *CACI, Inc.-Fed.*, Comp. Gen. B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31; *C/GNA Gov't Servs.*, Comp. Gen. B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230; *Gulf Coast Petroleum Reserve Operations, LLC*, Comp.

provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and the GAO will consider such information in determining whether the CO's OCI determination was reasonable.²⁹ A critical caveat to this whole discussion is that before withholding award based on OCI considerations, the CO must notify the contractor, provide the reasons for his or her determination, and give the contractor a reasonable opportunity to respond.³⁰ Failure to do so will result in a sustained protest.³¹

WHAT ABOUT THE CO'S REVIEW OF OCI MITIGATION PLANS SUBMITTED BY CONTRACTORS TO ATTEMPT TO MITIGATE AN ACTUAL OR POTENTIAL OCI?

An OCI mitigation plan must be sufficiently detailed to allow the CO to reasonably assess the viability of the proposed mitigation approach.³² In reviewing mitigation plans, the CO cannot merely rely on the contractor's self-assessment of whether an OCI exists or on the contractor's unilateral efforts to implement a mitigation plan. Rather, the CO must independently analyze the situation to ensure the contractor's mitigation plan actually mitigates the conflict.³³

Gen. B-409004.2, B-409004.3, B-409004.4, B-409004.6, Jan. 24, 2014, 2014 CPD ¶ 41.

²⁹ *McTech Corp.*, Comp. Gen. B-406100; B-406100.2, Feb. 8, 2012, 2012 CPD ¶ 97.

³⁰ FAR 9.504(e).

³¹ *AT&T Gov't Solutions, Inc.*, Comp. Gen. B-400216, Aug. 28, 2008, 2008 CPD ¶ 170.

³² *C2C Solutions, Inc.*, Comp. Gen. B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38; *Cahaba Safeguard Adm'rs, LLC*, Comp. Gen. B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39.

³³ *L-3 Servs., Inc.*, Comp. Gen. B-400134.11; B-400134.12, Sep. 3, 2009, 2009 CPD ¶ 171; *Johnson Controls World Servs., Inc.*, Comp. Gen.

When the record shows that the agency reasonably concluded that the potential areas of concern were adequately addressed by an OCI mitigation plan that included details and milestones, the GAO will deny the protest.³⁴

Mitigation plans are most often effective in mitigating unequal access to information OCIs, through use of firewalls to restrict access to and limit sharing of information, along with other organizational restrictions.³⁵ However, mitigation plans with firewalls are virtually irrelevant to impaired objectivity OCIs, because the conflict pertains to the organization and not to individual employees of the contractor.³⁶ Likewise, such mitigation plans will rarely be effective where a biased ground rules OCI results from a competitor having drafted the statement of work or specifications. In such case, the ordinary remedy is the elimination of that competitor from the competition.³⁷

B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20.

³⁴ *TriCenturion, Inc.; SafeGuard Servs., LLC*, Comp. Gen. B-406032; B-406032.2; B-406032.3; B-406032.4, Jan. 25, 2012, 2012 CPD ¶ 52.

³⁵ *L-3 Servs., Inc.*, Comp. Gen. B-400134.11; B-400134.12, Sep. 3, 2009, 2009 CPD ¶ 171; *Axiom Res. Mgmt., Inc.*, Comp. Gen. B-298870.3; B-298870.4, Jul. 12, 2007, 2007 CPD ¶ 117.

³⁶ *Nortel Gov't Solutions*, Comp. Gen. B-299522.5; B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10; *Cognosante, LLC*, Comp. Gen. B-405868, Jan. 5, 2012, 2012 CPD ¶ 87.

³⁷ *L-3 Servs., Inc.*, Comp. Gen. B-400134.11; B-400134.12, Sep. 3, 2009, 2009 CPD ¶ 171 (citing *The Jones/Hill Joint Venture*, Comp. Gen. B-286194.4, B-286194.5, B-286194.6, Dec 5, 2001, 2001 CPD ¶ 194.

An actual or potential OCI must be established by "hard facts," rather than inferences based on suspicion or innuendo.

Additional Thoughts

Financial Management
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MORE

WHAT IS REQUIRED TO PROVE AN OCI?

An actual or potential OCI must be established by “hard facts,” rather than inferences based on suspicion or innuendo.³⁸ Those “hard facts,” however, don’t have to show an actual conflict or a negative impact from the conflict. Where an agency decides to exclude an offeror from a competition based on an OCI arising from unequal access to information, the “hard facts” must include specifically identifying competitively useful, nonpublic information to which the offeror had access.³⁹ Also, because of the CO’s responsibility for protecting the integrity of the competitive procurement system and strictly avoiding any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships, the mere appearance of impropriety, if shown by “hard facts,” is enough to disqualify an offeror.⁴⁰

WHAT IF ONE OF THE OFFERORS ALLEGES THAT THE INCUMBENT CONTRACTOR HAS AN OCI THAT GIVES IT AN UNFAIR COMPETITIVE ADVANTAGE?

Regarding incumbent contracts, the mere existence of a prior or current

³⁸ *Turner Const. Co., Inc. v. United States*, 94 Fed. Cl. 561, 573 (Fed. Cl. 2010), *aff’d* 645 F.3d 1377 (Fed. Cir. 2011) (citing *Lucent Tech. World Servs., Inc.*, Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶ 55; *Noonan & Assocs.*, Comp. Gen. B-409103, Jan. 10, 2014, 2014 CPD ¶ 29.

³⁹ *NikSoft Sys. Corp.*, Comp. Gen. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104; *VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268; *Health Net Fed. Servs., LLC*, Comp. Gen. B-401652.3; B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220.

⁴⁰ FAR pt. 3.101-1; *NKF Eng’g, Inc. v. United States*, 805 F.2d 372 (Fed. Cir. 1986); *Health Net, supra*; *TeleCommunication Sys., Inc.*, Comp. Gen. B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229.

contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage. Moreover, an agency is not required to compensate for every competitive advantage gleaned by a potential offeror’s prior performance of a particular requirement.⁴¹ Rather, for an OCI to exist based on unequal information, there must be something more than mere incumbency, such as

- (1) An awardee so embedded in the agency that it gets insight into the agency’s operations beyond that which would be expected of a typical Government contractor;
- (2) The awardee obtained materials related to the specifications or statement of work for the instant procurement; or
- (3) Some other preferred treatment or agency action has occurred.⁴²

ESPECIALLY IN THIS ERA OF GOVERNMENT DOWN-SIZING, CAN AN OCI ARISE WHEN ONE OF THE OFFERORS HIRES A KEY FORMER OFFICIAL FROM THE GOVERNMENT REQUIRING ACTIVITY?

Such practices can give rise to an OCI and a firm that may have gained an unfair competitive advantage by hiring a former Government official can be disqualified based on the appearance of impropriety. However, the determination that

⁴¹ *ARINC Eng’g Servs., LLC v. United States*, 77 Fed. Cl. 196 (Fed. Cl. 2007); *Harmonia Holdings, LLC*, Comp. Gen. B-407186.2; B-407186.3, Mar. 5, 2013, 2013 CPD ¶ 66; *Onsite Health, Inc.*, Comp. Gen. B-408032; B-408032.2, May 20, 2013, 2013 CPD ¶ 138.

⁴² *ARINC Eng’g Servs., LLC*, 77 Fed. Cl. at 196.

the firm may have gained an unfair competitive advantage must be based on “hard facts,” not on mere innuendo or suspicion. In such cases, the GAO will presume an unfair competitive advantage exists where an offeror obtains competitively useful nonpublic information from a former Government employee who had access to such information and was already employed by the offeror when it prepared its proposal.⁴³ Where the facts demonstrate that the former Government employee potentially had access to competitively useful, nonpublic information, and the CO fails to meaningfully consider whether the awardee’s employment of the former Government employee gave that offeror an unfair competitive advantage, the GAO will sustain the protest without the need for a showing that the awardee actually used the information in preparing its proposal.⁴⁴

OTHER CONSIDERATIONS AND RESOURCES

MUST OCI CONCERNS BE RESOLVED BEFORE CONTRACT AWARD?

Yes. In fact, the CO is prohibited from awarding a contract where an OCI cannot be avoided or mitigated.⁴⁵ There is a presumption of prejudice to competing offerors where an OCI, other than a de minimis matter, is not resolved. Since OCIs

⁴³ *Threat Mgmt. Grp.*, Comp. Gen. B-407766.6, Jul. 3, 2013, 2013 CPD ¶ 167.

⁴⁴ *Int’l Res. Grp.*, B-409346.2, B-409346.6, B-409346.9, 2014 U.S. Comp. Gen. LEXIS 368 (Dec. 11, 2014).

⁴⁵ *NETSTAR-1 Gov’t Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (Fed. Cl. 2011), *aff’d*, 473 F. App’x 902 (Fed. Cir. 2012).

call into question the integrity of the competitive procurement process, no specific prejudice need be shown to warrant corrective action.⁴⁶

In cases where an OCI cannot be avoided, neutralized, or mitigated, there is one final avenue of resort – an OCI waiver. If the CO finds that it is in the Government’s best interest to award the contract notwithstanding an OCI, a request for waiver shall be submitted in accordance with FAR 9.503. The waiver request and decision must be included in the contract file,⁴⁷ and must be approved by the agency head or designee.⁴⁸ For the Air Force, the waiver approval authority is the Deputy Assistant Secretary for Contracting (SAF/AQC).

FINALLY, IT’S IMPORTANT FOR THE CO TO DOCUMENT HIS OR HER CONSIDERATION OF POTENTIAL OCIs.

Even though the FAR only requires formal documentation when a substantive issue concerning potential OCIs exists,⁴⁹ the best practice is for the CO to document his or her consideration of potential OCIs in every case. While the choice of documentation format (Determination and Findings (D&F) or memorandum) is not critical, the documentation should include a description of the investigation process, the relevant facts, the CO’s analysis of those facts, and his or her conclusions based on those facts. The

CO should also include with his or her findings relevant documents or evidence that supports the facts and analysis. Such documentation will ensure that the GAO and the courts have a sufficient record to review in the event a protester challenge’s the CO’s OCI determination. The lack of sufficient documentation may prevent the GAO or the courts from being able to determine that the CO reached a reasonable determination regarding the OCI and will likely lead to a sustained protest.

AS YOU DELVE FURTHER INTO OCI ISSUES, THE FOLLOWING ARE SOME GOOD OCI RESOURCES TO KEEP IN MIND.

- (1) Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25 (2005);
- (2) NASA Guide on OCIs (Mar 2010);
- (3) OCI Mitigation Plan Checklist; and
- (4) Major Travis P. Sommer, *Getting the Job Done: Meaningfully Investigating Organizational Conflicts of Interest*, Army Law., Nov. 2013, at 16.

Items 1 – 3 above are available on the Air Force Contract Law Homepage at https://afsa.jag.af.mil/AF/CONTRACT_LAW/index.html.

CONCLUSION

After reviewing this article, you should be much better equipped to discuss and offer advice on the OCI situation at your meeting later this morning with Lt Col Johnson and Mr. Jones. Also, while every OCI situation is different, the basic OCI concepts set forth in this article should help you address future OCI situations that are certain to arise as you continue to serve as Chief of Contract Law. Finally, stay tuned for further developments in this area. The new, updated Government-wide FAR rules on OCIs resulting from FAR Case 2011-001⁵⁰ are expected to be issued in the near future. **R**

⁵⁰ Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011) (to be codified at 48 C.F.R. pts. 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 18, 37, 42, 52, and 53).



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⁴⁶ *L-3 Servs., Inc.*, Comp. Gen. B-400134.11; B-400134.12, Sep. 3, 2009, 2009 CPD ¶ 171.

⁴⁷ FAR 9.504(e).

⁴⁸ FAR 9.503.

⁴⁹ FAR 9.504(d).

A BRIEF PRIMER

LAWS THAT ALLOW THE DEPARTMENT OF DEFENSE TO OPERATE



BY MAJOR SCOTT A. HODGES

Debate about the “defense budget” abounds this year. But what exactly does that term mean? Mr. John Martinez, a longtime senior advisor in the Judge Advocate General (JAG) Corps, explains to every Gateway class the importance of always being ready to succinctly and concisely speak to issues that those outside of the JAG Corps perceive as within our field of expertise. He calls it the ability to “make your point in 25 words or less,” otherwise known as the elevator speech. For example, we are expected to understand the laws that allow the Department of Defense (DoD) to operate, that is the laws that fund its operations: the National Defense Authorization Act (NDAA) and the Defense Appropriations Act.¹ If you don’t have a firm grasp on those laws and the differences between them,

this article is for you. If you have a fairly secure grasp on the legislative process feel free to skip to the Elevator Speech Pitfalls section at the end of the article.

THE BEGINNING OF THE APPROPRIATIONS PROCESS

When discussing appropriations in Congress, it is often true that the rules are followed only by exception. However, with respect to the DoD, Congress typically follows the standard appropriations process fairly closely.² The process begins on the first Monday in February when the President submits his proposed budget for the coming fiscal year which starts on October 1st.³ Hill watchers simply call this the PB, or PB [Fiscal Year], such as PB15, PB16, etc. The PB deals with all federal spending.

Almost immediately after the submission of the PB the four defense committees hold posture hearings. The four defense committees are the Senate Armed Services Committee (SASC), House Armed Services Committee (HASC), the Defense Subcommittee of the Senate Appropriations Committee (SAC-D), and the Defense Subcommittee of the House Appropriations Committee (HAC-D). The audience might think the hearing name refers to the rigid posture of the witnesses if they observed how uncomfortable the top civilian and top military official from DoD and each of the military departments appear to be when testifying.⁴ Really the name of the hearing refers to how the DoD and each of the services are postured, in terms of budget, manpower, force structure, etc., to accomplish their

¹ This article will use the term “act” when referring to a law signed by the President, and “bill” when referring to a proposed law not yet signed by the President.

² One major exception will be discussed in the omnibus section.

³ Timetable, Congressional Budget Process, 2 USC § 631. The PB is not always submitted on time.

⁴ The Commandant of the USMC testifies with the Chief of Naval Operations and Secretary of the Navy. As part of the Department of Homeland Security, the Coast Guard does not participate in these posture hearings.

national-security missions. In the past, some congressional members have strayed from the hearing's stated purpose for other interests, including discussions about sexual assault and religious freedom.⁵

The budget committees in the Senate and House initiate the next major step in the process by putting together their respective budget resolutions. The Congressional budget deals with all federal spending, and not just defense. Each chamber works on a budget independently and ultimately votes it out of committee and then through the full House and Senate. The next step is to reconcile the two bills through either a formal or informal conference process. Ideally, an identical budget resolution is passed by both chambers. Note that it is not a binding law because it is not signed by the President. Though not a law, the budget does provide Congress benchmarks within which it should operate when authorizing and appropriating funds for the DoD.⁶

AUTHORIZING VS. APPROPRIATING

Authorization acts establish policy for an agency. For example, the NDAA enacts modifications to the Uniform Code of Military Justice (UCMJ) and other clear-cut DoD policy changes.

⁵ A major focus of the posture hearing in 2013 became an incident at the US Air Force Academy involving a cadet who was required to remove a Bible verse from a white board outside of his dormitory room. Bryant Jordan, *Religious Debate Intensifies on Academy Whiteboard*, MILITARY.COM (Mar. 19, 2014), <http://www.military.com/daily-news/2014/03/19/religious-debate-intensifies-on-academy-whiteboards.html> (last visited Oct. 14, 2015).

⁶ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 302(a), 88 Stat. 297, 308.

Authorization acts also authorize Congress to appropriate certain amounts of money for specified purposes.

Appropriations acts, on the other hand, actually provide money to an agency from the U.S. Department of Treasury. These are not intended to establish policy, although lawmakers sometimes include policy riders.⁷ A major source of the confusion about the difference between these laws is that Congress often appropriates without an authorization. For example, almost every year each executive agency receives an annual appropriation of funds at the beginning of the fiscal year. But Congress does not pass current authorization acts for many of these agencies.⁸

Trying to pass an appropriations bill without an authorization opens up the bill to a procedural objection during floor debate. The members often consent to waiving that point of order and allowing a vote on the legislation. An existing statute, 10 U.S.C. § 114(a) appears to limit the ability of Congress to appropriate funds without an NDAA for several categories of DoD appropriations. The practical effect of this limitation

⁷ See, e.g., Thomas Spulak & George Crawford, *2015 appropriations bills: Are more policy riders inevitable?*, THE HILL (Apr. 25, 2014), <http://thehill.com/blogs/congress-blog/lawmaker-news/204230-2015-appropriations-bills-are-more-policy-riders-inevitable> (last visited Oct. 14, 2015).

⁸ See Danny Vinik, *The State Department hasn't been authorized in 13 years: Why Congress systematically neglects its main foreign-affairs job*, POLITICO <http://www.politico.com/agenda/story/2015/09/the-state-department-hasnt-been-authorized-in-13-years-000219> (last visited Oct. 14, 2015).

is difficult to discern, as Congress enacting a more recent law that appropriates funds probably trumps §114(a). Unlike the Budget Control Act of 2011 (BCA),⁹ §114(a) does not have a penalty mechanism like sequester to enforce its restriction. Congress can also appropriate fewer funds than the authorized amount.

MARKUP

The NDAA typically flows through the legislative process before the appropriations bill. The subcommittees of the HASC and SASC put together their respective portions of the bill and then submit those up to the full committee. The versions of the NDAA assembled by the subcommittees are a collection of inputs from the PB and legislative proposals, as well as inputs from members. Any member can submit a request for NDAA language. The submissions of the HASC and SASC members are more likely to be included in the subcommittee's bill.

The members of the subcommittee and full committee submit and vote upon amendments to the draft NDAA. Both the subcommittee and full committee amendment processes are referred to as markup. Anyone interested in the machinations of the political process should definitely watch full committee markup in the HASC.¹⁰ While subcommittee

⁹ Pub. L. No. 112-25, 125 Stat. 240 (2011).

¹⁰ The SASC traditionally marks up their bill in closed session. HASC markup is live streamed on the web and open to the public. Recordings of the entire FY16 NDAA markup in the HASC can be viewed on YouTube. *National Defense Authorization Act*, YouTube.com, <https://www.youtube.com/channel/>

THE APPROPRIATIONS & AUTHORIZATIONS PROCESS

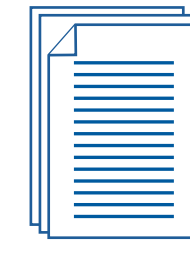


President's Budget (PB)

The President submits his proposed budget for the coming fiscal year which starts on October 1st.

President's Signature

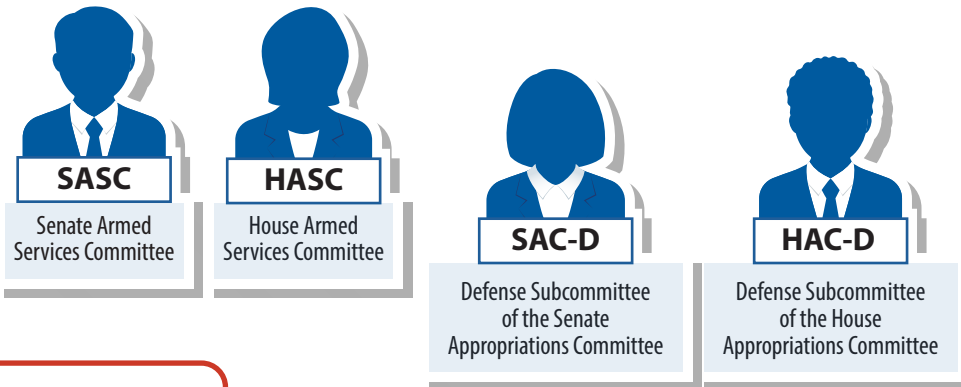
In order to avoid a government "shutdown", some form of an appropriations bill must be passed and signed by the President prior to midnight on 30 September, the end of the fiscal year.



The President rarely signs the NDAA into law before the end of the FY.

Posture Hearings

Almost immediately after the submission of the PB the four defense committees hold posture hearings.



Floor Vote Conference

The final bill then goes to the floor of the House and Senate for a final vote without modification.



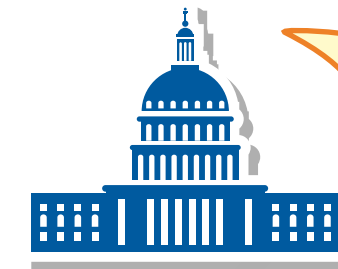
Budget Committee

The budget committees in the Senate and House put together their respective budget resolutions. The Congressional budget deals with all federal spending, and not just defense.



Conference

Confereing is the process by which the House and Senate negotiate the differences between their two bills and arrive at a consensus bill.



The Constitution requires the House and Senate to pass the same bill before the President can sign it into law.

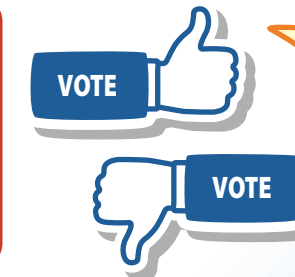
Floor Vote

The House and Senate vote on their respective committee's budget resolution.



Floor Consideration

The full House and Senate now review the bill, respectively. This is called going to the floor. Any Senator or Representative can propose a floor amendment to the bill.



Each chamber has rules that allow the majority party to block certain amendments from receiving a vote.

Conference

The two bills are then reconciled through either a formal or informal conference process.



Full Committee Markup

The member offering an amendment to the bill speaks on its behalf. Then other members have the opportunity to speak in support or in opposition to the amendment.



Budget Resolution

Ideally, an identical budget resolution is passed by both chambers. Note that it is not a binding law because it is not signed by the President.



Subcommittee Markup

The subcommittees of the HASC and SASC put together their respective portions of the bill and then submit those up to the full committee. Subcommittee markup is very formal and brief, and rarely changes the bill.

The NDAA typically flows through the legislative process before the appropriations bill.

markup is very formal and brief, and rarely changes the bill assembled by previously provided inputs of the members, full committee markup is full legislative combat.

In full committee markup, the member offering an amendment to the bill speaks on its behalf. Then other members have, and frequently take, the opportunity to speak in support or in opposition to the amendment. In the last few years, the HASC members have engaged in extensive and full-throated debates of sexual assault in the military, and many other topics of interest to JAGC members. While debate in the full House is limited, the Chairman of the HASC can allow debate in markup to go on as long as he or she sees fit. HASC markup traditionally begins on a Wednesday morning in mid-April and goes straight through into the morning of the following day.

Shortly after HASC and SASC complete markup, the NDAA advances to the full House and Senate, respectively. We call this going to the floor. Any Senator or Representative can propose a floor amendment to the NDAA, although each chamber has rules that allow the majority party to block certain amendments from receiving a vote. After the amendment process, the House and Senate vote on whether to pass the NDAA as amended.

Shortly after passage of the NDAA bill, the HAC-D and SAC-D

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commence markup of the defense appropriations bill. After the subcommittees take action, the bill then moves on to the full appropriations committees (HAC and SAC). As opposed to the NDAA, where the full committee puts together the work of all the subcommittees before considering the bill, the appropriations committees will consider each appropriations bill separately. After full committee markup of the defense appropriations bill it, in theory, moves on to the floor as a stand-alone appropriations bill.

CONFERENCE, OMNIBUS, AND THE DREADED CONTINUING RESOLUTION

As we all learned in civics class, the Constitution requires the House and Senate to pass the same bill before the President can sign it into law. Conferencing is the process by which the House and Senate negotiate the differences between their two bills and arrive at a consensus bill that then goes to the floor of the House and Senate for a final vote without modification. Formal conferencing involves the appointment of individual members from each chamber who in theory make all the important decisions. But the conference process is very heavily influenced by the Chairman and ranking minority member of the defense committees, and by the senior staff of those committees.¹¹ Outside of the posture

¹¹ See Connor O'Brien & Niels Lesniewski, *House Scraps NDAA Conference Vote Amid 'Blue Slip' Hang Up*, ROLL CALL (JUNE 24, 2015), http://www.rollcall.com/news/house_scraps_ndaa_conference_vote_amid_blue_slip_hang_up-242526-1.html (last visited Oct. 14, 2015).

hearings, conference is the DoD's best opportunity to communicate to Congress about how the draft NDAA will impact the DoD. These inputs are provided in formal written submissions as well as personal engagements between DoD officials and the members and committee staff.¹²

While the conference process is alive and well with respect to the NDAA, the same cannot be said of the defense appropriations bill. Even in years the defense appropriations bill makes it past the floor in one or both of the full chambers, the chambers rarely conference the stand alone bill. More commonly, the defense appropriations bill is absorbed by an omnibus appropriations bill, meaning that it addresses appropriations for many other agencies besides the DoD. In many cases appropriations addressing certain agencies never passed the full appropriations committees, let alone the floor. In some years the House and Senate do manage to pass a stand-alone appropriations bill or two, and then the omnibus bill simply addresses the appropriations needed for the rest of the federal government. The key requirement for continuity of operations is that some form of an appropriations bill is passed and signed by the President

¹² Sometimes the debate can even carry over to the press, as happened in the summer of 2015 when the Secretary of the Air Force voiced her concerns about NDAA provisions in an Op-Ed while conference negotiations were underway. Secretary of the Air Force Deborah Lee James, *Don't change BAH eligibility*, AIR FORCE TIMES (JULY 15, 2015), available at <http://www.airforcetimes.com/story/opinion/2015/07/15/basic-fairness-dont-change-bah-eligibility/30193847/>.

prior to midnight on 30 September, the end of the fiscal year.

If Congress fears it cannot achieve the goal of a signed appropriations act by the end of the fiscal year it will put together a continuing resolution, or CR. The CR tells the executive agencies they can continue spending at roughly the same rate that they spent in the last fiscal year. It sounds simple enough, and not necessarily a bad deal in some recent years where the DoD knew that, under the BCA,¹³ its appropriations would decrease in the next fiscal year. But CRs come with many fiscal-law constraints. Most significantly, they prevent the DoD from starting new acquisitions.

The President rarely signs the NDAA into law before the end of the fiscal year. However, failing to have some form of appropriations law in place before 1 October forces the government into a “shutdown.” As you recall from 2013, the term shutdown exaggerates the actual impact of a lapse in funding because many government activities are deemed essential and continue. Nonetheless, a shutdown is extremely disruptive. It results in many accounting headaches and waste, such as providing back pay to non-essential employees who were sent home.

ELEVATOR SPEECH PITFALLS

What happens if the President doesn't sign an NDAA before 1 October? While the NDAA establishes important policy for the DoD, the

¹³ Pub. L. No. 112-25, 125 Stat. 240 (2011).

real key for continuity of operations is that the President sign some form of *appropriations* act before 1 October. That absence of a signed NDAA on 1 October would have little practical effect on day to day operations in the Air Force. The biggest thing to remember is that the authorization and appropriation are two separate laws. The amount of funds appropriated by Congress is the amount of funds available to the Air Force to spend.

What does it mean to slash the DoD's budget? The budget is a vague term and could refer to the PB, the budget resolution passed by Congress, or the level of appropriations enacted into law. While this article didn't dive into the BCA, that is a somewhat unique law in that it established the sequester mechanism to decrease the amount of money otherwise appropriated by law if the amount appropriated exceeds the caps established in the BCA.¹⁴ While the BCA crosses fiscal years and limits appropriators, it is not the boogey man sometimes envisioned. It is still a law Congress could repeal or modify.

When is the appropriations bill going to conference? In order to go to formal conference, a bill must first pass both the floor of the House and Senate. In recent history Congress rarely goes to formal conference on a stand-alone defense appropriations bill. But informal negotiations still take place. So opportunities to influence the bill still exist.

¹⁴ Pub. L. No. 112-25, 125 Stat. 240 (2011).

CONCLUSION

The PB, the budget resolution, and the NDAA all provide indicators of what funds will be available to the DoD in the following FY. We often think of the NDAA as the primary defense bill because of the important policy changes it contains, such as modifications to the UCMJ. But the most important of these parts is the appropriations act. It is the actual determinative law respecting funding levels. Hopefully this article helps clarify the finer points of the appropriations process and the importance of appropriations acts. And perhaps it will help you avoid mangling any elevator speech on the NDAA you are asked to provide. **R**



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FY16 NDAA Video

THE INFORMANT

THE FBI, THE KU KLUX KLAN, AND THE MURDER OF VIOLA LIUZZO

BY GARY MAY (2005), REVIEWED BY MR. TOM BECKER

Historian Gary May explores the life of Gary Thomas “Tommy” Rowe, Jr., and his activities as a Federal Bureau of Investigation (FBI) informant who infiltrated into a Birmingham, Alabama chapter of the Ku Klux Klan (KKK)

The recent commemoration of the 50th Anniversary of the Selma to Montgomery March for voting rights and the popularity of the movie *Selma* prompted me to read a book that has been on my radar for a while. In *The Informant: The FBI, the Klux Klan, and the Murder of Viola Liuzzo*, historian Gary May explores the life of Gary Thomas “Tommy” Rowe, Jr., and his activities as a Federal Bureau of Investigation (FBI) informant who infiltrated into a Birmingham, Alabama chapter of the Ku Klux Klan (KKK). Rowe’s Klan activities included participation in a number of Klan atrocities in the 1960’s (or did he?) and eventually brought him, on 25 March 1965, to the Selma-Montgomery highway not far from Craig Air Force Base (AFB).¹

¹Craig AFB was a pilot training base built in 1940 and originally named Selma Army Air Base. Renamed Craig Field after 1Lt Bruce Craig, a Selma native killed as a test pilot in June 1941, it continued as a pilot training base until 1977 when the base was closed in the post-Vietnam drawdown of flight training bases. The City of Selma now uses the former base as an airport,

It was here that Viola Liuzzo, a Detroit housewife and volunteer civil rights worker, was killed by gunfire from a car full of Klansmen, that included Rowe, as she ferried Leroy Moton, another civil rights worker, from Selma back to Montgomery. The Liuzzo murder resulted in multiple state and federal criminal trials, all featuring Rowe as the star prosecution witness. These trials laid bare the FBI’s relationship with Rowe and how it handled informants, Rowe in particular, and raised questions about whether the FBI could have prevented Liuzzo’s murder and, indeed, whether Tommy Rowe himself may have pulled the trigger.

The Informant takes the reader through a time in recent American history that many would like to forget or pretend didn’t happen. It’s hard now to imagine the virulent racism that was prevalent in the Deep South.

industrial complex, and low-income housing.

The antics of Klan attorney Matthew Murphy defending one of the Liuzzo killers in the first state prosecution must be read to be believed. When a young Episcopalian minister and civil rights volunteer, Jonathan Daniels, was gunned down in cold blood by a Lowndes County reserve sheriff's deputy, Tom Coleman, who was then acquitted by the usual all-white Alabama jury, the National Association for the Advancement of Colored People issued a press release that the acquittal meant it was now "open season on Negroes and their white friends." Many of the church-going, law-abiding white citizens of Fort Deposit, Alabama responded with "Open Season" bumper stickers on their cars. After the Sixteenth Street Baptist Church bombing, Georgia Senator Richard B. Russell accused "the Negroes" of bombing the church "in order to keep emotions at a fever pitch." FBI Director J. Edgar Hoover thought the bombing had been the work of "Black Moslems [sic] loaded on Hashish." On the floor of the U.S. House of Representatives, Congressman William Dickinson of Alabama² accused the Selma-to-Montgomery marchers of engaging in interracial "free love" during their overnight stops because "[o]nly by the ultimate sex act with one of another color can they demonstrate that they have no prejudice."³ *The Informant* also showcases the courage of those Southerners, black and white, who continued to seek justice for all

² Yes, it's the same one you're thinking of.

³ This remark prompted a black marcher to comment, "These white folks must think we're supermen to be able to march all day [and] make whoopee all night."

victims of racist violence in Alabama, especially during and after the Dallas and Lowndes Counties voting rights campaign in the late winter and early spring of 1965. *The Informant* covers these events in great detail, including small but interesting roles played by Craig Air force Base and Maxwell Air Force Base. The star player of *The Informer*, however, is Tommy Rowe.



To say that Tommy Rowe was a complicated guy is an understatement. His multiple marriages, interspersed with serial adulteries with wives of fellow Klansmen, paint a picture of someone who did what he did, not because of love or lust, but because he could. His FBI handlers were well aware of Rowe's seduction skills and directed him to sleep with as many Klan wives as he could so he could get pillow-talk information as well as sow dissension in Klan ranks. Rowe was only too happy to oblige. On the plus side, Rowe was undeniably a volunteer informant, not—as is often the case with informants—recruited

as a way to get leniency for some transgression that had caught the attention of authorities. While the FBI paid Rowe for his services, the amount was paltry in comparison to the risks. Rowe professed to hate the Klan and, before his FBI recruitment, had never been associated with the KKK in any way.

The main attraction for Rowe was probably the cachet of being an "Undercover Man" for the FBI. Rowe was a cop wannabe—he liked to hang around police and, when his usefulness as a Klan informant was gone, he requested the FBI arrange a new identity and employment as a U.S. Deputy Marshal. He was a classic narcissist, relishing in telling and retelling stories of his undercover derring-do. In his later years, in appearances on a TV talk show and a Congressional committee hearing, Rowe affected wearing a hood that he said disguised his identity from Klan assassins even though the Klan knew quite well what he looked like. Until his death from a heart attack in 1998, although living under an assumed name, Rowe bragged about his FBI connections and contacted the Bureau asking for money. Interestingly, others in his Klan chapter suspected Rowe was a snitch from the beginning. This suspicion followed him until, in the aftermath of the Liuzzo murder, he was publicly revealed as an FBI informant.

His motivation and Klan suspicion notwithstanding, Rowe found himself in the middle or at the periphery of several notorious Klan operations

in the early and mid-1960s. He was with a group of Klansmen as they attempted some “missionary work” (Klan jargon for violence) at the home of a suspected informant. Their raid, however, was broken up by the Luger-wielding wife of their target. She started shooting and Klansmen scattered with tails between their legs. That, however, was not the last of the Klan version of Keystone Kops. On 14 May 1961, Rowe was with a group of Klansmen that attacked Freedom Riders at Birmingham’s bus depot. There is a newspaper photo showing a man, identified by others as Rowe, taking part in the beatings although Rowe denied he was the man in the photo. Two years later, on 15 September 1963 (also on Rowe’s watch as an FBI informant), the Klan bombed the Sixteenth Street Baptist Church in Birmingham, murdering four girls. May’s book contains considerable speculation that Rowe knew about the plans but failed to tip off the FBI. There is even some suspicion Rowe was in the area and may have been involved. All this leads up to Rowe’s role in the critical event of *The Informant’s* narrative: the murder of Viola Liuzzo on a dark Alabama highway on the night of 25 March 1965.

Viola Liuzzo was one of many volunteers from the North, both white and black, who were so moved by the Bloody Sunday violence on the Edmund Pettus Bridge on 7 March 1965 that they left their homes and traveled to Selma. Once there, they hoped to help the marchers present a voting rights petition to Governor

George Wallace.⁴ Although most of *The Informant* focuses on Rowe, a significant part of the book tells the story of Viola Liuzzo and that of her family both before and after her murder.

Viola Liuzzo was a poor, white Southerner by birth that eventually ended up in Detroit. After two failed marriages, the first of which was at age 16, she married Anthony Liuzzo, a Teamsters Union business agent. Liuzzo always sympathized with the plight of blacks, in both the North and South, and all people who were the lower links on the American economic food chain. After Bloody Sunday, she didn’t hesitate in her decision to go to Selma despite strong opposition from her husband and children. She drove to Selma and promptly turned over her car to volunteers to use as transport. Liuzzo marched from Selma to Montgomery with Dr. Martin Luther King and several thousand others, walking the last miles in her bare feet, as her shoes were chaffing. There is a photo of Liuzzo in *The Informant* showing her walking this last leg of the march—a 39-year-old white woman in a soiled dress, a little overweight, barefoot with her shoes in her hand. This photo was taken by a Klan member or sympathizer, one of many along the route placed there to heckle the marchers. It was first published in

⁴ The Selma March and associated events have been the subject of many books, documentaries, and other media portrayals. In my opinion, the best popular history of the Civil Rights struggle, including Selma, is *Eyes on the Prize: America’s Civil Rights Years, 1954-1965* by Juan Williams (1985). In 1990, *Eyes* was turned into a multi-part documentary series on PBS and is available on DVD and through Internet subscription services.

Night Riders, a Klan tabloid, as part of an article sensationalizing Liuzzo’s murder that included crime scene photos leaked to the Klan by the Alabama State Patrol.

The paths of Viola Liuzzo and Tommy Rowe crossed on the night of 25 March 1965 at the foot of the Edmund Pettus Bridge. Liuzzo was in her car driving Moton to Montgomery. Rowe was with three other Klansmen—Eugene Thomas (driving), Collie Wilkins, and William Eaton. They saw Liuzzo and Moton in the car together—a white woman with a black man—and decided to give chase. According to Rowe’s statements to the FBI and trial testimony, he tried to talk the other three out of the pursuit to no avail. As the chase went past Craig AFB, the Klansmen spotted an “MP”⁵ jeep from Craig AFB stopped at the side of the highway, so they backed off. When I read this detail, I wondered why the Air Police were there and how, if circumstances had been different, they might have been in a position to prevent the coming tragedy. In retrospect, no doubt the MP’s were there to observe the aftermath of the March to ensure the security of the base. It’s highly speculative that, under any circumstances, they would have been in any position to

⁵ Incorrectly identified as “MP’s” in *The Informant*, the Air Police (or “AP’s,” sometimes called the “Sky Cops”) were the Air Force’s version of Military Police from the establishment of the Air Force as a separate service in 1948 through the late 1960s, when they were renamed “Security Police” or “SPs.” The SPs became the “Security Forces” in 1997 along with a reorganization and change of mission in response to increased emphasis on force protection following the Khobar Towers bombing on 25 June 1996.

stop the crime. Still, it's interesting to wonder what might have been. In any case, the presence of the MP's deterred the Klansmen but only for a short time. Once past Craig AFB, the Klan car gained on Liuzzo and pulled up alongside. Rowe's account is that Collie Wilkins used Eugene Thomas's .38 pistol to shoot at Liuzzo and Moton. Rowe said he took his own pistol, pointed it out the window, and pretended to fire but did not. Liuzzo was hit in the head and died instantly. Moton was unhurt. The car then drifted off the highway and came to rest at a spot that's now marked by a memorial to Liuzzo.

Tommy Rowe reported the crime to his FBI handler the next morning. The agent examined Rowe's gun and hands, finding no evidence Rowe had fired a gun or that his pistol had been fired recently. Thomas, Wilkins, and Eaton were arrested (along with a pretended arrest of Rowe, whose status as an informant was still secret). Autopsy and firearms examinations concluded Liuzzo had been killed by a bullet from Thomas' gun. This evidence and Rowe's account were the prosecution mainstays for the State of Alabama trials and the federal trials for violations of the Civil Rights Act of 1963. Not surprisingly, the Alabama prosecutions didn't produce convictions, but eventually there were federal convictions of Thomas, Wilkins, and Eaton (although Eaton died and never served prison time). Upon their release from federal prison, Thomas and Wilkins spoke for the first time. Thomas was now a professed "born again Christian" and

sought repentance through telling the "true" account. Wilkins claimed no such high motives. Regardless, both accused Rowe of instigating the chase of Liuzzo and Moton and firing Thomas' pistol. These accusations resulted in both civil and criminal trials alleging Rowe either fired the murder shots himself or the FBI failed to do enough to prevent Liuzzo's murder. The criminal case against Rowe resulted in an acquittal. The civil lawsuit was resolved between the Liuzzo family and the federal government.

During all the litigation, Rowe was housed at Maxwell AFB and met with prosecutors and FBI agents in the Maxwell AFB Officers' Club. *The Informant* doesn't tell us but I surmise he took his food and drink (especially drink, which Rowe liked to do) at the O' Club as well. In my mind's eye, I imagine him sitting in The Pit wearing his hood, silently begging all the Squadron Officer School (SOS) and Judge Advocate Staff Officer Course (JASOC) students to ask him about it.

Gary May's purpose in writing *The Informant*, in addition to telling the stories of Viola Liuzzo and Tommy Rowe, is as a case study in law enforcement ambivalence. I'm sure the average reader was shocked at the FBI's tolerance and, perhaps, even passive encouragement of Rowe's involvement in the Klan's illegal activities. For readers with law enforcement or intelligence backgrounds, I'm equally sure *The Informant* produced a few indifferent shrugs. Whether

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Additional Thoughts

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History: Selma to Montgomery March

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Photos: Selma to Montgomery March

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Gary Thomas Rowe Jr.

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Johnson on KKK Murder of Civil Rights Workers

you're talking about the Klan, Mafia, or some other criminal gang, it's a tried-and-true Bad Guy tactic to force a newbie or suspected informant to commit a crime to prove their *bona fides*. Rowe's handlers appropriately advised him to avoid involvement in crimes, especially violent ones. But that's easier said than done if you don't want to be outed as an informer. It's doubly hard when events are unexpected, fast moving, and there's no time to figure out how to stop the crime while still wearing your Team Bad Guy sweater. That was the situation Rowe faced when the Klansmen spotted Liuzzo and Moton at the foot of the Edmund Pettus Bridge.

While Rowe himself has major credibility issues, my personal opinion is his account of Viola Liuzzo's murder is mostly true. I don't believe he did all he could to persuade Thomas and Wilkins to abandon the chase. I certainly don't believe his burlesque story that he pretended to fire his pistol. But I reject the self-serving accounts of Thomas and Wilkins, "born again" or not, that Rowe was the instigator of the chase and actual trigger man. In all prior Klan operations in which he was involved, Rowe was always following. Whether it was his natural inclination or because he was trying to keep to his FBI handler's instructions, Rowe didn't instigate anything. We know it was Thomas' gun that fired the fatal shot. While it makes sense that someone other than Thomas would use the gun, as Thomas was driving, it doesn't make sense that the shooter was Rowe. Thomas and Wilkins' post-prison

"confessions" smack of revenge tales cooked up to conform to the forensic evidence, which has supported Rowe's account from the start.

Of course, each reader will make up his or her own mind about Rowe's culpability, as well as about the FBI's use of Rowe as an informant and, in general, the use of informants in support of law enforcement and intelligence operations. This is the value of *The Informant* and other case studies. In Academic World, the case study method achieves the highest levels of learning where participants are able to judge, criticize, and defend the actions of others, and (hopefully) commit to evaluating their own actions in light of lessons learned.

The Informant presents readers with judgment opportunities a-plenty, not only about Viola Liuzzo's murder and Tommy Rowe, but about America, especially the Deep South, during the hottest days of the civil rights struggle. The violence chronicled in *The Informant* is shocking enough, but the attitudes of so many citizens in tolerating and often enabling the violence is astonishing even to someone like me who is old enough to remember contemporary accounts. When political leaders like the Director of the FBI and Members of Congress (including the man whose name graces our beautiful Judge Advocate General's School building) said the things they did, it's good that authors like Gary May remind us these events occurred less than two generations ago.

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Staff Sergeant Logan Pals, a 435th Construction Training Squadron pavements and construction equipment operator, sits in the seat of a bulldozer while waiting for gravel to be dumped at Diyarbakir Air Base, Turkey. (U.S. Air Force photo/Airman First Class Cory W. Bush)

