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Playing the MIDFIELD

It's High Time to Recognize Law as an Instrument of National Power

BY COLONEL JEREMY S. WEBER

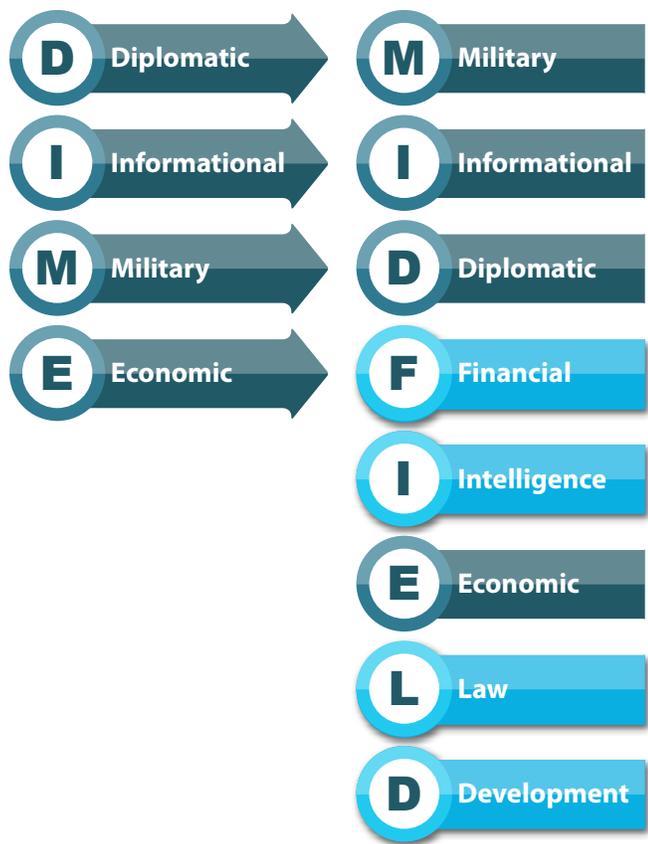
Law plays a central role in national power, and pretty much every other area of life. It is time we recognize a legal instrument of power to better incorporate the legal domain into our strategic planning.

For decades, the **DIME** framework has shaped understanding of the tools the United States controls to achieve strategic effects.[1] Nearly every strategy brief begins (and often ends) with an analysis of how to utilize America's **D**iplomatic, **I**nformational, **M**ilitary, and **E**conomic means.[2] Occasional attempts to add or modify the DIME have been put forth, but the tried-and-true DIME framework has proven resilient.[3]

However, a joint publication may mark the beginning of the end to the DIME's reign. **Joint Doctrine Note 1-18** (Strategy) proffers a new acronym—**MIDFIELD**—to describe the instruments of national power, adding financial, intelligence, law, and development weapons to the strategist's arsenal.[4] The addition of law, in particular, is long overdue. Law plays a central role in national power, and pretty much every other area of life. It is time we recognize a legal instrument of power to better incorporate the legal domain into our strategic planning.

"INSTRUMENT OF NATIONAL POWER" AND "LAW"

Does law deserve a place on the instruments of national power Mount Rushmore? To answer this, it first helps to know what "instrument of national power" means. On this point, there is surprisingly little guidance. Joint Publication 1—the central doctrinal document for the U.S. military—discusses the importance of using the instruments of national power to achieve America's strategic objectives and spells out the DIME instruments. However, it does not define the term "instrument of national power" or provide criteria as to what tools warrant the label.[5] The *DoD Dictionary of Military and Associated Terms* provides only a short and unhelpful definition that instruments of national power are the means available to the government to pursue its national objectives.[6] It thus seems that the definition is circular: strategy is the coordinated use of the instruments of national power to achieve the nation's large-scale interests, and an instrument of national power is anything that can be used to strategic effect.



DIME versus MIDFIELD

“Instrument of National Power”

For purposes of this analysis, let’s define an instrument of national power as follows:

“An instrument of national power is a resource over which the federal government can exercise a significant degree of control that, when combined with other instruments of national power, represents a significant opportunity to advance America’s strategic interests on the international stage.”

This definition offers three advantages. First, to qualify as an instrument of national power, the resource must be exactly that—national. In other words, it must be something the federal government has a meaningful ability to control. This definition may eliminate such purported instruments as “culture,” which, as powerful as it may be, is largely outside the federal government’s span of control. Second, an instru-

ment of national power is not necessarily expected to achieve strategic effects on its own. For example, militaries might be able to conquer territory or halt enemy advances, but absent diplomatic or other efforts, militaries rarely achieve lasting strategic interests. Finally, the resource need not *guarantee* strategic success; strategy is far too complicated for certainties.[7] However, to qualify for the title of instrument of national power, the resource should be able to move the needle of strategic probabilities to a meaningful degree.

“Law”

On the subject of definitional foundations, the term “law” is not much clearer. In fact, it has been said that the term “drips with ambiguity.”[8] Generally, however, the word has four meanings: (1) the *regime* that uses politically organized force or social pressure backed by force to order human activities and relations; (2) the *body* of authoritative sources issued by an organized society; (3) the *process* used to resolve controversies; and (4) some combination of the previous three.[9]

Using these definitions, the question of whether law warrants recognition as an instrument of national power focuses on whether the United States can use some combination of a legal regime, legal sources, or legal processes in combination with other instruments of national power to significantly increase its opportunity to advance its strategic interests on the international stage. If so, then law deserves a place among the DIME, MIDFIELD, or whatever other acronym one uses to describe the instruments of national power.

Law touches everyone every day
in ways seen and unseen.

THE CASE FOR A LEGAL INSTRUMENT OF NATIONAL POWER

Can law meet this test? Let’s start with three basic propositions. **First, law is pervasive:** it impacts nearly every aspect of society. Law touches everyone every day in ways seen and unseen. It regulates the air we breathe, the food we eat, the clothes we wear, the roads we drive on, and the jobs we

perform. It regulates our social, political, and economic relationships. It permits certain acts, and criminalizes others. It affects us from before the cradle to after the grave. This is true of domestic American law, but it is also true of international law.[10] It stands to reason that a power so omnipresent would be a natural candidate for the title of instrument of national power.

Second, the United States unquestionably uses domestic law to achieve strategic effects within her shores. Do we want to encourage people to buy homes, or have children, or contribute to charities? Then we pass laws to provide financial incentives to do so. Do we want to encourage more corporate responsibility in product design and manufacture? Pass laws and rules that allow consumers to more easily sue for damages due to faulty products. Is drunk driving a problem? Pass tougher criminal sanctions against the act. Are we concerned about the spread of false speech or dangerous ideologies or criminal enterprises on the Internet? Pass laws that hold the Internet-based platforms responsible for policing activity on their sites. Passing laws is such an effective means of changing behavior that the United States has so much law that it literally cannot be quantified.[11] It's no wonder that the majority of U.S Presidents, Senators, and Congressional Representatives have traditionally been lawyers: domestic strategic leaders need to understand how to wield their most powerful instrument.[12]

Lastly, the joint doctrine note is not the first published work to advocate for law's rightful place as an instrument of national power. The note quotes a 2011 *Joint Force Quarterly* article that first set forth the MIDFIELD acronym:

One of the most important additions to this new acronym is the letter L. Americans take great pride that their nation is governed by the rule of law: "Our past, and the past of every other nation, tells us that law and war were opposites, two means to resolve differences, one guided by commonly agreed-upon standards of justice, the other resolved by the calculus of power." Reaffirming the

American commitment to the rule of law by simply adding it to our national security dialogue is a step in the right direction to restoring what Joseph Nye termed *soft power*....[13]

Law is a Strategic Instrument

The 2011 *JFQ* author is hardly the first to note that law's use—or misuse—can have strategic effects. In fact, the term "lawfare," popularized by the former Air Force Deputy Judge Advocate General **Maj Gen (ret) Charles J. Dunlap, Jr.**, centers on the idea that law is a strategic instrument. The term is somewhat broad, but Dunlap himself has defined it as "the use of law as a means of accomplishing what might otherwise require the application of traditional military force," though it will often be used in conjunction with military force.[14] A popular website of the same name explores ways in which law can both be used and misused in national security matters.[15]

Exactly **how** can the federal government wield law in order to present a significant opportunity to advance America's strategic interests?

Yet all of these sources leave room for further development. Exactly *how* can the federal government wield law in order to present a significant opportunity to advance America's strategic interests? It's one thing to say that law carries powerful strategic possibilities. It's another to demonstrate how that can be done.

Law is not as obvious as the DIME instruments. It has not been traditionally considered an instrument of national power in its own right, and even today, few consider how the federal government can use law in combination with other instruments of national power to advance America's strategic interests internationally. What exactly is the case for including law among the instruments in the strategist's orchestra?

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National Security Law Writing Competition

To help answer this question, the Air Force Judge Advocate General's School, with the generous support of the **JAG School Foundation**, is conducting this year's National Security Law Writing Competition on the theme of "Law as an Instrument of National Power." We seek a wide variety of essays that address specific ways in which the U.S. government can use law to achieve strategic effects. To encourage many entries that can be combined into a larger work, the writing competition has changed its rules to reduce the size of entries to 2,500-3,000 words, or roughly ten to fifteen pages double-spaced. The JAG School Foundation is also raising the number of cash prizes from two to four to encourage entries.

Law Utilized at the Strategic Level

Law offers almost endless possibilities for creating strategic effects. Dunlap, for example, provided an example from military operations in Afghanistan in 2001, when officials needed to restrict high-resolution commercial satellite imagery from falling into enemy hands. Instead of taking a military approach, officials used a "legal weapon"—a contract—to achieve this effect.[16] Yet even this example (which perhaps resided below the strategic level) may represent just the tip of the iceberg. To suggest just a few examples of how law can be utilized at the strategic level, consider the following possibilities:

"Globalization is a great thing, but it needs a legal framework in which to blossom."

- **Creating a framework for a globalized world:** Italian journalist and political analyst Loretta Napoleoni was right when she said, "Globalization is a great thing, but it needs a legal framework in which to blossom." [17] The most recent U.S. National Security Strategy may take a step back from globalization's grander ambitions, [18] but the grand arc of U.S. grand strategy since the end of World War II—and particularly since the fall of the Berlin Wall—has been to enmesh countries in a U.S.-led, rules-based international order that benefits all participants and makes major conflict less likely, thus preserving a status quo in which the United States remains the leading power. [19] A complex web of treaties, agreements, and regulations supports this international order, ensuring predictability in transactions, a common operating picture, and predictable access to the global commons. Thus, for example, a vast legal infrastructure enables safe and accessible air travel, which in turn allows a nation's citizens to travel across the globe. [20] This makes military aggression less likely both by reducing a nation's incentives to war (a nation is less likely to attack another nation in which its citizens are present) and by promoting understanding of other cultures.
- **Use of International Agreements to Establish Norms and Change Behavior:** Perhaps the most important way in which law can achieve strategic effects is through the creation and solidification of norms that can change behavior. International law may lack enforceability at times, but one thing it does particularly well is establish norms that nations come around to voluntarily complying with. A prime example is the Universal Declaration of Human Rights. One might argue that the Declaration is more of a diplomatic effort than a legal one, as it is not strictly legally binding in and of itself, but it morally commits governments around the world to secure basic human rights for their people, has led to advances in human rights, has reframed the language of international relations, has been adopted in numerous treaties and national constitutions, and is the most translated document in the world. [21] This has furthered the United States' liberal international interests, even if some

human rights violators persist and recent years have seen some backsliding.[22] One would be hard-pressed to find a predominantly military or economic approach that has achieved similar track record.[23] Lawyers have played a leading role in using the Declaration to push nations to improve their human rights record, backed up by other instruments of national power.[24] For another example, take the much-maligned Kellogg-Briand Pact of 1928.[25] The agreement purported to outlaw war, a vision ridiculed as utopian given that a world war soon followed. But recent scholarship has come to see the agreement in a much more positive light. As one important recent work found, the Pact directly led to a steep drop in international aggression since 1945.[26] In other words, the United States and others sought the most aggressive, important goal in human history—to end war—and thanks to a legal document, they largely succeeded.

- **Promoting Respect for the Rule of Law:** A less visible but perhaps no less important role for law in achieving strategic effects is the positive example respect for the rule of law can provide in reducing armed conflict and promoting stability on the international stage. As with “instrument of national power” and “law,” “rule of law” remains a tricky concept; as one book put it, “The notion that the rule of law has an ‘I know it when I see it’ quality captures something powerful, because we do know it when we see it, and we most certainly know it when we *don’t* see it.”[27] However, the notion is best summarized by its two aspects: the rule of law aims at certain ends such as upholding law and order or providing predictability in human activity, and it involves institutional attributes such as comprehensive laws, functioning courts, and professional law enforcement.[28] The United States has often carries out “rule of law missions,” with judge advocates playing a leading role in addressing some of the core causes of conflict.[29] After all, much of America’s military involvement in countries with weak or ineffective government is really aimed at convincing people to settle their disputes through legal channels rather than violence. Yet the

rule of law has an even more powerful component. As the 2011 *Joint Force Quarterly* article quoted in the Joint Doctrine Note observes, the rule of law’s most powerful strategic role may come as the United States promotes the rule of law at home, setting an example for shaping the actions of other nations. The current *National Security Strategy* recognizes this; it uses the phrase “rule of law” nineteen times, including the following: “America’s commitment to liberty, democracy, and the rule of law serves as an inspiration for those living under tyranny.”[30]

- **Courts and law enforcement:** Law serves a valuable purpose in and of itself by establishing norms and setting an example, but it’s always helpful when law can be enforced. International law comes up short to a certain degree in this respect as there is no world police, but law enforcement still can be utilized to strategic effect. The International Criminal Court, while struggling to get off the ground, has successfully prosecuted government officials for offenses such as genocide, crimes against humanity, war crimes, and aggression, and it has investigated several other such cases, providing at least the possibility of a legal mechanism that can contribute to a more stable world order.[31] As the ICC’s President stated last year, “Just 30 years ago, who would have thought that crimes against humanity, war crimes and genocide would be prosecuted by an independent, permanent international institution?”[32] Likewise, the International Court of Justice has issued dozens of decisions involving disputes submitted to it along with advisory opinions.[33] Apart from international legal tribunals, domestic law enforcement can produce powerful strategic effects. Military commissions have formed a central part of the United States’ strategy to combat global terrorism, even as the commissions themselves have yielded uneven results. In the United States, law enforcement agencies have yielded impressive results in criminal investigations and prosecutions of threats, counterterrorism, and homeland defense.[34] For these reasons, many have advocated that law enforcement be added to the list of instruments of national power.[35]

- **Providing a legal framework for conflict:** While the phrase *inter arma enim silent leges* (in times of war, the law falls silent) has gained popular acceptance,[36] in reality, war has become a legal battleground. To use a historical example, lawyers in the U.S. Civil War played an enormous role in shaping the underlying disputes and providing a legal justification and framework for the conflict.[37] Since that time, lawyers have taken center stage for helping make the case for war when administrations thought it was necessary. In the 2003 Iraq war, for example, lawyers staked the claim that war was justified on legal bases because of Saddam Hussein’s violation of U.N. disarmament agreements.[38] Nations no longer feel free to invade others at will; the law constrains them from doing so, and they need lawyers to provide legal arguments for why war is justified, and what actions they are entitled to take.

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- **Law of war and shaping a better peace:** The law of war exists for strategic reasons. The purpose of the law of war is to make the successful accomplishment of the military mission possible while limiting war’s unnecessary effects, thereby facilitating the restoration of peace.[39] Thus, lawyers are integral in ensuring the United States obeys the law of war, which provides international legitimacy to its war efforts and denies adversaries an avenue for undercutting U.S. and international resolve. As former Dunlap once stated, “savvy American commanders seldom go to war without their attorneys.”[40] Or, as General Colin Powell said following the Gulf War, “Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process.”[41] There is little doubt

that the United States, as the world’s leading power and a proponent to create a rules-based international order, must scrupulously follow the law when it engages in military action. Lawyers ensure the nation does so.

CONCLUSION

Law may not be able to achieve many strategic effects on its own, but then again, neither can diplomacy, information, military action, or economic measures. An instrument of national power works in concert with the other instruments to contribute meaningfully to the achievement of strategic effects. Law provides the skeleton for a globalized world in which the United States ensures all nations participate on relatively peaceful terms. It establishes norms and changes behavior, causing even revisionist powers to couch their behavior under the legal framework the U.S.-led international order has built. U.S. respect for the rule of law encourages other nations to do the same, reducing violence. The tools for enforcing the law, while far from perfect, have come a long way and have been recognized for their strategic impact. Law provides a framework for armed conflict, and the justification for war has become a contest of legal positions. Finally, the law of war keeps a lid on war’s worst tendencies, facilitating a better peace.

A good argument can be made that law is the midfield of the MIDFIELD—the centerpiece instrument of national power around which all other efforts revolve.

If the law is not an instrument of national power, then nothing is. In fact, a good argument can be made that law is the midfield of the MIDFIELD—the centerpiece instrument of national power around which all other efforts revolve. This year’s National Security Law Writing Competition invites you to build upon this idea by exploring examples of how the United States can leverage law to its strategic advantage.

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ENDNOTES

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- [2] Jeffrey W. Meiser, *Are Our Strategic Models Flawed?*, 46 *Parameters* No. 4, 81-91 (Winter 2016-2017) (asserting that strategists have utilized the DIME or similar frameworks as a substitute for strategic thinking, not a tool in its aid).
- [3] *See id.* (noting an alternative whole-of-government approach that has been forth as DIMEFIL – diplomatic, information, military, economic, financial, intelligence, and law enforcement means); Major General William T. Lord, *USAF Cyberspace Command: To Fly and Fight in Cyberspace*, 2 STRATEGIC STUD. Q. vol. 3, 3, 11 (Fall 2008) (noting the standard framework as DIME-C, with the addition of culture to the traditional instruments of national power).
- [4] JOINT CHIEFS OF STAFF, JOINT DOCTRINE NOTE I-18, STRATEGY (25 April 2018).
- [5] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES I-1 (25 March 2013, C1 12 July 2017).
- [6] JOINT CHIEFS OF STAFF, *DoD Dictionary of Military and Associated Terms* 108 (July 2019).
- [7] *See, e.g.*, Colin S. Gray, *Why Strategy is Difficult*, 22 *Joint Force Q.* (Summer 1999) (“[S]trategy is perilously complex by its very nature. Every element or dimension can impact all others. The nature of strategy is constant throughout history but its character continually evolves with changes in technology, society, and political ideas.”)
- [8] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 66 (1973).
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- [10] Margaret E. McGuinness, *Old W(h)ine, Old Bottles: A Reply to Professor Paulsen*, 119 YALE L.J. ONLINE 31 (2009), <https://www.yalelawjournal.org/forum/old-whine-old-bottles-a-reply-to-professor-paulsen> (noting that international law is “everywhere” in the United States and the “ubiquity of international law and the myriad ways in which it has permeated U.S. legal, social, economic, and political life . . .”).
- [11] A Senior Legal Research Specialist for the Library of Congress noted that in 1982, the Justice Department embarked on a two-year project to calculate the number of criminal laws alone, and counted about 3,000 criminal offenses covering 23,000 pages of federal law. Jeanine Cali, *Frequent Reference Question: How Many Federal Laws Are There?*, IN CUSTODIA LEGIS: LAW LIBRARIANS OF CONGRESS (12 March 2003), <https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/>. A popular Twitter feed posts “A Crime a Day,” consisting of obscure offenses that criminalize oddly specific behavior. <https://twitter.com/crimeaday?lang=en> (last visited 27 September 2019).
- [12] *See* Norman Gross, *Presidential Bar Leaders: Fascinating Facts About America’s Lawyer-Presidents*, ABA BAR LEADER (January-February 2010), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/january_february/presidential/ (noting that, at the time of publication, 26 of the country’s 44 presidents had been attorneys); Justin Fox, *Maybe Washington Does Need More Lawyers*, BLOOMBERG OPINION (8 March 2019), <https://www.bloomberg.com/opinion/articles/2019-03-08/congress-might-need-more-lawyers> (reporting that historically, a majority of both houses of Congress was composed of lawyers, though the number of Representatives has been below 50 percent since the 1970s and is steadily to about 30 percent, while the Senate attorney population has just recently fallen below 50 percent for apparently the first time in its history.) A 2017 *Harvard Business Review* study of 3,500 corporate chief executive officers found that nine percent (9%) were attorneys, and that these CEOs were better at managing litigation risk. M. Todd Henderson, *Do Lawyers Make Better CEOs than MBAs?*, HARV. BUS. REV. (24 August 2017, updated 30 October 2017), <https://hbr.org/2017/08/do-lawyers-make-better-ceos-than-mbas>.

- [13] Peter C. Philips and Charles S. Corcoran, *Harnessing America's Power: A U.S. National Security Structure for the 21st Century*, 63 JOINT FORCE Q. (4th quarter 2011), at 40 (quoting DAVID ROTHKOPF, *RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER* 463 (2005) and citing JOSEPH NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* x (2004)).
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- [17] *Globalization and 'Rogue' Economics*, NEWSWEEK (22 April 2008), <https://www.newsweek.com/globalization-and-rogue-economics-86049>.
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- We stood by while countries exploited the international institutions we helped to build.... These competitions require the United States to rethink the policies of the past two decades—policies based on the assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy actors. For the most part, this premise turned out to be false.
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- [20] See generally RAYMOND C. SPECIALE, *FUNDAMENTALS OF AVIATION LAW* (2006) (summarizing domestic and international law affecting air travel).
- [21] *A New World Record: Universal Declaration in 370 Languages*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (23 April 2010), <https://www.ohchr.org/EN/NewsEvents/Pages/AnewworldrecordUDHR.aspx>.
- [22] For a look at the state of human rights across the world, see *World Report 2019*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019>. The report characterized the current era as “a dark time for human rights,” even as it noted encouraging developments in resistance to autocrats. *Id.* at 1-2.
- [23] See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 236 (2001):
- The Declaration's moral authority has made itself felt in a variety of ways. The most impressive advances in human rights—the fall of apartheid in South Africa and the collapse of the Eastern European totalitarian regimes—owe more to the moral beacon of the Declaration than to the many covenants and treaties that are now in force. Its nonbinding principles, carried far and wide by activists and modern communications, have vaulted over the political and legal barriers that impede efforts to establish international enforcement mechanisms. Most, though not all, flagrant and repeated instances of rights abuse are now brought to light, and most governments now go to great lengths to avoid being blacklisted as notorious violators. Extreme suffering and deprivation—whether due to human or natural causes—often, though not often enough, elicit practical responses.
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- [25] For an overview of the pact, see *The Kellogg-Briand Pact, 1928*, U.S. STATE DEP'T OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> (last visited 12 August 2019).
- [26] OONA A. HATHAWAY AND SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).
- [27] JANE STROMSETH ET. AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 57 (2006).
- [28] Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners* 3, CARNEGIE ENDOWMENT FOR INT'L PEACE (21 January 2005), <https://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.
- [29] See generally THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL CENTER FOR LAW AND MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2015), https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2015.pdf (providing a detailed look at the role of rule of law operations, their legal framework, the institutional and social context of such missions, the key players in these operations, planning for rule of law operations, fiscal considerations, resources and enablers for rule of law missions, and recent operational experiences in Afghanistan).
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- [34] See generally Ronnie S. Catipon, *Law Enforcement as an Instrument of National Power*, THE FOREIGN SERVICE JOURNAL, <https://www.afsa.org/law-enforcement-instrument-national-power>.
- [35] See, e.g., Christopher Goodyear et. al., *Countering Threat Networks: A Standard Lines of Effort Model*, SMALL WARS J. (XXXX). <https://smallwarsjournal.com/jrnl/art/countering-threat-networks-a-standard-lines-of-effort-model> (arguing that the DIMEFUL acronym, including law enforcement, "better captures the full range of instruments of national power.")
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- [37] See generally PETER C. HOFFER, *UNCIVIL WARRIORS: THE LAWYERS' CIVIL WAR* (2018) (detailing how lawyers found themselves at the center of the Civil War, as they worked to make sense of the conflict and shaped the legal arguments in favor of the Union's actions.)
- [38] *The Case for War*, THE ECONOMIST (1 August 2002), <https://www.economist.com/leaders/2002/08/01/the-case-for-war>.
- [39] See U.S. DEP'T OF DEF., OFFICE OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL para. 1.3.4 (June 2015) (setting forth the purposes of the law of war, including restoration of peace).
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- [41] Steven Keeva, *Lawyers in the War Room*, 77 A.B.A. J. 52 (December 1991).