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We welcome submissions from all points of view written by practitioners in the legal community and those in academia. We publish articles, essays, and book reviews that represent diverse ideas and make significant, original contributions to the evolving field of national security law.

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## SYMPOSIUM PANEL

### POLICY BY OTHER MEANS: A REVIEW OF DOD'S LAW OF WAR MANUAL

**Matthew McCormack, Dr. Nicholas Rostow, & Tom Bowman\***

*On November 16, 2015, the National Security Law Journal at George Mason University School of Law hosted Policy By Other Means: A Review of DOD's Law of War Manual, a symposium featuring a panel discussion on the Department of Defense's Law of War Manual, which was released in the summer of 2015. Following is an edited transcript of the remarks.*

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**RICK MYERS, EDITOR-IN-CHIEF:** Thank you for coming tonight. My name is Rick Myers, and I am the Editor-in-Chief of the *National Security Law Journal*. I want to welcome you to our Fall Symposium, "Policy by Other Means: A Review of DOD's Law of War Manual." The Law of War Manual was just released this past summer; we're excited to present this discussion today.<sup>1</sup>

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\* Matthew McCormack, Associate General Counsel in the Office of General Counsel for the Department of Defense; Dr. Nicholas Rostow, Professor at National Defense University; Tom Bowman, National Desk Reporter for National Public Radio. The panel was moderated by Harvey Rishikof, former Chair of the Advisory Committee, to the Standing Committee on Law and National Security.

<sup>1</sup> This article is an edited transcript of remarks delivered on November 16, 2015, at the *Policy By Other Means: A Review of DOD's Law of War Manual* symposium hosted by the *National Security Law Journal* at George Mason University School of Law in Arlington, Virginia.

As you can read in your program, the *National Security Law Journal* is one of the student-edited journals here at George Mason University School of Law. We publish two issues a year. Volume 4, Issue 1 should be available in the upcoming weeks. In the meantime, I invite you, if you enjoy the debate and discussion today, to visit our website, [nslj.org](http://nslj.org). You can find all of our past volumes online as well. At this time I would ask you turn off or silence your cell phones and any electronic devices. Your program also has a detailed [biography] for each of our panelists and our moderator that you can read.

At this time, though, I'll introduce our panel. At the end [of the table], we have Dr. Nicholas Rostow, who is a professor at the National Defense University. Next to him is Mr. Tom Bowman who is a National Desk Reporter for National Public Radio. Next to him is Matthew McCormick who is Associate General Counsel in the Office of General Counsel for the Department of Defense ("DOD"). And then finally, our moderator tonight is Mr. Harvey Rishikof, who is Chair of the Advisory Committee, to the Standing Committee on Law and National Security. So, at this time, I'll turn it over to you Harvey.

**HARVEY RISHIKOF:** Thank you so much. Let me first thank you, Kirstin, and the school for putting this together. It's a wonderful panel that we've been able to assemble, and I notice some great luminaries in the audience who we will expect to have fascinating questions from and the rules of engagement are, is it our expectation that the journal may be editing the discussion and may publish it so we may want to include the questions posed from the audience, so I encourage you to be concise and brevity is the soul of wit when it comes to a question. But you will probably be recorded as part of the proceedings this evening.

I'm not going to go into the bios of the individuals. I know most of them extremely well, and I think they're going to [have a] fun conversation, but as you know the document is [1,172] pages with [allegedly] 6196 footnotes. That's how you know there may have been one or two lawyers involved in the production of this extraordinary document. But I think this is the first night that we're going to start debating and around town, there are going to be a lot

of conferences trying to analyze this document from a whole variety of perspectives. But I want to compliment Matt as representing the DOD tonight for—this is a long awaited document, and hats off go to you and . . . Stephen Preston who [helped] manage [to] get this baby out the door.

So with that, what we thought we would do was let Matt set the table for a few minutes and then we thought Tom might have one or two issues or questions concerning the reporter section of the Manual and then Nick, as a professor of International Law will . . . raise some of the [major] theme[s] and big issues that we see in the document. So with that, Matt take it away.

**MATTHEW MCCORMACK:** Ok, thank you, I appreciate it. Well thank you to the *National Security Law Journal* for also inviting me to be here this evening. Before I begin, I have to mention that the views expressed tonight are my own and don't necessarily reflect the views of the United States Government or DOD. So with that caveat, let me begin with some background about the Manual.

**MR. RISHIKOF:** I think we'll have the caveat for both you and for Tom vis-a-vis NPR [and] Nick . . . for DOD. All the caveats in place, so you are not speaking for your organizations, including myself. So you won't have to do that, okay? For the record.

**MR. MCCORMACK:** Thanks. So, just over five months ago, the Office of General Counsel for DOD published the DOD Law of War Manual, which is the first ever department-wide Law of War Manual.

My original plan for our talk this evening was to begin to summarize the 1200 pages for you; they told me I only had ten minutes so you know that plan went out the window.

[AUDIENCE LAUGHTER]

So, my plan this evening, to your benefit, will be much more modest. I'm simply going to make a few remarks about what the Manual is, who wrote it, why it was written and how we envision it being used. While doing so, I'll also explain what the Manual is *not* which oddly enough can actually help people better understand the Manual's purpose and design. So first and foremost—what is this DOD Law of War Manual?

The Manual is an informational publication about International Law, more specifically, the law of war. The Manual is not directive in nature; it is descriptive in nature. The U.S. military, like so many other militaries in the world, works through a system of affirmative domestic authorizations, and orders given by civilian authorities. Thus, even though those orders [and operations must] comply with the law of war, the authorizations for taking those actions are domestic orders, not the law of war, much less an informational Manual about the law of war. In any event, the law of war is mostly prohibitions and restrictions and imposes obligations if certain actions are undertaken—it doesn't authorize or tell military forces or anyone else how to prosecute a military campaign or how to really act in war. Thus, legal discussions in the Manual about [how] the law of war deals with certain issues such as “What constitutes spying?” or “Under what circumstances may a person be entitled to treatment as a POW?” is not an authorization for U.S. military personnel to take any particular action. It just describes legal rules and resulting legal consequences of taking certain actions.

So the Manual describes U.S. international legal obligations. The Manual doesn't create or change any law, either international or domestic, or create or change any policy. So, when you look closely at the Manual, you'll see that it's largely written from a retrospective perspective. The Manual largely takes existing treaty obligations, existing interpretations of legal rules, and other existing legal positions that the United States or DOD has taken.

We thought that a retrospective approach would be the most beneficial approach for the primary audience of the DOD Manual, which is DOD legal practitioners. The most important thing for the start of any new legal analysis, is what was the last official authoritative U.S. or DOD-level position on the subject? Not an

abstract position crafted solely for the purpose of drafting a manual or even to advocate for a change in the law. Some people may dislike this retrospective approach because they want something more aspirational. Other people, such as practicing DOD lawyers, should really find the approach that we took useful.

So, it should go without saying that the DOD Law of War Manual was not drafted to codify customary international law (“CIL”). Even though the Manual refers to customary international law, the Manual focuses on the law of war applicable to the United States regardless of its source. So even though the Manual addresses CIL, not everything in the Manual is an expression or reflection of CIL. For example, the Manual states treaty rules, [and] U.S. law and policy [in some cases]. So it wouldn’t be correct simply to take statements in the Manual and say that the Manual reflects DOD’s views on CIL. By contrast, scholars have sometimes used military manuals in this way and the United States has objected to that. That said, when [the] U.S. legal position’s was that some rule does reflect customary international law, we said so in the Manual.

Now the Manual was prepared at the direction of the Secretary of Defense, by what we call the Law of War Working Group, which is chaired by a representative from the Department of Defense’s General Counsel’s Office. Over the last five years, that has been my boss, the Deputy General Counsel for International Affairs, Chuck Allen. The Working Group also includes representatives of all the service branches Judge Advocates General and [Military Department] General Counsel, as well as the Staff Judge Advocate to the Commandant of the Marine Corps, and [the] Legal Counsel to the Chairman to the Joint Chiefs of Staff. We’re also grateful to have received input from colleagues from the Department of Justice and the State Department. Of course, within my office, there was a very small team of lawyers who were researching and writing the text, chief among them, Karl Chang who was the principle drafter of the Manual.

Even though this is the first DOD-wide manual on the law of war, this is not the U.S. military’s first statement about the law of war. As noted in the foreword to the Manual, General Washington directed that the Continental Army would follow the law of war.

And then during the Civil War, President Lincoln issued General Order Number 1[00], the famed Lieber Code, which provided the basis for similar regulations in other countries and early multilateral treaties on the law of war. Throughout the twentieth century, each of the Military Services has issued multiple pamphlets and manuals on the law of war. So publishing this DOD-wide Manual is just the next step in DOD's effort to disseminate information about the law of war to its forces.

And this brings me to the issue of how we envision [the Manual] being used. Of course, some may wish to read it from beginning to end: I would not recommend that [*humorously*]. [More seriously,] we [can] see the Manual being used by instructors in the law of war, both civilian and military. But really, first and foremost, the audience that we had in mind was the DOD legal practitioner. We envisioned the Manual being used as a reference work for the practicing military lawyer. So, for example, a military lawyer who is advising an operational commander would use his or her Manual to refresh his or her knowledge of a particular rule. The practitioner would use the Manual [to] find the particular rule at issue, and the relevant U.S. and DOD interpretations of that rule. The Manual also identifies sources where further information can be found. With the practitioner in mind, we largely wrote the Manual with the rule stated up front and clear.

This leads me to my last point: the Manual's online nature and its design, which oddly enough—the fact that it's electronic—[has been the] subject [of some] controversy. People have expressed a lot of opinions about [it being] an online, electronic manual rather than a bound version . . . . But, before you hit “print”, or before you spend \$75 and send it to LawofWarManual.com, let me make a pitch for why [we believe that an electronic publication has distinct advantages over a printed version]. Really, first and foremost, the primary advantage for DOD, was that an online Manual would be immediately accessible. You post it and it's not just accessible within DOD, but anybody in the world can hit [the website] and look at [the Manual]. And, the second thing we realized was that we would be periodically updating [the Manual]. Of course, the law isn't static. So, we can envision updating the Manual on a periodic basis. [With an electronic Manual, no one is left] referring to version 1.0 after [we

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have updated successive editions of the Manual for] ten years and we're now on version 6.0. That's unless you printed it out, or you spent your \$75.00 [to buy a copy from LawofWar.com] [*humorously*]. So, [these are some] of the reasons for having an online Manual [and] why that makes sense to us.

[Also, an] electronic Manual is just eminently easier to navigate and use for a legal practitioner. For example, you're able to have Manual-level and chapter-level tables of contents that are hotlinked. We were able to have footnotes that [are] cross-linked to other sections. If you'll notice, the Manual is drafted largely in chunks of information. Those chunks of information have a descriptor that allows it to be identified so that it can be used as a cross-reference in the footnotes so that you don't have to repeat a lot of the same information over and over again in the Manual as you're building ideas or just wanting to discuss one topic. Without the ability to easily cross-reference other information, the Manual would have been ten times longer than it is [*with exaggeration*] because so much of the law of war is interrelated.

Some of the other features that really help with an electronic Manual are that Adobe Acrobat has section bookmarks, which is a table of contents that runs along the left hand column and other features. And, maybe the most powerful or most obvious [feature] is the ability to word-search—being able to plug in a word and find it immediately is just incredibly powerful for the researcher or a user of the Manual. Maybe just to draw one quick example: I picked a phrase, “Martens Clause.” How long would it take for me to find information by just opening the “find” button and typing it in? It took four seconds. Really all I did was typed it in, [and] it went to the first place it was mentioned in the Manual, which was in Chapter 2. There's a footnote there that says “Refer to section 18” “blank blank” section, “Martens' Clause.” I hit that [cross-reference], and there I have the information I was looking for—the Martens Clause. Now, without the ability to use the electronic cross-referencing, you would have to have a much more sophisticated understanding of how the Manual is organized, and then a much more sophisticated understanding of the law of war. For instance, there is nothing in the Table of Contents that says “Martens Clause,” right? And, we also didn't index the Manual because it would take a professional indexer



to do that and so we would still be waiting for the thing to be indexed if we were to go that route. So the Martens Clause information is included under the 1899 and 1907 Hague Conventions . . . because that's where the Martens Clause first appeared. But, unless you already knew that, you would have had a tough time finding it; you might've looked in ten different places. The other thing [to note] is that information [on the Martens Clause] is on page 1,173 in Chapter 19 [*with exaggeration*]. You would've spent a long time looking for it and you just don't have that issue with [an] electronic Manual.

**MR. RISHIKOF:** Just for the record though, it's actually [1145].

**MR. MCCORMACK:** [1145]—I just made [the number 1,173] up [for effect].

**MR. RISHIKOF:** But that, again, this is just for the printed version.

**MR. MCCORMACK:** How'd you know that? How'd you know the Martens Clause—you looked for it—you looked for it, too?

**MR. RISHIKOF:** I did.

**MR. MCCORMACK:** How about that? [*rhetorically*]

**MR. RISHIKOF:** We did not plan this, but I knew the Martens Clause would come up in the discussion, so I looked it up.

**MR. MCCORMACK:** Really?

**MR. RISHIKOF:** Yeah, but so, that's a perfect example—

**MR. MCCORMACK:** You worked for the Intel community at one point.

[AUDIENCE LAUGHTER]

**MR. RISHIKOF:** I've worked for many communities, but let's continue.

[AUDIENCE LAUGHTER]

**MR. MCCORMACK:** So, one last thing, we've heard people say, "I want something I can put in my pocket." [With the Manual], you can download it to your laptop or iPad and you're off and running.

Now, to say that we published the Manual is not to say that we are done with the Manual. We've already begun looking at ways to improve it. So, if you have thoughts about that, I'm going to be taking notes tonight. I [also] have colleagues in the audience who will be taking notes. The preface [of the Manual] also includes an email address where you can send comments. We encourage you to do so. That would be super helpful for us. When you do provide comments, try to make them as detailed as possible. If it's a legal source that you believe that we missed, or some other state practice that's otherwise not mentioned that you believe would be helpful, that would be very welcomed. So with that, I'll end my remarks and thank you for your attention.

**MR. RISHIKOF:** First of all, there are a number of things that are quite fascinating about this because, for the academics in the audience, though this exists, the authoritative version is going to be electronic.

**MR. MCCORMACK:** That's correct.

**MR. RISHIKOF:** So before you cite this as the authoritative version, all the academics have to go to the electronic site to make sure it has not been changed.

**MR. MCCORMACK:** That's correct.

**MR. RISHIKOF:** Which I've never—that's a really quite amazing phenomenon.

The second thing is, you said, "This Manual does not however preclude the Department of Defense from subsequently changing its interpretation of the law. Although the preparation of this Manual has benefited from the participation of the lawyers at the Department of State and the Department of Justice, this Manual does not necessarily reflect the views of any other department or agency of the United States Government or the views of the United States Government as a whole." That's also quite fascinating in this particular section. And then finally, the cover, you can't see, but it is a picture, I assume. I'll have to look at the citation because Senator McCain is on the cover as a POW. And just for the record, there is a guy that looks a lot like you behind them, but I'm sure it's not you given your age.

[AUDIENCE LAUGHTER]

**MR. MCCORMACK:** Yeah, there is an age difference I think.

[AUDIENCE LAUGHTER]

**MR. RISHIKOF:** . . . It is fascinating, the cover, is the current Senator who is Chairman of the Senate Armed Service Committee. With that, Tom . . .

**TOM BOWMAN:** Okay.

**MR. RISHIKOF:** I think there might be some issues that you specifically want to raise?

**MR. BOWMAN:** Sure.

**MR. RISHIKOF:** Then, we can move forward. But we thought it might be interesting if you might be able to comment on a section you find personally interesting.

**MR. BOWMAN:** Sure. I want to state from the outset, I'm not a lawyer, nor have I trained to be a lawyer, like many of you fine people out there. I am looking at this strictly from the position of a journalist—I've been a journalist all my adult life. And, I first became aware of this, the New York Times did an article on it a few months back and I did like I always do, everyday, I posted [it] on my Facebook page. And immediately, I got a response from a Marine Colonel I spent a lot of time with in Afghanistan, and it said, "Tom, you know nobody pays attention to manuals, why are you even putting this up there?"

Alright, so I didn't think too much of it until National Public Radio wrote a letter, a senior official at NPR wrote a letter. It says [reading from the letter], "Dear Secretary Carter, A country that protects its journalists, protects the truth. The Department of Defense recently released Law of War Manual fails to do that." So then I said [to myself], "Wow, I should look into this a little more, since my bosses have just written this letter to Secretary Carter."

So, not being a lawyer, but knowing some great lawyers, I sent a note to Gary Solis who was a Company Commander in Vietnam, then became a JAG, [and] taught law at Georgetown and George Washington. So I sent Gary a note. I said, “Hey Gary, what do you think of this new Law of War Manual?” [Reading from letter] “Tom, Oh yes, I’ve looked into the new Law of War Manual, as some of my fellow law of armed conflict teachers have. This Manual is not good. I admit, I’ve read only bits and pieces of it, but who can say they’ve actually read it? It’s too long for anyone with a life to have read it. More significantly, it’s only available online, discouraging any coherent study of its contents, and it has no index.” So, when I see Gary, he’s going to get a copy of this right here. I’m going to make sure he gets it. He’s going to have to carry it in his rucksack, but he will get a copy. So it’s a nice long note from Gary, and he said his concern is, it’s nothing like any LOAC Manual previously published by the U.S. “I have all the antecedent Manuals, the first dated 1914, the latest antecedent Manual issued in 1956 is 192 pages of text. A bunch of it simply repeating the 1949 Geneva Conventions.” And he said—goes on to say that—you know the whole issue of an unprivileged belligerent, which I guess I could become at some point overseas in the field—I’ve been called a lot of things in my life, worse than this, but this is pretty grim—unprivileged belligerent. Now, Gary Solis says, “It’s generally accepted that an unprivileged belligerent is ‘a civilian who takes up arms and directly participates in hostilities.’”

So one of my questions would be, well, why would anybody call me an unprivileged belligerent for reporting on the news? I just didn’t get it.

So I looked into it further and the Committee to Protect Journalists delved into this a bit and talked about what the Pentagon expects you to do. It says, first of all, “to avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities.” Which is problematic for how we do our work—some of our reporters have gone to Syria and Libya. They didn’t ask permission of Gaddafi or Bashir al Assad to go there. So, that’s a serious problem—and a lot of times we do not act openly. We’re prof . . . well, we’re not professionals. We’ve been down this road before, it’s really a craft. But we can talk about that later. But

you always want to say, “Listen, I’m doing a story, my name is Tom Bowman.” With anybody you meet—whether it’s a villager in Afghanistan, or whether it’s a United States Senator, you always want to be open about who you are. But *acting* openly is different.

Now, sometimes we’re out with military in Afghanistan and I might take a little side road and talk with some villagers about what they really think about what is going on. And, I was just there in April and in May talking with—I imbedded with the Afghan forces for a month which was fascinating and we would take villagers aside and say “What do you think is going on here?” And this poor old guy said—and I didn’t ask permission of anybody to do that, I mean that’s not how we do our work. And I said, “Well, what do you think about what’s going on?” He said, “Listen, I live in this little village. Every time I go out and try to tend to my cow, I get shot at by the Afghan forces. They come in, talk to me, and then, that night, when they leave, the Taliban comes in and beats me up for talking to the Afghan.” That tells you what is going on in that country. But I’m not going to go up to the Afghan officer and say, “Do you mind if I just talk to this guy?” Because he’s probably going to say “no.”

So we’re open in who we are and [in] describing who we are, but sometimes we do not act openly. And again, permission of relevant authorities is clearly problematic for the world we live in today. We had one of our reporters, Kelly McEvers, bravely—one of the bravest reporters I know—go into Syria wearing a burka. And if she got caught, she’d be in serious trouble.

It’s actually easier for a woman to go because she could sit in the back seat. If a guy goes, clearly I do not look like a Syrian, I would not pass, so I would have troubles. But she could sit in the back seat. She didn’t ask permission of anybody. Some reporters to this day go through the government channels and they go to Damascus and go around Damascus and they’re taken around by minders and that’s not how we like to do our work, having a government minder sitting with us. So, I find that to be particularly problematic.

And, then it goes on to say that “States may need to censor journalists work or take other security measures so that journalists do not reveal sensitive information to the enemy.” That’s a loaded

term—“sensitive information.” What is “sensitive information?” Now, I know if somebody slips me a top-secret document, that’s clearly sensitive and somebody may go to jail . . . or if someone gives me signals intelligence, which is highly classified. If Matt gives it to me, and of course he never would, but Matt goes to jail and I could potentially go to jail, right? 18 U.S. Code 1798. As Bobby Ray Inman said to me many, many times when I talked to him many years ago.

So, but sensitive information could be anything. And I’ll tell you one thing, this day and age, I don’t want to mention any names or administrations, but this is a particularly closed administration. They put out a letter two years ago that any general officer that meets a reporter informally has to tell authorities—public affairs—that “I met Bowman at a backyard barbeque.” They don’t reveal much about casualties among Afghan forces—they consider that sensitive—but, it doesn’t tell you how things are going. We had a general who said that the casualties in Afghanistan, said at a Pentagon briefing that “casualties are unsustainable,” and they bit his head off. They don’t want to tell you what’s going on—they consider all that sensitive. So if I print that stuff, do I run afoul of this stuff? Is someone going to put me in handcuffs? Is someone going to throw me out of Afghanistan or throw me out of an embed?

This happens time and time again when we do our work. The Marines in Afghanistan never reveal the specifics of a Marine casualty. A Marine may die in Helmand Province. They won’t tell you where it happened or what the circumstances were—they consider all of that sensitive information. The Army will say, “We lost a soldier North of Kandahar in an IED attack or a complex attack,” they’ll reveal it—the Marines will not.

So, if I’m out with the Marines and I broadcast that, “Poor Sargent Jones died in a complex attack from an IED and then was shot afterwards,” is that sensitive information? Can I run afoul of this? So, I see this time and time again when I’m looking at this as well.

Also, you know when I was in Iraq, I interviewed a guy that was a soldier with the Mahdi Army—he was the enemy of the United States. And one of our translators said, “Do you want to sit down with this guy?” I said, “Sure.” So, we walk down the street. We leave

our compound, which had blast walls around it. We hop in his car. We drive away to a parking lot where we meet another guy. We hop in his car. And, this guy's driving away. Drives to an abandoned building in the outskirts of Baghdad. Big concrete building, water dripping, dark. And, I walk in there and I said, "This is probably the dumbest thing I've done in many, many years." And, the guy who's driving the car turns to me and says, "I'm sorry we had to meet this way. But, I am the Mahdi Army Commander. Would you like some tea?" I said, "I would love some tea."

Now, clearly, I could run afoul of these rules and regulations by meeting with that Mahdi Army guy. And also, you know, the Sons of Iraq. They were shooting at American forces and all of a sudden, then you're paying them 300 bucks a month. Now, if I talk to this guy before you start paying him, do I violate these rules? And once you cut him a paycheck, it's okay for me to talk with him? I don't get it.

So, you know, this is the way we do our job. We have to get out there. We don't ask permission of anybody. I get it; if I'm imbedded with U.S. forces, there are rules and regulations—I believe too onerous, but that's another story—I'm prohibited from talking to anybody wounded unless that person gives permission. I'm prohibited from taking pictures of the dead with any markings. I once tried to get—we were in a firefight in an attack by the Taliban—a roadside bomb blew up a 40-ton striker vehicle, flipped it over, killed a couple of guys. They put them in a body bag and I took a picture of the body bag. I almost got beaten up by the Sergeant. He said, "You're not supposed to do that." I said, "Hang on a second. The rules say 'No pictures of the dead.' This is a body bag." But, it could have gone either way with this guy, right?

So our jobs are hard enough as they are, doing this day [in] and day [out] without having this kind of thing—without being called unprivileged belligerents, without saying this is 'sensitive information'—I'm telling you right now, we already have a hard enough time getting *any* information. So that's what troubles me.

And Matt's a good guy, we had a discussion earlier, but one of the other issues that NPR has was that you basically say that "Information that could be shared with a hostile force," and NPR



said, “Hang on a second. How about information shared *only* with a hostile force? Why don’t you change the language?” And the Defense Department said, “Yeah, we’ll look into that.” And NPR also said, “Did you ever sit down with any journalism groups, any journalists to walk through this stuff before you did it? That would have been helpful.” They said they would take that under advisement. And I hope they do sit down with them and go through some of this stuff because you know some of it’s troubling in how we do our work and also, the concern that NPR has and other journalists is, you know, someone is going to look at this Manual and see “unprivileged belligerent” in some more repressive government and say, “Wow, this what the United States is saying. This is what they’re putting in their Manual. We can do anything we want. We can be even harder on our people. And justify it—sensitive information.” So, those are some of my concerns on it, I hope they would at least talk to journalism groups and deal with this in a more serious way. But, those are some of my concerns. I’ll stop there. We can . . . talk about this in the Q&A, but again, I just think on review of this, there are some problems.

**MR. RISHIKOF:** I may change the rules and let you engage immediately, but let Nick speak but we clearly have engagement. And, as you know, this is one of the issues when the Manual came out that a lot of people are . . . focusing on so I think we look forward to having an interesting discussion about the complexities and nuance about what this means as you interpret the DOD [Manual]. Nick—

**DR. NICHOLAS ROSTOW:** Thank you, it’s a pleasure to be here and share this platform with such distinguished personages. And, I want to thank in particular, the *National Security Law Journal* for inviting me. Harvey has kindly taken care of the disclaimer; we can assume it was made. This is a beast. I’ve been on record as an enthusiastic supporter of the effort to write [the Manual] and to get it out, and I still am.

But, I will be candid in my comments because the kind of thing that Tom has just highlighted is not unique to the section on

Journalists. First of all, the question demanded by the title is, “Is it a manual, really? Or is it a treatise?” Either way, it may not be the official statement of the U.S. Government but it in fact is. And nothing like it exists anywhere else in the U.S. Government; nothing like it has ever been published by the U.S. Government. It is not analogous to the hundred and fifty page document produced by the Army in the 50s or the Navy subsequently, and it is therefore, uniquely important and uniquely valuable.

I say uniquely important because for years it has been in the making. I don’t [think] that Matt, you said exactly how long it had been in the making, but I know [that] Hays Parks—probably the most distinguished single expert on the laws of war in the United States for many, many years worked on this and couldn’t bring it to conclusion before he retired—first as a Marine and then as a civilian.

And it is of enormous importance *because* it is the U.S. Government’s statement on the laws of war. And the entire international community has been waiting for it. [Everyone] knew it was being worked. There were experts from foreign countries who participated and read [earlier] drafts and commented on drafts and the International Committee of the Red Cross, which arrogates to itself the chief interpreter of the Geneva Conventions and the Additional Protocols, looked forward to this, I’m sure, with some trepidation because unlike the ICRC, the United States actually engages in armed conflict. And therefore, what it says—what *it* believes the law to be—what it says the law is—is more significant—with all due respect, Harvey, to your native land—Canada . . . or any of the other countries that pontificate on this subject.

Secondly, it’s more of a treatise, exactly in the way that Matt outlined in that it’s a resource for lawyers, but that doesn’t mean that every word has to be taken as cast in stone and we can already see, thanks to Tom, issues arising with respect to the treatment of journalists from the mere term of “unprivileged belligerent.” The way it is used in the Manual reflects, I believe, DOD policy rather than law. It is important because the DOD is really important, and what it says governs the DOD until a higher authority says [something else]. To my simple way of thinking, an unprivileged belligerent is a fighter who is not a combatant and therefore not

entitled to the protections of the laws of war. And not entitled to prisoner of war status if captured. [Such a person, of course, is] entitled to humane treatment, but not entitled to prisoner of war status. And the Geneva Conventions lay out in great detail how you have to treat prisoners of war. So, it's an important point.

When I say it's more of a treatise, I'd like just to focus on three areas. First, use of the term feasibility, which appears in the Additional Protocols of 1977, and the Manual quite properly says a "rule of reason" has to apply to when something is said to be feasible. For example, warning a civilian population that a military operation is going to take place in the neighborhood and that might threaten to inflict harm on the civilians. The Israelis use broadcasts, they use telephones, they knock—that is to say, they'll drop dud bombs on the roofs of buildings as a signal to any civilians to get out of there. In connection with the Gaza campaign of a few years ago, Richard Goldstone concluded that that did not meet the legal standard of feasibility that is required by—that he regarded as customary law. This Manual takes a different view and quite properly so.

Secondly, I would say that its treatment of proportionality particularly with respect to law governing the decision to use force to begin with, I would argue is not correct. It, in my view should be, "that minimal amount of force required to achieve a lawful objective of the use of force." [It therefore is] not, as the Manual says, tied to civilian collateral damage.

Finally, I would say that it adopts a view of the law of war, which I think is a bit expansive to include the *jus ad bellum* as opposed to just the *jus en bello*, the Latin term for the law of war. And *jus ad bellum* governs the law governing the decision to go to war—it's a different animal. And the law of war was designed to ameliorate the calamities brought on incident to war not to protect civilians as this Manual says.

There are other issues that I could get into. My time is almost up—treatment of nuclear weapons, a lot of legal scholars like to say that the law of armed conflict, the law of war, has to apply to the use of nuclear weapons but lets face it people, nuclear weapons are *per se* indiscriminate weapons. A 20-kiloton bomb, that is what was used on Hiroshima, would today be a small weapon. No one

knows quite how tactical nuclear weapons would work, artillery shells and the like, and whether if you were a victim of such attack, you'd actually know whether you were under strategic attack or not and it's just better, in my view, not go down that path. But I've written an article on it, which is just coming out.

I think that, again, [the Manual is an extremely] important document. It's a very good document in a lot of ways, but . . . I think the next step would be for all the service JAGS to . . . develop manuals that are usable and carry-around-able in your kit bag and not just have this as a sort of library of international law for lawyers to use because I think the operational people in the field need to know enough about the law themselves to stay out of trouble. [P]eople in uniform in particular run individual criminal liability for their use of force, their conduct in military operations. It's one of the reasons the United States has so many lawyers trotting around with its soldiers because it was the response deemed appropriate to events like the Mai Lai Massacres during the Vietnam War. So, let me stop there because there's a lot more that can be said but I just want to reiterate that in the main, this a really important document, it's a really well done document, and I, for one, am very pleased that it is out. Thank you.

**MR. RISHIKOF:** Ok, so Matt, as you, I think, anticipated, the conversation when you produce a document like this generates an unbelievable amount of discussion and contention. The document does [what it very clearly sets out to do], what the major principles are—military necessity, humanity, proportionality, [and] distinction . . . And then, once those are the governing principles for the entire document, you have the questions that the panelists are focused on.

So I'll let you speak, but there are two things. One is that 'war' is sometimes used as a legal concept, as you put it in the opening of the paragraph. The application or operation of a legal rule may depend on the existence of "a war, an armed conflict, or hostilities. As a legal concept, war has traditionally been viewed as a condition in which a State is prosecuting its rights by military force, usually against another State. However, the precise definition of war often depends on the specific legal context in which it's used." And I

think both of the other panelists have raised that issue of what the context is of the functionality of reporting, or the context of the functionality that Nick has raised, how it understands proportionality and the role of civilians. So, I think we thought it would go this way. So, why don't you take a [minute] and sort of reflect on the comments and those issues."

**MR. MCCORMACK:** Sure, and maybe the way I'll begin is I'll take [Harvey's] first comment and then Tom's, and then some of Nick's.

You know, on the issue of "what is war?", one of the hardest chapters to write, really [was] the first chapter and the third chapter, which are very theoretical, but they're kind of foundational in many ways. So it's not just a matter of reciting treaty rules and statements that have previously been made in, you know, an ICJ brief the United States has made before the International Court of Justice [or other place]. But, "What is war?" War is not really defined by the Law of War. So this is often an issue of, sometimes in domestic law . . . you may have certain higher punishments for offenses conducted during war. You may have questions of when does the law of war apply in international matters, those *in bello* rules, the rules applied to the conduct of hostilities. So, this is kind of an interesting question that we had to deal with in kind of framing the Manual.

And maybe to pivot to some of Mr. Bowman's comments about the journalist section of the Manual . . . Maybe first and foremost, I'd like to just make the point that . . . please don't take what I say as kind of push back on Tom, or NPR, or the idea of expressing concerns is somehow wrong or inappropriate, or that I'm defensive in some way. What I would like to do is to push back though because I think the issue of journalists can provide a good vignette to help better understand what the Manual is. And, that's not to say that we won't update and improve the Manual going forward, including the section on journalists. In fact, that's something that we've committed to do. So please take with a grain of salt what I'm about to say.

So first, I totally agree with Mr. Bowman about the difficulty that journalists have on the battlefield. It's an incredibly dangerous

place for anybody – soldiers, sailors, Marines, journalists, humanitarian actors – it’s an incredibly trying environment. So, we in DOD—again, I’m not speaking for DOD—but we certainly know that there are difficulties with reporting. DOD policy is to support that reporting.

I mean, this is one of the issues with the Manual itself. The Manual is really about what are the international prohibitions and restrictions. It’s not really about how NPR on the ground in Kandahar, or wherever, is really interacting with public affairs officers in the military. DOD policy is that independent reporting is the way Congress, the American public, and other soldiers are to get news about what their military is doing. So, at least DOD policy . . . is very, very supportive of news organizations getting the story, to be able to report on U.S. military activities. Maybe the common example that people like to think of is the idea of embedded reporters, particularly during the invasion of Iraq. I think there were something like 600 [or] 700 embedded reporters that went with units. And, policy is that they are to go with all major units that are available. So DOD, in policy, has been very supportive of the idea of a journalists reporting on U.S. military activities.

And I think [that] with the Manual itself, and the law itself, we have a lot of similarities between the views of DOD and those that Tom expressed. The idea of helping to protect journalists on the battlefield, I believe that’s something that’s reflected in the Manual.

I’ll go into that a little bit more. The idea of avoiding journalists being mistaken for spies is another thing that’s in the Manual that we’re trying to communicate, that we believe would be in harmony with the ideals of the media and NPR and other news organizations. So, I think we have a lot of similarities there. And we have been talking to news media and journalists since the publication of the Manual in a very fulsome way. We’ve answered numerous queries from reporters who are writing stories, and we try to help them make their stories as accurate as possible. This is obviously a time-consuming process, but one that we believe is worthwhile. We’ve received letters, as Tom mentioned, from NPR . . . a very thoughtful letter. I believe that NPR received a very thoughtful substantive letter back. If you’ve ever received back a note from the

U.S. Government, a lot of times it's like "Hey, thanks for your interest in national security. I've been asked by the Secretary to respond on his behalf," and that's really it. *[with exaggeration]*

What we've tried to do is address the concerns that NPR has raised in a substantive way, better explaining the Manual to avoid confusion, and to actually identify where there are tensions or disagreements. We've done the same with the Committee to Protect Journalists, and other news organizations. My boss has appeared on *On the Media*, which is an NPR news program about media issues. So, we're doing this. And, we'd be happy to sit down with Gary Solis and talk about the Manual, talk about issues. Sometimes the best you can do is agree to disagree, or maybe you find out there's no disagreement.

Maybe I'll just address two things that Mr. Bowman brought up as it relates to the Manual substantively, and I'll try to explain what the Manual is doing and not doing. Mr. Bowman said that we've called him an unprivileged belligerent, or something to that effect. That is not the case. The Manual is not calling journalists unprivileged belligerents. All the Manual is doing is making the point . . . this is the first line of the journalist section: "In general, journalists are civilians." It also says that "journalism is a civilian activity." But, it notes that just like any other civilian, civilian journalists can lose their protected status. They can either engage in hostilities, and it cross-references the section on "directly participating in hostilities," where civilians can lose their protections.

The other kind of unique thing with journalists that we believe is kind of an important point to make, is that the Law of War doesn't control who calls themselves a journalist. The Law of War can tell you what is "direct participation in hostilities;" it can tell you who a "combatant" is; it can tell you who a "civilian" is, who a "protected person" is under the Fourth Convention. But the box of "journalist" is just not defined. So, what that means is that those civilians who are journalists can move to different categories if they do different things, such as spying, or those things.

All the Manual is doing there is making the point that there are ways the Law of War has recognized to help people avoid being mistaken as spies. As the NPR letter to the DOD reflected, there's a

lot of factual similarities. Both a spy and a journalist are collecting information. They're collecting information in the zone of battle. They're doing it to pass it on to someone else. There's a lot of factual similarities.

What the DOD Manual is trying to do is show the legal difference. That is, the Hague Convention of 1907 has a specific definition of what spying is, and we're trying to say, there are ways that journalists can take to avoid being mistaken for that activity, those being, embedding with a military unit, that helps verify who you are and why you're there, rather than just someone random on the battlefield. The other idea is reflected in the Third Geneva Convention: the idea of identification. That helps distinguish who's on the battlefield and why. And this is like a fundamental Law of War principle, the principle of distinction.

So, the Manual doesn't say anybody needs to get an identification document, except that the State has a responsibility in international armed conflict [to issue identification] so that war correspondents can be treated as POWs. But in the case that Tom's talking about in Afghanistan or whatever, there's just no requirement. You don't have to do that. But the Manual is just discussing ways that a journalist can better identify themselves as a journalist rather than being suspicious, or because their activities look similar to spying. So maybe I'll leave it at that.

**MR. RISHIKOF:** I'll add one more thing, which is quite fascinating. I'll let Tom respond... But just to give you the complexity of the context, the Manual does cite to a UN report in the International Criminal Tribunal for the Former Yugoslavia, where it says, "Whether the media constitutes a legitimate target is a debatable issue. If the media is used to incite crimes as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda and generating support for warfare, it is not a legitimate target." So that contextual issue is actually quite fascinating as to what puts you over the line of "you are a legitimate target" vs. "you're not," depending on what you're doing in that war effort, either domestic or internationally. I'm sure, Tom, you have thoughts about that.



**MR. BOWMAN:** The question I have it still the issue of “unprivileged belligerent.” As my friend Gary Solis said, going back to the antecedents 1914, it was always understood that an unprivileged belligerent is a civilian who takes up arms. So why has that been expanded to include spying, which is, you know, a vague term . . . sensitive information, as I was saying earlier. What is sensitive information? If I report on how a Marine dies in Helmand, the casualty rate of the Afghan forces . . . They don’t want that information out, because they don’t want to tell the Taliban. So is that sensitive, and could I be, you know, brought up on charges, handcuffed, dragged out of Afghanistan because of that sensitive information?

**DR. ROSTOW:** Well, I would raise the question, is it the Taliban they’re worried about, or the American people?

**MR. BOWMAN:** They say the Taliban.

**DR. ROSTOW:** Because the Department of Defense has a long history with the media, none of which is particularly happy....

**MR. BOWMAN:** Tell me about it.

**DR. ROSTOW:** ... going back to the Vietnam War. And the whole notion of embedding reporters gives the DOD control. Is that consistent with the First Amendment? Is any of this consistent with the First Amendment? Is any of this consistent with the law of armed conflict, or is it DOD policy that we’re reading about?

**MR. RISHIKOF:** Well, Nick, as you know this is always the *lex specialis*, the idea of war, but the Manual . . . is quite interesting [in] those grey areas. It says, for instance, “Journalism does not constitute taking a direct part in hostilities.” Such a person would be

deprived of protection, right? From being made the object of attack. The Manual adds, "In some cases, the relaying of information, such as providing information [for immediate use in] combat operations would constitute taking direct part in hostilities." So again, it's that grey area. I think Tom is legitimately nervous about who defines that grey area, and who has the ability to make that distinction at that moment, and how that will happen operationally while they're on the ground is probably the concern, and I don't know what the easy answer to that is.

**MR. MCCORMACK:** A lot of issues have been raised. Let me try to address them in somewhat of a logical order. Sorry, I forgot the last point that you made. Oh, yeah, "DPH."

**MR. RISHIKOF:** It's a DPH, right? Because it depends on the information being provided. And some journalists have gotten into problems in that area, when they've been embedded, giving reports which appear to be helping give positions away and things of that nature. We've had instances of that.

**MR. MCCORMACK:** So, on that specific issue, what the Manual does is [that] it says exactly what Mr. Rishikof says, and then it cross-references the nine or ten pages or so that discusses what is "direct participation in hostilities." In there, it uses those same words, "passing information on the battlefield," but the examples of that... right... it's just saying generally, this is what it is. But then, the specific examples are very clear, at least in my mind. It's like, acting as like an artillery spotter, acting as like a lookout for combatants.

It's not the idea that a reporter is reporting on top of a hilltop as part of an embed and is working within the ground rules, and is doing exactly what they're designed to do. It's the idea [that] a journalist could, we're not saying that they are, it's not a matter of probability, it's just the idea that, like, a person could lose their certain privileges not to be made the object of an attack if they abandon their neutral role. And just like Gary Solis says, it's the idea

of taking up arms with the enemy. We're not saying that any [particular] journalist is doing that. It's just noting that there is this legal change that can occur based upon people's actions. And maybe, as far as like on the ground, how does this work? This is like a really fascinating thing as a lawyer who has also been a Marine. Lawyers love talking about the law, and these kind of big things about how the law works. But, how things work in the real world are often very, very, very different. For instance, the rules of engagement that those forces are working under, their particular mission, and all those types of things naturally and responsively hem in what happens in the real world. So, . . . these legal big [issues] are something different from what's on the ground. So, for instance, the rules of engagement or the specific mission that a unit is on is going to drive things much more than these issues of international law and what's prohibited and what's restricted.

And then . . . maybe just on the last piece about sensitive information, because we've heard this several times . . . the issue in that section really isn't, like, running afoul of passing sensitive information. Really, it's just noting that States have found a need to restrict [the] passing of information during wartime. And, this is not a terribly unique thing. Like, so, for example, I don't know if Tom's ever been an embed...

**MR. BOWMAN:** Yes, many times.

**MR. MCCORMACK:** So there's like ground rules, right? Where you agree to certain restrictions?

**MR. BOWMAN:** Right. And the big thing is operational details. And my people at NPR, and the Committee to Protect Journalists, everyone agrees that you never say, "Next week, they're going to go to Helmand province, to Lashkar Gah, and mount this serious big operation. And I've been told many times information about operational details, and the Marines always knew I wouldn't tell anyone. And I said "How do you know I'm not going to tell anyone?" They said, "Because you're coming with us!"

**DR. ROSTOW:** “And we have the guns, and you don’t!”

**MR. BOWMAN:** But clearly, issues like that, again, you would never reveal that, because you don’t want to get anyone killed. How could you justify that? But again, these sweeping “sensitive information” make me kind of nervous. Because in this day and age, with this particular administration, this particular Pentagon, everything seems to be sensitive. That’s what I worry about, that I’ve seen.

**DR. ROSTOW:** One of the things that I think is really good about this Manual is that it has a running commentary on the Additional Protocols of 1977, and on certain interpretations of the law of armed conflict and the applicability in armed conflict of international human rights law, because there is more than a hidden agenda among some advocates of certain interpretations of the laws of war, that the laws of war should make wars unfightable and illegal. That is not the purpose of the laws of war. The purpose of the laws of war is to ameliorate the calamities that are an inevitable consequence of warfare. And I just wanted to make that point, because I think it’s an important one.

**[AUDIENCE MEMBER]:** And so what I’d ask you, Sir, Mr. McCormack, is you know, you said you had this vision for the Manual. Well, you know, visions, much like hope, is not a strategy. So if you could, Sir, my first question would simply be, I’d love to hear your plan to kind of spread this gospel throughout the DOD, in particular throughout the JAG Corps, perhaps to commanding officers, along those lines.

My second question, Sir, actually pertains to the Army. They had some verbiage in their manual. The language was essentially that the citizens of one nation are at war with every citizen of the other nation in a period of declared war. That language was not brought forward into this Manual at all. It’s mentioned in a footnote, but it’s

not really addressed. I don't know if you know even the details of that, but I'd love to hear why that was not adopted in the current Manual.

**MR. MCCORMACK:** So, the vision that I talked about was how the Manual will be used. We have put it out there. It's online. I think it's a marketplace of ideas, in many ways. Smart judge advocates, and the military schools that teach new lawyers and teach continuing education, that teach international law, are going to be using it. And, I've seen it used more and more, even though it's only been out several months, in operational [settings] and other reasons as people are thinking about what are the rules expressed in the Manual, the rationale for them, whether they apply in a specific circumstance, [and] what are the other policy considerations to take into account.

So, I can't say we're going to spread a gospel, in a way, but I think the strength of the Manual is its value to practitioners. If they find it valuable, they're going to use it, and they're going to use it more and more as they realize its value. Like I said, I literally use it every day, just because I find it super valuable. I think judge advocates who are really practicing the law of war will do the same. It'll be, like, how did I ever do this before I had this Manual?

Granted, it is different than the 1956 [manual on] Law of Land Warfare. It is not 123 pages. I love that document. It is a beautiful thing of simplicity. The problem, in my view, is you can't have that same Manual today. There are just more legal issues, more treaties.

And then the other thing we wanted to do [in the Manual] . . . you'll notice there's copious footnoting. That footnoting is for a purpose other than just to footnote. What we really wanted to do is provide transparency in the Manual. When something is in the text, we want you to know why we're saying it. We want to remember why we said it in the first place. So the footnotes are really the rationale for the main text, and it tells you the weight of the reason why the information is in the main text. Is this coming from a treaty? What is the actual treaty language? Is this a U.S.

interpretation? Is this a DOD view? Is it unfootnoted? All those things matter to transparency in legal discourse.

On the issue that you mentioned about the previous manual, noting that persons of an enemy state in international conflict are the enemy. In a way, I think that's probably what it says or something similar to that. Like you said, I don't think it's in the main text, but the idea's still in there.

This idea, it's like so much with the law of war. That is true in so many ways, but it's untrue in so many ways. Because we think of different rules as they relate to... the proportionality rule for attacks and whether the anticipated collateral damage would be excessive to the military advantage expected to be gained. So many people think about the law of war in terms of civilian protection, although the law of war is also protecting combatants, right? Those balances found in the law are a balance between the ability of people to protect themselves in a war and the ability for people to be protected in a war. So there's a fine balance going on, I don't think it's included, I can't say why it's not in the main text, but it could be very confusing to people, because they [could] think that you're [mistakenly saying that] all civilians of the enemy State [are] targetable. [Even] if they're a journalist, they may be made the object of an attack. People can easily misconstrue that, if it's not well-explained why you're including it. So, it may not have been worthwhile to bring that issue forward [in the Manual's main text].

**MR. RISHIKOF:** Well on that issue . . . One of the more interesting things that's happened in the past week is the attack in Paris, and the fact that the President of France has said "We're going to declare war on ISIS." And from a law of war legal doctrine, the United States was I think the first nation in the authorization of the use of military force [in 2001], which declared war not only on States, but organizations and individuals. So, we have helped create contextually, this new ability to project force, military force, against particular significant organizations.

**[AUDIENCE MEMBER]:** The "s" in "ISIS" stands for "State."

**MR. RISHIKOF:** Well, the interesting question also is whether it's "IS" or... it's different variations, right?

**[AUDIENCE MEMBER]:** Even if it's "IS", the "s" stands for "State."

**MR. RISHIKOF:** So, this is one theoretician that says this is an easy one, because of a geographical [territory]... But we are not signatories to AP I, and that's one of the interesting questions of whether or not the law of war applies when you're in a NIAC or IAC, and how you define a NIAC . . . non-international armed conflict and an international armed conflict . . . So it's one of those issues I think this Manual will be used... Yes, Nick.

**DR. ROSTOW:** One point to remember is that President Lincoln issued the Lieber Code, [General Order 100], as Matt said, but he never regarded the Confederacy as a State, he regarded it as rebels, but nonetheless, treated captives as prisoners of war, and conducted blockades and so forth and so on. But, it was a nice distinction that may not have made a difference.

**MR. RISHIKOF:** Well, it's an interesting question as to how one defines State and who gets to define what a State is.

More questions.

**[AUDIENCE MEMBER]:** I'm wondering how much influence you foresee this Manual will have on combatant commanders when developing ROEs and command directives.

**MR. MCCORMACK:** I don't think it's going to have a lot of influence on that, and this is the reason why I say that. Rules of

engagement are a combination of factors... there's various considerations. Some of them are operational, some of them are legal... there's lots of different reasons. But the law of war is like the outer limit of what may be done, what international law would otherwise prohibit or restrict.

The state of the law was the same before the Manual was published as it is afterwards. So, that's not going to change the outer limit. And then also the operational design of the commander that's going to work within that framework, really isn't going to be influenced by the Manual, because the Manual really isn't telling [him or her] how to conduct the operation. That operational design of how to defeat the enemy or to impede its progress or to interdict its movement is really going to be something that's part of the operational art that they're doing today, and I don't see the Law of War Manual really changing how they want to advance a military objective as it relates to designing ROE.

**MR. RISHIKOF:** I remember when I used to teach at the National War College, we used to have a slide of what the rules of engagement were, loosely, in World War II, versus the rules of engagement in Vietnam. And the Vietnam slide went on for a number of slides about how force could have been used in that particular conflict. As Matt is saying, the politics of the matter became very powerful in influencing how we understand the rules of engagement.

Any more questions?

**[AUDIENCE MEMBER]:** I'm Jeremy Rabkin. I have two questions, one for Mr. McCormack and one for anyone on the panel. The first is, could you just tell us a little more about why this took so long? There were some complaints, sort of a suggestion that the Obama Administration was sitting on this, holding it back... maybe you could tell us more about the history. And then, I'd like to hear more about, if I could say, the philosophy of this. If you put out a thousand pages, it suggests, there's really a lot of law, a lot a lot a lot



of law. And even if you say, no, don't worry, it's only online, we're revising it all the time, that doesn't make it less law.

So, was there concern, and do the rest of the panelists think maybe there should have been concern, if there wasn't? That this is contributing to the over-legalization of military activity and maybe this was wiser in the 1950s when they said, eh, a hundred pages, that'll do it, there are just a few rules, after that you're on your own. Is it really progress for us to try to go into such detail, and have the internal revenue code of armed conflict?

**MR. MCCORMACK:** Thank you for your question.

**MR. RISHIKOF:** I think he meant the analogy to the IRS in a positive way!

[AUDIENCE LAUGHTER]

**MR. MCCORMACK:** So, why did it take so long, or what's some of the history? Maybe the best way is I'll summarize some of the history, and then maybe I'll see what else I can address.

So this Manual had been in the works for a long time, that's the bottom line. When we look back, we see memoranda from the 1970s, where the idea would be that there would be an all-Services manual that would be kind of DOD sponsored. And a lot of this was developed out of the idea that we would ratify the [1977] Additional Protocols [to the Geneva Conventions of 1949], because obviously the United States participated in those multilateral negotiations, and there was a question as to whether we would ratify them or not. And if we did, we would certainly need to update our legal guidance to the field, through, like, a new manual. This idea kind of continued to percolate.

We never did ratify the Additional Protocols. That's, like, a good reason to delay a project: "Hey, we may do it tomorrow, we may do it tomorrow." But then the decision was made in the late 80s

not to [ratify Additional Protocol I]. But then its like, okay, that decision's been made, at least for Additional Protocol I. Additional Protocol II, which applies to "high-intensity NIAC" for a lack of a better way to express it, is with the Senate awaiting advice and consent. But the idea of updating the law of war manual based upon whether we were going to ratify AP I was resolved in the late 1980s. Like any project within the government, unless someone is asking for it, demanding it, things always take a higher priority. That's my only guess.

I know I work in a bureaucracy, as Mr. Rishikof said, when Stephen Preston, the former DOD General Counsel, said "This is one of my three priorities, it's going to get done," what do you think happened? It got done. So it's a matter of prioritization within a large organization. I don't know, I can't really assign or try to guess people's motives, or reasons why it took longer. I think probably 9/11 probably had people focused . . . a good portion of the legal community . . . so, that's also probably not a contributing factor to getting it done. But, I can say when Mr. Preston got there got there, it was probably 2012 or so, it was full steam ahead. I know that there's been suggestions that the project to write the Manual had collapsed because of political influence or interference, but that's not my experience. It's as simple as that.

**DR. ROSTOW:** Have we over-legalized the law of war, or warfare? I think every time the United States has been in armed conflict since World War II, and probably during World War II, the people in uniform, the people responsible for directing military operations, have been accused of war crimes. This was certainly true in Korea and in Vietnam.

So, that heightens the importance, if you will, of the laws of war, of conducting military operations in a manner consistent with the laws of war. Usually people who say that "so-and-so's a war criminal" don't know the laws of war, and really are making a political rather than a legal statement. But it's the kind of thing that carries with it real individual liability. Officials of the George W. Bush administration do not travel to certain places because of fear of arrest. So that's one thing.

Secondly, there have been a lot of conflicts since 1945, or 1949, when the Geneva Conventions were adopted. And, if you think of armed conflicts kind of like courts, that's where the law of war gets applied, gets amplified, [and] decisions get made as to what things mean and how to understand them. So, there's accretion to the law of war beyond what is written in the text. It's interstitial, if you will, to use the term Justice Cardozo used so famously. It's the way law grows.

Is a thousand pages a lot? It's a lot, but there are a lot of treaties, there's a lot of custom, and interpretation. Now, this is the Department of Defense view of what the law is, and what US policy in the field is, and that's enormously significant, and will have enormous impact, I hope positive impact, on other countries and the way their military is trained, their lawyers are trained, and what they think the law is. It might even have an impact on the International Committee of the Red Cross. That would be a useful thing. It might even have an impact on the International Criminal Court. That [also] would be a good thing. So, it's a hugely important event, and I think [that when] the Obama Administration [is] long forgotten, this Manual will still be used and looked to. So . . . Matt, you and your team have achieved immortality.

[AUDIENCE LAUGHTER]

**MR. BOWMAN:** From my perspective as a reporter, I'm always troubled when I see more rules and regulations. As it stands now, I have to fill out so many forms to embed with American troops its like buying another house. And they ask what stories you're going to be working on, and it's just troubling, and when you look at the issues of unprivileged belligerents and sensitive information and all this stuff . . . Neil Sheehan, who of course covered Vietnam, just did a piece for the New York Times. He found some pictures of the Ia Drang Valley fight in '65. We just passed the 50th anniversary of the first big battle in Vietnam. And, he talked about how back then, you could just hop in a helicopter and go out with U.S. troops. You didn't have to sign any damn papers, or your signature or blood type, or are you going to have a heart attack, or do you take any

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medications. You would just get on the god-damn bird and go. And, it all worked out well.

[AUDIENCE MEMBER]: Except for the Vietnam part.

MR. BOWMAN: That part, yeah.

DR. ROSTOW: And journalists who got killed. I mean, he didn't get killed.

MR. BOWMAN: We lost a lot of friends and colleagues in these wars. And, I remember right before the Iraq war started, we went down to Fort Benning. They put a lot of the reporters through training to see how you move with soldiers and all. They mostly did it to make fun of us, to see what we could do, and how quickly we could run, and all that other stuff. But, Hal Moore was there, and he talked about reporters and what we do. He said, "Anytime I went anywhere in Vietnam, I always brought reporters with me." He said, "The American people have a right to know what their sons are doing in their name." Particularly something like this. And, I think we've lost that.

Nothing against the Manual, but all these terms that we're bandying about . . . I mean, come on. People don't like reporters, but we're not spies. We're not going to pick up a weapon and fight anybody. I mean, this is ludicrous, some of this. And again, filling out these rules and regulations, and abiding by all this stuff... You know, you can't take pictures of the dead... We'll, how are people going to know what happens in war, if you have all these rules and regulations?

My neighbor's a guy named Norm Hatch, and most people don't even know his name. He was a Marine combat cameraman in World War II. Landed at Tarawa, walked in 300 yards, because they messed up the tides, held his camera over his head, saw people die to the left and right of him, got to the beaches, never got a scratch. So,

he takes all these videos and pictures, dead Marines floating in the water. First time anyone had taken pictures of dead Americans in World War II. He was a Marine, so they roll up all this footage and send it back to the West Coast. The Marines look at it and say, "No way anyone is ever going to see this." But, the Marines worked it up... others, I think, worked it up, and it got to the White House. It got to Roosevelt. And Roosevelt called in Robert Gerad, who some may remember as a great Time magazine reporter. This would never happen today. The President calling in a reporter and saying "Hey, what do you think about this stuff?" And he said what Hal Moore said. "People have a right to know what their sons are doing in their name."

**MR. BOWMAN:** Roosevelt said ok, run it. Ran on newsreels, all that stuff you would never see today.

**DR. ROSTOW:** And there was no censorship during the civil war.

**MR. BOWMAN:** Right. So it ran on newsreels all across the country in movie theaters and went on to win an Academy Award. Never happen today. Never. It's kind of different from what we're talking about, but it's part of the same issue of rules and regulations and we're going to sanitize it, you know H.W. Bush saying were not going to take any picture of caskets, flag draped caskets, coming out of Dover. You know, this is, I'm sorry Matt you're a good guy but this is just one more instance of censorship, and let's not tell people what's really going on. Sensitive information, unprivileged belligerent, it's one more evidence of that. I really think it is, and everybody here should think long and hard about that. You know, how many people here have, you know I can see some Marines here, but how many people have friends and neighbors, or know people, family members doing this kind of stuff? No one! Most people don't, less than one percent. It's easy to sanitize it. And it's wrong.

**MR. RISHIKOF:** I would say, what's interesting Tom, is that there is a distinction between the policies of an administration, deciding how war should be reported, and the Manual which is trying to lay out the rules and [regulations] about how to project force, of which a small section is, the reporter section. And, the pieces I read demonstrate . . . the distinctions and problems that they're having in modern warfare. I see it more in that kind of, that's how I see the distinction. Let me give you an opportunity.

**MR. MCCORMACK:** Thanks. So maybe just briefly on the issue of taking pictures of dead bodies, so obviously there is a bit of a tension, right? The desire to inform the public, but, and although the law of war doesn't say how reporters should report things, there are protections for the dead within the law of war itself—a certain respect for them and other issues that any policy would have to be consistent with. I'm not saying that the policies that you were dealing with were or weren't, but it's the idea of taking pictures of dead bodies could be contrary to some of these principles that are protected in [the] law of war.

I forgot to mention the issue on the voluminous nature of law of war. So, maybe I'll talk about the Manual itself and then about the law or war writ large. The idea when we were writing the Manual [was whether] you could make it shorter, right? You could make it shorter by summarizing the law, or you could make it shorter by leaving things out. We didn't want to summarize the law because we thought legal practitioners really wanted to know what the treaty language was, or what the language that was used in the statement that would assert what the interpretation of a legal rule would be. If you summarized that [information, the Manual] has so much less value [to the practitioner] because now [he or she has] got to look up the thing in the original document. So, [the Manual is] lengthy in the way, in some ways because we wanted to be really helpful to a practicing lawyer.

And, then the other issue is, you could have left stuff out, right? The easiest thing is, the [example of] Swiss francs. Why would you mention Swiss francs for POWs? Well, when you're looking at [the Manual], it's online. It doesn't matter that there's a section on

Swiss francs, unless you need to find something on the Swiss francs rules, right? Because on the computer, it's just a screen, right?

And so, the idea of completeness was important to us because there may be somebody who has to figure out whether we need to provide a canteen for the POWs, [or whether] we actually have to pay [POWs], right? The Third Geneva Convention requires advances of pay; this is a treaty obligation. Somebody may need to know that one day. And, then we were also informed by the idea that humans have this innate nature to [assume falsely] that they know what the future holds. We will never do an occupation again, you know? *[rhetorically]* We will never have to conduct another amphibious landing, you know? *[rhetorically]* The evidence of that was countered, you know, in the Korean War, right?

So, we just realized that it's impossible to just strip things out under the guise, or under the thought, of "oh, no one's ever going to need this." And, so we erred on the side of completeness.

That said, I do have real concerns about the voluminous nature of legal rules as it relates to armed conflict. And, it's not because of the rules themselves, but because the law has to be extremely intuitive and normative to people who've never opened up the Geneva Conventions and read them. It has to be innate; it has to be understood. You can do a lot of that in training and discipline, but [problems arise] when rules become exceedingly complex [and] when they're applied towards more tactical operations, [rather] than places where you have more time to deliberate [and where] you can get a lawyer or two there to help sort things out.

The real danger you have with the law of war not really making sense where it matters most, which is on the battlefield. The real strength of the law of war isn't so much in its legal nature and effect *per se*. Sure it has strength because, as Dr. Rostow said, you can go to jail, right? That has an effect. But, really the power [of ensuring compliance] on the battlefield, in my mind, is the fact that [the law] should embody shared values that are embraced by military professionals. They're going to [comply with the law] as a matter of course, and so the complexity [in the law] makes [implementation] much more difficult.

[AUDIENCE MEMBER]: It has to be adaptable; maybe that's a combination of perception the more voluminous it is, the more you discourage the notion that this is the general rule. Of course it would be adaptive. That seems to me the danger of [inaudible].

MR. RISHIKOF: Right, so this is always the tension between the common law and the more famous continental law, and statutory law...

[AUDIENCE MEMBER]: And common law countries.

DR. ROSTOW: But, also it's a tension embedded in such things as the ethics laws that govern federal employees, which ought to reflect common senses about what's ethical behavior and what isn't. But, anything but, it's as complicated in its own little way as the Internal Revenue Code and you can act ethically and violate it.

MR. RISHIKOF: Let me make more of a different type of point here, which is that: So the first is, one of the segues we have for the panel was to talk about the cyber issues. So, when you turn to page 994, it's about 15 pages, which is very elegant. But it says, it begins for most of the law students like the beginning of a Bluebook exam. It says precisely how the law of war applies to cyber operations is not well settled, and aspects of the law in this area are likely to be continuing to develop, especially as new cyber capabilities are developed and States determine their views and response to such developments.

So, it takes, so we know there's the Tallinn manual, the Tallinn Manual is out, [and it is an academic study on how international law applies to cyber conflicts]. There's going to be Tallinn II coming out, to deal with that classic question of "When does cyber issues rise to the projection of force is below the [threshold and is] just a criminal matter."



So, you guys I think were helpful in saying “here’s sort of where we’re at.” So, one of the advantages of the Manual is that it identifies ranges of issues that require more study, and will help focus discussions. So, I use it to help focus discussions and walk through the cyber operations to figure out what are the issues we know, what we don’t know.

The second issue, the length of it is, this is a little bit different because this Manual, [which] is a Manual that is used in order for us to [lawfully] kill people. Because that’s what we do at war, we kill people. So, you really want a certain level, clear justification, black and white, as to what’s appropriate or inappropriate. I think the soldiers on the field deserve that from their [lawyers and] commanders. And, it’s a little bit more detailed than other types of law.

The example I’ll give you is, so there’s probably going to be an issue about whether or not the President has the authority to move prisoners from Guantanamo [Bay] to CONUS [the United States]. And, there are two [sections involved]. The Constitution is very short, it’s very clean, very adaptable; Article II power appears to give the President that power and Section 8 very clearly says that Congress has the power to declare war, grant letters of mark and reprisal, and quote make rules concerning captures on land and water. There seems to be quite a clear black-letter Constitutional law, but yet there’s still dispute and I think that’s sort of an interesting phenomenon that [still] two hundred-plus years into the republic, that particular power is not clear as a Constitutional matter. I may have one view, but another Constitutional lawyer may have a different view about where the power resides. That level of ambiguity at the Constitutional level, [is] interesting; it really defines where we’re going to see the power.

But at the level of “can you define this person as a combatant?” That’s a rather important phenomenon for people who are on the field. And so it’s quite lengthy. Now, I think your position might be, “Professor, is that ‘does it remove the ambiguity of some of these issues?’” And, there it doesn’t, because a lot of it is contextual, but will it in the end provide the rules as to whether or not, as we always say, “are you going to pin a medal on the person, or

are you actually going to have an Article 32 trial against the individual?" And, that's rather important for people who are actually the practitioners.

So an attempt to try to [set the rules] is why people wanted the Manual out, because they really wanted to be able to see where the left and right margins are. You may be dissatisfied, you may not be happy where the margin has been drawn, but it actually helps you to fight back and say "that's the wrong margin, you should push it back." That's actually quite helpful as to where we are in 2015 on these issues. So, that's how I would respond to the length issue too. Jeremy, you may not like that, but it's a very credible response, really. As a Professor, it's definitely an A-plus response.

Sir, why don't you identify who you are and wait for the microphone, sir. We just need it for the record, because we want to memorialize your thoughts.

[AUDIENCE MEMBER]: You don't!

[AUDIENCE LAUGHTER]

Two questions, or one question and a comment.

Are there any sections or chapters that are more important than others, that inform the other chapters so that you can get into it easier than just reading from page one to page, you know, twelve hundred?

Secondly, it seems to me that, I mean there are so many uncertainties, and a law of war. I mean it's almost an oxymoron, just a law of war. You're talking about chaos; when you really need this Manual, you're really talking about chaos, and there's so many levels of understanding, from the snuffy that's the infantry man in the front line, and doesn't know whether to shoot or not, to the commanding general who says "ok we're going to go in there and clear out this mess," and some people might take him literally, and they do clear out a mess. It's sort of like, you know to me, it's sort of like if we had

marksmen over here shooting at you with live rounds, ok. But they're marksmen and they're not going to kill you, ok. And you're trying to conduct a discussion about war with that happening. And of course, that's what happens in war, without the certainty that you're not going to be shot. This is, you know, the cloud of war, my lord, it's something real. And maybe what my, what I'm getting to is, the understanding of a Manual like this is going to be different all the way down the ranks.

**MR. RISHIKOF:** So let me respond, and I'll let the rest of them respond. [W]e always used to bring Father J. Bryan Hehir to the [National] War College. He's one of the most popular lecturers. He's been doing it now [for] almost seventeen years in a row. So Hehir always begins the lecture with "there are no rules in love and war." So, the left margin is there are no rules. The right margin is "I'm a pacifist, I never believe the use of violence is ever justified, therefore I will never fight."

So, those are the parameters of the debate, but we have decided that there actually should be something as collective civilizations; we've agreed, there has to be something about the rules. One of the arguments always goes back to the Lieber Code: Lincoln's goal was to reincorporate the South. So, because he knew the ultimate goal was reincorporation, he felt if they did take a destroy and waste approach to the South, they would never be able to have the South rejoin the Union, because they would've created such animosity and hostility in the way they prosecuted the war, and treated the prisoners, that his ultimate the goal of the Union would've been defeated. So what's very intriguing about all of these [military codes is that] it starts with an internal civil war, it's really a NIAC, not an IAC, an international armed [conflict], but one of the reasons I think we want to do it this way is because in the end, the ultimate goal of war is to have the individuals we are fighting to join the "Borg." We want them to join the world of civilized nations. And, therefore we believe conducting [war] in a certain way allows that argument to be made. That's the position that we think, I think, is why this is very elaborate. It's an extraordinary amount of documentation, how you treat individuals down to prisoners of war,

which is why we had the Red Cross, but it's because in the end, that's the ultimate goal of projecting force. So, that's, I think, the philosophical answer. But I'll let my other colleagues respond.

**MR. MCCORMACK:** Maybe if, gentleman in the middle, might I go first?

On the issue of like the fog of war and the chaos of war, I think one of the interesting things about the law of war is in many ways it recognizes that. A lot of our treaty obligations were negotiated in the aftermath of World War II, or in the aftermath of Vietnam, where military judgment is incorporated in many ways in the rules themselves.

For instance, the idea of taking feasible precautions—that's like a military judgment of what kind of precautions you are to take before an attack. The idea of not to cause excessive collateral damage, there's flexibility in that rule, right? And it's a rule of military judgment as to what would be excessive in relation to the military advantage to be gained from the attack.

So a lot of these ideas are already incorporated in the law of war, and also reflected in the Manual.

And maybe the last point about this, is another thing that is reflected in the Manual is that the judgment of combatants is judged by what they knew at the time, not some *ex post* analysis, or I guess, yeah, some *ex post* analysis of second-guessing them. Everyone understands that the enemy is trying to deceive you; you don't know what the heck is going on; people are shooting at you; and it is a very difficult environment to do what you want to do. And so, a lot of the law of war already reflects that.

And then maybe, this point about where the heck to begin with [the Manual], right? It's so long. Is one chapter more important than the other? So, [the answer is] "no;" no chapter is more important than the other. That's the simple answer.

But this is what I would do, if I was like in maybe your shoes or anybody in the audience. I would look at the newspaper and, say it's two years ago, I think it's been two years ago, when the Assad

regime, the Syrian regime used chemical weapons against their own people as the allegation goes. I would type into the “find” function “chemical weapons” and I’d say [to myself], “what does the Law of War Manual say about this?” You’ll go to a section that’s about chemical weapons. You’ll read it. Like I said it’s chunked down. So, you can say “I’m going to read the three or four sections,” or you can say “I’m going to read one [because] I’d rather read the rest of the New York Times or the Washington Post.”

But, I would [review the Manual] issue-by-issue as things pique your interest. Because like I said, I wouldn’t recommend anybody read [the Manual] from beginning to end, just because it’s just too much.

What I do find though is [that] I never know [what] the thing is going to be that I’m going to need [to use the Manual for]. That’s why I say no chapter is more important than the next. I’ll get an issue and I’ll think—like today, I had an issue about when are the end of hostilities? This is an issue as it relates to the detention at Guantanamo, right? I wanted to see what we had in the Manual about that as it relates to the Third Geneva Convention [and] the Fourth Geneva Convention. When I started [my day] today, I didn’t know that I would want to know that information, right? But, I looked [and] I found it in three minutes. It’s right there, and now I know that issue. It’s refreshed in my mind and I can go about my day, or give the advice I need to give. So that’s my advice.

**MR. BOWMAN:** Well I’m not a lawyer so, you are right about the fog of war. War is difficult on lawyers, I think, and soldiers and journalists as well. Particularly insurgencies, how do you tell an insurgency’s succeeding? I always tell people if there’s one thing harder than fighting an insurgency, it’s covering one. But, as far as legal issues, I’ll turn it to Dr. Rostow.

**DR. ROSTOW:** Well, I think that Matt’s points were good, and I think Harvey’s are too. I would just add that one of the useful objects, I don’t know why they put John McCain as a POW on the cover, but if you want to know how to treat POW, and whether

torture is permitted, the Manual will tell you. And, it would've been helpful to have that . . .

**MR. RISHIKOF:** You just raised an interesting question, which is, we have *jus in bello* and *jus ad bellum*, [and] some people have talked about *jus post bellum*. *Jus post bellum* is when hostilities end, right, what's the appropriate role? Which is another cool area, potential area, of thinking through rules and regulations. So, if you don't think this is long enough, Jeremy, there's like a whole new volume that could be generated for that. More questions, yes sir?

**DR. ROSTOW:** Let me just add one more point, which is something that Matt said. It is one thing for the U.S. Government to say . . . what is excessive, what is reasonable, *et cetera.*, this commander's judgment about what is reasonable under the circumstances. That's really important to say, and for the U.S. Government to say, for DOD to say, because there are scholars, there are rapporteurs for the United Nations, there are judges in international criminal courts who don't agree with that.

**MR. RISHIKOF:** He's passing the parole as we say in France. That'll be around later, Judge, if you have a point. Mind saying who you are?

**[AUDIENCE MEMBER]:** I'm Peter Macchiaroli, I'm a 2L and I'm a candidate member for NSLJ.

You know in the last fifteen years or so we've really seen the rise of the prevalence of use of private military contractors. In Iraq, it was estimated there were over one hundred thousand mercenaries there at one point, and you know we've seen some of the issues that are associated with that. And, so I'm curious if this Manual was all designed with that in mind? Was it intended to clarify or assist them in any way? Does a lot of the material in there cover them, and if not, is that something, do we maybe need a companion or something that would enable, and clarify some of those issues?

**MR. RISHIKOF:** As you know that was a hot issue—which rules govern contractors?

**MR. MCCORMACK:** So, the issue of private military contractors isn't really a focus of the Manual itself. That said, the law of war applies regardless of whether you're a contractor, or you're a civilian, or you're a combatant. So, [the relevant rules] really depends on what you're doing, right?

So, it's like, the issue if you're a person accompanying the force, and it's an international armed conflict, that's covered. If you are a person who's a civilian and you're directly participating in hostilities, that's covered. If you are a civilian contractor and you, you [do] any number of things, that's covered.

It's not written from the framework of "Oh, I'm this person. I'm a contractor; here are the rules that apply to me."

Really, the way the Manual is written is from a functional approach. It's not written like "here are the rules for combatants in one box." "Here are the rules for civilians all in one box." "Here are the rules for contractors all in one box."

Really, it's a functional approach, and that's the way the law of war works. Some people explain [the law of war] in these big boxes because it's a very easy way to explain [that] "combatants can do 'x'." "Combatants can't do 'y'." That type of thing.

But really, so all the rules for private military contractors are in there. They're just not framed as for them specifically.

**MR. RISHIKOF:** But, there was an issue at one point as to whether or not jurisdictionally, they would fall under the Court of Military Appeals or they would fall under [an] Article III court, right?

So if you're looking for interesting law review articles, how the Manual and our statutes have covered that was a bit controversial during the last fifteen years that we've been at war. [Y]ou might

want to look and there's some scholarship on it, but it's an interesting topic about how the law is going to approach that issue. More questions? Sir.

[AUDIENCE MEMBER]: David Hart, retired Army, currently a 1L.

My question goes to the international piece, and really to all the panelists. Have you had any feedback from international organizations or other countries that you can talk about, about this Manual? Do they see their countries or organizations adopting it, using it, doing something similar?

MR. MCCORMACK: So we haven't had a whole lot of international feedback yet.

My boss is actually in Israel right now giving some remarks at a conference of legal scholars. I think that'll pique some people to provide input back to us, which would be very helpful.

The only real thing that I've gotten back from other foreign militaries is they appreciate the way we've documented the Manual. The reasons why we've stated what we've said in the main text by footnoting. [It's] an issue of transparency. It's not helpful to just state a bunch of rules in the main text and not know where the heck they're coming from, or why we're saying it.

If you can look in the footnotes and you can say "Oh, this is a treaty that we're a party to or not a party to, that's why they're saying this rule wouldn't apply to me" or "this is a U.S. interpretation of a legal rule; we may have a different interpretation in Canada or France or something." It allows them to really understand what we're saying and why we're saying it.

And like I said during my initial remarks, this isn't a codification of customary international law, *i.e.*, trying to say "oh these are the rules for everybody," right? It's more about what are the rules for U.S. forces under international law, regardless of their source.



So, that's the one point that I've gotten back is [about our] transparency, rather than a lot of other legal texts that are written vaguely in order to try to advance [a particular point of view as] universal.

**MR. RISHIKOF:** Though as you said, the first fifty pages are quite fascinating in the Manual, because it does engage the community as to what are core documents, so the relationship between human rights treaties and the law of war. It has a section on different views on applicability of human rights treaties. The International Covenant on Civil and Political Rights, that we're a signatory [to]. So it lays out sort of the framework, which is, not many documents do, and that allows you to engage, I think, as Nick was saying, it very clearly says there is a Convention against Torture.

**[AUDIENCE MEMBER]:** It sounds like we're not aware of anybody else having done such with the document? International organizations or entity.

**MR. RISHIKOF:** They are. I think probably the ICRC will be coming out with lots of views. I would say over the next six months to a year, to two years, there's a whole range of organizations that are engaged in this document, to try to respond to it, what they like, what they don't like, and we're going to find it.

**MR. MCCORMACK:** Yeah, I would expect that too. And, I think this volume gives people some pause and [they need] some time to think about it. The way I would actually really expect to see it used in some way is in the way that we used other military manuals. When we were writing this Manual, we referred to the UK Manual, Canada's Manual, Germany's Manual, and this is something that DOD and the Army before DOD did with the earlier manuals on law of war.

Many times, militaries will look at each other's manuals. What will be interesting to see is if military manuals going forward

look more like the DOD Law of War Manual. Some people may not like that, but it'll be interesting to see its influence on how people design or state their rules, because they may in fact be influenced to [do] that.

**MR. RISHIKOF:** I know the American Bar Association is going to put together a workshop with our National Security Law Committee and the Military Committee to review the document and do a small, short, white paper on what the issues are that people like or don't like, or considered controversial and may require more work. I know it's hard to imagine, but it's almost 9:00. I mean, the time has flown on this subject.

**MR. MCCORMACK:** There's my wife yawning back there!

[AUDIENCE LAUGHTER]

**MR. RISHIKOF:** Well it's funny because I actually gave Mrs. McCormack an opportunity to ask her husband a question in public, if you like?

Is there anything that you'd like to have him say, anything either on the Law of War of any other subject?

**DR. ROSTOW:** Sorry, Harvey usually embarrasses me with that sort of question, so...

**MR. RISHIKOF:** So feel free! I'll make sure you've got the last question if you want it. Last question then. Well then I'll give each of the, last question sir?

[AUDIENCE MEMBER]: [inaudible] Crawford, also retired military, Army intelligence. This theme of non-traditional actors in

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the contemporary operational environment. Point of question: are cyber perpetrators combatants? And two: are bloggers, posters, and people who tweet, are those journalists in your opinion and deserving of those privileges you spoke of earlier?

**MR. RISHIKOF:** So Tom maybe you could help the Supreme Court in this area? Define what is a journalist?

**MR. BOWMAN:** Well, one of the sad problems today is that any person can call himself or herself a journalist. You can be a blogger; you can sit in your mother's basement eating her cookies and can call yourself a journalist. I've talked about this before...

**MR. RISHIKOF:** A tough issue.

**MR. BOWMAN:** Yeah right, right! Yeah, we do have cookies here and they're very good!

[AUDIENCE LAUGHTER]

That you know, any person can get out there and call himself or herself a journalist. You have political operatives for certain campaigns, we see now ABC News. I mean that's just a troubling thing I see in this day and age.

But you're right, I mean all these people could end up on the battlefield and who's a journalist and who's not a journalist? It raises other issues for you in trying to work this thing through.

**MR. MCCORMACK:** And maybe the short answer to your question is "no." The Manual doesn't answer that question. I can't remember exactly what [the question] was but it was very detailed.

Really the cyber [chapter focuses on what] we have said already, and I don't think we've addressed anything [that] specific in a public way.

**MR. RISHIKOF:** But, we have said that it's clear that you can use Title 18 as a criminal matter, and we've put out indictments of individuals who've used cyber, right?

I think it is envisioned that if there are [differences], we're shrinking the difference between the kinetic world and the cyber world. And, that you can have cyber strikes that have kinetic impacts. And, if that happens, one would think there is, we would call them a carbon unit, is sitting behind that terminal. They might, depending on the context, would be a potentially lawful target, clearly if they're wearing a uniform, and we're in war.

But, the interesting question will be, and this kind of thing, and we'll end it like this is that that assumes there's a human participant, but if its algorithms and code that's responding, code against code, do you hold the code writers responsible? Who ultimately will become the responsible entity for that phenomenon? So, on that cheerful note, maybe an appendix to the Manual. *[humorously]*

**MR. MCCORMACK:** Another thousand pages!

[AUDIENCE LAUGHTER]

**MR. RISHIKOF:** I'll give our panelists a last moment or a last word if they want to say anything? Nick?

**DR. ROSTOW:** No, I think I've said enough!

[AUDIENCE LAUGHTER]

**MR. BOWMAN:** I think I've said enough too!

[AUDIENCE LAUGHTER]

**MR. MCCORMACK:** I just thank you for your attention and if you have any questions please feel free to ask.

**MR. RISHIKOF:** So last, Mrs. McCormack do you have a last question that you want to pose? *[humorously]*

[AUDIENCE LAUGHTER]

No! In that case, we will then end the evening. I want to thank the journal for putting on this wonderful forum and supplying this, a great opportunity for us to discuss it. Thank you so much!

**MR. MYERS:** Thank you. Well, on behalf of the *National Security Law Journal* I'd like to thank our panelists and moderator: Mr. McCormack, Dr. Rostow, Mr. Bowman, and Mr. Rishikof. Thank you for taking time to join us tonight.

I'd like to recognize our Symposium Editor, Kirstin Riesbeck, there in the back, who put this on. It was a very good event. And at this time I'd encourage everyone to join us back in the gallery. I think there's still some food and drinks available. Thank you!

