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RULES OF ENGAGEMENT FOR
 LAND FORCES: A MATTER
 OF TRAINING, NOT
 LAWYERING *Major Mark S. Martins*

THE ARMY AND THE
 ENDANGERED SPECIES ACT:
 WHO'S ENDANGERING WHOM? *Major David N. Diner*

DEFYING PRECEDENT: THE
 ARMY WRITING STYLE *Major Thomas Keith Emswiler*

MILITARY LAW REVIEW—VOL. 143

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

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MILITARY LAW REVIEW

Volume 143

Winter 1994

CONTENTS

ARTICLES

- Rules of Engagement for Land
Forces: A Matter of Training,
Not Lawyering***Major Mark S. Martins* **3**
- The Army and the Endangered
Species Act: Who's
Endangering Whom?***Major David N. Diner* **161**
- Defying Precedent: The Army
Writing Style***Major Thomas Keith Emswiler* **224**

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MILITARY LAW REVIEW

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Winter 1994

RULES OF ENGAGEMENT FOR LAND FORCES: A MATTER OF TRAINING. NOT LAWYERING

MAJOR MARK S. MARTINS

TABLE OF CONTENTS

	PAGE
I. Introduction	4
II. The Problem	10
III. Diagnosis	21
A. <i>The Present Method—Key Terms and Distinctions</i> ...	21
1. <i>The JCS Peacetime ROE</i>	22
2. <i>Purposes of ROE</i>	24
3. <i>Wartime Versus Peacetime ROE</i>	27
4. <i>Necessity and Proportionality</i>	28
5. <i>Functional Types of Land Force ROE</i>	30
6. <i>The Self-Defense Boilerplate</i>	33
B. <i>Historical Background of the Present Method</i>	33
1. <i>Development of ROE for Air Forces</i>	35
2. <i>Development of ROE for Seaborne Forces</i>	39
3. <i>Development of ROE for Land Forces</i>	45
C. <i>The "Legislative" Model of ROE</i>	55
1. <i>ROE as Law: Problems in Creation</i>	55
2. <i>ROE as Law: Problems of Interpretation</i>	58
3. <i>ROE as Law: Problems in Enforcement</i>	60
4. <i>ROE as Law: Problems in Land Force Doctrine</i> ..	68
5. <i>ROE as Law: Neglect of Cognitive and Environ- mental Dimensions</i>	71
IV. Curative Approach	76
A. <i>Refine Terms and Distinctions Employed in the Present Method</i>	78

<i>B. Acknowledge Historical Lessons and Trends</i>	81
<i>C. Adopt a "Paining Model" of Land Force ROE</i>	82
V. Specific Remedial Actions	85
<i>A. The "RAMP" Rules</i>	86
<i>B. Training Scenarios</i>	90
<i>C. ROE Alert Conditions—"ROECONs"</i>	92
<i>D. Standard Formats for ROE Annexes to Plans and orders</i>	94
<i>E. Other Recommendations</i>	98
VI. Potential Concerns.	103
VII. Conclusion	106
Appendix A. Functional Types of ROE	110
Appendix B. Common Task on Use of Force for Individual Soldier	118
Appendix C. Selected Problems in ROE	123
Appendix D. ROE Conditions.	143
Appendix E. Draft ROE Annex to Division OPLAN	157

In this article, Major Martins examines the difficult problem of imparting rules of engagement (ROE) to individual soldiers and marines. He argues that the present method of imparting ROE relies too heavily on a "legislative" model of controlling behavior. As a result, the present method suffers from a series of defects, culminating in a failure to account for the cognitive limits of humans under stress. Major Martins concludes that commanders and judge advocates can minimize these defects by adopting a "training model." Such a model would include a set of standing rules on the use of force for soldiers, a series of training scenarios designed to reinforce the standing rules across the spectrum of potential conflict, and a format by which units may supplement the standing rules for particular operations.

RULES OF ENGAGEMENT FOR LAND FORCES: A MATTER OF TRAINING, NOT LAWYERING

MAJOR MARK S. MARTINS*

The Commission concludes that the . . . ROE contributed to a mind-set that detracted from the readiness of the [U.S. contingent of the Multinational Force] to respond to the terrorist threat which materialized on 23 October 1983.

Department of Defense Commission on the Beirut International Airport terrorist act that killed 241 marines and sailors¹

Furthermore, this [court-martial] strongly recommends to the convening authority. . . that rules of engagement, in general, were not clearly stated to the soldiers, and specifically, that the use of warning shots by the Platoon Leader and Squad Leader, to halt fleeing civilians who were suspect only because they were running away, was contrary to standards of due care and shows negligence on the part of the chain of command.

United States Army court-martial panel upon sentencing Specialist James A. Mowris for negligent homicide of a Somali civilian²

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¹DEPT OF DEFENSE, REPORT OF THE COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, at 135(20 Dec. 1983)(unclassified version) [hereinafter W D REPORT].

²*United States v. Mowris*, No. 68 (Fort Carson & 4th Inf. Div. (Mech.) 1 July 1993)(sentence worksheet).

I. Introduction

United States soldiers and marines face hard choices about what, when, and where they can shoot. As the two epigraphs suggest, and as this article will maintain, these same soldiers and marines often get little help from the rules of engagement (ROE).” Over the past three decades, ground force commanders and judge advocates have searched for an effective method of imparting ROE to subordinate commanders as well as to individual soldiers and marines.⁴ The stakes are high in this search. Without an effective

The United States Joint Chiefs of Staff have defined ROE as “directives issued by competent authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” JOINT CHIEFS OF STAFF, PUBLICATION 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 317 (1 Dec. 1989) [hereinafter JOINT PUB. 1-02]. The Army definition closely follows the JCS version. See DEP’T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND SYMBOLS, 1-63 (21 Oct. 1985) [hereinafter FM 101-5-1]. A few examples illustrate the broad range of rules that fall within this definition: requiring an F-111 crew to confirm that all target acquisition systems are operable before bombing a Libyan barracks abutting a civilian population center; prohibiting entry by United States Navy ships into territorial seas or internal waters of a neutral nation; authorizing an infantryman at a guardpost to use deadly force against saboteurs of mission-essential equipment. Although some commentators imply that orders to individual soldiers regarding the use of force are not strictly “ROE,” see, e.g., Captain Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV. 46, 49 (1983) (stating that ROE do not address the right to protect the individual from attack or threat of imminent attack), and although this article will argue the need for doctrinal distinctions among many types of rules of engagement, see *infra* part IV.A, readers should note that hereinafter the term “ROE,” until otherwise qualified, will refer to the entire set of rules that fit within the broad JCS definition and that have been termed by one or more headquarters in the past as “ROE.”

⁴Judge advocates share a portion of the commander’s responsibility for ROE because all ROE must conform to international law, because a Department of Defense Directive and service regulations give military attorneys a role in ROE compliance, and because the Chairman of the Joint Chiefs of Staff has directed that attorneys will review all operations plans and participate in targeting meetings of military staffs. See DEP’T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM 2-4 (July 10, 1979) [hereinafter DOD DIR. 5100.77] (directing the Chairman of the Joint Chiefs of Staff and the Commanders of Unified and Specified Commands to ensure that rules of engagement comply with all international law pertaining to armed conflict); Joint Chiefs of Staff Memorandum MJCS 0124-88, subject: Implementation of DOD Law of War Program (4 Aug. 1988) (stating that legal advisers should attend planning conferences when ROE will be discussed and requiring legal advisers to review operations plans and ROE for consistency with the DOD Law of War Program); Dep’t of Army, Reg. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 2-1g(4) (requiring The Judge Advocate General to review plans and rules of engagement for compliance with domestic and international law); Marine Corps Order MCO 3300.3, Law of War Program (2 Aug. 1984) (requiring Marine judge advocates to review all operational plans and advise commanders regarding compliance with the W D Law of War Program).

The judge advocate’s involvement in ROE is fundamentally grounded, though only implicitly, in treaties to which the United States is a party. See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284 (requiring signatory nations to “issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present

method, at least two dangers to military missions become more imminent. The first danger is that troops will respond tentatively to an attack, thereby permitting harm to themselves, to fellow soldiers,⁵ or to some mission essential facility. The second, opposite, danger is that troops will strike out too aggressively, thereby harming innocents.

An example of the first danger occurred in Lebanon in 1983, when marine sentries—having been given contradictory ROE—responded tentatively to the approach of a truck bomb toward their barracks at the Beirut Airport.⁶ An example of the second danger occurred in Somalia in 1993, when an Army soldier—who later would claim that he was firing a warning shot as permitted by the ROE—killed an unarmed Somali civilian who was running away and posed no threat.⁷ An untimely over-tentative or over-aggressive result could turn a successful deployment into a political failure. In an age of instant global telecommunications, the achievement of strategic United States goals through military operations is vulnerable both to killings of soldiers at the hands of terrorists and to killings of defenseless noncombatants at the hands of American soldiers.

This article argues that ROE will provide optimal guidance to

Convention”); Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, art. 127, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 237 [hereinafter Geneva Convention III] (“The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.”); See generally H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, ARMY LAW., July 1983, at 1, 7-9 (discussing the requirements for “dissemination” contained in pertinent treaties). Article 82 of Protocol I to the Geneva Conventions, which eventually may be ratified by the United States, contains a more explicit role for judge advocates:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces in this subject.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, reprinted in 16 I.L.M.1391.

⁵Throughout this article, the term “soldier” will refer to United States Army personnel as well as to members of the United States Marine Corps. Exceptions to this general rule will be clear from context, as when a qualifying phrase describes the action of a particular Army ground unit.

⁶The facts of this incident—the focus of the Commission quoted in the first epigraph—are discussed more fully *infra* notes 22-26, 31, 164-66, 167 and accompanying text.

⁷This incident—the focus of the court-martial quoted in the second epigraph—is described more fully *infra* notes 39-48, 217-218 and accompanying text.

United States ground forces⁸ only after these forces refine their doctrine⁹ and alter the training of individual soldiers. The unpredictability of armed engagements and the inherent cognitive limitations of humans under stress define the role ROE can play in guiding individual soldiers toward appropriate decisions about when to fire. That role, although potentially decisive, is extremely narrow and must play itself out mostly before the shooting starts. For when the shooting starts, soldiers follow those principles that repetitive or potent experiences have etched into their minds. If those principles conform both to tactical wisdom and to relevant legal constraints on the use of force, then the larger system of ROE governing the ground component in a particular deployment¹⁰ will best serve military objectives and national interests.

Accordingly, this article formalizes the search for an effective method of imparting ROE by seeking the ideal placement of ROE within land force doctrine and training. The article's starting point is a problem: how can ROE best help individual troops avoid the extremes of over-tentative and undisciplined fire? Solving this problem demands careful analysis as well as a rational choice among options.¹¹ The analysis should reveal the misconceptions that doc-

*Much of the argument that follows can apply to naval and air forces, as well as to United States Navy Seals, United States Army Rangers, and other special operations units that shoot, move, and communicate while on land. However, to permit a focused and thorough treatment of issues, this article restricts the scope of its recommendations to ROE disseminated in conventional ground units of the Army and Marine Corps.

⁸As used here, doctrine is "the authoritative guide to how [land forces] fight wars and conduct operations other than war." See DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS V (14 June 1993) [hereinafter FM 100-5, OPERATIONS]. Doctrine seeks to build on collective knowledge within the military, to reflect wisdom that has been gained in past operations, and to incorporate informed reasoning about how new technologies may best be used and new threats may best be resisted. See generally MAJOR PAUL H. HERBERT, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER No. 16, DECIDING WHAT HAS TO BE DONE: GENERAL WILLIAM E. DEPUY AND THE 1976 EDITION OF FM 100-5, OPERATIONS 3-9 (1988) (describing the function of doctrine in an army and charting the modern practice of publishing doctrine in manuals).

¹⁰To include rules aimed well above the individual soldier level.

¹¹That is, senior leaders must themselves make a prior decision to adopt a method for improving firing decisions of soldiers in the field. Modern decision theory holds that in making a choice of any importance one needs to consider the available knowledge and possible alternatives before selecting the alternative that maximizes the objectives of the decision-maker. See, e.g., DAVID BRAYBROOKE & CHARLES E. LINDBM, A STRATEGY OF DECISION 37-40 (1963); JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY 172 (1938); Frederick S. Tipson, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT'L L. 535, 574 (1971). The Army incorporates decision theory into the problem-solving methodology it prescribes for use by staff organs and officers. See DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 5-1 (1984) [hereinafter FM 101-5, STAFF OPERATIONS]; DEP'T OF ARMY, TRAINING CIRCULAR 26-5, PROBLEM SOLVING (31 Dec. 1984). Soldiers pressed to make rapid choices to shoot do not have the luxury of reflectively applying decision theory. See, e.g., Gary A. Klein, *Strategies of Decision Making*, MIL. REV., May 1989, at 56.

trine and training have sometimes created while permitting senior decision-makers to optimize the diverse objectives that ROE further. This article seeks to furnish the needed analysis and recommend improvements while recognizing that no course of action will eliminate all errors that might be made by those at the trigger or in the command post. **Figure 1** charts the problem-solving method that this article will follow.¹² **Figure 2** depicts the unsystematic approach it attempts to avoid.¹³

Recent changes in Army doctrine, in national security strategy, and in the world at large have heightened attention to land force ROE because the changes mandate that modern land forces be highly flexible.¹⁴ Individual soldiers, as well as their units, must be capable of applying appropriate levels of force across the spectrum of military operations. The ROE must not only permit the field commander to assert the important interests of mission accomplishment and force security, but also must keep calibrated military force under legitimate civilian control. Moreover, ROE often must serve these functions during politically delicate multinational operations.

Achieving optimal use of ROE will demand, among other measures, that soldiers receive scenario-driven training on a new individual task, that the Army and Marine Corps endorse revisions to the Joint Chiefs of Staff (JCS) *Peacetime* ROE (PROE), and that judge advocates develop skills to perform a more active and useful role in the ROE process. Yet these and other specific recommendations require elaboration and support before readers accept them. Accordingly, part II of this article introduces the problem of soldiers who are

¹²**Figure 1** depicts the four steps of the problem-solving model developed in ROGER FISHER & WILLIAM URY, *GETTING TO YES* 68-71 (1983). This simple model conforms both to the tenets of decision theory developed in the sources cited *supra*, note 11, and to the Army approach reflected in *FM 101-5, Staff Operations*. For the purposes of this article, this model is superior to the six-step model typically used by Army staffs, see *FM 101-5, Staff Operations*, *supra* note 11, at F-4, because the Army model principally treats problems that are "well-defined" or of "medium structure," as opposed to "ill-defined" problems. See, e.g., Combined Arms and Services Staff School, United States Army, Staff Techniques Exercise **F121-1**, para. 4 (1992). The Rsher model addresses itself to problems at all levels of definition or structure. See, e.g., Harvard Negotiation Project, Overhead 1-5, *Needed: A Tool For Joint Problem-Solving*, para. III (1989) (referring to the four step model as a "'thinking tool' that is . . . Universal - Applicable to anything") (on file with author).

¹³**Figure 2** depicts ROE as part of a traditional, unsystematic approach to the dangers of over-tentative and undisciplined fire. The disliked symptoms of undisciplined fire, unnecessary civilian casualties, unfavorable media coverage, and soldier frustration or tentativeness, discussed more fully in part II *infra*, are treated with intuitive remedies consisting of written guidance and punitive enforcement, discussed at length in part III.C *infra*.

¹⁴See, e.g., GENERAL GORDON R. SULLIVAN & LIEUTENANT COLONEL JAMES M. DUBIK, STRATEGIC STUDIES INSTITUTE, UNITED STATES ARMY WAR COLLEGE, *LAND WARFARE IN THE 21ST CENTURY* 1 (1992), reprinted in *MIL. REV.*, Sept. 1993, at 13.

PROBLEM-SOLVING METHOD

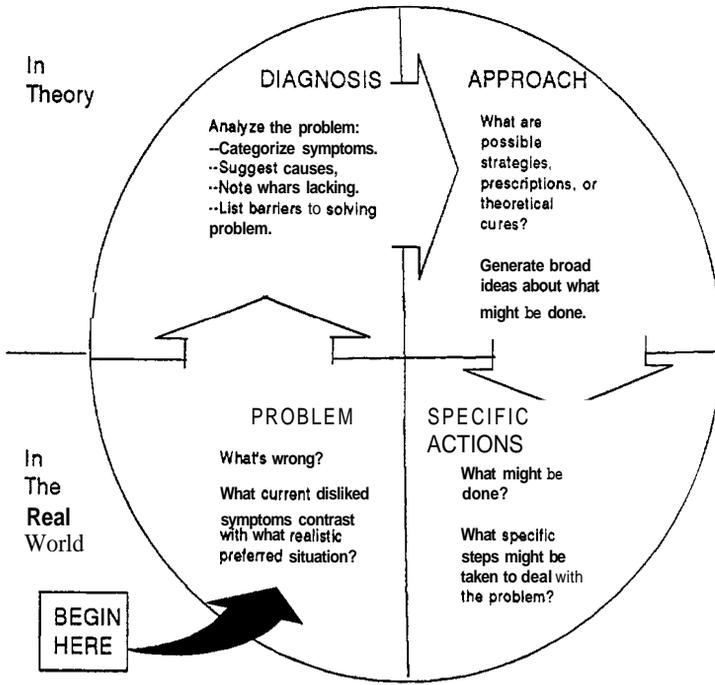


Figure 1

either over-tentative or undisciplined with their fire and notes that ROE alone cannot eliminate these extremes. Part III searches out underlying causes of the problem and identifies corresponding deficiencies in present ROE doctrine and training. Part IV considers theoretical cures suggested by the causes. Part V proposes a program of specific actions. Part VI addresses potential objections.¹⁵

¹⁵Numerous authors have contributed to the expanding commentary about ROE. See, e.g., CENTER FOR L. AND MIL. OPERATIONS & INT'L. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK (JA 422) H-92 to H-106 (draft 3d ed. 1993) [hereinafter *Op. Law Handbook*]; JONATHAN T. DWORKEK, CENTER FOR NAVAL ANALYSES, CRM 93-120, RULES OF ENGAGEMENT (ROE) FOR HUMANITARIAN INTERVENTION AND LOW-INTENSITY CONFLICT: LESSONS FROM RESTORE HOPE (1993); BRADD C. HAYES, RAND/UCLA CENTER FOR THE STUDY OF SOVIET INTERNATIONAL BEHAVIOR, N-2963-CC, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 169-80 (1975); George Bunn, *International Law and the Use of Force in Peacetime: Do United States Ships Have to Take the First Hit?*, NAVAL WAR C. REV., May-June 1986, at 69-80; Colonel W. Hays Parks, *Righting the Rules of Engagement*, U.S. NAVAL INST. PROC., May 1989, at 83-93, and Sept. 1989, at 88-89 [hereinafter *Parks, Righting*]; Lieutenant-Commander Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4-27; Roach, *supra* note 3; Scott D. Sagan, *Rules of Engagement, in AVOIDING WAR: PROBLEMS OF CRISIS MANAGEMENT* 443-470 (Alexander L. George ed., 1991); Charles Bloodworth, *Rules of*

TRADITIONAL TREATMENT

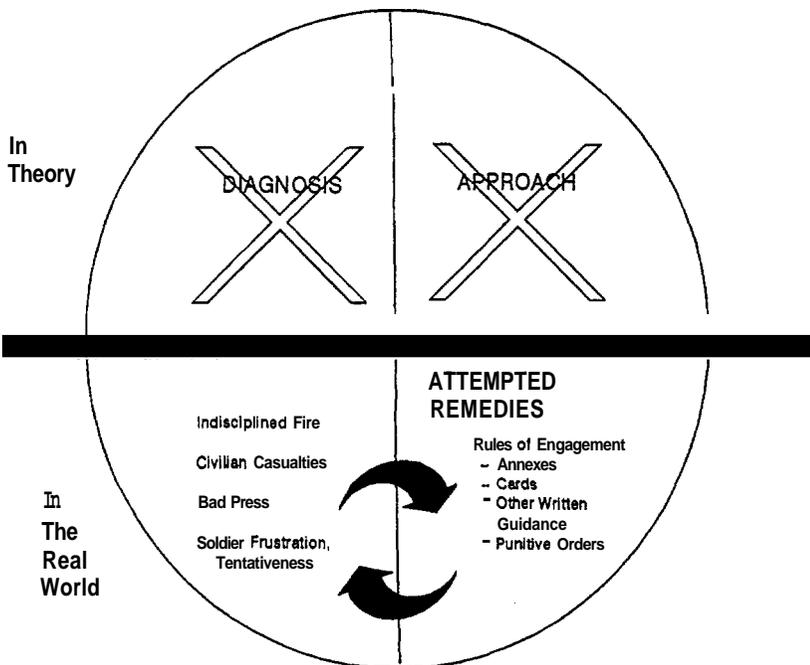


Figure 2

This article considers both war and operations other than war.¹⁶ It contends that an international law adviser can contribute to many kinds of military operations in more than the traditional roles of

Engagement: The Second C of C³I (1989) (on file with the Center for Law and Mil. Operations, The Judge Advocate General's School, Charlottesville, Virginia [hereinafter CLAMO]); Major Scott R. Morris, Rules of Engagement: Origin, Practical Use, Doctrinal Integration, and Theoretical Concept (1994) (unpublished article on file with the CLAMO).

However, none of these authors has subjected the topic of land force ROE to the comprehensive and structured analysis demanded by methodical problem-solving techniques. Such analysis yields recommendations for specific actions, but only after examining potential underlying causes and developing a theory both of what is wrong and what might be done. This article seeks to fill the gap in the ROE literature; accordingly, parts II, III, IV, and V complete, in sequence, the four steps of the Fisher model corresponding to the quadrants of the circular chart at *Figure 1*.

¹⁶Examples include noncombatant evacuation operations, civil disturbance operations, humanitarian assistance, disaster relief, security assistance, nation assistance or peace building, counterdrug operations, counterterrorism operations, peacekeeping, peace enforcement, shows of force, attacks, raids, and support for insurgencies or counterinsurgencies. See FM 100-5, OPERATIONS, *supra* note 9, at 13-4 to 13-8; JOINT CHIEFS OF STAFF PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS I-3 to I-4 (9 Sept. 1993) [hereinafter JOINT PUB. 3-0]. The term "operations other than war" is new. The Army uses it to describe what were previously termed operations in "low intensity conflict"—classically support for insurgencies and counterinsurgencies—in addition to operations that previously avoided official doctrinal classification, such as disaster

“advocate,” “judge,” or “conscience.”¹⁷ Accordingly, although authored by a lawyer, this article is not a zealous prosecution of client interests within an adversarial setting;¹⁸ it is not a determination of what legal rules or precedents require;¹⁹ and it is not a statement about the moral or ethical thing to do.²⁰ The argument that land force doctrine and training should change is an argument about how to help solve a problem, only one part of which is “legal.” In making the argument, this article articulates a distinctly modern role of the lawyer as “counselor.”²¹

II. The Problem

Whether deployed as peacekeepers, counterinsurgents, peace enforcers, or conventional warriors, United States ground troops sometimes make poor decisions about whether to fire their weapons. Far from justifying criticism of individual soldiers at the trigger, this fact provides the proper focus for systemic improvements. The problem arises when the soldier—having been placed where the use of deadly force may be necessary—encounters something and fails to assess correctly whether it is a threat. Then the soldier either shoots someone who posed no such threat, or surrenders some tactical advantage. The lost advantage may even permit a hostile element to kill the soldier or a comrade.

A classic example of this deadly dilemma was the hesitant response of the marine sentry near the Beirut Airport at 0620 on October 23, 1983. Consider the following sequence of events:²²

relief or humanitarian assistance. See generally DEP'T OF ARMY, FIELD MANUAL 100-20, MIL. OPERATIONS IN **LOW INTENSITY CONFLICT** (5 Dec. 1990) [hereinafter FM 100-20] (establishing previous Army doctrine for such operations); Colonel Richard M. Swain, *Removing Square Pegs From Round Holes: Low-Intensity Conflict in Army Doctrine*, MIL. REV., Dec. 1987, at 2 (describing the evolution of doctrine for low intensity conflict); Sam C. Sarkesian, *The Myth of United States Capability in Unconventional Conflicts*, MIL. REV., Sept. 1988, at 2 (discussing doctrinal categories for unconventional conflicts).

¹⁷See Matthew E. Winter, “Finding the Law”—*The Values, Identity, and Function of the International Law Adviser*, 128 MIL. L. REV. 1, 21-29, 31-33 (1990) (defining roles of the international law adviser).

¹⁸See *id.* at 21 (defining the role of “advocate”).

¹⁹See *id.* at 26 (defining the role of “judge”).

²⁰See *id.* at 31 (defining the role of “conscience”).

²¹That is, one who assists leaders in the decision-making process, see *supra* note 11, by serving as “a problem-solver, someone who advises ‘on ways of using law and on the risks involved in proposed or alternative courses of action.’” See *id.* at 29-30 (quoting Oscar Schachter, *The Place of Policy in International Law*, 2 GA. J. INT'L & COMP. L. 5, 6 (Supp. 2, 1972)).

²²See generally DOD REPORT, *supra* note 1, at 94-99; *Review of the Adequacy of Security Arrangements for Marines in Lebanon: Hearings Before the House Armed Services Comm.*, 98th Cong., 1st Sess. (1983); DANIEL P. BOLGER, *AMERICANS AT WAR*

*Marine Sentry**Mercedes Truck*

1. Stands guard just outside the marine compound, watching over a parking lot.

2. Circles the parking lot twice, then gathers speed, crashes through concertina wire barrier, and barrels toward the compound.

3. Without suspecting the unfamiliar truck, waits and watches from his sentry post, which is sandbagged to protect against sniper fire.

4. Hurtles toward a little-used rear gate of Marine compound.

5. Crouches in the corner of sandbagged post. Fellow sentry at nearby post loads magazine, chambers round of ammunition, but then fails to fire.²³ Contrary to instructions on a “rules of engagement” card in their pockets, neither sentry has a magazine of ammunition loaded in his M-16 rifle.²⁴

1975-1986: AN ERA OF VIOLENT PEACE 191-260 (1988); MICHAEL PETIT, *PEACEKEEPERS AT WAR* (1986); Melinda Beck, *Inquest on a Massacre*, NEWSWEEK, Nov. 7, 1983, at 85.

²³DOD REPORT, *supra* note 1, at 95 (detailing the actions of the sentries on Posts 6 and 7).

²⁴Marines carried a “White Card” bearing the following text:

The mission of the Multi-national Force (MNF) is to keep the peace. The following rules of engagement will be read and fully understood by all members of the United States contingent of the MNF:

—When on post, mobile or foot patrol, keep a loaded magazine in the weapon, weapons will be on safe, with no rounds in the chamber.

—Do not chamber a round unless instructed to do so by a commissioned officer unless you must act in immediate self-defense where deadly force is authorized.

—Keep ammunition for crew-served weapons readily available but not loaded in the weapon. Weapons will be on safe at all times.

—Call local forces to assist in all self-defense efforts. Notify next senior command immediately.

—Use only the minimum degree of force necessary to accomplish the mission.

6. Rolls through the gate and bursts across sandbag barricade. Crashes into the ground floor of the four-story headquarters building, and detonates load of explosives. Kills 241 marines and sailors.

The first of the two epigraphs at the beginning of this article reflects the official view that ROE contributed to the inadequate security at the compound,²⁵ although blame for the tragedy properly lies with several causes.²⁶

-
- Stop the use of force when it is no longer required.
 - If effective fire is received, direct return fire at a distant target only. If possible, use friendly sniper fire.
 - Respect civilian property; do not attack it unless absolutely necessary to protect friendly forces.
 - Protect innocent civilians from harm.
 - Respect and protect recognized medical agencies such as Red Cross, Red Crescent, etc.

These rules of engagement will be followed by all members of the United States MNF unless otherwise directed.

DOD REPORT, *supra* note 1, at 49–50. These rules differed from the “Blue Card” ROE that had been distributed to marines at the United States Embassy in Beirut in that the “Blue Card” specifically deemed as “hostile acts” attempts by vehicles or persons to breach the perimeter fence. A truck bomb attack had killed 17 United States citizens at the United States Embassy in April, 1983. *See id.* at 30.

In addition to the “White Card,” the Marine guards at the Airport were subject to two other forms of guidance. First, the Battalion Landing Team (BLT) 1/8 Marines Compound was supposedly observing “Alert Condition II,” the second highest alert posture in a series of four conditions based on the probability of attack:

[Attack probable]

All positions reinforced to two sentries (off-duty guard force alerted; LAW antitank rockets issued)

Machine guns and TOWs manned

Forward air controllers/artillery observers to roof

Reaction platoon alerted

Emergency departures only

Search of all entering civilian vehicles

Cobra helicopters alerted

See BOLGER, *supra* note 22, at 251. Second, the commander of the 24th Marine Amphibious Unit (MAU)—the immediate higher headquarters of the BLT 1/8—had modified the security posture with “a conscious decision not to permit insertion of magazines in weapons on interior posts to preclude accidental discharge and possible injury to innocent civilians.” *See id.* at 252 (quoting *Situation in Lebanon and Grenada: Hearings Before the House Comm. on Appropriations* 28–29, 98th Cong., 1st Sess. (1983)). The outcome of this additional guidance was that the sentries at the critical guard posts would have to load a magazine and chamber a round before firing, in contradiction to the written guidance on their ROE cards.

²⁵*See also* DOD REPORT, *supra* note 1, at 51 (“In short, the Commission believes the marines at [Beirut International Airport] were conditioned by their ROE to respond less aggressively to unusual vehicular or pedestrian activity at their perimeter than were those marines posted at the Embassy locations.”).

²⁶The “presence” and “peacekeeping” nature of the mission statement, the failure by the chain of command to increase troop dispersion in light of the deteriorat-

To evaluate fairly the actions of the marines in Lebanon, or any American troops engaged in operations other than war, one must consider two criteria. First, troops should demonstrate initiative in defending themselves and members of their unit. Second, troops should apply all levels of force only when necessary.²⁷ The first

ing political situation, and the lack of timely intelligence concerning potential terrorist threats were the other causal factors cited in the official report. *See* DOD REPORT, *supra* note 1, at 134-38; *see* also BOLGER, *supra* note 22, at 250 ("Although a nonmilitary state of mind, lack of dispersion, weak defensive works, and imprecise intelligence increased the scale of the eventual enemy success, intentional and unintentional deviations from security procedures proved to be the immediate causes of the disaster."); *id.* ("Unfortunately, the marines around [Beirut International Airport] kept their old [White] ROE cards."); Sagan, *supra* note 15, at 464 n.12 ("Unfortunately, these new [WhiteCard] ROE were not extended to the United States Marines at the Beirut International Airport (BIA) whose ROE suggested they should fire only if fired on.").

It is important to emphasize that while the Beirut bombing contains teaching points about the ROE in effect, analysts of the bombing cannot reasonably conclude that "better" ROE would have prevented the tragedy. Such a conclusion would be wrong. The official investigation confirmed that even if the marines on the outermost sentry positions had begun firing at the moment the truck came into view, great damage and destruction would probably have occurred:

The FBI Forensic Laboratory described the bomb as the largest conventional blast ever seen by the explosive experts community. Based upon the FBI analysis of the bomb that destroyed the United States Embassy on 18 April 1983, and the preliminary findings on the bomb used on 23 October 1983, the Commission believes that the explosive equivalent of the latter device was of such magnitude that major damage to the BLT Headquarters building and significant casualties would probably have resulted even if the terrorist truck had not penetrated the USMNF defensive perimeter but had detonated in the roadway some 330 feet from the building.

DOD REPORT, *supra* note 1, at 99.

²⁷*Cf.* FM 100-5, OPERATIONS, *supra* note 9, at 13-4 (describing the principles of "Security" and "Restraint"). Army and joint service doctrine hold that six principles should guide actions during operations other than war:

Objective-Direct every military operation toward a clearly defined, decisive, and attainable objective;
 Unity of Effort-Seek unity of effort toward every objective;
 Legitimacy-Sustain the willing acceptance by the people of the right of the government to govern or of a group or agency to make and carry out decisions;
 Perseverance-Prepare for the measured, protracted application of military capability in support of strategic aims;
 Restraint-Apply appropriate military capability prudently;
 Security-Never permit hostile factions to acquire an unexpected advantage.

See id. at 13-3 to 13-4; JOINT PUB. 3-0, *supra* note 16, at V-2 to V-5. The principles bearing most directly on use of force by the individual soldier are restraint and security. The other principles speak primarily to commanders. Note that restraint is not inconsistent with employing "overwhelming" force, because it is entirely possible to overwhelm an opponent without physically harming him or others. *See, e.g.*, General Colin L. Powell, United States Forces: *Challenges Ahead*, FOREIGN AFF., Winter 1992, 193, at 32, 37, 39. ("When force is used deftly—in smooth coordination with diplomatic and economic policy—bullets may never have to fly."). *See* also JOINT PUB. 3-0, *supra* note 16, at V-3 to V-4 (noting that the concept of restraint "does not preclude the application of overwhelming force, when appropriate, to display US resolve and commitment").

criterion recognizes that a military force must protect itself to accomplish its objective. The second acknowledges that use of excessive force could jeopardize claims to legitimacy and frustrate both short-term and long-term goals.

Soldiers too reluctant to fire their weapons prevent military units from achieving combat objectives. In a study of soldier behavior in combat during World War II, S.L.A. Marshall found that most infantrymen he interviewed never fired their weapons, even when directly confronted by enemy forces.²⁸ Among the nonfirers were those who “had seen clear targets and still did not fire.”²⁹ Applying the axiom of infantry tactics that fire and maneuver are what defeat the enemy in combat, Marshall concluded, “Toss the willing firers out of an action and there can be no victory.”³⁰

Unduly inhibited soldiers also deny units success in operations short of large scale combat, as the example from Beirut illustrates. The destruction of the headquarters and a major portion of the armed American force marked a clear failure to accomplish the stated mission: “[T]o establish an environment that would facilitate the withdrawal of foreign military forces from Lebanon and to assist the Lebanese government and the Lebanese Armed Forces (LAF) in establishing sovereignty and authority over the Beirut area.”³¹

As soldiers feel more restricted in using force and as friendly

²⁸S.L.A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND IN FUTURE WAR 56-57 (1978).

²⁹*Id.*

³⁰*Id.* at 60, 64. Marshall proposed that a soldier’s reluctance to fire stemmed from “the fact that he comes from a civilization in which aggression, connected with the taking of life, is prohibited and unacceptable.” *Id.* at 78. He suggested that leaders train soldiers to anticipate correctly the dangers and distractions of the battlefield, *id.* at 37, and that they decrease soldier isolation and foster soldier-to-soldier communication as means of building aggressiveness. *Id.* at 123-78. For related views that unit cohesiveness contributes to combat effectiveness, see generally Edward Shils & Morris Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, PUB. OPINION Q., Fall 1948, at 281; JAMES FALLOWS, NATIONAL DEFENSE 107-38 (1981); MARTIN VAN CREVELD, FIGHTING POWER: GERMAN AND UNITED STATES PERFORMANCE, 1939-1945, at 170 (1982); WILLIAM D. HENDERSON, COHESION: THE HUMAN ELEMENT IN COMBAT (1985). Although since Marshall’s death in 1977 researchers have challenged both his data pertaining to the number of nonfirers in World War II and the link between unit cohesion and combat effectiveness, see, e.g., Gerald J. Garvey & John J. DiIulio, Jr., *Only Connect: Cohesion vs. Combat Effectiveness; Ban on Gay Military Personnel*, NEW REPUBLIC, Apr. 26, 1993, at 18; *Role of Cohesion in Developing Combat Effectiveness in Relation to Ban on Homosexuals in the Military: Hearings Before the Senate Armed Services Comm.*, 103d Cong., 2d Sess. 52 (1993) (testimony of Lawrence Korb, Director, Center for Public Policy Education and Senior Fellow in Foreign Policy Studies, The Brookings Institute), Marshall remains unchallenged in his assertion that willing firers win battles. For a defense of Marshall’s work, see JOHN D. MARSHALL, RECONCILIATION ROAD: A FAMILY ODYSSEY OF WAR AND HONOR (1993).

³¹DOD REPORT, *supra* note 1, at 2.

deaths mount, public support for a foreign deployment may fade quickly in a nation that abhors American casualties. The eventual result can be a strategic victory for a weaker enemy. Eight months before the bombing of the headquarters at the Beirut Airport, an Islamic terrorist wounded five marines with a grenade, beginning a stream of media reports that depicted the marines in Lebanon as targets of fire from opponents of United States policy.³² Within months of the airport bomb attack, the United States reversed its policy and moved all marines off-shore and out of Lebanon, leaving the fragile Lebanese government to fend for itself. Ten years later, press coverage of the more recent deployment to Somalia included caricatures of United States troops as targets before the death of eighteen Americans in a firefight with a Somali faction.³³ Within days of that firefight, the United States announced a deadline for complete withdrawal from Somalia and abandoned major policy goals.³⁴ When fully sensitized by an undistracted press corps, America will not tolerate the perception that its soldiers are sitting ducks.

On the other hand, soldiers who fire too readily also erect obstacles to tactical and strategic success.³⁵ Soldiers who spray fire

³²See, e.g., Jonathan C. Randal, *Attacks on Patrols in Beirut Wound 5 United States Marines, 8 Italian*, WASH. POSR, Mar. 17, 1983, at A1.

³³See, e.g., Keith B. Richburg, *United States Troops in Somalia Express Anger, Confusion Over Mission; Chief Role Now Is 'Dodging Bullets,' GI Says*, WASH. POSR, Aug. 16, 1993, at A1; Bill Mitchell, *United States To Send 400 More Troops Into Somalia . . .*, USA TODAY, Aug. 25, 1993, at 10A (cartoon depicting three soldiers wearing bull's eye targets around their necks).

³⁴See Susan Page, *Rangers Pulled Out; Clinton orders Somalia exit*, NEWSDAY, Oct. 20, 1993, at 22 (reporting the President's promise to withdraw all United States forces by March 31, 1994).

³⁵In combat operations, military units routinely struggle with the adverse effects of friendly fire—also "amicicide" or "fratricide"—that particular type of firing error that victimizes the fellow soldier. In a study of friendly fire incidents in both world wars, the Korean, and the Vietnam conflicts, one commentator concluded that some friendly fire incidents

delayed or even completely halted offensive operations, disrupted and weakened defensive operations, and, on occasion, precipitated withdrawal and local defeats. The negative impact of [friendly fire incidents] on friendly combat power is, however, often more complex and subtle. Each incident contributes in some measure to the subtle degradation of combat power by lowering morale and confidence in supporting arms so necessary to the successful pursuit of modern combined arms operations. This effect is, as has been mentioned, geometric rather than linear.

MAJOR CHARLES R. SHRADER, *AMICICIDE: THE PROBLEM OF FRIENDLY FIRE IN MODERN WAR 107-08*(1982) [hereinafter SHRADER, *AMICICIDE*].

The high proportion of casualties due to friendly fire in Operation Desert Storm has renewed interest in Shrader's observations. There were 28 incidents of United States fire being directed against American forces during Operation Desert Storm. In all, 36 of 148 American dead died from friendly fire. Ground fighting accounted for 16 incidents, in which ground-to-ground fire killed 24 soldiers and wounded 57 others. Air-to-ground fire accounted for 9 incidents, killing 11 soldiers and wounding 16. See,

when they should not do so sabotage any operation in which the United States seeks to bolster the legitimacy of a government or faction. The most important modern illustration of this is the conduct of some United States Army forces in Vietnam. Soldiers did not win the hearts and minds of the Vietnamese people because—as one senior officer from that conflict has admitted—some soldiers were applying firepower “on a relatively random basis” and “just sort of devastat[ing] the countryside.”³⁶ A British general who witnessed American operations in Vietnam described United States tactics as “prophylactic firepower, which means that if you do not know where the enemy is, make a big enough bang and you may bring something down.”³⁷ Because the local civilian population rather than enemy guerrillas often received the fire, the Army foiled its

e.g., Caleb Parker, *War Friendly Fire Prompts United States Call for Doctrine Shift*, DEF. NEWS, Dec. 9, 1991 at 4 (citing official data released by the Department of Defense on 13 August 1991).

To suggest that friendly fire incidents are an “ROE problem” would be misleading. Amicide is multifaceted, with sophisticated studies indicating that ground-to-ground, direct fire amicide is caused most often by a lack of “situational awareness” or by incorrect “target identification.” See UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, INTERIM REPORT OF THE COMBAT IDENTIFICATION PROGRAM 2 (Dec. 12, 1991). In the aftermath of the war with Iraq, the Army’s plan for reducing fratricide called upon the defense industry to develop devices designed to mark United States and allied vehicles. Specifically, defense contractors have been asked to develop improved Identification-kiend-or-Foe (IFF) systems, better optics, and global positioning satellite (GPS) receivers for fighting vehicles. *Id.* at 4-5. *But see generally* Lieutenant Colonel Charles R. Shrader, *Friendly Fire: The Inevitable Price*, PARAMETERS, Autumn 1992, at 29, 43 [hereinafter Shrader, *Inevitable Price*] (“Even after we have applied the full range of technological and human preventatives, friendly fire incidents will continue to occur.”); Memorandum, Headquarters, United States Military Assistance Command, Vietnam, MACJ343, subject: Vietnam Lessons Learned No. 70: Friendly Casualties from Friendly Fires, Defense Technology Information Center No. AD841510, at 4 (acknowledging that “adherence to proven techniques and established procedures does not completely eliminate the possibility of error”).

Yet when seeking optimal use of ROE and when seeking lower rates of fratricide, land forces confront related challenges. Both challenges involve attempts to mitigate, to the extent possible, the “fog of war.” *Compare infra* note 241 and accompanying text (asserting that the harsh environment in which soldiers must decide whether, how, and when to use force “tends to heighten the fear, the sense of being alone, and the stress of confronting a potentially dangerous foe”) with SHRADER, AMICIDE, *supra* at vii (“Noise, smoke, faulty communications, tension, hyperactivity, and fear all conspire to mask from the soldier and his leaders the true situation on the battlefield.”). Moreover, though perhaps rare, there are occasions when ROE considerations can be directly linked to friendly fire incidents. See, *e.g.*, Rowan Scarborough, *Broken Rule Caused Friendly-fire Deaths*, WASH. TIMES, July 10, 1991, at 3 (citing official Army investigation, which found that an attack helicopter pilot mistakenly fired on friendly armored vehicles in part because he had flown his aircraft toward the vehicles from east to north, in violation of a ROE requiring attacks to come from the Saudi desert over friendly territory toward Iraq).

³⁶ ANDREW F. KREPINEVICH, JR., *THE ARMY AND VIETNAM* 199 (1986) (quoting statements made by General Harold K. Johnson during interview on 22 Jan. 1973).

³⁷ *Id.* (quoting Brigadier General W.F.K. Thompson).

own avowed counterinsurgency strategy and ensured the success of its enemy.³⁸

A more recent example of the dangers of undisciplined fire is the case of Army Specialist James Mowris.³⁹ On the morning of February 14, 1993, Specialist Mowris' platoon was conducting a sweep of a Somali village to seize weapons and munitions that observers had sighted there.⁴⁰ If necessary, the platoon also had the mission to disarm members of one of the Somali bands that had been interfering with international famine relief efforts in that troubled country.⁴¹ After initially sweeping the village and finding a few small arms and live mortar rounds but no armed Somalis, the platoon paused while an interpreter questioned a villager. The platoon leader then noticed two Somalis running between buildings of a nearby abandoned military compound and ordered the platoon to chase them. In the ensuing chase, as one of the men ran from members of the platoon, the platoon leader and a sergeant fired shots into the air in an attempt to get the Somalis to stop. Specialist Mowris pursued one of the men into a bushy area away from the buildings and, after shouting "there he is,"⁴² fired what he later said was "a warning shot in the dirt" to convince the Somali to stop running away.⁴³

³⁸*See id.* at 199 ("Hatred was our enemy's major instrument to turn the people against us. . . [m]ore often than not, it was the local people who were exposed to our fire because by the time it came, the guerrillas had fled or taken shelter underground." (quoting LIEUTENANT GENERAL DONG VAN KHUYEN, UNITED STATES ARMY CENTER OF MIL. HISTORY, INDOCHINA MONOGRAPH, THE RVNAF 300 (1980))).

³⁹United States v. Mowris, GCM No. 68 (Fort Carson & 4th Inf. Div (Mech) 1 July 1993).

⁴⁰*See* Exhibit 10 to Report of Article 32(b) Investigating Officer, Sworn Statement of First Lieutenant Brian K. Mangus, 20 Feb. 1993, at 1, *Mowris*.

⁴¹*Id.* Although Specialist Mowris' platoon, part of the 984th Military Police Company, consisted of military policemen rather than infantrymen, the mission resembled those of many Army and Marine Corps infantry units during the Somalia deployment. See Major General S.L. Arnold & Major David T. Stahl, *A Power Projection Army in Operations Other Than War*, PARAMETERS, Winter 1993-94, at 4, 20-21; Colonel F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS, Winter 1993-94, at 27, 31.

⁴²Exhibit 8 to Report of Article 32(b) Investigating Officer, Sworn statement of Staff Sergeant Marvin J. Applegate, 20 Feb. 1993, at 1, *Mowris*.

⁴³Exhibit 1 to Report of Article 32(b) Investigating Officer, Sworn statement of Accused, 15 Feb. 1993, at 2, *Mowris*. Specialist Mowris and his platoon were subject to ROE issued by the Commander of Army Forces in Somalia, Major General S.L. Arnold, also the 10th Mountain Division commander. Those ROE—consisting of five typed pages and thus too long to be reproduced here—read in pertinent part as follows:

Nondeadly force should be used if the security of United States Forces is not compromised by doing so. A graduated show of force includes:

- (a) an order to disband or disperse;
- (b) show of force/threat of force by United States Forces that is greater than the force threatened by the opposing force;
- (c) warning shots aimed to prevent harm to either innocent civilians or the opposing force;

After examining ballistics and medical evidence and hearing testimony from another soldier who heard Specialist Mowris admit to killing the man,⁴⁴ a court-martial convicted Mowris. The crime? Negligent homicide. The victim? Osman Asir, a Somali national.⁴⁵ The convening authority later set aside the conviction.⁴⁶ Without entering the debate over Specialist Mowris' criminal innocence or guilt, a disinterested reader of the trial record notes that the soldiers of Specialist Mowris' platoon did not understand and had not received training on the written ROE issued by higher headquarters. Moreover, as the second of the two introductory epigraphs indicates, the court-martial panel found that the warning shots fired in and around the village were excessive under the circumstances. Regardless of whether one's sympathy lies with the soldier or the Somali, incidents such as this give credibility to opponents of United States policy and frustrate United States interests.⁴⁸

(d) other means of nondeadly force;

(e) if this show of force does not cause the opposing force to abandon its hostile intent, consider if deadly force is appropriate.

Headquarters, 10th Mountain Div., Operations Plan for Restore Hope, Annex N, at para. 3(c)(3) (1993).

⁴⁴See Testimony of Staff Sergeant Elizabeth C. Marmet, Record at 42, *Mowris*.

⁴⁵See Findings Worksheet, *Mowris*.

⁴⁶See Action by Convening Authority, *Mowris*.

⁴⁷The platoon leader described it this way:

There was no indepth briefing concerning Rules of Engagement, they are vague. [sic] When I first got here some E7 told us that the Rules of Engagement are pretty vague. We were briefed by someone associated with 10th Mountain. We talk about the Rules of Engagement all the time. Its always the same thing, no one has anything new to add. [sic] I'm sure if I don't understand the Rules of Engagement my soldiers don't either.

See Testimony of First Lieutenant Brian Mangus in Report of Article 32(b) Investigation, at 6, *Mowris* (testimony summarized by reporter); see also Testimony of Staff Sergeant Elizabeth Marmet, Record at 41, *Mowris* ("Occasionally, some things would come up in regard to rules of engagement, but they were not discussed verbatim. . . nothing was really discussed in depth. . . [w]arning shots were not discussed that I remember until after the incident.") (testimony summarized by reporter).

⁴⁸Coverage of the *Mowris* case in the print media was extensive. See, e.g., Peter G. Chronis, *Soldier Guilty of Lesser Charge in Somali's Death*, DENV. POST, July 2, 1993, at A1; Bruce Finley, *GI's Trial: A Study in War Irony*, DENV. POST, July 1, 1993, at A1; Ft. Carson GI in Somalia Faces Manslaughter Charge, DENV. POST, Apr. 9, 1993, at A23; GI Convicted of Killing Somali, N.Y. TIMES, July 3, 1993, at A3; Kevin Simpson, *Did Somali's Acts Inspire Court-martial Reversal?*, DENV. POST, Oct. 10, 1993, at C1; Peter Sleeth, *Guilty Verdict Thrown Out in Somali Death*, DENV. POST, Oct. 5, 1993, at A5.

An act of excessive force committed 12 days earlier by another American in Somalia drew contemporaneous media coverage. The case of Marine Corps Gunnery Sergeant Harry Conde, addressed more fully *infra* notes 212–213 and accompanying text, further heightened public scrutiny of the mission in Somalia. See, e.g., David Evans, *There's No Place for Trigger-Happy Marines in Somalia*, CHI. TRIB., Mar. 12, 1993, at 21; Mark Fineman, *Use of Force at Issue in a Land of Anarchy*, L.A. TIMES, Mar. 5, 1993, at A12; Jim Hoagland, *Prepared for Non-combat*, WASH. POST, Apr. 7, 1993, at A20; Donatella Lorch, *Marines Begin Shooting Inquiry*, N.Y. TIMES, Mar. 5,

An intuitive but insufficient approach to the problem of poor firing decisions is to issue ROE—directives that “set forth who can shoot at what, with which weapons, when and **where**.”⁴⁹ These rules, if not part of a wider commitment of resources or if inadequately reinforced by training, can deepen rather than solve the problem. Few senior leaders in Vietnam felt that soldiers understood the ROE well before the My Lai massacre,⁵⁰ and even fewer believed that soldiers adhered carefully to the ROE.⁵¹ Perceiving that ROE restrictions designed to avoid noncombatant casualties unduly tied their hands, United States soldiers engaged in “creative application”

1993, at A6; Keith B. Richburg, *2 United States Marines Face Charges in Somalia*, WASH. POST, Mar. 4, 1993, at A16 [hereinafter Richburg, *Marines Face Charges*]; Keith B. Richburg, *Marine Testifies to Perils of Mogadishu*, WASH. POST, Mar. 6, 1993, at A23; Keith B. Richburg, *Marine is Convicted in ‘Sunglasses’ Case*, WASH. POST, Apr. 7, 1993, at A20; Liz Sly, *Marine Relives Somali’s Attack*, CHI. TRIB., Mar. 6, 1993, at 1.

⁴⁹Colonel Fred Green, *An Address to the American Society of International Law, on the Subject of Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity* (1992) (using this informal definition of ROE and discussing the role of ROE in United States operations during the 1991 war against Iraq), reprinted in 86 AM. SOC’Y INT’L L. PROC. 39, 62–67 (1992); see also DEP’T OF ARMY, SUBJECT SCHEDULE 27–1, THE GENEVA CONVENTIONS OF 1949 AND THE HAGUE CONVENTION No. IV OF 1907, para. 3a (29 Aug. 1975).

⁵⁰This tragic and notorious incident took place on March 16, 1968, when a combat task force from the 11th Light Infantry Brigade of the 23d Infantry Division assaulted by helicopter into the village complex of Son My, in the province of Quang Ngai, South Vietnam. There, the American forces found only unarmed civilian women, children, and old men, rather than the anticipated large force of enemy soldiers. Despite encountering no resistance, some members of the task force began to round civilians up and gun them down, under the direction of several junior officers. American troops put more than 200 of the villagers to death during the killing spree. See generally Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 156–59 (1993).

Reference to the My Lai incident in this article is not intended to imply that ROE “defects” played a major role in that tragedy. Informed commentators conclude that the massacre sprang from culpable individual actions and failures to act rather than from unsatisfactory firing orders. See, e.g., *id.* at 164 (“These individuals clearly were in an environment in which little, if anything, deterred them from overtly expressing their criminal propensities.”); LIEUTENANT GENERAL W.R. PEERS, THE MY LAI INQUIRY 230 (1979) (noting that “there were some things a soldier did not have to be told were wrong—such as rounding up women and children and then mowing them down, shooting babies out of mothers’ arms, and raping”) [hereinafter PEERS ACCOUNT OF MY LAI INQUIRY]; Letter from Major General George S. Prugh (ret.), The Judge Advocate General of the Army from 1971 to 1975, to author (Aug. 7, 1994) (stating that “the My Lai situation does not, in my opinion, lend itself to much utility or relevance to the ROE discussion”) (on file with author); cf. PEERS ACCOUNT OF MY LAI INQUIRY at 236 (criticizing the lack of clarity in plans and orders issued by leaders to soldiers prior to the massacre).

Nevertheless, My Lai triggered a process of critical investigation and self-study by the Army, a process that shed light on ROE and many related topics. Moreover, My Lai investigative exhibits have preserved directives and orders that offer valuable glimpses of ROE for land forces in Vietnam. See *infra* notes 152–63 and accompanying text.

⁵¹See KINNARD, THE WAR MANAGERS 54–55 (1977) (citing results of survey of Army generals), quoted in KREPINEVICH, *supra* note 36, at 199.

of the ROE⁵² or “ben[t] the ROE in favor of killing ‘potential’ insurgents, although in many instances they might have been innocent civilians.”⁵³ Today, operations officers on military staffs sometimes delegate the drafting of ROE to judge advocates who possess little knowledge of the combat arms or land force weapons systems.⁵⁴ As a result, soldiers may regard ROE as “‘ivory tower’ nonsense”⁵⁵ or as “handcuffs which impede combat operations and increase risk to soldiers.”⁵⁶ Rather than helping matters, the ROE simply may add frustration or confusion to the already adverse circumstances under which soldiers must decide whether to fire.⁵⁷

The cartoon posted on a bulletin board by marines in Beirut after the 1983 bombing undoubtedly captures the view some soldiers have of ROE. A marine rifleman is in a prone firing position behind a barricade in Lebanon. The President of the United States is whispering in his ear, “Before you fire, I want you to consider the nuances of the War Powers Act.”⁵⁸

An alternative exists. Soldiers can learn to defend themselves and their units with initiative and to apply deadly force only when necessary. Clear and simple rules on the use of force can complement the learning process. Once assimilated into a soldier’s judgment, these rules can provide a base of understanding on which a larger

⁵²See KREPINEVICH, *supra* note 36, at 199.

⁵³*Id.* at 202.

⁵⁴See, e.g., Memorandum, Colonel Walter B. Huffman, Staff Judge Advocate, United States Army VIIth Corps to The Judge Advocate General of the Army, subject: After Action Report on Operations Desert Shield and Storm (22 Apr. 1992), quoted in UNITED STATES ARMY LEGAL SERVICES AGENCY, THE DESERT STORM ASSESSMENT TEAM’S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, Operational Law-2 & Issue # 161 (22 Apr. 1992) [hereinafter DESERT STORM ASSESSMENT TEAM REPORT] (stating that meaningful involvement of judge advocates in ROE matters “requires knowledge of combat arms and weapons systems” and that “JAG’s need more training here”).

⁵⁵Memorandum, Captain James Durkee to Colonel Richard H. Black, Staff Judge Advocate, 7th Infantry Division (Light) & Fort Ord, subject: “Just Cause” After Action Report (23 Feb. 1990), quoted in Morris, *supra* note 15, at 56.

⁵⁶See Bloodworth, *supra* note 15, at 3.

⁵⁷See, e.g., Major Paul D. Adams, *Rules of Engagement: The Peacekeeper’s Friend or Foe?*, THE MARINE CORPS GAZETTE, Oct. 1993, at 21 (“The real point is that the rules [the Marine] must play by may also kill him, and frequently, the rules are stacked against him.”); John Lancaster, *Mission Incomplete, Rangers Pack Up; Missteps, Heavy Casualties Marked Futile Hunt in Mogadishu*, WASH. POST, Oct. 21, 1993, at A1 (“We played by our rules and he doesn’t play by our rules,” [military official stated], . . . ‘He surrounds himself with women and children and stays in the most crowded part of the city.’”); Richburg, *supra* note 33, at A8 (“[The GIs] complained that the rules of engagement under which they operate in this hostile environment are far too restrictive, requiring them, for example, to clearly see an attacker before returning fire.”); Beck, *supra* note 22, at 8 (quoting one Marine as stating “[i]f we see someone out there running around with an AK-47, we should waste him, cut and dried,” and another as stating “[t]hey should either pull us out or let us loose”).

⁵⁸The cartoon is described in Beck, *supra* note 22, at 9.

system of contingent ROE may rest. Ground force trainers—a term comprising judge advocates as well as commanders—can anticipate scenarios, design rehearsals, promote role-playing, and demand brief-backs. Consequently, trainers can condition soldiers to respond better and use force more appropriately across the entire spectrum of potential armed conflict.

III. Diagnosis

How can ROE best help ground troops avoid over-tentativeness, at one extreme, and undisciplined fire, at the other? Framing the question in this way acknowledges that no mere system of rules, however well designed, can ever eliminate all inappropriate omissions and acts of armed soldiers. Instead, the problem is to determine how ROE can *best contribute* to minimizing inappropriate omissions and acts. A prudent diagnosis of the problem would begin by describing the different elements of the present method and providing a brief historical account of how land forces came to use it. A truly complete diagnosis then would generate a theory of why the present method of imparting ROE to land forces is suboptimal. Accordingly, after describing the present method and considering recent historical trends that shaped the method, this part of the article presents the following theory: ROE do not help land forces as much as they could because leaders and judge advocates issuing ROE—although undoubtedly motivated by noble intentions—are relying on a legislative model of controlling conduct.

This model unrealistically assumes that leaders can create, interpret, and enforce ROE the same way governments create, interpret, and enforce laws. The model also neglects the stressful environment in which soldiers must decide whether to use force. Yet current land force doctrine and training on ROE implicitly rely on the model. This part of the article identifies, in theoretical terms, what is lacking in current land force doctrine and training that if present might help resolve the problem.

A. *The Present Method—Key Terms and Distinctions*

Soldiers pulling guard duty during peacekeeping deployments, riding convoy during humanitarian assistance missions, or conducting air assaults into hostile territory receive ROE that originate with the President and the Chairman of the Joint Chiefs of Staff (CJCS). However, these ROE undergo amplification at as many as nine subordinate levels of authority. To recognize that so many layers filter and qualify the ROE reaching individual soldiers is to begin to under-

ROE LEVELS AND FORMS

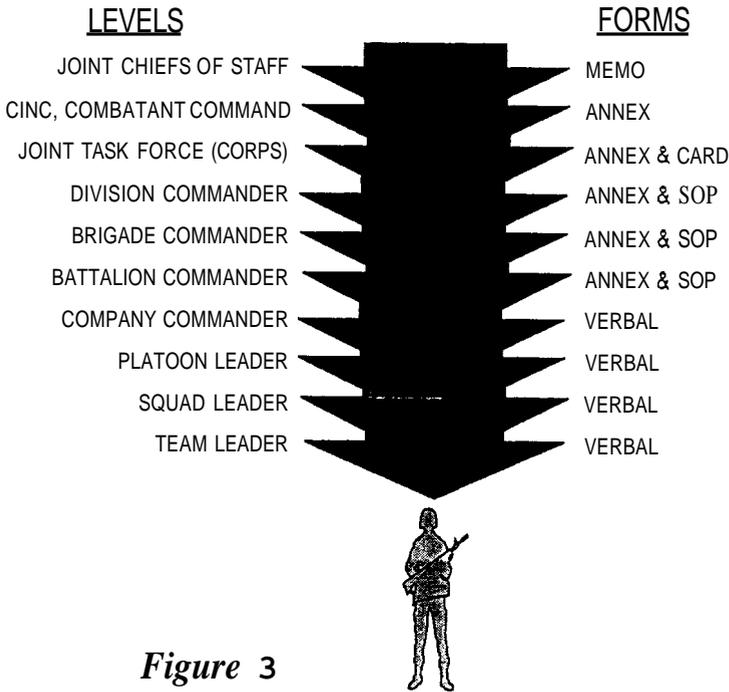


Figure 3

stand the enormous difficulties any method of imparting **ROE** to land forces must surmount. See *Figure 3*.⁵⁹

1. *The JCS Peacetime ROE.*—The mainspring of the present method of imparting **ROE**, at least officially, is a set of rules in a document called the *Peacetime ROE*.⁶⁰ The *PROE*, which the JCS issued in 1988, direct the commanders-in-chief (CINCs) of the unified combatant commands⁶¹ to exercise force consistent with the

⁵⁹*Figure 3* illustrates the levels at which land force ROE may be made in a typical deployment as well as the forms the ROE may take.

⁶⁰SECRET Memorandum, Joint Chiefs of Staff, subject: Peacetime Rules of Engagement (PROE) (28 Oct. 1988). Note that hereinafter, reference to this JCS document within the text of the article will be to the *PROE* (italics typeface). Reference merely to rules by which one or more subordinate authorities implement the *PROE* will be to PROE (roman typeface).

⁶¹A unified combatant command is “a military command which has broad, continuing missions and which is composed of forces from two or more military departments.” 10 U.S.C. § 161(c)(1) (1988). The President, acting through the Secretary of Defense and with the advice and assistance of the Chairman of the JCS, establishes unified combatant commands, see *id.* § 161(a), of which there are presently eight:

- United States Atlantic Command (USACOM);
- United States European Command (USEUCOM);
- United States Pacific Command (USPACOM);

mandates of the United Nations Charter and international law.⁶² The PROE apply to all military operations and contingencies⁶³ short of declared war or prolonged conflict and remain in effect until specifically modified or superseded.⁶⁴

The CINC of the unified command, with the CJCS, modifies the PROE for specific operations or contingencies by supplementing the standing PROE with rules tailored to the mission.⁶⁵ The CINC then

United States Southern Command (USSOUTHCOM);
 United States Central Command (USCENTCOM);
 United States Transportation Command (USTRANSCOM);
 United States Special Operations Command (USSOCOM);
 United States Space Command (USSPACECOM);

DEP'T OF DEFENSE, ARMED FORCES STAFF COLLEGE PUBLICATION 1, **THE JOINT STAFF OFFICER'S GUIDE** 46-47 (1988) [hereinafter AFSC PUB. 1]. Although the defense organization of the United States has been molded into its modern form by no fewer than seven major pieces of legislation over the past forty-six years, *see id.* at 32, the definition of a unified combatant command has not changed since Congress passed the National Security Act of 1947. *See id.* at 42.

The purpose of the National Security Act of 1947 was to incorporate into law the lessons World War II had taught about the hazards of parochialism among the military services and thus "provide for the effective strategic direction of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval, and air forces." *See id.* at 42.

The most recent significant development in the trend toward a unified command structure occurred in 1986, when Congress designated the Chairman, JCS, the principal military adviser to the President, transferred duties of the corporate JCS to the Chairman, specified that the operational chain of command shall run from the President to the Secretary of Defense directly to the combatant commanders, and authorized the President to communicate with the combatant commanders through the Chairman. *See* DEP't of Defense Reorganization (Goldwater-Nichols) Act of 1986, Pub. L. No. 99-433, 100 Stat. 1012-17 (codified at 10 U.S.C. §§ 161-66 (1988)); *see also* DEP'T OF DEFENSE, DIRECTIVE 5100.1, **FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS** (25 Sept. 1987) (exercising the President's authority by directing that the Chairman "function[] within the chain of command by transmitting communications to the commanders of the combatant commands from the President and the Secretary of Defense"). *See generally* AFSC PUB. 1 at 32-45.

⁶²*See* OP. LAW HANDBOOK, *supra* note 15, at H-95.

⁶³A contingency is "[a]n emergency involving military forces caused by natural disasters, terrorists, subversives, or by required military operations." *See* JOINT PUB. 1-02, *supra* note 3, at 86. Because of "the uncertainty of the situation, contingencies require plans, rapid response and special procedures to ensure the safety and readiness of personnel, installations, and equipment." *Id.*

⁶⁴*See* OP. LAW HANDBOOK, *supra* note 15, at H-94. The PROE may remain in force through many stages of an armed conflict. For instance, during all but 43 days, United States forces in the Persian Gulf conflict of 1990-91 operated under PROE. *See* Interview with Lieutenant Commander James P. Winthrop, Judge Advocate General's Corps, United States Navy, Former Staff Judge Advocate, Commander, Cruiser-Destroyer Group **TWO**, Stationed on Board the USS America (CV 66), in Charlottesville, Va. (Mar. 26, 1994).

⁶⁵*See* Parks, *Righting*, *supra* note 15, at 86 (describing the system of supplementation). In situations of war or prolonged conflict, the CINC drafts an entirely separate set of ROE and submits it to the CJCS for review and approval. *See* Morris, *supra* note 15, at 33 n.81 (citing telephone interview by author with W. Hays Parks,

issues ROE to subordinate commands that are consistent with the *PROE*.⁶⁶ In turn, each subordinate commander is free to issue ROE specific to his unit, provided that they are neither less restrictive nor otherwise inconsistent with the ROE from higher headquarters.⁶⁷ The individual soldier typically learns of the ROE in a briefing from his immediate commander. Occasionally, the soldier receives mission-specific instruction on the ROE from a judge advocate or a member of the chain of command. Later, the soldier may consult a pocket-sized card that purports to summarize the most important and relevant ROE.

The JCS definition of "rule of engagement" is quite broad.⁶⁸ Accordingly, operations orders at all but the lowest levels of command contain ROE directed toward many decision-makers besides riflemen: fighter aircraft pilots, attack helicopter pilots, ship captains, air defense artillerymen, field artillerymen, tank commanders, subordinate unit leaders, and so on. Because the present method of imparting ROE incorporates input from so many levels of command, prescribes the conduct of so many decision-makers, and changes particular rules from mission to mission, it struggles to sort the ROE into clear conceptual categories.

2. *Purposes of ROE.*—For instance, the present method of imparting ROE sorts rules into three groups based on the purposes they serve: policy, legal, and military.⁶⁹ An example of ROE that serve policy purposes is Executive Order 11,850, which prohibits first use of riot control agents and herbicides without presidential approval.⁷⁰ An example of a rule that serves military purposes is the

Special Assistant for Law of War Matters, International & Operational Law Division, United States Army Office of The Judge Advocate General (Oct. 4, 1991).

⁶⁶United States commanders, beginning at the top of the military operational chain with the CINC, issue ROE as part of an operations plan, which then is implemented by a subsequent operations order. See JOINT CHIEFS OF STAFF PUBLICATION 5-03.2, JOINT OPERATION PLANNING AND EXECUTION SYSTEM (JOPES) VOLUME II: PLANNING AND EXECUTION FORMATS AND GUIDANCE, at 111-205 to 111-206 (10 Mar. 1992) [hereinafter JOPES FORMATS] (depicting the format by which CINCs are to issue ROE to subordinate commands and locating the ROE at Appendix 8 to Annex C of the main operation plan). See generally FM 101-5, STAFF OPERATIONS, *supra* note 11, at 7-1 to 7-2 (describing types of military orders).

⁶⁷See OP. LAW. HANDBOOK, *supra* note 15, at H-95.

⁶⁸See *supra* note 3.

⁶⁹See HAYES, *supra* note 15, at 13; cf. Roach, *supra* note 3, at 48 (distinguishing diplomatic, political, military, and legal purposes); Parks, *supra* note 15, at 86-87 (distinguishing between ROE serving purposes of domestic law, national security policy, operational, and international law).

⁷⁰Exec. Order No. 11,850, 40 Fed. Reg. 16,187 (1975). The United States maintains that international law does not prohibit these modes. See DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 38 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10], *construing* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

common requirement in ground operations that the artillery tubes organic to a unit will not fire beyond a designated fire support coordination line, which ensures an efficient division of labor between fires controlled at one level and those controlled by higher levels of command.⁷¹ An example of ROE drafted for legal purposes is the prohibition that “hospitals, churches, shrines, schools, museums, and any other historical or cultural sites will not be engaged except in self-defense.”⁷²

Yet the purposes of ROE quite often overlap, and rules implementing strategic policy decisions may well serve an operational or tactical military goal while simultaneously bringing United States forces in compliance with domestic or international law. See *Figures 4a*⁷³ and *4b*.⁷⁴ As a result, troops in the field may not appreciate the reasons why a leader fashioned a particular rule. Indeed, troops may not discern purposes even if the clear military disadvantage of the

June 17, 1925, 26 U.S.T. 571. Accordingly, the prohibition contained in the executive order is the product of political sensitivities rather than the implementation of a requirement of international law. See Parks, *supra* note 15, at 90. Note that on August 22, 1994, when this article was submitted, the impact on Executive Order 11,850 of a recent international agreement, see United Nations Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, and on Their Destruction, with Annexes, Jan. 13, 1993, 32 I.L.M. 800 (1993) (signed by the United States on Jan. 13, 1993, but not ratified as of this date), was undergoing interagency review within the executive branch. See Interview with Colonel Raymond C. Ruppert, United States Army, Chief, International & Operational Law Division, Office of The Judge Advocate General (Mar. 23, 1994). Pending completion of this review, the Senate will likely not offer its advice and consent as to ratification, despite the fact that President Clinton himself strongly endorsed ratification. See Letter of Transmittal from President William J. Clinton to United States Senate (Nov. 23, 1993), reprinted in DEP'T OF STATE, DISPATCH Dec. 6, 1993, at 849.

⁷¹See FM 101-5-1, *supra* note 3, at 1-32.

⁷²Headquarters, Joint Task Force South, Operations Order 90-2, ROE Card, para. L (20 Dec. 1990) (summarizing ROE stated in Annex R of the Corps level Operations Order for Operation Just Cause in Panama) (on file with the CLAMO). This rule approximates the United States treaty obligation, in sieges and bombardments, “to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.” Annex to Hague Convention No. IV Embodying the Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 27, 36 Stat. 2295, 2303, 205 Consol. T.S. 289, 293.

⁷³*Figure 4a* is an adaptation of the Venn diagram devised by Roach, *supra* note 3, at 48, to depict the frequent overlap between ROE purposes; see also HAYES, *supra* note 15, at 13 (condensing “diplomacy” and “policy” to a single circle labeled “political”).

⁷⁴*Figure 4b* adapts another Venn diagram published by Roach, *supra* note 3, at 47, to illustrate that ROE restrict military operations more than the requirements of international or domestic law and that law provides an outer boundary within which all ROE must fall. The requirement that ROE be lawful is also captured in the JCS definition, which states that ROE are directives “issued by competent authority.” See *supra* note 3. For a helpful discussion of the distinction and relationship between international policy and international law, see Roger Fisher, *Intervention: Three Problems of Policy and Law*, in ESSAYS ON INTERVENTION 3-30 (Roland J. Stanger, ed., 1964).

ROE PURPOSES

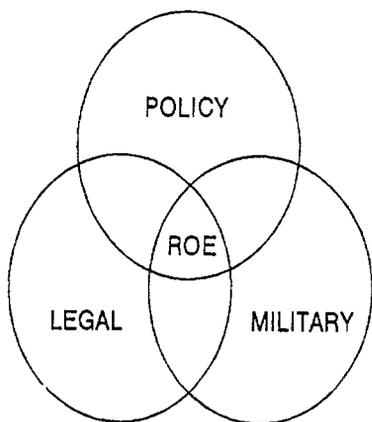


Figure 4A

ROE AND LAW

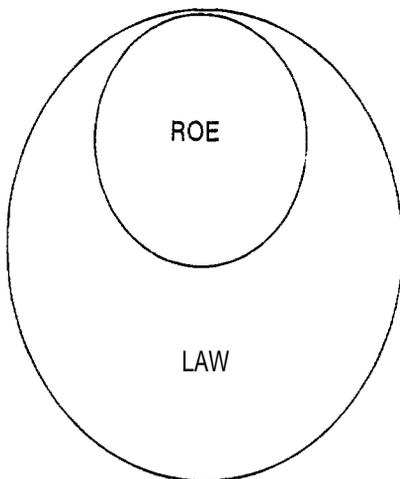


Figure 4B

rule and its restrictiveness compared to a prior rule would make its policy origins apparent to an outside observer. It is unlikely that the sweaty private in Somalia during October, 1993 understood or cared to understand the delicate policy aims of his superiors. Then, what was effectively an abrupt shift in ROE prevented soldiers from patrolling the streets of Mogadishu and confronting Somali gunmen who were manning checkpoints there.⁷⁵

3. Wartime Versus Peacetime ROE.—Recall that these initial sections of the diagnosis are intended to be more descriptive than

⁷⁵Cf., John Lancaster, *GIs in Somalia Dig, Duck and Cover: Mean Streets Get Meaner as United States Military Avoids Conflict*, WASH. POST, Oct. 31, 1993, at A1 (summarizing the purpose as "want[ing] to avoid offensive measures that could foil diplomatic efforts to broker a peace settlement among [faction leader Mohamed Farah] Aideed and rival clans"). Note that as an official matter, what were termed "ROE" did not change, though "mission guidance" from leaders had the practical effect of halting United States security patrols in the streets of Mogadishu. See Interview with Major Walter G. Sharp, United States Marine Corps, Former International Law Adviser and subsequently Deputy Staff Judge Advocate, Joint Task Force Somalia (Mar. 18, 1994) [hereinafter Sharp Interview]. Because this article argues for a vocabulary based on functional rather than conceptual categories, see *infra* notes 271-75 and accompanying text, it purposefully regards such "mission guidance" as "ROE." This approach is supported by the literal meaning of the JCS definition—that is, prohibiting security patrols "delineate[s] the circumstances and limitations under which United States forces will initiate and or continue combat engagement with other forces encountered"—and by the prior practice of ground units that have labeled such "guidance" as "ROE." See, e.g., Headquarters, 101st Airborne Div., Operations Plan for Operation General Tosta, Appendix I (ROE) to Annex C (1986) (listing the prohibition on combat patrols as a ROE).

evaluative. Yet even continuing in a descriptive vein, one notes that **as** the present method of imparting land force ROE struggles to sort rules according to their purposes it also struggles to draw a sharp conceptual line between war and peace. Combatant commands draft and disseminate wartime rules in the same manner **as** they do peacetime rules; however, the rules themselves differ to reflect the increased justification for using force in wartime operations. Wartime ROE (WROE) permit United States forces to fire on all identified enemy targets, regardless of whether those targets represent actual, immediate threats.⁷⁶ By contrast, the **PROE** merely permit engagement in individual, unit, or national self-defense—the sole legal ground for international use of force during peacetime.⁷⁷

The training of the United States ground component emphasizes WROE rather than PROE. Accordingly, training relies on a bright-line distinction between war and peace even **as** land force doctrine is now blurring that same distinction.⁷⁸ Individual Army privates and officer trainees in all occupational specialties receive instruction and undergo evaluation on the following basic wartime rules: “Attack only combat targets. Use the firepower necessary to accomplish your mission but avoid needless destruction.”⁷⁹ Army trainers also test in rudimentary fashion the trainee’s ability to identify the persons, places, and things that are proper combat targets on the battlefield. Marine Corps training similarly stresses the basic wartime rule of attacking combat targets while seeking to impart some understanding of what those targets properly are.⁸⁰ The *Department of Defense Law of War Program*⁸¹ and numerous law of war publications issued for consumption by soldiers and judge advocates further illustrate the focus on wartime rules.⁸²

⁷⁶For a lucid discussion of the change in the legal consequences of “war” in light of the modern prohibition on interstate use of force, see generally YORAM DINSTEIN, *WAR AGGRESSION, AND SELF-DEFENCE* 140-61 (1988) (concluding that even when the United Nations Security Council deems armed action by a state to be unlawful aggression, individual soldiers on either side who kill enemy soldiers are immunized from criminal prosecution so long as they have complied with the rules of warfare).

⁷⁷See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, cmts. a-h & notes 1-10 (1986); DINSTEIN, *supra* note 76, at 166-67; Bunn, *supra* note 15, at 78-79; O’Connell, *supra* note 15, at 64; Lieutenant Colonel Richard J. Erickson, *Use of Armed Force Abroad: An Operational Law Checklist*, REP., June 1988, at 3.

⁷⁸See FM 100-5, OPERATIONS, *supra* note 9, at 2-1 (depicting “conflict” and “combat” as potentially occurring during operations other than war).

⁷⁹DEP’T OF THE ARMY, SOLDIER TRAINING PUBLICATION NO. 21-1-SMCT, SOLDIER’S MANUAL OF COMMON TASKS, SKILL LEVEL 1 at 726 (1990) [hereinafter COMMON TASKS MANUAL].

⁸⁰See MARINE CORPS BATTLE SKILLS TRAINING HANDBOOK, BOOK 1, PVT-GYSGT, GENERAL MIL. SUBJECTS, 1-1-19 (1993) [hereinafter MARINE BATTLE SKILLS HANDBOOK].

⁸¹DOD DIR. 5100.77, *supra* note 4.

⁸²See, e.g., DEP’T OF ARMY, FIELD MANUAL 27-2, YOUR CONDUCT UNDER THE LAW OF WAR (23 Nov. 1984); FM 27-10, *supra* note 70; DEP’T OF ARMY, PAMPHLET No. 27-1,

4. *Necessity and Proportionality.* —Despite training for war, soldiers often serve outside their warrior roles.⁸³ In these situations.

TREATIES GOVERNING LAND WARFARE (7 Dec. 1956); DEP'T OF ARMY, PAMPHLET No. 27-161-2, INTERNATIONAL LAW VOLUME II (23 Oct. 1962); DEP'T OF ARMY, PAMPHLET No. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1 Sept. 1979); DEP'T OF ARMS, TRAINING CIRCULAR No. 27-10-1, SELECTED PROBLEMS IN THE LAW OF WAR (26 June 1979) [hereinafter TC 27-10-1]; DEP'T OF ARMY, TRAINING CIRCULAR No. 27-10-2, PRISONERS OF WAR (17 Sept. 1991); DEP'T OF ARMY, TRAINING CIRCULAR No. 27-10-3, THE LAW OF WAR (12 Apr. 1985).

The Army regulation addressing soldier training in the rules of engagement focuses exclusively on wartime rules. See DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, Ch. 14 (19 Mar. 1993) [hereinafter AR 350-41]. Indeed, in listing the nine "Soldiers' Rules" to be taught to all entering soldiers, the regulation styles the subject matter as "basic law of war rules:"

- (1) Soldiers fight only enemy combatants.
- (2) Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superiors.
- (3) Soldiers do not kill or torture enemy prisoners of war.
- (4) Soldiers collect and care for the wounded, whether friend or foe.
- (5) Soldiers do not attack medical personnel, facilities, or equipment.
- (6) Soldiers destroy no more than the mission requires.
- (7) Soldiers treat all civilians humanely.
- (8) Soldiers do not steal. Soldiers respect private property and possessions.
- (9) Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superiors.

Id. at para. 14-3b.

A superseded but still influential Army regulation addressing rules of engagement also focuses on training in wartime rules. See DEP'T OF ARMY, REG. 350-216, TRAINING: THE GENEVA CONVENTIONS OF 1949 AND HAGUE CONVENTION No. IV OF 1907, paras. 7-8, (7 Mar. 1975) [hereinafter AR 350-216] (including ROE within the scope of required training, affirming that such training is a command responsibility, and directing that legally qualified personnel will conduct training together with officers having command experience), *superseded* by AR 350-41, *supra*, (29 Jan. 1986). Although superseded, AR 350-216 continues to guide instruction by judge advocates. See OP. LAW HANDBOOK, *supra* note 15, at Q-189. ARMY REGULATION 350-216 addresses the Geneva Conventions of 1949 and the Hague Convention No. IV of 1907, international agreements that apply principally in time of war. Specifically, AR 350-216 outlines the following areas of emphasis for "Training in the Conventions":

- (1) the rights and obligations of United States Army personnel regarding the enemy, other personnel, and property;
- (2) The rights and obligations of United States Army personnel if captured, detained, or retained;
- (3) The requirements of customary and conventional law pertaining to captured, detained, or retained personnel, property, and civilians;
- (4) Probable results of acts of violence against, and inhuman treatment of personnel;
- (5) Illegal orders;
- (6) Rules of engagement;
- (7) War crimes reporting procedures.

AR 350-216, *supra*, at para. 7; *cf.* DOD DIR. 5100.77, *supra* note 4 (requiring that the Law of "War" program must "encompass[] all international law with respect to the conduct of armed conflict, binding on the United States or its individual citizens, either in international treaties and agreements to which the United States is a party, or applicable as customary international law") (emphasis added).

⁸³See, e.g., BARRY M. BLECHMAK & STEPHEN S. KAPLAN, FORCE WITHOUT WAR: UNITED STATES ARMED FORCES AS A POLITICAL INSTRUMENT 3-5 (1978) (analyzing 216 inter-

the present method of imparting ROE urges soldiers to conform their actions to the principles of necessity and proportionality. These principles help define the peacetime justification to use force in self-defense,⁸⁴ and ROE in operations other than war frequently contain restatements of these two principles. The most common PROE restatement of the necessity principle is that friendly forces may engage only those forces committing hostile acts or clearly demonstrating hostile intent.⁸⁵ This formulation—a quite restrictive rule for the use of force—captures the essence of peacetime necessity under international law.⁸⁶ In 1840, Secretary of State Daniel Webster opined, in a passage scholars now cite as international legal authority, that self-defense is justified only in cases in which “the necessity of that self-defense is instant, overwhelming and leaving no choice of means and no moment for deliberation.”⁸⁷ The rule of necessity applies to individuals as well as to military units or sovereign states.⁸⁸

Definitions of “hostile act” and “hostile intent” frequently accompany the necessity rule in the ROE and make it more concrete. Although the *PROE* definitions of these terms bear security classifications that restrict circulation to those who “need to know,”⁸⁹

ventions short of conventional war between 1946 and 1975, many of which included deployment of ground troops).

⁸⁴The principles of necessity and proportionality also help define the broader justification to use force during “war,” though in the wartime context the principles have correspondingly broader formulations. See FM 27-10, *supra* note 70, at 4 (“The prohibitory effect of the law of war is not minimized by ‘military necessity,’ which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”) and at 19 (stating that “the loss of life and damage to property must not be out of proportion to the military advantage to be gained”).

⁸⁵See, e.g., Roach, *supra* note 3, at 49-50.

⁸⁶See, e.g., O’Connell, *supra* note 15, at 170-71; Bunn, *supra* note 15, at 74-75; Roach, *supra* note 3, at 74-75.

⁸⁷2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409-12 (1906), quoted in Bunn, *supra* note 15, at 70. Secretary Webster penned his now famous words in the aftermath of an attack on the United States steamship *Caroline* by Canadian militia in 1837. See generally Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493 (1990) R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

⁸⁸Jennings, *supra* note 87, at 91 (“Even Webster, in his letter of April 24, 1841, the source of the formulation of the classic definition of self-defense, says: ‘It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both.’”); cf. XIII UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, CASE NO. 81, at 149-51 (1949) (“The finding of the Court [to acquit Erich Weiss and Wilhem Mundo, tried on 9-10 November 1945 by United States military commission for the alleged unlawful killing of an American prisoner] is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes.”).

⁸⁹See generally DEP’T OF DEFENSE, DIRECTIVE 5200.1, INFORMATION SECURITY PRO-

their gist is unclassified. A hostile act is “simply the actual use of armed force—attacking.”⁹⁰ Hostile intent “is the threat of imminent use of force.”⁹¹ The precise contents of these definitions become sensitive when the ROE describe specific behaviors as hostile acts or equate particular objective characteristics with hostile intent. For instance, the ROE might define a foreign uniformed soldier aiming a machinegun from behind a prepared firing position as a clear demonstration of hostile intent, regardless of whether that soldier truly intends to harm United States forces.⁹²

Ground force ROE typically restate the principal of proportionality in the form of a requirement that “soldiers will use only the amount of firepower necessary to accomplish the mission.”⁹³ This rule expresses the international legal norm that nations and individuals must limit the intensity, duration, and magnitude of force to what reasonably is required to counter the attack or threat of attack.⁹⁴ The definitions of hostile act and hostile intent, the rule that one or both of them must be present before using force (necessity), and the rule that the use of force must be scaled to the threat (proportionality), constitute the core of what commanders and judge advocates distribute to ground troops as “ROE” in operations other than war.

5. Functional Types of Land Force ROE.—Mere restatement of these core legal principles does not indicate specifically enough the circumstances under which soldiers may fire weapons in national, unit, or individual self-defense. Nor do these principles articulate the myriad restrictions that a commander may impose on a force to serve the nonlegal purposes mentioned above. In practice, the pre-

GRAM (June 7, 1982); DEP'T OF ARMY, REGULATION 380-5, INFORMATION SECURITY PROGRAM para.1-327 (25 Feb. 1988) (defining “need to know” as “[a] determination made by a possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to, or knowledge, or possession of the classified information in order to accomplish lawful and authorized Government purposes”).

⁹⁰Roach, *supra* note 3, at 50

⁹¹*Id.*

⁹²As early as 1975, O'Connell recognized the imprecise boundaries between hostile act and hostile intent when he described the “conundrum” of translating hostile intent into hostile act. See O'CONNELL, *supra* note 15, at 171; see also DWORREN, *supra* note 15, at 9-11. Another way to create a rule with similar but more sweeping effect is to designate a “hostile force”—and therefore permit gunners to target—any soldier of a particular uniform, regardless whether that soldier subjectively wishes to harm United States forces. Commanders at high levels have the authority to declare forces hostile, a measure which when taken effectively transforms PROE into WROE with respect to posture toward the hostile force. See Sagan, *supra* note 15, at 445-46 & n.14.

⁹³Headquarters, 25th Infantry Division (Light), Standing ROE for OPLAN/OPORD Annexes at J-2 (1991) (on file in CLAMO).

⁹⁴See Roach, *supra* note 3, at 50.

sent method of imparting ROE relies on attorneys at numerous levels to participate in targeting cell meetings and ensure that targeting decisions comply with the ROE.⁹⁵ Also in practice, commands insert many specific rules into ROE annexes and soldier cards to elaborate further on the rules of necessity and proportionality and to dictate precise terms of restrictions having little or nothing to do with law.

The specific rules follow no rigorous format, and variations are as numerous as units and missions, but ten functional types have emerged over time. Appendix A describes each type of ROE, provides samples that have appeared in actual ground force plans or in ROE cards, and notes the risks of using each type. Briefly, the ten types are as follows:

Type I—Hostility Criteria. Provide those making decisions on whether to fire with a set of objective factors to assist in determining whether a potential assailant exhibits hostile intent and thus clarify whether shots can be fired before receiving fire.

Type II—Scale of Force/Challenging Procedure. Specify a graduated show of force that ground troops must use in ambiguous situations before resorting to deadly force. Include such measures as giving a verbal warning, using a riot stick, perhaps firing a warning shot, or firing a shot intended to wound. May place limits on the pursuit of an attacker.

Type III—Protection of Property and Foreign Nationals. Detail what and whom may be defended with force aside from the lives of United States soldiers and citizens. Include measures to be taken to prevent crimes in progress or the fleeing of criminals.

Type IV—Weapons Control Status/Alert Conditions. Announce, for air defense assets, a posture for resolving doubts over whether to engage. Announce for units observing alert conditions a series of measures designed to adjust unit readiness for attack to the level of perceived threat. The measures may include some or all of the other functional types of rules.

Type V—Arming Orders. Dictate which soldiers in the force are armed and which have live ammunition. Specify which precise orders given by whom will permit the loading and charging of firearms.

⁹⁵See Green, *supra* note 49, at 64.

Type VI—Approval to Use Weapons Systems. Designate what level commander must approve use of particular weapons systems. Perhaps prohibit use of a weapon entirely.

Type VII—Eyes on Target. Require that the object of fire be observed by one or more human or electronic means.

Type VIII—Territorial or Geographic Restraints. Create geographic zones or areas into which forces may not fire. May designate a territorial—perhaps political—boundary, beyond which forces may neither fire nor enter except perhaps in hot pursuit of an attacking force. Include tactical control measures that coordinate fire and maneuver by means of graphic illustrations on operations map overlays.⁹⁶

Type IX—Restrictions on Manpower. Prescribe numbers and types of soldiers to be committed to a theater or area of operations. Perhaps prohibit use of United States manpower in politically or diplomatically sensitive personnel assignments requiring allied manning.

Type X—Restrictions on Point Targets and Means of Warfare. Prohibit targeting of certain individuals or facilities. May restate basic rules of the law of war for situations in which a hostile force is identified and prolonged armed conflict ensues.

Even though neither military nor legal doctrine recognizes them, the ten functional types furnish an accurate summary of the rules soldiers actually receive. See *Figure 5*.

Under the present method of imparting ROE, subordinate commands and individual soldiers receive some or all of these ten types of specific rules. The ten types are distinct in a practical rather than a logical sense, and a single sentence appearing in an ROE annex or card frequently will blend or combine two or more types. Command judgments about the nature of the mission, intelligence on potential threats, surrounding terrain, strengths and weaknesses of troops, and time available to prepare for threats will dictate which specific rules the soldiers receive. For instance, the commander of a noncombatant evacuation operation may direct troops to defend with deadly force certain mission essential equipment (Type III) and remind aircraft not to overfly neutral third-party airspace (Type VIII), while the commander of a humanitarian assistance operation

⁹⁶FM 101-5-1, *supra* note 3, at 1-19.

RULES OF ENGAGEMENT

BASIC CATEGORIES

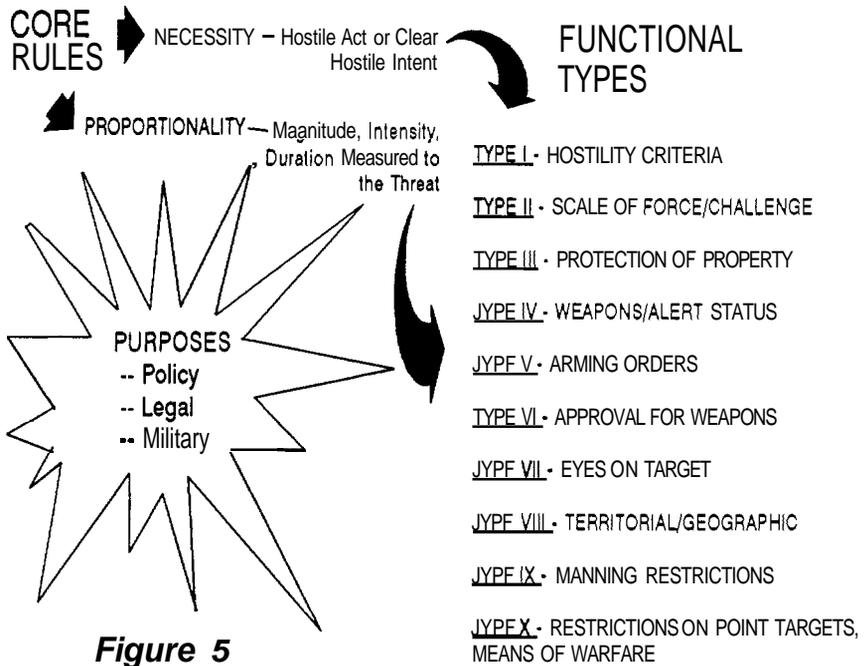


Figure 5

may issue a preferred graduated show of force to be used against unarmed but hostile civilians (Type 11).

6. The Self-Defense Boilerplate—In addition to the basic rules of necessity and proportionality and the ten specific types of rules, the present method of imparting ROE features a prominent notice regarding the right of self-defense. This cautionary rule typically appears at the very beginning of written ROE, often in capital letters. One common version states that "nothing in these rules limits the rights of individual soldiers to defend themselves or the rights and responsibilities of leaders to defend their units."⁹⁷ Irrespective of mission or unit, this or similar boilerplate appears in every ROE annex and card prepared for ground forces. Accordingly, it represents perhaps the only constant in the present method of imparting ROE to soldiers.

B. Historical Background of the Present Method

What are the origins of ROE, and how did the present method

⁹⁷Headquarters, XVIIIth Airborne Corps, *Peacetime Rules of Engagement for Operation Desert Shield (1990)* (soldier card).

of imparting ROE to ground forces come about? One might begin answering these questions by identifying predecessors of modern ROE in tactical orders given on battlefields long ago. For example, on June 17, 1775, in the Battle of Bunker Hill, William Prescott issued his now famous order, "Don't one of you fire until you see the whites of their eyes."⁹⁸ That order, because it specified the circumstances under which friendly forces could initiate combat with other forces, would qualify today as a rule of engagement.⁹⁹

One also might search for the origins of ROE in seminal writings on military strategy. The proposition of Clausewitz that war is but a means of achieving political objectives¹⁰⁰ is an obvious ancestor to the modern notion that ROE function as devices to help bring military operations in line with political purposes.¹⁰¹ Strategy sets fundamental conditions for conflict, establishes goals in theaters of operations, assigns forces, and provides assets, whereas ROE set specific concrete limits on weapons and targets to serve these strategic aims.¹⁰² Consequently, the link between strategy and ROE is both strong and conspicuous.

Yet ROE are distinctly modern, as is the present method of imparting them. Although legendary battlefield orders and early writings on strategy are plausible precursors, the present method finds its most important roots no further back in history than the early 1950s. The method builds on precedents laid down by all of the military services since the Korean War.

In the period since that conflict three factors have converged, forcing senior American leaders to issue ROE to harness military action to political ends more completely. First, weapons of mass destruction have been available to competing sovereign states, creating the specter of nuclear holocaust and the incentive to prevent

⁹⁸JOHN BARTLETT, *FAMILIAR QUOTATIONS* 446 & n.1 (Emily M. Beck, ed., 14th ed., Little, Brown and Co. 1968) (attributing slight variations of the same statement to Prince Charles of Prussia, Israel Putnam, and Frederick the Great).

⁹⁹*See, e.g.*, Phillips, *supra* note 15, at 5 (citing Prescott's remark as "a classic instance of ROE"); Morris, *supra* note 15, at 14 (referring to Prescott's remark as "arguably a rule of engagement").

¹⁰⁰KARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976)(1832).

¹⁰¹*See, e.g.*, DEP'T OF AIR FORCE, *PROJECT CONTEMPORARY HISTORICAL EVALUATION FOR COMBAT OPERATIONS (CHECO) REPORT: RULES OF ENGAGEMENT 1 JANUARY 1966-1 NOVEMBER 1969* (1969), *reprinted in* 131 CONG. REC. 5248, 5249 (1985) [hereinafter CHECO REPORT 1969]; MAJOR MICHAEL A. BURTON, UNITED STATES ARMY COMMAND AND GENERAL STAFF COLLEGE, SCHOOL OF ADVANCED MILITARY STUDIES, *DEFENSE TECHNICAL INFORMATION FILE NO. AD-A184 917, RULES OF ENGAGEMENT: WHAT IS THE RELATIONSHIP BETWEEN RULES OF ENGAGEMENT AND THE DESIGN OF OPERATIONS?* 8 (1987); Morris, *supra* note 15, at 12-13.

¹⁰²*See* BURTON, *supra* note 101, at 8-9.

minor incidents and conflicts from escalating.¹⁰³ Second, technological advances in communications and information processing have vastly increased a central authority's ability to direct the actions of subordinates, even though these same advances have not achieved the sort of "perfect, real-time" information¹⁰⁴ that conceivably would make ROE unnecessary. Third, an aggressive and skeptical news media **has** emerged, willing to question the use of military force, capable of projecting the consequences of this force into millions of living rooms, and prepared to focus the wrath of the American people on a political leader who appears to have lost control.¹⁰⁵

1. Development of ROE for Air Forces.—Although not yet referred to **as** such, modern rules of engagement first appeared during the air campaign over North Korea in 1950, when General MacArthur received orders from Washington that American bomber aircraft were neither to enter Chinese air space nor destroy the Suiho Dam on the North Korean side of the Yalu River.¹⁰⁶ While flying sorties to destroy bridges over the Yalu, bomber pilots were to approach their targets on an angle parallel to the North Korean-China border so as to prevent overflight of Chinese territory. Historians have documented well the Truman Administration's preoccupation with the risk that the United Nations' military response in Korea, begun in July of 1950, could escalate into nuclear conflict. General Omar Bradley, then Chairman of the JCS, speculated that the restrictions on the Yalu bombings may have been "the first time

¹⁰³See generally HERMAN KAHN, *ON ESCALATION* 94-133 (1965)(discussing the "nuclear threshold").

¹⁰⁴SULLIVAN & DUBIK, *supra* note 14, at 17 & n.34 (citing MARTIN VAN CREVELD, *COMMAND IN WAR* 261-75 (1985), RICHARD SIMPKIN, *THE RACE TO THE SWIFT: THOUGHTS ON TWENTY-FIRST CENTURY WARFARE* 227-55 (1985), and CLAUSEWITZ, *supra* note 100, at 100-21).

¹⁰⁵See generally Peter B. Clark, *The Opinion Machine: Intellectuals, The Mass Media and American Government*, in *THE MASS MEDIA AND MODERN DEMOCRACY* 48 (Harry M. Clor, ed. 1974); PETER BRAESTRUP, *BIG STORY: HOW THE AMERICAN PRESS AND TELEVISION REPORTED AND INTERPRETED THE CRISIS OF TET 1968 IN VIETNAM AND WASHINGTON (1977)* MICHAEL J. ARLEN, *THE LIVING ROOM WAR* (1982).

¹⁰⁶See Morris, *supra* note 15, at 17-20. Unless otherwise noted, this two paragraph overview of Air Force ROE development prior to the Vietnam conflict is based on Morris, *supra* note 15, at 17-26. In addition to completing original research in the archives of the military services and conducting interviews with living participants in that early development, Major Morris' sources included *CRISIS STABILITY AND NUCLEAR WAR* (Kurt Gottfried and Bruce G. Blair, eds. 1947), Martin Lichterman, *To the Yalu and Back*, in *AMERICAN CIVIL-MILITARY DECISIONS: A BOOK OF CASE STUDIES* 580, 581, 586, 596, 604-05, 634 n.7 (Harold Stein, ed. 1963), DAVID REES, *KOREA: THE LIMITED WAR* xi, 378-79, WILLIAM V. O'BRIEN, *THE CONDUCT OF A JUST AND LIMITED WAR* 245 (1981), OMAR N. BRADLEY & CLAY BLAIR, *A GENERAL'S LIFE* 585 (1983), ROBERT F. FLITRELL, *THE UNITED STATES AIR FORCE IN KOREA: 1950-1963* 208-11 (1961), DOUGLAS MACARTHUR, *REMINISCENCES* 330, 389-95 (1964), ROBERT E. OSGOOD, *LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY* (1957), Sagan, *supra* note 15, at 445 & n.52, 464 n.7, and Commander Joseph F. Bouchard, *Use of Force in Crisis: A Theory of Stratified Crisis Interaction* 235-90 (1989) (on file in Stanford University Library).

the JCS had ever overridden a theater commander on a tactical operation."¹⁰⁷ In the most memorable American illustration of civilian control over the military since George Washington defused the Newburgh Conspiracy, President Truman relieved MacArthur because the general did not follow the rules of engagement.

Contemporaneous dogfights between American and Soviet aircraft, however, probably provided the impetus for the Pentagon to coin the term "ROE." Commentators have reconstructed, from Korean War documents now declassified, a tense series of incidents between aircraft of the two nuclear powers. During the period from September 3, 1950 to July 23, 1953, three United States aircraft and no fewer than three Soviet aircraft were downed in at least five separate air-to-air combat engagements. Indeed, the numbers of downed aircraft and engagements may have been much higher. These highly charged confrontations likely prodded the JCS to issue, on November 23, 1954, a set of "Intercept and Engagement Instructions," which Air Force and Navy staffers termed ROE. In 1958, the JCS formally adopted and defined the term "rule of engagement."

The Vietnam conflict accelerated the development of ROE for American air forces. Tightly restricted by a provision of the 1954 Geneva Accords which prohibited arms transfers into Vietnam,¹⁰⁸ the Kennedy Administration introduced United States Air Force aircraft and crews into the Republic of Vietnam in 1961 under rules designed to conceal American assistance. For example, the ROE required American aircraft to fly with a combined United States and Vietnamese crew, to refrain from conducting armed reconnaissance missions, and to carry markings of the Vietnamese Air Force.¹⁰⁹ Even though by 1964 the United States had abandoned the position

¹⁰⁷BRADLEY & BLAIR, *supra* note 106, at 585.

¹⁰⁸The Geneva Accords were signed on 20 July 1954 between France and the government of Ho Chi Minh. They ended the war between those two parties and divided the State of Vietnam into northern and southern partitions. See generally Khuyen, *supra* note 38, at 5. Although the United States was not a signatory to the Accords, both the Eisenhower and Kennedy administrations decided to abide by them. See Memorandum for Record, by Lieutenant Colonel E.B. Roberts, Assistant Secretary of the United States Army General Staff, subject: Report of Chief of Staff's Trip to the Far East Southeast Asia, and Pacific Areas, 16 March-12 April 1957, para. 6 (Apr. 16, 1957), reprinted in DEP'T OF STATE, I FOREIGN RELATIONS OF THE UNITED STATES: VIETNAM 783-84 (1985); see also DEP'T OF AIR FORCE, PROJECT CONTEMPORARY HISTORICAL EVALUATION FOR COMBAT OPERATIONS (CHECO)REPORT: EVOLUTION OF THE RULES OF ENGAGEMENT FOR SOUTHEAST ASIA (1965), reprinted in 131 CONG. REC. 4636, 4637 (1985) [hereinafter CHECO REPORT 1965] (quoting Chapter III, Article 17(a) of the Accords: "With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any reinforcements in the form of all types of arms, munitions, and other war material, such as combat aircraft, naval craft, pieces ordinance, jet engines and jet weapons and armored vehicles, is prohibited.").

¹⁰⁹See CHECO REPORT 1965, *supra* note 108, at 4637 (citing Military Assistance Command Vietnam Directive Number 62 of 24 November 1962 and referring to these

that American combat forces were not involved in the Vietnam War, the rules of engagement grew even more complex and restrictive as national policy evolved in that theater.

The policy of gradualism, implemented by the Rolling Thunder bombing campaign over North Vietnam between 1965 and 1968, resulted in ROE of unprecedented detail and restrictiveness. A 1969 Air Force review of the rules in force during 1966 summarized a portion of the ROE on targeting in and around Hanoi and Haiphong as follows:

Attacks on populated areas and on certain types of targets, such as hydropower plants, locks and dams, fishing boats, sampans, and military barracks were prohibited. The suppression of [surface-to-air missiles] and gun-laying radar systems was prohibited in this area as were attacks on NVN air bases from which attacking aircraft might be operating. In military eyes, these restrictions had the effect of creating a haven in the northeast quadrant of [North Vietnam] into which the enemy could with impunity import vital war materials, construct sanctuaries for

constraints as “operational restrictions”). Note that the “ROE” pertaining to air operations in Southeast Asia actually had three separate names:

. . . there were three categories of rules which controlled the employment of airpower in the Southeast Asia (SEA) conflict. *The Rules of Engagement* (ROE) were promulgated by the Joint Chiefs of Staff and sent through channels to the operational commands. Covering all of SEA, these Rules of Engagement defined: geographical limits of SEA, territorial airspace, territorial seas, and international seas and airspace; definitions of friendly forces, hostile forces, hostile acts, hostile aircraft, immediate pursuit, and hostile vessels; rules governing what could be attacked by United States aircraft, under what conditions immediate pursuit could be conducted, how declarations of a “hostile” should be handled, and the conditions of self-defense.

The second set of rules was designated *Operating Restrictions*, which were contained in the CINCPAC Basic Operations Orders. These rules included prohibitions against striking locks, dams, hydropower plants, fishing boats, houseboats, and naval craft in certain areas; prohibitions against strikes in certain defined areas such as the Chinese Communist (ChiCom) buffer zone or the Hanoi/Haiphong restricted areas; conditions under which targets might be struck, such as validation requirements, when FACs were required, distances from motorable roads.

Finally, *Operating Rules* . . . concerned the use of Forward Air Controllers (FACs), the return of ground fire, the use of the AGM-45 (SHRIKE) missile, restrictions against mine-type munitions, and the requirements for navigational position determination.

Although, in theory, these three types of rules were distinct, in practice, they were almost always referred to collectively as “Rules of Engagement.”

CHECOPORT 1969, *supra* note 101, at 5248 (emphasis added).

his aircraft, and prop his [anti-aircraft] defenses around the cities of Hanoi and Haiphong.¹¹⁰

In statements to newsmen, President Johnson expressly sought and gained political value from strict adherence to the ROE.¹¹¹

After a series of highly publicized inadvertent bombings of Laotian and Vietnamese villages in March, 1967, the ROE in southern Laos became almost as restrictive as the outright prohibition in effect near Hanoi and Haiphong. North Vietnam aggressively maintained a supply line running through the southern Laotian panhandle into South Vietnam. Still, all United States air strikes along that supply line required the double safeguard of approval by the American Embassy in Laos and control by a forward air controller on the ground. Because of these restrictions, an average time of fifteen-and-a-half days elapsed between identification of a target area in Laos and receipt of clearance to strike. Not surprisingly, these pauses often sacrificed the effectiveness of bombing, which required prompt responses to fresh intelligence.¹¹²

Vietnam created a high water mark of political involvement in day-to-day operations of American air forces.¹¹³ Depending on perceived progress at the negotiating table, political leaders alternated between imposing more and less restrictive ROE until the end of American participation in that war. In general, the ROE restricted military operations far more than did international laws of armed conflict. As President Truman had ended General MacArthur's career a generation earlier, political leaders ended the career of one Air Force general for alleged ROE violations.¹¹⁴ Since the Vietnam

¹¹⁰CHECO REPORT 1969, *supra* note 101 at 5249.

¹¹¹*See, e.g.*, CHECO REPORT 1969, *supra* note 101, at 5249 (quoting the President's statement to newsmen on 5 July 1966 that "[w]e were very careful not to get out of the target area, in order not to affect civilian populations").

¹¹²*See, e.g.*, J. Terry Emerson, *Making War Without Will: Vietnam Rules of Engagement*, in THE VIETNAM DEBATE: A FRESH LOOK AT THE ARGUMENTS 161, 164 (John N. Moore, ed. 1990).

¹¹³*See* W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV., Jan.-Feb. 1982, at 4, 14 [hereinafter Parks, *Rolling Thunder*] (describing the process by which target lists were forwarded to the Tuesday luncheons at the White House, where in the frequent absence of military advisers, the President and other attendees selected targets).

¹¹⁴This was Air Force General Jack Lavelle, Commander of 7th Air Force, who during the last week of March, 1972 "was accused of conducting 28 raids against the [North Vietnam] airfields and radar sites in violation of White House rules and at a time when the Administration was engaged in delicate peace negotiations with Hanoi." DEP'T OF AIR FORCE, PROJECT CONTEMPORARY HISTORICAL EVALUATION FOR COMBAT OPERATIONS (CHECO) REPORT: RULES OF ENGAGEMENT, NOVEMBER 1969-SEPTEMBER 1972 (1973), reprinted in 131 CONG. REC. 5278, 5283 (1985) [hereinafter CHECO REPORT 1973].

War, a debate has raged about whether the ROE created thousands of unnecessary combat casualties and sacrificed victory.¹¹⁵

Perhaps in part due to that debate and in part due to different styles of governance, administrations since the Vietnam War have never again linked ROE for air forces so tightly to immediate policy aims. Loosening has occurred despite a tense Cold War standoff with the Soviet Union that would continue until 1990, an unmanned satellite program that would improve communications between Washington and aircraft worldwide, and a press corps that would grow more aggressive and skeptical of military missteps. During the air campaign in the 1991 conflict with Iraq, ROE were generally no more restrictive than international law.¹¹⁶ On a smaller scale, however, the removal of short-term policy aims from ROE had been underway for several years. An engagement in August, 1981 over the Gulf of Sidra illustrated this development, when American F-14s downed two Libyan Su-22 Fighters in self-defense under ROE that had removed many restrictions unrelated to international law or military effectiveness.¹¹⁷

2. Development of ROE for Seaborne Forces.—The ROE exercised over the Gulf of Sidra in 1981 were forerunners to the present *PROE*, which bear the stamp of the United States Navy more than any other service. Modern maritime ROE developed around the service-specific question of whether United States ships were obliged to “take the first hit,” although as with the air forces it was Cold War tension, ever-improving communications, and emerging skepticism in the news media that made the question an urgent one. Long accustomed to operational conditions that permitted the fleet to receive initial fire from hostile vessels and *then* mount an effective—and easily justified—response,¹¹⁸ naval leaders grew increasingly concerned in the late 1960s that tactical advantage could pass irrevocably to a hostile force which fired first.¹¹⁹

¹¹⁵See, e.g., 131 CONG. REC. 5248 (1985) (statement of Sen. Goldwater) (“I do not derogate the principle of civilian control of the military, but I think it should be recognized that once civilians decide on war, the result of placing military strategy and tactics under the day-to-day direction of unskilled amateurs may be greater sacrifice in blood and the denial of a military victory”); Emerson, *supra* note 112; Colonel W. Hays Parks, *No More Vietnams*, U.S. NAVAL INST. PROC., Mar. 91, at 27 [hereinafter Parks, *No More*]; Parks, *Righting*, *supra* note 15; Parks, *Rolling Thunder*, *supra* note 113.

¹¹⁶See Lieutenant Colonel John G. Humphries, *Operations Law and the Rules of Engagement*, AIRPOWER J., Fall 1992, at 25, 27; Parks, *No More*, *supra* note 115, at 27.

¹¹⁷See BOLGER, AMERICANS AT WAR, *supra* note 22, at 169-90; Bunn, *supra* note 15, at 74; Commander Dennis R. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. NAVAL INST. PROC., Jan. 1982, at 26.

¹¹⁸See O’CONNELL, *supra* note 15, at 70; Bunn, *supra* note 15, at 74.

¹¹⁹See O’CONNELL, *supra* note 15, at 70-71 (describing the alarm caused to naval staffs by 1967 sinking of the Israeli destroyer Eilat by Styx missiles); Bunn, *supra* note

The Royal Navy had been wrestling with similar questions for years, and the eventual American approach to ROE strongly resembled British naval doctrine spawned in the mid-1960s.¹²⁰ Writing in 1975, D.P. O'Connell noticed that over the preceding decade the Royal fleet had placed increasing emphasis on rules "which specify in detail the circumstances under which fire may be opened."¹²¹ O'Connell regarded these "rules of engagement" as the practical implementation of both international law and national policy.¹²² He sought to provide a "theory of graduated rules of engagement"¹²³ to assist planners in preparing precise advance guidance to naval commanders, and in so doing, avoid "the dangers of uncontrolled escalation."¹²⁴

O'Connell cited a series of confrontations between British and various foreign vessels in and near Malaysian territorial seas in 1963 and 1964 to illustrate the hazards of improvising rules of engagement. The situation was one of high political tension. The state of Malaysia formed on September 16, 1963 in the face of hostility from its neighbor, Indonesia, which claimed that Malaysia had absorbed unwilling populations from two islands. Indonesia set out to undermine the new Malaysian state by diplomatic, economic, and even military pressure, as Indonesian seaborne and airborne commandos made armed incursions into Malaysian territory. The Royal Navy took an active part in the defense of Malaysia, a former British colony.¹²⁵

15, at 74; Morris, *supra* note 15, at 27 & n.62. See generally SECRET GERALD A. BROWN & J. PALMER SMITH, RULES OF ENGAGEMENT: VITAL LINK OR UNNECESSARY BURDEN?, DEFENSE TECHNICAL INFORMATION CENTER DOCUMENT No. ADC 029 566 (1982) (charting the early development of seaborne ROE).

¹²⁰This is not to say that seaborne ROE were a British invention. As early as the Bay of Pigs invasion in April 1961, United States naval forces operated under strict ROE to ensure that United States escort ships for the Cuban Expeditionary Force would not engage Cuban aircraft prematurely. See Sagan, *supra* note 15, at 451-53. However, the evolution of ROE in the British navy undoubtedly had a profound influence on the contemporaneous evolution of ROE occurring in the United States Navy. See Roach, *supra* note 3 (frequently and prominently citing to O'Connell for authority); Phillips, *supra* note 15, at 6 (referring to O'Connell's chapter on Rules of Engagement as a "seminal article[]" in the area of ROE); Elective Course SE 211 taught at the United States Naval War College on Rules of Engagement: Crisis Management and Conflict Control, Week No. 5 of the Syllabus (1987) (assigning fleet officers taking the course "[t]he ROE chapter of (O'Connell's]classic text") (on file with the CLAMO).

¹²¹O'Connell, *supra* note 15, at 169.

¹²²*Id.*

¹²³*Id.* at 171.

¹²⁴*Id.* at 170.

¹²⁵O'Connell provides little background information pertaining to the Malaysian-Indonesian conflict. The historical matters presented in this paragraph follow the information set forth in 14 ENCYCLOPEDIA BRITANNICA 690 (1969) (article on Malaysia).

The guidance to ship captains in the area of operations was that they were to interrogate 126 vessels on the high seas that acted suspiciously or fled when challenged. They were to use force against vessels in Malaysian territorial seas exhibiting the same behavior. Finally, they were to fire on any Indonesian vessels that refused to stop in Malaysian waters or that fired against any target in Malaysian territory.

O'Connell viewed these rules as dangerous. Although they partially accounted for differences in the legal character of the high seas and the territorial seas,¹²⁷ and for limitations on the right of innocent passage,¹²⁸ they expressly permitted overaggressive action

¹²⁶As employed here, "interrogate" refers to the hailing and questioning of the encountered vessel via radio transmission. The questions will typically consist of requests for the radio operator to state the vessel's port of origin, flag, registry, international call sign, cargo, last port of call, next port of call, and final destination. See, e.g., Memorandum, Commander, United States Surface Warfare Development Group, TACMEMO ZZ00050-1-91, Marine Interdiction Force Procedures, para. 5.3.1 (29 Mar. 1991) (cancelled 29 Mar. 1993).

¹²⁷The traditional legal classification of the world's oceans contained three broad categories: internal waters, territorial seas, and high seas. See, e.g., DEP'T OF NAVY, NAVAL WAR PUBLICATION 9, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 1.1 (July 1987) [hereinafter NWP 9, 1987 EDITION]. Internal waters are those waters

landward of the baseline from which the territorial sea is measured. Internal waters consist of lakes, rivers, some bays, harbors, some canals, and lagoons and have the same legal character as the land itself. There is no right of innocent passage in internal waters, and, unless in distress, ships and aircraft may not enter internal waters without the permission of the coastal or island nation.

Id. at para. 1.4.1. The territorial sea, the next category of waters moving in a seaward direction, is "a belt of ocean from between 3 to 12 nautical miles in width and subject both to the coastal or island nation's sovereignty and to certain navigational rights reserved to the international community." *Id.* at para. 1.4.2. Beyond territorial seas are the high seas, on which freedoms of navigation are preserved to the international community, *id.* at 1.5, subject to the inherent right of one vessel to defend itself against hostile actions of another. See O'CONNELL, *supra* note 15, at 54.

¹²⁸Under customary international law, ships of all nations enjoy the right of innocent passage, which is the right to pass

through the territorial sea for the purpose of continuous and expeditious traversing of that sea without entering internal waters, or of proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation or as rendered necessary by force majeure or distress. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal or island nation. Among the military activities considered to be prejudicial to peace, good order, and security, and therefore inconsistent with innocent passage are

1. Any threat or the use of force against the sovereignty, territorial integrity, or political independence of the coastal or island nation;
2. Any exercise or practice with weapons of any kind;
3. The launching, landing, or taking on board of aircraft or any military device;

and generated a series of emergency decisions. Should the warships of a nation seeking peacefully and gradually to extricate itself from the crushing responsibilities of a worldwide colonial empire be boarding vessels of other nations on the high seas? Should they be firing on merely "suspicious" vessels in territorial waters, to which the general rule of innocent passage applies? The captains improvised, and no international incidents erupted. Because of the confrontations during this period, however, "the concept of rules of engagement, as instruments of carefully devised policy, entered naval doctrine with a view to controlling events rather than reacting to them."¹²⁹

In 1978, the United States Navy embarked on its own ambitious project to develop an authoritative set of ROE while laying to rest the notion that its ships could fire only if fired on. Admiral Hayward, the Chief of Naval Operations, set out to standardize the guidance given to seaborne captains on the use of force without restricting the flexibility to respond to a changing crisis.¹³⁰ He directed a study, conducted by the Center for Naval Analyses, that generated the Worldwide Peacetime Rules of Engagement for Seaborne Forces (PMROE). The JCS approved the PMROE in 1981, and the **F-14** pilots of Task Force 60 exercised them the same year over the Gulf of Sidra.

Admiral Crowe, CINC of Pacific Command and eventual CJCS, used the PMROE as a model for the all-service *PROE* that Secretary of Defense Weinberger approved in June, 1986 and that the JCS issued soon afterwards.¹³¹ The JCS made minor refinements when it updated the *PROE* in 1988. Yet these refinements came only after two incidents in the Persian Gulf had dramatically highlighted both the chill ROE may cast on military initiative and the inherently lim-

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4. Intelligence collection activities detrimental to the security of that coastal or island nation;
 5. The carrying out of research or survey activities.

The coastal or island nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the uses of force.

NWP 9, 1987 EDITION, *supra* note 127, at 2.3.2.1. See generally Lieutenant Commander John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992) (analyzing the right of innocent passage as codified in the 1982 United Nations Convention on the Law of the Sea in the context of a United States-Soviet incident in 1988).

¹²⁹O'CONNELL, *supra* note 15, at 174.

¹³⁰See Parks, *Righting*, *supra* note 15, at 84.

¹³¹See Morris, *supra* note 15, at 27-29; see also Bob Woodward, *The Admiral of Washington*, WASH. POST, Sept. 24, 1989, at 18:2 (paraphrasing Admiral Crowe's belief that because of the *PROE* "no longer did the United States military man have to be shot at before he could defend himself").

ited impact ROE will have on decision-makers once a crisis is underway.

According to some commentators, the attack on the *USS Stark* showed that even ROE incorporating the right of anticipatory self-defense can encourage an overabundance of caution when the same ROE also appear to set elaborate preconditions for the exercise of that right.¹³² On May 17, 1987, thirty-seven United States sailors died when two Exocet missiles fired by an Iraqi Air Force Mirage F-1 aircraft struck the *Stark*, a frigate on escort patrol duty in the Persian Gulf.¹³³

Although the ROE—because they incorporated the basic *PROE* formulations of necessity and proportionality—permitted the *Stark's*

¹³²For a more complete discussion of the circumstances surrounding the *Stark* incident, see HOUSE COMM. ON ARMED SERVICES, REPORT ON THE STAFF INVESTIGATION INTO THE IRAQI ATTACK ON THE *USS Stark*, 100th Cong., 1st Sess. 12–14 (Comm. Print 1987) [hereinafter HOUSE REPORT ON *Stark*]; REAR ADMIRAL GRANT SHARP, DEP'T OF NAVY, FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE ATTACK ON THE *USS Stark* ON 17 MAY 1987 (1987) (unclassified version); HAYES, *supra* note 15, at 40–44; Sagan, *supra* note 15, at 456–58; Michael Vlahos, *The Stark Report*, U.S. NAVAL INST. PROC., May 1988, at 64–67.

Two of the “commentators” referred to in the text are Bradd Hayes and Scott Sagan. Hayes writes,

That a significant number of naval commanders viewed the rules of engagement in effect at the time of the *Stark* incident as restrictive and reactive could be seen in their reaction to revision efforts following the incident. Navy officers insisted that in revising the rules of engagement “the main point is to insure that ship captains are authorized to shoot down hostile aircraft.” The implication was that they didn’t feel they had sufficient authority before the *Stark* attack. As a matter of argument, the authority to shoot down hostile aircraft really didn’t change. Navy captains had always had that authority. What changed were the formal criteria for determining whether an aircraft was hostile, the mindset that recognized an increased sense of danger, and the fate of the *Stark's* commanding officer in the attack’s aftermath.

HAYES, *supra* note 15, at 43–44 (quoting John H. Cushman, Jr., *United States Expecting to Send Larger Cruises to Gulf*, N.Y. TIMES, May 31, 1987, at A6). Sagan writes,

The fact that important changes were made in the ROE for United States Persian Gulf forces immediately after the *Stark* incident, however, belies [the official Navy report’s] confident assessment that appropriate rules of engagement existed prior to May 17. The existing ROE, coupled with other communications that stressed the importance of avoiding provocative acts, bear at least a modicum of responsibility for the outcome of this incident.

Sagan, *supra* note 15, at 456–57. Sagan also later writes,

Thus, although the *Stark* had “technical authority” to shoot down any potentially hostile plane that approached it with apparent hostile intent, the distance set for radio warning contacts, the rules for repeated attempts at warning and identification, and the suggestion to fire warning shots all guided officers toward quite conservative judgments concerning whether or when to attack preemptively.

Sagan, *supra* note 15, at 457 (quoting HOUSE REPORT ON *Stark*, *supra*, at 1).

¹³³See Sagan, *supra* note 15, at 456.

captain to use force against any aircraft that either committed a hostile act or displayed hostile intent, they also specified a graduated scale of force that may have encouraged conservative judgments about whether to attack preemptively.¹³⁴ The Navy accurately identified the immediate causes of the missile hit to be warning and weapons system failures, as well as poor tactical judgments by individual officers. Understandably, the Navy thus blamed the *Stark's* captain, rather than the ROE, for the American deaths. However, the combatant commander and the JCS subsequently accelerated the sequence of measures along the scale of force¹³⁵ and added specific hostility criteria¹³⁶ to the Persian Gulf ROE. In doing so, these authorities implicitly conceded that the previous ROE were subject to restrictive misinterpretation, even if the *Stark's* captain could not reasonably avail himself of that excuse.

The downing of a commercial Iranian Airbus by the *USS Vincennes* only thirteen months later kindled attempts to pin part of the blame on "looser" ROE, while the official investigation found that stress-induced operator errors and psychological distortions of data were the major causes for the tragedy.¹³⁷ On July 3, 1988, the *Vincennes* fired two missiles at Iran Air Flight 655, destroying the civilian aircraft at 13,500 feet and killing all 290 people on board. Commentators have argued plausibly that because the revised ROE

¹³⁴ Among the measures in the graduated show of force were the following: Potentially hostile contacts that appear to be approaching within specified distances of United States units should be requested to identify themselves and state their intentions . . . Commanders are also directed not to stop if one attempt to attract the attention of an approaching contact has not elicited a response to their radio warnings. They should take graduated actions in attempting to attract the attention of the approaching contact, including training guns and firing warning shots."

HOUSE REPORT ON *Stark*, *supra* note 132, at 4, quoted in Sagan, *supra* note 15, at 457.

¹³⁵ The distance at which commanders were to begin interrogating and warning approaching aircraft, and engaging them if necessary, was set further away to prevent successful attacks on United States ships by long-range missiles. See Sagan, *supra* note 15, at 458 & n.73.

¹³⁶ Secretary of Defense Weinberger gave examples of these hostility criteria in a report to Congress:

Any aircraft or surface ship that maneuvers into a position where it could fire a missile, drop a bomb, or use gunfire on a ship is demonstrating evidence of hostile intent. Also a radar lock-on to a ship from any weapons system fire control radar that can guide missiles or gunfire is demonstrating hostile intent.

CASPAR W. WEINBERGER, OFFICE OF THE SECRETARY OF DEFENSE, A REPORT TO CONGRESS ON SECURITY ARRANGEMENTS IN THE PERSIAN GULF 17 (Apr. 27, 1988), quoted in Sagan, *supra* note 15, at 458.

¹³⁷ See HAYES, *supra* note 15, at 54-56; Parks, *Righting*, *supra* note 15, at 84; Sagan, *supra* note 15, at 459-61. Primary source materials pertaining to the incident are contained in DEP'T OF DEFENSE, FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DOWNING OF IRAN AIR FLIGHT 655 ON 3 JULY 1988 (1988) [hereinafter DOD VINCENNES REPORT].

enabled the Vincennes captain to equate with hostile intent the Airbus' failure to respond to a warning, they formed a "but for" cause of the decision to fire.¹³⁸ Yet the direct causes lay elsewhere. Sailors in the Vincennes' combat information center received erroneous data that the Airbus was a military aircraft because one sailor did not adjust the instrument that would have displayed Flight 655's commercial status and because he also failed to consult readily available air traffic schedules. The crew then fell prey to "scenario fulfillment" when it dismissed accurate information in favor of reinforcing its erroneous belief that the aircraft was a hostile F-14.¹³⁹ The captain gave the order to fire based on the resulting faulty information that the crew relayed to him.

3. Development of ROE for Land Forces.—While America's air and sea forces developed ROE for tense encounters that could occur at any time and then escalate rapidly into nuclear war, the ground component trained for mid-intensity conventional war and developed its ROE for every other type of operation on an "as needed" basis. Also, while aircraft and ships on duty around the clock worldwide could conceivably be expected to fire on a Soviet plane or vessel purely in national self-defense,¹⁴⁰ these scenarios were unlikely to confront land forces, whose main defensive concerns centered on individuals or units. Accordingly, development of ROE in the land forces was less preoccupied with rapid escalation into nuclear holocaust. Instead, the dominant influences were the improved communications between Washington and field commanders, the still imperfect communications between those commanders and frequently inexperienced individual soldiers, and the growing distrust between the military and news media.

Even though accurately labeled by historians as a limited war,¹⁴¹ the Korean conflict that United States ground forces fought was intense and deadly. Unrestrained by orders on either side resembling modern ROE, the ground fighting killed or wounded thirty

¹³⁸ See Sagan, *supra* note 15, at 461.

¹³⁹ DOD VINCENNES REPORT, *supra* note 137, at 45, quoted in Sagan, *supra* note 15, at 460.

¹⁴⁰ Firing in national self-defense is a use of force

to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other United States forces not under [the decision-maker's] command.

Roach, *supra* note 3, at 49. A situation of purely national—as opposed to unit or individual—self-defense arises during regional or global tensions in which the commander must make the decision whether to fire despite the fact that his particular unit has neither suffered a hostile act nor witnessed hostile intent.

¹⁴¹ See, e.g., ROBERT OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY (1957); RUSSELL F. WIEGLEY, HISTORY OF THE UNITED STATES ARMY 619 & n.24 (1967).

thousand Americans per year.¹⁴² Additionally, American ground troops fired all available conventional weapons. Despite facing in North Korean and Chinese infiltrators an unconventional foe, the United States Army made maximum use of superior firepower against two identifiable hostile forces. Americans, quite appropriately, shot these forces on sight with no deliberations on the subtleties of hostile intent.

Even later in the decade when nearly 15,000 American ground troops deployed on a politically sensitive mission in Lebanon, the term "ROE" had not yet entered the language of the soldier. This was not due to any lack of restrictions on firing: the objective of maintaining urban peace and frustrating communist takeover of a land recently torn by civil war demanded extreme fire discipline on the part of individual riflemen.¹⁴³ Yet while air force pilots by this time were conforming their responses to "ROE,"¹⁴⁴ troops in Lebanon during the 1958 "Bluebat" operation merely followed a "standing order . . . not to return fire unless they had a clear target."¹⁴⁵ The intervention in Lebanon, which lasted 102 days and resulted in one casualty to enemy fire, inspired commentary by ground commanders on the virtue of restraint in low intensity conflict.¹⁴⁶ Still, the deployment was a contingency operation that challenged leaders to develop a plan under crisis conditions and that exposed gaps in existing plans and soldier training.¹⁴⁷

Peacekeeping operations by American ground forces in the Dominican Republic during 1965-66 also required restraint.¹⁴⁸ How-

¹⁴²WIEGLEY, *supra* note 141, at 524.

¹⁴³See ROGER J. SPILLER, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER No. 3, NOT WAR BUT LIKE WAR THE AMERICAN INTERVENTION IN LEBANON 41-47 (1981).

¹⁴⁴See *supra* p. 36.

¹⁴⁵SPILLER, *supra* note 143, at 41.

¹⁴⁶Lieutenant Colonel Harry A. Hadd, Commander of the 2d Battalion, 2d Marine Regiment, offered the following assessment of fire discipline during the deployment:

When a youngster lands all prepared and eager to fight and finds himself restricted from firing at a known rebel who he sees periodically fire in his direction and in every instance restrains himself from returning the fire, it is felt that this is outstanding and indicates good small unit discipline.

See JACK SCHULIMSON, HEADQUARTERS, UNITED STATES MARINE CORPS, HISTORICAL REFERENCE PAMPHLET, MARINES IN LEBANON (1966), at 32, *quoted in* SPILLER, *supra* note 143, at 41. Note that the principles of restraint and fire discipline had long been regarded within the Marine Corps as critical to success in "small wars." See, e.g., HEADQUARTERS, UNITED STATES MARINE CORPS, SMALL WARS MANUAL (1940). In this regard, the Marine Corps' post World War II doctrine differed from the Army's, which stressed passive firepower within a mindset of conventional conflict. See, e.g., *infra* note 175 and accompanying text.

¹⁴⁷See SPILLER, *supra* note 143, at 44-45.

¹⁴⁸The source for the historical information contained in this paragraph is LAWRENCE A. YATES, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NUMBER 15, POWER PACK: UNITED STATES INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966 (1988).

ever, a newly skeptical press corps, instant communications between ground commanders and Washington, and shifting packages of politically motivated ROE set the Dominican intervention apart from Bluebat and all prior ground deployments. Operation “Power Pack” at its height committed nearly 24,000 American troops to America’s unstable Caribbean neighbor to block what the Johnson Administration perceived to be a communist grab for power. Once the intervention had effectively blocked the rebels, the military mission soon gave way to diplomacy, and political leaders tightly coordinated troop activities to enhance the prospects for a negotiated settlement.¹⁴⁹ Soldiers trained to fire on sighting of enemy units made an uncomfortable adjustment to restrictive ROE, for which they felt inadequately prepared.¹⁵⁰ The Dominican intervention helped make the term “ROE” familiar to American soldiers, who assimilated it into their vocabulary as a curse word.¹⁵¹

The Vietnam War widened soldier familiarity with ROE.¹⁵² The war also triggered a reaction against ROE—a reaction which to some observers involved misinterpretation or outright circumvention of the published rules.¹⁵³ Familiarity with the term “ROE,” and even

¹⁴⁹*Id.* at 119, 122–24, 140–43 & nn. 29–30, 177–78, synopsis on back cover.

¹⁵⁰*Id.* at 143.

¹⁵¹*See id.* at 142 (“Veterans of the intervention have chosen less charitable words [than ‘numerous and complex’] to describe the rules of engagement: ‘dumb,’ ‘crazy,’ ‘mind-boggling,’ ‘demoralizing,’ ‘convoluted,’ and ‘confusing’ are but a sample of the printable ones.”).

¹⁵²Many of the messages, directives, orders, and regulations cited in the endnotes to this paragraph contained classified provisions at one time. All matters cited have been downgraded to “unclassified” by appropriate orders of the Secretary of the Army.

¹⁵³Some of those who were troubled by widespread soldiers’ reaction against the ROE were senior officers:

Another potentially serious trend reflected in recent reports pertains to disparaging comments concerning restraints on application of firepower. Comments such as “the only good village is a burned village,” are indicative of the trend. Here again, renewed command emphasis on troop indoctrination is necessary to insure that newly arrive [sic] personnel in particular are thoroughly conversant with need for minimizing noncombatant battle casualties, and understand the rationale behind current instructions on this subject.

Message, Headquarters, United States Military Assistance Command Vietnam, MACJ02, subject: Relationship Between United States Military and Vietnamese (180107Z Nov 66), reprinted in III DEP’T OF ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: EXHIBITS, BOOK 1—DIRECTIVES 235, 237–38 (1970) [hereinafter MY LAI INVESTIGATION EXHIBITS]. Historians, see KREPINEVICH, *supra* note 36, at 199, news reporters, see JONATHAN SCHELL, THE OTHER HALF 161 (1968), and moral philosophers, see MICHAEL WALZER, JUST AND UNJUST WARS 189–90 (1977), were among the others who were alarmed. Professor Walzer, for instance, identified 3 essential restraints in the ROE pertaining to bombardment of villages:

1. A village could not be bombed without warning if American troops had received fire from within it . . .

ready availability of various specific rules in written form, was no substitute for proper training in fire discipline and proportionality. Still, the proliferation of written guidance insulated senior commanders when individuals committed serious or intentional violations.¹⁵⁴ Ground component headquarters in Vietnam required that all newly assigned officer and enlisted personnel receive information cards that recited rules against targeting civilians, wounded persons, and captives.¹⁵⁵ All commanders received a card containing the rule, "use your firepower with care and discrimination, particularly in

2. Any village known to be hostile could be bombed or shelled if its inhabitants were warned in advance . . .

3. Once the civilian population had been moved out, the village and surrounding country might be declared a "free fire zone" that could be bombed and shelled at will.

WALZER, *supra*, at 190. Professor Walzer eventually argues against the assumption that anyone still living in a village after this process was a guerrilla. Yet first he asserts that the rules themselves were not obeyed:

In considering these rules, the first thing to note is that they were radically ineffective. "My investigation disclosed," writes [Jonathan Schell], "that the procedures for applying these restraints were modified or twisted or ignored to such an extent that in practice the restraints evaporated entirely . . ." Often, in fact, no warning was given, or the leaflets were of little help to villagers who could not read, or the forcible evacuation left large numbers of civilians behind, or no adequate provision was made for the deported families and they drifted back to their homes and farms.

WALZER, *supra*, at 190 (quoting Schell, *supra*, at 151).

¹⁵⁴I DEPT OF ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: THE REPORT OF THE INVESTIGATION, 9-1 to 9-22 (1970) [hereinafter MY LAI INVESTIGATION REPORT] (comprising a chapter dedicated to examining "Policy and Directives as to Rules of Engagement and Treatment of Non-combatants" and finding at 9-14 that "[d]ocumentation of [General Westmoreland's] policy and interest in [ROE] was and is plentiful"); PEERS ACCOUNT OF MY LAI INQUIRY, *supra* note 50, at 230 (finding fault not with the written guidance issued at the highest levels but rather with poor training and with "the failure to disseminate division, brigade, and task force policies down to the individual soldier"). See also *Investigation into the My Lai Incident: Hearings Before the House Armed Services Comm.*, 91st Cong., 2d Sess. 834 (1970) (Statement of General William C. Westmoreland) ("Because of the constant turnover of personnel in Vietnam, I established a policy in 1966 of frequent review, revision, and republication of the rules of engagement. This was to ensure maximum visibility to all United States personnel during their tour of duty, and was done at least once a year.").

¹⁵⁵Headquarters, United States Army, Vietnam, Reg. 612-1, Personnel Processing, para. 3 (8 Jan. 1968) [hereinafter USARV Reg. 612-1], *reprinted in* MY LAI INVESTIGATION EXHIBITS, *supra* note 153, at 301, directed that upon arrival all personnel would receive 7 different information cards. Among these was one entitled "The Enemy in Your Hands," which cautioned that "suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind." All of the cards are reprinted in MY LAI INVESTIGATION EXHIBITS, *supra* note 153, at 259-68. Distribution of the cards was not restricted to the Army component. USARV Reg. 612-1 implemented Headquarters, United States Military Assistance Command, Vietnam, Directive 612-1, Personnel Processing: Processing of New Arrivals (16 Mar. 1968) [hereinafter MACV Dir. 612-1], *reprinted in* MY LAI INVESTIGATION EXHIBITS, *supra* note 153, at 139, and directed distribution of cards to all Americans in the theater.

populated areas.”¹⁵⁶ The ROE issued by various levels of command controlled virtually every type of ground force weapon and included most of the ten functional types of ROE outlined above.¹⁵⁷ The frequent sensational press reports of indiscriminate fire and brutality only served to increase the number and versions of rules disseminated to individual soldiers.¹⁵⁸

Careful study of the regulations, directives, standard operating

¹⁵⁶MACV Dir. 612-1, *supra* note 155, at para. 4b(6) (directing that all officers receive a copy of the card entitled “Guidance for Commanders in Vietnam,” which contained the quoted rule at para. 7). The card is reprinted in MY LAI INVESTIGATION EXHIBITS, BOOK 4-MISCELLANEOUS DOCUMENTS, *supra* note 153, at 14.

¹⁵⁷*See, e.g.*, Headquarters, United States Military Assistance Command, Vietnam, Directive 525-13, Rules of Engagement for the Employment of Firepower in the Republic of Vietnam (May 1971) [hereinafter MACV Dir. 525-13]; Headquarters, United States Military Assistance Command, Vietnam, Directive 525-18, Combat Operations-Conduct of Artillery/Mortar and Naval Gunfire (21 Jan. 1968) [hereinafter MACV Dir. 525-18]; Headquarters, III Marine Amphibious Force, Order 3040-3, Minimizing Noncombatant Battle Casualties (13 Dec. 1966) [hereinafter III MAF Force Order 3040-3]; Headquarters, III Marine Amphibious Force, Order 3121.5, Standing Operating Procedure for Ground and Air Operations (10 Nov. 1967) [hereinafter III MAF Force Order 3121.5]; Headquarters, III Marine Amphibious Force, Order 3330.1, Conduct of Artillery/Mortar and Naval Gunfire (3 Feb. 1967) [hereinafter III MAF Force Order 3330.1]; Headquarters, Americal Division, Reg. 525-4, Combat Operations: Rules of Engagement (16 Mar. 1968) [hereinafter Americal Div. Reg. 525-4]; Headquarters, 11th Infantry Brigade, Reg. 525-1, Combat Operations: Rules of Engagement (9 Feb. 1968) [hereinafter 11th Inf. Bde. Reg. 525-1].

The consecutively paginated Books 1 and 2 of MY LAI INVESTIGATION EXHIBITS, *supra* note 153, reprint MACV Dir. 525-18 at 135, III MAF Force Order 3040.3 at 475, III MAF Force Order 3121.5 at 479, III MAF Force Order 3330.1 at 489, Americal Div. Reg. 525-4 at 587, and 11th Inf. Bde. Reg. 525-1 at 757. MACV Dir. 525-13, Americal Div. Reg. 525-4, and 11th Inf. Bde. Reg. 525-1 were reprinted in 121 CONG. REC. 17,551-58 (1975) at the request of Senator Barry Goldwater.

¹⁵⁸Message traffic to subordinate headquarters from MACV Headquarters reflected command sensitivity to adverse media reports:

Extensive press coverage of recent combat operations in Vietnam has afforded a fertile field for sensational photographs and war stories. Reports and photographs show flagrant disregard for human life, inhumane treatment, and brutality in handling of detainees and PW. These press stories have served to focus unfavorable world attention on the treatment of detainees and prisoners of war by both [Vietnamese and American forces] . . . Vigorous and immediate command action is essential. . . .

Message, Headquarters, United States Military Assistance Command, Vietnam, MACJ15, subject: Mistreatment of Detainees and PW (211531A Feb. 68).

The resulting thicket of rules and cards did not effectively transmit to the individual soldier what was expected of him. Although they were careful to conclude that a large number of factors contributed to the tragedy at My Lai, the members conducting the official inquiry into the incident observed that

neither units nor individual members of Task Force Barker and the 11th Brigade received the proper training in . . . the Rules of Engagement. . . . Several of the men testified that they were given MACV’s “Nine Rules” and other pocket cards, but . . . they had put the cards in their pockets unread and never had any idea of their contents . . .

PEERS ACCOUNT OF MY LAI INQUIRY, *supra* note 50, at 230.

procedures, annexes, and cards used during the Vietnam War to impart ROE to soldiers reveals striking similarities to the documents used today. The war institutionalized most features of the present method because it confronted so many ground units and leaders, in the glaring public eye over such a long period, with the imperatives of restraint as well as force security. The ROE used today in operations demanding restraint are not much different from the rules that governed employment of small arms and automatic weapons in American infantry divisions in Vietnam:

Individual and crew-served weapons . . . may be employed by commanders against:

(1) Enemy personnel observed with weapons who demonstrate hostile intent either by taking a friendly unit under fire, taking evasive action, or who occupy a firing position or bunker.

(2) Targets which are observed and positively identified as enemy.

(3) Point targets from which fire is being received. (This will not be construed as permission for indiscriminate firing into areas inhabited by non-combatants).

(4) Suspected enemy locations when noncombatants will not be endangered,¹⁵⁹

Action (1)—although it somewhat begs the question “who is the enemy?”—acknowledges the modern insight that ordinary people can become legitimate targets if they carry arms and show hostile intent. Actions (2) and (4) are completely consistent with the WROE embodied in the common tasks taught today to soldiers. Action (3) states the soldier’s inherent right in peace or war to protect himself against hostile acts, a rule included today in most ROE annexes and cards. The close resemblance between present-day land force ROE and those of the Vietnam War era provides a sobering illustration that despite twenty additional years of experience with operations short of war, ground units use the same basic methods in the attempt to bring their operations in line with political and legal constraints.

Nevertheless, three developments since the Vietnam War have changed land force ROE and the method by which leaders transmit them. First, references to “free-fire zones” and “specified strike zones” have disappeared. A free-fire zone was a specifically delimited geographic area that political authorities previously had approved for use of all means of fire and maneuver.¹⁶⁰ Although

¹⁵⁹11th Inf. Bde. Reg. 525-1, *supra* note 157, at para. 4a.

¹⁶⁰MY LAI INVESTIGATION REPORT, *supra* note 154, at 9-7.

free-fire zones never obviated the presence of military necessity or the requirement to avoid firing on known protected targets—such as civilians discovered to be within a zone¹⁶¹—the Military Assistance Command in Vietnam (MACV) in 1967 abruptly replaced the term with “specified strike zone,”¹⁶² presumably because the language of “free fire” defied the goals of encouraging disciplined fire and engendering the affection of the Vietnamese people. Yet the latter term also has fallen out of use. So, too, have the procedures permitting a village to be included within a zone—and thereafter subject to unobserved artillery and mortar fire—once hostile fire had emanated from it and civilians had been evacuated or warned to leave.¹⁶³

Second, ground component staffs now insert the self-defense boilerplate discussed above at or near the beginning of all ROE annexes and cards. This development has occurred in the aftermath of the 1983 terrorist killing of the marines in Beirut. The official investigation into that incident commented that the ROE in force had affected adversely the “mind-set” of the marines at the Beirut International Airport because those ROE “underscored the need to fire only if fired upon, to avoid harming innocent civilians, to respect civilian property, and to share security and self-defense efforts with the [Lebanese Armed Forces].”¹⁶⁴ Although other pertinent findings criticized the lack of specific guidance for countering vehicular terrorist attacks¹⁶⁵ and the inadequacy of preparatory training for dealing with unconventional military threats,¹⁶⁶ the single institutional change in land force ROE from the Beirut tragedy

¹⁶¹See, e.g., Americal Div. Reg. 525-4, supra note 157, para 3d (defining a Free Fire Zone (FFZ) as “[a]n area designated by the responsible political authority (District/Province Chief) in which political clearance has been granted for the period specified” but stating that “[m]ilitary clearance and compliance with the established rules of engagement are required”).

¹⁶²MY LAI INVESTIGATION REPORT, supra note 154, at 9-7.

¹⁶³See, e.g., III MAF Force Order 3121.5, supra note 157, at para. 405; III Force Order 3330.1, supra note 157, at para 3a. The designation of a geographical zone within which persons, having been duly warned, may be presumed hostile, is no different in concept from the designation of other hostility criteria, such as continued manning of a machine gun position by an unknown crew after due warnings to exit the position with hands up. The hostility criteria form of ROE—Type I ROE as discussed in section III.A.5 *infra*—has not been renounced. However, future designation of free fire areas or specified strike zones in ROE annexes is improbable because of the notoriety such measures gained among in the news media and in academic circles, see e.g. SCHELL, supra note 153; WALZER, supra note 153, even if they remain a conceptually plausible way to sort out the hostile intention of an ambiguous force. Cf. FM 101-5-1, supra note 3, at 1-29, 1-34, F-1, and G-1 (defining “engagement area” and “free fire area” as “control measures” commonly employed in the offense and defense against identified enemy forces).

¹⁶⁴DOD REPORT, supra note 1, at 51.

¹⁶⁵*Id.* at 135.

¹⁶⁶*Id.* at 130.

appears to have been that written ROE must remind troops, up front and in capital letters, that they have a right to defend themselves.¹⁶⁷

Third, a clear trend toward joint service ROE¹⁶⁸ has resulted in the adoption by ground component staffs of a basic analytic framework and a set of terms that originated in Navy circles. Although many subordinate ground units continue to issue PROE in unique format, more and more units are providing definitions of hostile act and hostile intent, stating that one or both of these must be present before using force (necessity), and stating that soldiers must scale their force to the threat (proportionality). At higher levels of command, the adoption of this foundational framework is universal, despite the persistence of great differences in presentation and specific language even at division and corps level.

American operations between 1987 and 1990 in Panama provide a good snapshot of the present-day method of imparting ROE to soldiers. Military historians have recorded the political constraints bearing on the several distinct military operations conducted during that period.¹⁶⁹ These operations culminated in Operation Just Cause, the contingency mission undertaken to drive Manuel Noriega from power and reestablish order. It suffices here to note that American ground troops in Panama—when they had received background instruction in ROE—had been trained for the conventional task of shooting identified enemy forces on sight. Yet, most of the operations in Panama required troops to avoid overt provocation of America's canal partner, lest the United States cede Noriega the moral high ground. Accordingly, soldiers received a quick baptism in the PROE, and in the sometimes ambiguous waters of hostile intent and proportionality.

Although most troops performed with both admirable restraint and appropriate aggressiveness, the adjustment to restrictive rules

¹⁶⁷The military undertook other changes in response to the Long Commission findings. Perhaps the most significant was the *Program to Combat Terrorism*, several aspects of which serve as good models for how the method of imparting ROE to land forces should be changed. See *infra* note 240 and accompanying text. The important point to note here is that the self-defense boilerplate was the only change to ROE drafting widely adopted by ground units in the aftermath of the Beirut tragedy.

¹⁶⁸See *supra* notes 130–31 and accompanying text; Parks, *Righting*, *supra* note 15, at 86 (“The PROE endeavor to expand peacetime ROE to all sea, air, and land forces: success with the latter remains limited.”).

¹⁶⁹See, e.g., Lawrence A. Yates, *Joint Task Force Panama: Just Cause—Before and After*, MIL. REV., Oct. 1991, at 59, 64, 68, 69–70 [hereinafter Yates, *Joint Task Force Panama*]; Interview with Dr. Lawrence A. Yates, Historian, Combat Studies Institute, United States Army Command & General Staff College (Mar. 22, 1994) [hereinafter Yates Interview] (discussing numerous interviews, conducted by Dr. Yates, of participants in operations in Panama); Morris, *supra* note 15, at 146–67. Unless otherwise noted, this two paragraph synopsis of ROE matters in Panama draws from Yates' article and interviews and from Morris' manuscript.

proved difficult, with or without the distribution of pocket cards and despite the ubiquitous self-defense boilerplate. Troops responded to the lack of preparation with numerous sensible questions about hostile intent: is the only clear indication of hostile intent the receipt of hostile fire? Is a Panamanian Defense Force (PDF) soldier demonstrating hostile intent if he aims his rifle in my direction? What if numerous PDF soldiers have aimed their rifles previously without firing them? Commanders wrestled with the question of whether and how to impose the most restrictive form of ROE: orders dictating which soldiers are armed and have live ammunition and when they may chamber rounds.¹⁷⁰ Marines objected to the rules requiring a verbal warning as part of the graduated measures leading to use of deadly force, citing the Beirut disaster and arguing that verbal shouts to armed intruders would endanger Marine sentries.¹⁷¹ Inevitably, soldiers accused of using inappropriate force invoked aspects of ROE in their defense.¹⁷²

¹⁷⁰See, e.g., Memorandum, Commander, Joint Task Force Panama, JTF-PM CO, to All Subordinate Commanders, subject: Weapons Safety (19 Jan. 1990), *reprinted infra* note 200.

¹⁷¹See Yates, *Joint Task Force Panama*, *supra* note 169, at 64.

¹⁷²See, e.g., United States v. Bryan, Unnumbered Record of Trial 118 (Hdqtrs, Fort Bragg 31 Aug. 1990) (opening statement of defense counsel). See also *infra* notes 220-21 and accompanying text (discussing the *Bryan* case in more detail).

Occasions that might have required less than deadly force proved particularly challenging to infantry soldiers because "the specific rules of engagement changed from day to day and from location to location" and because training rules of engagement "are normally very vague . . . and nobody sees much reason to emphasize those, which is a mistake." See Testimony of Lieutenant Colonel Lynn D. Moore, Record of Article 32(b) Investigation, 7 May 1990, at 10, 12, *Bryan*. One brigade commander observed that "given the realities of the crisis, he had come to rely more on his staff judge advocate than his operations officer and that he would gladly have traded one of his rifle companies for a [military police] company 'well trained in peacetime ROE.'" Yates, *Joint Task Force Panama*, *supra* note 169, at 68.

The difficulties of reorienting a force trained in WROE to the conditions prevailing in Panama were clearest to small unit leaders. The executive officer of a rifle company observed that

[w]hen threatening situations arose, we handled them as well as possible in accordance with the rules of engagement in effect at the time. Problems arose when we suddenly had to change roles. For the most part we were infantrymen, trained primarily "to close with and destroy the enemy." Then suddenly we were expected to act as diplomats and policemen. Behavior deemed meritorious under one set of rules could be construed as unacceptable under another set. It's not difficult to understand how a soldier can become confused when he is praised for an act in one instance but is then reprimanded for a similar act in another. This is especially true in an environment where hesitation or a lapse in judgment could very well kill you or your fellow soldiers. The result was often frustration, tension, and ambivalence that further complicated an already confusing state of affairs.

See CLARENCE E. BRIGGS, III, OPERATION JUST CAUSE, PANAMA DECEMBER 1989: A SOLDIER'S EYEWITNESS ACCOUNT 4 (1990). Yet rules that were very clear on their face sometimes oversimplified the nature of the decision whether to shoot. The same infantry com-

More recently, ground force leaders and judge advocates in Saudi Arabia and Iraq (1991), in Los Angeles (1992), and in Somalia (1993) developed innovative ways to communicate and reinforce ROE.¹⁷³ However, these innovations have not yet spurred systemic changes in the method by which most troops receive the ROE. Doctrine and training in the ROE remain as yet largely unchanged and overlooked.¹⁷⁴ The Gulf War—validating as it did the traditional military preference for conventional wars—could conceivably offer a rationale for leaving ROE alone, just as it has reinforced the perennial distaste of the mainstream military with low intensity conflict, ROE's most fertile soil.¹⁷⁵ Yet ground troops endured long months without combat in Saudi Arabia, and WROE issues, when they finally arose, were relatively simple to resolve. These factors spurred comments from judge advocate participants, who observed that for most of the deployment, "rules of force" to protect people and property" were more germane than rules "for active engagements" and that "peacetime ROE do not seem adequate to address landpower force protection for prehostilities and posthostilities."¹⁷⁶ Still, despite the likelihood that low-intensity conflicts will continue to be "the stuff of superpower interventions,"¹⁷⁷ the view that ground forces should prepare exclusively for conventional war enjoys considerable inertia.¹⁷⁸ At present, staffs tend to draft ROE

pany, given the mission of restoring law and order along the western edge of the City of Colon after the start of Just Cause, received the following instructions:

1. Shoot all armed civilians
2. Looters, if armed, will be killed.
3. Unarmed looters will be dealt with as follows:
 - a. Fire a warning shot over their head.
 - b. Fire a shot near the person(s).
 - c. Shoot to wound.

Id. at 77. Apparently, none of the soldiers receiving these ROE killed any civilians carrying weapons for purposes of self-protection.

¹⁷³See *infra* notes 295, 313, 325, and accompanying text

¹⁷⁴*Cf.* International Law Note, "Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement, ARMY LAW., Dec. 1993, at 48 (mentioning an informal poll of staff judge advocates attending optional ROE seminars held during the annual Worldwide Staff Judge Advocates' Conference, noting that "a liberal estimate" of those who had previously worked with the JCS PROE was one-third of the attendees, and describing the process underway to improve lack of familiarity with the JCS PROE).

¹⁷⁵See Daniel P. Bolger, *The Ghosts of Omdurman*, PARAMETERS, Autumn 1991, at 33, 31 (arguing that "[l]ow intensity conflict receives its grudging due and no more" even as tomorrow's problems call for the Army to prepare to fight "the savage wars of peace").

¹⁷⁶DESERT STORM ASSESSMENT TEAM REPORT, *supra* note 54, at Operational Law-2 & 3 (22 Apr. 1992).

¹⁷⁷Bolger, *supra* note 175, at 39.

¹⁷⁸See, e.g., Colonel Christopher C. Shoemaker, et al., *Commentary & Reply*, PARAMETERS, Spring 1992, at 101-02, 105-07; Harry G. Summers, *Powell Echoes Grant in Focusing Military*, ARMY TIMES, Sept. 27, 1993, at 78; Sean D. Naylor, *Will Peace-*

for operations other than war only after the crisis has arrived, and troops tend to receive these ROE only after the best opportunity for training has passed.¹⁷⁹

C. The “Legislative” Model of ROE

The underlying problem with the present method of imparting ROE to ground troops is that it relies on a legislative model of controlling conduct. This model serves certain established interests and provides a traditional role for judge advocates, but it is not optimal for inculcating initiative and restraint in a military land force. Rules of engagement in this legislative model are laws—primarily written texts that authorities issue, supplement, and perhaps supersede; that members of the controlled group consult, interpret, and sometimes obey; and that other functionaries implement, distinguish, and occasionally prosecute. A legislative approach to land force ROE can create danger when the time comes for living, breathing, sweating soldiers to translate the texts into results on the ground. Every analogy can be pushed too far, but the analogy here—between the present method of imparting ROE and the familiar social process of controlling behavior through legislation—furnishes a compelling summary of what is defective in present ROE doctrine.

1. ROE as Law: Problems in Creation.—Commanders and legislators share the sensible inclination to control individual conduct by creating rules. Giving an order, issuing a rule, announcing a policy, writing a law—these are all attempts to bring about desired behavior via a straightforward mechanism: “If I need them to act a certain way, I’ll simply write instructions on how I want it done.”

The advantages of this approach are readily apparent. Regardless of the circumstances, a form of response is always available. Writing how one expects or demands individuals to act when faced with a set of facts can provide valuable coordination to otherwise chaotic or destructive group activity. Written pronouncements also can reaffirm and reinforce important group values. In addition, issuing fresh rules enables one to give special, tailored attention to each contingency as it arises, in all of its particular complexity. Legislators or commanders may never intentionally create rules to dispel the

keepers Become ‘Flabby Do-Gooders’?, ARMY TIMES, Oct. 11, 1993, at 15; Lieutenant Colonel James A. Baker, *Peace Missions Dull the Army’s Combat Edge*, ARMY TIMES, Dec. 6, 1993.

¹⁷⁹See generally Major Daniel P. Bolger, *Contingency Warfare: Training Mindset for the Future*, ARMY TRAINER, Fall 1993, at 26, 28 (“We must train in ways that accustom us to these patterns of contingency warfare.”); Yates Interview, *supra* note 169 (“Most traditionalists have yet to realize that United States officers and soldiers must be prepared to enter a crisis like Panama with a mindset at odds with much of what they have been taught about war.”).

appearance of inaction. Yet one effect of rule creation is to dispel such appearances.¹⁸⁰

Governing or leading by rule creation also has at least two disadvantages, although these are not as apparent, particularly to an inexperienced rulemaker. First, the mere making of a rule does not change what one eminent jurist has called “primary, private individual conduct.”¹⁸¹ The wisdom contained in the adage “you can’t legislate morality” applies to all sorts of rulemaking—in the sense that an abstract rule by itself has no grip on concrete realities. Connections or hooks into individual behavior must come from something else, namely from willful obedience to or enforcement of the rule.

Second, rule creation easily tends toward rule overpopulation. With few obvious incentives to unmake rules, and with every incentive to create diverse rules of varying specificity to meet new challenges, legislators and commanders alike naturally will produce progressively thicker codes of rules, often with the help of others—namely lawyers. The result is that few rules are directly superseded or wiped off the books. Instead, supplements, qualifications, and explanations abound, contradictory rules emerge, and redundancies thrive as the rule creator inevitably neglects the hard work of integrating a new rule into the older web and of imposing hierarchical order on the entire mass. One legislator and commander replaces another, raising the perennial question: which of the former rulemaker’s rules still apply?

Military commanders encounter other, special difficulties in rule creation because of the essential legal and moral difference between peace and war. For example, while a legislator seeking to proscribe murder will immediately find a pretty good first draft in the rule “thou shalt not kill, except in self-defense,” the commander seeking to prevent murder on the battlefield must use many more words to account for the special immunity soldiers should and do enjoy for killing lawful combatants during armed conflict:¹⁸² “thou

¹⁸⁰ See *supra* note 146. OP. LAW HANDBOOK, *supra* note 15, at H-92, describes one of the practical purposes of ROE as follows:

ROE protect the commander by providing guidance assuring that subordinates comply with the law of war and national policy. For example, the commander may issue ROE that reinforce the law of war specifically prohibiting destruction of religious or cultural property. In the area of national policy, ROE can limit such items as the use of chemical weapons, riot control agents, and herbicides. The inclusion of restrictions on these agents in an OPLAN insulates, to the extent possible, the commander from subordinates who may violate national policy out of ignorance.

¹⁸¹ *Mackey v. United States*, 401 United States 667, 677 (Harlan, J., concurring in part and dissenting in part).

¹⁸² See, e.g., VIII UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 47, Trial of William List and Others, at 58-59 (1948) (“Fight-

shalt not kill, except in self-defense, and except during war; but even during war, thou shalt not use methods calculated to cause unnecessary suffering and shalt not kill civilians and wounded enemy soldiers, except in self-defense.”

Consider another example—this one taken directly from actual land force ROE—which illustrates how different headquarters guided by similar purposes, if left to themselves, will create significantly different texts. The standing ROE for operations other than war used in the recent past by four infantry units of division or brigade size contain the following statements of the basic necessity rule:

Unit A: You are authorized to use deadly force in self-defense [if]:

- a. you are fired upon;
- b. armed elements, mobs, and/or rioters threaten human life; [or]
- c. there is a clear demonstration of hostile intent in your presence.¹⁸³

Unit B: Soldiers will defend themselves. Soldiers under actual attack or facing a clearly imminent attack will use necessary force to defend themselves even if the attacker would be otherwise protected (e.g. a medic or civilian).¹⁸⁴

Unit C: The right of self-defense is never denied. If a [Unit C soldier] is fired upon he may return fire in order to defend himself, his unit, and accompanying personnel.¹⁸⁵

Unit D: Nothing in these ROE shall limit the right of an individual soldier to defend himself or a commander's right and responsibility to defend his command and/or those in his charge from attack. The right of self-defense is never denied. . . . Engageable forces [include] . . . [t]hose committing hostile acts. . . . Hostile acts [include] actual attacks [and] threats of imminent attack.¹⁸⁶

ing is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.”)

¹⁸³Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N, at para. 3(b)(1) (1993).

¹⁸⁴Headquarters, 25th Infantry Division, Standing ROE For OPLAN/OPORD Annexes, at para. 2a (1991).

¹⁸⁵Headquarters, 75th Ranger Regiment, Tactical Standing Operating Procedure, Appendix 4 (Rules of Engagement) to Annex H (Civil-Military Affairs), at para. 1a (1992).

¹⁸⁶Headquarters, 82d Airborne Division, Operations Plan 8-89, Appendix 8 (Rules of Engagement) to Annex C (Operations), para. 3a, 3b (1989).

In this example, Unit C's drafter chose not to mention the hostile intent prong of the peacetime necessity rule—that is, that a soldier may use force if confronted with clear indications of hostile intent—while Unit A's drafter chose to state this explicitly (“there is a clear demonstration of hostile intent in your presence”). Unit B's drafter elected to imply the possibility (“or facing a clearly imminent attack”), and Unit D's drafter chose to incorporate hostile intent into the definition of hostile act (“hostile acts include actual attacks and threats of imminent attack”). Nothing is inherently wrong with any of these formulations, but the inconsistency of texts across units within the same land force is one factor causing problems of interpretation and preventing standardized training.¹⁸⁷

2. ROE as Law: Problems of Interpretation.—Problems at the level of interpretation hamper the legislative model of controlling conduct. The model assumes that members will consult and can assimilate the rules prior to acting. It also assumes that members will be able to decide which rules take precedence on the frequent occasions when many rules apply to a situation.

These assumptions are tenable for many ordinary social processes that occur in a modern state. The business executive can read the rules on claiming deductions for charitable contributions on an income tax return, can consult a tax attorney concerning which of two interpretations is legal, and can read opinions published by the Commissioner of the Internal Revenue Service or judgments published by federal courts before deciding whether to make a claim and how much to deduct. Plenty of time, and a large, elaborate set of institutions equipped to interpret and provide advice can help produce conforming behavior in the individuals subject to the rules.¹⁸⁸

Military staffs deliver advice and interpretive guidance to commanders and other decision-makers, thereby mitigating the confu-

¹⁸⁷The inconsistency of texts *between higher and lower* headquarters is at least as problematic as that across units. Note that such variety is implied by the Unit D formulation. The unified command level's standing ROE are the *PROE*, which distinguish between hostile act and hostile intent. See *supra* notes 90-92 and accompanying text. Yet Unit D chooses to incorporate hostile intent into hostile act. Again, there is nothing inherently wrong with this approach. Clear indications of hostile intent can sometimes be equated with hostile acts, as O'Connell observed. See O'CONNELL, *supra* note 15, at 171; *supra* note 92. Still, inconsistency impairs understanding, a truth well-understood by drafting experts. See, e.g., REED DICKERSON, *MATERIALS ON LEGAL DRAFTING* 168(1981).

¹⁸⁸Of course this analysis assumes that individuals have respect for the limits imposed by the rules. See generally Edwin J. DeLattre, *Police Discretion and the Limits of Law Enforcement*, *THE WORLD & I*, January 1989, at 563, 573 (noting in the context of discussing police observance of rules that “endless proliferation of laws, regulations, and policies can reduce respect for limits; when the lists become so long that no one could reasonably believe that he really knows them with any thoroughness, people are as likely to sneer at the whole business as to try to identify the fundamentals”).

sion engendered by multiple rules. Thus, the Navy captain with a judge advocate on the bridge can arrive at a prudent interpretation of the ROE, even when one rule counsels restraint and another commands him to use necessary preemptive force, and even while a Soviet vessel is moments away from physically bumping his cruiser in an international dispute over the right of innocent passage. Similarly, the commander of an Army corps can select targets from a list recommended by a staff cell, the judge advocate for which has identified the potential targets that violate no ROE. However, land force commanders below brigade level do not have judge advocates readily available, and battalion commanders are the most junior soldiers with staffs.¹⁸⁹ Accordingly, interpretive guidance is scarce within a deployed ground force.¹⁹⁰

¹⁸⁹See UNITED STATES ARMY, TABLE OF ORGANIZATION AND EQUIPMENT HANDBOOK 87042L-CTH, COMMANDERS' TOE HANDBOOK, HEADQUARTERS AND HEADQUARTERS COMPANY BRIGADE (15 May 1990); UNITED STATES ARMY, TABLE OF ORGANIZATION AND EQUIPMENT HANDBOOK 87102L-CTH, TOE HANDBOOK, HEADQUARTERS AND HEADQUARTERS COMPANY, HEAVY SEPARATE BRIGADE (5 Aug. 1991); UNITED STATES ARMY, TABLE OF ORGANIZATION AND EQUIPMENT HANDBOOK 57004L-CTH, HEADQUARTERS AND HEADQUARTERS COMPANY AIRBORNE DIVISION/BRIGADE AND INFANTRY BATTALION (10 Jan. 1992).

¹⁹⁰The features of the legislative model—a purely theoretical construct—are illuminated by the contrast drawn here between ship captains, aircraft pilots, and high level commanders on the one hand, and individual riflemen on the other. However, one should not infer that only individual riflemen may be forced into firing decisions without interpretive guidance. One experienced commentator has perceptively observed that

it is unlikely that there will be a Navy judge advocate at a level lower than the Battle Group (rather than on the bridge of any ship); for example, there are a number of frigate commanders who have operated independently and had to make decisions in fast-moving scenarios that are not unlike those a rifleman may face. A naval vessel may have capabilities for distinguishing a *bandit* from a *bogey*, or gaining indications and warnings of hostile intent, or better access to communication with higher authority, but these do not necessarily make the decision to shoot in self-defense any easier. Even if a potentially unfriendly naval vessel or aircraft is manifesting hostile intent, the finger on the missile-launch button is controlled by the shooter's intent, which may be based upon the briefing he received before he launched. This is no different from the individual soldier facing a potentially unfriendly rifleman pointing his rifle at our soldier. We have no way of getting inside the shooter's head in either case.

Memorandum, W. Hays Parks, Special Assistant for Law of War Matters, International and Operational Law Division, Dep't of Army, Office of The Judge Advocate General, to author, subject: Comments on Draft Thesis, at 10 (25 Mar. 1994) (also noting that "[l]ike the frigate commander, a pilot may have better access to additional information and command guidance, but often there are times when that is not the case") (in possession of the author).

Nor should one identify in the contrast drawn here a suggestion that commanders, staff officers, ship captains, or pilots lack concern for individual soldiers. The compassion for soldiers is clearly evident whenever these professionals in arms undertake military operations. As this article has repeatedly emphasized, the present method of imparting ROE is suboptimal because of systemic factors rather than particular errors. This is precisely why there are no quick or simplistic answers to the challenge of improving on the present method.

Education and experience in problem-solving on the part of those subject to the rules also can increase the legislative model's effectiveness at controlling behavior. College-educated Navy captains and Air Force pilots can sometimes interpret contradictory rules, even when time for consulting authoritative sources of interpretation is not available.¹⁹¹ The eighteen-year-old assigned to an infantry platoon, whose guidance descends through many layers of command, is more likely to violate the purpose of senior leaders' ROE, despite desperately wanting to do the right thing.¹⁹²

3. ROE as Law: Problems in Enforcement.—Under the legislative model, violations of ROE too readily take on the appearance of criminal violations. Good judgment by commanders and judge advocates always will mitigate the effects, but this factor nevertheless frustrates the goal of fielding a land force infused with initiative as well as restraint. This perception also reinforces the stereotype of judge advocates as bureaucrats who are more efficient at prosecuting violators than at offering preventive advice. The dynamics stemming from enforcement highlight incompatibilities between the military operations occurring in the real world and the legislative model on which present-day ROE rest.

Even though the conduct it proscribes may constitute an independent crime under one or more punitive articles of the Uniform

¹⁹¹Of course, education and experience are no guarantee that a decision-maker will be able to arrive at the desired response. Those who adopt the focus, common to Navy circles, that ROE training is for officers and commanders, *see* Sagan, *supra* note 15, at 444, readily acknowledge that bad outcomes can occur even when these decision-makers are doing the interpreting. *See id.* at 462 ("Finally, if unclear or contradictory ROE are issued to military forces, faulty signaling, undesired vulnerabilities, and inadvertent escalation might occur.").

¹⁹²In land forces, shortfalls in education and experience combine with organizational characteristics and limited armament to doom the legislative approach to ROE. As one judge advocate assigned to advise an Army Corps on operational law describes the environment,

[u]nlike other components of the services, the majority of ground operations are highly decentralized and executed at the platoon and squad level. The commanders of these forces are lieutenants and sergeants not ship captains. The individual soldier's primary weapon has a maximum effective range of only 460 meters. Therefore his or her opportunity to react to hostile acts or hostile intent is much more reduced in time and distance than his fellow comrade in arms. . . . The problem in designing ROE for ground forces is "to translate the president's decisions and guidance into operational plans and specific orders that go through the military chain of command eventually to 38-year-old battalion commanders, to 28-year-old company commanders, to 23-year-old platoon leaders, to 19-year-old privates."

Major Scott R. Morris, Rules of Engagement: Origin, Practical Use, Doctrinal Integration, and Theoretical Concept 4-5 (1993) (unpublished early draft of paper cited *supra* note 15, on file with the CLAMO) (quoting Albert C. Pierce, *Crisis Management in the White House and the Pentagon*, in RAND CORPORATION, MANAGING MILITARY OPERATIONS IN CRISES: A CONFERENCE REPORT No. R-4038-CC at 34 (C. Preston Niblack, ed. 1991)).

Code of Military Justice (UCMJ), a rule of engagement itself becomes enforceable criminal law only through a narrow channel. Article 92 of the UCMJ makes punishable certain failures to obey orders or regulations, but only after the order or regulation in question has run a gauntlet of statutory elements and constitutional doctrines any one of which can render it unenforceable. Orders found merely to “supply general guidelines or advice for conducting military functions” are unenforceable,¹⁹³ as are orders found by a military judge to be unconstitutionally vague,¹⁹⁴ overbroad,¹⁹⁵ or otherwise unlawful.¹⁹⁶ The highest levels of command specifically describe their rules of engagement to lower headquarters as policy, rather than as criminally enforceable orders. However, commanders may purposefully issue particular rules of engagement for the individual soldier as punitive general orders, creating the possibility of courts-martial for violators.¹⁹⁷

The companion cases of *United States v. McMonagle*¹⁹⁸ and *United States v. Finsel*¹⁹⁹ demonstrate that violations of ROE can be enforced via court-martial. In these cases—which arose out of American operations in Panama in January, 1990—the accused infantry soldiers had received a general order from their division commander to not “chamber a round of ammunition unless enemy and/or criminal contact is imminent.”²⁰⁰ Although the mission of American forces in Panama never abruptly or clearly shifted from “combat” to

¹⁹³MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 16c(1) (1984) [hereinafter MCM].

¹⁹⁴United States v. Wysong, 9 C.M.A. 249, 251, 26 C.M.R. 29, 31 (1958).

¹⁹⁵United States v. Nation, 9 C.M.A. 724, 726, 26 C.M.R. 504, 506 (1958). Note that together the vagueness and overbreadth doctrines—subordinate doctrines to criminal due process and free expression respectively—comprise a substantial body of court-made law devoted exclusively to defects that can arise when laws are created and interpreted. These doctrines record, in case after case, the potential problems outlined in parts III.C.1 & 2 immediately above.

¹⁹⁶MCM, *supra* note 193, pt. IV, ¶¶ 14c(2)(a), 16c(1)(c).

¹⁹⁷Alternatively, the prosecution could proceed under the theory that the accused received and had knowledge of a rule of engagement within a lawful order—other than a general order—and that he then violated the order by defying the rule. *See id.* pt. IV, ¶ 16b(2). Still another alternative theory of prosecution is Article 90, which proscribes willful disobedience of a superior commissioned officer. *See id.* pt. IV, ¶ 14b(2). Yet the orders issued in these alternative theories of prosecution must be “lawful” in all of the ways in which general orders must be lawful; hence, such orders are no more readily enforceable than general orders.

¹⁹⁸34 M.J. 825 (A.C.M.R. 1992).

¹⁹⁹33 M.J. 739 (A.C.M.R. 1991). *Finsel* and *McMonagle* are two of only four reported judicial opinions that have made reference to the term “rules of engagement,” a fact that is consistent with the relatively recent development of ROE. *See* discussion *supra* part III.B.3. The other cases are *United States v. McGhee*, 36 C.M.R. 785 (N.C.M.R. 1966) and *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), both of which arose in the context of Vietnam.

²⁰⁰The order, issued by Major General Carmen J. Caveza, the commander of

“stabilization,”²⁰¹ and although the two accuseds’ company “maintained a secure posture to deter terrorist-type attacks,”²⁰² the company had not experienced any hostile actions in the previous several weeks, and “the threat level was considered low.”²⁰³ On January 25, Private First Class McMonagle, Sergeant Finsel, and a third soldier from the unit intentionally violated the rule against chambering

Joint Task Force Panama and Division Commander of the 7th Infantry Division, read as follows:

19 January 1990
 JTF-PM CO (340d)
 MEMORANDUM FOR ALL SUBORDINATE COMMANDERS
 SUBJECT: Weapons Safety

1. Recent accidental discharges of weapons, one of which resulted in a soldier’s death, makes it imperative for me to establish the following guidelines:

a. No one is authorized to maintain a clip in their pistol, a magazine in their rifle (M-16 or AR 203), or a belt of ammunition linked to the feed tray of a M-240 SAW, M-60 MG, or Cal. 50 MG, unless so directed by a commander at the colonel level or higher.

b. Clips will be placed in pistols, magazines will be placed in rifles, and ammunition belts attached to feed trays only when required by operational necessity, e.g., the knowledge that criminal or enemy contact is probable.

c. Under no circumstances will United States Army forces be authorized to chamber a round of ammunition unless enemy and/or criminal contact is imminent. Even then, the weapon will remain on safe until visual sighting of the target has been made.

d. Only commanders in the rank of colonel can authorize fragmentation grenades to be carried, and then operational necessity must clearly warrant the carrying and use of those indiscriminate weapons. All fragmentation grenades will be turned in to the ASP and drawn only when colonel-level commanders so direct.

2. These drastic measures are being taken to ensure that we safeguard lives, both United States and Panamanian. Our casualties during the last two weeks have all been self-inflicted. This must stop!

3. Commanders at every level must take immediate action to disseminate these guidelines. My intent is simple. I want no one killed or wounded as the result of an accidental discharge of a weapon. I expect everyone’s full support.

/S/

Finsel, 33 M.J. at 743 (Appendix). This order provides a useful illustration of Type V ROE (Arming Orders), see part III.A.5. *supra*, which in this operation served the purely military purpose—at least officially—of promoting safety and avoiding accidental harming of friendly forces. Some question whether rules delivered in a memorandum on safety can accurately be termed “ROE.” *See, e.g.*, Roach, *supra* note 3, at 52 (“[ROE] should not cover safety-related restrictions.”); *but see* Parks, *Righting supra* note 15, at 86 (arguing, in response to Roach, that “such a limited view of ROE is not consistent with their proper use at all levels”). The court in *Finsel* recognized the functional character of the memorandum as ROE. *See* 33 M.J. at 741 n.3 (“The task force commander had previously published a letter which, in effect, modified the rules of engagement. The letter forbade the chambering of ammunition and the firing of weapons except under specific limited conditions.”).

²⁰¹ *See* Yates, *Joint Task Force Panama, supra* note 169, at 71.

²⁰² *McMonagle*, 34 M.J. at 856.

²⁰³ *Id.* at 856.

rounds when they not only chambered their firearms but then also shot them into the air above Panama City despite the complete absence “of hostile Panamanians or of hostile gunfire.”²⁰⁴ Subsequent courts-martial convicted McMonagle and Finsel of violating Article 92,²⁰⁵ and a dissenting opinion to the appellate court’s decision affirming McMonagle’s conviction of a related crime made explicit that ROE establish a separate basis for prosecution.²⁰⁶

Yet it was the related crimes in this case that suggest how odd it seems to regard an ROE violation as just another crime to be prosecuted, a view that is central to the legislative model. McMonagle and Finsel unlawfully chambered their weapons during the very same episode in which one or each of them was drinking alcohol in violation of a no-drinking order,²⁰⁷ having sexual relations with a woman in a local brothel despite an order prohibiting intimate personal contact with Panamanian females,²⁰⁸ staging an elaborate mock firefight to cover up Finsel’s loss of a 9mm pistol,²⁰⁹ and finally murdering an innocent bystander who fell victim to a wild shot.²¹⁰ The ROE violations here were incidental to other serious wrongs, some among these being *mala in se*.²¹¹ Without criticizing the deci-

²⁰⁴*Finsel*, 33 M.J. at 741.

²⁰⁵*McMonagle*, 34 M.J. at 864 (affirming violation of article 92(1) as lesser included offense of Article 90); *Finsel*, 33 M.J. at 740-41.

²⁰⁶[T]he rules of engagement imposed by a commander are guidelines pertaining to firing of weapons. Those rules generally are aimed at preventing needless casualties and unnecessary destruction. Even if the rules of engagement are violated, however, the lawfulness of the killing resulting from the firing will be determined by the UCMJ and the law of war. Thus, even though a particular shooting may violate a command-imposed rule of engagement, *and thus be subject to punishment under the UCMJ*, the killing resulting from that shooting may nevertheless be lawful.

McMonagle, 34 M.J. at 870 (Johnston, J., dissenting) (emphasis added).

²⁰⁷*Id.* at 856, 865; *Finsel*, 33 M.J. at 740.

²⁰⁸*McMonagle*, 34 M.J. at 856, 865.

²⁰⁹*Id.* at 856; *Finsel*, 33 M.J. at 741.

²¹⁰*McMonagle*, 34 M.J. at 857. The court expressly rejected the accused’s claim that he was mistakenly firing at an enemy combatant. *See id.* at 864. This claim, if true, would have made the accused innocent of murder as well as of one violation of the ROE. On higher appeal, McMonagle’s conviction was overturned because the trial court’s failure to instruct the court-martial panel on the defense of mistake of fact was held to be prejudicial error. *See United States v. McMonagle*, 38 M.J. 53, 59-61 (C.M.A. 1993). Finsel’s convictions were upheld on higher appeal. *See United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993).

²¹¹A *malum in se* is

[a]wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.

sion to prosecute the ROE violations in this case, the judge advocate instructing soldiers on legal rights to employ force understandably experiences discomfort at the notion that McMonagle and Finsel were "ROE criminals" as opposed to merely "criminals."

Poor dissemination of the facts surrounding a criminal allegation of excessive force can curb initiative and cause soldiers to hesitate. In the case of *United States v. Conde*,²¹² a court-martial panel found fault with the accused's decision to fire his M79 grenade launcher out the window of a vehicle traveling through downtown Mogadishu, Somalia.²¹³ In addition to *Conde*, at least six criminal

BLACK'S LAW DICTIONARY 865 (5th ed. 1979) (citations omitted). "Mala in se" is the plural form of this term. *Id.* at 861.

²¹²No. 583 842098/2889 (I Marine Expeditionary Force, 6 Apr. 1993).

²¹³On February 2, 1993, Marine Corps Gunnery Sergeant Harry N. Conde discharged a canister of buck shot toward two Somali youths, injuring them, after one had grabbed his sunglasses. Soldiers received the following ROE on a card:

JTF FOR SOMALIA RELIEF OPERATION
GROUND FORCES RULES OF ENGAGEMENT

NOTHING IN THESE RULES OF ENGAGEMENT LIMITS YOUR RIGHT TO TAKE APPROPRIATE ACTION TO DEFEND YOURSELF AND YOUR UNIT.

A. YOU HAVE THE RIGHT TO USE FORCE TO DEFEND YOURSELF AGAINST ATTACKS OR THREATS OF ATTACK.

B. HOSTILE FIRE MAY BE RETURNED EFFECTIVELY AND PROMPTLY TO STOP A HOSTILE ACT.

C. WHEN UNITED STATES FORCES ARE ATTACKED BY UNARMED HOSTILE ELEMENTS, MOBS, AND/OR RIOTERS, UNITED STATES FORCES SHOULD USE THE MINIMUM FORCE NECESSARY UNDER THE CIRCUMSTANCES AND PROPORTIONAL TO THE THREAT.

D. YOU MAY NOT SEIZE THE PROPERTY OF OTHERS TO ACCOMPLISH YOUR MISSION.

E. DETENTION OF CIVILIANS IS AUTHORIZED FOR SECURITY REASONS OR IN SELF-DEFENSE.

REMEMBER

1. THE UNITED STATES IS NOT AT WAR.
2. TREAT ALL PERSONS WITH DIGNITY AND RESPECT.
3. USE MINIMUM FORCE TO CARRY OUT MISSION.
4. ALWAYS BE PREPARED TO ACT IN SELF-DEFENSE.

Headquarters, Joint Task Force Somalia, SJA Ser #1 (2 Dec. 1992) *reprinted in* Exhibit 26 to Article 32(b) Investigating Officer's Report, *Conde*.

Some question exists concerning whether all marines understood these ROE, *see, e.g.*, Sworn Statement of Sergeant Charles M. Schuster (2 Feb. 1993), *reprinted in* Exhibit 25 to Article 32(b) Investigating Officer's Report, *Conde* (remarking in spite of paragraph A of the ROE card, that "I have been told we are not to fire at the civilians unless we're fired on first; but these teens did not fire on us"); nevertheless, the panel rejected Conde's claim of self-defense. According to observers of the trial, *see* Interview with Captain Clark R. Fleming, United States Marine Corps, Trial Counsel of Record, in Charlottesville, Va. (Oct. 20, 1993), one compelling piece of evidence was Conde's statement after the shooting that "[a]t least those fuckers have a Hell of a headache." Testimony of Lance Corporal Chad B. Rivet, Article 32(b) Investigating Officer's Report at 84 (Mar. 4, 1993), *Conde*.

Gunnery Sergeant Conde was found guilty of assault with a dangerous weapon. *See* Appellate Exhibit XIX, *Conde*. In addition to the assault charge, Conde initially

cases in Somalia involved marines and other soldiers who allegedly had used force in excess of what the ROE allowed.²¹⁴ Regardless of whether each received eventual exoneration or punishment in accordance with the facts, **as deserved**,²¹⁵ soldiers—as well **as** the press and other commentators—perceived that prosecution would follow every decision to fire.²¹⁶

had been charged with a violation of a general order prohibiting the retention of a captured weapon for personal use. Yet although the M79 grenade launcher was a captured weapon, the convening authority dismissed the latter charge on recommendation of the Article 32(b) Investigating Officer, who reported that Conde's chain of command had officially reissued the weapon to Conde. See Addendum to Article 32(b) Investigating Officer's Report, para. 1 (10 Mar. 1993), *C o d*. Conde's sentence for the assault conviction was to forfeit \$1706 and to be reduced one grade. See Appellate Exhibit XX, *C o d*.

²¹⁴See Lorenz, *supra* note 41, at 33. Another shooting incident involving marines driving through crowded Mogadishu offers an interesting contrast to *C o d*. On February 4, 1993, Sergeant Walter A. Johnson was the right rear passenger in a 1 1/4-ton utility truck, the second vehicle in a two-vehicle convoy. He and the other marines in the convoy recently had received situation reports highlighting grenades thrown at coalition patrols in Mogadishu **as well as** adults handing grenades to children and persuading them to use them against coalition forces. The rules of engagement were the same **as** those in the *C o d* case. As the convoy made its way through a market street, a crowd of Somalis surrounded the two vehicles, although all of the civilians were kept several feet away from the vehicle by the stern looks, verbal warnings, and vigilance of the well-armed marines. Then the convoy stopped. A large cargo truck blocked the road.

Suddenly, a boy carrying what appeared to be a small box in one hand, ignored the warnings and ran up behind the vehicle. Security of the rear of the vehicle was Sergeant Johnson's responsibility. As the boy approached, Sergeant Johnson asked the other marine in the rear of the vehicle to "[l]ook at this weird guy" and then a moment later yelled "[w]hat the _____ does this kid have in his hand?" Only after the boy had continued to ignore warnings and then had placed his arm in the back of the truck—but out of Sergeant Johnson's reach—did Sergeant Johnson fire his weapon at the boy. Despite Sergeant Johnson's extraordinary efforts to collect the fallen boy from the hostile crowd and the marines' swiftness in getting to the nearest hospital, the boy died.

All of the witnesses supported Sergeant Johnson's account of the incident; however, the small box was not recovered. The Article 32 Investigating Officer concluded that Sergeant Johnson had acted appropriately, and the convening authority dismissed all charges. See generally *United States v. Johnson*, No. 458 27 1616 (I Marine Expeditionary Force, 16 Mar. 1993) (Report of Article 32(b) Investigating Officer) (copy on file with the CLAMO).

²¹⁵The author's firm opinion—based on interviews with participants **as well as** all investigation reports and records of trial available to him—is that justice was served in every case.

²¹⁶See, e.g., Dworken, *supra* note 15, at 15 ("The command did not issue any clarifications about the cases, so soldiers naturally assumed the worst and in some cases were hesitant to use deadly force when they had every right to."); Richburg, *supra* note 48 (" 'We're out here getting shot at, and now they want to prosecute us,' said one Marine rooftop sniper from Florida when he heard the news of the pretrial hearings [of Conde and Johnson]."); Adams, *supra* note 57, at 22 (questioning the Conde conviction). Soldiers in Panama in 1988 and 1989 expressed similar concerns about being tried for firing their weapons, even if in self-defense. See Yates Interview, *supra* note 169.

The investigation and court-martial conviction of Army Specialist Mowris,²¹⁷ for instance, had a restraining influence on soldier responses to fire. The convening authority decided to set aside Specialist Mowris' conviction for negligent homicide only after many soldiers received a strong signal. As one Army colonel who commanded in Somalia noted, "[b]ecause of this case, soldiers in some cases were reluctant to fire even when fired upon for fear of legal action. It took weeks to work through this—but we did. There is no doubt this case had a major effect on the theatre."²¹⁸ Another observer, noting a similar restraining influence, proposed that leaders do not explain why certain soldiers face criminal charges because clarifying explanations might trigger unlawful command influence allegations from defense counsel.²¹⁹

Initiative is not the only casualty, however. The commander's interest in restraint, when appropriate, also can fall prey to the enforcement features of the legislative model. Criminal prosecution of deployed soldiers for excessive force is highly sporadic, for reasons well-illustrated by the case of *United States v. Bryan*. In that case, the shooting of a prisoner in Panama City would have gone unprosecuted had not one of the witnesses come forward and stuck to a controversial rendition of events that portrayed MSG Bryan as a murderer.²²⁰ That investigators and judge advocates often are far from hostile spots, that many instances of excessive force have few

²¹⁷See *supra* notes 39–48 and accompanying text.

²¹⁸Letter from Colonel Wade H. McManus, Jr., Commander, Division Support Command, to Major General Guy A. J. LaBoa, subject: Specialist James D. Mowris (28 Sept. 1993), reprinted in Record of Trial, Volume I, *Mowris*.

²¹⁹See Dworken, *supra* note 15, at 15 (commenting on cases arising in Marine Corps units).

²²⁰See *United States v. Bryan*, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990). The record of trial reveals that without the testimony of First Lieutenant (1LT) Brandon B. Thomas, the prosecution would have had little evidence on which to proceed. According to 1LT Thomas, the accused—the senior noncommissioned officer for an infantry company—had no justification for shooting the near-lifeless body of a Panamanian prisoner.

On December 23, 1989, three days after Operation Just Cause had begun, First Sergeant (1SG) Roberto E. Bryan and other infantry soldiers and military policemen manned the traffic control point at Madden Dam. In the early afternoon a small truck carrying five or six Panamanian men pulled up to the search point and stopped. The ensuing inspection of the vehicle disclosed equipment that revealed the men to be members of the Panamanian Defense Force, which at this time remained loyal to Manuel Noriega. As American soldiers moved to handcuff the Panamanians, one of the men removed a grenade from his pants, pulled the pin, and rolled it. The grenade exploded, injuring several Americans with shrapnel and triggering a barrage of rifle fire from the Americans.

Upon hearing the rifle shots, 1LT Thomas drove toward the traffic control point and arrived within minutes. After identifying a wounded Panamanian among the dead bodies of the other Panamanians, 1LT Thomas dragged the wounded Panamanian to a safe place by the side of the road. A few minutes later, according to 1LT Thomas, the soldier guarding the wounded Panamanian remarked to 1SG Bryan "this

surviving witnesses—these and other factors create wide evidentiary gaps that translate to erratic enforcement of ROE.²²¹ Not surprisingly, military historians of the Vietnam War attribute at least some of the excessive uses of force in that conflict to the command's failure to enforce the ROE by prosecuting violators.²²²

As trial counsel warm to the task of prosecuting the few violators for whom enough evidence exists to proceed, the apparent role of the judge advocate under the legislative model becomes clear to commanders and soldiers. The role is that of an outsider, a second-guesser who enters the picture after the shooting has stopped and articulates standards with sharp clarity. These standards, for the participants at the scene, may have been distorted and may have received no emphasis in training before the alleged crime. For good reason, the Department of Defense and the separate services require judge advocates to participate in the proper disposition, under the UCMJ, of alleged war crimes. Yet the availability of this traditional prosecutorial role, when not balanced by strong countervailing leadership from senior judge advocates, dampens the incentives for military attorneys to master some of the nonlegal, technical information that might permit advance training of soldiers on ROE: effective ranges, lethality and other characteristics of friendly and enemy weapons; likely indicators of hostile intent from potential enemy forces or terrorists; specific pieces of military doctrine and training that might appear to contradict the boilerplate ROE transmitted

one's alive, he's almost dead though." Then, according to 1LT Thomas, 1SG Bryan walked to within ten feet of the Panamanian and fired five or six aimed rounds into the body, which was face down and far away from any potential weapons. The soldier who had been guarding the body, Private Scott A. Bowland, steadfastly maintained that the prisoner on the ground was moving, raising his buttocks, and that the prisoner—who had not been searched—could have been reaching for a grenade. After hearing this and other evidence contradicting 1LT Thomas' account, a court-martial panel acquitted 1SG Bryan of murder.

²²¹The Article 32 Investigating Officer in Bryan described the difficulty of gathering evidence in terms that would appear to apply to any deployment against hostile forces:

The investigation into the charges against 1SG Bryan was made difficult by . . .

a. The lack of physical evidence. The alleged victims were never identified. They did not or could not be interviewed or present a complaint in the case of the aggravated assaults . . . No body or autopsy report could be produced in the case of the premeditated murder charge . . .

b. The reliance on testimony only. The testimony received from the 18 witnesses called before the Article 32b investigation was conflicting and confusing. Many of the witnesses contradicted each other concerning the timing of events, the level of threat present at any particular time, and the actions taken and why

See Investigating Officer's Report, Narrative, para. 1 (18May 1990), *Bryan*.

²²²See, e.g., KREPINEVICH, *supra* note 36, at 199.

from judge advocates at higher headquarters and thus contribute to misinterpretation.

Most disturbing, however, is that the enforcement features of the legislative model of imparting ROE turn military doctrine and precepts into legal ones. Fighting wars, performing military missions in operations other than war, training soldiers—these are functions that embody a separate science and art, that inhabit a separate sphere, that require military rules, not legislated ones.²²³ Given the shortcomings of a legislative approach to controlling behavior, and given the constraints on a soldier's decision processes under stress,²²⁴ *military* rather than *legal* principles should dictate the ground component's doctrine and training, even in operations other than war.

4. *ROE as Law: Problems in Land Force Doctrine.*—Land force doctrine expounds military principles. Yet today that doctrine, at least as to ROE, mostly reinforces the legislative model. Even the Army—which far more than the Marine Corps records in written doctrine its authoritative guidance on how units fight wars and conduct operations²²⁵—has only begun to develop a doctrinal treatment of ROE that acknowledges some of the creation, interpretation, and enforcement problems discussed above. The present Army treatment of ROE in its doctrinal manuals, and derivatively in its training manuals,²²⁶ remains inadequate to the challenge of fielding a force comprising soldiers with the proper balance of initiative and restraint.

Two chapters of *FM 100-5, Operations*, the Army's "keystone" doctrinal manual,²²⁷ address ROE in a manner that reveals the authors' apparent recognition of them as a challenge more for military training than legal processes. In Chapter 2, entitled "Fundamentals of Army Operations," the reader learns that

[t]he Army operates with applicable rules of engagement (ROE), conducting warfare in compliance with interna-

²²³See *Parker v. Levy*, 417 United States 733 (1974) (noting that "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society" because "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise").

²²⁴See *infra* part III.C.5.

²²⁵See, e.g., Major Robert S. Trout, *Dysfunctional Doctrine: The Marine Corps and FMFM 1, Warfighting*, MARINE CORPS GAZETTE, Oct. 1993, at 33, 34.

²²⁶See, e.g., HERBERT, *supra* note 9, at 3 ("Doctrine is an approved, shared idea about the conduct of warfare that undergirds an army's planning, organization, training, leadership style, tactics, weapons, and equipment.") (emphasis added).

²²⁷See *FM 100-5, OPERATIONS*, *supra* note 9, at v (noting that a keystone manual "furnishes the authoritative foundation for subordinate doctrine, force design, material acquisition, professional education, and individual and unit training").

tional laws and within the conditions specified by the higher commander. Army forces apply the combat power necessary to ensure victory through appropriate and disciplined use of force.²²⁸

Three paragraphs later, still in Chapter 2, readers learn that a commander ensures the disciplined use of combat power “by building good training programs that reinforce the practice of respecting those laws and ROE,” and that “good training programs . . . force the practice of law-of-land warfare and ROE.”²²⁹

Chapter 13, entitled “Operations Other Than War,” offers a promising discussion of ROE training in still greater detail:

Transmission of and assured understanding of ROE throughout the totality of units requires follow-through, rehearsals with situations to check understanding and compliance, and continuing brief-backs. Soldiers who thoroughly understand ROE are better prepared to act with initiative and defend themselves and members of their unit.²³⁰

This discussion presents a persuasive image of soldiers internalizing rules through rehearsals and scenario-driven training.

However, another image conflicts with this one—the image of new rules arriving on the scene too frequently for any of them to be absorbed into soldiers’ trained responses.

The actions of soldiers and units are framed by the disciplined application of force, including specific ROE. In operations other than war, these ROE will be more restrictive, detailed, and sensitive to political concerns than in war. Moreover, these rules may change frequently.²³¹

The allusion to specificity and to the prospect of frequent changes in ROE echoes other remarks from Chapter 2.²³² In this manner, the manual glosses over the commander’s challenge of identifying the pertinent ROE far enough in advance to train them. The manual ignores the challenge of isolating certain core ROE into which

²²⁸*Id.* at 2-3.

²²⁹*Id.* at 2-4.

²³⁰*Id.* at 13-4.

²³¹*Id.*

²³²Properly written ROE are clear and tailored to the situation. ROE may change over the duration of a campaign. A force-projection army tends to face a wide array of ROE. For example, ROE during Operations Just Cause, Desert Shield, Desert Storm, and Provide Comfort were widely diverse; within each operation, the ROE were different and changed overtime. *Id.* at 2-4.

leaders could integrate more specific ROE. This is the legislative view of ROE enshrined in military doctrine, and the doctrinal and training manuals subordinate to *FM 100-5, Operations* fail to dispel it.²³³

Perhaps recognizing that the JCS *PROE* provide little guidance to land forces,²³⁴ *FM 100-5, Operations* makes no reference to the *PROE*. Yet neither does it or any subordinate manual refer to the terms “hostile act” and “hostile intent,” or to the necessity and proportionality rules, a reference that might go far toward discouraging the varied formulations cited above.²³⁵ No manual or circular acknowledges the ten distinct functional types of ROE surveyed above²³⁶ or establishes a format by which operations orders might disseminate these functional types in a more comprehensible fashion.²³⁷ Furthermore, the entire doctrinal apparatus, built as it is on the conventionally sharp distinction between peace and war,²³⁸ reaffirms the view that contingency operations require “tailored” ROE, that conventional operations require “wartime” ROE, and that the two demand entirely separate drafting exercises.²³⁹

²³³For instance, the manual containing doctrine for legal operations addresses the topic of ROE in the following manner:

[Judge Advocates] [a]ssist in the preparation of and review of rules of engagement (ROE). ROEs must be consistent with the operations plan; higher headquarters ROEs; national policy; and domestic, international, and applicable foreign law. Some operations may require sets of ROEs. Different missions and theaters of operations will require tailored ROEs.

DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 33 (3 Sept. 1991); *cf. id.* at 17 (“Before deployment, JAGC personnel . . . review rules of engagement (ROE); provide required training on the law of war and ROEs . . .”). *See also* DEP'T OF ARMY, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT 1-9, 4-2, 5-2, 5-3, 5-4, 5-7, App. F (5 Dec. 1990); Dep't of Army, Field Manual 100-19, Assistance to Civil Authorities, App. C (1993) (Initial Draft); Dep't of Army, Field Manual 100-23, Peace Operations, 5-54 to 5-64 & Appendix C (1 Oct. 1993) (draft) [hereinafter Draft FM 100-23].

²³⁴*See* International Law Note, *supra* note 174, at 48; Parks, *Righting*, *supra* note 15, at 86 (“The *PROE* endeavor to expand peacetime ROE to all sea, air, and land forces: success with the latter remains limited.”).

²³⁵*See supra* part III.C.1.

²³⁶*See supra* part III.A.5.

²³⁷The format prescribed by the CJCS for ROE issued by the combatant commands, *see* JOPES FORMATS, *supra* note 66, at III-205 to III-206, is generally not used in the plans and orders of subordinate commands. *See generally* Bloodworth, *supra* note 15, at 4-5 (describing the unsystematic manner in which ROE annexes to operations plans are sometimes prepared).

²³⁸*See* FM 100-5, OPERATIONS, *supra* note 9, at 2-0 (dividing the range of military operations between “war” and “operations other than war”).

²³⁹*See* AR 350-216, *supra* note 82, at para. 6c (further reinforcing this view by requiring that within two weeks after arrival in a theater of operations all soldiers receive instruction on the rules of engagement “tailored to the particular environment and type of warfare being experienced”); *cf. O'CONNELL*, *supra* note 15, at 56 (outlining a theory of graduated force to undergird rules of engagement, a theory which “excludes the relevance of the traditional boundary between peace and war,

Security concerns about the sensitivity of the subject matter do not explain the absence of doctrinal guidance. Units have long trained to communicate via radio using frequencies and identifying information that have been declassified and systematically altered to permit thorough training on them. Similarly, the Army's Combating Terrorism program permits effective training because it relies on random insertion of antiterrorism measures and the safeguarding of "essential elements of friendly information" to ensure operational security for what is otherwise a well-articulated, comprehensive, and largely declassified plan.²⁴⁰ A system for imparting particular, mission-specific ROE could be protected with similar measures. In short, traditionalists can invoke neither the Army's need to keep secrets nor its need for mission-specific ROE as reasons to deny soldiers training on declassified, baseline ROE that leaders can later calibrate to the situation.

5. *ROE as Law: Neglect of Cognitive and Environmental Dimensions.*—Soldiers urgently need effective training on a baseline scheme of ROE because of the harsh environment in which they must decide whether, how, when, and where to use force. This environment, usually far different from that in which the members of a civil society contemplate obedience to laws, tends to heighten the fear, the sense of being alone, and the stress of confronting a potentially dangerous foe.²⁴¹

What specifically is missing from present training on ROE? The

upon which, of course, traditional international law is postulated"); KREPINEVICH, *supra* note 36, at 37-52 (criticizing Army doctrine's continued treatment of counterinsurgency merely as a "contingency" during the Vietnam conflict); Yates, *Joint Task Force Panama*, *supra* note 169, at 67 (describing a partial noncombatant evacuation operation in Panama during 1989, in which "'doctrine' was being made on the spot"); Bolger, *supra* note 179, at 28 (asserting that "[t]he contingency battlefield should be as familiar to us as Fulda Gap was" and that "we must know the likely threats as well as we once understood the composition and disposition of the Third Shock Army").

²⁴⁰See DEP'T OF ARMY, REGULATION 525-13, THE ARMY COMBATING TERRORISM PROGRAM, para. 3-7 (27 July 1992) [hereinafter AR 525-13] (directing implementation of security measures in a random fashion in order to frustrate surveillance attempts and introduce uncertainty into the planning of terrorist groups); DEP'T OF ARMY, FIELD MANUAL 100-37, TERRORISM COUNTERACTION (24 July 1987); DEP'T OF ARMY, TRAINING CIRCULAR 19-16, COUNTERING TERRORISM ON UNITED STATES ARMY INSTALLATIONS 5-8 (25 Apr. 1983); see generally DEP'T OF ARMY, REGULATION 530-1, OPERATIONS SECURITY (OPSEC), para. 1-5c (1 May 1991) (emphasizing removal of "arbitrary programmatic constraints" and creating "a concern with indicators and critical information as opposed to almost exclusive concern with classified information").

²⁴¹A portion of FM 100-5, *Operations* not dealing with ROE describes the environment well: "Loneliness and fear on the battlefield increase the fog of war. They can be overcome by effective training, unit cohesion, and a sense of leadership so imbued in the members of a unit that each soldier, in turn, is prepared to step forward and give direction toward mission accomplishment." FM 100-5, OPERATIONS, *supra* note 9, at 14-2.

initial response to this question must be that most **ROE** training, when it occurs at all, is less “training” than “instruction.” With few exceptions, attempts to expose soldiers to the impact of law and other external considerations on their actions consist of a small amount of formal instruction on the law of war.²⁴² When training objectives involving law of war or use of force issues do find their way into field exercises or unit evaluations at training centers, even realistic scenarios have no base of performance-oriented,²⁴³ individual soldier training²⁴⁴ on which to build. Under the present approach, rules of engagement for operations short of war are things to be “briefed,” not trained.²⁴⁵

A more extended response to the question concerning what is missing from **ROE** training contrasts this “training” of **ROE** with examples of truly effective training. Consider how the Army trains a soldier to correct common malfunctions of his M16 rifle. The soldier first receives a demonstration of how the task looks when performed

²⁴²One Army commentator traces the lack of training to regulatory requirements:

A review of [AR350-216's] requirements reveals a major weakness. The bifurcated system of training leads to breakdowns in its implementation. The formal instruction is being done. It is part of the soldier's formal military education. It is easily checked. The calibre of the instruction can be monitored by the commander and the staff judge advocate. But the soldier's actual understanding of the law of war, or lack thereof, is not so easily checked. The soldier's appreciation of his or her responsibilities under the law of war can only be realistically checked by followup training. Yet the regulation offers no guidance on how to conduct any such training.

A further deficiency arises from the fact that the judge advocate is mentioned only in connection with the formal instruction. Thus an impression is created that the judge advocate has no role in the training process beyond delivering a formal lecture. This often leads to the judge advocate delivering a “canned” lecture to a unit and then ceasing any further involvement in the training of that unit.

Elliott, *supra* note 4, at 12. In 1986, the Army replaced AR350-216 with Chapter 14 of AR 350-41. See *supra* note 82. Far from addressing the deficiencies that contributed to “canned” lectures, the new regulation provides even sketchier guidance. See AR 350-41, *supra* note 82 (consisting of 5 short paragraphs filling one-half of a page).

²⁴³According to Army training doctrine, one of nine principles of training is to “use performance-oriented training.” The principle is grounded in the view that “[s]oldiers learn best by doing, using a hands-on approach.” DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE 1-4 (15 Nov. 1988) [hereinafter FM 25-100].

²⁴⁴Army training doctrine distinguishes between “individual” tasks—ones performed by the individual soldier—and “collective” tasks—ones performed by crews, sections, squads or larger units. Although a unit's proficiency ultimately depends on its performance of collective “missionessential” tasks, a critical challenge for trainers is “to understand the responsibility for and the linkage between the collective mission essential tasks and the individual tasks which support them.” FM 25-100. *supra* note 243, at 1-7 to 1-8.

²⁴⁵See *supra* note 47.

to standard at full speed.²⁴⁶ Then the soldier receives formal, step-by-step instruction. The instruction identifies the task, states the conditions under which the soldier will perform the task,²⁴⁷ and describes the standards to which the sergeant will compare the soldier's performance. The instructor sergeant's description of standards centers on the word "SPORTS," which the soldier soon learns can help ingrain the sequence of subordinate tasks into memory.²⁴⁸ After individualized instruction, correction of deficiencies, evaluation, and any necessary retraining, leaders test the soldier's ability to perform the task during other training events. These include marksmanship training, live-fire exercises, and ultimately live-fire evaluations at training centers. At training centers, evaluators test the unit, all of its component systems, and individual soldiers on hundreds of tasks. By this time, "SPORTS," and the numerous associated proper movements and responses—reinforced by experience—have been ingrained into the soldier's thoughts and actions.

This essential training methodology succeeds even when the task is more analytical and the standards of performance follow no rigid sequence. For example, the Army trains junior officers to prepare effective orders for their subordinates by grouping together five concepts under the key word "METT-T."²⁴⁹ That word is a memory device. It aids decision-making by reducing the risk that the officer has chosen a course of action without considering an important situational factor. Even though conceptually distinct, the five factors interact. The officer must reexamine them periodically as he prepares the order. Despite the more flexible standards of performance inherent in a "thinking" task such as this, the officer succeeds in assimilating METT-T into his judgment. He does this by applying the factors again and again, by accumulating numerous

²⁴⁶See COMMON TASKS MANUAL, *supra* note 79, at 5 ("Show the soldier how to do the task to standard . . .").

²⁴⁷The "conditions" pertinent here are that the soldier will be armed with a loaded M16A1 or M16A2 rifle, and that the rifle has malfunctioned and stopped firing. *Id.* at 152 (Task 071-311-2029).

²⁴⁸S—Slap upward on the magazine to make sure it is properly seated.

P—Pull the charging handle all the way back.

O—Observe the ejection of the case or cartridge. Look into the chamber and check for obstructions.

R—Release the charging handle to feed a new round in the chamber.

T—Tap the forward assist.

S—Shoot.

Id. at 153.

²⁴⁹See DEP'T OF ARMY, SOLDIER TRAINING PUBLICATION No. 21-II-MQS, MILITARY QUALIFICATION STANDARDS II; MANUAL OF COMMON TASKS FOR LIEUTENANTS AND CAPTAINS 3-86 (31 Jan. 1991) (Task 04-3303.02-0014, Prepare Platoon or Company Combat Orders) (describing the factors of "mission, enemy, terrain, troops, and time available").

experiences that give content to the factors, and by assessing the effectiveness of his orders during unit exercises and evaluations.

The Army's training methodology in these examples accords well with academic theories in the areas of cognitive psychology and human learning. Although adherents subscribe to many versions, the "information processing" and "schema" theories as a group carry practical implications for teaching individuals new skills.²⁵⁰ These theories, like all cognitive learning theories, focus "on what happens in the mind and view learning as changes in the learner's cognitive structure."²⁵¹ Psychologists developing these theories attempt "to describe how sensory input is perceived, transformed, reduced, elaborated, stored, retrieved, and used."²⁵² Educators and trainers seek to translate what psychologists discover about these cognitive tasks into techniques for better instruction.²⁵³

Central findings of research into information processing include the following:

1. Working memory can only store five to nine bits of information at any one time;²⁵⁴
2. A human must retrieve information from long-term memory and transfer it to working memory before he can incorporate it into his responses to stimuli;²⁵⁵
3. "[O]rganized structures of stereotypic knowledge," which researchers call "schemas,"²⁵⁶ permit humans to

²⁵⁰CANDACE S. BOS & SHARON VAUGHN, *STRATEGIES FOR TEACHING STUDENTS WITH LEARNING AND BEHAVIOR PROBLEMS* 56 (1991).

²⁵¹*Id.* at 44. Unlike cognitive theories, operant or behavioral learning theories—which form the other major branch of learning theories—focus on "identifying observable behaviors and manipulating antecedents and consequences of these behaviors to change behavior." *Id.* at 26. The useful caricature of operant theory is that it "is not concerned with what you think or tell yourself during the learning process." *Id.* Although training strategies must incorporate the lessons of both major branches, the clear relevance of intellectual functioning to conforming one's actions to ROE explains the emphasis in this article upon the cognitive branch.

²⁵²*Id.* at 44 (citing Earl B. Hunt, *Verbal Ability*, in *HUMAN ABILITIES: AN INFORMATION PROCESSING APPROACH* 63–100 (Robert J. Sternberg, ed. 1985); ÜLRIC NEISSER, *COGNITION AND REALITY: PRINCIPLES AND IMPLICATIONS OF COGNITIVE PSYCHOLOGY* (1976); H. Lee Swanson, *Information Processing Theory and Learning Disabilities: An Overview*, *J. OF LEARNING DISABILITIES*, Mar. 1987, at 1,3–7.

²⁵³*Id.* at 56.

²⁵⁴G.A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, *PSYCHOL. REV.* 63, 81–97 (1956).

²⁵⁵See BOS & VAUGHN, *supra* note 250, at 52.

²⁵⁶*Id.* at 52 (citing ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS, AND UNDERSTANDING* (1977)). "Schemas" is the plural form of the word "schema." An alternative plural form is "schemata."

retrieve information from long-term memory into working memory.²⁵⁷

Corresponding training strategies include helping individuals “develop adequate schemas and modify their current schemas for better understanding,” teaching them “to use memory strategies,” and using other techniques to assist them “in organizing their long-term memories.”²⁵⁸

Memory devices such as “SPORTS” and “METT-T”—once they have been accommodated or assimilated as schemata into the soldier’s cognitive structure²⁵⁹—also stand a chance of improving decisions made under the stress of a crisis. The massive research literature concerning the impact of crisis-induced stress on decision-makers resists a brief synopsis. However, few dispute that stress can impair cognitive functioning, resulting in “a tendency to seek familiar patterns, to relate the critical events to mental schemata or scripts.”²⁶⁰ If devices such as SPORTS and METT-T can systematically alter the schemata of the soldier to remind him, when under stress, of helpful examples, experiences, information, or principles from long term memory—then in theory they can mitigate such

²⁵⁷See *id.* at 52 (citing SCHANK & ABELSON, *supra* note 256; David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, in THEORETICAL MODELS AND PROCESSES OF READING 33-58 (Harry Singer & Robert B. Ruddell, (eds.) 3rd ed. 1980); R.J. Spiro, *Constructive Processes in Prose Comprehension and Recall*, in THEORETICAL ISSUES IN READING COMPREHENSION 245-76 (R.J. Spiro et al. eds., 1980); WR. BREWER & GLENN V. NAKAMURA, UNIVERSITY OF ILLINOIS, CENTER FOR THE STUDY OF READING, TECH. REP. 325, THE NATURE AND FUNCTION OF SCHEMAS (1984)).

²⁵⁸*Id.* at 56; see also BRUCE JOYCE & MARSHA WEIL, *MODELS OF TEACHING* 94, 97 (2d ed. 1980) (discussing teaching models designed to improve memorizing skills). Because it sets individual soldier training within a system that reinforces that training through crew and team drills, unit exercises, and elaborate feedback mechanisms, the Army approach also incorporates insights from training models developed specifically for military purposes. See, e.g., Robert M. Gagne, *Military Training and Principles of Learning*, AMERICAN PSYCHOL. 17 (1962) (arguing that the simplified stimulus-response-reinforcement exercises of the operant conditioning labs are inadequate to permit design of training for more complex behavior); KARL U. SMITH & MARGARET F. SMITH, *CYBERNETIC PRINCIPLES OF LEARNING AND EDUCATIONAL DESIGN* (1966) (modeling the human as a self-correcting information-processing system).

²⁵⁹The process of “assimilation” is the incorporation of new experience, whereas “accommodation” is changing one’s cognitive structure to fit the new experiences that occur. See JOYCE & WEIL, at 107 (summarizing a distinction made in JEAN PIAGET, *THE ORIGINS OF INTELLIGENCE IN CHILDREN* (1952)).

²⁶⁰Jerrold M. Post, *The Impact of Crisis-Induced Stress on Policy Makers*, in AVOIDING WAR: PROBLEMS OF CRISIS MANAGEMENT 471, 475 (Alexander L. George, ed. 1991) (citing IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS—CONFLICT, CHOICE, AND COMMITMENT* (1977) and IRVING L. JANIS, *CRUCIAL DECISIONS* (1989)). The “scenario fulfillment” phenomenon to which the crew of the *Vincennes* fell prey, see *supra* note 139 and accompanying text, arose from impairment of cognitive functioning under stress. See Sagan, *supra* note 15, at 460. The individual sees what his schemata have prepared him to see. Inconsistent data simply is ignored. *Id.* at 80 (citing sources).

impairment of cognitive functioning. Although soldiers facing the prospect of hostile fire for the first time may distort perceptions or fall prey to other flawed cognitive processes regardless of their training experiences, the most consistent prescription for improving decision-making under stress remains training, training, and more training.²⁶¹

Yet meaningful ROE training cannot occur because the present, “legislative” approach to imparting ROE encourages commanders to make many diverse rules without imposing a clear hierarchical structure. Meaningful ROE training cannot occur because troops receive little interpretive assistance in the form of examples or illustrations. Even if some of what a soldier hears about “necessity” or “proportionality” or “self-defense” or “clear hostile intent” penetrates to that soldier’s long-term memory, the values and rules used in crisis will come from schemata formed much earlier. If the chain of command has trained this soldier to “attack the enemy,” then perhaps this simple combat rule will be a guide. If not, then perhaps no particular piece of information will come into his mind and move him to act.²⁶²

IV. Curative Approach

The elaborate diagnosis presented in part III serves a crucial purpose. By carefully describing the present method of imparting

²⁶¹ See, e.g., Post, *supra* note 260, at 491; HAYES, *supra* note 15, at 59.

²⁶² A widely used taxonomy in the field of education provides a helpful framework with which to view the legislative model. Educators employing the taxonomy regard the “cognitive domain” as consisting of six categories: (1) knowledge; (2) comprehension, (3) application, (4) analysis, (5) synthesis, and (6) evaluation. See generally TAXONOMY OF EDUCATIONAL OBJECTIVES: HANDBOOK I, COGNITIVE DOMAIN (B. S. Bloom et al. eds., 1956) (describing the cognitive categories in detail and presenting illustrative objectives for each). The lowest level of learning is knowledge, which the taxonomy defines as the remembering of previously learned material. See NORMAN E. GRONLUND, HOW TO WRITE AND USE INSTRUCTIONAL OBJECTIVES 32 (4th ed. 1991). The highest level is evaluation, which is the making of judgments based on certain criteria. See *id.* Each of the levels consists of skills that build on the lower levels. See *id.* at 30. Thus, comprehension—defined as “the ability to grasp the meaning of material”—presumes knowledge. *Id.* Application—“the ability to use learned material in new and concrete situations”—presumes comprehension and knowledge. *Id.* Analysis—“the ability to break down material into its component parts so that its organization structure may be understood”—presumes application, comprehension, and knowledge. *Id.* Synthesis—“the ability to put parts together to form a new whole”—presumes analysis, application, comprehension, and knowledge. *Id.* The problem with the legislative model of imparting ROE, within this taxonomy, is that it assumes soldiers will be able to make judgments concerning use of force (evaluation) before rules have been identified and entered into memory (knowledge), understood (comprehension), related to new situations (application), distinguished from other situations (analysis), or combined with other cognitive tasks (synthesis). Stated figuratively, the legislative model assumes soldiers will be able to run before they can crawl.

land force ROE, isolating historical trends that have shaped the method, and developing a theory of why ROE sometimes do soldiers more harm than good, part III laid the groundwork for choosing an approach that will address underlying causes and not mere symptoms. In short, the theory is that ROE are produced and imparted using a legislative model, and that ROE produced and imparted in this manner are not as helpful as they could be in guiding soldiers to appropriate decisions about whether, when, where, and how to use force. A curative approach consistent with this theory should offer an alternative free from the shortcomings of the legislative model.

Lawyers, line officers, and scholars writing about ROE have tended inadvertently to reinforce the legislative model. Although these dedicated and resourceful professionals have admirably drawn attention to ROE, identified key areas of concern, and stimulated valuable discussion, the model remains intact as a systemic barrier to improved soldier decisions on the use of force. The handbook to which most ground component judge advocates turn for information about ROE²⁶³ provides a fair summary of conventional wisdom. The handbook stresses that ROE must both define and be defined by the particular mission.²⁶⁴ It recommends intimate involvement by judge advocates in “the planning process.”²⁶⁵ It provides numerous tips for “drafting,” “writing,” “reviewing,” “[t]ailor[ing],” “disseminating,” and “brief[ing]” the ROE for particular operations.²⁶⁶ The handbook implies that wartime and peacetime are environments requiring wholly separate ROE.²⁶⁷ Each of these prescriptions supports one or more assumptions of the legislative model uncovered above.

²⁶³See OP. LAW HANDBOOK, *supra* note 15, at 3 (“The Operational Law Handbook has become the hornbook for deploying Judge Advocates.”), H-92 to H-106 (addressing rules of engagement).

²⁶⁴See *id.* at H-92 (“ROE define the mission by Limiting the use of force in such a way that it will be used only in a manner consistent with the overall military objective.”); *id.* at H-94 (“The key to success in drafting ROE is familiarity with the commander’s concept of the mission.”); *accord, e.g.*, Parks, *Righting*, *supra* note 15, at 88 (recommending that those preparing ROE should first ask “[w]hat is my mission?”).

²⁶⁵See OP. LAW HANDBOOK, *supra* note 15, at H-94; *accord, e.g.*, Roach, *supra* note 3, at 53 (“When developing specific operations, planners should anticipate what additional ROE will be needed in the event of changed circumstances, particularly if they run into increasingly tense or hostile situations—and then ask for revised or additional ROE ahead of time, on a contingency basis.”).

²⁶⁶OP. LAW HANDBOOK, *supra* note 15, at H-92 to H-106; *accord, e.g.*, Phillips, *supra* note 15, at 25 (stating the ROE “are designed to be part of operations plans and orders” and that “[t]he procedural aspects involved in ROE are drafting, reviewing, approving, modifying, and ultimately applying them”).

²⁶⁷See OP. LAW HANDBOOK, *supra* note 15, at H-95 & n.1; *accord, e.g.*, Roach, *supra* note 3, at 49, 53-54.

Aside from one statement urging that “[s]quad leaders should drill their troops on ROE,”²⁶⁸ the handbook makes no reference to the sort of individual training that might actually influence soldier decisions under stress. More important, the handbook and the literature it summarizes also suggest that ROE come in countless and changing shapes, colors, and flavors.²⁶⁹ Virtually no commentary exists on how to structure these many rules so that ordinary soldiers might assimilate the most important ones for their purposes and later—in a crisis—retrieve them from memory.²⁷⁰

Adhering roughly to the sequence of topics addressed in the diagnostic part of this article, this part endorses a “training” model for imparting land force ROE. Part IV.A introduces terms and distinctions different from those employed in the present method and essential to the adoption of a training model. Part IV.B identifies the historical trends most pertinent to selecting “baseline” or “default” rules for use in training soldiers. Part IV.C then further describes the training model and contrasts it with the legislative model it is designed to replace.

A. Refine Terms and Distinctions Employed in the Present Method

An improved model of imparting land force ROE will require a sharper notion of “ROE.” It will require more emphasis on the distinction between “nonhostile” and “hostile” and less on the traditional one between “peacetime” and “wartime.” It will require that leaders unpack the self-defense boilerplate into meaningful components. This subpart of the article takes up these three propositions in turn.

First, an improved model will require a more precise vocabulary. The JCS definition of “rule of engagement” is so broad that many different types of rules may be termed “ROE.” In itself, this creates no confusion. A generic term has its role. Yet professional discourse on land force ROE will become precise only when partici-

²⁶⁸OP. LAW HANDBOOK, *supra* note 15, at H-93.

²⁶⁹*See id.* at H-92 to H-106 (recommending that drafters “[s]eparate ROE by job description,” providing a summary of PROE, and then reprinting 12 different samples from various units and missions); *accord, e.g.*, Phillips, *supra* note 15, at 25 (“While the role for [each level of the chain of command will vary], each level should play a part in the production of ROE to develop a more realistic set of rules.”).

²⁷⁰Two commentators suggest an analogy between training military officers and training policemen, asserting that ROE must be written so that decision-makers may employ individual judgment. *See* Sagan, *supra* note 15, at 444; Parks, *Righting*, *supra* note 15, at 86. Still, aside from a comment by one that the ROE must therefore be “written in a flexible manner,” Sagan, *supra* note 15, at 444, neither commentator provides specific guidance on whether and how rules might contribute to the process of *forming* judgment, and if *so*, what sorts of rules these might be.

pants agree to use a larger vocabulary, one that communicates important distinctions. It is no wonder that the artillery officer who conceives of ROE primarily as rules dictating approving authorities for use of weapons systems²⁷¹ will communicate poorly with the infantry officer who regards ROE primarily as hostility criteria clarifying whether soldiers can fire shots before receiving fire.²⁷²

The purposes of ROE—policy, legal, military—cannot furnish the basis for a more precise vocabulary. In the classroom, Venn diagrams depicting the overlap between these purposes²⁷³ can remind readers of Clausewitz's insight that military orders often must implement policy goals. However, because of the frequent overlap in purposes, the insight is worthless as a labeling tool. Those receiving ROE cannot determine from the text of the rules themselves what purposes the rules serve.²⁷⁴

The better method for deriving a more precise vocabulary is to label the *content* or *function* of the rules themselves rather than the *purposes* to which leaders put the rules. The label "core rules" fairly names the content of the two basic principles stated in the JCS PROE: necessity—incorporating the definitions of hostile act and hostile intent—and proportionality. Additionally, the ten "functional

²⁷¹See Major Joseph P. Nizolak, Jr., *ROE Dissemination: A Tough Nut to Crack!*, FIELD ARTILLERY, Apr. 1992, at 35–36.

²⁷²See Captain Kevin Dougherty, *Tactical Rules of Engagement*, ARMY TRAINER, Spring 1992, at 10–11. Both of these ground soldiers will talk at cross-purposes with the ship captain who regards ROE solely as instructions pertaining to use of force in national self-defense. See Roach, *supra* note 3, at 49.

²⁷³See *supra* Figure 4a, note 73, and accompanying text.

²⁷⁴Another interesting distinction that proves ultimately unworkable as the basis for a new vocabulary is that between "strategic-political ROE," "operational ROE," and "tactical ROE," a tripartite scheme favored by one recent commentator. See Morris, *supra* note 15, at 85–92 (eventually acknowledging that "[e]ven within the JCS ROE [part of the strategic-political ROE] there are tactical restraints"). Perhaps because distinctions based on levels of authority do not translate into discernible differences in textual language, a similar tripartite scheme during the Vietnam war was routinely ignored in military parlance. See *supra* note 109.

Still another distinction with little use for land forces beyond the classroom is that between "command by negation" provisions and "positive command" provisions. See Alexander L. George, *Crisis Management: The Interaction of Political and Military Considerations*, 26 SURVIVAL 223, 227 (1984); HAYES, *supra* note 15, at 5; Sagan, *supra* note 15, at 444. Command by negation involves permissive orders that allow a wide range of action unless countermanded by higher authority. Positive command involves restrictive orders that detail actions which can be taken only when authorized by higher authority. Ship captains and senior ground commanders do well to know that functional Type VI rules often take the logical structure of positive command (e.g., no use of chemical weapons without approval of the National Command Authority); however, accomplishment of most missions will require a combination of permissive orders and specific countermands. As a result, to know that this regime can formally be labeled "command by negation" is far less useful than to know the substance of the specific countermands.

types” outlined above²⁷⁵ provide accurate labels for specific rules based on how those rules actually operate to control the use of force. Widespread use of these terms could quickly dispel confusion.

Second, an improved model would refine the peacetime/war-time distinction. The distinction between “peace” and “war” has grown too elusive to be of use in imparting ROE to soldiers. For the soldier walking patrol during a show of force operation in a foreign land, it matters little whether the soldiers who might shoot him pledge allegiance to a state that formally has declared war on the United States. Similarly, the soldier’s decision-making process on the use of force is no simpler when confronting civilians or prisoners in a war zone merely because Congress has declared war on one or more nations.

By contrast, the combatant commander gives all ground soldiers in his command crucial information when he designates a “hostile force.” So long as those wearing the described uniform are not surrendering, American soldiers may shoot on sight. Before firing on those not wearing the described uniform, the core rules still apply: the soldier must first identify a hostile act or clear indications of hostile intent.

Land force leaders can meet the devilish challenge of getting soldiers to identify hostile intent through realistic training on the core ROE in a variety of scenarios. They can preserve a warrior spirit by helping soldiers master transition. Specifically, these leaders can help soldiers alternate between protecting the unit from individuals with ambiguous intentions and attacking a force that has been declared hostile. Leaders cannot inculcate good judgment in soldiers about the use of force merely by stating that America is or is not at war.

Third, an improved model would break down the self-defense boilerplate. Telling soldiers in capital letters that they may “take all necessary measures in self-defense” is not a panacea. What are “necessary measures?” Is anticipatory self-defense allowed? What if my commander orders me to hold fire against an attacker so as to preserve the stealth essential to a decisive blow by my squadmate? What if my commander has prohibited me from carrying ammunition? Of course, any short verbal formula will be unable to capture the myriad factors a soldier may face. Still, the self-defense boilerplate begs too many questions to be one of the thoughts a soldier should bring to mind under stress. The separate military and legal principles that constitute self-defense provide a better basis for making the tough decisions on when, where, and how to use force.

²⁷⁵See part III.A.5*supra* and Appendix A

B. Acknowledge Historical Lessons and Trends

Much as commanders and soldiers may sometimes chafe under ROE, they are here to stay. The three factors that gave rise to modern ROE since the Korean conflict²⁷⁶ show no signs of abating. First, although the United States is no longer locked in a tense standoff with another world nuclear superpower, many nations now control enormously destructive, if not nuclear, weapons. As a result, the incentive persists for all states to prevent minor incidents and conflicts from escalating. Second, communications and information-processing technology continue to improve command and control over military operations by senior leaders. Still, no one anticipates a day when a combatant commander will be able to decide whether to fire for each soldier standing guard. Third, the news media investigates and reports the use of military force as aggressively and skeptically as ever. No reason exists to expect that media scrutiny will decrease.

The structure of top-level rules developed over the past three decades by Navy and Air Force staffs and embodied in the JCS PROE should remain intact. A body of doctrine in the conduct of joint service operations already incorporates the PROE's system of standing and supplemental rules, a system familiar to pilots, naval captains, and their judge advocates. Irrespective of the "peacetime" in the name, the PROE themselves—if not the land force ROE implementing the PROE—acknowledge well the uncertain dividing line between peace and war and provide a mechanism for decision-makers to obtain guidance even in extended combat engagements.²⁷⁷ Additionally, the PROE formulations of necessity and proportionality are sound restatements of the fundamental legal constraints governing all armed units and individuals. Recent history thus counsels that land forces adopt a model for imparting ROE that prepares individual soldiers to make tough choices on the ground while still permitting senior commanders to comply with prevailing joint service practice.

The historic mission of the Army to prepare for mid-intensity conventional war will not likely change in the near term, regardless of how many brush-fire conflicts American soldiers extinguish in operations other than war. Accordingly, force structure likely will continue featuring a mixture of heavy and light units designed to fight against a threat resembling the Korean Peoples Army while

²⁷⁶See *supra* notes 103–05 and accompanying text.

²⁷⁷See *infra* notes 331–33 and accompanying text (endorsing the recent recommendation by a jointly staffed conference to change the name *Peacetime ROE* to *Standing ROE*).

also permitting “crisis response” across the full spectrum of conflict.²⁷⁸

A collection of mostly light units equipped for contingency missions might present an easier challenge in developing doctrine and training in ROE. Leaders could emphasize scenarios in which the predominant threats are terrorists, insurgents, or outlaws. Rules of engagement could educate soldiers on the finer points of hostile intent without also creating the mindset needed to mount a prolonged offensive against a large conventional force.

Yet American land forces do not face this easier challenge. The “baseline” or “default” ROE that become second nature to a soldier must guide the soldier to wary but restrained actions both in combat when facing civilians or prisoners and in operations other than war when facing any individual or force that the command has not declared hostile. Just as important, these “baseline” ROE must guide the soldier to initiate aggressive action, regardless of the environment, against those who either fit the description of a previously identified hostile force or display hostile acts or intentions toward American forces.

C. Adopt a “Training Model” of Land Force ROE

Specific recommendations are the project of part V of this article. The immediate project in this subpart is to state—in theoretical rather than concrete terms—the elements of a model for controlling behavior that might produce better decisions by soldiers regarding the use of force. The five problems plaguing the legislative model²⁷⁹ correspond to five elements of a “training model” that avoids these problems.

First, under the training model, commanders would make rules far enough in advance for soldiers to train with them. As much as possible, the texts of the rules would not vary—either vertically between units in a particular operational chain or horizontally across similarly manned and equipped units. A single, brief “default” text would capture those ROE—perhaps better termed “principles”—that apply to individual soldiers in a wide range of circumstances. Training doctrine would standardize and package this text with a device, modeled after “METT-T,” that would help soldiers remember the default rules. A commander would retain the flexibility to issue specific guidance to the entire force not by “tailoring” entirely new ROE during the planning process leading up to a specific mission.

²⁷⁸See General Gordon R. Sullivan, *Power Projection and the Challenges of Regionalism*, *PARAMETERS*, Summer 1993, at 2-15.

²⁷⁹See *supra* part III.C.

A CONTRAST IN APPROACH

<u>LEGISLATIVE MODEL</u>	<u>TRAINING MODEL</u>
EXTERNAL RULES	INTERNAL PRINCIPLES
WRITTEN TEXTS	MEMORY & JUDGMENT
MANY RULES	SINGLE SCHEMA
INTERPRETIVE SKILLS	PRACTICAL APPLICATION
ADVISERS & COUNSELORS	PERSONAL EXPERIENCE
ENFORCEMENT & PUNISHMENT	TRAINING & EVALUATION
'TAILORING' FOR MISSION	FORMATTED SUPPLEMENTS
LEISURELY ENVIRONMENT	FOG OF WAR

Figure 6

Rather, the commander would retain flexibility by using a pre-established structure of alert conditions²⁸⁰ and by ensuring the staff **has** drafted ROE annexes for contingency plans that anticipate all of the tasks the unit might be called on to complete. These alert conditions and ROE annexes would build on, connect with, and supplement the single schema of “default” principles on which leaders would be continuously training soldiers. See *Figure 6*.

Second, under the training model, land force ROE on the soldier level would consist of internalized principles rather than external, written texts. Soldiers would apply these principles by drawing on individual experience and judgment. The training model rejects the assumption that soldiers, short on time and interpretive guidance, can follow ROE in the same way a business executive follows the tax code. Under the training model, leaders would assist soldiers in acquiring the judgment necessary to apply the default principles across a wide variety of situations. Leaders would achieve this by simulating those situations and evaluating soldier responses against preestablished standards.

²⁸⁰Cf. O'CONNELL, *supra* note 15, at 179 (“While detailed rules of engagement cannot easily be promulgated to cover every type of hypothetical situation, it is possible to envisage general rules which can be applied to any one of three broad situations, namely low tension, high tension, and hostilities.”).

Third, under the training model, instances in which soldiers break the rules would become learning tools. Because the training model seeks conformity with ROE through internalization rather than criminal prosecution, leaders would stress repetitive practice to demanding standards more than zealous enforcement by judge advocates. Yet while courts-martial of soldiers charged with offenses involving excessive force can frustrate the goal of fielding a land force infused with initiative as well as appropriate restraint, a small fraction of soldiers inevitably will commit crimes that go beyond good faith technical infractions. The military justice system must hold this small fraction accountable for their actions. The training model would acknowledge this by ensuring that soldiers learn the facts of criminal cases in a manner that permits them to contrast allegedly criminal conduct with appropriate decisions under the ROE.

Fourth, land force doctrine under the training model would place less emphasis on “tailoring” entirely new ROE and more emphasis on supplementing an existing structure. Doctrine would stress the insight that “[t]ransmission of and assured understanding of ROE . . . requires follow-through, rehearsals with situations to check understanding and compliance, and continuing brief-backs.”²⁸¹ Pronouncements that “rules may change frequently”²⁸² and that “[a] force projection army tends to face a wide array of ROE”²⁸³ would accompany references noting that the JCS *PROE* contain standing rules on use of force and that leaders continuously train individual soldiers on default rules consistent with the *PROE*. Doctrine would guide commanders to issue specific ROE by supplementing these standing rules through established alert conditions and existing formats. Furthermore, doctrine under the training model would assist “[t]ransmission of and assured understanding of ROE” by formally endorsing the “core rules” and the ten “functional types” discussed above.²⁸⁴

Fifth and most important, under the training model a single schema would organize the rules and give soldiers a realistic chance of retrieving them from memory during a stressful moment. Just as no logistical system will increase combat effectiveness if it demands that the soldier assaulting a beach carry sixty pounds of rations, equipment, and munitions on his back,²⁸⁵ no system of ROE will

²⁸¹FM 100-5, OPERATIONS, *supra* note 9, at 13-4, *quoted supra* in text accompanying note 230.

²⁸²*Id.* at 13-4, *quoted supra* in text accompanying note 231

²⁸³*Id.* at 2-4, *quoted supra* in note 232.

²⁸⁴*See supra* parts III.A.5 and IV.A.

²⁸⁵*See, e.g.*, S.L.A. MARSHALL, THE SOLDIER'S LOAD AND THE MOBILITY OF A NATION 23-36 (1950).

improve decisions concerning use of force if it expects that the soldier under stress can consult, interpret, and deconflict a body of rules and orders that leaders stack on him for the first time during the current operation. The training model rests on the understanding that stress will impair cognitive functioning. It assumes soldiers will seek familiar patterns and "relate the critical events to mental schemata or scripts." Accordingly, the training model would feature repetitive, scenario-based reinforcement of a schema containing only four rules, a size that could fit within the working memory of every soldier. The four default rules would exclude the WROE maxim to "shoot the enemy." They would exclude the PROE maxim to "take all appropriate measures in self-defense." These traditional boilerplates simply leave open too many questions for leaders to include them in a schema that, under the training model, must become second nature to soldiers.

V. Specific Remedial Actions

Although a careful analysis of underlying causes can suggest remedial steps previously ignored or downplayed, a theory seldom translates easily into a single small set of specific recommendations. This part of the article recommends measures that are fully consistent with the approach outlined in part IV, heedful of the diagnosis presented in part III, and targeted at the problem defined in part II. Still, these recommendations are only some of the concrete steps, consistent with the training model, that might improve soldier decisions on the use of force. To achieve the specificity necessary for any recommendation to be practical, this part of the article frames many suggestions in language and systems peculiar to Army training doctrine. Due to great similarities between training practices in the two land forces, the Marine Corps could adopt the recommendations with only slight modifications.²⁸⁶

²⁸⁶Despite the inevitable differences in training terminology and practices that result from their distinct missions, compare 10 U.S.C. § 3062(b) (1993) (stating that the Army "shall be organized trained, and equipped primarily for prompt and sustained combat incident to operations on land) with 10 U.S.C. § 5063(a) (1993) (stating that the Marine Corps "shall be organized, trained and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign"), the Army leader quickly finds a close replica within the Marine Corps for almost every aspect of training. For instance, the discussions *infra* of individual and collective Army tasks (parts VA and VE) could apply without change to the Marine Corps, *see, e.g.*, DEP'T OF NAVY, FLEET MARINE FORCE MANUAL, FMFM 1, WARFIGHTING 47-48 (6 Mar. 1989), while the discussion of Army Combat Training Centers (part VE) could apply with only slight change to the Marine Corps Air Ground Combat Center at Twentynine Palms, California. *See, e.g.*, HEADQUARTERS, UNITED STATES MARINE CORPS, HISTORY AND MUSEUMS DIVISION, UNITED STATES MARINES AT TWENTYNINE PALMS, CALIFORNIA 72-83 (1989).

STANDING RULES OF FORCE FOR THE INDIVIDUAL SOLDIER

" R - A - M - P "

Return fire with aimed fire. Return force with force. You always have the right to repel hostile acts with necessary force.

Anticipate attack. Use force first if, but only if, you see clear indicators of hostile intent.

M **Measure the amount of force** that you use, if time and circumstances permit. Use only the amount of force necessary to protect lives and accomplish the mission.

P **Protect with deadly force only human life,** and property designated by your commander. Stop short of deadly force when protecting other property.

Figure 7

A. The "RAMP" Rules

All soldiers should train to an individual task that incorporates "default" principles on which the entire structure of land force ROE could build. Appendix B contains a proposed draft of this task, similar in format to other entries in the *Soldier's Manual of Common Tasks*,²⁸⁷ published by the Army. Also refer to *Figure 7*.

The proposed task, entitled "Use Force Appropriately," employs the "key word" device exemplified by "METT-T" and "SPORTS" and endorsed by learning theorists as a means of organizing long-term memory for rapid retrieval and application.²⁸⁸ In short, "RAMP" is a single schema that once effectively assimilated by soldiers through training can avoid the disadvantages of the present "legislative" approach to ROE.

²⁸⁷ See COMMON TASKS MANUAL, *supra* note 79.

²⁸⁸ See, e.g., JOYCE & WEIL, *supra* note 258, at 100. Other examples in which Army training employs key words may be found in COMMON TASKS MANUAL, *supra* note 73, at 14 (recommending the letters of "SALUTE" to assist soldiers in recalling what information to report on sighting the enemy) and in DEP'T OF ARMY, FIELD MANUAL 7-8, THE INFANTRY PLATOON AND SQUAD (INFANTRY, AIRBORNE, AIR ASSAULT, RANGER) N-1 to N-2 (31 Dec. 1980) [hereinafter FM 7-81 (recommending the "five 'S's'" to assist soldiers in remembering how to handle prisoners of war on capture).

The proposed task incorporates a sensible approach to potentially complex legal issues. As the infantry platoon handling captured prisoners need not know the nuances of legal status under the Geneva Conventions of 1949, the individual soldier facing a potential terrorist need not know precisely how the status of forces agreement relates to the civil trespass law of a nation hosting American forces. The infantry platoon trains to handle captured prisoners by giving all prisoners the humanitarian treatment accorded under law to the most protected class of captives; the platoon allows higher headquarters to determine the captives' precise legal status.²⁸⁹ Sim-

²⁸⁹The platoon trains for circumstances involving captives under a simple set of rules that ensures compliance with international law while protecting the legitimate interests of the Army in obtaining intelligence and in shielding its forces from harm. The rules are known to soldiers as "the five 'S's':

1. *Search PWs* as soon as you capture them. Take their weapons and papers, except identification papers. Give a written receipt for any personal property and documents taken. Tag documents and personal property so that you know which PW had them. Have one man guard while another searches. When searching, do not get between the PW and the guard. To search a PW, have him spread-eagle against a tree or wall, or on the ground in a pushup position with the knees on the ground. Search the PW and all his gear and clothing.

2. *Segregate PWs* into groups: officers, NCOs, enlisted men, civilians, males, females, and political figures. This keeps the leaders from promoting escape efforts. Keep groups segregated as they move to the rear.

3. *Silence PWs*. Do not let them talk to each other. This keeps them from planning escape and from cautioning each other on security. Report anything a PW says to you or tries to say to another PW.

4. *Speed PWs* to the rear. Platoons turn PWs over to the company, where they are assembled and moved to the rear for questioning by the s2.

5. *Safeguard PWs* when you take them to the rear; make sure they arrive safely. Watch out for escape attempts. Do not let them bunch up, spread too far out, or start diversions (fist fights, etc.). These create a chance for escape. At the same time, do not let anyone abuse them.

FM 7-8, *supra* note 288, at N-1 to N-2. Soldiers following these rules protect all captives as if they were prisoners of war, despite the fact that international law reserves this most protected status to individuals meeting criteria specified in Article 4 of Geneva Convention III, *supra* note 4. *Cf.* Letter from Abraham D. Sofaer, Legal Adviser to the United States Dep't of State, to Richard L. Thornburgh, United States Attorney General (Jan. 31, 1990) (copy on file with the CLAMO) (explaining that "[p]risoner of war status is generally sought by captured individuals because persons entitled to such status may not be prosecuted for legitimate acts of war," and reporting that on December 20, 1989 the Departments of State and Defense had elected to extend protections of the status to members of the Panamanian Defense Force "even if they might not be entitled to these protections under the terms of Article 4 of Geneva Convention III").

Soldiers easily can remember and apply the five "S's." *See, e.g.*, United States v. Bryan, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990) (page 48 of initial testimony by Captain Jon W. Campbell before Article 32 Investigation on 7 May 1990) (responding to question about Panamanian prisoners with statement that soldiers were "[t]o handle with the 5 'S's': search, segregate, safeguard, speed, silence"). Tribunals convened further "to the rear" under Article V of Geneva Con-

ilarly, under RAMP an individual soldier would train to use force within the universal legal principles of necessity and proportionality; the soldier would allow higher authorities to determine whether to supplement these basic principles.

Yet the component rules of "RAMP" are not abstract generalities. Even though they permit soldiers to protect themselves, they convey more substance than the self-defense boilerplate. Although they demand that use of force comply with "necessity" and "proportionality"—within the meaning those concepts have acquired through hundreds of years of legal and military practice—the RAMP rules run less risk of being forgotten by the soldier who dislikes long words or misconstrued by the soldier who tends to interpret words literally.²⁹⁰ The RAMP concept is concrete because it incorporates not only necessity and proportionality, but also functional Types I, II, and III. See *Figure 8*.

The proposed task provides the flexibility needed to permit its use across the range of potential armed conflict. The RAMP rules are default settings that a commander may supplement or modify for a particular mission.²⁹¹ Depending on the mission, the potential threats, the terrain, or the experience of his troops, a commander might supplement the "A-Anticipate Attack" rule with additional hostility criteria. A senior commander might even declare a particular force hostile, in which case he would supplement the "A" rule to permit preemptive attack on all forces fitting the given description. Also depending on situational factors, a commander might supplement the "M-Measure" rule to include a more or less graduated escalation of force, or, by supplementing the "P-Protect" rule, order troops to defend certain mission essential property with deadly force.

vention III are in a better position than front-line soldiers to apply the sometimes fine factual and legal distinctions over prisoner status. *See, e.g.*, Memorandum, Commander, 101st Airborne Div. (Air Assault), AFZB-JA, subject: Article 5 Tribunal Standard Operating Procedure (12 Feb. 1992) (providing for status determinations at division level and assigning a legal adviser to review all determinations not to bestow prisoner of war status).

²⁹⁰One reasonably expects that an 18-year-old under stress might interpret "necessity" to mean, literally, "anything needed to help me accomplish my mission faster and easier." Such literal—and legally unjustifiable—interpretations of "necessity" in a military context are well-documented. *See, e.g.*, The Hostage Case (United States v. List), XI Trials of War Criminals 1252-54 (1948); WALZER, *supra* note 153, at 144; WILLIAM V. O'BRIEN, *The Meaning of Military Necessity in International Law*, in 1 YEARBOOK OF WORLD POLITY 109 (William V. O'Brien ed., 1957).

²⁹¹Note that paragraph 1 of the Training Information Outline, *see infra* Appendix B, requires that soldiers "[f]ollow all lawful orders of your chain of command regarding use of force." *Cf.* Headquarters, British Army, Instructions By the Director of Operations for Opening Fire in Northern Ireland, para. 1 (Nov. 1971) (copy on file with the CLAMO) ("When troops are operating collectively soldiers will only open fire when ordered to do so by the commander on the spot.").

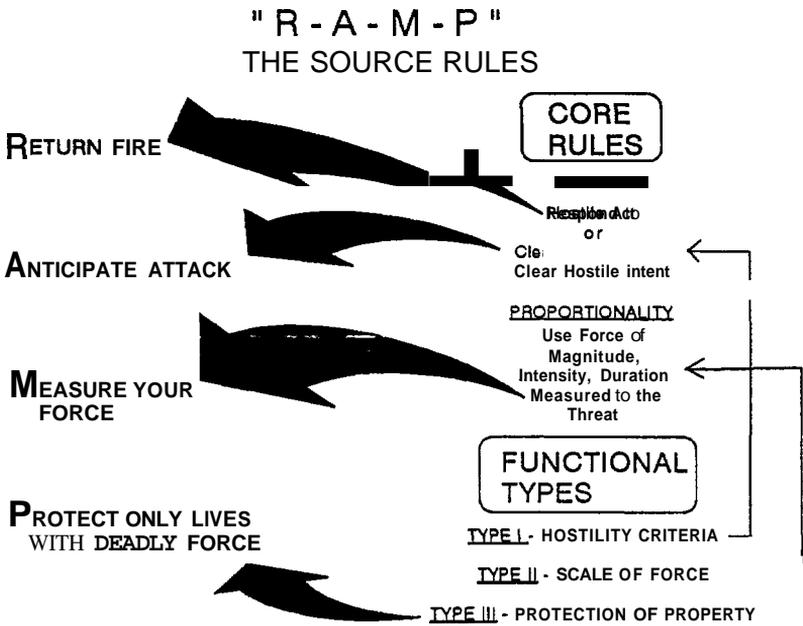


Figure 8

Perhaps most significant, the proposed task heeds the warning of one commentator who recognized that no substitute exists for discretion and good judgment by individuals:

The ROE never will draw a line that, once crossed, automatically authorizes the use of force—except that very clear line a protagonist crosses when he fires first. The line otherwise cannot be drawn because it does not exist. Herein lies the frustration. While there is a reluctance to be the first to shoot, there is an equal desire not to be the first to be shot, shot down, or sunk; the temptation by many is to endeavor to write ROE that go beyond the basic self-defense language in receiving a clearer picture of the potential threat. Yet no word picture can be drawn that offers an effective substitute for the discretion or judgment of the man on the scene. The problem is not unlike that with which police are confronted in questions regarding the use of deadly force.²⁹²

The first rule in RAMP—"R-Return Fire With Aimed Fire"—draws the only clear line that can be drawn concerning authority to use

²⁹²Parks, *Righting*, *supra* note 15, at 86.

force. Unlike pocket ROE cards issued for particular deployments, the other default rules in the draft task do not purport to be a “word picture” conveying the proper response to an infinite set of contingencies. Rather, the RAMP rules provide standards with which leaders can supervise “judgmental” training, analogous to that conducted in police academies.²⁹³

B. Training Scenarios

Although in some operations other than war soldiers may feel as if they are policemen, a soldier will never be strictly analogous to a cop on the beat. The soldier’s situation is distinctive in that his missions may exceed merely keeping the peace, his potential enemies may range from individual terrorists to large organized units, his arsenal may be smaller or larger than the policeman’s, and his comrades may be more or less able than the policeman’s to provide reinforcement. Training must account for these differences.

The Army should publish a training circular comprising numerous scenarios that pose problems on the appropriate use of force. Appendix C contains nine draft scenarios suitable for inclusion in this circular, which could be a companion to the Army’s training circular entitled *Selected Problems in the Law of War*.²⁹⁴ The circular would formally implement an idea that was popular with commanders during operations in Saudi Arabia during 1990 and in Somalia during 1993, when leaders used brief “scenarios” or “vignettes” to illustrate aspects of the ROE.²⁹⁵ Yet the scenarios in

²⁹³See, e.g., UNITED STATES ARMY MILITARY POLICE SCHOOL, INSTRUCTORS’ NOTES: JUDGMENTAL FIREARMS TRAINING—SHOOT/DON’T SHOOT (1993) (providing introductory notes for 36 scenarios designed to be replayed on interactive video laser disc); Metro-Dade Police Dep’t, Doral Station Field Training Unit, Use of Force/Levels of Resistance Matrix (July 1990) (outlining standards on which to base training); see also COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, standards 1.3.1 to 1.3.4, 1.3.7, 1.3.9, 1.3.13 (1991).

²⁹⁴See *supra* note 82.

²⁹⁵See Arnold & Stahl, *supra* note 41, at 24 (providing a commander’s view of ROE management in Somalia); Interview with Lieutenant Colonel John M. Smith, Staff Judge Advocate of the 10th Mountain Div. (Light), in Charlottesville, Va. (Oct. 5, 1993) (describing use of scenarios in training in Somalia); Interview with Captain Karen V. Fair, Former Command Judge Advocate, Joint Task Force Support Command and subsequently United Nations Logistics Support Command, Somalia, in Charlottesville, Va. (Mar. 22, 1994) (describing use of scenarios in Somalia); Sharp Interview, *supra* note 75 (describing use of scenarios in Somalia); Interview with Major Richard M. Whitaker, Former Trial Counsel for 1st Brigade, 101st Airborne Division (Air Assault), in Charlottesville, Va. (Feb. 18, 1994) (describing use of scenario training in Saudi Arabia in 1990). See also Information Paper, Staff Judge Advocate, United Nations Operation in Somalia (UNOSOM II), AFZA-JA, subject: Rules of Engagement (20 Sept. 1993) [hereinafter Information Paper] (copy on file with the CLAMO) (enclosing 13 scenarios); Memorandum, Acting Staff Judge Advocate, 1st Armored Division, AETV-THH, to Judge Advocate, United States Army Europe & Seventh

Appendix C contain enough detail to ensure that training can meaningfully apply the standards embodied in Appendix B. Leaders will be able to train and evaluate, giving a more favorable evaluation to soldiers who apply the RAMP rules than to those who merely respond “it all depends.”

The scenarios in Appendix C closely follow actual incidents recounted in authoritative sources—official investigations, scholarly research or interviews, and criminal proceedings. Accordingly, the skeptical soldier cannot assail them on the basis that they lack realism. Furthermore, the close linkage of certain scenarios to court-martial records provides an opportunity for trainers to clarify the extraordinary circumstances in which a soldier might face punishment for using excessive force. While staying clear of the command influence issues that might inhibit a commander from disseminating the facts of a pending prosecution, the training circular could illustrate how soldiers who apply the RAMP rules both comply with the law and accomplish the mission.

Experience is the best trainer. The draft scenarios could structure experiences challenging the soldier to transfer the memorized RAMP rules to the real world.²⁹⁶ By learning to analyze each problem using the RAMP rules, the soldier could develop a single schema to guide responses even under stressful conditions. The RAMP rules themselves can be of no use in molding judgment without practice in an environment that simulates what soldiers actually might face. Just as the soldier best learns to pull the charging handle of his rifle completely back by *doing* the “P” in “SPORTS” with an actual weapon in his hands,²⁹⁷ he best learns to forego a warning shot along the scale of force by *doing* the “A” in “RAMP” with a simulated kamikaze truck barreling toward his comrades.

Some of the scenarios require soldiers to make the transition from noncombat to combat conditions. By illustrating how simple supplements to the RAMP rules will result in clear orders for this transition, Appendix C provides a groundwork for creating in soldiers a mindset conducive to effective operations in all environments. By placing the use of force on a continuum, the RAMP

Army, subject: Lessons Learned from CMTC—Peace Implementation Operations (28 June 1993) [hereinafter Memorandum on Peace Implementation Training] (copy on file with the CLAMO) (enclosing 7 scenarios designed to improve understanding of ROE in a hypothetical “peace implementation” mission in Bosnia).

²⁹⁶See JOYCE & WEIL, *supra* note 258, at 379 (describing the stage of training at which individual transfer newly learned skills to more realistic conditions).

²⁹⁷See *supra* note 248.

²⁹⁸This mindset need not incorporate an understanding of such rarefied distinctions as that between “peacekeeping” and “peace enforcement.” See generally *An Agenda For Peace—Preventive Diplomacy, Peacemaking, and Peacekeeping: Report*

rules—when properly supplemented and reinforced—eliminate the misleading dichotomy between “peace” and “war” while preparing soldiers for both.

C. ROE Alert Conditions—“ROECONs”

Each division should incorporate a system of “ROE Alert Conditions” (ROECONs) into its tactical standard operating procedure (TACSOP).²⁹⁹ Appendix D contains a draft of such a system, suitable for the TACSOP of a light infantry division. Mechanized and armored divisions could draft similar systems suitable for their distinctive armament and tactics. The ROECONs would mesh with and supplement the individual soldier’s RAMP rules, eliminating the inconsistent guidance and interpretive difficulties that plague the legislative approach to imparting ROE.

Ground units need a system of ROECONs to supplement RAMP because recent history has shown that the diverse and complex operations of a combined arms team may compel commanders to use any or all of the ten functional types of ROE in addition to the core rules. By design, RAMP embodies only the core rules, and only functional Types I, II, and III of those outlined in Appendix A. The ROECONs

of the Secretary-General, U.N.G.A., 47th Sess., U.N. Doc. A 47/277 (1992) (discussing the distinction at length and calling upon member states of the United Nations to assume a permanent legal obligation to make forces and assistance available to the Security Council). Although senior officers and judge advocates must understand this distinction, *see* FM 100-5, OPERATIONS, *supra* note 9, at 13-7 (contrasting the two types of operations as a matter of Army doctrine), soldiers need merely know whether and how the distinction changes the RAMP. Peacekeeping operations, because they presume that antagonistic parties have consented to the presence of United States personnel as impartial observers, rarely require leaders to identify hostile forces or specify hostile criteria (Type I) and frequently require them to prescribe scales of force (Type II) that stress reporting and even withdrawal in lieu of opening fire. Peace enforcement operations, because they involve the restoration of peace between hostile factions that may not have consented to intervention, will frequently require leaders to identify hostility criteria and dispense with measures short of deadly force. Soldiers can learn these differences without getting a brief on the contents and terminology of Secretary-General Boutros-Ghali’s report.

²⁹⁹ Standing operating procedures (SOPs) are standing orders that “prescribe routine methods to be followed in operations.” FM 101-5, STAFF OPERATIONS, *supra* note 11, at 7-2. Doctrine prescribes no rigid format for SOPs, but their doctrinally stated purpose suggests that SOPs could serve as antidotes to the legislative model. FM 101-5, *Staff Operations* elaborates the purpose of an SOP:

[a]n SOP lists procedures that are unique to the organization and is used habitually for accomplishing routine or recurring actions or matters. It facilitates and expedites operations by reducing the number, length, and frequency of other types of orders; by simplifying the preparation and the transmission of other orders; by *simplifying training*; by promoting understanding and teamwork among the commander, staff, and troops; by advising new arrivals or newly attached units of procedures followed in the organization; and by reducing confusion and errors.

FM 101-5, STAFF OPERATIONS, *supra* note 11, at 7-3 (emphasis added).

would permit commanders to control operations with Types IV, V, VI, and VII, while also establishing a format that enables advance training and rapid dissemination.

A system of ROECONs implements the idea behind functional Type IV notify forces to assume a level of readiness for attack based on the degree of threat. The 101st Airborne Division (Air Assault) used a system similar to the one in Appendix D for a period during the late 1980s, and the marines in Beirut in 1983 operated under a comparable system, albeit one corrupted by contradictory orders from the chain of command.³⁰⁰

Two prominent applications of the alert condition concept remain in force, although the proposed system in Appendix D would differ from each in fundamental ways. The system of three ROECONs would differ from the five terrorist threat conditions (THREATCONs) specified in *The Army Combatting Terrorism Program*. The THREATCONs prescribe measures for all Army personnel and family members connected with United States installations or facilities, whereas the ROECONs would prescribe measures for units and soldiers during the conduct of operations in a tactical or training setting. The ROECONs also would differ from the three weapons control statuses applicable to air defense assets. Rather than merely announcing a posture for resolving doubts over whether to engage approaching aircraft, they would dictate measures of alertness for an entire division task force.

Unless otherwise stated in the TACSOP, the ROECONs—and the soldiers' RAMP imbedded in the ROECONs—would take priority over inconsistent provisions in other regulations or manuals. For instance, during tactical operations or even local training exercises, the ROECONs would displace provisions in the Army regulation pertaining to the carrying of firearms and the use of force in law enforcement duties.³⁰¹ In a tactical or operational setting, ROECONs

³⁰⁰See Headquarters, 101st Airborne Division (Air Assault), Operations Plan for Operation General Tosta, Appendix 1 (Rules of Engagement) to Annex C (1986) (establishing a system of three sets of ROE—"Green," "Amber," and "Red"—based on three levels of threat to personnel participating in a training exercise in Honduras); *supra* note 24 (discussing the four alert conditions used in Beirut). Although innovative and commendable in their own right, these forerunners to the ROE alert conditions detailed at Appendix D were fated to fall out of use "because they lacked a stable, baseline set of soldier ROE to which they could attach." Interview with Major Paul DeAgostino, Operational Law Attorney for 101st Airborne Div. (Air Assault) from 1990-91, in Charlottesville, Va. (Feb. 18, 1994). The ROECONs at Appendix D borrow heavily from the 101st Airborne Division system, as well as from AR 525-13, *supra* note 240, at para. 3-6 & App. B and from Nizolak, *supra* note 271, at 35-36 (devising an effective shorthand for Type VI ROE).

³⁰¹See DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES, para. 1-5e (12 Mar. 1993) ("Provisions of this regulation do not apply to [Army] personnel engaged in military operations and sub-

and RAMP similarly would displace inconsistent provisions in Marine Corps manuals governing the application of deadly force for interior guard.³⁰²

Why establish the ROECONs at division level? The reasons are institutional more than logical, and nothing sacred dies if distinct ROECONs are published and then exercised by battalions, brigades, or corps. The division is the largest Army organization that trains and fights as a team.³⁰³ It is the smallest Army organization that includes an attorney dedicated to international law matters.³⁰⁴ Additionally, division commanders are responsible for evaluating battalions,³⁰⁵ the tactical units around which the Army traditionally has oriented training management.³⁰⁶ Accordingly, successive evaluations of battalions using the same ROECONs would provide a division staff with the practical applications necessary to refine the ROECONs into a working system.

D. Standard Formats for ROE Annexes to Plans and Orders

Each division should prepare an ROE annex for every contingency plan that contributes tasks to the unit's mission essential task list (METL).³⁰⁷ These annexes should explicitly build on and rein-

ject to authorized rules of engagement . . ."); DEP'T OF ARMY, SOLDIER TRAINING PUBLICATION No. STP-19-95B1-SM, SOLDIERS' MANUAL, MOS95B, MILITARY POLICE, SKILL LEVEL 1, 2-353 (stating tasks, conditions, and standards for evaluating use of force by police on patrol).

³⁰²See MARINE BATTLE SKILLS HANDBOOK, *supra* note 80, at 1-9-1 to 1-9-13 (describing duties and organization of the interior guard, including eleven general orders, challenging procedures, and rules for the application of deadly force); DWORREN, *supra* 15, at 16 (noting occasional confusion by soldiers and marines over whether to apply the ROE or overlapping manuals and regulations).

³⁰³See, e.g., UNITED STATES ARMY COMBINED ARMS & SERVICES STAFF SCHOOL, TEXT E709, ORGANIZATION OF THE ARMY IN THE FIELD 15 (1989).

³⁰⁴DEP'T OF ARMY, REG. 570-2, MANPOWER REQUIREMENTS CRITERIA, para. 10-8 (13 Aug. 1993).

³⁰⁵DEP'T OF ARMY, FIELD MANUAL 25-101, BATTLE FOCUSED TRAINING 1-8 (16 Apr. 1990) [hereinafter FM 25-101].

³⁰⁶*Id.* at i (organizing the manual around the training of a hypothetical battalion task force).

³⁰⁷Under Army training doctrine, a mission essential task is "a collective task in which an organization must be proficient to accomplish an appropriate portion of its wartime mission." See FM 25-100, *supra* note 243, at Glossary-5. The METL is a compilation of such tasks on which a unit focuses training, given that "Army organizations cannot achieve and sustain proficiency on every possible training task." *Id.* at 2-1. In a process termed "METL Development," a commander analyzes "war plans" (technically including contingency plans for operations other than war as well as wartime operations plans) and "external directives" (mission training plans (MTPs) published by United States Army Training and Doctrine Command (TRADOC), mobilization plans, etc.) to reduce the set of all potential training tasks to a manageable number which, if performed to standard, will permit the unit to accomplish its missions. See *id.* at 2-1 to 2-3. Examples of mission essential tasks for a light infantry battalion might be "Assault an Objective," see DEP'T OF ARMY, ARMY TRAINING AND

force both the soldier's RAMP and the division's ROECONs.³⁰⁸ Appendix E contains a sample operations plan (OPLAN) annex. The annex assumes that a light infantry division has been tasked with the mission of providing a secure environment for the distribution of humanitarian relief supplies in a country resembling Somalia in late 1992. The sample annex follows the formats specified in the *Joint Operations Planning and Execution System*³⁰⁹ and in *FM 101-5, Staff Operations*,³¹⁰ but it does so in a manner that ensures soldiers will receive guidance consistent with the single schema deliberately constructed through training.

In addition to preparing annexes in this format for potential combat operations of mid-intensity, staffs should prepare annexes for the entire spectrum of operations other than war. The OPLAN annex would provide a division commander the ability to control operations with the core ROE as well as with the entire range of functional types. Types VIII, IX, and X are more important for commanders of large tactical units, because these commanders must translate broad strategic and operational goals into tactical guidance. The sample format in Appendix E would create the vehicle by which a division staff—the lowest level staff equipped for the job—could translate these goals into forms soldiers will have been trained to understand—namely RAMP supplements and ROECONs.

In annexes to OPLANs, division and brigade commanders could “tailor” the ROE to specific operations without recreating at soldier level the interpretive problems of the legislative model. Unlike individual soldiers, brigade commanders have staffs as well as extensive

EVALUATION PROGRAM, ARTEP 7-20-MTP, MISSION TRAINING PLAN FOR THE INFANTRY BATTALION, **Task No. 7-1-1008**, at 5-27 (27 Dec. 1988) [hereinafter ARTEP 7-20-MTP], and “Occupy Assembly Area.” *Id.*, **Task No. 7-1-1001**, at 5-8.

³⁰⁸*Cf.* AR 350-41, *supra* note 82, at para. 14-4 (stating that commanders should ensure law of war training “[i]s designed, where appropriate, around current missions and contingency plans (including anticipated geographic areas of deployment or rules of engagement)”).

³⁰⁹JOPES FORMATS, *supra* note 66.

³¹⁰FM 101-5, STAFF OPERATIONS, *supra* note 11, at 7-5, G-1 to G-157. As a technical matter, the *Joint Operations Planning and Execution System* (JOPES) requires only commanders submitting operations plans (OPLANs) directly to the CJCS for review (e.g., a CINC of a unified command) to prepare those OPLANs in JOPES format. *See* JOPES FORMATS, *supra* note 66, at I-1. However, “[t]o facilitate communications concerning operation planning,” *see id.*, all levels of command prepare OPLANs according to some format. In the Army, this is usually a format standardized by the immediate higher headquarters in general conformance with Appendix G of *FM 101-5, Staff Operations*. The recommendation here is that division commanders should issue OPLANs with ROE annexes in the format specified in Appendix E to this article (essentially the JOPES format with minor changes to ensure accurate cross-referencing to the remainder of the OPLAN), even though *FM 101-5, Staff Operations* does not specify any particular format for the ROE annex and even though CJCS imposes no requirement that lower levels of command follow JOPES format.

decision-making experience to help them reconcile pieces of the division OPLAN that might appear to be inconsistent.³¹¹ As with ship captains and aircraft pilots, the assumptions of the legislative model of imparting ROE are more tenable as applied to brigade commanders than to individual soldiers, and the greater volume and complexity of guidance from authorities above brigade makes the legislative approach more defensible at that level.

For example, the ROE annex for a noncombatant evacuation operation (NEO)³¹² might prescribe ROECON Red for the initial

³¹¹Many portions of an OPLAN other than the ROE annex qualify as directives which delineate "circumstances and limitations under which United States forces will initiate and or continue combat engagement." These other forces thus fit the JCS definition of "ROE," the breadth of which is also discussed *supra* page 78 as well as at notes 3, 68, and accompanying text. Indeed, because of the hitherto ill-defined contours of the ROE annex, it is not unusual for Type VI ROE to appear, for instance, in paragraph 3 of the main OPLAN under scheme of fires, *see* FM 101-5, STAFF OPERATIONS, *supra* note 11, at G-15, and in the fire support annex, *see id.* at G-39, as well as in the ROE annex. Similarly, Type VII ROE might appear both in the army aviation annex, *see id.* at G-28, and in the ROE annex, while Type VIII ROE might appear in paragraph 3 of the main OPLAN under both scheme of maneuver and coordinating instructions, *see id.* at G-15, and in the airspace management annex, *see id.* at G-26, as well as in the ROE annex. There are many other similar possibilities for such overlap.

The best way to ensure this overlap creates minimum confusion is for drafters of these different portions of the plan to compare their texts before the final document is issued to subordinate units. *See* Bloodworth, *supra* note 15, at 16-20 (recommending a drafting methodology for division staffs); *see also* UNITED STATES ARMY COMBINED ARMS COMMAND, CENTER FOR ARMY LESSONS LEARNED, BOSNIA PREDEPLOYMENT: INITIAL IMPRESSIONS REPORT, Ch. VI (July 1993) [hereinafter BOSNIA PREDEPLOYMENT REPORT] (copy on file with the CLAMO) ("[Department of the Army] should doctrinalize how the ROE drafting and staffing process should be accomplished. The recommended solution is that operational planners should have the primary responsibility, with support from the SJA/Legal Adviser. Staff officers drafting the ROE should be organized as an ROE Working Group."). Also, the ROE annex should be understood to have the dual purposes of *supplementing* RAMP and ROECONs and *summarizing*—with a comprehensive list of cross-references—all rules of Types I to X that appear implicitly or explicitly elsewhere in the OPLAN. *See* Parks, *Righting*, *supra* note 15, at 87 ("While it may be viewed as academically incorrect by some, integration of [fire control measures] into ROE pragmatically permits ROE to be the single reference point for fire control measures."); Morris, *supra* note 13, at 65 (proposing that "ROE should be the single reference point for the command to find all control restrictions in effect"). *See also* OP. LAW HANDBOOK, *supra* note 15, at H-94 ("Particular attention should be paid to the control measures and coordinating instructions in [the OPLAN] annexes. ROE should supplement and explain these control measures."). *But cf. id.* at H-94 ("Phase lines, control points, and other tactical control measures should not be contained in the ROE."); Roach, *supra* note 3, at 52 (stating that ROE "should not cover safety-related restrictions" and that they "should not set forth service doctrine, tactics or procedures, for example, relating to airspace management").

³¹²One of the operations other than war cited in note 16, *supra*, a NEO relocate[s] threatened civilian noncombatants from locations in a foreign country or host nation. These operations may involve United States citizens whose lives are in danger but could include selected host nation citizens or third country nationals. NEOs occur in a peaceful, orderly fashion or may require force.

See FM 100-5, OPERATIONS, *supra* note 9, at 13-4 to 13-5. *See generally* DEP'T OF DEFENSE, DIR. 3025.14, PROJECTION AND EVACUATION OF UNITED STATES CITIZENS AND DESIG-

phase, supplement the “A” of the soldier’s RAMP to permit preemptive use of force on all individuals wearing certain police force uniforms, and permit hot pursuit of the police force across the border of a coalition partner state. The annex for a nation assistance mission in a relatively peaceful host nation might prescribe ROECON Green for the initial phase, make no adjustments to the soldier’s RAMP, and forbid all crossings of international borders. The annex for a domestic civil disturbance operation might prescribe ROECON Amber for the initial phase, supplement both that ROECON and the soldier’s RAMP to incorporate a more detailed set of arming orders,³¹³ and issue other specific guidance consistent with higher level civil disturbance plans³¹⁴ or domestic law. Commanders could change the ROECON in effect or further adjust the RAMP through use of fragmentary orders.³¹⁵ At all times leaders could format guidance to mesh

NATED ALIENS IN DANGER AREAS ABROAD (Nov. 5, 1990) [hereinafter DOD DIR. 3025.14] (defining evacuation for all services and setting general policy); UNITED STATES MARINE CORPS, FLEET MARINE FORCE MANUAL 8-1, SPECIAL OPERATIONS, ch. 7 (13 Aug. 1974) (describing evacuation operations); Major Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, XL NAV. L. REV. 45, 59-60 (1992) (providing general description of likely ROE in a NEO).

³¹³Nothing in RAMP is inconsistent with what the law requires of soldiers in domestic civil disturbance operations; however, two factors might cause senior leaders to impose strict Type V ROE: first, extreme aversion to the prospect of American troops opening fire on American citizens; second, likely participation in the operation of reserve and national guard troops whose level of training might not ensure appropriate use of force under standing RAMP rules. During military operations in Los Angeles in May, 1992, a joint task force composed of California National Guard as well as active duty Army and Marine Corps units operated under the arming orders detailed at Appendix A, Type V. See International Law Note, *Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles*, ARMY LAW, Sept. 1992, at 30; Interview with Major Brad Page, Operational Law Attorney to Joint Task Force Los Angeles, in Charlottesville, Va. (Feb. 19, 1994). In addition to the arming orders, the ROE for the operation included Type II and Type III rules consistent with RAMP except that warning shots were disallowed as part of the scale of force. *Id.* Leaders could train and then disseminate similar civil disturbance ROE by reminding soldiers of their obligation under RAMP to obey orders of the chain of command and by modifying the “M-Measure your force” rule to exclude warning shots.

³¹⁴See, e.g., DEP’T OF DEFENSE, CIVIL DISTURBANCE PLAN, Annex C, Appendix 1, para. F(1)(F) (15 Feb. 1991) (describing preference for “baseball” grenades of riot control agents (RCA) over bulk-type dispersers in cases in which RCA is necessary to control the disturbance). A soldier trained on RAMP can easily incorporate use of such grenades at the appropriate point in the scale of force specified under a supplemented “M-Measure your force” rule, while units trained to understand ROECONs could readily comprehend a decision to retain RCA approval authority at JTF command level.

³¹⁵A “fragmentary” order (FRAGO), which consists of a brief oral or written message, gives an extract of a more detailed order or changes a previous order. See FM 101-5, STAFF OPERATIONS, *supra* note 11, at 7-2. Of course, a solid base of training in the default rules contained in RAMP and ROECONs is a prerequisite for soldiers to understand FRAGOs. See, e.g., DWORREN, *supra* note 15, at 19-20 (describing the potential for confusion created by a FRAGO which authorized Army soldiers to use deadly force if necessary to prevent theft of weapons and night vision goggles). *But see* Interview with Lieutenant Colonel John M. Smith, *supra* note 295 (describing how

with the principles on which they already have trained their soldiers.

E. Other Recommendations

Leaders should keep the basic RAMP rules, the training scenarios, and the ROECONs unclassified to permit thorough dissemination and training. Land force units should maintain operational security by classifying OPLAN annexes as well as all mission-specific supplements to either the RAMP or the ROECONs. In addition, units occasionally should supplement the RAMP and ROECONs with random measures to further ensure operational security.³¹⁶ For example, the commander may announce that ROECON Green is in effect, but may direct that units implement the random measure of conducting armed security patrols around the perimeter of the compound or assembly area.³¹⁷

scenario training dispelled confusion by clarifying that soldiers were first to use lesser means of force). Effective training on scenarios reinforcing the "M-Measure your force" and "P-Protect with deadly force" rules of RAMP could similarly help prevent FRAGOs from creating confusion. Better still, in addition to a solid base of training in RAMP, the FRAGO itself could be phrased as a supplement to the "P-Protect" rule, thus further reinforcing the soldiers' schema.

³¹⁶This operational security measure would be analogous to the provision for random measures at AR 525-13, *supra* note 240, at para. 3-7. Somewhat unfortunately, the cited paragraph creates the acronym "RAMP" to denote "Random Antiterrorism Measures Program." Because the sequence of rules keyed to "RAMP" in Appendix B of this article must be preserved to reinforce a single, carefully designed schema, and because combined use of the acronym could create confusion, this article recommends that the "Random Antiterrorism Measures Program" be renamed to "Implementation of Random Antiterrorism Measures." This alternative title could be abbreviated "IRAM" without any loss of meaning or convenience.

³¹⁷The experience of the United Nations Interim Force in Lebanon (UNIFIL) in 1981 illustrates the sort of situation in which a commander may need to create uncertainty in the minds of potential hostile forces by supplementing the soldiers' RAMP. The mission of UNIFIL was "to confirm the withdrawal of Israeli forces [from areas occupied by Israel following the 1978 invasion of Lebanon to stem Palestinian infiltrations], restore international peace and security, and assist the government of Lebanon in ensuring the return of its effective authority in the area." S.C. Res. 425, U.N. SCOR, 2074th mtg., U.N. Doc. S/RES/425 (1978). UNIFIL forces included troops from Fiji, Ghana, Ireland, the Netherlands, Nigeria, Norway, Senegal, France, Italy, Sweden, and Nepal. *See* William Claiborne & Jonathan C. Randal, *U.N. Peacekeepers: Caught in Middle of Lebanon's Battleground*, WASH. POST, Mar. 17, 1981, at A8. The United Nations ROE included a scale of force and challenging procedure, similar to that in the baseline "M-Measure" rule of RAMP. One observer noted the dangers posed by ROE that are too predictable:

UNIFIL's rules of engagement require a challenge and then a warning shot before a soldier may fire for effect, and then without intent to kill. Both sides [Palestinian guerrillas as well as Lebanese allies of both Palestinian and Israeli forces] have taken advantage of this directed tameness to humiliate U.N. soldiers and officers by hijacking vehicles and forcing them to return to their units on foot, sometimes without shoes and shirts.

Id. An American land force commander facing a similar situation could supplement

Army training should thoroughly integrate the RAMP, the scenarios, the ROECONS, and the ROE annexes into existing doctrine and institutions. For example, training and evaluation outlines (T&EOs) in the mission training plans (MTPs) for battalions should change to include assessments whether individual soldiers are using force within the RAMP standards and whether units are complying with their division's ROECONS.³¹⁸ The T&EOs in MTPs for division command groups and staffs³¹⁹ should test whether division staffs use the format appended to this article for the ROE annex and whether they format all ROE for the individual soldier in terms of RAMP.³²⁰ United States Army Training and Doctrine Command (TRADOC) schools should incorporate overviews of these topics into their curricula.

the "M" rule by, for instance, directing that warning shots will not be fired as part of the progression of measures a soldier will take when facing potentially hostile forces. Supplements of this kind—if their timing and contents were classified—could create uncertainty for terrorists or harassing forces without sacrificing disciplined operations.

³¹⁸Specifically, if the battalion is, say, light infantry, new items should appear in the T&EOs for at least six battalion tasks in which appropriate use of force under RAMP and ROECONS is particularly important:

Perform Rear Operations	Task No. 7-1-1020
Occupy Assembly Area	Task No. 7-1-1001
Perform Tactical Road March	Task No. 7-1-1002
Consolidate	Task No. 7-1-1027
Establish Lodgement	Task No. 7-1-1033
Perform Stay-Behind Operations	Task No. 7-1-1035

See ARTEP 7-20-MTP, *supra* note 307, at 5-54, 5-8, 5-11, 5-69, 5-97, 5-104. Some T&EOs, such as that for "Perform Rear Operations" already evaluate ROE as a staff planning function. See *id.* at 5-55, para. 2d ("Battalion commander and staff plan for rear battle tasks. Plan contains . . . [r]equirements for training rules of engagement, recognizing allied units, and enforcing civilian control policies.") and as a coordination function, see *id.*, para. 3d ("Battalion prepares and coordinates for rear battle tasks . . . [r]outes, boundaries, convoy schedules, identification procedures, frequencies, call signs, obstacles, rules of engagement, and other information are exchanged."). RAMP and ROECONS provide standards against which the unit and individual soldiers could be evaluated directly on decisions to use force.

The T&EOs developed by units themselves—because of the absence of centrally published MTP guidance—should likewise include evaluation of RAMP and ROECONS. See, e.g., Bolger, *supra* note 179, at 28, 31-32 (recommending battalions be trained in evacuation operations, despite lack of formal T&EO, and noting that although "extracting hostages is a [Special Operations Forces] task," nevertheless, "securing and removing potential hostages" often falls to conventional Army units").

³¹⁹See DEP'T OF ARMY, ARMY TRAINING AND EVALUATION PROGRAM, ARTEP 100-2, DIVISION COMMAND GROUP AND STAFF (15 Jun. 1978).

³²⁰Because Army training doctrine requires commanders to assess training by separately examining each "Battlefield Operating System" (BOS), ROE should be formally integrated into this analytical framework, which includes seven functions: intelligence, maneuver, fire support, air defense, mobility and survivability, logistics, and command. See FM 100-5, OPERATIONS, *supra* note 9, at 2-12 to 2-15 (describing BOS); FM 25-101, *supra* note 305, at F-3 (depicting how a commander assesses unit training by determining the proficiency of each system's performance of a task before arriving at an overall assessment of proficiency). Given the close relationship between

Consistent with the “battle focus” concept, training priorities will depend on the distinct METLs developed for each division.³²¹ Yet for many divisions, the soldiers’ mastery of RAMP should be a battle task,³²² and commanders’ memoranda regarding training philosophy and quarterly training guidance frequently should list soldier training in RAMP and staff training in ROECONs among the areas of emphasis.³²³ Because RAMP is a critical individual task, sergeants should monitor training status in leader books, soldier by soldier.³²⁴ Field training exercises (FTXs), command post exercises (CPXs), and situational training exercises (STXs) specifically should include as training events the individual and collective tasks pertaining to ROE, as should deployments to the Combat Training Centers (CTCs).³²⁵ Because during force-on-force training the action will not stop to permit detailed evaluation of individual thought processes, after-action reviews (AARs) would be crucial for determining if sol-

ROE and the exercise of command, the intuitive BOS function is “command.” *But see* Arnold & Stahl, *supra* note 41, at 14 (describing the addition of a “force protection” operating system, which “included a constant review of the rules of engagement and the building of limited infrastructure in the theater where no infrastructure existed for the support of our soldiers”).

³²¹ *See supra* note 307.

³²² Under Army training doctrine, a “battle task” is a task “which must be accomplished by a subordinate organization if the next higher organization is to accomplish a mission essential task.” FM 25-100, *supra* note 243, at Glossary-3.

³²³ *See* FM 25-101, *supra* note 305, at A-9, A-19, A-26, A-33 (providing sample training memoranda issued by division, brigade, and battalion commanders and listing areas of emphasis).

³²⁴ *See id.* at B-5 (describing the role of leader books in training).

³²⁵ *See id.* at C-1 to C-14 (describing the role of FTXs, CPXs, STXs, and other exercises in training). Combat Training Centers have a special role in Army training doctrine. The four centers are the Combat Maneuver Training Center (CMTC) in Hohenfels, Germany, the National Training Center (NTC) in Fort Irwin, California, the Joint Readiness Training Center (JRTC) in Fort Polk, Louisiana, and the Battle Command Training Program (BCTP), centered in Fort Leavenworth, Kansas. The CTCs are designed to provide

the active and reserve forces with hands-on training in a stressful, near-combat environment. The training is designed to exercise all or portions of the unit’s METL. The centers provide realistic integration and portrayal of the joint and combined aspects of war; they train units in [doctrine] to MIP standards. Further, the CTCs focus on those soldier tasks and leadership skills that contribute directly to the success or failure of collective tasks and unit missions.

Id. at D-12. While acknowledging the desirability of a standardized individual common task on use of force, observers familiar with training at CMTC and JRTC note that some scenario-based training is already being used in exercises at these centers. *See* Memorandum on Peace Implementation Training, *supra* note 295, at para. 7 (“Some battalions effectively employed ‘ROE rehearsals’ in their company and platoon level OPORDER briefs—the deployed JA monitored much of this training. These ‘rehearsals’ consisted of factual situations or vignettes anticipated from the specific operation.”); BOSNIA PREDEPLOYMENT REPORT, *supra* note 311, at Ch. VI (July 1993) (“The interactive scenarios used at CMTC provide the realistic, integrated training required for the implementation of ROE.”); Interview with Captain Kyle Smith, Former Command Judge Advocate to JRTC, in Charlottesville, Va. (Feb. 20, 1994).

ROE TRAINING WITHIN EXISTING TRAINING DOCTRINE

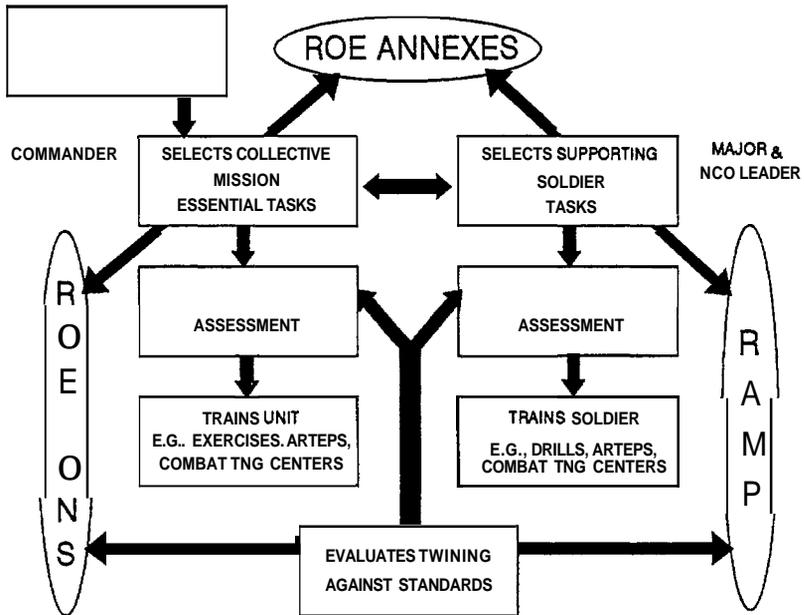


Figure 9

diers' minds are assimilating the RAMP schema: "Specialist Crimson, what were you thinking during the evacuation operation in the village when you fired at the guerilla who was dressed as a priest?" See *Figure 9*.³²⁶

The Army should develop and then use a full range of training aids, devices, simulators, and simulations (TADSS)³²⁷ to reinforce ROE individual and collective tasks. For example, the Army should contract with a private commercial producer of interactive video programs to create a simulator for evaluating soldier responses to the scenarios at Appendix C.³²⁸ Police departments commonly use these programs, which incorporate laser disc technology.³²⁹ A unit

³²⁶*Figure 9* depicts the relationship between the triangular structure of ROE recommended in this article (RAMP, ROECONS and ROE Annexes) and the process by which a commander selects and then trains particular collective and individual tasks.

³²⁷See FM 25-101, at E-1 to E-5 (describing the role of TADSS in Army training doctrine).

³²⁸For instance, Firearms Training Systems, Inc., of Norcross, Georgia produces the program for military police discussed *supra* note 293 and accompanying text.

³²⁹See Interview with Sergeant Sean P. Hayes, Director, Doral Station Field Training Unit, Metro-Dade Police Dep't. (Nov. 1, 1993) (describing use of programs

could reserve this simulator from the Training and Support Center (TASC) and build proficiency on RAMP during periods on the training schedule that would otherwise be unstructured.

Unlike training doctrine, keystone doctrine need only incorporate the refinements previously mentioned. The next edition of *FM 100-5, Operations* should acknowledge the existence of the JCS *PROE* and the supplemental apparatus to those *PROE*, should endorse the “core rules” and the ten “functional types,” and should give leaders the solemn responsibility of ensuring that the system of ROE remains directed toward effective soldier training.³³⁰ At the joint service level, the name “Standing ROE” should displace “PROE” to make clear that a default regime governing the use of force is always in place.³³¹ Additionally, even though the most important changes in land force ROE must come below the combatant command level,³³² the JCS should incorporate the other minor

similar to that used by the military police in addition to “role-playing” scenarios involving live actors).

One explanation for the prevalence of innovative training techniques in domestic police forces is the risk of civil liability to which police departments and municipalities are exposed under federal civil rights laws. Although in the aftermath of the trials of police involved in the beating of Rodney King most Americans are familiar with the potential for federal prosecutions against police based on excessive use of force, a lesser known fact is that municipalities can be liable for damages under 42 U.S.C. § 1983 if an inadequate police training program is linked to the excessive use of force by an individual police officer. See *City of Canton v. Harris*, 489 United States 378 (1989). See generally *Zuchel v. City and County of Denver*, 997 F.2d. 730, 739 (10th Cir., 1993) (describing testimony of Mr. James J. Fyfe, an expert on training police to use force appropriately, and noting the inadequacies of Denver’s training against Mr. Fyfe’s standards); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 183–84 (1993) (describing ambitious research and training based on guidelines prescribed by experienced street cops). Although the substantive standards on the use of force for domestic police officers are shaped by distinct influences such as the enormous body of law surrounding use of deadly force against fleeing felons, see *e.g.*, *Tennessee v. Garner*, 471 U.S. (1985), and although important contrasts between military soldiers and policemen will persist, see *supra* page 90, the parallels are strong enough to merit cross-fertilization of training techniques. See Parks, *Righting*, *supra* note 15, at 86, quoted in note 292, *supra* (making the analogy); Sagan, *supra* note 15, at 443–44 (making the analogy).

³³⁰The next edition of *FM 101-5, Staff Operations*, *supra* note 11, should include—in its collection of sample annexes—the sample ROE annex at Appendix E of this article. Also, the Army should educate leaders at all levels in the historical importance of particular ROE case studies included in the training circular recommended in part V.B *supra*. This process would conform to that part of Army training doctrine known as “leader development.” See *FM 25-101, supra* note 305, at 1–13.

³³¹This was one of the recommendations that grew out of the Army’s symposium—from October 11–15, 1993—held to develop input into the ongoing review of the JCSPROE. See International Law Note, *supra* note 174, at 49.

³³²See *id.* (noting that symposium participants, which included 18 senior officers and judge advocates, “decided to keep the JCS Standing ROE at the general level, and to leave the mission-specific (“down in the weeds”) ROE to corps, divisions, and lower level units”).

refinements to the *PROE* recently recommended by representatives of all military services.³³³

VI. Potential Concerns

One potential objection is that by making the “default” ROE similar to the current peacetime ROE, American soldiers and marines will lose their edge as warriors. This is the “flabby peacekeeper” objection, which proponents raise against those who imply the Army might find better ways to conduct operations other than war.³³⁴ The response to the objection is that soldiers trained on RAMP could certainly better protect themselves and accomplish missions in operations other than war,³³⁵ but they could also better “RAMP up”³³⁶ for combat engagements against identified hostile

³³³*See generally* Memorandum, Major Marc L. Warren to Director of the Academic Department, The Judge Advocate General’s School, subject: JCS Rules of Engagement (ROE) Conference—After Action Report (22 Feb. 1994) (recording unclassified summaries of the recommendations of the conference held at the Naval War College in Newport, Rhode Island, from January 26–28, 1994)(also noting that all services concurred in recommending the change in name from *Peacetime ROE* to *Standing ROE*).

³³⁴*See, e.g.*, sources cited in note 178 *supra*. Echoes of this view in portions of official doctrine are muted but distinct. *See* FM 100–5, OPERATIONS, *supra* note 9, at 13–8 (“The Army organizes, trains, and equips to fight and win the nation’s wars. **This** remains its primary mission. The leadership, organization, equipment, discipline, and skills gained in training for war are also of use to the government in operations other than war.”); Draft FM 100–23, *supra* note 233, at F-3 (“The entire chain of command must develop a different mind set [for peace operations] than for warfighting. A force involved in peacekeeping quickly loses its fighting edge and is usually not suited for transition to peace enforcement Operations.”). *But see* FM 100–5, OPERATIONS, *supra* note 9, at 13–2 (acknowledging that the “operations other than war environment is a complex one that will require disciplined, versatile Army forces to respond to different situations, including transitioning rapidly from operations other than war to wartime operations”); Draft FM 100–23, *supra* note 233, at F-4 (“Many of the skills that enable a unit to accomplish its primary [wartime] mission are applicable in peace operations.”); Army-Air Force Center for Low-Intensity Conflict, “Strawman” Tactics, Techniques, and Procedures for Peace Enforcement, Peacemaking, Peacekeeping, Humanitarian Assistance, Joint/Combined Interagency Operations II-9 to II-10 (21 Dec. 1992).

³³⁵*See, e.g.*, Arnold & Stahl, *supra* note 41, at 22 (recommending that “predeployment training should include situational training exercises focusing on rules of engagement for all forces to be deployed”) (emphasis added). One of the most important benefits of scenario-based training on RAMP in the normal training cycle is that commanders will have less need to resort to Type V ROE (arming orders), which create the risk that because the soldier is carrying an unloaded weapon, he will be unable to defend himself even in cases where he has no mental reservations or “mind-set” problems about firing.

³³⁶“Ramp,” when used *as* a verb, can mean “to rise or fall to a higher or lower level.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Philip B. Gove ed., 1969) (4th verb definition). When used *as* a noun, it can denote a sloping walk “leading from one level to another.” *Id.* (3rd noun definition). In the process of assisting soldiers to “develop adequate schemas,” *see supra* note 258 and accompany-

forces. Even though individuals trained exclusively on police techniques might lose the fighting skills and a spirit of the offensive necessary to conquer a determined conventional force, to assert that fire discipline and appropriate restraint are inconsistent with victory in mid-intensity conflicts is simply false. To the contrary, even in conventional campaigns, the best and most aggressive warriors treat civilians, prisoners, and casualties according to RAMP principles. Moreover, fire discipline reduces friendly fire incidents and masses available munitions where they can best help win the war: against the enemy.

A second potential objection is that the recommended system—comprising RAMP, ROECONs, ROE annexes, core rules, and ten functional types—is too complicated. Once commanders supplement the RAMP in the ROE annex—such as, by adding hostility criteria to the “A-Anticipate Attack” rule—the entire apparatus will become as difficult to understand as the system it replaced. The response to this objection is that the present method of imparting land force ROE is not a system, but rather a collection of frequently inconsistent written texts issued by hundreds of different headquarters.³³⁷ Although the recommended apparatus would require practice, professional leaders accustomed to synchronizing complex operations and exam-

ing text, these widely understood connotations of “RAMP” can help impart the versatile mind set required to achieve both initiative and restraint. See generally JOYCE & WEL, *supra* note 258, at 99–100 (discussing the value of associations and images in memory).

³³⁷This is not to imply criticism of commanders or judge advocates, many of whom have been working heroically to create order out of chaos and to ensure that soldiers on the ground receive clear and simple guidance. As discussed in part III *supra*, the legislative model has persisted because it permits commanders to create different rules in different circumstances. There are important contrasts between a peacekeeping mission, which stresses observing and reporting by forces carrying a limited arsenal, and an evacuation mission, which may require anticipatory use of force by a fully armed joint task force within limits carefully drawn by diplomats. Inevitably, the ROE will need to reflect these differences in mission.

The challenge is to create a system for imparting ROE that allows for adaptation to different circumstances while standardizing the basic rules and features that can apply even to vastly different military missions. The desired balance is not unlike that which one commentator attributes to German tactical doctrine during World War I:

The German doctrine achieved the balance between the demands of precision for unity of effort and the demands of flexibility for decentralized application. With clearly stated principles, the doctrine provided thorough, consistent guidance for the training, equipping, and organizing of the army. However, this consistency was not rigid, for in its battle-field application, the doctrine provided sufficient flexibility to accommodate the demands of local conditions and the judgment of several commanders.

TIMOTHY T. LUPFER, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NO. 4, THE DYNAMICS OF DOCTRINE: THE CHANGES IN GERMAN TACTICAL DOCTRINE DURING THE FIRST WORLD WAR 55 (1981).

ining seven different battlefield operating systems (BOS)³³⁸ could quickly learn to set ROE according to these formats. Once trained on RAMP through evaluation in a variety of scenarios, soldiers could understand and act on supplements to the RAMP, particularly when training includes opportunities to assimilate these supplements. The soldier who truly masters SPORTS³³⁹ can correct malfunctions on his rifle even when a misshapen round prevents the extractor from properly ejecting a spent brass casing and even while hostile shots are slicing into earth on his left and right. A base of training on well-articulated standards makes possible the transfer of skills to situations that no controlled setting can ever anticipate completely.

A third potential objection is that RAMP and ROECONs ignore the nuances of coalition operations. According to this objection, diplomatic considerations sometimes will require unimaginable constraints, ones that RAMP and ROECONs cannot capture. The response to this objection is that while the recommended system creates a stable schema permitting advance training, it nevertheless is supple enough to permit leaders to control operations in a variety of ways, particularly by providing guidance in the ROE annex. Yet the ever-present need to explain the ROE to soldiers in terms of RAMP will not only compel senior leaders to make principled demands on American political officials and diplomats, but also will enable those officials and diplomats to confer with coalition partners in full knowledge of military needs and interests. Moreover, media reports exaggerate the degree of friction between United States interests in ROE and those of coalition partners or multinational organizations.³⁴⁰

³³⁸See *supra* note 320.

³³⁹See *supra* note 248.

³⁴⁰See, e.g., Memorandum, Mr. Marrack Goulding, Under-Secretary General for Peacekeeping, United Nations, New York, to Force Commander, United Nations Protection Forces (UNPROFOR), Zagreb, Croatia, subject: United Nations Rules of Engagement: Statements to the Media (20 Jan. 1993) (strongly disagreeing with January 15, 1993 statement by former United States Ambassador Jeane Kirkpatrick in the *International Herald Tribune* that "returning fire is not permitted under UN rules of engagement except to save your own life"); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter, 1992-93, at 89, 91 ("Existing rules of engagement allow [United Nations soldiers to open fire] if armed persons attempt by force to prevent them from carrying out their orders."); DWORREN, *supra* note 15, at ("Most militaries from smaller countries do not place as much emphasis—or thought—on ROE as the United States does, and are therefore willing to defer to the United States on this matter."). *But cf.* STAFF OF SENATE COMM. ON FOREIGN RELATIONS, REPORT ON REFORM OF UNITED NATIONS PEACEKEEPING OPERATIONS: A MANDATE FOR CHANGE 17-18 (1993) [hereinafter STAFF REPORT ON REFORM OF PEACEKEEPING] (commenting that "different nationalities interpret differently self-defense" and noting recent examples in which Canadian, British, Spanish, as well as United States commanders in United Nations operations have taken "muscular" views of ROE); JOINT PUB. 3-0, *supra* note 16, 27, at VI-6 ("Complete consensus or standardization of ROE may not be achievable because of individual national values and operational employment concepts."). The

A fourth potential objection is that to develop special devices for imparting land force ROE is to overlook the growing importance of joint operations. Commanders of “land forces” typically command a large number of pilots and frequently request fire support from naval gunships, to name just two examples in which the “land force” concept can be soft on the edges. The response to this objection is that joint operations and doctrine never will eliminate certain essential differences between seaborne, air, and land forces. These differences—such as in the average age and experience of the individuals tasked to make firing decisions—are real, not imagined. While a legislative approach to imparting ROE might work tolerably well for the services which “man their equipment,” it simply cannot work for the services which “equip their men.”³⁴¹ Moreover, nothing in RAMP or ROECONs defies either the *PROE* or joint doctrine.³⁴²

VII. Conclusion

Having started by introducing the problem of occasional poor firing decisions by soldiers, this article has now come full circle. Part II, which expressed the problem in terms of deficiencies in the real world, meets adequate resolution only in part V, which sets forth recommendations for the real world. Yet the pivot upward into theory was no detour. See *Figure 10.343*

Because they follow upon a search into underlying causes (part III) and implement an approach harnessing the theory of those

proposal of this article is not that the military forces of other nations in a coalition use RAMP and ROECONs, but rather that these devices form a stable medium by which United States forces receive and communicate the ROE agreed upon between coalition partners.

No such stable medium for communicating ROE exists within United Nations institutions or practices. One recent study of United Nations field missions included that

[r]ules of engagement are unclear both to the peacekeepers and the local people. The ambiguity of the situations most peacekeepers find themselves in civil conflicts [sic] results in different peacekeepers interpreting differently their rules of engagement. The effect of widely differing interpretations weakens support for the overall mission.

STAFF REPORT ON REFORM OF PEACEKEEPING, *supra*, at 19. Thus, RAMP and ROECONs would displace no pre-ordained system. Nor could they possibly increase the potential for different interpretations between nations.

³⁴¹See International Law Note, *supra* note 174, at 49 (summarizing different orientations of the services with the observation that “[t]he Navy and Air Force ‘man their equipment;’ the Army ‘equips its men.’”).

³⁴²See JOINT PUB. 3-0, *supra* note 16, 27, at V-1 to V-16 (describing “Operations Other Than War” with frequent verbatim passages from *FM 100-5, Operations*, which predated its publication by about two months).

³⁴³*Figure 10* depicts parts II through V of this article within the circular chart introduced at *Figure 1 supra*.

PROBLEM-SOLVING METHOD

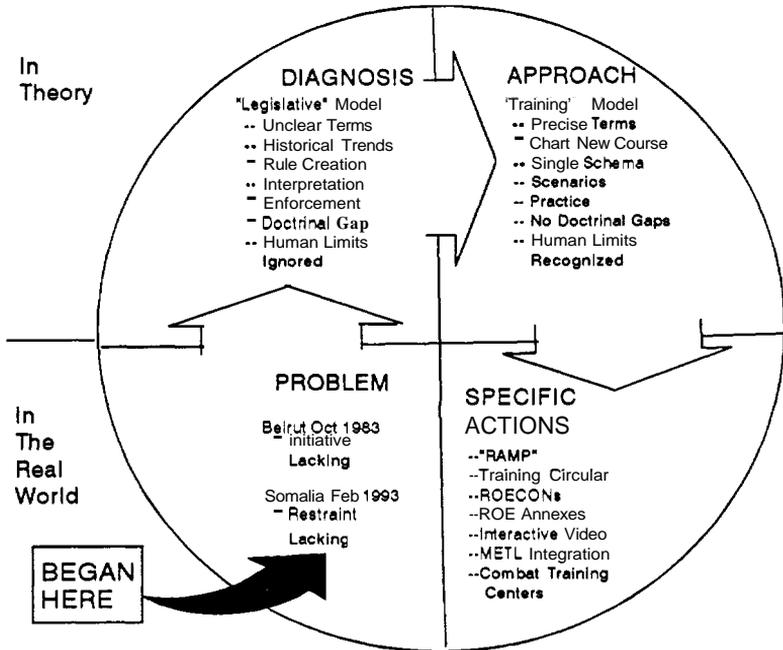


Figure 70

causes (part IV), the recommendations avoid being just another assortment of ad hoc measures. Because it reveals many of the traditional measures to be linchpins of the legislative model, the article perhaps persuades uncommitted readers that alternative measures within a training model are essential.

Rules of engagement for land forces must become a matter of training, not lawyering—at least not traditional lawyering. The implications of this assertion for judge advocates are significant and tangible: even while continuing to pursue excellence in the traditional roles of “advocate,” “judge,” and “conscience,” we must develop new skills and greater enthusiasm for the role of “counselor.”

Judge advocates perform four distinct roles. When representing the government or individual soldiers before courts-martial, administrative hearings, domestic courts, or international tribunals, a military lawyer has an ethical obligation to perform the role of “advocate,” one who zealously guards the client’s interests within

an adversarial setting.³⁴⁴ When called on "for an opinion or ruling on the applicability of law or, more precisely, on the existence of a legal obligation or right," a military lawyer must perform the role of "judge," one who decides not on the basis of her own policy preferences, but rather, as far as possible, on "objective" reasons grounded in the "law."³⁴⁵ When confronted with the rare commander who refuses or fails to balance military necessity with the prevention of unnecessary suffering, the military lawyer must occasionally perform a role as the "conscience" of the unit, one who purposefully tries to inject humanitarian considerations into military decisions.³⁴⁶ Finally, when assisting the commander to accomplish unit goals within the law, the military lawyer performs the role of "counselor," one who provides input beforehand so that the unit can find solutions to problems and accomplish its mission within legal constraints.³⁴⁷

Greater emphasis on the "counselor" role has antecedents. Senior judge advocates have consistently exhorted military attorneys to practice "preventive law"³⁴⁸ and, more recently, to become "Operational lawyers."³⁴⁹ Yet a central position for training in land force ROE would pour new meaning into these terms. Judge advocates must not merely teach classes on the Hague and Geneva Conventions, involve themselves early on with the planners of operations, caution ordering officers on the legal limits of their authority,

³⁴⁴See Winter, *supra* note 17, at 21-24.

³⁴⁵See Schachter, *supra* note 21, at 6, *quoted* in Winter, *supra* note 17, at 26.

³⁴⁶See Winter, *supra* note 17, at 31-32.

³⁴⁷See *id.* at 29-30.

³⁴⁸Today the term is formally identified with an Army program designed to ensure that judge advocates are "aggressive and innovative in disseminating information to soldiers and their families that is responsive to potential legal problems and issues," DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-3b (30 Sept. 1992) (tasking supervising attorneys to ensure that preventive law services "are provided by attorneys performing legal assistance duties, *as well as by others under their supervision*") (emphasis added), but the term was being applied to international law attorneys more than a decade ago. See, e.g., William H. Parks, *The Law of War Adviser*, 31 JAG J. 1, 19 (1980) [hereinafter Parks, *Law of War Adviser*].

³⁴⁹See, e.g., OP. LAW HANDBOOK, *supra* note 15, at 7-8 (describing the operational lawyer's functions); Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9 (tracing the genesis of OPLAW to United States Military activities in Grenada); Steven Keeva, *Lawyers in the War Room*, A.B.A. J., Dec. 1991, at 52, 55-56 (charting the development of operational law). The counselor role presumes a post-legal realist view of the law and is therefore relatively modern. See, e.g., Tipson, *supra* note 11, at 569. However, well before the coining of the term "OPLAW," military attorneys practicing international law identified the importance of the counselor role. See, e.g., MAJOR GENERAL GEORGE S. PRUGH, DEP'T OF ARMY, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 viii, 3 (1975); George S. Prugh, *United States European Command: a Giant Client*, 44 Mil. L. Rev. 97, 111-13 (1969); James A. Burger, *International Law—The Role of the Legal Adviser, and Law of War Instruction*, ARMY LAW., Sept. 1978, at 22, 24; Elliott, *supra* note 4, at 18; Parks, *Law of War Adviser*, *supra* note 348, at 18-24.

inform commanders of the law governing military assistance to civil authorities, and provide advice on the other manifold legal issues that inevitably will confront a deploying force. They must become trainers of soldiers.

To create optimal conditions for **ROE** to influence soldier decisions under stress, operational lawyers must master the rudiments of the training system. They must know the **METL** of the unit. They must be familiar with the commander's present training assessment of collective tasks and with the command sergeant major's present training assessment of supporting soldier tasks. They must understand the commander's training objectives for both units and soldiers. They must be able to decipher long-range, short-range, and near-term training calendars. If the **RAMP**, the scenarios, the **ROE-CONs**, and the **ROE** annexes become part of training doctrine, operational law attorneys must determine whether training aids and **simulators** are effective and whether exercise evaluators are testing portions of the **MTPs** dealing with these **ROE** matters. They must anticipate the supplements to **RAMP** that commanders likely will want, and then select or develop scenarios capable of making soldiers comfortable with such supplements. They must be prepared to respond with concrete examples when questioned on how a hostility criterion in a **RAMP** supplement should affect a soldier's decision to fire.³⁵⁰ Training in its fullest sense must become part of the judge advocate's craft,

United States soldiers and marines face hard choices about what, when, and where they can shoot. These same soldiers and marines often get little help from the **ROE**. Hard choices will continue to confront troops for as long as there are conflicts, but **ROE** training can help transform frightened reactions into appropriate decisions. Let the training begin!

³⁵⁰Preparedness to answer such questions implies that the judge advocate will know basic characteristics of United States and common foreign-made weapons, such as maximum effective range, rate of fire, kill radius, etc., and that he or she will be able to estimate distances with some accuracy. The attorney who does not know that a well-aimed infantry assault rifle can easily kill a target at 300 meters is ill-prepared to advise a soldier as to whether the aiming of such a rifle constitutes "hostile intent." Fortunately, excellent training publications and materials on these subjects are available. See, e.g., *OP. LAW HANDBOOK*, *supra* note 15, at Mc-5 to Mc-7; UNITED STATES ARMY COMBINED ARMS AND SERVICES STAFF SCHOOL, TEXT E614, SOVIET ARMY WEAPONS AND EQUIPMENT (1989); UNITED STATES ARMY WAR COLLEGE, FORCES/CAPABILITIES HANDBOOK, VOLUME II, WEAPONS SYSTEMS (1988).

APPENDIX A

FUNCTIONAL TYPES OF RULES OF ENGAGEMENT

Type I: Hostility Criteria

Purpose: Provide those making decisions whether to fire with a set of objective factors to assist in determining whether a potential assailant exhibits hostile intent and thus clarify whether shots can be fired before receiving fire.

Example: "Hostile intent of opposing forces can be determined by unit leaders or individual soldiers if their leaders are not present. Hostile intent is the threat of imminent use of force against United States Forces or other persons in those areas under the control of United States Forces. Factors you may consider include: (a) weapons: are they present? what types?; (b) size of opposing force; (c) if weapons are present, the manner in which they are being displayed; that is, are they being aimed? are the weapons part of a firing position?; (d) how did the opposing force respond to United States Forces?; (e) how does the opposing force act toward unarmed civilians?; (f) other aggressive actions." Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N, at para. 3b(c)(1) (1993).

Risks: Restraint may suffer if soldiers regard as a checklist which enables automatic decision to fire.

References: See, e.g., Headquarters, 6th Battalion, 502d Infantry Regiment, Operations Plan for TF 6-502 Deployment to Macedonia, para. 5 (1993) (ROE Card); cf. D.P. O'Connell, *The Influence of Law on Sea Power* 82 (1975) (suggesting that ROE might authorize a "hostile" designation "when the potential attacker's radar guidance system has 'locked on' to target, supposing that the missile is 'beam-riding' "); George Bunn, *International Law and the Use of Force in Peacetime: Do United States Ships Have to Take the First Hit?*, *Naval War College Review*, May-June 1986, at 69, 75 (stating that "ROE may provide detailed criteria for an on-scene commander's decision whether an attack on his unit is so imminent as to justify shooting first in self-defense").

Type II: Scale of Force or Challenge Procedure

Purpose: Specify a graduated show of force that ground troops must use in ambiguous situations before resorting to deadly force. Include such measures as giving a verbal warning, using a riot stick, perhaps

firing a warning shot, or firing a shot intended to wound. May place limits on the pursuit of an attacker.

Example: “Patrols may use deadly force if fired upon or if they encounter opposing forces which evidence hostile intent. Nondeadly force should be used if the security of United States Forces is not compromised by doing so. A graduated show of force includes: (a) an order to disband or disperse; (b) show of force/threat of force by United States Forces that is greater than the force threatened by the opposing force; (c) warning shots aimed to prevent harm to either innocent civilians or the opposing force; (d) other means of non-deadly force; (e) if this show of force does not cause the opposing force to abandon its hostile intent, consider if deadly force is appropriate.” Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N at para. 3c(3) (1993).

Risks: Initiative may suffer if soldiers feel the need to progress sequentially through the measures on the scale.

References: See, e.g., Dep’t of Defense, *Civil Disturbance Plan: Garden Plot*, Appendix 1 (Alert Order) to Annex C (Concept of the Operation), at para. F(1)(C)3 (15 Feb. 1991); cf. Marine Corps Institute, *Marine Battle Skills Training Handbook, Book 1: PVFGYSGT, General Military Subjects* at 1-9-11 (1993) (describing the “escalation of force”); Dep’t of Army, Regulation 190-14, *Carrying of Firearms and Use of Force for Law Enforcement and Security Duties*, para. 3-2g (12 Mar. 1993) (describing gradations of force).

Type 111: Protection of Property and Foreign Nationals

Purpose: Detail what and whom may be defended with force aside from the lives of United States soldiers and citizens. May include measures to be taken to prevent crimes in progress or the fleeing of criminals. May place limits on pursuit of an attacker.

Example: “You may use force in self-defense in response to attacks or threats of imminent attack against U.S. or host nation forces, citizens, property, or commercial assets.” Headquarters, XVIIIth Airborne Corps, Peacetime Rules of Engagement for Operation Desert Shield (1990) (soldier card).

Risks: Restraint may suffer if soldiers view as license to resort directly to deadly force in protection of the threatened object or person.

References: See, e.g., Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N, at para. 3c(3) (1993) (“Patrols are authorized to protect relief supplies, United States Forces, and other persons in those areas under the control of United States

Forces.”); *cf.* Memorandum, Mr. Marrack Goulding, Under-Secretary for Peacekeeping, United Nations, New York to Force Commander, United Nations Protective Force (UNPROFOR), Zagreb, Croatia, subject: United Nations Rules of Engagement: Statements to the Media (20 Jan. 1993) (“[For a soldier, self defense] always includes defending his comrades and any persons entrusted in his care, as well as defending his post, convoy, vehicle, or rifle.”).

Type IV: Weapons Control Status or Alert Conditions

Purpose: Announce, for air defense assets, a posture for resolving doubts over whether to engage. Announce, for units observing alert conditions, a series of measures designed to adjust unit readiness for attack to the level of the perceived threat. The measures may include some or all of the other functional types of rules.

Example: “The Task Force Commander will order into effect Rules of Engagement based upon the following three levels of threat to exercise personnel: (1) ROE GREEN. . . when no credible threat of attack against United States or host country personnel or facilities exists. . . . (2) ROE AMBER [u]pon a determination that a credible threat to United States forces within the country of [host nation] exists. . . . (3) ROE RED [u]pon actual attack of United States [or as otherwise deemed appropriate by the Commander] . . .” Headquarters, 101st Airborne Division, Operations Plan for Operation General Tosta, Appendix 1 (Rules of Engagement) to Annex C (1985) (listing specific measures for each status at separate tabs).

Risks: Confusion may result if system is implemented without training on soldier-level rules and their relationship to these statuses.

References: See, e.g., Dep’t of Army, Field Manual 44-3, *Air Defense Artillery Employment, Chaparral/Vulcan/Stinger* 7-10 (15 June 1984) (describing weapons control statuses- “weapons free,” “weapons tight,” “weapons hold”); *cf.* Dep’t of Army, Reg. 525-13, *The Army Combatting Terrorism Program*, para. 3-6; App. B (establishing “THREATCON” system); Daniel P. Bolger, *Americans at War 1975-1986: An Era of Violent Peace* 251 (1988) (describing alert conditions used by Marines in Beirut in 1983); D.P. O’Connell, *The Influence of Law on Sea Power* 179 (1975) (“While detailed rules of engagement cannot easily be promulgated to cover every type of situation, it is possible to envisage general rules which can be applied to any one of three broad situations, namely low tension, high tension, and hostilities.”).

Type V Arming Orders

Purpose: Dictate which soldiers in the force are armed and which

AO	Rifle	Bayonet	Ammunition Mag/Chamber	Control
1	Sling	Scabbard	In Pouch/ Empty	OIC/ NCOIC
2	Port	Scabbard	In Pouch/ Empty	OIC/ NCOIC
3	Sling	Fixed	In Pouch/ Empty	OIC/ NCOIC
4	Port	Fixed	In Pouch/ Empty	OIC/ NCOIC
5	Port	Fixed	In Weapon/ Empty	OIC/ NCOIC
6	Port	Fixed	In Weapon/ Locked&Ld	OIC

Figure A-1

have live ammunition. Specify which precise orders given by whom will permit the loading and charging of firearms.

Example: The table depicted at **Figure A-1** appeared in Headquarters, Joint Task Force Los Angeles, Operations Plan for Civil Disturbance Operation, para. C (2 May 1992)(scabbard status omitted).

Risks: If arming order requires an empty chamber, soldier may be unable to defend himself.

References: *See, e.g.,* Memorandum, Commander, Joint Task Force Panama, JTF-PM-CO, subject: Weapons Safety (19 Jan. 1990); Headquarters, 101st Airborne Division (Air Assault), Operations Plan for Operation General Tosta, Tab A to App. 1 to Annex C (Rules of Engagement) (1986) (stating that personnel other than military police will “retain loaded magazines in their ammunition pouches, weapons will be on safe, chambers will be empty”); *cf.* Dep’t of Army, Reg. 190-14, Carrying of Firearms and Use of Force for Law Enforcement and Security Duties, para. 2-7 (12 Mar. 1993)(prohibiting certain persons from carrying firearms); Headquarters, United Nations Protection Forces (UNPROFOR), Zagreb, Croatia, Force Commander Directive 01/92, Rules of Engagement (19 July 1993) (classified “UN RESTRICTED”).

Type VI: Approval to Use Weapons Systems

Purpose: Designates what level commander must approve use of

Approving Commander	RCA	Demo	Mortars		FASCAM
			PA	UA	
JCS					
CINCPAC					
JTF	X				
Corps					X
Div			X		
Bde				X	
Bn		X			
co					

Figure A-2

particular weapons systems. Perhaps prohibits use of a weapon entirely.

Example: The table depicted at *Figure A-2* appeared in Headquarters, 25th Infantry Division (Light), Operations Order 91-1, Rules of Engagement (5 Mar. 1991)(certain weapons systems omitted).

Risks: Units or soldiers may not be able to defend themselves adequately.

References: See, e.g., Headquarters, Joint Task Force South, Operations Order 90-2, ROE Card, para. F (“If civilians are in the area, do not use artillery, mortars, armed helicopters, AC 130, tube or rocket launched weapons, or M551 main guns against known or suspected targets without the permission of a ground maneuver Commander LTC or higher (for any of these weapons).”).

Type VII: Eyes on Target

Purpose: Require that the object of fire be observed by one or more human or electronic means.

Example: “Surface Weapons. This subparagraph applies to the conduct of fire in both low and mid-intensity combat operations to include the employment of indirect and direct fire surface weapons and naval gunfire. . . . Every effort will be made to observe fires regardless of the target location.” Headquarters, I (United States) Corps, Operations Plan 5-86 (Celtic Cross IV), Annex T, para. 3b (1986).

Risks: Initiative may suffer if redundant eyes on target are required.

References: See, e.g., Headquarters, Americal Division, Reg. 525-4, Combat Operations: Rules of Engagement, para. 3g, 5b (16 Mar. 1968) (defining “observed fire” as “[e]mployment of fire support under the direct observation and control of artillery forward/air observer, FAC, or other competent individual,” and detailing circumstances in which indirect fire must be observed); cf. W. Hays Parks, *Righting the Rules of Engagement*, United States Naval Institute Proceedings, May 1989, 83, 89 (reporting that in the 1986 United States air strike against Libya, all target acquisition systems of the F-111F aircraft had to be operable in order to bomb).

Type VIII: Territorial or Geographic Constraints

Purpose: Create geographic zones or areas into which forces may not fire. May designate a territorial—perhaps political—boundary, beyond which forces may neither fire nor enter except perhaps in hot pursuit of an attacking force. Include tactical control measures that coordinate fire and maneuver by means of graphic illustrations on operations map overlays, such as coordinated fire lines, axes of advance, and direction of attack.

Example: “You are not permitted to enter the land, sea, or airspace of other countries—besides the host nation.” Headquarters, XVIIIth Airborne Corps, Peacetime Rules of Engagement for Operation Desert Shield, para. C (1990).

Risks: Units may be unable to defend themselves adequately if entering area is only way to suppress continued attack.

References: See, e.g., Dep’t of Army, Field Manual 101-5-1, *Operational Terms and Symbols* (21 Oct. 1985) (defining “tactical control measures,” “coordinated fire lines,” “axes of advance,” and “direction of attack”); Headquarters, Americal Division, Reg. 525-4, Combat Operations: Rules of Engagement, paras. 3c-e (16 Mar. 1968) (defining “specified strike zones,” “free fire zones,” and “no fire zones”).

Type IX: Restrictions on Manpower

Purpose: Prescribe numbers and types of soldiers to be committed to a theatre or area of operations. Perhaps prohibit use of United States manpower in politically or diplomatically sensitive personnel assignments requiring allied manning.

Example: “[The United States Army armed UH-1 (Iroquis) Helicopter], when employed on combat support missions, will be United States marked and manned with a combined United States and Vietnamese crew.” Headquarters, United States Military Assistance Command, Vietnam, Directive No. 62 (24 Nov. 1962).

Risks: Positions may be manned for other than purposes of military effectiveness.

References: See, e.g., Major General S.L. Arnold & Major David T. Stahl, *A Power Projection Army in Operations Other Than War*, Parameters, Winter 1993-94, at 4, 11 (discussing force caps).

Type X: Restrictions on Point Targets and Means of Warfare

Purpose: Prohibit targeting of certain individuals or facilities. May restate basic rules of the Law of War for situations in which a hostile force is identified and prolonged armed conflict ensues.

Example: “Hospitals, Churches, Shrines, Schools, Museums, and any other historical or cultural site will not be engaged except in self defense.” Headquarters, Joint Task Force South, Operations Order 90-2, ROE Card, para. L.

Risks: Restating the Law of War can clutter the message on mission specific tasks.

References: See generally Dep’t of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) (C1, 15 July 1976) (detailing numerous restrictions contained in pertinent conventions).

LOCATION OF FUNCTIONAL TYPES WITHIN THE INSTRUMENTS RECOMMENDED IN THIS ARTICLE

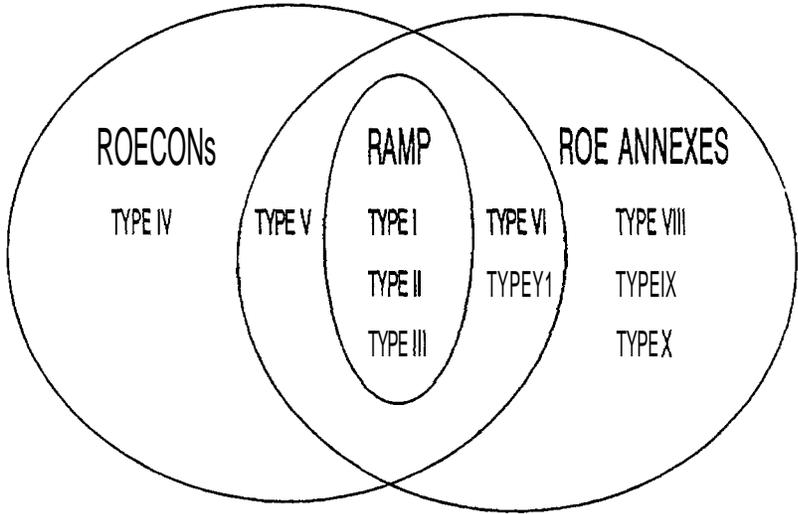


Figure A-3

APPENDIX B**PROPOSED ENTRY FOR
SOLDIER'S MANUAL OF COMMON TASKS****USE FORCE APPROPRIATELY**

181-906-1506

CONDITIONS

Given a noncombat but potentially hostile situation in which your unit is deployed to promote stability, provide humane assistance to distressed areas, assist civil authorities, or protect United States interests.

STANDARDS

1. Defend yourself and members of your unit with initiative.
2. Apply all levels of force only when necessary.
3. Apply an amount of force proportionate to each threat encountered.
4. Transition appropriately to a combat situation when ordered to do so by your chain of command.

TRAINING AND EVALUATION

Training Information Outline

1. Follow all lawful orders of your chain of command regarding use of force. Follow the four standing rules stated in the next paragraph in the absence of more specific guidance. The four rules interlock; do not apply one rule to the exclusion of the others. Your chain of command may supplement one or more of these rules to permit accomplishment of a mission. In such a case, these rules should guide your judgment only to the extent that they do not conflict with the instructions of your chain of command.
2. When facing a potential threat, exercise initiative as well as restraint. Any weapons fire must be disciplined and aimed, while also effective in achieving self-defense. When encountering a potential threat, remember R-A-M-P. That key word will help you respond in a way that protects lives, supports the mission, and complies with the law.

Return fire with aimed fire. Return force with force. You always have the right to repel hostile acts with necessary force.

Anticipate attack. Use force first if, but only if, you see clear indicators of hostile intent.

Measure the amount of force that you use, if time and circumstances permit. Use only the amount of force necessary to protect lives and accomplish the mission.

Protect with deadly force only human life, and property designated by your commander. Stop short of deadly force when protecting other property.

3. “R-Return Fire” means that if you have been fired on or otherwise attacked, you may do what you must to protect yourself. This is the core of the right to self-defense, which is never denied.

4. “A-Anticipate Attack” means that self-defense is not limited to returning fire. Soldiers do not have to receive the first shot before using force to protect themselves and other lives.

a. When soldiers initiate the use of force to defend themselves they use what is known **as** “anticipatory” or “preemptive” force. During noncombat operations, unless ordered otherwise, you must use anticipatory or preemptive force only when you face an imminent threat of attack and can identify or describe to yourself certain clear indicators of hostile intent.

b. Determine whether someone’s intentions are hostile by considering the same factors you use when reporting enemy information to your leader under the SALUTE format (CT **071-331-0803**).

Sue	How many individuals are you facing?
Activity	What is he doing? Pointing a weapon?
Location	Is he within small arms range? In a prepared firing position? Has he entered a restricted area?
Unit	Is he wearing a uniform? Part of an organized armed force?
Time	How soon before he is upon you?
Equipment	Is he armed? With what? What is the range and lethality of his weapon?

c. Do not base anticipatory force on a mere hunch that the person is hostile. On the other hand, if your commander informs you that a particular fighting force has been designated **by** higher headquarters **as** “hostile,” or **as** “the enemy,” you may shoot that force or its equipment on sight without identifying indicators of hostile intent.

5. “M-Measure Your Force” means that if you have a moment to choose your method, you must do so.

a. As a soldier—a professional in the use of force—you are

expected to adjust the intensity, magnitude, and duration of your force to fit the scale of threat that you face. Excessive force endangers innocent lives and hinders mission accomplishment.

b. If possible, apply a graduated escalation of force, particularly when facing civilian crowds that appear to be unarmed, but also unfriendly. In handling potentially hostile situations, use one or more of the actions in V-E-W-P-R-I-K:

Verbal warning.	Tell person(s), in their language, to disperse, stay away, or halt.
Exhibit weapon.	Show your weapon or use some other display that you have superior force at your disposal.
Warning shot.	Shoot a warning shot, if authorized.
Pepper spray.	Spray cayenne pepper spray, if authorized and available and the individual is close enough.
Riot stick.	Strike with riot stick, if authorized and available and if the individual is close enough. Poke fleshy parts of the body first, arms and legs next, and, if necessary, escalate to striking the head.
Injure with fire.	Shoot to wound.
Kill with fire.	Shoot to kill.

6. “P-Protect With Deadly Force” means that you must defend more than your own personal safety, but it also means you may use deadly force only in limited circumstances. Your commander may designate that certain sensitive or mission-essential facilities be protected with deadly force. On other occasions, your commander may designate that no property receive this maximum level of protection. This might be the case when your unit is operating in a host nation the laws of which permit the use of deadly force only to protect life.

7. These four rules operate as an up-ramp when conditions grow more hostile and the situation develops into combat.

a. R-A-M-P states the rules by which you increase your level of force to meet the threat.

b. R-A-M-P also guides your use of force in many situations during war. During war, you attack combat targets according to the Law of War (CT 181-906-1505) whether or not you are in imminent danger from the enemy; however, R-A-M-P remains your guide on the use of force when dealing with civilians and prisoners.

8. These rules operate as a down-ramp when combat conditions cool down into an operation other than war and use of force must become more restrained.

9. Your commander will be complying with rules of engagement from higher headquarters. These rules of engagement will be in the form of ROE Conditions (ROECONs) and ROE Annexes to operations orders. These rules of engagement may impact on the way individual soldiers use force. If so, your commander will translate guidance to you in terms of “R-A-M-P,” and will “walk you up” each of the RAMP rules to clarify how to use force appropriately in the situations you will face.

Evaluation Preparation

Setup: Soldiers should be individually tested for this task. The evaluator briefs the soldier on the simulated noncombat situation, providing information on the mission, the potential threat, the soldier’s location in relation to other troops in the unit, and the terrain. The soldier is then questioned as to his recognition and actions on the performance measures. The most realistic method of training this task is to include rules of engagement and use of force problems in Army Training and Evaluation Programs (ARTEP) and field training exercises (FTX). The problems should require skill level 1 soldier recognition and action.

Brief Soldier: Tell the soldier that he is deployed in a simulated noncombat but potentially hostile environment. The soldier may be on guard duty, riding in a convoy, or walking to his cot from the mess tent. The soldier may be confronted with a variety of threats from armed and unarmed individuals and vehicles. The soldier will be asked to describe what actions he should take. If available, use TC 27-10-4, Selected Problems in Rules of Engagement, to create scenarios for the soldier. At some point, modify the soldier’s R-A-M-P such that an identified enemy force has been designated a “hostile force” by higher headquarters. Enemy soldiers may appear on the battlefield, surrender, or be sick or wounded. If available, use TC 27-10-1, Selected Problems in the Law of War, to create wartime scenarios for the soldier. The soldier will be asked to describe what actions he should take.

Evaluation Guide: 181-906-1506

USE FORCE APPROPRIATELY

Performance Measure	Results	
1. Returns fire from a hostile force with aimed fire.	P	F
2. Identifies clear demonstrations of hostile intent using the SALUTE factors. Anticipates attack by firing first.	P	F

3. Identifies situation where hostile intent is unclear using the SALUTE factors. Holds fire while maintaining or seeking a secure position.	P	F
4. Responds with measured force when confronted with a potentially hostile force. Uses the scale of V-E-W-P-R-I-K measures.	P	F
5. Omits lower level V-E-W-P-R-I-K measures if the threat quickly grows deadly (i.e., civilian pulls grenade out from underneath clothing and prepares to throw).	P	F
6. Declines to use deadly force when piece of property is snatched (i.e., sunglasses).	P	F
7. Uses deadly force, if indicated, to protect comrades and persons under United States control.	P	F
8. Uses deadly force, if indicated, to protect key property designated by commander (i.e., United States aircraft).	P	F
9. When told that a force has been designated a "hostile force," fires aimed shots at members of hostile force whether or not they show hostile intent.	P	F
10. When told that a force has been designated a "hostile force," continues to use "RAMP" when encountering civilians, prisoners, and casualties.	P	F
11. When told that attacks of a particular kind have been reported against United States or coalition forces in the area (e.g., hand grenades delivered by civilians, car bomb attacks, Molotov cocktails), considers these potential threats when looking for indicators of hostile intent.	P	F
12. Seeks clarification in terms of RAMP when given instructions on use of force that do not fit the RAMP format.	P	F

Feedback

Score the soldier GO if he passes all steps. Score the soldier NO-GO if he fails any steps. If the soldier scores NO-GO, show what was done wrong and how to do it correctly.

References

APPENDIX C

SAMPLE TRAINING SCENARIOS

CASE STUDY 1 RETURNING FIRE DEFENDING AGAINST HOSTILE ACTS

SITUATION: A soldier is walking from the mess facility to his sleeping tent after the dinner meal. His route takes him near the perimeter of his Brigade Support Area, which is marked by single-strand concertina wire and a protective berm of earth. The soldier's unit is deployed on the outskirts of the capital city in a small island country. Two days ago the United States Ambassador determined that American citizens present in the country were in danger due to political instability. At the request of the Ambassador and the invitation of the prime minister of the country, the President ordered military forces to conduct a noncombatant evacuation operation. In twelve hours, the soldier's company will deploy by helicopter to a marshalling area in the interior of the country to collect Americans residing there. His immediate mission is to rest up for the hard work ahead. He is armed with an M-16A2 rifle. In accordance with his commander's orders, the rifle is not loaded, but the soldier's ammunition pouches contain four magazines full of ammunition. The commander has ordered that the standing "R-A-M-P" rules of force are in effect. Thus far the presence of American military forces in the country has resulted in no hostile response by any of the police forces supporting an anti-American political faction. Although the soldier is walking alone, several fellow soldiers are within fifty meters of him. Because the engineer platoon has not yet completed building the protective berm, there are numerous areas along the perimeter that provide no cover from potential small arms fire.

EVENT: As the soldier passes near the perimeter, he looks to the left and sees a sniper about 150 meters away aiming a weapon toward him. The sniper fires, and a round hits the earth a few feet away. The sniper is visible, only partially obscured by vegetation, and is about 100 meters from three civilian women who were talking to each other when the first shot came. The sniper is taking aim again at the soldier or at one of the other Americans in the area.

CONSIDERATIONS: The key rule here is to RETURN FIRE with aimed fire. The standing R-A-M-P rules allow soldiers to defend themselves against attacks. Here, the sniper clearly attacked the

soldier and United States forces by firing a deadly weapon. The soldier can return fire with aimed shots to defend himself and his unit, while reporting the incident to his chain of command so that other measures can be taken to eliminate the threat. Each of the other R-A-M-P rules would support a decision by the soldier to return fire. If soldiers see clear indicators of hostile intent, they may ANTICIPATE ATTACK and use force first; this rule was immediately satisfied when the sniper committed a hostile act (and thus showed hostile intent) by attacking the security guards with aimed fire. No analysis of the S-A-L-U-T-E factors is necessary to determine hostile intent. Soldiers must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. Under these circumstances, aimed shots fired back at a sniper constitute force that is properly adjusted in magnitude, intensity, and duration to the threat. Given the closeness of innocent civilians, the soldier's commander would violate this rule if, for instance, he requested indirect mortar fire in the vicinity of the sniper. Again, because the soldier already has used deadly force, no progression through a scale of force—that is, verbal warning or a warning shot is necessary. The rule permitting soldiers to PROTECT LIFE WITH DEADLY FORCE supports a decision to fire because the lives of United States soldiers are in the direct line of the sniper's fire.

SUGGESTED RESPONSE: To find cover and concealment, place a magazine into the rifle, chamber a round, and fire aimed shots at the sniper.

REFERENCES: SMCT 181-906-1506; Yoram Dinstein, *War, Aggression and Self-Defense* 200-02 (1988).

CASE STUDY 2
ANTICIPATING ATTACK
RESPONDING WITH FORCE TO A CLEAR DEMONSTRATION OF
HOSTILE INTENT

SITUATION: A soldier stands guard in the early morning at a post outside his battalion compound. The compound is set in a series of buildings near a large airport. His unit's mission is to maintain peace in the capital city of a country where instability and civil war threaten United States interests. The soldier's mission is to safeguard the perimeter of the compound, where nearly 300 soldiers are now sleeping. The soldier is armed with his M-16A2 rifle. In accordance with his guard instructions, the rifle is not loaded, but one of the soldier's ammunition pouches contains a magazine with ten rounds of ammunition. The commander has ordered that the standing "R-A-M-P" rules of force are in effect. Six months ago, a terrorist killed seventeen United States citizens and destroyed the United States embassy in the city by driving a truck loaded with explosives into the building. The area surrounding the compound contains individuals bearing small arms as well as rival factions armed with mortars and machine guns. In recent days, United States soldiers have been occasional targets of these weapons, though higher headquarters has not officially designated any forces as hostile. A parking lot outside the concertina wire marks the perimeter of the compound. This lot is in the soldier's sector of responsibility. Another soldier mans a post along the same portion of the perimeter 160 meters from the first soldier.

EVENT: Suddenly, a yellow truck that has circled the empty lot twice gathers speed, crashes through the concertina wire barrier, and barrels toward the main building of the compound. Within seconds it will be at the main building.

CONSIDERATIONS: The key rule here is to ANTICIPATE ATTACK on the main building. Even when only the standing R-A-M-P rules are in effect, soldiers can fire their weapons before receiving fire, if they see clear indicators of hostile intent. Here the soldier can conclude that the truck driver's intentions are hostile because the S-A-L-U-T-E factors support that conclusion. Note the driver's *activity* (he has crashed a concertina barrier after circling the lot and gathering speed), the *locution* (within a restricted compound), the *time* factor (only seconds before the truck reaches hundreds of United States soldiers), and *equipment* (a truck bombing recently occurred nearby). Each of the other R-A-M-P rules supports a decision to fire at the truck driver. Soldiers can RETURN FIRE with fire, and

respond to hostile acts with necessary force. They must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. Under these circumstances, aimed shots at the truck driver are the correct measure of force to protect lives and accomplish the mission. Given the lack of time available, the soldier should not attempt lesser measures along the graduated scale of force—verbal warning, warning shot, etc.). Finally, the soldier can fire his rifle, the only lethal weapon available, because soldiers can PROTECT LIFE WITH DEADLY FORCE.

SUGGESTED RESPONSE To place the magazine into the weapon, chamber a round, and fire at the driver of the truck.

HISTORICAL NOTE: This problem is patterned after a terrorist attack that claimed the lives of 241 marines and sailors in Beirut, Lebanon on October 23, 1983. The Department of Defense Commission that investigated the incident concluded that several factors detracted from the security posture of United States forces on that date. One factor was a “mind-set” encouraged by the rules of engagement. The rules, as disseminated by the chain of command, left marines with doubts about whether they could initiate fire under extremely threatening circumstances, such as those described above.

REFERENCES: SMCT 181-906-1506; Dept. of Defense, *Rep't of the Comm'n on the Beirut International Airport Terrorist Act* 67-103 (1983); Daniel P. Bolger, *Americans at War: 1975-1986, An Era of Violent Peace* 242-54 (1988).

CASE STUDY 3
MEASURING FORCE
USING FORCE NECESSARY
TO ACCOMPLISH THE MISSION

SITUATION. A platoon has formed a hasty perimeter in a small village. The platoon leader is talking with one of the villagers through an interpreter. United States forces are deployed in a flat, hot, dry, famine-stricken country as part of a multinational coalition force. The mission of the coalition is to provide a secure environment for the distribution of humanitarian relief supplies. Armed bands have been frustrating these efforts for months and have even fired upon United States soldiers several times over the past few days. The mission of the platoon is to search the village and seize weapons and munitions that were sighted there the night before, when a firefight among rival bands had taken place. If necessary, the platoon also has the mission of disarming members of any of the bands found in the village. The platoon has completed a sweep of the village and has found a few small arms and live mortar rounds, but no armed individuals or bands. The soldiers of the platoon bear M-16A2 rifles, which are locked and loaded. The commander has ordered that the standing “R-A-M-P” rules of force are in effect.

EVENT: Two unarmed men in white shirts suddenly dash through an alley in the village. The platoon leader orders several soldiers to chase after the men to determine whether they know anything about the firefight the night before. One soldier chases one of the men into an area outside the village. The soldier notices movement in a bush about twenty-five meters away and then sees the white shirt of a man running away from him and from the remainder of the American platoon.

CONSIDERATIONS: The key rule here is to MEASURE THE AMOUNT OF FORCE to fit the level of the threat. Under the standing R-A-M-P rules, a soldier must use only the amount of force necessary to protect lives and accomplish the mission. The force used must fit the scale of the threat in magnitude, intensity, and duration. If possible, soldiers apply a graduated escalation of force when facing civilians who are unarmed, but also confrontational and unfriendly. Here, the civilian man is unarmed and running away. The man poses no immediate threat to the safety of the soldier or his American comrades. No use of force is appropriate. Nor do the other R-A-M-P rules support the use of force. Soldiers may RETURN FIRE with fire, but the man has fired no shots. Soldiers may ANTICIPATE ATTACK and fire first if they see clear indicators of hostile intent, but here, none of the S-A-L-U-T-E factors indicate hostile intent. Soldiers must

PROTECT LIFE WITH DEADLY FORCE, but no lives are endangered by this fleeing unarmed man.

SUGGESTED RESPONSE: To continue chasing the man but to refrain from firing the rifle.

HISTORICAL NOTE: This problem is roughly patterned after an incident that occurred in Somalia in February **1993**. In circumstances similar to these, an American soldier shot and killed an unarmed Somali man. A panel of officers and enlisted men, after hearing numerous witnesses and examining ballistic and medical evidence, determined that the soldier had used excessive force, despite the soldier's claim that he had fired a "warning shot in the dirt" to the left of the fleeing man. The panel also found fault with the chain of command for not ensuring that the soldiers understood the rules of engagement. The rules of engagement were similar to R-A-M-P in that they allowed for warning shots, but only if appropriate as part of a graduated show of force against a threatening element. The soldier's Division Commander set aside his conviction for negligent homicide.

REFERENCES SMCT **181-906-1506**; United States v. Mowris, (Headquarters, Fort Carson & 4th Inf. Div. 1 July **1993**).

CASE STUDY 4
PROTECTING PROPERTY
APPROPRIATE USE OF DEADLY FORCE

SITUATION: A soldier sits on the passenger side in the front of a High Mobility Multipurpose Wheeled Vehicle (HMMWV). He and the driver are in the first vehicle of a two-vehicle convoy in the center of a city. As the vehicles move through the city, they pass many civilian men, women, and children. United States forces are deployed in a flat, hot, dry, famine-stricken country as part of a multinational coalition force. The mission of the coalition is to provide a secure environment for the distribution of humanitarian relief supplies. Armed bands have been frustrating these efforts for months and have even fired upon United States soldiers several times over the past few days. Civilians frequently taunt coalition soldiers and attempt to steal items from passing vehicles. The immediate mission of the convoy is to link up with the remainder of the soldier's company. The soldier is armed with an M-79 grenade launcher that is loaded with a canister. The commander has ordered that the standing "R-A-M-P" rules of force are in effect.

EVENT: As the vehicle rounds a bend, an unarmed boy puts his hand through the window, pushes back the soldier's head, and removes an expensive pair of prescription sunglasses. The vehicle moves forward, and the youth slips back into a crowd.

CONSIDERATIONS: The key rule here is to PROTECT WITH DEADLY FORCE ONLY HUMAN LIFE AND PROPERTY DESIGNATED BY YOUR COMMANDER. Under the standing R-A-M-P rules, a soldier must stop short of deadly force when protecting other property. Here, the property stolen by the youth is not the sort of sensitive or mission-essential equipment that commanders must sometimes protect with deadly force. None of the other R-A-M-P rules supports the use of deadly force in this situation. Soldiers may RETURN FIRE with fire, but the youth has fired no shots. Soldiers may ANTICIPATE ATTACK and fire first if they see clear indicators of hostile intent, but here, none of the S-A-L-U-T-E factors indicate hostile intent. Soldiers must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. The force used must fit the scale of the threat in magnitude, intensity, and duration. If possible, soldiers apply a graduated escalation of force when facing civilians who are unarmed, but also confrontational and unfriendly. Here, the youth has used some force and has committed an aggressive act; however, the youth also is unarmed and has moved away from the departing vehicle. The youth poses no immediate threat to the safety of the soldier or his comrades. The soldier may shout verbal warnings in the native tongue to bystanders

to disperse, stay away, or halt. He may visibly display his weapon to indicate available force. He may use pepper spray or some other irritant, if available, to ward off those who may reach toward a vehicle. He may use a riot stick or some other implement to ward off or even strike persistent individuals in nonvital regions. But he may not use deadly force under these circumstances when the standing R-A-M-P rules are in effect.

SUGGESTED RESPONSE: To refrain from firing the M-79, while maintaining alertness for others who attempt to steal from the vehicle. Upon returning to the base camp the soldier should ask the chain of command how to file a claim for the lost glasses.

HISTORICAL NOTE: This problem is roughly patterned after an incident that occurred in Somalia in February 1993. In circumstances similar to these, an American marine leaned out the window of the vehicle and discharged his M-79 over and behind his right shoulder. Fragments from the canister wounded two Somali boys. One of the boys had been standing nearby sipping grapefruit juice. A panel of officers and enlisted men, after hearing numerous witnesses and examining all available evidence, determined that the marine had used excessive force.

REFERENCES: SMCT 181-906-1506; United States v. Conde, (First Marine Expeditionary Force, 6 Apr. 1993).

CASE STUDY 5
ANTICIPATING ATTACK
RESPONDING TO UNCLEAR
INDICATORS OF HOSTILE INTENT

SITUATION A soldier quickly exits a **UH-60** Blackhawk aircraft **as** soon **as** it touches down. The helicopter landing zone is on a military installation in a country that has long been allied with the United States. Recently, however, that country has been ruled by a military dictator whose methods have grown increasingly corrupt and repressive. The military installation houses American military families—routinely stationed in the country **as** part of an ongoing training and regional security mission—as well **as** soldiers of the allied nation. The soldier's unit is deployed to the country with the mission of enforcing America's rights under a treaty that the military dictator has openly begun to repudiate. On this evening, the soldier's battalion has the mission of conducting a show of force at the military installation to demonstrate American resolve to defend its interests under the treaty. The soldier and the remainder of his squad, all running from the helicopter toward a woodline with full combat equipment and wearing skin camouflage, have the mission to provide security around part of the helicopter landing zone. The soldier carries an M203 grenade launcher, the rifle portion of which is locked and loaded with 5.56mm ammunition. The soldier has several grenade rounds in the outside pockets of his rucksack. The terrain is mostly jungle, with occasional grassy clearings. The buildings of the military installation's residential area are several hundred meters away. An infantry company of the country's defense forces, still loyal to the dictator, occupy the military installation. The commander has ordered that the standing "R-A-M-P" rules of force are in effect, but has emphasized that the host country's defense forces will feel threatened by the show of force and may reflexively aim weapons toward American soldiers. During similar shows of force in recent days, defense forces in other parts of the country have held their fire after initially training their weapons on American forces. Also, intelligence reports maintain that the military dictator does not seek hostilities with American forces at this time. Accordingly, the commander has supplemented the "A" of "R-A-M-P" with the guidance that if a member of the defense forces aims a weapon at United States forces, then without more, that act is not to be interpreted **as** a clear indicator of hostile intent. Higher headquarters has not officially designated **as** hostile any forces, to include the host country's defense forces.

EVENT As the soldier rushes toward the woodline, he sees a member of the host country's defense force **50** meters away. The member

of the defense force is peering at the soldier and his fellow American soldiers from behind a machine gun that is mounted on a tripod in a prepared position.

CONSIDERATIONS: The key rule here is ANTICIPATE ATTACK, which means that the soldier may use force first if, but only if, he sees clear indicators of hostile intent. The R-A-M-P rules, **as** supplemented by the commander, permit the soldier to fire his weapons before receiving fire, but only if he can identify clear, objective indicators of hostile intent. Here the soldier cannot conclude that the machine gunner's intentions are hostile. The S-A-L-U-T-E factors do not provide a clear picture of the machine gunner's intentions: *size* (thus far only a single machine gunner is visible), *activity* (presently aiming a weapon but holding fire from a stationary position **as** American's conduct an air assault), *locution* (within range of all weapons systems), *time* (capable of opening fire without delay, and of receiving prompt assistance from host country defense forces), and *equipment* (a machine gun in a prepared position with an unknown amount of ammunition). Moreover, the commander has emphasized that the aiming of a weapon is not a clear indicator of hostile intent, under the circumstances. Each of the other R-A-M-P rules would support a decision to refrain from firing at or launching a grenade at the machine gunner. Soldiers can RETURN FIRE with fire, and respond to hostile acts with necessary force. Certainly, if the machine gunner fires a single shot toward American forces, the soldier can return fire. Soldiers must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. Under these circumstances, some demonstration of available force may ultimately be necessary to persuade the machine gunner to stand down from his ready position, but for the moment, the soldier can perform the immediate task of reaching the woodline and taking up a position on his squad's perimeter without using any force against the machine gunner. His chain of command can then determine the appropriate measure of force to use. If the situation develops to where the soldier must PROTECT LIFE WITH DEADLY FORCE, he may do so, but right now, only protective measures well short of deadly force are appropriate.

SUGGESTED RESPONSE To dive onto the ground and use individual movement techniques (high crawl, low crawl, rush) to reach the woodline. The soldier should remain **as** covered and concealed from the machine gunner **as** possible, while reporting the location of the position to the chain of command.

HISTORICAL NOTE This mission was part of a show of force that United States marines conducted during June, 1989 at Fort Amador, Panama. The operation was Nimrod Dancer. Rather than an air

assault, the marines conducted an amphibious landing at the installation. The natural response of the Panamanian Defense Forces to the landing was to turn their weapons in the direction of the landing marines. Because the marines did not open fire, the show of force occurred without incident or casualties, and the United States retained the moral high ground in the tense confrontation with Manuel Noriega. The confrontation became an armed conflict six months later, on terms favorable to the United States, in Operation Just Cause.

REFERENCES SMCT 181-906-1506; Interview with Lawrence A. Yates, Historian, Combat Studies Institute, United States Army Command & General Staff College (Mar. 22, 1994) (discussing interviews with JTF-Panama commander and staff, with the Marine Force commander under JTF-Panama, and with a Marine staff officer at U. S. SOUTHCOM, June 1989, December 1988).

CASE STUDY 6
MEASURING FORCE
USING FORCE NECESSARY
TO ACCOMPLISH THE MISSION

SITUATION A soldier is in a convoy of five Army vehicles as it winds its way down a narrow road through a thick jungle. The road is in a country that has long been allied with the United States. Recently, however, that country has been ruled by a military dictator whose methods have grown increasingly corrupt and repressive. American units are routinely stationed in the country as part of an ongoing training and regional security mission, but the Army unit manning the convoy is currently deployed to the country with the mission of enforcing America's rights under a treaty that the military dictator has openly begun to repudiate. Specifically, the defense forces of the country—still loyal to the military dictator—have been denying freedom of movement along the road to convoys of United States vehicles. On this afternoon, the convoy has the mission of traveling the length of the road without being escorted by the host nation's defense forces. The Army captain and the thirty soldiers under his command in the vehicles are carrying full combat equipment and wearing skin camouflage. The battalion commander has ordered that the standing "R-A-M-P" rules of force are in effect, but has provided the following two pieces of supplemental guidance. First, the host country's defense forces will feel threatened by the armed convoy and may reflexively aim weapons toward American soldiers. During similar shows of force in recent days, defense forces in other parts of the country have held their fire after initially training their weapons on American forces. Also, intelligence reports maintain that the military dictator does not seek hostilities with American forces at this time, and higher headquarters has not officially designated as hostile any forces, to include the host country's defense forces. Accordingly, the battalion commander has supplemented the "A" of "R-A-M-P" with the guidance that if a member of the defense forces aims a weapon at United States forces, then without more, that act is not to be interpreted as a clear indicator of hostile intent. Second, the battalion commander has supplemented the "M" of "R-A-M-P" with the guidance that the convoy commander will take a specific series of escalating measures and give specific orders to soldiers if the host nation defense forces block the convoy's movement.

EVENT As the convoy rounds a bend, it encounters a roadblock. Five armed members of the host country's defense forces man the roadblock and motion the convoy to halt. As the vehicles stop, the

soldier notices several other members of the defense forces in prone positions, aiming weapons at the convoy.

CONSIDERATIONS: One key rule here is ANTICIPATE ATTACK, which means that the soldier may use force first if, but only if, he sees clear indicators of hostile intent. The R-A-M-P rules, **as** supplemented by the commander, permit the soldier to fire his weapons before receiving fire, but only if he can identify clear, objective indicators of hostile intent. Here the soldier cannot conclude that the defense force intentions are hostile. The S-A-L-U-T-E factors do not provide a clear picture of their intentions: *size* (squad-size element is typical for manning a roadblock), *activity* (presently aiming weapons but holding fire from stationary positions **as** Americans approach in a convoy), *location* (within range of all weapons systems), *time* (capable of opening fire without delay), and *equipment* (small arms, with an unknown amount of ammunition). Moreover, the commander has emphasized that the aiming of a weapon is not a clear indicator of hostile intent, under the circumstances. The other key rule here is to MEASURE THE AMOUNT OF FORCE to fit the level of the threat. Under the standing R-A-M-P rules, a soldier must use only the amount of force necessary to protect lives and accomplish the mission. The force used must fit the scale of the threat in magnitude, intensity, and duration. If possible, soldiers apply a graduated escalation of force when facing potentially hostile elements. Here, the captain commanding the American convoy has specific orders on what measures will be used in the escalation of force. For instance, he might read aloud to the host nation defense forces from an index card containing the article of the treaty authorizing freedom of movement for United States forces. If the forces do not let the convoy pass, he may give sequential orders for troops to dismount the vehicles, lock and load weapons, and fix bayonets. No independent use of force by the soldier is appropriate. Nor do the other two R-A-M-P rules support the use of force. Soldiers may RETURN FIRE with fire, but the forces have fired no shots. If the situation develops to where the soldier must PROTECT LIFE WITH DEADLY FORCE, he may do so, but right now, only protective measures in accordance with the convoy commander's orders are appropriate.

SUGGESTED RESPONSE To refrain from firing and to follow the orders of the convoy commander.

HISTORICAL NOTE. This problem is adapted from armed convoy missions conducted by elements of the United States Army 7th Infantry Division (Light) during May, 1989 in Panama. The missions were part of Operation Nimrod Dancer. The natural response of Panamanian Defense Forces to the armed convoys was to turn their

weapons in the direction of American soldiers. Because Americans did not open fire, the convoys reached their destinations without incident or casualties, and the United States retained the moral high ground in the tense confrontation with Manuel Noriega. The confrontation became an armed conflict seven months later, on terms favorable to the United States, in Operation Just Cause.

REFERENCES: SMCT 181-906-1506; Interview with Lawrence A. Yates, Historian, Combat Studies Institute, United States Army Command & General Staff College (Mar. 22, 1994) (discussing interviews with a 7th Infantry Division (Light) brigade commander, June, September 1989, an unclassified briefing at Fort Leavenworth, Kansas, September 28, 1989, interviews with JTF-Panama commander and staff, May-June 1989, and declassified operations order for first convoy, May 21, 1989).

CASE STUDY 7
PROTECTING SELF AND FELLOW SOLDIERS
APPROPRIATE USE OF DEADLY FORCE

SITUATION A soldier sits on the passenger side in the rear of a High Mobility Multipurpose Wheeled Vehicle (HMMWV). He and the driver are in the second vehicle of a two-vehicle convoy in the center of a city. As the vehicles move through the city, they pass many civilian men, women, and children. United States forces are deployed in a flat, hot, dry, famine-stricken country **as** part of a multinational coalition force. The mission of the coalition is to provide a secure environment for the distribution of humanitarian relief supplies. Armed bands have been frustrating these efforts for months and have even fired upon United States soldiers several times over the past few days. Civilians frequently taunt coalition soldiers and attempt to steal items from passing vehicles. The immediate mission of the convoy is to shuttle a military staff officer to a point outside the city. The soldier is armed with an M-16A2 rifle with a magazine in the well, a round chambered, and selector switch on safe. The commander has ordered that the standing “R-A-M-P” rules of force are in effect, but has provided one piece of supplemental guidance. Recent situation reports state that a coalition patrol was the target of a grenade thrown by someone dressed in local garb. Also, adults have been seen handing grenades to children and persuading them to use them against coalition forces. Accordingly, the commander has supplemented the “A” of “R-A-M-P” with the guidance that Somalis bearing grenade-sized items and ignoring warnings to stay away should be considered to have hostile intentions.

EVENT: As the convoy makes its way through a market street, a crowd of townspeople surrounds the two vehicles. Nevertheless, all of the townspeople are staying several feet away from the vehicle because of the stern looks, verbal warnings, and vigilance of the soldier and his well-armed comrades. Then the convoy stops because a large cargo truck up ahead has stopped in the road. Suddenly, a boy, carrying what appears to be a small box in one hand, ignores the warnings, and runs up behind the vehicle. He places his hand inside the rear cargo area of the HMMWV **as** the soldier continues to warn him to stay away.

CONSIDERATIONS: The key rules here are to ANTICIPATE ATTACK and to PROTECT HUMAN LIFE WITH DEADLY FORCE. The R-A-M-P rules, **as** supplemented by the commander, permit the soldier to fire his weapon before receiving fire if he can identify clear indicators of hostile intent. Here, the soldier can conclude that the boy’s intentions are hostile and can ANTICIPATE ATTACK. The S-A-L-U-T-E factors support this conclusion. Note the boy’s *activity* (he has

ignored verbal warnings, has run up to the vehicle, and placed his arm in the rear of the vehicle), the *locution* (the boy is within the kill radius of a grenade from the soldier and his comrades, but out of arm's reach), the *time* factor (only split seconds before the boy could pull the pin of a grenade and drop it), and *equipment* (a box of hand grenade size). A finding of hostile intent is further supported by the recent situation reports concerning hand grenades and the commander's R-A-M-P supplement. Because the lives of everyone on the vehicle are in danger, the soldier can PROTECT HUMAN LIFE WITH DEADLY FORCE. Each of the other two R-A-M-P rules supports a decision to fire the rifle. Soldiers can RETURN FIRE with aimed fire, and respond to hostile acts with necessary force. They must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. Under these circumstances, an aimed shot at the boy is the correct measure of force, given that lesser V-E-W-P-R-I-K measures have not turned the boy back or are impracticable.

SUGGESTED RESPONSE: To fire an aimed shot at the boy.

HISTORICAL NOTE: This problem is patterned after an incident in Somalia on February 4, 1993. The Marine Corps sergeant who shot and killed a Somali boy carrying a box did so only after the boy had ignored warnings and had placed his hand inside the stopped HMMWV. Despite the sergeant's courageous actions in collecting the fallen boy from the hostile crowd and the marines' swiftness in getting to the nearest hospital, the boy died. All of the witnesses supported the sergeant's account of the incident, though the small box was not recovered. The incident was tragic, but after an investigation, the sergeant was deemed to have acted appropriately in firing on the boy.

REFERENCES: United States v. Johnson, No. 458 27 1616 (I Marine Expeditionary Force, Mar. 16, 1993) (Report of Article 32(b) Investigating Officer).

CASE STUDY 8
MEASURING FORCE AND PROTECTING PROPERTY
USING FORCE NECESSARY
TO ACCOMPLISH THE MISSION

SITUATION It is nighttime, and a soldier guards a portion of the perimeter of a company-sized base camp. Behind him, about **50** soldiers are sleeping and small amounts of fuel, supplies, weapons, and equipment are stored, and several vehicles are parked. United States forces are deployed in a flat, hot, dry, famine-stricken country as part of a multinational coalition force. The mission of the coalition is to provide a secure environment for the distribution of humanitarian relief supplies. Armed bands have been frustrating these efforts for months and have even fired upon United States soldiers several times over the past few days. Local townspeople test the perimeter nightly in attempts to steal food or equipment. The soldier's mission is to prevent intrusions into the basecamp and safeguard his fellow soldiers and unit property. The soldier is armed with an M-16A2 rifle. He has a magazine of ammunition in the well, but no round is chambered, and the selector switch is on safe. The commander has ordered that the standing "R-A-M-P" rules of force are in effect with one piece of supplemental guidance. He has supplemented the "P-PROTECT" rule with the guidance that soldiers may use the entire scale of force, including, if necessary, aimed shots to kill, to protect the following property: any CEOI's and Vinson security or keying hardware.

EVENT: About thirty meters to the soldier's left an unarmed local boy scurries beneath the concertina wire into the cantonment area and runs to a parked vehicle. There he quickly grabs a magazine of M-16A2 ammunition left in a footwell by a negligent soldier and runs back to the wire.

CONSIDERATIONS The key rule here is to MEASURE THE AMOUNT OF FORCE to fit the level of the threat. Under the standing R-A-M-P rules, a soldier must use only the amount of force necessary to protect lives and accomplish the mission. The force used must fit the scale of the threat in magnitude, intensity, and duration. If possible, soldiers apply a graduated escalation of force when facing civilians who are unarmed, but who also are confrontational and unfriendly. Here, the boy is unarmed and is running away. He poses no immediate threat to the safety of the soldier or his American comrades, and although he is stealing United States property, it is not one of the types of property the commander has designated to be protected with deadly force. Unless the soldier can get close enough to the boy to stop him by grabbing hold of him, use of force is not appropriate. Nor do the other R-A-M-P rules support the use of force.

Soldiers may RETURN FIRE with fire, but the man has fired no shots. Soldiers may ANTICIPATE ATTACK and fire first if they see clear indicators of hostile intent, but here, none of the S-A-L-U-T-E factors indicate hostile intent. Soldiers must PROTECT LIFE WITH DEADLY FORCE, but no lives are endangered by this fleeing boy.

SUGGESTED RESPONSE To chase the boy but to refrain from firing the rifle. Report the incident to the chain of command as soon as possible.

HISTORICAL NOTE: This problem is patterned after numerous incidents that occurred in Somalia in 1993, when local civilians entered United States base camps and stole various items. Although aggressive in safeguarding their supplies and equipment, soldiers time and again showed appropriate restraint in situations such as this one.

REFERENCES: SMCT 181-906-1506; Colonel Gilbert S. Harper, *Operations Other Than War: Leading Soldiers in Operation Restore Hope*, Military Rev., Sept. 1993, at 78.

CASE STUDY 9
ANTICIPATING ATTACK
USING FORCE NECESSARY
TO ACCOMPLISH THE MISSION

SITUATION. A company-sized convoy of light infantry, mounted on High Mobility Multipurpose Wheeled Vehicles (HMMWVs), moves along a city street. United States forces are deployed in a flat, hot, dry, famine-stricken country as part of a multinational coalition force. The mission of the coalition is to provide a secure environment for the distribution of humanitarian relief supplies. Armed bands have been frustrating these efforts for months, and about 1 hour ago, United States Special Operations forces conducted a raid to seize two lieutenants of the most powerful local bandit. During the raid, two UH-60 helicopters were shot down by bandits armed with RPG-7 rocket propelled grenades. About 90 United States soldiers are pinned-down at the first crash site by hundreds of bandits armed with AK-47 assault rifles and RPG-7s. At least two Americans are dead and more than twenty are injured. Casualties among the bandits are much higher. The mission of the company is to reach the pinned down soldiers at the crash site, reinforce them, and help evacuate all forces and wounded to a secure area. When the company left its position at a nearby airfield ten minutes ago, the standing R-A-M-P rules were in effect, but five minutes ago several vehicles in the convoy were ambushed by organized bands firing AK-47s. United States forces returned fire and continued. The commander has just supplemented R-A-M-P with the order to ANTICIPATE ATTACK along the route by firing at armed local persons who appear near the road.

EVENT: As his vehicle rounds a bend, a soldier in a HMMWV near the back of the convoy notices three men with rifles peering at the front of the convoy from behind a wall and talking among themselves. The men begin to raise the weapons to their shoulders.

CONSIDERATIONS The key rule here is to ANTICIPATE ATTACK on the convoy. Under the R-A-M-P rules, as supplemented by the commander, soldiers can fire their weapons before receiving fire, if they see clear indicators of hostile intent. Here the soldier can conclude that the intentions of the three men are hostile because of their *size* (small but organized, similar to ambushing bands), *activity* (they are hiding behind a wall and raising their weapons), the *locution* (near the road being traveled by the convoy), the *time* factor (only minutes after other vehicles in the quick reaction force have been ambushed with rifle fire), and *equipment* (AK-47s). Each of the other R-A-M-P rules supports the soldier's decision to fire at the men. Soldiers can RETURN FIRE with fire, and respond to hostile acts

with necessary force. Although it is not clear that these particular men fired on the convoy earlier, what the soldier observes is consistent with a continued attack on the United States convoy. Soldiers must MEASURE THE AMOUNT OF FORCE to fit the level of the threat, if time and circumstances permit. Under these circumstances, aimed shots at the men are the correct measure of force to protect lives and accomplish the mission. Given the lack of time available, the soldier should not attempt lesser measures along the graduated scale of force—verbal warning, etc. Finally, the soldier can fire his rifle, the only lethal weapon available, because soldiers can PROTECT LIFE WITH DEADLY FORCE.

SUGGESTED RESPONSE To fire at the men and alert the remainder of the convoy.

HISTORICAL NOTE: This problem is roughly patterned after an incident that occurred in Somalia on October 4, 1993. Although conducting a humanitarian assistance mission, United States forces found themselves in a fierce firefight with Somali bandits. The company was part of a Quick Reaction Force ordered to reinforce Special Operations soldiers who were pinned down in a different part of Mogadishu. Shortly after leaving Mogadishu International Airport in the late afternoon, the company was ambushed. Soldiers and Somalis fired thousands of rounds of ammunition and fired hundreds of grenades before the Americans were forced to backtrack and seek an alternative route to the crash site.

REFERENCES: SMCT 181-906-1506; Rick Atkinson, *Night of a Thousand Casualties: Battle Triggered the United States Decision to Withdraw From Somalia*, Wash. Post, Jan. 31, 1994, at A1.

APPENDIX D

PROPOSED APPENDIX TO DIVISION TACTICAL SOP INCORPORATING ROE ALERT CONDITIONS

APPENDIX 8 TO ANNEX C TO 55th INFANTRY DIVISION (LIGHT)
TACTICAL STANDING OPERATING PROCEDURE (TACSOP)(U)

THE RULES OF ENGAGEMENT ALERT CONDITIONS (ROECONs)
SYSTEM

- (U) REFERENCES:
- a. (U) STP 21-1-SMCT, Soldiers Manual of Common Tasks—Skill Level 1 (26 July 1996)
 - (1) (U) Task 181-906-1506—Use Force Appropriately
 - (2) (U) Task 181-906-1505—Conduct Operations According to the Law of War
 - (3) (U) Task 071-331-0801—Use Challenge and Password
 - (4) (U) Task 071-331-0803—Report Enemy Information
 - b. (U) TC 27-10-4, Selected Problems in Rules of Engagement (26 July 1996).
 - c. (U) TC 27-10-1, Selected Problems in the Law of War (26 June 1979).
 - d. (U) FM 27-10, The Law of Land Warfare (18 July 1956)(C1, 15 July 1976).
 - e. (U) FM 100-5, Operations (26 July 1996) (pages 2-3 to 2-4, describing "Disciplined Operations").
 - f. (U) FM 27-100, Legal Operations (26 July 1996)(chapter 6, discussing rules of engagement).
 - g. (U) FM 7-8, The Infantry Platoon and Squad (31 Dec. 1980)(Appendix N-Prisoners and Captured Documents).
1. (U) PURPOSE. To establish a system by which the Commander of a task force organized from this Division can quickly and clearly convey to subordinate units a desired posture regarding use of force.
 2. (U) STRUCTURE OF ROE. Rules of engagement (ROE) are directives that delineate the circumstances under which a unit or soldier will initiate or continue combat engagement with other forces encountered. As such, they include the many specific types of rules and measures described in references e and f. The

most important ROE are contained in the RAMP rules (see reference a(1)) to which soldiers regularly train, in the ROE conditions (ROECONs) periodically announced by the Task Force Commander, and in the ROE annexes appended to operations plans and orders. The individual soldier's RAMP, as supplemented by the ROECONs system, is the baseline for the development of ROE annexes.

3. (U) OBJECTIVES.

- a. (U) This triangular ROE structure (RAMP, ROECONs, ROE Annexes) has three objectives:
 1. (U) Soldiers and units will employ an appropriate mix of initiative and restraint during operations other than war;
 2. (U) Soldiers and units will make a rapid transition to combat operations on identification of a hostile force;
 3. (U) Soldiers and units will operate aggressively and with discipline during combat operations.
- b. (U) A task force can accomplish these objectives only if the commander conveys clear instructions on use of force. The commander conveys clear instructions by transmitting rules to soldiers in terms of RAMP, by transmitting recurring instructions to subordinate unit leaders in terms of ROECONs, and by ensuring that mission-specific instructions in ROE annexes follow a format that builds on these two mechanisms.

4. (U) CONCEPT.

- a. (U) The Task Force Commander will order into effect one of the ROECONs specified in the Tab to this Appendix. There are three "default" ROECONs:
 1. (U) ROECON GREEN. Applies when no discernable threat of hostile activity exists. This condition places the force in a routine security posture. Due to the nature of the immediate mission (typically a training exercise or staging operations conducted in a stable host nation), such a posture will involve minimal arming, and protection only of the force and of key facilities. The commander may order into effect certain rules or measures from a higher ROECON to create deterrence or to respond to incomplete intelligence received. Soldiers generally operate under the standing RAMP rules.
 2. (U) ROECON AMBER. Applies when there is a discernible threat of hostile activity, but not a threat justifying ROECON RED. Although intelligence may indicate additional hostility criteria to supplement the "A" rule of the soldiers' RAMP, ROECON AMBER generally does not apply to situations in which higher headquarters have formally

identified a hostile force. ROECON AMBER provides for arming of additional key United States personnel, establishment of roadblocks or barriers on high speed approaches into United States positions, security patrols, other measures to enhance perimeter security, and increased availability of ordinance. The commander may order into effect certain rules or measures from a higher ROECON to create deterrence or to respond to incomplete intelligence received.

3. (U) ROECON RED. Applies when an actual attack on United States forces occurs, a threat of imminent attack exists, or higher headquarters has formally identified a hostile force in theatre. ROECON RED directs the force to continue the protection measures detailed in the lower ROECONs, while arming all personnel and lowering levels of approval authority on certain weapons systems. Leaders supplement the soldiers' RAMP by providing specific hostility criteria or by identifying the hostile force designated by higher headquarters to assist in implementing the "A-Anticipate" rule.
 - b. (U) Brigade, battalion, and separate company commanders may find it necessary to add or delete measures in effect for a particular ROECON status to meet the unique requirements of a tactical setting. A written set of rules cannot be provided that will apply to every situation. Except for the measures which establish levels of approval authority (Measures 8, 48, and 56) the decision on the ROECON in effect and on whether specific rules or measures will be added to or deleted from a ROECON will be at the discretion of the senior tactical commander present. This commander will consider the mission and the situation in making the ROECON determination, and will notify higher headquarters **as** soon **as** possible if the ROECON deemed appropriate differs from that ordered by the Commander, 55th Infantry Division (Light).
6. (U) UNIT SELF-DEFENSE. Under all ROECON statuses, the commander retains the inherent right and responsibility to defend his unit. The standing RAMP rules that define a soldier's authority to defend himself also apply to the actions that a commander takes in unit self-defense.
7. (U) OPERATIONS SECURITY. Consistent with Annex L (Operations Security) to this TACSOP, the ROECON in effect (GREEN, AMBER, RED) will be classified at least SECRET. The commander will order random measures into effect **as** necessary to create uncertainty in the minds of potential terrorists or other hostile forces planning attacks on United States forces.

TAB TO APPENDIX 8 TO ANNEX C TO 55th INFANTRY DIVISION
(LIGHT)
TACTICAL STANDING OPERATING PROCEDURE (TACSOP)(U)
RULES OF ENGAGEMENT ALERT CONDITIONS (ROECONs)

ROECON GREEN MEASURES

- Measure 1.** Inform all task force personnel that the standing RAMP rules are in effect. See reference a(1) to this Appendix. Conduct sustainment training in RAMP on 5 to 7 scenarios from reference b to this Appendix that most closely match the situation facing the task force. Supplement the "P" rule by designating the following property to be protected with the entire scale of force, including, if necessary, aimed shots to kill:
- a. Papers or other recorded information stored within the Special Compartmentalized Intelligence Facility (SCIF) at the main command post.
 - b. Any United States aircraft.
 - c. Vinson security and keying hardware.
 - d. CEOI's.
 - e. Spare.
 - f. Spare.
 - g. Spare.
- Measure 2.** Issue live ammunition only to the following personnel:
- a. The Command Group (task force Commander, Assistant Division Commanders or Executive Officer as applicable, Aides), G-2/S-2, G-3/S-3: 9mm M9 semiautomatic pistol. Loaded magazines will be kept in ammunition pouches, weapons will be on safe, chambers will be empty.
 - b. Military Police Detachment, including CID agents: 9mm M9 semiautomatic pistol, .45 caliber pistol, .38 caliber pistol, 5.56mm M16A2 ball, 7.62mm NATO Ball-Tracer MLB 1-4, depending on issued weapon. Each MP vehicle equipped with an M-60 MG will carry 1 ammunition can (200 rounds) per

MG. Each MG will be carried inside the vehicle, and will not be mounted on the pintle unless the gunner intends to shoot. Ammunition will be sealed within complete metal ammunition cans, and bandoliers will not be mounted on the MG unless the gunner intends to shoot. Individuals bearing pistols and rifles will carry loaded magazines in ammunition pouches. Weapons will be on safe, and chambers will be empty.

- c. Aviators on flight status: 9mm M9 semiautomatic pistol, .45 caliber pistol, .38 caliber pistol, depending on issued weapon. Loaded magazines will be kept in survival vests, along with pistols; weapons will be on safe, and chambers will be empty.
- d. Crew chief for aircraft fitted with M-60D MG: 7.62mm NATO Ball-Tracer MLB 1-4. Each aircraft equipped with an M-60 MG will carry 1 ammunition can (200 rounds) per MG. Each MG on such aircraft will be carried inside the aircraft, but will not be mounted on the pintle unless the gunner intends to shoot. Ammunition will be sealed within complete metal ammunition cans, and bandoliers will not be mounted on the MG unless the gunner intends to shoot.
- e. Spare.
- f. Spare.

Measure 3. Store all unissued ammunition in a secure storage facility, under the supervision of the G-4/S-4, within a barrier of protective wire and berms, and under guard of the military police detachment.

Measure 4. Establish a restricted area of at least 50 meters in width (approximate hand grenade range) around any United States facility or aircraft. If resources permit, create an obstacle along the outside boundary of the restricted area with single strand concertina wire. Post signs in English and in the host nation language warning that entry into the restricted area is prohibited.

Measure 5. Establish a physical barrier consisting of at least triple-strand concertina wire with berms around the task force Tactical Operations Center (TOC) and SCIF in accordance with the Tab (Command Post configura-

tion overlay) to Appendix 3 (Command Posts) to Annex C (Operations) to this TACSOP. Place this area under guard of the military police detachment.

- Measure 6.* Minimize the number of access points for vehicles and personnel, consistent with the requirement to maintain a flow of traffic permitting accomplishment of daily missions.
- Measure 7.* Remind soldiers that although they must remain vigilant at all times for suspicious or hostile activity in accordance with the “A” rule in RAMP, the following activities are not authorized.
- a. Unboxing or preparing LAW’s, hand grenades, M-203 grenades, or M18A1 Claymore mines.
 - b. Emplacement, computation of firing data, or preparation of ammunition for mortars or artillery.
 - c. Establishment of roadblocks, barriers, bunkers, or fighting positions, other than the traffic control points and dismount points associated with measures 3, 4, and 5.
 - d. Establishment of LP/OP’s.
 - e. Patrolling, other than convoy escort by aircraft or Military Police vehicles.
 - f. Preparation or emplacement of antitank weapons (DRAGON, TOW).
 - g. Arming of helicopter gunships (20mm, 30mm, FFAR, TOW, or Hellfire).
 - h. Confiscating weapons in possession of non-task force members, unless proper action under RAMP requires confiscation.
 - i. Spare.
 - j. Spare.
- Measure 8.* Comply with the matrix at Figure [D-1], which details what level commander must approve use of a particular weapons system or other listed action.
- Measure 9.* Establish liaison with local police, intelligence, and security agencies as well as coalition forces to monitor the threat to task force personnel and facilities. Notify these agencies and forces concerning the ROE-

APPROVING COMMANDER	SMALL ARMS	MINES	DEMO. LITIONS	MORTARS		AVIATION			ARTILLERY		AIR DEFENSE	CAS	GUIDED MUNITIONS	FASCAM	NGF	RCA	DESIGNATE HOSTILE FORCE	ELECTRONIC JAMMING	SPARE	SPARE	
				PA	UA	PA	UA	PA	UA												
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	
SPARE																					4
DIV OR HIGHER	X		X	X	X	X	X	1	1	X	X	X	X	X	X	X	X	X			3
BRIGADE																					2
BATTALION																					1
COMPANY																					0

NOTE:

1 LESS FASCAM AND COPPERHEAD

LEGEND: PA=Populated Area CAS=Close Air Support RCA=Riot Control Agent
 UA=Unpopulated Area NGF=Naval Gunfire

Figure D-1

CON AMBER measures that, if implemented, could impact on their operations.

- Measure 10.* Keep all personnel on recall time limits to unit areas that are no longer than those for the Division Ready Force 1 in the 55th Infantry Division Readiness SOP (RSOP).
- Measure 11.* Place quick reaction forces on two hour recall.
- Measure 12.* Permit physical training (running) by task force personnel around task force compounds, restricted areas, and command posts.
- Measure 13.* Any fire by Task Force personnel will be observed by one or more human or electronic "eyes." Observed fire includes shots aimed by a soldier using any direct fire weapon system, indirect fire called for by a forward observer with eyes on target, indirect counter-battery fire directed by *Q36* or *Q37* radar, helicopter gunship fire directed either by a pilot with eyes on the target or by a forward air controller (FAC) with eyes on target. This measure is not an independent source of authority to fire. RAMP must be observed, and use of particular weapons systems must comply with measure 8.
- Measure 14.* Spare.
- Measure 15.* Spare.
- Measure 16.* Spare.
- Measure 17.* Spare.
- Measure 18.* Spare.
- Measure 19.* Spare.
- Measure 20.* Spare.
- Measure 21.* Spare.
- Measure 22.* Spare.
- Measure 23.* Spare.
- Measure 24.* Spare.
- Measure 25.* Spare.

ROECON AMBER MEASURES

- Measure 26.** Inform soldiers of any hostility criteria arising out of the discernible threat activity. “Walk soldiers up” the RAMP factors, showing how intelligence pertaining to the threat — that is, potential grenade or car bomb attack — supplements the “Anticipate Attack” rule. Conduct sustainment training in RAMP on at least five scenarios that most closely match the new situation.
- Measure 27.** Issue each member of the task force his basic load of small arms ammunition.
- Measure 28.** Issue air defense missiles to gunners. Weapons control status is (weapons hold/weapons tight/weapons free) (select one depending on situation).
- Measure 29.** Issue all other items of ammunition (hand grenades, M-203 grenades, M18A1 claymore mines, LAWs, AT4s, DRAGON rounds, etc.) to the Military Police Detachment Commander or Infantry unit commanders for integration into the ground defensive plan.
- Measure 30.** Mount M-60 machine guns on Military Police and scout platoon vehicles, and on aircraft pintles.
- Measure 31.** Direct that all personnel on perimeter security and guards at entrance points to task force compounds, restricted areas, and command posts will have magazines in their weapons, with chambers empty, and selector switches on safe. Machine gunners on perimeter security or at guard posts will have a bandolier of ammunition attached to the feed tray; weapons will be on safe; bolts will be forward.
- Measure 32.** Direct that all other personnel will retain magazines loaded in ammunition pouches with the remainder of the basic load stored in ruck sacks per unit SOPs. Weapons will be on safe, chambers will be empty.
- Measure 33.** Increase the restricted area around task force facilities to not less than 300 meters (the approximate range of light rockets).
- Measure 34.** Create roadblocks and other barriers (chicanes, speed bumps, etc.) to block high speed avenues of approach into task force positions.

- Measure 35.** Visually inspect the interior of 1 in 5 civilian vehicles (selected at random) entering task force compounds, restricted areas, and command posts, as well as the exterior of the suitcases, briefcases, packages, and other containers in these vehicles. Conduct detailed vehicle inspections (trunk, undercarriage, glove boxes, etc.) of 1 in 15 civilian vehicles entering task force compounds, restricted areas, or command posts.
- Measure 36.** Inform soldiers that the unboxing and preparing of LAWs, AT4s, hand grenades, or M18A1 mines are unauthorized, and that except for the arming detailed in Measures 3d and 48, helicopter gunships are not to be armed.
- Measure 37.** Emplace indirect fire weapons (mortar and artillery). Lay these weapons for direction and compute firing data for likely avenues of approach, landmarks, dead space, and final protective lines (FPLs). Ammunition will be removed from wooden containers, but will not be removed from fiber containers. Charges will not be cut. Communications with forward observers (FOs) will be established, and fire direction nets will be monitored by the fire support element in the (TOC).
- Measure 38.** Prepare bunkers and fighting positions as necessary.
- Measure 39.** Establish LP/OP's as necessary to provide early warning of attack or infiltration.
- Measure 40.** Conduct reconnaissance patrols as necessary.
- Measure 41.** Establish DRAGON and TOW positions as necessary to protect the task force from vehicular attack.
- Measure 42.** Position snipers as necessary.
- Measure 43.** Direct soldiers that weapons in possession of civilians and paramilitary forces are to be confiscated.
- Measure 44.** Comply with the matrix depicted in Figure [D-2], which details what level of commander must approve use of a particular weapons system or other listed action.
- Measure 45.** Establish direct communication links with local police, intelligence, and security agencies as well as coalition forces to monitor the threat to task force personnel and facilities. Such links may include stringing dedicated land lines, exchange of liaison

APPROVING COMMANDER	SMALL ARMS	MINES	DEMO-LITIONS	MORTARS		AVIATION			ARTILLERY		AIR DEFENSE	CAS	GUIDED MUNITIONS	FASCAM	NGF	RCA	DESIGNATE HOSTILE FORCE	ELECTRONIC JAMMING	SPARE	SPARE	T
				PA	UA	PA	UA	PA	UA												
SPARE																					4
DIV OR HIGHER	X	X	X	X	X				1			X	X	X	X	X	X	X			3
BRIGADE					X				1	X											2
BATTALION																					1
COMPANY																					0
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	

NOTE:

- 1. LESS FASCAM AND COPPERHEAD

LEGEND: PA = Populated Area CAS = Close Air Support RCA = Riot Control Agent
 UA = Unpopulated Area NGF = Naval Gunfire

Figure D-2

officers, entry into radio nets, etc. Notify these agencies and forces concerning the ROECON RED measures that, if implemented, could impact on their operations.

- Measure 46.* Place all personnel on two hour recall.
- Measure 47.* Place quick reaction forces on 15minute recall.
- Measure 48.* Activate a reaction force of helicopter gunships. Direct that they be loaded with 7.62mm/20mm/30mm ammunition. FFAR, TOW, and Hellfire will not be loaded but will be prepositioned in bunkers near the aircraft.
- Measure 49.* Suspend physical training (running) by task force personnel around task force compounds, restricted areas, and command posts.
- Measure 50.* Spare.

ROECON RED MEASURES

- Measure 51.* Inform soldiers of any hostility criteria arising out of threat attacks or activity. If applicable, identify any hostile forces designated by higher headquarters. "Walk soldiers up" the RAMP factors, showing how any new intelligence RAMP up pertaining to the threat supplements the "A-Anticipate" rule. Remind soldiers that while they may shoot identified hostile forces on sight, the standing RAMP rules, as well as the five "S's" described in reference g, continue to dictate handling of civilians, prisoners, and casualties. Conduct sustainment training in RAMP on at least five scenarios that most closely match the new situation.
- Measure 52.* Direct that unboxing or preparing LAW's, AT4s, hand grenades, M-203 grenades, or M18A1 Claymore mines may occur under the controls specified in the ground defensive plan.
- Measure 53.* Direct the full arming of army aircraft (7.62mm, 20mm, 30mm, FFAR, TOW, Hellfire).
- Measure 54.* Direct that Measures 31, 32, and 37 pertaining to location of ammunition or ordinance in relation to weapon chambers, breeches, tracking devices, or other firing mechanisms no longer apply. Subordinate

leaders **as** well **as** soldiers will make judgments using RAMP on when to chamber rounds or otherwise prepare weapons for firing.

- Measure 55.* Visually inspect the interior of all civilian vehicles—as well **as** trunk, undercarriage, glove boxes, etc.—entering task force compounds, restricted areas, and command posts. As a condition of entry, search all suitcases, briefcases, packages, and other containers in these vehicles, but do not search individuals claiming diplomatic status without prior approval from the authority specified in the matrix in Figure [D-3].
- Measure 56.* Comply with the matrix depicted at Figure [D-3], which details what level commander must approve use of a particular weapons system or other listed action.
- Measure 57.* Recall all personnel to unit areas or positions.
- Measure 58.* Alert quick reaction forces and place on **5** minute standby.
- Measure 59.* Alert reaction force of helicopter gunships and place on **5** minute standby.
- Measure 60.* Direct subordinate leaders that, subject to any territorial restrictions in applicable operations plans or orders, pursuit of hostile forces is authorized **as** necessary to permit mission accomplishment and conform to RAMP.
- Measure 61.* Spare.
- Measure 62.* Spare.
- Measure 63.* Spare.
- Measure 64.* Spare.
- Measure 65.* Spare.
- Measure 66.* Spare.
- Measure 67.* Spare.
- Measure 68.* Spare.
- Measure 69.* Spare.
- Measure 70.* Spare.
- Measure 71.* Spare.
- Measure 72.* Spare.

APPROVING COMMANDER	SMALL ARMS	MINES	DEMO- UCTIONS	MORTARS		AVIATION			ARTILLERY		AIR DEFENSE	CAS	GUIDED MUNITIONS	FASCAM	NGF	DESIGNATE HOSTILE FORCE	ELECTRONIC JAMMING	SPARE	SPARE	
				PA	UA	PA	UA	PA	UA											
SPARE																				
DIV OR HIGHER		X	X	X	X	X	X	X	1			X	X	X	X	X	X			
BRIGADE									1											
BATTALION					X					X										
COMPANY																				

NOTE:

1 LESS FASCAM AND COPPERHEAD

LEGEND: PA=Populated Area CAS=Close Air Support RCA=Riot Control Agent
 UA=Unpopulated Area NGF=Naval Gunfire

Figure D-3

Measure 73. Spare.

Measure 74. Spare.

Measure 75. Spare.

APPENDIX E

**PROPOSED APPENDIX TO DIVISION OPERATIONS
PLAN INCORPORATING THE RAMP RULES AND
ROE ALERT CONDITIONS**

APPENDIX 8 TO ANNEX C TO TASK FORCE 55 OPERATIONS PLAN
04-96, OPERATION RESTORE VIGOR (U)
RULES OF ENGAGEMENT

- () REFERENCES:
- a. () STP21-1-SMCT, Soldiers Manual of Common 'Risks—Skill Level 1 (26 July 1996):
 - (1) () 'Risk181-906-1506—Use Force Appropriately
 - (2) () 'Risk181-906-1505—Conduct Operations According to the Law of War
 - (3) () Task 071-331-0801—Use Challenge and Password
 - (4) () 'Risk071-331-0803—Report Enemy Information
 - b. () TC 27-10-4, Selected Problems in Rules of Engagement (26 July 1996).
 - c. () TC 27-10-1, Selected Problems in the Law of War (26 June 1979).
 - d. () FM 27-10, The Law of Land Warfare (18 July 1956)(C1, 15 July 1976).
 - e. () FM 100-5, Operations (26 July 1996) (pages 2-3 to 2-4, describing “Disciplined Operations”).
 - f. () FM 27-100, Legal Operations (26 July 1996)(chapter 6, discussing rules of engagement).
 - g. () FM 7-8, The Infantry Platoon and Squad (31 Dec. 1980)(Appendix N-Prisoners and Captured Documents).
 - h. () Appendix 8 to Annex C to 55th Infantry Division (Light) Tactical Standing Operation Procedure (TACSOP), The Rules of Engagement Conditions (ROECONs) System.

- i. () AR 190-14, Carrying of Firearms and Use of Force for Law Enforcement and Security Duties (12 Mar. 1993).
- j. () AR 525-13, The Army Combatting Terrorism Program, para. 3-6 & App. B (27 July 1992).

1. () *Situation.*

- a. () *General.* United Nations Security Council Resolution 1027, acting under the authority of Chapter VII, has authorized member states to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Grommalia-Hertzabalina.” Over forty countries have responded to the resolution, contributing small contingents of troops to a force led by the United States.
- b. () *Enemy.* See Annex B, Intelligence. No forces have been designated hostile forces by higher headquarters; however, any identification of uniforms and vehicle markings of Serbian regular armed forces should be considered hostility criteria within the “A-Anticipate” rule of RAMP.
- c. () *Friendly.* See basic OPLAN.

(1) () Higher Headquarters ROE. The multinational Unified Task Force (UNITAF) ROE have been approved by the North Atlantic Council (NAC) as well as by the U.N., and several nations influenced the final wording and emphasis of these high-level rules. Because the UNITAF Commander is also the Commander of the Joint Task Force (JTF) and III Marine Expeditionary Force (III MEF) [TF 55’s immediate higher headquarters, which has planned the operation under the direction of U.S. Central Command (CENTCOM)], the UNITAF ROE bear a close resemblance to the CENTCOM Standing ROE (SROE). The UNITAF ROE are completely compatible with the RAMP/ROECONS/ROE Annex structure that TF 55 uses.

(2) () Adjacent Units ROE. 1st Marine Division will implement the JTF/III MEF ROE using the RAMP/ROECONS/ROE Annex structure.

2. () *Mission.* TF 55 moves by airlift from Fort Swampy to intermediate staging base (ISB) at Bonjarmi Island (TP7660) NLT 140900 Jan. D-day, H-Hour TF establishes lodgement at Togadishu

Airport (QR4550). TF creates a secure environment for the distribution of humanitarian relief supplies in Togadishu City (QR4540) and prepares airport for evacuation of U.S. and foreign nationals by 1st Marine Division. On order, TF conducts peacekeeping operations in support of ongoing diplomatic efforts.

3. () *Execution.*

a. () Concept of Operation.

- (1) () Phase I (Predeployment). TF prepares for deployment at Fort Swampy subject to normal installation rules on use of force. See references i and j.
- (2) () Phase II (ISB). ROECON GREEN, with following supplement: Measure 49.
- (3) () Phase III (Establish Lodgement). ROECON RED, with following supplement: Measure 1.e. (the structural integrity of the soccer stadium at QR45315021); Measure 1.f. (the structural integrity of the landing strip at Beirut Airport (QR45255067)); Measure 56.0.1; Measure 56.Q.2.
- (4) () Phase IV (Prepare for Evacuation). ROECON RED, with following supplement: Measure 1.e. (the structural integrity of the soccer stadium at QR45315021); Measure 1.f. (the structural integrity of the landing strip at Beirut Airport (QR45255067)); Measure 56.0.1.
- (5) () Phase V (On order Peacekeeping). ROECON AMBER, with following supplement: Measure 7.h;

b. Tasks.

- (1) () 1st, 2d, 3d Brigades. Observe territorial constraints depicted in scheme of maneuver, Annex B (Operation Overlay). Notify TF 55 headquarters immediately in the event of inadvertent entry into Growmalia district of Timers.
- (2) () Aviation Brigade. Observe territorial constraints depicted in Annex N (Airspace Management). Notify TF 55 headquarters immediately in event of inadvertent overflight of farms vic QR43305166.
- (3) () Fire Support (Artillery). Observe no fire areas for each of the protected places designated in Annex P Civil Affairs.
- (4) () 21st Military Intelligence Battalion. Conduct electronic jamming only during Phase III.

c. Coordinating Instructions.

- (1) () All units conduct sustainment training on Problems 1, 2, 3, 12, and 13 of reference b.
- (2) () No unit or individual shall conduct operations across the international border between Gromalia-Hertzebalina and Cerbia. Notify TF 55 headquarters immediately in event of inadvertent crossing of this border.

4. () *Service Support*. Basic OPLAN.

5. () *Command and Signal*. Basic OPLAN.

Acknowledge ·

STONE
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THE ARMY AND THE ENDANGERED SPECIES ACT: WHO'S ENDANGERING WHOM?

MAJOR DAVID N. DINER*

I. Introduction

The Lord giveth and the Lord taketh away, but he is no longer the only one to do so.¹

Aldo Leopold

The world is witnessing the greatest mass extinction of plant and animal species in the past **250** million years.² Animal extinction is nothing new—approximately ninety percent of all species that have inhabited the earth no longer are alive.³ What is new is the cause and rate of extinctions. Extinctions have accelerated from a natural “background” level of perhaps a few species per one million years, to a current level of approximately one species per day.⁴ By the end of this century, the rate could increase to thousands or tens of thousands of species extinguished each year.⁵ What also is unique is that one species is the primary cause of these extinctions: homo sapiens.

In 1973, the United States Congress acted to stem the tide of animal extinctions by passing the Endangered Species Act (ESA).⁶ Finding that “economic growth and development untempered by adequate concern and conservation had caused extinctions;”⁷ Con-

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¹ ALDO LEOPOLD, A SAND COUNTY ALMANAC 116(2D ED. 1977)(originally published in 1949).

² NORMAN MEYERS, THE SINKING ARK 4 (1979).

³Id.

⁴Id. at 5.

⁵Id. Meyers estimates that as many as 40,000 species may become extinct per year by the year 2000.

⁶ 16 U.S.C. §§ 1531-1541 (1988 & Supp. 1992).

⁷Id. § 1531(1988).

gress designed the ESA to conserve endangered species and their threatened ecosystems.⁸ The ESA contains a comprehensive program to identify endangered and threatened species and prohibit their being "taken"⁹ by any person. The ESA also strictly limits federal agency action that may affect listed species, and imposes an affirmative duty on these agencies to conserve these species.

The United States Army owns or administers approximately twenty-five million acres of land within the United States,¹⁰ making it the fifth largest steward of federal lands. As the range and lethality of modern weapons have increased, so has the Army's need for training space. Army leaders insist on tough, realistic training, allowing soldiers to employ their weapons and vehicles as they would in actual combat. At the same time, efforts to save money have caused the Army to close—or propose for closure—scores of Army installations, further reducing available training land.

While the pressure on Army training areas increases, so does the number of endangered species.¹¹ Destruction of old-growth and other valuable habitat on private lands has increased the need to recover listed species on federal lands. In many cases, species have disappeared from private lands, and exist only in national parks, forests, and on military installations. The Army is on an apparent collision course with endangered species and the law that protects them. Can it be that Congress intended an "undistinguished woodpecker,"* fish, slug, wolf, or tortoise to threaten the training and combat effectiveness of the forces guarding the nation? Can the

⁸[T]he purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be preserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section. *Id.*

⁹"Taking" is defined broadly as "[t]o harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (1988); *See* Palila v. Hawaii Dep't of Land & Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

¹⁰GEORGE H. SIEHL, NATURAL RESOURCE ISSUES IN NATIONAL DEFENSE PROGRAMS 1 (Congressional Research Service Report for Congress, 1991).

¹¹Virginia Albrecht & Kathleen Rogers, *After the Snail Darter: The Endangered Species Act and Private Land Use*, 750 A.L.I. A.B.A. 750, 754 (1992). As of July 6, 1992, 727 United States species were on the endangered species list. Of these, 558 were endangered and 169 were threatened. Sixteen species have been removed from the list: four recovered, seven became extinct, and five had been listed erroneously. The status of 55 of the listed species was improving, however, the status of 212 was declining.

¹²"*Picoides borealis*, commonly known as the red-cockaded woodpecker, is a small undistinguished woodpecker indigenous to the southern United States." *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1265 (E.D. Tex. 1988), *aff'd*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

Army exist in peace with animals while training for war with humans?

My answer to the latter question is yes. To achieve this end, I propose a proactive and scientific approach to managing endangered species on Army lands. This approach adopts an interdisciplinary focus, involving cooperative efforts among Army biologists, lawyers, trainers, and commanders. If the Army commits adequate resources to this strategy, it can accomplish its mission and conserve endangered species as well.

The ESA is equal parts science and law, and understanding the ESA requires a working knowledge of biology and the process of extinction. I will explore the science aspect of the ESA by examining the biology of three animals: the red-cockaded woodpecker, the Mexican gray wolf, and the desert tortoise. These species best exemplify the Army's ESA experience.

Critical to understanding this thesis is an appreciation of the desperate problem posed by plant and animal extinctions. The earth is hemorrhaging life, and compromising the stability of the global ecosystem—an ecosystem we depend on for existence. Understanding why this is occurring requires an examination of the origins of life on this planet and the phenomenon of extinction.

II. The Science of Extinction

A. *In the Beginning*

The earth was formed from a cloud of celestial gasses about **4.6** billion years ago.¹³ Life on earth began approximately **3.5** billion years ago.¹⁴ The first animals appeared **750** million years ago; the first reptiles, **320** million years ago; the first mammals, **220** million years ago; the first birds, **145** million years ago; and the first humans, **300** thousand years ago.¹⁵

During this **750** million-year period, extinctions have been a fact of life.¹⁶ A “background” or normal level of extinction has

¹³STEVEN M. STANLEY, *EXTINCTION* 62 (1987).

¹⁴MEYERS, *supra* note 2, at 4. This life consisted of simple, single cell organisms. Algae did not develop until approximately 1.4 billion years ago. STANLEY, *supra* note 13, at 62.

¹⁵STANLEY, *supra* note 13, at 9.

¹⁶“Extinction” is defined as the contraction of a species’ geographic range and population to zero. *Id.* at 10. Because extinction implies an imperfect creator, the concept was denied on religious grounds until the mid-nineteenth century, when the evidence became compelling. *Id.* at 1.

occurred at a fairly constant rate of perhaps three or four species per one million years. These extinctions were local in character and resulted from normal evolution and competition between species for food, resources, and ecologic niches."¹⁷

B. Mass Extinctions

Separate from the background extinctions discussed above were eras of vastly accelerated species loss called mass extinctions. These eras were characterized by rapid—in geological terms—loss of life forms on a regional or global scale. Entire biological classifications of life were wiped out.¹⁸ While the cause of these mass extinctions is unclear, most theories involve global and catastrophic climate changes that radically altered the environment.¹⁹

During the past 750 million years, nine such periods of mass extinction have occurred.²⁰ One particularly cataclysmic episode occurred at the end of the Permian²¹ period. During this time, seventy to ninety percent of the world's species became extinct.²² Land and sea species were impacted worldwide, although sea species were affected most. Possible causes include radical changes in sea level and salinity, cosmic radiation, and trace element poisoning.²³ This mass extinction lasted several million years. The extinction rate during this period was approximately 190 taxonomic²⁴ families per one million years.²⁵ Through the process of respeciation, the earth eventually was able to rebuild the inventory of species, *but it took*

¹⁷ *Id.* at 13. See David Jablonski, *Mass Extinctions: New Answers, New Questions*, in *THE LAST EXTINCTION* 43, 44 (Les Kaufman & Kenneth Mallory eds., 1986).

¹⁸ Life is classified into seven taxonomic groups: kingdom, phylum, class, order, family, genus, and species. For example, man is classified as: kingdom-animal, phylum-chordates (vertebrates), class-mammals, order-primates, family-hominids, genus-homo, and species-homo sapiens. STANLEY, *supra* note 13, at 12. Mass extinctions have swept away life up to the order level. Two orders of dinosaurs were extirpated during the late Cretaceous period of mass extinction.

¹⁹ Examples are an increase or decrease in sea level, an increase or decrease in the salinity of sea water, an increase or decrease in global temperature, and catastrophic collisions with celestial bodies. See Antoni Hoffman, *Changing Palaeontological Views on Mass Extinction Phenomena*, in *MASS EXTINCTIONS: PROCESSES AND EVIDENCE* 1, 1-12 (Stephen K. Donovan ed., 1989).

²⁰ W.D. Maxwell, *The End Permian Mass Extinction*, in *MASS EXTINCTIONS: PROCESSES AND EVIDENCE* 152, 158-59 (Stephen K. Donovan ed., 1989).

²¹ Geologic time is divided into eons, eras, and periods. Periods last approximately 30 to 100 million years. The Permian period occurred from 286 million years ago to 248 million years ago, a total of 38 million years. Jablonski, *supra* note 17, at 9.

²² STANLEY, *supra* note 13, at 96.

²³ *Id.*

²⁴ See *supra* note 18.

²⁵ *Id.* See Jablonski, *supra* note 17, at 45. See Maxwell, *supra* note 20, at 158.

approximately 110 million years. Not until the late Jurassic²⁶ period did the number of taxonomic families equal pre-Permian mass extinction levels.²⁷

The most well-known episode of mass extinction occurred in the late Cretaceous period, ending approximately sixty-five million years ago. This was the mysterious period when dinosaurs became extinct. For more than 100 million years, dinosaurs and other great reptiles were the dominant form of life on earth. Great herds of dinosaurs roamed what is now the western United States, rivaling in numbers and diversity the herds of mammals that populated the grasslands of Africa early in this century.²⁸ Mammals existed, but were small, inconspicuous, and poorly developed by modern standards—living in terror of preying herds of carnivorous dinosaurs.

Despite their dominance, the dinosaurs disappeared in the geological blink of an eye. Mammals escaped, however, virtually unscathed.²⁹ The total extinction of the dinosaurs allowed the small, rodent-like mammals to rise to ascendancy—in a process called radiated speciation—and to colonize the world. Without the extinction of the dinosaurs, man would not have evolved.³⁰

Many theories attempt to explain the demise of the dinosaurs and other creatures that disappeared during the late Cretaceous mass extinction. They range from terminal constipation,³¹ to increased volcanic activity, to acid rain, to catastrophic impacts with celestial bodies.³² Even during this period of mass devastation, when

²⁶The Jurassic period occurred from 213 million years ago to 144 million years ago, a period of 69 million years. Jablonski, *supra* note 17, at 9.

²⁷*Id.* at 45.

~~STANLEY *supra* note 13, at 129-31.

²⁹Jablonski, *supra* note 17, at 47.

³⁰STANLEY, *supra* note 13, at 132.

³¹PAUL & ANNE EHRLICH, *EXTINCTION 28 (1981)* [hereinafter *EHRLICH & EHRLICH*]. This theory postulates that the evolution of flowering plants caused herbivorous dinosaurs to die of constipation, leading to lack of prey and subsequent starvation for carnivorous dinosaurs as well. As appealing as it is, the theory does not explain the simultaneous demise of sea creatures that also occurred during the late Cretaceous mass extinction episode.

³²The celestial impact theory involves the collision with the earth of a large meteor, probably 7-14 miles in diameter. The impact, equivalent in energy to hundreds of hydrogen bombs, threw massive amounts of dust into the atmosphere. The dust blocked out the sun's energy and caused a significant decrease in the earth's temperature, with catastrophic consequences for the dinosaurs. The presence of iridium, an extremely rare mineral, in the earth's geological record at the end of the Cretaceous period bolsters this theory. Iridium is known to exist in abundance in meteors. See STANLEY, *supra* note 13; EHRLICH & EHRLICH, *supra* note 31; Garland R. Upchurch Jr., *Terrestrial Environmental Changes and Extinction Patterns at the Cretaceous-Tertiary Boundary, North America*, in *MASS EXTINCTIONS: PROCESSES AND EVIDENCE 195* (Stephen K. Donovan ed., 1989); Jablonski, *supra* note 17.

whole taxonomic orders of life were obliterated with headspinning rapidity, probably no more than one species became extinct each thousand years.³³

This was the "great dying" that has captivated the imagination of a generation of paleontologists and school children. This was the last great "natural" extinction³⁴—the last extinction to predate the arrival of man.

C. *The New Mass Extinction*

1. *How Many Species Exist?*—Man evolved into a recognizable species about 300,000 years ago.³⁵ By 40,000 years ago, truly modern man had evolved, indistinguishable from humans today.³⁶ At first, humans had minimal impact on animal populations. Humans lacked the speed, strength, and natural weapons of more successful predators. As the human population grew and technological innovations in weapons and tactics evolved, however, man proved capable of hunting animals to extinction.³⁷ By 1600 A.D., man had overtaken natural processes as the greatest cause of animal extinctions.³⁸ Between 1600 A.D. and 1900 A.D., man extirpated about seventy-five species, and by 1960 man had driven another seventy-five species out of existence.³⁹ Since 1960, the rate has grown dramatically, with as many as 1000 species per year becoming extinct as a direct consequence of human activity.

No one knows how many species of plants and animals exist in the world. Estimates vary between three and ten million.⁴⁰ Approximately 1.5 million species have been identified, of which forty percent are concentrated in the tropical rain forests that comprise about seven percent of the earth's land mass.⁴¹ One million species or more

³³ MEYERS, *supra* note 2

³⁴ Several "minor" extinction episodes have occurred since the end of the Cretaceous period, but they are of limited significance. See STANLEY, *supra* note 13, at 1.

³⁵ Bryan G. Norton, *Introduction to THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY* 3 (Bryan G. Norton ed., 1986).

³⁶ Steven M. Stanley, *Extinction as Part of the Natural Evolutionary Process: A Paleobiological Perspective*, in *ANIMAL EXTINCTIONS: WHAT EVERYONE SHOULD KNOW* 31, 39 (R.J. Hoage ed., 1985).

³⁷ Large deposits of woolly mammoth bones have been discovered in central Europe, mixed with flint spear heads and other stone-age implements dating back approximately 20,000 years. EHRLICH & EHRLICH, *supra* note 31, at 111.

³⁸ MEYERS, *supra* note 2, at 29.

³⁹ *Id.* at 4.

⁴⁰ Thomas E. Lovejoy, *Species Leave the Ark One by One*, in *THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY* 13, 14 (Bryan G. Norton ed., 1986).

⁴¹ EHRLICH & EHRLICH, *supra* note 31, at 17.

may exist in the Amazon Basin alone. The distribution of the world's identified species is summarized as follows:

<u>SPECIES TYPE</u>	<u>NUMBER OF SPECIES</u>
Mammals	4,100
Birds	8,600
Reptiles	6,500
Amphibians	2,600
Fish	20,000
Higher Plants	250,000
Insects	<u>1,200,000</u>
TOTAL:	<u>1,491,80042</u>

As many as twenty-five percent of these (and the unidentified species) may be lost in the next quarter century. Assuming the existence of five million species in the world, then one million species or more may become extinct.⁴³ This would amount to a loss rate of 40,000 species per year, or about forty million times the rate of extinction of the dinosaurs.⁴⁴

2. Why are They Dying?—Humans can cause animal extinctions directly by over hunting. Even species with abundant populations can be eradicated with astonishing rapidity once man—the greatest predator species to ever live—decides to hunt in earnest.⁴⁵ Man kills

⁴²*Id.*

⁴³Norton, *supra* note 35, at 10.

⁴⁴Les Kaufman, *Why the Ark is Sinking, in THE LAST EXTINCTION* 1, 12 (Les Kaufman & Kenneth Mallory eds., 1986). See MEYERS, *supra* note 2, at 5.

⁴⁵The classic example of a direct hunting extinction is the passenger pigeon of the United States. See A. W. SCHORGER, *THE PASSENGER PIGEON: ITS NATURAL HISTORY AND EXTINCTION* (University of Oklahoma Press 1973). A bird of immense population in the eighteenth and nineteenth centuries, individual flocks were known to number more than two billion pigeons. At the time America was discovered, the passenger pigeon may have accounted for 25–40% of all birds in North America. A roosting flock could stretch for 40 miles, and their droppings could swamp vegetation and kill trees by sheer volume. Humans liked them because they were good to eat and easy to catch. As flocks flew over early American cities, literally blotting out the sun, residents would blaze away with shotguns or strike at low flying birds with sticks, hoes, brooms, or nets. Even greater hauls could be made by hunting the birds in their roosts. One innovative hunting method involved feeding the birds grain that had been soaked in alcohol. The intoxicated birds would fall from the trees in droves allowing the hunters to collect them on the ground. Instances arose where hunters killed over one million birds at a time by this and other methods. By the 1870s the passenger pigeon was rapidly declining. The last one died in the Cincinnati zoo in 1914. EHRlich & EHRlich, *supra* note 31, at 114–15. James D. Williams & Ronald M. Nowak, *Vanishing Species in Our Own Backyard: Extinct Fish and Wildlife of the United States and Canada, in THE LAST EXTINCTION* 107, 110 (Les Kaufman & Kenneth Mallory eds., 1986).

for meat, fur, hides, horns, ivory, and sport. Man also kills to prevent competition from predator species such as wolves and coyotes.⁴⁶ Man also causes extinctions indirectly through habitat destruction. Although not as spectacular or obvious as the direct taking of species through hunting, habitat destruction poses a far greater threat. It also presents the more difficult issues of land use, deforestation, and economic development.⁴⁷

The world is home to over 200 nations and almost five billion people.⁴⁸ Since prehistoric times, ever-growing human populations, coupled with advancing technology and aspirations, have pressured the habitat of animals and plants. Disruptions can be physical, chemical, or biological.⁴⁹ Physical disruptions include clearing land, planting crops, building homes and businesses, building dams, and filling wetlands. Chemical disruptions involve spreading pesticides and insecticides, and industrial and agricultural pollution. Biological disruptions involve importing nonnative species that compete and interact with native species in often unintended ways.⁵⁰

These processes are well advanced in many parts of the world, and just beginning in others. Western Europe has been eighty percent deforested since 900 A.D. for cropland,⁵¹ and only a small fraction of old-growth forest remains in the United States. Many of the animals associated with these habitats are extinct or displaced.⁵² In

Other examples include the American bison and Stellar's sea cow. The bison was reduced during a brief time-span, from around 30 million individuals down to 500. They were pulled back from the brink of extinction and have now recovered to about 25,000, but none exist in the wild. Stellar's sea cow was discovered by naturalist Stellar in the eighteenth century. This 20 foot marine mammal was hunted to extinction within about ten years, primarily by Russian sailors for its tasty flesh. E. RAY LANKESTER, *EXTINCT ANIMALS* 21 (1905). Many species of whales—such as the blue and the fin—also were hunted to near extinction by the early twentieth century for their oil. *Id.*

⁴⁶In Australia over one million kangaroos have been killed because they compete with sheep for grass. *Id.*

⁴⁷The difficulty of preventing directly caused extinctions should not be minimized. Even protected species in national parks and wildlife refuges remain in serious danger of extinction from poaching. The hippopotamus, rhino, and elephant, hunted for meat, horns, and ivory tusks are examples. An estimated 50,000 to 150,000 elephants are killed each year for the ivory trade. *Id.*

⁴⁸Kaufman, *supra* note 44, at 1.

⁴⁹*Id.*

⁵¹*Id.*

⁵²Probably the first fish to become extinct in North America in recent times is the harelip sucker. Once abundant in streams throughout the midwest and south, the harelip sucker became extinct around 1900. Increased silt and mud in its streams caused its extinction. The silt was runoff from forest land cleared for agriculture in the nineteenth century. The cloudy streams smothered the mollusks that the sucker lived on and reduced its ability to see its food. *Id.* at 120.

terms of potential species loss, the most critical habitat is the tropical rain forests.⁵³

The Amazon Basin is the world's largest tropical rain forest. It contains 1.235 billion acres of land and drains into the sea one-fifth of the world's fresh water.⁵⁴ The Amazon Basin contains an awesome collection of plant and animal species; science has identified only fifteen percent of these species.⁵⁵ Some say that man knows more about the moon than he does about the interior of the great tropical rain forest.⁵⁶

Unfortunately, man is destroying the rain forests relentlessly. Unlike some temperate forests, the rain forests lack the capacity to regenerate themselves. Once a tropical rain forest is destroyed, it and its animal inhabitants are gone for good. Because of the rain forest's poor soil quality, rotting leaves and vegetation on the forest floor contain most of the nutrients relied on by the trees. Once man clears the forest, the soil is capable of sustaining crops or grazing cattle for only a few years. After that, wind and erosion turn the once lush forest into a wasteland.⁵⁷ Pressure from expanding and desperately poor populations continues the cycle.⁵⁸

These factors have combined to create an unprecedented

⁵³Paul and Anne Ehrlich state:

The fate of the tropical forests will be the major factor that determines the biological wealth of the Earth in the future. These extraordinarily vulnerable ecosystems are the greatest single reservoir of biotic diversity on the planet . . . something on the order of two-fifths to one-half of all species on Earth occur in the rain forests, which occupy only 6 percent of the Earth's land surface.

EHRlich & EHRlich, *supra* note 31, at 159.

⁵⁴Ghillean T. Prance, *The Amazon: Paradise Lost?*, in *THE LAST EXTINCTION* 63 (Kaufman & Mallory eds., 1986). If accounted for as a separate country, the Amazon basin would be the world's ninth largest nation. The author describes the rain forest as follows:

[t]he depths of the tropical rain forest are awesome to enter. A sense of quiet dignity pervades the quiet interior, where one is surrounded by massive trunks rising pillar-like to the vaulted arches of branches and the green ceiling of layered leaves . . . [t]he damp, decaying leaves muffle the sound of footsteps, and only the snapping of a twig or whine of an insect breaks into the solemn serenity.

Id. at 64.

⁵⁵*Id.*

⁵⁶EHRlich & EHRlich, *supra* note 31, at 159.

⁵⁷*Id.* See MEYERS, *supra* note 2, at 119.

⁵⁸Scientists speculate that destroying the rain forests would have catastrophic consequences for the temperate regions of the world as well. Climatic changes including reduced rainfall in the United States plains region, and increased global warming are some of the possible results. Effects of this scenario on United States food production could be severe. MEYERS, *supra* note 2, at 128.

extinction spasm. Comparing the current mass extinction with those of the past demonstrates how serious this extinction is:

<u>EXTINCTION PERIOD</u>	<u>EXTINCTION RATE</u> ⁵⁹
Background	3-4 Per Million Years ⁶⁰
Late Permian	190 Genera Per ⁶¹ Million Years
Late Cretaceous	1 Per Thousand Years ⁶²
1600-1900 A.D.	1 Per Four Years ⁶³
1901-1980 A.D.	1 Per Year ⁶⁴
1981-1999 A.D.	1 Per Day ⁶⁵
2000-2025 A.D.	109 Per Day ⁶⁶

D. *The Value of Biological Diversity*

1. *Why Do We Care?*—No species has ever dominated its fellow species as man has. In most cases, people have assumed the God-like power of life and death—extinction or survival—over the plants and animals of the world. For most of history, mankind pursued this domination with a single-minded determination to master the world, tame the wilderness, and exploit nature for the maximum benefit of the human race.⁶⁷ In past mass extinction episodes, as many as ninety percent of the existing species perished, and yet the world moved forward, and new species replaced the old. So why should the world be concerned now?

The prime reason is the world's survival. Like all animal life, humans live off of other species. At some point, the number of species could decline to the point at which the ecosystem fails, and then humans also would become extinct. No one knows how many

⁵⁹ All figures are for species, except for the late Permian period which is given by genus. Estimating extinction rates is not possible with precision. Although science knows with fair accuracy how many taxonomic families disappeared from the fossil record, how long the extinctions took is unclear. The late Permian extinction probably exterminated upwards of 90% of all living species, but took five or ten million years. The late Cretaceous extinction wiped out far fewer families and species but did so over a shorter period. *See generally* Jablonski, *supra* note 17, at 44-47.

⁶⁰ MEYERS, *supra* note 2, at 3-5.

⁶¹ W. Desmond Maxwell, *The End Permian Mass Extinction*, in MASS EXTINCTIONS: PROCESSES AND EVIDENCE 158 (Stephen K. Donovan ed., 1989).

⁶² MEYERS, *supra* note 2, at 4.

⁶³ Kaufman, *supra* note 44, at 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Norton, *supra* note 35, at 10 (based on an average estimate of four to five million species in the world today, and a 20-25% loss rate over the next quarter century).

⁶⁷ Prior to the late nineteenth century man generally did not believe that animals could become extinct. Such a notion conflicted with the religious tenet of a perfect creator and creation. *See supra* note 16.

species the world needs to support human life, and to find out—by allowing certain species to become extinct—would not be sound policy. In addition to food, species offer many direct and indirect benefits to mankind.⁶⁸

2. Ecological Value.—Ecological value is the value that species have in maintaining the environment. **Pest,**⁶⁹ erosion, and flood control are prime benefits certain species provide to man. Plants and animals also provide additional ecological services—pollution control,⁷⁰ oxygen production, sewage treatment, and biodegradation.⁷¹

3. Scientific and Utilitarian Value.—Scientific value is the use of species for research into the physical processes of the world.⁷² Without plants and animals, a large portion of basic scientific research would be impossible. Utilitarian value is the direct utility humans draw from plants and animals.⁷³ Only a fraction of the

⁶⁸Stephen R. Kellert, *Social and Perceptual Factors in the Preservation of Animal Species*, in *THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY* 50, 52–53 (Bryan G. Norton ed., 1986).

⁶⁹Paul R. Ehrlich, *Extinctions and Ecosystem Functions: Implications for Humankind*, in *ANIMAL EXTINCTIONS: WHAT EVERYONE SHOULD KNOW* 159, 161 (R.J. Hoage ed., 1985). Ecological systems naturally control over 97% of crop pests and carriers of human disease.

⁷⁰MEYERS, *supra* note 2, at 78. One third hectare of water hyacinth can purify 2000 tons of sewage per day, and also can filter out many heavy metals.

⁷¹*Id.* These services are essential to human life. “Few people in our society, and certainly few of our decision makers, understand that the ecological systems of the planet provide homo sapiens with a whole series of little recognized but absolutely essential services, without which civilization cannot exist—indeed, without which Homo sapiens cannot exist.” Ehrlich, *supra* note 69, at 160.

Plants are the most critical group of species for the functioning of the world’s ecosystem. Although all species depend on the sun as their source of food and energy, only plants can directly manufacture food from the sun’s rays. All other species either eat plants, or eat plant eaters. As widespread deforestation occurs, the earth’s capacity to utilize the sun’s energy declines and the world’s food supply decreases. Because of the dependency on plants, each plant species extinction may cause as many as 10 animal extinctions. Plants also have a major effect on climate by reflecting the sun’s energy and by processing water. See generally MEYERS, *supra* note 2, at 128.

⁷²MEYERS, *supra* note 2, at 128.

⁷³*Id.* Norman Meyers summarized the utilitarian value of species as follows:

Protection of species is not merely an objective for idealist preservationists. It serves strictly utilitarian purposes of immediate value to society. Present uses of genetic resources run into the many thousands of forms, the main categories being modern agriculture, medicine, and pharmaceuticals, and industrial processes. In view of the benefits derived from the small segment of species investigated thus far, the planetary spectrum of species can be considered among society’s most valuable raw materials. Conversely, the erosion of genetic resources is not only a loss to future generations, but an impoverishment for present society.

Id. at 57.

The Penicillium mold appeared to be an ordinary and useless mold. Subsequently, man discovered it had a natural ability to ward off competing fungi. This discovery led to the development of modern antibiotics. Lovejoy, *supra* note 40, at 16.

earth's species have been examined, and mankind may someday desperately need the species that it is exterminating today.

To accept that the snail darter, harelip sucker, or Dismal Swamp southeastern shrew⁷⁴ could save mankind may be difficult for some. Many, if not most, species are useless to man in a direct utilitarian sense. Nonetheless, they may be critical in an indirect role, because their extirpations could affect a directly useful species negatively. In a closely interconnected ecosystem, the loss of a species affects other species dependent on it.⁷⁵ Moreover, **as** the number of species decline, the effect of each new extinction on the remaining species increases dramatically.⁷⁶

4. Biological Diversity. — The main premise of species preservation is that diversity is better than simplicity.⁷⁷ **As** the current mass extinction has progressed, the world's biological diversity generally has decreased. This trend occurs within ecosystems by reducing the number of species, and within species by reducing the number of individuals. Both trends carry serious future implications.⁷⁸

⁷⁴ Many colorfully named species exist. The court in *Sierra Club v. Lyng* dryly noted:

The red-cockaded woodpecker has joined the ranks of other interestingly named **flora** and fauna, including the Santa Cruz long-toed salamander, the Dismal Swamp southeastern shrew, the purple-spined hedgehog cactus, and the Appalachian monkeyface pearly mussel. Of course, the listing of an animal or plant on the endangered species list is a distinction without cause for celebration. The list also includes the national symbol of our country, found on the seal of this Court—*Haliaeetus leucocephalus*, commonly known **as** the American bald eagle.

Sierra Club v. Lyng, 694 F.2d 1260, 1265 (E.D. Tex. 1988).

⁷⁵ See Bryan G. Norton, On the *Inherent Danger of Undervaluing Species*, in *THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY* 110, 118 (Bryan G. Norton ed., 1986).

⁷⁶ *Id.* at 119. Norton uses this theory to argue that all species have utilitarian value to man, which man has been significantly undervaluing. When the relationships between species are taken into account, almost any extinction probably will affect a species that has utilitarian value to man. Norton states **as** follows:

Scientific understanding of ecosystems is too limited even to begin to list interdependencies among species, **so** it is impossible to predict which species will be included in the cascading wave of extinctions resulting from the initial extinction. When an extinction creates more extinctions, a downward spiral in diversity, which will be extremely difficult to reverse, is begun.

BRYAN G. NORTON, WHY PRESERVE NATURAL VARIETY? 62 (1987). A high utilitarian value also exists in having a diverse species "bank" to draw on, both for presently undiscovered uses, and for maintaining the health and vigor of the bank itself.

⁷⁷ NORTON, *supra* note 76, at 61.

⁷⁸ Although geneticists believe that around 80,000 potential food plants exist on earth, **20** of them provide about 90% of the world's crops. MEYERS, *supra* note 2, at 57. Any disease or blight that strikes one of these varieties could cause famine. To keep these crops productive, geneticists must periodically renew the crops' genetic makeup. After a few years, plants become vulnerable to newly evolved forms of

Biologically diverse ecosystems are characterized by a large number of specialist species, filling narrow ecological niches. These ecosystems inherently are more stable than less diverse systems. “The more complex the ecosystem, the more successfully it can resist a stress [l]ike a net, in which each knot is connected to others by several strands, such a fabric can resist collapse better than a simple, unbranched circle of threads—which if cut anywhere breaks down **as** a whole.”⁷⁹

By causing widespread extinctions, humans have artificially simplified many ecosystems. As biologic simplicity increases, so does the risk of ecosystem failure. The spreading Sahara Desert in Africa, and the dustbowl conditions of the **1930s** in the United States are relatively mild examples of what might be expected if this trend continues. Theoretically, each new animal or plant extinction, with all its dimly perceived and intertwined affects, could cause total ecosystem collapse and human extinction. Each new extinction increases the risk of disaster. Like a mechanic removing, one by one, the rivets from an aircraft’s wings,⁸⁰ mankind may be edging closer to the abyss.

III. The Endangered Species Act

A. Introduction

“It is further declared to be the policy of Congress that all federal departments and agencies shall seek to conserve endangered

diseases, and geneticists breed the plant with wild strains from the “gene reservoir” to produce new strains resistant to disease. *Id.* at 60. For example, in introducing two new strains of sorghum, scientists studied **9000** wild forms of the plant.

Geneticists produced the so-called “green revolution” that drastically increased the productivity of certain food crops by taking genes from thousands of wild plant species and producing the characteristics of the plant most useful to man. This would have been impossible without sufficient genetic diversity. Genetic diversity also is important within species, **as** the well-known problems with “inbreeding” of species has shown. As many populations of species shrink, the strength of the species declines, and **so** does its ability to respond to stress, disease, and disruption. In a genetically diverse species, some individuals usually will have a “natural” resistance to a **disease** or toxin. These surviving individuals then pass this trait to succeeding generations. Examples are the rapid resistance insects develop to certain forms of pesticides, and the devastation suffered by native populations in North and South America after contact with European diseases. Over many generations, the Europeans developed genetic resistance to common diseases like measles which the native populations lacked.

⁷⁹ **BARRY COMMONER**, *THE CLOSING CIRCLE* 38 (1972).

⁸⁰ **EHRlich & EHRlich**, *supra* note 31, at xi. The Ehrlichs **pose** an example of a “rivet popper” methodically removing rivets from an aircraft’s wing because the airline can sell each rivet for two dollars and fuel additional growth. The rivet popper sees no harm in this because the manufacturer constructed the aircraft stronger than it needs to be, and because he has been popping rivets for a long time with no apparent ill effect on the plane.

species and threatened species and shall utilize their authorities in furtherance of the purposes of this act."⁸¹ In 1973, with these words, the United States Congress launched federal agencies deeply into the wildlife conservation arena. Congress selected the ESA as the method to deal with the problem of diminishing biological diversity. Its goal was nothing short of reversing the greatest mass extinction of the past 250 million years.

Sometimes called the "pit bull" of American environmental statutes,⁸² the ESA is comprehensive and far reaching. The United States Supreme Court, in reviewing the ESA, stated that "the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."⁸³ Although the ESA has been able to modestly change the behavior of deeply entrenched economic and political interests, it has, in many respects, failed to live up to its promise.⁸⁴

Largely neglecting ecosystem preservation, the ESA instead focuses on a species-by-species protection scheme. The ESA fails to protect species in even severe decline until the species is "in danger of extinction over all or a significant portion of its range,"⁸⁵ or likely to become so.⁸⁶ At this point, recovery of the species may be excessively difficult and costly, if it is possible at all. Still, by its clear expression of American national policy, and recognition of the value of species, the ESA galvanized public opinion and debate on the issue of disappearing plant and animal species.

The ESA was not the first federal foray into wildlife conservation. As early as 1894, hunting was prohibited in Yellowstone National Park⁸⁷ and, in 1900, Congress enacted the Lacey Act,⁸⁸ which provided for limited conservation of wild birds. The Lacey Act was the first true acknowledgement that species protection and restoration was in the national interest.⁸⁹ National wildlife refuges were well established by the 1930s.

⁸¹ 16 U.S.C. § 1531(c)(1) (1988).

⁸² Robert D. Thorton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

⁸³ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

⁸⁴ See John D. Dingell, *The Endangered Species Act: Legislative Perspectives on a Living Law*, in BALANCING ON THE BRINK OF EXTINCTION 25 (Kathryn A. Kohm ed., 1991).

⁸⁵ 16 U.S.C. § 1532(6) (1988).

⁸⁶ *Id.* § 1532(20).

⁸⁷ Kathryn A. Kohm, *The Act's History and Framework*, in BALANCING ON THE BRINK OF EXTINCTION 10 (Kathryn A. Kohm ed., 1991).

⁸⁸ 16 U.S.C. §§ 701, 3371-3378; 18 U.S.C. § 42 (1976 and Supp. V 1981).

⁸⁹ Kohm, *supra* note 87, at 11.

In the 1960s the impetus for the modern species conservation movement began to grow.⁹⁰ Several high-profile extinctions and near extinctions served to advance the issue in the national consciousness.⁹¹ In 1964, the United States Interior Department formed a Committee on Rare and Endangered Species, and issued the first official list of endangered species.⁹² The plight of endangered species became a powerful rallying point for the burgeoning American environmental movement of the late 1960s.

In 1973, Congress enacted the ESA virtually unopposed. Few lawmakers apparently envisioned the bitter competition between owls, darters, power plants, and loggers that the ESA would engender.⁹³

The ESA contains three key provisions: section 4, which deals with listing endangered and threatened species; section 7, which deals with the affirmative obligations of federal agencies; and section 9, which prohibits the taking of listed species.⁹⁴

B. Determination of Listed Species

The Secretary of the Interior and the Secretary of Commerce administer the listing provisions of the ESA.⁹⁵ The Secretary of the Interior has authority for listing land animals, and has delegated this authority to the United States Fish and Wildlife Service (FWS).⁹⁶ Because of the species-by-species approach to preserving biological diversity adopted by the ESA, great significance is placed on whether a species is a “listed” species. Essentially, a species receives no protection unless it is listed.⁹⁷

⁹⁰*Id.*

⁹¹*Id.* Such as the extinction of the American bison in the wild, and the serious plight of the American bald eagle.

⁹²*Id.* The list, containing 63 vertebrate species, was compiled from informal expert opinion.

⁹³Lynn A. Greenwalt, *The Power and Potential of the Act*, in *BALANCING ON THE BRINK OF EXTINCTION* 31, 32 (Kathryn A. Kohm ed., 1991).

⁹⁴This section is a review of the ESA for readers not familiar with the statute or its implementing regulations. For a more comprehensive—albeit somewhat dated—treatment of the ESA, see generally James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup View From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991). See also *supra* note 9 (a definition of the term “taking”).

⁹⁵ 16 U.S.C. § 1532 (15) (1988).

⁹⁶See 50 C.F.R. § 17.2 (1991). The Secretary of Commerce has authority for listing marine animals, and has delegated this authority to the National Marine Fisheries Service (NMFS). Under the Act, the term “Secretary” is used interchangeably to refer to the secretary with the appropriate authority for a particular species. 16 U.S.C. § 1532(15) (1988); 50 C.F.R. § 424.02 (1992).

⁹⁷If a species is a candidate species—that is, a species proposed for listing—the Secretary must monitor its status periodically to ensure that it does not become extinct while the listing decision is pending. Because of a large backlog, a species can

A species, subspecies, or group of species may be listed when the Secretary determines that it is either threatened or endangered.⁹⁸ Once a species is listed, it may only be removed from the list if the Secretary of the Interior finds that the species has become extinct, **has** recovered so it no longer is threatened or endangered, or the original listing decision was in error.⁹⁹

Significantly, the Secretary of the Interior must base his or her decision to list a species “*solely* on the best available scientific and commercial information without reference to possible economic or other impacts of such determination.”¹⁰⁰ Nonetheless, listing a species—an act that will significantly affect business or industry—can evoke enormous political and public pressure.

In *Idaho Farm Bureau v. Babbitt*,¹⁰¹ business and agricultural groups challenged the listing of the Bruneau Hot Springsnail as an endangered species. This extremely small snail lives only in thermal springs along the Bruneau River in southwest Idaho. The FWS determined that excessive groundwater pumping posed a mortal threat to the snail by reducing the volume of water in the thermal springs. Restricting the pumping could have a correspondingly devastating impact on farmers and cattlemen who depended on the water for irrigation and cattle watering operations.

Because of scientific uncertainties, political sensitivity, and public outcry, the FWS waited over seven years to complete the listing process. The FWS spent much of this time conducting scientific studies, trying to come to agreements with various interest groups, and responding to public comments. When the FWS finally decided to list the snail, the interest groups sued, claiming that the

languish as a candidate for years. In 1975, after only two years of the ESA, the Secretary had made 114 listing decisions out of 23,962 petitions received. William Reffalt, *The Endangered Species Lists: Chronicles of Extinction?, in* BALANCING ON THE BRINK OF EXTINCTION 77, 81 (Kathryn A. Kohm ed., 1991).

⁹⁸ 16 U.S.C. § 1533(a)(1) (1988); 50 C.F.R. § 424.11 (1992). The species must possess at least one of the following five criteria:

1. Present or threatened destruction, modification, or curtailment of its habitat or range;
2. Overutilization for commercial, recreational, scientific, or educational purposes;
3. ~~Disease~~ or predation;
4. Inadequacy of existing regulatory mechanisms;
5. Other natural or manmade factors affecting its continued existence.

An emergency listing procedure also exists, where protection for a species begins as soon as notice is published in the Federal Register, pending completion of the normal rulemaking procedure. 16 U.S.C. § 1533(b)(7) (1988). See *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989).

⁹⁹ 50 C.F.R. § 424.11 (1992).

¹⁰⁰ *Id.* § 424.11.

¹⁰¹ 839 F. Supp. 739 (D. Idaho 1993).

listing decision had taken too long.¹⁰² The United States District Court for the District of Colorado agreed, holding that waiting in excess of eighteen months to make the decision was arbitrary and capricious, and set aside the listing.¹⁰³ This case highlights the inherent problems with listing a species—especially an unpopular snail—when such listing is expected to have significant economic impact.

C. Designation of Critical Habitat

The Secretary of the Interior also is required to make a determination of a listed species' critical habitat," "to the maximum extent prudent and determinable at the time the species is proposed for listing."¹⁰⁵ In designating a critical habitat, the Secretary must consider not only the biological and scientific information available, but also the economic impact of the decision. The ESA balances these competing factors by permitting the Secretary to exclude an area from designation as critical habitat if the "benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless he determines . . . the failure to designate such area . . . will result in the extinction of the species concerned."¹⁰⁶

Interestingly, the implementing regulations speak solely to the meaning of "prudent and determinable" in designating critical habitat. The regulations make no mention of the balancing of benefits required of the Secretary under section 1533(b)(2) of the ESA.¹⁰⁷ Under the regulations, a critical habitat must be designated at the time of listing, unless the species would be harmed by the designation,¹⁰⁸ or insufficient information is available to make the determination. These would appear to be relatively rare exceptions. In

¹⁰²The ESA requires the listing decision to be made within, at most, 18 months from the date of proposed listing. 16 U.S.C. § 1533(b)(6).

¹⁰³*Idaho Farm Bureau v. Babbitt*, 1993 U.S. Dist. LEXIS 17699 at *42.

¹⁰⁴"Critical Habitat" means:

1. The specific areas within the geographic area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection; and

2. Specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.

50 C.F.R. § 424.02 (1992).

¹⁰⁵16 U.S.C. § 1533(a)(3)(A) (1988); 50 C.F.R. § 424.12 (1992).

¹⁰⁶16 U.S.C. § 1533(b)(2) (1988).

¹⁰⁷50 C.F.R. § 424.12 (1992).

¹⁰⁸This situation could occur if hunters and trappers threaten the species, and designating a critical habitat would notify the potential "takers" where they might expect to find the species.

practice, the critical habitat has been designated for only about twenty percent of listed species, however, and that percentage has been declining steadily.¹⁰⁹ In 1986, concurrent critical habitat designation was made in only four out of forty-five cases.¹¹⁰ From 1980 through 1988, the FWS declined to list a critical habitat concurrently with listing an endangered or threatened species in 320 cases. In 317 of these cases, the FWS found that a critical habitat designation would not be prudent.¹¹¹

The reasons are evident. Political, commercial, and economic interests often exert intense pressure on the FWS to avoid designation. These groups fear that a designation of critical habitat will impact negatively on land use in a particular area.¹¹² Conversely, environmental preservationists often pressure the FWS to designate a critical habitat, not so much to protect the endangered species, but to protect the habitat itself. Because no general land use statute applies throughout the United States, the ESA has been forced to do what it was not intended to do—arbitrate land use and development questions between developers and preservationists. Its species-by-species approach leaves it ill-suited to the task. Some commentators actually have called for a general land use law as a solution.¹¹³

3. Recovery Plans.—Recovery plans form the heart of the ESA's approach to the preservation of biological diversity, and generally are required for each listed species.¹¹⁴ The recovery plans list the details of how a species will be saved, and each must contain the following:

- a. A description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- b. Objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

¹⁰⁹James Salzman, *Evolution and Application of Critical Habitat Under The Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 332 (1990).

¹¹⁰D. ROLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 51 (1989).

¹¹¹*Id.*

¹¹²*See Northern Spotted Owl v. Hodel*, 716 E. Supp. 479 (W.D. Wash. 1988) (holding that FWS abused its discretion in failing to designate critical habitat concurrently with listing northern spotted owl as threatened).

¹¹³*See generally* Christopher A. Cole, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U.L. REV. 343, 373-79.

¹¹⁴16 U.S.C. § 1533(f)(1) (1988).

c. Estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.¹¹⁵

The type of conservation embodied in recovery plans goes far beyond merely providing passive protection to a species. The plans outline affirmative management steps required from a host of agencies and organizations. They employ a team approach and require extensive coordination and administrative skill to implement successfully.¹¹⁶ They also are a costly approach to species conservation, largely because of the individual approach taken. As of 1991, the FWS had 276 approved recovery plans, covering 363 domestic species.¹¹⁷

Some notable recovery success stories have been reported—such as the American bald eagle, American alligator, and peregrine falcon.¹¹⁸ Overall, however, the record has been spotty.¹¹⁹ Many of the plans are outdated, and less than half are being implemented actively.

C. Interagency Cooperation

Section 7 applies exclusively to federal agencies and is the heart of the ESA.¹²⁰ It generally requires federal agencies to conserve listed species and protect them from agency activities.

1. *Consultation Requirement.*—Section 7(a)(2) uses a consultation system to ensure that federal agencies do not take actions that

¹¹⁵ *Id.* § 1533(f)(1)(B).

¹¹⁶ See generally Tim Clark & Ann Harvey, *Implementing Recovery Policy: Learning As We Go?*, in *BALANCING ON THE BRINK OF EXTINCTION* 147 (Kathryn A. Kohm ed., 1991).

¹¹⁷ Kilbourne, *supra* note 94, at 526.

¹¹⁸ Clark & Harvey, *supra* note 116, at 148.

¹¹⁹ *Id.* Clark and Harvey identify four common problems of recovery teams that have led to difficulties:

First, species recovery is a tremendously complex task involving numerous people who must somehow integrate their diverse perspectives into a workable program. Second, these people often have conflicting goals, some of which have more to do with controlling the project than saving the species. Third, rarely is their explicit consideration of organizational structures appropriate to the task of saving species; recovery programs tend to develop into traditional hierarchial bureaucracies. Fourth, intelligence failures and program delays often occur because of preconceptions held by decision makers and the large number of clearances required in programs with multiple participants.

Id.

¹²⁰ See Kilbourne, *supra* note 94, at 525–27 (stating that most of the ESA litigation has centered around section 7 because of the broad reach of federal agency actions).

are “likely to jeopardize the continued existence of a [listed species]. . . .”¹²¹ The term “action” is defined broadly, covering “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal Agencies in the United States or upon the high seas.”¹²² This includes actions in which a federal agency is the approval or permitting authority for a project.¹²³ For land species, the FWS is the delegatee of the Secretary of the Interior for engaging in consultations with federal agencies, and generally is called the consulting agency. For marine species, the consulting agency is the National Marine Fisheries Service (NMFS).

Concern over the welfare of candidate species (those proposed for listing) prompted Congress to insert section 7(a)(4). This section requires federal agencies to “confer” with the Secretary of the Interior on actions likely to jeopardize the continued existence of those species, or in the destruction or adverse modification of a proposed critical habitat.¹²⁴ The conferences are “informal discussions” that result in nonbinding recommendations by the FWS to “minimize or avoid the adverse impacts.”¹²⁵

The section 7 consultation requirements apply only to discretionary agency actions.¹²⁶ If an action agency is required to take a particular action by law—the consultation, which would be meaningless—is not required.

Section 7(a)(2) spawned a host of litigation.¹²⁷ The most well-known case is *Tennessee Valley Authority v. Hill*,¹²⁸ in which a three-inch fish (the snail darter)¹²⁹ stopped the \$100 million Tellico

¹²¹ 16 U.S.C. § 1536(a)(2) (1988). The phrase “[j]eopardize the continued existence of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (1991).

¹²² 50 C.F.R. § 402.02 (1991). Examples of agency actions that require consultations are as follows:

1. Actions intended to conserve listed species or their habitat;
2. The promulgation of regulations;
3. The granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
4. Actions directly or indirectly causing modifications to the land, water, or air.

¹²³ The vast majority of all projects are included within the ambit of section 7 because of the wide definition of “action.”

¹²⁴ 16 U.S.C. § 1536(a)(4) (1988).

¹²⁵ 50 C.F.R. § 402.02 (1991).

¹²⁶ *Id.* § 402.03.

¹²⁷ See generally Kilbourne, *supra* note 94, at 526.

¹²⁸ 437 U.S. 153 (1978).

¹²⁹ The snail darter is a type of perch, one of about 130 different species of darters. At the time of discovery, approximately 10 to 15 thousand snail darters

Dam project. *Hill* was a defining moment for the American environmental movement in general, and for the ESA in particular. In *Hill*, the Supreme Court was faced with the certain eradication of the snail darter on one hand, or the cancellation of the almost complete Tellico Dam project on the other.¹³⁰ The Court ruled that Congress had made a conscious choice, in enacting the ESA, to give endangered species priority over the primary missions of federal agencies, holding:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million . . . [w]e conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result. One would be hard pressed to find a statutory provision whose terms were any plainer than those of section 7 of the Endangered Species Act . . . [t]his language admits of no exception.¹³¹

This decision provoked a firestorm of protest from the Tennessee Valley Authority and other development organizations, and disbelief from many lawmakers who apparently failed to realize the implications of the act for which they had voted with such enthusiasm.¹³² Eventually, Congress amended the ESA extensively and voted to let the Tellico Dam open.¹³³

2. Biological Assessment.—The ESA requires agencies to review their actions and determine if any “may affect listed species or a critical habitat.”¹³⁴ Any actions that affect listed species or a

existed. The snail darters’ sole habitat was a branch of the Little Tennessee River. New species of darters were regularly discovered at about the rate of one per year. *Id.* at 159.

¹³⁰The Tellico Dam had been approved, financed, and mostly built before the ESA and section 7 became law. *Id.* at 157. The snail darter had been listed as an endangered species, and the Little Tennessee River designated as its critical habitat. *Id.* at 162-62.

¹³¹*Id.* at 172. The Court held that section 7’s prohibition against agency action—that jeopardized the continued existence of a listed species or its critical habitat—prohibited the opening of the dam.

¹³²Greenwalt, *supra* note 93, at 32. Many lawmakers later sheepishly admitted that they thought they had been voting to protect eagles, bears, condors, and other popular, high-profile animals, and had not realized that obscure, apparently valueless species also would be protected. The lawmakers also did not realize the type of land use issues that the ESA would raise. After the decision in *HILL*, lawmakers, conservationists, and developers would not underestimate the power of the Act again.

¹³³*Id.*

¹³⁴50 C.F.R. § 402.14 (1991).

critical habitat will trigger the consultation requirements of section 7(a)(2). If consultation is required, the agencies must first determine the “action area”—that is, “the area to be affected directly or indirectly by the federal action.”¹³⁵

A biological assessment is required if the proposed action is a major construction activity.¹³⁶ Otherwise, conducting a biological assessment is optional. The biological assessment is designed to evaluate thoroughly and scientifically the effects of the proposed action on listed species and critical habitat in the action area.¹³⁷ It gives the action agency its “shot” at the science of a project, and allows it to favorably influence the consulting agency if the assessment is performed properly. For this reason, preparing a biological assessment, even for actions not strictly requiring one, often is advisable.

3. Federal Agency Consultations.—The next stage is initiating consultations. These consultations may be either formal or informal. The action agency initiates informal consultations—consisting of informal discussions and other contacts between the action and consulting agencies—at its option.¹³⁸ These informal consultations assist the action agency in determining whether formal consultations are necessary. If the agencies can agree that the proposed action is not likely to adversely affect a listed species or a critical habitat, further consultation is not required.¹³⁹ This is the major attraction of the

¹³⁵*Id.* 402.02. Including the area of indirect effects may substantially enlarge the action area from the immediate area. The action agency also must consider cumulative effects of the proposed action. The cumulative effects are “those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation.” The reason for excluding effects of other federal actions is that these actions would be the subject of section 7(a)(2) consultation requirements in their own right.

¹³⁶*Id.* A major construction activity is a “major federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C)” —an action that would trigger the obligation to prepare an environmental impact statement under the NEPA.

¹³⁷50 C.F.R. § 402.12 (1991). Although the contents of the biological assessment are up to the action agency, the regulations suggest that the following be considered:

1. The results of an on-site inspection of the action area to determine if listed or proposed species are present or occur seasonally;
2. The views of recognized experts on the species at question;
3. A review of the literature;
4. An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies;
5. An analysis of alternative actions considered by the federal agency for the proposed action.

Id.

¹³⁸*Id.* § 402.13. The time limits present in the formal consultation process do not apply to informal consultation.

¹³⁹*Id.* The consulting agency may suggest modifications to the proposed action that would avoid the likelihood of adverse impacts to listed species or critical habitat.

informal consultations. Any opinion by the FWS that a proposed action is likely to jeopardize the continued existence of a listed species or a critical habitat requires formal consultation.

The action agency initiates formal consultations by written request,¹⁴⁰ and the agency must provide the “best scientific and commercial data available [to evaluate the effects of the proposed action] on listed species and critical habitat”¹⁴¹ during the formal consultations. Normally, a formal consultation must conclude within ninety days of its inception.¹⁴²

In *Lane County Audubon Society v. Jamison*,¹⁴³ the Society challenged the Bureau of Land Management (BLM) for its failure to consult with the FWS over its strategy for managing 1,149,954 acres of old-growth, northern spotted owl habitat. The BLM claimed that the strategy was not an agency action requiring consultation, but merely a voluntarily created “policy statement.” The BLM further argued that each individual decision to allow logging in the old-growth forest would be submitted for consultation. The United States Court of Appeals for the Ninth Circuit (Ninth Circuit Court of Appeals) disagreed, upholding the district court’s injunction, pending the proper consultations. The Ninth Circuit Court of Appeals ruled that the management strategy set forth the criteria to be used in selection of land to be logged. Consequently, the strategy was, independent of the actual timber sales, an agency action.¹⁴⁴ This decision continued the trend toward an expansive definition of ‘agency action.’

After the consultations are complete, the action agency has a continuing obligation to comply with section 7. In *Sierra Club v.*

¹⁴⁰*Id.* § 402.14(c). The following items will accompany the request:

1. A description of the action to be considered;
2. A description of the specific area that may be affected by the action;
3. A description of any listed species or critical habitat that may be affected by the action;
4. A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
6. Any other relevant available information on the action, the affected listed species, or critical habitat.

Id.

¹⁴¹*Id.* § 402.14(d). Examples in the regulation include studies or surveys conducted by the action agency.

¹⁴²*Id.* § 402.14(e). The action and consulting agencies may mutually agree to extend this period.

¹⁴³958 F.2d 290 (9th Cir. 1992).

¹⁴⁴*Id.* at 293.

Yeutter,¹⁴⁵ the United States Forest Service (USFS) adopted management practices for the red-cockaded woodpecker, and consulted with the FWS about the practices. The FWS approved the practices with monitoring requirements. Ultimately, the Sierra Club sued the USFS, alleging that the management practices violated, *inter alia*, section 7 of the ESA, because they threatened the continued existence of the woodpecker. The United States Court of Appeals for the Fifth Circuit (Fifth Circuit Court of Appeals), upholding the district court judgment, ruled that the USFS, even after consultations, had the burden of determining whether its silvicultural practices violated section 7.¹⁴⁶

4. *Biological Opinion*.—At the conclusion of formal consultations, the consulting agency issues its biological opinion. This opinion provides the consulting agency's views on whether the proposed action is likely to jeopardize the continued existence of any listed species or critical habitat.¹⁴⁷ The consulting agency can issue two general types of opinions: the "no jeopardy biological opinion,"¹⁴⁸ and the "jeopardy biological opinion."¹⁴⁹ If the consulting agency issues a jeopardy opinion, it must identify "reasonable and prudent alternatives,"¹⁵⁰ if any, that will allow the action agency to go forward with the action. The reasonable and prudent alternatives cannot change the basic design and scope of the project. They are simply other methods of accomplishing essentially the same objective, without the negative impacts.

In *Greenpeace v. Franklin*,¹⁵¹ the Ninth Circuit Court of Appeals stated the standard that biological opinions must meet to survive review on an "arbitrary and capricious" standard. Greenpeace alleged that the NMFS had violated section 7 by issuing a no jeopardy biological opinion allowing excessive pollack fishing. The pollack are the main food source of the endangered stellar sea lion. The Ninth Circuit Court of Appeals ruled that the biological opinion was adequate, even though it relied on some data that was uncer-

¹⁴⁵926 F.2d. 429 (5th Cir. 1991), *aff'd* Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988).

¹⁴⁶*Id.* at 439.

¹⁴⁷50 C.F.R. § 402.14(g) (1991).

¹⁴⁸*Id.* § 402.14(h). This opinion states that the proposed agency action is not likely to jeopardize the continued existence of a listed species or critical habitat.

¹⁴⁹*Id.* The jeopardy biological opinion states that the proposed action is likely to jeopardize the continued existence of a listed species or critical habitat.

¹⁵⁰*Id.* Reasonable and prudent alternatives are alternative actions that can: (1) be implemented by the action agency, consistent with the intended purpose of the action, within the authority and jurisdiction of the action agency; (2) are technically and economically feasible; and (3) will avoid the likelihood of jeopardizing the continued existence of the listed species or critical habitat.

¹⁵¹982 F.2d 1342 (9th Cir. 1992).

tain, and could not accurately predict the impact on the sea lion.¹⁵² As long as the NMFS analyzed all of the available data, and premised its opinion on a reasonable evaluation of that data, the opinion was acceptable.¹⁵³

5. Incidental Take.—If the consulting agency issues a no jeopardy biological opinion, or a jeopardy opinion with reasonable and prudent alternatives, it also includes an incidental take statement.¹⁵⁴ This statement sets forth how many individual members of a species can be taken permissively in conjunction with the action agency's proposed action. This recognizes the impossibility of not taking some members of a species when implementing an action. As long as the requirements of the incidental take statement are met, the taking is lawful.¹⁵⁵ The incidental take statement also contains measures the action agency must take¹⁵⁶ to minimize the impact of the taking, as well as monitoring and reporting requirements.

6. Implementation Record of Section 7.—How well has section 7 worked? Although it raised fears among developers of widespread cancellation and delay of projects, the numbers do not bear these apprehensions out. Of the consultations conducted between 1979 and 1986, less than one percent resulted in jeopardy opinions.¹⁵⁷ Between 1982 and 1984, the FWS conducted 18,670 consultations.¹⁵⁸ Of these, only 922 were formal consultations; and of these, only eighty-six received jeopardy opinions. Of these eighty-six, only fourteen projects were cancelled.¹⁵⁹ In the vast majority of cases, the action agency was able to design mitigating measures into the projects to avoid conflicts with endangered species.¹⁶⁰

¹⁵² See *Swan View Coalition v. Turner*, 824 F. Supp. 923, 934 (D. Mont. 1992) (in issuing biological opinion, it is not arbitrary and capricious for the FWS to rely on the Forest Service's well-reasoned management plan even if many of the impacts of the plan are uncertain).

¹⁵³ *Greenpeace v. Franklin*, 982 F.2d 1342, 1355. The action agency cannot blindly rely on the biological opinion. Their reliance must not be arbitrary or capricious. *Pyramid Lake Paiute Tribe of Indians v. Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); but see *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1459–60 (9th Cir. 1984) (even if FWS biological opinion is based on weak data, action agency's reliance will not be overturned unless the movant can show new information contradicting the FWS opinion).

¹⁵⁴ 50 C.F.R. § 402.14(i) (1991).

¹⁵⁵ *Id.* § 402.14(i)(5).

¹⁵⁶ *Id.* § 402.14(i)(2). These required measures are referred to as "reasonable and prudent measures."

¹⁵⁷ Steven L. Yaffee, *Avoiding Endangered Species/Development Conflicts Through Interagency Consultation*, in *BALANCING ON THE BRINK OF EXTINCTION* 86, 89 (Kathryn A. Kohm ed., 1991).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Examples of mitigating measures used in some projects include the following: creating a conservation trust fund, conducting conservation research, acquir-

Delay has not been a serious problem either. The 922 formal consultations that took place between 1982 and 1984 averaged only fifty days. Even those resulting in jeopardy opinions required an average of only ninety days.¹⁶¹

The use of formal consultation has decreased dramatically. Formal consultations made up approximately thirty-eight percent of all consultations in 1979, but only four percent in 1989.¹⁶² Part of this decrease was attributable to the additional time and cost of a formal consultation. Although the number of consultations conducted annually has increased fourfold, the FWS consultation budget remained roughly constant. Another part of the decrease was caused by the increasing knowledge and experience of the action agencies in planning and assessing projects. Overall, section 7 has succeeded in injecting endangered species consideration into the planning and implementing of federal actions.

7. Duty to Conserve Species.—Section 7(a)(1) of the ESA¹⁶³ requires all federal agencies to “carry out programs for the conservation¹⁶⁴ of endangered species and threatened species listed pursuant to section 4 of this act.”¹⁶⁵ In the early years of the ESA, section 7(a)(2) received most of the attention as litigants sought to define agencies’ duties to avoid jeopardizing listed species.¹⁶⁶ Recently, section 7(a)(1) began to attract attention from courts, agencies, and litigants, as the importance of agencies’ duties to conserve species became more appreciated.

While the duty to conserve listed species under section 7(a)(1) is mandatory, the agencies have substantial latitude in selecting and implementing their programs. They have more discretion than they

ing alternate habitat, revegetation of disturbed areas, off-site reintroduction and recovery, public education plans, and changing use regulations for public waterways and boat rentals.

¹⁶¹ *Id.* at 90.

¹⁶² *Id.* at 91.

¹⁶³ 16 U.S.C. § 1536(a)(1) (1988).

¹⁶⁴ The term “conservation” means:

To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Id. § 1532(3).

¹⁶⁵ *Id.*

¹⁶⁶ Kilbourne, *supra* note 94, at 564.

have in meeting their section 7(a)(2) obligations.¹⁶⁷ Unlike the mandatory findings of section 7(a)(2), the consulting agency may provide “conservation recommendations” with the biological opinion.¹⁶⁸ These recommendations are “advisory and not intended to carry legal force.”¹⁶⁹ Unlike the detailed regulations promulgated to implement section 7(a)(2), the consulting agencies have not issued regulations implementing section 7(a)(1).

Like section 7(a)(2), section 7(a)(1) contains a provision requiring consultation with the Secretary in “utilizing [the agencies’] authorities in furtherance of the provisions of this act . . .”¹⁷⁰ Nevertheless, the agencies interpret these consultation requirements less strictly than those in section 7(a)(2). The lack of mandatory regulations covering these consultations tends to support the action agencies’ views. Courts have recognized that agencies have considerable discretion in carrying out their conservation duties under section 7(a)(1).

The first court to address section 7(a)(1) was the Supreme Court in *Tennessee Valley Authority v. Hill*.¹⁷¹ In *Hill*, the Court firmly rejected the notion that an agency’s primary mission took priority over its duty to conserve listed species, noting that Congress carefully had omitted any such language from the final version of the ESA.¹⁷²

The leading case in this area, however, is *Pyramid Lake Paiute Tribe of Indians v. Navy*.¹⁷³ *Pyramid Lake* involved a challenge to the Navy’s agricultural outlease program at Fallon Naval Air Station, Nevada. Under this program, the Navy leased land and associated irrigation water rights to farmers to grow vegetated buffer strips adjacent to air strips at the installation. The buffer strips were necessary to maintain safe flight conditions on the air strips. Irrigating the buffer strips required the diversion of water from the Truckee River, which reduced the water flowing into Pyramid Lake. Pyramid Lake is located on the Pyramid Lake Indian Reservation, and is the sole habitat of the endangered cui-ui fish. The parties stipulated that an

¹⁶⁷ *Id.*

¹⁶⁸ 50 C.F.R. § 402.140 (1991).

¹⁶⁹ *Id.* Conservation recommendations are “suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding development of information.” *Id.* § 402.02.

¹⁷⁰ 16 U.S.C. § 1536(a)(1) (1988).

¹⁷¹ 437 U.S. 153 (1978).

¹⁷² *Id.* at 181.

¹⁷³ 898 F.2d. 1410 (9th Cir. 1990).

increased flow of water into Pyramid Lake was necessary to conserve and recover the cui-ui.

The Paiute Indian Tribe, which lived along the lake, sought to enjoin the Navy outlease program, claiming it violated the Navy's duty not to jeopardize, and to conserve, the cui-ui under sections 7(a)(2) and 7(a)(1) of the ESA. The district court ruled in favor of the Navy on both provisions, holding that noninterior agencies are entitled to "some discretion" in carrying out their duties to conserve listed species under section 7(a)(1).¹⁷⁴

The Ninth Circuit Court of Appeals affirmed, holding that, as to the section 7(a)(2) claim, the Navy's reliance on FWS "no jeopardy" opinions was not arbitrary and capricious.¹⁷⁵ The court also addressed the section 7(a)(1) claim, holding that federal agencies have some discretion in carrying out conservation activities, but rejecting the Navy's position that the degree of conservation exercised only needed to be "consistent with the agencies' primary goals."¹⁷⁶ The circuit court rejected the Paiute Tribe's contention that the Navy must implement the tribes's Conservation plan, finding that the tribe's plan would have only an insignificant impact on the water levels in the lake. The court reasoned as follows:

An insignificant conservation measure in the context of the ESA is oxymoronic; if the proposed measure will be insignificant in its impact, how can it serve the ends of conservation, and thus be a "conservation measure?" To require an agency to implement such a measure would be ill-advised. This position . . . coincides with the wording of the Act, which . . . defines conserve to mean "the use of all methods and procedures which are necessary to render a species no longer subject to the label endangered."¹⁷⁷

The court specifically distinguished *Pyramid Lake* from *Hill*, noting that in *Hill*, the Supreme Court was faced with the almost certain eradication of a species. The Court also placed weight on a series of mitigation measures the Navy offered to implement to help the cuiui.

¹⁷⁴*Id.* at 1413.

¹⁷⁵*Id.* at 1415. The Navy had consulted each year with the FWS prior to awarding the leases. Each year the FWS returned a "no jeopardy" biological opinion, stating that the lease program would not jeopardize the continued existence of the cui-ui. The court ruled that although an agency cannot "abrogate its responsibility to ensure that its actions will not jeopardize a listed species," a court only will overturn a case where the agencies' reliance on a biological opinion is arbitrary and capricious. *Id.*

¹⁷⁶*Id.* at 1418. The Court relied on *Hill*, noting that the Supreme Court had rejected the same argument in that case.

¹⁷⁷*Id.* (citation omitted).

Although Pyramid Lake is instructive, a great deal of uncertainty as to the scope of section 7(a)(1) remains. The circuit court was not faced with a case in which a listed species was likely to be exterminated, or an alternative conservation measure which was clearly superior to the one advanced by the agency. The most that can be gleaned from the holding is that a federal agency, in carrying out its conservation duty under section 7(a)(1), will be granted “somediscretion” in selecting a conservation program. Future cases will have to determine the remaining scope of section 7(a)(1).

D. Prohibited Acts

Section 9 of the ESA¹⁷⁸ prohibits a wide range of conduct applied to endangered species. The most significant is the prescription against “taking [any endangered species] within the United States or the territorial sea of the United States.”¹⁷⁹ Like other key terms in the ESA, “taking” is defined broadly.¹⁸⁰

Unlike section 7—which applies only to federal agencies—the prohibition against taking endangered species under section 9 applies to “any person subject to the jurisdiction of the United States.”¹⁸¹ This includes individuals, corporations, and local, state, and federal governments and agencies.¹⁸² Accordingly, section 9 regulates private and public conduct. Violators of section 9 are subject to criminal and civil liability.¹⁸³ The general taking provisions are reasonably clear and merit little discussion. What is not well settled, however, is whether section 9 can be used to stop adverse habitat modification by private parties.

1. Adverse Habitat Modification.—Section 7 of the ESA prohibits federal agencies from engaging in any action that would “result in the destruction or adverse modification” of an endangered species’ critical habitat.¹⁸⁴ In contrast, section 9 does not expressly forbid adverse habitat modification. It does forbid, however, “harm” to an endangered species. If the definition of harm extends to adverse habitat modification, section 9 can be used to regulate private—that is, nonfederal—land development practices. If so, section 9 likely will exert an enormous influence on land use

¹⁷⁸ 16 U.S.C. § 1538 (1988).

¹⁷⁹ *Id.* § 1538(a)(1)(B) (1988).

¹⁸⁰ *Id.* § 1532(19). See also *supra* note 9.

¹⁸¹ *Id.* § 1538(a)(1).

¹⁸² *Id.* § 1532(13).

¹⁸³ *Id.* § 1540. A defense to prosecution for taking an endangered species is that the defendant committed the offense based on a good faith belief that he was acting in self-defense, or defense of another, from attack by the endangered species.

¹⁸⁴ *Id.* § 1536(a)(2).

development law in the years to come. Therefore, section 9 has been termed "perhaps the strongest and most far-reaching provision of the Endangered Species Act."¹⁸⁵

The ESA does not define "harm." However, the Secretaries of Interior and Commerce define harm in their implementing regulations as "an act which actually kills or injures wildlife."¹⁸⁶ They include in this definition "significant habitat modification or degradation where it actually kills or injures wildlife . . ."¹⁸⁷

The Ninth Circuit Court of Appeals addressed this issue in *Palila v. Hawaii*.¹⁸⁸ The endangered Palila is a bird whose sole habitat is the slopes of Mauna Kea on the Island of Hawaii.¹⁸⁹ The State of Hawaii completely owns the Palila's critical habitat. The bird is entirely dependent on the mamane-naio woodlands for food and shelter, and eats the pods, flowers, buds, berries, and leaves of the mamane and naio trees. The Hawaii Department of Land and Natural Resources (Hawaii) introduced species of feral goats and sheep, and later the mouflon sheep,¹⁹⁰ to the mamane-naio woodlands for the enjoyment of sport hunters. These goats and sheep fed on the mamane trees and allegedly posed a mortal threat to the Palila. The plaintiffs claimed that by introducing the goats and sheep, Hawaii had harmed the Palila and therefore committed a taking under section 9 of the ESA.¹⁹¹

The district court ruled in favor of the Palila, finding that the introduction of the mouflon sheep constituted "harm" under the Secretary's definition,¹⁹² by "causing habitat degradation that could result in extinction."¹⁹³ On appeal, Hawaii claimed that the Secretary interpreted the term "harm" too broadly, because harm included not only direct killing or injuring, but also indirect harm by "impairment of essential behavior patterns via habitat modification."¹⁹⁴

¹⁸⁵ John P. Ernst, *Federalism and the Act, in* BALANCING ON THE EDGE OF EXTINCTION 98, 104 (Kathryn A. Kohm ed., 1991).

¹⁸⁶ 50 C.F.R. § 17.3 (1991).

¹⁸⁷ *Id.*

¹⁸⁸ 852 F.2d 1106 (9th Cir. 1988).

¹⁸⁹ The palila, a member of the Hawaiian honeycreeper family, had standing to bring the lawsuit in its own name as an endangered species. As a party it was entitled to have its name capitalized. *Id.* at 1107.

¹⁹⁰ Earlier litigation resolved the issue of the feral goats and sheep. The instant case dealt with the mouflon sheep. *Id.*

¹⁹¹ *Id.*

¹⁹² 50 C.F.R. § 17.3 (1991).

¹⁹³ *Palila v. Hawaii*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

¹⁹⁴ *Palila*, 852 F.2d at 1108.

The Ninth Circuit Court of Appeals rejected Hawaii's argument, finding that Congress intended to define "take" in the broadest possible way to include every conceivable way a person could take an endangered species.¹⁹⁵ The court held that the Secretary's interpretation followed the plain language of the ESA in protecting ecosystems on which endangered species depend.¹⁹⁶

Although the circuit court left open the issue of whether habitat modification that only retards species recovery constitutes a taking, it firmly established—at least in the Ninth Circuit—the validity of regulating land use under section 9 of the ESA.

Recently, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court of Appeals) considered this same issue and reached the opposite conclusion in *Sweet Home Chapter of Communities v. Babbitt*.¹⁹⁷ The court ruled that the expansive definition of "harm" contained in the FWS's regulations was invalid and unjustified based on the plain meaning of the statute.

The court found that Congress, in enacting the ESA, meant to impose broad duties on federal agencies and narrow duties on private parties. Section 7 contains specific prohibitions on modifying a critical habitat, while section 9 does not. The court, believing that this distinction was purposeful, drew support from section 9's definition of "take."¹⁹⁸ Congress used the term "harm" in a series with nine other words that all connoted direct injury to species. Because the doctrine of *noscitur a sociis* requires that words grouped together be given similar meanings, the court reasoned that "harm" should be interpreted to mean a direct assault on a species.¹⁹⁹

The D.C. Circuit Court of Appeals found that habitat modification that only indirectly impacts on a species does not constitute "harm." This is the better reasoned approach, preventing the FWS from extending, by regulation, the section 7 federal agency habitat rules to private parties under section 9, which is especially significant because section 9 carries criminal penalties.

Because the FWS has refused to designate critical habitat in most instances, this opinion removes one of the most potent weapons preservationists have to prevent habitat modification or destruction on public and private land. How the split between the circuit courts will be resolved remains to be seen.

¹⁹⁵ *Id.*

¹⁹⁶ 16 U.S.C. § 1531(b) (1988).

¹⁹⁷ No. 92-5255, 1994 U.S. App. LEXIS 4341 (D.C. Cir. Mar. 11, 1994).

¹⁹⁸ 16 U.S.C. § 1532(19) (1988).

¹⁹⁹ *Sweet Home Chapter of Communities v. Babbitt*, No. 92-5255, 1994 U.S. App. LEXIS 4341, at *5 (D.C. Cir. Mar. 11, 1994).

2. Lawful Taking.—In some instances, the ESA authorizes the taking of endangered and threatened species. Takings authorized by an incidental take statement under section 7, or for legitimate self-defense, are two examples. Another instance of lawful taking is in the “extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved.”²⁰⁰ Takings under this last circumstance are considered conservation measures that aid the species’ survival.²⁰¹

E, Exemptions

In the wake of the Tellico Dam decision,²⁰² Congress extensively amended the ESA in 1978. Surprised by the plain language in their own law, many lawmakers admitted that they were unaware that the ESA would protect the lowly snail darter, along with more majestic species, like the bear and eagle.²⁰³ In response, they created a complicated exemption process under section 7 of the ESA.

1. The Endangered Species Committee.—Congress selected the Endangered Species Committee (Committee) as the mechanism to review applications for exemptions.²⁰⁴ Known variously as the “God Committee” or the “God Squad” for their supposedly divine power over endangered species, the Committee is chaired by the Secretary of the Interior and is comprised of six cabinet level officials and one member, appointed by the President, from each state affected by the decision.²⁰⁵ The Committee has broad authority to receive evidence and grant exemptions, but its decisions are subject to judicial review.²⁰⁶

2. Procedures.—A federal agency, state governor, or permit or license applicant may apply for an exemption, as long as the party has completed consultation with the consulting agency under sec-

²⁰⁰ 16 U.S.C. § 1532(3) (1988).

²⁰¹ See *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1984), where the FWS issued regulations allowing sport hunting of the eastern timber wolf (a threatened species) in Minnesota. The Eighth Circuit Court of Appeals struck down the regulation as being a taking under section 9, because the FWS could not demonstrate any genuine population pressures, or conservation benefit to the wolves as a result of the taking.

²⁰² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

²⁰³ See *supra* note 132. Congress received a wave of protest from development interests and taxpayers enraged at the waste of federal dollars expended on the Tellico Dam.

²⁰⁴ 16 U.S.C. § 1536(e) (1988).

²⁰⁵ *Id.* § 1536(e)(2). The cabinet-level officials are the Secretaries of the Departments of Agriculture, Army, and Interior, plus the Chairman of the Council of Economic Advisors, the Administrator of the EPA, and the Administrator of the National Oceanic and Atmospheric Administration.

²⁰⁶ *Id.* § 1536(n).

tion 7(a)(2), and received a jeopardy biological opinion.²⁰⁷ On receipt of the application, the Secretary of the Interior must make certain threshold determinations. If the applicant satisfies these prerequisites, the application qualifies for consideration by the Committee.²⁰⁸

The Secretary of the Interior prepares a report on the application for consideration by the Committee. To assist in developing a record for the report, the Secretary may appoint an administrative law judge to conduct a hearing. The report generally will discuss the merits of the application, including the benefits of the proposed project, the availability of reasonable and prudent alternatives, and any appropriate and reasonable mitigation and enhancement measures.²⁰⁹

The Secretary of the Interior submits the completed report to the full Committee for action. At least five members must concur to approve an exemption. The exemption is granted if the Committee determines:²¹⁰

²⁰⁷ *Id.* § 1536(g)(1); 50 C.F.R. § 451.02(c) (1992). The application must be accompanied by complete documentation, studies, and justification for the proposed exemption.

²⁰⁸ 16 U.S.C. § 1536(g)(3)(A) (1988); 50 C.F.R. § 452.03 (1992). The threshold determinations are as follows:

1. Whether any required biological assessment was conducted;
2. Whether the federal agency and any permit or license applicant carried out consultations in good faith and have made a reasonable and responsible effort to develop and fairly consider alternatives that would not violate section 7(a)(2);
3. Whether the federal agency and any permit or license applicant have refrained from making any irreversible or irretrievable commitment of resources.

²⁰⁹ 50 C.F.R. § 452.04 (1992). The report will contain the following:

1. The availability of reasonable and prudent alternatives to the proposed action;
2. The nature and extent of the benefits of the proposed action;
3. The nature and extent of the benefits of alternative courses of action consistent with conserving the species or the critical habitat;
4. A summary of the evidence concerning whether the proposed action is in the public interest;
5. A summary of the evidence concerning whether the proposed action is of regional or national significance;
6. Any appropriate and reasonable mitigation and enhancement measures which should be considered by the Committee in granting an exception; and
7. Whether the federal agency and permit or license applicant, if any, have refrained from making any irreversible or irretrievable commitment of resources.

²¹⁰ *Id.* § 453.03.

1. No reasonable and prudent alternatives to the proposed action exist;
2. The benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat and such action is in the public interest;
3. The action is of regional or national significance; and
4. Neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources.

3. **Exemption Record.**—In 1978, Congress ordered the Committee to consider exemptions for the Tellico Dam and the Gray Rocks Dam on the Laramie River in Wyoming.²¹¹ In the Gray Rocks Dam case, the Committee granted the exemption; in the Tellico Dam case, it did not.²¹²

The Gray Rocks Dam case involved the endangered whooping crane. The Committee voted unanimously to grant the exemption, with mitigation and enhancement measures designed to reduce the threat to the birds.²¹³ The mitigation and enhancement measures required the establishment of a conservation trust fund to maintain the critical habitat, and the careful monitoring of water withdrawals from the dam.²¹⁴

In the Tellico Dam case, the Committee carefully considered the benefits of the dam and the costs associated with obliterating the Little Tennessee River. These costs included the eradication of the snail darter and the loss of the cultural, recreational, and archeological value of the riverside way of life. The Committee voted unanimously to deny the exemption.²¹⁵

After this decision, legislation was introduced in the Senate to abolish the Committee, but was defeated. Ultimately, Congress voted in 1980 to exempt the Tellico Dam from the ESA.²¹⁶

²¹¹ 16 U.S.C. § 1539(i)(1) (Supp. III 1979).

²¹² See Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 845–46 (1991).

²¹³ The term "mitigation and enhancement measures" means acts intended to minimize the adverse effects of a proposed action, or to improve the conservation status of the species. The measures must be likely to protect the listed species or the critical habitat and be reasonable in cost. 50 C.F.R. § 450.01 (1992). Why the consulting agency, during the consultation process under section 7(a)(2) of the ESA, could not have considered the mitigation and enhancement measures adopted for the whooping crane reasonable and prudent alternatives is unclear.

²¹⁴ See des Rosiers, *supra* note 212, at 845

²¹⁵ *Id.*

²¹⁶ *Id.* at 847.

These were the only two decisions the Committee made until 1992, when the BLM sought exemption for forty-four timber sales in Oregon. The proposed timber sales threatened the critical habitat of the northern spotted owl, a threatened species. In a somewhat bizarre procedural setting, the BLM—a division of the Department of Interior—was pitted against the FWS—also a division of the Department of Interior—finally appealing to the Committee, chaired by the Secretary of the Interior.²¹⁷ The hearing consisted largely of a battle of science and biology between proponents and opponents of the spotted owl and the old-growth ecosystem of the Pacific Northwest.

The Committee ultimately voted in favor of the BLM timber sales. Their decision was soon challenged, however, when citizen groups sued the Committee alleging that improper ex parte communications between the White House and the Committee tainted the exemption process. In *Portland Audubon Society v. Endangered Species Committee*,²¹⁸ the Ninth Circuit Court of Appeals agreed with the citizen groups that ex parte communications, if they occurred, were improper.²¹⁹

The public's right to attend all Committee meetings, participate in all Committee hearings, and have access to all Committee records would be effectively nullified if the Committee were permitted to base its decisions on the private conversations and secret talking points and arguments to which the public and the participating parties have no access.²²⁰

The circuit court ordered the Committee to conduct a thorough investigation, and the final chapter on the spotted owl story remains unwritten.²²¹ Other proposed sales of timber from old-growth BLM forests in Oregon also are tied up in litigation, casting doubt on the significance of the Committee's decision.²²²

In many ways, the Committee has not lived up to its billing. It has issued only three decisions in the almost fifteen years since its

²¹⁷ Kathleen Trever, *The Endangered Species Committee: The Wizard or the Man Behind the Curtain?*, 22 ENVTL. L. 1097 (1992). In addition to the BLM and the FWS, intervening parties from environmental groups, the timber industry, timber workers, municipalities, and the State of Oregon were involved. *Id.*

²¹⁸ 984 F.2d 1534 (9th Cir. 1993).

²¹⁹ *Id.* at 1546. The allegations consisted of news reports, based on two anonymous White House sources, that claimed at least three "God Squad" members came to the White House to receive pressure to grant the exemption. *Id.* at 1538.

²²⁰ *Id.* at 1542.

²²¹ *Id.* at 1549.

²²² Trever, *supra* note 217, at 1101. A federal district court has issued a preliminary injunction halting timber sales on BLM land in Oregon to protect the spotted owl.

creation.²²³ It has not proven to be an easy way around the strict requirements of the ESA, as opponents feared in 1978. On the other hand, it has served to deflect criticism from the ESA and its priority of species preservation above all. Organizations that might have gone to Congress for relief from unfavorable FWS opinions can be asked to prove their cases to the Committee first, where their economic concerns can be aired.

4. National Defense Exemption.—The ESA contains a broad exemption for national security reasons. “Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”²²⁴ This exemption is not subject to the discretion of the Committee, but is dependent only on certification by the Secretary of Defense. The Army views the exemption as an extraordinary remedy, to be invoked as a measure of last resort in wartime.²²⁵ It has never been used.²²⁶

With an understanding of the problems of extinction, and the mechanics of the ESA, I now turn to my central theme—the Army’s environmental program, its experiences with endangered species, and the prospects for success in its future conservation efforts.

IV. The Army and Endangered Species

A. *The Army Environmental Program*

The modern environmental movement began in the late 1960s. Although not widely appreciated, the Army, in several important respects, was at the forefront of this movement.²²⁷

²²³This also may be a reflection of the low number of jeopardy opinions issued by the FWS in recent years.

²²⁴ 16 U.S.C. § 1536(j) (1988).

²²⁵ Interview with Major Craig Teller, United States Army Environmental Law Division, Office of The Judge Advocate General, in Arlington, VA (Feb. 3, 1993).

²²⁶ *Id.*

²²⁷ In 1977, the Army, on its own initiative, formed an organization that ultimately would become the United States Army Toxic and Hazardous Materials Agency (USATHAMA). By 1978, USATHAMA was engaged in a nationwide study of Army installations to detect, stabilize, and ultimately remediate contamination problems caused by past waste disposal practices. This program became known as the Installation Restoration Program, and predated the passage of the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as the “Superfund,” by almost three years. When enacted, the Superfund adopted many of the procedures pioneered by USATHAMA.

By 1991, The Installation Restoration Program included 10,578 Army sites, of which 5054 needed restoration work. Interagency Agreements, governing clean-ups at all 30 Army sites listed on the National Priorities List were completed.

Like other large public or private organizations of the time, the Army did not fully appreciate the magnitude of the environmental challenges it confronted. Although some notable successes occurred, the Army's compliance record was inconsistent, and no overall strategy existed for incorporating environmental objectives into the Army's mission.

By the late 1980s, this situation improved, with the formation of the Army Environmental Law Division within the Office of The Judge Advocate General,²²⁸ and the Army Environmental Office, within the Office of the Chief of Engineers. Overall coordination of Army environmental policy was vested in the Assistant Secretary of the Army for Installations, Logistics, and the Environment, and the Deputy Assistant Secretary of the Army for Environment, Safety, and Occupational Health.²²⁹

By 1992, the Army had developed and largely implemented an ambitious environmental program. The Army allocated more than \$2 billion in support of the program that year.²³⁰ In 1992, the Army also articulated a comprehensive environmental strategy designed to carry it into the twenty-first century. The linchpin of the strategy is a concept of environmental stewardship; the idea that the Army received the nation's land and vital resources in trust, and must manage the land and resources wisely for the benefit of current and future generations.²³¹

The strategy is built around plans to achieve success in four major environmental functional areas:²³² compliance with environmental laws; restoration of previously contaminated sites; prevention of future harm; and conservation and preservation of natural resources.²³³ Preserving biological diversity and managing endangered species issues is part of the conservation pillar.

²²⁸ The Environmental Law Division serves as counsel in environmental litigation, and advises the Army staff and major command elements on a full range of policy and compliance issues.

²²⁹ The Secretary of the Army and the Chief of Staff of the Army have ultimate responsibility and control over the Army environmental program.

²³⁰ UNITED STATES ARMY, ENVIRONMENTAL STRATEGY INTO THE 21ST CENTURY 31 (1992) [hereinafter ARMY STRATEGY].

²³¹ To ensure the future success of the Army and the nation, the Army pledged to be "a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission." *Id.* at 1.

²³² The Army strategy refers to these functional areas as pillars.

²³³ The focus of the conservation pillar is to "assess, conserve, preserve, and restore ecological resources to maintain carrying capacities." ARMY STRATEGY, *supra* note 230, at 18.

B. *The Army and Conservation*

Expecting the Army to act as a steward of environmental resources is not a new concept. The military has supervised or managed public lands since 1823.²³⁴ Before the National Park Service and the United States Forest Service were established, the Armed Forces managed the national parks and forests. Army engineers built roads in some national parks well into the 1920s.²³⁵ During World War II, the Army acquired millions of acres of new lands for training and housing the eight million soldiers that would enter the ranks during the war. Army engineers conducted major conservation activities on portions of these lands, including erosion and dust control projects and forestry activities.²³⁶ Following World War II, the services were given responsibility for managing wildlife resources on their installations.²³⁷ Today, the Armed Forces administer over twenty-five million acres of public lands.²³⁸

C. *Endangered Species Movement*

Endangered or threatened species listed under section 4 of the ESA have been found at sixty-three Army installations.²³⁹ These include fifty-seven endangered species, forty-three threatened species, and several hundred candidate species.²⁴⁰ These species present special challenges for commanders and natural resource managers. Although official policy requires the Army to be a leader in conserving listed species,²⁴¹ the Army's record has been less than perfect. Brigadier General Gerald Brown, then Director of Environ-

²³⁴ SIEHL, *supra* note 10, at 29

²³⁵ *Id.* at 30. One of the prime reasons for acquiring the national military parks was the military training offered by studying the civil war battlefields. The Army was in charge of administering these national battlefields until 1933. *Id.* at 32-33. During the depression years of the 1930s, the Army managed the human resources of the Civilian Conservation Corps, as the Corps was performing wide-ranging conservation duties in the national parks and forests. *Id.* at 30.

²³⁶ *Id.* Forestry activities provided excellent training for engineer units, and timber sales served as a source of revenue.

²³⁷ *Id.* at 31. See the Sikes Act of 1960, Pub. L. No. 86-797, § 101(1), 74 Stat. 1052 (1960) (codified as amended at 16 U.S.C. § 670A (1992)). The Sikes Act authorized the Secretary of Defense to carry out comprehensive wildlife conservation and rehabilitation programs on military installations, in cooperation with the Secretary of the Interior and state agencies.

²³⁸ SIEHL, *supra* note 10, at 31.

²³⁹ ARMY STRATEGY, *supra* note 230, at 34.

²⁴⁰ THE RAND CORPORATION, TWO SHADES OF GREEN: ENVIRONMENTAL PROTECTION AND COMBAT TRAINING 13 (1993) [hereinafter TWO SHADES OF GREEN].

²⁴¹ UNITED STATES ARMY, GUIDANCE FOR MANAGEMENT OF ENDANGERED/THREATENED SPECIES 1 (1994) [hereinafter ARMY GUIDANCE]. The Army originally issued this guidance to all Army commands as interim policy guidance on January 26, 1993. It issued it again with minor amendments on February 15, 1994 and the Army will officially publish it as part of an Army regulation in 1994.

mental Programs, in a memorandum to all Army elements, stated as follows:

The Army continues to experience serious problems in meeting its responsibilities under the Endangered Species Act of 1973 (ESA). ESA requirements have had a significant impact on training operations at Fort Bragg and have the potential to significantly restrict Army training operations at other installations. Therefore, *it is crucial that the Army adopt policies and procedures that will provide for more effective endangered species management and reduce the conflict with mission requirements.*²⁴²

On February 15, 1994, the Army issued comprehensive guidance on its management of endangered and threatened species.²⁴³ This guidance provides a blueprint for the future of endangered species management within the Army.

The guidance revolves around the following simple but critical directive: "Mission requirements cannot justify actions violating the ESA."²⁴⁴ Given the nature of the Army mission—that is, deterring and fighting wars—this is an astounding statement. It appears to give a higher priority to protecting endangered species than it does to the Army's warfighting mission. This depth of commitment is especially evident when contrasted with the private sector, where the attempt to protect even a modest remnant of old-growth habitat has evoked storms of protest from the affected economic interests and politicians.²⁴⁵

The central tenet of the ESA is a species-by-species approach to protecting endangered plants and animals that provides no protection until a species is well advanced on the path to extinction. Many severely criticize this strategy as costly and inefficient.²⁴⁶ In contrast, the Army guidance adopts an ecosystem approach to preserving species, and specifically recognizes the value of biological

²⁴²Memorandum, Gerald C. Brown, Director of Environmental Programs, Dep't of Army, Office of the Chief of Engineers, to all Army elements, subject: Endangered/Threatened Species Guidance (Jan. 26, 1993) (emphasis added) (on file with author).

²⁴³ARMY GUIDANCE, *supra* note 241. The Army developed this guidance after an exhaustive review of Army endangered species issues conducted during 1992 and 1993 by a departmental level task force commissioned by the Army Chief of Staff.

²⁴⁴*Id.* at 1.

²⁴⁵The author's intent is not to belittle the nature of the controversy involving the timber industry and the northern spotted owl in the Pacific Northwest. The point is that the significance of these interests pales when compared to the defense of the United States and, therefore, the commitment of the Army leadership to the ESA truly is remarkable.

²⁴⁶See *infra* text accompanying notes 373-76 (discussion of the future of the endangered species act).

diversity and protecting species before they are in danger of extinction.²⁴⁷

This commitment goes beyond the requirements of the ESA and vaults the Army to the forefront of preservation science. How did this occur? The answer is best divined by examining case studies of three endangered species whose fate has become intertwined with the Army's fate. The species are the red-cockaded woodpecker, the Mexican gray wolf, and the desert tortoise.

V. Endangered Species Case Studies

A. *The Red-Cockaded Woodpecker*

*[t]he voluminous evidence...introduced in the trial of this case leaves the court with the firm persuasion that we are presiding over the last rights of this cohabitant of the blue planet.*²⁴⁸

Picoides borealis, commonly called the red-cockaded woodpecker (RCW), is an eight-inch, zebra-striped, black and white woodpecker found only in the pinewoods of the southeastern United States.²⁴⁹ The bird takes its name from a small red patch, or cockade, on the side of the male's head that it displays during courtship and other times of high excitement. Anywhere from 3000–9000 RCWs still exist—all in the United States. The largest concentrations of RCWs are located in the coastal plain forests of the Carolinas, Florida, Georgia, Alabama, Mississippi, Louisiana, and eastern Texas. The RCW is found on eight Army installations in the southeast, including relatively large populations on Fort Benning, Georgia, and Fort Bragg, North Carolina. The battle to save the RCW is for the

²⁴⁷ ARMY GUIDANCE, *supra* note 241, at 2–3. The guidance provides as follows:

Biological diversity is important in maintaining a quality existence for humans. The Army recognizes that natural ecosystems play a vital role in maintaining a healthy environment. Natural ecosystems can best be maintained by protecting the biological diversity of natural organisms and the ecological processes that they perform . . . The Army also recognizes the importance of habitat management, the key to effective conservation of biological diversity, in the protection of listed species . . . Conserving biological diversity minimizes the number of species that must be protected as threatened and endangered.

Id.

²⁴⁸ *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1265 (E.D. Tex. 1988), *aff'd*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). *Lyng* dealt with the demise of the red-cockaded woodpecker in the national forests of Texas.

²⁴⁹ ROBERT W. MCFARLANE, *A SILLNESS IN THE PINES: THE ECOLOGY OF THE RED-COCKADED WOODPECKER* 15 (1992).

most part lost on private lands; eighty-four percent of the birds live on federal property, either on military reservations, wildlife refuges, or national forests.²⁵⁰ This is true even though seventy-five percent of the nation's pine forests are privately owned. Very few privately owned pine trees over eighty years old still exist.²⁵¹ Those that do are rapidly giving way to hardwood species, as man dutifully prevents forest fires.²⁵²

The court in *Sierra Club v. Lyng*²⁵³ described the RCW as being a rather "undistinguished woodpecker" not well adapted to the realities of twentieth century America. "This woodpecker makes no great or even necessary contribution to ecological balance, his song is unremarkable, and his plumage causes no heads to turn . . . the red-cockaded woodpecker's chief claim to fame is the fact that it has succeeded in having its name inscribed on the endangered species list."²⁵⁴

1. Biology.—The world contains approximately 200 species of woodpeckers. Of these, twenty-one live in North America.²⁵⁵ Woodpeckers evolved as specialists in using their bills to construct shelter and forage for food in wood. Woodpeckers developed specialized legs and toes, for grasping vertical tree trunks; strong, wide tail feathers for bracing against the tree while pecking; and powerful neck and shoulder muscles to provide force, and to absorb the incessant pounding inherent in their work.²⁵⁶ The woodpecker's tongue has evolved into a remarkable tool for food gathering. It may protrude several inches beyond the tip of the bill, and has a horny, spined tip used to skewer grubs, beetles, and other insects it discovers within the bark or sapwood of a tree.

The RCWs are specialists among specialists, because they are the only woodpeckers known to construct shelters, or cavities, in living trees. All other woodpeckers construct cavities in dead trees in which they can more easily manage the decaying wood. While other woodpeckers can construct a cavity within a week, an RCW cavity generally takes over one year to build²⁵⁷—an extraordinary

²⁵⁰ *Id.* at 162.

²⁵¹ *Id.* Of 63 million acres of privately owned pine forest, only 2.5% are over 60 years old, and .6% are over 80 years old.

²⁵² *Id.* at 21. Hardwood trees are more vulnerable to fire than pine trees. Frequent wildfires tend to clear the hardwoods, and perpetuate the pine forest.

²⁵³ *Sierra Club v. Lyng*, 694 F. Supp. at 1265.

²⁵⁴ MCFARLANE, *supra* note 249, at 21. The RCW has been protected as an endangered species since 1968, in the precursor act to the ESA.

²⁵⁵ *Id.* at 40 n.267.

²⁵⁶ *Id.* at 44-48.

²⁵⁷ *Id.* at 76.

investment of time and energy. The RCW prefers live pine trees that have been infected with a fungus called "red heart." The red heart fungus weakens the inner wood of a pine tree (the heartwood) and allows easier excavation.²⁵⁸ However, the RCW apparently cannot tell which trees are infected without excavating through the bark and the hard outer sapwood and into the heartwood. Consequently, the bird may have to make several abortive attempts at cavity building before it locates a tree infected with red heart.²⁵⁹

Once the RCW excavates a suitable cavity, it may use it for many years. The RCW does not migrate, but roosts and nests in the trees year round. The cavity provides a warm, dry, defensible shelter that enable RCWs to successfully raise a larger percentage of its young to adulthood than ordinary, branch-nesting birds.²⁶⁰

The RCW also forages for food in the pine trees. Its diet consists mainly of ants and beetles discovered within the bark and sapwood of pine trees. Older trees provide better foraging habitat than younger trees because the cracks and crevices of the older trees are more likely to shelter the insects preferred by the RCW. Each colony of RCWs requires about 125 acres of high quality, old-growth habitat.²⁶¹

The RCW lives in a group called a clan. A clan consists of a mating pair with young, and sometimes older offspring who remain with the natal clan. A colony consists of several cavity trees occupied by a clan.²⁶² Usually, all the cavity trees will be within a circle 1500 feet wide, and several cavity trees may be under construction at the same time.²⁶³ The clan has only one mating male, and he vigorously defends his territory against rivals.

The RCW is a cooperative breeder, meaning nonmating members of the clan assist the breeding pair in raising the young.²⁶⁴ The "helper" birds assist in feeding the young, defending the territory,

²⁵⁸ *Sierra Club v. Lyng*, 694 F. Supp. at 1266

²⁵⁹ McFARLANE, *supra* note 249, at 80-81. An advantage of using live trees for cavity building is that they produce sap when damaged. The RCW uses the sap to ward off one of its most feared predators, the rat snake. This snake has the ability to slither straight up pine trees to the cavity and consume the RCW eggs or nestlings. Pine sap contains a natural substance that irritates the snake. The RCW will "mine" this sap by pecking the tree around the cavity, thereby inducing the tree to produce sap at the desired location. The RCW also will mine adjoining trees to prevent the snake from gaining access in that manner. Once the tree no longer can produce sap, the RCW abandons the cavity.

²⁶⁰ *Id.* at 74.

²⁶¹ *Id.* at 208.

²⁶² UNITED STATES FISH AND WILDLIFE SERVICE, RED-COCKADED WOODPECKER RECOVERY PLAN 7 (1985) [hereinafter RCW RECOVERY PLAN].

²⁶³ *Id.*

²⁶⁴ *Id.* at 2-3.

and maintaining the physical plant of the colony. Interestingly, the helper birds are all male offspring of the mated pair, who apparently elect to spend an extra season at home before striking out on their own. Female offspring leave the colony **as** soon **as** they reach adulthood.²⁶⁵

The affinity for red heart infected pine trees is a major reason for the decline of the RCW. Red heart generally does not affect young, strong trees. Pine trees are not susceptible to the fungus until they are sixty to eighty years old. The best trees for RCW cavities are usually 100 years old or more. This schedule is not compatible with the modern timber industry, which prefers to “harvest” younger trees which grow at a faster, more economically productive rate.²⁶⁶

The timber industry’s preferred method of harvest is “even age management,” better known **as** “clear cutting.” Under this method, all trees in a certain area are removed at the same time, and replanted with seedlings or allowed to regenerate naturally by leaving a few seed trees to repopulate the area.²⁶⁷ Clear cutting destroys the foraging habitat and prevents trees from reaching the suitable cavity tree age.

Another serious threat to the RCW is encroachment from hardwood undergrowth or mid-story.²⁶⁸ This mid-story dangerously impedes RCW access to cavities and pine forage, while enabling

²⁶⁵MCFARLANE, *supra* note 249, at 137–38. This fascinating behavior may stem from the length of time it takes an RCW to construct a cavity. Males cannot establish a territory until they have at least one cavity to call their own. Put another way, a female will not consider a male **as** a serious mate until he has his own cavity. Because a cavity may take a year or more of mind-numbing labor to complete, some timid males elect to stay at home with their parents for an extra season to build up strength for the venture. A fortunate male may find a territory with one or more abandoned cavity trees and move right in—an ideal circumstance.

²⁶⁶*Sierra Club v. Lyng*, 694 F. Supp. at 1260. The district court found, **as** a matter of fact, that the RCW would be extinct in the Texas national forests by 1995 unless the Forest Service changed its timber management practices from the current emphasis on clear cutting. The court found that the sole reason the Forest Service endorsed clear cutting was a desire to please the timber industry, which provided the greatest market for jobs once Forest Service employees left government service. *Id.* at 1267.

²⁶⁷*Id.* The timber industry prefers to cut trees when they reach around 60 years of age. Once clear cut, the area is useless to the RCW, even for forage, for at least 30 years.

²⁶⁸Hardwood mid-story are young hardwood trees growing within the stands of pine. The pine tree is a hardy, fast growing, “pioneer” species, usually the first tree to colonize an area and form a forest. Within its protection, slower growing hardwood trees begin to grow. Eventually, the hardwood trees will grow above the pine trees, block out the sun with their broad leaves, and kill the pine trees. In this way, pine forests gradually give way to hardwood forests. Frequent forest fires retard this process because hardwoods are very vulnerable to the flames while pine trees are not, thus clearing out the hardwood mid-story and returning the nutrients to the soil. MCFARLANE, *supra* note 249, at 21.

predators to approach more easily. Strangely enough, frequent forest fires naturally clear the mid-story, while sparing the pine trees, and are essential for the RCW's survival. Nevertheless, for generations man has devoted substantial assets to aggressively stamping out the supposed scourge of forest fires, thereby further endangering the RCW.

2. *The Army and the RCW.*

a. *Fort Benning.*—The red-cockaded woodpecker is the most substantial ESA challenge facing the Army.²⁶⁹ In 1989, the Sierra Club and the FWS notified the Army that alleged improper timber management practices at Fort Benning, Georgia, were harming the RCW. The improper practices cited were similar to those of the United States Forest Service condemned by the court in *Sierra Club v. Lyng*, and included clear cutting of RCW foraging habitat, burning cavity trees, and failing to control hardwood mid-story.²⁷⁰ With minor exceptions, the violations did not involve Army training activities. The FWS also notified the Army that it was conducting a criminal investigation into possible violations of section 9 of the ESA, at Fort Benning, involving the unlawful taking of the RCW. The Sierra Club and the FWS alleged that the practices at Fort Benning violated RCW management guidelines that the Army had accepted earlier.²⁷¹

John Beasley, in researching his excellent thesis on these allegations,²⁷² visited Fort Benning, interviewed Fort Benning and FWS personnel, and reviewed correspondence between Fort Benning and the FWS. He reached the following disturbing conclusions:

1. The Commander and senior leadership at Fort Benning were not aware that problems existed with RCW compliance;
2. Despite the Army having agreed to implement a comprehensive set of RCW protective guidelines, the Commander and senior leadership at Fort Benning generally were unaware of their ESA responsibilities;
3. Fort Benning officials had placed RCW protection in relatively equal competition with commercial timber harvesting;

²⁶⁹ John H. Beasley, *The Army and the Red-Cockaded Woodpecker: Managing an Endangered Species* 74 (1991) (unpublished M. Laws thesis, George Washington University).

²⁷⁰ *Id.* at 80.

²⁷¹ *Id.*

²⁷² See *id.* Lieutenant Colonel (Retired) John H. Beasley is the former Chief of the Environmental Litigation Branch of the Army's Environmental Law Division located in Arlington, Virginia.

4. Forestry personnel, rather than the wildlife staff, controlled RCW decisions;
5. No established mechanism existed whereby the Commander could measure ESA compliance;
6. Fort Benning officials had not attempted to go beyond the scope of the guidelines by voluntarily adopting measures from the recovery plan;
7. Fort Benning officials had established no internal review procedures for RCW protection;
8. Fort Benning officials had not provided adequate resources for RCW protection;
9. The Fort Benning relationship with the FWS was spotty at best.

These findings were especially disturbing when one considers how unimportant commercial timber sales are to the Army mission. The findings were indicative of a generally poor understanding of ESA issues at the installation level, and the low priority attached to them by commanders and installation staffs. Even though the Army had agreed to RCW protective guidelines, it had failed to implement them in the field. On January 28, 1992, three Army civilian employees of the Fort Benning Forestry office were indicted in the United States District Court for the Middle District of Georgia for conspiring to take the RCW in violation of section 9 of the ESA, and making false statements to FWS criminal investigators during the investigation.²⁷³

b. Fort Bragg.—Unlike Fort Benning, Fort Bragg, North Carolina, squarely presents the issue of Army training versus the RCW. Fort Bragg, comprising approximately 150,000 acres, is the most active military installation in the United States. It contains one of the largest remaining parcels of old-growth pine forests in the United States, and approximately seventy percent of all RCW colonies in the state. In 1991, approximately 279 active RCW colonies were widely scattered over 100,000 acres.²⁷⁴

In the mid-1970s, Fort Bragg rejected a proposed RCW management plan because the plan conflicted with the installation's timber management goals. Although Fort Polk, Louisiana, and Marine Corps Camp Lejeune, North Carolina, sought consultation with the FWS

²⁷³TWO SHADES OF GREEN, *supra* note 240, at 3–4. The cases concerning these three individuals were subsequently resolved through a pretrial disposition.

²⁷⁴Beasley, *supra* note 269, at 87.

over military training impacts on the RCW in 1980 and 1979, respectively, Fort Bragg did not.²⁷⁵ Although the same 1984 Army-wide RCW forestry guidelines applied to both Fort Bragg and Fort Benning, officials at these installations did not widely implement these guidelines. In May 1988, the FWS notified Fort Bragg of its concerns about the impact of military training on the RCW.²⁷⁶ The FWS also expressed concern over Fort Bragg's failure to remove hardwood mid-story encroachment in RCW colony areas, and requested that Fort Bragg enter into consultation over the training issues. After prompting from higher headquarters, Fort Bragg officials agreed to prepare a biological assessment and enter into consultations with the FWS.²⁷⁷

In July 1989, a team of Army forestry and wildlife personnel from the Pentagon visited Fort Bragg and found numerous violations—caused by military training—of the 1984 Army RCW guidelines. The team found heavy troop activity in RCW colonies including gun positions directly beneath cavity trees, heavy digging and direct damage to cavity trees, and extensive damage from tracked vehicles circling cavity trees.²⁷⁸ In some cases, the team found axe damage and cable and parachute lines wrapped around marked cavity trees.²⁷⁹ The team reported these observations to the Army leadership in Washington, D.C.

²⁷⁵ *TWO SHADES OF GREEN*, *supra* note 240, at 34. Insufficient DA level direction or coordination occurred with the installations in this era. The Army Environmental Office and the Environmental Law Division were not formed until the late 1980s. Earlier, each installation had considerable autonomy to negotiate directly with the FWS and other environmental agencies.

²⁷⁶ *Beasley*, *supra* note 269, at 89. The FWS also attached to the May 1988 letter a copy of a sign found on Fort Bragg depicting a range target superimposed over a picture of an RCW. This caused the FWS to question how seriously Fort Bragg was taking the RCW issue.

²⁷⁷ *TWO SHADES OF GREEK*, *supra* note 240, at 36.

²⁷⁸ *Beasley*, *supra* note 269, at 88. *Beasley* relates the full extent of the violations:

1. Significant hardwood mid-story encroachment within RCW colonies;
2. Fire plow damage within RCW colonies;
3. Heavy troop activity in and among colony sites; numerous foxholes and gun positions directly beneath active cavity trees;
4. Active troop usage—staging areas, generator site placements—directly beneath active cavity trees;
5. Direct damage to RCW cavity trees—heavy digging in the area, root damage, total ground cover removal, direct damage to the tree trunks;
6. Highly visible heavy tracked/wheeled vehicle activity in the colony site areas;
7. Cable and parachute lines wrapped around visibly marked cavity trees, axe damage to trees, and severe limb damage;
8. Severe erosion from roads and drop zones depositing sediment in colony areas causing death of trees.

Id.

²⁷⁹ *Id.* at 89.

In March 1989, Fort Bragg officials released their biological assessment. It was a defiant, combative document that demanded total flexibility to train "without environmental consideration."²⁸⁰ While officials of the FWS were stewing over this, Fort Bragg officials added fuel to the fire by conducting a massive training exercise involving as many as seventeen artillery battalions which caused heavy damage to RCW habitat.²⁸¹ Bad luck played a role as well, when Hurricane Hugo roared through South Carolina, wiping out the largest RCW population in the country, thereby increasing the importance of the Fort Bragg colonies.²⁸²

On February 2, 1990, the FWS issued its biological opinion. The consultations leading up to the biological opinion had not gone well for Fort Bragg, with training personnel showing little interest in participating, and engineering personnel having insufficient authority to negotiate for the Army in good faith.²⁸³ Not surprisingly, the biological opinion that resulted was a hard line, "jeopardy with reasonable and prudent alternatives" opinion. The reasonable and prudent alternatives consisted of a series of very restrictive conditions on training.²⁸⁴

At the same time, the Environmental Defense Fund, a prominent national environmental group, notified the Army of its intent to sue the Army for violations of sections 7 and 9 of the ESA, under the ESA's citizen suit provisions.²⁸⁵ Fort Bragg officials had maneuvered

²⁸⁰*Id.* at 93. This posture was contrary to official Army policy, and was virtually certain to evoke a negative response from the FWS. Beasley speculates that Fort Bragg may have welcomed a fight with the FWS as a way to gain support for claiming the national security exemption to the ESA under section 7.

²⁸¹TWO SHADES OF GREEN, *supra* note 240, at 37.

²⁸²McFARLANE, *supra* note 249, at 248-49. The Francis Marion National Forest in South Carolina was home to the showcase population of RCWs in the nation, 483 active colonies and 1000 birds. The population of RCWs in this forest was healthy and increasing. The hurricane destroyed 50% of the birds instantly and wiped out most of the trees that the remainder need to survive.

²⁸³TWO SHADES OF GREEN, *supra* note 240, at 37-38. The Rand study concluded that a lack of coordination between mission and garrison staff contributed to the problems during the formal consultations with the FWS.

²⁸⁴*Id.* at 39. The restrictions included the following:

1. Marking every cavity tree on Fort Bragg with tape and signs;
2. Marking all trees within 200 feet of cavity trees;
3. Severely limiting damage to pine trees anywhere on Fort Bragg to maintain foraging habitat;
4. Limiting activities in colony sites (approximately 1500 feet surrounding cavity trees) to transient foot traffic, and vehicular traffic on pre-existing roads;
5. Requiring colony sites to be clearly marked on installation training maps;
6. Instituting a three-year burn cycle to clear hardwood mid-story.

Id.

²⁸⁵The citizen suit provisions appear at 16 U.S.C. § 1540(g) (1988).

themselves into the worst of all positions: severe training restrictions, high-profile litigation with adverse publicity, potential criminal liability, and abysmal relations with the FWS.²⁸⁶ This debacle was to be the low point in the Army's stormy history with the RCW and the ESA,²⁸⁷ providing the impetus for the new Army policy on protecting biological diversity.

B. *The Mexican Gray Wolf*

*And when he got to the well and stooped over and was just about to drink, the heavy stones made him fall in and was drowned miserably. **When** the seven kids saw that, they came running to the spot. "The wolf is dead! The wolf is dead!" they cried, and danced for joy round about the well with their mother.*²⁸⁸

The Brothers Grimm

Few creatures on earth are as reviled by humans as wolves. Unlike the RCW, which suffers largely from indirect and unintended deprivations, the wolf has been systematically, even joyfully, hunted, trapped, clubbed, and poisoned to the brink of extinction.²⁸⁹ Likewise, few creatures illustrate the fickle relationship between man and animal as well as the wolf. Ironically, the wolf now depends for survival on the same government agency that devotedly pursued it to extinction.²⁹⁰

²⁸⁶ Perhaps ironically, the RCW would soon receive a temporary reprieve from Fort Bragg soldiers, as the 82nd Airborne Division—the premier contingency unit in the Army—became the first United States forces to deploy to Saudi Arabia in support of Operation Desert Shield/Desert Storm. During the first, crucial days of the operation, these Fort Bragg soldiers were the only friendly forces between the Iraqi army and the oil riches of Saudi Arabia. The tough, realistic training they had received at Fort Bragg would pay handsome dividends in the months to come.

²⁸⁷ The biological opinion authorized an incidental take of eight RCWs. Fort Bragg recently had completed a \$15 million multipurpose range complex (a high technology live-fire range) in an area containing three active RCW colonies. Fort Bragg closed the range because of concern over exceeding the incidental take limit. Two SHADES OF GREEN, *supra* note 240, at 49–50.

²⁸⁸ THE BROTHERS GRIMM, ONE HUNDRED FAIRY TALES, THE WOLF AND THE SEVEN LITTLE KIDS 15 (1882).

²⁸⁹ See generally DAVID E. BROWN, THE WOLF IN THE SOUTHWEST: THE MAKING OF AN ENDANGERED SPECIES (1983). In 1982 the Mexican Wolf Recovery Plan noted: "People far removed from the scene of action, who will never own a cow, or meet a wolf, are taught to abhor and fear the malefactor, and to applaud its death and even its suffering." UNITED STATES FISH AND WILDLIFE SERVICE, MEXICAN WOLF RECOVERY PLAN 5 (1982) [hereinafter MEXICAN WOLF RECOVERY PLAN].

** (Literature, theater, and the movies are replete with unflattering characterizations of wolves. What child is not familiar, from infancy, with the "big, bad, wolf," whose favorite occupation is to "huff, and puff, and blow your house in"? (With generally unpleasant consequences for the residents). Even the box office success, "Beauty and the Beast" featured a pack of snarling, ravening wolves, appearing at critical junctures to menace the heroine and her father. One must resort to Roman

1. Biology. — The wolf's downfall can be traced to its direct competition with man for food. In early times, it competed with man for game, and later, it raided man's domesticated herds of livestock. At times, the wolf seemed almost to revel in the competition, often killing three or four of a rancher's yearling calves, but feeding only on one.²⁹¹ One storied wolf, nicknamed "Old Aguila" by ranchers, was said to have killed sixty-five sheep in one night, and forty in another.²⁹²

Although a handful of Mexican gray wolves (*Canis lupus baileyi*) still exist in Mexico,²⁹³ man completely exterminated the species in the United States by about 1970. The wolf became an endangered species in 1976. In 1990, forty-six Mexican wolves—the nucleus of a proposed reintroduced population²⁹⁴—lived in a captive breeding program in the United States.

The Mexican wolf is one of the physically smallest North American wolf species.²⁹⁵ Adults average about five feet in length, including a fifteen-inch tail. Height at the shoulders is about thirty inches.²⁹⁶ They weigh an average of eighty-nine pounds (males) and seventy-seven pounds (females). They have large feet, short, thick muzzles, and thick necks.²⁹⁷ Their jaws are remarkably strong, and have been known to bite through steel traps, galvanized buckets, and enamel pots and pans.²⁹⁸ Their teeth are sharp enough to slice through tough steer hide, and spill a victim's entrails at a dead run. Their most famous attribute is their long howl, thought to announce presence and facilitate assembly after separation.²⁹⁹

Relatively little is known of their detailed behavior because man performed no comprehensive studies of the wolves prior to

mythology to locate an arguably positive portrayal of a wolf, in the tale of Romulus. In that myth, Romulus, the son of Mars and a vestal virgin, was abandoned at birth and left to die with his twin brother Remus. A she-wolf named Etruscan rescued and raised the twins. Romulus later founded Rome and became its first king in 753 B.C. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1128 (1969).

²⁹¹ BROWN, *supra* note 289, at 137.

²⁹² *Id.* at 157–58.

²⁹³ JAMES C. BEDNARZ, AN EVALUATION OF THE ECOLOGICAL POTENTIAL OF WHITE SANDS MISSILE RANGE TO SUPPORT A REINTRODUCED POPULATION OF MEXICAN WOLVES 1 (1989).

²⁹⁴ Affidavit of Michael Spear, Regional Director of Region 2, United States Fish and Wildlife Service 1 (June 27, 1990) [hereinafter *Spear* Affidavit] (on file with the author).

²⁹⁵ JAMES C. BEDNARZ, THE MEXICAN WOLF: BIOLOGY, HISTORY, AND PROSPECTS FOR REESTABLISHMENT IN NEW MEXICO 7 (1988).

²⁹⁶ BROWN, *supra* note 289, at 119.

²⁹⁷ *Id.* at 122.

²⁹⁸ *Id.* at 126–27.

²⁹⁹ BEDNARZ, *supra* note 295, at 2.

their eradication in the wild. The best information available is anecdotal accounts from wolf hunters.³⁰⁰ Mexican wolves are nocturnal hunters, and can range huge distances in search of prey. They use their keen sense of smell to locate their prey in the dark, and obtain the advantage of surprise. Their natural prey was deer, but they came to prefer the fatter, easier pickings of cattle, sheep, and horses.³⁰¹ They generally prefer to run their prey down from the rear and bite through the flanks and hindquarters.

Wolves are social animals and live and hunt in packs. The packs occupy and defend discrete territories which are scent-marked with urine and dung. Mexican wolves live in smaller packs than northern wolves, perhaps two to eight animals, and might hunt in pairs or alone.³⁰² They bear young once per year, usually in litters of four to five pups. The members of the pack assist the mother in caring for the young. Food is brought to the den partially digested in the adults' stomachs, and then disgorged for the pups. They also may drag carcasses and body parts to the den.³⁰³

2. Mexican Gray Wolf Control Programs.—From the time European settlers arrived in the new world, they battled to control wolves, which devoured the sheep that arrived with the original settlers at Jamestown.³⁰⁴ Later, George Washington lost hope of ever building a viable sheep industry in the United States because of wolves.³⁰⁵ In 1896, the annual losses to wolf depredation in Wyoming were \$1 million per year—four times the entire state budget.³⁰⁶ Some of the earliest public laws in colonial America related to wolf control and cash bounties for killing wolves.³⁰⁷

In the American west, wolf control became serious business after 1880, when the vast plains filled with grazing herds of domesticated livestock for the first time. These initial efforts were private. Ranchers and cattle associations offered bounties to freelance wolf hunters. Later, many larger ranches hired full-time wolf hunters. The prime methods employed were shooting, trapping, poisoning, and denning, in which a den of wolf pups would be located and destroyed.³⁰⁸

³⁰⁰ *Id.* at 5.

³⁰¹ BROWN, *supra* note 289, at 132.

³⁰² BEDNARZ, *supra* note 295, at 2.

*****MEXICAN WOLF RECOVERY PLAN, *supra* note 289, at 11.

³⁰⁴ David Todd, *Wolves-Predator Control and Endangered Species Protection: Thoughts on Politics and Law* 33 S. TEX. L.J. 459, 463 (1992).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 465. Delaware considered it a public duty for each citizen to produce two dead wolves per year.

³⁰⁸ BROWN, *supra* note 289, at 32–37.

In 1915, the United States government entered the wolf killing business in earnest. Congress appropriated \$125,000 and placed responsibility for the program on the FWS. The goal was total extermination. The methods used were similar to those in use already, but with a greatly expanded use of poison—particularly arsenic, strychnine, and cyanide.³⁰⁹ Poisoned grain was spread in likely wolf areas, poison was encapsulated in suet, and sodium cyanide was loaded into a spring gun device called a “coyote getter.”³¹⁰

By 1925, the campaign was largely successful, although efforts would continue into the 1970s.³¹¹ The government pursued the wolf to destruction with an almost religious zeal, even after it reduced the wolf’s numbers to manageable levels. This single-minded intent to cause extinction is probably unprecedented in natural history.³¹² The government exterminated the wolf from New Mexico by 1942.³¹³ The last known Mexican wolf was killed in the wild in the United States in 1970,³¹⁴ although a sparse population remains in Mexico.

After Congress enacted the ESA in 1973, the indiscriminate killing of predator species was largely curtailed.³¹⁵ In 1976, the Mexican wolf was officially listed as endangered.³¹⁶ In an ironic reversal of roles, the FWS assumed responsibility for recovering the species.³¹⁷ Between 1977 and 1979, four Mexican wolves were captured

³⁰⁹MEXICAN WOLF RECOVERY PLAN, *supra* note 289, at 5.

³¹⁰BROWN, *supra* note 289, at 107. Brown gives a detailed description of the coyote getter:

A mechanical device which expels sodium cyanide and consists of a shell holder wrapped with fur, cloth, wool, or steel wool; a firing unit; a 38 cal. shell containing the sodium cyanide; and a 5-7 inch hollow stake. The stake is driven into the ground, the firing unit is cocked and placed in the stake and the shell holder containing the cyanide shell is screwed onto the firing unit. A fetid bait, usually made of fish, brains, or blood, is carefully spread on the shell holder. An animal attracted by the bait will try to pick up the baited shell holder. The cartridge fires when the animal pulls up on the shell holder and the cyanide is blown into the animal’s mouth.

Id.

³¹¹For example, Todd reports that as late as 1963, the FWS set 39,910 traps, spread 151,942 pounds of poisoned grain, prepared 708,130 poisoned baits, and set 64,921 coyote getters. Todd, *supra* note 304, at 460.

³¹²The wolf recovery team felt that the desire to blot out the last surviving wolves was more emotional than economic and attributed the motive to man’s innate “fear and loathing” of the wolf. MEXICAN WOLF RECOVERY PLAN, *supra* note 289, at 5.

³¹³BEDNARZ, *supra* note 295, at 2.

³¹⁴UNITED STATES FISH AND WILDLIFE SERVICE, A GENERAL PLAN FOR THE REINTRODUCTION OF THE MEXICAN WOLF (DRAFT) 1 (1990).

³¹⁵Kevin Bixby, *Predator Conservation, in* BALANCING ON THE EDGE OF EXTINCTION 199, 201 (Kathryn A. Kohm ed., 1991).

³¹⁶41 Fed. Reg. 24,062, 24,066 (1976).

³¹⁷BROWN, *supra* note 289, at 176.

in Mexico and brought to the United States to form the basis of a captive breeding program.³¹⁸ In 1982, the FWS issued a recovery plan for the Mexican wolf under section 4 of the ESA. The recovery team concluded that reintroduction was feasible if the FWS could locate a suitable area within the historic range of the Mexican wolf. They estimated that 5000 square miles would be needed to support a self-sustaining population of 100 wolves.³¹⁹

3. *The Army and the Mexican Gray Wolf.*—Finding a reintroduction site proved a daunting task. In 1986, the FWS contacted the three states in the Mexican wolf's historic range—Arizona, New Mexico, and Texas—and asked for nominations for suitable sites. The Texas legislature responded by making it illegal to reintroduce wolves in Texas.³²⁰ Arizona initially identified fifteen locations, but later requested that the FWS postpone reintroduction for several years pending a public education program.³²¹ New Mexico nominated the United States Army White Sands Missile Range (WSMR).³²²

White Sands Missile Range is a large installation, measuring 100 miles long and 37 miles wide. It is located in the Tularosa Basin of south-central New Mexico, approximately forty-five miles north of El Paso, Texas.³²³ Its mission is to support missile and weapons development for the armed forces, NASA, and other government agencies.³²⁴ The climate is typical of the dry Chihuahuan desert region.³²⁵

The unsolicited³²⁶ nomination of WSMR put the Army in a unique position. For the first time, the Army was involved in a major environmental controversy unrelated to its mission. Moreover, the issue involved protecting an animal not present on Army lands. Complicating matters further were WSMR's neighbors—working cattle and sheep ranchers who were decidedly cool to the idea of conserving the wolf.

³¹⁸ These four animals had multiplied to 46 by 1990. Spear Affidavit, *supra* note 294, at 1.

³¹⁹ MEXICAN WOLF RECOVERY PLAN, *supra* note 289, at 23.

³²⁰ Bixby, *supra* note 315, at 203.

³²¹ Spear Affidavit, *supra* note 294, at 2.

³²² *Id.*

³²³ UNITED STATES FISH AND WILDLIFE SERVICE, AN EVALUATION OF THE ECOLOGICAL POTENTIAL OF WHITE SANDS MISSILE RANGE TO SUPPORT A REINTRODUCED POPULATION OF MEXICAN WOLVES 4 (1989) [hereinafter MEXICAN WOLF STUDY].

³²⁴ *Id.*

³²⁵ *Id.* at 10.

³²⁶ New Mexico did not inform White Sands Missile Range of the nomination. Defendants' Opposition to Plaintiffs' Motion to Compel at 5, Wolf Action Group v. Lujan, CIV-90-0390-HB (D. N.M. 1990).

The FWS coordinated the proposed action directly with the commander of WSMR, who initially allowed the FWS to commission a biological evaluation of WSMR's suitability for wolves.³²⁷ On September 27, 1987, approximately nine months into the study, the commander changed his mind and rescinded his agreement to the reintroduction, although he allowed the study to continue.³²⁸ The commander apparently made this decision without approval from higher headquarters.³²⁹ The new commander affirmed this decision on March 1, 1988. Stymied, the FWS put the project on hold.³³⁰

On February 14, 1990, a group of environmental organizations, including the Sierra Club and the National Audubon Society,³³¹ served the Secretary of the Interior and the Secretary of Defense with a sixty-day notice of intent to sue.³³² The group alleged that the FWS improperly terminated the reintroduction plans, and that the Army violated its duty to conserve the Mexican wolf under section 7(a)(1) of the ESA.³³³ On April 20, 1990, Headquarters, Department of the Army, reversed the WSMR commander's decision. In a letter to the FWS, the Army agreed to "cooperate fully" with the FWS in further studies of WSMR as a potential reintroduction site.³³⁴ The Army further stated that it had no objection to the FWS proceeding with "appropriate planing" for the reintroduction.³³⁵

³²⁷ Spear Affidavit, *supra* note 294, at 2.

³²⁸ *Id.* Letter from Major General Joe S. Owens, Commander, United States Army White Sands Missile Range, to Michael J. Spear, Regional Director, United States Fish and Wildlife Service (Sept. 29, 1987). Major General Owens's stated reason for withdrawing authorization for the reintroduction was simply that "it is not in the best interest of the range to support the reintroduction program." He concluded by stating, "I wish you good luck on finding another site for the Mexican wolf reintroduction." *Id.*

³²⁹ Defendants' Opposition to Plaintiffs' Motion to Compel, *supra* note 326, at 8. On November 17, 1989 the Army issued Technical Note No. 420-74-2, Endangered Species Management Requirements on Army Installations, requiring approval from the Army Major Command and the Army Engineering and Housing Support Center, before the reintroduction of an endangered species. *Id.* at 2. The technical note also stated that "[t]he conservation of endangered species, including introduction and reintroduction, will be supported unless such actions are likely to result in long term significant impacts to the accomplishment of the military mission." *Id.*

³³⁰ *Id.* at 6.

³³¹ The group of organizations consisted of the Wolf Action Group, the Mexican Wolf Coalition, the National Audubon Society, the Environmental Defense Fund, the Sierra Club, and the Wilderness Society.

³³² Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment at 8, Wolf Action Group v. Lujan, Civ. No. 90-0390 HB (D. N.M. 1990). The 60-day notice is a prerequisite to suit under the ESA pursuant to 16 U.S.C. § 1540(g)(2) (1988).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* Later, the Commander of White Sands Missile Range wrote to the FWS and agreed to review draft plans for the reintroduction and to allow access to FWS personnel preparing the draft plan. *Id.* at 9.

Not satisfied, the plaintiffs filed suit on April 23, 1990, alleging that the Army failed to cooperate with the FWS for the better part of eight years,³³⁶ and demanding a “mandatory injunction compelling the Secretary of Defense to cooperate with the United States Fish and Wildlife Service in the implementation of the Mexican Wolf Recovery Plan.”³³⁷

This case has been settled, with the FWS agreeing to actively implement the Mexican Wolf Recovery Plan.³³⁸ Meanwhile, the Mexican wolf still waits for a home.

C. *The Desert Tortoise*

The desert tortoise (*Gopherus agassizii*) is a shy and peaceful plant-eating species that has survived, in some form, for 175 million years.³³⁹ Dating from the age of the dinosaurs, the tortoise survived the ancient mass extinctions, but may not live through the current one. The desert tortoise provides a fascinating glimpse of prehistory, but like the other animals I have discussed, is ill-suited to modern life.

1. Biology.—The desert tortoise is found in portions of California, Arizona, Nevada, and Utah. It also lives in Sonora and Sinaloa, Mexico.³⁴⁰ The tortoise is an herbivorous reptile that reaches one

³³⁶ Memorandum in Support of Plaintiffs’ Motion to Compel at 6, Wolf Action Group v. Lujan, Civ. No. 90-0390-HB (D. N.M. 1990). The plaintiffs stated as follows:

In this case the Recovery Plan for the Mexican Wolf is eight years old, and still no definitive action has been taken to reintroduce the wolf. The Army’s indecision and failure to cooperate over the *better part of this period* is evidence not only of a violation of the mandate under the Endangered Species Act that federal agencies shall utilize their authorities in furtherance of the purposes of the Act, but is also evidence that the Army is likely to revoke its current cooperative position sometime in the future.

Id. (emphasis added).

Actually, the Army was not contacted by the FWS regarding the possible reintroduction of the Mexican Wolf until early 1987. Spear Affidavit, *supra* note 294, at 2. How the period between 1987 and 1990 constitutes indecision and failure to cooperate for the better part of eight years is unclear.

³³⁷ Memorandum in Support of Plaintiffs’ Motion to Compel at 6, Wolf Action Group v. Lujan, Civ. No. 90-0390-HB (D. N.M. 1990).

³³⁸ Stipulation of Dismissal and Settlement Agreement, Wolf Action Group v. Babbit, Civ. No. 90-0390 HB (D. N.M. 1993). The FWS has not completed the decision-making process required under the NEPA. The Army likely will agree to support the FWS decision at the conclusion of this process. *Id.*

³³⁹ THE DESERT TORTOISE: A DELICATE BALANCE, THE NASA DRYDEN FLIGHT RESEARCH FACILITY, EDWARDS AIR FORCE BASE, CA (1992) [hereinafter DESERT TORTOISE VIDEO] (on file with author).

³⁴⁰ NATIONAL TRAINING CENTER, FORT IRWIN, CA, REVISED FINAL DESERT TORTOISE BIOLOGICAL ASSESSMENT AND CONSERVATION PLAN FOR THE NATIONAL TRAINING CENTER’S LAND ACQUISITION PROJECT 3-14 (1992) [hereinafter BIOLOGICAL ASSESSMENT].

foot in diameter and lives seventy years or more.³⁴¹ The desert tortoise spends large portions of the year in burrows as deep as thirty feet, dug in the desert floor. The burrows shield the tortoise from the extreme hot and cold temperatures present in the harsh desert environment, and provide protection from predators.³⁴² The desert tortoise is most active in spring when it emerges from its burrow to feed on the fresh perennial plants in spring bloom.

The desert tortoise has a long life cycle and is a slow reproducer. It does not reach sexual maturity until about fifteen or twenty years of age. Few young desert tortoises survive to adulthood. Their shells do not fully harden for nearly five years, during which time they are especially vulnerable to predators. Desert tortoises do not care for their young. Once they lay their eggs, they have completed their parental duties.³⁴³

Researchers believe that between 308,465 and 530,688 desert tortoises exist.³⁴⁴ The desert tortoise is a threatened species in California under the **ESA**. Although the desert tortoise's numbers are much larger than the other species I have discussed, they have been in rapid decline for the past ten years. The prime reasons for the decline are increased predation and loss of habitat. The increased predation **is** due to large increases in ravens, a natural tortoise predator.³⁴⁵ In a curious chain reaction, the ravens, which feed on garbage at city landfills, have increased due to the urbanization of many desert areas.³⁴⁶

The loss of habitat is due to damage by off-road recreational vehicles, overgrazing by cattle and sheep, and increased human construction and development of the desert.³⁴⁷ In addition, many desert tortoises have been collected by humans as pets.³⁴⁸

The desert tortoise has been increasingly afflicted with a some-

³⁴¹ **DESERT TORTOISE VIDEO**, *supra* note 339.

³⁴² **BIOLOGICAL ASSESSMENT**, *supra* note 340, at 3-14.

³⁴³ **DESERT TORTOISE VIDEO**, *supra* note 339.

³⁴⁴ **BIOLOGICAL ASSESSMENT**, *supra* note 340, at ii. The extensive time the tortoise spends underground makes it difficult to get an accurate count. As part of an intensive inventory of a particular area during the biological assessment, researchers moved foot by foot through suspected habitat, located every desert tortoise burrow identifiable, and lowered portable video cameras into the burrows to verify the presence of animals. *Id.* at 3-15.

³⁴⁵ **Las Vegas v. Lujan**, 891 F.2d 927, 930 (D.C. Cir. 1989). The ravens prey mainly on young desert tortoises whose shells have not hardened.

³⁴⁶ This is a good example of the unpredictable impacts of human activities on animals. It also demonstrates that some animals benefit from the changes man makes to habitat. Sewer rats and some squirrels are other examples.

³⁴⁷ **Lujan**, 891 F.2d at 930.

³⁴⁸ **DESERT TORTOISE VIDEO**, *supra* note 339.

what mysterious ailment called Upper Respiratory Tract Disease (URTD).³⁴⁹ This disease is highly contagious and appears to be 100% fatal. The cause of URTD is unknown, but is believed to be related to ecological stress on this sensitive animal and its habitat.³⁵⁰ The severe California drought of the past five years likely has played a role in the disease as well.

2. The Army and the Desert Tortoise.—The Army has run afoul of the desert tortoise over the proposed expansion of the Army's National Training Center (NTC) at Fort Irwin, California. The NTC is the Army's premier training facility, located in the heart of California's Mojave desert. It may seem strange that, in an era of defense reductions and base closures, the Army wants to drastically expand this facility, but the NTC is not the average Army installation. Unlike other Army installations, the NTC does not have assigned combat units.³⁵¹ Instead, combat battalions from throughout the Army periodically "rotate" through the NTC to receive training.³⁵²

By any measure, Fort Irwin is already a large military installation, occupying approximately 1000 square miles, although only about fifty-five percent of the area actually is available for training.³⁵³ This size is insufficient, however, for brigade-sized exercises. Moreover, the vastly increased range, lethality, and mobility of modern weapons, coupled with the Army's warfighting doctrine,³⁵⁴ requires large training spaces. In 1988, the United States Commission on Base Realignment and Closure recognized the need for expanded

³⁴⁹ *Lujan*, 891 F.2d at 930

³⁵⁰ BIOLOGICAL ASSESSMENT, *supra* note 340, at 3–15

³⁵¹ The NTC does have a highly proficient force trained to mimic likely enemy tactics and equipment to provide realistic training opportunities to United States units. This force is known as the Opposing Forces (OPFOR). Fort Irwin also contains normal support troops.

³⁵² The training consists of a series of highly realistic "battles" against the local OPFOR using laser devices and high-tech detection equipment to simulate weapons employment and casualties. The units are evaluated intensively on their performance. The result is tough, realistic, and extremely demanding training in modern warfare. The NTC training has been credited with the exceptional performance of many Army units in Operation Desert Storm. BIOLOGICAL ASSESSMENT, *supra* note 340, at 2–1. See DANIEL B. BOLGER, *DRAGONS AT WAR* (1986) (giving experiences of one mechanized infantry battalion during its NTC rotation). Some veterans of the Vietnam conflict characterized the NTC training as more stressful than actual combat. *Id.*

³⁵³ BIOLOGICAL ASSESSMENT, *supra* note 340, at 2–3. Mountainous areas unsuitable for training, environmentally sensitive regions, archaeological sites, and joint use areas restrict training on large portions of Fort Irwin. *Id.*

³⁵⁴ Army doctrine envisions high mobility combined arms forces, operating in depth over large battle areas. These forces must be capable of simultaneously fighting a close-in battle and performing deep strikes against an enemy's follow-on troop echelons. Army doctrine anticipates intensive, continuous, night and day operations (as actually occurred in Iraq and Kuwait). This doctrine depends on highly proficient and trained soldiers. See DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (1993).

training areas at certain critical locations, including the NTC at Fort Irwin.³⁵⁵

In 1985, an Army land use study (validated by the GAO in 1990), determined that an additional 238,000 acres of training land was required at Fort Irwin.³⁵⁶ In 1988, the Army and the BLM agreed to cooperatively analyze the environmental impact of the proposed expansion, with the BLM as the lead agency for preparing an environmental impact statement under NEPA. In 1991, the Army prepared and submitted a biological assessment to the FWS as part of the consultation process under section 7(a)(2) of the ESA.³⁵⁷ The biological assessment envisioned a 328,660 acre expansion to the south of the NTC.³⁵⁸

In September 1991, the FWS responded to the Army proposal with a draft biological opinion. It found that the terrain to the south of the NTC contained high density desert tortoise populations and habitat, and the Army plan would likely jeopardize the continued existence of the species. They identified three reasonable and prudent alternatives that did not involve expansion of the NTC to the south.³⁵⁹

The Army had several choices in responding to the unfavorable FWS biological opinion. It could have adopted an adversarial posture, in the manner of the Tennessee Valley Authority and the timber industry, and sought an exemption from the Endangered Species Committee. It could have requested that the Secretary of Defense declare the action “necessary for reasons of national security” under 16 U.S.C. § 1536(j), as Fort Bragg considered in 1989. It could have sought legislative relief in Congress. Finally, it could carefully study the FWS concerns, and undertake additional scientific work with a view towards achieving the Army’s objectives while accommodating the survival of the desert tortoise. That the Army chose the latter alternative was the first tangible evidence of a dramatic change in the Army’s attitude toward endangered species—an attitude that soon would spawn the far-reaching guidance for management of the endangered/threatened species referred to above.³⁶⁰

³⁵⁵ SIEHL, *supra* note 10, at 24. Attempting to train for modern combat at many of the Army installations in the Eastern United States has been compared to training a professional football team on a tennis court. *Id.*

³⁵⁶ BIOLOGICAL ASSESSMENT, *supra* note 340, at 2-1.

³⁵⁷ 16 U.S.C. § 1536(a)(2) (1988).

³⁵⁸ BIOLOGICAL ASSESSMENT, *supra* note 340, at 2-4. The Army selected this alternative—out of fourteen it studied—as the most suitable expansion area for training purposes. *Id.*

³⁵⁹ *Id.* at 2-5.

³⁶⁰ See ARMY GUIDANCE, *supra* note 241.

The Army decided to abandon the proposed expansion south of the NTC and study a possible expansion to the east. The NTC commissioned four separate tortoise density studies during late 1991 and 1992, to better define the desert tortoise population.³⁶¹ The data gathered convinced the Army that an expansion to the east, coupled with aggressive mitigation measures, could give the Army the high quality training land it needed, without jeopardizing the continued existence of the desert tortoise.

In October 1992, the Army issued a new biological assessment.³⁶² This assessment called for acquiring approximately 327,150 acres of land to the north and east of the NTC.³⁶³ This proposal was somewhat similar to one of the reasonable and prudent alternatives posed by the FWS in its draft biological opinion. The Army estimated that if it implemented this proposal, without mitigation measures, approximately 1266 desert tortoises would be lost due to incidental taking and habitat loss.³⁶⁴

The Army proposed an extensive set of mitigation measures as part of a desert tortoise conservation plan. The plan consisted of tortoise-proof fencing at strategic locations, relocation of tortoises to safe areas, soldier education, and extensive tortoise research. The plan also called for the acquisition of an important desert tortoise habitat to the south of the NTC as a refuge. The cost of these conservation measures total \$5.7 million the first year, and \$17.1 million over the following twenty-eight years for a total cost of \$22.8 million.³⁶⁵ After implementation of the conservation plan, the Army estimates that 670 desert tortoises will be lost (from a total population of between 308,465 and 530,688).³⁶⁶

On August 19, 1993, the FWS issued their final biological opinion.³⁶⁷ The FWS found that if the Army implemented its proposed mitigation measures, the expansion of the NTC would not be likely to jeopardize the continued existence of the desert tortoise.³⁶⁸ The Army apparently had resolved the conflict to the benefit of all concerned.

³⁶¹ BIOLOGICAL ASSESSMENT, *supra* note 340, at 1-4.

³⁶² *See id.*

³⁶³ *Id.* at 2-5.

³⁶⁴ *Id.* at ii.

³⁶⁵ *Id.* at 5-13.

³⁶⁶ The long-term benefit to the species from the research programs may more than compensate for the loss of 670 animals. If the Army projections are correct, the mitigation measures will save 596 desert tortoises at a cost of \$22.8 million, or \$38,255 per animal saved.

³⁶⁷ UNITED STATES FISH AND WILDLIFE SERVICE, BIOLOGICAL OPINION ON THE IMPACT OF THE PROPOSED EXPANSION OF FORT IRWIN ON THE DESERT TORTOISE (1993).

³⁶⁸ *Id.* at 2.

We must now attempt to draw lessons from the Army's experiences with the three animals previously examined. What is the likely future course of the ESA, and the Army's prospects for long-term compliance with, or exemption from, the ESA?

VI. Analysis

A. *The Case Studies*

The case studies demonstrate the evolution of Army ESA issues by subject matter and time. Until the late 1980s, the Army obviously did not place a high priority on the ESA, the science of extinctions, protecting ecosystems, or the earth's diminishing biodiversity. The Army was struggling to define its environmental program, and it placed priority on achieving compliance with rule-based statutes, and addressing the thousands of contaminated sites discovered on its installations. The ESA, by contrast, is a planning statute, requiring negotiation, consultation, and close cooperation with other agencies, rather than reliance on black-letter rules. Traditionally, the Army has been more comfortable dealing with rule-based laws.³⁶⁹

Consequently, installations were largely left to themselves on ESA issues, and generally assigned these missions to their engineer or forestry offices. Commanders and trainers showed little interest. At Fort Bragg and Fort Benning, officials gave timber sales—of trivial importance to the Army mission—a higher priority than they gave to protecting the RCW. The notion that a soldier or Army civilian employee could be criminally prosecuted for a violation of the ESA would have been considered absurd.

This era came to an abrupt close with the RCW debacle at Fort Bragg in 1989. This event proved to be a defining moment in the environmental program because it shocked the Army leadership into a change of priority, a change that ultimately would grow into the visionary Army policy on protecting biodiversity.³⁷⁰

We glean similar insights from examining the Army approach to the Mexican wolf at WSMR.³⁷¹ Acting independently, the com-

³⁶⁹ See *TWO SHADES OF GREEN*, *supra* note 240.

³⁷⁰ Telephone Interview with John H. Beasley, former Chief of the Environmental Litigation Branch, Department of the Army Environmental Law Division (Mar. 12, 1993). Beasley described a meeting of top Army officials in 1991 where the Army Chief of Staff personally directed the formation of a top-level, interdisciplinary task force to find a solution to the RCW problem at Fort Bragg. This task force eventually would evolve into the Army Endangered Species Team, which later drafted the new Army policy on protecting biodiversity.

³⁷¹ The plight of this despised creature prompts biblical analogy. Like Moses and the children of Israel, many of the Mexican wolves bred in captivity may die of old age before reaching the promised land.

mander alternately approved, then abruptly withdrew Army cooperation for reintroduction of the wolf on the installation. Prompted by litigation, the Army disavowed the commander's actions, and instituted a policy generally favorable to reintroduction of endangered predator species to their former ranges.³⁷²

Finally, the desert tortoise provides a glimpse of the future—a future in which the Army achieves its vital objectives with coordinated, proactive, and scientifically defensible programs, in compliance with the law of the land.

B. *The Future of the ESA*

Like the Army environmental program, the ESA has evolved substantially over the past twenty years. Its central tenet, a species-by-species approach to preventing extinctions, has been largely discredited as inefficient and expensive.³⁷³ A growing realization exists that herculean efforts to save a few high-profile species does little to stem the tidal wave of extinctions sweeping the planet.

This old approach has given way to a system-wide emphasis, protecting whole ecosystems rather than individual species.³⁷⁴ In this way, species can flourish or die naturally, while giving the planet (and humans) the full value of their ecological services.³⁷⁵ This new approach emphasizes both the importance of preserving diversity within species as well as among species, and the need to have sufficient numbers of individual members of a species to perform ecologically significant tasks.³⁷⁶ No effort is made to select which species should live and which should die. It is likely that, after reauthorization this year or next, the ESA will move significantly in this direction.

³⁷² ARMY GUIDANCE, *supra* note 241, at 22. Installations are now required to coordinate reintroduction questions with Headquarters, DA. They also are required to support the reintroduction unless it will have a substantial impact on the Army's mission. *Id.*

³⁷³ Reed F. Noss, *From Endangered Species to Biodiversity*, in BALANCING ON THE BRINK OF EXTINCTION 227 (Kathryn A. Kohm ed., 1991).

³⁷⁴ Hal Salwasser, *In Search of an Ecosystem Approach to Endangered Species Conservation*, in BALANCING ON THE BRINK OF EXTINCTION 247 (Kathryn A. Kohm ed., 1991).

³⁷⁵ Ecological services are the essential services species contribute to the system by providing food, oxygen, pest and erosion control, nutrient recycling, and similar items, without which an ecosystem and the creatures in it would collapse.

³⁷⁶ For example, whether zero or fifty California condors exist is insignificant from an ecological services perspective. Either way the numbers are too small to have significant impacts on the system. However, the current ESA would commit enormous resources to "save" the condor, while ignoring precipitous declines in other species, not yet on the brink of doom. In the long run, this is precisely the wrong approach to take.

C. *The Future of the Army and the ESA*

1. *Can the Army Comply with the ESA.2*—The short answer is yes, although much work remains. In formulating the new endangered species guidance, the Army acted quickly and decisively to embrace the future of the ESA, with its emphasis on protecting biodiversity and ecosystems. The Army Environmental Strategy for the twenty-first century also evidences a strong leadership commitment towards conservation and endangered species issues. The challenge now facing the Army is to implement these policies in the field.

The Army must adopt a cooperative and scientific approach to conserving biodiversity. Money spent to hire biologists will pay dividends in increased credibility and flexibility. The Army must have the tools to make its case convincingly. If the Army pays adequate attention to the science, and integrates lawyers, trainers, and commanders into the team, it can accomplish its mission and comply with the ESA. The example from WSMR demonstrates the viability of this approach.

The obstacles are considerable. Even in a drastically downsized Army, the pressures on remaining training lands seems likely to multiply. The increased sophistication and range of weapons, coupled with the larger scale and level of dispersion needed for survival on the modern battlefield, demands ever-larger training grounds. At the same time, the FWS, confronting an expanded endangered species list, and shrinking old-growth habitats on private land and in national forests, increasingly will look to military installations as recovery havens for endangered species.³⁷⁷ The impact of a reduced military budget adds a substantial element of uncertainty to the equation.³⁷⁸

2. *Should the Army Seek Exemption from the ESA.2*—The difficulty in complying with the ESA has prompted some within the Army to advocate relief from the requirements, by resort to the Endangered Species Committee, the national security exemption of the ESA, or outright legislative exemption from the ESA. In an unforeseen or extreme emergency, this possibility cannot be ruled out; but presently, such a request is premature.

Most of the Army's ESA violations have occurred because of

³⁷⁷ After all, military installations do not present the thorny political issues of economic impacts and lost jobs present in the timber and construction industries. One senses that if a convenient military installation was present in the Pacific Northwest on which to recover the spotted owl, it would quickly become the FWS's preferred location.

³⁷⁸ The Army of the future may not be able to spend \$38,000 per animal for a conservation program as the Army proposes to do for the desert tortoise at the NTC. See *supra* note 366.

arrogance and ignorance, not good faith inability to comply. Axe damage to clearly marked RCW cavity trees, and emplacement of tracked vehicles and generators directly beneath these trees at Fort Bragg are examples.³⁷⁹ The Army would be hard pressed to articulate how this type of behavior is critical for national defense. Until the Army eliminates these obvious violations, it is in no position to request special consideration.

The key to improvement is educating commanders and soldiers about ESA compliance and integrating these concerns into routine mission planning. Substantial progress in this area already has been made at Fort Bragg.

Accordingly, that the Army can achieve compliance with the ESA while maintaining its training excellence is apparent. The only remaining question is how.

VII. Conclusions and Recommendations

Inadequate or nonexistent communication between the Army staff and the installations has caused or substantially aggravated the greatest failings in the Army endangered species program. Officials at Fort Bragg and WSMR effectively made Army policy, apparently without the knowledge of the Army Secretariat or Staff.³⁸⁰ Moreover, this poor coordination prevents the Army from adopting a proactive posture in planning its ESA compliance strategy. The Army has displayed an unfortunate tendency to allow environmental activist groups to define its priorities through strategically timed litigation. The endangered species issues at Fort Benning, Fort Bragg, and WSMR were not meaningfully advanced towards resolution until these activist groups sued or threatened suit under the citizen suit provisions of the ESA. Obviously, such instances force the Army into a less desirable defensive or reactive posture.

The cause of this failure to effectively communicate is obvious. Under the current system, the DA Environmental Law Division and the Department of Justice intensively manage cases in litigation. Other cases receive scant attention because of caseload restraints and limited resources—a poor approach because environmental litigation is enormously time consuming on one hand, and inefficient on

³⁷⁹ See *supra* note 278.

³⁸⁰ In the Fort Bragg case, the Rand Corporation study found that "[t]he absence of an expert Department of the Army (DA) or MACOM team for participating in the planning and negotiating process, *coupled with the tradition of installation autonomy*, also prevented a coordinated response [by the Army]. Two SHADES OF GREEN, *supra* note 240, at vii (emphasis added).

the other. A proactive, coordinated strategy that resolves endangered species issues prior to litigation would conserve resources and provide better legal service to the Army.

I propose the formation of regional endangered species teams. These teams would possess sufficient legal, scientific, and operational expertise to intensively manage endangered species issues at the installation level. Their mission would be to conserve biodiversity on Army lands with minimal impact on military training. I envision a reasoned, scientific approach, and close working relationships with the **FWS** and the installations. This cooperation should help prevent the surprises, litigation, and derailed strategies of the past. The endangered species teams would consult with the **FWS**—relieving the installations of this burden—which should prevent many of the problems evident in the case studies.

The endangered species teams could be located with or part of the proposed regional branch offices of the Environmental Law Division. Alternatively, they could be located near **FWS** regional headquarters, or Army Corps of Engineers regional offices.

The Army has made tremendous strides in its commitment to endangered species since Congress passed the ESA in **1973**. Despite notable ups and downs, I am convinced that the new guidance on endangered/threatened species is a farsighted and scientifically valid approach that can place the Army in a leadership role for the nation in protecting biodiversity. Because the outcome of this issue may well determine the long-term health and viability of our country, that the Army should play this role is fitting. Properly implementing the guidance, however, presents a significant challenge. The interdisciplinary, coordinated, and proactive approach detailed above offers a substantial probability of success.

DEFYING PRECEDENT: THE ARMY WRITING STYLE

MAJOR THOMAS KEITH EMSWILER*

All of us, from the Chief on down, need to improve our skills. Learning to write well is a lifelong endeavor:

General John A. Wickham, Jr.,
Chief of Staff,
United States Army, 12 Dec 85.1

I. Introduction

Book reviews often note, "a great book, for a first novel." The writing is good, it shows promise, but it is not fully mature. Perhaps, with later novels, the author's writing will mature into something truly worthy of praise. Indeed, many reviews of the lifework of a particular author point to the time when the author had fully matured, had mastered the craft of writing.

General Wickham's comment, "Learning to write well is a lifelong endeavor," is timeless,² and applies to novelists, letter writers, and judge advocates alike.

Regardless of purpose, all writers write for an audience and will better serve their audience if they become better writers. Writers who do not work at improving their writing may find that their skills have stagnated, perhaps diminished. Lawyers, in particular, often

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¹DEP'T OF ARMY, PAMPHLET 600-67, EFFECTIVE WRITING FOR ARMY LEADERS, Foreword (2 June 1986) [hereinafter DA PAM 600-67].

²He is not the first to make it, nor will he be the last. Circa 100 A.D. Epictetus wrote: "If you would be a good . . . writer, write." EPICETUS, DISCOURSES, BOOK II, ch. XVIII, reprinted in THE DISCOURSES OF EPICETUS 176 (George Long trans., A.L. Burt, Co. 1900). In 1711, Alexander Pope wrote: "True ease in writing comes from art, not chance. As those move easiest who have learn'd to dance." Alexander Pope, *An Essay on Criticism* II:362-63 in S.L. PAUL, ALEXANDER POPE AN ESSAY ON CRITICISM 97 (Sidharta Pub. 1988) (1711). In this century, and with specific regard to attorneys, Professor Weihofen wrote: "It is practice, then, that makes, if not perfect writing style, at least surely and constantly improved style." HENRY WEIHOFEN, LEGAL WRITING STYLE 2 (2d ed. 1980).

write less effectively than they once did. Although most lawyers think they write well, many don't. Instead of writing plainly and clearly, many lawyers write in the ponderous, lifeless style known as "legalese." Because lawyers see so much "legalese" they erroneously believe that this style of writing is proper. Additionally, judge advocates are exposed to "bureaucratic" writing—a style of writing common to bureaucrats which shares many of the same faults common to the writing of lawyers—which further aggravates the effect of exposure to "legalese."

Consequently, all writers must constantly reassess writing skills. All writers—to include judge advocates—can improve their writing. Adhering to the Army Writing Style can help us to do that. In general, the Army Writing Style advances principles that are as timeless as those advanced by General Wickham. Following these principles makes for better writing in any context.

11. Army Programs Aimed at Improving Writing

In the mid-1980s, the Army initiated several programs to improve the writing of soldiers and civilian employees.³ These programs included establishing the Army Writing Office,⁴ dispatching writing teams to a number of posts, and implementing regulatory guidance.⁵ Despite these efforts, many soldiers and civilian employees still write poorly. Many are unaware that the Army has established a mandatory Army Writing Style.⁶

The Judge Advocate General's School, United States Army (TJAGSA),⁷ has taken similar steps to improve the writing of Army lawyers.⁸ Like other members of the Army, many judge advocates

³DEP'T OF ARMY, REG. 600-70, THE ARMY WRITING PROGRAM (5 Apr. 1985) [hereinafter AR 600-70], superseded by DEP'T OF ARMY, REG. 25-50, INFORMATION MANAGEMENT: PREPARING AND MANAGING CORRESPONDENCE (5 Apr. 1985) [hereinafter AR 25-50]. Army Regulation 600-70 established the "Army Writing Program" and assigned responsibility for its implementation. See also Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 235 (1987).

⁴AR 600-70, supra note 3, para. 2c. This regulation directed the Commanding General, United States Army Training and Doctrine Command, to establish an Army Writing Office.

⁵Army Regulation 25-50 established the "Army Writing Style." AR 25-50, supra note 3, ch. 1, § IV.

⁶Adherence to the Army Writing Style is mandatory. Id. para. 1-47b.

⁷The Judge Advocate General's School, United States Army, is accredited by the American Bar Association. Successful Graduate Course students are awarded the degree of master of laws (LL.M.) in Military Law. 10 U.S.C. § 4315 (1988).

⁸Since 1976, the Graduate Course has included a comprehensive communications program. This program includes classroom instruction and graded writing and

write poorly. Nevertheless, both basic and graduate course students at TJAGSA frequently comment that they do not need instruction on writing.⁹ Most are wrong. A recent survey of graduate course graduates and judge advocates in supervisory positions indicated that they believe TJAGSA's communications program is vital and should be expanded.¹⁰ Accordingly, judge advocates should heed General Wickham's admonition that we all can and must improve our writing skills. In the second part of this article I will discuss the Army Writing Style and explain how it can help make judge advocates become better writers. I will start, however, with a discussion of why good writing is important and why lawyers are poor writers.

III. Why Write Well?

Legal writing is one of those rare creatures, like the rat or the cockroach, that would attract little sympathy even as an endangered species.

Richard Hyland¹¹

[L]egal analysis, no matter how brilliant, is only useful if it is communicated well.

Michelle S. Simon¹²

Lawyers are notorious for bad writing.¹³ Yet few lawyers con-

speaking requirements. The communications program constitutes more credit hours than any other course at the school. THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, COMMUNICATIONS PROGRAM: PROGRAM SUMMARY (1994) (on file with the author). Since 1984, the Basic Course at TJAGSA has included instruction in military correspondence and writing, military research and bibliography, and military speaking. Basic course students also must complete an assignment that the faculty evaluates for both research ability and writing ability. *Id.*

⁹Students make similar criticisms in civilian law schools. Neal Feigenson, *Legal Writing Texts Today*, 41 J. LEGAL EDUC. 503 n.1 (1991). Many civilian programs suffer from an additional problem—a general lack of credibility—caused by “low academic credit, low status of the teachers, little faculty support, and insufficient instruction time.” Michelle S. Simon, *Teaching Writing Through Substance: The Integration of Legal Writing With All Deliberate Speed*, 42 DEPAUL L. REV. 619, 624 (1992). The faculty at TJAGSA has addressed this problem in a number of ways. The School dedicates a regular faculty member to lead the communications program, assigns faculty members to serve as communications program advisors for up to three students, has division chiefs lead three seminars (each seminar reviews a writing project that the entire graduate course completes), and devotes substantial class time and academic credit to the program.

¹⁰Senior Judge Advocate/Supervisory Judge Advocate Survey (1993) (on file with the Academic Department, TJAGSA).

¹¹Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 600 (1985-86).

¹²Simon, *supra* note 9, at 624.

¹³See George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987-88); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*,

sider good writing to be of legal significance. These lawyers are wrong. We live and die by our communications. We draft documents, write letters, file briefs, argue before courts, and advise clients. Virtually everything we do uses language. We express much of that language in writing. How we express that language often will determine the result. If we communicate effectively, we are more likely to achieve our ends.¹⁴

Consider a letter written to a client. If the client cannot understand what we have written, the client will be unable to follow our advice. Additionally, others may seek to prove meanings different from what we intended in our writings.¹⁵ Consider a will written for a client. If we do not express our meaning clearly, the will may be challenged. Even the slightest ambiguity will allow an attorney representing a disgruntled heir to challenge the will.¹⁶ The case of *United States v. Ron Pair Enterprises, Inc.*¹⁷ demonstrates the importance of clear writing. At issue was the interpretation of a bankruptcy statute.¹⁸ A critical issue in this five-to-four decision was the placement of a comma.¹⁹

If the placement of a comma can lead to a five-to-four split in the United States Supreme Court, how we write is important. What we write also can take on legal significance. We must be concerned

40 VAND. L. REV. 135 (1987); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1983-84). Comedian Will Rogers said: "The minute you read something and you can't understand it, you can be sure it was written by a lawyer." Quoted in ROBERT B. SMITH, *THE LITERATE LAWYER* 18 (2d ed. 1991).

¹⁴*Army Pamphlet 600-67, Effective Writing for Army Leaders*, states: "a. Leaders lose too much time grappling with poor writing; b. Poor writing hinders decisions." DA PAM 600-67, *supra* note 1, para. 2-1. The pamphlet points out that Army leaders must: "a. Issue guidance to establish uniform, effective standards. b. Be a mentor to your subordinates . . . c. Show the new standards using sets of examples." *Id.* para. 2-3. Judge advocates have a responsibility to serve as mentors to enlisted soldiers and junior officers and to teach them how to improve their writing.

¹⁵"When a lawyer writes . . . it is often for an audience that will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning." GEORGE D. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* 1 (1981). See also WEIHOFEN, *supra* note 2, at 8 ("[T]he lawyer must write in constant fear of what we might call the reader in bad faith, the man looking for loopholes . . .").

¹⁶Dickens's novel, *Bleak House*, presents a portrait of such a challenge and illustrates the importance of clear writing. In *Bleak House*, a will is probated over the course of generations. At Chancery, when the matter is finally settled, "great bundles of paper began to be carried out—bundles in bags, bundles too large to be got into bags, immense masses of paper of all shapes and no shapes, which the bearers staggered under, and threw down for the time being. . . while they went back to bring out more." CHARLES DICKENS, *BLEAK HOUSE* 796 (Everyman's Library 1972) (1853).

¹⁷*United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

¹⁸*Id.*

¹⁹*Id.* See also Richard C. Wydick, *Should Lawyers Punctate?*, 1 SCRIBES J. LEGAL WRITING 18, 23 (1990) (concluding that lawyers must be attentive to punctuation and must adhere to the rules of standard English).

with more than legal analysis;²⁰ we also must be concerned with how we express our analysis; we must be concerned with how we write.²¹ We need to translate our thoughts into writing that can be easily understood. Unfortunately, many lawyers either lack the skills necessary to write well or are unwilling to devote sufficient time to writing well.²²

IV. Why Don't Lawyers Write Well?

Lawyers have two common failings. One is that they do not write well and the other is that they think they do.

Carl Felsenfeld²³

There are two things wrong with almost all legal writing. One is its style. The other is its content.

Fred Rodell, 1938²⁴

Most first-year law students are poorly prepared to write, and those who can write well often will "succumb" to the "verbal horrors of legal language."²⁵ Several theories have been advanced for

²⁰Some lawyers believe that their legal analysis is the critical part of their work; when they have completed their analysis, they believe their work is done. See Gopen, *supra* note 13, at 343. These lawyers believe that the expression of their analysis is of no consequence. Although sound legal analysis clearly is vital to a lawyer's work, the belief that writing is inconsequential is wrong. What we write has legal significance—" [t]he knowledge or wisdom he has in his head is of no use to anyone unless he can communicate it to others." WEIHOFEN, *supra* note 2, at 1.

Others have asserted that writing is directly linked to analysis. Benjamin Cardozo remarked: "Form is not something added to substance as a protuberant ornament. The two are fused into a unity." Benjamin Nathan Cardozo, *Law and Literature*, in MARGARET E. HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 340 (1947). Similarly, George Orwell remarked: "the English language . . . becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts." George Orwell, *Politics and the English Language*, in GEORGE ORWELL, *THE ORWELL READER* 355 (1956).

"Writings frequently initiate action and remain to the last as historical memoranda of how events developed from the beginning and how they concluded at the end." Allen Hartman, *Legal Writing: A Judge's Perspective*, 35 TRIAL LAW GUIDE 154 (1991).

²²See Carl McGowan, *Lawyers and the Uses of Language*, 47 A.B.A.J. 897, 901 (1961) ("The lawyer or judge who can write well but doesn't have time to is lost to the cause of better communication.").

²³Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L.J. 408, 413 (1981-82).

²⁴Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936-37). *But cf. infra* notes 116-17 and accompanying text (discussing expletives).

²⁵Fred Rodell, *Goodbye to Law Reviews - Revisited*, 48 VA. L. REV. 279, 289 (1982) [hereinafter Rodell *Revisited*]. John Mitchell points out in his discussion of learning theories that students who have succeeded in other programs "seem to experience a breakdown in the most basic powers of logic, common sense, and clear

this “succumbing.” Some argue that the schools that prepare students for law school are not teaching writing as effectively **as** in the past.²⁶ They cite falling Scholastic Aptitude Test scores **as** proof of this failure to teach writing effectively. The verbal scores in the Scholastic Aptitude Test have fallen fifty points since 1960.²⁷ This failure to teach writing at the grade school level is exacerbated by the de-emphasis of writing in colleges.²⁸ Thus, the argument goes, students come to law school poorly prepared to write. Because law schools do not teach “writing,” students naturally leave law school writing no better than when they entered.

Some argue that factors other than education are responsible for the general decline in writing ability. People read less than in the past. Reading is clearly vital to good writing.²⁹ But with the advent

expression when they enter law school. . . .” John B. Mitchell, Current *Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275 (1989). Joseph Williams provides three examples of such “breakdowns.” He comments on three students in his analysis of why law students emerge from law school **as** poor writers. All three appeared to be poor writers, yet **as** undergraduates, the first had been considered a “competent writer;” the second had “published several books and articles, and had been judged a good writer;” and the third had been judged a “superior writer.” Joseph M. Williams, On the Maturing of Legal Writers: *Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 21 (1991) [hereinafter Williams, Maturing of Legal Writers]. He also discusses the causes of poor writing in his book, *Style*. JOSEPH M. WILLIAMS, *STYLE* (1990) [hereinafter WILLIAMS, STYLE].

²⁶ “[T]he second most noticeable shortcoming among today’s college graduates . . . is their writing.” Joseph Kimble, Plain English: A Charter For Clear Writing, 9 COOLEY L. REV. 1, 4 (1992); See also Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 570 (1984-85) (He remarks that “[r]elatively little writing is taught in colleges . . .”).

²⁷ Thomas Sowell, *The Decline of America—Bill Bennett’s New Book May Drive you To Drink*, ATLANTA CONST., Feb. 18, 1994, at A-14. This decline may not be solely attributable to declining educational standards. It may be partially or wholly attributable to more students going to college and consequently more taking the test. Editorial, *Lake Wobegonizing the SAT*, SACRAMENTO BEE, Jan. 29, 1994, at B-6. Had the base been similarly large twenty-five years ago, the scores may have been similarly low. Id. Not to worry, however, plans are under way to increase test scores by adjusting scores up. Id. Hence, in the near future, test scores will be **as** high **as** ever.

Test scores of students at TJAGSA also have shown a decline in recent years. Since 1976, we have used the College English Placement Test to test entering members of the Graduate Course. The scores in 1993 were five and one-half percent lower than 1976, but the decline did not become pronounced until 1990 (test results are on file with the author).

²⁸ Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292, 293 (1979-80) (commenting on a first-year law student who had graduated from college “without ever writing anything”). Some twenty years earlier, a Carnegie Corporation study concluded that “80 per cent of entering graduate students embark upon their work with inadequate and wholly unsatisfactory writing ability.” McGowan, *supra* note 22, at 897.

²⁹ One writer has argued that the general decline in writing skills is directly attributable to failure to study the literary classics in their original languages. Hyland, *supra* note 11, at 621-22. He wrote: “The difficulty lawyers face in learning to understand to write legal argument is that they have little access to training in con-

of television, more automobiles, and reduced airfares, people spend less of their free time reading.³⁰

I do not believe, however, that any of these factors are the cause of poor legal writing. Legal writing has been attacked for centuries (although it does seem to have worsened in this century).³¹ In 1566, a judge became incensed over the submission of an overly long pleading. He sentenced the plaintiff to have a hole cut through the pleading, have it hung about his neck, and then be taken from court to court as a warning to others.³² As is often the case, this plaintiff bore the costs of his attorney's poor writing.³³ Scholars also have criticized legal writing.³⁴ This century, one said that "the antediluvian or mock-heroic style in which most law review material is writ-

ceptual thought At one time, conceptual thinking was learned indirectly, by the reading of good books" *Id.* at 621. Judge Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma is the introductory speaker for TJAGSA's communications program. Judge Alley emphasizes the importance of reading to both intellectual growth and to writing. In 1641 Ben Jonson noted that "to write well [one must] read the best authors and much exercise of his own style." BEN JONSON, *TIMBER: OR, DISCOVERIES* 57 (Greenwood Press 1976)(1641).

To expose our students to good writing and to allow them to exercise their own writing skills, we require students in TJAGSA's LL.M. program to read and review four books unrelated to legal topics during the academic year. In the 1994-95 academic year, students will only read and review two books, but each review must be suitable for publication in the *Military Law Review*.

³⁰In addition to "legal writing" (*see infra* notes 37-50 and accompanying text), much of what we are exposed to is not good writing. "[A]dvertising and the media have influenced the way we perceive and think [T]he English language has been assaulted, mutilated, and dismembered." Richard P. Laverdure, *Dangling Participles, Hanging Prepositions, and Other High Crimes Against the English Language*, *ARMY LAW*, Jan. 1983, at 25. A Supreme Court Justice speculated that poor writing was attributable to "the restricted reading habits of lawyers, both in terms of the small amount of time devoted to general reading and the ephemeral character of what is read." McGowan, *supra* note 22, at 901.

³¹John E. Nowak, *Woe Unto You, Law Reviews*, 27 *ARIZ. L. REV.* 317, 319 (1985) (Late 19th and early 20th century law review articles "are better written and more interesting than those in today's publications"); Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing*, 1 *SCRIBES J. LEGAL WRITING* 25, 29 (1990) ("[J]udicial writing has gone down hill since the halcyon days of Holmes, Cardozo, Jackson.")

The argument that a general decline in writing skill is responsible for poor legal writing also does not account for those students who had been good writers but "succumbed" in law school. *See supra* note 25 and accompanying text.

³²Milward *contra* Welden, 8 *Eliz. li. B. fo.* 678 (1656-66), *reprinted in* 21 *Eng. Rep.* 136 (1902). The judge found that the plaintiff's 120 page submission could have been shortened to sixteen. 5 *SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW* 233 (photo. reprint 1966)(1924).

³³This plaintiff faced an additional penalty. At the time, the length of the document determined the attorney's fee. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 190 (1962).

³⁴In the United States, criticism of overly technical, jargon-strewn legal writing arose in the early 1800s. *See* Mark E. Steiner, *Heroes of the Revolution: Henry D. Sedgwick and Timothy Walker*, 3 *SCRIBES J. LEGAL WRITING* 43 (1992). Criticism of the English system predates those criticisms that arose in America. *See, e.g.*, MELLINKOFF, *supra* note 33; Gopen, *supra* note 13, at 346-47.

ten has, as I am well-aware, been panned before. That panning has had no effect, just as this panning has had no effect.’³⁵

So why has incessant, nearly universal criticism not led to better writing? Why can’t lawyers, who are among the best educated in any community, write well? Why can’t law professors, who are among the best educated in the legal community, write well? The answer is reliance on precedent—the lawyer’s bread and butter.³⁶ What law student hasn’t looked at a sentence such as: “Accordingly, substantive equality should be measured by equality in fact; the process must be equal but the results must also reflect the effort to remedy the effects of a century of official discrimination,”³⁷ and aspired to write in a similar manner? Reliance on precedent leads to poor writing.

Most legal writing is not good writing. Law review writing is particularly bad. Many law professors **do** not write well.³⁸ To gain respect as a legal scholar, one must write in the stilted manner common to legal scholarship.³⁹ Fred Rodell once noted that “[t]he best way to get a laugh out of a law review article is to take a couple of drinks and then read an article, any article, aloud. That can be really funny.”⁴⁰ Law review articles are humorous because you can-

³⁵Rodell, *supra* note 24, at 38. When asked to supplement his article twenty-five years later, Professor Rodell added “[a] quarter of a century has wrought no revolution among the professional purveyors of pretentious poppycock.” Rodell *Revisited*, *supra* note 25, at 286. The weight of centuries of criticism is finally taking effect. See *infra* notes 63–67 and accompanying text.

³⁶See Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149 (1984) (law students are “forced to read **so** much bad writing that they mistake what they’ve read for the true and proper model); Williams, *Maturing of Legal Writers*, *supra* note 25, at 21–22 (law students “imitate the voice in most of what [they] have been reading for the first time”).

³⁷Lani Guinier, *quoted in* John Leo, *A Second Look at Lani Guinier*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 19. Mr. Leo was commenting on Professor Guinier’s book, *The Tyranny of the Majority*, an apparent attempt to clarify the positions she advanced in several law review articles. A belated reading of these articles reportedly led President Clinton to withdraw her nomination for the position of Director of the Civil Rights Division in the Department of Justice. After setting out this quote, Mr. Leo remarked, “[i]t is not an easy task to figure out what Professor Guinier really thinks. The book gave her a chance to clarify her ideas. It is a chance she missed.” *Id.* After President Clinton withdrew her nomination, Professor Guinier said, “I think that the President and many others have misinterpreted my writings, which were written in an academic context, which are very nuanced [sic], which are very ponderous.” Andrea Sachs, *Tailor Made to be Used Against Her*, TIME, June 14, 1994, at 24. I am not sure if Professor Guinier meant to say that her writings were ponderable (instead of ponderous), but I am certain that no one would have misinterpreted her writings if she had clearly expressed her ideas.

³⁸Nowak, *supra* note 31, at 319; Rodell, *supra* note 25, at 288.

³⁹Fred Rodell once decried a decision to pass over a law professor who wrote for commercial periodicals rather than law reviews. Rodell, *supra* note 25, at 288.

⁴⁰Rodell, *supra* note 24, at 40. A good test to determine whether your writing is clear is to read it out loud. Lawrence Sterne once noted: “Writing, when properly

not understand them. Then, once you get a sense of what the article is all about, you realize that the author really has very little to say,⁴¹ which makes it even funnier.

Unfortunately, the poor law student does not find this writing amusing. Instead, the student models her own writing after the learned professor. Not only does the law school teach the student to “think like a lawyer,” it also teaches her to “write like one.” If the student excels, by her third year she may be picked to teach other students “legal writing.”⁴² Of course, such students are usually members of the law review and will pass on the “law review style of writing.”⁴³

Students also model their writing after judicial opinions. Many judges are poor writers.⁴⁴ They, too, are influenced by academia; they are not immune to flattery or criticism. If writing in the academic style makes them appear more scholarly, they may write their opinions in that style.⁴⁵ Additionally, law clerks draft many deci-

managed (as you may be sure I think mine is) is but a different name for conversation.” LAWRENCE STERNE, *TRISTAM SHANDY* BOOK II, chap. XI (1759) *reprinted in* I THE COMPLETE WORKS OF LAWRENCE STERNE 178 (AMS Press 1970). Similarly, in 1825 William Hazlitt wrote: “No style is good that is not fit to be spoken aloud with effect.” William Hazlitt, *On the Conversation of Authors*, in WILLIAM HAZLITT, *THE PLAIN SPEAKER* 52 (London, George Bell & Sons 1890). This century, W. Somerset Maugham remarked “good prose should resemble the conversation of a well-bred man.” W. SOMERSET MAUGHAM, *THE SUMMING UP* 38 (Garden City Pub. 1940) (1938).

⁴¹When he was a new professor, Professor Nowak was advised how to establish a reputation: “Take an obscure little problem that no one has really thought much about, blow it all out of proportion, and solve it, preferably several times, in prestigious law reviews.” Nowak, *supra* note 31, at 320. *See also* Rodell, *supra* note 24, at 38 (noting that “[t]he average law review writer is peculiarly able to say nothing with an air of great importance”).

⁴²Sandra Craig McKenzie, *Storytelling: A Different Voice For Legal Education*, 41 KAN. L. REV. 264, 265 (1992-93).

⁴³*Id.*

⁴⁴Like criticism of scholarly writing, criticism of judicial writing is nothing new. In the 1600s, Francis Bacon wrote that cases were “reported with too great prolixity . . . They should be more tightly reported . . . tautologies and impertinencies to be cut off” MELLINKOFF, *supra* note 33, at 193. *Cf.* Steven Stark, *supra* note 31, at 25; Williams, *Maturing of Legal Writers*, *supra* note 25, at 22-23 (both authors criticize current judicial writing). Like lawyers who are concerned more with analysis than writing (*see supra* note 20 and accompanying text) some judges may believe their writing is unimportant. Stark, *supra* note 31, at 31. This is as misguided as the practicing attorney’s belief that day-to-day writing is not important. The United States Supreme Court also has come under attack. John Frank wrote that “the general style [of judicial opinions] might be called legal ‘lumpy.’” JOHN P. FRANK, *MARBLE PALACE* 130 (1961). Benjamin Cardozo paints a similarly unflattering picture of some Supreme Court writing. He describes six styles of opinions in his essay *Law and Literature*. HALL, *supra* note 20, at 339-56. He defines one style as “the tonsorial or agglutinative,” and remarks: “I will not expatiate upon its horrors.” *Id.* at 352.

⁴⁵Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 315 (1989); Michael Barone, *Our Overworked Justices Should Fire Some Law Clerks*, WASH. POST, Nov. 24, 1994, at A-17 (noting that “most Supreme Court Justices may consider [law reviews to be] their real constituency”).

sions.⁴⁶ Because most law clerks have law review experience, they write many judicial decisions in the style common to academic writing. This does a disservice to practitioners who must rely on judicial decisions **as** precedent and to law students who are being introduced to “legal writing.”

Historically, legal research and writing courses have done little to correct poor writing⁴⁷—they actually may have the opposite effect. Many first-year “legal writing” classes do little more than introduce legal research and require several written submissions (often only memoranda of law and an appellate brief).⁴⁸ Little time is spent on the mechanics of writing.⁴⁹ Instead, first-year law students—still struggling to obtain fluency with a new discipline—are asked to apply legal concepts to particular formats that have been defined **as** “legal.” The emphasis on concepts and formats over writing does not promote good writing. It may serve only to persuade students that “legal writing” is somehow unique. Students typically will look to what others have written before them—court opinions and scholarly articles—and model their responses accordingly. They then produce a few memoranda of law and a legal brief and believe they have mastered the craft. Because few students take writing courses beyond the required introduction, they leave law school believing that they can write well because they write in the “legal style.”

Relying on precedent continues after law school. The new attorney will look to office products that have served others successfully. Rather than improving the product, he simply changes names and dates.

Some argue that this reliance on old forms and documents is beneficial. They believe that forms and documents written in time-tested legalese ensures certainty of result. This position has valid,

⁴⁶Stark, *supra* note 31, at 29; Barone, *supra* note 45, at A-17. Frank goes further; he notes “[t]he extent to which Justices use ghosts as clerks is largely unknown.” FRANK, *supra* note 44, at 117. However, he does comment on one Justice who was “said to do all his writing with his hands in his pockets.” *Id.*

⁴⁷Despite centuries of criticism, the Association of American Law Schools did not list “legal writing” as a field of instruction until 1947. Kathleen M. Carrick & Donald J. Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, 30 N.Y.L. SCH. L. REV. 645, 647 (1985). Real growth in the publication of legal writing texts did not start until 1970. *Id.*

⁴⁸Barbara J. Cox & Mary Barnard Ray, *Getting Dorothy Out of Kansas: The Importance of an Advanced Component to Legal Writing Programs*, 40 J. LEGAL EDUC. 351 (1990); Jill A. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 J. LEGAL WRITING INST. 123, 128 (1991).

⁴⁹Patricia M. Wald, *Commencement Address 1982*, 32 CATH. U. L. REV. 1, 7 (1982-83).

albeit outdated, historical origins.⁵⁰ Professor Mellinkoff has thoroughly discredited the position that legal language is certain.⁵¹ Nevertheless, articles continue to advance the position that use of legalese ensures certainty of result.⁵² Today, however, this position has the reek of heresy, rather than the bouquet of doctrine.

Others argue that writing obscurely is in the attorney's economic interest. By writing in a manner indecipherable to laymen, the attorney can justify high fees.⁵³ If the attorney were to write clearly, the layman might believe that he could have done the same himself.⁵⁴ Pursuit of money is not the only reason some lawyers write cryptically. They also may seek power.⁵⁵ Lawyers can achieve a sense of power by using language that separates them from the rest of society. Thus, even government employees can "benefit" from the use of legalese.

These economic arguments are as old as the complaints about the writing of lawyers.⁵⁶ At one time, they may have had some validity.⁵⁷ Nevertheless, I believe the same factors that contribute to poor writing today were at play then. The principal factor is precedent. Our legal system evolved from one in which Latin first predom-

"Courts once required very precise pleadings. The law had a maxim: "He who fails in a syllable fails in his whole cause." See MELLINKOFF, *supra* note 33, at 183.

⁵¹*Id.* David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423 (1983-84). See also Felsenfeld, *supra* note 23, at 412-14; Benson, *supra* note 26, at 561-62. All note that few words actually have precise meanings. One need only scan *Black's Law Dictionary* or *West's Words and Phrases* to see that most legalese is imprecise. Additionally, those words that have achieved a degree of precision in a particular jurisdiction likely have not achieved that degree of precision in adjoining jurisdictions.

⁵²See, e.g., Walter P. Armstrong, Jr., *In Defense of Legalese*, 3 SCRIBES J. LEGAL WRITING 33 (1992) [hereinafter Armstrong, *In Defense of Legalese*]; Walter P. Armstrong, Jr., *In Defense of Legalese—Once More*, 3 SCRIBES J. LEGAL WRITING 41 (1992) [hereinafter Armstrong, *Once More*].

⁵³See, e.g., Stark, *supra* note 13, at 1389; Gopen, *supra* note 13, at 345; Donald H. Layh, *Plain English: Increasing the Power of our Writing*, 56 SASK. L. REV. 1, 7 (1992). Professor Gopen also remarks that the average lawyer's workload may preclude devoting sufficient time to writing and that lawyers may be uncomfortable with billing their clients for a better written product. Gopen, *supra* note 13, at 341.

⁵⁴Stark, *supra* note 13, at 1389; Gopen, *supra* note 13, at 344; Layh, *supra* note 53, at 7.

⁵⁵Benson, *supra* note 26, at 529 (remarking that "[a]nthropologists have observed that formal language functions as a 'form of power for the powerful'").

⁵⁶Jeremy Bentham remarked that "[l]awyers' cant, besides serving them as cover and as a bond of union, serves them as an instrument, an iron crow or a pick-lock key, for collecting plunder in cases in which it otherwise could not be collected . . ." MELLINKOFF, *supra* note 33, at 262.

⁵⁷In England, lawyers and clerks were once paid according to the length of their documents. *Id.* at 186-92. This system of payment was abolished in 1852. 9 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 362, 364 (photo. reprint 1960) (1926). Although one might suppose that the current system of payment—by the hour—would still serve as an incentive to produce lengthy writings, it may have just the opposite effect. That is, lawyers may be so concerned about what they bill that they are unwilling to devote sufficient time to writing (to include revising). See Gopen, *supra*

inated, then came French, and finally, English.⁵⁸ Each evolution retained remnants of the old. Lawyers, being cautious creatures, were unwilling to completely discard the old and replace it with the new. The remnants became memorialized in statutes and forms and have been passed to each succeeding generation of lawyers.

Reliance on precedent has not enhanced the reputation of the legal profession. Society does not like the way attorneys write. Society condemns us for our writing style. Improving our writing should improve our image. Additionally, writing clearly, instead of “legally,” would increase, not diminish client satisfaction which, in turn, should increase, not diminish, a lawyer’s economic well-being.⁵⁹

V. What is the Purpose of Writing?

Having established the importance of good writing and the reasons that have led the legal profession to write poorly, I will now turn to the purposes of writing. Although many attorneys believe that “legal writing” is somehow unique, this section will demonstrate that good writing in any endeavor shares a common purpose.

Writing may have one of four purposes: narration, description, exposition, and argumentation.⁶⁰ When lawyers write, they write for one of these purposes.⁶¹ Whether narrating a sequence of events in a stipulation of fact, describing a piece of land for a deed, setting forth a legal principle in a law review article, or arguing a client’s position in an appellate brief, lawyers are engaging in exactly the same process as any other writer. Because lawyers are writing for the same purposes as other writers,⁶² they should adhere to the same rules of writing applicable to other writers. Legal writing texts draw on the rules common to basic English composition (as does the Army Writing Style).

note 13, at 341. Richard Hyland dismisses the economic theory entirely. He writes: “The problem is that lawyers cannot write clearly unless . . . they understand the structure of the law.” Hyland, *supra* note 11, at 621.

⁵⁸See Layh, *supra* note 53, at 2–4; MELLINKOFF, *supra* note 33, at 36–282.

⁵⁹See generally Layh, *supra* note 53, at 10–11.

⁶⁰GLENN LEGGETT ET AL., PRENTICE HALL—HANDBOOK FOR WRITERS 352 (11th ed. 1991). Almost every English composition text gives similar purposes. For example, another lists narrative writing, expository writing, descriptive writing, and persuasive writing. JOHN E. WARRINER, ENGLISH COMPOSITION AND GRAMMAR 4 (1988).

⁶¹Professor Wright reduces the purposes to two. “The purpose of our writing is to explain and persuade.” Charles Alan Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455, 1457 (1980).

⁶²Specialized formats such as pleadings, contracts, answers, motions, or briefs are merely the form we use to express our purpose. “Legal writing is a misnomer. Every rhetorical problem that faces lawyers faces other professionals as well” Gopen, *supra* note 13, at 334.

Recognizing that good writing is the same regardless of context, many law schools, commentators,⁶³ and legislatures are placing greater emphasis on the importance of clear writing. More schools have created second and third year writing electives.⁶⁴ Some have required these courses.⁶⁵ Two journals are devoted to improving the writing of lawyers.⁶⁶ The plain-English movement has been advancing both in the United States and abroad.⁶⁷ Thus, while the criteria applicable to good legal writing are old, the response of the legal profession is new. Much of the profession is working toward improving the writing of attorneys. The goal is for attorneys to write not in the ponderous, lifeless style that has been a hallmark of the profession for centuries, but instead to write in the clear, vigorous style that is common to all good writing.

VI. What Does the Army Writing Style Have to Say to Army Lawyers?

Good Army writing is concise, organized, and right to the point.⁶⁸

The Army Writing Style was created to make members of the

⁶³Of the 409 articles published on legal writing, 50.6% have been published since 1980. George D. Gopen & Kary D. Smout, *Legal Writing: A Bibliography*, 1 J. LEGAL WRITING INST. 93 (1991).

⁶⁴The Legal Writing Institute surveyed the 163 members of the Association of American Law Schools. Of the 130 schools that responded, 60% had upper level electives. Ramsfield, *supra* note 48, at 127, 129.

⁶⁵Seventeen schools who responded to the Legal Writing Institute Survey had second or third year required courses in legal research and writing. *Id.* at 129. The Judge Advocate General's School, United States Army, has had a comprehensive communications program since 1976. *See supra* note 8 and accompanying text. Some aspects of this program are similar to recent trends in civilian law schools that require writing projects in regular classes (the "writing across the curriculum" movement). For a discussion of this movement, see Philip C. Kissam, *Seminar Papers*, 40 J. LEGAL EDUC. 339, 340 (1990); Kissam, *supra* note 13, at 40; Simon, *supra* note 9, at 619.

⁶⁶*See* THE SCRIBES JOURNAL OF LEGAL WRITING, vol. 1 (1990); THE JOURNAL OF THE LEGAL WRITING INSTITUTE, vol. 1 (1991).

⁶⁷In 1977, Minnesota enacted the first statute that required insurance contracts to be written in plain English. Gopen, *supra* note 13, at 347. In the mid-1970s, the consumer movement led several corporations to issue documents written in plain English. The plain English movement spread as several state legislatures imposed such requirements and the federal government imposed plain English requirements via numerous consumer statutes. For a time, federal regulations were even required to be written in plain English. Several bar associations have endorsed the movement. *See* Kimble, *supra* note 26, at 1-7. The plain English movement is not without critics. For example, Walter P. Armstrong, Jr. argues that lawyers should ignore criticisms aimed at excessively long sentences and at use of legal jargon when such writing is aimed at ensuring the validity of a document. Armstrong, *In Defense of Legalese*, *supra* note 52, at 33. Professor Mellinkoff refuted such apologies for legalese with his book *The Language of the Law*. MELLINKOFF, *supra* note 33.

⁶⁸AR 25-50, *supra* note 3, para. 1-48b.

Army better writers. The Army Writing Style makes no distinction between soldiers assigned to combat arms units, combat support units, or combat service support units. Instead it states that “[t]he goal of all Army correspondence is effective communication,”⁶⁹ and it provides guidance on how to achieve this goal. An effective writing is one that “transmits a clear message in a single, rapid reading.”⁷⁰

This goal is equally applicable to judge **advocates**.⁷¹ The writings of most judge advocates do not “transmit a clear message in a single, rapid **reading**.”⁷² This does a disservice to our clients. By adhering to the Army writing style judge advocates will be better able to produce writings that are “concise, organized, and right to the point.”⁷³

Writing that is concise, organized, and right to the point has always been recognized **as** the best writing. In 322 B.C. Aristotle remarked: “style to be good must be clear . . .”⁷⁴ Legalistic or bureaucratic writing is neither clear nor to the point. With legalistic or bureaucratic writing the reader spends too much time searching for the meaning rather than understanding the message. Although it may look impressive, it often fails to clearly convey the author’s **message**.⁷⁵ As judge advocates, we will better meet the needs of the Army and our clients if we follow the Army Writing Style.

VII. Achieving the Standards

To produce a writing that “transmits a clear message in a single, rapid reading” you must first understand your subject.⁷⁶ You cannot write well if you do not understand what you are writing about.⁷⁷

⁶⁹*Id.* para. 1-47a.

⁷⁰*Id.* para. 1-48a.

⁷¹**Adherence** to the Army writing style is mandatory. *Id.* para. 1-47b.

⁷²*Id.* para. 1-48a.

⁷³*Id.* para. 1-48b.

⁷⁴**ARISTOTLE’S RHETORIC AND POETICS 167** (W. Rhys Roberts trans., Modern Library 1954) [hereinafter **ARISTOTLE’S RHETORIC**].

⁷⁵*See supra* note 37 and accompanying text. In 1824 Walter Savage Landor remarked, “Clear writers, like fountains, do not seem so deep **as** they are: the turbid look the most profound.” **III WALTER SAVAGE LANDOR, IMAGINARY CONVERSATIONS 30** (Boston, Roberts Bros. 1882) (1828).

⁷⁶Albeit in a slightly different context, Professor Hyland remarked “lawyers cannot write clearly unless they understand the structure of the law.” Hyland, *supra* note 11, at 621.

⁷⁷**Professor** Weihofen wrote “[t]o write clearly you must . . . have thought about it, perceived the relation of one decision, rule, or fact-situation to another, decided which one or two are primary, and worked out a logical plan of presentation.

You must devote time to understanding the problem and its solution, which may involve reading Army regulations, conducting WestLaw, LEXIS, or Flite searches, or reviewing your office files. Whatever method of research you select, you should not begin to write until you understand your subject.

Once you understand your subject, you must consider why you are writing—to narrate, to describe, to exposit, or to argue.⁷⁸ The purpose of your writing will dictate its nature. Finally, you must understand your audience; consider who you are writing for and what they need to know.⁷⁹ Whether you are writing a staff action, a newspaper article, or a thesis at TJAGSA, you always must ask who will read your writing, how much do they know about the subject, and how much must you tell them about the subject.

Only after you have mastered your subject, considered why you are writing, and determined who your audience is, should you begin to write. You must break free from the tethers of precedent and strive to write concisely and clearly. The Army Writing Style will help you to do that.

VIII. Organize Your Work

The last thing one discovers in composing a work is what to put first.
Blaise Pascal⁸⁰

To make our writings “right to the point,”⁸¹ the Army Writing Style directs us to “begin with the main point.”⁸² Authors of texts and articles on legal writing provide similar guidance.⁸³ All urge the

WEIHOFFEN, *supra* note 2, at 135. Similarly, Professor Gopen commented “good writing . . . cannot exist in the absence of good thought.” Gopen, *supra* note 15, at 19. *See also* Layh, *supra* note 53, at 9 (“Clarity of language requires clarity of thought.”).

⁷⁸*See supra* notes 60–62 and accompanying text. *See also* Layh, *supra* note 53, at 12 (remarking that the audience determines the purpose of our writing).

⁷⁹GINNY FIELD, *EFFECTIVE WRITING WORKBOOK* 6–7 (Undated **FBI Academy Workbook**); Layh, *supra* note 53, at 12; WEIHOFFEN, *supra* note 2, at 6. (“It is nothing less than foolish for a lawyer to fail to keep clearly the mental picture of the man whom he is addressing, and to measure every statement, every word he writes, with the test, what effect will this have on *him?*”)

⁸⁰BLAISE PASCAL, *PENSEES* 347 (A.J. Krailsheimer trans., Penguin Classics 1967).

⁸¹AR 25–50, *supra* note 3, para. 1–48b.

⁸²*Id.* para. 1–49a; DA PAM 600–67, *supra* note 1, para. 3–2a(1).

⁸³*See generally* Albert M. Joseph, *The High Cost of the Great American Windbag*, *ARMY LAW.*, May 1975, at 1, 3 (Mr. Joseph’s article, which had been previously published in the *Government Executive*, appears to have been the basis for The Army Writing Style); Samuelson, *supra* note 36, at 152 (“Quite as important as having a point is getting to it with reasonable dispatch.”); Kissam, *supra* note 65, at 345 (“(A) strong introduction . . . [will include] a statement of the author’s major conclusions, findings, or thesis.”).

writer to begin with the main point and then use the rest of the paper to explain how she reached it.⁸⁴

The main point is the writer's conclusion or recommendation. Ideally, the writer will determine her main point before she begins to write. Sometimes the writer may not be sure of her main point until she has completed her analysis and written her first draft. This is particularly true of long papers that require extensive research or that involve complex topics. All too often these papers reflect the writer's voyage of discovery.⁸⁵ As she wrote, she developed her conclusion. Although the end product may reflect a logical development, if it does not start with the main point it can be difficult to follow. Thus, extensive revision may be necessary to begin with the main point. Because most writers use word processors, this should not be too difficult.

Sometimes writers intentionally place their main point last. They want their analysis to lead the reader to their conclusion.⁸⁶ I do not like this approach.⁸⁷ I have read numerous theses that ramble through sixty pages of background material and then devote only ten or fifteen pages to the thesis. In most cases the thesis would have been easier to follow and more scholarly had the writer placed these ten or fifteen pages up front and devoted the remainder of the thesis to their defense.⁸⁸

For shorter papers such as staff actions, the reader may only be

⁸⁴Writers of mysteries and writers of letters conveying bad news—such as a rejection letter from an employer—may delay their main point until the end of their writing. Although this is appropriate for writings of these genre, it is not appropriate for writing on legal subjects.

⁸⁵See Williams, *Maturing of Legal Writers*, *supra* note 25, at 20; WILLIAMS, STYLE, *supra* note 25, at 107. "This practice in drafting illustrates the truth that the best form of education is to put one's own words on paper." Arthur L. Goodhart, *Lincoln and the Law*, 50 A.B.A. J. 433, 436 (1964). Cf. MAUGHAM, *supra* note 40, at 31 ("Another form of obscurity is that the writer is not quite sure of his meaning. This is due largely to the fact that many writers think, not before, but as they write. The pen originates the thought.")

⁸⁶See WILLIAMS, STYLE, *supra* note 25, at 106. Professor Williams remarks, however, "Unless you have good reason to withhold your main points until the end, get them out early. . . ." *Id.* at 108.

⁸⁷Other authors have reached similar conclusions. See, e.g., Samuelson, *supra* note 36, at 152 (beginning with the main point "means that you should start your analysis of the thesis on page two or three, not on page twenty or thirty").

⁸⁸Obviously a thesis requires more than a simple bottom-line up-front approach. A thesis requires a strong introduction which should include: (1) a statement of the author's purpose, main point, or focus; (2) a statement of the different sections of the paper and relationships between them . . . ; and (3) a statement of the author's major conclusions, findings, or thesis." Kissam, *supra* note 65, at 345. See also Samuelson, *supra* note 36, at 157 ("The introduction . . . is like the overture to an opera. It should introduce the audience to and prepare it for the major themes that will recur throughout the work.").

concerned with the main point. Can she do what she has sought advice for or not? Once she gets the answer she may not be concerned with the analysis. By starting with the main point, you have saved the reader's time.

Once you have begun your paper with your main point, you must logically develop your analysis.⁸⁹ For staff work, the Army Writing Style mandates the structure of your analysis. You must start with "a short, clear purpose statement," follow it with the "recommendation, conclusion, or more important information," and "clearly separate each section" of your paper.⁹⁰ Following this format helps the writer to focus on the critical points of his writing and allows him to better achieve the standards required by the Army Writing Style. It also helps the reader because the analysis is developed through a standardized format with which he is familiar.

Before you begin to develop your analysis, prepare a logical outline of your response.⁹¹ For a short staff action you may be able to outline mentally. For longer papers, prepare a written outline which should break your paper into discrete sections. As you write each section, you must use "short paragraph headings or section titles."⁹² Each section heading should tell the reader something about what is to follow.⁹³ General headings such as "facts" or "discussion" do not provide this information.⁹⁴ Developing your paper this way will enable you to write in a manner that is "concise, organized, and right to the point."

IX. Write Concisely

Let thy words befew. ECCLESIASTES 5:2

Long sentences and long paragraphs are difficult to follow.⁹⁵ The Army Writing Style directs that your "average . . . sentence

⁸⁹For an excellent discussion of how to develop the analysis for longer papers, such as a thesis, see Samuelson, *supra* note 36.

⁹⁰AR 25-50, *supra* note 3, para. 1-51c.

⁹¹Most writing texts contain sections on organization of ideas and outlining. See, e.g., GLENN LEGGETT ET AL., *supra* note 60, at 354-65.

⁹²AR 25-50, *supra* note 3, para. 1-51c(3).

⁹³Samuelson, *supra* note 36, at 158.

⁹⁴*Id.*

⁹⁵Long papers also can be hard to follow. Army *Regulation 25-50* directs us to limit most staff actions and letters to one page. AR 25-50, *supra* note 3, para. 1-50b(7). Strive to communicate only the most essential information. If you need a more detailed analysis for your files, put it in a "Note for Retained Copy" or in a "Memorandum for Record." See *id.* para. 2-11.

should be about fifteen words.”⁹⁶ The word “average” gives you some room for discretion. You need not limit every sentence to fifteen words; some can be longer, some can be shorter. On balance, however, to best enable your writing to “transmit a clear message in a single, rapid reading,”⁹⁷ you should keep your average sentence to about fifteen words.

By the same token, you should write in short paragraphs. A new paragraph signals the reader that you are about to develop a new point. It helps the reader follow your analysis. To do this effectively, most paragraphs should be no longer than “one inch deep”⁹⁸ (single spaced). As with the rule on sentence length, some can be longer, but to communicate most effectively keep most of your paragraphs within the one inch perimeter.⁹⁹

Perhaps even more distracting to the reader than long sentences and long paragraphs are long words. Even when the reader is familiar with the longer word, if a simpler word is available you can express yourself more effectively by using it. Short, familiar words communicate more effectively than long words. The Army Writing Style directs us to “try to not use more than fifteen percent over two syllables long.”¹⁰⁰ As Oliver Wendall Holmes remarked, “I would

⁹⁶*Id.* para. 1-50b(2). Compare with SMITH, *supra* note 13, at 7 (keep most sentences under 20 words) and RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 31 (2d ed. 1985)(average sentence length should be below 25 words).

⁹⁷AR 25-50, *supra* note 3, para. 1-48a.

⁹⁸*Id.* para. 1-50b(3).

⁹⁹These rules on sentence length and paragraph length are equally applicable to non-Army writing; although, in scholarly writing, having your average paragraph length longer than one inch may often be necessary and will generally pose no problem to understanding. Nevertheless, I have read numerous theses that have paragraphs that run for several pages (the longest being four pages). In every case, the length demonstrated that the writer had lost his focus.

¹⁰⁰AR 25-50, *supra* note 3, para. 1-50b(1). See also WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 21-23, 76-78 (3d ed. 1979) [hereinafter STRUNK & WHITE]; WYDICK, *supra* note 96, at 52-53; TEXAS LAW REVIEW ASS'N, MANUAL ON STYLE 19 (6th ed. 1990) [hereinafter TEXAS LAW REVIEW ASS'N]; GLENN LEGGETT ET AL., *supra* note 60, at 328; Smith, *supra* note 13, at 5-7, 14-19, 27 (all urge writers to use short, everyday words).

Like most of the points discussed in this paper, this advice is not new. Aristotle wrote: “Clearness is secured by using the words (nouns and verbs alike) that are current and ordinary.” ARISTOTLE’S RHETORIC, *supra* note 74, at 167. Similarly, Ben Jonson wrote:

Words borrowed of antiquity do lend a kind of majesty to style and are not without their delight sometimes, for they have the authority of years and out of their intermission do win to themselves a kind of grace like newness; but the eldest of the present and the newest of the past language is best. For what was the ancient language which some men do dote upon, but the ancient custom?

JONSON, *supra* note 29, at 43. Many lawyers use old legal terms simply to conform with custom.

never use a long word where a short one would answer the purpose."¹⁰¹

Similarly, jargon and acronyms diminish the clarity of your writing. The Army Writing Style directs us to avoid both.¹⁰² Jargon is the language that is unique to a particular trade—such as the legal profession or the Army. Use jargon only when you are sure your audience will understand it.

You generally should write out an acronym the first time you use it.¹⁰³ You may use certain standardized Army abbreviations when you write to a military audience without first expressing the acronym fully.¹⁰⁴ Before doing so, however, you must ensure that the reader will understand it.¹⁰⁵ You also must re-express acronyms that you have not used for a number of pages. If you don't re-express your acronyms and your reader is not an expert in the field, the reader must peruse your writing to find the acronym's meaning or simply will gloss over your point. In either case you have not communicated effectively.¹⁰⁶

Will short sentences, paragraphs, and words make your writing appear too simplistic? Not at all. Turgid, pedantic prose does not impress, it annoys. Your reader will be more impressed with your writing if he can understand it.¹⁰⁷ Your goal must be to communicate

¹⁰¹H.L. MENCKEN, A NEW DICTIONARY OF QUOTATIONS OF HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 1156 (1957).

¹⁰²Avoid jargon: AR 25-50, *supra* note 3, para. 1-50b(4). *See also* WYDICK, *supra* note 96, at 53; GLENN LEGGETT ET AL., *supra* note 60, at 298-99, 305-07; Smith, *supra* note 13, at 174-75.

Spell out acronyms: AR 25-50, *supra* note 3, para. 1-22. *See also* DEP'T OF ARMY, REG. 310-50, AUTHORIZED ABBREVIATIONS, BREVITY CODES, AND ACRONYMS (15 NOV. 1985) [hereinafter AR 310-50].

¹⁰³AR 25-50, *supra* note 3, para. 1-22.

¹⁰⁴AR 310-50, *supra* note 102.

¹⁰⁵*Id.* para. 1-5c(3).

¹⁰⁶For example, consider reading a thesis with this paragraph at page 50:

Thus, as 1990 concluded, OVT at JACADS was finally underway. The German retrograde and PBA's BZ disposal were completed. Construction of the disposal facility at TEAD was on schedule. Other sites strived to meet NEPA, RCRA, and CAA requirements, and Congress waited to see whether development of cryofracture and/or possible "future use" proposals might render any program cost savings. Another productive year, but NEPA opposition remained poised to disrupt the programs at APG, LBAD, and NAAP.

The acronyms were defined at:

OVT—Operational Verification Test, p. 49; JACADS—Johnson Atoll Chemical Agent Disposal System, p. 48; APG—Aberdeen Proving Ground, p. 31; LBAD—Lexington-Bluegrass Army Depot, p. 29; PBA—Pine Bluff Arsenal, p. 26; BZ—a psychochemical agent, p. 26; NEPA—National Environmental Policy Act, p. 24; TEAD—Toeel Army Depot, pp. 21-22; CAA—Clean Air Act, p. 4; RCRA—Resource Conservation and Recovery Act, p. 4.

¹⁰⁷Aristotle noted: "We can now see that a writer must disguise his art and give

a complicated subject in a straightforward manner.¹⁰⁸ You truly will impress your readers if your writing “transmits a clear message in a single, rapid reading.”¹⁰⁹

X. Write Clearly

Passive voice, expletive constructions, and avoidance of personal pronouns are all hallmarks of legalistic/bureaucratic writing. They make for ponderous, lifeless writing. The Army Writing Style directs us to use the active voice, to avoid expletive constructions, and to use personal pronouns. Like a carpenter who strips away the layers of paint from an old cabinet and finds beautiful wood underneath, following these directives will strip away the legalistic attributes of your writing and leave prose that is clear and direct.

A. Use Active Voice¹¹⁰

“Mistakes were made” is an expression that is in vogue with

the impression of speaking naturally and not artificially. Naturalness is persuasive, artificiality is the contrary. . . .’ ARISTOTLE’S RHETORIC, *supra* note 74, at 167.

¹⁰⁸*See, e.g.*, Irving Younger, *In Praise of Simplicity*, 1984 N.Z. L.J. 277 (1984). He remarks: “It has long been understood . . . that simplicity marks the master.” *Id.* As an example he states: “On the ceiling of the Sistine Chapel, Michelangelo painted a picture of God transmitting the spark of life to Adam and fashioned an image of awesome power. What is it? Simply God’s finger touching Adam’s. A six-year old can understand it. Only Michelangelo could create it.” *Id.*

Obviously, simplicity does not mean simple English. While most writers cannot expect to transmit their message with the elegance of Michelangelo, they can aspire to write clearly and directly. *See also* Dr. Margaret McLaren, *The Case for plain legal English in New Zealand*, 1992 N.Z. L.J. 167 (1992) (“Plain English is, of course, not simple English but an attempt to write in order to be understood.”); Kimble, *supra* note 26, at 19 (“We advocate writing that is simple and direct as the circumstances allow. Not simplistic or simple-minded. Not Dick and Jane. Not street talk or slang. But the style you would want to use if your readers were sitting across the table and you wanted to make sure they understood.”); Wright, *supra* note 61, at 1458 (He comments on a time when Fred Rodell asked a professor to read a section of one of the professor’s articles to his class. “[He] obliged, and read a paragraph filled with the jargon and convolutions that mark most legal writing. When he had finished, Fred asked him what the paragraph meant. [He] sputtered for a moment and then gave a brief and clear explanation of the proposition he had stated at much greater length in his article. ‘Why didn’t you write it that way?’ Fred asked. The point was made . . .”).

Professor White said it best:

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all of his sentences short, or that he avoid all detail and treat his subject only in outline, but that every word tell.

STRUNK & WHITE, *supra* note 100, at 23.

¹⁰⁹AR 25-507, *supra* note 3, para. 1-48a.

¹¹⁰*Id.* para. 1-49e. *See also* STRUNK & WHITE, *supra* note 100, at 18-19; WYDICK, *supra* note 96, at 27-30; GLENN LEGGETT ET AL., *supra* note 60, at 57-58, 100-101;

politicians. It seems to admit something but does not accept complete responsibility. By whom were the mistakes made is the unanswered question. It is much more ambiguous than "I made a mistake." Ambiguity is a common problem with sentences written in the passive voice. Additionally, an active sentence generally is shorter (although not in this example) than a sentence written in the passive voice.

The most common advice given by writers of the legal writing texts is "use active voice."¹¹¹ A sentence written in the active voice corresponds with one of the most basic sentence patterns (subject-verb-direct object) with which we are most familiar and find easiest to follow. A sentence written in the passive voice reverses this basic order and can be harder to follow. For example, in the sentence, "CPT Jones passed the exam," "CPT Jones" is the subject, "passed" is the verb, and "the exam" is the direct object of the verb. Written as a passive sentence it becomes, "The exam was passed by CPT Jones." The order is inverted (object-verb-subject) and the sentence is now two words longer. Although the sentence is not ambiguous, it lacks the crispness of the active sentence. In a long paper, numerous passive sentences make for a tedious read.

One way to ensure that you are writing in the active voice is to review your paper with a view toward ensuring that your subject always comes before your verb.¹¹² An easier way to do a quick review of your paper for passive voice is to look for any form of the verb to *be* (am, is, are, was, were, been, being) and see if it is followed by a past participle of a main verb (the main verb will usually end in *ed* or *en*).¹¹³ Using the previous example, "The exam was passed by Captain Jones," look first to see if the sentence contains any form of the verb to *be*. This sentence does (the word "was"). Look next to see if "was" is followed by a past participle of a main verb, which, in this case, it is (the word "passed"). Correct it by moving the subject in front of the verb (in some cases you must first identify the subject). In this case you would rewrite the sentence **as**: "CPT Jones passed the exam."

You need not write every sentence in the active voice. Sometimes the passive voice is preferable.¹¹⁴ For example, when the per-

TEXAS LAW REVIEW ASS'N, *supra* note 100, at 15-16; FIELD, *supra* note 79, ch. 6; SMITH, *supra* note 13, at 20-21; GOPEN, *supra* note 15, at 27-31; WEIHOFEN, *supra* note 2, at 85-86, 97, 111 (all urge writers to use the active voice).

¹¹¹ See, e.g., *supra* note 110.

¹¹² Another author has suggested using the words actor, action, acted on instead of subject, verb, object. RELD, *supra* note 79, at 13.

¹¹³ AR 25-50, *supra* note 3, para. 1-49c.

¹¹⁴ See also SMITH, *supra* note 13, at 21; GOPEN, *supra* note 15, at 30-31; WYDICK, *supra* note 96, at 29; WILLIAMS, STYLE, *supra* note 25, at 37-39, 54-55; WEIHOFEN, *supra* note 2, at 102, 130.

son who performed the action is unidentified or insignificant, the passive is appropriate. The sentence, "My M-16 was stolen" is **as** good or better than the sentence, "A thief stole my M-16." You also may use the passive to de-emphasize the subject of the sentence ("Mistakes were made.") or when the object of the sentence is more important than the person who performed the action ("The drowning boy was saved."). Finally, in litigation, you may choose to express your opponent's argument in passive voice.¹¹⁵

B. Delete The Expletives

We often start sentences with the words "it," or "there." When we follow "it" or "there" with any form of the verb "to be" this is known **as** an expletive. For those of you who can recall the Watergate investigation, whenever transcripts of President Nixon's tape-recorded telephone conversations were published, they frequently noted "expletive deleted." Although "it is," "it was," "there is," "there are," "there ~~was,~~" and "there were" are different types of expletive, the same general rule applies—delete the expletive.

The Army Writing Style directs us to avoid sentences that begin with expletives.¹¹⁶ Expletives usually amount to no more than surplus words. They also can lead you to use passive voice. You can generally delete an expletive and not affect meaning.¹¹⁷ For example, "There are five sex discrimination cases pending before the 5th Circuit," could be rewritten **as** "Five sex discrimination cases are pending before the 5th Circuit" and the meaning would not be affected.

C. Use personal pronouns

The Army Writing Style directs us to "[u]se I, you, and we **as** subjects of sentences instead of this office, this headquarters, all individuals, and so forth."¹¹⁸ Starting a sentence with "I," "you," or "we" avoids the use of passive voice and expletives and contributes to clear writing.¹¹⁹

¹¹⁵SMITH, *supra* note 13, at 21. Using passive voice allows you to accurately iterate your opponent's contentions but also drain them of their vigor. Id.

¹¹⁶AR 25-50, *supra* note 3, para. 1-50b. See also WYDICK, *supra* note 96, at 16-17; GLENN LEGGETT ET AL., *supra* note 60, at 9-10, 265-66, 324; TEXAS LAW REVIEW ASS'N, *supra* note 100, at 35; WEIHOFEN, *supra* note 2, at 45 (all urge writers to avoid starting Sentences with expletives).

¹¹⁷"It is" is proper when "it" Serves **as** a pronoun for something written earlier. For example, "I saw your new car. It is lovely." See, e.g., WYDICK, *supra* note 96, at 16-17. Occasionally writers may wish to **use** expletives "to change the emphasis of a sentence," "to set-up a passive construction," or "to change the pace of a sentence." See, e.g., GLENN LEGGETT ET AL., *supra* note 60, at 9-10. Expletives do not, however, generally enhance legal writing.

¹¹⁸AR 25-50, *supra* note 3, para. 1-50b(6).

¹¹⁹Although personal pronouns are rarely used in scholarly writing, for the

Starting a sentence with “I” or “we” also admits responsibility for what is written. An introduction such as “this office has reviewed,” appears to mask the writer in anonymity. I am confident that any commander who relied on such advice to her detriment would pierce this veil of anonymity with relative ease.

XI. Edit and Rewrite

I have made this [letter] longer than usual, only because I have not had the leisure to make it shorter.

Blaise Pascal¹²⁰

[T]here is no such thing as good writing. There is only good rewriting.

Louis D. Brandeis¹²¹

It takes time to write properly. To achieve the standards advanced by the Army Writing Style you must revise and rewrite your work. You cannot be content with issuing your first draft.

For many Army writers, habits that we have developed throughout our legal and military careers will take time to break. Using passive voice, expletive constructions, and avoiding use of personal pronouns are ingrained. These bad habits make for poor writing.

As a first step in reviewing your work, you should use the spell-check feature on your word processor. You must then read your work. A spell-checker, while useful, cannot tell you when you have used the wrong, albeit correctly spelled word—such as form, when you meant to use from. A spell-checker also cannot detect errors in grammar, mechanics, or usage.¹²²

Many word processing programs have the capability to check grammar. These programs will spot many of the flaws the Army Writing Style directs you to avoid. You also may find it useful to review your writing using a checklist. I have appended a checklist to

same reasons they enhance “Army Writing” they also would enhance scholarly writing. Several scholars have decried the avoidance of personal pronouns by writers of legal prose. See Rodell, *supra* note 24, at 39; Stark, *supra* note 13, at 1392; Nowak, *supra* note 31, at 318. *But see* WEIHOFEN, *supra* note 2, at 285 (“I,” “you,” and “me” are rarely appropriate for briefs, but “we” or “us” is often acceptable).

¹²⁰2 BLAISE PASCAL, *LETTRES PROVINCIALES* 114 (Paris, Fain 1830) (from a post-script to the 16th of Pascal’s “Provincial Letters,” published on December 4, 1656).

¹²¹EUGENE C. GERHART, *QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS* 462 (1988).

¹²²Army writing must “[u]se correct spelling, grammar, and usage.” AR 25-50, *supra* note 3, para. 1-50b(5).

this article which highlights the key elements of the Army Writing Style. If you use it to check your work you may soon find that you can break free from the bad habits you have developed over a lifetime of writing and begin to write in a manner that is “concise, organized, and right to the point.”¹²³

XII. Conclusion

Begin at the beginning, the King said, very gravely, and go on till you come to the end: then stop.

Lewis Carroll¹²⁴

Lawyers must write well to be effective communicators. Unfortunately, most lawyers do not write well. Although many could once write simply and clearly,¹²⁵ at some point they strayed from the path of clear writing and started down the road to ruin. For most attorneys, this detour started in law school. The legal method, through its reliance on precedent, caused aspiring attorneys to look to what other attorneys had written to guide them in their early writing endeavors. Because most of this precedent was written poorly, the student, too, adopted a writing style that does not communicate effectively. The reliance on precedent continues after law school and, for military lawyers, is exacerbated by reliance on bureaucratic writing.

The Army developed the Army Writing Style to help Army writers break free from these bad habits. It was not designed to enable you to write the “great American novel;” it was designed to help you to write simply and clearly. Closely examining and following its principles is a good first step toward improving your writing. You may then move on to develop a style that also reflects a touch of eloquence.¹²⁶ After all, “Learning to write well is a lifelong endeavor.”¹²⁷

¹²³*Id.* para. 1–48b.

¹²⁴LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 111 (Signet Classics 1960) (1870)

¹²⁵*See, e.g.*, SMITH, *supra* note 13, at x (many lawyers write less effectively than they did at age six).

¹²⁶The Judge Advocate General’s School, United States Army, issues a grammar book and two style manuals to students in the LL.M. program. We hope that students will use these books in conjunction with their writing requirements to further refine their writing. In the 1994–95 academic year, students will keep a portfolio of their written work. Students will review (first on their own, and then with their communications program advisors) each writing requirement to see if it shows improvement from previous submissions. Advanced writing courses at civilian law schools similarly seek to enhance the writing skills of their students. *See, e.g.*, Cox & Ray, *supra* note 48.

¹²⁷DA PAM 600–67, *supru* note 1, Foreword.

APPENDIX

Army Writing Style Checklist

I. Is your paper “concise, organized, and right to the point?” AR 25-50, para. 1-48b.

A. Does it “begin with the main point?” Have you placed the “bottomline’ up front?” *Id.* para. 1-49b.

B. Does your paper reflect good organization? *Id.* para. 1-51c.

1. Does it start with “a short, clear purpose statement?” *Id.*

2. Is this followed by your “recommendation, conclusion, or more important information?” *Id.*

3. Have you “clearly separate[d] each section” of your paper? *Id.*

C. Is your paper concise?

1. Is your average sentence length “about fifteen words?” *Id.* para. 1-50b(2).

2. Are most of your paragraphs “no more than one inch deep?” *Id.* para. 1-50b(3).

3. Have you used “short words.” *Id.* para. 1-50b(1). Have you tried to “not use more than fifteen percent over two syllables long?” *Id.*

11. Does your paper “transmit[] a clear message in a single, rapid reading. . .?” *Id.* para. 1-48a.

A. Have you used the active voice? *Id.* para. 1-49c. To find passive voice, **look** for any form of the verb *to be* [am, is, are, was, were, been, being] and see if it is followed by a past participle of a main verb (the main verb will usually end in *ed* or *en*).

B. Have you avoided the use of jargon or determined that your reader will be familiar with the jargon you are using? *Id.* para. 1-50b(4).

C. Have you spelled out acronyms the first time you used them or determined that your reader will be familiar with the acronyms you are using? *Id.* para. 1-22; AR 310-50, para. 1-5c(3). Have you re-expressed any acronyms that you last used and first spelled many pages previously?

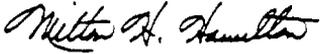
D. Have you used “I, you, and we as subjects instead of: this office, this headquarters, all individuals, and so forth?” AR 25-50, para. 1-50b(8).

E. Have you “avoid[ed] sentences that begin with “It is . . . There is . . . or There are . . . ,?” *Id.* para. 1-50b(8).

By Order of **the Secretary of the Army**:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army

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