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The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory.

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ARTICLE

THE STRANGE CASE OF LIEUTENANT WADDELL: HOW OVERLY RESTRICTIVE RULES OF ENGAGEMENT ADVERSELY IMPACT THE AMERICAN WAR FIGHTER AND UNDERMINE MILITARY VICTORY

JEFFREY F. ADDICOTT*

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I. INTRODUCTION

“Don’t fire until you see the whites of their eyes.”¹
Unknown American Officer during the Battle of Bunker Hill,
June 17, 1775

Since the start of the “War on Terror”² in 2001, the United States has engaged in two major military actions—Iraq³ and Afghanistan.⁴ In those

1. PAUL LOCKHART, *THE WHITES OF THEIR EYES: BUNKER HILL, THE FIRST AMERICAN ARMY, AND THE EMERGENCE OF GEORGE WASHINGTON* 280 (2011). This quote is attributable to an American military officer at the Battle of Bunker Hill during the War for American Independence. Nevertheless, there is some debate concerning exactly which American officer uttered the famous order. Historians have narrowed the possibilities to Colonel William Prescott, whose orders were to defend Bunker Hill until relieved; Colonel John Stark, who correctly predicted the British would attempt to flank the American forces at Bunker Hill; and General Israel Putnam, the actual commander of the American forces situated at Bunker Hill. *See id.* (attributing these words to all three officers). *See generally* SAMUEL ADAMS DRAKE, *BUNKER HILL: THE STORY TOLD IN LETTERS FROM THE BATTLEFIELD BY BRITISH OFFICERS ENGAGED 15–22, 25–27, 31–34* (Boston, Nichols & Hall 1875) (describing the Battle of Bunker Hill from the vantage point of various British officers).

2. The phrase “War on Terror” has been used both as a metaphor to describe a general conflict against all radical Islamic international terrorist groups and to describe the combat operations against the Taliban in 2001 and Saddam Hussein in 2003. The more precise use of the term is to describe the ongoing international armed conflict between the United States of America and the “Taliban, [al Qaeda], or associated forces.” Military Commissions Act of 2006, 10 U.S.C. § 948a(1)(A)(i) (2006). One of the clearest indications of the Congressional authorization for war and for the use of the law of war, the Military Commissions Act identifies an “unlawful enemy combatant” as:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id. For an overview of the phrase “War on Terror” and its many uses see Jeffrey F. Addicott, *Essay: Efficacy of the Obama Policies to Combat Al-Qaeda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 344–48 (2010).

3. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498, 1501 (codified at 50 U.S.C. § 1541 (2006)) (authorizing the President of the United States to use force in Iraq after finding that Iraq posed a continuing threat to national security). The Authorization cited many factors to justify the use of military force against Iraq, including alleged stockpiling of weapons of mass destruction and programs to develop such weapons in violation of applicable U.N. sanctions. These acts posed a “threat to the national security of the United States,” in tandem with Iraq’s “capability and willingness to use weapons of mass destruction against other nations and its own people.” *Id.* at 1498–99.

4. *See* Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) (recognizing the President’s authority to deter terroristic threats).

conflicts, the United States lost more than 6,000 American lives, mostly in combat operations.⁵ The war in Iraq is now completely at an end.⁶ Meanwhile, the war in Afghanistan continues, albeit in the primary capacity of a backward action to withdraw coalition forces.⁷ As Afghan forces take responsibility for their own national security, insurgent groups have stepped up attacks across the region in order to regain lost ground and consolidate power in areas they control.⁸ Undoubtedly, Afghanistan will quickly revert to its pre-9/11 configuration of competing tribal rivalries, criminal syndicates, and as a safe haven for any number of radical Islamic terrorist groups.⁹

A student of history cannot fail to address the issue of how the United States failed so miserably in Afghanistan. While there are many facets to this question, one that directly contributed to the failure was the self-imposed so-called “Rules of Engagement” (ROE).

In tandem with the strict mandates associated with the law of war, all Western democracies, including the United States, self-impose ROE as restrictive additions to the law of war.¹⁰ These ROE are designed to

5. See Amy Roberts & Lindsey Knight, *By the Numbers: Memorial Day and Veterans*, CNN POLITICS (May 23, 2012, 7:02 PM), <http://www.cnn.com/2012/05/25/politics/numbers-veterans-memorial-day> (recounting the deaths of U.S. troops in Afghanistan and Iraq). The actual period of a state of international armed conflict in both military engagements was measured in months. The military campaign against the Taliban started in October 2001. *US Military Campaigns in Iraq and Afghanistan Cost More Than USD 1 Trillion: Report*, RAWA NEWS (June 10, 2010), <http://www.rawa.org/temp/runews/2010/06/10/us-military-campaigns-in-iraq-and-afghanistan-cost-more-than-1-trillion-report.html>; President George W. Bush, Address to the Nation on Military Strikes in Afghanistan (Oct. 7, 2001) (transcript available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.htm). The military campaign against Saddam Hussein’s Iraq began in March 2003, and President Bush declared an end to major combat operations in Iraq in May. *Bush Declares Victory in Iraq*, BBC NEWS (May 2, 2003, 10:16 AM), <http://news.bbc.co.uk/2/hi/2989459.stm>; *US Military Campaigns in Iraq and Afghanistan Cost More Than USD 1 Trillion: Report*, RAWA NEWS (June 10, 2010), <http://www.rawa.org/temp/runews/2010/06/10/us-military-campaigns-in-iraq-and-afghanistan-cost-more-than-1-trillion-report.html>.

6. John T. Bennett, *With a Signature, U.S. War in Iraq is Over*, DEFCON HILL: THE HILL’S DEF. BLOG (Dec. 18, 2011, 1:03 PM), <http://thehill.com/blogs/defcon-hill/operations/200139-with-a-signature-iraq-war-is-over>.

7. See Margherita Stancati, *Afghan Militants Attack Officials*, WALL ST. J., Jan. 28, 2013, at A16 (lamenting the increase in violence as U.S. troops withdraw from Afghanistan).

8. See *id.* (fearing that recent attacks in Afghanistan evidence the increased control of the Taliban in the area).

9. See Paul Szoldra, *Marine: Strict Rules of Engagement Are Killing More Americans Than Enemy in This Lost War*, BUS. INSIDER (Aug. 24, 2012, 3:05 PM), <http://www.businessinsider.com/one-marines-views-on-afghanistan-2012-8> (emphasizing the likelihood that withdrawal from Afghanistan will leave the nation in ruins).

10. See generally JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 23–28 (6th ed. 2011) (explaining the United Nations’ application of the law of war).

further limit the application of the use of force in combat apart from the law of war.¹¹ In both Iraq and Afghanistan, the United States promulgated numerous ROE to further limit the use of force associated with combat operations.¹² Furthermore, ROE have been changed many times over the years as dictated by political considerations.¹³ Indeed, as the fighting in Afghanistan continues, ROE are still subject to constant revision.¹⁴ While the efficacy of ROE can be argued as a matter of premise, it appears certain that some of the ROE promulgated are simply patronizing in nature, and their overbroad restrictions on the use of force have directly contributed to large numbers of American casualties.¹⁵ For the sake of distinction, this paper will refer to this category of ROE as “overly restrictive.”¹⁶

Unlike the law of war, which is static in nature until revised by international treaty or customary practice, ROE can be changed at any time based on political or policy objectives.¹⁷ While the rule of law provisions related to the law of war reflect fundamental concepts of

11. The Department of Defense defines ROE as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” J. CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 236–37 (Nov. 8, 2010, as amended through Oct. 15, 2013), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

12. See Andrew Tilghman, *Close-Air Support Curtailed*, MARINE CORPS TIMES, June 25, 2012, at 8 (discussing the ROE restrictions issued to U.S. troops in 2012).

13. See Dan Lamothe, *Congress to Scrutinize Rules of Engagement*, ARMY TIMES (Sept. 15, 2010, 8:41 PM), <http://www.armytimes.com/article/20100915/NEWS/9150311/Congress-scrutinize-rules-engagement> (recounting the continuing scrutiny of the ROE since July 2009 when Gen. Stanley McChrystal directed “leaders at all levels to scrutinize and limit the use of force”).

14. See Andrew Tilghman, *Close-Air Support Curtailed*, MARINE CORPS TIMES, June 25, 2012, at 8 (comparing multiple changes in the restrictive nature of the ROE since 2009).

15. See Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 859–62 (2008) (explaining that adherence to ROE led to soldiers dying based on the formulaic application and interpretations of ROE).

16. See LTC Stephen M. Fimple, Rules—In a Knife Fight? A Study of Rules of Engagement 17 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (advocating that “[r]ules of engagement cannot bind commander’s hands”). Supplemental ROE delegated to subordinate commanders are considered restrictive, in that they limit what service members may or may not do while in combat. INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 78 (2012). For an example of a ROE card, and what may be considered “overly restrictive ROE,” see the OPERATIONAL LAW HANDBOOK. *Id.* at 100–01. Examples of overly restrictive ROE from Iraq and Afghanistan are difficult to provide as they are classified and have not been released to the public.

17. See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 816–18 (2008) (explaining the flexible nature of ROE and applying the rules to a hypothetical example based on events during the 1991 Gulf War).

human behavior that comport with universal moral values—do not kill civilians, do not kill enemies who surrender, do not destroy civilian property, etc.—ROE address restrictions on behavior that are not necessarily common sense.¹⁸ In many instances, the behavior prohibited by a rule of engagement is extremely subtle and invariably produces random outcomes.¹⁹ Micromanaging the otherwise lawful use of force under the law of war, as ROE require, can result in confusion on the one hand and inaction on the other.²⁰ Consequently, service members are often unsure what the ROE entail and may simply choose to do nothing for fear of violating them.²¹ Ultimately, ROE should not exceed, and must comport with, the restrictions of the law of war.²²

Tragically, many service members have been wrongfully accused of violating various ROE due to the proliferation of overly restrictive provisions during the War on Terror.²³ In some instances, the service members were unaware of the violation, but in others, it is evident that even those at the highest level of command were equally unclear about the application and function of a given rule of engagement.²⁴ Furthermore, similar violations by different actors are punished unequally.²⁵ Not only

18. See generally LTC Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176 (2000) (outlining the history of the ROE and their interaction with human rights).

19. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 57–58 (1994) (giving examples of subtle textual differences and the potential problems of interpretation).

20. See MAJ Paul E. Jeter, *What Do Special Instructions Bring to the Rules of Engagement? Chaos or Clarity*, 55 A.F. L. REV. 377, 408 (2004) (“It is not inconceivable to accept that some ROE principles and SPINS have qualified language that may present options for the decision makers.” (footnote omitted)).

21. See Paul Szoldra, *Marine: Strict Rules of Engagement Are Killing More Americans Than Enemy in This Lost War*, BUS. INSIDER (Aug. 24, 2012, 3:05 PM), <http://www.businessinsider.com/one-marines-views-on-afghanistan-2012-8> (“When faced with a split-second decision of whether to shoot, soldiers many times must hesitate—or be investigated.”). Service members fighting for other nations also fear the repercussions of violating the overly restrictive ROE. See, e.g., Jonathan Owen, *British Soldiers Resort to ‘Baiting’ Taliban to Beat Rules of Engagement*, INDEPENDENT (Aug. 27, 2012), <http://www.independent.co.uk/news/uk/home-news/british-soldiers-resort-to-baiting-taliban-to-beat-rules-of-engagement-8082165.html> (reporting that British troops deliberately march in the open to draw Taliban fire to get around the strict rules of engagement).

22. See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 805–07 (2008) (comparing the relationship between ROE and law of war).

23. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 60–68 (1994) (illustrating the problems in criminalizing soldiers who are convicted of violating ROE).

24. See *id.* 58–60 (analyzing ROE interpretation issues).

25. See Andrew Tilghman, *Screwed by the R.O.E.*, ARMY TIMES, Apr. 23, 2012, at 15 (“Troops

are some service members disciplined by criminal action while others are disciplined by administrative action, in many cases, service members receive absolutely no punishment whatsoever for violations of ROE.²⁶

Additionally, the current administration has used the ROE in an effort to create and manage its reputation in the national media, as well as in the international community.²⁷ This is not a new phenomenon, as a similar pattern of shifting ROE based on political objectives occurred during the Vietnam War.²⁸ It is widely acknowledged that the ROE during the Vietnam War equated to micromanagement taken to the highest level.²⁹ This level of micromanagement, developed by politicians defining the ROE rather than military experts, created rules that were so restrictive and confusing that they ultimately ran counter to the military objective of victory.³⁰

Like Vietnam, the insurgent tactics in Afghanistan make it nearly impossible for service members to distinguish between combatants and noncombatants.³¹ In this context, the War on Terror is a fight against non-state actors and terrorist groups that observe no territorial boundaries and prefer targeting civilians.³² Enemy combatants hide amongst the

who run afoul of the ROE can face a range of reprimands, including nonjudicial punishment or even court-martial.”). There are no official guidelines as to which type of punishment must be imposed when ROE are violated.

26. Compare E-mail from Gregory Gillette, Staff Judge Advocate, U.S. Marine Corps Forces Cent. Command, to Mark Waddell, father of Lieutenant Joshua Waddell (Mar. 20, 2012, 1:29 PM) (on file with author) (refusing to punish Lt. Col. Folsom for alleged violations of ROE), with USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at add. 3 (on file with author) (upholding an adverse fitness report for Lt. Waddell’s so-called violation of ROE).

27. See Andrew Tilghman, *Close-Air Support Curtailed*, MARINE CORPS TIMES, June 25, 2012, at 8 (stressing the political motivation involved in the continuous revisions of the ROE).

28. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 36–38 (1994) (suggesting that President Johnson sought to gain political value from adherence to ROE).

29. See MAJ Matthew J. Dorschel, United States Air Force, *The Effects of Restrictive Rules of Engagement on the Rolling Thunder Air Campaign*, GLOBAL SECURITY (1995), <http://www.globalsecurity.org/military/library/report/1995/DM.htm> (bemoaning the restrictive nature the ROE had on the American troops’ tactics in Vietnam).

30. See *id.* (discussing the inherent distrust between policy-makers and military advisers and its effect on the development and implementation of the ROE).

31. See Nathan A. Canestaro, “*Small Wars*” and the Law: *Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT’L L. 73, 80 (2004) (“The ability of guerillas to melt into the populace . . . is a key component of their military strategy.” (citing SUN TZU, THE ART OF WAR 98 (Samuel B. Griffith trans. 1963))).

32. See Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 53 (2010) (“[New warfare] conflicts generally involve a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons . . .”).

general population and do not wear uniforms, thereby challenging the ROE and making it difficult, if not impossible, for U.S. forces to discern civilians from combatants.³³

The basic conundrum is that one side abides by the ROE while the other does not.³⁴ Predictably, the strategy of enemy combatants is to use overly restrictive ROE to their advantage.³⁵ While there is no argument that U.S. forces should not uphold the law of war, much of the current self-imposed ROE leave service members with rules that simply cannot be applied in a practical manner to defeat the enemy.³⁶

It is just as obvious today as it was more than fifty years ago—when the term ROE was first coined³⁷—that by limiting the way in which our military engages and kills the enemy in combat, the United States would suffer a greater loss of American lives at the tactical level of war.³⁸ This loss of lives is only one by-product. ROE can diminish morale and fighting spirit, which can directly contribute to defeat at the strategic level of war.³⁹

To the uninformed, the origin and function of ROE are certainly news.⁴⁰ The assumption is that ROE and law of war are synonymous concepts. To the informed, however, it is a continuing reminder that the employment of overly restrictive ROE spells extreme hazard or disaster for many troops in combat environments, and in many cases can directly

33. See Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 107 (2005) (summarizing the negative effects of current and future war tactics that U.S. enemies will inevitably deploy).

34. *Id.* at 79.

35. See, e.g., *id.* at 107 (speculating that adversaries view ROE compliance by American troops as a potential strategic advantage).

36. See Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 854–58 (2008) (recognizing the dilemma that U.S. soldiers face when applying the law of war while also making sure they comply with the ROE).

37. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 34 (1994) (discussing the creation of the term “Rules of Engagement”).

38. See Paul Szoldra, *Marine: Strict Rules of Engagement Are Killing More Americans Than Enemy in This Lost War*, BUS. INSIDER (Aug. 24, 2012, 3:05 PM), <http://www.businessinsider.com/one-marines-views-on-afghanistan-2012-8> (“If we do not allow our military to carry out their mission[,] . . . then the next two years will be marked with more American deaths, [and] many more wounded . . .”).

39. See Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 859–62 (2008) (citing examples of hesitant soldiers and describing them as frustrated).

40. See Andrew Tilghman, *Screwed by the R.O.E.*, ARMY TIMES, Apr. 23, 2012, at 15 (outlining the confusing nature of ROE for rank-and-file soldiers).

contribute to tactical and even strategic defeat.⁴¹ Tragically, the general ignorance associated with ROE is fueled by the so-called sophisticated approach to warfare. This approach demands the use of overbearing ROE on our American forces under the naïve notion that the enemy will respond to our restrictive use of force with similar acts of kindness, and that the civilian population will view American soldiers with a greater degree of respect and admiration.⁴² In essence, our armed forces are ordered to fight the enemy with one hand tied behind their back. Ironically, the delusion of the sophisticated approach to warfare is so disoriented to reality that those with common sense cannot understand it.

The purpose of this Article is to outline the legal and policy issues associated with ROE, particularly in the context of our continuing armed conflict in Afghanistan. Not surprisingly, with the drawdown in Afghanistan, the Obama Administration is further restricting the use of force by means of even more restrictive ROE.⁴³ Amazingly, after years of having ROE imposed on military planners by the political elites of the Executive Branch, there is little serious critical thinking or analysis addressing their necessity. This Article will demonstrate that much of the ROE imposed on our military are really the by-products of crusader arrogance by the American government in using the military to promote political and social objectives that have nothing to do with winning a war.

The case study of then-Marine First Lieutenant Joshua Waddell will serve as a backdrop to demonstrate the absurdity that has muddied American policy, vis-à-vis ROE, since the War on Terror began, but particularly during the Obama Administration. For better or worse, ROE will continue to be a source of future frustration as we engage in the next war.⁴⁴

41. *See id.* (recounting the adverse effects of overly restrictive ROE, including consequences for soldiers in the field).

42. *See* JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 382–87 (6th ed. 2011) (arguing that when waging war against non-democratic nations or people, military victory can only be achieved through a proper understanding of the enemy's nature and the need to reject all voices of appeasement).

43. *See, e.g.*, Andrew Tilghman, *Close-Air Support Curtailed*, *MARINE CORPS TIMES*, June 25, 2012, at 8 (discussing the Taliban's ability to adapt and exploit new ROE to their benefit).

44. Andrew Tilghman, *Screwed by the R.O.E.*, *ARMY TIMES*, Apr. 23, 2012, at 15 (“Lt. Josh Waddell was found to have ‘poor judgment’ after ordering a sniper team to fire on a known insurgent in Afghanistan.”). *See generally* *Numbers* 21:14; *Ecclesiastes* 3:8; *Matthew* 24:6; *Mark* 13:7; *Luke* 21:9 (New American Standard) (referencing the existence of war).

II. WAR AND THE LAW OF WAR

“[W]ar may not be avoided but is deferred to the advantage of others.”⁴⁵

Niccolò Machiavelli, *The Prince*

The practice of individuals arming themselves to engage in physical violence against one another is as old as human history.⁴⁶ Often unavoidable, organized violence has long been a tool that opposing forces have used to settle disputes, achieve survival, and ensure security.⁴⁷ This phenomenon can be described with the use of one simple three-letter word—war. Webster defines the word “war” in terms of the nation-state as “open and declared armed hostile conflict between states or nations.”⁴⁸ According to the influential writer Carl Von Clausewitz, “War is a [m]ere [c]ontinuation of [p]olicy by [o]ther [m]eans.”⁴⁹

Curiously, even a cursory review of history will reveal that when people engage in the act of war, they will attempt to regulate the conduct of war.⁵⁰ Some of these ancient rules are not consistent with modern humanitarian concepts reflected in the current law of war, but many provisions in the modern law of war are derived directly from early formulations of the rules regulating warfare. The book of *Deuteronomy*, more than three-thousand-years-old, provides an excellent example. The Hebrew army, about to lay siege to an enemy city, was given detailed mandates affording certain protections to the persons and property of that city.⁵¹ Generally, if the city surrendered, the inhabitants could be forced to labor, but could not be physically harmed.⁵² Torture was always

45. NICCOLÒ MACHIAVELLI, *THE PRINCE* 12–13 (Harvey C. Mansfield trans., 2d ed. 1998) (1532).

46. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 4 (2010) (recounting 10,000-year-old cave art showing men engaging in armed warfare).

47. See *id.* at 3–4 (examining the history of war and the frequency with which it has occurred).

48. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1409 (11th ed. 2004); see also BLACK’S LAW DICTIONARY 818 (4th ed. 2011) (defining war as “hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state”).

49. CARL VON CLAUSEWITZ, *THE ESSENTIAL CLAUSEWITZ: SELECTIONS FROM ON WAR* 127 (Joseph I. Greene ed., Dover Publ’n, Inc. 2003) (1945).

50. See Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 182–85 (2000) (contending that laws regulating conflict have developed in almost every culture).

51. See *Deuteronomy* 20:1–20 (New American Standard) (concerning exemptions to Hebrew males from military service, rules for combat operations, rules for protection of the environment, and rules for protection of civilians).

52. *Id.* at 20:11.

prohibited.⁵³ Even environmental protection was prescribed. For instance, fruit trees located outside an enemy city were not to sustain unnecessary damage, and although the fruit could be had, it was prohibited to cut the trees down.⁵⁴

In 1945, the United Nations Charter was adopted, and the United Nations was born.⁵⁵ Article 51⁵⁶ sets out the general framework for determining the right of self-defense in the context of aggression, or when force may be lawfully employed by a nation acting on its own behalf or for another. Prior to 1945, the concept known as *jus ad bellum* provided the framework for such a determination.⁵⁷ The guiding principles customarily used under this framework can be summarized by six specific requirements: (1) the nation had a just cause; (2) the nation was acting under the color of legitimate governing authority and that authority issued a formal public declaration; (3) the nation had just intentions; (4) the nation carefully considered the proportionality in the results; (5) the nation clearly demonstrated that the use of force was only used as a last resort; and (6) there existed a reasonable hope of success in the ultimate outcome.⁵⁸

53. JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 204 (6th ed. 2011).

54. *Deuteronomy* 20:19–20 (New American Standard).

55. U.N. Charter Preamble. “Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.” *Id.*

56. *Id.* at art. 51. The analytical framework for the use of force is found in Article 51 of the U.N. Charter, which codifies the inherent right of self-defense. *See id.* (highlighting the importance of the right of self-defense). The inherent right of self-defense refers to the right of a country to unilaterally engage in acts of self-defense regardless of what any other nation or organization, to include the United Nations, may or may not do. *Id.* (sanctioning members’ ability to self-defend). This is a well-known and ancient component of international law, which predates any international treaty:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

57. *See* BRIAN OREND, *THE MORALITY OF WAR* 31 (2006) (explaining that the concept of *jus ad bellum* means “justice of war”).

58. *See id.* at 32 (categorizing these six factors as the prerequisites for a just war).

While international law no longer recognizes *jus ad bellum* as a viable legal prism in determining when a nation may go to war, the concept of *jus in bello*⁵⁹ is still functionally valid and often used when discussing the law of war. The term *jus in bello* refers to just conduct in war or, simply put, abiding by the law of war.⁶⁰ When a nation goes to war, the law of war mandates that the use of force against enemy targets be strictly guided by three dominant principles: (1) military necessity; (2) proportionality; and (3) the prevention of unnecessary suffering. “Military necessity” refers to the legitimacy of the object to be targeted with violence.⁶¹ The object of attack must directly provide a military use to the enemy.⁶² Proportionality refers to the requirement that the appropriate amount of force be used to accomplish the mission according to the value of the targeted object.⁶³ Unnecessary suffering refers to the requirement to minimize civilian casualties in the use of force.⁶⁴

In the modern era, the practice of war—when two nations engage in an international armed conflict—is regulated by a body of law known as the law of armed conflict⁶⁵ or the law of war. The basic goal of the law of war is to mitigate the inevitable “evils of war by: a. [p]rotecting both combatants and noncombatants from unnecessary suffering; b. [s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and c. [f]acilitating the restoration of peace.”⁶⁶

Under the law of war, which consists of customary principles⁶⁷ and international treaties—primarily the 1949 Geneva Conventions⁶⁸—all

59. *See id.* at 31 (meaning “justice in war”).

60. *See id.* (contrasting *jus ad bellum* (“ethics of resorting to force”) to *jus in bello* (“ethics of conduct during armed conflict”).)

61. *See* U.S. DEP’T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE ¶ 3, at 3–4 (1956) (requiring combative states or nations to abstain from unnecessary militaristic violence).

62. *See id.* at 3 (condemning the use of force for non-militaristic purposes).

63. *See* BRIAN OREND, THE MORALITY OF WAR 32 (2006) (contending that “[a] state resorts to war justly only if” the level of force employed is proportional to the conflict as a whole).

64. *See* U.S. DEP’T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE ¶ 2, at 3 (1956) (emphasizing the “protect[ion] [of] both combatants and noncombatants from unnecessary suffering”).

65. *See generally* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 3–7 (2010) (giving a thumbnail history of the origin and development of the law of war).

66. U.S. DEP’T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE ¶ 2, at 3 (1956). Field Manual 27–10 is a compilation of all relevant treaties and customary international laws dealing with the law of war. *See id.* ¶ 1 (declaring itself the “authoritative guidance” on war conduct).

67. Customary international law consists of all those binding norms recognized and practiced by nations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986) (outlining principles of customary international law).

militaries must comply with a threshold of behavior when conducting combat operations.⁶⁹ The Geneva Conventions are set out in categories to address four main areas of concern: (1) the wounded and sick in the field;⁷⁰ (2) the wounded, sick, and shipwrecked at sea;⁷¹ (3) prisoners of war;⁷² and (4) protecting civilians during wartime.⁷³

To observe that the modern law of war rests firmly upon an ancient foundation of humanitarian concerns, which are intrinsically acceptable to non-totalitarian nations, is only one reason why the rules have enjoyed universal acceptance. The fact that such rules are morally valuable axioms only captures part of the truth as to their development and utility. Clearly, the historical development of rules regulating warfare also follows a general pattern of what might be termed pragmatic necessity. “While many of the rules limiting suffering were undoubtedly based on humanitarian concerns, it can be argued that the basic rationales for having a law of war are rooted in several collateral principles of self-interest,” with the concept of reciprocity standing at the forefront.⁷⁴ A nation refrains from violations with the knowledge that the opposing nation will follow suit.⁷⁵

68. The Geneva Conventions are set out in four categories. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

69. See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 3, at 3 (1956) (limiting a belligerent's exercise of power during hostilities).

70. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (providing guidelines for physically impaired soldiers).

71. See Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (addressing situations of maritime warfare).

72. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (protecting prisoners of war).

73. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (setting forth principles in regard to treatment of civilians).

74. See JEFFREY F. ADDICOTT, TERRORISM LAW: MATERIALS, CASES, COMMENTS 204 (6th ed. 2011) (discussing the rationale behind the law of war); see also INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUG. 1949, 19 (1995), <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> (“The year 1945 marked the close of a war waged on an unprecedented scale; the task had to be faced of developing and adapting the humanitarian elements of International Law in the light of the experience gained.”).

75. See JEFFREY F. ADDICOTT, TERRORISM LAW: MATERIALS, CASES, COMMENTS 204 (6th ed. 2011) (discussing collateral reasons to limit suffering between nations).

Because the vast majority of the activities accomplished during conflict relate to military operations conducted outside the scope of a state of international armed conflict, United States policy requires its armed forces to abide by “the principles and spirit of the law of war” on all contingency operations.⁷⁶ In Afghanistan, which is considered a state of international armed conflict, the law of war exists in fact.⁷⁷

III. RULES OF ENGAGEMENT

“If words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame.”⁷⁸

Sun Tzu, *The Art of War*

A. *History of Rules of Engagement*

As indicated, ROE compound the traditional law of war rules, producing a more restrictive and mission-specific environment under which the armed forces must operate.⁷⁹ ROE apply to both combat operations on the battlefield in time of war and to contingency operations,⁸⁰ also called military operations other than war (MOOTW).⁸¹

76. DEPT OF DEF. DIRECTIVE 5100.77, ¶ 5.3.1, DOD LAW OF WAR PROGRAM (Dec. 9, 1998).

77. Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”*, 75 GEO. WASH. L. REV. 1105, 1121 (2007) (specifying that the laws of war are applicable in the Afghanistan conflict).

78. SUN TZU, *THE ART OF WAR* 72 (Lionel Giles trans., classic ed. 2009).

79. See INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 78 (2012) (contrasting supplemental ROE as restrictive in nature). Rules of engagement are broken down into two categories: mission accomplishment and self-defense. See *id.* at 76 (“The purpose of the [standing Rules of Engagement] is twofold: (1) provide implementation guidance on the application of force for mission accomplishment, and (2) ensure the proper exercise of the inherent right of self-defense.”). Generally, restrictive ROE relate to mission accomplishment and do not limit the inherent right of self-defense. *Id.* at 78.

80. The term “contingency operation” means a military operation that—

- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (B) results in the call or order to, or retention on, active duty of members of the uniformed services . . . or any other provision of law during war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(a)(13) (2012).

81. MOOTW operations include:

[A]rms control, combatting terrorism, Department of Defense support to counterdrug operations, enforcement of sanctions/maritime intercept operations, enforcing exclusion zones, ensuring freedom of navigation and overflight, humanitarian assistance, military support to civilian authorities, nation assistance/support to counterinsurgency, noncombatant evacuation operations, peace operations, protection of shipping, recovery operations, show of force

The term “rules of engagement” is also employed in other arenas as well, including, for instance, maritime security.⁸² How and when the military can employ force is set out in a standardized definition of ROE, which is found in the *Department of Defense Dictionary of Military and Associated Terms*.⁸³ Rules of engagement are “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces [naval, ground, and air] will initiate and/or continue

operations, strikes and raids, and support to insurgency.

CHAIRMAN OF THE J. CHIEFS OF STAFF, JOINT PUBLICATION 3–07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR ix (June 16, 1995), available at <http://ids.nic.in/Jt%20Doctrine/Joint%20Pub%203-0MOOTW.pdf>.

82. Rules of engagement exist in other arenas of potential armed conflict. For instance, in the last decade the scourge of organized Somali piracy in the Indian Ocean, Gulf of Aden, Arabian Sea, and Gulf of Oman has caused great concern. See, e.g., Larry Liebert, *Pirates Seize Two Americans Off Nigeria, Officials Say*, BLOOMBERG NEWS (Oct. 24, 2013, 11:00 PM), <http://www.bloomberg.com/news/2013-10-25/pirates-seize-two-americans-off-nigeria-officials-say.html> (reporting “‘99 attacks in the first nine months of 2012 . . . in the waters off the coast of Somalia”). One response has been the use of hundreds of armed men, mostly ex-military or former law-enforcement, placed aboard clients’ otherwise undefended merchant ships. See, e.g., Frank Gardner, *Dangerous Waters: Running the Gauntlet of Somali Pirates*, BBC NEWS ASIA (Mar. 13, 2012, 12:37 PM), <http://www.bbc.co.uk/news/world-asia-17354830> (“[T]he owners of this ship . . . make it a policy to always put armed teams on this dangerous route.”). These men are not mercenaries, but privately contracted security personnel. *Id.* A merchant ship’s security team has its own unit leader, but the team nonetheless falls under the command of the ship’s master (“captain” in America). Each team further operates under maritime ROEs that have evolved through the interaction of private security contractors, the maritime industry (ship owners, operators, and insurers), the International Maritime Organization, the Security Association for the Maritime Industry, and interested parties such as the European Union and NATO, whose naval forces patrol the area.

For instance, an embarked security team on a client’s merchant vessel cannot open fire on an incoming motorboat that looks suspicious. This restriction takes into account the following mitigating considerations: (1) throughout the region, legitimate fishermen use skiffs with large outboard motors; (2) fishermen also pack Kalashnikov rifles with which to protect their own motorboats (as well as trawlers and dhows) against pirates; and (3) fishermen might steer their skiffs toward merchant ships to try to make the large vessels change course and not run over unseen fishing nets or lines ahead.

ROE are intended to promote a graduated response—identification, evasive maneuvers, warning signals, warning shots, and lastly, lethal gunfire—to a possible threat of inbound pirates. ROEs are also intended to prevent tragedies such as that of February 2012 where two Indian fishermen mistaken for pirates were shot to death—not by privately contracted armed guards, but by members of the Italian military assigned to guard an Italian-flagged crude-oil tanker. Pratap Patnaik & Andrew MacAskill, *Italian Marines Charged With Killing Fishermen Face Indian Trial*, BLOOMBERG NEWS (Jan. 18, 2013, 1:02 AM), <http://www.bloomberg.com/news/2013-01-18/italian-marines-charged-with-killing-fishermen-face-indian-trial.html>. The two Italian marines were charged with murder in India. *Id.*

83. See J. CHIEFS OF STAFF, JOINT PUBLICATION 1–02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 236–37 (Nov. 8, 2010, as amended through Oct. 15, 2013), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (issuing an official definition for rules of engagement).

combat engagement with other forces encountered.”⁸⁴ ROE are propounded by a variety of sources, including the Department of Defense and individual commanders.⁸⁵

The term “rules of engagement” was coined during the Korean War and described the practice of restricting where American aircrafts could fly and what they could target.⁸⁶ The term was formally adopted in 1958 by the Joint Chiefs of Staff to impose restrictions on how American fighter pilots would respond in confrontations with Soviet aircraft during the Cold War.⁸⁷ Then, with the decade-long war in Vietnam, countless ROE were produced at all levels of command that applied to ground, sea, and air forces.⁸⁸

B. *Standing Rules of Engagement*

While it is true that all ROE are internally-imposed restrictions, there are many levels and types of ROE with which the military must comply. Today, the starting point for reviewing ROE begins with what is known as the Standing Rules of Engagement (SROE), which are written and promulgated by the Chairman of the Joint Chiefs of Staff.⁸⁹ The SROE establish the basic policies and procedures governing the actions that

84. *Id.*

85. See 72 STEPHEN A. ROSE, U.S. NAVAL WAR COL., CRAFTING THE RULES OF ENGAGEMENT FOR HAITI 225–30 (1998) (detailing the various contributors to the drafting of ROE); see also Andrew Tilgman, *Screwed by the R.O.E.*, ARMY TIMES, April 23, 2013, at 14 (“Drafted by lawyers and reviewed by senior commanders, the ROE govern when it’s OK to shoot—and when it’s not.”). See generally INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 95–98 (2012) (outlining the ROE process).

86. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 35 (1994) (tracing modern ROE back to the Korean War).

87. LTC Stephen M. Fimple, *Rules—In a Knife Fight? A Study of Rules of Engagement 3* (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf>.

88. 131 CONG. REC. 10,553–55 (1985), available at <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2185205001> (recounting the various way ROE stifled combat troops).

89. CHAIRMAN OF THE J. CHIEFS OF STAFF, CHAIRMAN OF THE J. CHIEFS OF STAFF INSTRUCTION, No. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES 98 (2005); see also INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 76 (2012) (“[SROE] provide a common template for development and implementation of ROE for the full range of operations, from peace to war.”). The Secretary of Defense must approve the SROE after they are written by the Chairman of the Joint Chiefs of Staff. INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 76 (2012). The current edition of the “SROE went into effect on 13 June 2005” following revisions to the 2000 and 1994 editions. *Id.* Before the SROE, the Joint Chiefs of Staff issued the “Peacetime Rules of Engagement” in 1988. See LTC Stephen M. Fimple, *Rules—In a Knife Fight? A Study of Rules of Engagement 3* (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf>.

ground commanders can take during all forms of military operations—ranging from terrorist attacks to prolonged conflict beyond the borders of the United States.⁹⁰ The SROE represents the first indication that the leadership is making illegal or improper what the law of war would otherwise allow.⁹¹

Because the SROE is a mere six pages long and unclassified, it provides only general guidelines and fundamental policies concerning the correct way to utilize force.⁹² In the case of individual military operations, the President or Secretary of Defense may impose more detailed, supplemental ROE (in addition to the SROE). In turn, lower levels of command at the theater level will develop even more layered ROE in conjunction with specific guidance from the Executive Branch.⁹³ Although all ROE recognize the inherent right of self-defense if attacked by an enemy, all ROE center on the concept of employing minimum force to complete any given activity,⁹⁴ even at the expense of increased levels of harm to friendly forces.

As expected, the ROE, operating underneath the SROE, are generally classified documents and unavailable for public view.⁹⁵ Nevertheless,

90. See Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 248 (1997) (“As a general rule, the SROE apply to all U.S. forces at all places at all times They are not limited to peacetime application, but are designed to remain effective in prolonged conflict as well. There are no ‘wartime’ ROE awaiting implementation at the first outbreak of hostilities. The SROE, augmented as necessary by supplemental rules, are the bedrock of U.S. military engagement throughout the spectrum of conflict.”); see also Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 847 (2008) (noting the purpose of the SROE is to protect innocent civilians as well as enemy combatants from unnecessary suffering).

91. See Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 847 (2008) (“The SROE are consistent with the law of war but this escalation requirement is far more restrictive than the law’s requirements, because the former necessitates a use-of-force continuum.”). See generally U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense . . .”).

92. See CHAIRMAN OF THE J. CHIEFS OF STAFF, CHAIRMAN OF THE J. CHIEFS OF STAFF INSTRUCTION, No. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES 85 (2005) (announcing the purpose of SROE); INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 76 (2012) (providing a baseline, but allowing for the creation and enforcement of supplemental measures).

93. INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 78 (2012) (“Combatant Commanders may augment the SROE as necessary by implementing supplemental measures or by submitting supplemental measures for approval, as appropriate.”).

94. See *Legal Aspects of War—Rules of Engagement (ROE) and the Law of War*, ARMY STUDY GUIDE, http://www.armystudyguide.com/content/Leadersbook_information/Combat_Leaders_Guide/legal-aspects-of-war-rule-2.shtml (last visited Nov. 8, 2013) (identifying minimum force as central to every ROE).

95. A simple Google search yields numerous results, but only a select few return actual ROE.

ROE stem from two general arenas: (1) ROE that require the approval of the Secretary of Defense; and (2) ROE that allow subordinate commanders to restrict the use of force regarding particular missions.⁹⁶ In turn, ROE may also be distinguished by whether they are conduct-based ROE or status-based ROE.⁹⁷ The first category of conduct-based ROE deal with self-defense matters, and the latter category deals with the ability to use deadly force against a particular individual based on his identification as a hostile threat, e.g., an enemy combatant.⁹⁸

To better visualize the relationship of ROE to the use of force, it is helpful to understand that there are three basic areas of concern that directly impact the formulation of ROE: (1) national policy objectives; (2) the operational requirements of the field commanders; and (3) the legal restrictions associated with the law of war.⁹⁹ Obviously, national policy is the dominant ingredient in ROE.¹⁰⁰ More than any other factor, it shapes how the use of force will be applied and under what conditions. When political leadership is confused or disoriented regarding its goals and objectives, it is certain that disaster will quickly follow suit.¹⁰¹ For instance, when a CNN reporter asked President Obama in 2009 about how he would achieve victory in Afghanistan, he replied that he is “always worried about using the word ‘victory.’”¹⁰² If the Commander in Chief could not define victory, it was certain disaster was waiting for American military on the ground as President Obama launched his ill-fated “surge.”¹⁰³

96. See CHAIRMAN OF THE J. CHIEFS OF STAFF, CHAIRMAN OF THE J. CHIEFS OF STAFF INSTRUCTION, No. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES 85–86 (2005) (citing the Secretary of Defense and subordinate commanders as those who provide guidance).

97. See LTC Stephen M. Fimple, Rules—In a Knife Fight? A Study of Rules of Engagement 12 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (distinguishing between hostile status and hostile conduct).

98. See Jim Michaels, *Brennan Defends Use of Drones to Target Terror*, USA TODAY, Feb. 6, 2013, at 6A (discussing the legality of using drones to kill and the associated ROE).

99. See LTC Stephen M. Fimple, Rules—In a Knife Fight? A Study of Rules of Engagement 3 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (asserting that there are “three fundamental pillars forming the foundation for rules of engagement”).

100. See *id.* at 3–4 (contending that national policy is the biggest concern for the ROE).

101. See JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 202 (6th ed. 2011) (opining that the lack of objectives in Vietnam and Afghanistan resulted in defeat).

102. See *Obama: ‘Victory’ Not Necessarily Goal in Afghanistan*, FOXNEWS (July 23, 2009), <http://www.foxnews.com/politics/2009/07/23/obama-victory-necessarily-goal-afghanistan/> (reporting Obama’s reluctance to use the word “victory”).

103. See generally David Jackson, *Obama’s Surge in Afghanistan Ends*, USA TODAY (Sept. 21, 2013,

Of course, the operational requirements of the military are supposed to be left to the field commanders to develop with the assets provided. In other words, the commander must translate the national policy into action on the ground with the applicable resources. This takes into consideration the geography, culture, and nature of the enemy forces.¹⁰⁴ Nevertheless, if the commander determines that he cannot match the national policy with the operational requirements, it is his duty to inform the chain of command and to seek modification of the ROE.¹⁰⁵

The final element of the rule of law simply means that the use of force comports with the law of war.¹⁰⁶ This is perhaps the simplest factor, as ROE cannot exceed the restrictions of the law of war.

C. *Current Application of ROE*

For better or worse, ROE serve as a dominant factor in military operations.¹⁰⁷ Accordingly, they must be clear, concise, and comprehensive.¹⁰⁸ In addition, all military personnel must receive them in a timely fashion to facilitate appropriate training before engaging in military operations.¹⁰⁹ Indeed, ROE must navigate the line between being too narrow and too overbroad. In many instances in the War on Terror, this requires distinction between combatants (armed forces) and non-combatants (civilians) during armed conflicts.¹¹⁰ This is critical, as

11:11 AM), <http://content.usatoday.com/communities/theoval/post/2012/09/21/obamas-surge-in-afghanistan-ends/70000832/1#.UghCkWTVs4> (detailing the winding down of operations in Afghanistan).

104. See LTC Stephen M. Fimple, *Rules—In a Knife Fight? A Study of Rules of Engagement* 4 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (identifying geography, customs, and culture of local forces as considerations in translating ROE).

105. See *id.* (noting that it is the commander's responsibility to adjust the ROE or inform a superior commander if there is a problem meeting the objective).

106. See *id.* at 4–5 (discussing the importance of ensuring the third element of ROE comply with United States and international law).

107. See MAJ Paul E. Jeter, *What Do Special Instructions Bring to the Rules of Engagement? Chaos or Clarity*, 55 A.F. L. Rev. 377, 385 (2004) (“In a nutshell, ROE delineate what can be attacked, how it can be attacked, and whose permission you need to attack it.” (footnote omitted)).

108. See LTC Stephen M. Fimple, *Rules—In a Knife Fight? A Study of Rules of Engagement* 5 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (stressing the importance of clear, comprehensive, and concise ROE).

109. See *id.* (emphasizing timely distribution of ROE to ensure appropriate training).

110. See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 THE LAW OF LAND WARFARE ¶ 62, at 27 (1956) (recognizing the distinction between combatants and noncombatants). The terms “combatant” and “non-combatant” have extremely important implications in the context of combat operations, especially in regard to prisoner-of-war (POW) status. See *id.* ¶ 73, at 31 (treating hostile

American military forces are generally trained to employ the full use of force allowed under the law of war against enemy targets.¹¹¹ In short, the nuances related to ROE that stress interaction with civilians and enemy forces hiding amongst civilians require extensive and intensive training before actual combat. Obviously, specialized training in such ROE is a serious obligation for the commander to consider.

Of course, in the Afghanistan conflict, where enemy forces do not wear uniforms and hide amongst the civilian population, the challenges are often extremely difficult.¹¹² While some may argue that non-combatants are unnecessarily endangered without overly restrictive ROE, the other side of the coin is that American forces are unnecessarily endangered by the imposition of overly restrictive ROE in such environments.¹¹³ In short, the national command authority should concentrate on outlined successful mission objectives that take into account the strategic goals of victory and not mire American forces in tactical combat actions that achieve nothing but American casualties.¹¹⁴ For example, in 1995 the author, the Staff Judge Advocate¹¹⁵ for the U.S. Army Special Forces, Fort Bragg, North Carolina, was involved in providing input to the negotiating process for the ROE that were proposed for the United Nations mission in Haiti.¹¹⁶ Because some of the very first forces on the

persons differently than non-hostile persons). A civilian contractor who engages in combat operations may lose POW status and even be categorized as an illegal combatant. *Compare id.* ¶ 61(A)(4), at 26 (providing contractors with POW status and protection), *with id.* ¶¶ 72–73, at 31 (removing POW status from those “who commit acts hostile to the occupant”).

111. *See* LTC Stephen M. Fimple, Rules—In a Knife Fight? A Study of Rules of Engagement 15 (2003) (unpublished paper, Naval War College) (approved for public release), *available at* <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (recognizing the state of indecisiveness that occurs when faced with an enemy who is indistinguishable from a civilian).

112. *See id.* (examining the difficulties that arise when enemy forces cannot easily be distinguished).

113. *See id.* at 15–16 (contending that the interplay between ROE and indistinguishable enemy combatants results in a binding of our troops’ hands).

114. *See id.* at 16–17 (proposing key considerations in formulating effective ROE).

115. *See* J. CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 256 (Nov. 8, 2010, as amended through Oct. 15, 2013), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (defining staff judge advocate); *see also* J. CHIEFS OF STAFF, JOINT PUBLICATION 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS II-11, Fig. 11-7 (Aug. 17, 2011), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_04.pdf (outlining how a staff judge advocate helps create ROE for courses of action).

116. *See* 72 STEPHEN A. ROSE, U.S. NAVAL WAR COL., CRAFTING THE RULES OF ENGAGEMENT FOR HAITI 225–26 (1998) (detailing the staff judge advocate duties in developing ROE for Haiti). *See generally* MINUSTAH: *United Nations Stabilization Mission in Haiti*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/minustah/background.shtml> (last visited Nov. 8, 2013) (providing the background of the U.N. mission in Haiti starting in 1990 and continuing today).

ground would be Green Berets, the author was extremely concerned about weapons and the restrictions on the use of force. Initial drafts of the ROE restricted American forces (as well as other UN forces) to the use of side-arms only under the bizarre notion that the Haitian people would therefore consider the multinational force as “peaceful” and not feel threatened. As the Staff Judge Advocate for the U.S. Army Special Forces, the author, along with other American military commanders and their lawyers, strongly objected to this inane rule of engagement.¹¹⁷ After subsequent revisions, the final ROE allowed entering forces to carry a variety of light and heavy weapons in keeping with potential combat operations.¹¹⁸ Clearly, those responsible for drafting ROE must ensure that legitimate concerns are voiced at an early stage in ROE development, as limitations and constrictions result in loss of American lives in the field of battle.¹¹⁹

On the positive side, ROE can serve a useful purpose by providing the soldier with specific guidance on when, where, and how to use force. As a practical matter, viable ROE must be written at a level that can be understood by the seventeen to twenty-year-old.¹²⁰ Accordingly, the ROE must be simple.¹²¹ In turn, because the lower-commissioned officers and the non-commissioned officers enforce the ROE, it is imperative that this leadership completely understands their responsibility.

The use of so-called “tactical directives” has made a noteworthy contribution to the confusion surrounding ROE. In 2011, General John R. Allen, the Commander of NATO’s International Security Assistance Force (ISAF), ordered revised ROE for use in Afghanistan.¹²² Although

117. See generally 72 STEPHEN A. ROSE, U.S. NAVAL WAR COL., CRAFTING THE RULES OF ENGAGEMENT FOR HAITI 228 (1998) (describing the competing concerns in drafting ROE).

118. See, e.g., *id.* at 229–30 (commenting on the final ROE for non-permissive entry into Haiti).

119. See LTC Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 9 (criticizing the executive branch for failing to listen to commanders’ concerns about restrictive ROE).

120. See LTC Stephen M. Fimple, Rules—In a Knife Fight? A Study of Rules of Engagement 5 (2003) (unpublished paper, Naval War College) (approved for public release), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a415367.pdf> (stressing the importance of understanding ROE); LTC Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 25 (elaborating on the Operational Law Handbook’s five rules for drafting ROE: be clear and concise, avoid elaborate words, remember your audience, separate and categorize the ROE, and make the ROE simple to remember).

121. See LTC Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 25 (listing the factors that make effective ROE). For an example of a sample ROE card, see INT’L AND OPN’L LAW DEP’T, OPERATIONAL LAW HANDBOOK 99 (2012).

122. See Memorandum from Int’l Sec. Assistance Force Commander John R. Allen on COMISAF’s Tactical Directive to the ISAF 1 (Nov. 30, 2011) (on file with author) (explaining a recent tactical directive revision).

labeled as a tactical directive, it was completely in the vein of ROE because it “provide[d] guidance and intent for the employment of force in support of ISAF operations”¹²³ by limiting when, how, and where violence may be utilized in combat situations.¹²⁴ Because tactical directives carry no punitive weight, this term only provides added levels of consternation. As stated, ROE are considered lawful orders.¹²⁵ Hence, a violation of a rule of engagement can be a criminal offense under the military’s Uniform Code of Military Justice (UCMJ).¹²⁶ Tactical directives can only be used to punish a violator with administrative tools such as verbal or written reprimand, unfavorable command reports, transfers to less desirable jobs, or a pay-grade reduction.¹²⁷ Nevertheless, administrative punishment can destroy a military career.¹²⁸

123. *Id.* Although tactical directives have ROE-like characteristics, they do not change the ROE and are purely intended for guidance purposes. *Hearing on National Defense Authorization Act for Fiscal Year 2011 and Oversight of Previously Authorized Programs Before the Committee on Armed Services*, 111th Cong. 157 (2010) (clarifying that “it should be noted that the tactical directive . . . is command guidance and not a change to the Rules of Engagement”).

124. *See* Memorandum from Int’l Sec. Assistance Force Commander John R. Allen on COMISAF’s Tactical Directive to the ISAF 1 (Nov. 30, 2011) (on file with author) (stating its purpose as providing “guidance and intent for the employment of force”).

125. The difference between ROE and tactical directives is that tactical directives are for guidance (tell troops what should be done), and ROE carry the weight of a lawful order (inform troops what can be done). SrA Tania Reid, *ISAF, SCR Address Military ROE and Tactical Directives*, AFG. ISAF (July 2011), <http://www.isaf.nato.int/article/news/isaf-scr-address-military-roe-and-tactical-directives.html>. German Army Brig. Gen. Josef Blotz, spokesman for the International Security Assistance Force (ISAF), stated in a press conference in 2011:

Our rules of engagement are solid, and they have not changed. They are based on international law and are standardized across 47 nations, and describe the circumstances and limitations under which forces will begin or continue to engage in combat. This defines the “right and left limits” of what we will allow our forces to do as they fight.

Id.

126. *See* SCOTT A. SNOOK, *FRIENDLY FIRE: THE ACCIDENTAL SHOOTDOWN OF U.S. BLACKHAWKS OVER NORTHERN IRAQ* 38 (2000) (specifying that a soldier’s actions are judged by the Uniform Code of Military Justice). The Uniform Code of Military Justice (UCMJ) imposes a variety of restrictions in a “legal framework within which individual military members’ actions are judged.” *Id.* The UCMJ is codified in the United States Code under Title 10, Chapter 47. 10 U.S.C. §§ 801–946 (2012). ROE are issued as general orders, and “[s]uch directions carry with them legal authority” requiring the service member “to use military force within certain clearly specified limits toward the accomplishment of” the mission. SCOTT A. SNOOK, *FRIENDLY FIRE: THE ACCIDENTAL SHOOTDOWN OF U.S. BLACKHAWKS OVER NORTHERN IRAQ* 38 (2000). Because such limits are defined in an operation’s ROE, the service member can be punished for violating a lawful order under the applicable provisions of the UCMJ. *See id.* (asserting the authority of ROE).

127. *See* U.S. GEN. ACCOUNTING OFFICE, *FPCD-80-19, BETTER ADMINISTRATION OF THE MILITARY’S ARTICLE 15 PUNISHMENTS FOR MINOR OFFENSES IS NEEDED* 1–2 (1980) (reviewing different administrative punishments available under Article 15).

128. *See id.* at i (insisting that minor punishment “can negatively affect service members’ entire

While violations of the ROE are not necessarily violations of the law of war, most ROE are regarded as general orders and are thus punishable under the UCMJ if violated.¹²⁹ For those who violate the ROE, the military command would generally charge the service member with a formal crime, such as disobeying a lawful order.¹³⁰ In many instances, however, the military does not charge the service member with a crime under the UCMJ, but instead uses adverse administrative measures to impose punishment.¹³¹

As stated, this method of punishment would also apply to a violation of the tactical directive. While a service member has numerous due process rights when charged with a crime, due process rights associated with adverse administrative actions are far more limited in nature.¹³² Without some level of additional impartial review, service members have few due process rights to defend themselves from the all too common occurrence of power abuse.¹³³

IV. LIEUTENANT WADDELL

“Always do right—this will gratify some and astonish the rest.”¹³⁴

Mark Twain

Due to the confusing and often changing nature of ROE and their application, it is painfully apparent that some ROE have proven to be a source of injustice to service members in the field of combat operations. This is particularly true when the chain of command uses administrative punishment to discipline service members whom they believe may have violated a rule of engagement, knowing very well that administrative punishment leaves service members with little recourse and likely results in

military careers”); see also Andrew Tilghman, *Screwed by the R.O.E.*, ARMY TIMES, April 23, 2012, at 14 (emphasizing that a negative fitness report can severely damage a military career).

129. *Legal Aspects of War—Rules of Engagement (ROE) and the Law of War*, ARMY STUDY GUIDE, http://www.armystudyguide.com/content/Leadersbook_information/Combat_Leaders_Guide/legal-aspects-of-war-rule-2.shtml (last visited Nov. 8, 2013).

130. See, e.g., 10 U.S.C. § 892 (2012) (allowing a court-martial to punish a violation of an order).

131. See U.S. GEN. ACCOUNTING OFFICE, FPCD-80-19, BETTER ADMINISTRATION OF THE MILITARY'S ARTICLE 15 PUNISHMENTS FOR MINOR OFFENSES IS NEEDED 14 (1980) (citing the frequency with which administrative punishment is chosen for certain offenses).

132. See *id.* at 3 (admitting that the imposition of administrative punishment “is virtually unrestrained by legal process”).

133. See *id.* at 30–33 (stressing the inapplicability of rules of evidence and absence of the right to defense counsel).

134. RON GRAVES & RON PALERMO, 250 OPTIMISTIC QUOTES FOR ACHIEVING THE EXTRAORDINARY 19 (2007).

damage to any potential career advancement.¹³⁵ Not only is this an injustice to the service member, but it also provides a chilling effect on other service members who may now choose inaction when faced with a difficult decision on when to use force.

The 2011 case of then-Marine Corps First Lieutenant Joshua C. Waddell illustrates this problem. In response to an alleged violation of ROE in a combat incident in Afghanistan, the military chain of command wrongfully employed severe administrative punishments tantamount to terminating a decorated combat officer's opportunity for promotion in the military.¹³⁶ While Lieutenant Waddell was never charged with a crime, he was relieved from his position as Executive Officer and given a fitness report (FITREP) that strongly recommend no promotion to the next officer rank (Captain).¹³⁷

If Lieutenant Waddell had been charged with a crime, he would have had access to a full range of due process rights.¹³⁸ Because his commander elected administrative action only, Lieutenant Waddell's only functional recourse outside of his chain of command was to appeal the FITREP to an administrative board in the United States (Board of Corrections for Naval Records)—a process limited in due process and extensive in cost and time.¹³⁹

The facts of the case are outlined as follows: On November 1, 2011, the subordinate watch officer called Lieutenant Waddell to the Marine Company's Combat Operations Center.¹⁴⁰ As the company Executive Officer, Lieutenant Waddell possessed the highest authority in the

135. See U.S. GEN. ACCOUNTING OFFICE, FPCD-80-19, BETTER ADMINISTRATION OF THE MILITARY'S ARTICLE 15 PUNISHMENTS FOR MINOR OFFENSES IS NEEDED 34 (1980) (emphasizing military personnel's lack of awareness as to the severe effects of administrative punishment).

136. See Sara A. Carter, *Marine's Career Threatened by Controversial Rules of Engagement*, WASH. EXAMINER (Jan. 23, 2012, 7:05 PM), <http://washingtonexaminer.com/marines-career-threatened-by-controversial-rules-of-engagement/article/167369> ("Waddell was demoted from executive officer, and the [B]attalion [C]ommander . . . determined he had violated rules of engagement that governed when Marines could fire, and at whom.").

137. USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at 5 (on file with author) ("[Lieutenant Waddell] was relieved of his duties due to his demonstrated poor judgment on 1 Nov 2011. A Command Investigation concluded that his actions, which endangered civilian lives and destroyed a civilian vehicle, were counter to the COMISAF Tactical Directive.").

138. See generally Robert D. Powers, Jr., *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1 (1963) (exploring the development and meaning of military due process).

139. See 10 U.S.C. § 815e (2012) (providing for and describing the appellate process in administrative proceedings).

140. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 10, at 4 (on file with author). The summary in the text is based primarily on the Marine Corp's findings of fact during their investigation.

company in the absence of the Commanding Officer, who was a Captain. At the time, the commanding officer was co-located with a forward platoon.¹⁴¹ Thus, all use of live fire clearance¹⁴² and tactical guidance rested with Lieutenant Waddell.¹⁴³

The watch officer alerted Lieutenant Waddell that “a surveillance asset with full motion video (FMV) had spotted a person of interest in [the] area of operations (AO).”¹⁴⁴ Although this individual was dressed in local civilian attire, he was positively identified as a person of interest in connection with the placement of an Improvised Explosive Device (IED) on the southern border of the area of operations.¹⁴⁵ That particular IED had exploded the day before and rendered one of Lieutenant Waddell’s platoon members a triple amputee.¹⁴⁶

As surveillance continued on the subject person of interest, he was joined by a group of men also dressed in civilian attire.¹⁴⁷ The subject then directed the placement of additional IEDs alongside a tree line.¹⁴⁸ Once the surveillance asset positively identified the IED components, Lieutenant Waddell declared the subject and his companions hostile enemy combatants, and a targeting solution was developed.¹⁴⁹ As this IED cell was operating in broad daylight, it was determined that “there were too many civilians present to conduct an aerial or artillery strike” to

141. *Id.* ¶ 3, at 3.

142. See U.S. DEP’T OF ARMY, FIELD MANUAL 1 at 1-32 (2004) (defining the ability to approve an attack upon targets).

143. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 3, at 3 (on file with author); Account from 1Lt Joshua Waddell ¶ 1, at 1 (on file with author).

144. Account from 1Lt Joshua Waddell ¶ 1, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 5, at 3 (on file with author).

145. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 10, at 4 (on file with author); Account from 1Lt Joshua Waddell ¶ 1, at 1 (on file with author).

146. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 4, at 3 (on file with author); Account from 1Lt Joshua Waddell ¶ 1, at 1 (on file with author).

147. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 9, at 4 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

148. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 9, at 4 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

149. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 10, at 4 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

neutralize the threat.¹⁵⁰ Thus, Lieutenant Waddell directed an attached Marine sniper team to position themselves on one of the base's guard towers and locate the target, as the subject was within firing range.¹⁵¹

Once in position, the snipers confirmed that they had acquired the location of the enemy target and began tracking him.¹⁵² When the subject stepped away from a nearby group of bystanders, Lieutenant Waddell gave the orders to take the shot.¹⁵³ The two Marine snipers missed with the first shots, but subsequent shots "hit the target in the stomach."¹⁵⁴ The subject enemy combatant "doubled over and rolled into a ditch."¹⁵⁵

The target's previous companions, other IED cell members, and other Afghans came to the wounded man's aid, "dragging him to a nearby orchard."¹⁵⁶ Lieutenant Waddell immediately "dispatched an infantry squad to intercept them and take them into custody and render aid as necessary."¹⁵⁷ "A landing zone for a helicopter extraction for the enemy casualty" was established for use once the area was secured.¹⁵⁸ However, because the area was a veritable minefield of freshly planted IEDs, the Marine reaction squad was slow in reaching the target.¹⁵⁹

When the surveillance video showed the "IED cell commandeering a

150. Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author); Memorandum from the United States Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 12, at 4 (on file with author).

151. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶¶ 13, 15, 17, at 4–5 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

152. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 18, at 5 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

153. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 20, at 5 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

154. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 21, at 5 (on file with author); Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author).

155. Account from 1Lt Joshua Waddell ¶ 2, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶¶ 21, 22, at 5 (on file with author).

156. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 25, at 6 (on file with author).

157. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Preliminary Inquiry into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ d, at 2 (on file with author).

158. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author).

159. *Id.*; Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 26, at 6 (on file with author).

farmer's tractor," Lieutenant Waddell began looking for a way to delay the enemy so that the advancing Marines could complete their mission.¹⁶⁰ Lieutenant Waddell "told the sniper team leader via radio to engage the engine block of the tractor with the SASR (.50 caliber anti-material sniper rifle) if they got a clear shot."¹⁶¹ Once the casualty was loaded onto the tractor, the Marine snipers took the shot.¹⁶² At the same time, Lieutenant Waddell, in order to ensure the safety of civilians in the area, issued a cease-fire order to the Marine snipers.¹⁶³ "The tractor burst into flames from the [shot's impact] and, out of desperation, the IED cell ran south carrying their casualty and [used the terrain] to mask their movements from the snipers until they reached what they knew to be a British-controlled AO."¹⁶⁴

The target was lost, but later intelligence reported that the subject enemy combatant eventually died of his wounds.¹⁶⁵ Indeed, there was a dramatic "drop in IED activity in that area in the following months."¹⁶⁶

"As the FMV [system] had recorded the [entire] engagement, it was available for viewing."¹⁶⁷ To ensure that the engagement was in accordance with the law of war and ROE, standard operating procedure

160. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶¶ 27, 28, at 6 (on file with author).

161. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 29, at 6 (on file with author).

162. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 29, at 6 (on file with author); Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author).

163. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 29, at 6 (on file with author); Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author).

164. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author); Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶¶ 29–31, at 6 (on file with author).

165. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 31, at 6 (on file with author); Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author). Though Lieutenant Waddell was the only individual punished for the actions of that day, the report admits that "he was not alone in being at fault." Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 9, at 8 (on file with author). The report opined that other officers present did not take the opportunity to intervene, and the sniper team is accountable for their actions as well. *Id.*; Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author).

166. Account from 1Lt Joshua Waddell ¶ 3, at 1 (on file with author).

167. *Id.* ¶ 4, at 1.

required a preliminary investigation of the entire incident.¹⁶⁸ A fellow officer in the battalion conducted the investigation.¹⁶⁹ Satisfied that the incident complied with the law of war and ROE, the battalion commanding officer found no evidence of any wrongdoing on the part of Lieutenant Waddell.¹⁷⁰

Later, in a subsequent joint operation, “another Marine officer was stationed in the same workspace as the FMV operators.”¹⁷¹ “During a graveyard shift and out of boredom, the civilian FMV operator showed the officer a compilation of some of [the] company’s kinetic strikes in the preceding months.”¹⁷² Taking issue with this particular incident, the marine officer made a formal report to the Marine Expeditionary Force (MEF)—the highest Marine authority in Helmand Province, Afghanistan.¹⁷³ Amazingly, Lieutenant Waddell was accused of violating the law of war (termed the law of armed conflict in the report) and the ROE.¹⁷⁴ Lieutenant Waddell’s Battalion Commander then re-opened the investigation and ordered a more thorough investigation.¹⁷⁵ As the investigation progressed, Lieutenant Waddell was relieved of his duty as executive officer.¹⁷⁶

The Major’s command investigation concluded “that there had been civilians in the area and, specifically, children on the tractor during the engagement.”¹⁷⁷ Lieutenant Waddell related that neither he nor the action officers and snipers involved in the incident had a recollection of civilians in the area.¹⁷⁸ Apparently, the determination that children were on the tractor was the result of a “painstaking review of the FMV recordings of the incident.”¹⁷⁹ Lieutenant Waddell was held responsible

168. *Id.*

169. *Id.*

170. *Id.* ¶ 4, at 1–2.

171. *Id.* ¶ 4, at 2.

172. *Id.*

173. *Id.*

174. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 34, at 7 (on file with author); Account from 1Lt Joshua Waddell ¶ 4, at 2 (on file with author).

175. Account from 1Lt Joshua Waddell ¶ 4, at 2 (on file with author).

176. *Id.*; USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at 5 (on file with author).

177. Memorandum from the U.S. Marine Corps on Command Investigation into the Facts and Circumstances Surrounding the Engagement by Scout Snipers ¶ 27, at 6 (on file with author); Account from 1Lt Joshua Waddell ¶ 5, at 2 (on file with author).

178. Account from 1Lt Joshua Waddell ¶ 5, at 2 (on file with author).

179. *Id.*

for violating the ROE and the current ISAF Tactical Directive (TD4).¹⁸⁰ Lieutenant Waddell “was permanently relieved as the company executive officer.”¹⁸¹

The battalion immediately began processing an adverse fitness report for Lieutenant Waddell, pending any further legal charges, as the investigation went to the Marine Commanding Brigadier General in the chain of command in Afghanistan for review and endorsement.¹⁸² The FITREP provided the lowest possible recommendation for Lieutenant Waddell’s promotion to the next grade of rank and contained numerous false allegations about the nature of the incident.¹⁸³ While the FITREP was being processed at this level, Lieutenant Waddell provided several written rebuttals to the allegations.¹⁸⁴

In January 2012, the Commanding General’s endorsement of the FITREP stated clearly that there was no law of war or ROE violation.¹⁸⁵ Nevertheless, the Brigadier General refused to send the adverse FITREP back to the battalion level for reconsideration and revision.¹⁸⁶ Instead, the Commanding General allowed the adverse FITREP to go forward for filing in the official military records of Lieutenant Waddell. The findings included that although “it is not possible to technically break the TD4, as it is more of a guidance document,” the TD4 should have caused pause in the presence of civilians.¹⁸⁷ The Commanding General called Lieutenant

180. In light of the stated purpose of the tactical directive as a purely advisory order, it is hypocritical to charge a soldier with violating it. *See* Memorandum from Int’l Sec. Assistance Force Commander General John R. Allen on COMISAF’s Tactical Directive to the ISAF 1 (Nov. 30, 2011) (on file with author) (updating General David Petraeus’s tactical directive and merely providing guidance on the use of force in combat operations).

181. Account from 1Lt Joshua Waddell ¶ 5, at 2 (on file with author).

182. *Id.*; USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at 6 (on file with author).

183. USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at 5 (on file with author).

184. *Id.* at add. 1–2.

185. *Id.* at add. 3. The reviewing officer stated, “We must be careful when we evaluate decisions that are made in combat when individuals have only seconds to react. Reflecting on an event after a detailed investigation is much different than making decisions in the heat of an engagement.” *Id.*

186. *Id.*

187. The Commanding General’s assessment of the TD4 aligns with General Petraeus’s testimony in 2010 before Congress: “The tactical directive was *never intended as a punitive measure* but rather as a positive measure to focus commanders and troopers on protecting the Afghan people. *It’s not a punitive order and was never intended to be.*” *Hearing on National Defense Authorization Act for Fiscal Year 2011 and Oversight of Previously Authorized Programs Before the H. Comm. on Armed Servs.*, 111th Cong. 157 (2010) (emphasis added) (responding to questions regarding tactical directives and ROE issued by General McChrystal); *see also* Account from 1Lt Joshua Waddell ¶ 5, at 2 (on file with author).

Waddell a “superb and heroic combat leader,” but would not overturn the judgment of the battalion commander.¹⁸⁸

Lieutenant Waddell was reassigned to the Afghan Mentorship Team and served his remaining time with his unit in non-combat activities.¹⁸⁹ Meanwhile, “[n]o other officers or individuals were charged with anything.”¹⁹⁰

On December 24, 2011, the Center for Terrorism Law¹⁹¹ was contacted by the father of Lieutenant Waddell, former Navy SEAL Commander Mark Waddell, for assistance in the case.¹⁹² The Center for Terrorism Law has long assisted service members who have been wrongfully accused of war crimes but, until Lieutenant Waddell’s situation, had never taken on the issue of ROE violations.¹⁹³ Because Lieutenant Waddell’s situation stood for hundreds of other combat service members in similar situations, the Center for Terrorism Law agreed to assist.¹⁹⁴

After discovering that the Marine chain of command in Afghanistan was not open to discussing the case of Lieutenant Waddell, the Director of the Center for Terrorism Law traveled to Washington, D.C. to draw media and Congressional attention to the ongoing abuse of ROE, as demonstrated by the case of Lieutenant Waddell.¹⁹⁵ This resulted in a media blitz, including: a FOX NEWS network television interview; a story

188. USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at add. 3 (on file with author).

189. Account from 1Lt Joshua Waddell ¶ 6, at 2 (on file with author).

190. *Id.*

191. Founded in 2003 at St. Mary’s University School of Law, San Antonio, Texas, the Center for Terrorism Law is a nonpartisan, nonprofit institution [501(C)(3)] dedicated to the study of legal issues associated with antiterrorism and counterterrorism. The goal of the Center is to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between national security and civil liberties. As a fully operational research facility, this goal is pursued through teaching terrorism law courses; professional exchanges such as symposia and consultations; writing; commenting on and publishing written materials; conducting training; and ensuring access to extensive information resources regarding terrorism. The Center also provides assistance apart from an attorney–client relationship to members of the military and law enforcement. The author is the Director of the Center.

192. Hope Hodge Seck, *Officer Who Ordered Fire on Insurgent Vehicle Exonerated*, MIL. TIMES (Aug. 19, 2013, 6:00 AM), <http://www.militarytimes.com/apps/pbcs.dll/article?AID=2013308190037>.

193. Jeanne Graham, *Center for Terrorism Law at St. Mary’s University School of Law Marks Decade of Study, Service*, TEX. LAW. BLOG (Apr. 12, 2009, 4:07 PM), http://texaslawyer.typepad.com/texas_lawyer_blog/2013/04/center-for-terrorism-law-at-st-marys-university-school-of-law-marks-decade-of-study-service.html.

194. Hope Hodge Seck, *Officer Who Ordered Fire on Insurgent Vehicle Exonerated*, MIL. TIMES (Aug. 19, 2013, 6:00 AM), <http://www.militarytimes.com/apps/pbcs.dll/article?AID=2013308190037>.

195. See CTR. FOR TERRORISM LAW, MONTHLY ACTIVITY REPORT MARCH 2012 (2012) (describing the Center for Terrorism Law’s work in assisting Senator John Cornyn with a Congressional Inquiry into military administrative actions and oversight of the ROE).

in the *Washington Examiner*,¹⁹⁶ a front page story in the *Marine Corps Times*,¹⁹⁷ a front page story in the *Army Times*,¹⁹⁸ and a story on the cover of the *Federal Times*. As various media outlets caught wind of ROE abuse, the Center's Director engaged in approximately fifty national radio interviews over the next four months.¹⁹⁹ Every investigative story came to the same general conclusion, one best summarized in *military language* set forth on the front cover of the *Army Times* on April 23, 2012: *Screwed by the R.O.E.: How Rules of Engagement Can Cost Lives and Destroy Careers*.²⁰⁰

The Center for Terrorism Law hoped the national media frenzy would catch the attention of Marine Corps leadership and turn the tide for Lieutenant Waddell. The desired effect was achieved in a matter of months. On June 25, 2012, the *Marine Corps Times* ran the caption: *Officer Overcomes War-Zone Firing, Gets Promoted*.²⁰¹ Despite the career-killing FITREP and relief as the company executive officer, a promotion board recommended the advancement of Lieutenant Waddell, and he was officially promoted to the rank of Captain on June 1, 2012.²⁰² In the end, the simple use of reason trumped the absurd use of ROE.

V. PROPOSED LEGISLATION

"The truth is this, [t]he march of Providence is . . . slow."²⁰³

Robert E. Lee

As seen in the case of Lieutenant Waddell, the discretionary nature of the punishment process for a ROE violation not only creates due process issues for the individuals accused, but also creates disparity among service members on the front lines who make judgment calls similar to Lieutenant Waddell's.²⁰⁴ While each military campaign is different, it appears that for

196. Sara A. Carter, *Congress Explores Options for Soldiers Burned by Rules of Engagement*, WASH. EXAMINER, (April 2, 2012, 8:04 PM), <http://washingtonexaminer.com/article/437611>.

197. Andrew Tilghman, *Sacked & Sold Out*, MARINE CORPS TIMES, April 23, 2012, at 1.

198. Andrew Tilghman, *Screwed by the R.O.E.*, ARMY TIMES, April 23, 2012, at 1.

199. See CTR. FOR TERRORISM LAW, MONTHLY ACTIVITY REPORT MARCH 2012 2-3 (2012) (on file with *St. Mary's Law Journal*) (listing all the interviews given by Jeffrey Addicott concerning ROE and Lt. Waddell's case in March 2012 alone).

200. Andrew Tilghman, *Screwed by the R.O.E.*, ARMY TIMES, April 23, 2012, at 1.

201. Andrew Tilghman, *Officer Overcomes War-Zone Firing, Gets Promoted*, MARINE CORPS TIMES, June 25, 2012, at 24.

202. See *id.* ("Capt. Josh Waddell . . . pinned on his new rank June 1, about eight months after he was relieved for ordering a sniper team to fire on an insurgent despite the presence of civilians nearby.").

203. JOHN M. TAYLOR, DUTY FAITHFULLY PERFORMED 241 (1999).

204. See MAJ Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not*

the foreseeable future the United States will be involved in the Middle East theater of operations. The frustration and, in some instances, confusion regarding ROE mandate that the current system needs impartial oversight, particularly when the chain of command relies on administrative measures as punishment. Congress, through its power to regulate the armed forces, can provide the military with an efficient solution.

While the role of Congress is not to conduct war, Congress does have the power under Article I, Section 8 of the Constitution to “make [r]ules for the . . . [r]egulation of the land and naval [f]orces.”²⁰⁵ To provide a neutral level of review *outside* of the chain of command for service members who are facing adverse administrative actions such as relief or adverse fitness reports, an independent ROE Review Board should be established in the theater of operations to conduct an impartial review before the finalization of adverse actions against the service member.²⁰⁶

Such a board would be composed of senior military officers as selected and appointed by the applicable Combatant Commander. The board would be placed in the theater of military operations in order to facilitate the gathering of evidence as expeditiously as possible, including witness statements, Preliminary Investigation reports, Command Investigation reports, etc. The service member would have the right to appear before the board. The board would be required to make specific findings and recommendations. These findings and recommendations would then go forward to the appointing authority that would make a final determination. The details of the review process would be drawn from the due process provisions in accordance with those procedures found in *Army Regulation 15–6, Procedures for Investigating Officers and Boards of Officers*.²⁰⁷

The ROE Review Board would not be designed to supersede any of the provisions already available for service members such as recourse within the chain of command. Instead, it would function as an extra level of protection outside the chain of command. In light of these considerations, the Center for Terrorism Law was asked to draft proposed legislation that

Lawyering, 143 MIL. L. REV. 3, 55–68 (1994) (summarizing the various problems with the ROE as they are currently implemented, including problems with creation, interpretation, and enforcement).

205. U.S. CONST. art. 1, § 8, cl. 14. This creates an imbalance of power between the legislative branch, which creates rules and regulations under the Constitution, and the executive branch, which through the Department of Defense creates ROE, micromanaging troops on the ground level.

206. At the request of U.S. Congressman Trent Franks from Arizona, the author drafted legislation for an ROE Review Board. The draft bill was never offered for consideration.

207. See generally U.S. DEP’T OF THE ARMY, REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS 1–1, at 1 (2006) (“This regulation establishes procedures for investigations and boards of officers . . .”).

would address the concerns of ROE administrative review.²⁰⁸ The recommendation below summarizes the proposal submitted by the Center for Terrorism Law:

RECOMMENDATION:

A **ROE Review Board** should be created in order to provide an impartial review process for service members who are accused of violations of ROE, but who are facing adverse administrative action only. The **ROE Review Board** would:

- Consist of at least three senior military officers.
- Be appointed by the subject Combatant Commander.
- Convene in the theater of combat operations on a permanent basis.
- Apply the due process provisions promulgated by the DOD.
- Consider all requests dealing with alleged violations of ROE or Tactical Directives and determine eligibility of the case.
- Conduct a thorough, comprehensive, and properly documented investigation.
- Make specific findings and recommendations to the Combatant Commander.

The proposed review board would serve several purposes. It would allow for service members who had been accused of violating ROE an opportunity to argue their case before receiving either a court martial or an administrative punishment. The review board would also guarantee service members due process rights when arguing ROE violations, something that is currently lacking under an Article 15 punishment. Finally, having a separate process for ROE violations would provide more consistent punishment, instead of the disparate punishments now served.

208. See JEFFREY F. ADDICOTT, CTR. FOR TERRORISM LAW, ROE REVIEW BOARD FOR MILITARY PERSONNEL FACING ADVERSE ADMINISTRATIVE ACTION DUE TO ALLEGED VIOLATIONS OF RULES OF ENGAGEMENT 4 (2012), available at <http://www.stmarylaw.org/archive/files/FacultyScholarship/April2012CenterTerrorismLReport63.pdf> (proposing legislation to create an ROE Review Board to “provide impartial review” for services members “accused of ROE violations”).

VI. EPILOGUE

“What’s good for the goose is good for the gander.”²⁰⁹
Old English Proverb

Ironically, the fact that violations of ROE are issued arbitrarily is illustrated by the allegation of ROE violation that was leveled against Marine Lieutenant Colonel Seth Folsom, the Battalion Commander who was the driving force behind Lieutenant Waddell’s administrative punishments via the relief and FITREP.²¹⁰ Lieutenant Colonel Folsom himself was accused of violating the ROE for ordering non-precision weapon fire into a village area where suspected enemy combatants had hidden themselves.²¹¹

The Folsom incident occurred just three days prior to the Waddell incident.²¹² In the Colonel’s case, however, the Staff Judge Advocate for United States Marine Corps Forces Central Command deemed the alleged violation of ROE in Afghanistan on October 28, 2011 as excusable and not worthy of disciplinary action,²¹³ primarily because Lieutenant Colonel Folsom’s use of “non-precision munitions” in a civilian area “did not result in any civilian casualties.”²¹⁴ Common sense makes this statement untenable. If the standard of determination for a ROE violation is based on whether civilians are harmed, like in the case of Lieutenant Colonel Folsom’s use of force three days prior, then Lieutenant Waddell should never have faced punishment—no civilians were harmed by his actions either.²¹⁵ The only damage suffered was one enemy combatant killed and one tractor “wounded.”²¹⁶ Furthermore, Lieutenant Waddell used precision weapons—sniper rifles—while Lieutenant Colonel Folsom employed gunships.²¹⁷ Lieutenant Colonel Folsom suffered no

209. A DICTIONARY OF AMERICAN PROVERBS 422 (Wolfgang Mieder ed., Oxford Univ. Press 1992).

210. E-mail from Gregory Gillette, Staff Judge Advocate, U.S. Marine Corps Forces Cent. Command, to Mark Waddell, father of Lieutenant Joshua Waddell (Mar. 20, 2012, 1:29 PM) (on file with author).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See id.* (explaining that the LTC Folsom incident was not ruled a violation of ROE because there were no civilian casualties).

216. Sara A. Carter, *Marine’s Career Threatened by Controversial Rules of Engagement*, WASH. EXAMINER (Jan. 23, 2012, 7:05 PM), <http://washingtonexaminer.com/marines-career-threatened-by-controversial-rules-of-engagement/article/167369>.

217. USMC Fitness Report (1610), NAVMC 10835A (Rev. 1-01) (P A-PES 5.2.6.7) at 5 (on file

punishment.²¹⁸ As the saying goes, “what’s good for the goose”²¹⁹

Ultimately, however, reason prevailed, and Captain Waddell’s record was corrected.²²⁰ All references to Captain Waddell’s apparent violations of ROE were removed from his file.²²¹

VII. CONCLUSION

“[C]ommon sense in an uncommon degree is
what the world calls wisdom.”²²²

Samuel Taylor Coleridge

Due to the confusing and changing nature of ROE and how they are applied, it is painfully apparent that overly restrictive ROE have proven to be a source of injustice to service members in the field of combat operations. This is particularly true when the chain of command uses administrative punishment as a form of discipline, providing little recourse to the service member.

Because nothing is certain in the realm of combat, it is clear that service members need an extra level of due process protection when it comes to alleged ROE violations. In fact, the creation of an autonomous ROE Review Board that functions outside of the chain of command may prove useful in revealing ROE that should be repealed. In addition, a ROE Review Board would go far in eliminating perceptions of double standards.

The recommendations put forth in this article are meant to serve as a starting point on how to best provide this level of review. At a minimum, a ROE Review Board will better clarify exactly what is expected of our troops in the field, thereby alleviating fears of unjust treatment from the chain of command when adverse administrative measures are initiated against a service member.

The general consensus has long been that overly restrictive ROE are

with author); *see* E-mail from Gregory Gillette, Staff Judge Advocate, U.S. Marine Corps Forces Cent. Command, to Mark Waddell, father of Lieutenant Joshua Waddell (Mar. 20, 2012, 1:29 PM) (on file with author) (concluding that LTC Folsom used non-precise munitions that were “precisely delivered” and resulted in no civilian casualties).

218. E-mail from Gregory Gillette, Staff Judge Advocate, U.S. Marine Corps Forces Cent. Command, to Mark Waddell, father of Lieutenant Joshua Waddell (Mar. 20, 2012, 1:29 PM) (on file with author).

219. A DICTIONARY OF AMERICAN PROVERBS 422 (Wolfgang Mieder ed., Oxford Univ. Press 1992).

220. Memorandum from the U.S. Marine Corps to Fitzpatrick Hagood Smith & UHL LLP c/o Captain Joshua C. Waddell on Correction of Naval Record (Aug. 14, 2013) (on file with author).

221. *Id.*

222. 5 THE COMPLETE WORKS OF SAMUEL TAYLOR COLERIDGE 130 (Prof. Shedd ed. 1854).

necessary in Afghanistan to win the general population over to the Afghan government and the American presence. This is incorrect. When a nation in its ignorance follows a course of action that leads to its own casualties and defeat, then the ROE merely reflect that nation's ignorance of history, let alone common sense.²²³

Overly restrictive ROE reflect the cult of appeasement and capitulation that has dominated American foreign policy persistently since the end of World War II. In its relation to American foreign policy, generally, and to the war in Afghanistan, specifically, the Executive Branch has created an insidious system of ROE that seems designed to destroy and pervert morale and *esprit de corps* in the armed forces of the United States. In the words of one Marine stationed in Afghanistan who does not know Lieutenant Waddell: "The rules of engagement are meant to placate [President Hamid] Karzai's government at our expense. They say it is about winning the hearts and minds, but it's not working. We're not putting fear into the enemy, only our own troops."²²⁴

The current ROE in Afghanistan reflect a national moral exhaustion and a surrender reflex. Not only does the political leadership understand that these overly restrictive ROE hamstring our forces, they also sanctimoniously proclaim that it is just and moral that this should be the case. On the other hand, our service members in the field understand the inevitable consequences of overly restrictive ROE. They know the falsity of the view that ROE contribute to the mission. They know that the overly restrictive ROE paralyze military victory. The enemy interprets our silly ROE as a predisposed will on the part of the Americans to lose. ROE reflect the cult of appeasement and capitulation that inevitably emboldens them to greater violence.

Finally, if any good can come out of the Waddell case, it is that the story of the injustice done to Captain Waddell is specifically covered in ROE training classes conducted by the military here in the United States. Further reforms in the system have not occurred.

223. See R. B. THIEME JR., *FREEDOM THROUGH MILITARY VICTORY* 36–40 (4th ed. 2000) (expressing the view that there is no substitute for military victory—that the very freedoms enjoyed by the United States come from military victory and destroying the enemy).

224. Sara A. Carter, *Marine's Career Threatened by Controversial Rules of Engagement*, WASH. EXAMINER (Jan. 23, 2012, 7:05 PM), <http://washingtonexaminer.com/marines-career-threatened-by-controversial-rules-of-engagement/article/167369>.