



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-447

August 2010

SPECIAL JOINT SERVICE EDITION

Articles

**The Proportionality Balancing Test Revisited:
How Counterinsurgency Changes “Military Advantage”**
Commander Matthew L. Beran, JAGC, USN

**Confidentiality and Consent: Why Promising Parental Nondisclosure to Minors in the
Military Health System Can Be a Risky Proposition**
Major Charles G. Kels, JAGC, USAF

Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act
Lieutenant Commander Brian W. Robinson, JAGC, USCG

Bridging the Gap That Exists for War Crimes of Perfidy
Major Byron D. Greene, JAGC, USAF

The Long Range Acoustic Device: Don’t Call It a Weapon—Them’s Fightin’ Words
Major Joe Schrantz, JAGC, USMC

Book Reviews

CLE News

Current Materials of Interest

Editor, Captain Ronald T. P. Alcalá
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$45.00 each (\$63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at TJAGLCS-Tech-Editor@conus.army.mil.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to TJAGLCS-Tech-Editor@conus.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (19th ed. 2010) and the *Military Citation Guide* (TJAGLCS, 15th ed. 21010). No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil/ArmyLawyer>.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to TJAGLCS-Tech-Editor@conus.army.mil.

Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

New Developments

Center for Law & Military Operations.....	1
---	---

Lore of the Corps

Master of Laws in Military Law—The Story Behind LL.M. Awarded by The Judge Advocate General’s School <i>Fred L. Borch III</i>	2
---	---

Articles

The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage” <i>Commander Matthew L. Beran, JAGC, USN</i>	4
Confidentiality and Consent: Why Promising Parental Nondisclosure to Minors in the Military Health System Can Be a Risky Proposition <i>Major Charles G. Kels, JAGC, USAF</i>	12
Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act <i>Lieutenant Commander Brian W. Robinson, JAGC, USCG</i>	20
Bridging the Gap That Exists for War Crimes of Perfidy <i>Major Byron D. Greene, JAGC, USAF</i>	45
The Long Range Acoustic Device: Don’t Call It a Weapon—Them’s Fightin’ Words <i>Major Joe Schrantz, JAGC, USMC</i>	53

Book Reviews

<i>Warrior King: The Triumph and Betrayal of an American Commander in Iraq</i> Reviewed by <i>Major Jeffrey S. Dietz, JAGC, USA</i>	60
CLE News	64
Current Materials of Interest	78
Individual Paid Subscriptions to <i>The Army Lawyer</i>	Inside Back Cover

New Developments

Center for Law & Military Operations

CLAMO Publishes New *Rule of Law Handbook*¹

The Center for Law and Military Operations (CLAMO) has published the latest *Rule of Law Handbook*, which is now available online from CLAMO's website.² The new *Rule of Law Handbook* is in its fourth edition and has been updated to include the latest information from practitioners in the field and descriptions of recent rule of law projects.

The *Rule of Law Handbook* is designed to serve as an educational tool to assist judge advocates and paralegals involved in the rule of law mission during on-going military operations.³ Written primarily for judge advocates, the handbook is "not intended to serve as U.S. policy or military doctrine for rule of law operations" but should be used as a resource for judge advocates preparing to participate in rule of law development.⁴

The content of the current handbook shares much in common with earlier editions, though some material has been revised and new chapters have been added since the handbook was last published in 2009. The handbook begins by defining "rule of law" and describing key players in the joint, interagency, intergovernmental, and multinational process. The handbook also outlines the legal framework for rule of law and highlights planning and fiscal considerations for rule of law operations. Theater-specific information for Iraq and Afghanistan is discussed in a separate chapter.

Two new sections have been added to the fourth edition. Chapter 9 discusses rule of law metrics and provides sample checklists to help judge advocates formulate their own "tailored set of metrics for the operation at hand."⁵ Chapter 10 explains how practitioners can use Human Terrain Teams to support rule of law initiatives. The discussion of sharia law in chapter 5 has also been substantially revised.

In addition, the handbook includes rule of law narratives provided by recently deployed practitioners. One article offers the British perspective on support to the informal justice sector in Helmand Province, Afghanistan. Another, written by an Air Force judge advocate, discusses the Central Criminal Court of Iraq. An article by a Senior Legal Advisor with the Department of Justice describes the achievements of the Counter-Narcotics Justice Task Force in Afghanistan. Lastly, several Army judge advocates offer their insights on rule of law efforts undertaken at both the brigade and division levels, while judge advocates who served with the Asymmetric Warfare Group and with a Special Forces battalion also relate their experiences.

Judge advocates serve an important role during rule of law operations, and the *Rule of Law Handbook* represents a useful starting point and guide for practitioners engaged in the rule of law mission. As the handbook itself notes, "Even if the *Handbook* only serves as an introductory resource to further Judge Advocates' professional education on the topic, it will have served a vital purpose."⁶

—Captain Ronald T. P. Alcala

¹ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CTR. FOR LAW & MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2010) [hereinafter *ROL HANDBOOK*].

² Publications, CTR. FOR LAW & MILITARY OPERATIONS, <https://www.jagcnet2.army.mil/8525751D00557EFF/0/A86D78669E17E6F9852574DA005E3ADF?opendocument> (follow "Rule of Law Handbook (2010)" hyperlink).

³ *ROL HANDBOOK*, *supra* note 1, at ii.

⁴ *Id.*

⁵ *Id.* at 241.

⁶ *Id.* at iii.

Lore of the Corps

Master of Laws in Military Law The Story Behind the LL.M. Awarded by The Judge Advocate General's School

Fred L. Borch III
Regimental Historian & Archivist

Every year in May, career military officers who have successfully completed the Graduate Course at The Judge Advocate General's School, U.S. Army (TJAGSA),¹ are awarded a Master of Laws (LL.M.) in Military Law. This unique LL.M.—no other law school in the world awards such a degree—from the world's only American Bar Association-accredited military law school has been conferred since 1988. But the story behind that degree—how and why it came to be—is not well known.

In 1951, TJAGSA moved from Fort Myer, Virginia, to the grounds of the University of Virginia (UVA) in Charlottesville. From the outset, the School's first Commandant, then-Colonel (COL) Charles L. "Ted" Decker, understood that TJAGSA's affiliation with UVA meant that the Army's curriculum must achieve the standard of legal education set by the American Bar Association (ABA). As a result of the caliber of its students, its rigorous academic curriculum, and Decker's personal efforts, TJAGSA became the first and only military law school in American history to receive accreditation from the ABA, in February 1955.

A year later, in March 1956, "action was initiated to obtain statutory authority . . . to confer the Master of Laws degree for successful completion of the Advanced Program."² Legislation drafted by the Office of The Judge Advocate General (OTJAG) was sent to Congress in late 1956 but was not enacted.

The Corps, however, did not give up its desire for an LL.M. at TJAGSA, and this explains why, in February 1958, the School sought—and obtained—ABA approval for TJAGSA's 42-week-long Advanced Course as a graduate law program. While the ABA stamp of approval and ABA accreditation of the Advanced Course put it on par with UVA's graduate law program, in fact, the Corps believed that ABA accreditation would enhance its chances of obtaining statutory authority from Congress to grant an LL.M. degree.

Despite lack of progress toward obtaining authority to grant the degree, the JAG Corps did not drop its wish for the LL.M. in the 1960s and 1970s. On the contrary, COL

Kenneth Crawford, who served as Commandant from 1967 to 1970, routinely lobbied his counterparts at UVA's law school for their support for a Masters of Laws degree—but these efforts came to naught. Colonel John Jay Douglass, who followed Crawford as TJAGSA Commandant, tried a different approach. In November 1971, Douglass wrote to Edgar F. Shannon, then serving as UVA's president, and requested that the university work with TJAGSA to create a "program . . . whereby students in the Judge Advocate Officer Advanced Course could earn an advanced degree conferred by the University of Virginia."³ While correspondence from Shannon to Douglass proves that UVA carried out "preliminary discussions" with the JAG Corps on the possibility of a UVA-granted LL.M., nothing happened.

It took another fifteen years before TJAGSA gained the right to award a graduate legal degree. This ultimately successful effort was spearheaded by then Lieutenant Colonel (LTC) David E. Graham, head of TJAGSA's International Law Division—at the urging of the Commandant, COL Paul "Jack" Rice, and The Assistant Judge Advocate General, Major General (MG) William K. Suter.

The first step toward obtaining accreditation for the degree involved winning the support of the Army and the Defense Department for an LL.M. Building on work started in January 1986 by then-LTC Daniel E. Taylor, Graham's predecessor in the International Law Division at TJAGSA, Graham modeled the JAG Corps's bid to obtain an LL.M. on an initiative the Defense Intelligence School (DIS) used to win authority to award a graduate degree in strategic intelligence.⁴ Graham assembled a packet for TJAGSA's LL.M. that included proposed legislation and coordinated his efforts with a variety of interested parties. Then, in November 1986, Graham obtained approval from Mr. Delbert Spurlock, a former Army General Counsel who was then working as the Assistant Secretary of the Army (Manpower and Reserve Affairs). Approval from the Office of the Assistant Secretary of Defense (Military Manpower and Personnel Policy) followed—no doubt helped by the fact that an Army judge advocate, COL Fred K. Green, was assigned to that office at the time.

¹ The Judge Advocate General's School, U.S. Army, became The Judge Advocate General's Legal Center and School (TJAGLCS) in 2003.

² NATHANIEL B. RIEGER, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, REPORT OF THE COMMANDANT, 15 JUNE 1955 – 25 FEBRUARY 1957, at 1-2 (1957).

³ Letter from Edgar F. Shannon, Jr., President, Univ. of Va., to John Jay Douglass, Commandant, The Judge Advocate Gen.'s Sch., U.S. Army (Nov. 26, 1971) (on file with Regimental Historian, The Judge Advocate General's Corps).

⁴ In 1980, DIS had obtained the authority to award a Master of Science in Strategic Intelligence degree. Pub. L. § 96-450, Oct. 14, 1980; 10 U.S.C. § 2161 (2006).

The next step was to gain the Secretary of Education's approval for the degree. United States law requires that any federal agency wishing to obtain degree-granting status must obtain a positive recommendation from the Department of Education before it may forward any proposed legislation to Congress.

On 1 December 1986, COL Rice and U.S. Court of Military Appeals Chief Judge Robinson Everett (representing the ABA) appeared before the Education Department's National Advisory Committee on Accreditation and Institutional Eligibility. They showed a five-minute film about TJAGSA—developed by Graham with assistance from Mr. Dennis L. Mills in TJAGSA's media services branch—and delivered a forty-minute presentation explaining why the School wanted the authority to award an LL.M. In his prepared remarks, Rice emphasized the Army's belief that “the existence of a graduate degree program . . . will prove to be *an invaluable* asset in retaining the *best* qualified and most *highly* motivated individuals as career military attorneys.”⁵ He also stressed that the uniqueness of TJAGSA's curriculum meant “the graduate degree we propose to grant [a Master of Laws in Military Law] cannot be obtained at other non-Federal educational institutions.”

The accreditation review committee voted 15-0 in favor of TJAGSA's LL.M. proposal, and Secretary of Education William J. Bennett concurred on 18 March 1987. The next step was to introduce legislation in both the House and the Senate. On 23 March 1987, Representative Les Aspin introduced H.R. 1748, which contained legislation giving the “Commandant of the Judge Advocate General's School of the Army . . . upon recommendation of the faculty of such school” the power to “confer the degree of master of laws (LL.M.) in military law.” Identical legislation was introduced in the Senate and, on 3 December 1987, Congress enacted Public Law 100-180, giving TJAGSA's Commandant the authority to award the LL.M.⁶

The first judge advocates to be awarded the LL.M. were the members of the 36th Graduate Course, who graduated in May 1988. The first recipient of the LL.M. was Captain (CPT) Elyse K. Santerre who, having finished first in the class was the first to walk across the stage at graduation and the first to be handed the new LL.M. diploma.

Probably the thorniest issue raised in the aftermath of the successful LL.M. initiative was retroactivity: Should past graduates of the Advanced and Graduate Courses—especially those in the 35th Graduate Class whose curriculum was used as the basis for the LL.M. legislative package—be retroactively awarded the LL.M.? While the legislation enacted by Congress was silent on the issue of retroactivity, the ABA had no doubts in the matter: The answer was no, an opinion to which The Judge Advocate General, MG Hugh Overholt, reluctantly acceded.

Today, the Commandant, TJAGLCS continues to award the LL.M. to those career military attorneys who successfully complete the Graduate Course—and it continues to be a truly unique degree.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

⁵ Colonel Paul J. Rice, Commandant, The Judge Advocate Gen.'s School, U.S. Army, Presentation to Nat'l Advisory Comm. on Accreditation and Institutional Eligibility (Dec. 1987) (on file with Regimental Historian, The Judge Advocate General's Corps) (emphasis in original).

⁶ 10 U.S.C. § 4315 (2006).

The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage”

Commander Matthew L. Beran*

*There is nothing collateral about collateral damage.*¹

I. Introduction

The United States’ position on the law of armed conflict principle of proportionality² is anchored in its collective response to Additional Protocol I to the Geneva Conventions.³ “The principle of proportionality requires the

* Judge Advocate, U.S. Navy. Presently assigned as International Law Attorney, Office of Legal Counsel, U.S. Africa Command (AFRICOM), Stuttgart, Germany. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The views expressed in this article are exclusively those of the author and do not reflect the official policy or position of the Department of Defense or the United States Government. The author would like to thank Major Shane Reeves, U.S. Army, for his mentorship and guidance on this article. The author would also like to thank Captain Ron Alcalá, U.S. Army, and Mr. Chuck Strong, for their editing advice and technical expertise on this article.

¹ Telephone Interview with Rear Admiral (Upper Half) Kurt W. Tidd, Vice Dir. for Operations, J3, Joint Staff, and former Commander, *Dwight D. Eisenhower* Carrier Strike Group (Feb. 25, 2010).

² The four universally-recognized principles governing the use of force in the law of armed conflict are military necessity, distinction (also known as discrimination), proportionality, and unnecessary suffering. “The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective.” U.S. DEP’T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEP’T OF HOMELAND SEC. AND U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS [NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A], at 5-2 (2007) [hereinafter *COMMANDER’S HANDBOOK*]. “The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize damage to civilians and civilian objects.” *Id.* at 5-3. “[The principle of] proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from [an] attack.” *Id.* Finally, “the law of armed conflict prohibits the use of arms, projectiles, or material calculated to cause unnecessary suffering to combatants.” *Id.* The *Commander’s Handbook* provides an excellent summary of the four principles, but it is not a source of legal authority.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) annex I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The United States is a signatory, but not a ratified party, to AP I. The portions of AP I regarding proportionality (Articles 51(5)(b) and 57(2)(a)(iii)) may be considered customary international law by U.S. authorities. See Michael Matheson, *Additional Protocol I as an Expression of Customary International Law*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987). However, Matheson’s remarks may no longer be considered authoritative. See, e.g., Charles Garraway, Charles H. Stockton Professor of Int’l Law, U.S. Naval War Coll., Remarks at the U.S. Naval War College, Conference on the Law of War in the 21st Century: Weaponry and the Use of Force, available at <http://www.usnwc.edu/getattachment/e5e1e236-bda9-4ecf-8c03-e997c7efd9ef/2005-Conference-Brief> (last visited Aug. 12, 2010). Other U.S. authorities do not agree with Matheson’s assessment. See Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel (Int’l), Office of the Sec’y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 9,

commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”⁴ The assessment is prospective in nature, calling for an evaluation based on situational awareness prior to an attack.⁵ However, no further guidance, in the form of definitions or examples, is provided to commanders, who are left with only the plain meaning of the words. When the concrete and direct military advantage expected to be gained is anchored in a conventional operation’s goal of “partial or complete submission of the enemy,”⁶ the balancing test weighs

1986). The author adopts the proportionality test from AP I as an expression of customary international law.

⁴ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also *COMMANDER’S HANDBOOK*, *supra* note 2, at 5-3; U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 39–41 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]; U.S. DEP’T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE 39, 52, 147–52 (1 Feb. 1998) [hereinafter AF PAM. 14-210]. The U.S. Air Force’s first publication on the law of armed conflict, Air Force Pamphlet 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, was released on 19 November 1976 but was later rescinded on 20 December 1995. Air Force E-Publishing—Obsolete Products, <http://www.e-publishing.af.mil/obsolete-products/index.asp?rdoFormPub=rdoPub&txtSearchWord=afp110-31> (last visited Aug. 12, 2010). The Air Force recently released, through its Judge Advocate General’s School, its new publication on the law of war. See AIR FORCE OPERATIONS & THE LAW—A GUIDE FOR AIR, SPACE & CYBER FORCES 19–21 (2009) [hereinafter AIR FORCE GUIDE].

⁵ For example, in the pre-planned strike on a fixed target, also known as a deliberate strike, the United States uses a formal process for collateral damage estimation (CDE), which takes into account the destructive capability of the potential weapons to be employed, the method of employment, the nature of the target (length, width, height, composition, etc.), the location of the target with respect to civilian property, and the presence of civilians (both within the target as well as in the vicinity of the target). See JOINT CHIEFS OF STAFF, JOINT MANUAL 3160.01, NO STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter JCS JOINT MANUAL 3160.01]. The Collateral Damage Manual (CDM) “assists commanders in weighing risk against military necessity and in assessing proportionality within the framework of the military decision-making process. In short, the CDM is a means for a commander to adhere to the [law of war].” COMPENDIUM OF CURRENT CHAIRMAN, JOINT CHIEFS OF STAFF DIRECTIVES 65 (15 Jan. 2009), available at http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf.

⁶ See Convention (IV) Respecting the Laws and Customs of War on Land arts. 22–28, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]. See also Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) [hereinafter Lieber Code]. “Military necessity admits of all direct destruction of life or limb of ‘armed’ enemies, and of other persons whose destruction is incidentally ‘unavoidable’ in the armed contests of the war . . .” *Id.* While the Lieber Code is no longer itself a lawful general order binding on U.S. forces, it is generally considered to be the genesis of modern law of war and its tenants to be customary international law. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT:

destruction of the enemy against collateral damage to civilians.⁷

However, counterinsurgency operations are inherently different,⁸ because the mission focuses not on destruction of the enemy but on providing for the safety and security of the local population, making safety and security the military advantage to be gained.⁹ Consequently, civilian casualties (both civilian deaths and civilian injuries) and civilian property damage in counterinsurgency operations necessarily detract from the military advantage to be gained and may result in mission failure.¹⁰ Recognizing this, the proportionality balancing test must be adjusted to weigh the goals of counterinsurgency (the safety and security of the local population) against civilian casualties and civilian property damage. Refocusing military operations from an enemy-centric to a population-centric center of gravity compels a re-balancing of the proportionality test in lethal targeting that has been used in the field by U.S. commanders for decades.¹¹

INTERNATIONAL HUMANITARIAN LAW IN WAR 38–46 (Cambridge Univ. Press 2010).

⁷ Civilians are unfortunately sometimes categorized as non-combatants, a usage which is technically inaccurate, because armed forces are divided into two groups, combatants and non-combatants. Non-combatant members of the armed forces, such as chaplains and certain medical personnel, are treated differently than combatant members of the armed forces. See Hague IV, *supra* note 6, art. 3. See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 15, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁸ See DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 4, 49–60, 81–86 (Praeger Security International 2006) (1964). “Thus the battle for the population is a major characteristic of the revolutionary war.” *Id.* at 4. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24/U.S. MARINE CORPS WARFIGHTING PUBLICATION 3-33.5, COUNTERINSURGENCY 1-23, 1-24 (15 Dec. 2006) [hereinafter COUNTERINSURGENCY MANUAL].

⁹ GALULA, *supra* note 8, at 4, 49–60, 81–86. “The population, therefore, becomes the objective for the counterinsurgent as it was for his enemy. Its tacit support, its submission to law and order, its consensus . . . have been undermined by the insurgent’s activity.” *Id.* at 52.

¹⁰ *Id.* The author, David Galula, is widely regarded as the doctrinal father of counterinsurgency theory. However, even he upholds the need for application of conventional warfare proportionality at the initial stage of a counterinsurgency (“the first step”), which calls for the destruction or expulsion of insurgent forces. *Id.* at 76. “The operations during this step, being predominantly of a military nature, will inevitably cause some damage and destruction.” *Id.* After swift and short actions to eliminate the insurgents, the focus of attention shifts for the remainder of the counterinsurgency (“steps two through eight”). “[The insurgents] can be conclusively wiped out only with the active cooperation of the population . . . This is why the counterinsurgent forces must now switch their attention from the [insurgents] to the population.” *Id.* at 77. The proposed proportionality test for counterinsurgency operations described in this article should be implemented at the conclusion of “the first step” of combat operations, when the mission focus shifts from destroying the enemy to providing for the safety and security of the local population. See *infra* Part IV.

¹¹ The balancing test for proportionality dates back to 1956. Although articulated as a law of armed conflict principle in the Hague and Geneva Conventions traditions of international law, the balancing test incorporating proportionality was established as military doctrine in paragraph 41 of the 1956 edition of the U.S. Army Field Manual 27-10 (FM 27-10). The exact

II. Proportionality in Counterinsurgency Operations: Lessons of Farah, Afghanistan

The air strikes conducted by elements of the U.S. Navy and U.S. Air Force in Farah, Afghanistan, on 4 May 2009 demonstrate the need to reassess how the United States applies the proportionality balancing test in counterinsurgency operations.

A. Factual Background

On 4 May 2009, elements of the Afghanistan National Security Forces¹² (ANSF) engaged Taliban insurgents outside Gerani Village, Bala Balouk District, Farah Province, Afghanistan, in a battle which lasted almost nine hours.¹³ Coalition allies, including U.S. Marine ground forces and U.S. Navy and U.S. Air Force airborne assets, eventually participated in the battle after the ANSF reported initial contact with the enemy.¹⁴ Navy F/A-18 strike fighters and Air Force B-1B bombers conducted several strikes during the battle while performing close air support (CAS) of friendly forces.¹⁵ The battle unfortunately resulted in civilian casualties and civilian property damage, which were initially examined by U.S. military authorities stationed inside Afghanistan and were later investigated by an independent team from outside Afghanistan appointed by the Commander, U.S. Central Command.¹⁶

B. Violations of the Law of Armed Conflict (Principle of Proportionality)

The target of the second B-1B airstrike was a building used by Taliban insurgents. A group of insurgents had been

test required that, in certain circumstances, “loss of life and damage to property must not be out of proportion to the military advantage to be gained.” See FM 27-10, *supra* note 4, at 19. In 1977, key terms were added. The current test states, “Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.” *Id.* at 5.

¹² The Afghanistan National Security Forces (ANSF) are comprised of two organizations, the Afghanistan National Army (ANA) and Afghanistan National Police (ANP). USCENTCOM’S UNCLASSIFIED EXECUTIVE SUMMARY—UNITED STATES CENTRAL COMMAND INVESTIGATION INTO CIVILIAN CASUALTIES IN FARAH PROVINCE, AFGHANISTAN ON 4 MAY 2009, at 2 (18 June 2009) [hereinafter FARAH REPORT].

¹³ *Id.* at 5–9. Fighting began at approximately 1230 and was substantially over by 2112 [local (Kabul) time]. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1–2. “U.S. military elements first returned to the village on May 7, 2009, as part of a joint visit with a delegation led by the Provincial Governor of Farah.” *Id.* “On May 8, 2009, the Commander of U.S. Central Command, General Petraeus, directed a U.S. Army brigadier general from outside Afghanistan to conduct a full investigation.” *Id.*

observed entering the building while en route to the battle,¹⁷ and although neither the ground commander nor the B-1B aircrew could confirm the presence, or absence, of civilians in the building, the ground commander ordered its destruction.¹⁸ The B-1B aircrew eventually dropped two 500-pound Global Positioning System (GPS)-guided¹⁹ Guided Bomb Units (GBU)²⁰ and two 2000-pound GPS-guided GBUs on the target.²¹ The CENTCOM investigation later concluded that this attack was one of the strikes that resulted in civilian casualties.²² Lack of knowledge regarding the presence, or absence, of civilians at the target, however, effectively precluded a proper collateral damage assessment; the commander could not perform a meaningful balancing test without information about the civilian situation.²³

In the third B-1B strike, neither the ground commander nor the B-1B air crew could confirm the presence, or absence, of civilians in a building which had been tentatively selected for engagement.²⁴ As in the second airstrike, the building was targeted because a group of Taliban insurgents had just entered it.²⁵ The ground commander eventually

ordered the B-1B air crew to drop one 2000-pound GPS-guided GBU on the target, which destroyed the building.²⁶ Once again, lack of knowledge regarding the presence, or absence, of civilians already in the building at the time of engagement made it impossible for the ground commander to complete the required proportionality assessment using the balancing test.²⁷ The CENTCOM investigation also noted this attack as a likely source of civilian casualties.²⁸

In the case of the second and third B-1B bomber strikes, the commander authorized of the use of deadly force without conducting the required balancing test. Consequently, both strikes resulted in violations of the law of armed conflict and long-standing U.S. policy regarding compliance with the law of armed conflict.²⁹

C. Effect of the Farah Air Strikes

The Farah air strikes had lasting effects. On 19 May 2009, the President of the Islamic Republic of Afghanistan, Hamid Karzai, and the U.S. Ambassador to Afghanistan, Karl Eikenberry, met with Afghan civilians in Farah to address concerns over the use of air strikes by coalition forces.³⁰ On 2 July 2009, shortly after the release of the investigation into the Farah air strikes, General Stanley McChrystal, Commander of NATO's International Security Assistance Force (ISAF) in Afghanistan, issued a tactical directive on the use of force.³¹ The unclassified portion of the directive is significant for three reasons. First, the Commander identified safeguarding the safety and security of the Afghan population as ISAF's mission.³² Second, the Commander linked collateral damage to mission failure.³³ Third, the Commander directed scrutiny of, and limits on,

¹⁷ *Id.* at 8. The B-1B air crew observed and tracked the group of Taliban insurgents and passed this information to the ground commander. *Id.*

¹⁸ *Id.* at 8–9.

¹⁹ The Global Positioning System (GPS) is a U.S. space-based radio navigation system that provides positioning, navigation, and timing services. Global Positioning System, <http://www.gps.gov> (last visited Feb. 25, 2010).

²⁰ The Guided Bomb Unit (GBU) is a standard acronym for air-delivered ordnance. FARAH REPORT, *supra* note 12, at 2.

²¹ *Id.*

²² *Id.* at 9. “While this investigation assesses approximately 26 civilian casualties based on the information from various sources and on new graves in the Gerani area in early May, no one will ever be able conclusively to determine the number of civilian casualties that occurred on May 4, 2009.” *Id.* at 11. The Afghan Independent Human Rights Commission report, favorably received by the U.S. investigation team, cited as many as eighty-six civilian casualties from the incident. *Id.*

²³ It was impossible for the commander to properly weigh—using the balancing test—what he and the air crew did not know. The occurrence of collateral damage, however regrettable, is not a per se violation of the law of armed conflict. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). The failure to affirmatively weigh collateral damage prior to a strike, however, is a violation of the law of armed conflict. *Id.* The failure to affirmatively weigh collateral damage prior to a strike is also a violation of U.S. policy with regard to compliance with the law of armed conflict. See U.S. DEP’T OF DEF., DIR. 2311.01E, DoD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DODD 2311.01E]. “It is DoD policy that . . . [m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” *Id.* at 2. Of note to Navy judge advocates, principles of international law trump Navy Regulations. “At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.” U.S. DEP’T OF NAVY, REG. 0705, OBSERVANCE OF INTERNATIONAL LAW (14 Sept. 1990).

²⁴ FARAH REPORT, *supra* note 12, at 9.

²⁵ *Id.* This group of Taliban insurgents was actually moving northward, away from friendly forces, at the time of engagement. *Id.*

²⁶ *Id.*

²⁷ The failure to affirmatively weigh collateral damage prior to a strike is a violation of the law of armed conflict. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additionally, the failure to affirmatively weigh collateral damage prior to a strike is a violation of U.S. policy with regard to compliance with the law of armed conflict. See DODD 2311.01E, *supra* note 23, at 2. Therefore, the third B-1B strike, like the second B-1B strike, violated the law of armed conflict, as well as U.S. policy regarding compliance with the law of armed conflict.

²⁸ FARAH REPORT, *supra* note 12, at 9.

²⁹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also DODD 2311.01E, *supra* note 23, at 2.

³⁰ Carlotta Gall, *A Vow to Cut Afghan Civilian Deaths*, N.Y. TIMES, May 19, 2009, at A12, available at http://www.nytimes./2009/05/20/world/asia/20Afghan.html?_r=2&ref=world.

³¹ Press Release, Headquarters, International Security Assistance Force, Tactical Directive (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf [hereinafter Press Release, Tactical Directive] (on file with author). The press release contained the two-page unclassified version of the Tactical Directive for publication. The Tactical Directive is a classified document.

³² *Id.*

³³ *Id.*

the use of force, such as close air support (CAS), which might result in collateral damage.³⁴

The tactical directive set the stage for discussion over the need to adjust the application of the balancing test during counterinsurgency operations. Before exploring that discussion, however, the Farah air strikes should be examined from a counterinsurgency perspective.

D. Farah Air Strikes as Mission Failure in Counterinsurgency

The Farah air strikes were mission failures in the broader counterinsurgency effort. Even if the commander at Farah had had the information necessary to comply with the principle of proportionality—and had completed the balancing test—the test itself must be adjusted for counterinsurgency operations.

The mission of conventional warfare is defeat of the enemy.³⁵ In that context, the balancing test for proportionality weighs the number of enemy killed and enemy equipment destroyed (military advantage to be gained) against civilian casualties and civilian property damage as an unintended (collateral) consequence.³⁶ In contrast, the mission of counterinsurgency operations is the provision of safety and security to local populations, making such safety and security the military advantage to be gained.³⁷

Commanders currently have little effective guidance on how to properly weigh collateral damage directly against the safety and security of the local population—that is, the military advantage to be gained during counterinsurgency. The Army and Marine Corps's joint manual on counterinsurgency only briefly notes the difference in weighing proportionality during counterinsurgency operations: "But in [counterinsurgency] operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained."³⁸ This definition is of doubtful

³⁴ *Id.*

³⁵ Hague IV, *supra* note 6, arts. 22–28. See also Lieber Code, *supra* note 6, art. 15.

³⁶ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also COMMANDER'S HANDBOOK, *supra* note 2, at 5-3; FM 27-10, *supra* note 4, paras. 39–41; AF PAM. 14-210, *supra* note 4, at 39, 52, 147–52; AIR FORCE GUIDE, *supra* note 4, at 19–21.

³⁷ GALULA, *supra* note 8, at 4, 83. "[V]ictory is not the destruction in a given area of the insurgent's forces and his political organization." *Id.* at 54. It is something more (difficult). "[V]ictory is that plus the permanent isolation of the insurgent from the population, isolation not enforced upon the population but [rather] maintained by and with the population." *Id.*

³⁸ COUNTERINSURGENCY MANUAL, *supra* note 8, at 7-6.

utility because it presumes commanders know exactly which enemies to engage, which places an even higher burden on commanders than simple knowledge of the presence, or absence, of civilians in a potential strike situation.³⁹ Providing commanders with useful definitions for terms, as well as guidance for completing the balancing test in a counterinsurgency, is absolutely essential to avoiding future incidents such as the 4 May 2009 air strikes in Farah.

III. Guidance to Commanders

A. Proposed Definitions

The balancing test for proportionality is articulated in two ways. The first suggests that "proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from the attack."⁴⁰ The second states that "the principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained."⁴¹ These descriptions include terms that must be defined.

1. "Military Advantage"

"Military" as a legal term means "pertaining to war or to the army; concerned with war."⁴² "Advantage" is "superiority of position or condition; benefit, gain."⁴³ Taken

³⁹ *Id.* "In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape." *Id.* This test is highly speculative in nature and demands a level of knowledge plus immediate ability for assessment and decision-making in order to be useful. However, the Counterinsurgency Manual embraces sensitivity to the impact of military operations on the local population. "If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement." *Id.*

⁴⁰ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The first statement of the test—the language quoted above—is found in the *Commander's Handbook*. COMMANDER'S HANDBOOK, *supra* note 2, at 5-2. See also AIR FORCE GUIDE, *supra* note 4, at 19. The U.S. Army does not address this statement of the test. See FM 27-10, *supra* note 4, paras. 39–41.

⁴¹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The second statement of the test—the language quoted above—is found in the *Commander's Handbook*. COMMANDER'S HANDBOOK, *supra* note 2, at 5-2. See also FM 27-10, *supra* note 4, para. 41; AIR FORCE GUIDE, *supra* note 4, at 19.

⁴² BLACK'S LAW DICTIONARY 992 (6th ed. 1990).

⁴³ WEBSTER'S NEW COLLEGIATE DICTIONARY 17 (1977).

together, “military advantage,” as a combined term, should be defined as “a more favorable position pertaining to war.”

Reviewing these definitions is not a pedantic exercise; it is quite useful to re-emphasize that proportionality assessments must be evaluated in martial terms. Conventional warfare operations focus on the enemy, which naturally reinforces the military character of proportionality assessments. In contrast, because counterinsurgency operations focus on the local population, extraneous factors—such as political, diplomatic, or even economic considerations—can cloud what must be pragmatic, mission-based assessments of safety and security of the local population.⁴⁴ The key questions when evaluating military advantage in a counterinsurgency, therefore, are the following: Does the proposed military action result in a more favorable position for the local population? And does the proposed military action benefit the people?

2. “Concrete and Direct”

“Concrete” as a common term is defined as “characterized by or belonging to immediate experience of actual things or events; real, tangible”⁴⁵ “Direct” as a legal term is defined as “immediate; proximate.”⁴⁶ Both terms, taken together, stand for the proposition that military advantage must be measured at the point of engagement using information readily available to the commander conducting the balancing test.⁴⁷

In conventional warfare operations, “concrete and direct” can be measured by the number of enemy forces killed or captured and the amount of enemy equipment destroyed or damaged;⁴⁸ it is quantitative in nature.⁴⁹ In

counterinsurgency operations, “concrete and direct” must be both quantitative and qualitative in nature.⁵⁰ As a qualitative assessment, “concrete and direct” measures the real-time impact on the safety and security of the local population.⁵¹ As a quantitative measure, “concrete and direct” allows not only for an assessment of the number of enemy killed or captured and the amount of enemy equipment destroyed or damaged—which parallels the conventional warfare model—but also the number of civilian casualties and amount of civilian property damage.⁵² Finally, it is important to also allow an assessment of the number of civilian casualties and amount of civilian property damage that will not occur if the proposed military action is not pursued.⁵³

3. “Unavoidable and Incidental”

“Unavoidable” as a legal term is defined as “incapable of being shunned or prevented, inevitable, and necessary.”⁵⁴ “Incidental” as a common term is defined as “occurring merely by chance or without intention or calculation; being likely to ensue as a chance or minor consequence; accidental.”⁵⁵ Both terms, taken together, purport to modify the clause “loss to civilians and civilian property that will result from the attack.” However, this grammatical construction is fundamentally inconsistent with the nature of counterinsurgency operations, because causing civilian casualties and civilian property damage is neither “by chance” nor “minor.”⁵⁶ Counterinsurgency operations turn this fundamental assumption of conventional warfare on its head and demand in its place a commitment to avoiding collateral damage to achieve the desired objective of safeguarding and securing the local population.⁵⁷ No civilian damage is ever collateral in counterinsurgency operations.⁵⁸

⁴⁴ GALULA, *supra* note 8, at 4, 49–60, 81–86; COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-23, 1-24.

⁴⁵ WEBSTER’S NEW COLLEGIATE DICTIONARY 234 (1977).

⁴⁶ BLACK’S LAW DICTIONARY 459 (6th ed. 1990).

⁴⁷ The Rendulic Rule demands examination of a particular situation as it appeared to the commander at the time of the decision. In *United States v. List* (“Hostages Trial”), General Lothar Rendulic was charged with war crimes for his “scorched earth” tactics while in command of German troops in Scandinavia. General Rendulic defended his actions as necessary in light of his belief that Russian forces were in the immediate vicinity and in hot pursuit of his forces. The Court acquitted him of the charge. “But we are obliged to judge the situation as it appeared to the defendant at the time. . . . [T]he defendant may have erred . . . but he was guilty of no criminal act.” *United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 1296–97 (1947–48). Neither the *Commander’s Handbook* nor the *Land Warfare Manual* specifically addresses this temporal requirement. However, the *Air Force Guide* does. “Commanders must determine if use of force is proportional based on all information reasonably available at the time.” AIR FORCE GUIDE, *supra* note 4, at 20 (quoting the rescinded CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES GL-17 (15 Jan. 2000)).

⁴⁸ Hague IV, *supra* note 6, arts. 22–28. See also Lieber Code, *supra* note 6, art. 15; COMMANDER’S HANDBOOK, *supra* note 2, at 5-2, 5-3; FM 27-10,

supra note 4, paras. 39–41; AF PAM. 14-210, *supra* note 4, at 39, 52, 147–52; AIR FORCE GUIDE, *supra* note 4, at 13–21.

⁴⁹ *Id.*

⁵⁰ GALULA, *supra* note 8, at 4, 83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-2, 1-22, 1-28.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* See also Press Release, Tactical Directive, *supra* note 31, at 1–2.

⁵⁴ BLACK’S LAW DICTIONARY 1523 (6th ed. 1990).

⁵⁵ WEBSTER’S NEW COLLEGIATE DICTIONARY 580 (1977).

⁵⁶ GALULA, *supra* note 8, at 4, 81–83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-22, 1-28; Press Release, Tactical Directive, *supra* note 31, at 1–2.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also *supra* note 1.

4. “Excessive”

“Excessive” as a legal term is defined as “greater than what is usual or proper.”⁵⁹ Determining what is usual or proper will inherently involve a fact-specific inquiry, which makes operational guidance on “excessive” of critical importance to commanders.⁶⁰ Conventional operations, which focus on the subjugation of an enemy, are more forgiving of civilian casualties and civilian property damage.⁶¹ Counterinsurgency operations, on the other hand, compel a double assessment of civilian casualties and civilian property damage, first, for their impact on the counterinsurgency mission, and second, as an independent but necessary factor for subjective evaluation of “properness.”⁶²

IV. Reconsidering the Balancing Test for Counterinsurgency Operations

Defining the terms of the proportionality balancing test to conform to both conventional and counterinsurgency operations is unworkable. In short, the test must be reconsidered, and, for clarity, one clear description of the test for counterinsurgency operations is needed. The definitions discussed above reveal the differences between conventional warfare operations and counterinsurgency operations, including the goal of military operations and the fundamental rejection of “collateral damage” in counterinsurgency operations. Significantly, counterinsurgency operations demand a double assessment of civilian casualties and civilian property damage because of the focus on provision of safety and security to the local

population and because the “properness” of military action must be evaluated differently.

A. The Balancing Test for Counterinsurgency Operations—A Proposal

I propose the following revised balancing test to address the shortfalls of the current test when applied to counterinsurgency operations. “In counterinsurgency operations, the principle of proportionality requires commanders to confirm that a proposed action will likely result in a concrete and direct military advantage without excessive loss of civilians and civilian property.”⁶³

The second part of the counterinsurgency balancing test’s double assessment of civilian casualties and civilian property damage requires a subjective evaluation of what is “excessive.” This evaluation is best left to operational commanders to define, shape, or at least discuss in orders to subordinate commanders, generally in the form of commander’s intentions or concept of operations during a military campaign.⁶⁴ What is “usual or proper” cannot be fixed by definitions within the balancing test. The balancing test must set forth the process and means for proportionality assessments, but not mathematical formulas or precise metrics, because such numerical standards will change with each military operation.

B. The Balancing Test for Counterinsurgency Operations—The Argument Against Change

Some may argue that the balancing test for proportionality, which has been used for decades,⁶⁵ needs no adjustment. Arguably, adjusting the focus and definitions of the test could limit the discretion and latitude it affords to commanders, who are used to, and comfortable with, the current test, including its vague terms and lack of specific additional guidance. However, counterinsurgency

⁵⁹ BLACK’S LAW DICTIONARY 561 (6th ed. 1990).

⁶⁰ Press Release, Tactical Directive, *supra* note 31, at 1–2. “We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.” *Id.* at 1.

⁶¹ W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 149–202 (1990). For example, the Battle of Britain resulted in 23,002 civilian deaths over the seven-month period between June and December 1940. The eight-day bombing campaign over Hamburg (24–30 July 1943) resulted in 42,600 civilian deaths. The two-day bombing campaign over Dresden (14–15 February 1945) caused an estimated 25,000 civilian deaths. Finally, the two-day bombing campaign over Tokyo (9–10 March 1945) resulted in 83,793 civilian deaths. *Id.* at 154. These staggering figures reflect the total war mentality of the conflict, and two underlying notions prevailing at the time regarding collateral damage—first, that such damage was simply the price for waging war (“the cost of doing business”) and second, that the responsibility for minimization of collateral damage rested with the nation in control of the civilian population and individual civilians themselves. *Id.* at 149–50. Neither notion is consistent with counterinsurgency theory. First, “the business” in counterinsurgency operations is providing for the safety and security of the local population. See GALULA, *supra* note 8, at 4. Second, U.S. forces, by law and policy, are responsible for minimizing collateral damage in all operations. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii); DODD, 2311.01E, *supra* note 23, at 2.

⁶² GALULA, *supra* note 8, at 4, 81–83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-2, 1-22, 1-28; Parks, *supra* note 61, at 149–50.

⁶³ The second of the two ways the current balancing test is stated is, “The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.” See COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See *supra* notes 40–41 and accompanying text. The major changes are removal of the term “incidental” and emphasis on the term “excessive.” See *infra* Part IV.B.

⁶⁴ General McChrystal’s Tactical Directive of 2 July 2009 is an example. In it, he sets forth the mission for all U.S. forces operating under the control of U.S. Forces–Afghanistan (USFOR-A) and his intentions for employment of force. “Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take.” See Press Release, Tactical Directive, *supra* note 31, at 1.

⁶⁵ The balancing test for proportionality dates back to 1956. The original test was modified in 1977 to its current form. See FM 27-10, *supra* note 4, at 5, 19. See *supra* note 11 and accompanying text.

operations are a radical revolution in warfare⁶⁶ that compels an equally radical re-examination of conventional warfare, including how proportionality is assessed in armed conflict. Additionally, re-assessment of the balancing test does not restrict a commander's discretion; it simply better informs the decision-making process by aligning the means and methods employed with the mission objective.

The current balancing test should not be rescinded; in fact, it must remain in place because it properly assesses proportionality in conventional warfare operations, as well as at the very beginning of counterinsurgency operations.⁶⁷ The critical question left to the commander is, When does the mission shift from a focus on destruction of the enemy to a focus on providing for the safety and security of the local population?⁶⁸ When the mission shifts, the proposed balancing test for counterinsurgency operations must displace the balancing test for conventional warfare to re-align means and methods to support the counterinsurgency mission.

The proposed balancing test for proportionality in counterinsurgency operations is an improvement over the two current versions⁶⁹ in at least one critical aspect—the term “incidental” is no longer used. Removing “incidental” is key to the understanding that civilian casualties and civilian property damage are never collateral in military operations that support a counterinsurgency effort. The proposed test re-focuses attention on the nature of “excessive,” which reinforces the weight civilian casualties and civilian property damage should be given on both sides of the balance, as well as how they can offset military advantage and act as an independent factor for “properness.” The current balancing test for proportionality, with its use of the term “incidental,” perpetuates the conventional warfare focus on the enemy—a focus that is incongruous with the

nature of counterinsurgency operations. By dropping “incidental” from the test, the proposed test embraces a focus on the population while maintaining a means to assess the appropriateness of proposed military actions.

C. The Balancing Test for Counterinsurgency—Increase in Risk

Re-considering, or re-balancing, the proportionality test for counterinsurgency operations is novel—and has risks. By shifting emphasis away from destruction of the enemy to providing for the safety and security of the local population, the equation favors the safety and security of civilians over the safety of coalition forces.⁷⁰ This shift is necessary because counterinsurgencies re-define the mission to maximize benefit to civilians.⁷¹ In that regard, counterinsurgency is graduate level warfare.⁷² Commanders, by law and policy, are bound to uphold the law of armed conflict⁷³—including the principle of proportionality—and implementation of the re-balanced test, despite its difficulties, is a necessary step towards a successful counterinsurgency campaign.⁷⁴

V. Conclusion

The balancing test for proportionality is derived from a conventional warfare model of military operations, which views collateral damage as an unfortunate but necessary outcome of missions focused on the destruction of an enemy. In stark contrast, counterinsurgency operations radically redefine the mission to one of providing for the safety and security of the local population, compelling a fundamental re-assessment of proportionality. Civilian casualties and civilian property damage are never collateral considerations in counterinsurgency operations, and the balancing test for proportionality must embrace this

⁶⁶ GALULA, *supra* note 8, at xi–xiv.

⁶⁷ See Hague IV, *supra* note 6, arts. 22–28; GALULA, *supra* note 8, at 4, 49–60, 81–86; *supra* note 10 and accompanying text.

⁶⁸ GALULA, *supra* note 8, at 75–77. “The goal is reached when static units left to garrison the area can safely deploy to the extent necessary.” *Id.* at 75. It is clear that the timeframe for conventional warfare operations is short. “The first step in the counterinsurgent’s operations should not be allowed to drag on for the sake of achieving better military results.” *Id.* at 76.

⁶⁹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The first statement of the test is found in the *Commander’s Handbook*. COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also AIR FORCE GUIDE, *supra* note 4, at 19. The U.S. Army does not address this statement of the test. See FM 27-10, *supra* note 4, paras. 39–41. The second statement of the test is found in the COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also FM 27-10, *supra* note 4, para. 41; AIR FORCE GUIDE, *supra* note 4, at 19.

⁷⁰ Press Release, Tactical Directive, *supra* note 31, at 1–2. “I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk wherever possible.” *Id.* at 1.

⁷¹ GALULA, *supra* note 8, at 83.

⁷² COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-1.

⁷³ DoDD 2311.01E, *supra* note 23, at 2.

⁷⁴ Initial assessments suggest that the Tactical Directive is having a positive impact in reducing collateral damage caused by coalition forces. “Civilian deaths caused by U.S. and allied forces dropped by nearly a third . . . indicating that coalition efforts to cut down on civilian casualties are having an impact on the battlefield.” Anand Gopal, *Taliban Drive Up Afghan Civilian Toll: U.N. Says Insurgent Attacks Led to 14% Jump in Fatalities in 2009; Western Effort to Reduce Deaths Shows Results*, WALL ST. J., Jan. 14, 2010, available at <http://online.wsj.com/article/SB1000142405274870436200457500083380271148.html>. “The number of civilians killed by the Taliban and their allies rose sharply, by about 40%.” *Id.* “The drops in deaths resulting from allied action and the corresponding increase in deaths attributed to insurgents could help Western forces win support from wary Afghans.” *Id.*

fundamental difference between conventional warfare operations and counterinsurgency operations.

The proffered proportionality test, which addresses the change in how “military advantage” should be defined, re-balances the test for counterinsurgency operations. The

proposed definitions and guidance of the revised test should better equip commanders for operations in this complex and demanding arena of warfare.

Confidentiality and Consent:

Why Promising Parental Nondisclosure to Minors in the Military Health System Can Be a Risky Proposition

Major Charles G. Kels*

In general, Department of Defense (DoD) rules governing the uses and disclosures of protected health information preempt state law, unless DoD policy specifically states otherwise. One such notable exception involves the “disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor,” in which case “the state law of the state where the treatment is provided shall be applied.”¹ So long as the parent, guardian, or person acting in loco parentis has the undisputed authority to make healthcare decisions on behalf of the unemancipated minor patient, the inevitable variations in state disclosure laws are typically not problematic for DoD healthcare personnel. When a parent or guardian has the typical power to provide informed consent for a minor’s healthcare services, that adult will nearly always be granted de facto status as the child’s personal representative for purposes of receiving relevant protected health information.²

What about those cases in which the minor has the right to provide or withhold informed consent to a particular medical procedure, with or without the input of an adult? What, if anything, can the healthcare provider disclose to the minor’s adult caretakers? In these situations, military treatment facilities (MTFs), along with the judge advocates who advise them, find themselves wading into the thickets of state law, based on where the relevant medical service was provided. In applying the respective state law on parental notification in cases of independent minor consent, the MTF may disclose protected health information where permitted or required, must withhold it where prohibited, and will enable licensed healthcare professionals to exercise discretion where the law is silent.³

Instances in which minors seek medical care without their parents’ involvement, and perhaps without their knowledge, tend to be among the most emotionally charged to begin with. Unfortunately, this is also an area where guidance can be less than clear and, hence, where misconceptions abound. A false promise of confidentiality, made innocently but incorrectly by healthcare personnel, runs the risk of exacerbating an already fraught situation, not to mention shattering the minor’s expectation of

nondisclosure. As such, it is vital that MTFs not promise minors confidentiality of treatment vis-à-vis their parents, even when minors can lawfully obtain a healthcare service without their parents’ permission, unless they are justifiably confident that the law mandates, or at the very least permits, such confidentiality in a given case. Even then, the MTF cannot definitively prevent parents from accessing the minor’s medical record or receiving a statement of insurance benefits. Similarly, those of us who advise MTFs must recognize that the ability of a minor to consent to treatment in specified circumstances does not always guarantee that the treatment will be kept confidential from the minor’s parents or guardians. Consent and confidentiality fall under interrelated, but not necessarily identical, medico-legal rubrics and must each be assessed individually.⁴

Informed Consent by Minors

In perhaps the most famous jurisprudential statement on informed consent, Justice Benjamin Cardozo wrote that “every human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁵ Of course, Cardozo’s sweeping pronouncement on bodily autonomy excluded two distinct groups from its scope: minors and others deemed lacking in the requisite decision-making capacity to authorize or refuse medical treatment.

In the United States, the military health system (MHS) defers to state laws governing consent for medical treatment of minors, unless those laws conflict with federal guidelines.⁶ As a general rule, healthcare providers must obtain parental consent before proceeding with treatment of a minor. This longstanding axiom “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions,” as well as the assumption “that natural bonds of affection lead parents to act in the best interests of their children.”⁷ Exceptions to the general requirement of parental consent fall under two broad categories: those having to do with the minor’s legal status and those concerning the type of healthcare service involved.⁸

* Judge Advocate, U.S. Air Force. Presently assigned as Medical Law Consultant, Air Force Legal Operations Agency, Mike O’Callaghan Federal Hospital, Nellis Air Force Base, Nevada.

¹ U.S. DEP’T OF DEF., DIR. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C2.4 (24 Jan. 2003) [hereinafter DODD 6025.18-R].

² *Id.* para. C8.7.3.1.

³ *Id.* para. C8.7.3.2.

⁴ Sara Rosenbaum et al., *Health Information Law in the Context of Minors*, 123 PEDIATRICS S116, S117–118 (2009).

⁵ *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

⁶ *See, e.g.*, U.S. DEP’T OF AIR FORCE, INSTR. 44-102, MEDICAL CARE MANAGEMENT para. 2.6 (1 May 2006) [hereinafter AFI 44-102].

⁷ *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

⁸ David M. Vukadinovich, *Minors’ Rights to Consent to Treatment: Navigating the Complexity of State Laws*, 37 J. HEALTH L. 667, 677 (2004).

Exceptions Based on the Minor's Status

Exceptions in state law based on a minor's status recognize that certain actions or decisions undertaken prior to the statutory age of majority effectively emancipate the minor for some or all purposes and thus remove the presumption that the minor is incapable of independent informed consent to medical treatment. Exceptions of this type rest on state legislative determinations that certain experiences "constitute an act of physical, psychological or economic separation from one's parents," which in turn "encroaches upon the parents' ability to determine the appropriate healthcare for such children."⁹ In addition to a court order, acts typically imbued with emancipating repercussions include marriage, enlistment in the Armed Forces, and, in some cases, a specified time period living apart from and independently of one's parents. Certain state laws eschew the time period calculation in favor of a general determination that the minor is either living self-sufficiently or is homeless.¹⁰ Unlike the relatively clear-cut facts of marriage, military service, or a court order, the self-sufficiency exception requires a subjective determination by the individual medical provider and is therefore not binding upon other providers.¹¹

In addition, some states regard pregnancy¹² or childbirth¹³ as conferring an emancipated status, whereas others perceive it as a specific medical condition that invests minors with control only over treatment related to that condition.¹⁴ The latter view can potentially lead to the uneasy situation in which a minor mother can exercise control over her child's medical treatment, but not over her own, unless such treatment is directly related to her pregnancy or delivery.¹⁵

Some jurisdictions have also recognized the so-called "mature minor" rule, which states that an unemancipated minor's consent may be required, in addition to or instead of the minor's parents, if "the physician's good faith assessment of the minor's maturity level" indicates that "the minor has the capacity to appreciate the nature, risks, and consequences of the medical procedure to be performed, or the treatment to be administered or withheld."¹⁶ Whereas

emancipation typically is concerned with outward signs of independence or self-support, the concept of maturation pertains to developmental cognition.¹⁷ The mature minor rule is largely a judicial, rather than a statutory, doctrine "that extends the common law principle of self-determination to minors";¹⁸ however, some states have enacted mature minor legislation in response to such court decisions.¹⁹ The general applicability of the mature minor doctrine is questionable given that some jurisdictions have outright rejected or simply ignored it.²⁰ Even those that have embraced it caution that the mature minor exception "is by no means a general license to treat minors without parental consent."²¹

Exceptions Based on the Minor's Medical Condition

Perhaps the most prevalent exception based on the type of service rendered is emergency medical care,²² "when failure to treat would result in potential loss of life, limb, or sight."²³ The basis of the emergency exception as it pertains to minors is not that parental consent is unnecessary, but rather that it is presumed.²⁴ Moreover, emergency treatment is less a specific exception to parental consent than an exception to the doctrine of informed consent in general. The emergency care of minors adds an additional wrinkle because attempts must be made to contact and obtain consent from the parents prior to treatment if practicable; after treatment, the parents should also be contacted and back-briefed as soon as possible.²⁵ When unable to make contact with the parents prior to rendering emergency treatment, the healthcare provider should seek a second medical opinion, unless doing so would cause a potentially hazardous delay to the minor patient.²⁶

child, as well as upon the conduct and demeanor of the child at the time of the procedure or treatment." *Id.*

¹⁷ Batterman, *supra* note 9, at 641.

¹⁸ John Alan Cohan, *Judicial Enforcement of Lifesaving Treatment for Unwilling Patients*, 39 CREIGHTON L. REV. 849, 850 (2006).

¹⁹ See, e.g., W. VA. CODE § 16-30C-6(d) (1998) (enacted in response to *Belcher*, 422 S.E.2d 827).

²⁰ *O.G. v. Baum*, 790 S.W.2d 839 (Tex. Ct. App. 1990); *In re Thomas B.*, 574 N.Y.S.2d 659 (N.Y. Misc. 1991); *Novak v. Cobb County Kennestone Hosp. Auth.*, 74 F.3d 1173 (11th Cir. 1996).

²¹ *Cardwell v. Bechtol*, 724 S.W.2d 739, 745 (Tenn. 1987).

²² Some experts consider medical emergencies a separate category "of statutory exceptions to the requirement of parental consent." Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 164 (2000).

²³ U.S. DEP'T OF AIR FORCE, INSTR. 41-115, AUTHORIZED HEALTH CARE AND HEALTH CARE BENEFITS IN THE MILITARY HEALTH SYSTEM (MHS) para. 1.11.1 (28 Dec. 2001) [hereinafter AFI 41-115].

²⁴ *Vukadinovich*, *supra* note 8, at 677.

²⁵ Albert K. Tsai et al., *Evaluation and Treatment of Minors: Reference on Consent*, 22 ANN. EMERGENCY MED. 1211, 1214 (1993).

²⁶ AFI 41-115, *supra* note 23, para. 1.11.1.

⁹ Nancy Batterman, *Under Age: A Minor's Right to Consent to Health Care*, 10 TOURO L. REV. 637, 640 (1994).

¹⁰ See, e.g., CAL. FAM. CODE § 6922(a) (2004); COLO. REV. STAT. § 13-22-103(1) (2004).

¹¹ *Vukadinovich*, *supra* note 8, at 680.

¹² PA. CONS. STAT. ANN. tit. 35, § 10101 (2004).

¹³ NEV. REV. STAT. ANN. § 129.030(1)(c) (2003).

¹⁴ CAL. FAM. CODE § 6925(a); VA. CODE ANN. § 54.1-2969(G) (2004).

¹⁵ *Vukadinovich*, *supra* note 8, at 688.

¹⁶ *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827, 838 (W.Va. 1992). This factual determination is based "upon the age, ability, experience, education, training, and degree of maturity or judgment obtained by the

Various state legislatures have also determined that certain medical conditions pose a grave enough threat to the minor, and perhaps to others, that in such cases the public interest in unfettered access to treatment trumps parental rights. One such exception, rooted in public health concerns, involves sexually transmitted diseases (STDs) and other infectious diseases.²⁷ The American Medical Association (AMA) has opined that “allowing minors to consent for the means of prevention, diagnosis and treatment of STDs, including AIDS” can work “to decrease the spread of STDs in minors.”²⁸ The AMA further encourages its constituent associations “to support enactment of statutes that permit physicians and their co-workers to treat and search for venereal disease in minors legally without the necessity of obtaining parental consent.”²⁹

Other condition-specific exceptions include treatment or counseling for drug or alcohol abuse,³⁰ rape or sexual assault,³¹ and mental health services.³² While the authority to consent for medical services related to sexual assault typically adheres to minors “regardless of age,”³³ the mental health exception applies “a minimum age requirement,” often twelve or older.³⁴ As discussed above, some state laws treat pregnancy or childbirth as a matter of emancipation, while others view pregnancy-related services as a specific medical condition for which minors can consent to treatment or prevention.³⁵ With respect to both contraceptive services and prenatal care, states tend to either explicitly authorize minors to consent or have no statute specifically addressing the issue.³⁶ According to the AMA,

the teenage girl whose sexual behavior exposes her to possible conception should have access to medical consultation and the most effective contraceptive advice and methods consistent with her physical and emotional needs; and the physician so consulted should be free to prescribe or withhold contraceptive advice in

accordance with their best medical judgment.³⁷

Regardless of the nature of the exception to parental consent (aside from emergencies), it is important to note that a minor’s right to exercise informed consent does not guarantee that the minor will be capable of giving informed consent. The onus remains on the provider to make a good faith determination as to whether the minor is sufficiently mature to have the capacity to give informed consent.³⁸ To do otherwise would obviate the very basis of informed consent, because the concept presumes that the patient’s decision is underpinned by an understanding of the nature of the proposed treatment, the relevant potential outcomes, and the alternatives, to include no treatment at all.³⁹

Confidentiality for Minors

As with the issue of informed consent for the medical care of minors, the MHS also defers to state law on the matter of disclosing or withholding minors’ protected health information from adults.⁴⁰ The MHS’s Notice of Privacy Practices asserts that where “state laws concerning minors permit or require disclosure of protected health information,” MTFs “will act consistent with the law of the state where the treatment is provided and will make disclosures following such laws.”⁴¹

In the overwhelming majority of cases, a parent is “the personal representative of the minor child and can exercise the minor’s rights with respect to protected health information, because the parent usually has the authority to make healthcare decisions about his or her minor child.”⁴² However, in those circumstances where the minor, due to either an emancipated status or a specific condition, has the ability to independently consent to or refuse treatment, the possibility remains that the relevant state statute or common law may treat the right of consent and the right to control health information as two distinct concepts.⁴³ Thus, “the fact that a minor can consent to treatment without parental approval is not automatically dispositive of the separate

²⁷ See Vukadinovich, *supra* note 8, at 685–86.

²⁸ AM. MED. ASS’N, HEALTH AND ETHICS POLICY H-60.958, RIGHTS OF MINORS TO CONSENT FOR STD/HIV PREVENTION, DIAGNOSIS AND TREATMENT (1994).

²⁹ AM. MED. ASS’N, HEALTH AND ETHICS POLICY H-440.996(4), GONORRHEA CONTROL (1972).

³⁰ See Vukadinovich, *supra* note 8, at 684–85.

³¹ *Id.* at 686–87.

³² *Id.* at 682–83.

³³ *Id.* at 686.

³⁴ *Id.* at 682.

³⁵ *Id.* at 688–90.

³⁶ Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, GUTTMACHER REP. PUB. POL’Y 4, 6 (Aug. 2000).

³⁷ AM. MED. ASS’N, HEALTH AND ETHICS POLICY H-75.999, TEENAGE PREGNANCY (1971).

³⁸ Vukadinovich, *supra* note 8, at 677.

³⁹ See Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83 MAYO CLINIC PROC. 313 (2008).

⁴⁰ DODD 6025.18R, *supra* note 1, para. C2.4.2.1.

⁴¹ MILITARY HEALTH SYSTEM, NOTICE OF PRIVACY PRACTICES (14 Apr. 2003).

⁴² U.S. DEP’T OF HEALTH & HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS, PERSONAL REPRESENTATIVES (3 Apr. 2003) [hereinafter PERSONAL REPRESENTATIVES].

⁴³ Rosenbaum, *supra* note 4, at S118.

question of whether a minor can control the privacy of such information with respect to parents or third parties.”⁴⁴

At first glance, the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule appears to give wide latitude in this area, enabling minors who control their healthcare decisions to also control their protected health information. Indeed, the three specific exceptions to parental access to health information “generally track the ability of certain minors to obtain specified healthcare without parental consent.”⁴⁵ These exceptions include instances where (1) the minor consents to a particular healthcare service and no parental consent is required,⁴⁶ (2) a court or provision of law empowers someone other than the parent to consent to a healthcare service for a minor and that person or entity does so,⁴⁷ and (3) a parent agrees to confidentiality between the minor and a medical provider with respect to the relevant service.⁴⁸

Commentators have correctly noted that the confidentiality right afforded to minors by the HIPAA Privacy Rule is, on its face, quite sweeping, because it focuses on whether a minor “could have” obtained a given healthcare service in the absence of parental consent.⁴⁹ Indeed, the first exception to parental control over protected health information specifically notes that its focus is on whether the minor who gave informed consent to a particular service had the power to do so, “regardless of whether the informed consent of another person has also been obtained.”⁵⁰ As such, “a minor patient may have a confidentiality right in health information resulting from services to which the minor is authorized under state law to consent even if, in practice, the minor’s parent or guardian actually gives consent.”⁵¹

However, what this analysis overlooks is the language that immediately follows the description of circumstances in which parents lose their status as personal representatives regarding a minor’s protected health information. “Notwithstanding the provisions of” the Privacy Rule barring parental access to certain information,⁵² an MTF may disclose a minor’s protected health information to a parent “to the extent permitted or required by an applicable provision of State or other law, including applicable case

law”;⁵³ may not disclose such information “to the extent prohibited by an applicable provision of State or other law, including applicable case law”;⁵⁴ and may provide or deny access “where there is no applicable access provision under State or other law, including case law . . . if such action is consistent with State or other applicable law, if such decision must be made by a licensed healthcare professional in the exercise of professional judgment.”⁵⁵ The Privacy Rule makes clear that the use of the word “may” in this context is not meant to suggest that MTFs can choose whether to comply with state law, but rather reflects the variances in such laws from state to state. “In cases involving disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor,” the Rule flatly asserts that “the State law of the State where the treatment is provided shall be applied.”⁵⁶ This deference to state laws “that require, permit, or prohibit” the disclosure of a minor’s protected health information to parents holds true even in those “exceptional circumstances,” previously discussed, “where the parent is not the ‘personal representative’ of the minor.”⁵⁷

If the Privacy Rule allows state law to control in this regard, it can end up giving “parents access to minors’ health information that would seem to be prohibited under the Rule” itself.⁵⁸ So, does the Privacy Rule’s continuing deference to state statutory or common law, “notwithstanding” its three exceptions to parents’ de facto status as personal representatives, effectively negate the exceptions altogether? It *can*, but not necessarily will, depending on the relevant state law and the particular healthcare service rendered. For example, Nevada law states that “the consent of the parent, parents or legal guardian of the minor is not necessary to authorize” care “for the treatment of abuse of drugs or related illnesses.”⁵⁹ However, “any physician who treats a minor pursuant to” such provision “shall make every reasonable effort to report the fact of treatment to the parent, parents or legal guardian within a reasonable time after treatment.”⁶⁰ Colorado similarly authorizes any physician licensed to practice in the state to “examine, prescribe for, and treat” a minor patient “for addiction to or use of drugs” with only the minor’s consent. Unlike Nevada, though, Colorado adds that such treatment can be accomplished “without the consent of *or notification to* the parent, parents, or legal guardian of such

⁴⁴ *Id.* at S120.

⁴⁵ PERSONAL REPRESENTATIVES, *supra* note 42.

⁴⁶ DODD 6025.18R, *supra* note 1, para. C8.7.3.1.1.

⁴⁷ *Id.* para. C8.7.3.1.2.

⁴⁸ *Id.* para. C8.7.3.1.3.

⁴⁹ Vukadinovich, *supra* note 8, at 669.

⁵⁰ DODD 6025.18R, *supra* note 1, para. C8.7.3.1.1.

⁵¹ Vukadinovich, *supra* note 8, at 669.

⁵² DODD 6025.18R, *supra* note 1, para. C8.7.3.2.

⁵³ *Id.* para. C8.7.3.2.1.

⁵⁴ *Id.* para. C8.7.3.2.2.

⁵⁵ *Id.* para. C8.7.3.2.3.

⁵⁶ *Id.* para. C2.4.2.1.

⁵⁷ PERSONAL REPRESENTATIVES, *supra* note 42.

⁵⁸ Rosenbaum, *supra* note 4, at S119.

⁵⁹ NEV. REV. STAT. ANN. § 129.050 (2003).

⁶⁰ *Id.*

minor patient.”⁶¹ Thus, “healthcare providers in Colorado cannot be compelled to release to a parent a minor’s medical records” pertaining to drug addiction,⁶² whereas Nevada physicians may have an affirmative duty to do so.

The HIPAA Privacy Rule and Its Evolution

Advocates of stronger privacy rights for adolescents and teenagers, who object to HIPAA’s deference to state laws that provide “less stringent” confidentiality protection for minors,⁶³ point to changes in the Privacy Rule effectuated in 2002 as the source of their current predicament.⁶⁴ In late December 2000, in response to HIPAA’s 1996 mandate to develop regulations governing the security and privacy of electronic health records, the Department of Health and Human Services (HHS) issued its final Privacy Rule.⁶⁵ The final rule recited the three previously mentioned exceptions precluding parents from acting as the personal representatives of their minor children, but it did not include the language immediately following those exceptions deferring to state law.⁶⁶ However, this earlier version of the final rule did explicitly state that “nothing in this subchapter may be construed to preempt any State law to the extent that it authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian, or person acting *in loco parentis* of such minor.”⁶⁷ This disclaimer was included under a discussion of state laws that were “more stringent” than the federal regulation being promulgated,⁶⁸ which has led some commentators to determine—contrary to the language of the disclaimer itself—that the 2000 Privacy Rule deferred “only to more-stringent state law.”⁶⁹

This interpretation of the rule was never put to a practical test. In April 2001, nearly two years before the Privacy Rule’s compliance date, the new Administration announced its intention to “consider any necessary modifications” to the final rule from the previous year. One of HHS’s stated goals in modifying the rule was to “make it clear” that “parents will have access to information about the

health and well-being of their children.”⁷⁰ The modified final Privacy Rule,⁷¹ promulgated in August 2002 after a new round of notice and comments, added the previously discussed “notwithstanding” language immediately following its discussion of circumstances in which parents are precluded from controlling minors’ protected health information.⁷² In so doing, the modified rule moved the language on disclosing protected health information about a minor to a parent from the discussion of “more stringent” state laws in the 2000 rule, to the section on “standards regarding parents and minors” in the 2002 iteration.⁷³ Moreover, whereas the 2000 rule had explicitly deferred to state law “to the extent that it authorizes or prohibits disclosure of protected health information” about minors to parents,⁷⁴ the 2002 rule extended the terms of deference where state law either “permitted,” “required,” or “prohibited” disclosure.⁷⁵ According to HHS’s analysis, this change was intended to correct an “unintended consequence” of the earlier rule, which “may have prohibited parental access in certain situations in which State or other law may have permitted such access.”⁷⁶ In addition, the modified Privacy Rule specifically granted autonomy to “a licensed healthcare professional, in the exercise of professional judgment”⁷⁷ in cases where “state and other laws are silent or unclear.”⁷⁸ According to HHS, this change addressed a second “unintended consequence” of the prior Administration’s rule, which “fail[ed] to assure that State or other law governs when the law grants a provider discretion in certain circumstances to disclose protected health information to a parent.”⁷⁹

It is probably an overstatement to argue, as do some youth advocates, that the 2002 modified regulation “severs the existing link between minors’ right to consent to healthcare and their ability to keep their medical records private.”⁸⁰ A more accurate description of the Privacy Rule and its evolution recognizes that the rule’s “provisions represent a compromise between competing viewpoints about the importance of parental access to minors’ health

⁶¹ COLO. REV. STAT. § 13-22-102 (1999) (emphasis added).

⁶² Cynthia Dailard, *New Medical Records Privacy Rule: The Interface with Teen Access to Confidential Care*, GUTTMACHER REP. PUBLIC POL’Y 6, 7 (Mar. 2003).

⁶³ Rosenbaum, *supra* note 4, at S119.

⁶⁴ *See, e.g.*, Dailard, *supra* note 62, at 7.

⁶⁵ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (28 Dec. 2000).

⁶⁶ *Id.* at 82,806.

⁶⁷ *Id.* at 82,800.

⁶⁸ *Id.*

⁶⁹ Rosenbaum, *supra* note 4, at S119.

⁷⁰ STATEMENT BY HHS SECRETARY TOMMY G. THOMPSON REGARDING THE PATIENT PRIVACY RULE (12 Apr. 2001).

⁷¹ Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 (14 Aug. 2002).

⁷² *Id.* at 53,267.

⁷³ *Id.* at 53,201.

⁷⁴ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (28 Dec. 2000).

⁷⁵ Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,267.

⁷⁶ *Id.* at 53,200.

⁷⁷ *Id.* at 52,367.

⁷⁸ *Id.* at 53,201.

⁷⁹ *Id.* at 53,200.

⁸⁰ Dailard, *supra* note 62, at 7.

information and the availability of confidential adolescent healthcare services.”⁸¹ Although it is relatively clear from the regulatory history that the Clinton Administration placed more emphasis on adolescent confidentiality, while the succeeding Bush Administration leaned more towards parental notification, the 2002 “final version reflects compromise and a balance among competing views.”⁸² During the comment period between HHS’s proposed modifications to the Privacy Rule in March 2002 and the issuance of the final modifications that August, professional healthcare organizations openly favored protecting “minors’ privacy when they are legally authorized to consent to their own healthcare.”⁸³ While the final modifications may afford “minors somewhat less control over parents’ access to their health information” than the 2000 rule and may give “providers and health plans greater discretion regarding parental access to minors’ health information,” the rule’s general deference to state law and professional standards remained largely unchanged.⁸⁴ In lieu of “sweeping changes in adolescents’ ability to access services on a confidential basis,” the rule “in the end left the status quo essentially intact.”⁸⁵

One of HHS’s stated “goals with respect to the parents and minors provisions in the Privacy Rule” was not “to interfere with the professional requirements of State medical boards or other ethical codes of healthcare providers with respect to confidentiality of health information or with the healthcare practices of such providers with respect to adolescent healthcare.”⁸⁶ According to some commentators, “this statement would suggest that healthcare providers can continue to uphold the recommendations of professional societies that champion confidential healthcare for minors.”⁸⁷ Professional medical associations generally advocate encouraging minors to involve their parents in healthcare decision-making, but also support protecting a competent minor’s confidentiality where the physician is so requested and the law so allows. For example, “where the law does not require otherwise,” the AMA believes that “physicians should permit a competent minor to consent to

medical care and should not notify parents without the patient’s consent.”⁸⁸

Special Cases

In the context of parental notification, there are two special cases in which the MHS does not automatically defer to state law. The first involves services specifically marketed to or designed for potential alcohol and drug abusers, which must “be in compliance with the confidentiality requirements for drug and alcohol treatment.”⁸⁹ The second involves suspected abuse, neglect, or endangerment.⁹⁰

The regulation governing the confidentiality of substance abuse treatment records,⁹¹ promulgated under the Public Health Service Act,⁹² encompasses “some of the most protective confidentiality rules in federal law.”⁹³ The DoD’s implementation of the HIPAA Privacy Rule notes that “covered entities shall comply with the special rules protecting the confidentiality of alcohol and drug abuse patient records in federally assisted alcohol and drug abuse programs.” When applicable, MTFs must comply with both the Privacy Rule and the confidentiality rule for substance abuse treatment records. If the rules conflict, the stricter of the two controls: “To the extent any use or disclosure is authorized by [the Privacy Rule] but prohibited” by the drug and alcohol abuse treatment confidentiality rule, DoD regulation directs that “the prohibition shall control.”⁹⁴ Similarly, if “any use or disclosure is authorized by [the confidentiality rule] but prohibited by [the Privacy Rule], the prohibition shall control. Covered alcohol and drug abuse patient records may only be used or disclosed if the requirements of both [the Privacy Rule] and [the confidentiality rule] are satisfied.”⁹⁵

In order for protected health information covered by the Privacy Rule to also qualify as an alcohol and drug abuse patient record covered by the confidentiality rule, two conditions must be met. “First, the provider, program, or facility must be ‘federally assisted,’” which is a given in the

⁸¹ Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36(2) PERSPECT. SEXUAL & REPROD. HEALTH 80 (Mar.–Apr. 2004).

⁸² *Id.* at 81.

⁸³ Carol A. Ford & Abigail English, *Limiting Confidentiality of Adolescent Health Services: What Are the Risks?*, 288(6) J. AM. MED. ASS’N 752, 753 (14 Aug. 2002).

⁸⁴ English & Ford, *supra* note 81, at 81.

⁸⁵ *Id.* at 85.

⁸⁶ Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,267 (14 Aug. 2002).

⁸⁷ Pedro Weisleder, *The Right of Minors to Confidentiality and Informed Consent*, 19(2) J. CHILD NEUROLOGY 145, 147 (Feb. 2004).

⁸⁸ AM. MED. ASS’N, HEALTH AND ETHICS POLICY E-5.055, CONFIDENTIAL CARE FOR MINORS (1994) [hereinafter CONFIDENTIAL CARE FOR MINORS].

⁸⁹ U.S. DEP’T OF DEF., INSTR. 1010.6, REHABILITATION AND REFERRAL SERVICES FOR ALCOHOL AND DRUG ABUSERS para. 5.2.3 (13 Mar. 1985) [hereinafter DoDI 1010.6].

⁹⁰ See DoDI 6025.18R, *supra* note 1, para. C8.7.5.

⁹¹ 42 C.F.R. Pt. 2 (2002).

⁹² 42 U.S.C. § 290dd-2 (1998).

⁹³ Rebecca Gudeman, *Federal Privacy Protection for Substance Abuse Treatment Records: Protecting Adolescents*, 24(3) YOUTH L. NEWS 28 (July.–Sept. 2003).

⁹⁴ DoDD 6025.18R, *supra* note 1, para. C8.9.

⁹⁵ *Id.*

MHS. Second, the provider, program, facility, or a unit thereof must “hold itself out as providing alcohol or drug abuse diagnosis, treatment, or referral for treatment,” or else have identified an individual employee who serves primarily “as a provider of alcohol or drug abuse diagnosis, treatment, or referral.”⁹⁶ This definition clearly covers specially designed programs such as the Army’s Substance Abuse Program (ASAP)⁹⁷ and the Air Force’s Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program.⁹⁸ However, it would not apply to a typical MTF emergency department, nor to a family medicine or pediatric clinic, unless that unit has designated a specific provider as a substance abuse specialist or otherwise presents itself as a resource for such services.⁹⁹

Where the substance abuse treatment confidentiality rule does apply, the protections against parental notification are much stronger than those normally afforded under the Privacy Rule. For example, where state law does not require parental consent for a minor to access alcohol or drug abuse treatment, written consent for disclosure “may be given only by the minor patient,” to include “any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement.”¹⁰⁰ Even where state law does require parental consent for these services, disclosure to parents is highly restricted. In that case, “the fact of a minor’s application for treatment may be communicated to the minor’s parent, guardian, or other person authorized under State law to act in the minor’s behalf only if” the minor consents in writing, or if the “program director” determines that the minor patient “lacks capacity for rational choice” and that notifying the parents may reduce “a substantial threat” to someone’s “life or physical well being.”¹⁰¹ Therefore, the Nevada statute described above that requires “any physician who treats a minor” for drug or alcohol abuse to “make every reasonable effort to report the fact of treatment to the parent, parents or legal guardian within a reasonable time after treatment”¹⁰² may be preempted by federal law in the case of a substance abuse patient record covered by the confidentiality rule. The federal confidentiality rule explicitly states that “no State law may either authorize or compel any disclosure prohibited by these regulations.”¹⁰³

The second special case in which military healthcare providers are not bound by state law dictating disclosure of a minor’s protected health information to a parent or guardian is implicated when the MTF has a “reasonable belief” that the situation entails potential abuse, neglect, or endangerment.¹⁰⁴ This provision of the Privacy Rule is applicable not only to minors, but also in all other cases of suspected domestic violence or abuse. Nevertheless, this failsafe provision has “different implications for minors, specifically with regard to disclosure of information to parents.”¹⁰⁵ The MTF “may elect not to treat a person as the personal representative of an individual” with respect to accessing and disclosing that individual’s protected health information, if there is a history of or potential for “domestic violence, abuse, or neglect by such person”;¹⁰⁶ if “treating such person as the personal representative could endanger the individual”;¹⁰⁷ or if “the exercise of professional judgment” leads the MTF to conclude that “it is not in the best interest of the individual to treat the person as the individual’s personal representative.”¹⁰⁸

Conclusion

From a practical standpoint, the inevitable uncertainty in many cases over whether care rendered to minors without parental consent can ultimately be kept confidential from their parents reinforces the importance of doctor-patient communication. This is especially true when setting a minor’s expectations for secrecy, as well as when urging parental involvement where appropriate. For example, Air Force healthcare providers are instructed to “make every effort to encourage the patient to inform parents of their medical issues” whenever minors consent to their own care.¹⁰⁹ This requirement mirrors AMA policy, which states that “when minors request confidential services, physicians should encourage them to involve their parents.”¹¹⁰ Moreover, because parents ordinarily can obtain “access to a minor child’s medical record,” Air Force regulation mandates that “the minor shall be made aware that any care they receive may be discovered.”¹¹¹ The AMA similarly “urges physicians to discuss their policies about confidentiality with parents and the adolescent patient, as well as conditions under which confidentiality would be

⁹⁶ Gudeman, *supra* note 93, at 29.

⁹⁷ U.S. DEP’T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (2 Feb. 2009) [hereinafter AR 600-85].

⁹⁸ U.S. DEP’T OF AIR FORCE, INSTR. 44-121, ALCOHOL AND DRUG ABUSE PREVENTION AND TREATMENT (ADAPT) PROGRAM (26 Sept. 2001) [hereinafter AFI 44-121].

⁹⁹ Gudeman, *supra* note 93, at 29.

¹⁰⁰ 42 C.F.R. § 2.14(b) (2002).

¹⁰¹ *Id.* § 2.14(c)–(d).

¹⁰² NEV. REV. STAT. ANN. § 129.050 (2003).

¹⁰³ 42 C.F.R. § 2.20.

¹⁰⁴ DoDD 6025.18R, *supra* note 1, para. C8.7.5.

¹⁰⁵ English & Ford, *supra* note 81, at 81.

¹⁰⁶ DoDD 6025.18R, *supra* note 1, para. C8.7.5.1.1.

¹⁰⁷ *Id.* para. C8.7.5.1.2.

¹⁰⁸ *Id.* para. C8.7.5.1.3.

¹⁰⁹ AFI 44-102, *supra* note 6, para. 2.6.1.

¹¹⁰ CONFIDENTIAL CARE FOR MINORS, *supra* note 88.

¹¹¹ AFI 44-102, *supra* note 6, para. 2.6.1.

abrogated.”¹¹² The Society for Adolescent Medicine “suggests that providers clarify to their adolescent patients the circumstances that could lead them to reveal sensitive information to a responsible adult.”¹¹³

Thus, the communication challenge for healthcare providers remains twofold: (1) facilitating interaction “between adolescent patients and their parents in a way that is respectful of adolescents’ need for privacy and the support that parents can provide,” and (2) clearly “conveying the protections and limitations of confidentiality to adolescent patients and their parents.”¹¹⁴ The peculiar challenge facing members of the MHS in this regard is that military providers are bound to practice in several states over the course of a career, and the state where they are providing care at any given time is typically not one where they received their training or are licensed to practice outside the MTF. The intricacies and variations of state law with respect to consent and confidentiality for minors are therefore particularly daunting in the military context. As one attorney specializing in adolescent health issues has summarized the legal landscape:

A handful of states grant minors a right to confidentiality in almost every service to which the minor can give consent. Other states grant minors a right to confidentiality in certain minor consent-granted services, but not others. Alternatively, some states grant providers the discretion to decide when to notify parents about a minor’s services, but parents have no absolute right to the information.¹¹⁵

State laws mandating disclosure are relatively rare compared to those that merely authorize it or allow for physician discretion,¹¹⁶ but where they exist, they can have the effect of essentially tying the healthcare provider’s hands.

The irony from a public policy perspective is that the statutory exceptions to parental consent are largely intended to remove barriers to minors seeking treatment, yet most experts agree that confidentiality is a key to meeting that goal.¹¹⁷ Studies have effectively shown that mandatory parental notification tends to reduce minors’ willingness to seek care but does not significantly alter the underlying behavior, such as sexual activity, that renders such care especially important.¹¹⁸ There appears to be a general consensus within the adolescent healthcare field that “many teenagers would not get treatment if they knew their parents would be notified,”¹¹⁹ and that after-the-fact disclosure, by undermining teens’ readiness “to consent to services in the first place,” can render the right to consent practically “meaningless.”¹²⁰ “The bottom line,” according to some advocates, is that “if we don’t assure access to confidential healthcare, teenagers simply will stop seeking the care they desire and need.”¹²¹ The AMA has opined that “confidential care for adolescents is critical to improving their health,” and thereby advocates eliminating “laws which restrict the availability of confidential care.”¹²²

While some states, such as California, Montana, and Washington, have taken steps to more directly link the right of minors to consent to healthcare services with their right to control the information produced by those encounters,¹²³ the general state of the law in this area remains uneven and highly variable. Military medical providers, and those of us who advise them, must be prepared to encounter this fluctuating terrain and ensure that minors seeking confidentiality are provided with accurate, localized information. It may indeed be the case that “adolescents and the professionals who provide their healthcare have long expected that when an adolescent is allowed to give consent for healthcare, information pertaining to it will usually be considered confidential.” While the law “sometimes supports this understanding,” other times it does not.¹²⁴ To earn the trust of minor patients and avoid misleading them, it is important that MTFs not make promises they cannot keep.

¹¹² AM. MED. ASS’N, HEALTH AND ETHICS POLICY H-60.965, CONFIDENTIAL HEALTH SERVICES FOR ADOLESCENTS (1992) [hereinafter CONFIDENTIAL HEALTH SERVICES FOR ADOLESCENTS].

¹¹³ Weisleder, *supra* note 87, at 145–46.

¹¹⁴ English & Ford, *supra* note 81, at 81.

¹¹⁵ Rebecca Gudeman, *Adolescent Confidentiality and Privacy Under the Health Insurance Portability and Accountability Act*, 24(3) YOUTH L. NEWS 1, 2 (July–Sept. 2003).

¹¹⁶ English & Ford, *supra* note 81, at 82.

¹¹⁷ See Ann Maradiegue, *Minors’ Rights vs. Parental Rights: Review of Legal Issues in Adolescent Health Care*, 48(3) J. MIDWIFERY & WOMEN’S HEALTH 170–77 (May–June 2003).

¹¹⁸ Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls’ Use of Sexual Health Care Services*, 288(6) J. AM. MED. ASS’N 710–14 (14 Aug. 2002).

¹¹⁹ Schlam & Wood, *supra* note 22, at 167.

¹²⁰ Dailard, *supra* note 62, at 7.

¹²¹ Boonstra & Nash, *supra* note 36, at 8.

¹²² CONFIDENTIAL HEALTH SERVICES FOR ADOLESCENTS, *supra* note 112.

¹²³ Rosenbaum, *supra* note 4, at S118.

¹²⁴ English & Ford, *supra* note 81, at 82.

Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act

Lieutenant Commander Brian W. Robinson*

*The competition [for immigrant passengers] . . . is so great, that it has been found expedient to engage runners to pick up passengers. The fellows employed for this purpose are usually a set of arrant knaves, that are wont to practice the most egregious deception on guileless and credulous emigrants.*¹

I. Introduction

At the crack of dawn on 9 June 2006, Amay Machado Gonzalez, a twenty-four-year-old Cuban citizen, embarked from the north coast of Cuba in a small Florida-registered sport boat, along with twenty-eight other migrants, for the ninety-mile voyage to the Florida Keys.² The men who operated the boat and had organized the smuggling venture had originally entered the United States illegally from Cuba but were now living legally in South Florida as “parolees”³ and lawful permanent residents.⁴

A few hours after the voyage began, Ms. Gonzalez was dead.⁵ She sustained a severe head trauma when the

smugglers attempted to evade and outrun a U.S. Coast Guard law enforcement vessel and subsequently died from the injury.⁶ The smugglers’ vessel, colloquially known as a “go-fast,” had been outfitted with three high-horsepower outboard motors making the boat capable of speeds in excess of forty-five knots.⁷ Such speeds far exceed any safe operating speed and are extremely dangerous to passengers in even the calmest of seas—doubly so when operators engage in a pell-mell effort to evade interdiction.⁸

The illegal maritime migrant smuggling trade puts the lives of every migrant who embarks on a smuggling boat at great risk.⁹ Like the “runners” that the Irish Emigrant Society warned about in another century,¹⁰ the modern-day maritime smuggler appeals to the overwhelming desire of prospective migrants from Cuba and other Caribbean countries to make it to the United States by any means.

* Judge Advocate, U.S. Coast Guard. Presently assigned as U.S. Coast Guard Liaison and Advanced Operational Law Fellow at the Center for Law and Military Operations, The Judge Advocate’s Legal Center and School, Charlottesville, Virginia.

¹ WILEY & PUTNAM, *EMIGRANT’S GUIDE: COMPRISING ADVICE AND INSTRUCTION IN EVERY STATE OF THE VOYAGE TO AMERICA* 16 (1845) (quoting a circular of the Irish Emigrant Society warning prospective emigrants to the United States of the dangers of being taken in by “runners” employed by shipping companies to drum up business and pack the steamships of less reputable companies with passengers).

² See Kelli Kennedy & Jessica Gresko, *1 Dead, 4 Injured en Route from Cuba*, ORLANDO SENTINEL, July 9, 2006, at B5; David Ovalle, *Migrant Dead After Chase at Sea*, MIAMI HERALD, July 9, 2006, at B1. The initial news reports of this incident described all of the passengers in the boat as “migrants.” Two of the men on board were smugglers living in south Florida and a third man who embarked the smuggling vessel in Cuba was assisting the two Florida-based smugglers. See *infra* note 4.

³ The Secretary of the Department of Homeland Security may grant parole to an individual present in the United States who is ineligible to enter the United States lawfully in cases of emergency or in furtherance of humanitarian or public interests. See 8 U.S.C. § 1182(d)(5)(A) (2006), 8 C.F.R. § 212.5 (LexisNexis 2010) (parole), 8 C.F.R. § 245 (LexisNexis 2010) (lawful permanent resident); see also Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1114 (9th Cir. 2007) (discussing various types of parole under U.S. immigration law); see generally Major Kenneth Basco, *Don’t Worry, We’ll Take Care of You: Immigration of Local Nationals Assisting the United States in Overseas Contingency Operations*, ARMY LAW., Oct., 2009, at 38, 42-43 (providing a short summary of humanitarian and public benefit parole procedures under U.S. immigration law).

⁴ Cammy Clark, *The Keys: Cuban Migrant Convicted of Migrant-Smuggling Conspiracy*, MIAMI HERALD, Oct. 13, 2006, at B1 (noting that the two smugglers who were living in south Florida previously pled guilty to all charges arising from the smuggling conspiracy and a jury convicted the third man, a Cuban national who assisted the Florida-based smugglers, of migrant smuggling charges but acquitted him of charges related to his role in causing the death of Ms. Gonzalez).

⁵ See Kennedy & Gresko, *supra* note 2 (noting that Ms. Gonzalez suffered a head injury when the smugglers attempted to speed away from the Coast Guard law enforcement vessel, lost consciousness while the Coast Guard

provided medical attention after stopping the smuggling boat, and was pronounced dead at 8:34 a.m. local time).

⁶ See Kelli Kennedy, *Autopsy: Cuban Died of Head Injuries*, ORLANDO SENTINEL, July 10, 2006, at B7 (quoting Monroe County (Florida) Chief Medical Examiner who determined that Ms. Gonzalez died of blunt-force head trauma consistent with her head striking surfaces in the smuggling boat). The autopsy also revealed blunt force trauma to Ms. Gonzalez’s arms, legs, and back all sustained from her violent tossing about in the smuggling boat as it attempted to outrun law enforcement. Captain P. Heyl, the U.S. Coast Guard Commanding Officer of Sector Key West, noted that “there was no way for these people [the smuggled migrants] to brace themselves against the impact of the boat slamming into the rough seas.” *Id.*; see also Kennedy & Gresko, *supra* note 2 (reporting from Coast Guard sources that the smuggling boat ignored orders to stop and attempted to ram the Coast Guard law enforcement vessel and that the seas during the interdiction were rough and choppy).

⁷ See Ovalle, *supra* note 2.

⁸ See, e.g., U.S. DEP’T OF TRANSP., U.S. COAST GUARD OFFICE, COMMANDANT PUB. P16754.22, RECREATIONAL BOATING STATISTICS—2008 (Aug. 9, 2009) (noting in an annual compilation of data relating to reported recreational boating accidents that of 2626 reported accidents, 774 incidents were the direct result of careless or reckless vessel operation or excessive vessel speed and that reckless or high speed vessel operation was the cause of 61 deaths and 658 significant injuries).

⁹ See Ovalle, *supra* note 2. Alex Acosta, U.S. Attorney for the Southern District of Florida, stated, “[S]mugglers often treat migrants as if they’re human cargo without regard for life or human safety,” and Alfredo Mesa, director of the Cuban American National Foundation stated, “[L]et’s not lose sight that the ones responsible [for Ms. Gonzalez’s death] are the smugglers [T]hey’re the ones putting lives at risk.” *Id.*; see also Alfonso Chardy, *Cuban Migrants: Families Despair for 40 Lost at Sea*, MIAMI HERALD, Jan. 14, 2008, at A1 (noting that Coast Guard statistics estimate that at least 220 Cuban migrants had died at sea in smuggling ventures since January 1, 2001).

¹⁰ See *supra* note 1.

Because space is limited on the typical go-fast boat, smugglers cram as many passengers as possible into every available space to maximize profits.¹¹ Smugglers ignore basic vessel and passenger safety, preferring to fill space normally occupied by safety gear with additional bodies at \$8,000 to \$10,000 per person for every trip.¹²

Always on alert to the presence of the Coast Guard, Customs and Border Protection, and other law enforcement agencies in the Florida Straights, smugglers place a premium on vessel speed. Often, smugglers outfit go-fast vessels with as many as five 250-horsepower outboard engines to increase their speed and shorten travel times.¹³ A vessel capable of forty to sixty knots or more can make short work of the trip from Cuba to the Florida Keys and vastly increases the likelihood of a successful smuggling operation.¹⁴ However, the combination of passenger overcrowding and highly overpowered vessels is inherently dangerous and often deadly.

Unfortunately, tragic deaths, like Ms. Gonzalez's, are not uncommon among migrants.¹⁵ Every year, thousands of

¹¹ See Clark, *supra* note 4 (noting that in the smuggling venture in which Ms. Gonzalez died, thirty-one people were crammed into a boat designed for a maximum of nine passengers); Ovalle, *supra* note 2 (noting that a video obtained by the Coast Guard after it stopped the boat on which Ms. Gonzalez was killed showed migrants "squeezed in to the point where they could barely do anything but stand in place").

¹² See *Hearing of H. Judiciary Subcomm. on Crime, Terrorism, and Homeland Security on Department of Homeland Security Law Enforcement Operations*, 111th Cong. (2008) (statement of Rear Admiral Wayne Justice, Assistant Commandant for Capabilities) [hereinafter RADM Justice Statement] (copy of written testimony on file with author).

¹³ *Id.*

¹⁴ Admiral Justice testified,

Go-fast smuggling vessels have replaced rafts and rusticas as the preferred mode of transportation due to their increased probability of success. We [the Coast Guard] estimate that the rate of success for a raft or rustica is never better than 50 percent and generally 25 percent or lower. By comparison, the rate of success for a go-fast vessel operated by a smuggling organization is estimated at 70 percent.

Id.; see also Kennedy & Gresko, *supra* note 2 (quoting Coast Guard spokesperson confirming that an overpowered go-fast vessel can make the trip from Cuba to south Florida in approximately two hours).

¹⁵ See, e.g., Jacqueline Charles, *At Least 9 Haitian Migrants Dead, 79 Missing Off Turks and Caicos*, MIAMI HERALD, July 28, 2009 (reporting the death of nearly 100 Haitian migrants and the rescue of 113 migrants by the Coast Guard when a heavily overloaded "sail freighter" type smuggling vessel capsized); Andres Vignucci, *Migrant Smuggling Case: 7 From South Florida Face Alien-Smuggling Charges*, MIAMI HERALD, Sept. 30, 2008, at B3 (reporting initial charges against seven suspected migrant smugglers working in south Florida who used an overloaded go-fast and two decoy and support boats to transport thirty-two migrants; one of the migrants died after he sustained a serious head wound when the smuggling boat fled a U.S. Customs and Border Protection vessel); *Smuggling Prosecutions*, MIAMI HERALD, Apr. 13, 2008 (summary report of updates to prosecutions in seven cases in which maritime smugglers were charged with responsibility for the deaths of migrants, including one case involving a six-year-old boy who drowned beneath a go-fast boat when the overloaded vessel capsized). The risks to maritime migrants and high death toll in this

migrants put their lives in the hands of smugglers who operate in well-organized criminal syndicates with virtual impunity under existing law.¹⁶ Serious injuries and deaths are reported in large numbers every year, yet the majority of smuggling operations either successfully evade detection or conclude with a dangerous chase that results in no significant injuries despite the inherent risks.¹⁷ A maritime smuggling trip is essentially a roll of the dice. Most often, the smugglers and migrants win; the migrants arrive safely in the United States and the smugglers turn a huge profit. However, when the dice roll against the smugglers, people like Ms. Gonzalez can wind up dead in this gamble.

Under current law, 8 U.S.C. § 1324, maritime migrant smugglers rarely face more than an eighteen-month sentence when smuggling does not result in death or serious physical injury to any passenger.¹⁸ As a result, migrant smugglers typically continue operating until they kill or seriously injure a migrant and face a significant jail sentence. What little deterrent the current law provides is seldom enough to

trade is not limited to the Caribbean. The European Union confronts a similar maritime migration and smuggling challenge. See Andrea Fischer-Lescano, Tillmann Lohr & Timo Tohidipur, *Border Controls at Sea: Requirements Under International Human Rights And Refugee Law*, 21 INT'L J. REFUGEE L. 256 (2009) (noting that data from the International Centre on Migration Policy Development suggests that between 100,000 and 120,000 migrants from Africa, Asia, and the Middle East attempt to migrate illegally to Europe via maritime routes annually and that approximately 10,000 persons have drowned en route in the last decade).

¹⁶ See Office of Law Enforcement, *Coast Guard Migrant Interdictions—Fiscal Year 1982–Present*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/amio.asp#Statistics> (follow "Coast Guard Migrant Interdictions—Fiscal Year 1982–Present" hyperlink) (last visited May 15, 2010); see also RADM Justice Statement, *supra* note 12. Admiral Justice testified,

Since 1980, the Coast Guard has interdicted over 350,000 illegal migrants at sea, including around 180,000 Cuban and Haitian migrants during mass migrations in 1980 and 1994. The normal flow of illegal migrants can change dramatically from one year to the next, dependent upon a variety of push and pull socio-economic and political factors related to individual countries. For example, between 2005 and 2007 the number of illegal migrants departing Cuba increased to levels not experienced in a decade, averaging almost 6,800 migrants per year.

Id.

¹⁷ *Id.* (noting that go-fast migrant smugglers presently enjoy a success rate of approximately seventy percent).

¹⁸ The U.S. Sentencing Guidelines for a garden-variety migrant smuggling case that a prosecutor charges under 8 U.S.C. § 1324 provide a base offense level of 12—a coded value that the court uses to determine the recommended sentence range. 8 U.S.C. § 1324 (2006). With no prior convictions and no aggravating or mitigation factors included in the calculation the guidelines suggest a sentence range of only ten to sixteen months. See Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525 (Jan. 21, 2010); U.S.S.G. § 2L1.1 (2010) (Smuggling, Transporting, or Harboring an Unlawful Alien); see also Telephone Interview with Lieutenant Commander Thomas "Russ" Brown, Executive Officer, U.S. Coast Guard Law Enforcement Acad. (formerly Special Assistant U.S. Attorney for the S. Dist. of Miami) (May 15, 2010) [hereinafter Brown Interview].

prevent smugglers from plying their illegal trade when the profits from even a single smuggling venture can offer a massive payday.¹⁹ Thus, the legal toolkit federal prosecutors must work with is missing a critical component. What prosecutors need is a law that properly recognizes the inherent danger and criminality of maritime migrant smuggling and that offers penalties that can effectively deter and properly punish the crime.²⁰

Congress has recognized the need for new legislation on this issue, but has failed to provide a viable solution.²¹ In proposed revisions and amendments to the existing smuggling law, Congress specifically found that “[e]xisting penalties for alien smuggling are insufficient to provide appropriate punishment for alien smugglers” and “[e]xisting alien smuggling laws often fail to reach the conduct of alien smugglers, transporters, recruiters, guides, and boat captains”²² However, Congress has yet to adopt a suitable response.

The Coast Guard, with support from the Department of Justice, has proposed a Maritime Alien Smuggling Law Enforcement Act (MASLEA) as a solution to this gap in existing law.²³ The MASLEA proposal involves a two-pronged approach to closing the gap. First, the proposal recommends adopting a new offense making the unique crime of maritime migrant smuggling punishable by a minimum three-year sentence in routine cases involving no significant aggravating facts and by higher penalties in cases involving aggravating circumstances. Second, the proposed MASLEA would include enhanced sentences under 18 U.S.C. § 2237, an existing law that carries a penalty of up to five years for vessel operators that knowingly fail to obey Coast Guard or other law enforcement orders to stop a vessel.²⁴

¹⁹ See Chardy, *supra* note 9 (noting that a suspected smuggler in a case where forty migrants drowned when an overcrowded vessel capsized en route to Florida stood to gain \$400,000 from the single smuggling trip); Brown Interview, *supra* note 17 (noting the migrant smugglers consider the possibility of eventually spending twelve to eighteen months in jail as a cost of doing business).

²⁰ See Brown Interview, *supra* note 18 (suggesting that sentences of three years for routine migrant smuggling cases are needed to provide an effective deterrent to prevent the rise of smuggling networks in south Florida).

²¹ *Id.* Although Congress has recognized the need for a new law to combat maritime alien smuggling, the proposed changes to 8 U.S.C. § 1324 set forth in H.R. 1029 would significantly hamper prosecutions of maritime migrant smugglers and have an effect opposite to that which Congress intended in its expressed findings. See *infra* Part V.A.4.

²² H.R. 1029, 111th Cong. § 2 (2009).

²³ The text of the Coast Guard’s MASLEA proposal is provided in the Appendix.

²⁴ 18 U.S.C. § 2237 (2006). At present, this law has no enhanced sentencing provisions in cases where a vessel operator’s failure to stop a vessel causes death or serious injuries, places the lives of passengers at risk, or facilitates the commission of other crimes. In most cases where violations of 18 U.S.C. § 2237 are the only charged offenses, sentences range from three to twelve months. See Brown Interview, *supra* note 18.

This article will explore the merits of the MASLEA proposal and will make the case that enacting the MASLEA is necessary to adequately respond to the threat that maritime migrant smuggling presents to the United States, to fulfill obligations under international law to effectively combat this crime, and to protect the lives and safety of maritime migrants, who will take to the sea regardless of how open or restrictive United States immigration policy may be.

II. The Migrant Smuggling Threat

A. The United States and Immigration—A Reversible Welcome Mat

The United States has struggled with its immigrant identity almost from the founding of the Republic.²⁵ In 1794, George Washington wrote to John Adams on the potential advantages of immigration noting in one passage that “by an intermixture with our people, [immigrants], or their descendants, get assimilated to our customs, measures and laws: in a word, soon become one people.”²⁶ However, in the same letter Washington cautioned that immigration to the new nation should be limited “except of useful Mechanics and some particular descriptions of men or professions.”²⁷ Thus, Washington summarized an underlying angst in U.S. immigration policy that has lingered for more than two centuries. Our nation embraces those who seek the freedom and opportunity that America offers—but the enthusiasm of that embrace will vary depending on the political landscape for those who are not “useful Mechanic[s]”²⁸ or professionals who brings more to the table than a mere desire to “breathe free.”²⁹

²⁵ See Ryan Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1359–72 (2005) (summarizing various closed-door and open-door periods of U.S. immigration policy from the 1800s through the present).

²⁶ Letter from George Washington to John Adams (Nov. 15, 1794), reprinted in 34 THE WRITINGS OF GEORGE WASHINGTON, 1745–1799, at 78 (John C. Fitzpatrick ed., University of Virginia 1931–1944), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi34.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=13&division=div1> (last visited May 15, 2010) [hereinafter Washington Letter].

²⁷ *Id.*

²⁸ James Madison articulated a view similar to Washington’s in a 3 February 1790 address to Congress:

[w]hen we are considering the advantages that may result from an easy mode of naturalization, we ought also to consider the cautions necessary to guard against abuse. It is no doubt very desirable that we should hold out as many inducements as possible for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours. But why is this desirable? Not merely to swell the catalogue of people. No, sir, it is to increase the wealth and strength of the community; and those who acquire the rights of citizenship,

The gate of U.S. immigration policy may swing wide or slam shut in response to the political winds of the day, but regardless of how open or restrictive immigration policy may be, migrants continue to embark for the land of opportunity in astonishing numbers by means legal and illegal.³⁰ Every year, thousands of migrants seek to enter the United States illegally by maritime means.³¹ An increasing percentage of those migrants arrive on vessels operated by sophisticated migrant smuggling networks.³²

B. Smuggled Migrants—By The Numbers

The Coast Guard characterizes illegal migration via maritime routes as either “routine” (i.e., regular and predictable) or “mass” migration.³³ Routine illegal maritime migration typically involves relatively small numbers of migrants, usually a group of up to two-hundred persons on a

vessel lead by a smuggler or group of smugglers, or a migrant group that has collectively taken to the sea without a smuggler.³⁴ In contrast, mass migrations involve much larger groups of migrants and are events of national (or global) significance, such as the “Mariel Boatlift” that occurred between April and September 1980 and involved more than 120,000 Cuban nationals who fled Cuba for the United States in makeshift crafts and smuggling vessels.³⁵ Even in periods of “routine” maritime migration, the Coast Guard interdicts a significant number of migrants. Between fiscal years 1984 and 2009, the Coast Guard interdicted over 230,000 migrants attempting to illegally enter the United States from all over the world, although the vast majority traveled the major Caribbean smuggling routes (see Figure 1).³⁶ As shown in Figure 2, between 2003 and 2008, the Coast Guard interdicted more than 40,000 migrants from the primary Caribbean threat area for illegal maritime migration in the vicinity of Cuba, the Dominican Republic, and Haiti.³⁷

without adding to the strength or wealth of the community are not the people we are in want of.

A Brief History of American Response to Immigration, IMMIGRATION NEWS DAILY, http://idexer.com/articles/immigration_response.htm (last visited May 15, 2010) [hereinafter *Madison Address*] (quoting Madison’s address).

²⁹ EMMA LAZARUS, *THE NEW COLOSSUS* (1883), reprinted in EMMA LAZARUS: *SELECTED POEMS* (AMERICAN POETS PROJECT) 58 (John Hollander ed., Literary Classics of the U.S., Inc. 2003). Lazarus’s sonnet appears on a plaque inside the pedestal of the Statue of Liberty.

³⁰ See DHS Office of Immigration Statistics, *Annual Report: Immigration Enforcement Actions—2008*, at 1, http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf (August 2010) (last visited August 24, 2010). In its 2009 annual report, the Department of Homeland Security confirmed that DHS components apprehended nearly 613,000 foreign nationals attempting to enter the U.S. illegally during fiscal year 2009.

³¹ *Id.*; see also Office of Law Enforcement, *Alien Migrant Interdiction Statistics*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (2009) (last visited May 15, 2010) [hereinafter *Alien Migrant Interdiction Statistics*] (providing detailed statistics of interdictions of undocumented aliens attempting to enter the United States from 1982 to present).

³² See RADM Justice Statement, *supra* note 12 (noting that migrants are increasingly employing the services of migrant smugglers operating go-fast vessels).

³³ See Office of Law Enforcement, *Alien Migrant Interdiction*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/amio.asp> (last visited May 15, 2010) [hereinafter *Alien Migrant Interdiction*] (describing mass migration events and routine Coast Guard alien maritime interdiction operations (AMIO)).

³⁴ *Id.*

³⁵ See *id.* (describing Mariel Boatlift between 21 April and 28 September 1980, when the Cuban Government permitted any person who wanted to leave Cuba access to passage from the port of Mariel). During the period of the Mariel Boatlift, approximately 124,000 undocumented Cuban migrants entered the United States. Most of the migrants arrived on vessels registered in Florida. *Id.*; see also Alberto Perez, Comment, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 443 (2005) (discussing mass migration of Cuban nationals to south Florida during the Mariel Boatlift).

³⁶ See *Alien Migrant Interdiction Statistics*, *supra* note 30. These figures include all nationalities of migrants and include migrants interdicted on vessels operated by smugglers or by migrants traveling without suspected smugglers on board.

³⁷ See *id.*; see also RADM Justice Statement, *supra* note 12. In calendar year 2009, the Coast Guard reported a sharp decline in the number of maritime migrants interdicted in the primary Caribbean threat vector. The Coast Guard attributes this reduction in maritime migration, in substantial part, to the decline in the U.S. economy and the emergence of the Yucatan peninsula as a new threat vector for illegal Cuban migration to the United States. With increasing frequency, maritime smugglers transport Cuban migrants to Mexico via the Yucatan Strait. Once migrants have landed in the Yucatan, other smugglers transport the migrants overland to the U.S. border with Mexico. This has become an attractive route for maritime smugglers because the Coast Guard conducts fewer patrols in this area. Telephone Interview with Commander Tim Connors, Chief, Operations Law Group, U.S. Coast Guard Headquarters, Mar. 3, 2010 [hereinafter *Connors Interview*].

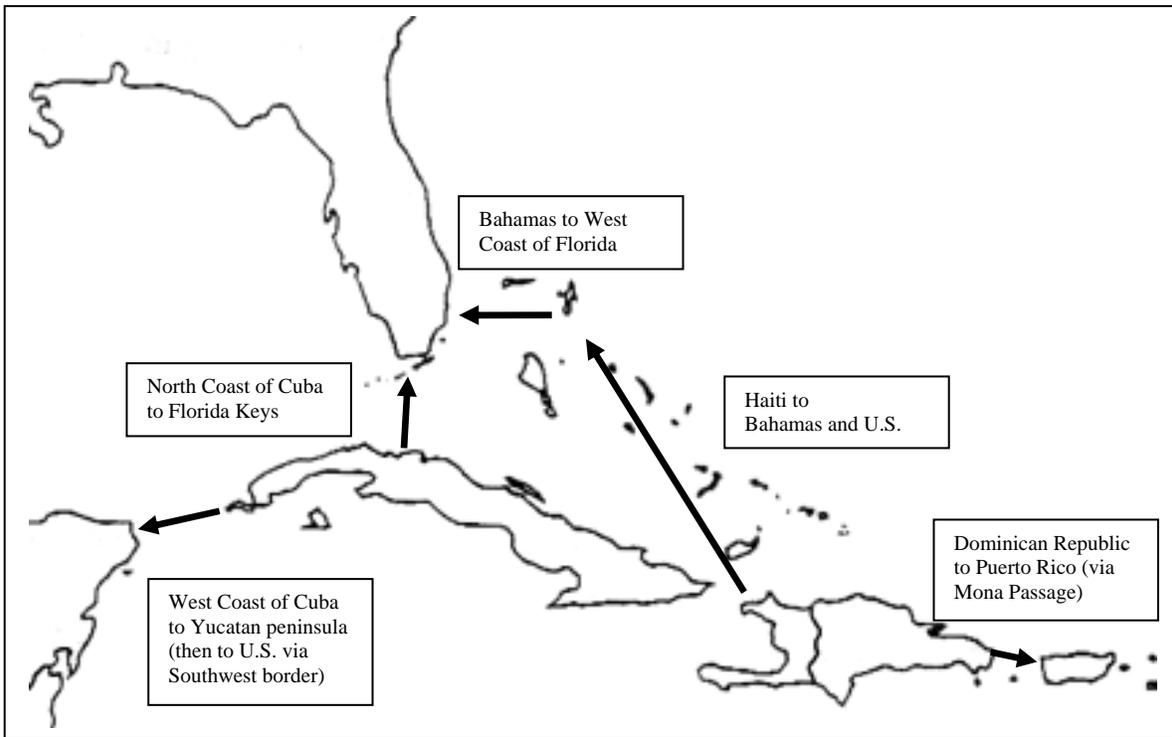


Fig. 1. Major Caribbean Migrant Smuggling Routes

<i>Year</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>
Haiti	2013	3229	1850	1198	1610	1582
Cuba	1555	1225	2712	2810	2868	2199
Dominican Republic	1748	5014	3612	3011	1469	688 ³⁸

Fig. 2. Coast Guard Maritime Alien Interdictions, 2003–2008

³⁸ The sharp drop in interdictions of migrants from the Dominican Republic en route to Puerto Rico in 2007–2008 is largely the result of the at-sea biometrics program the U.S. Coast Guard implemented in close cooperation with other Department of Homeland Security components in Puerto Rico and the U.S. Attorney’s Office for the District of Puerto Rico. *See infra* Part VI.B.

C. Smuggling Migrants—It’s Just Good [Criminal] Business

Migrant smuggling is tailor-made for organized crime. The business of trafficking migrants to the United States offers advantages of low capital investment—the cost of a small boat and several high-horsepower outboard engines are the most significant start-up expenses—and massive potential profits. Compared with narcotics trafficking, the smuggled product—human beings—requires no cultivation, processing, or packaging, and generally transports itself to the embarkation point at its own cost. Most importantly, the legal consequences of being caught “red-handed” in a migrant smuggling venture are insignificant when compared with the penalties for smuggling drugs.³⁹ With the potential for huge financial gains, a relatively low-risk of apprehension, and a “worst case” penalty of months—not years—in jail if caught smuggling migrants where no serious injury or death is involved, existing law provides virtually no deterrent to organized migrant smuggling. Like the anti-heroes in the popular Scorsese film based on the life of mobster Henry Hill, the average migrant smuggler can “take a pinch” and do the time without complaint.⁴⁰

III. Obligations to Combat Migrant Smuggling Under International Law

A. Border Control Authority Under Customary International Law and the United Nations Convention on the Law of the Sea

The authority to regulate the entry of persons is a fundamental tenet of state sovereignty under international law.⁴¹ A coastal state enjoys sovereignty over the area of its

³⁹ As noted above, the sentence range under applicable U.S. Sentencing Guidelines for a migrant smuggling charge with no aggravating factors is ten to sixteen months. See *supra* note 18. Conversely, in a case involving the possession or transportation of a distribution quantity of cocaine or other drug contraband in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507, the U.S. Sentencing Guidelines provide a base offense level of between thirty to thirty-five. Defendants with no prior conviction history typically receive sentences of ten years in prison (for defendants who plead guilty and cooperate in ongoing investigations) or up to twenty years (for defendants who receive no reduction in sentence in exchange for cooperation). See U.S.S.G. § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); see also Connors Interview, *supra* note 37.

⁴⁰ GOODFELLAS (Warner Bros. Pictures 1990).

⁴¹ See generally U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDINST M16247, series, § 6.B.1 (2008) (discussing customary international law regarding traditional rules of territorial sovereignty of states) [hereinafter MLEM]; see also *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (upholding constitutionality of Chinese Exclusion Act of 1882 and noting that Congress should be unlimited in its power to control immigration), *Frei*, *supra* note 24, at 1363–66 (discussing *Wong Wing* decision and history of Supreme Court deference to Congress on matters of immigration policy).

territorial sea under customary international law and various international conventions including the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (the 1958 TTS Convention) and the 1982 U.N. Convention on the Law of the Sea (UNCLOS).⁴² Under customary international law and UNCLOS, coastal states may claim a territorial sea extending beyond the state’s land territory and internal waters to an area of sea adjacent to its coastline up to a limit of twelve nautical miles measured from the baseline (coastline) of the state.⁴³ In addition, customary international law and applicable conventions provide that a coastal state may exercise control within its “contiguous zone” necessary to prevent infringement of its customs, fiscal, *immigration* or sanitary regulations and punish infringements of those regulations.⁴⁴ The contiguous zone is an area of the high seas beyond a coastal state’s territorial sea that extends up to twenty-four nautical miles from the baseline of the coastal state.⁴⁵

Thus, concepts of territorial sovereignty, immigration, and border control are woven into the tapestry of the international law of the sea. The high seas may be the last great global commons,⁴⁶ but within twenty-four nautical miles from the coast, coastal states exercise immigration and border control with nearly the same authority and sovereignty as they do at their land borders.

B. United Nations Convention Against Transnational Organized Crime

In 2001, the international community adopted the U.N. Convention Against Transnational Organized Crime (TOC Convention) “to promote cooperation to prevent and combat transnational organized crime more effectively.”⁴⁷ The United States and key Caribbean states are parties to the TOC Convention.⁴⁸ The TOC Convention obliges its parties

⁴² See Convention on the Territorial Sea and Contiguous Zone art. 1, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter 1958 TTS Convention]; United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 21 I.L.M. 1245 [hereinafter UNCLOS].

⁴³ UNCLOS, *supra* note 42, art. 3. The United States is not a party to UNCLOS, but has always considered the navigation and overflight provisions of UNCLOS to reflect binding customary international law. See generally President Ronald Reagan Statement on Oceans Policy, 1983 PUB. PAPERS 378–79 (Mar. 10, 1983).

⁴⁴ 1958 TTS Convention, *supra* note 42, art. 24; UNCLOS, *supra* note 42, art. 33.

⁴⁵ *Id.*

⁴⁶ See JAMES T. CONWAY ET AL., A COMPREHENSIVE STRATEGY FOR 21ST CENTURY SEAPOWERS 14 (Oct. 2007), available at <http://www.navy.mil/maritime/ MaritimeStrategy.pdf>.

⁴⁷ U.N. Convention Against Transnational Organized Crime art. 1, Jan. 8, 2001, U.N. GAOR, 55th sess., Supp. No. 49, U.N. Doc. A/45/49 [hereinafter TOC Convention].

⁴⁸ See Status of TOC Convention, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited May 15, 2010) (noting that

to enact legislation to establish specific criminal offenses to combat organized crime, money laundering, and corruption. The TOC Convention further requires parties to cooperate with each other to investigate and prosecute international organized crime, seize assets connected to such criminal activity, extradite suspects to appropriate jurisdictions, and otherwise lend mutual legal assistance to other parties to combat organized crime on an international scale.⁴⁹ Notably for purposes of the discussion of migrant smuggling, the TOC Convention defines a “serious crime” as an “offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”⁵⁰

C. The Palermo Protocols to the TOC Convention

The TOC Convention lays the groundwork for the United States’ obligation under international law to combat migrant smuggling. The 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the U.N. Convention Against Transnational Organized Crime (the Smuggling Protocol) and the 2000 Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol)—collectively referred to as the “Palermo Protocols”—establish the specific obligations of the parties to combat maritime migrant smuggling.⁵¹ The United States and most Caribbean states are parties to the Palermo Protocols.⁵²

The Smuggling Protocol established that “action to prevent and combat the smuggling of migrants . . . requires a comprehensive international approach” and noted that “the significant increase in the activities of organized criminal

groups in smuggling of migrants . . . bring[s] great harm to the States concerned . . . [and] endanger[s] the lives or security of migrants involved.”⁵³ Article 6 of the Smuggling Protocol provides that each party to the Protocol shall adopt legislative and other measures necessary to establish criminal offenses for migrant smuggling, attempted migrant smuggling, and the organization of smuggling ventures.⁵⁴ Article 8 of the Smuggling Protocol requires that Parties to the Convention cooperate with each other in combating maritime migrant smuggling by, *inter alia*, authorizing the boarding, search, and inspection of vessels flying the flag of one party that another party reasonably suspects is engaged in the smuggling of migrants by sea.⁵⁵

Similarly, the Trafficking Protocol established the need for international cooperation to combat the organized trafficking of persons. The purpose of the Protocol is to prevent such trafficking and protect the victims of that criminal trade.⁵⁶ The Trafficking Protocol defines trafficking as the use of force, coercion, abduction, fraud, or similar means for the purposes of exploiting the persons being trafficked.⁵⁷ The parties to the Trafficking Protocol are obliged to enact specific legislation to establish criminal offenses for human trafficking.⁵⁸ Although the Trafficking Protocol does not contain specific provisions dealing directly with maritime human trafficking, the Protocol obliges parties to strengthen border control measures to detect and deter human trafficking.⁵⁹

Thus, under the TOC Convention and the Palermo Protocols, the United States undertook an obligation to combat migrant smuggling and human trafficking and the organizations that sponsor this widespread criminal activity. The United States is certainly in compliance with the letter of those obligations through the various immigration and smuggling offenses set forth in title 8 of the U.S. Code, more fully discussed below. However, the obligation under the TOC Convention and Palermo Protocols to criminalize smuggling and trafficking is utterly meaningless if the parties enact legislation that is ineffective and inadequate to effectively punish and deter smuggling and trafficking. The fundamental tenet of the Palermo Protocols is the protection of migrants and victims of trafficking, their humane treatment, and the effective investigation and prosecution of smugglers and traffickers under laws that adequately reflect the seriousness of the offenses. The delivery of meaningful consequences to traffickers and smugglers is a lynchpin in

United States, Bahamas, Cuba, Dominican Republic, and Mexico have all ratified TOC Convention and that Haiti has signed the convention with ratification pending).

⁴⁹ See TOC Convention, *supra* note 47, arts. 5–18.

⁵⁰ See *id.* art. 2.

⁵¹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, A/55/383 [hereinafter Smuggling Protocol]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (vol. I) (2001) [hereinafter Trafficking Protocol]

⁵² See U.N. Office on Drugs and Crime Country List for Migrant Smuggling Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html> (last visited May 15, 2010) (confirming that the United States, Bahamas, Cuba, Dominican Republic, and Mexico have all ratified TOC Convention and that Haiti has signed the convention with ratification pending); U.N. Office on Drugs and Crime Country List for Trafficking Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (confirming 124 Parties to the Smuggling Protocol including the United States, Bahamas, Dominican Republic and Mexico and that Haiti has signed the protocol with ratification pending) (last visited May 15, 2010). Notably, Cuba is a Party to the TOC Convention, but not the Smuggling Protocol and Cuba is not a Party to the Trafficking Protocol.

⁵³ Smuggling Protocol, *supra* note 51, pmb1.

⁵⁴ *Id.* art. 6.

⁵⁵ *Id.* art. 8.

⁵⁶ Trafficking Protocol, *supra* note 51, pmb1., art. 2.

⁵⁷ *Id.* art. 3.

⁵⁸ *Id.* art. 5.

⁵⁹ *Id.* art. 11.

the overall scheme of the TOC Convention and Palermo Protocols to deter illegal migration and protect the lives of migrants. As long as the United States continues to give federal prosecutors the wrong tool for the job, it will fail to meet the spirit of its obligations under these treaties.

D. Obligations and Authorities Under Bilateral Agreements

The Coast Guard is the executive agent for the United States in more than fifty bilateral agreements with other states relating to maritime law enforcement.⁶⁰ The majority of these agreements relate to partnerships between the United States and South and Central American countries to suppress maritime drug trafficking through coordinated operations, but several of the agreements relate to migrant smuggling. In particular, the United States has bilateral agreements with the governments of the Bahamas, Haiti and the Dominican Republic that allow the parties to coordinate operations to suppress maritime smuggling, including migrant smuggling, in the Caribbean region.⁶¹

Because most Caribbean states do not have substantial naval or maritime law enforcement capabilities, these bilateral agreements permit states to maximize the effect and reach of their assets by coordinating their operations with U.S. patrols. Some partner states employ “shipriders”—officers who literally “ride” on a U.S. Coast Guard or other authorized U.S. Government vessel and may authorize the vessel to conduct operations in locations where the shiprider’s state has jurisdiction (i.e., the territorial sea of the shiprider’s state) and to board vessels over which the

shiprider’s state has jurisdiction (i.e., vessels flying the same flag as the shiprider’s state).⁶²

The agreements with the Bahamas and Dominican Republic also authorize the United States to conduct operations within the territorial seas of the Bahamas or Dominican Republic to interdict suspected migrant smuggling vessels under certain prescribed conditions.⁶³ Each agreement also contains streamlined procedures by which each party may obtain the authorization of its partners to board and search suspected smuggling vessels under the flag state authority of the partner state.⁶⁴ This reduces the time it takes to obtain the flag state’s authority to stop, board, and search a suspicious vessel from hours (or days) to minutes and vastly increases the capability and efficiency of these states’ maritime law enforcement patrols. These agreements ensure the flag state retains jurisdiction and authority over suspicious vessels⁶⁵ while providing an efficient process that allows the flag state to authorize other states to conduct a search.

The United States has invested significant political capital in generating these important bilateral agreements with partner states in the region. As noted above, article 8 of the Smuggling Protocol requires its parties to cooperate in granting permission to stop, board, and search vessels engaged in migrant smuggling. The network of bilateral agreements that the United States has established with its partners in the Caribbean institutionalizes that required cooperation. The goal of this cooperation is, of course, a reduction of criminal activity and an overall increase in the safety of persons at sea. In the end, the effectiveness of each partner nation’s interdiction efforts in the threat area will make little difference if the biggest partner prosecutes the smugglers it interdicts under a law that provides no meaningful deterrent. The lack of an effective deterrent to migrant smuggling under U.S. law is the Achilles’ heel of this entire international crime-fighting effort.

⁶⁰ See U.S. Coast Guard OPLAW Fast Action Reference Materials [hereinafter FARM] (Brad Kieserman & Brian Robinson, eds., 10th ed. 2009) (For Official Use Only manual that includes text of all bilateral agreements relating to U.S. Coast Guard maritime law enforcement and homeland security operations) (copy on file with author); see also U.S. State Dep’t, Office of the Legal Advisor, Treaty Affairs, *Treaties in Force: A List of Treaties of the United States and Other Agreements In Force on January 1, 2010* (January 1, 2010), available at <http://www.state.gov/documents/organization/143863.pdf> (last visited August 24, 2010) [hereinafter *Treaties in Force*] (copy on file with the author).

⁶¹ See Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement, U.S.-Bah., July 29, 2004, in FARM, *supra* note 60, at 109–115; Agreement Between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, U.S.-Haiti, Sept. 5, 2002, in FARM, *supra* note 60, at 270–73; Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Law Enforcement, U.S.-Dom. Rep., May 20, 2003, in FARM, *supra* note 60, at 384–89. Haiti has granted permission for U.S. Coast Guard air and surface assets to enter its territorial sea and airspace above the territorial sea, under certain circumstances, for migrant smuggling operations; however, the United States and Haiti are not parties to a formal bilateral agreement relating specifically to migrant smuggling. *Id.* at 390; see also *Treaties in Force*, *supra* note 60 (listing Bahamas, Haiti, and Dominican Republic bi-lateral agreements in force).

⁶² See generally Brian Robinson, *You Want Authority with That? How I Learned to Stop Worrying and Love Shipriders*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY & SEC. AT SEA 62 (Summer 2009) (discussing strategic expansion of Coast Guard shiprider programs with partner states in South and Central America, the Caribbean, the Pacific Rim, and West Africa for counter-drug, migrant smuggling, and other maritime law enforcement missions).

⁶³ Advance notice of the entry into another state’s territorial sea is required, and authority to enter is limited, in most cases to situations where no coastal state law enforcement assets are available to respond. See FARM, *supra* note 60, at 109–15, 384–89.

⁶⁴ *Id.* See also UNCLOS, *supra* note 42, art. 92 (“Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas.”).

⁶⁵ In appropriate cases, a state that has primary jurisdiction over a smuggling case may waive jurisdiction in favor of prosecution in another state that also has jurisdiction over the criminal activity.

E. “In Short, We’re in a Full Partnership with the Cuban Government.”⁶⁶

During the early 1960s, the United States viewed the steady exodus of Cuban intellectuals and professionals from Cuba to Florida as a political victory.⁶⁷ As the immigration burden grew and as the Castro government began to “push” individuals it deemed counterrevolutionaries off the island to the United States, it became apparent that the United States needed to bring order to the situation. These events culminated in the passage of the 1966 Cuban Adjustment Act (CAA).⁶⁸ Under this law, the Attorney General was given the discretion to grant lawful permanent resident status to any Cuban migrant (or refugee) who remains physically present in the United States for at least one year.⁶⁹ In other words, the CAA put Cuban migrants on a fast track to U.S. citizenship—a fast track that remains in place today.

The implications of the CAA’s fast track to citizenship are significant when coupled with the so-called “feet wet, feet dry” policy, which has the practical effect of guaranteeing that Cuban migrants will get on the CAA’s “fast track” as long as they arrive by any means on United States soil. Probably no U.S. immigration policy is more misunderstood or mischaracterized than “feet wet, feet dry.” The most common misperception of the policy is that “feet wet, feet dry” applies only to Cuban migrants.⁷⁰ This is simply not the case. The “feet wet, feet dry” policy is really a compilation of opinions from the Department of Justice’s Office of Legal Counsel (OLC), from 1993 to 1996, that collectively concludes that undocumented aliens seeking to reach the United States, but who have not landed physically in the United States, do not have a right to certain immigration proceedings (such as removal proceedings before an immigration judge) under the Immigration and Nationality Act.⁷¹ These opinions suggest that appropriate

⁶⁶ THE GODFATHER, PART II (Paramount Pictures 1974) (referring to fictional character Hyman Roth’s description of his planned expansion of casino operations in Havana).

⁶⁷ See Roland Estevez, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1274–76 (2002) (discussing six “stages” of Cuban immigration to the United States following Fidel Castro’s overthrow of the Batista government in 1959).

⁶⁸ See Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2000)).

⁶⁹ *Id.*

⁷⁰ See, e.g. Perez *supra* note 34, at 445 (describing the feet wet, feet dry policy as a direct response of President Clinton to the Castro government’s facilitation of the Mariel Boatlift and suggesting that the policy applies solely to Cubans); Estevez, *supra* note 67, at 1291 (describing the feet wet, feet dry policy as a device used by the United States against Cubans to “circumvent” the CAA).

⁷¹ See Memorandum from Doris Meissner to all INS officers, subject: Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (Apr. 26, 1999) (clarifying that Cubans, along with their spouses and children, who arrive at a location in the United States other than designated ports of entry, are eligible for parole, as well as eventual adjustment of status to that of permanent resident); see also Memorandum

U.S. authorities (including the Coast Guard) may directly repatriate any persons who have not “landed” physically in the United States, including persons interdicted in U.S. internal waters or territorial sea or persons on board vessels that are moored to a pier but who have not disembarked.⁷² When any person affirmatively expresses or manifests any fear of persecution, Department of Homeland Security officers will conduct a preliminary screening to determine whether that fear is credible.⁷³ In the end, “feet wet, feet dry” is not a policy at all; it is a determination made by the President’s lawyers about how, where, and under what circumstances other immigration policies and laws apply. The courts have consistently held that the application of the “policy” is legally sound.⁷⁴

For many years the United States and Cuba have been engaged in a partnership of sorts relating to joint efforts to combat migrant smuggling in the Florida Straights.⁷⁵ This pairing of Cold War adversaries around a shared law enforcement and border control dilemma emphasizes that the crime of maritime migrant smuggling knows little of political boundaries and respects none.⁷⁶ In a marriage born of necessity, the Coast Guard and Cuban Border Guard generally cooperate to identify suspected smuggling vessels departing Cuban waters for the Florida Keys⁷⁷ and to

from Walter Dellinger, Assistant Attorney Gen., to Attorney Gen., subject: Immigration Consequences of Undocumented Aliens’ Arrival in United States Territorial Waters (Oct. 13, 1993); Memorandum from Walter Dellinger, Assistant Attorney Gen., to T. Alexander Aleinikoff, Gen. Counsel, Immigration & Naturalization Serv., subject: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an “Arrest” under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994); Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney Gen., to Attorney Gen., subject: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996); see generally MLEM, *supra* note 41, § 6.B.2.b (discussing Office of Legal Counsel Opinions regarding the feet wet, feet dry policy).

⁷² *Id.*

⁷³ See 8 C.F.R. §§ 205.5(b), 253.1(f) (LexisNexis 2010).

⁷⁴ See, e.g., Yang v. Maugans, 68 F.3d 1540, 1546–49 (3d Cir. 1995); Zhan v. Slattery, 55 F.3d 732, 754 (2d Cir. 1995) (holding alien attempting to enter the United States by sea does not satisfy the physical presence element until he has landed), *cert. denied*, 116 S. Ct. 1271 (1996) (finding alien was not fully present until he came to the beach); Chen Zou Chai v. Carroll, 48 F.3d 1331, 1343 (4th Cir. 1995) (finding alien did not enter the United States for purposes of application of INA because he was apprehended before he reached the shore).

⁷⁵ See Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba, Sept. 4, 1994 [hereinafter Migrant Accords].

⁷⁶ In virtually every Cuban smuggling case, Florida registered sport vessels illegally enter Cuban territorial sea, beach on remote locations of the north coast of Cuba, embark migrants, and begin the return trip to the Florida keys. Entry into Cuban territorial sea by a U.S. registered vessel is illegal without a permit that the Coast Guard issues upon application. See 33 C.F.R. § 170.215 (LexisNexis 2010).

⁷⁷ Connors Interview, *supra* note 37 (confirming that Cuban Border Guard typically alerts U.S. Coast Guard District Seven Headquarters in Miami to last known location and course of suspected migrant smuggling vessels that evade interdiction within Cuban territorial sea).

facilitate the orderly repatriation of Cuban nationals interdicted by the U.S. Coast Guard at sea who have expressed no credible fear of return to Cuba.⁷⁸

A 1994 Joint Communiqué between the Governments of the United States and Cuba, known as the “Migrant Accords,” formalizes this odd-couple relationship.⁷⁹ Most notably for purposes of this discussion, the Migrant Accords state,

The United States and the Republic of Cuba recognize their common interest in preventing unsafe departures from Cuba which risk loss of human life. The United States underscores its recent decisions to discourage unsafe voyages.⁸⁰ Pursuant to those decisions, migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States.

....

The United States and the Republic of Cuba agreed that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994 will continue to be arranged in diplomatic channels.⁸¹

In 1995, the two governments amended the original Migrant Accords and agreed that, “effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba.”⁸²

The merger of law and policy at the meeting point of the CAA, “feet wet, feet dry” policy, and the Cuban “Migrant Accords” is unique. Unlike any other migrant smuggling (or landing) scenario, when a Cuban migrant lands on U.S. soil

⁷⁸ *Id.* (process for routine repatriation of Cuban nationals to Cuba involves communication from Coast Guard to Cuban Border Guard providing identifying information for persons proposed for repatriation and confirmation of acceptance of persons for repatriation from Cuban Boarder Guard to Coast Guard followed by coordination of transfer of persons at mutually agreed location).

⁷⁹ Migrant Accords, *supra* note 75; FARM *supra* note 60, at 370–71 (copy on file with author).

⁸⁰ Migrant Accords, *supra* note 75. This passage refers to executive orders discussed below.

⁸¹ *Id.*

⁸² Joint Statement of the Government of the United States and the Government of the Republic of Cuba Regarding Migrant Accords, May 2, 1995, [hereinafter references to Migrant Accords include this Joint Statement], FARM *supra* note 60, at 370–71 (copy on file with author).

he or she has achieved the equivalent of winning the lottery.⁸³ Under the CAA, any Cuban who remains physically present in the United States may become a lawful permanent resident in only one year. Once the migrant is “feet dry,” he is entitled to the same due-process protections of the Immigration and Nationality Act as a migrant of any other nationality. However, as a practical matter, once a Cuban migrant is “feet dry,” there is no place the U.S. Government can send the individual because, under the Migrant Accords, the Cuban Government will accept the repatriation of only those Cubans who the United States interdicts “at sea.”

This predicament explains why “feet wet, feet dry” is often misunderstood as a unique U.S. policy that favors Cuban migrants above all others.⁸⁴ The common misperception holds that the United States made a conscious decision to create a policy that allows Cubans to remain in the United States as long as they put their toes in our sand. In reality, however, the United States cannot deport or initiate removal proceedings against Cubans once they are “feet dry” because Cuba will not accept them except in extraordinary cases.⁸⁵

This is where the smugglers come in. Smugglers may not be well-versed in the legal and policy underpinnings of the CAA, the Migrant Accords, or the OLC opinions that form the “feet wet, feet dry” policy; however, every smuggler is acutely aware of the practical results of the merger of these policies and laws. With a potential return of \$250,000 to \$500,000 for every smuggling trip, and the relatively minor risk of a year and a half in jail if caught, smugglers willingly roll the dice to smuggle migrants to the United States. The lack of an effective prosecution tool creates a dangerous incentive for smugglers of Cuban migrants to run from law enforcement so that their human cargo can be safely deposited on American beaches, ensuring their own payday. With light sentences as the only

⁸³ Under the Migrant Accords, the United States also agreed to facilitate the orderly lawful migration of at least 20,000 Cuban nations each year, not including immediate relatives of persons who are already U.S. citizens. *See* Migrant Accords, *supra* note 75. The United States and Cuba further agreed to “work together” to facilitate procedures to implement such legal migration. *Id.* Cubans who wish to immigrate to the United States legally apply for an exit visa from Cuba to enter the United States under this agreement. Because the number of Cuban nationals who seek to immigrate lawfully from Cuba to the United States every year vastly exceeds the 20,000 persons that the United States agreed to accept, the selection process has become known both in popular culture and in official diplomatic channels as the “Cuban lottery” (“Sorteo” in Spanish). *See Cuban Lottery (1998)*, UNITED STATES INTERESTS SECTION, HAVANA, CUBA, http://havana.usint.gov/diversity_program.html (last visited May 15, 2010) (providing instructions to applicants for the “Cuban lottery”).

⁸⁴ *See, e.g.,* Estevez, *supra* note 67, at 1293–94 (discussing allegations of preferential treatment to Cuban migrants under feet wet, feet dry policy).

⁸⁵ The controversial Elian Gonzalez case in the summer of 2000 is the most publicized case in which the Castro government agreed to facilitate the return of a Cuban national who had landed in the United States. *See Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000).

deterrent under current law, there is no incentive for any individual with a faulty moral compass *not* to play this dangerous game.

Two possible courses could change this dynamic. The United States could completely unravel more than forty years of policy, law, and diplomatic agreements with a government that one could charitably describe as “unfriendly.” Alternatively, the United States could simply pass MASLEA as a way to create meaningful consequences for would-be smugglers of Cuban migrants so that the results of apprehension and prosecution make the game much less attractive.

IV. Authorities and Obligations Under Domestic Law to Combat Maritime Migrant Smuggling

A. Border Control Under Domestic Law

The Immigration and Nationality Act (INA)⁸⁶ provides the President with authority to establish immigration policy and controls. Most notably, section 215(a)(1) of the INA, as amended, provides:

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.⁸⁷

Section 212(f) of the INA, as amended, further provides:

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁸⁸

⁸⁶ 8 U.S.C. § 1185(a)(1) (2006).

⁸⁷ *Id.* § 1185(a)(1).

⁸⁸ *Id.* § 1182(f).

B. Evolution of Executive Policy

1. Presidential Proclamation 4865 and Executive Order 12324—Suspending the Entry of Undocumented Aliens

On 29 September 1981, President Reagan issued Proclamation 4865 suspending the entry of undocumented aliens attempting to enter the United States by sea.⁸⁹ Proclamation 4865 announced:

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN . . . in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.⁹⁰

⁸⁹ 3 C.F.R. 50–51 (1981–1983 Comp.) (1983), 46 Fed. Reg. 48,107 (LexisNexis 2010).

⁹⁰ 3 C.F.R. 50–51 (1981–1983 Comp.) (1983), 46 Fed. Reg. 48107 (LexisNexis 2010).

Simultaneously with Proclamation 4865, President Reagan issued Executive Order (EO) 12324, which directed the Coast Guard to interdict and repatriate migrants attempting to enter the United States illegally.⁹¹ With this stroke, the Executive established a policy of actively pushing the U.S. border out well beyond the coast to deter illegal maritime migration by interdicting migrants and smuggling vessels while they were still in transit on the water.

2. Executive Order 12807—Interdict and Repatriate Redux

On 24 May 1992, President Bush issued EO 12807 to provide renewed guidance and direction to the federal agencies charged with enforcing the suspension of entry of undocumented migrants in place since President Reagan issued Proclamation 4865.⁹² In EO 12807 President Bush

⁹¹ 3 C.F.R. § 2(c)(3), at 181 (1981–1983 Comp.) (1983). President Bush’s Executive Order 12,807 in 1992, discussed below, updated and replaced Executive Order 12,324.

⁹² Executive Order 12,807 provides, in pertinent part:

(1) The President has authority to suspend the entry of aliens coming by sea to the United

States without necessary documentation, to establish reasonable rule, and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States:

....

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally:

I, GEORGE BUSH, President of the United States of America hereby order as follows:

....

Section 2. The Secretary of the Department in which the Coast Guard is operating in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the Interdiction of any defined vessel carrying such aliens.

....

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such

vessels are engaged in the irregular transportation of persons or violations of

mandated, *inter alia*, that the Coast Guard would be the lead federal agency for interdicting illegal migrant vessels and that it would thenceforth be the policy of the United States to stop illegal migrants beyond the territorial sea of the United States when possible and repatriate migrants to their country of origin, or some third country, whenever appropriate.⁹³

3. Can He Do That? *Sale v. Haitian Centers Council*

The most significant challenge to Executive policy regarding the suspension of entry of undocumented maritime migrants and repatriation of migrants that the United States interdicts at sea came in *Sale v. Haitian Centers Council*.⁹⁴ In *Sale*, the plaintiffs (and petitioners at the appellate level) claimed that the maritime migrants the United States interdicts at sea are entitled to certain rights under the Immigration and Nationality Act (INA) and that the policy of interdicting and repatriation of migrants at sea violated the INA and international law.⁹⁵

In rejecting the petitioner’s claims, the Supreme Court ruled that Article 33 of the U.N. Convention relating to the Status of Refugees (the Refugee Convention) and section 243(h) of the INA do not apply outside the land territory of the United States.⁹⁶ Section 243(h)(1) of the INA⁹⁷ provides that

[t]he Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular

United States law or the law of a country with which the United States has an

arrangement authorizing such action.

....

(3) To return the vessel and its passengers to the country from which it came, or

to another country . . . provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

57 Fed. Reg. 23,133 (1992).

⁹³ *Id.*

⁹⁴ 509 U.S. 155 (1993).

⁹⁵ *Id.* at 162–64, 166–67.

⁹⁶ *Id.* at 172–87.

⁹⁷ Amended by 8 U.S.C. § 1158(a).

social group, or political group.⁹⁸

In rejecting the argument that the Refugee Convention applied to Coast Guard interdictions of maritime migrants, the Court held that “a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”⁹⁹ With respect to the INA, the Court reasoned,

all available evidence about the meaning of § 243(h) of the Immigration and Nationality Act of 1952 . . . leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.¹⁰⁰

The Court unequivocally upheld EO 12807¹⁰¹ and thus confirmed that the United States is not required to screen all undocumented migrants at sea (i.e., while on board Coast Guard vessels) to determine whether they qualify for asylum or other immigration processing.¹⁰² Although the *Sale* decision and Coast Guard migrant interdiction procedures are the subject of some scholarly criticism,¹⁰³ the Supreme

⁹⁸ 8 U.S.C. § 1253(h)(1).

⁹⁹ *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 183 (1993).

¹⁰⁰ *Id.* at 177.

¹⁰¹ Executive Order 12,807 concludes with a statement that “this order [shall not be] construed to require any procedures to determine whether a person is a refugee.”

¹⁰² *Sale*, 509 U.S. at 177–83.

¹⁰³ See Barbara Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, 30 *FORDHAM INT’L L. J.* 75, 95–97, 106–07 (2006). Professor Miltner’s critique of the *Sale* decision discusses what she characterizes as a majority view of scholars and the Inter-American Commission on Human Rights that article 33 of the U.N. Refugee Convention has no geographic boundaries. The argument confuses the notion that a state’s law enforcement authorities must affirmatively seek out potential asylum seekers whenever and wherever they are encountered outside their state’s land border (a notion that the Supreme Court rejected in *Sale*) with the concept that a state is obliged under the principle of *non-refoulement* to screen a potential asylum-seeker encountered extraterritorially when the individual affirmatively manifests a credible fear of return. Taken to its logical extreme, this argument would require law enforcement authorities to essentially escort illegal migrant smuggling vessels into port to complete the smuggling journey and facilitate immigration processing and asylum screening ashore. Professor Miltner also suggests that international cooperation in interdicting migrant and smuggling vessels through bilateral agreements “effectively dispenses with the concept of exclusive flag state jurisdiction by creating an interception-sharing scheme” International cooperation in combating smuggling is affirmatively required in the TOC Convention and its Protocols as discussed above. The existence of bilateral agreements to facilitate such cooperation is a clear affirmation—not a dilution—of the concept of exclusive flag state jurisdiction and coastal state authority. Each such agreement clearly prescribes that authorities conducting any interdiction of a suspect vessel bearing the flag of one of the parties or in waters subject to the jurisdiction of another party may only proceed with the authorization of that flag or coastal state. These agreements simply expedite the process by which

Court has clearly ruled that these procedures comply with domestic and international law.¹⁰⁴

4. Presidential Decision Directive 9 (1993)—*Stop Alien Smuggling and Keep It Out of Our Backyard*

Prompted in part by continued illegal maritime migration in the Caribbean and by significant increases in maritime alien smuggling of migrants from China under particularly dangerous and inhumane conditions,¹⁰⁵ President Bill Clinton issued Presidential Decision Directive 9 (PDD-9) on 18 June 1993.¹⁰⁶ This directive states that the “U.S. government will take the necessary measures to preempt, interdict, and deter alien smuggling into the U.S.,” and that U.S. policy is to “interdict and hold the smuggled aliens *as far as possible from the U.S. border* and to repatriate them when appropriate.”¹⁰⁷ The PDD-9 specifically tasks the Coast Guard to “direct U.S. interdiction efforts at sea with appropriate DOD support if necessary.”¹⁰⁸ The directive

parties obtain that authorization. See also Lory Diana Rosenberg, *The Courts and Interception: The United States’ Interdiction Experience and Its Impact on Refugees and Asylum Seekers*, 17 *GEO. IMMIGR. L.J.* 199, 209–15 (2003) (discussing the historical background of the *Sale* case and the debate over whether *Sale* effectively sanctions U.S. violations of article 33 of the U.N. Refugee Convention).

¹⁰⁴ Although the Supreme Court ruled that the Refugee Convention did not require the United States to provide screening of migrants at sea, as a matter of policy, the Coast Guard, in close cooperation with the U.S. Citizenship and Immigration Service (USCIS), conducts preliminary asylum screening at sea in any case in which an interdicted migrant verbally or physically manifests a credible fear of return to the location of proposed repatriation. In addition, the Coast Guard and USCIS provide asylum screening for all interdicted migrants who are Cuban nationals being repatriated to Cuba. See MLEM, *supra* note 41, § 6.D.3–4 (discussing asylum pre-screening procedures coordinated between Coast Guard and USCIS). The Coast Guard conducts all maritime migrant interdictions consistent with human rights standards and the principle of *non-refoulement*. Regardless of a state’s sovereign authority to protect its borders and enforce immigration laws, customary and conventional international law (including the Refugee Convention) affirm the obligation of states not to return (*refouler*) persons to territories where their lives or freedom would be threatened by reason of the person’s race, religion, nationality, political expression or membership in a particular social group. The Coast Guard conducts all maritime migrant interdiction and repatriation operations consistent with these principles. See *id.* § 6.B.1.a–b.

¹⁰⁵ Smugglers of Chinese migrants typically transported their human “cargo” in container ships and often enclosed migrants in sealed containers with little or no food, water, or facilities for sanitation or safety. See generally Office of Law Enforcement, *Alien Migrant Interdiction*, U.S. COAST GUARD <http://www.uscg.mil/hq/cg5/cg531/amio.asp> (last visited May 15, 2010) (discussing trends and tactics of various maritime migrant smugglers).

¹⁰⁶ PRESIDENTIAL DECISION DIR. 9 (June 18, 1993), available at <http://www.fas.org/irp/offdocs/pdd9.txt>. (last visited May 15, 2010) (portions of PDD-9 are classified so only the unclassified portion of the text is publicly available) [hereinafter PDD-9].

¹⁰⁷ *Id.* (emphasis added). Repatriation “when appropriate” incorporates the concept that USCIS will provide additional asylum screening to any migrant who manifests any credible fear of return to a point of repatriation consistent with the *non-refoulement* obligation.

¹⁰⁸ *Id.*

further requires the Coast Guard to “board suspect vessels when authorized” and “direct/escort them to flag states or the nearest non-U.S. port if practical and assuming host nation concurrence.”¹⁰⁹ President Clinton directed the Department of Justice to “review criminal and civil authorities and penalties for alien smuggling and recommend alternative prosecution strategies or penalty increases if appropriate.” The directive further tasked the Justice Department to “determine whether U.S. Attorneys should be instructed to prioritize prosecution of alien smuggling cases in light of limited penalties.”

Thus, early in his first term President Clinton built on and expanded the border-pushing policy that President Reagan established in 1981 and that President Bush renewed in 1992.¹¹⁰ He did so as a direct response to the continued security threat that international criminal organizations presented. Finally, President Clinton forecast in PDD-9 that “we will seek tougher criminal penalties both at home and abroad for alien smugglers.”¹¹¹ The PDD-9 clarifies that a two-pronged approach to deterrence is necessary to combat the threat; interdiction and repatriation are not enough, and tougher criminal penalties are needed to deter the criminal conduct. Unfortunately, more than fifteen years later, federal prosecutors still need a purpose-built tool to combat routine maritime migrant smuggling operations in the Caribbean.

5. Executive Order 13276

President George W. Bush issued EO 13276 on November 15, 2002.¹¹² The order directs the Department of Defense to provide support to the Coast Guard in carrying out the duties that EO 12807 described.¹¹³ Executive Order

¹⁰⁹ *Id.*

¹¹⁰ In *Sale v. Haitian Ctrs. Council*, the Supreme Court described the development of Executive policy as follows:

In the judgment of the President's [George H.W. Bush] advisers, [removing the suspension of entry of undocumented migrants that President Reagan implemented] not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft [citing reports of hundreds of deaths of Haitian migrants at sea during the 1981 mass migration from Haiti] . . . [o]n May 23, 1992, President Bush adopted the second choice [referring to EO 12807]. After assuming office, President Clinton decided not to modify that order; it remains in effect today.

509 U.S. 157, 163–64 (1993).

¹¹¹ See PDD-9, *supra* note 106.

¹¹² 67 Fed. Reg. 69,985 (Nov. 19, 2002).

¹¹³ *Id.*

13276 also provides authority to maintain interdicted undocumented aliens in extraterritorial detention facilities and allocates responsibilities among the participating agencies, including the Department of Homeland Security, Secretary of State, and Secretary of Defense.¹¹⁴

6. The Paradigm Shift

The development of Executive policy that commenced with President Reagan's suspension of entry of undocumented migrants and culminated with President Bush's lane-clarifying EO 13276 is a true paradigm shift. Prior to Proclamation 4865 and EO 13234 in 1981, the Government most often apprehended maritime migrants, if at all, after they made landfall. In Proclamation 4865, President Reagan linked illegal maritime migration to national-level threats and organized crime that threatened the welfare and safety of communities where illegal landings were becoming commonplace. Although the Coast Guard had always enjoyed authority to enforce immigration laws in waters and over vessels subject to U.S. jurisdiction, President Reagan specifically charged the Coast Guard in EO 13234 with actively detecting and interdicting illegal maritime migration as part of the service's core maritime law enforcement mission. Every President since has further refined, shaped, and *expanded* that policy.

The unique nature of this Executive policy lies in its association with national, homeland, and community security. The Statue of Liberty may be the “mother of exiles,”¹¹⁵ but the United States is no stranger to anti-immigration sentiments. Most groups that have objected to an influx of immigrants have typically based their objections on economic and social fears. More than 150 years ago, the fringe Know Nothing party complained that Irish, German, and other European immigrants were taking jobs from “real Americans” and were importing what the party fathers deemed unwanted social traits.¹¹⁶ Government has also used economics and social policy as cornerstones in decisions to widen or close the immigration door. The Founding Fathers' belief that the new nation should direct immigration inducements to “useful Mechanics” and “the worthy part of mankind”¹¹⁷ evolved into contemporary immigration

¹¹⁴ *Id.* Executive Order 13,286 amended Executive Order 13,276 and substituted the Secretary of the Department of Homeland Security for “Attorney General” in section 1. 68 Fed. Reg. 10,619.

¹¹⁵ See *supra* note 29.

¹¹⁶ See generally CALETION BEALS, BRASS-KNUCKLE CRUSADE: THE GREAT KNOW-NOTHING CONSPIRACY, 1820–1860 (1960); see also Frei, *supra* note 24, at 1364–65 (noting that congressional floor debates in support of passage of the Chinese Exclusion Act of 1882 contained what most Americans would consider today to be disturbing racist and xenophobic viewpoints).

¹¹⁷ See Washington Letter, *supra* note 26; Madison Address, *supra* note 28.

requirements in title 8 of the U.S. Code.¹¹⁸

Since 1981, the Executive Branch has taken a different tack on the threat that illegal maritime migration presents. Because of the intimate ties between maritime migrant smugglers and larger international smuggling syndicates,¹¹⁹ and the dangers that maritime migrant smuggling presents to the migrants themselves, Executive policy specifically acknowledges that maritime migrant smuggling is not simply a violation of U.S. immigration laws; it is also a national and homeland security threat that requires the United States to push the nation's border outward and "seek tougher criminal penalties both at home and abroad for alien smugglers."¹²⁰ President Clinton's charge to seek tougher penalties for migrant smugglers in PDD-9 is now nearly twenty years old. In that time, maritime migrant smuggling networks have only expanded their operations and refined their tactics—in large part because existing laws prohibiting their conduct have virtually no deterrent effect.

C. Coast Guard's Law Enforcement and Humanitarian Missions

1. Coast Guard Law Enforcement Authority

The Coast Guard is the nation's premier maritime law enforcement agency empowered by Congress to enforce all U.S. laws in waters and over vessels subject to the jurisdiction of the United States.¹²¹ The Coast Guard's core law enforcement authority is set forth in 14 U.S.C. 89, which provides:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers,

¹¹⁸ 8 U.S.C. § 1182 (Section 212 of the INA) sets forth an exhaustive list of classes of aliens not eligible for admission to the United States. Notably, a criminal history in alien smuggling or human trafficking would make an alien ineligible for admission to the United States. *Id.* § 1182(a)(2)(H); 1182(a)(6)(E).

¹¹⁹ See PDD-9, *supra* note 106.

¹²⁰ *Id.*

¹²¹ See U.S. COAST GUARD PUB. 1, AMERICA'S MARITIME GUARDIAN, <http://www.uscg.mil/top/about/pub1.asp> (last visited May 15, 2010); 14 U.S.C. § 2 (2006) (defining the Coast Guard's various missions to include maritime law enforcement).

and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.¹²²

2. Search and Rescue Authorities and Obligations

a. Customary International Law, UNCLOS, and SOLAS

It is well-settled under customary international law that masters of vessels have an obligation to render assistance to other mariners in distress.¹²³ Article 12 of the 1958 Geneva Convention on the High Seas and Article 98 of UNCLOS both provide, in pertinent part, that

[e]very State shall require the master of a ship [flying its flag] . . . (a) [t]o render assistance to any person found at sea in danger of being lost; [and] (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance . . .¹²⁴

Similarly, the 1974 International Convention for the Safety of Life at Sea (SOLAS) provides,

The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal from any source that

¹²² 14 U.S.C. § 89 (2006). The origins of the Coast Guard's law enforcement authority date back to the founding of the Revenue Cutter Service in 1798.

¹²³ See THOMAS & DUNCAN, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 213-14 (1997).

¹²⁴ United Nations Convention on the High Seas art. 12, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200; UNCLOS, *supra* note 42, art. 92.

persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.¹²⁵

This general obligation to render assistance applies throughout the high seas. The mariner's duty to render assistance to persons and vessels in peril even trumps state sovereignty.¹²⁶ It is well-settled that entry into another State's territorial sea to conduct a *bona fide* rescue of those in danger or distress at sea when the location of the person or vessel in distress is reasonably well-known is authorized under international law.¹²⁷

b. Coast Guard Search And Rescue Authority: 14 U.S.C. § 88

Congress granted the Coast Guard extensive and broad authority to conduct search and rescue operations in 14 U.S.C. 88. The statute provides,

In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations,

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the

Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.¹²⁸

Courts have construed this authority broadly. In *Thames Shipyard and Repair Co. v. United States*,¹²⁹ the First Circuit held that the Coast Guard's broad search and rescue authority authorizes Coast Guard personnel to conduct rescue operations even against the will of the persons rescued when lives are threatened.¹³⁰

Accordingly, even absent its inherent law enforcement authority, the Coast Guard may stop and interdict migrant smuggling vessels in most cases under the authority in international and domestic law to affect rescues at sea because of the unsafe and often inhuman conditions of migrant smuggling voyages.

V. Current U.S. Law Prohibiting Maritime Migrant Smuggling Is Inadequate

A. 8 U.S.C. §1324—A Virtual Free Ride for Maritime Smugglers

The TOC Convention, discussed above, defines "serious" offenses as those for which the offender faces four years or more of confinement.¹³¹ At present, the principal federal criminal statute for prosecuting alien smugglers (maritime or otherwise) is 8 U.S.C. § 1324, Bringing In and Harboring Certain Aliens.¹³² In virtually all maritime alien

¹²⁸ 14 U.S.C. § 88.

¹²⁹ 350 F.3d 247 (1st Cir. 2003).

¹³⁰ In *Thames Shipyard*, the First Circuit held:

[t]he Coast Guard . . . has been granted by Congress a variety of public safety responsibilities and powers, including, of course, the specific power under discussion to rescue and aid persons and property. In exercising its rescue powers, it construes its own role as giving priority to the saving of lives over the saving of property. . . . In circumstances such as the present, Coast Guard operations are relevantly different from the situation in which a private vessel or a commercial salvor comes to the aid of a distressed vessel. Under the circumstances, we think it reasonable to assume that Congress, in granting the Coast Guard the broad authority to undertake 'any and all acts necessary to rescue and aid persons and protect and save property,' intended to confer powers analogous to those commonly possessed by state public safety officials, namely, the power to rescue a person even against his will in lifethreatening circumstances.

Id. at 251.

¹³¹ See *supra* note 50.

¹³² See 8 U.S.C. § 1324; Brown Interview, *supra* note 18 (confirming that 8 U.S.C. §1324 is the primary statute charged in all migrant smuggling prosecutions).

¹²⁵ International Convention for the Safety of Life at Sea, ch. V, reg. 10, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700, 1184 U.N.T.S. 2 (as amended) [hereinafter SOLAS]. The SOLAS does not impose obligations on warships, but the general duty of mariners to render assistance to those in distress at sea is clear.

¹²⁶ See e.g., UNCLOS, *supra* note 41, art. 98.

¹²⁷ UNCLOS, *supra* note 42, art. 98; see also THOMAS & DUNCAN, *supra* note 123, at 214–15 (discussing master's duty to render assistance, right of assistance entry into the territorial sea of another state, duty of U.S. Navy Commanders to render assistance to those in distress at sea per U.S. Navy regulations and principles of safe harbor under international law).

smuggling cases, offenses under this law only rise to the felony level if the Government can prove beyond a reasonable doubt that a smuggler obtained a profit, commercial advantage, or private financial gain; caused serious bodily injury; placed in jeopardy the life of any person or “encouraged or induced” the migrants to make an illegal voyage; or engaged in a smuggling conspiracy.¹³³

Under existing law, federal prosecutors usually bring charges, if at all, against most migrant smugglers under a conspiracy to “encourage or induce” theory.¹³⁴ The maximum penalty in such cases can be up to five years in prison.¹³⁵ However, under applicable Sentencing Guidelines, most migrant smugglers receive sentences of between ten and sixteen months. Consequently, until Congress passes legislation that provides more significant punishments for migrant smuggling, the United States cannot credibly maintain that its domestic legislation meaningfully upholds its obligations under the TOC Convention and Palermo Protocols. To be sure, stiff sentences under 8 U.S.C. § 1324 are available for egregious cases;¹³⁶ however, these cases are the exception and not the rule.¹³⁷ As long as migrant smugglers continue to be punished lightly in “routine” smuggling cases, the criminal activity will continue.

B. The Profit and Inducement Conundrum

Felony-level prosecutions and the imposition of significant sentences for migrant smuggling should not hinge on proof of profit, serious injury, or death. As a practical matter, proving the realization of a profit can be nearly impossible because smugglers rarely, if ever, bring their proceeds with them and do not typically confess to earning massive profits to investigators when apprehended.¹³⁸ Migrants aboard smuggling vessels are equally disinclined to confirm the amounts they paid because migrants who assist

law enforcement are often “blackballed” for future voyages.¹³⁹ In the absence of a way to prove that smugglers profited from their smuggling activities, prosecutors must rely on an “encouraged and induced” theory for felony smuggling prosecutions, which requires the Government to prove “inducement” through circumstantial evidence—or through the testimony of an undocumented migrant who must be brought to the United States for trial.¹⁴⁰ With a maximum penalty of only five years imprisonment under an “inducement” theory, prosecutors rarely obtain sentences of more than twelve to sixteen months in typical cases involving no aggravating facts.

C. Can I Get a Witness?

The requirement to prove profit or inducement to reach a felony-level offense under 8 U.S.C. § 1324 often requires federal prosecutors to make a Hobson’s choice. To prove inducement, prosecutors may be forced to bring interdicted migrants to the United States to testify to the inducement. In doing so, prosecutors must ignore Executive directives to stop and repatriate undocumented migrants as far from the United States as possible or risk losing the case.

This need to call witnesses that have been interdicted can affect other cases, too. For example, in several high-profile smuggling cases that involved death or serious injury to migrants, prosecutors were forced to call dozens of interdicted migrants as material witnesses; a number of repatriated witnesses were deemed material and potentially exculpatory for the defense and not calling them would have put the Government’s homicide prosecution in jeopardy.¹⁴¹ Therefore, not only is the existing migrant smuggling law an ineffective deterrent, it actually places federal prosecutors in the awkward position of having to violate Executive directives to ensure the success of the Government’s most important prosecutions.

D. Just Add Confusion: Why H.R. 1029 Makes a Bad Situation Worse

The findings set forth in H.R. 1029 note that “[e]xisting penalties for alien smuggling are insufficient to provide appropriate punishment for alien smugglers” and “[e]xisting alien smuggling laws often fail to reach the conduct of alien smugglers, transporters, recruiters, guides, and boat captains”¹⁴² However, despite good intentions, H.R. 1029 rewords 8 U.S.C. § 1324 without making any significant improvements to the law. The existing migrant smuggling

¹³³ See *id.* § 1324(a)(1)(A)(i)–(iv), (a)(1)(B)(i), (a)(1)(B)(iv) (establishing punishment of not more than five years imprisonment when offense involves “inducement”—not more than ten years if “offense was done for the purpose of commercial advantage or private financial gain”—not more than twenty years if the offense caused serious bodily injury or placed the life of any person in jeopardy - any term of years or life imprisonment if the offense resulted in the death of any person); *id.* § 1324(a)(2) (punishment limited to no more than one year imprisonment when any person who brings or attempts to bring undocumented migrant to the U.S. unless government proves additional aggravating facts, including commercial advantage or private financial gain).

¹³⁴ Brown Interview, *supra* note 18 (noting that encouragement and inducement theory is the most common charging theory under 8 U.S.C. § 1324).

¹³⁵ 8 U.S.C. § 1324(a)(1)(B)(ii).

¹³⁶ See *id.*; *id.* § 1324(a)(1)(B)(v) (penalty for offense resulting in death to any person is death or imprisonment for any terms of year or life).

¹³⁷ Brown Interview, *supra* note 18.

¹³⁸ See *id.* (describing difficulties in proving profit or financial gain element of offense under 8 U.S.C. § 1324(a)(1)(B)(1) and (a)(2)(B)(ii)).

¹³⁹ See *id.*

¹⁴⁰ 8 U.S.C. § 1324(a)(1)(A)(iv).

¹⁴¹ Brown Interview, *supra* note 18.

¹⁴² H.R. 1029, 111th Cong. § 2 (2009).

law is already complex and confusing, as discussed above. The attempt to rework the law into a statute that will work well in maritime smuggling prosecutions is akin to rearranging the deck chairs on the Titanic as an emergency response plan for an iceberg strike. What is needed is new law that specifically addresses the unique challenges of maritime migrant smuggling prosecutions and that provides for penalties that properly reflect the serious nature of the crime.

Although H.R. 1029 is supposed to address alien smuggling networks, it falls short of making changes that would significantly help federal prosecutors and law enforcement hold these networks accountable. Numerous provisions of H.R. 1029 would actually be a step backwards if the bill became law. For example, findings in section 2 of H.R. 1029 imply that 8 U.S.C. § 1324 does not apply extraterritorially.¹⁴³

More critically, section 4 of H.R. 1029 appears to reduce the punishment for alien smuggling from a felony to misdemeanor for transporting aliens (on land or sea) if at least one person in the “load” is a member of the alleged smuggler’s family.¹⁴⁴ Apparently this provision’s intent is to reduce the culpability a smuggler who is attempting to reunite or otherwise keep together his own family. Unfortunately, the wording of section 4 could have a devastating effect on the vast majority of migrant smuggling prosecutions. The Department of Justice takes the view that, as Congress has presently drafted the bill, an individual could be operating a massive smuggling ring that brings in thousands of migrants a year and reaps millions of dollars in illegal profits, yet prosecutors would not be able to charge him with anything more than a misdemeanor offense if at least one family member served as a partner on each voyage because courts might construe the presence of that single

¹⁴³ *Id.* § 2. The findings include the following statement: “[m]uch of the conduct in alien smuggling rings occurs outside of the United States. Extraterritorial jurisdiction is needed to ensure that smuggling rings can be brought to justice for recruiting, sending, and facilitating the movement of those who seek to enter the United States without lawful authority.” This could be misconstrued to suggest that Congress hold the view that 8 U.S.C. § 1324 does not presently apply extraterritorially.

¹⁴⁴ *Id.* § 4. This section contains a modified offense with the following text: “(vii) if the offense involves the transit of the defendant’s spouse, child, sibling, parent, grandparent, or niece or nephew, and the offense is not described in any of clauses (i) through (vi), be fined under title 18, United States Code, or imprisoned not more than 1 year, or both.” Clauses (i) through (vi) of the revised proposed law deal with (i) causing death or serious injury, (ii) kidnapping, (iii) knowledge that a migrant entering the United States is a terrorist, (iv) placing the life of the migrant in jeopardy, (v) knowledge that the migrant is entering the United States for the specific purpose of committing a felony in the United States or (vi) the voyage was for profit or financial gain. Thus, unless prosecutors can prove these egregious facts, the revisions that H.R. 1209 proposes would be counter-productive. Although it would be a tortured construction of Congress’ expressed intent, the language of H.R. 1209 leaves open the possibility that smugglers could ensure nothing more than a misdemeanor prosecution by bringing a family member on every smuggling voyage.

family member as limiting the punishment to a one-year misdemeanor.¹⁴⁵

In addition, the need to disprove familial claims would place an unwarranted burden on the Government. The Coast Guard and other government agencies would be forced to gather evidence about the *lack* of family relationships among suspected smugglers and the migrants on board, requiring that the Coast Guard to keep migrants on sea for interviews and other evidence gathering. Interviewers, interpreters, and perhaps lawyers might be required on Coast Guard vessels to complete this process. The massive strain this would place on limited interdiction resources would likely result in a dismantling of maritime interdiction operations in the primary threat area.

Ultimately, if H.R. 1029 becomes the “new” migrant smuggling law, smugglers will have won the lottery. Every smuggler who falsely asserts that even one migrant on a smuggling vessel is a family member will be rewarded for that lie with only misdemeanor punishment—or no punishment at all because of burden it will place on the already limited resources of prosecutors.

VI. The Right Tool For The Job

A. Keep It Simple

The proposed MASLEA dramatically simplifies the offense for maritime migrant smuggling. The text of 8 U.S.C. §1324 is a complicated nest of cross-references and confusion that occupies several pages and creates multiple different offenses including bringing aliens from outside the United States into the country, transporting aliens from point A to point B within the United States to evade detection, harboring aliens who have entered the country illegally, shielding aliens from detection, and other similar conduct. This is one of the core infirmities in the existing statute: It is an attempt to stuff half a dozen different criminal immigration offenses into one basket. The effort to make 8 U.S.C. §1324 an omnibus immigration smuggling (and everything else) law has made it an unworkable statute—and an unworkable statute with no teeth.

The MASLEA, in contrast, is a one-trick pony. The text of the proposed offense in the MASLEA is Spartan compared to prolix text of 8 U.S.C. §1324. The MASLEA proposes “any person who knowingly transports, harbors, or conceals an alien on board a vessel described in subsection (d) of this section, knowing or in reckless disregard of the fact that such alien is attempting to enter the United States unlawfully, shall be punished as provided in section

¹⁴⁵ See *id.*; see also e-mail from Michael Surgalla, U.S. Dep’t of Justice, Criminal Div., and author (Dec. 2008–Mar. 2009) (on file with author) (discussing various objections of DOJ to H.R. 1209).

70702.”¹⁴⁶ This is a simple offense that gets straight to the heart of the criminal conduct: using a vessel to knowingly transport an alien who is attempting to enter the United States illegally.

Proving the offense would require evidence gathered by the Coast Guard or other law enforcement demonstrating that the suspected smugglers were operating the vessel and that aliens who had no authorization to enter the United States at a legitimate port of entry were on board. Intent to enter the United States illegally could be shown through circumstantial evidence, including the vessel’s registration in the United States, the vessel’s anticipated landing point based on its trajectory for the United States, and similar evidence. The ability to use circumstantial evidence would also reduce the need to transport undocumented migrants to the United States as potential material witnesses, because they would no longer be needed to prove “inducement” or “profit.”

B. Build the Consequences, and They Won’t Come

The Coast Guard has already proven that a multi-agency approach to prosecutions can have dramatic effects on illegal migration. Beginning in 2006, the Coast Guard, in close cooperation with other components of the Department of Homeland Security and the U.S. Attorney’s Office in San Juan, Puerto Rico, commenced a biometrics-at-sea program to combat rampant migrant smuggling between the Dominican Republic and Puerto Rico through a ninety mile stretch of ocean known as the Mona Passage.¹⁴⁷ This interagency partnership organized into the Caribbean Border Interagency Group (CBIG) and agreed on a set of standard operating procedures for the efficient interdiction and, in appropriate circumstances, prosecution of persons attempting to enter the United States illegally via the Mona Passage.¹⁴⁸

Notably, the U.S. Attorney’s Office agreed to prosecute misdemeanor offenses under 8 U.S.C. §1325¹⁴⁹ in cases of repeat offenders who had previously attempted to enter the United States illegally. The Coast Guard deployed mobile

biometrics equipment on its cutters operating in the Mona Passage and was able to capture digital fingerprint records of interdicted migrants, records which were identical in all practical respects to the scanned fingerprints collected at Customs and Border Protection stations at airports and other border locations. Armed with this new capability, the Coast Guard and its interagency partners were able to identify repeat immigration law offenders, suspected migrant smugglers, and persons with prior criminal histories in the United States who were attempting to re-enter the country after having been deported.¹⁵⁰

The majority of prosecutions under this program have been misdemeanor cases under 8 U.S.C. §1325, which typically carry jail sentences of between one to twelve weeks in guilty-plea cases.¹⁵¹ Conviction under this law, however, also carries with it deportation from the United States as an administrative consequence of the offense and conviction. Once deported, it is virtually impossible for an alien convicted under the statute to immigrate to the United States legally.¹⁵² Between the fall of 2006, when the program commenced, and March 2010, the U.S. Attorney’s Office in San Juan has prosecuted well over 250 cases; prior to the program, the office prosecuted virtually no immigration cases relating to interdictions in the Mona Passage.¹⁵³

The CBIG partnership understood that existing laws to prosecute migrant smugglers did not deter the smugglers from continuing their dangerous operations. However, unlike other threat areas, the consequences of misdemeanor convictions and final orders of deportation on migrants from the Dominican Republic were very significant. By focusing on “the customers” of the smugglers operating in the Mona Pass the CBIG partnership was able to drastically reduce the illegal conduct. The results of this program and the numerous prosecutions have been dramatic. Traditionally, illegal migration in the Mona Passage accounted for approximately forty percent of all Coast Guard migrant interdictions annually.¹⁵⁴ Following implementation of the biometrics-at-sea program in 2006 and the first prosecutions under the program, the flow of illegal migrants in the Mona Passage declined dramatically. In 2004, the Coast Guard interdicted 5014 migrants who departed the Dominican

¹⁴⁶ See Appendix, § 70701.

¹⁴⁷ See DOD Biometrics Task Force, *Coast Guard Employs Biometrics Advantage*, http://www.biometrics.dod.mil/Newsletter/issues/2009/Apr/v5/issue2_PM.html (last visited May 15, 2010) [hereinafter *Biometrics Advantage*] (discussing history and results of Coast Guard biometrics-at-sea program); see also Stew Magnuson, *Coast Guard Biometrics Program Expands*, NAT’L DEF. MAG. (Jan. 2009).

¹⁴⁸ The author was a participant in the interagency working group that produced the first collection of CBIG standard operating procedures. The text of the CBIG standard operating procedures is a For Official Use Only document. See FARM, *supra* note 60, at 391–93 (copy on file with author).

¹⁴⁹ See *id.*; see also 8 U.S.C. § 1325 (2006). This law creates a misdemeanor offense for attempts to enter the United States without prior authorization at a place other than a port of entry.

¹⁵⁰ See *Biometrics Advantage*, *supra* note 147.

¹⁵¹ Connors Interview, *supra* note 37.

¹⁵² See 8 U.S.C. § 1326 (felony offense for alien previously deported to attempt to re-enter the United States); see also *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998), *cert. denied* 525 U.S. 976 (holding that statute criminalizing re-entry into United States by previously deported aliens was permissible exercise of Congress’s sweeping power over immigration matters), *United States v. Cooke*, 850 F.Supp. 302 (E.D. Pa. 1994), *aff’d* 47 F.3d 1162 (3d Cir. 1994) (purpose of statute prohibiting reentry after deportation is to deter aliens who have been forced to leave the United States from reentering the country without prior consent of Attorney General and to provide for varied maximum terms of imprisonment from undeterred aliens, depending on the convictions prior to deportation).

¹⁵³ Connors Interview, *supra* note 37.

¹⁵⁴ See *Alien Migrant Interdiction Statistics*, *supra* note 30.

Republic for Puerto Rico.¹⁵⁵ By 2009 that figure dropped to 757—a reduction in the flow of illegal maritime migration of over 80% from 2004, its recent statistical zenith.¹⁵⁶ In the first three months of 2010, the Coast Guard interdicted only fifty-seven illegal migrants in the Mona Passage.¹⁵⁷ By all accounts, the consequence delivery engine that the CBIG partnership designed is largely responsible for the decline. Migrant smuggling in that region is at an all-time low, not because the penalties on smugglers are any different, but because the CBIG partners eliminated the “market” for smugglers by penalizing and discouraging the persons who employ them.

The core concept for the MASLEA is essentially the same: criminal activity will decline when the consequences of prosecutions are meaningful to the individuals prosecuted. However, unlike the Mona Passage, the United States cannot build its consequence delivery engine around misdemeanor prosecutions. If the United States began bringing Cuban migrants to the United States to prosecute misdemeanor offenses under 8 U.S.C. §1325, the likely result would be another Cuban mass migration.

Because the Cuban Government typically refuses to accept the return (by deportation or otherwise) of any Cuban who has “landed” in the United States, bringing a Cuban interdicted at sea to the United States for prosecution would be equivalent to giving that migrant a lifetime pass to reside in the United States. Unlike illegal migrants from the Dominican Republic, who the United States will deport to the Dominican Republic following conviction under 8 U.S.C. §1325, the United States cannot deport illegal Cuban migrants to Cuba because the Cuban Government’s policy. That being the case, if the United States brought Cuban migrants ashore for misdemeanor prosecutions it would have the unintended result of encouraging more Cubans to come because there is no risk of final deportation. Accordingly, when it comes to establishing consequences for Cuban migrant smuggling, the only viable option is to penalize the smugglers.

However, as discussed above, the penalties under existing law are simply inadequate to provide any meaningful deterrent to migrant smugglers who operate from south Florida. Prosecutors in that region believe that sentences of three years or more are the minimum required in “routine” cases to deter most prospective or practicing migrant smugglers.¹⁵⁸ Therefore, the MASLEA proposes a mandatory minimum sentence of three years for the maritime migrant smuggling offense with enhanced sentences for cases involving aggravating factors.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Brown Interview, *supra* note 18.

C. I Think I’ve Seen You Somewhere Before: The Successful Maritime Drug Law Enforcement Act Is the Model for MASLEA

In the 1980s the Coast Guard and Department of Justice were struggling to combat massive maritime drug smuggling from Colombia and other South and Central American countries.¹⁵⁹ Existing drug trafficking laws under title 21 of the U.S. Code were not well-suited to proving drug smuggling offenses arising from the multi-ton cocaine seizures that Coast Guard cutters and Navy vessels with Coast Guard Law Enforcement Detachments were making at the time.¹⁶⁰ Congress addressed this problem in 1986 when it passed, with the urging of the Department of Justice and Coast Guard, the Maritime Drug Law Enforcement Act (MDLEA).¹⁶¹ Congress recognized that law enforcement at sea is unique and passed the MDLEA to establish specific new offenses for maritime drug smuggling.¹⁶² The MDLEA incorporated specific provisions for extraterritorial application (the applicability of title 21 drug possession and transportation offenses outside the borders of the United States was a subject of debate at the time), established jurisdiction over vessels, and addressed other unique challenges associated with combating crimes in the unforgiving environment of the high seas.¹⁶³

The MDLEA has proven invaluable in combating maritime drug smuggling with a near 100 percent conviction rate.¹⁶⁴ Sentences for cooperating witnesses convicted under the MDLEA are approximately ten to eleven years, while non-cooperating defendants convicted under the law often face twenty-year sentences.¹⁶⁵ As a result, the majority of drug smugglers become cooperating witnesses upon

¹⁵⁹ See Office of Law Enforcement, *Drug Interdiction*, U.S. COAST GUARD, http://www.uscg.mil/hq/cg5/cg531/drug_interdiction.asp (providing an overview and history of the Coast Guard drug interdiction mission).

¹⁶⁰ MLEM, *supra* note 41, § 5.C (discussing origins of Maritime Drug Law Enforcement Act as primary federal statute prohibiting and punished maritime drug trafficking); telephone interview with Wayne Raabe, U.S. Dep’t of Justice, Criminal Div. (Mar. 3, 2010) (discussing history of maritime drug law enforcement prosecutions prior to passage of the MASLEA, DOJ difficulties in applying title 21 offenses to major drug interdiction cases in the “transit zones” in the Eastern Pacific ocean and Caribbean, and the joint DOJ-Coast Guard effort to encourage Congress to pass the MDLEA as a law dedicated to the unique nature of maritime drug trafficking).

¹⁶¹ 46 U.S.C. §§ 70501–70507 (2006).

¹⁶² *Id.* § 70503(a).

¹⁶³ *Id.* § 70502 (provisions defining vessels of the United States and vessels subject to the jurisdiction of the United States including procedures for confirming that certain vessels are stateless or subject to assimilation to stateless status), 70503(b) (establishing extraterritorial application of the law), § 70504 (jurisdiction and venue), § 70507 (establishing criteria for seizure of smuggling vessel based on *prima facie* evidence of maritime smuggling).

¹⁶⁴ See RADM Justice Statement, *supra* note 12.

¹⁶⁵ Connors Interview, *supra* note 37.

apprehension.¹⁶⁶ The information these individuals provide to law enforcement has contributed to the progressive dismantling of major drug cartels in Colombia and other drug exporting countries and the growth and success of the Department of Justice's Organized Crime Drug Enforcement Task Force (OCDEF) investigations.¹⁶⁷

The Coast Guard constructed its proposal for the MASLEA in close cooperation with the Department of Justice using the MDLEA as a model. The MASLEA incorporates and cross-references many of the unique provisions of the MDLEA with respect to extraterritorial application of the law and the jurisdiction of U.S. law enforcement over "vessels of the United States" and "vessels subject to the jurisdiction of the United States."¹⁶⁸ In addition to borrowing the established text and provisions of the MDLEA where appropriate, MASLEA is the natural next step in the development of smuggling laws that are uniquely tailored to the maritime environment. The success of the MDLEA has demonstrated that providing federal prosecutors the right tool to combat a unique criminal enterprise can pay substantial dividends. Congress should adopt the same approach to the problem of maritime migrant smuggling and pass the MASLEA.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; see also *Before the House Government Reform Subcommittee on Criminal Justice Drug Policy, and Human Resources "Interrupting Narco-Terrorist Threats on the High Seas: Do We Have Enough Wind in Our Sails, June 29, 2005*, <http://www.justice.gov/dea/pubs/cngrtest/ct062905.html> (last visited May 15, 2010) (statement of Thomas M. Harrigan, Chief of Enforcement Operations Drug Enforcement Administration). In his statement to Congress, then DEA chief Harrigan noted,

Operation Panama Express [is] a multi-agency Organized Crime Drug Enforcement Task Force (OCDEF) investigation that began in the mid 1990s. Panama Express has had a measurable impact on the cocaine transportation industry, and law enforcement in general, outside of the statistical accomplishments of arrests and seizures and dismantlement of the cocaine organizations. Panama Express has had a significant impact on many factors related to task force operations, intelligence gathering, the deployment of naval and air assets dedicated to the interdiction of smuggling ventures, the development of technology used to target drug transportation and prosecution of cases resulting from . . . interdictions. The impact of Operation Panama Express is evident in the fact that not only have drug trafficking organizations (DTO) generally reduced the size of the cocaine loads they are smuggling by fishing vessel to an average of 3,000 kilograms, but also through Panama Express, more than 500 mariners have been arrested, significantly diminishing the supply of experienced mariners to operate the fishing vessels and go-fast boats used to smuggle cocaine. These factors resulting from the impact of Operation Panama Express have imposed significant hardships on the operating procedures of drug traffickers.

¹⁶⁸ 46 U.S.C. 70502.

D. The Need for Tougher Sentences Under 18 U.S.C. § 2237

In 2006, Congress passed 18 U.S.C. §2237, which provides criminal penalties for operators and passengers of vessels that fail to obey Coast Guard orders to stop or that engage in other activity to obstruct Coast Guard law enforcement activities.¹⁶⁹ This new law created three separate offenses, making it unlawful (1) for a master or person in charge of a vessel of the United States or subject to the jurisdiction of the United States to knowingly fail to obey an order to stop by an authorized Federal law enforcement officer to heave to (stop) that vessel,¹⁷⁰ (2) for any person on board to resist or interfere with a boarding or other law enforcement action,¹⁷¹ and (3) for any person to provide materially false information to law enforcement officers during a vessel boarding.¹⁷² The penalty for any of the three offenses includes imprisonment for not more than 5 years.¹⁷³

Prosecutors have used this failure to heave to law in cases where migrant smugglers have attempted to flee Coast Guard and Customs and Border Protection interdiction assets. Prosecutors often charge this as a secondary offense in migrant smuggling cases and as a "stand alone" prosecution when migrant smuggling or other offenses are not tenable.¹⁷⁴ While prosecutors have used this law to punish migrant smugglers who might otherwise avoid prosecution altogether because of the problems with 8 U.S.C. §1324 noted above, the penalties under the law should include more significant sentences for aggravating factors. As part of its MASLEA proposal, the Coast Guard has advocated sentence enhancements under 18 U.S.C. §2237 for cases involving serious risk to the lives of any person on board, serious bodily injury to any person on board the vessel, or that result in the death of any person.¹⁷⁵ These simple changes would ensure that smugglers that injure or place migrants at significant risk of injury while attempting to outrun law enforcement would face significant punishment for the aggravated nature of their offense.

VII. Conclusion

The United States has invested tremendous political and economic capital in combating maritime migrant smuggling. For nearly thirty years, Presidents have charged the Coast

¹⁶⁹ 18 U.S.C. § 2237.

¹⁷⁰ *Id.* § 2237(a)(1).

¹⁷¹ *Id.* § 2237(a)(2)(A).

¹⁷² *Id.* § 2237(a)(2)(B).

¹⁷³ *Id.* § 2237(b).

¹⁷⁴ See Brown Interview, *supra* note 18.

¹⁷⁵ See Appendix, § 70707.

Guard with interdicting migrant smuggling vessels bound for the United States as far from U.S. land territory as possible and repatriating undocumented aliens discovered on board whenever possible. The United States has ratified numerous international conventions that obligate parties to apprehend and punish migrant smugglers, human traffickers, and the criminal syndicates that conduct international smuggling operations. Furthermore, the United States has engaged regional partners throughout the Caribbean and entered into bilateral agreements that permit the United States unprecedented authority to patrol other states' territorial seas and board foreign-flagged vessels suspected of migrant smuggling to suppress smuggling activity and protect the lives of migrants.

The Government has consistently maintained that this dangerous crime puts the lives of migrants who embark in unsafe smuggling vessels at grave risk, leading directly to tragic deaths at sea every year. The Coast Guard, Customs and Border Patrol, and other federal agencies charged with combating migrant smuggling devote massive operating hours (and costs) to patrol the primary maritime migration threat areas, repatriate migrants, and prosecute suspected smugglers and other related activities.¹⁷⁶

Undermining this massive multi-agency and multi-national effort is a law that does not work. The Executive and Legislative Branches both freely acknowledge that existing laws to combat migrant smuggling are inadequate. The solution that the House of Representatives has proposed in H.R. 1029 is untenable and does nothing more than tinker with an instrument (8 U.S.C. §1324) that is woefully

inadequate for its intended purpose. With no law capable of meting out meaningful punishment to smugglers, there is virtually no deterrent to any would-be maritime migrant smuggler. Over the years, smuggling networks have grown more sophisticated, and massive profits from smuggling have funded expanding criminal enterprises throughout south Florida.

The Coast Guard's MASLEA proposal can eliminate this weak link in the strategy. Cooperation between the Coast Guard and Department of Justice has produced tremendous success in combating drug smuggling. The multi-agency approach to combating migrant smuggling from the Dominican Republic to Puerto Rico has proven that the right combination of prosecutions and meaningful punishment can dramatically reduce migrant smuggling activity. The MASLEA proposal can do the same for the primary threat areas in the Florida Straights by ensuring that migrant smugglers operating out of Florida face significant prison terms that reflect the serious nature of the crime and the risk that smugglers subject migrants to on every voyage. In the end, the MASLEA is not an immigration law; it imposes no new criminal or other penalties on migrants who attempt to enter the United States illegally. On the contrary, the MASLEA is targeted solely at smugglers who seek to profit from the desperation of maritime migrants. By putting in place a law that promises to deliver meaningful consequences to smugglers, the MASLEA will reduce the lure of maritime migrant smuggling by increasing the prosecution risk and penalty to smugglers, which, in turn, will reduce risks to migrants and save lives.

¹⁷⁶ Connors interview, *supra* note 37.

Appendix

Proposed Maritime Alien Smuggling Law Enforcement Act And Sentence Enhancements To 18 U.S.C. § 2237

Subtitle VII of Title 46, United States Code, is amended by adding at the end the following new subchapter:

Chapter 707—Maritime Alien Smuggling Law Enforcement

Sec.

70701. Offense.

70702. Penalties.

70703. Seizure and forfeiture of property.

70704. Jurisdiction.

70705. Claims of failure to comply with international law.

70706. Federal Activities.

70707. Definitions.

§ 70701. Offense.

(a) any person who knowingly transports, harbors, or conceals an alien on board a vessel described in subsection (d) of this section, knowing or in reckless disregard of the fact that such alien is attempting to enter the United States unlawfully, shall be punished as provided in section 70702.

(b) any person who attempts or conspires to commit a violation under this section shall be punished in the same manner as a person who completes a violation of this section.

(c) it is an affirmative defense to any prosecution under this chapter of any master, operator or person in charge of a vessel only, which the defendant must prove by a preponderance of the evidence, that –

(1) the alien was on board pursuant to a rescue at sea, or was a stowaway; and

(2) the defendant, as soon as reasonably practicable, informed the United States Coast Guard of the presence of the alien and the circumstances of any rescue:

Provided that the defendant complies with all orders given by U.S. law enforcement officials and does not bring or attempt to bring any alien to the land territory of the United States unless the alien is in imminent threat of death or serious bodily injury, in which case the defendant shall report to the U.S. Coast Guard the circumstances of any rescue or the discovery of any stowaway immediately upon delivering the alien to emergency medical personnel or to U.S. law enforcement or immigration officials ashore.

(d) the following vessels are covered by this section –

(1) a vessel of the United States that is less than 300 gross tons (as measured under chapter 145 or an alternate tonnage measurement as prescribed by the Secretary under section 14104,

(2) a vessel that is subject to the jurisdiction of the United States that is less than 300 gross tons (as so measured), or

(3) a vessel of any size that is abandoned, stateless or stolen.

§ 70702. Penalties

Any person who commits a violation of this chapter shall –

(a) shall be imprisoned for not less than 3 years and not more than 20 years, fined under title 18, or both;

(b) in the case in which the violation created a substantial risk of death or serious bodily injury to another person, including without limitation the transportation of any person under inhumane conditions as defined in section 70707, be imprisoned not less than 5 years and not more than 20 years, fined under title 18, or both;

(c) in the case in which the violation caused serious bodily injury to any person, regardless of where the injury occurred, be imprisoned not less than 7 years and not more than 30 years, fined under title 18, or both;

(d) in the case in which the violation caused the death of any person, regardless of where the death occurred, be imprisoned not less than 10 years, any terms of years, or life, fined under title 18, or both.

§ 70703. Seizure and Forfeiture of Property.

(a) Any personal property used or intended to be used to commit or facilitate the commission of a violation of this chapter, the proceeds of such violation, and any real or personal property traceable to such property or proceeds, shall be subject to forfeiture.

(b) Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, except that such duties as are imposed upon the Secretary of the Treasury under the Customs laws described in section 981(d) shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security.

§ 70704. Jurisdiction.

(a) There is extraterritorial jurisdiction of an offense under this chapter;

(b) Jurisdiction of the United States with respect to vessels and persons subject to this chapter is not an element of the offense. All issues of jurisdiction over vessels and persons arising under this chapter are preliminary questions of law to be determined by the trial judge.

§ 70705. Claim for failure to comply with international law.

Failure to comply with international law shall not be the basis for any defense of a person charged with a violation of this chapter. A claim of failure to comply with international law in the enforcement of this chapter may only be invoked by a foreign nation, and a claim of failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this section.

§ 70706. Federal Activities.

Nothing in this chapter shall apply to otherwise lawful activities carried out by or at the direction of the government of the United States.

§ 70707. Definitions.

As used in this chapter –

(a) the term ‘alien’ has the meaning given that term in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3));

(b) the term ‘proceeds’ includes any property or interest in property obtained or retained as a consequence of an act or omission in violation of this section;

(c) the term ‘vessel subject to the jurisdiction of the United States’ has the meaning given that term in section 70502 of this title;

(d) the term ‘vessel of the United States’ has the meaning given that term in section 70502 of this title;

(e) the term ‘transportation under inhumane conditions’ means the transportation of persons in an engine compartment, storage compartment, or other confined space, transportation at an excessive speed, transportation of a number of persons in excess of the rated capacity of the means of transportation, or intentionally grounding a vessel in which persons are being transported.”

Section 2237 of title 18, United States Code, is amended –

(1) in subsection (a), by adding at the end the following new paragraph:

“(3) It shall be unlawful for the master, operator, or person in charge of a vessel of the United States or a vessel subject to the jurisdiction of the United States, less than 300 gross tons (or an alternate tonnage prescribed by the Secretary under section 14104 of title 46), as measured under section 14502 of title 46, to knowingly operate or assist in the operation of any such vessel whenever it is fitted out, in whole or in part, for the purpose of being employed to bring any merchandise, contraband, or person unlawfully into the United States.”; and

(2) by striking subsection (b) and inserting the following:

“(b)(1) Whoever intentionally violates this section shall, unless the offense is described in paragraph (2), be fined under this title or imprisoned for not more than 5 years, or both.

“(2) If the offense—

“(A) is committed in the course of a violation of section 274 of the Immigration and Nationality Act (alien smuggling); chapter 77 (peonage, slavery, and trafficking in persons), section 111 (shipping), 111A (interference with vessels), 113 (stolen property), or 117 (transportation for illegal sexual activity) of this title; chapter 705 (maritime drug law enforcement) or chapter 707 (maritime alien smuggling) of title 46, or title II of the Act of June 15, 1917 (Chapter 30; 40 Stat. 220), the offender shall be fined under this title or imprisoned for not more than 10 years, or both;

“(B) results in serious bodily injury (as defined in section 1365 of this title) or transportation under inhumane conditions, the offender shall be fined under this title, imprisoned not more than 15 years, or both; or

“(C) results in death or involves kidnapping, an attempt to kidnap, the conduct required for aggravated sexual abuse (as defined in section 2241 without regard to where it takes place), or an attempt to commit such abuse, or an attempt to kill, be fined under such title or imprisoned for any term of years or life, or both.”

Bridging the Gap That Exists for War Crimes of Perfidy

Major Byron D. Greene*

*The condemnation of perfidy is an ancient precept of the laws and customs of war derived from the principle of chivalry. It has remained a cardinal principal in modern times, because perfidious abuse of protections under the law of armed conflict tends strongly to degrade the protections and restraints developed in the mutual interest of all Parties, their combatants and civilians.*¹

I. Introduction

Parties to an armed conflict can be destructive, cunning, and merciless in advancing their interests, but they may not act in bad faith. Their actions are guided by the collective wisdom of the bulk of nations, encapsulated within international conventions and norms governing the conduct of warfare. The rules of warfare demand respect and safeguard this respect through the condemnation of perfidy.

This article examines perfidy in international armed conflict and addresses a gap in how perfidy is criminalized. This gap threatens to weaken the protections afforded by the law of armed conflict because it allows some acts of perfidious conduct to go unpunished. As will be discussed, the international community should bridge the gap by treating all forms of perfidy as grave breaches. By doing so, the international community would bolster the purpose of the law of armed conflict—namely, to humanize warfare to the maximum extent possible.²

Part II of this article starts by differentiating between unlawful perfidy and lawful ruses and ends by traversing the sources of law prohibiting perfidy. Part III illustrates a gap that exists with respect to how perfidy is criminalized and discusses the debate over whether some types of perfidy are even prohibited. Part IV describes the magnitude of the problem raised by the gap in the criminalization of perfidious conduct and explains how the gap threatens to weaken the protections of the law of armed conflict. Part V argues for the need to bridge the gap by treating all types of perfidious conduct as grave breaches. Finally, Part VI concludes that bridging the gap by prosecuting all instances of perfidy as grave breaches is in the best interests of civilians and combatants.

* Judge Advocate, U.S. Air Force. Presently assigned as Staff Judge Advocate, 422d Air Base Group, RAF Croughton, United Kingdom.

¹ MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 202 (1982).

² See ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 162 (2008).

II. Perfidy in International Armed Conflict

Although perfidious conduct raises concerns in all types of armed conflict,³ this article focuses on perfidious conduct that occurs during international armed conflict. Before describing the legal framework that prohibits perfidy in this setting, the distinction between unlawful perfidy and lawful ruses must be made.

A. Unlawful Perfidy Versus Lawful Ruses

The essence of perfidy has been described as the “deliberate claim to legal protection for hostile purposes.”⁴ This characteristic bad faith distinguishes acts of perfidy from ruses, which are still acts of deception but which do not hinge on an enemy’s compliance (by according an adversary certain protections) with the law of armed conflict.⁵ Therefore, an adversary may trick his enemy into believing he will attack from the south and then attack from the north;⁶ however, the adversary may not attack its enemy after indicating its intent to surrender under a flag of truce. The latter conduct would take advantage of the enemy’s requirement under the law of war to spare forces that surrender from further attack.⁷

³ See John C. Denn, *Permissible Perfidy?*, 6 J. INT’L CRIM. JUST. 627 (2008) (providing a thorough analysis of perfidy occurring in noninternational armed conflict). Denn describes the Colombian Government’s successful rescue of hostages from the *Fuerzas Armadas Revolucionarias de Colombia* in July 2008. He analyzes the ramifications to international humanitarian law caused by the Colombian Government’s perfidious use of the emblem of the Red Cross to trick the *Fuerzas Armadas Revolucionarias de Colombia* into allowing the Colombian Government to rescue the hostages.

⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS 435 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY].

⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; see also Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) [hereinafter Lieber Code]; BOTHE ET AL., *supra* note 1, at 202–03; A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 36–37 (2d ed. 2004).

⁶ Additional examples of ruses include the use of camouflage, decoys, dummy artillery pieces, ambushes, mock operations, and feigned attacks or retreats, to name a few. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 427 (2010).

⁷ See AP I, *supra* note 5, art. 41(2)(b). Other examples of perfidious conduct include feigning sickness or injury, feigning civilian or other non-combatant status, or feigning neutral or United Nations status. See H. MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 145–46 (1990).

B. Sources of Law

As described below, the rules applicable to international armed conflict that prohibit perfidy are found in historical references, international conventions, and national practices and legislation.

1. Historical References

The first codified source containing a prohibition against perfidy is the Lieber Code of 1863.⁸ Promulgated by President Lincoln, the Lieber Code was drafted by Professor Francis Lieber to catalogue the customs of war.⁹ In article 101, the Lieber Code states that “[t]he common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.”¹⁰ The Lieber Code was followed by the Brussels Declaration of 1874, which was commissioned by Czar Alexander II of Russia to examine the laws and customs of war.¹¹ The Brussels Declaration, in article 13(b), prohibits “murder by treachery of individuals belonging to the hostile nation or army.”¹² Although the parties to the agreement never officially ratified the Brussels Declaration, it served as a springboard for the adoption of the Oxford Manual of the Laws and Customs of War in 1880.¹³ Article 8(b) of the Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy”¹⁴

2. International Conventions

The first international convention to prohibit perfidy is the fourth Hague Convention of 1907 (Hague IV).¹⁵ The

⁸ See Lieber Code, *supra* note 5, art. 101.

⁹ D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 22–34 (1988).

¹⁰ See Lieber Code, *supra* note 5, art. 101.

¹¹ Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> [hereinafter Brussels Declaration]. See also SCHINDLER & TOMAN, *supra* note 9, at 22–34.

¹² See Brussels Declaration, *supra* note 11, art. 13(b).

¹³ See The Laws of War on Land, Sept. 9, 1880, available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> [hereinafter Oxford Manual]; see also SCHINDLER & TOMAN, *supra* note 9, at 22–34 (describing contribution of Brussels Declaration to formation of Oxford Manual).

¹⁴ See Oxford Manual, *supra* note 13, art. 8(b). The *Oxford Manual* provides as an example of “treacherous attempts upon the life of an enemy” the practice of keeping assassins in pay. Under this practice, the assassin would presumably appear as a civilian, whom the enemy would be obliged to accord protections in accordance with the law of armed conflict. Of course, the enemy’s adherence to the law of armed conflict would be met with unsuspected lethal force, making this a case of treachery resulting in death. See generally Lieber Code, *supra* note 5, art. 101.

¹⁵ Convention (IV) Respecting the Laws and Customs of War on Land art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

regulations annexed to Hague IV, in article 23(b), forbid the “treacherous killing or wounding of individuals belonging to the hostile nation or army.”¹⁶ Roughly seventy years after the adoption of Hague IV, Additional Protocol I to the Geneva Conventions of 1949 came into existence and recognized a slightly different prohibition against perfidy.¹⁷ Specifically, article 37 of Additional Protocol I starts by defining perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”¹⁸ The article then states that “[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy.”¹⁹

The most recent law applicable to the majority of nations is the Rome Statute of the International Criminal Court.²⁰ Adopted in 1998, the Rome Statute contains two provisions on perfidy. Article 8(2)(b)(vii) criminalizes “[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.”²¹ Article 8(2)(b)(xi) further prohibits “[k]illing or wounding treacherously individuals belonging to the hostile nation or enemy.”²²

3. National Practices and Legislation

Perfidy is also prohibited by numerous states in their field manuals applicable to armed forces.²³ The International Committee of the Red Cross (ICRC), in analyzing customary international law regarding perfidy, reviewed the field manuals of various nations and concluded that the prohibition against perfidy can be grouped into three general schemes. The most common prohibits killing or injuring the enemy by resort to perfidy.²⁴ Italy, Russia, the United Kingdom, and the United States follow this

¹⁶ *Id.* The words “treachery” and “perfidy” are considered to be synonymous, although “perfidy” is more commonly used today. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 171 (3d ed. 2008).

¹⁷ See API, *supra* note 5, art. 37.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

²¹ *Id.* art. 8(2)(b)(vii).

²² *Id.* art. 8(2)(b)(xi).

²³ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 223–25 (2005).

²⁴ *Id.*

approach.²⁵ The other main approach prohibits killing, injuring, or capturing the enemy by resort to perfidy.²⁶ The field manuals of Argentina, France, and Spain provide examples of this prohibition.²⁷ Finally, a small segment of states prohibit any hostile act carried out in a perfidious manner.²⁸ The armed forces of Benin, Canada, and Togo are bound by this prohibition.²⁹

The United States' stance on the prohibition against perfidy is best characterized as uneven. The War Crimes Act of 1996 identifies only perfidy as it is defined in article 23(b) of Hague IV (i.e., the treacherous killing or wounding of individuals belonging to the hostile nation or army) as a war crime.³⁰ However, the Military Commissions Act of 2009 makes perfidy that results in death, injury, or capture an offense triable by military commission.³¹

III. Surveying the Gap

Under the international law of armed conflict, perfidy is best described as a "harm-based" offense.³² In other words, perfidy is only prohibited when the acts used to bait the enemy into according protection under the rules of armed conflict result in some tangible harm to the enemy.³³ Generally, the law of armed conflict appears most concerned with perfidy resulting in death, injury, or capture, although a gap exists in the treatment of perfidy that results in capture. This gap extends to perfidy resulting in military advantage.³⁴

²⁵ *Id.* See also U.K. MINISTRY OF DEF., JOINT SERV. PUB. 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT para. 5.9.4 (2004); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 31 (18 July 1956) (C1 15 July 1976) [hereinafter FM 27-10].

²⁶ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 223–25.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 18 U.S.C. § 2441(c)(1) (2006) (defining as a war crime any grave breach of Geneva Conventions I–IV or "any protocol to such convention to which the United States is a party," which would exclude the definition of perfidy as described in AP I, article 37, because the United States is not a party to AP I). See also HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 4169 (illustrating that the United States has not ratified AP I).

³¹ Military Commissions Act of 2006, 10 U.S.C. § 948a, § 950v(b)(17) (2006) [hereinafter 2006 MCA].

³² See Denn, *supra* note 3, at 633; see also FRITZ KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 82 (1987) (explaining that "the betrayal of confidence does not constitute an offence [of perfidy] by itself: it only becomes so when it is linked to the act of killing, injuring, or capturing the adversary").

³³ See Denn, *supra* note 3, at 633.

³⁴ Admittedly, the term "military advantage" could be interpreted to include any act that benefits one party at the expense of another during the course of an international armed conflict. In that sense, the belligerent state's use of perfidy to kill, injure, or capture its adversary could be considered "perfidy resulting in military advantage." However, for purposes of this article, the term "military advantage" describes efforts by a belligerent to achieve a gain during international armed conflict that does not amount to death,

A. Different Degrees of Criminalization

The gap is most evident from the manner in which perfidy is criminalized. Under the repression of breaches scheme of the Geneva Conventions and Protocols, only perfidy resulting in death or injury is considered a grave breach.³⁵ Likewise, the Rome Statute defines perfidy as a war crime, but only when the perfidy results in death or injury.³⁶

The existence of this gap begs the question: Are there other grave breach offenses that encompass perfidious captures or perfidious gains of military advantage? Evidence suggests the drafters of the Geneva Conventions and Rome Statute did not intend to bridge the gap in the criminalization of perfidy by including the conduct under separate provisions. For example, the offense of unlawful confinement—which is conceptually closest to perfidious capture—is defined as a grave breach under the Geneva Conventions and as a war crime under the Rome Statute.³⁷ However, legal experts have interpreted this offense to apply to the procedures and conditions under which *protected persons* are confined during international armed conflict.³⁸ Therefore, even though an adversary who captures his enemy by resort to perfidy also arguably confines his enemy, the provisions prohibiting unlawful confinement would not prohibit the perfidious act.³⁹ The same reasoning applies to the offense of hostage taking.⁴⁰ Specifically, experts believe this grave breach offense requires a showing of threats by a perpetrator to kill, injure, or continue to detain a seized

injury, or capture. This would include, but is not necessarily be limited to, a belligerent's use of perfidy to collect information and move troops or military supplies without interference. See generally SOLIS, *supra* note 6, at 423.

³⁵ See AP I, *supra* note 5, art. 85(3)(f) ("The following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing *death or serious injury to body or health*: the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol." (emphasis added)).

³⁶ See Rome Statute, *supra* note 20, art. 8(b)(vii) and 8(b)(xi).

³⁷ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 287 [hereinafter GC IV]; Rome Statute, *supra* note 20, art. 2(a)(vii).

³⁸ See KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 112–18 (2003). A lawful combatant captured by the adversary is not considered a protected person as defined in the fourth Geneva Convention, article 4, because the combatant receives the protections of the Geneva Convention Relative to the Treatment of Prisoners of War. See GC IV, *supra* note 37, art. 4; see also Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter GC III].

³⁹ Considering parties to an international armed conflict may lawfully intern prisoners of war, this proposition makes even more sense. See GC III, *supra* note 38, art. 21.

⁴⁰ See GC IV, *supra* note 37, art. 147; Rome Statute, *supra* note 20, art. 2(a)(viii).

person for purposes of compelling an entity to act or refrain from acting.⁴¹ Certainly, such threats and demands would not be present in every capture by resort to perfidy. As such, the offense of hostage taking would not prohibit every act of perfidy that results in capture.

Similarly, perfidy resulting in military advantage is not made a grave breach under separate provisions of the Geneva Conventions and Protocols. For example, article 38 of Additional Protocol I prohibits the improper use of emblems, signs, and signals protected by the Geneva Conventions and Additional Protocols.⁴² Although this prohibition conceivably encompasses many instances of perfidy resulting in military advantage,⁴³ the conduct prohibited in article 38 is not defined as a grave breach under the Geneva Conventions or as a war crime under the Rome Statute.⁴⁴

Consequently, the international community would most likely treat perfidious conduct resulting in capture or military advantage as a simple breach of the Geneva Conventions.⁴⁵ However, whether or not this conduct is even prohibited is subject to debate.

B. Framing the Debate

1. Arguments Why Perfidious Conduct That Falls in the Gap Is Not Prohibited

Because there is no international consensus on which types of perfidy are prohibited, some have argued that perfidious conduct that falls in the gap is not prohibited.⁴⁶ This argument proved persuasive during the drafting of the Rome Statute; several representatives to the convention doubted whether customary international law prohibited all

perfidious conduct resulting in military advantage.⁴⁷ The International Committee of the Red Cross (ICRC) reached a similar conclusion, suggesting that only perfidy resulting in death or injury constitutes a war crime.⁴⁸

Moreover, the Geneva Conventions and the Additional Protocols arguably preempted consideration of other types of perfidy as war crimes by defining specific acts of perfidy as grave breaches (i.e., perfidy that results only in death or serious injury).⁴⁹ This preemption argument is further supported by the Rome Statute, which generally follows the grave breach scheme with respect to criminalizing perfidy; again, only perfidy that results in death or serious injury is prohibited.⁵⁰ On the other hand, some have argued that by defining war crimes to include both grave breaches and other “serious violations of the laws and customs applicable to international armed conflict,”⁵¹ the Rome Statute “virtually wipes out” the distinction between grave and simple breaches.⁵² In other words, if the Rome Statute subsumes both grave and simple breaches, any conduct not criminalized by the Rome Statute might not be prohibited. Furthermore, because the majority of states have ratified the Rome Statute, perfidy as it is defined in the statute could be considered a verdict on its status under international law.⁵³ That is, the signatories to the Rome Statute would have defined perfidy that results in capture or military advantage as a war crime if the international community had believed that to be the case.

⁴¹ See DÖRMANN, *supra* note 38, at 124.

⁴² AP I, *supra* note 5, art. 38(1).

⁴³ In many cases, the improper use of a protected emblem, sign, or signal would probably be a lesser-included offense of perfidy resulting in military advantage. So, in a hypothetical prosecution for perfidy resulting in military advantage, the prosecutor would first have to prove misuse of a protected emblem, sign, or signal before establishing how the misuse resulted in a military advantage (and also that the belligerent intended to mislead the enemy into according protections under the law of armed conflict).

⁴⁴ In so far as the conduct involves purely a misuse of a protected emblem, sign, or signal. As previously discussed, when the misuse of a protected emblem, sign, or signal results in death or serious injury, the conduct becomes a grave breach as defined by Additional Protocol I and a war crime as defined by the Rome Statute. See AP I, *supra* note 5, art. 85(3)(f); Rome Statute, *supra* note 20, art. 8(2)(b)(vii).

⁴⁵ Although AP I does not specifically refer to lesser violations as “simple breaches,” it does reference a class of violations deemed “all other breaches” distinct from those violations deemed grave breaches. AP I, *supra* note 5, art. 86(1). For practical purposes, these lesser violations will be referred to as “simple breaches” in this article.

⁴⁶ See *supra* text accompanying notes 23–29.

⁴⁷ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 195 (stating that “several delegations participating in the drafting of elements for the Rome Statute expressed some doubts as to whether improper use in order to shield, favor, protect, or impede military operations would be prohibited under customary international law”). Cf. DÖRMANN, *supra* note 38, at 206 (explaining that “not every misuse of the distinctive emblems of the Geneva Conventions amounts to a war crime, but only the *abusive* use”) (emphasis added).

⁴⁸ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 225. The issue of what conduct constitutes a war crime is outside the scope of this article. However, it is sufficient to say there is no universally accepted definition of “war crime.” Compare FM 27-10, *supra* note 25, para. 178 (providing that every violation of the law of armed conflict is a war crime), with UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 24 (1948) (explaining that only *serious* violations of the laws or customs of war are war crimes). Given that at least one reference defines every violation of the law of armed conflict as a war crime, the issue becomes whether this also means those actions *not* deemed war crimes are prohibited by the law of armed conflict.

⁴⁹ See AP I, *supra* note 5, art. 85(3)(f); see also Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 229 (Dieter Fleck ed., 1999) (arguing that perfidy is prohibited only as it is defined by AP I, which would exclude military advantage gained by resort to perfidy).

⁵⁰ See Rome Statute, *supra* note 20, art. 8(2)(b)(vii) and 8(2)(b)(xi).

⁵¹ *Id.* art. 8(2)(a) and 8(2)(b).

⁵² See GREEN, *supra* note 16, at 327.

⁵³ See ICC—The States Parties to the Rome Statute, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Aug. 24, 2010) (showing that 113 countries are party to the Rome Statute of the International Criminal Court).

2. Arguments Why Perfidious Conduct That Falls in the Gap Is Prohibited

Despite arguments to the contrary, there are several overriding reasons why perfidious conduct that results in capture or military advantage is prohibited. First, defining some violations of the Geneva Conventions and Protocols as grave breaches does not establish a baseline of conduct that is prohibited (i.e., violations deemed grave breaches) and not prohibited (i.e., violations not deemed grave breaches). Rather, the grave breach scheme simply establishes a hierarchy of major and minor violations of the Geneva Conventions and Protocols.⁵⁴ This explains why international criminal tribunals have exercised jurisdiction over violations of the law of war that do not represent grave breaches.⁵⁵ For example, the International Criminal Tribunal for the Former Yugoslavia, which construed customary international law, exercised jurisdiction over grave breaches and violations of the customs of war.⁵⁶

Furthermore, the Rome Statute should not be interpreted to preclude prosecutions for acts of perfidy not addressed in the statute. First, the Rome Statute, in article 1, only exercises jurisdiction over persons for “the most serious crimes of international concern.”⁵⁷ This implies less serious crimes of international law exist that the International Criminal Court may choose not to prosecute. Additionally, evidence suggests the Rome Statute was never intended to be the last word on what should and should not be prohibited. For example, the principle of complementarity suggests the main responsibility for the prosecution of crimes rests with individual states and not the International Criminal Court.⁵⁸ The past practice of the United States, with respect to defining war crimes, also demonstrates the limits of the Rome Statute’s reach—although, notably, the United States never ratified the Rome Statute. Specifically, crimes defined by the Rome Statute did not limit what conduct was criminalized under the Military Commissions

Act;⁵⁹ under the Military Commissions Act, perfidy that results in death, injury, or capture is prohibited.⁶⁰

IV. Perfidy That Falls in the Gap: A Serious and Recurring Problem that Threatens to Weaken the Law of Armed Conflict

Perfidious conduct that results in capture or military advantage represents a serious problem for parties, combatants, and civilians involved in international armed conflict. In addition to the harm resulting from bad faith, perfidious conduct threatens to erode the protections provided by the law of armed conflict.

Capture by resort to perfidy could occur during any international armed conflict. For example, this type of perfidy was used in 1995 during the Kosovo War. In one instance, Bosnian Serb forces disguised in French uniforms, driving a U.N. armored personnel carrier, captured twelve French peacekeepers near a bridge in Sarajevo.⁶¹ According to reports, the French peacekeepers did not expect anything out of the ordinary until the point of capture.⁶² After the capture, Bosnian Serb forces held the French peacekeepers as hostages at a location where other hostages were handcuffed or chained to potential targets, effectively turning them into human shields.⁶³ Furthermore, as a result of the capture, Bosnian Serb forces gained control of an observation post that had been previously established by the United Nations at the site of the bridge.⁶⁴

⁵⁹ See 2006 MCA, *supra* note 31, § 950v(b)(17).

⁶⁰ *Id.* The United States’ approach to defining war crimes may have been influenced by the fact the United States is not a party to the Rome Statute. See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 4179. Also, the jurisdiction of the Military Commissions Act applies on a limited basis; specifically, only alien unprivileged enemy belligerents may be prosecuted under the Military Commissions Act. See 2006 MCA, *supra* note 31, § 948(b)(a).

⁶¹ See Roger Cohen, *2 French Killed as Sarajevo Battle Takes New Course*, N.Y. TIMES, May 29, 1995, at A1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* As discussed in Part III, the International Criminal Tribunal for the Former Yugoslavia asserted jurisdiction over grave breaches and other violations of the customs of war. See *supra* text accompanying notes 55–56. However, there have been no indictments issued against Bosnian Serb soldiers specifically directed to the perfidious capture of the French peacekeepers discussed in this paragraph. Instead, the only related indictments are those issued against Radovan Karadzic and Ratko Mladic for their roles in planning, ordering, and aiding the taking of several hundred U.N. military observers and peacekeepers, including the twelve French peacekeepers, as hostages. See *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 87 (Feb. 27, 2009); *Prosecutor v. Mladic*, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 87 (Feb. 27, 2009). Radovan Karadzic is currently on trial for war crimes, crimes against humanity, and genocide and is representing himself pro se. See, e.g., *Indicted Ex-Leader of Bosnian Serbs Calls Atrocities ‘Myths’*, N.Y. TIMES, Mar. 3, 2010, at A3. Mladic, on the other hand, is still on the run. Marliese Simons, *Trove of Data on Balkan Wars Found in Genocide Suspects Home*, N.Y. TIMES, July 11, 2010, at A14 (“On the run for more

⁵⁴ See GARY D. SOLIS & FRED L. BORCH, GENEVA CONVENTIONS 248 (2010) (explaining that “the import of . . . [the grave breach scheme] . . . is that some violations of the Conventions, while unlawful, are considered to be minor offenses that could not be punished to the same extent as grave breaches”).

⁵⁵ See S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993) (United Nations Security Council resolution establishing an International Tribunal for the Former Yugoslavia to prosecute grave breaches and other violations of international humanitarian law occurring in the area since 1991).

⁵⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 610 (May 7, 1997).

⁵⁷ See Rome Statute, *supra* note 20, art. 1 and pmb. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured.”) (emphasis added).

⁵⁸ See DÖRMANN, *supra* note 38, at xi (stating that, based on the principal of complementarity, the International Criminal Court would only assert its jurisdiction when a state is unwilling or unable to genuinely carry out the investigation or prosecution).

Perfidy used to achieve a military advantage poses an equally serious threat because of the frequency and potential consequences of the conduct. The types of perfidy that could be used to gain a military advantage are limited only by a belligerent's imagination. For example, by feigning *hors de combat* status,⁶⁵ a belligerent could trick an enemy into ceasing an attack and force the enemy to adjust its tactics or operations.⁶⁶ On top of the immediate advantage gained at the time of the perfidious act, the belligerent could acquire intelligence to facilitate an attack upon the enemy at a later time. Consequently, enemy deaths and injuries could flow directly from the belligerent's original perfidy.

Similar scenarios unfolded numerous times over the past decade in armed clashes between Israel and Palestinian terrorist organizations. Palestinian organizations reportedly used ambulances to transport terrorists, weaponry, explosives, and intelligence to points inside Israel.⁶⁷ This practice sometimes involved law-abiding ambulance drivers who were coerced by terrorists to infiltrate Israeli security checkpoints.⁶⁸ The terrorists, who knew that Israeli soldiers would grant access to ambulance drivers because of their medical status, set in motion devastating attacks against the Israeli civilian population.⁶⁹

The gap in conduct that is criminalized as perfidy could erode the law of armed conflict by tempting parties to act in bad faith. If only perfidious conduct that results in death or injury is criminalized, bad faith actors may be tempted to circumvent the law by engaging in perfidious conduct that does not involve death or injury.⁷⁰ By definition, such

than a decade, [Mladic] is reported to be in Serbia, moving among different hiding place").

⁶⁵ In accordance with AP I, a person is *hors de combat* if (1) he is in the power of an adverse Party; (2) he clearly expresses an intention to surrender; or (3) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and, therefore, is incapable of defending himself, provided that in any of these cases the individual abstains from any hostile act and does not attempt to escape. AP I, *supra* note 5, art. 41(2).

⁶⁶ See AP I COMMENTARY, *supra* note 4, at 435.

⁶⁷ See *The Palestinian Use of Ambulances and Medical Materials for Terror*, ISR. MINISTRY OF FOREIGN AFF. (Dec. 22, 2003), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/12/The+Palestini+an+use+of+ambulances+and+medical+mate.htm [hereinafter Israel MFA Report].

⁶⁸ See Jason Koutsoukis, *Hamas Tried to Hijack Ambulances During Gaza War*, SYDNEY MORNING HERALD, Jan. 26, 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gaza-war/2009/01/25/1232818246374.html>.

⁶⁹ See Israel MFA Report, *supra* note 67 (describing a terrorist attack in which an ambulance driver dispatched a suicide bomber inside Israel who later killed one Israeli civilian and injured one hundred others).

⁷⁰ AP I COMMENTARY, *supra* note 4, at 432 (explaining "that a prohibition that is restricted to acts which have a definite result would give the Parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at . . . [inflicting restricted acts upon] . . . the members of the armed forces of the adverse party, but at forcing them to submit to tactical or operational measures which will be to their

conduct still involves abuses of protections provided by the law of armed conflict. Faced with this perfidious conduct on a routine basis, an adversary may be less likely to grant protections if he believes the belligerent may misuse them at any time.⁷¹ Alternatively, an adversary may adopt restrictive measures designed to ferret out any misuse. For example, as a result of the Palestinian misuse of ambulances, Israeli guards were encouraged to conduct security checks of every ambulance in the wake of repeated Palestinian attacks.⁷² Significantly, in a situation where time is of the essence, such checks could mean the difference between life and death. Therefore, the idea that some forms of perfidy may be permissible threatens to erode the goals of the law of armed conflict—that is, to ensure parties act in good faith, end their conflicts quickly, and move on peacefully.⁷³

V. Bridge the Gap by Treating All Forms of Perfidy as Grave Breaches

In light of the serious consequences of perfidious conduct, the international community should insist all forms of perfidy, regardless of effects, are considered grave breaches. This approach has historical support, is consistent with precedent, and would ensure effective prosecution. Ultimately, this approach would bolster the purpose of the law of armed conflict.

A. History Supports Treating All Forms of Perfidy Equally

The historical roots that underpin the condemnation of perfidy suggest that bad faith—as opposed to the results of acting in bad faith—is the genesis of the prohibition. For example, when the seventh century Islamic caliph Abu Bakr opined, "Let there be no perfidy, no falsehood in treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly," his concern arguably applied to acting in good faith, as opposed to the results of acting in bad faith.⁷⁴ Likewise,

disadvantage").

⁷¹ See KOLB & HYDE, *supra* note 2, at 162 (arguing that if "any belligerent has reason to fear that at any moment there may be a misuse of the . . . [protections of the law of armed conflict] . . . he or she would no longer be ready to grant them").

⁷² See Israel MFA Report, *supra* note 67.

⁷³ See BOTHE ET AL., *supra* note 1, at 202 (stating "the prohibitions of perfidy are directly related to protection for the wounded and sick, *hors de combat* combatants, prisoners of war, and civilians"); see also FM 27-10, *supra* note 25, para. 50 (explaining that "perfidious conduct in war is forbidden because it destroys the basis for the restoration of peace short of the complete annihilation of one belligerent by the other"). See generally Denn, *supra* note 3, at 627 (arguing that "punishing perfidious captures criminally but less severely than deaths or injury better ensures compliance with the rule against bad faith military operations").

⁷⁴ See GREEN, *supra* note 16, at 22 (citing C. AD 634, ALIB HASAN AL MUTTAQUI, 4 BOOK OF KANSUL'UMMAN 472 (1979)).

by stating “military necessity . . . admits of deception, but disclaims acts of perfidy,” Professor Lieber focused on the acts, not the consequences, of perfidy.⁷⁵ Thus, if the prohibition against perfidy is true to its roots, all forms of perfidy should be treated equally, by criminalizing them as grave breaches.⁷⁶

B. On Par with Other Grave Breaches?

Some acts of perfidy may not seem that serious and, some may argue, do not rise to the level of a grave breach. However, several grave breach offenses already exist that encompass conduct similar in magnitude to perfidy that results in capture or military advantage. For example, article 147 of the fourth Geneva Convention makes the “unlawful transfer” of a protected person a grave breach.⁷⁷ Article 130 of the third Geneva Convention makes “willfully depriving a prisoner of war the rights of fair and regular trial” a grave breach.⁷⁸ Certainly, these offenses are significant, but they are no more significant than the perfidious conduct of a bad faith actor who abuses the protections of the law of armed conflict to gain valuable military advantages.⁷⁹ Moreover, as deceit offenses that are “so dangerous” and “so difficult to guard against,” perfidy that results in capture or military advantage seems a natural fit for the most serious criminal censure provided by the law of armed conflict.⁸⁰

⁷⁵ See Lieber Code, *supra* note 5, art. 16.

⁷⁶ While on the subject of historical support, it should be noted that a similar approach was advocated during the drafting of Additional Protocol I. Repeated requests were apparently made during both preliminary conferences and the final conference itself for a *per se* prohibition of perfidy instead of the limited prohibition that exists today. The best explanation for why the prohibition found in Additional Protocol I exists in its current form is that the drafters sought to develop, rather than replace, article 23(b) of the fourth Hague Convention. See AP I COMMENTARY, *supra* note 4, at 432.

⁷⁷ GC IV, *supra* note 37, art. 147. As in the case of unlawful confinement, this offense is concerned primarily with the unlawful transport of protected persons during the course of an international armed conflict. See DÖRMANN, *supra* note 38, at 106–12.

⁷⁸ GC III, *supra* note 38, art. 130. Some commentators believe this conduct was made a grave breach following an incident during World War II where the Gestapo summarily shot fifty British Royal Air Force prisoners of war. The British personnel tried to escape and received no due process in the wake of their capture. Furthermore, because it was not illegal under international law to attempt to escape, some believe any punishment should have been very light. See SOLIS & BORCH, *supra* note 54, at 163–64. Original intent notwithstanding, a deprivation involving much less serious consequences could still be considered a grave breach under a plain reading of the offense. For example, one could argue that by imposing the light punishment suggested by the commentators—just without the procedures of a fair and regular trial—the Gestapo would still have committed a grave breach.

⁷⁹ See *supra* text accompanying notes 61–69.

⁸⁰ See Lieber Code, *supra* note 5, art. 101. Although Professor Lieber was referring to clandestine or treacherous attempts to injure the enemy with these comments, his words carry equal weight in the context of clandestine or treacherous attempts to capture the enemy or achieve a military advantage at the enemy’s expense.

C. Assurances of Effective Prosecution

Some have contended that if the law of armed conflict is to be taken seriously, there must be a strong international response to any misuse of the protections afforded by the Geneva Conventions and their Protocol.⁸¹ In the international war crimes arena, the most serious criminal censure is reserved for grave breaches.⁸²

By treating all forms of perfidy as grave breaches, the international community would provide the best assurance that perfidious conduct is effectively prosecuted. Apart from the inherent seriousness that comes with the grave breach designation, the grave breach scheme is designed to ensure effective prosecution. The concern for meaningful prosecution of grave breaches explains the Geneva Conventions requirement that nations “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed . . . grave breaches.”⁸³ Nations are also obligated to “search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches,” and have the option to extradite persons alleged to have committed grave breaches to other states that are signatories to the Geneva Conventions.⁸⁴ In the end, effective prosecution of perfidy offers the best hope for deterring this bad faith conduct.

The strengths of the grave breach system also serve to underscore the pitfalls of maintaining the status quo as it relates to how perfidy is criminalized. For example, the only requirement concerning simple breaches the Geneva Convention imposes on nations is that they “take measures necessary for” their suppression.⁸⁵ Under this standard, a nation could administratively discipline a violator and comply with the Geneva Conventions.⁸⁶ Although states are at liberty to impose harsher forms of discipline,⁸⁷ the Geneva Conventions provide no guarantee that perfidious conduct resulting in capture or military advantage would be effectively prosecuted. For example, there is no analogous universal jurisdiction provision that applies to simple

⁸¹ See DÖRMANN, *supra* note 38, at ix (arguing that “a law which is not backed up by sanctions quickly loses its credibility”).

⁸² See generally SOLIS, *supra* note 6, at 301 (describing the hierarchy of violations occurring in armed conflict—from least serious to most serious—as crimes, war crimes, and grave breaches); see also SOLIS & BORCH, *supra* note 54, at 70 (explaining that grave breaches are the most serious violations of the law of armed conflict).

⁸³ See, e.g., GC IV, *supra* note 37, art. 146.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See SOLIS, *supra* note 6, at 303 (explaining that “administrative offenses do not have penal significance or trigger the mandatory actions that grave breach offenses require”).

⁸⁷ That is, under the rubric of taking measures necessary for the suppression of simple breaches. See, e.g., GC IV, *supra* note 37, art. 146.

breaches.⁸⁸ Consequently, a state with no ties to the armed conflict would have no basis to prosecute perfidious conduct resulting in capture or military advantage. This limitation is significant in light of the possibility some nations may choose to ignore perfidious conduct that falls in the gap. Finally, as long as the debate over whether some perfidious is even prohibited persists, there is no guarantee perfidy that results in capture or military advantage will ever be effectively prosecuted.⁸⁹ The international community can end this debate by treating every act of perfidy as a grave breach.

VI. Conclusion

Somewhere along the timeline between the genesis of the prohibition against perfidy and its current day status, the international community splintered, establishing a hierarchy of crimes of perfidy. What arguably started as a condemnation of any bad faith action, morphed into a condemnation of perfidy only when the conduct resulted in death, injury, or, in some cases, capture. Currently, the condemnation of perfidy arguably only applies when the perfidious conduct results in death or injury. The party who

has benefited the most from this transformation is the party who insists on acting in bad faith to achieve its military objectives. Stated differently, the international community does not bolster the Geneva Conventions when states turn their gaze from a capture achieved by the deliberate misuse of a protected emblem. Likewise, the military commander who realizes the enemy has gained valuable intelligence through the deliberate misuse of a flag of truce is likely to find little solace in the fact that some consider this an inconsequential misuse.

In light of this quandary, the most logical response would be to treat every form of perfidy as a grave breach. Ultimately, this would be in the best interest of states, combatants, and civilians. By equally criminalizing any hostile act committed under cover of legal protection, the international community would remain true to the intent of the condemnation of perfidy—namely, that any intentional misuse of the protections afforded by the law of armed conflict serve only to lengthen the duration of the conflict; worsen the condition of the sick, wounded, and imprisoned; and subject the civilian population to the devastation of war.⁹⁰

⁸⁸ See, e.g., GC III, *supra* note 38, art. 129 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such *grave breaches*, and shall bring such persons, regardless of their nationality, before its own courts.”) (emphasis added).

⁸⁹ See *supra* text accompanying notes 46–60.

⁹⁰ See *supra* text accompanying note 73.

The Long Range Acoustic Device: Don't Call It a Weapon—Them's Fightin' Words

Major Joe Schrantz*

*American Technology Corp.'s Long Range Acoustic Device (LRAD) is not a weapon, military or otherwise; it is an effective long-range communications device used to clearly broadcast critical information, instructions and warnings.*¹

I. Introduction

You have been posted at the checkpoint for several hours.² Besides roadside bombs, you feel the most likely way you might be killed is by a vehicle loaded with explosives.³ You look over to your squad leader as he mumbles, "Sitting ducks. That's all we are."⁴ Your buddy next to you agrees and says he is "just hanging around waiting to get blown up."⁵ Their fatalism is doing little to take your mind off the fact that you have nine months to go in your fifteen-month deployment.⁶

So far, all the vehicles that have passed through the checkpoint have complied with the wooden signs, the written directions, and your hand and arm signals.⁷ Nevertheless, you cannot shake the anger you feel towards

the military lawyer who briefed you on escalation of force and the rules of engagement.⁸ Your resentment has not subsided since you left the auditorium that day: Shoot at what you perceive as a threat and get investigated by "the judge,"⁹ or do not shoot and get blown up.¹⁰ You wonder, "What does the lawyer know, and why does the military make lawyers teach escalation of force and rules of engagement anyway?"¹¹

* Judge Advocate, U.S. Marine Corps. Presently assigned as Operational Law Attorney, International and Operational Law Branch, Judge Advocate Division, Headquarters Marine Corps. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

¹ Robert Putnam, *LRAD No Weapon*, TRIB. LIVE, Oct. 27, 2009, http://www.pittsburghlive.com/x/pittsburghtrib/opinion/letters/s_649951.html#.

² DOD NON-LETHAL WEAPONS PROGRAM, ANNUAL REPORT 2008, EXPANDING WARFIGHTER CAPABILITIES 1 (2008) [hereinafter NLWP ANNUAL REPORT]. The fictional scenario in this article is loosely based on the Introduction to the Annual Report, which asks the reader to "[i]magine yourself manning one of the countless checkpoints throughout Iraq or Afghanistan since the beginning of the Global War on Terror." *Id.*

³ See, e.g., Tim King, *Five Soldiers Killed by VBIED in Iraq Among Latest Casualties*, SALEM NEWS.COM, Apr. 12, 2009, http://www.salem-news.com/articles/april122009/casualty_update_4-12-09.php (describing "another long group of names and circumstances detailing the deaths of Americans" in both Afghanistan and Iraq).

⁴ See Bartle Breese Bull, *Checkpoint Iraq: A Tactic That Works*, WASH. POST, Mar. 13, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A28924-2005Mar12.html>. The quotations in this sentence (and the next) are actual statements made by Soldiers. Both were recorded by the author and are utilized in this primer to illustrate the sometimes helpless feelings servicemembers have while manning vehicular checkpoints.

⁵ *Id.*

⁶ See Rod Powers, *Army Deployment Lengths*, ABOUT.COM, Apr. 14, 2007, <http://usmilitary.about.com/od/terrorism/a/ardeplength.htm> ("All soldiers in the U.S. Central Command area of operations will serve 15-month tours in the region beginning immediately, Defense Secretary Robert M. Gates announced on April 11, 2007.")

⁷ See CENTER FOR ARMY LESSONS LEARNED, ESCALATION OF FORCE HANDBOOK 55 (July 2007) [hereinafter EOF HANDBOOK] (describing how defensive measures such as hand and arm signals, signs, flags, loudspeakers, spotlights, and laser pointers can help servicemembers guide traffic at a vehicular checkpoint) (on file with author).

⁸ See Christopher C. Pascale, *Keep 'Em Away from My Marines*, MARINE CORPS GAZ., Aug. 2008.

There is nothing more confusing, disheartening, and discouraging to a Marine who is going to go, or has just returned from, war than for another servicemen, Marine or not, with little or no credibility, telling him about the Law of War, Code of Conduct, and post-traumatic stress disorder (PTSD). During the past 4 ½ years that I have been in the Corps I've seen captains who are attorneys, skilled in litigation, rather than engineers, infantryman, or those from the intelligence community speak to young men and women, Active and Reserve, about the Law of War and the Code of Conduct in ways that lead them to believe that the only purpose for the period of instruction is to tell them that they are very likely to go to prison if they are on either end of a violent situation that may occur during their deployment. Returning from Iraq in 2005, we generally angry, depressed, and in some cases suicidal Marines attended a class on PTSD given by a second lieutenant who had not been to Iraq with us, did not know what we were going through, and appeared to be on the end of a "tag, you're it" situation where he won the prize of being the slide reader. Our consolation, in turn was to feel our blood pressure rise while this Marine learned the degrees of his comfort when talking in front of people and which will make him feel like quite the colonel when he addresses his own battalion one day in the future.

Id.

⁹ A term frequently used to describe a military lawyer.

¹⁰ See, e.g., CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, TIP OF THE SPEAR, AFTER ACTION REPORTS FROM JULY 2008–AUGUST 2009, at 223–24 (Sept. 2009) [hereinafter TIP OF THE SPEAR]; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008, at 176 (Sept. 1, 2008) [hereinafter FORGED IN THE FIRE] (capturing descriptions of the "investigation workload" and explaining "the large volume of all varieties of administrative investigations" in a deployed environment).

¹¹ See, e.g., TIP OF THE SPEAR, *supra* note 10, at 180–86 (citing numerous after-action reports that illustrate the substantial involvement of judge advocates in rules of engagement training to units); see also INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 73 (2009) [hereinafter

As you continue to stare down the road, you conclude that the briefs are provided so the military can court-martial you if you make a mistake.¹² There has to be something better than wooden signs, hand and arm signals, and warning shots to determine if a driver has hostile intent. You genuinely want to avoid mistakenly killing innocent women and children, but you are also concerned for your own safety.¹³

The Long Range Acoustic Device (LRAD) was designed primarily to “hail, warn, and notify” vehicles and sea vessels at a distance and was developed to assist servicemembers with difficult scenarios like the one described above.¹⁴ The LRAD allows U.S. personnel to more easily determine the intent of approaching vehicles at a safe distance.¹⁵ The manufacturer describes the device as a “highly directional, warning, and deterrent system” that “uses high . . . intensity focused acoustic output to communicate over distance with authority and high intelligibility.”¹⁶ More specifically, it allows users to give voice commands and warnings beyond the range of small arms.¹⁷ Because of its small size, the LRAD can be mounted

OPLAW HANDBOOK] (“Judge Advocates (JA) participate significantly in the preparation, dissemination, and training of ROE.”).

¹² See, e.g., David Wood, *Making U.S. Policy Work on the Mean Streets of Iraq*, LEATHERNECK.COM, Dec. 27, 2006, <http://www.leatherneck.com/forums/showthread.php?t=39149>.

Here comes a car careening around a corner, and Marines have about five seconds to determine whether it is a suicide bomber or a family on the way to market. If they judge wrong, their squad might be blown to smithereens, or an innocent family could be shredded by automatic rifle fire and the Marines brought up on charges of killing civilians.

“[I]t’s easy to sit back in the command center going, ‘You should have done this or that,’” grouses a Marine. “You’ve got a heartbeat to make a decision.”

“[G]uys are thinking, ‘You could be on your way to Leavenworth,’” says a second Marine, referring to the military prison in Kansas.

Id.

¹³ See Jaime Holguin, *7 Iraqis Killed at Checkpoint*, CBS NEWS, Mar. 31, 2003, <http://www.cbsnews.com/stories/2003/04/01/iraq/main547091.shtml> (describing in graphic detail the aftermath of an engagement of a vehicle “packed with women and children,” which resulted in the “mangled bodies” of two children).

¹⁴ Press Release, Joint Non-Lethal Weapons Program, Acoustic Hailing Device Officially Added to Family of Non-lethal Systems (June 22, 2007) (on file with author) (announcing a contract was awarded to “American Technology Corporation on May 17, to design, develop and build four Acoustic Hailing Devices” to “enable U.S. forces to more effectively determine intent of a person, crowd, vessel, or vehicle at a safe distance and potentially deter them prior to escalating to lethal force.”).

¹⁵ Scott Stuckey, Vice President, Bus. Dev., Am. Tech. Corp., Long Range Acoustic Device Operations and Safety Training (2009) (PowerPoint Presentation) (on file with author).

¹⁶ *Id.*

¹⁷ Acoustic Hailing Devices (AHD) Fact Sheet, Joint Non-Lethal Weapons Program, Feb. 2008, [https://www.jnlwp.com/misc/fact_sheets/AHD%201%](https://www.jnlwp.com/misc/fact_sheets/AHD%201%20Feb%2008.pdf)

on a number of different platforms, including guard towers, tripods, vehicles, ships, and trucks.¹⁸ The user’s ability to transmit messages “in a highly directional beam . . . reduces the risk of exposing nearby personnel or peripheral bystanders to harmful audio levels.”¹⁹

Despite the device’s nonviolent purpose, multiple conflicting media reports portray the LRAD as more than just a communication device by using terms like “weapon,”²⁰ “gun,”²¹ “sound cannon,”²² and “sonic cannon,”²³ that can “inflict pain-or even permanent deafness.”²⁴ Regardless of how it has been described by the media, the LRAD is not a weapon if it is used for its intended purpose. Instead, it is a lawful communication tool for use in complex operational environments.

Part II of this article discusses why the LRAD was developed and how the LRAD can be used to assist the U.S. military in contemporary counterinsurgency operations. Part III describes the weapons review process and concludes that the LRAD, when used for its intended purpose, is a helpful communication device, not a non-lethal weapon.²⁵ Finally,

https://www.jnlwp.com/misc/fact_sheets/AHD%201%20Feb%2008.pdf [hereinafter Acoustic Hailing Devices (AHD) Fact Sheet].

¹⁸ *Id.*

¹⁹ LRAD Corporation—Product Overview, <http://www.lradx.com/site/content/view/15/110/> (last visited Aug. 8, 2010).

²⁰ Adam Blenford, *Cruise Lines Turn to Sonic Weapon*, BBC NEWS, Nov. 8, 2005, <http://news.bbc.co.uk/2/hi/africa/4418748.stm>.

²¹ *Georgian Police Accused of Brutality*, RUSSIA TODAY, Nov. 9, 2007, http://rt.com/Top_News/20071109/Georgian_police_accused_of_brutality.html (last visited Jan. 14, 2010) (“Georgian police are being accused of brutality during Wednesday’s violent crackdown on opposition protesters in Tbilisi. TV pictures showed officers and soldiers using a range of weapons to disperse crowds, including rubber bullets, tear gas and a sonic gun.”) (on file with author).

²² Ian Urbina, *Protesters Are Met by Tear Gas at G-20 Conference*, N.Y. TIMES, Sept. 24, 2009, available at <http://www.nytimes.com/2009/09/25/us/25pittsburgh.html> (discussing how “police fired a sound cannon that emitted shrill beeps, causing demonstrators to cover their ears and back up . . . City officials said they believed it was the first time the sound cannon had been used publicly.”).

²³ *I Beat Pirates with a Hose and Sonic Cannon*, BBC NEWS, May 17, 2007, http://news.bbc.co.uk/2/hi/uk_news/6664677.stm (stating how “after dragging his injured colleague Som Bahadur Gurung to safety, he saw off the heavily armed mercenaries by hitting them with a hi-tech sonic cannon.”).

²⁴ William M. Arkin, *The Pentagon’s Secret Scream*, L.A. TIMES, Mar. 7, 2004, available at <http://articles.latimes.com/2004/mar/07/opinion/op-arkin7>.

²⁵ U.S. DEP’T OF DEF., DIR. 3000.3, POLICY FOR NON-LETHAL WEAPONS (9 July 1996) [hereinafter DODD 3000.3]. Non-lethal weapons are defined as:

[W]eapons that are explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.

[U]nlike conventional lethal weapons that destroy their targets principally through blast, penetration and

Part III discusses why the LRAD, even if used to intentionally cause pain (which *would* render it a non-lethal weapon), would still comply with the principles of the law of war.

II. Why the LRAD Was Developed

A. Historical Background

On 12 October 2000, a U.S. naval vessel, the USS *Cole*²⁶ was attacked by terrorists²⁷ while refueling in the port of Aden, Yemen.²⁸ The USS *Cole* was rammed by a small boat filled with explosives, killing seventeen sailors.²⁹ Investigations into the incident resulted in a report commissioned by the Department of Defense (DoD).³⁰ Among other findings, the report concluded,

fragmentation, non-lethal weapons employ means other than gross physical destruction to prevent the target from functioning.

Id.

²⁶ DDG 67 Cole, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/agency/navy/ddg-67.htm> (last visited Mar. 4, 2010) (explaining the “USS Cole is the first warship named for Sergeant Darrell S. Cole, USMC (1920–1945). Sergeant Cole was posthumously awarded the Medal of Honor for his conspicuous gallantry in the campaign at Iwo Jima.”).

²⁷ History, USS *COLE* (DDG 67), <http://www.cole.navy.mil/site%20pages/history.aspx> (last visited Mar. 4, 2010).

²⁸ YEMEN, CIA—THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ym.html> (last visited Mar. 4, 2010) (explaining that “Yemen is in the Middle East, bordering the Arabian Sea, Gulf of Aden, and Red Sea, between Oman and Saudi Arabia”).

²⁹ USS *Cole* Casualties, ARLINGTON NAT’L CEMETERY WEBSITE, <http://www.arlingtoncemetery.net/usscole-main.htm> (last visited Mar. 4, 2010). Memorialized are

Chief Petty Officer Richard Costelow, Signalman Seaman Recruit Cheron Luis Gunn, Seaman James Rodrick McDaniels, Seaman Recruit Lakiba Nicole Palmer, Operations Specialist 2nd Class Timothy Lamont Saunders, Ensign Andrew Triplett, Seaman Apprentice Craig Bryan Wibberley, Hull Maintenance Technician 3rd Class, Kenneth Eugene Clodfelter, Mess Management Specialist Seaman Lakeina Monique Francis, Information Systems Technician Seaman Timothy Lee Gauna, Engineman 2nd Class Mark Ian Nieto, Electronics Warfare Technician 3rd Class Ronald Scott Owens, Engineman Fireman Joshua Langdon Parlett, Fireman Apprentice Patrick Howard Roy, Electronics Warfare Technician 2nd Class Kevin Shawn Rux, Mess Management Specialist 3rd Class Ronchester Mananga Santiago, Fireman Gary Graham Swenchonis Jr..

Id.

³⁰ U.S. DEP’T OF DEF. USS *COLE* COMMISSION REPORT (EXECUTIVE SUMMARY) (9 Jan. 2001), <http://www.dod.mil/pubs/cole20010109.html> [hereinafter USS *COLE* REPORT].

Since the attack on Khobar Towers³¹ in June 1996, the Department of Defense (DoD) has made significant improvements in protecting its servicemembers, mainly in deterring, disrupting, and mitigating terrorist attacks on installations. The attack on USS *COLE* (DDG 67), in the port of Aden, Yemen, on 12 October 2000, demonstrated a seam in the fabric of efforts to protect our forces, namely in-transit forces. Our review was focused on finding ways to improve the US policies and practices for deterring, disrupting, and mitigating terrorist attack on US forces in transit.³²

The DoD report also concluded that development of “resource credible deterrence standards; deterrence specific tactics, techniques and procedures; and defensive equipment packages” were also needed.³³ Most importantly, the report found that “more responsive application of currently available military equipment, commercial technologies, and aggressive research and development can enhance the [antiterrorism/force protection]³⁴ and deterrence posture of transiting forces.”³⁵ Finally, the report recommended that the “Secretary of Defense direct the Services to initiate a major unified effort to identify near-term [antiterrorism/force protection] equipment and technology requirements, field existing solutions from either military or commercial sources, and develop new technologies for remaining requirements.”³⁶

The attack on the USS *Cole* highlighted the need for additional tools, like the LRAD, to protect servicemembers.³⁷ The tragedy of the USS *Cole* revealed gaps in force protection that acoustic devices, like the

³¹ See Stephanie Watson, *Khobar Towers Bombing Incident*, ENCYCLOPEDIA.COM (2004), <http://www.encyclopedia.com/doc/1G2-3403300438.html> (describing the attack on 25 June 1996, when “a truck laden with explosives ignited in front of the Khobar Towers apartment building in Dhahran, Saudi Arabia” killing 19 American servicemen and wounding hundreds more).

³² USS *COLE* REPORT, *supra* note 30.

³³ *Id.*

³⁴ U.S. DEP’T OF ARMY, REG. 525-13, ANTITERRORISM (11 Sept. 2008) (defining “antiterrorism” as “[d]efensive measures used to reduce the vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military and civilian forces”; and “Force Protection” as “[a]ctions taken to prevent or mitigate hostile actions against DOD personnel (to include Family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.”).

³⁵ USS *COLE* REPORT, *supra* note 30.

³⁶ *Id.*

³⁷ *Id.*; see also NLWP ANNUAL REPORT, *supra* note 2, at 3 (“The warfighter’s need for non-lethal weapons is evident throughout the world.”).

LRAD, could fill, and DoD began exploring the development and potential acquisition of such devices.³⁸

B. Today's Counterinsurgency Fight

Minimizing unnecessary loss of life through the measured application of necessary force is vital to fighting an insurgency as “nothing moves the population against one side or another as much as the indiscriminate use of force.”³⁹ Many measures can be taken to determine whether an approaching vehicle is demonstrating hostile intent.⁴⁰ The use of laser pointers, tire strips, laser dazzlers, and communication devices can “yield valuable clues as to the driver’s intent, such that Soldiers can make more accurate determinations of whether hostile acts or hostile intent are present.”⁴¹ Making accurate assessments about the threats that exist can be more easily achieved if “the intent of a person, crowd, vessel, or vehicle” can be determined at a “safe distance and potentially deter them prior to escalating to lethal force.”⁴²

Statistics continue to illustrate the need to improve checkpoint operations.⁴³ In Afghanistan, in 2008, 514 escalation of force incidents were reported by the International Security Assistance Force (ISAF).⁴⁴ During these incidents, eighty-three local nationals were injured and twenty-seven were killed.⁴⁵ A subsequent investigation revealed that none of the killed or injured represented improvised explosive device threats to ISAF troops.⁴⁶

³⁸ Acoustic Hailing Devices (AHD) Fact Sheet, *supra* note 17.

After the U.S.S. Cole attack in 2000, this priority was addressed by operational units directly purchasing and utilizing several of the Commercial Off the Shelf (COTS) AHD products available on the market.

[O]n May 17, 2007 a contract was awarded, based on a full and open competition, to American Technology Corporation to design, develop and build four modified COTS Acoustic Hailing Devices for the U.S. Army, U.S. Navy and U.S. Coast Guard.

Id.

³⁹ EOF HANDBOOK, *supra* note 7 (stating “Force must be perceived by the people as judicious, appropriate, and proportional to the threat, while still protecting our Soldiers Plan for and employ force protection equipment to help increase reaction time and reduce unnecessary casualties.”); *see also* U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-25 (Dec., 2006) [hereinafter FM 3-24].

⁴⁰ *Id.*

⁴¹ OPLAW HANDBOOK, *supra* note 11, at 81.

⁴² Acoustic Hailing Devices (AHD) Fact Sheet, *supra* note 17.

⁴³ Int’l Sec. & Assistance Force, Force Escalation Awareness Training (Jan. 2009) (PowerPoint Presentation) (on file with author).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

In Iraq, the challenges are similar. A recently redeployed unit remarked in an after-action report that “in all but one case, the [escalation of force] incident involved innocent civilians (or at least no proven hostile intent). In most cases, the Iraqis involved in the incident were not paying attention or did not understand the signals used by U.S. Forces.”⁴⁷

It is extremely important in a counterinsurgency environment to apply appropriate force precisely “so that it accomplishes the mission without causing unnecessary loss of life or suffering.”⁴⁸ In the fight against insurgents, servicemembers may be tempted to use excessive force. However, “through planning, preparation, and training, the number of those incidents can be decreased and the lethality of the incidents reduced.”⁴⁹

Based on lessons learned and a growing body of statistics, the Secretary of Defense has made incorporating non-lethal capabilities into DoD operations a priority by stating:

[M]ilitary Departments will incorporate employment of nonlethal capabilities into existing and future doctrine and will develop a Joint Integrating Concept for Non-Lethal Capabilities with enhanced joint training, education, war gaming, and exercises. Combatant Commanders will include the employment of non-lethal capabilities in training and exercises. Military Departments will ensure that domestic response forces are equipped, trained, and ready to employ non-lethal capabilities.”⁵⁰

Having identified a need for non-lethal capabilities, the DoD has repeatedly sought to supply its servicemembers with non-lethal tools, such as the LRAD.⁵¹

⁴⁷ TIP OF THE SPEAR, *supra* note 10, at 177; *see also* EOF HANDBOOK, *supra* note 7, at 81.

Civilians don’t know what to do when coming into contact with the U.S. military—true or false? The answer is decidedly “true.” In fact, as hard as it is for Soldiers to predict the next move of an ordinary civilian approaching a hasty checkpoint, it may be just as hard for that civilian to discern the exact intentions of a Soldier pointing a gun at or near him.

Id.

⁴⁸ FM 3-24, *supra* note 39, at 1-25.

⁴⁹ EOF HANDBOOK, *supra* note 7, at i.

⁵⁰ NLWP ANNUAL REPORT, *supra* note 2, at 4.

⁵¹ LRAD Corp. Press Releases, <http://www.lradx.com/site/content/view/42/55/> (last visited Aug. 8, 2010) (posting numerous press releases that identify millions of dollars in orders by the Army and Navy to supply their respective services with acoustic device technology).

III. Is the LRAD a Weapon?

A. Weapons Review Process

All U.S. weapons are reviewed for legality⁵² to ensure they do not violate the law of war.⁵³ Legal reviews are mandated by DoD Directive (DoDD) 5000.01, *The Defense Acquisition System*, which states that “[t]he acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements . . . customary international law, and the law of armed conflict (also known as the laws and customs of war).”⁵⁴ As a result, any proposed “weapon” has to be reviewed by the service for legality under the Law of War.⁵⁵

In addition, DoDD 3000.3 requires “a legal review of the acquisition of all non-lethal weapons.”⁵⁶ Legal reviews “ensure consistency with the obligations assumed by the U.S. Government under all applicable treaties, with customary international law, and, in particular, the laws of war.”⁵⁷

Although the United States has not ratified Additional Protocol I, it provides the legal review of “new weapons” is also required under Article 36, which states,

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.⁵⁸

⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I], reprinted in INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 187 (2009); U.S. DEP’T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM (12 May 2003) [hereinafter DoDD 5000.01]; see also OPLAW HANDBOOK, *supra* note 11, at 17. Although the United States has not ratified this treaty, the review policies set forth in DoDD 5000.01 and DoDD 3000.3 were established before AP I.

⁵³ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR HANDBOOK 164 (2005) [hereinafter LOW HANDBOOK] (setting forth the four key principles of the law of war: Military necessity/military objective; Distinction/discrimination; Proportionality; and Humanity/unnecessary suffering).

⁵⁴ DoDD 5000.01, *supra* note 52.

⁵⁵ OPLAW HANDBOOK, *supra* note 11, at 17.

⁵⁶ DoDD 3000.3, *supra* note 25.

⁵⁷ *Id.*

⁵⁸ AP I, *supra* note 52, art. 36.

This legal review will focus on three areas: “whether the employment of the weapon or munition for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness,”⁵⁹ whether the weapon is capable of being controlled in a discriminatory manner, and whether there is a specific rule of law that prohibits or restricts its use.

In accordance with these requirements, the Department of the Navy, Office of The Judge Advocate General, International and Operational Law Division, conducted a preliminary legal review of acoustic energy non-lethal weapon systems.⁶⁰ Notably, this review was conducted in 1998 and did not “describe any specific weapon or weapon system.”⁶¹ Rather, the review acknowledged that additional legal reviews would be required when specific acoustic devices, like the LRAD, were identified.⁶²

The Navy’s review nevertheless examined the law of war implications of acoustic technologies and reviewed whether suffering caused by an acoustic device would be needless, superfluous, or “disproportionate to the military advantage reasonably expected” from use; whether it could be used in a discriminate manner to minimize risk to civilians not taking a direct part in hostilities; and finally, “whether there is a specific rule of law or treaty provision prohibiting the weapon’s acquisition or use.”⁶³ The review concluded, “there are no legal barriers to the development” of the acoustic system technology it examined.⁶⁴

⁵⁹ LOW HANDBOOK, *supra* note 53, at 177.

⁶⁰ Int’l & Operational Law Div., Office of The Judge Advocate Gen., Dep’t of the Navy, Preliminary Legal Review of Proposed Acoustic Energy Non-Lethal Weapon Systems, 5000, ser. 106/354 (26 May 1998). SECNAVINST 5000.2D, *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, of 16 Oct 08 is the current reference that requires the Navy to conduct a legal review.

⁶¹ *Id.* (examining “two types of acoustic technology: aural (sonic) systems and non-aural (infrasonic) systems”). A review of a specific acoustic weapon (the LRAD was part of a platform) would not take place until 2007.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* Specifically, the review concluded:

Based on the information provided, there are no legal barriers to the development of either of these acoustic systems. With respect to those aural systems that could cause permanent hearing loss, however, it will be necessary, if such a weapon is fielded, to develop an adequate focusing mechanism to ensure compliance with the principle of discrimination. Furthermore, from a purely policy perspective, the potential for causing permanent disability and effects such as disorientation, may raise some objections by the International Committee of the Red Cross (ICRC), based on the Sirius Project findings. Nonetheless, it must be emphasized that, from a legal perspective, none of these injuries would render the aural system illegal.

Id.

The next legal review, conducted in 2007, actually identified the LRAD.⁶⁵ On 22 January 2007 the Department of the Army, Office of The Judge Advocate General, conducted a legal review of the “Full-Spectrum Effects Platform Sheriff.”⁶⁶ The LRAD was one component of this platform.⁶⁷

The Army concluded that use of the LRAD would not violate the law of war.⁶⁸ The review noted studies which illustrated “that the LRAD, when used in the manner proscribed [sic], will not cause permanent damage to the ear or hearing loss.”⁶⁹ However, the review did acknowledge that the LRAD had the capability of being “employed with the intent to cause discomfort to the listener.”⁷⁰ This type of use would convert the LRAD from being only a “communication” device, to becoming a non-lethal weapon.⁷¹ Specifically, the review stated:

The LRAD, to date, has merely been used as a “hail and warning device,” and therefore, not been considered a non-lethal weapon. Should the LRAD be employed with the intent to cause discomfort to the listener, it would be considered a non-lethal weapon, but because the discomfort is well short of permanent damage to the ear, it does not violate the legal threshold of ‘superfluous injury or unnecessary suffering.’⁷²

Importantly, in its finding, the review concluded that even if used as a non-lethal weapon (i.e., to intentionally cause discomfort instead of to communicate), the LRAD would still provide Soldiers with a lawful tool in today’s complex environment.⁷³

The review found that the LRAD has consistently been used as a communication device rather than as a weapon.⁷⁴

⁶⁵ Memorandum from the Office of The Judge Advocate General, U.S. Army, to Program Executive Office, Ground Combat Sys., subject: Full-Spectrum Effects Platform/Sheriff; Final Legal Review (22 Jan. 2007) [hereinafter Final Legal Review Memorandum].

⁶⁶ *Id.*

⁶⁷ *Id.* “The Full-Spectrum Effects Platform/Sheriff (FSEP) was conceived to provide the warfighter with multiple precise and scaleable synergistic effects.” It includes the LRAD, a “Maxa beam white light,” a “laser glare optical aversion device,” an “acoustic, infrared radar,” a “counter-IED system,” and a .50 caliber machine gun. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Nevertheless, even though its use as a communication device or as a non-lethal weapon would be permissible under the law, ensuring that the LRAD is properly described and used is important. Understanding this nuance is particularly important for the judge advocate. Knowledge of this fine line between a “communication device” and a “non-lethal weapon” will allow the judge advocate to be in a better position to advise the commander on its employment and capabilities.⁷⁵

B. Knowing What It Is, Not What the Media Says It Is (Them’s Fightin’ Words)

Public misperception of the LRAD, which has been fueled by the media, has been growing, and judge advocates must understand the rumors in order to properly advise commanders.⁷⁶

In fact, LRAD, which is 33 inches in diameter and looks like a giant spotlight, has been used by the U.S. military in Iraq and at sea as a non-lethal force. In these settings, operators can use the device not only to convey orders, but also as a weapon. When in weapon mode, LRAD blasts a tightly controlled stream of caustic sound that can be turned up to high enough levels to trigger nausea or possibly fainting.⁷⁷

Use of the LRAD will likely raise the same questions and comments by civilians encountered in combat operations as has been raised domestically by misinformed media sources and the general public. For example, in 2009, a San Diego, California, sheriff’s department displayed an LRAD at a town hall forum.⁷⁸ Although it was intended to be used only to communicate with “an estimated 1,300–1,500 people,” it instead provoked public concern that it was a weapon.⁷⁹ Specifically, one citizen wrote, “[I]ong-range acoustic devices [LRADs] for crowd control can be extremely dangerous. These are used in Iraq to control insurgents. They can cause serious and lasting harm to

⁷⁵ See TIP OF THE SPEAR, *supra* note 10, at 197 (stating that “JAs should have baseline knowledge of what weapons and weapons systems are available to increase their situational awareness and their value to their commanders”).

⁷⁶ See *supra* notes 20–24 and accompanying text. The media’s portrayal of the LRAD, which is primarily communication technology, as a “weapon” is best illustrated by the following quote.

⁷⁷ Amanda Onion, *RNC to Feature Unusual Forms of Sound*, ABC NEWS, Aug. 25, 2004, <http://abcnews.go.com/Technology/story?id+99472&page=1>.

⁷⁸ Miriam Raftery, *Sonic Weapons Used in Iraq Positioned at Congressional Townhall Meetings in San Diego County*, EAST COUNTY MAG., Sept. 11, 2009, <http://www.eastcountymagazine.org/?q=node/1874>.

⁷⁹ *Id.*

humans We want to know WHY our Sherriff Dept has this weapon.”⁸⁰

In order to address these types of concerns, all Soldiers, especially commanders, should be able to respond to questions about the LRAD and other non-lethal capabilities if posed by concerned citizens or the media in counterinsurgency operations.

IV. Conclusion

The LRAD is being used to assist military personnel in complex environments, and it is helping to save lives.⁸¹ With the aid of the LRAD, servicemembers can more easily determine, at a safe distance, the intent of individuals approaching in vehicles at checkpoints.⁸² When properly employed as a communication device, users can give voice commands and warnings at great distances.⁸³ A user can,

however, improperly employ the LRAD to cause intentional pain. When this happens, the LRAD transitions from being a communication device to being a non-lethal weapon.⁸⁴ Nevertheless, the LRAD was intended to be used as a communication device, not a “weapon,” “gun,” or “sound cannon” to “inflict pain or even permanent deafness,” but even when improperly used as a non-lethal weapon, the LRAD would fully comply with the law of war⁸⁵ because the “discomfort” it can cause “is well short of permanent damage to the ear” it would not exceed the “threshold of superfluous injury or unnecessary suffering.”⁸⁶

Judge advocates must be conscious of the LRAD’s capabilities and the implications of its use. So long as judge advocates are aware of its nuances and the ways it might be used in operations, the LRAD can continue to provide servicemembers with another lawful tool for today’s complex combat operations.

⁸⁰ *Id.*

⁸¹ NLWP ANNUAL REPORT, *supra* note 2, at 5 (“the use of non-lethal devices at vehicle checkpoints in Iraq has resulted in reduced casualties.”).

⁸² Acoustic Hailing Devices (AHD) Fact Sheet, *supra* note 17.

⁸³ *Id.*

⁸⁴ Final Legal Review Memorandum, *supra* note 65.

⁸⁵ *Supra* notes 20–24 and accompanying text; *see also* Final Legal Review Memorandum, *supra* note 86.

⁸⁶ *Id.*

Warrior King: The Triumph and Betrayal of an American Commander in Iraq¹

Reviewed by Major Jeffrey S. Dietz*

[Dan Rather] began to ask a serious question, opening with the words, “Colonel Sassaman, you know the president of the United States has declared all ground warfare complete as of May 1—”

Like the smart aleck that I can sometimes be, I interrupted. “Did we win?”²

I. Introduction

Retired Lieutenant Colonel Nathan Sassaman believes in winning.³ He won as West Point’s quarterback,⁴ and he preached the virtue of rising after a fall as an Army officer.⁵ In *Warrior King*, Sassaman attempts to win back his public image after involvement in a notorious incident of detainee abuse early in the Iraq War.

In early 2004, while commanding 1st Battalion, 8th Infantry Regiment (1-8 Inf.) in Iraq, Sassaman learned that his subordinates had thrown two detainees into the Tigris River and that one of the men allegedly drowned.⁶ Sassaman coached his subordinates, “Don’t say anything about the water.”⁷ When word of the incident became public, Sassaman was roundly criticized for his deceitful and discreditable response.

Sassaman has subsequently argued that he made the right decision and that an unfair Army system punished him for it, but he fails to argue convincingly that withholding information was justifiable.⁸ He sets out to counter the damning 2005 article “The Fall of the Warrior King,”⁹ which harshly judged him for his response to the detainee incident, but *Warrior King* is most compelling when he veers from his thesis to critique senior military leaders in Iraq. This review analyzes Sassaman’s thesis that his decision to withhold information was correct but that the

Army system betrayed him. This review also suggests how judge advocates can use the book to become better advisors to commanders. Ultimately, I recommend *Warrior King* to readers interested in the ethical complexities of the tactical counterinsurgency battlefield.

II. Sassaman’s Decision to Withhold

Sassaman argues that he was justified in withholding information about the detainee incident from his brigade commander because Sassaman was better qualified to judge his Soldiers.¹⁰ Sassaman suggests his brigade commander, Colonel Fred Rudesheim,¹¹ was incompetent in combat,¹² concerned only about his own career advancement,¹³ and lacked any understanding of the plight of the common Soldier.¹⁴ In contrast, Sassaman claims he succeeded as a combat commander,¹⁵ put the welfare of his Soldiers before his own,¹⁶ and heroically saved a fallen Soldier.¹⁷ Sassaman had success in Balad and Samara, usually by disobeying Rudesheim’s orders,¹⁸ while his peers failed.¹⁹ Sassaman employed aggressive and violent tactics to bring his areas under control,²⁰ while other commanders fell short by mindlessly adhering to Rudesheim’s passive appeasement model.²¹

Sassaman cleverly asserts that no one has the right to judge the combat decisions of Soldiers unless he, too, has

* Judge Advocate, U.S. Army. Presently assigned as Personnel Law Attorney, Office of The Judge Advocate General, Washington, D.C.

¹ NATHAN SASSAMAN WITH JOE LAYDEN, *WARRIOR KING: THE TRIUMPH AND BETRAYAL OF AN AMERICAN COMMANDER IN IRAQ* (2008).

² *Id.* at 59.

³ *Id.* at 168.

⁴ *Id.* at 33.

⁵ *Id.* at 12.

⁶ *Id.* at 240–41.

⁷ *Id.* at 245.

⁸ *Id.* at 9 (“The ultimate irony in this entire action was that the battalion commander of arguably the finest fighting battalion in the division was about to take one for Big Army because he had decided to do what was right in view of the circumstances, as opposed to blindly making his men walk the gangplank.”).

⁹ Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES (Magazine), Oct. 23, 2005, available at <http://www.nytimes.com/2005/10/23/magazine/23sassaman.html>.

¹⁰ SASSAMAN, *supra* note 1, at 267–68; *id.* at 245–46.

¹¹ Rudesheim currently holds the rank of brigadier general and is serving as the Deputy Commanding General—Support for the 1st Cavalry Division, currently stationed in Baghdad, Iraq, <http://www.hood.army.mil/1stcavdiv/about/leadership/dcgs.htm>.

¹² SASSAMAN, *supra* note 1, at 146.

¹³ *Id.* at 157.

¹⁴ *Id.* at 146.

¹⁵ *Id.* at 224, 247.

¹⁶ *Id.* at 159.

¹⁷ *Id.* at 138–39.

¹⁸ *Id.* at 161.

¹⁹ *Id.* at 247.

²⁰ *Id.* at 99.

²¹ *Id.* at 199.

had “American blood on [his] hands.”²² He uses this argument to justify withholding information from Rudesheim and to disarm his own critics. He was a better decision-maker than Rudesheim and Rudesheim would have judged the Soldiers unfairly, he argues in defense of his actions.²³

However, Sassaman fails to support the claim that he was a better decision-maker in combat. The successes he attributes to his superior leadership were based on aggressive and violent tactics that put fear into the citizen population—tactics that run contrary to the Army’s counterinsurgency doctrine.²⁴ He further criticizes tactics of “appeasement”—tactics similar to the ones famously espoused and practiced by General David Petraeus.²⁵ Embodied in Army Field Manual 3-24, *Counterinsurgency*,²⁶ Petraeus’s counterinsurgency principles²⁷ helped the U.S. military make important gains in Iraq, as evident from the historic bilateral security agreement signed between the United States and Iraq.²⁸ One core principle of counterinsurgency is that “[s]ometimes the more force used, the less effective it is.”²⁹ Throughout the book, Sassaman overlooks the lasting impact of Petraeus’s counterinsurgency strategy and fails to recognize that his own tactics likely fed the insurgency.

Sassaman flaunts his disobedience of Rudesheim’s orders yet expected obedience from his own subordinates.³⁰ His divergent position on discipline likely influenced the abuse of detainees. Sassaman takes every opportunity to reaffirm his commitment, and the commitment of his Soldiers, to the proper treatment of detainees,³¹ but he fails to mention that his Soldiers were also implicated in two other allegations of detainee killings.³² The brigade prosecutor responsible for compiling the evidence against

Sassaman and his Soldiers has commented that Sassaman’s battalion “was a world unto itself, one where unlawful, even brutal, acts were, at least, condoned and, at worst, explicitly ordered.”³³ The real product of his aggressive leadership was a more emboldened insurgency and a more undisciplined unit.

Sassaman further fails to support the claim that Rudesheim would have judged his Soldiers unfairly. Sassaman also neglects to mention that the division commander, Major General Ray Odierno, would likely have decided whether the Soldiers would have been court-martialed. He flirts with the argument that the military justice system is unjust,³⁴ suggesting that the unjust system combined with Rudesheim’s bias justified his withholding of the detainee abuse report to prevent an injustice. However, Sassaman’s judgment of Rudesheim is conclusory and unsupported, and he further ignores the constitutional guarantees of due process.³⁵

Despite his efforts, Sassaman’s arguments fail to justify or satisfactorily explain his actions, and instead of the leader who heroically “sticks up for his men, regardless of the consequences,”³⁶ Sassaman comes off as a know-it-all, elitist, spurned, former Soldier who covered up subordinate misconduct because he preferred “to be one of the boys.”³⁷

III. Betrayal

Sassaman next attempts to demonstrate that the Army system betrayed him. He blames the Army for tolerating failure³⁸ while shunning leaders who take risks.³⁹ Under the circumstances, he took a calculated risk for the benefit of his Soldiers, and he suggests that punishing him for one wrong decision discourages others from innovation.⁴⁰

His decision to conceal evidence, he declares, was an ethical decision, not a tactical one. First, he expertly distinguishes his career from others in the Army,⁴¹ but fails to prove a betrayal. He then declares that he valued the welfare of his Soldiers over honesty. His statement is ironic,

²² *Id.* at 4, 187.

²³ *Id.* at 157.

²⁴ *Id.* at 99.

²⁵ *Id.* at 162.

²⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-25 to 1-27 (15 Dec. 2006) [hereinafter FM 3-24] (describing the use of the appropriate level of force and the counterinsurgency paradoxes).

²⁷ See Editorial, *The Petraeus Effect*, WALL ST. J., Apr. 8, 2008, at A20.

²⁸ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008.

²⁹ FM 3-24, *supra* note 26, at 1-27; see also JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE 30 (2002) (discussing the doctrine of “minimum force” to avoid diminishing the support of the people for the counterinsurgency force).

³⁰ SASSAMAN, *supra* note 1, at 127–28.

³¹ *Id.* at 36, 146, 128.

³² VIVIAN H. GEMBARA WITH DEBORAH A. GEMBARA, DROWNING IN THE DESERT 300 (2008).

³³ *Id.* at 283–84.

³⁴ SASSAMAN, *supra* note 1, at 8, 291.

³⁵ See *In re Winship*, 397 U.S. 358, 364 (1970); Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28 (2005) (arguing that beyond a reasonable doubt is the proper standard in nonjudicial punishment).

³⁶ SASSAMAN, *supra* note 1, at 248.

³⁷ *Id.* at 267.

³⁸ *Id.* at 201.

³⁹ *Id.* at 90.

⁴⁰ *Id.*

⁴¹ *Id.* at 205 (lamenting the promotion of his less successful peer).

given that he rhetorically asks the Bush Administration, “Why not just be honest?”⁴² To win over the reader, Sassaman must prove either a betrayal or that he was justified in choosing Soldiers over honesty. He does neither.

Sassaman misses the opportunity to convince readers that his best friend’s death contributed to his poor decision. The day before the operation that led to the Tigris incident, Sassaman’s best friend in Iraq, Captain Eric Paliwoda, died during a mortar attack.⁴³ Following the attack, Sassaman helped treat Paliwoda and get him to a medical helicopter, but Paliwoda later succumbed to his wounds.⁴⁴ Sassaman counseled his Soldiers to withhold information about the Tigris detainees shortly after returning from Paliwoda’s memorial service.⁴⁵

Sassaman briefly explores how Paliwoda’s death affected him and his decision-making, noting that his “spirit was broken.”⁴⁶ He admits he even briefly considered executing a detainee following his friend’s death.⁴⁷ Compared to Paliwoda’s death, he states honestly, he did not consider the Tigris River incident that significant.⁴⁸

If Sassaman had been as candid about how his friend’s death affected his decision-making as he was critical of Rudesheim’s ineffectiveness, he may have won over more readers. Winning public acceptance would also have required acknowledging that his decision was wrong, and Sassaman refuses to concede this point. He comes closest when he admits he contributed to his Soldiers’ mistake, but he pulls up short to lay blame for his decision on Rudesheim.⁴⁹

One critic has suggested that the Army’s treatment of Sassaman was a “proverbial slap on the wrist” and part of a broader failure to respond to commanders who fail to punish.⁵⁰ One of Sassaman’s fellow battalion commanders, Lieutenant Colonel David Poirier, also bristled at Sassaman’s light punishment, suggesting that Odierno effectively granted immunity to Sassaman.⁵¹ Additionally, the brigade’s prosecutor is still disappointed in the chain-of-

command’s handling of the 1-8 Inf. detainee abuse cases.⁵² In the end, Sassaman fails to establish that he was betrayed by the Army. On the contrary, Sassaman’s punishment was arguably lighter than it should have been.

IV. Relevance

Sassaman’s frank discussion of the difficult ethical dilemmas he faced, including the requirement to provide protection and treatment to the very people he was trying to kill, offers a number of useful lessons. For example, Sassaman describes the way he ramped up violence following an attack⁵³ and notes that the Soldiers of 1-8 Inf. were most violent following the death of a comrade.⁵⁴ This acceptance of violence combined with an atmosphere of disobedience, which stemmed from the contempt and disrespect Sassaman showed for Rudesheim, translated into a breakdown of discipline in 1-8 Inf. that culminated in the incident at the Tigris River bridge and the execution of detainees. *Warrior King* provides insights, particularly relevant to judge advocates, into how a breakdown in discipline and the inability to adhere to the law of war leads to disintegration into savagery and brutality.⁵⁵

Also instructive—and of particular interest to judge advocates—is Sassaman’s demonstrated misunderstanding of the rules of engagement. He was a bright and talented officer, yet he incorrectly believed that the rules “allowed for the execution of Iraqi insurgents.”⁵⁶ He admits that the rules were difficult to understand,⁵⁷ and he describes how some Soldiers had trouble overcoming their instinct of restraint even when the rules clearly allowed them to kill.⁵⁸ He describes detaining nearly twenty-four sheiks for nearly three weeks, not because evidence or intelligence suggested they were involved in an attack, but because Sassaman wanted to send a message that he would not tolerate attacks on his Soldiers.⁵⁹ By reading *Warrior King*, judge advocates can learn how tactical level commanders see the battlefield, interpret the rules of engagement, and perceive their authority under those rules.

⁴² *Id.* at 51.

⁴³ *Id.* at 228–29.

⁴⁴ *Id.*

⁴⁵ *Id.* at 238, 245.

⁴⁶ *Id.* at 235.

⁴⁷ *Id.*

⁴⁸ *Id.* at 245. However, Sassaman further acknowledges that he never has considered the incident as significant. *Id.*

⁴⁹ *See id.* at 247.

⁵⁰ Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT’L L. 251, 259–60 (2009).

⁵¹ THOMAS E. RICKS, *FIASCO* 288 (2006).

⁵² GEMBARA, *supra* note 32, at 298.

⁵³ SASSAMAN, *supra* note 1, at 96, 118.

⁵⁴ *Id.* at 183 (describing the actions following the death of Staff Sergeant Dale Panchot); *id.* at 229, 233 (describing the actions following the death of Captain Eric Paliwoda).

⁵⁵ *See* GEMBARA, *supra* note 32, at 283–84.

⁵⁶ *Id.* at 142.

⁵⁷ *Id.* at 141.

⁵⁸ *Id.* at 142 (explaining that on multiple occasions Sassaman dealt with U.S. snipers “asking for permission to pull the trigger. Each time, the sniper had spotted an insurgent clearly engaged in the burying of an IED. Yet, something prevented the soldier from executing the target in the prescribed and accepted fashion.”).

⁵⁹ *Id.* at 183.

Warrior King highlights the difficulty of making decisions in combat. Even the best commanders face difficult decisions and make the wrong choices. Sassaman is a strong personality who made decisions based on his judgment of right and wrong. He placed the welfare of Soldiers and mission accomplishment above all priorities, including honesty. A judge advocate counseling a leader like Sassaman must understand his perspective in order to give effective advice. *Warrior King* offers insights into the minds of commanders, the difficult ethical and legal decisions they must make, and the leadership principles that guide them.

V. Conclusion

In *Warrior King*, Sassaman makes a number of claims that he fails to support. He admits to counseling his Soldiers to withhold information about the Tigris River incident, but

he comes up short in explaining his response or accepting responsibility for his clearly unethical advice. At its best, *Warrior King* puts the reader in Sassaman's shoes to reveal the challenges he faced and successfully exposes the "cowardly manner"⁶⁰ in which senior officers behaved in combat. However, unlike the West Point officer he champions early in the book, he failed to make the courageous and ethically right call in a difficult situation. He may have demonstrated personal bravery and tremendous tactical decision-making as a commander, but he ultimately failed to be the leader of character the American people needed him to be, and thus fails to win back his public image.

⁶⁰ *Id.* at 306.

CLE News

1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5-27-C20	183d JAOBC/BOLC III (Ph 2)	5 Nov – 2 Feb 11
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	214th Senior Officer Legal Orientation Course	18 – 22 Oct 10
5F-F1	215th Senior Officer Legal Orientation Course	24 – 28 Jan 11
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11

5F-F5	Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
5F-F55	2011 JAOAC	3 – 14 Jan 11
5F-JAG	2010 JAG Annual CLE Workshop	4 – 8 Oct 10
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES

512-27D30	1st Advanced Leaders Course (Ph 2)	18 Oct – 23 Nov 10
512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	1st Senior Leaders Course (Ph 2)	18 Oct – 23 Nov 10
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES

7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11
7A-270A3	11th Senior Warrant Officer Symposium	1 – 5 Nov 10

ENLISTED COURSES

512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 11
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	14th Redictation Course	3 – 7 Jan 11

512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11
5F-F58	27D Command Paralegal Course	1 – 5 Nov 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F23	66th Legal Assistance Course	25 – 29 Oct 10
5F-F23E	USAREUR Client Services CLE Course	25 – 29 Oct 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F28	Income Tax Law Course	6 - 10 Dec 10
5F-F28E	USAREUR Tax CLE Course	29 Nov – 3 Dec 10
5F-F28H	2011 Hawaii Income Tax CLE Course	10 – 14 Jan 11
5F-F28P	2011 PACOM Income Tax CLE Course	3 – 7 Jan 11
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F11	Government Contract Law Symposium	16 – 19 Nov 10
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F34	35th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	38th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 10

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F45	10th Domestic Operational Law	18 – 22 Oct 10
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10
5F-F47E	2011 USAREUR Operational Law CLE	19 – 23 Sep 10
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (030) Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	2 Aug – 9 Oct 10 12 Oct – 17 Dec 10 24 Jan – 1 Apr 11 1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (070) Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	27 Sep – 1 Oct 10 (Newport) 12 – 15 Oct 10 (Newport) 29 Nov – 3 Dec 10 (Newport) 24 – 28 Jan 11 (Newport) 14 – 18 Mar 11 (Newport) 25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (020) Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	14 – 18 Dec 10 (Hawaii) 4 – 8 Oct 10 (Pensacola) 15 – 19 Nov 10 (Pensacola) 13 – 17 Dec 10 (Hawaii) 10 – 14 Jan 11 (Pensacola) 24 – 28 Jan 11 (Yokosuka) 14 – 18 Feb 11 (Pensacola) 4 – 8 Apr 11 (Pensacola) 9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)

03RF	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	25 Oct 10 – 21 Jan 11 7 Mar – 20 May 11 13 Jun – 28 Aug 11
03TP	Basic Trial Advocacy (010)	7 – 11 Feb 11
049N	Reserve Legalman Course (Phase I) (010)	4 – 15 Oct 10
056L	Reserve Legalman Course (Phase II) (010)	18 – 29 Oct 10
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11
NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170) Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk) 13 – 15 Oct 10 Norfolk 8 – 10 Nov 10 (San Diego) 15 – 17 Nov 10 (Norfolk) 13 – 17 Dec 10 (Hawaii) 10 – 12 Jan 11 (Mayport) 31 Jan – 12 Feb 11 (Okinawa) 16 – 18 Feb (Norfolk) 22 – 24 Mar 11 (San Diego) 25 – 27 Apr 11 (Bremerton) 16 – 20 May 11 (Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	28 Feb – 4 Mar 11 (San Diego) 19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
748K	Trial Advocacy CLE (010) Trial Advocacy CLE (020) Trial Advocacy CLE (030) Trial Advocacy CLE (040)	21 – 22 Oct 10 (Jacksonville) 13 – 17 Dec 10 (Hawaii) 20 – 21 Jan 11 (Yokosuka) 14 – 15 Apr 11 (San Diego)
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
7487	Family Law/Consumer Law (010)	Cancelled
7878	Legal Assistance Paralegal Course (010)	18 – 22 Apr 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11

846M	Reserve Legalman Course (010)	1 – 12 Nov 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)
850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Sep 10 20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	13 – 17 Dec 10 (Hawaii) 17 – 21 Jan 11 (Yokosuka) 16 – 20 May 11 (Naples)
961D	Military Law Update Workshop (010) Military Law Update Workshop (020)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	13 – 17 Sep 10 (Pendleton) 4 – 8 Oct 10 (San Diego) 10 – 14 Jan 11 (San Diego) 28 Mar – 1 Apr 11 (San Diego) 4 – 8 Apr 11 (San Diego) 25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	30 Nov – 13 Dec 10 7 – 20 Apr 11 18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
4048	Legal Assistance Course (010)	18 – 22 Apr 11
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (020)	12 – 14 Oct 10 16 – 18 Feb 11 12 – 14 Jul 11
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030)	12 Oct – 17 Dec 10 28 Jan – 1 Apr 11 29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (010) Paralegal Ethics Course (020) Paralegal Ethics Course (030)	25 – 29 Oct 10 7 – 11 Mar 11 13 – 17 Jun 11

NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020) Legal Service Court Reporter (030)	1 Sep – 19 Nov 10 14 Jan – 1 Apr 11 22 July – 7 Oct 11
NA	Leadership Training Symposium (010)	29 Nov – 3 Dec 10 (Washington)
NA	Information Operations Law Training (010)	4 – 18 Mar 11 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	4 – 8 Apr 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (080) Legal Officer Course (090) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	12 – 30 Jul 10 16 Aug – 3 Sep 10 18 Oct – 5 Nov 10 29 Nov – 17 Dec 10 24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 4 – 22 Apr 11 9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	19 – 30 Jul 10 23 Aug – 3 Sep 10 25 Oct – 5 Nov 10 6 – 17 Dec 10 31 Jan – 11 Feb 1 7 – 18 Mar 11 11 – 22 Apr 11 16 – 27 May 11 18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	9 – 13 Aug 10 13 – 17 Sep 10 4 – 8 Oct 10 15 – 19 Nov 10 10 – 14 Jan 11 (Mayport) 28 Mar – 1 Apr 11 6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	19 Jul – 6 Aug 10 16 Aug – 3 Sep 10 18 Oct – 5 Nov 10 29 Nov – 17 Dec 10 24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11
947J	Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	26 Jul – 6 Aug 10 16 – 27 Aug 10 18 – 29 Oct 10 29 Nov – 10 Dec 10 3 – 14 Jan 11 31 Jan – 11 Feb 11 28 Mar – 8 Apr 11 9 – 20 May 11 13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10
Defense Orientation Course, Class 11-A	4 – 8 Oct 2010

Federal Employee Labor Law Course, Class 11-A	4 – 8 Oct 10
Paralegal Apprentice Course, Class 11-01	5 Oct – 17 Nov 10
Judge Advocate Staff Officer Course, Class 11-A	12 Oct – 16 Dec 10
Paralegal Craftsman Course, Class 11-01	12 Oct – 23 Nov 10
Advanced Environmental Law Course, Class 11-A (Off-Site, Wash., DC Location)	19 – 20 Oct 10
Civilian Attorney Orientation, Class 11-A	21 – 22 Oct 10
Article 32 Investigating Officer's Course, Class 11-A	19 – 20 Nov 10
Deployed Fiscal Law & Contingency Contracting Course, Class 11-A	6 – 10 Dec 10
Pacific Trial Advocacy Course, Class 11-A (Off-Site, Japan)	13 – 17 Dec 10
Trial & Defense Advocacy Course, Class 11-A	3 – 14 Jan 11
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 11
Gateway III, Class 11-A	19 Jan – 4 Feb 11
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 11-A (Off-Site)	21 – 22 Jan 11
Homeland Defense/Homeland Security Course, Class 11-A	24 – 28 Jan 11
CONUS Trial Advocacy Course, Class 11-A (Off-Site, Charleston, SC)	31 Jan – 4 Feb 11
Interservice Military Judges' Seminar, Class 11-A	1 – 4 Feb 11
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 11
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 11
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 11
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 11
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 11
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 1
Defense Orientation Course, Class 11-B	4 – 8 Apr 11
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 11
Military Justice Administration Course, Class 11-A	18 – 22 Apr 11
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11

Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

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

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

Individual Paid Subscriptions to *The Army Lawyer*

Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.

ARLAWSMITH212J ISSUE0003 R 1
 JOHN SMITH
 212 MAIN STREET
 SAN DIEGO, CA 92101

The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
 Superintendent of Documents
 ATTN: Chief, Mail List Branch
 Mail Stop: SSOM
 Washington, D.C. 20402



Order Processing
 Code: 5937

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 866 612-1800
 Phone: 202 512-1800
 Fax: 202 512-2104

Mail: Superintendent of Documents
 PO Box 371854
 Pittsburgh, PA 15250-7954

YES, enter my subscription(s) as follows:

_____ subscription(s) of the *Army Lawyer* (ARLAW) for \$50 each (\$70 foreign) per year.

_____ subscription(s) of the *Military Law Review* (MILR) for \$20 each (\$28 foreign) per year. The total cost of my order is \$_____.

Prices include first class shipping and handling and is subject to change.



Check method of payment:

Check payable to Superintendent of Documents

SOD Deposit Account

VISA MasterCard Discover/NOVUS American Express

_____ (expiration date)

_____ (expiration date)

Thank you for your order!

Personal name _____ (Please type or print)

Company name _____

Street address _____ City, State, Zip code _____

Daytime phone including area code _____

Purchase Order Number _____

Authorizing signature _____

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS

By Order of the Secretary of the Army:

Official:

GEORGE W. CASEY, JR
General, United States Army
Chief of Staff



JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
0900000
