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AFJAGS Podcast: Episode 67

Domestic Terrorism and the Gray Zone with Captain Andrew McCaffrey (National Security Law Competition)

Host: Major Charlton Hedden

Guest: Captain Andrew McCaffrey

This episode is the first of a series of interviews with competitors in the National Security Law Competition, a writing competition hosted by The Air Force Judge Advocate General's School and sponsored by the JAG School Foundation. This year's topic was How National Security Law Impacts America's Strategic Competition in the Gray Zone. Capt McCaffrey's paper discussed how our internal responses to domestic terrorism have impacted our strategic response in the Gray Zone.

[Music: Band playing clip of Air Force song]

Introduction

Major Charlton Hedden:

Hello and welcome back to The AFJAG Podcast. I'm here with Capt McCaffrey, who is assistant Staff Judge Advocate at MacDill Air Force Base. And we're talking to him about his paper that he submitted for the National Security Law Writing Competition that is put on by the Ops and International Law Division here at The Air Force JAG School.

This year's topic was how a national security law impacts America's strategic competition in the gray zone. Captain McCaffrey's submission was titled "The Red, White and Blue in the Gray Zone" and explore some really fascinating topic. Give us just the 2 to 3 sentence elevator speech version of your main thesis and illustrations that you used in your paper.

Captain Andrew McCaffrey:

Absolutely. What it comes down to, in my opinion, is that the union, the United States, isn't simply a fact. It's a construct. It's something that requires constant

maintenance, constant upkeep, and that means legal upkeep as well. And the union is vulnerable to gray zone threats, both foreign and domestic gray zone threats. However, there are tools, legal tools available that have been used in the past and can be used more or have simply been not used, that should be employed for the first time to bolster the nation's security against rising threats.

Gray Zone

Maj Hedden:

Yeah, I think that's really neat. You start off with the oath of office mentioning how we all many of us in government service, in military service, swear to defend this nation against all enemies, foreign and domestic. And I thought it was very cool how you explored this gray zone idea from both ends. Nearly everything I've read so far has been when it comes to gray zone discussions has been about foreign threats and you know, specifically our big main competitors and Russia and China.

Capt McCaffrey:

Well, yeah. So, I think the gray zone, it's a term used to describe ambiguous competition. And the definition that I found and that I included in my paper is, you know, competitive interactions among and within state and non-state actors that fall between the traditional peace and war duality. And so, one of the things I really latched on to was that non-state actors and I thought that that element of the gray zone definition read that in light of the oath of office that both military members and civil service members take.

And it triggered this realization that domestic extremism is as much a gray zone threat as anything that our near-peer adversaries in Russia and China are doing.

Russia

Maj Hedden:

Yeah, so starting with the forum like you did in your paper, you focused on Russia and its actions against and sometimes with these other Eastern European states. So, can you kind of just start with the history that you

started with the last 20 some odd years of Putin and his apparent strategies and goals and what he's done about those? And then what sort of gray zone activity in there that you've been that Russia has been engaging in.

Capt McCaffrey:

Yes, sir. So, one of the terms that I've used a lot to describe Russia's actions under the Putin regime is hostile interventionism. And that encompasses and includes a lot of gray zone activity, typically we see the gray zone activity on the front end. And then it is followed up by more traditional military activity. So, I went through chronologically. First example I talked about was Russian involvement in Georgia in the early part of the 21st century.

I remember, you know, when it was 2008, I was watching the news and I saw artillery shelling. And I thought I never thought I'd see, you know, artillery shelling as something happening in the in the news, you know, amongst traditional powers like Russia. But there it was. However, as I delved a little deeper, did some research. You know, the shooting started in 2008, but the conflict, I think, can be traced back to at least November of 2003.

November 2003, Georgia was having parliamentary elections. There was a dispute. And again, this is going to be a theme that we see emerging contested elections, rigged elections, and there was unrest. And the Russians took advantage of that situation, to support the faction that they favored against the faction that the United States favored. So that was 2003. Escalation in the gray zone continued over the course of several years.

For example, in 2006, Georgia arrested four Russian officers on espionage excuse me, espionage charges. So already, you know, we can see two years ahead of active military hostilities, Russian forces, you know, laying the groundwork. Of course, the Russians were using their own laws against the Georgians. Economic pressures, import bans or deportations under dubious circumstances. And ultimately, what we saw was support from the Russians for secessionist forces within

Georgia, in South Ossetia. And that is when I think the general public started to tune in and pay attention to the situation. And it moved from a gray zone competition to more traditional warfare.

Belarus

Maj Hedden:

Right. And it seems like a theme. You're going to walk us through some more episodes of this. But it seems like Russia has, as now kind of come up with this formula of softening their target for months or years with especially, election involvement and influence operations. And then like you said, the diplomatic, economic, everything they can sort of ramping up hostilities to the point where there are few options left and also the cost of them just taking military action have gone down because of the actions that they've taken to put, you know, sympathetic people in office and that sort of thing.

So, moving on to a country that probably I'm going to go out on a limb and expose my own ignorance. I didn't know a ton about until the last year or so. Haven't I haven't read or heard things about Belarus and what's gone on there nearly as much as I had Georgia and Ukraine. So, tell us what you what you wrote about Belarus and how that plays into this whole pattern.

Capt McCaffrey:

Sure thing. So, Belarus' key strategic location, out there in Eastern Europe and right now key a strategic ally for Putin's Russia. You know, you look at the map before the current Russian invasion of Ukraine began, the Russians were marshaling forces within Belarus, which is, of course, very close to Kiev, the Ukrainian capital, but fast or rather rewinding back to 2020, in August of 2020, Belarus had a fraudulent election in which Lukashenko claimed victory. In the lead up to that 2020 election, the opposition, the main opposition candidate who was a noted critic of Belarus' ties to Russia, was arrested on charges of organizing mass unrest and inciting social hatred. So, this opposition leader, Tikhonovskiy, he announced his candidacy via YouTube from a prison cell. So interesting

overlap between new technologies as well in this sort of gray zone arena.

Ultimately, however, he was in prison, he was unable to run, and his wife ran for office in his stead, campaigning on a platform of free elections. However, the Lukashenko regime claimed victory in an election and the United States officially deemed that that was a rigged election. The massive protests that made worldwide news and in response to the protest, the Lukashenko government responded with violent repression and torture of detainees.

As of March 2022, Lukashenko regime still had over 1100 political detainees. And that is obviously a disturbing thing. But also disturbing is that Lukashenko reached out to Vladimir Putin for aid on account of this popular unrest. There was a televised address in which Lukashenko characterized the protests and the fraudulent elections he orchestrated as, "a threat not just to Belarus, if Belarusians do not hold out the label head over there, too." There being Russia. So again, we see this patina of legitimacy being laid to justify gray zone sort of unlawful action and intervention. And later that same day, Lukashenko, and Putin, had a phone call in which Vladimir Putin reportedly promised, quote, comprehensive help to ensure the security of Belarus, and that led to an extension of \$1.5 billion to the Lukashenko government.

Maj Hedden:

Yeah. And now and to this day now fast forward now they're pretty faithful allies of most things that Russia wants to do, seemingly. Right?

Capt McCaffrey:

Exactly. You know, the groundwork was laid back in 2020. The ties were formed and solidified between Russia and one of its neighbors. Russia was able to extend its sphere of influence into Belarus under these very suspect circumstances. But then two years later, 2022, the Putin regime was able to reap the rewards of its of its efforts, of its planning, and they were able to strategically locate

their military assets close to the Ukrainian capital as they were posturing for this unprovoked, unlawful war in which the Ukrainians and Russians are still involved.

Russian Interference in U.S. Elections

Maj Hedden:

It's crazy. So, switching gears just a little bit, we thought, so there's a couple of examples there, right? So, there's Georgia and Belarus where Russia attempts to influence elections and or political decision making with varying levels of success. And depending on how that goes, they either win without having to fire a shot. And now they have a government like Belarus that is, you know, is willing to support them in their endeavors to keep expanding that sphere of influence. Or they have one like Georgia, where they end up, you know, having a little less success politically. So, they use military force to come in similar to the way they did with and or are trying to do with Ukraine.

So, jumping across the Atlantic now to the United States, we see at least some version of the first part of that influencing elections over here. Tell us about that and how you talked about the Russian interference in U.S. elections.

Capt McCaffrey:

Yes, Sir. You know, I kind of have a mental, you know, Venn diagram right at the outset, we were discussing the domestic gray zone threats and foreign gray zone threats. But then there's this very alarming overlap. And I think everyone is familiar to some degree or another with the Russian interference in the United States elections and this, as we've discussed, this action of interfering with free and fair elections is nothing new to the Russians.

And they've had success in the past. And so, in 2016, they reached out and they interfered in the United States elections where there was the Mueller investigation. And in my paper, I quote extensively from it, and it says,

you know, unambiguously, Russia interfered in the 2016 presidential election. And that is something that we as Americans need to not lose sight of going forward.

Maj Hedden:

Right. Because, interestingly, Russia seems to have found a way to win whether their candidate wins or not. Their preferred side can gain enough power, then they can have a friendly nation state on the other side. And if their preferred candidate does not or there's so much unrest, they win by their opponents experiencing large amounts of civil unrest too.

Capt McCaffrey:

Precisely, precisely. And, you know, and just to you know, to be clear, you know, a lot of this is being done on social media. That's one of the primary prongs through which this Russian interference happened. But this isn't just, you know, some individuals here and there who happen to be Russians like this is an orchestrated effort. You know, there's a federal grand jury has indicted seven Russians and all of those named defendants are officers in the [GRU](#) or the Russian main intelligence directorate. This is this is not an accident. This is a deliberate attempt to undermine the United States government.

Maj Hedden:

Right. Which is yeah, like I said, pretty scary. And something we should probably keeping our eye on the fact that there are other competitors who have found ways or are continuing to attempt to find ways to influence the ways that we not just think but actually vote and run our country, which is, you know, one definition of gray zone activity.

Capt McCaffrey:

Exactly. It's that it falls outside the traditional peace war, you know, duality. But it's definitely action being conducted by the Russian state to further its strategic goals at the expense of the United States' national security and strategic goals.

Russian Invasion of Ukraine

Maj Hedden:

Right. So, then the last kind of chapter of this Russian influence before we get kind of talking about your ... the U.S. response is the 2022 Russian invasion of Ukraine that at this moment of recording in June of 22, is it still ongoing. So, talk about the I guess, the gray zone elements of that and the buildup?

Capt McCaffrey:

Yes, Sir. So, the groundwork had been laid in the various conflicts we had already discussed. And then one thing that I wanted to draw attention to in my paper that I think has been overlooked in light of the very, you know, shocking circumstances surrounding the current invasion of Ukraine is the Russian influence and intervention in Kazakhstan in February of 2022. Immediately right on the doorstep of the invasion of Ukraine. Russia deployed so-called, you know, peacekeeping forces to Kazakhstan.

And there that I think is a significant difference, is that it wasn't a unilateral Russian activity. There were also forces from Armenia, Belarus, Kazakhstan, Kyrgyzstan. Right. The [CSTO](#) Regional Alliance led by Russia, a sort of a counter to make forces. And so, again, we see this patina of legitimacy being used again, but in a more concrete way, the patina is kind of getting thicker and stronger from repeated use.

But then with this, you know, current invasion of Ukraine, they were able to posture forces, as we discussed in Belarus. And then 24 February, the invasion was launched.

National Security Law

Maj Hedden:

And now we turn to the sort of linking this to the topic of your paper and the topic of the national security law writing competition, which is all right, the role of U.S. national security law in our strategic competition in the gray zone. So a lot of a lot of examples of what our strategic this particular strategic competitor is doing

in the gray zone and how it is expanding its influence over in Eastern Europe and even attempting to here domestically.

So what how would you characterize the U.S. response legally? How is our national security law up to this point confronted this particular threat?

Capt McCaffrey:

Yeah, in my opinion, the U.S. has a very understandable and appropriate goal in preserving peace. But however, that emphasis on preserving peace has had oftentimes the unintended consequence of not providing sufficient assurance to American allies and deterrence to American adversaries. And that and that's the result of, as I described in the paper, you know, leaving some of these tools unused on the table.

That applies in both international examples we've discussed, as well as domestic examples. You know, the use of economic sanctions without any kind of proportionate or corresponding increase in direct military aid. Or if any kind of direct military aid is given, it is not in an amount that is correlative to the threat American allies overseas are facing. So now that being said, since I've written this paper, things have started to change, and the United States is moving more in the direction that I recommended and described. Increased amounts of aid, notably, there was the [NATO](#) summit this very week where there were some tremendously important announcements made. I think arguably the biggest one being the announcement of a permanent U.S. installation in Poland. Obviously, the, you know, a Ukrainian border state, a NATO ally that has been in the shadow of Russia for a long time. And by re-posturing American forces in this very significant way, I think the United States is going to be able to send a much clearer deterrent message to Russia going forward.

Maj Hedden:

I guess really now that they know that the U.S. and NATO's have ratcheted up the response a bit past what it was when you were initially drafting this paper. The

jury is out now to see what kind of deterrent effect that will have going forward and how our allies perceive our willingness to do what's necessary.

Capt McCaffrey:

Exactly.

Domestic Threats

Maj Hedden:

So, we're going to we're going to loop back around and talk more about more specifics about your kind of policy recommendations and how we could better wield national security law. But first, we're going to describe the other prong of this threat. The domestic side of things. And I mentioned earlier, this was fairly novel for me, so I'm excited to hear you talk about these gray zone threats that are coming from inside the house, the domestic right-wing extremists.

That's the example you give particularly. And I wanted to ask you, what sort of organizations and actions are you getting at here when you're talking about these actors in the gray zone domestically?

Capt McCaffrey:

Yes, sir. So, I think there is a line it's not it's not a clear line. But between ordinary crime and crime that threatens the Constitution of the United States, crime that is undertaken with the mindset that criminal acts are not wrong but are in fact rightful and lawful in some abstract, personal, you know, self-righteous sense. And over the years, you know, long before the January 6th insurrection, there have been examples of right-wing extremists violating the law, taking hostile actions against the United States government. And again, the parallel fashion to the perhaps underwhelming response to Russian aggression, the response domestically to foreign extremist or excuse me, to domestic extremists was similarly underwhelming in a way that did not deter future misconduct. And what started, as I argue, as arguably minor infractions escalated until we get to January 6th with the national capitol coming under attack.

Bundy Family

Maj Hedden:

Right. You kind of draw a line—a heard of cows to the attack on the Capitol and I would love for you to kind of start with the Bundy family and their actions and how those sorts of meet the definition you've been using of gray zone activity.

Capt McCaffrey:

Yes, sir. So again, citing back to that definition, the gray zone encompasses state actors and non-state actors. And so, using that definition, I think the Bundy family and their supporters are exactly the kind of non-state actors that engage in gray zone activity that is detrimental to the United States and its interests.

Maj Hedden:

Give us a little background on the Bundy family. Where do they operate? What do they operate? And what do they, I guess, kind of what are they after, what's their angle?

Capt McCaffrey:

Sure. Absolutely. So, this goes back goes back decades. And as you said, it started with raising some cattle. So back in the 90s, the Bundy family, their associates were illegally grazing their cattle on protected federal land. That's trespass. A violation of the law—trespass. This trespass followed decades of tensions, which included a pipe bombings at federal offices in the 1990s.

Led by extremists against the Bureau of Land Management [BLM] after the Bureau of Land Management plan to round up the illegally grazing cattle in 2012. And the BLM, you know, the Bureau of Land Management, backed off in response to these extremist threats. Then, after further provocation by the Bundy's, the BLM decided not to enforce a federal court order it had won against the Bundy's. Prompting one of the Bundy family to announce, "We won the battle."

I mean, that I think that is a very telling word. Not argument—battle—in which these individuals view the United States government as the bad guy. So that was the first out of the first round, if you will. And then later on, you know, in light of that tepid response, domestic extremists, you know, learned, I think.

And in 2016, a group led by Ammon Bundy began an occupation, an armed occupation of the Federal Wildlife Refuge in Oregon in response to the conviction of Dwight and Steve Hammond, who had committed arson on federal property. Right. We have these people engaging in retaliatory hostile acts against the federal government. And this band of extremists, they held that refuge. They held federal territory for 41 days. 41 days! During that time, you know, the administration made multiple attempts to negotiate, but the situation was finally resolved only when one of the extremist leaders was killed while attempting to evade arrest. So obviously, we have an obligation to uphold the law, to respect people's due process. But there's also an obligation on members of the civil service, members of law enforcement to defend the union and defend the federal government.

And, you know, I think the very slow the very calculated, tepid responses were sending the wrong the wrong message.

Maj Hedden:

Yeah. I get the feeling that maybe we as a as a society naively assume most of the time that there's not some faction always willing to exert their will that is contrary to the will of the union. And anytime our guard is down, they will be attempting to make things go their way through whatever means they think is, you know, works for their purposes.

Some of those being violent, some of those being legal, some of those said being illegal, things like trespass. But this deterrent is it is a 24/7 mission. And so, we saw now, okay, that they launched this retaliatory occupation, armed occupation of federal property that doesn't end

for 41 days. And then talk about the kind of legal criminal fallout from that.

Capt McCaffrey:

Sure. Absolutely. So, the federal government did respond with legal action, but with not a ton of success. Ammon and Ryan Bundy and 24 other defendants were charged with conspiracy to impede officers through the use of force, intimidation or threats. And some also faced additional charges of firearm possession and theft of public property. Some defendants entered into plea deals, but there was an acquittal on conspiracy and firearm charges and a hung jury on property theft defense charged against Ryan Bundy.

But this is not the type of accountability that I think is appropriate or necessary in circumstances like this. And on top of it all, I mentioned the arsonist whose imprisonment was the trigger for this. Those individuals received a presidential pardon in 2018. So not only has there not been convictions, when convictions seem appropriate based on all the facts, but people who have been convicted have had, you know, have been granted pardons under circumstances that don't appear to warrant them.

January 6 Attack on the Capitol

Maj Hedden:

Then fast forward a few years and in light viewing that kind of through a transactional lens that illustrates that the relatively low cost of that sort of operation. And then fast forward a few years, sprinkle in a little of the Russian influence that we talked about back in sort of the foreign segment of this discussion. And you get to the buildup of January 6, kind of tell us why that fits in to this conversation.

Capt McCaffrey:

Absolutely. I mean, it's the critical, crucial moment where the two fears of gray zone competition against the United States merged together into a unifying front, right. Where people who had been influenced by Russian misinformation campaigns and were, you

know, further extreme on those extreme-ized, if that's the appropriate term in their views. Encouraged by the lack of repercussion that they had seen happen for people who had engaged in hostile acts against the government in the past. They felt safe to attack the nation's capitol.

And obviously, you know, I think the January 6 special committee is doing incredibly important work of gathering the necessary facts and evidence put in front of the American people to realize just how serious this was. You know, again, this wasn't this wasn't random. This wasn't an accident. This was something that had a lead up to it, a lead up that can be traced back to gray zone competition on both the domestic and foreign fronts.

Maj Hedden:

And that's an important point here, that the accountability, we hope, is still continuing for everyone who was involved in that. But you do talk about what so far has been the legal response to people found to be responsible for the attacks on January 6th. What has that been like so far?

Capt McCaffrey:

So since I wrote the paper, there have actually been some updates on that front as well. But at the time I was writing the paper, the response had, you know, the legal response had generally been lackluster, in my opinion. One of the examples that I cite was to a famous photo of the individual who was carrying off the speaker's platform.

So that individual was not brought up on any kind of federal sedition charges, federal insurrection charges, but on a simple trespass. The legal repercussions for Adam Johnson, the individual who infamously posed for a photo while carrying off the speaker of the House's lectern. He was sentenced to only 75 days in jail for entering and remaining in a restricted area. That's a misdemeanor offense for an individual who participated in an attack on the Capitol building.

Such paltry charges don't match the severity of the crime committed and I think are going to do little to dissuade similar criminal acts in the future. However, since then there have been more robust legal actions taken and one example that actually can be traced back to as early as January of 2022 was for the leader of the Oath Keepers.

And actually, this month, in June of 2022, the indictment against him was expanded and even the original indictment included charges under 18 [U.S.C. Section 2384](#) for conspiracy to commit insurrection. So, there is appropriate progress being made at this point, thankfully.

Deterrence

Maj Hedden:

Yeah, it sounds like that. That's very interesting to hear on both fronts, the developments, and the challenges of trying to write something that stays relevant with moving targets. So, I think this fascinating it's easy to see and just I mean, I don't know, it's just self-evident that when the cost of a certain action is and continues to be low enough, then people will engage in that.

And I know that's not the only lens that we that we use. But look, using that lens that this general deterrence kind of idea.

Capt McCaffrey:

Practitioners of military law, you know specific and general deterrence is something that we're all very familiar with, right. The sentencing factors laid out in the manual for courts martial and obviously that is something unique to the military. But the underlying concepts have a universal application and unfortunately, those factors I don't think have been given proper weight in either the international or domestic sphere until fortunately recently when we started to see.

Maj Hedden:

Yeah, it does, so your examples basically point out you point to concrete examples of things that have happened basically because historically the deterrent effect of our efforts has been too low and now possibly the specific examples that you cite with Russia and January 6 have started to turn the tide a little bit. So, let's move into your sort of policy prescriptions.

I know we've touched on them a little bit and talked about, you know, some of these updates here. But you talk in detail in your paper about some ideas. You have to update our response to maintain our union by increasing the deterrent effect of us of our of our response. So, going back to the foreign idea, what are some of the things you talked about that we could do—tools in our tool chest—that we could reach for to hopefully have more of an impact? And if there are things, more updates or things that may not even be specifically in your paper, but other ideas along this line that give it give us those at this point.

Capt McCaffrey:

Absolutely. So, I'll start with the I think perhaps the most novel idea, but in fact, the oldest legal tool that I identified in my paper is the letter of marque. Right. And this is something spelled out in the Constitution. Letters of marque give private citizens license to engage in reprisals against another nation. Congress has the sole power to issue letters of marque.

Now, traditionally, letters of marque were used to authorize capture of enemy ships at sea. But this an old tool from older times. But as with everything else in the constitution of the law, it can be adapted to modern circumstances. At least that's the argument I try to make. I think that such traditional use is even still a viable option.

And on February 28th, 2022, a bill was put forth in the House committee on Foreign Affairs. Crucially, the text of the bill includes the authority to seize, quote, any yacht, plane, or other assets on it. And so, I think that that

final element, the other any other asset would allow the United States to ... if Congress passes or issued these letters of marque, we have a robust private sector.

Think about the tech companies in the technology sector. And Congress could issue letters of marque to seize various, you know, financial assets, digital assets held by people who have been identified as hostile, you know, foreign actors. And we wouldn't even need, you know, the [NSA](#) or some other government actor to do it. Congress has the authority to enable private actors to do this.

And so, I think that this is an old tool that could be put to effective use in these modern times in a way that allows the United States to not cede the gray zone, but rather, you know, fight back in a lawful fashion.

Maj Hedden:

Fascinating concepts. Just to make a point of clarification. This would be completely voluntary on the part of the private actors. We're not talking any kind of commandeering here, right?

Capt McCaffrey:

Yeah. We're not talking about conscripting, conscripting, you know, Alphabet or Google into doing things. But it would be a license. It would give private actors the ability to do it under the auspices of the federal government.

Maj Hedden:

Yeah. And it does seem like ... I'm thinking in the, you know, digital, financial, technological realm that we could really make some headway at minimal real risk to the actors. I could see where a Carnival cruise does not want to try to seize a Russian submarine, even if it had the opportunity. But like you said, Alphabet, using the tools at its disposal to take assets that say Russia is using to host its bot farm ... seems promising.

Capt McCaffrey:

Right. And I mean, of course, you know, this is not by no means an easy, you know, situation overall, overall.

And there are, you know, concerns about, you know, proportionality that would need to be thought out and addressed. And that is what needs to be done in a very deliberate and thought-out fashion. This is not something that should be done willy nilly, but it is, as I said, a lawful option that is on the table.

Maj Hedden:

Right. And just theoretic in general terms, there are deterrent effects to having options on the table, even if you don't end up needing them very often or use employing them very often. Increasing the potential cost of an action can have that deterrent effect. So, I could see that being a consideration too.

Capt McCaffrey:

Yes, exactly.

Maj Hedden:

Anything else on this on the foreign idea, on addressing these foreign gray zone threats that you that you've thought about or come up with that we could ...

Capt McCaffrey:

Yeah, absolutely. I mean, this isn't anything you know, I can't claim this as an original thought because, you know, other people have been talking about this, too, but it deserves to be discussed. The so-called Budapest Memorandum, the 1994 memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Nonproliferation of nuclear weapons. And this is something that the United States, Russia and Ukraine are all a part of, and so is the United Kingdom.

The Ukraine, as part of this agreement, gave up its nuclear arms. And part of the deal was that their sovereignty, the territorial integrity, would be respected and maintained. That obviously hasn't happened. Now, interestingly, Russia has their own international law argument justifying their hostile intervention. Their argument is that, yeah, in 2014 when the new Ukrainian government came into power, that government was unconstitutional and therefore the Budapest

Memorandum and Russia's obligations thereunder were void. Seems shaky to me.

But I think it's important for the United States, the United Kingdom, other parties to not lose sight of this, you know, written international instrument and acknowledge in front of the [UN](#) and other channels that Russia has violated its obligations under this agreement. And I think that this violation is something that would justify a direct provision of material to the Ukrainian forces.

Again, it's a policy decision. You know, that's something that would need to be thought out. And we need to think about what other kinds of liability that might be exposed in the United States, too. But just on the basis of this agreement and the fact that Russia has violated it, I think that the United States could start sending direct assistance.

Already we've seen, you know, intelligence sharing, and we've seen the positive effects of that, that for Ukrainian self-defense and that, you know, we can certainly continue with that effort, but we can also do more.

Maj Hedden:

Yeah. Does sound like there's some advantages to doing that. I'd be interested to see if there are any movements or updates on that front as this conflict continues. Again, we're recording at the end of June 2022, and this has been going on for months now, which has led apparently to some willingness to reconsider the level of aid that the U.S. and other Western nations are providing to Ukraine.

Turning now to the domestic we've talked probably a little bit more. We've already kind of mentioned some of this, but you had some more specific policy proposals to, I guess, in effect, try to convince right wing extremists and other domestic extremists that it would be a bad idea to get to the point of attacking the U.S. Capitol again to exert your political will.

So, what are those ideas?

Capt McCaffrey:

So those are matters of federal statute. Previously I mentioned, you know, 18 United States Code Section 2384. That's for seditious conspiracy. And that is the one of the counts that Elmer Rhodes, the leader of the Oath Keepers, is facing. But within that section of the United States Code, there are other statutes that I think viable options. One of them is the immediately preceding section.

Section 2383, which states whoever incites sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof or give aid or comfort there to shall be fined under this title or in prison not more than ten years. So, these statutes are already on the books, and it seems as though, you know, federal prosecutors are, you know, starting to employ these.

And I think that we need ... that is something that should be applauded and should be continued. You know, at the time I wrote the paper, over 725 people had been arrested and charged with offenses relating to January 6th. But as I discussed in the case of Adam Johnson, a lot of these charges are for misdemeanors. And that does not seem to be an appropriate indictment for the severity of the offense.

Fortunately, you see that we are seeing a shift in these statutes that fit. I mean, obviously, the jury, you know, the fact finders will find whatever they find. But based on the evidence available, these statutes seem to be the appropriate vehicles for ensuring that justice is done and that an appropriate punishment is imposed on these wrongdoers, and that, as we keep discussing, an appropriate deterrent message is sent going forward so that we don't face something like this in 2024 or ever again in the United States.

Final Thoughts

Maj Hedden:

Yeah. Certainly, a worthwhile goal. Now that we've talked through your ideas, your identifying of a couple of indisputable issues that the United States faces, foreign and domestic. And then your kind of proposals for there to possibly experience them less going forward. Give us a kind of a wrap up, final parting thoughts from your side, Captain McCaffrey.

Capt McCaffrey:

Yes, sir. So, I think the big takeaway that I wanted to leave people with is that anyone can act against the United States in the gray zone. And that has been happening in both the domestic and the foreign spheres. And most troublingly, that has happened in a synergistic way. Foreign actors have taken advantage of domestic actors and, whether, you know, intentionally or not, these hostile domestic and hostile foreign forces wind up working in unison.

Therefore, there needs to be a uniform response. Right. And members of the military, members of the civil service, you know, the civilian law enforcement all need to consider that oath that they took to protect the Constitution and defend the United States against all enemies, foreign and domestic. That needs happen in a lawful way that respects people's civil rights and due process.

But just because people's civil rights and due process are being respected does not mean that there should not be zealous advocacy. Right? A zealous defense in upholding of our Constitution and the laws enacted by us, the people in Congress thereunder.

Maj Hedden:

Hear, hear. I appreciate your willingness to talk to us about this today. Thank you for your time and your expertise and educating us a little bit. We really enjoyed your paper.

Announcer:

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Glossary

- **AFJAG:** Air Force Judge Advocate General
- **BLM:** Bureau of Land Management
- **CSTO:** Collective Security Treaty
- **GRU:** Russia's largest security service
- **JAG:** Judge Advocate General
- **NATO:** North Atlantic Treaty Organization
- **NSA:** National Security Agency
- **U.S.C.:** United States Code

Layout by Thomasa Huffstutler