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Lore of the Corps
The Remarkable—and Tempestuous—Career of a Judge Advocate General:
Eugene Mead Caffey (1895–1961)

Fred L. Borch
Regimental Historian and Archivist

Eugene M. Caffey, who served as The Judge Advocate General (TJAG) from 1954 to 1956, had a remarkable career as an Army lawyer. He apparently is the only judge advocate in history to transfer from his basic branch to the Judge Advocate General's Department (JAGD),¹ and then return to his basic branch before returning to the JAGD once again—to finish out his career as the Army's top lawyer. Caffey also is unique as the only World War II-era judge advocate to have been decorated with both the Distinguished Service Cross and Silver Star—awards for combat heroism that are outranked only by the Medal of Honor. Finally, Caffey is the only judge advocate in modern history to go from colonel to brigadier general to major general (and TJAG) in just six months. Yet despite his outstanding service as a judge advocate and combat commander, Major General Caffey's career was tempestuous because he was unable (or unwilling) to get along with his superiors and was unable (or unwilling) to keep his opinions to himself.



Major General Eugene M. Caffey's official portrait
April 1956

Born in Decatur, Georgia, on 21 December 1895, Eugene Mead Caffey entered the U.S. Military Academy in 1915.² His father had retired as an Infantry colonel and

¹ Before 24 June 1948, the JAG Corps was known as the JAG Department. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975*, at 198 (1975).

² At least one source (<http://www.20thengineers.com/ww2-caffey.html> (accessed April 21, 2014)) claims that Caffey entered West Point in 1914, but this is incorrect. His military records correctly reflect that Caffey matriculated in 1915. U.S. Dep't of Def., DD Form 214, Armed Forces of

young "Gene" Caffey, having spent his "boyhood on various Army posts in the West, the Philippines and China," likewise wanted a life as a Soldier.³

After the United States entered World War I, classes at West Point were accelerated, with the result that Caffey graduated on 12 June 1918 and was commissioned a second lieutenant and a first lieutenant (temporary)—on that same day.⁴ Two months later, he was promoted to captain, and when the fighting ended in Europe in November 1918, Captain (CPT) Caffey was a company commander in the 213th Engineer Regiment, Camp Lewis, Washington.⁵

Caffey subsequently served with the Panama Canal Department and with the Tacna-Arica Plebiscite Commission in Chile. After completing his tour of duty in Chile, First Lieutenant (1LT) Caffey (who had lost his captain's rank with the end of World War I) travelled to Managua, Nicaragua, in July 1928. There, he served as the assistant to the Secretary, American Electoral Mission in Nicaragua. Caffey also served as a member of a survey team, and assisted in exploring an alternative canal route in Nicaragua. This survey expedition was considered to be of great importance in the late 1920s because, despite the existence of the Panama Canal (completed in 1914), "dreams of a canal through Nicaragua persisted in the United States and elsewhere."⁶ When Caffey left South America, his boss lauded him as "an alert, energetic officer of pleasing personality with the ability to adapt himself to a wide range of duties and discharge them in an excellent manner."⁷

After returning to the United States, 1LT Caffey applied for detail with the Judge Advocate General's Department. He was accepted and moved with his family to Charlottesville, Virginia, as he had been admitted to the

the U.S. Report of Transfer or Discharge, Eugene Mead Caffey, block 32 (1 Nov. 1955).

³ *Eugene Mead Caffey*, ASSEMBLY 83 (Fall 1961).

⁴ U.S. Dep't of Army, DA Form 66, Eugene Mead Caffey, block 12 (1 Nov. 1954) (Appointments).

⁵ For details on Caffey's unusual involvement in a homicide prosecution, see Fred L. Borch, *The Shooting of Major Alexander P. Cronkhite: Accident? Suicide? Murder?*, ARMY LAW., Mar. 2014, at 81–83.

⁶ Michael J. Brodhead, "A West, Nasty Job": *Army Engineers and the Nicaragua Canal Survey of 1929–1931*, FED. HIST. J., Jan. 2013, at 15, 18.

⁷ War Department, Adjutant Gen.'s Office, AGO Form 67, Efficiency Report, First Lieutenant Eugene M. Caffey, block R (9 Mar. 1929) (covering 1 July 1928 to 20 Dec. 1928).

University of Virginia's law school. First Lieutenant Caffey was a brilliant student, and finished first in his class. He was elected to Phi Beta Kappa, the Raven Society, and the Order of the Coif.⁸

After being admitted to the Virginia bar, Caffey was promoted to captain on 1 July 1933. He then served his first tour as a judge advocate at Fort Bliss, Texas, where he was the "Assistant to the Division Judge Advocate."⁹ In June 1934, Caffey was reassigned to Washington, D.C., where he was placed on "detached service" with the Army's Bureau of Insular Affairs. For the next four years, Caffey defended the interests of the War Department in U.S. courts when those interests involved the Philippine government. In one particularly important piece of litigation—lasting two years—Caffey's skills resulted in the defeat of six suits filed in U.S. District Court for the Southern District of New York. Plaintiffs in these suits had sought to force The Chase National Bank of New York City to pay between six and eight million dollars of Philippine government funds, on deposit in the bank, to the plaintiffs.¹⁰ "The loss of such a sum would have shaken the financial position of the [Philippine] government, have seriously threatened the value of its currency, and introduced serious political and administrative problems into the relationship between the United States and the Commonwealth."¹¹ No wonder that Philippine government officials praised Caffey's skills as an Army attorney—and requested that a Distinguished Service Medal be awarded CPT Caffey in recognition of his fine work.¹²

But not everyone was happy with CPT Caffey's work. A letter written by Major General Allen W. Gullion, then serving as TJAG, and filed in Caffey's official military records in September 1938, indicates why. According to Gullion, Caffey had come to his office sometime between November 1937 and April 1938 and told Gullion that

[Captain Caffey] wanted to keep [Guillion] from getting in trouble, that the Secretary of War was becoming dissatisfied because [Captain Caffey] wasn't being allowed a free enough hand in Philippine matters. [Guillion] replied somewhat as follows: "I don't know

whether you are trying to bluff me, Captain Caffey, but if the Secretary of War is dissatisfied with me he will let me know and I don't think he will employ you as his medium."¹³

As if this were not bad enough, Gullion continued: the Army Chief of Staff had stated "that a Congressman had complained that Captain Caffey and another officer had been trying to induce Congressmen to support legislation to which the War Department was opposed." When confronted with this statement, Caffey "did not deny it, but minimized it and said he would desist from further activities along the lines complained of."¹⁴

Major General Gullion's unhappiness with Caffey resulted in Gullion *personally* writing Caffey's Efficiency Report. After checking "unsatisfactory" when it came to "cooperation," Gullion wrote that while Caffey was an "officer of strong intellectual ability," his "value to the service is lessened by reluctance to accept the decisions of superior authority when he thinks such decisions involve a diminution of his prestige." Major General Gullion concluded by stating that Caffey's "General Value to the Service" was "doubtful."¹⁵

Captain Caffey subsequently wrote a twelve-page rebuttal to this adverse Efficiency Report. Caffey went into considerable detail to explain his actions, and counter the adverse information that Major General Gullion had relied upon in writing the Efficiency Report. Perhaps Caffey was right in some respects, but this is hard to know. The Judge Advocate General, however, declined to change his views on Caffey. As Gullion put it, he "had no personal animosity in this case" and what he had written was "only intended to convey a fair estimate of this officer."¹⁶

So what was Caffey to do? An official history of The Judge Advocate General's Corps published in 1975 states that "by early 1941, it became obvious that war was imminent," and now Major (MAJ) Caffey "traded his JAGD brass for the engineer castle and 'Essayons' buttons." The clear suggestion is that Caffey returned to the Corps of Engineers because he was a "man of action" who wanted to be in the thick of any future fighting.¹⁷ But this is simply

⁸ ASSEMBLY, *supra* note 3, at 84.

⁹ War Dep't, Adjutant Gen.'s Office, AGO Form 67, Efficiency Report, Captain Eugene M. Caffey, blocks E (Duties), H (Performed) (8 June 1934) (covering 27 Aug. 1933 to 6 June 1934).

¹⁰ *Berger v. Chase Nat'l Bank*, 105 F. 2d 1001 (2d Cir. 1939). The plaintiffs were five liquidators of closed national banks.

¹¹ Letter, J. M. Elizalde, Resident Comm'r of the Philippines to the United States, to Major General Arthur W. Brown, The Judge Advocate Gen. (8 Apr. 1940).

¹² *Id.*

¹³ Letter, Major General Gullion, to The Adjutant Gen., 3d Wrapper Endorsement (12 Aug. 1938).

¹⁴ *Id.*

¹⁵ War Dep't, Adjutant Gen.'s Form 67, Efficiency Report, Captain Eugene M. Caffey (15 Aug. 1938) (covering period 1 Aug. 1937 to 14 November 1937).

¹⁶ Letter, Major General Gullion, to The Adjutant Gen., 7th Wrapper Endorsement para. 2 (7 Dec. 1938).

¹⁷ THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 220.

untrue; Caffey requested a transfer back to his basic branch because he believed his career as a judge advocate was at an end. Since Major General Gullion was so displeased with MAJ Caffey, and had reflected this unhappiness in writing, Caffey was probably correct. After all, if TJAG considered Caffey's "General Value to the Service" to be "doubtful," a transfer from the JAGD to the Corps of Engineers was the best course of action. Certainly Caffey must have thought that he stood a better chance to undo the damage to his career if returned to his basic branch.

On 14 February 1941, Caffey became an Engineer again. "Timing is everything," and this saying was certainly true for MAJ Caffey. Assigned to the 20th Engineer Combat Regiment as its executive officer, now Colonel (COL) Caffey deployed to North Africa with *Operation Torch*. After landing in French Morocco, he saw combat in Tunisia in early 1943 and was awarded the Silver Star for gallantry in action and the Purple Heart for wounds received when the jeep in which he was riding ran over a German landmine. In May 1943, COL Caffey took command of the 30,000-man 1st Engineer Special Brigade and participated in the Allied invasions of Sicily and mainland Italy. He was still in command of that unit when it took part in the American, British, and Canadian landings at Normandy in June 1944. Caffey was one of the first Soldiers to wade ashore onto Omaha Beach and, in the hours and days that followed, demonstrated his superlative abilities as combat commander. For his extraordinary heroism on D-Day 1944, Caffey was awarded the Distinguished Service Cross with the following citation:

Colonel Caffey landed with the first wave of the forces assaulting the enemy-held beaches. Finding that the landing had been made on other than the planned beaches, he selected appropriate landing beaches, redistributed the area assigned to shore parties of the 1st Engineer Special Brigade, and set them at work to establish routes inland through the sea wall and minefields to reinsure the rapid landing and passage inshore of the following waves. He frequently went on the beaches under heavy shell fire to force incoming troops to disperse and move promptly off the shore and away from the water sides to places of concealment and greater safety further back. His courage and his presence in the very front of the attack, coupled with his calm disregard of hostile fire, inspired the troops to heights of enthusiasm and self-sacrifice. Under his experienced and unfaltering leadership, the initial error in landing off-course was promptly overcome, confusion was prevented, and the forces necessary to a victorious assault were successfully and expeditiously landed and cleared from the

beaches with a minimum of casualties. He thus contributed, in a marked degree, to the seizing of the beachhead in France.¹⁸

This well-written and descriptive citation demonstrates that Caffey was a remarkable Soldier and, assuming that the film *Saving Private Ryan* accurately depicts the horrific events of 6 June 1944, COL Caffey's "presence in the very front of the attack, coupled with his calm disregard of hostile fire," must have truly inspired the Soldiers who saw him in action. In any event, Caffey remained in Normandy for the rest of the war and, when the fighting ceased in Europe in May 1945, was in command of the Normandy Base Section. Since that Base Section had from 70,000 to 150,000 troops during the last six months of the war, COL Caffey had significant command responsibility.¹⁹

When COL Caffey returned to the United States in early 1946, he was a respected and highly decorated officer—having also been awarded three Legions of Merit and a Bronze Star Medal. He almost certainly was destined for general officer rank in the Corps of Engineers and his official records show that he was being considered for promotion to brigadier general.²⁰ Despite this bright future in the Corps of Engineers, COL Caffey decided to request a transfer to the Judge Advocate General's Department. As he explained in his official request:

The reason underlying this request is that the [JAGD] is becoming increasingly short-handed. By reason of service in and with the [JAGD] for over ten years (September 1930 to March 1941), I am qualified for duty in it and am probably one of the very few older regular officers (not now a member of it) who is so qualified. The logic of the situation is that I should serve where, as I understand it, officers of my qualifications are needed and extremely hard to find.²¹

Interestingly, the Corps of Engineers initially resisted Caffey's request for a transfer. Correspondence in his records shows that the Engineers were considering Caffey for command of the 2d Engineer Special Brigade located at Fort Ord, California, and believed that "the importance of the duties" of the unit made it "imperative that a capable

¹⁸ Headquarters, European Theater of Operations, Gen. Orders No. 161 (4 May 1945).

¹⁹ Special Rating of General Officers, Colonel Eugene M. Caffey para. 7 (26 May 1945).

²⁰ Major General Edward F. Witsell, The Adjutant Gen., to Colonel Caffey, subj: General Officers' Eligible List (26 Mar. 1946).

²¹ Letter, Colonel Eugene M. Caffey, to The Adjutant Gen., Wash., D.C., subj: Transfer (27 Dec. 1946).

officer be in command.”²² But the Corps of Engineers relented when Caffey again insisted that he wanted to transfer to the JAGD and when Major General Thomas H. Green, who had recently assumed duties as TJAG, wrote that he had “previously recommended approval of Colonel Caffey’s transfer and would be pleased to have him as a member of [his] Department.”²³

As a result, Caffey pinned on the crossed-pen-and-sword insignia on 23 May 1947. When one considers that the JAGD was losing hundreds of officers (who were returning to civilian life) as the Army demobilized after World War II and recognizing that the creation of a new and independent Air Force meant that many experienced Army judge advocates would be exchanging Army green uniforms for Air Force blue suits, it seems likely that TJAG Green personally solicited COL Caffey to resume his career as a judge advocate. Additionally, as Caffey’s nemesis, Major General Gullion, was no longer on active duty, there was no reason for COL Caffey to think that his skills as an attorney would not be appreciated.

After returning to our Corps, COL Caffey served first as the Executive Officer and Chief, Administrative Division, Office of The Judge Advocate General. In August 1948, he assumed duties as the Staff Judge Advocate, Third Army, Fort McPherson, Georgia. Since Caffey had been born in nearby Decatur, he must have been pleased to return to familiar surroundings.

By May 1953, however, Caffey had had enough of active duty and requested that he be retired the following month, on 30 June 1953. As he wrote in his letter to The Adjutant General, he would “have completed over thirty-five years’ service as a commissioned officer in the Regular Army, including service in World War I prior to 12 November 1918.”²⁴ Caffey’s request for retirement, however, contains a lengthy explanation for his desire to leave active duty. In light of his earlier conflict with TJAG Gullion in the 1930s, and because Caffey’s words provide some insight into his temperament, what he wrote is worth setting forth in its entirety.

Throughout my service in the Army, the pay, allowances and perquisites of officers have undergone a steady decline: actually, in terms of purchasing power, and relatively, as compared with the emoluments of civilians of education and positions of responsibility. The net result of the decline, in my case, is that after

²² Memorandum from W.H. Biggerstaff, to The Adjutant Gen., subj: Transfer from Engineers to JAG, cmt. no. 10 (12 Mar. 1947).

²³ Disposition Form, subj: Transfer cmt. 4 (12 Feb. 1947).

²⁴ Letter, Colonel Eugene M. Caffey, to The Adjutant Gen., subj: Voluntary Retirement (7 May 1953).

spending my Army income and a good many thousands of dollars besides in order to sustain a moderate existence and educate my children, I approach the end of my useful life without resources sufficient to acquire even a simple house on the wrong side of the tracks in which to pass my remaining years. The prospect is not cheerful. On the other hand, at this time I have an attractive business opportunity of the sort which will not likely be open to me again. Such an opportunity, if I can take advantage of it, gives strong indication that it will clear away the dismal financial future which now confronts me.

Besides the financial side just discussed, the Army seems to have undergone numerous changes which to me are unacceptable and to which I do not and will not subscribe. These changes, so far as I am concerned, have rendered my status as an officer undesirable and have destroyed the attractiveness of the military service as a profession. My own self-respect will cause me faithfully to discharge my duty so long as I continue in the service but having reached the point where I feel but faint pride and slight satisfaction in being an officer of the Army, it seems to me that the interest of the service would be well served were I to pass from active service.

One would think that that language of this kind would not go down well in the Pentagon and that, having revealed that he felt but “faint pride and slight satisfaction in being an officer,” COL Caffey would quietly fade away.²⁵ But that did not happen because COL Caffey withdrew his request to retire from active duty; it was returned to him “without action” on 3 July 1953. Why? Because he must have received word from Washington, D.C. that retirement at this time was not in his best interest. Colonel Caffey did the right thing in deciding to remain on active duty as, on 23 July 1953, the Secretary of the Army announced that he was promoted to brigadier general.²⁶

²⁵ While this cannot be said with certainty, and Caffey does not identify the “numerous changes” that he found “unacceptable,” it seems likely that in light of Caffey’s speech to the Georgia Legislature in 1956, he was dissatisfied with certain policy changes in the Armed Forces, such as President Truman’s 1948 executive order directing desegregation. Since the Army had been racially segregated since 1866, there were more than a few white men and women in uniform who did not like Truman’s decision to end institutional racism: Caffey may have been one of them. *See infra* note 31 and accompanying text.

²⁶ Letter, The Adjutant Gen., to Colonel Eugene M. Caffey, subj: Promotion (23 July 1953).

Brigadier General Caffey returned to the Pentagon in August 1953, where he assumed duties as the Assistant Judge Advocate General for Civil Law.²⁷ Amazingly, he was in that position for less than six months as, on 22 January 1954, President Dwight D. Eisenhower nominated him to be TJAG with the rank of major general. When Caffey was confirmed by the Senate on 5 February 1954, he made history, as no judge advocate in the modern era has gone from colonel to major general in just six months. Given that Caffey had expressed such unhappiness with his lot as a Soldier in May 1953, it seems incredible that he now was the Army's top lawyer.



General Matthew Ridgway, Army Chief of Staff congratulating the new TJAG, Major General Caffey February 1954

Major General Caffey's rise to the top of the Corps was remarkable, and his outstanding record as an attorney and Soldier no doubt explain his rise. But one has to ask what judge advocates who had served in the JAGD during World War II thought of a colleague who had left the Corps prior to the outbreak of war, spent the entire conflict as an Engineer, and then returned in 1947—and was now TJAG. As Major General Caffey's contemporaries passed from the scene long ago, however, there is no way to know.

In late January 1956—after two years as TJAG—Caffey gave a speech on the floor of the Georgia Legislature. Just why he was in Atlanta, and why he was talking to the Georgia House (presumably by invitation), is not entirely clear. But Major General Caffey praised a speech given by U.S. Representative Jack Flynt (D-Ga.), in which Flynt defended racial segregation and “urged support” of those Southerners who wanted “to avoid desegregating public

schools in line with the Supreme Court's ruling.”²⁸ Said Caffey to the Georgia lawmakers: “If I were going to make a speech I would hope to make one like that.” Some time later, Major General Caffey “told the Georgia Senate the speech contained ‘a lot of meat’ and added, ‘I, for one, admire it.’”²⁹

In the uproar that followed, the National Association for the Advancement of Colored People called for Caffey to “be dismissed or disciplined” for his comments. Representative Adam C. Powell (D-N.Y.) “demanded in a telegram to President Eisenhower that Caffey be dismissed.”³⁰ Caffey's response was that Representative Flynt “is a friend of mine. But nothing I said was an endorsement of anyone or anything. I simply paid tribute to Jack Flynt's ability to make a speech.”³¹

Was Major General Caffey being disingenuous? According to Major General Wilton B. Persons, who served as TJAG from 1975 to 1979, Secretary of the Army Wilbur M. Brucker thought that Caffey was and, according to Persons, told Caffey that it was time for him to retire. This explains why, despite having been appointed to a four-year term as TJAG, Caffey retired on 31 December 1956. As TJAG Persons remembers, Secretary Brucker “didn't like Caffey personally and after Caffey endorsed the segregationist speech, that was the last straw. [Brucker] called Caffey into his office and told him he was finished and was retiring. Caffey did not resist.”³² This explains why TJAG Caffey's last Officer Efficiency Report contains the following language from General W. Bruce Palmer, the Vice Chief of Staff of the Army: “An able, aggressive, outspoken man, who has amassed a fine record of achievement in his varied career. *His lack of tact sometimes tends to arouse needless controversy.*”³³

²⁷ As the Assistant Judge Advocate General for Civil Law, Brigadier General Caffey supervised the Military Affairs (today called Administrative and Civil Law), Government Appellate Division, Defense Appellate Divisions, and Army Legal Assistance. U.S. Dep't of Army, DA Form 67-3, Officer Efficiency Report, Brigadier General Eugene M. Caffey (26 Jan. 1954) (covering the period of 5 Aug. 1953 to 26 Jan. 1954).

²⁸ *Army's Chief Legal Officer May Be Asked to Explain Integration Stand*, STAR-BANNER (Ocala, Fla.), Feb. 1, 1956, at 1. The Supreme Court's 1954 decision in *Brown v. Board of Education* was very unpopular with many white Southerners, and this would explain Representative Jack Flynt's speech.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Telephone Interview with Major General Wilton B. Persons (Apr. 8, 2014) [hereinafter Persons Telephone Interview] (on file with author).

³³ U.S. Dep't of Army, DA Form 67-3, Officer Efficiency Report, Major General Eugene M. Caffey, block 12 (3 July 1956) (emphasis added).



Colonel Ted Decker (left), Judge Walter M. Bastian (center)
TJAG Caffey (right), JAG Conference
Charlottesville, Virginia, September 1954

General Caffey and his wife Catherine moved to Las Cruces, New Mexico, where he grew a full beard “like a Civil War general”³⁴ and practiced law.³⁵ Unfortunately, this private practice was relatively short-lived, as Caffey died in Las Cruces on 1 May 1961, at the age of 65. One of his partners, Edwin L. Mechem, who would serve four terms as Governor of New Mexico, remembered Caffey as “one of the finest . . . men I have ever met [A] gentleman and a great patriot.” Another of his law partners said, “Eugene Mead Caffey desired a simple and uncomplicated life [F]ew among his closest friends in New Mexico had any idea until after his death of his spectacular career in the Army.”³⁶

There is no doubt that Major General Caffey had a truly remarkable career. He was a first-class lawyer in every respect. He was an outstanding combat commander. But Caffey’s inability to get along with TJAG Gullion in the 1930s, and with the Secretary of the Army in the 1950s, means that he also had a tempestuous career. Some of this conflict seems to have been caused by Major General Caffey’s unwillingness (or inability) to keep his opinions to himself. On at least one occasion (when he submitted his retirement request in 1953), his outspokenness had no adverse impact. His comments on the floor of the Georgia legislature in 1956, however, very much affected his military career.

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>

³⁴ Persons Telephone Interview, *supra* note 32.

³⁵ The Caffey family also had “five tall sons and four lovely daughters”: Eugene Mead, Catherine Howell, Lochlin Willis, Hester Washburn, Benjamin Franklin, Francis Gordon, Helen Mead, Mary Winn, and Thurlow Washburn. ASSEMBLY, *supra* note 2, at 84. One son, Lochlin Willis Caffey, attended West Point and graduated in 1945. Like his father, Lochlin was commissioned in the Corps of Engineers; he retired as a colonel. ASS’N OF GRADUATES, REGISTER OF GRADUATES (1992), Class of 1945, Lochlin Willis Caffey, No. 14438.

³⁶ ASSEMBLY, *supra* note 3, at 84.

The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations

Major Jerrod Fussnecker*

I. The Complexities of a Multinational Military Operation

French General Ferdinand Foch, General-In-Charge of the Western Front in World War I, compared the duties of a commander in charge of a multinational military operation to that of a conductor: “I am the leader of an orchestra. Here are the English Bassos, here the American baritones, and there the French tenors. When I raise my baton, every man must play, or else he must not come to my concert.”¹

While the North Atlantic Treaty Organization (NATO)-led International Security Assistance Force (ISAF) in Afghanistan is currently under the command of one officer, U.S. General Joseph Dunford,² getting all the ISAF “band members” to play at the proverbial raise of the baton has proven a great challenge. This challenge derives from caveats issued by each of the fifty contributing nations that limit how the ISAF commander may employ their nations’ troops.³ These caveats reflect ISAF troop-contributing nations’ differing international legal obligations and national security policies, and have impacted ISAF’s ability to accomplish its mission by creating fissures among ISAF troop-contributing nations on vital issues, such as who the coalition may administratively detain and who the coalition may lethally target.

Caveats often result from disagreement among the troop-contributing nations on two rudimentary international law issues: (1) the legal classification of the military operation⁴ and (2) the applicability of international human rights law to the military operation.

Legal classification of a military operation refers to categorizing an operation as part of an international armed conflict (IAC), a non-international armed conflict (NIAC),

or no conflict at all (such as a peacekeeping operation).⁵ The classification of the operation determines what treaty law is applicable to the operation in addition to customary international law. An IAC is an armed conflict between two states⁶ and requires adherence by signatory states to the four Geneva Conventions of 1949⁷ and Additional Protocol I to the Geneva Conventions of 1977.⁸ A NIAC is defined in Common Article 3 of the Geneva Conventions as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” A NIAC is generally an internal conflict between a state and opponents who are “not combatants of another state’s armed force.”⁹ The law of armed conflict applicable to NIACs is much less developed than that applicable to IACs, as only Common Article 3 of the Geneva Conventions and Additional Protocol II¹⁰ potentially apply to signatory states.¹¹ International human rights law, domestic law, or a combination thereof apply to non-conflict situations such as peacekeeping operations.¹²

⁵ Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 EMORY INT’L L. REV. 87, 87 (2012).

⁶ Common Article 2 of the 1949 Geneva Conventions (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”). For a list of countries who have ratified each of the Geneva Conventions, see ICRC—Treaties and State Parties to Such Treaties, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 (last visited May 12, 2014).

⁷ The four conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV].

⁸ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

⁹ GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 52 (Cambridge University Press 2010).

¹⁰ For a list of countries that have ratified Additional Protocol II to the Geneva Conventions, see ICRC—Treaties and State Parties to Such Treaties, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 (last visited May 12, 2014).

¹¹ Ashley Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 404–05 (2009). Professor Deeks states that “detention in non-international armed conflict is governed almost exclusively by a state’s domestic law.” *Id.*

¹² SOLIS, *supra* note 9, at 150–53.

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¹ FERDINAND FOCH, *THE MEMOIRS OF MARSHAL FOCH* 270 (1st ed. 1931).

² *About ISAF*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/leadership.html> (last visited Apr. 29, 2014).

³ Ian Hope, *Unity of Command in Afghanistan: A Forsaken Principle of War* (2008), <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub889.pdf> (last visited May 12, 2014).

⁴ See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32 (2012) (providing a thorough analysis of the legal classification of various types of military operations).

As will be discussed in Part III, there is great debate as to whether international human rights law is displaced by the law of armed conflict or whether it applies concurrently with the law of armed conflict during IACs and NIACs. The traditional U.S. position is that the law of armed conflict displaces international human rights law, while many of its NATO allies remain bound to their international human rights obligations during armed conflict.¹³

Since the various troop-contributing nations operating under the ISAF unified command have different standpoints on the classification of the conflict and the applicability of international human rights law, the legal landscape in Afghanistan can be complex for military operational law attorneys.¹⁴ As a result, troop-contributing nations often jointly participate in “operations under different rules of engagement . . . [leaving] those forces vulnerable to miscommunication, inaction, and even danger.”¹⁵ Given this complex legal landscape, understanding the effects of international human rights law on multinational military operations is critical for military operational law attorneys responsible for advising the commanders and staffs of an allied command.

Oftentimes, especially in the NATO environment, the military operational law attorney will be a member of a legal staff comprised of attorneys from various coalition nations and will be responsible for advising commanders and staff officers who also hail from various nations.¹⁶ When advising a NATO command such as ISAF, the operational law attorney may be assigned in a NATO personnel billet and considered a NATO attorney for the duration of the assignment. In the multinational environment, the attorney will often advise both the alliance—composed of several partner nations—and the attorney’s national government. Understanding the international human rights law obligations of these partner nations will allow the operational law attorney to better understand various alliance perspectives on issues such as detention operations and lethal targeting, which may contrast significantly with the policy of the attorney’s own nation.¹⁷ Often, the attorney

¹³ See, e.g., William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 ISR. L. REV. no. 2, at 592 (2007).

¹⁴ Blank, *supra* note 5, at 176–77.

¹⁵ *Id.*

¹⁶ The observations concerning the operational scheme within a North Atlantic Treaty Organization (NATO) command are based upon the author’s professional experiences as Command Judge Advocate, Operational Corps Headquarters, office of the legal advisor to the International Security Force (ISAF) Joint Command, and V Corps Office of the Staff Judge Advocate, Kabul, Afghanistan, from September 2012 to April 2013 [hereinafter Professional Experiences]. See also Colonel Brian H. Brady, *The North Atlantic Treaty Organization Legal Adviser: A Primer*, ARMY LAW., Oct. 2013, at 5.

¹⁷ Commander Alan Cole, a former British legal advisor to ISAF, described “issues of State responsibility for the actions of others” as one of the most challenging legal issues an operational law attorney will face, since

advises on the application of NATO standard operating procedures and rules of engagement. Understanding the international human rights law obligations and policy perspectives of partner nations allows the operational law attorney to gain an awareness of issues that may underlie why a troop-contributing nation may not comply with the NATO standard operating procedures or rules of engagement.

Within ISAF, there are currently several legal offices composed of operational law attorneys from multiple NATO and NATO partner nations, including the offices of the legal advisor at the ISAF headquarters, the ISAF Joint Command (IJC) headquarters, and the NATO Training Mission-Afghanistan (NTM-A) headquarters.¹⁸ The IJC and NTM-A are commanded by three-star generals who each report to the ISAF commanding four-star general. The offices of the legal advisor at these headquarters also provide legal guidance to each of the offices of the legal advisor at the six regional commands throughout Afghanistan.¹⁹ The regional commands are U.S. division equivalents commanded by two-star Generals from four NATO nations.²⁰ The regional commands are typically comprised of subordinate units from various NATO and NATO partner nations, thus making military interoperability among these units critical for mission accomplishment.

This article aims to familiarize military operational law attorneys with issues concerning the effects of international human rights law on legal interoperability in multinational military operations by using ISAF as a case study, while also using examples from other multinational military operations.²¹ While ISAF operations in Afghanistan are set

operations often involve the cooperation of more than ten nations. Alan Cole, *Legal Issues in Forming the Coalition*, 85 INT’L L. STUD. 141, 148 (2009).

¹⁸ As an example of the multinational legal offices, the ISAF Joint Command legal office is currently composed of a U.S. Legal Advisor who supervises six U.S. attorneys, an Italian Deputy Legal Advisor, a Chief of Operational Law from the United Kingdom, and an Operational Law Attorney from Australia. The Deputy Staff Legal Advisor position has previously been held by officers from France and Spain. Professional Experiences, *supra* note 16.

¹⁹ See *About ISAF: Troop Numbers and Contributions*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/troop-numbers-and-contributions/index.php> (last visited May 9, 2014) (listing ISAF troop-contributing nations and the six ISAF regional commands).

²⁰ Regional Command (RC)–North is currently commanded by a German officer, RC–Capital by a Turkish officer, RC–West by an Italian officer, and RCs East, South, and Southwest by U.S. officers. Professional Experiences, *supra* note 16.

²¹ For additional information concerning judge advocate support of a multinational operation, see also Major Winston S. Williams, Jr., *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW., Jan. 2013, at 24.

to end by 1 January 2015,²² legal interoperability must be focused on post-ISAF so that future coalition engagements are more efficiently pursued. Part II discusses the concepts of military and legal interoperability in a multinational military operation, where several nations operating under varying domestic and international legal obligations must attempt to resolve their disparate and at times contradicting obligations to form a unified military command operating under uniform procedures. Part III addresses the two primary sources of disagreement among ISAF troop-contributing nations concerning the law applicable to its operations: (1) the legal classification of the military operation in Afghanistan and (2) the extent to which international human rights law applies to ISAF operations. Part IV outlines practical issues concerning detention operations and lethal targeting that ISAF has faced due to disagreement among its troop-contributing nations on the law applicable to ISAF operations.

Part V concludes by noting that the experience in Afghanistan has demonstrated a need for the NATO alliance to address the current ambiguity in the application of the law of armed conflict²³ and international human rights law, as demonstrated by the differences among ISAF troop-contributing nations on the applicability of these bodies of law to ISAF operations in Afghanistan. Until this ambiguity is properly addressed, military operational law attorneys must understand the different troop-contributing nations' perspectives on the effects of international human rights law on multinational military operations so that they may provide informed legal advice to military commanders and staff officers from various nations to help achieve unity of effort within the command.

II. Military and Legal Interoperability in Multinational Military Operations

A. Military Interoperability

Unity of command and purpose is a critical element if coalition operations . . . are to succeed. With regard to the military component, there were at least two types of difficulties related to unity of command. First off, not all the national contingents operating in the area were placed under UNOSOM [United Nations Operation in Somalia] command, and this led to tragic consequences. Secondly, some contingents that were ostensibly part of UNOSOM were in fact following orders

²² *NATO and Afghanistan*, NORTH ATLANTIC TREATY ORGANIZATION, http://www.nato.int/cps/en/natolive/topics_8189.htm (last visited May 9, 2014).

²³ The term "law of armed conflict" as used in this article may be used interchangeably with the "law of war" or "international humanitarian law."

from their respective capitals; this made them unreliable in the mission area and reduced the mission's effectiveness.²⁴

As seen from the experience in Somalia, the absence of unity of command²⁵ impedes mission accomplishment by denying the multinational force commander the power needed to coalesce troops from various nations into a synchronized force, operating under uniform standards to accomplish a unified purpose. Since "the level of command authority vested in a multinational force commander is established by agreement among the multinational partners"²⁶ who withhold certain command authorities from the multinational force commander, the commander is not limited merely by his own nation's laws and policies, but also by the laws and policies of each of the operations' troop-contributing nations.

As noted by Professor Peter Rowe, troop-contributing nations in a multinational force do not "somehow meld seamlessly into a single armed force comparable to the army of a single nation."²⁷ While there may be a single commanding officer acting as the multinational force commander, "the reality of the situation is that he will pass his orders to the national commanders who then, in turn, will command their own national contingents."²⁸ Therefore, while the ISAF commander could theoretically order all ISAF troops to conduct detention operations or lethal targeting operations in accordance with a particular body of law, the execution of this order by each troop-contributing nation is subject to that nation's domestic law, treaty obligations, and policy stances. As a result, subordinate commanders often vet orders through their nations' capitols to determine whether orders they receive can be executed in accordance with their nations' laws.²⁹ Troop-contributing nations may respond to orders by emplacing various

²⁴ THE COMPREHENSIVE REPORT ON LESSONS LEARNED FROM UNITED NATIONS OPERATION IN SOMALIA (UNOSOM) (Apr. 1992–Mar. 1995), <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/ULibrary/UNOSOM.pdf>.

²⁵

The decisive application of full combat power requires unity of command. Unity of command results in unity of effort by coordinated action of all forces toward a common goal. Coordination may be achieved by direction or by cooperation. It is best achieved by vesting a single commander with requisite authority.

U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 25–27 (Sept. 1954). While this field manual has been rescinded, its definition of "unity of command" remains pertinent.

²⁶ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 2-48 (27 Feb. 2008) [hereinafter FM 3-0].

²⁷ PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES 226 (Cambridge University Press 2006).

²⁸ *Id.*

²⁹ *Id.*

restrictions on where their nation's forces can be utilized in the area of operations, what functions their troops may perform, and by dictating the operating procedures and rules of engagement that will apply to their troops.

Since pure unity of command is unlikely to be achieved in multinational military operations, commanders focus on achieving unity of effort,³⁰ which requires consensus building among troop-contributing nations rather than "direct command authority."³¹ Unity of effort requires each troop-contributing nation to dedicate its personnel and resources to a unified purpose. Military interoperability is the means of synchronizing the various troop-contributing nations' personnel and resources to achieve unity of effort and "focuses on developing . . . procedures with partner nations so that . . . partner forces can operate effectively and interchangeably in designated combined operations."³² Achieving military interoperability in a multinational military operation poses difficulties because the varying troop-contributing nations inevitably have different weapons and communications systems, military cultures, languages, national defense policies, and legal obligations.

As coalition warfare has become the norm, "the importance of military interoperability has become almost axiomatic."³³ For example, emphasis on interoperability with coalition partners is prominent in the U.S. National Defense Strategy, the U.S. National Military Strategy, and joint doctrine.³⁴ To achieve interoperability, the multinational force develops common rules of engagement and standard operating procedures to standardize operating norms among the various militaries participating in the multinational operation. These rules of engagement and standard operating procedures often reflect compromises among the various troop-contributing nations so that a procedure can be achieved that complies with each of the nations' legal obligations and national security policies. Despite the effort to achieve interoperability, many nations must still issue caveats stating that they will not adhere to certain rules of engagement or standard operating procedures. By understanding the international human rights law and law of armed conflict obligations of the various troop-contributing nations, the operational law attorney can better anticipate potential interoperability issues

and advise on how to minimize the impact of these issues on operations.³⁵

B. Legal Interoperability as a Subset of Military Interoperability

British military legal advisor Major General (retired) A.P.V. Rogers defines legal interoperability as the ability to

[ensure] that within a military alliance or coalition, despite different levels of ratification of international treaties and different interpretation of those treaties and of customary international law, military operations can be conducted effectively and within the law. This involves identifying likely problem areas, understanding the various national positions and trying to achieve a legal practice to which all can subscribe.³⁶

Ideally, each of the troop-contributing nations' differing legal obligations could be resolved so that each of the nations could adhere to the same rules of engagement and standard operating procedures without issuing caveats, thus achieving legal interoperability. While formal alliances such as NATO have invested considerable resources toward standardization and achieving military interoperability, "legal planning has generally lagged behind."³⁷ Difficulties in achieving legal interoperability have "been exacerbated by differences between Western states in relation to major features of international law."³⁸

The following section discusses two of the features of international law that have caused difficulty in achieving legal interoperability within ISAF: the legal classification of an operation and the applicability of international human rights law to the operation.

³⁰ Unity of effort is defined as "[c]oordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization—the product of successful unified action. U.S. DEP'T OF DEF., JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010), available at http://ra.defense.gov/documents/rtn/jp1_02.pdf.

³¹ FM 3-0, *supra* note 26, para. 2-49.

³² U.S. Secretary of Defense's Guidance for Employment of the Forces, in Troy Stone, *War Is Too Important to Be Left to the Lawyers* 10–11 (Oct. 9, 2008) (unpublished thesis, Naval War Coll.), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a494360.pdf>.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ For example, in the Kosovo War, NATO procedures allowed troop-contributing nations to decline to execute targeting assignments if they viewed a target as being unlawful. United States Lieutenant General Michael Short observed, "There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front." M. Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force*, 2 AUSTL. ARMY J. no. 2, at 161, 162 (2005).

³⁶ A.P.V. Rogers, *Command Responsibility and Legal Interoperability*, NATO LEGAL GAZ. NO. 16, Sept. 2009, at 19–20, <http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/LGE16.pdf>.

³⁷ Kelly, *supra* note 35, at 162.

³⁸ *Id.*

III. Legal Classification of Military Operations and the Applicability of Human Rights Law During Military Operations

“Identifying the applicable law in a conflict or during a stability operation is . . . an essential first step that enables both military and civilian actors to define their engagement in any international intervention.”³⁹

The challenge of determining the law applicable to a military operation and promoting the rule of law in armed conflict is “compounded when states involved in a conflict or military operation do not explicitly characterize it, or when coalition partners have conflicting views as to its characterization.”⁴⁰ The ISAF has faced both the issue of troop-contributing nations not explicitly characterizing the military operation in Afghanistan, and troop-contributing nations having conflicting views on the characterization of the operation.⁴¹

Troop-contributing nations’ characterization of a military operation, which stem from their nations’ legal obligations and strategic policy decisions, have a direct impact on the tactical issues faced by soldiers, such as determining whether or not they are allowed to conduct lethal offensive operations and whether or not they are allowed to administratively detain individuals who pose a security risk. A nation’s classification of an operation dictates what bodies of law its soldiers are obligated to follow during the operation. A military operation may be classified as an IAC, a NIAC, or as a non-conflict such as a peacekeeping operation.⁴² However, even if a troop-contributing nation has determined that the operation should be classified as an armed conflict, there is disagreement among troop-contributing nations as to whether human rights law applies concurrently with the law of armed conflict or whether human rights law is displaced by the law of armed conflict.⁴³ This section first analyzes ISAF troop-contributing nations’ stances on the legal classification of the situation in Afghanistan, and then analyzes ISAF troop-contributing nations’ differing perspectives on the applicability of international human rights law to ISAF operations in Afghanistan.

A. Legal Classification of ISAF Operations in Afghanistan

The legal classification of operations in Afghanistan by individual troop-contributing nations has evolved since the

beginning of operations to the present day.⁴⁴ Following the attacks by Al Qaeda on the United States on 11 September 2001, United Nations (UN) Security Council Resolutions 1368 and 1373 expressly recognized the United States’ inherent right to act in self-defense in response to the attacks, and the right of its allies to act in collective self-defense.⁴⁵ Operation Enduring Freedom (OEF), the military effort of the United States and its coalition partners directed at the Taliban and Al Qaeda, commenced on 7 October 2001.⁴⁶ Early coalition participation in the military operation against the Taliban and Al Qaeda reflected the general consensus that the operation was an IAC between the United States and its allies against the Taliban-controlled Afghan government and Al Qaeda, which was governed by the law of IAC.⁴⁷ By November 2001, the coalition dislodged the Taliban government from Kabul and assisted the Afghans in forming a provisional government: the Afghan Interim Authority.⁴⁸

After the fall of the Taliban government, some NATO nations questioned “whether the remaining operations in Afghanistan amounted to an armed conflict and, if so, whether it justified the scale of operations taken by OEF.”⁴⁹ Subsequently, in December 2001, UN Security Council Resolution 1386 authorized the establishment of ISAF for six months with the mission “to assist the Afghan Interim Authority in the maintenance of security in Kabul and the surrounding area.”⁵⁰ The ISAF was initially composed of nineteen nations under the command of a United Kingdom lieutenant general.⁵¹ Some of the ISAF troop-contributing nations, including the United States, United Kingdom, Canada, and Australia, also continued contributing troops to the parallel OEF mission.⁵² In comparison to OEF operations, which have been conducted throughout Afghanistan and the region to destroy terrorist training camps and communications and to “clear the way for sustained, comprehensive, and relentless operations to drive [terrorists] out and bring them to justice,”⁵³ the ISAF

⁴⁴ Cole, *supra* note 17, at 141–46.

⁴⁵ S.C. Res. 1368, U.N. Doc. S.RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S.RES/1373 (Sept. 26, 2001).

⁴⁶ U.S. President George W. Bush, Address to the Nation (Oct. 7, 2001), available at <http://www.press.uchicago.edu/Misc/Chicago/481921texts.html> [hereinafter Bush Address].

⁴⁷ Cole, *supra* note 17, at 143.

⁴⁸ *Id.* at 143–44.

⁴⁹ *Id.* at 145.

⁵⁰ S.C. Res. 1386, U.N. Doc. S.RES/1386 (Dec. 20, 2001). Fourteen UN Security Council Resolutions relate to ISAF: 1386, 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1817, 1890, 1917, 1943 and 2011. *ISAF’s Mandate*, NORTH ATLANTIC TREATY ORGANIZATION, available at http://www.nato.int/cps/en/natolive/topics_69366.htm (last visited May 15, 2014).

⁵¹ Cole, *supra* note 17, at 144.

⁵² *Id.* at 145.

⁵³ Bush Address, *supra* note 46.

³⁹ Blank, *supra* note 5, at 88.

⁴⁰ *Id.*

⁴¹ *Id.* at 89.

⁴² *Id.* at 87.

⁴³ See, e.g., Schabas, *supra* note 13, at 592.

mission to provide support to the Afghan government in its struggle against the Taliban and Al Qaeda has been more limited in scope.⁵⁴ The ISAF operations were initially limited to the Kabul area, and the ISAF mission was primarily defensive, “with only exceptional recourse to the use of offensive force under the law of armed conflict.”⁵⁵

Due to the fall of the Taliban government and the formation of ISAF, coalition members such as the United Kingdom and Canada began considering the ongoing military presence in Afghanistan to have transitioned from an IAC to a NIAC between the government of Afghanistan, with the assistance of the ISAF alliance, against the Taliban and Al Qaeda.⁵⁶ This viewpoint is shared by the International Committee of the Red Cross (ICRC), whose official position is that the ISAF operation in Afghanistan has been a NIAC since the fall of the Taliban government in June of 2002.⁵⁷

NATO took command of ISAF in August 2003 upon the request of the Afghan government and the UN.⁵⁸ The UN subsequently authorized ISAF to expand outside of Kabul.⁵⁹ “Stage One Expansion” began in northern Afghanistan in response to a request from the Afghan Minister of Foreign Affairs for security assistance “in the wider country.”⁶⁰ NATO member states at that time “collectively realized there was still substantial fighting to be done if the conditions for political and physical construction were to be created,” which resulted in the formation of “policy, legal, and capability constraints that have characterized ISAF operations.”⁶¹

While many of its NATO partners viewed the situation in Afghanistan as a NIAC, the position of the U.S. Bush administration at the time was that the conflict was an IAC.⁶² However, the 2006 ruling of the U.S. Supreme Court in *Hamdan v. Rumsfeld* required the United States to apply Common Article 3 of the Geneva Conventions to individuals detained abroad, and indicated that the Court viewed the

conflict as a NIAC.⁶³ John Bellinger, the U.S. Department of State Legal Advisor at the time, argued that the law of armed conflict applicable to NIAC, as compared to the law of armed conflict applicable to IAC, failed to address basic detention issues such as whom a state could detain, what procedures applied to determining a detainee’s status, and when a detainee was required to be released.⁶⁴ While the ICRC, human rights advocates, and some partner nations argued that these gaps in the law of armed conflict applicable to NIAC should be filled with international human rights law that provided more precise norms for the conduct of detention, the United States maintained its stance that international human rights law was inapplicable during times of armed conflict.⁶⁵

In contrast to the U.S. position at the time that ISAF operations fell solely under the purview of the law of armed conflict, Germany was an example of an ISAF troop-contributing nation who “remained reluctant . . . to characterize their involvement under the aegis of [ISAF] as an armed conflict” and, while not explicitly stating so, appeared to be applying human rights norms to its involvement in ISAF.⁶⁶ In 2006, the German government insisted that the use of lethal force by its troops was “prohibited unless an attack is taking place or is imminent.”⁶⁷ German soldiers were directed not to refer to their actions as “attacks,” but were instructed to speak in terms of the “use of appropriate force.”⁶⁸

While the Germans did not specifically state at the time that the law of armed conflict did not apply to their operations in Afghanistan, this German “national clarification”⁶⁹ to the NATO rules of engagement is in line with the perspective that the Germans were conducting operations at that time under international human rights law rather than the more permissive law of armed conflict, which allows “use of deadly force as a measure of first resort.”⁷⁰ In 2009, the German news magazine *Spiegel* reported that the German government was slowly realizing that the threat posed by the Taliban in the German area of operations in Regional Command North required a more “offensive

⁵⁴ Cole, *supra* note 17, at 145.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ICRC Resource Center—International Humanitarian Law and Terrorism: *Questions and Answers*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/resources/documents/publication/p0703.htm> (last visited May 12, 2014).

⁵⁸ North Atlantic Treaty Organization, *ISAF’s Mission in Afghanistan*, http://www.nato.int/cps/en/natolive/topics_69366.htm (last visited Apr. 16, 2014).

⁵⁹ *Id.*

⁶⁰ Cole, *supra* note 17, at 146.

⁶¹ *Id.*

⁶² Stephen Pomper, *Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead*, 85 INT’L L. STUD. 525, 526 (2009).

⁶³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

⁶⁴ John Bellinger, *Leverhulme Programme Lecture on the Changing Character of War* (Dec. 10, 2008), available at <http://2001-2009.state.gov/s/rls/96687.htm>.

⁶⁵ Pomper, *supra* note 62, at 528.

⁶⁶ Blank, *supra* note 5, at 89.

⁶⁷ *Changing the Rules in Afghanistan: German Troops Beef Up Fight Against Taliban*, SPIEGEL ONLINE INT’L (July 9, 2009), <http://www.spiegel.de/international/germany/0,1518,635192,00.html> [hereinafter *Changing the Rules*].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 85 INT’L HUMANITARIAN LEGAL STUD. (1) 52 (2010).

approach” than the “peace operations” the Germans were conducting at the time allowed.⁷¹ In April of 2009, the Germans recanted their national clarification of 2006, and in 2010, the German government finally recognized its participation in ISAF military operations as being part of an armed conflict.⁷²

While most ISAF troop-contributing nations recognize current operations in Afghanistan as part of a NIAC,⁷³ there is still much disagreement concerning how international human rights standards apply during times of NIAC and whether international human rights rules serve as “gap-fillers” when the law of NIAC does not directly or adequately address conduct during military operations.⁷⁴

B. The Applicability of International Human Rights Law to ISAF Operations in Afghanistan

The traditional viewpoint is that the law of armed conflict regulates the actions of states and individuals during armed conflict, while international human rights law and domestic law regulate the actions of states and individuals during times of peace.⁷⁵ Despite the traditional viewpoint, almost all ISAF troop-contributing nations now hold the position that both the law of armed conflict and international human rights law apply during times of armed conflict; however, there is disagreement among those nations as to the extent of the applicability of human rights law during armed conflict.⁷⁶ This section discusses the conflicting views on the application of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) during armed conflict.⁷⁷

⁷¹ *Id.*

⁷² “Foreign Minister Guido Westerwelle, speaking explicitly as a representative of the government as a whole, announced before the Bundestag that Germany now considered the conflict in all of Afghanistan, and thus including the northern part of the country, an ‘armed conflict’ in terms of international humanitarian law.” Timo Noetzel, *Germany’s Small War in Afghanistan: Military Learning Amid Politico-Strategic Inertia*, 31 CONTEMP. SECURITY POL’Y 486, 487 (2010).

⁷³ *Rule of Law in Armed Conflicts Project (RULAC), Afghanistan: Applicable International Law*, GENEVA ACAD. OF INT’L HUMANITARIAN LAW & HUMAN RTS., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1 (last visited Apr. 16, 2014).

⁷⁴ Schabas, *supra* note 13, at 598.

⁷⁵ Blank, *supra* note 5, at 90–91.

⁷⁶ *Id.* at 91.

⁷⁷ Due to their pertinence to the issues of detention operations and lethal targeting within the ISAF, the international human rights treaties that are principally discussed in this article are the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (opened for signature Nov. 4, 1950) [hereinafter ECHR].

First, the section addresses the U.S. traditional stances that the ICCPR does not apply outside of its borders and that the law of armed conflict displaces international human rights law during times of armed conflict, and then contrasts this position with the international consensus that the ICCPR applies both extraterritorially and during times of armed conflict. The section then discusses the obligations under the ECHR of European NATO members and the implications of decisions by the European Court of Human Rights (ECtHR), holding that the ECHR applies both extraterritorially and during times of armed conflict.

1. *The ICCPR and Its Applicability Extraterritorially and During Armed Conflict*

The ICCPR is among the foremost international human rights treaties, and together with the Universal Declaration of Human Rights⁷⁸ and the International Covenant on Economic and Social Rights,⁷⁹ comprise what is informally referred to as the “International Bill of Human Rights.”⁸⁰ The ICCPR is of great importance in the debate of the applicability of human rights law during times of armed conflict due to its provisions potentially affecting detentions and lethal targeting.⁸¹

Specifically concerning detentions, Article 9 of the ICCPR states, “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁸² Article 9 also includes rights for detainees that are not provided by the law of armed conflict, such as the detainee’s right to know the reason of his detention at the time of arrest, the right to have a court review the grounds for detention, the right to a trial, and the right to compensation for being unlawfully detained. These rights are more expansive than what are available to a detainee under the law of armed conflict. For example, in a NIAC, Common Article 3 of the Geneva Conventions provides little protection other than the guarantee of “humane treatment” and the prohibition of “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.”

⁷⁸ G.A. Res. 217A (III), U.N. Doc A/810, at 71 (1948).

⁷⁹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

⁸⁰ *International Bill of Human Rights*, UNITED FOR HUM. RTS., <http://www.humanrights.com/what-are-human-rights/international-human-rights-law-continued.html> (last visited Apr. 16, 2014).

⁸¹ The ICCPR has been described as “the most comprehensive articulation of relevant human rights obligations to which the United States is a party.” Pomper, *supra* note 62, at 529.

⁸² ICCPR, *supra* note 77, art. 9.

Article 6 of the ICCPR potentially applies to lethal targeting during armed conflict and states that an individual cannot be arbitrarily deprived of life, and that a sentence of death may only be “carried out pursuant to a final judgment rendered by a competent court.”⁸³ This prohibition on the deprivation of life stands in contrast to the law of armed conflict’s permissive lethal targeting of enemy combatants as a “measure of first resort.”⁸⁴

Given the conflicting standards under the law of armed conflict and international human rights law for conducting detentions and lethal targeting, states have had differing perspectives on how to apply these competing norms during extraterritorial armed conflicts.⁸⁵ The United States’ traditional stance has been that its human rights obligations are not applicable “to actions arising in extraterritorial armed conflicts, both because of treaty-based limitations and because of the doctrine of *lex specialis*.”⁸⁶ *Lex specialis* is a legal doctrine of interpreting competing rules which requires the more specific rule to “displace the more general rule.”⁸⁷ There are two different interpretations as to how the concept of *lex specialis* should be applied during armed conflict. The first interpretation is that of “norm conflict avoidance,” in which the law of armed conflict as *lex specialis* displaces international human rights law in whole so that all legal issues during times of armed conflict are governed by the law of armed conflict.⁸⁸ The second interpretation is that of “norm conflict resolution,” in which international human rights law and the law of armed conflict are complementary during times of armed conflict and that for any given issue, the rule to be applied—whether from human rights law or law of armed conflict—according to *lex specialis* should be the one that provides the greatest level of specificity for that issue.⁸⁹ The United States has traditionally advanced the norm conflict avoidance interpretation: the position that its law of armed conflict obligations displace its international human rights law obligations during times of armed conflict.⁹⁰

As for limitations to the ICCPR based upon the wording of the treaty, the ICCPR states, “Each State Party to the

present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant”⁹¹ In 2004, the UN Commission on Human Rights, the treaty body responsible for monitoring human rights issues, interpreted this provision to apply to individuals within a state’s territory *or* subject to its jurisdiction outside of its territory.⁹²

In contrast, the United States has often cited the italicized phrase of the ICCPR above to argue that the ICCPR’s obligations do not apply outside of its national borders. U.S. Department of State Legal Advisor John Bellinger, in his opening remarks to the UN Committee Against Torture in 2006, stated that “[t]he United States has made clear its position . . . the [ICCPR], by its express terms, applies only to ‘individuals within its territory *and* subject to its jurisdiction.’”⁹³ Additionally, in its 2007 response to the UN Commission on Human Rights’ General Comment 31,⁹⁴ the U.S. government cited the ICCPR’s drafting history, focusing on the ICCPR phrase “within its territory and subject to its jurisdiction” to support its argument of non-extraterritorial application.⁹⁵ The U.S. government argued that the U.S. negotiating party led by Eleanor Roosevelt “insisted on the reference to ‘territory’ in Article 2 because they did not believe it would be practicable to apply the guarantees of the Covenant extraterritorially.”⁹⁶ From the

⁹¹ ICCPR, *supra* note 77, art. 2, para. 1 (emphasis added).

⁹²

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

United Nations Comm’n on Human Rts. Gen. Comment on ICCPR Article 31 (2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f> (last visited Apr. 16, 2014).

⁹³ John B. Bellinger, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), <http://www.state.gov/g/drl/rls/68557.htm> (emphasis added).

⁹⁴ The UN Human Rights Committee is the treaty body responsible for oversight of the implementation of the ICCPR by its signatory states. *See Human Rights Committee*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited May 12, 2014). In its General Comment 31, the Human Rights Committee interpreted Article 2 of the ICCPR to require signatory states to “respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” Human Rights Committee General Comment No. 31, (May 26, 2004), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

⁹⁵ U.S. Observations on Human Rights Committee General Comment 31, U.S. DEP’T OF STATE (Dec. 27, 2007), <http://2001-2009.state.gov/s/1/2007/112674.htm>.

⁹⁶ Pomper, *supra* note 62, at 530.

⁸³ *Id.* art. 6.

⁸⁴ Corn, *supra* note 70, at 75.

⁸⁵ *Id.* at 56.

⁸⁶ Pomper, *supra* note 62, at 526.

⁸⁷ Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. no. 2, at 310, 338 (2007).

⁸⁸ Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, J. CONFLICT & SECURITY L. 459, 475 (2010).

⁸⁹ *Id.* at 473–76.

⁹⁰ *See, e.g.*, J. Bellinger, Comments of John Bellinger, former U.S. State Department Legal Advisor, OPINIO JURIS (Jan. 25, 2007), available at <http://opiniojuris.org/author/john-bellinger/> (last visited Apr. 16, 2014).

drafting of the ICCPR until 2011, the U.S. government's position remained consistent that Article 2, Paragraph 1 was written in the conjunctive, which requires a person over whom the United States is exercising authority to be within U.S. territory and subject to U.S. jurisdiction for the United States to be bound by the ICCPR to respect and ensure rights under the covenant to that person.⁹⁷

However, the United States' Fourth Periodic Report in 2011 to the UN Human Rights Committee concerning its obligation under the ICCPR indicated a shift of its stance on the application of its international human rights law obligations during times of armed conflict and outside of its borders.⁹⁸ The report first acknowledged the traditional U.S. position that it is not bound by the ICCPR for wars outside of its territory. The report then recognized that the UN Human Rights Committee, the International Court of Justice, and other State Parties have taken the position that the ICCPR applies outside of a State Party's boundaries, but failed to state the current U.S. position on extraterritorial application of the ICCPR.⁹⁹ Some commentators see the U.S. acknowledgement of the international community's pervasive viewpoint of extraterritoriality and omission of the current U.S. position as a subtle sign of a shifting policy toward U.S. recognition of international human rights obligations outside of its territorial boundaries.¹⁰⁰

In contrast to the ambiguity on the U.S. position regarding extraterritoriality, the report explicitly recognized the application of the ICCPR during times of armed conflict, but did not specifically address situations of extraterritorial conflict. The report stated that "a time of war does not suspend the operation of the Covenant to matters within its scope of application," and cited the right to religious belief and the right to vote as two examples of obligations a state would be compelled to respect during a time of war.¹⁰¹ The phrase "within its scope of application" indicates that the U.S. position may be that the ICCPR applies only to armed conflicts within its territory and not to extraterritorial armed conflicts. The report further states "that international human

rights law and the law of armed conflict are in many respects complementary and mutually reinforcing."¹⁰² This statement is in stark contrast to the prior U.S. position that international human rights law does not pertain to times of armed conflict.¹⁰³ The report goes on to acknowledge the concurrent application of human rights law and the law of armed conflict:

Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of NIACs occurring within a State's own territory.¹⁰⁴

Once again, this statement on the complementary of the law of armed conflict and international human rights law stands in contrast to the prior U.S. position that the law of armed conflict displaces international human rights law during times of armed conflict. Due to its explicit statement that the ICCPR applies during times of armed conflict and its previously stated position that the ICCPR does not apply extraterritorially, it appears that the United States' current position is that it must adhere to the ICCPR during times of armed conflict, but only if the armed conflict is within its own territory. In its concluding observations on the United States' Fourth Periodic Report on 26 March 2014, the Human Rights Committee stated, "The Committee regrets that the State party continues to maintain its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, despite the contrary interpretation of article 2(1) supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and state practice."¹⁰⁵ It remains to be seen if the United States' position will change to explicitly recognize the application of the ICCPR outside its boundaries.

As recognized by the United States in its Fourth Report to the Human Rights Committee and emphasized by the Human Rights Committee's concluding observations on the report, the current generally held view in the international community is that international human rights obligations do apply both extraterritorially and during times of armed

⁹⁷ *Id.* The U.S. government also maintained this stance in its first submission to the United Nations Human Rights Committee in 1995.

⁹⁸ U.S. Dep't of State, Fourth Periodic Rep. of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011) [hereinafter U.S. Fourth Periodic Rep.], available at <http://www.state.gov/j/drl/rls/179781.htm>.

⁹⁹ "The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party's jurisdiction." *Id.* para. 505.

¹⁰⁰ See, e.g., Beth Van Schaack, *U.S. ICCPR Report Coy on Extraterritoriality*, INTLAWGIRLS (Jan. 21, 2012), <http://www.intlawgrrls.com/2012/01/us-icpr-report-coy-on.html>; Marko Milanovic, *U.S. Fourth ICCPR Report, IHRL and IHL*, EJIL TALK! (Jan. 19, 2012), <http://www.ejiltalk.org/us-fourth-icpr-report-ihrl-and-ihl/>.

¹⁰¹ U.S. Fourth Periodic Rep., *supra* note 98, para. 506.

¹⁰² *Id.* para. 507.

¹⁰³ See, e.g., Beth Van Schaack, *U.S. Adjusts View on Human Rights Law in Wartime*, INTLAWGIRLS (Jan. 23, 2012), available at <http://www.intlawgrrls.com/2012/01/us-adjusts-view-on-human-rights-law-in.html>. International Law Girls is a legal commentary website that serves as a forum for leading female judges, attorneys, professors, law students, and advocates to comment on international legal issues.

¹⁰⁴ U.S. Fourth Periodic Rep., *supra* note 98, para. 507.

¹⁰⁵ Advanced Unedited Version of UN Human Rights Committee Concluding Observations on the 4th Periodic Report of the United States' (Mar. 26, 2014), available at <http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf>.

conflict. The following provision from the International Court of Justice's 1996 *Nuclear Weapons* advisory opinion is "one of the key sources of the position that human rights law and the law of armed conflict apply jointly in the context of IAC"¹⁰⁶:

The Court observes that the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰⁷

The court in the *Nuclear Weapons* advisory opinion appears to adopt the norm conflict resolution interpretation of *lex specialis*, in which the law of armed conflict applies concurrently to international human rights law rather than displacing it. The court later elaborated on the complementarity of the law of armed conflict and international human rights law in its *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory* opinion, thus further cementing in international law the notion that international human rights law is applicable during times of armed conflict.¹⁰⁸

¹⁰⁶ Pomper, *supra* note 62, at 530.

¹⁰⁷ Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, Advisory Opinion, 1996 I.C.J. 226, 240, para. 25.

¹⁰⁸

As regards [to] the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178, para. 106.

2. *The Applicability of the ECHR to Extraterritorial Armed Conflict*

The International Court of Justice is not the only international judiciary body to hold that international human rights law is applicable during armed conflict. In the *Case of Al-Skeini and Others v. The United Kingdom*,¹⁰⁹ the ECtHR explicitly held that state parties to the ECHR are obligated to apply the ECHR during extraterritorial armed conflicts when spatial and personal jurisdiction requirements are met.¹¹⁰ Since each of the European members of NATO are parties to the ECHR,¹¹¹ the decisions of the ECtHR holding that the ECHR is applicable to ECHR parties during extraterritorial armed conflict is of great significance to all NATO parties. For example, as will be discussed in the next section, many ISAF nations have chosen not to conduct administrative detentions due to obligations under the ECHR.¹¹²

In *Al-Skeini*, the ECtHR held that a state's obligation under the ECHR applies extraterritorially to an individual when a state exercises "public powers normally to be exercised by a sovereign state" in the territory of another state and has personal jurisdiction over that individual.¹¹³ In this case, there were representatives for six applicants—five were Iraqi citizens who were "killed, or allegedly killed, by British troops on patrol in UK-occupied" territory in Iraq, and the sixth applicant was allegedly mistreated and then killed in a UK detention facility in Iraq.¹¹⁴ The applicants litigated the case through the UK court system and ultimately appealed the House of Lords' decision that the ECHR was not applicable extraterritorially¹¹⁵ to the ECtHR.

The ECtHR's holding was a "bizarre mix of the personal model [of jurisdiction] with the spatial [model of jurisdiction]."¹¹⁶ The court tried to reconcile past decisions on which it based the extraterritoriality of the ECHR on

¹⁰⁹ *Case of Al-Skeini and Others v. The United Kingdom*, European Court of Human Rights App. No. 55721/07, 7 July 2011.

¹¹⁰ Relevant ECHR provisions during times of armed conflict include Article 5(1), which states that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. . . ." See Milanovic, *supra* note 88, at 474. The article then lists six specific instances in which an individual may be arrested or detained, none of which would allow administrative detention as conceived under the Geneva Conventions. *Id.*

¹¹¹ John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, EUROPEAN J. INT'L L. (2000), <http://www.ejil.org/pdfs/12/3/1528.pdf>.

¹¹² Cole, *supra* note 17, at 150.

¹¹³ Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 2 EUROPEAN J. INT'L L. no. 1, at 121, 131 (2012).

¹¹⁴ *Id.* at 125.

¹¹⁵ *United Kingdom House of Lords, R (on the application of Al-Skeini and others) v. Sec'y of State for Defence*, (2007) UKHL 26, (2008) AC 153.

¹¹⁶ Milanovic, *supra* note 113, at 131.

either a state's personal jurisdiction of an individual outside of its borders or on a state's spatial jurisdiction outside of its borders due to public powers the state was exercising in another state.¹¹⁷ Article 1 of the ECHR pertains to the scope of the convention and states that "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention." Note that the ECHR simply refers to "jurisdiction" and does not include the territorial requirement that the ICCPR contains. The *Al-Skeini* decision that interprets a state to have jurisdiction when it exercises public powers in another state and has personal jurisdiction over that individual appears to be an amalgam of the ECtHR's previous decisions in *Loizidou v. Turkey*¹¹⁸ and *Cyprus v. Turkey*.¹¹⁹ In *Loizidou v. Turkey*, the ECtHR had set out a spatial model of jurisdiction in which "a state possesses jurisdiction whenever it has effective overall control of an area."¹²⁰ Whereas, in *Cyprus v. Turkey*, the ECtHR applied the personal model of jurisdiction in which "a state has jurisdiction whenever it exercises authority or control over an individual."¹²¹

In *Al-Skeini*, the ECtHR found that the UK had jurisdiction over the six deceased Iraqis, requiring application of the ECHR since the UK exercised "public powers normally to be exercised by a sovereign government" by engaging "in security operations in Basrah"¹²² (spatial jurisdiction) and that acts of UK soldiers caused each of the six deaths (personal jurisdiction).¹²³ The ECtHR found the UK breached its obligations to the six Iraqis under the ECHR and "awarded substantial damages and costs" to the applicants. The *Al-Skeini* decision is significant for the European members of NATO because it sets a precedent that their extraterritorial military operations will likely be subject to the ECHR and that failure to adhere to the ECHR can result in pecuniary liability to potentially thousands of individuals detained or killed in violation of the ECHR.¹²⁴ The following section discusses how the influence of international human rights law and cases such as *Al-Skeini* have influenced NATO troop-contributing nations during ISAF operations in Afghanistan.

¹¹⁷ *Id.*

¹¹⁸ *Loizidou v. Turkey*, European Court of Human Rights App. No. 15318/89, Judgment (preliminary objections), 23 Feb. 1995; *Loizidou v. Turkey*, European Court of Human Rights App. No. 15318/89, Judgment (merits), 18 Dec. 1996.

¹¹⁹ *Cyprus v. Turkey*, European Court of Human Rights App. Nos. 6780/74 and 6950/75, 26 May 1975.

¹²⁰ *Id.* at 122.

¹²¹ *Milanovic*, *supra* note 113, at 122.

¹²² *Id.* at 149.

¹²³ *Id.* at 150.

¹²⁴ *Id.* at 139.

IV. Practical Legal Interoperability Issues Encountered in ISAF

The legal classification of ISAF operations and the issue of how the law of armed conflict and international human rights law interact during armed conflict are not merely theoretical debates. The differences among ISAF troop-contributing nations has had an effect on the ground in Afghanistan, especially involving the issues of lethal targeting and detention operations.

A. Lethal Targeting

The law of armed conflict "authorizes states to use force as a first resort against legitimate targets"; whereas, human rights law requires that force be used only as a last resort."¹²⁵ The law of armed conflict rules applicable to lethal targeting are "based on the presumption that *all* members of an enemy force represent a threat sufficient to justify the use of deadly force as a means to produce enemy submission."¹²⁶ International human rights law does not allow for such a presumption; deadly force is only allowed based upon the conduct of the individual which poses an immediate threat under "a traditional law enforcement paradigm."¹²⁷

Differences in approaches to the use of deadly force have caused a fracture among ISAF members over how lethal targeting may be conducted in Afghanistan. For example, in 2008, a German special forces unit located in Kunduz under the German commanded Regional Command North attempted to capture a Taliban leader known as the Baghlan bomber, who had been suspected of emplacing roadside improvised explosive devices, sheltering suicide bombers prior to their attacks, and killing seventy-nine Afghans in the bombing of a sugar factory in Baghlan.¹²⁸ Upon approaching the bomber's hiding place, the German special forces unit was detected by the bomber, allowing the bomber to flee.¹²⁹ Under the law of armed conflict, the Germans could have killed the bomber while he was fleeing, but were prohibited from doing so by a German "national exception" that stated "[t]he use of lethal force is prohibited unless an attack is taking place or is imminent."¹³⁰ The Germans' failure to neutralize the Baghlan bomber caused great angst at ISAF headquarters as reflected in a British ISAF staff officer's statement that "[t]he Krauts are allowing

¹²⁵ *Blank*, *supra* note 5, at 117.

¹²⁶ *Corn*, *supra* note 70, at 82.

¹²⁷ *Blank*, *supra* note 5, at 117.

¹²⁸ Susanne Koelbl & Alexander Szandar, *Not Licensed to Kill: German Special Forces in Afghanistan Let Taliban Commander Escape*, DER SPIEGEL (May 19, 2008), available at <http://www.spiegel.de/international/world/not-licensed-to-kill-german-special-forces-in-afghanistan-let-taliban-commander-escape-a-554033.html>.

¹²⁹ *Id.*

¹³⁰ *Id.*

the most dangerous people to get away and are in the process increasing the danger for the Afghans and for all foreign forces here.”¹³¹

By restricting the use of force to situations of self-defense, the German government caused its special forces unit to be impotent once it was discovered by the enemy, put the lives of those German soldiers at risk, and impeded the ISAF objective of neutralizing Taliban leaders to improve Afghanistan’s security situation. The German government justified its national exception prohibiting it from offensively targeting Taliban leaders by stating it considered its ISAF allies’ policy on offensive targeting as “not being in conformity with international law,” and that “[a] fugitive like the Baghlan bomber is not an aggressor and should not be shot unless necessary.”¹³² While the German government did not elaborate on how its ISAF allies did not comply with international law in conducting offensive targeting, it is a fair conclusion that the German statement was premised on their characterization of the operation as a peacekeeping operation governed by international human rights law.¹³³ Accordingly, the Germans prohibited themselves from offensively targeting the Baghlan bomber in accordance with the law of armed conflict.

The German news magazine *Spiegel* reported in 2008 that the German reluctance to participate in lethal targeting was creating problems with ISAF because insurgents were “increasingly gaining influence in the nine provinces under German control.”¹³⁴ In 2009, *Spiegel* reported that German soldiers were subject to the rules of “peacetime operation” and that they were confused as to when they could use lethal force.¹³⁵ During a battle in Chahar Dara in 2009, some German “soldiers thought that they had to wait until they were shot at before they could fight back” and “essentially turned themselves into targets.”¹³⁶ Around this time, the German government began “allowing its forces to take a

more offensive approach”¹³⁷ and finally, in 2010, acknowledged ISAF military operations as an armed conflict.¹³⁸ However, since that time, the German military and government have still demonstrated reluctance to participate in targeting operations as robustly as many of its ISAF partners.¹³⁹

It is critical for operational law attorneys in a multinational military operation to be aware of national exceptions such as the one previously in place by the Germans, which only allowed German soldiers to use lethal force if an attack was taking place or imminent. Such national exceptions limit a multinational commander’s ability to utilize all of the troops within the command for certain offensive engagements. The operational law attorney must advise the commander accordingly so that the commander can most optimally utilize his troops given the legal constraints emplaced by various troop-contributing nations.

B. Detention Operations

In Afghanistan, disagreements concerning detention operations stem from troop-contributing nation differences on the characterization of ISAF operations and the applicability of international human rights law to those operations. These disagreements negatively impact “the operational-level commander’s ability to standardize and synchronize population control and intelligence gathering operations, two cornerstones of any successful counter-insurgency campaign.”¹⁴⁰ The classification of the operation as an IAC, a NIAC, or as a non-conflict “impacts the parameters and term of the detention, the relevant international humanitarian law and human rights norms applicable upon transfer, procedures for review and prosecution”¹⁴¹

Disagreements among troop-contributing nations on the legal characterization of ISAF operations in Afghanistan and the applicability of international human rights law have created varying standards among the troop-contributing nations on the conduct of detention operations.¹⁴² While some states authorize their “forces to detain under the ISAF aegis, another refuses to detain at all.”¹⁴³ The varying stances reflect the ambiguity and contrasting viewpoints concerning what law should be applied to ISAF operations.

¹³¹ *Id.*

¹³² *Id.*

¹³³ For another instance of how the German approach to ISAF operations varied from its ISAF partners, see James D. Bindenagel, *Afghanistan: The German Factor*, PRISM 1, no. 4, Sept. 4, 2010, at 95, 107.

U.S. forces conduct practical training for the Afghan army in real combat situations, but such training fell outside the German mandate. In contrast, German forces at first applied police training methods relevant to domestic law enforcement activities. Although both types of training were useful and important, the clash in perspectives reduced the ability to engage in joint operations and joint decision-making on these issues.

Id. at 107.

¹³⁴ Koelbl & Szandar, *supra* note 128.

¹³⁵ *Changing the Rules*, *supra* note 67, at note 65.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Noetzel, *supra* note 72, at 487.

¹³⁹ *Id.*

¹⁴⁰ Stone, *supra* note 32, at 8.

¹⁴¹ Blank, *supra* note 5, at 96.

¹⁴² *Id.* at 109.

¹⁴³ *Id.*

The law of armed conflict in an IAC allows states to administratively detain enemy combatants on purely preventive grounds to prevent them from returning to combat¹⁴⁴ and to intern civilians “if the security of the Detaining Power makes it absolutely necessary.”¹⁴⁵ The law of armed conflict in a NIAC allows for states to “detain individuals engaged in hostile acts against it, such as armed rebels and individuals that the state deems a serious threat to security.”¹⁴⁶ Whereas, under the ECHR (the international human rights treaty pertinent to detentions most often followed by NATO states), states may only detain individuals in six specific instances which comport with a traditional criminal justice paradigm as compared to the more permissive detention standards of the law of armed conflict.¹⁴⁷

NATO troop-contributing nations are thus required to choose between the standards under either the law of armed conflict or international human rights law in determining who their soldiers may detain during ISAF operations. While ISAF policy provides guidance for conducting administrative detention, NATO countries such as Canada, the Netherlands, and the United Kingdom have refused to participate in ISAF detention operations in Afghanistan, and have each reached bilateral agreements with the Afghan government that captured enemy combatants will be transferred to Afghan authorities rather than detained by the alliance.¹⁴⁸ Soldiers from these nations do not administratively detain captured enemies themselves, but

allow the Afghan troops they operate with to take custody of the prisoners whenever possible or hold the prisoners for a short time until they may be transferred to Afghan authorities.¹⁴⁹

While, in theory, transfer of captured enemy fighters to Afghan authorities is a step toward building the rule of law in Afghanistan, many problems have resulted from the failure of all ISAF troop-contributing nations to conduct administrative detention. By immediately transferring prisoners to Afghan authorities, ISAF has at times failed to obtain the prisoners’ actual identities, subsequently lost oversight of the prisoners’ status, and also lost opportunities to question the prisoners to gain intelligence about enemy activity.¹⁵⁰ Losing accountability of enemy prisoners has allowed some insurgents to return to the battlefield, setting back ISAF’s objective “to enable the Afghan authorities to provide effective security across the country and ensure that the country can never again be a safe haven for terrorists.”¹⁵¹

Furthermore, troop-contributing nations that have chosen to transfer captured combatants to Afghan authorities instead of administratively detain enemy combatants have come under attack for failing to meet their obligations under the Convention Against Torture.¹⁵² The Convention Against Torture’s provision on non-refoulement prohibits transferring “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁵³ Since detainees in Afghan detention facilities have persistently made claims of being tortured by Afghan detention officials,¹⁵⁴ NATO states have often found themselves in the catch-22 of not being able to administratively detain certain enemy combatants themselves due to their obligations under the ECHR, but being unable to transfer them to Afghan authorities under the Convention Against Torture. As a result, many NATO nations have “been reluctant to take part in detention

¹⁴⁴ GC III, *supra* note 7, art. 21.

¹⁴⁵ GC IV, *supra* note 7, arts. 41–43.

¹⁴⁶ Deeks, *supra* note 11, at 404.

¹⁴⁷ ECHR, *supra* note 77, art. 5(1) states

(a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id.

¹⁴⁸ David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASH. POST, Nov. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301397>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *NATO and Afghanistan*, NORTH ATLANTIC TREATY ORGANIZATION, http://www.nato.int/cps/en/natolive/topics_8189.htm? (last visited Apr. 16, 2014). To achieve this objective, ISAF has shifted “progressively from a combat-centric role to a more enabling role focusing on training, advising and assisting the Afghan National Security Forces to ensure that they are able to assume their full security responsibilities by the end of transition.” *Id.*

¹⁵² See, e.g., *Amnesty International Canada v. Canada* (Chief of the Defence Staff) (F.C.), 2008 FC 336, [2008] 4 F.C.R. 546, Canada: Federal Court, 12 Mar. 2008, available at <http://www.unhcr.org/refworld/docid/49cb8cff2.html>. Amnesty International sued the Canadian government for violating the Convention Against Torture by transferring detainees to Afghan authorities. *Id.*

¹⁵³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁵⁴ See, e.g., United Nations Assistance Mission Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On* (2013), available at <http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBL0S5b37o%3D&tabid=12323&language=en-US>.

operations.”¹⁵⁵ This reluctance has resulted in disparate detention practices among ISAF troop-contributing nations and hindered unity of effort within ISAF. While ISAF troop-contributing nations may choose to derogate from their international human rights law obligations in times of emergency¹⁵⁶ and choose to follow the law of armed conflict, states rarely declare they are derogating from their human rights treaty obligations because to do so “would be interpreted as a concession that the IHRL treaty, in principle, applies extraterritorially to a given situation, and would thus open the State’s actions to judicial scrutiny, even if a curtailed one.”¹⁵⁷

Therefore, as with lethal targeting, it is important for military operational law attorneys to know what body of law a NATO troop-contributing nation will follow so that the operational law attorney may anticipate military interoperability issues and advise the multinational military commander and staff how best to proceed in operations involving the potential detention of enemy combatants.

V. Conclusion

Efforts to improve legal interoperability are necessary because the law ultimately affects the actions of soldiers on the battlefield. These soldiers must receive clear instructions on how to conduct themselves because, as Professor Geoffrey Corn stated, “In an area of an already complex and often confused battle space, there can be little tolerance for adding complexity and confusion to the rules that war-fighters must apply in the execution of their missions. Instead, clarity is essential to aid them in navigating this complexity.”¹⁵⁸

Furthermore, the necessity to understand the implications of international human rights law during armed conflict is only likely to increase, as NIACs and multinational military operations have increasingly become the norm in the past seventy years.¹⁵⁹

As demonstrated by the difficulties of ISAF in achieving military interoperability in the areas of lethal targeting and detention operations, the experience in Afghanistan has shown a need for the NATO alliance to address the current ambiguity within NATO as to how to reach a consensus on the applicable law during multinational military operations, and what standards from the law of armed conflict and international human rights law are to be applied during multinational military operations. Until this ambiguity is properly addressed,¹⁶⁰ military operational law attorneys must understand the effects of international human rights law on legal interoperability in multinational military operations so that they may provide informed legal advice to military commanders and staff from various nations to help the multinational military operation best achieve unity of effort within the confines of international law.

¹⁵⁵ Cole, *supra* note 17, at 150.

¹⁵⁶ See, e.g., ICCPR, *supra* note 77, art. 4; ECHR, *supra* note 77, art. 15 (derogation clauses).

¹⁵⁷ Milanovic, *supra* note 88, at 467.

¹⁵⁸ Corn, *supra* note 70, at 54.

¹⁵⁹ Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000) (“The change in direction toward intrastate or mixed conflicts—the context of contemporary atrocities—has drawn humanitarian law in the direction of human rights law.”).

¹⁶⁰ For an example of efforts by some NATO member states to address the deficiencies in legal interoperability, see Jacques Hartman, *The Copenhagen Process: Principles and Guidelines* (Dec. 25, 2012), available at <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guide-lines>. The Government of Denmark initiated the Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process) on October 11, 2007 to address “uncertainties surrounding the legal basis for detention and the treatment of detainees during military operations in non-international armed conflicts, such as . . . operations in Afghanistan or Iraq.” *Id.*

An Ounce of Improper Preparation Isn't Worth the Cure: The Impact of Military Rule of Evidence 612 on Detecting Witness Coaching

Major Michael Zimmerman*

*[A counsel's] duty is to extract the facts from the witness, not to pour them into him.*¹

I. Introduction

You are the Chief of Military Justice at a large installation. A batch of new litigators has been entrusted to your care and you have dutifully taught them everything you know about military justice over the past six weeks. One of your more promising young counsel has recently interviewed his first victim. On your way out of the building Friday night, you stop and ask him how the interview went. He excitedly tells you that it went great: he took your advice and provided the victim a clean copy of her statement, but he also went “off-script” and showed the victim a group of three to five pictures he selected from the thirty pictures the criminal investigators took, as well as the statement of an eyewitness that had highlights, stars, underlines, and notes the counsel had made in the margin because the victim was having trouble remembering key facts. The counsel tells you that he feels the victim is well prepared for trial next week, even though the events took place almost one year ago. In addition, he tells you he is sure that there are no issues because all of the statements and pictures have previously been turned over in discovery to defense. You sit back down at your desk, call your spouse to say you will be late for dinner, and you begin to wonder what the ramifications are of your young counsel's actions.

The above hypothetical illustrates a common problem many new counsel face. No one has ever taught them what they should and should not do when interviewing a witness. One of the major reasons for this deficiency is that the parameters of what is permitted are unclear. In addition, the scenario highlights the ambiguity that often exists in witness preparation and the role Military Rule of Evidence (MRE) 612² plays in discovering when the line has been crossed

into impermissible coaching³ of the witness. There are no Supreme Court or military cases dealing with MRE 612. However, the federal circuits have grappled with the scope of the corresponding federal rule⁴ with varying degrees of success. This article discusses why it is difficult to discern when witness coaching has occurred; the role MRE 612 plays in aiding cross-examination to detect coaching; the various tests developed to analyze Federal Rule of Evidence (FRE) 612 issues; and which test should be adopted by the military courts. Finally, this article addresses the issues presented by the three types of documents the counsel showed the victim in the above hypothetical.

II. Determining When Witness Preparation Turns into Coaching

Determining when the line has been crossed between witness preparation and coaching is difficult because the limits of what is allowed are poorly defined. Furthermore, the work product doctrine shields from discovery the vast majority of the steps counsel take to prepare for trial. The application of that doctrine makes it difficult for the opposing side to detect coaching and to cross-examine witnesses on the difference between their actual memory and what may have been suggested to them during pre-trial interviews. The following shows how the confluence of vague witness preparation rules and the protections of the work product doctrine necessitated the development of FRE 612.

³ See Robert K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret,"* 38 HASTINGS CONST. L.Q. 1007 (2011) (noting that impermissible witness preparation techniques are often referred to as coaching). The term coaching will be used throughout this article.

⁴ While Military Rule of Evidence (MRE) 612 and Federal Rule of Evidence (FRE) 612 are not mirror images of each other, the main aspect of the rule is the same in both rules: if the witness (1) used a writing; (2) to refresh memory prior to testifying; (3) the court may order disclosure in the interest of justice. The remaining portion of MRE 612 (not appearing in the FRE) details the procedure for attendant claims of privilege. The MRE also deletes discussion of the *Jencks Act* due to the more liberal discovery rules applicable in the military. Compare MCM, *supra* note 2, MIL. R. EVID. 612, with FED. R. EVID. 612 (Writing Used to Refresh a Witness); see also UCMJ, app. 22, at 50 (2012).

Rule 612 is taken generally from the Federal Rule but . . . [l]anguage in the Federal Rule relating to the Jenks Act . . . which would have shielded material from disclosure to the defense under Rule 612 was discarded. Such shielding was considered to be inappropriate in view of the general military practice and policy which . . . encourages broad discovery.

Id.

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¹ *In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y., 1880).

² MANUAL FOR COURTS-MARTIAL UNITED STATES, MIL. R. EVID 612 (2012) (Writing Used to Refresh Memory).

A. The Vague Line

Witness testimony is the life blood of any trial, particularly criminal trials, as confrontation clause jurisprudence has shown. As such, one would expect that the limits of what is permitted when preparing a witness for trial to be a source of significant proscription. Unfortunately, what constitutes proper preparation as opposed to coaching is largely a matter of opinion. This is because the parameters of what is allowed have not been the subject of much judicial or legislative review.⁵

There are no military cases dealing with witness coaching in a significant way.⁶ The only Supreme Court case addressing the issue does not define what is permissible. Instead, the Supreme Court in *Gerdes v. United States* placed the burden on cross-examination to reveal any impropriety in the procurement of testimony.⁷ While it is obvious that an attorney may not procure false testimony, determining what is allowed is far less definitive.⁸ Perhaps the most salient description of where the line is between proper and improper preparation can be found in *In re Eldridge*.⁹ In that case, the highest court of the state of New York held “[a counsel’s] duty is to extract the facts from the witness, not to pour them into him.”¹⁰ While this opinion does not serve as binding precedent in the military justice system, it explains the difference between what is and is not allowed when preparing a witness in a manner that can be easily conceptualized.

To effectively cross-examine the opposing side’s witnesses, and determine whether preparation crossed into coaching, counsel would certainly be interested in the steps the opposition took to prepare for trial. To that end,

⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 (2000) [hereinafter RESTATEMENT] (noting that beyond the obvious prohibition against suborning perjury, the limits on witness preparation is supported by relatively sparse authority); Flowers, *supra* note 3 (“The fine line between proper witness ‘preparation’ and improper witness manipulation . . . — sometimes called ‘coaching’—is rarely disciplined or even detected.”).

⁶ *United States v. Rodriguez-Rivera*, 63 M.J. 372 (2006) (holding that the accused did not establish prosecutorial misconduct based on the allegation that a six-year-old child victim was improperly coached by trial counsel, assistant trial counsel, and her parents during recess regarding her testimony). This case is the closest any military court has come to addressing witness coaching, but still no guidance is given regarding what is allowed.

⁷ *Gerdes v. United States*, 425 U.S. 80, 90–91 (1932) (“The opposing counsel in the adversary system is not without weapons to cope with ‘coached’ witnesses. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility.”).

⁸ RESTATEMENT, *supra* note 5, § 116.

⁹ *In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y., 1880).

¹⁰ *Id.*; see also *United States v. Millan*, 16 M.J. 730, 734 (A.F.C.M.R., 1983).

discovery requests might legitimately focus on which witnesses were interviewed and what documents were shown to each witness. However, acquiring that information is usually difficult due to the work product doctrine.

B. The Work Product Doctrine

The work product doctrine was created to prevent access to the opposition’s files and allow mental impressions to remain confidential.¹¹ In *Hickman v. Taylor*,¹² the Supreme Court recognized that “[u]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.”¹³ The Court was concerned that if the fruits of a counsel’s labor were subject to the normal rules of what must be produced, then an impossible choice would have to be made between preparing for trial and maintaining secrecy.¹⁴ Thus, the work product doctrine was created to protect the internal deliberative process of counsel.¹⁵

Typically, the work product doctrine is viewed as primarily a civil rule; however, it applies equally to criminal cases.¹⁶ The rule applies to military justice cases through *United States v. Vanderwier*¹⁷ and the Rules for Courts-Martial.¹⁸

¹¹ *Hickman v. Taylor*, 329 U.S. 495, 498 (1947).

¹² *Id.*

¹³ *Id.*

¹⁴ See *id.* at 511–12. The court was concerned about the likelihood of disclosed work product revealing the mental impressions of counsel. Specifically, the court noted, “[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” *Id.*

¹⁵ *Id.*; see also *James Julian Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982) (“Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation [of specific documents] is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.”).

¹⁶ *United States v. Nobles*, 422 U.S. 225, 239–41 (1975).

¹⁷ 25 M.J. 263 (1987). In *United States v. Vanderwier*, the defense sought discovery of the notes that the trial team took of a certain witness. The court reinforced that “[e]ven though liberal, discovery in the military does not ‘justify unwarranted inquiries into the files and mental impressions of an attorney’” and held that the notes were protected by the work product doctrine. *Id.* at 269.

¹⁸ MCM, *supra* note 2, R.C.M. 701(f) (Information not subject to disclosure).

While the doctrine protects against disclosure, it is not an absolute bar and may be waived.¹⁹ However, waiver of the work product protection is a very narrow concept, and only applies to the most intentional of abuses.²⁰ If counsel used notes from a previous interview to assist a witness in testifying at trial, those notes would be protected from disclosure unless the court found that work product doctrine was purposefully waived.²¹ This would prevent the opposing party from effectively cross-examining the witness on the difference between what the witness actually remembers and what may have been suggested to him. Thus, absent egregious conduct, the work product doctrine acts as a barrier to cross-examination by preventing discovery of the facts necessary to challenge the witness.

III. Federal Rule of Evidence 612 and Military Rule of Evidence 612

Without a rule, a definite conflict exists between the work product doctrine and *Gerdes v. United States*' mandate of cross-examination as the means for detecting coaching.²² While the work product doctrine favors secrecy, effective cross-examination requires production of the documents shown to the witness. Prior to the enactment of FRE 612, the work product protections could only be overcome by the narrow concept of waiver.²³ Thus, producing the documents needed to test the limits of the witness's true memory was significantly limited. Federal Rule of Evidence 612 was created to counterbalance the protections of the work product doctrine and ensure access to such documents.

¹⁹ *Nobles*, 422 U.S. at 239–40 (“Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination.”) (citations omitted). *Id.*

²⁰ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 463–64 (D. Md. 1998) (noting that waiver of the work product doctrine requires egregious, intentional conduct).

[F]or work product, waiver does not take place unless a disclosure has been made which is consistent with a conscious disregard of the advantage that is otherwise protected by the doctrine. The work product doctrine, therefore, is both broader and more robust than the attorney client privilege, as it does not appear that it can be waived by inadvertent disclosure in the same way that the attorney client privilege can.

Id. (citations omitted). Thus, waiver is ordinarily only found in extreme cases, making waiver of the work product doctrine narrower than the scope of FRE 612.

²¹ *Id.*

²² *Id.* at 461. Specifically, the court noted that “it has been recognized that there is a clear conflict between Fed. R. Civ. P. 26(b)(3), which codifies the work product doctrine, and Fed. R. Evid. 612.” *Id.*

²³ Waiver only applies in the limited circumstance where the work product doctrine has been intentionally abused. *See id.* at 464.

A. The Legislative History of Federal Rule of Evidence 612

Since MRE 612 is derived from FRE 612, understanding the rationale behind the enactment of FRE 612 is important. As the advisory committee began drafting the Federal Rules of Evidence, the potential misuse of the work product doctrine led to the inclusion of Rule 612 in the submission to Congress in 1972.²⁴

After seven years of research conducted by the advisory committee, Congress held hearings to discuss the enactment of the FRE.²⁵ The House Committee on the Judiciary called numerous witnesses, taking over 600 pages of testimony.²⁶ After the proceedings closed, the committee submitted a twenty-one-page report that addressed modifications, additions, deletions, or amendments to particular rules.²⁷ One of the rules the House Committee specifically amended was FRE 612. The committee noted that while the treatment of documents used to refresh recollection at trial is well-settled, the treatment of documents used prior to trial had been left to the discretion of the trial judge.²⁸ The committee stated the “purpose of the rule is essentially the same as the *Jencks*²⁹ statute: . . . to promote the search of credibility and memory.”³⁰ Unlike the *Jencks Act*, FRE 612 is equally applicable to both the government and defense, making the scope of the rule much broader. While the committee was concerned with ensuring that witnesses could be fairly cross-examined regarding their testimony, they were equally concerned about the rule completely abrogating the work product doctrine. To that end, the committee noted that

[t]he purpose of the phrase “for the purpose of testifying” is to safeguard against using the rule as a pretext for wholesale exploration of an opposing

²⁴ FED. R. EVID. 612 advisory committee's notes; *see also* *Berkey Photo Inc v. Eastman Kodak Co.*, 74 F.R.D. 613, 616–17 (S.D.N.Y. 1977) (expressing concern for a counsel's ability to use the work product doctrine as a shield against disclosure).

²⁵ H. R. REP. NO. 93-650 at 1–4 (1973).

²⁶ *Id.* The subcommittee held six days of hearings, heard twenty-eight witnesses, and received numerous written communications. Additionally, the subcommittee held seventeen markup sessions which culminated in a Committee Print of the proposed rules. The Committee Print was circulated nationwide for comment and printed in the *Congressional Record* to assure the widest distribution. Over the course of six weeks, approximately ninety comments were received by the subcommittee. *Id.* at 3.

²⁷ *Id.*

²⁸ FED. R. EVID. 612 advisory committee's notes.

²⁹ The *Jencks Act*, 18 U.S.C. § 3500, requires that the government produce all prior statements of a witness to the defense after a witness testifies. The rule does not apply to the defense. It has long been settled that the *Jencks Act* applies to the military. *See* *United States v. Strand*, 17 M.J. 839, 841 (N.M.C.M.R. 1984) (citations omitted).

³⁰ FED. R. EVID. 612 advisory committee's notes.

party's files and to ensure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.³¹

Finally, the committee cautioned that “nothing in the Rule shall be construed as barring the assertion of privilege with respect to writings used by a witness to refresh his memory.”³² Thus, the committee attempted to strike the balance between the protections the work product doctrine affords the mental impressions of counsel, and the need for effective cross-examination to test the credibility of the witness.

B. The Text of the Rule

Military Rule of Evidence 612 states,

[i]f a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying, or before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon.³³

While there is a lack of case law from military courts analyzing the parameters of MRE 612, cases from the federal district courts citing FRE 612 are instructive.

To conduct a FRE 612 analysis, federal courts have isolated three elements that must be met: (1) a witness must use a writing to refresh his memory; (2) for the purpose of testifying; and (3) the court must determine that, in the interests of justice, the adverse party is entitled to see the writing.³⁴ The first two elements are factual predicates and must be established before moving on to the third element.³⁵

³¹ *Id.*

³² *Id.* The committee was very concerned that the rule not be turned into an avenue for a wholesale exploration of an opposing party's files. This concern was codified into MRE 612, as it directs, “[i]f it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing *in camera*, excise any privileged information or portions not so related, and order delivery of the remainder.” MCM, *supra* note 2, MIL. R. EVID. 612.

³³ MCM, *supra* note 2, MIL. R. EVID. 612.

³⁴ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 461 (D. Md. 1998).

³⁵ *Id.*

C. The Factual Predicates—The First Two Elements

The first element, that a witness used a writing to refresh his or her memory, is essentially a matter of relevance.³⁶ It ensures that only documents actually reviewed by the witness are potentially subject to disclosure. On the surface, that standard seems easy to establish: either the witness reviewed the document or they did not. However, courts have required a much greater showing than simply reviewing a document. To establish this prong, there must be evidence that the witness *relied upon* the document such that their memory was somehow influenced.³⁷ Thus, counsel must determine what documents a witness reviewed and the effect that reviewing the documents had on their memory to establish this prong.

The second element of the rule requires that the document shown to the witness was for the purpose of testifying. The advisory committee noted that language was used

to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to ensure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.³⁸

The stage at which the document is shown to the witness is important. The closer to trial the witness's memory is refreshed, the easier it is to establish that the writing was shown to the witness for the purpose of testifying. However, courts have held that pretrial testimony taken under oath also satisfies the “for the purpose of testifying” language within the rule.³⁹ For the military practitioner, this means that documents shown to a witness for the purpose of refreshing memory prior to an Article 32 hearing should qualify as well. Fleshing these facts out with the witness in a pretrial interview, or under oath at an Article 32 hearing, is critically important to ensuring that the factual predicates can be established later at trial.

³⁶ *Alfreda Robinson, Duet or Duel: Federal Rule Of Evidence 612 and the Work Product Doctrine Codified in Civil Procedure Rule 26(B)(3)*, 69 U. CIN. L. REV. 197 (2000).

³⁷ *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir.1995) (“[E]ven where a witness reviewed a writing before or while testifying, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party.”) (citing 28 Charles Wright & Victor Gold, *Federal Practice and Procedure* § 6185, at 465 (1993)); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 679 (S.D.N.Y.1983) (noting that nothing in the deponent's testimony revealed he relied upon the documents reviewed).

³⁸ FED. R. EVID. 612 advisory committee's notes.

³⁹ *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (noting that, for depositions, cross-examination of witnesses is conducted to the same extent as permitted at trial under the provisions of the Federal Rules of Evidence).

D. The Balancing Test—The Third Element

The third element mandates that the court determine whether the adverse party is entitled to the writing in the interests of justice. This element requires balancing the need for disclosure—to promote effective cross-examination—against the policies underlying the work product doctrine.⁴⁰ As one court stated,

[i]n the setting of modern views favoring broad access to materials useful for effective cross-examination, embodied in rules like 612, . . . it is disquieting to posit that a party's lawyer may "aid" a witness with an item of work product and then prevent totally the access that might reveal and counteract the effects of such assistance.⁴¹

The role of FRE 612 in aiding the truth seeking process by revealing evidence that may impeach a coached witness was specifically set out in the legislative history.⁴² Thus, if the facts show that a document was relied upon by the witness, for the purpose of testifying, FRE 612 allows the opposition to test the credibility and true memory of the witness, but only if the interests of justice require disclosure.

E. When the Interests of Justice Require Disclosure

The purpose of FRE 612 is to overcome the usual protections afforded work product by shifting the policy in favor of promoting effective cross-examination.⁴³ Therefore, determining when the interests of justice require disclosure addresses the balance between these two goals. If there are credible concerns that a witness's testimony has been influenced by a piece of work product, then the item should be produced. However, not all federal courts have given an equal amount of credence to determining when the interests of justice are implicated. As the following will show, two approaches have developed in the federal circuits: one where disclosure is nearly automatic, and one that balances the competing concerns of the work product doctrine and the need to effectively cross-examine the witness. The *Military Rules of Evidence Manual* suggests a third approach for dealing with MRE 612 issues, but this test

⁴⁰ *Nutramax Labs. Inc.*, 183 F.R.D. at 468; *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Vanderwier*, 25 M.J. 263 (1987) (explaining that the purpose of the work product doctrine is to prevent unwarranted inquiries into the files and mental impressions of counsel).

⁴¹ *Berkey Photo Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

⁴² FED. R. EVID. 612 advisory committee's notes (stating that the expressed purpose of the rule is to promote the search of credibility and memory).

⁴³ *In re Comair Disaster Litigation*, 100 F.R.D. 350, 353 (E.D.Ky. 1983).

fails to adequately balance the concerns of the work product doctrine against MRE 612's role in promoting cross-examination to detect coaching.

1. Cases Finding Nearly Automatic Disclosure

Determining when the line is crossed between proper preparation and misuse of work product has been a source of division in the federal circuits. One method for addressing these issues can be found in *Berkey Photo Inc. v. Eastman Kodak*, where the court cautioned that any material shown to a witness will be produced to the opposing side.⁴⁴ In that case, counsel for the defendant (Eastman Kodak) used several notebooks to prepare a witness to testify at a deposition.⁴⁵ The plaintiff sought production of the notebooks under FRE 612, and the defendant objected on work product grounds. While the court did not order disclosure, it did issue a stern warning to prevent future litigants from using the work product doctrine to gain an unfair advantage.⁴⁶ In particular, the court advised,

[f]rom now on, as the problem and the pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today. To put the point succinctly, there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.⁴⁷

This rule favoring near automatic disclosure has also been the holding in other courts.⁴⁸

⁴⁴ *Berkey Photo Inc.*, 74 F.R.D. at 617; *Robinson*, *supra* note 36 (discussing *Berkey Photo Inc.* as the seminal case for automatic disclosure of all documents shown to a witness).

⁴⁵ *Berkey Photo Inc.*, 74 F.R.D. at 614.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 145 (D. Del. 1978) ("Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education."); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs. Inc.*, 81 F.R.D. 8, 10 (D.C. Ill. 1978) ("If the paramount purpose of federal discovery rules is the ascertainment of the truth, the fact that a document was used to refresh one's recollection prior to his testimony instead of during his testimony is of little significance."); *see also Robinson*, *supra*, note 36.

2. *Cases Balancing Work Product Protections With the Need to Test Credibility*

Cases such as *Berkey Photo Inc.* apply the factual predicates—the first two elements—but contain very little review of when the interests of justice require disclosure—the third element.⁴⁹ The analysis tends to be nothing more than a rule that disclosure to a witness requires disclosure to the opposition.⁵⁰ By contrast, an approach that seeks to balance protecting work product and the need to test a witness’s memory can be found in *Nutramax Laboratories Inc. v. Twin Laboratories Inc.*⁵¹

In that case, the plaintiff sued the defendant for infringement of their patent. During the pretrial phase, the defendant sought the disclosure of materials used by the plaintiff’s counsel to prepare witnesses for their depositions.⁵² Noting the conflict between the work product protections and FRE 612, the court stated,

[N]o competent counsel can afford to ignore reviewing with witnesses the documents which relate to critical issues. During a deposition, counsel questioning a witness will seldom fail to ask the witness about what he or she did to prepare for the deposition, and the identity of any documents reviewed for this purpose [W]here, as here, many thousands of pages of documents have been produced and counsel have analyzed them and selected a population of “critical documents” relevant to case dispositive issues, a deposition question aimed at discovering what documents were reviewed to prepare for a deposition may draw an assertion of the work product doctrine. In response, the deposing attorney may contend that if the witness used the documents to prepare for the deposition, then work product immunity has been waived, and Fed.R.Evid. 612 requires the production.⁵³

The court went on to give a detailed review of the work product doctrine. Specifically, the court looked at the cases⁵⁴ that discussed waiver and concluded that a balance

must be struck, especially when testimonial use is made of work product.⁵⁵

Once the two factual predicates are met, the court established a list of nine factors to consider when weighing the balance between work product protections and the interests of justice.⁵⁶ These factors are:

- (1) the status of the witness (either expert or lay);
- (2) the nature of the issue in dispute (whether the witness is testifying about the crux of the case or some lesser issue);
- (3) when the events took place: . . . the ability of a witness to perceive, remember, and relate events is fair game for cross-examination, and a deposing attorney has a legitimate need to know whether the witness is testifying from present memory, unaided by any review of extrinsic information, present memory “refreshed” by reference to other materials, or really has no present memory at all, and can only “testify” as to what is memorialized in writings prepared by the witness or others—the greater the passage of time since the events about which the witness will testify, the more likely that the witness needed to refresh his or her recollection;
- (4) when the documents were reviewed (the review of documents close to the date of the deposition may affect whether the court concludes that the purpose was to prepare for testimony);
- (5) the number of documents reviewed (a court may be less inclined to order the production of several hundred documents than if the witness reviewed a single document, or very few documents, selected by the attorney that relate to a critical issue in the case);

⁴⁹ *Berkey Photo*, 74 F.R.D. at 616–17.

⁵⁰ *Id.*

⁵¹ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 468 (D. Md. 1998).

⁵² *Id.* at 458.

⁵³ *Id.* at 461.

⁵⁴ In particular, the court compared *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir.1988) and *In re Allen*, 106 F.3d 582, 607 (4th Cir.1997)

with *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y.1977).

⁵⁵ *Nutramax Labs. Inc.*, 183 F.R.D. at 467. The court also noted that waiver occurs in only the most intentional abuses of the work product doctrine. Military Rule of Evidence 612 covers a much broader scope, and favors the production of documents to test the true nature of a witness’s memory when the elements of the rule are met. While intentional abuse of the work product protections is a significant factor, less egregious conduct may satisfy the factors listed in the *Nutramax Labs. Inc.* balancing test.

⁵⁶ *Id.* at 469–70.

(6) whether the witness prepared the documents (greater need than documents prepared by others);

(7) whether the documents contain pure work product (such as discussion of case strategy);

(8) whether the documents reviewed have been previously disclosed; and

(9) whether there are credible concerns regarding manipulation of a witness's testimony (if the court believes that there was inappropriate conduct affecting testimony in the case, and the documents demanded relate to these concerns, then the rationale for disclosure increases significantly).⁵⁷

The court noted that the list was illustrative, and the weight to be assigned to each factor may vary on a case-by-case basis.⁵⁸ However, given the legislative history and the express purpose of FRE 612—to prevent the misuse of the work product doctrine—the final factor is seemingly the most important: if there are credible concerns regarding the manipulation of a witness's testimony, then disclosure will invariably be required.

The remaining eight factors listed in *Nutramax Labs. Inc.* are a thorough recitation of the additional issues that should be considered when deciding whether the work product doctrine should yield to the concerns of MRE 612. For example, the factors focusing on when the events occurred and when the challenged materials were shown to the witness demonstrate the importance of time in the analysis. The further away from the event and closer to trial, the greater the chances are that review of the document can fairly be said to have had an effect on the witness.

The *Nutramax Labs. Inc.* approach to determining when the interests of justice require disclosure completely addresses the concerns of FRE 612. The nine factors balance the work product concerns with the need to test the credibility and true memory of the witness.

3. The Military Rules of Evidence Manual Suggested Approach

Another approach to define the limits of MRE 612 can be found in the *Military Rules of Evidence Manual*.⁵⁹ The

authors suggest that the military judge consider the following factors in determining whether justice requires disclosure:

(1) the degree to which the witness actually relied upon the document;

(2) how similar the witness's testimony is to the document's content;

(3) what other documents, conversations, or independent events may have contributed to refreshing the witness's memory;

(4) how important to the litigation is the refreshing document; and

(5) whether it contains privileged or work product information.⁶⁰

The common theme between the *Nutramax Labs. Inc.* factors and those laid out in the *Military Rules of Evidence Manual* is that it matters which witness was shown the material. As the importance of the witness to the outcome of trial increases, and as it appears more likely that the documents were used to manufacture favorable testimony, the likelihood of disclosure increases.

However, the *Military Rules of Evidence Manual*'s approach is flawed. The test suggested in the *Manual* combines the factual predicates identified in *Nutramax Labs. Inc.* with the issue of when the interests of justice require disclosure.⁶¹ The clearer approach is to view the factual predicates separately, so that the party seeking disclosure is first required to demonstrate that the documents were relied upon by the witness for the purpose of testifying. Doing so will ensure that the intent of the rule is met—shielding work product that has not had any effect on a witness's testimony and disclosing documents that have.⁶²

⁶⁰ *Id.* Though the end of the comment to the rule states that while attorney client privilege information is not likely to be produced under Rule 612(2), “[t]here is less reason to be protective of work product [I]f a witness uses work product to prepare testimony, the trend in federal cases . . . is to hold that the work product should be subject to disclosure under the Rule.” *Id.* at 6-146.

⁶¹ In particular, the *Military Rules of Evidence Manual* simply applies the five-part test and weighs all parts of the test equally. There is no requirement to first establish that the witness relied on the document, for the purpose of testifying, before weighing the factors to determine if the interests of justice require disclosure. *See id.*

⁶² FED. R. EVID. 612 advisory committee's notes (“The purpose of the phrase ‘for the purpose of testifying’ is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.”).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 2 STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 6-141 (6th ed., 2006).

In addition, the approach proposed in the *Military Rules of Evidence Manual* fails to address the third element of MRE 612. This final element requires disclosure “if the military judge determines it is necessary in the interests of justice.” The language mandates judicial review of the manner in which the witness was prepared to testify. The *Military Rules of Evidence Manual* fails to address critical components of the final element. Factors such as the timing of when the documents were shown to the witness or the appearance of intentional abuse of the work product doctrine are key to determining whether the interests of justice are implicated.⁶³ If an unfair advantage was gained, justice requires disclosure, no matter the ordinary protections afforded the material used.⁶⁴ The *Military Rules of Evidence Manual* test is incomplete because it does not strike the necessary balance between the protections of the work product doctrine and the need for effective cross-examination found in the third element of the rule.

Based on the above, the most accurate and most complete analysis of an FRE 612 issue appears in *Nutramax Labs. Inc.* Therefore, when confronted with a potential MRE 612 issue, military practitioners would be well advised to follow the *Nutramax Labs. Inc.* test to frame the issue for the court.

IV. Litigating a Witness Coaching Issue

If counsel suspects that a witness has been improperly coached, care should be taken to ensure that the factual predicates can be established using the *Nutramax Labs. Inc.* test.⁶⁵ Recall that the first factual predicate is that the document was used to *refresh the witness’s memory*.⁶⁶ Asking the witness simple questions such as, “Why did the counsel show you the document?” or, “After reviewing the document, did you remember anything differently?” will help demonstrate that fact.

Next, counsel will want to ensure that the facts support a finding that the witness’s recollection was refreshed *for the purpose of testifying*.⁶⁷ Frequently, an opposing counsel will take the witness into the court room and prepare them with a “live fire” rehearsal. Establishing what took place during these sessions, to include what types of questions were asked and the timing of the session, will help establish the purpose.⁶⁸ Crystallizing the facts that establish the

documents were provided (1) to refresh memory and (2) for the purpose of testifying is critical. Without those predicates, the balancing test is never reached to determine if the interests of justice require disclosure.

Once the factual predicates are met, counsel should review the nine factors listed in *Nutramax Labs. Inc.*⁶⁹ The case for disclosure should be made by paying close attention to the timing of when items were shown to the witness, and any facts that demonstrate that the work product doctrine was used to gain a tactical advantage. Those factors will make the most compelling argument for production of the evidence.

Once counsel believes the facts support disclosure, care should be taken to ensure the opposing side is made aware of which document or documents are in issue. Counsel should also demand that the documents be preserved in the state in which they were shown to the witness.⁷⁰ The reason for the notice and demand to preserve is that, if those documents are subsequently destroyed or materially altered, the argument for an adverse inference instruction is significantly increased.⁷¹

An adverse inference instruction is a potential remedy for destruction of evidence issues in military courts.⁷² However, the limits of when destruction of evidence will trigger that remedy are underdeveloped in military law. Civilian courts have significantly addressed these issues, and most look favorably on claims for remedy when the opposition has given notice of what is in issue and a demand to preserve.⁷³ This is because subsequent destruction by the opposition represents an element of bad faith.⁷⁴ By borrowing from the civilian jurisprudence, using the same notice and demand procedure, counsel can strengthen the argument that the destruction of evidence instruction is appropriate, instructing the members that they may presume the evidence was

⁶³ SALTZBURG ET AL., *supra* note 59.

⁶⁴ *In re Doe*, 662 F.2d, 1073, 1079 (4th Cir. 1981).

⁶⁵ *See supra* Part III.C.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ A document shown to a witness several months before trial is less likely to be “for the purpose of testifying” than several days before trial.

⁶⁹ *Nutramax Labs. Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 469–70 (D. Md. 1998).

⁷⁰ A memorandum is suggested to document which pieces of evidence are believed to be the subject of a MRE 612 disclosure, and a demand should be made to preserve those documents. A sample memorandum can be found in the Appendix.

⁷¹ For a sample adverse inference instruction, see 3 FED. JURY PRAC. & INSTR. § 104:27 (6th ed.). “If you should find that a party willfully [suppressed] [hid] [destroyed] evidence in order to prevent its being presented in this trial, you may consider such [suppression] [hiding] [destruction] in determining what inferences to draw from the evidence or facts in the case.” *Id.*

⁷² *United States v. Ellis*, 57 M.J. 375, 380 (2002) (“An adverse inference instruction is an appropriate curative measure for improper destruction of evidence.”).

⁷³ James T. Killelea, *Spoilation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045 (2005). Destruction or hiding of evidence is also known as “spoliation” of evidence in many civil contexts. *Id.*

⁷⁴ *Id.*

destroyed because it was adverse to the destroying party's case.⁷⁵

Taking the above steps, counsel can be confident they have gathered the necessary facts to litigate a MRE 612 issue. Doing so will also ensure that a remedy will be available should the challenged material no longer exist. Documents are sometimes lost or destroyed, at least in the manner in which they were shown to a witness, when the opposing counsel uses working copies of statements to refresh memory. These working copies typically contain counsel's notes, highlights, and underlines to emphasize certain facts. Those types of documents frequently change as counsel continue to prepare for trial. Thus, exercising diligence in demanding their preservation is imperative.

V. How Rule 612 Affects the Documents Your Counsel Showed the Victim

Returning to the actions taken by your zealous young counsel, recall that he provided the victim a clean copy of her statement; showed the victim the statement of an eyewitness that had highlights, stars, underlines, and notes the counsel had made in the margin; and showed the victim a group of three to five pictures he selected from the thirty pictures the criminal investigators took. Regardless of whether this material would fall under the disclosure requirements of *Brady v. Maryland*,⁷⁶ or whether the defense would need to file a motion, it would be beneficial to recognize when improper witness preparation may have occurred and preserve the documents. Doing so will make a subsequent order by the court to disclose the pertinent documents easier to comply with. In addition, preserving the document makes the most tactical sense given the potential for an adverse inference instruction to remedy the destruction of evidence.⁷⁷

Applying the *Nutramax Labs. Inc.* test, the witness's own statement is likely not subject to disclosure under MRE 612; the statement of the eyewitness with the counsel's work product is likely to be subject to disclosure; and the selected photos fall into a gray area which may or may not be subject to disclosure.

⁷⁵ *Id.* If the document needed to test the witness's credibility and memory no longer exists, this instruction is really the only recourse to impeach the coached witness.

⁷⁶ 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment); *see also* Giglio v. United States, 405 U.S. 150 (1972) (finding "nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution"). *Id.*

⁷⁷ *See supra* Part IV.

A. The Victim's Own Statement Will Not Be Subject to Disclosure Under MRE 612

Of the three types of documents shown to the victim, the most benign is the clean copy—free from notes highlights and underlines—of the victim's own statement. This is because it includes no facts other than those the witness has already attested to. As discussed earlier, what constitutes proper preparation as opposed to coaching is largely a matter of opinion because the parameters of what is allowed have not been the subject of much judicial or legislative review.⁷⁸ However, providing a witness a clean copy of their own statement is a common practice⁷⁹ and is the type of necessary preparation that the court in *Nutramax Labs. Inc.* was referring to when they noted that "no competent counsel can afford to ignore reviewing with witnesses the documents which relate to critical issues."⁸⁰ The witness likely made the statement soon after the events in question, while they were fresh in the witness's mind; the statement contains facts known to the witness, such that there is no concern over tainting the witness with external facts; and the witness is going to be asked questions from both parties regarding the contents of the statement. Therefore, this type of witness preparation does not implicate the improper use of the work product doctrine that MRE 612 was enacted to combat.⁸¹ The opposing counsel will have already been provided a copy of the statement under Rule for Courts-Martial 701(a)(1)(C),⁸² so its content will be available for use on

⁷⁸ *See* RESTATEMENT, *supra* note 5, § 116.

⁷⁹ *See* Patricia J. Kerrigan, *Witness Preparation*, 30 TEX. TECH L. REV. 1367, 1379 (1999) (noting that every witness should be given a copy of any statement they have made); *In re Convergent Tech. Second Half 1984 Securities Lit.*, 122 F.R.D. 555, 566 (citing Fed. R. Civ. Pro. 26(b)(3), which requires counsel to furnish witnesses a copy of their statement prior to trial to prevent unfairness or embarrassment). *But see* Bennett L. Gersham, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 858 (2002) (stating that a witness should not be given their statement unless absolutely necessary).

⁸⁰ *Nutramax Labs. Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458 (D. Md. 1998). Specifically, the court noted:

However, where, as here, . . . counsel have analyzed [and] selected a population of "critical documents" relevant to case dispositive issues, a deposition question aimed at discovering what documents were reviewed to prepare for a deposition may draw an assertion of the work product doctrine, . . . it has been recognized that there is a clear conflict between Fed.R.Civ.P. 26(b)(3), which codifies the work product doctrine, and Fed.R.Evid. 612, which has been held to apply during depositions by virtue of Fed.R.Civ.P. 30(c).

Id. at 461.

⁸¹ *See In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y. 1880) (noting that there is little danger of crossing the line between extracting facts from a witness and pouring facts into a witness by providing them a "clean" copy of their own statement).

⁸² This rule specifically requires disclosure of "[a]ny sworn or signed statement relating to an offense charged in the case which is in the

cross-examination.

Looking at the factual predicates, the purpose of the meeting and the timing—the week before trial—are clearly for the purpose of testifying. Since the events occurred nearly a year ago, it would not be difficult to argue that the document refreshed the witness’s recollection. The question would then become, “do the interests of justice require disclosure?” It is on this third prong that the analysis fails. Though some factors weigh in favor of disclosure,⁸³ the fact that the document has likely been previously disclosed under the discovery rules and that there is no apparent abuse of the work product doctrine, a judge would not likely order a second disclosure.

B. The Eyewitness Statement, With Counsel’s Notes, Will Be Subject to Disclosure Under MRE 612

The next document is the statement of the eyewitness, with counsel’s notes and highlights, shown to the victim. This document squarely falls within the ambit of MRE 612 and a judge will likely order disclosure. Providing a witness with the statements of other witnesses or the notes of counsel is not a commonly accepted practice⁸⁴ and exceeds the bounds of fair preparation identified in *Nutramax Labs. Inc.*⁸⁵ In fact, that conduct falls into the type of activity that the court in *Berkey Photo* was concerned about.⁸⁶ In this case, the document had never been turned over to the opposition, at least not in the state in which it was shown to the victim. In addition, the document contained another witness’s views on what occurred, along with the views of counsel. There is a serious concern that the victim’s testimony may have been tainted by facts that are outside of the victim’s own personal knowledge. Providing the victim this type of document crosses the line between extracting facts from a witness and pouring facts in.⁸⁷ If the rationale behind FRE 612, and by extension MRE 612, is “to aid the search of credibility and memory,” then disclosure of this document certainly advances that objective.⁸⁸

possession of the trial counsel.” MCM, *supra* note 2, R.C.M. 701(a)(1)(C); *see also id.* R.C.M. 701(b)(1)(A) (defense witnesses).

⁸³ *See supra* Part III.D.1.b n.52 (factors such as the timing to the trial, importance of the witness, and who prepared the document would all be implicated).

⁸⁴ *See* Kerrigan, *supra* note 79 (discussing the parameters of commonly accepted witness preparation methods).

⁸⁵ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458 (D. Md. 1998).

⁸⁶ *Berkey Photo Inc v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (“[I]t is disquieting to posit that a party’s lawyer may ‘aid’ a witness with an item of work product and then prevent totally the access that might reveal and counteract the effects of such assistance.”).

⁸⁷ *In re Eldridge*, 82 N.Y. 161, 171-72 (Ct. App. N.Y., 1880).

⁸⁸ FED. R. EVID. 612 advisory committee’s notes.

Applying the *Nutramax Labs. Inc.* analysis, the eyewitness statement meets the factual predicates of the test. The victim was having trouble remembering key facts, according to your young counsel, so he took the step of showing her the eyewitness’s statement. This satisfies the requirement that the document was shown to the witness to refresh recollection.⁸⁹ In addition, given the timing of the meeting and its stated purpose, there is little doubt that this action was done for the purpose of testifying.⁹⁰

Finally, the interests of justice require disclosure⁹¹ under these facts. Victims are typically the most important witness to a case. The events happened almost one year ago, and the document is being shown to the victim seven days before trial. These facts weigh heavily in favor of disclosure.

In addition, the misuse of the work product doctrine in this instance is likely to sway the judge. The statement of the witness, with the notes, underlines, and highlights, reveals those work product details that the counsel believes are most important. Showing this document to the victim raises credible concern regarding the manipulation of the victim’s testimony because it contains some other witness’s account and the thoughts of counsel. This concern over work product abuse is especially true since the document in question—with the notes, underlines, and highlights—has never been provided to the opposition. The search of credibility and memory would be ill served by allowing the work product doctrine to protect this document. The best course of action is to preserve the document in the state in which it was shown to the witness.⁹²

C. The Selection of Certain Pictures Shown to the Victim Might Be Subject to Disclosure Under MRE 612

While the two previous scenarios are somewhat clear examples in the otherwise murky arena of witness preparation, the selection of particular photographs is less definitive. Just like the victim’s own statement, the photographs have probably already been turned over in discovery. There are work product concerns with allowing the opposition to see which particular photographs counsel has selected to review with the victim. Arguably, revealing those specific pictures would tell the opposition something about what the counsel felt was important. That emphasis would reveal something of the strategy or internal thought process of the opposition. This is a similar argument to the one found in the civil cases from the federal circuits dealing with the specific, critical pages selected from the

⁸⁹ *See supra* Part III.C.

⁹⁰ *See id.*

⁹¹ *See supra* Part III.D.

⁹² *See supra* Part IV.

voluminous documents provided in discovery to prepare a witness for testifying.⁹³ Here, there is a clear conflict between the need to test the victim's credibility and memory—does she remember what happened or was her testimony influenced by the pictures—and the work product doctrine's purpose of allowing counsel to prepare in secrecy.

Utilizing the *Nutramax Labs. Inc.* test, the likely result is unclear. Like the above documents, the factual predicates can probably be established based on the timing and purpose of this meeting with the victim.⁹⁴ The issue arises in determining whether the interests of justice require disclosure. While the victim is an important witness and the timing suggests disclosure is proper, there is far less concern of improper influence of the victim's testimony from merely reviewing a selection of photographs. Unlike the statement of some other witness baring the thoughts and emphasis of counsel, the photographs are neutral views of the scene. Going over the scene of the crime with the victim is a procedure that falls squarely within what the vast majority of practitioners would consider legitimate preparation for testimony.⁹⁵ Though the risk of improperly manufacturing testimony is low, there are some legitimate work product concerns in disclosing these documents.⁹⁶ Balancing those concerns with MRE 612's purpose of testing the witness's credibility and memory, the likely result is that disclosure will not be ordered. This is especially true considering that all of the pictures have invariably been produced in discovery. This would not preclude the opposition from asking the victim to identify what pictures she reviewed, but it would not result in an order to produce the specific pictures.

VI. What Is the Lesson?

Most young counsel do not understand what is allowed when conducting the critical task of preparing a witness to testify at trial. That fact should not be surprising as the parameters of witness preparation are poorly defined, and even seasoned professionals disagree on what is and is not permitted. Therefore, mistakes are likely to be made as young counsel gain experience in this arena.

When confronted with a possibility that a witness was coached, military justice managers on both sides of the issue should understand how MRE 612 operates to ensure that work product is not unnecessarily disclosed or that useful material is obtained for cross-examination. In addition, understanding the rule is imperative so that managers can properly teach counsel the parameters of proper witness preparation. Recognizing the confluence between the work product doctrine and MRE 612 will ensure that counsel will not inadvertently learn that improper preparation is not worth the cure.

⁹³ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 464–65 (D. Md. 1998).

⁹⁴ See *supra* Part III.C.

⁹⁵ See Kerrigan, *supra* note 79.

⁹⁶ The revelation of which photos counsel feel are most important arguably reveals something about the counsel's mental impressions, though this example highlights that the line can be fuzzy.

Appendix

Sample Notice and Demand to Preserve



DEPARTMENT OF THE ARMY
ORGANIZATION
STREET ADDRESS
CITY STATE ZIP

OFFICE SYMBOL

Date

MEMORANDUM FOR Defense Counsel

SUBJECT: Notice and Demand to Preserve Documents Used to Prepare a Witness to Testify

1. On (date), a pretrial interview occurred between members of the defense and (the witness). The purpose of the interview was to prepare the witness for (trial/Article 32 testimony). During this interview, the following document(s) were shown to the witness: (list documents).
2. The document(s) shown to the witness have had an impact on what the witness remembers. Based on my interview of the witness, justice requires disclosure of the document(s) to the government so that the witness may be examined regarding this impact. It is requested that the document(s) be turned over to the government in the same state in which they were shown to the witness, complete with any underlines, highlights, notes or any other work product that was on the document(s) when the witness reviewed it.
3. Please respond in writing. If you object to production of the document(s), you are hereby on notice of this demand that you preserve the document(s) in the same manner in which they were shown to the witness. Any objection will be litigated and the government demands the document(s) be preserved so that it can be reviewed in camera by the military judge.

JOHN R. SMITH
CPT, JA
Trial Counsel

New Developments

Administrative & Civil Law

Marchand v. GAO: The Next Butterbaugh?

On 27 December 2012, the Office of Compliance granted summary judgment in the case of *Marchand v. General Accountability Office*.¹ This decision overruled the Office of Personnel Management's (OPM's) narrow interpretation of the Federal Differential Pay Act.² Much like its predecessor, *Butterbaugh v. Department of Justice*, the *Marchand* decision found a Uniform Servicemember Employment and Reemployment Rights Act (USERRA) violation based upon an erroneous interpretation of a federal statute by OPM.³ And, like *Butterbaugh*, the *Marchand* decision will have implications for the federal government for years to come.⁴

In *Butterbaugh*, the issue before the court was an OPM interpretation of the federal statute granting fifteen days of paid military leave to federal government employees.⁵ The court found that the OPM had misinterpreted the Military Leave Act to require servicemembers to erroneously take additional leave days to cover military service, which constituted a USERRA violation. The OPM's narrow interpretation of the Military Leave Act caused many federal government employees to have to use military leave in conjunction with other types of leave to cover all periods of military duty. For example, Reserve Soldiers were forced to use military leave, annual leave, and/or leave without pay to account for absences from their federal government positions due to inactive duty training, annual training, and other types of military duty. Following the *Butterbaugh* decision, numerous federal employees qualified for compensation from their agencies for the wrongful use of annual and other types of leave to cover their military service.⁶ Although the *Butterbaugh* case was decided in 2003, the Department of Defense continues to receive so-

called "Butterbaugh Claims" to the present day,⁷ as USERRA violations have no statute of limitations.⁸

The *Butterbaugh* case underscores the danger involved when the OPM takes a narrow view of federal statutes associated with benefits for servicemembers.⁹ The statute at issue in *Marchand* was 5 U.S.C. § 5538(a).¹⁰ This provision provides, "[a]n employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled" to differential pay.¹¹ Further, under 10 U.S.C. § 101(a)(13)(B), a contingency operation is defined as one implicating a call or order to active duty "under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress."¹²

The OPM interpreted (and still interprets) the language found in § 5538(a) as requiring any call or order to active duty to be specifically referenced in § 101(a)(13)(B). For the OPM, the phrase "referred to in section 101(a)(13)(B)" literally means that § 101(a)(13)(B) must explicitly delineate the statute under which the order is issued for differential pay to apply.¹³ Therefore, in OPM's opinion, the final clause of § 101(a)(13)(B) ("or any other provision of law during a war or during a national emergency declared by the President or Congress") has no relevance with respect to differential pay.¹⁴

¹ See *Marchand v. General Accountability Office*, Case No. 12-GA-05 VT (27 Dec. 2012), available at <http://www.compliance.gov/wp-content/uploads/2013/05/Marchand-Order-12-27-2012.pdf>

² *Id.* at 3; 5 U.S.C. § 5538 (2013); see *infra* note 13 and accompanying text.

³ *Id.*; see also *Butterbaugh v. Dep't of Justice*, 336 F.2d 133, 1336 (Fed. Cir. 2003). The federal statute at issue in *Butterbaugh* was the Military Leave Act, 5 U.S.C. § 6323. *Id.*

⁴ *Id.*; see also *Garcia v. Dep't of Justice*, 2006 M.S.P.R. 29, 8 (2006); *Harper v. Dep't of the Navy*, 2006 M.S.P.R. 30, 6 (2006). The United States Merit Systems Protection Board (MSPB) found that under the Uniformed Services Employment and Reemployment Rights Act (USERRA), current and former servicemembers may seek restoration of improperly charged leave for the entire period of the misapplication of the military leave statute (1980 through 2003). *Id.*

⁵ See *Butterbaugh*, 336 F.2d 133, 136.

⁶ *Id.*

⁷ See DEF. FIN. & ACCOUNTING SERV., BUTTERBAUGH CASE, <http://www.dfas.mil/civilianemployees/butterbaughcase.html> (last visited May 7, 2014).

⁸ See *Garcia v. Dep't of Justice*, 2006 M.S.P.R. 29, 8 (2006); *Harper v. Dep't of the Navy*, 2006 M.S.P.R. 30, 6 (2006).

⁹ See *Marchand*, Case No. 12-GA-05 VT, at 3.

¹⁰ *Id.* at 2.

¹¹ 5 U.S.C. § 5538(a) (2013). Differential pay is defined as the amount of basic pay which would otherwise have been payable to an employee for a pay period if such employee's civilian employment with the federal government had not been interrupted by military service; it is the amount of such basic pay which exceeds the pay and allowances the employee actually receives for the military service. *Id.*

¹² 10 U.S.C. § 101(a)(13)(B) (2013).

¹³ See *Marchand*, Case No. 12-GA-05 VT, at 3; see also OFFICE OF PERS. MGMT., PAY AND LEAVE, <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=summary> (last visited May 20, 2014).

¹⁴ *Marchand*, Case No. 12-GA-05 VT., at 3.

The problem for the complainant Marchand was that he had been mobilized in 2011 in support of a contingency operation under 10 U.S.C. § 12301(d),¹⁵ the voluntary mobilization statute.¹⁶ Based on the aforementioned OPM interpretation of 5 U.S.C. § 5538(a), Marchand was excluded from receiving differential pay by his agency (the General Accounting Office) because 10 U.S.C. § 12301(d) was not explicitly mentioned as one of the authorities within the definition of a contingency operation found in 10 U.S.C. § 101(a)(13)(B).¹⁷

Marchand filed an action with the Office of Compliance, the Legislative Branch’s version of the Merit System Protection Board, seeking to challenge the OPM interpretation of § 5538(a).¹⁸ The Office of Compliance found the OPM interpretation overly narrow. Specifically, OPM’s disregard for the final phrase in § 101(a)(13)(B) (“or any other provision of law during a war or during a national emergency declared by the President or Congress”) violated the cannon against superfluity and was contrary to the will of Congress.¹⁹ It was undisputed that Marchand had been mobilized under a call or order to active duty in support of a contingency operation, albeit under 10 U.S.C. 12301(d).²⁰ Section 12301(d) was clearly within the meaning of “any other provision of law during a war or national emergency declared by the President or Congress.”²¹ Therefore, the Office of Compliance found that Marchand qualified for differential pay during his mobilization.²²

Because Marchand had been erroneously denied a benefit of employment—differential pay—that accrued due to his military service, such denial constituted a violation of USERRA.²³ Citing *Butterbaugh v. Department of Justice*, the Office of Compliance found OMB had violated USERRA when it applied the narrow OPM interpretation of 5 U.S.C. § 5538.²⁴

While the *Marchand* decision does not provide precedential value beyond the legislative branch, its holding is persuasive in that it establishes a reasonable interpretation of 5 U.S.C. § 5538 that will likely be adopted by subsequent judicial decisions.²⁵ Therefore, *Marchand* may become synonymous with *Butterbaugh* as a type of claim precipitated by an OPM rule that misinterprets the law.²⁶

—MAJ T. Scott Randall

¹⁵ *Id.* at 2.

¹⁶ *See generally* 10 U.S.C. § 12301(d) (2013).

¹⁷ *Marchand*, Case No. 12-GA-05 VT., at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² *Id.* at 4.

²³ *Id.* at 5. The discrimination analysis under USERRA for military-specific benefits is that where “the benefits are only granted to employees performing duties in the uniformed services, the question of whether the employee’s status was a substantial or motivating factor in the employer’s action is not applicable, as it is ‘self evident’ that the employee’s military service was a substantial or motivating factor.” *Id.* (citing *Haskins v. Dept’t of Navy*, 106 M.S.P.R. 616, 621–22 (2007)).

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.*

Rape Is Rape

How Denial, Distortion, and Victim Blaming Are Fueling a Hidden Acquaintance Rape Crisis

Reviewed by *Major Michael J. McDonald**

*The time has come for rape denial to become as unacceptable as Holocaust denial . . . There is only truth. And we must all tell the truth.*¹

I. Introduction

The Department of Defense reported that from October 2011 to September 2012, approximately 26,000 servicemembers experienced unwanted sexual contact.² While these statistics have left some doubtful about the prevalence of unwanted sexual contact in the military,³ they have also motivated our President⁴ and some members of our Congress⁵ to demand accountability and reform. The debate over what should or should not be done to counter sexual assault in society is not a new issue.⁶ On one side, there are those who would conduct surveys, create taskforces, and pass new laws in hopes that less sexual assaults would occur, more victims would come forward

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¹ JODY RAPHAEL, JD, *RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS* 194 (2013).

² U.S. DEP'T OF DEF., ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2012 19, fig.4 (Apr. 30, 2013), <http://s3.documentcloud.org/documents/697934/pentagon-report-on-sexual-assault-in-2012.pdf> [hereinafter *DoD ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2012*]. Based on a survey of servicemembers, the Department of Defense (DoD) has estimated that in fiscal year 2012, 26,000 servicemembers experienced unwanted sexual contact, and that 2,949 of these servicemembers reported sexual assault to DoD authorities. *Id.*

³ See, e.g., Lindsay L. Rodman, Op.-Ed., *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 19, 2013, § A, available at <http://online.wsj.com/article/SB10001424127887323582904578484941173658754.html> (critiquing statistics regarding the prevalence of unwanted sexual contact in the military because DoD statistics are based on a relatively small number of surveys received which are more likely to have been completed by victims of unwanted sexual assault). Others have made similar critiques of the Center for Disease Control (CDC) studies on sexual assault. See, e.g., Christina Hoff Sommers, *How the CDC Is Overstating Sexual Violence in the U.S.*, WASH. POST (Jan. 27, 2012), http://articles.washingtonpost.com/2012-01-27/opinions/35441276_1_sexual-violence-assaults-cdc (critiquing CDC statistics as being "wildly at odds with official crime statistics").

⁴ Craig Whitlock, *Abuse Cases Up in Military*, WASH. POST, May 18, 2013, at A15. In the wake of the DoD statistics, President Obama said he has "no tolerance for [sexual assault]." *Id.*

⁵ See, e.g., Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013). Among other things, this bill would limit the commander's authority to refer serious crimes to courts-martial by giving convening authority to certain senior independent military officers. Craig Whitlock, *Law Makers Demand Crackdown on Sex Assault in Military*, WASH. POST, June 4, 2013, http://www.washingtonpost.com/world/national-security/military-chiefs-balk-at-sex-assault-bill/2013/06/04/cd061cc4-cd1c-11e2-ac03-178510c9cc0a_story.html.

⁶ RAPHAEL, *supra*, note 1, at 4.

when they do occur, and more allegations of sexual assault would result in conviction. On the other side, we have those who view sexual assault as a crime much like any other, which can be adequately addressed by current laws, standard police enforcement, and the normal judicial process. This latter group would view surveys, taskforces, and new laws as superfluous. What is this debate really about? Certainly, it is not that some are against rape while others are in favor of it. Are we not all in favor of fewer occurrences of sexual assault?

While few authors have taken the time to analyze why there seems to be two sides to the issue of sexual assault, Jody Raphael attempts to do just that. This book review addresses the basics of Raphael's argument; it discusses the statistics upon which Raphael bases her argument; it shows that Raphael's actual message is "rape is real"; and it analyzes the countervailing concerns of the criminal justice system. This review concludes by providing thoughts on the application of this book to the military setting.

II. Raphael's Argument

In *Rape Is Rape*, Raphael aptly describes the history and psychology behind the sexual assault debate.⁷ She demonstrates that a large part of the debate centers on the prevalence of rape and the perceived credibility of rape prevalence statistics.⁸ A large part of *Rape Is Rape* is aimed at analyzing the psychology behind people whom Raphael calls "rape deniers"—people who do not believe that sexual assault is as prevalent as some statistics suggest.⁹ Raphael explains that "rape deniers" may also disbelieve victims' accounts of rape or believe that acquaintance rape is often just "bad sex" or the result of lowered inhibitions due to alcohol.¹⁰ In response to these denial strategies, Raphael cites to social science data demonstrating the frequency of acquaintance rape, and she shares victim accounts of acquaintance rape to show that acquaintance rape can

⁷ RAPHAEL, *supra*, note 1, at 41, 53. Notably, Raphael finds roots of rape denial in both feminist and conservative theory. *Id.* at 41–73. Some feminists on the one hand argue that rape is "an acceptable risk of sexual freedom" and "view the issue of acquaintance rape as a threat to women's sexual liberation." *Id.* at 41. Some conservatives denied a "rape epidemic," viewing the problem instead as an issue of "promiscuity." *Id.* at 53.

⁸ *Id.* at 23–29.

⁹ See generally *id.*

¹⁰ *Id.* at 53–54.

happen in a variety of settings to a variety of women.¹¹ Raphael states, “Any reaction to rape today must be to [the] accounts [of rape victims]—not to an idea of rape put forth by those somehow needing to minimize and deny rape.”¹²

III. The Statistics

Rape Is Rape provides critical information to any reader regarding the statistical prevalence of sexual assault in society. Raphael aims to dispel the idea that the statistics on rape prevalence are inflated and based on inaccurate data.¹³ *Rape Is Rape* does an outstanding job of explaining how the distortion of sexual assault statistics has fueled the arguments of “rape deniers.”¹⁴ Raphael fully addresses concerns of those who believe that social scientists use an expanded definition of rape in their studies, and she explains how such arguments have hindered the movement against sexual assault since the 1970s.¹⁵

Raphael contends that many rape deniers are mistakenly focused on definitional mistakes made in one decades-old study, and that they erroneously attribute these mistakes to all rape prevalence studies.¹⁶ In 1987, a social-science survey conducted by Mary Koss found that 27.5 percent of college-aged women had experienced sexual assault since the age of fourteen.¹⁷ That survey asked participants a series of questions, including whether the participants engaged in unwanted sexual intercourse due to psychological coercion.¹⁸ Many critics have challenged these and similar rape prevalence statistics,¹⁹ claiming that they must be based on an overly broad definition of rape.²⁰ Raphael shows that

more recent studies²¹ have segregated questions regarding forcible rape.²² Even when the definition of rape is limited to forcible penetration, these studies indicate that between 10 and 16 percent of American women report they have been victims of forcible sexual assault.²³

While *Rape Is Rape* addresses concerns of those who believe rape prevalence studies use overly broad definitions of rape, it ignores many other concerns regarding collection of data.²⁴ For example, *Rape Is Rape* generally ignores concerns²⁵ such as those posed by Captain Lindsay Rodman²⁶ in her article entitled *The Pentagon’s Bad Math on Sexual Assault*.²⁷ Rodman critiques statistics regarding the prevalence of unwanted sexual contact in the military presented in the U.S. Department of Defense Annual Report on Sexual Assault in the Military for Fiscal Year 2012 because these results are based on only 22,792 surveys received out of a total of 108,478 surveys sent.²⁸ According to Rodman, developing estimates based on surveys received is flawed because people who complete the surveys are more likely to have been the victim of unwanted sexual contact.²⁹ *Rape Is Rape* largely ignores this area of concern.³⁰ This failure may cause readers to question Raphael’s credibility and the credibility of the statistics she references.

¹¹ *Id.* at 86.

¹² *Id.* at 5.

¹³ *Id.* at 194.

¹⁴ *Id.* at 23–26.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 24 (citing Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, J. OF CONSULTING & CLINICAL PSYCHOL. 55, no. 2, at 168 (1987)). Mary Koss is a University of Arizona public health professor, well known for a 1987 study that first found that 25 percent of college women had experienced rape. Heather MacDonald, *The Campus Rape Myth*, 18 CITY JOURNAL 1 (Winter 2008), available at http://www.city-journal.org/2008/18_1_campus_rape.html.

¹⁸ RAPHAEL, *supra*, note 1, at 24.

¹⁹ See MacDonald, *supra* note 22 (citing a survey of University of Virginia sorority girls, which found that “only 23 percent of the subjects whom the survey characterized as rape victims felt that they had been raped” and a 200-campus rape study by the Department of Justice in which the alleged “victims . . . generally did not state that their victimization resulted in physical or emotional injuries.”).

²⁰ RAPHAEL, *supra*, note 1, at 24–26.

²¹ See, e.g., Dean G. Kilpatrick et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* (Charleston, SC: Medical University of South Carolina, 2007), 27, 44, available at www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf; MICHELLE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 18–19 (2010) (Atlanta GA: Nat’l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention) (finding that 12.3 percent of responding women had experienced forcible penetration within their lifetime), available at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

²² *Id.* at 83–86.

²³ *Id.* at 86.

²⁴ See *id.* at 24–26.

²⁵ See generally *id.* She briefly mentions these concerns as a type of “rape denial,” but does not seem to acknowledge them as a valid concern worth addressing. See *id.* at 24–26.

²⁶ Captain Lindsay Rodman, United States Marine Corps, is Deputy Legal Counsel in the Office of the Legal Advisor to the Chairman of the Joint Chiefs of Staff. *Captain Lindsay L. Rodman, USMC*, CENTER FOR A NEW AMERICAN SECURITY, <http://www.cnas.org/LindsayRodman>. She is on detail from headquarters Marine Corps, where she served at the Judge Advocate Division in the front office of the Staff Judge Advocate to the Commandant of the Marine Corps. Previously, she served as defense counsel and legal assistance attorney at the Legal Services Support Section, Combat Logistics Regiment-37 in Okinawa, Japan. She also served as the operational law attorney for 1st Marine Division (Forward) in Helmand, Afghanistan. Rodman was an associate at Arnold & Porter before joining the Marine Corps. She earned her B.A. in Mathematics from Duke University, her J.D. from Harvard Law School, and her Masters in Public Policy from the Kennedy School of Government. *Id.*

²⁷ See Rodman, *supra* note 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See RAPHAEL, *supra*, note 1, at 86.

IV. Rape is Real

While Raphael's message is valuable, her book is not exactly what it purports to be. As the title implies, Raphael believes society misunderstands the definition of rape, and that this misunderstanding fuels arguments made by "rape deniers."³¹ Raphael briefly discusses theories of rape denial which suggest that acquaintance rape is not "real rape" because it may not include physical force.³² To these deniers, Raphael sends a clear, but brief, message that "rape is rape."³³ However, a much more prominent message of her book is "rape is real."³⁴ All of the rape victim accounts³⁵ in the book involve physical force, and Raphael never discusses any definitional misunderstanding in depth.³⁶ Instead, Raphael's main focus is to educate the reader on the prevalence of rape in society.³⁷ Her statistics and her victim accounts are aimed at addressing those who believe that rape happens infrequently and only in certain scenarios—such as when alcohol is involved.³⁸ Raphael's misleading title and thesis contribute to a muddled message throughout the book. Readers who understand Raphael's main focus from the beginning of the book may come away with a clearer understanding of her message.

V. The Motives of "Rape Deniers"

As part of Raphael's attempt to analyze the psychology driving "rape deniers," she gives an informative account of the history of rape denial in both feminist and conservative circles.³⁹ While her information is valuable, she is not as persuasive as she could be for two reasons. First, by using the term "rape deniers," she alienates the same people she aims to educate. Second, Raphael fails to address valuable and legitimate reasons why certain acquaintance rape cases may not be pursued legally.⁴⁰

³¹ *Id.* at 4–5.

³² *Id.* at 53–58.

³³ *Id.* at 194.

³⁴ *See id.* at 83–87.

³⁵ Raphael tells the story of Tracey, who was forcibly raped by an acquaintance. *Id.* at 35–40. Although Tracey knew the man who raped her and "stopped crying, fighting, and wrestling," she also had a piece of her tongue bit off and was anally penetrated so forcefully that she bled and could not sit for days. *Id.* at 37–38. Raphael also tells the story of Nafissatou Diallo, a housekeeper at a luxury Manhattan hotel who was sexually assaulted by Dominique Strauss-Kahn, a hotel customer and managing director of the International Monetary Fund. *Id.* at 7. She entered the hotel room to clean when Struass-Kahn forced her to her knees and forced his penis into her mouth. *Id.*

³⁶ *See id.* at 7, 12, 37, 77, 80, 98.

³⁷ *See id.* at 4–5.

³⁸ *See id.* at 5.

³⁹ *Id.* at 41–73.

⁴⁰ *See generally id.*

Rape is indeed real, and many need to come to terms with their own biases to be effective responders to the rape crisis. Acknowledging the prevalence of rape and the accounts of victims is important, and nothing minimizes that importance. There are, however, other important values that may at times conflict with rape prosecutions. These countervailing concerns are not an excuse to avoid the difficult issues presented, but they also cannot be ignored. Unfortunately, Raphael does not fully understand some of these countervailing concerns.

Consider a criminal prosecutor, for example. Raphael seems to assume that prosecutors do not pursue rape cases because of perceived social biases that may influence a jury.⁴¹ She cites Kaethe Morris Hoffer, legal director of the Chicago Alliance Against Sexual Exploitation:

That the jury won't convict is not an acceptable, or legal, reason for a prosecutor to refrain from charging a perpetrator with rape. To do so is the same as saying to a black man who was almost killed by a posse and a hanging, "We totally believe you, but in this community we could never get a conviction, so we are not going to prosecute the lynch mob." Fundamentally, if a prosecutor believes a crime was committed, he or she must not allow social biases to prevent him or her from seeking justice. Prosecutors certainly ought to tell victims when they think a conviction would be unlikely—due to social biases that make people doubt what women report—but they should always be willing to put the offender on trial if the victim, understanding the difficulty of winning, nonetheless wants the rapist charged. . . . [G]irls and women do not receive the protection of the laws to which they are entitled, which invests men who rape to engage in rape with impunity.⁴²

While it is true that prosecutors should not make charging decisions based solely on the social bias of the jury, there are other legitimate reasons a prosecutor may be unable to proceed with an acquaintance rape case. A prosecutor may agree that "rape is rape" and that acquaintance rape is a pervasive problem, but may be limited in certain circumstances by the ability to prove the case beyond a reasonable doubt.⁴³ Unlike the case of a man

⁴¹ *See id.* at 183–85.

⁴² *Id.* at 184 (quoting Interview with Kaethe Morris Hoffer, Legal Dir., Chi. Alliance Against Sexual Exploitation (Apr. 16, 2010)).

⁴³ *See* MODEL CODE OF PROF'L CONDUCT R. 3.8 (a) (2011); *id.* R. 1 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations

who was almost killed and hung, a case of acquaintance rape may have no physical evidence or witnesses. While it is unfortunate, it is the secret and easily-disguised nature of this crime that “invite[s] men who rape to engage in rape with impunity.”⁴⁴ Raphael should acknowledge that prosecutors do not necessarily reject cases because they are “rape deniers.” A prosecutor may turn down a case simply because of important and valuable realities of our criminal justice system. If a prosecutor’s only evidence is the testimony of the rape victim, the presumption of innocence⁴⁵ ensures that conviction would be difficult even with an unbiased jury. When the presumption of innocence and a lack of evidence make conviction highly unlikely, it is responsible for a prosecutor to choose to use limited time and resources where convictions can be obtained. Raphael is correct in declaring that prosecutors should not “shrink from charging in difficult cases” or “back off filing charges for fear of public criticism.”⁴⁶ It is important to remember, however, that prosecutors who are overly zealous on any issue will risk violating their ethical and professional responsibilities.⁴⁷ In this respect, Raphael loses credibility and alienates certain readers.

Just as prosecutors may have valid and important reasons for not being overly zealous with respect to certain allegations of sexual assault, military members in the chain

to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence . . .”).

⁴⁴ *Id.* at 184.

⁴⁵ *Coffin v. United States*, 156 U.S. 432 (1985) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

⁴⁶ See RAPHAEL, *supra*, note 1, at 183.

⁴⁷ See MODEL CODE OF PROF’L CONDUCT R. 3.8 (2011). A prosecutor may choose to prosecute without knowing for certain that he can prove the case beyond a reasonable doubt and he does not need to predict what the jury will decide. However, a prosecutor who proceeds on a case with no physical or other strong evidence or with significant exculpatory evidence may be tempted to engage in ethical violations such as overreaching and withholding of evidence. While surely an extreme example, the case of prosecutor Mike Nifong and the Duke Lacrosse Players demonstrates this temptation perfectly. *Mike Nifong Disbarred Over Ethics Violations in Duke Lacrosse Case*, ASSOCIATED PRESS, June 17, 2007, <http://www.foxnews.com/story/2007/06/17/mike-nifong-disbarred-over-ethics-violations-in-duke-lacrosse-case/>. Nifong prosecuted three members of the Duke Lacrosse team based on allegations of rape made by an exotic dancer who attended one of their parties in March 2006. *Nifong: Offers Apology, Says No “Credible Evidence” of Crime in Lacrosse Case*, ASSOCIATED PRESS, July 26, 2007, <http://www.foxnews.com/story/2007/07/26/nifong-offers-apology-says-no-credible-evidence-crime-in-lacrosse-case/>. He continued to claim that a rape had occurred even after evidence mounted indicating that the defendants were innocent. Nifong was eventually disbarred. *Id.* The committee for the state bar characterized the prosecution as “selfish,” claiming that he did it to boost his chances of winning the election for district attorney. *Mike Nifong Disbarred Over Ethics Violations in Duke Lacrosse Case*, ASSOCIATED PRESS, June 17, 2007, <http://www.foxnews.com/story/2007/06/17/mike-nifong-disbarred-over-ethics-violations-in-duke-lacrosse-case/>. They found that he “committed ‘a clear case of intentional prosecutorial misconduct’ that involved ‘dishonesty, fraud, deceit and misrepresentation.’” *Id.*

of command may also have valid and important reasons for acting with restraint in the same circumstances. In the military context, those in the chain of command must consider their position and influence and ensure that they do not exert unlawful command influence⁴⁸ on the military justice process.⁴⁹ An example of this was seen recently in the reaction to President Obama’s remarks on sexual assault in the military.⁵⁰ In early May of 2013, President Obama stated to reporters in a speech regarding military sexual assault, “I don’t want just more speeches or awareness programs or training but, ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they’ve got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.”⁵¹ While his zealous advocacy for an end to sexual assault in the military is commendable, as the Commander-in-Chief, he is at the top of the chain of command, and his comments could amount to unlawful command influence on courts-martial.⁵²

⁴⁸ Unlawful Command Influence (UCI) is prohibited by Article 37(a) of the UCMJ, which provides:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

UCMJ art. 37(a) (2012). Unlawful command influence has been called a “mortal enemy of military justice.” See *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

⁴⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2012) [hereinafter MCM].

⁵⁰ Whitlock, *supra* note 4.

⁵¹ *Id.*

⁵² Jennifer Steinhaur, *Obama Words Complicating Military Trials*, N.Y. TIMES, July 14, 2013, at A19.

In at least a dozen sexual assault cases since the president’s remarks at the White House in May, judges and defense lawyers have said that Mr. Obama’s words as commander in chief amounted to ‘unlawful command influence,’ tainting trials as a result. Military law experts said that those cases were only the beginning and that the president’s remarks were certain to complicate almost all prosecutions for sexual assault.

These presidential remarks have caused service-wide concern that military commanders, judges, juries, and prosecutors will be pressured to make unjust decisions in sexual assault cases.⁵³ Because of this concern, the Secretary of Defense issued an ameliorative memorandum regarding the integrity of the military justice process to every military officer and enlisted member.⁵⁴ The memorandum explained that there are no expected outcomes in military justice cases and that each military justice case must be resolved on its own facts.⁵⁵ The President's remarks and the problem of unlawful command influence demonstrate an important influence on the way that military leaders can respond to sexual assault that Raphael does not consider.

The purpose of *Rape Is Rape*, however, is to educate the reader regarding the prevalence and reality of rape in our society.⁵⁶ In this respect, Raphael is successful. This mission is valuable and may help many to acknowledge and change biases they may have to individual claims of acquaintance rape. It is critical that police, prosecutors, judges, jurors, and commanders be capable of believing that acquaintance rape does exist. Unfortunately, because it fails to address the valid reasons behind why rape allegations are sometimes not pursued, *Rape Is Rape* again loses credibility and misses an important concern of many readers.

VI. Application to the Military

Given the increasing occurrence of unwanted sexual contact in today's military,⁵⁷ *Rape Is Rape* is a valuable read for any military member because it provides insight into the variety of ways in which rape occurs and the prevalence of the problem. While *Rape Is Rape* does not specifically address rape in the military context, its lessons are still relevant. Every servicemember must understand that rape is a pervasive and real problem in our society. By providing a history of the debate surrounding sexual assault, *Rape Is Rape* may also help servicemembers come to terms with any biases that affect the way they react to claims of acquaintance rape. *Rape Is Rape* will help military readers understand the truth about rape both in the military context and in society at large.⁵⁸

Id.

⁵³ *See id.*

⁵⁴ *See* Memorandum from Sec'y of Defense, to See Distribution, subject: The Integrity of the Military Justice Process (6 Aug. 2013), available at <http://online.wsj.com/public/resources/documents/081413hagel.pdf>.

⁵⁵ *Id.*

⁵⁶ *See generally* RAPHAEL, *supra*, note 1, at 4.

⁵⁷ For fiscal year 2010, the DoD estimated that 19,000 servicemembers had experienced unwanted sexual contact. U.S. DEP'T OF DEF., ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2010 90 Exh. 39 (March 2011) [hereinafter DOD ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2010], available at [http://servicewomen.org/SAPRO%20 Reports/ hDoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.p df](http://servicewomen.org/SAPRO%20Reports/hDoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf). These reports suggest a 35% increase in unwanted sexual contact over the two-year period between FY 2010 and FY 2012. Compare DOD ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2012, *supra* note 2, at 19 fig.4, with DOD ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY FY 2010, *supra* note 57, at 90 exh. 39. *See also* Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in the Military*, WASH. POST, May 7, 2013, available at http://articles.washingtonpost.com/2013-05-07/world/39078504_1_sexual-assault-offenders-kirsten-gillibrand.

⁵⁸ RAPHAEL, *supra*, note 1, at 194.

The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth¹

Reviewed by *Major Theodore B. Reiter**

Drones are the drug of choice . . . there is a seductive quality because of the feeling there are no risks. But when something is easier to use, you use it more. What is our standard . . . what [is] the threshold for the United States going to war?²

I. Introduction

With the World Trade Center in New York City in ruins, President George W. Bush signed an order that lifted the Central Intelligence Agency's (CIA) restriction on the use of lethal force. This order began the CIA's transformation from an "espionage service devoted to stealing the secrets of foreign governments" into "a killing machine . . . consumed with man hunting."³ Mark Mazzetti's new book, *The Way of the Knife*, unveils the "shadow war" that has taken place since 2001 in undeclared war zones around the world. He also highlights the two primary U.S. actors to advance those operations: the CIA and the Pentagon's Joint Special Operations Command (JSOC).⁴ With the wars in Afghanistan and Iraq already thoroughly covered, Mazzetti provides a glimpse into the less widely-known realm of lethal operations occurring elsewhere, to include in Pakistan, Yemen, Somalia, and the Philippines.⁵ Mazzetti focuses on the U.S. government's proliferation and increased use of unmanned aerial vehicles (drones)⁶ over the past decade;⁷

the negative ramifications for the CIA in their ability to collect and analyze intelligence because of their overemployment of drones; and the United States' involvement with Pakistan at the strategic and tactical level.

The book covers the years 2001 to 2012 and is organized by interweaving topics in lieu of by chronology, such as sections on the marriage between the CIA and Pakistan's Directorate for *Inter-Services Intelligence*, and then the unraveling of the relationship.⁸ Other chapters focus mainly on the use of the drones.⁹ Elsewhere, though, Mazzetti discusses multiple subjects in a single chapter despite the subjects having little connection to one another.¹⁰ Though it increases the ease of readability, such an unsystematic organization style disrupts the author's logical analysis. Notwithstanding this flaw, the book is manifestly well researched by an author experienced in both his subject-matter and published writing.¹¹ While Mazzetti's prior professional experience and published works have assisted him in completing the book, the lens by which he views these topics may have contributed to one of the main weaknesses of the *The Way of the Knife*: a lack of objectivity.

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¹ MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* (2013).

² Interview by Bob Schieffer with Mark Mazzetti, Author of *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY AND A WAR AT THE ENDS OF THE EARTH*, *Face the Nation* (CBS News television broadcast Apr. 7, 2013), <http://www.cbsnews.com/video/watch/?id=50144342n> (quote by Mark Mazzetti).

³ MAZZETTI, *supra* note 1, at 4.

⁴ *Id.* at 82, 128–35. The author mentions Pentagon and Central Intelligence Agency (CIA) operations in Iraq and Afghanistan as well, but to a limited degree and only to buttress explaining the "secret war." He also uses the terms "secret war" and "shadow war" interchangeably throughout the book.

⁵ *Id.* at 5. The author includes only one paragraph in the book on the secret war taking place in the Philippines, though U.S. Special Forces have had troops in the country since 2002. See Wyatt Olsen, *U.S. Troops See Terrorism Threat Diminish on Philippine Island of Mindanao*, STARS & STRIPES (Sept. 28, 2012), available at <http://www.stripes.com/news/us-troops-see-terrorism-threat-diminish-on-philippine-island-of-mindanao-1.191126>.

⁶ Throughout the book, the author uses the more colloquial term "drones" to describe unmanned aerial vehicles. For that reason, the term is also used throughout this review.

⁷ See generally U.S. DEP'T OF ARMY, REG. 95-23, UNMANNED AERIAL FLIGHT REGULATIONS (14 May 2004). The regulation provides that an unmanned aerial vehicle (UAV) is an "aircraft capable of flight beyond visual line of sight under remote or autonomous control for military

purposes, primarily for reconnaissance, surveillance, and other intelligence gathering missions." The aircraft may be used for aerial target identification, or "for the adjustment of artillery and mortar fire." In addition, UAVs may be equipped to carry weaponry. *Id.* at 39.

⁸ MAZZETTI, *supra* note 1, ch. 2, 14.

⁹ *Id.* ch. 5, 16.

¹⁰ At times the book feels akin to dozens of independent short stories that the author was only able to combine using weak mortar. As an example, a chapter that discusses how Joint Special Operations Command (JSOC) and the CIA began synchronizing their efforts also contains the following: the Pentagon not trusting CIA's intelligence; the lack of a standard operating procedure to obtain approval for lethal operations in countries outside of Iraq and Afghanistan; discussion of the CIA's interrogation techniques and detention operations; and the attempted outsourcing to Blackwater U.S.A. of lethal operations. *Id.* at 115–37.

¹¹ Mazzetti is currently a national security correspondent for the *New York Times*, and since 2001 has reported on military affairs for the *Los Angeles Times* and *U.S. News & World Report*. MARK MAZZETTI—*Biography*, <http://markmazzetti.net/biography/> (last visited May 14, 2014); see also Interview by Charlie Rose with Mark Mazzetti, *Bloomberg TV* (interview conducted on Apr. 10, 2013), available at <http://www.bloomberg.com/video/author-mazzetti-on-cia-book-the-way-of-the-knife-IodnNJ84RiyDhuQHgTNh~g.html> (information provided by Mark Mazzetti). In 2009, Mazzetti shared a Pulitzer Prize for "reporting on the intensifying violence in Pakistan and Afghanistan, and Washington's response thereto." Mazzetti also investigated and broke the story of the CIA's destruction of interrogation videotapes. MAZZETTI, *supra* note 1, biography on jacket.

II. The Secret War

The *Way of the Knife* is derived from a phrase used in 2010 by John Brennan, then Assistant to the President for Homeland Security and Counterterrorism, to describe President Obama's desired mechanism for waging war in the future. Brennan stated during a speech that "we will exercise force prudently, recognizing that we often need to use a scalpel, not a hammer to accomplish the mission."¹² In lieu of the "messy, costly wars that topple governments and require years of American occupation," the nation would now employ special operation forces and armed drones to defeat its enemies.¹³ The author declares without explanation that Brennan's "analogy suggests that this new kind of war is without costs or blunders—a surgery without complications."¹⁴ Mazzetti continues that the "way of the knife has created enemies just as it has obliterated them. [The secret war] has fomented resentment among former allies and at times contributed to instability even as it has attempted to bring order to chaos."¹⁵ Moreover, he writes that these secret operations have "lowered the bar for waging war, and [that] it is now easier for the U.S. to carry out killing operations at the ends of the earth than at any other time in its history."¹⁶ The clear inference is that Mazzetti disapproves of use of the "scalpel" to wage this war,¹⁷ and he supports that inference by discussing previous and ongoing military operations in undeclared war zones.

¹² MAZZETTI, *supra* note 1, at 5; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at the Center for Strategic and International Studies: Securing the Homeland by Renewing American Strength, Resilience and Values (May 26, 2010) [hereinafter Brennan Speech] (complete transcript is available at <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi>).

¹³ MAZZETTI, *supra* note 1, at 5.

¹⁴ *Id.* at 5–6. Interestingly, the subsequent sentences to the cited Brennan quote acknowledge that the secret war is not without collateral damage, and issues a warning of prudence when using force for that very reason. He states,

When we know of terrorists who are plotting attacks against us, we have a responsibility to take action to defend ourselves—and we will do so. At the same time, an action that eliminates a single terrorist, but causes civilian casualties, can, in fact, inflame local populations and create far more problems—a tactical success, but a strategic failure. So we need to ensure that our actions are more precise and more accurate than ever before. This is something the President not only expects, but demands.

Brennan Speech, *supra* note 12 (quote by John Brennan).

¹⁵ MAZZETTI, *supra* note 1, at 6.

¹⁶ *Id.*

¹⁷ For another book review that draws the same conclusion on this point, see Richard T. Willing, *The Way of the Knife*, *Studies in Intelligence*, vol. 57, no. 3 (Sept. 2013), available at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-57-no-3/pdfs/Studies%20in%20Intelligence_57-3%20Sep2013.pdf.

III. The Angry Bird¹⁸

As the primary means of carrying out the secret war, substantial attention is afforded to the U.S. government's use of drones in various Middle Eastern countries. Mazzetti provides an insightful explanation on early drone research and development. The military made technological advances in drone flight in the 1990s, but the platform still lacked the ability to fire a weapon at that time.¹⁹ In September 2000, when the CIA began flying drones in Afghanistan, it quickly became apparent a weaponized version was needed after one of the flights spotted Osama bin Laden at a training facility. Even if the President had wanted to kill Osama bin Laden at that time, he was unable to because of a lack of capability.²⁰ Moreover, pre-9/11, there was little appetite for covert operations. Neither the President nor the CIA felt confident in employing such tactics after President Ford rescinded the authority to conduct lethal operations in the 1970s.²¹

But after September 2001, "thorny questions about assassination, covert action, and the proper use of the CIA in hunting America's enemies were quickly swept aside" and the Nation fully embraced its new "ultimate weapon for a secret war": the drone.²² Of interest to judge advocates, the author discusses the legalities and morality of using this weapon outside of declared war zones. To highlight this issue, Mazzetti discusses the use of the drone inside Yemen to kill "the renegade American cleric," Anwar al-Awlaki,²³

¹⁸ The Angry Bird is the title of chapter 5, which discusses drone development and implementation.

¹⁹ MAZZETTI, *supra* note 1, at 91.

²⁰ *Id.* at 93; see *The Central Intelligence Agency's 9/11 File*, National Security Archive Electronic Briefing Book No. 381 (Barbara Elias-Sanborn ed., Jun. 19, 2012), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB381/>. The declassified CIA documents provide that "[t]wice in the fall of 2000, the Predator [drones] observed an individual most likely to be [Osama] bin Laden; however, [the CIA] had no way at the time to react to this information." Furthermore, "American unmanned aerial vehicles did not have sufficient weapons capabilities at the time . . . to fire on the suspect using the UAV." *Id.*

²¹ MAZZETTI, *supra* note 1, at 9, 88–94. Regarding this point, the author writes, "[By] the late 1990s, [a] generation of CIA officers, who had jointed the agency after the revelations of the Church Committee and President Ford's ban on assassinations, had ascended to leadership positions at Langley." As a result, "the agency's paramilitary branch had been allowed to wither . . . [and pre-9/11, the] CIA was even divided about whether it could justifiably kill Osama bin Laden." *Id.* at 88.

²² *Id.* at 99.

²³ Born in New Mexico, Anwar al-Awlaki was a preacher "who had evolved from a peddler of Internet hatred to a senior operative in Al Qaeda's branch in Yemen." Mark Mazzetti, Charlie Savage, & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?_r=0. Coming to the Federal Bureau of Investigation's attention in 1999, Awlaki was questioned after the September 2001 attacks for his associations with three of the airplane hijackers. He achieved

in lieu of “capturing him or bringing him to trial.”²⁴ The author is also concerned that the CIA and JSOC (at least in Yemen) maintain independent kill lists and are “carrying out nearly the exact same mission.”²⁵ Lastly, he is uneasy about the ad hoc nature of the killings. At the time of the book’s publication, the U.S. government had not yet produced a written national level guideline for the use of lethal force outside of declared war zones.²⁶ It appeared President Obama shared the author’s concern. Recently, he approved what is colloquially called “the drone playbook,” a classified policy that “institutionalizes the Administration’s exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets.”²⁷

Mazzetti concludes that drones have changed the nature of war, primarily because we can “flex American muscle without putting American lives at risk,” and, therefore, the “bar for [waging] war had been lowered.”²⁸ The author’s implication is that such technological advances used in this manner are detrimental to U.S. interests.²⁹ Mazzetti extends

international attention in 2009 when U.S. Army Major Nidal Malik Hasan killed thirteen people at Fort Hood, Texas. Though Awlaki had not directed Major Hasan to act, the two had exchanged e-mails beforehand, and Awlaki encouraged such actions following the shooting. Also in 2009, Awlaki personally directed and aided Nigerian-born Umar Farouk Abdulmutallab to “blow up an airliner as it approached Detroit.” Mr. Awlaki subsequently increased his involvement with terrorist attacks, “including the attempted car bombing of Times Square in May 2010 by Faisal Shahzad . . . and the attempted bombing by Al Qaeda in the Arabian Peninsula of cargo planes bound for the United States that October.” *Id.* Culminating years of intensive intelligence work, in September 2011 the CIA eliminated Awlaki in Yemen by missiles fired from drones. The legal debate concerning whether it was lawful under international and domestic law to kill a U.S. citizen in such a manner continues to the present day.

²⁴ MAZZETTI, *supra* note 1, at 302–10.

²⁵ *Id.* at 310–14. As evidence of the supposed dysfunction associated with two organizations running lethal drone operations, the author cites to the accidental death by a JSOC drone of al-Awlaki’s “sixteen-year-old Denver-born son” in Yemen, who died two weeks after his father. *Id.* at 311–12. But the articulated analysis of exactly how having both organizations running intelligence and lethal operations resulted in an accidental death is absent, and is one more example of how the author submits conclusions without the desired analysis.

²⁶ Interview by Jon Stewart with Mark Mazzetti, *The Daily Show with Jon Stewart* (Comedy Central broadcast Apr. 18, 2013), available at <http://www.thedailyshow.com/watch/thu-april-18-2013/mark-mazzetti> (information provided by Mark Mazzetti).

²⁷ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to The Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate (May 22, 2013), available at http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-letter.html?_r=0; see also Michael Crowley, *Holder: Obama’s New Drone-Strike ‘Playbook’ Has Arrived*, TIME (May 22, 2013), available at <http://swampland.time.com/2013/05/22/holder-obamas-new-drone-strike-playbook-has-arrived/>.

²⁸ MAZZETTI, *supra* note 1, at 99–100.

²⁹ By only offering one side of the argument without acknowledging the benefits to the U.S. government in its use of drones, the reader is left with the impression that Mazzetti lacks objectivity in addressing the debate surrounding use of these weapons. A counter-argument is that the United

the potential harm as well to the CIA, that their covert targeted killing program has undermined their ability to act as the premier national intelligence collection agency.

IV. The CIA’s Atrophy

The author clearly rejects the concept that the CIA should be involved in lethal operations, arguing that, to a large degree, they have abandoned their traditional mission of collecting national-level intelligence. He states the agency was “established with a relatively simple mission: collect and analyze intelligence so that American presidents could know each day about the various threats facing the United States.”³⁰ Finding the “opportunity costs of a muscle-bound CIA . . . evident,” he cites as support the agency’s failure to know North Korea’s Kim Jong Il had died before the rest of the world,³¹ the attack on the Libyan diplomatic compound,³² and the Arab Spring.³³

States is accomplishing the same mission using fewer troops and with a smaller foreign footprint. Another is that lethal drone operations are preventing future September 2001 attacks. As an example, before 9/11 and before the CIA had armed drones, a drone spotted Osama bin Laden in Afghanistan. The CIA lacked the ability to eliminate him using available resources. *Id.* at 93–94. An argument is available that the CIA may have prevented the attacks of September 2001 had they possessed armed drones at that time.

³⁰ *Id.* at 44.

³¹ *Id.* at 315; see also Jonathan Marcus, *Kim Jong-il Death: Did U.S. Intelligence Fail?*, BBC NEWS (Dec. 21, 2011), <http://www.bbc.com/news/world-asia-16287506> (providing that “U.S. analysts were still uncertain of Kim Jong-il’s death some 48 hours after his demise”).

³² After the fall of Muammar Gaddafi from power in Libya, the CIA had established a small base in an attempt to prevent “Gaddafi’s arsenal of shoulder-fired missiles from getting into the hands of the militant groups.” On 11 September 2012, the CIA operatives received “a frantic call from the American diplomatic compound just a mile away.” MAZZETTI, *supra* note 1, at 316. Though responding immediately, they arrived too late to save the life of Ambassador J. Christopher Stevens. The CIA operatives departed the scene and returned to the CIA base, which soon also fell under armed attack. All told, four Americans died during the incident. Regarding the attack and citing the “decade-long pivot toward paramilitary operations,” Mazzetti states that “the attack had, quite literally, blinded the CIA inside Libya.” *Id.* at 317.

³³ In December 2010, a Tunisian street vendor set himself on fire in protest. His act “unleashed a wave of anger about poverty, unemployment and repression that built into nationwide protests across the Middle East and North Africa—in Tunisia, Egypt, Yemen, Bahrain, Libya and Syria—that became known as the Arab Spring.” Marie-Louise Gumuchian & Laura Smith-Spark, *Arab Spring Three Years On*, CNN (Mar. 15, 2014), <http://www.cnn.com/2014/03/14/world/meast/arab-spring-three-years/>. The events caught the CIA “flat-footed” because they did not have enough spies doing actual spying . . . whose job it was to collect intelligence.” The CIA lacked enough spies because “both President George W. Bush and Barack Obama had decided that hunting and killing terrorists should be the agency’s top priority.” MAZZETTI, *supra* note 1, at 253–54. The author’s argument is potentially undermined by pre-September 2001 CIA intelligence failures, to include Operation Eagle Claw, or, for that matter, the attacks on 11 September 2001. *Id.* at 69.

Furthermore, Mazzetti argues that the agency's use of drones has "made the CIA the villain in countries like Pakistan, where it should be the spy agency's job to nurture relationships for the purpose of gathering intelligence."³⁴ Appropriately so, he debates whether the agency's excitement for targeted killing is diminishing its ability to provide unbiased analysis on "broader subjects like the level of support al Qaeda [has] in the Muslim world," or whether our military operations in the Middle East are "radicalizing a new generation of militants."³⁵ Finally, he argues that the CIA's intelligence capabilities have atrophied because of a "decade-long pivot toward paramilitary operations." This pivot created "a generation of CIA officers" who "have *only* experienced man hunting and killing."³⁶ New agents have "felt more of the adrenaline rush [of killing] than the patient, 'gentle' work of intelligence-gathering and espionage."³⁷ For these reasons, the author advances the legitimate argument that the CIA should extract itself from targeted killings and return to intelligence duties. This debate about the CIA's proper role continues to the present.³⁸

V. A Missed Opportunity

The author's clearly discernible and overly repeated thesis is that since 2001, the "lines between soldiers and spies" have blurred, with the CIA taking on "tasks traditionally associated with the military," and the Pentagon expanding into the CIA's human intelligence operations.³⁹ Disapproving of this fact, Mazzetti constructs his at times shaky conclusions with nefarious tones,⁴⁰ instead of providing the more rational reason for why such a blurring occurred during the decade-long war. The fact of the matter is that the blurring occurred because of practical considerations, including the organizations having to operate under different legal authorities and the difficulty of engaging in lethal operations in foreign countries.⁴¹ These

³⁴ *Id.* at 318.

³⁵ *Id.* at 14.

³⁶ *Id.* at 318.

³⁷ *Id.*

³⁸ See Ken Dilanian, *Debate Grows Over Proposal for CIA to Turn Over Drones to Pentagon*, L.A. TIMES (May 11, 2014), <http://www.latimes.com/world/middleeast/la-fg-yemen-drones-20140511-story.html> (discussing "the White House proposal for the CIA to eventually turn over its armed drones and targeted killing program to the military").

³⁹ MAZZETTI, *supra* note 1, at 4–5, 314.

⁴⁰ For example, in describing Raymond Davis's detention in Pakistan in 2011, the author states, "the bloody affair seemed to confirm all the conspiracies . . . in Pakistan: that the United States had sent a vast secret army to Pakistan, men who sowed chaos and violence as part of a covert American war in the country." *Id.* at 4.

⁴¹ *Id.* at 76–77, 286–87. The author spends too little time describing these authorities, which establish the basic legal foundation for the CIA and Pentagon to wage the secret war; he assumes the reader already understands

issues led both the CIA and the Pentagon to develop overlapping intelligence and kinetic capabilities in order to accomplish their missions.⁴²

Mazzetti disapproves of the U.S. government's use of drones for lethal operations in undeclared war zones.⁴³ But he chooses to raise a problem without offering solutions. While drone use may be negatively impacting U.S. interests around the world, as Mazzetti claims, what are the alternatives? Does he propose that every lethal drone strike is publicly debated before the missile is fired? Does he desire a law enforcement construct in lieu of one centered on the law of armed conflict, such as was used pre-9/11? Does the author suggest that the United States is better served by deploying thousands of U.S. military members to occupy territory in places like Pakistan, Somalia, and Yemen, in lieu of using special operators and drones? How does the United States continue to remain on the offensive to keep the Nation's enemies in a reactionary, depleted condition of offensive capability without JSOC and the CIA engaging in such actions?

The author raises a number of questions worthy of consideration for judge advocates. For example, on the topic of the morality of killing in countries outside declared war zones, why does there exist a "distinction between killing people from a distance using an armed drone and training humans to do the killing themselves?"⁴⁴ Or whether a program of targeted killing, conducted without judicial oversight or public scrutiny, is consistent with American interests and values?⁴⁵ Lastly, what is the scope of responsibility the U.S. government wishes to entrust to private contractors, if any, to participate in U.S. lethal foreign engagements?⁴⁶

these concepts. For an explanation of the U.S. Code Title 10 and Title 50 interaction, see Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. OF NAT'L SECURITY LAW & POL'Y 539 (2012), available at <http://jnslp.com/wp-content/uploads/2012/01/Military-Intelligence-Convergence-and-the-Law-of-the-Title-10Title-50-Debate.pdf> (discussing the convergence of military and intelligence operations since September 2011).

⁴² See generally MAZZETTI, *supra* note 1, at 66–68, 115–17.

⁴³ For a contrasting viewpoint on the use of drones, see Lieutenant Colonel Shane R. Reeves & Major William J. Johnson, *Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?*, ARMY LAW., Apr. 2014, at 25.

⁴⁴ MAZZETTI, *supra* note 1, at 125.

⁴⁵ *Id.* at 319; see also Steve Coll, *Remote Control: Our Drone Delusion*, NEW YORKER, May 6, 2013, available at http://www.newyorker.com/arts/critics/books/2013/05/06/130506crbo_books_coll.

⁴⁶ MAZZETTI, *supra* note 1, at 122–25.

VI. Conclusion

The Way of the Knife is a well-researched, interesting, and timely book concerning the United States' shadow war taking place in countries around the world. To form an opinion on how the nation should move forward on such matters, one must understand how we first arrived in such a predicament. Mazzetti successfully describes the political, military, and legal background behind the necessity for the secret war, to include the tumultuous and often times frustrating relationship between agencies of the United States and Pakistan. That compilation of relevant information is the book's primary value, and it is worth reading for this reason alone. Regardless of criticisms, readers should also bestow a certain degree of deference to the author: he notes, "[it] is a great challenge to write an account of an ongoing war that, at least officially, remains a secret."⁴⁷ Overall, Mazzetti tackles this significant challenge well.

Unfortunately for the judge advocate or student of international relations, this book will only provide one small piece of a very large puzzle. Quickly drawn conclusions, a lack of counter-arguments and the resultant analysis,⁴⁸ along with an absence of recommendations on how to appropriately use force in the secret war, leaves the reader unsure of alternatives to these dilemmas. Contrary to his intent, a reader armed with the information provided in the book may reasonably extract the opinion that the United States has evolved its capabilities to accomplish a military mission using a smaller, more lethal force, the effect of which is to place fewer U.S. citizens in harm's way. Those studying these issues will have to look elsewhere to fully grasp the pros and cons of the United States' continued use of drones in undeclared war zones, the CIA's role in foreign affairs, and our perpetuation of the secret war.

⁴⁷ *Id.* at 335.

⁴⁸ Any counter-arguments the author does provide are quickly dismissed, such as when Mazzetti asserts that "some senior CIA officials speak with pride about how the drone strikes in Pakistan have decimated al Qaeda . . . and many believe that the drone program is the most effective cover-action program in CIA history." *Id.* at 318. He then immediately returns to the negatives of drone use; therefore, readers should look elsewhere for the multiple military advantages of utilizing drones.

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 TJAGLCS CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

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

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

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

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

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

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

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

2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

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

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

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

3. Civilian-Sponsored CLE Institutions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) FLEP students;

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

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

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

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

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

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

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

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

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

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

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

3. Additional Materials of Interest

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

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

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

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

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