

Interpreting Recent Changes to the Standing Rules for the Use of Force

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I. Introduction

On 29 August 2005, Hurricane Katrina swept through the Gulf Coast Region, causing unprecedented devastation and widespread flooding.¹ In response, thousands of National Guard Soldiers deployed to the area to provide assistance. In addition, the President ordered U.S. Army active-duty units to immediately deploy to the region to provide additional medical, transportation, and communication support.² This short-notice deployment came, for many Soldiers, on the heels of a one-year tour in Iraq or Afghanistan.³ The potential for Soldiers to confuse combat rules of engagement with domestic rules for the use of force was a major concern.⁴ As a result, Soldiers received a comprehensive rules for the use of force (RUF) brief that emphasized the differences between combat operations and the type of mission they were about to undertake.⁵

The Department of Defense (DOD) released the current Standing Rules for the Use of Force (SRUF), dated 13 June 2005, in early July 2005.⁶ These rules are drastically different from prior versions. Both the format and the language have changed, but probably the most important modification is the addition of new terms and definitions. While some of the modifications serve to simplify the SRUF, other modifications may not be as favorably received. The SRUF, which are designed for use in the United States, and therefore based on domestic law, now include language that is identical to the Standing Rules of Engagement (SROE),⁷ which are rooted in international law. As a result, the potential for confusion in application of these two distinct sets of rules may be significant.

This article will argue that the recent injection of international law concepts into SRUF may blur the line between SRUF and SROE, thereby resulting in unnecessary confusion to both Soldiers and the Judge Advocates that advise them. Many veterans of Operation Iraqi Freedom and Operation Enduring Freedom are intimately familiar with ROE, but have little or no experience with SRUF.⁸ Therefore, the resulting confusion could lead to two significant issues. First, combat ROE are

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¹ United States Army National Guard, *National Guard Homeland Defense White Paper: September 11, 2001, Hurricane Katrina, and Beyond*, Oct. 11, 2005, <http://www.armg.army.mil/Publications.aspx>.

² The units deployed included elements of 13th Corps Support Command, Fort Hood, Tex., and elements of the 82d Airborne Division. STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE, RL 33095 (2005).

³ Many of the Soldiers deployed to the region from 1st Cavalry Division, Fort Hood, Texas, had recently re-deployed from Iraq. Interview with Major Deidre Brou, then assigned as Judge Advocate, 1st Cavalry Division, in Charlottesville, Va. (Jan. 22, 2007); see also *Hurricane Katrina—The Aftermath Weblog for Day 14, Friday, September 9, 2005*, TIMES-PICAYUNE (New Orleans), Sept. 9, 2005, at 99 (“Army Capt. Dave Maxwell from Fort Hood, Texas, said he and several of his soldiers, many of whom returned from Iraq five months ago, volunteered for duty in New Orleans.”); Jonathan Pitts, *Giving Respect, Getting Respect in New Orleans*, BALTIMORE SUN, Sept. 11, 2005, at 7E (“Blum and his 60-soldier unit, more than half of them Iraq or Afghanistan veterans, flew into New Orleans to help.”).

⁴ Interview with Lieutenant Colonel (LTC) Joseph S. Dice, Director, Domestic Operational Law, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 23, 2007) (While assigned to CLAMO, LTC Dice deployed to the region during the days following Hurricane Katrina and served as an analyst for the Joint Center for Operational Analysis). See generally Joint Ctr. for Operational Analysis, *Hurricane Katrina Lessons Learned*, JOINT CTR. FOR OPERATIONAL ANALYSIS Q. BULL. 8 (June 2006) [hereinafter *Katrina Lessons Learned*] (discussing the Joint Task Force (JTF) rules for the use of force (RUF), which reflected the command's concern that federal troops would overstep their bounds and violate the Posse Comitatus Act).

⁵ Major Deidre Brou, Standing Rules for the Use of Force Brief (Sept. 5, 2005) (unpublished PowerPoint Presentation, on file with author). Elements of the 82d Airborne Division received their brief immediately after arriving in New Orleans. Interview with Colonel Stephen Berg, former Staff Judge Advocate, 82d Airborne Division, in Rosslyn, Va. (Jan. 22, 2008) [hereinafter Berg Interview].

⁶ JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES para. 3b (13 June 2005) [hereinafter CJCSI 3121.01B]. Although released in July 2005, many of the units deployed to Hurricane Katrina in August 2005 relied primarily on the “old” RUF and not on the SRUF discussed in this article. Brou, *supra* note 5; Berg Interview, *supra* note 5.

⁷ *Id.*

⁸ The recent federalization of National Guard troops to support Border Patrol agents demonstrates how challenging and unfamiliar RUF development can be. In a 2006 press conference, Lieutenant General Steven Blum, Chief of the National Guard Bureau, described the difficulty of drafting the RUF:

typically much more aggressive than domestic RUF, so the potential for excessive use of force incidents in domestic operations may be significant. Secondly, the confusion may expose Soldiers to greater danger, as they will be uncertain of the limits of their authority.⁹ Because domestic operations are usually short-notice deployments, lack of training in SRUF may compound this confusion.

To support this thesis, this article will explore the history of rules for the use of force and how they differ from rules of engagement. This article will then highlight some of the positive and negative changes, comparing the new SRUF to previous versions of RUF and SROE. It will then provide specific examples of how the SRUF are applied in domestic operations, and how past challenges with the application of RUF can provide valuable lessons about the dangers of ambiguous RUF. Finally, the article will propose some possible solutions to ensure that Soldiers properly apply SRUF in domestic operations without inhibiting their right to self-defense.

II. History of the Standing Rules for the Use of Force

The DOD defines rules for the use of force as “[d]irectives issued to guide United States forces on the use of force during various operations.”¹⁰ This rather general definition is further augmented by the definition contained in the current SRUF: Standing Rules for the Use of Force “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DOD civil support and routine Military Department functions occurring within U.S. territory or U.S. territorial seas.”¹¹

Perhaps the best way to define SRUF is in the negative: SRUF are not SROE. The SROE “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies . . . occurring outside U.S. territory . . . and outside U.S. territorial seas.”¹² Although SRUF and SROE share some common principles, SRUF are based on domestic law, while SROE is largely based on international law.¹³ Therefore, any definitions and concepts contained in RUF must be rooted in the U.S. Constitution and domestic laws.¹⁴

The use of force, and the reasonableness of such force, is governed by the Fourth Amendment. Among other protections, the Fourth Amendment prohibits “unreasonable . . . seizures”¹⁵ The Supreme Court, in *Graham v. Connor*,

The rules of engagement and the rules of use of force are absolutely essential. Any time you put uniformed military personnel in an operational role in the United States of America, they have to meet the intent of the Constitution. The four Attorney Generals of the affected states are working with the Judge Advocate and my General Counsel and the Department of Defense General Counsel and others to make sure that we have a rules of use of force and a rules of engagement that are appropriate and are consistent across all four states, even though we will be very sensitive to the state laws.

U.S. Dep’t of Homeland Security, *Press Briefing by Secretary Chertoff and Other Government Officials on the President’s Immigration Plan*, May 16, 2006, available at <http://www.freerepublic.com/focus/f-news/1637775/posts>.

⁹ The balance between using the least amount of force necessary to accomplish the mission, while at the same time ensuring that Soldiers understand their right to self-defense, is a difficult one. As one author notes:

First, troops should demonstrate initiative in defending themselves and members of their unit. Second, troops should apply all levels of force only when necessary. The first criterion recognizes that a military force must protect itself to accomplish its objective. The second acknowledges that use of excessive force could jeopardize claims to legitimacy and frustrate both short-term and long-term goals.

Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 13 (1994) (citing U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS V (14 June 1993)).

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Aug. 2006), available at <http://www.dtic.mil/doctrine/jel/doddict/>.

¹¹ CJCSI 3121.01B, *supra* note 6, para. 3b. “SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians, and contractors performing law enforcement and security duties at all DOD installations (and off-installation while conducting official DOD security functions), within or outside US territory, unless otherwise directed by the SecDef.” *Id.*

¹² *Id.* para. 3a. In addition, SROE “apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the Secretary of Defense (SecDef).” *Id.*

¹³ *Id.*; see also Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1.

¹⁴ See Commander Sean P. Henseler, *Self-Defense in the Maritime Environment Under the New Standing Rules of Engagement/ Standing Rules for the Use of Force (SROE/SRUF)*, 53 NAVAL L. REV. 211 (2006) (highlighting the different standards that must be met in order to use force inside the United States vice outside the United States).

¹⁵ U.S. CONST. amend. IV.

held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”¹⁶ This reasonableness standard has been articulated as requiring consideration of “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁷ Although many of the underlying cases in this area of law deal with civilian law enforcement,¹⁸ the fundamental analysis of the use of force can aptly be applied to federal forces in domestic military operations as well.

Given that SROE governs military operations occurring primarily outside U.S. territory,¹⁹ international law, not domestic law, logically serves as the basis for these rules. The most identifiable example is the concept of a “hostile act.” A hostile act is defined in SROE as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property.”²⁰ This concept is rooted in the United Nations Charter, Article 51, which declares: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²¹ Legal scholars and practitioners almost universally agree that an armed attack, or “hostile act,” triggers the right of self-defense.²²

The SROE does provide examples of the United States’ expanded interpretation of international law as well. For instance, the concept of “hostile intent” is not explicitly rooted in the U.N. Charter. In fact, Article 51 makes it clear that the inherent right of self-defense is only triggered “if an *armed attack occurs* against a Member of the United Nations.”²³ Therefore, some Nations believe that this permits use of force for self-defense only *after* an armed attack occurs.²⁴ However, the United States and many other nations believe that the right of “anticipatory self-defense”²⁵ is not negated by the U.N. Charter. Rather, they contend that countries may act with force to prevent imminent attacks against their interests.²⁶ However, the debate often focuses on when an attack is “imminent” enough to justify anticipatory self-defense. As such, the definition of “hostile intent” is far from definitively established in the international community.

As with the concepts of “hostile act” and “hostile intent,” SROE are based on an extremely dynamic and diverse body of international law.²⁷ This body of law, as a general rule, is significantly different from domestic law dealing with use of force within the United States. Therefore, the military must avoid establishing RUF for domestic operations that are actually rooted in international law. The current version of the SRUF, however, appears to do exactly that.

¹⁶ *Graham v. Connor et al.*, 490 U.S. 386, 395 (1989).

¹⁷ *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). For a discussion of the effects of stress on the reasonableness analysis, see Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515 (2002).

¹⁸ See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a cause of action for violation of the Fourth Amendment’s guarantee against unreasonable searches by federal agents). *But see Saucier v. Katz*, 533 U.S. 194 (2001) (a U.S. Army military police officer was entitled to qualified immunity in a *Bivens* suit alleging he used excessive force in detaining a protester at an on-post appearance by then-Vice President Albert Gore, Jr.).

¹⁹ CJCSI 3121.01B, *supra* note 6, at enclosure A, para. 3a.

²⁰ *Id.*

²¹ U.N. Charter art. 51. For a contemporaneous analysis of Article 51, see HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 795–97 (1950).

²² Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 *A.F. L. REV.* 87, 112–13 (2004).

²³ U.N. Charter art. 51 (emphasis added).

²⁴ Kastenberg, *supra* note 22, at 113 (quoting PHILIP JESSUP, *THE USE OF INTERNATIONAL LAW* 165 (1959)); see also LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 178 (1946).

²⁵ The concept of anticipatory self-defense in the United States was first articulated by Daniel Webster, the Secretary of State at the time of the destruction of the U.S. steamer *Caroline* in New York. During subsequent negotiations with British officials, Webster stated the U.S. view as: “Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’” *Destruction of the “Caroline,”* 2 *MOORE DIGEST* §§ 217, 409, 412 (1906).

²⁶ See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 331 (1963).

²⁷ See, e.g., *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* xix (W. Michael Reisman & Chris T. Antoniou eds., 1994) (“The sources of the law of armed conflict, like international law of which it is a part, are more diverse and complex than in domestic legal systems.”).

After the September 11th attacks, the U.S. Northern Command (USNORTHCOM) was established, with a mission to provide “command and control of DOD homeland defense efforts and to coordinate defense support of civil authorities.”²⁸ In apparent furtherance of this consolidated domestic command, various RUF were consolidated into one document, covering responses to all types of domestic missions.²⁹ The current versions of SRUF/SROE consolidate use of force guidance previously found in at least three different sources:³⁰ counter drug operations,³¹ civil disturbances (GARDEN PLOT),³² and law enforcement and security duties.³³ Unlike previous versions, which were tailored to the type of attack (chemical, conventional, natural disaster), the current version is triggered by the various responses to those types of attacks and the level of force required to respond. Although consolidation of RUF is generally considered a positive development, some of the new language contained in the SRUF was not as favorably received.³⁴

III. Recent Changes to SRUF

A. Beneficial Changes

The form and layout of the new SRUF is drastically different from, and in many ways an improvement over, previous versions. The current SRUF serves as one comprehensive source that consolidates the previous versions of RUF into several core principles that are applicable to every type of domestic operation. This approach allows for mission-specific RUF to be developed from these basic principles, thereby reducing the need for commanders to consult several different sources for guidance.

1. *How Imminent Is “Imminent”?*

The definition of the term “imminent” under the new SRUF is an example of the improvements over previous versions. The old RUF merely stated, “[t]he determination of whether a particular threat or danger is ‘imminent’ is based on an assessment of all the circumstances known to DoD personnel at the time. ‘Imminent’ does not necessarily mean ‘immediate’ or ‘instantaneous.’”³⁵ However, if a Judge Advocate were searching for additional guidance, RUF for counter drug operations contained not only that definition, but the following clarification: “Thus, an individual could pose an imminent danger even if he or she is not at that very moment pointing a weapon at DOD personnel or someone within the immediate vicinity of the DOD personnel.”³⁶ In addition, the counter drug operation RUF provided specific examples of when a threat may be imminent.³⁷ By consolidating various RUF into one complete document, the new SRUF states:

²⁸ United States NORTHCOM, http://www.northcom.mil/about_us/about_us.htm (last visited Feb. 20, 2007). The specific mission is to “conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories and interests within the assigned area of responsibility (AOR); and [a]s directed by the president or secretary of defense, provide defense support of civil authorities including consequence management operations.” *Id.* See also Lance Gurwell, *NORTHCOM Responsible for U.S. Homeland Defense*, COLO. SPRINGS BUS. J., Aug. 30, 2002, at 1.

²⁹ CJCSI 3121.01B, *supra* note 6.

³⁰ The current version cancels CJCSI 3121.01A, 15 January 2000, CJCSI 3121.02, 31 May 2000 and CJCSI 3123.01B, 01 March 2002. CJCSI 3121.01B, *supra* note 6, para. 2.

³¹ JOINT CHIEFS OF STAFF, INSTR. 3710.01A, DOD COUNTERDRUG SUPPORT (30 Mar. 2004) [hereinafter CJCSI 3710.01A].

³² U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) app. 8 (Special Instructions) to Annex C (Concept of Operations) (4 Feb. 1994) [hereinafter DOD DIR. 3025.12]; U.S. DEP’T OF DEFENSE, CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991) [hereinafter GARDEN PLOT].

³³ U.S. DEP’T OF DEFENSE, DIR. 5210.56, USE OF FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (1 Nov. 2001) [hereinafter DOD DIR. 5210.56].

³⁴ Telephone Interview with LTC Vanessa Berry, Operational Law Attorney, U.S. Northern Command (Feb. 18, 2007) [hereinafter Berry Interview]. The debate centers around whether or not the international law terms injected in the current SRUF will actually cause confusion. While some argue that Soldiers are sophisticated enough to discern between using force in combat and using force in domestic operations, others argue that using international law terms in domestic SRUF will cause confusion even among Judge Advocates, not to mention Soldiers. *See id.*

³⁵ DOD DIR. 5210.56, *supra* note 33, para. 3.6. In comparison, the dictionary definition of “imminent” is: “likely to happen without delay; impending; threatening: said of danger, evil, misfortune.” WEBSTER’S NEW WORLD DICTIONARY 675 (3rd Coll. ed. 1988).

³⁶ JOINT CHIEFS OF STAFF, INSTR. 3121.02, RULES ON THE USE OF FORCE BY DOD PERSONNEL PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES, at A-4 (31 May 2000) [hereinafter CJCSI 3121.02].

³⁷ *Id.* The examples include:

1. An individual possesses a weapon or is attempting to gain access to a weapon under circumstances indicating an intention to use it against DOD personnel or other person within the immediate vicinity of the DOD personnel.

Imminent Threat. The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DOD forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous. Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat.³⁸

In addition to attempting to clarify the meaning of “imminent,” the new definition also reminds Soldiers that they are responsible for making a subjective determination based on the facts available at that time.³⁹ While the language still leaves some room for ambiguity regarding demonstrated intent, the new language is a vast improvement over previous versions and succeeds in providing guidance in one source.

2. Escalation of Force

The current SRUF also provides a definitive statement on the escalation of force (EOF).⁴⁰ Soldiers have an inherent right to use force in self-defense.⁴¹ However, prior to employing force, they are encouraged to defuse the situation, thereby avoiding the necessity to use force.⁴² Escalation of force is a concern in any operation involving civilians, whether in the United States or in a foreign country. For example, commanders in Iraq have greatly emphasized de-escalation, particularly given the relatively large number of EOF incidents.⁴³ Lieutenant General (LTG) Peter Chiarelli, former Multi-National Corps – Iraq commander, recently instituted additional training requirements and revamped the ROE card to provide additional guidance on EOF issues.⁴⁴ The challenge with such an emphasis, however, is ensuring a proper balance between the need to use the minimum amount of force, while not appearing to restrict the individual Soldier’s right to self-defense. Lieutenant General Chiarelli faced skepticism with his introduction of the EOF measures, to which he responded: “I’m not trying to change the ROE . . . I’m trying to prepare soldiers better. Give them more tools and data. It’s a force protection issue.”⁴⁵

The current SRUF reflects the importance of clearly enunciated EOF policies during complex domestic operations. Although prior versions provided minimal guidance on the subject, the current SRUF (and SROE) provides “De-escalation” guidance as the first instruction under the “Procedures” section. The SRUF states: “De-Escalation. When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.”⁴⁶ While prior versions of the RUF made passing reference to de-escalation, allowing deadly force only after “[I]f lesser means have been exhausted, are unavailable, or cannot be reasonably employed,”⁴⁷ the current SRUF dedicates an independent paragraph to the concept, making it clear that de-escalation is an important concept that must be addressed in formulating RUF. This clarification assists Soldiers and their leaders in balancing their obligation to defend themselves and others, while also helping to prevent the use of excessive force.

2. An individual without a deadly weapon, but who has the capability of inflicting death or serious physical injury and is demonstrating an intention to do so (e.g., an attempt to run over DOD personnel or other persons within the immediate vicinity of the DOD personnel with a car).

Id.

³⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4b.

³⁹ *Id.*

⁴⁰ *Id.* at enclosure L, para. 5a. While not specifically using the term “escalation of force,” the SRUF does provide a subheading entitled “de-escalation.” *Id.*

⁴¹ *Id.*

⁴² *Id.* para. 5b.

⁴³ Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints*, STARS & STRIPES, Mar. 18, 2006, available at <http://www.stripes.com/article.asp?section=104&article=34944&archive=true>. During one eight week period in February–March 2006 in Iraq, there were “more than 600 [EOF] incidents . . . with more than 30 deaths and more than 60 injuries.” *Id.*

⁴⁴ The current ROE provides additional guidance on the use of “Graduated Measures of Force,” consisting of a reiteration of the 5 S’s (shout, show, shove, shoot (to warn), shoot). INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 118 (2006).

⁴⁵ Montgomery, *supra* note 43.

⁴⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5a.

⁴⁷ DOD DIR. 5210.56, *supra* note 33, at 9.

3. Eliminating Confusing Language

The current SRUF also eliminated some language that could cause confusion regarding a Soldier's right to self-defense. The previous RUF contained a section entitled "Additional requirements for the use of firearms,"⁴⁸ which listed five general requirements that must be satisfied prior to using firearms. One of the listed requirements was: "When a firearm is discharged, it will be fired with the intent of rendering the person(s) at whom it is discharged incapable of continuing the activity or course of behavior prompting the individual to shoot."⁴⁹ Although the formulation of this passage may have its roots in federal law enforcement rules,⁵⁰ the language is rather legalistic and unhelpful to the layperson. Instead of simply stating that "every time you shoot, aim center of mass," it leaves some doubt as to the Soldier's responsibility. In fact, it may cause some leaders and Soldiers to wrongly believe that they must attempt to first "shoot to wound," thereby rendering the hostile person "incapable of continuing the activity," without actually killing him.⁵¹

In reality, the idea that one can incapacitate a human being with a non-deadly shot is a fallacy.⁵² The only reason a Soldier would be justified in shooting at another person is if the "activity or course of behavior"⁵³ the perpetrator was engaging in posed a deadly threat to that Soldier or others.⁵⁴ Therefore, in responding to a deadly threat, the only way to ensure that the perpetrator is rendered incapable of continuing the activity would be to shoot to kill.⁵⁵ By deleting this ambiguous passage, and relying on the guidance provided in the definition and application of deadly and non-deadly force, the SRUF has eliminated this potential confusion.

B. Potentially Confusing Language

Although some changes to SRUF may be beneficial, other modifications may prove confusing. The definitions of deadly force and self-defense have changed significantly, with language that may unwittingly expand use of force criteria. Although the current language is more aggressive, these changes do not necessarily provide more protection to Soldiers. Instead, ambiguities in the language may expose them to additional risk.⁵⁶ Also, the terms "hostile act" and "hostile intent" are new additions to the SRUF, and represent a significant change in the language usually associated with domestic operations.⁵⁷ These additions to the current SRUF raise the question: What role, if any, should international law concepts play in domestic operations?

⁴⁸ *Id.* at 11.

⁴⁹ *Id.*

⁵⁰ The Federal Bureau of Investigation guidance on the application of deadly force states: "When the decision is made to use deadly force, agents may continue its application until the subject surrenders or no longer poses an imminent danger." John C. Hall, *FBI Training on the New Federal Deadly Force Policy*, Apr. 1996, <http://www.fbi.gov/publications/leb/1996/apr1966.txt>.

⁵¹ DOD DIR. 5210.56, *supra* note 33, at 11. The RUF under GARDEN PLOT, which has also been preempted by the new SRUF, had even more explicit "shoot to wound" language, stating: "when firing ammunition, the marksman should, if possible, aim to wound rather than to kill." DOD DIR. 3025.12, *supra* note 32, at 8 (Special Instructions) to Annex C (Concept of Operations). This type of language regarding "shooting to wound" is similar to that assailed by critics of ROE training tools used in past peacekeeping operations. W. Hays Parks, *Deadly Force is Authorized*, U.S. NAVAL INST. PROC., Jan. 2001, at 32-37, available at <http://www.usni.org/Proceedings/Articles01/PROparks1.html>. In response to Parks's criticisms, LTC Mark S. Martins acknowledged that shooting to wound was dangerous, but that the U.S. Army has never mandated such a practice. Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, But Also Trained*, ARMY LAW., Sept. 2001, at 1, 8. The FBI also discourages this practice, stating: "When deadly force is permitted under this policy, attempts to shoot to cause minor injury are unrealistic and can prove dangerous to agents and others because they are unlikely to achieve the intended purpose of bringing an imminent danger to a timely halt." Hall, *supra* note 50.

⁵² UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS 62 (2005). Medical and ballistic studies have shown that:

The human target can be incapacitated reliably and immediately only by the disruption or destruction of the brain or upper spinal cord. Otherwise, incapacitation is subject to a random host of variables, the most important of which are beyond the control of the shooter. Incapacitation becomes an eventual event, not necessarily an immediate one. If the proper psychological factors that contribute to incapacitation are present, even a minor wound can be immediately incapacitating. If they are not present, incapacitation can be significantly delayed even with major non-survivable wounds.

Id.

⁵³ DOD DIR. 5210.56, *supra* note 33, para. E2.1.6.2.

⁵⁴ *Id.*

⁵⁵ PATRICK & HALL, *supra* note 52, at 62.

⁵⁶ Martins, *supra* note 51 (arguing that liberal use of force policies do not necessarily provide additional protection to Soldiers); see also Martins, *supra* note 9 ("Soldiers can learn to defend themselves and their units with initiative and to apply deadly force only when necessary. Clear and simple rules on the use of force can complement the learning process." (emphasis added)).

⁵⁷ CJCSI 3121.01B, *supra* note 6, enclosure L, para. 5c.

1. *Deadly Force*

The meaning and proper application of deadly force is the central issue in any set of RUF.⁵⁸ Soldiers operating in a domestic setting must know what constitutes deadly force and when they are justified in employing such force. If Soldiers are uncertain, or hesitate in responding to a deadly threat, they are risking their lives and the lives of their fellow Soldiers.⁵⁹ On the other hand, if they are too aggressive, they can compromise the mission and cause unnecessary injury or death.⁶⁰ In order for Soldiers and commanders to accurately balance these competing interests, SRUF must provide definitive guidance on the employment of deadly force. The current SRUF falls short of that requirement.

a. *Format Changes*

The use of deadly force paragraph changed both in format and content. The format modifications, although seemingly insignificant, do represent a potential change in the way Soldiers approach a “deadly force” analysis. Previous RUF required Soldiers to satisfy a mental checklist of considerations prior to applying deadly force.⁶¹ Under that methodology, deadly force was authorized “only under conditions of extreme necessity.”⁶² In addition, the RUF required Soldiers to find *all* three of the following elements: (1) “Lesser means have been exhausted, are unavailable, or cannot be reasonably employed;” (2) “[t]he risk of death or serious bodily harm to innocent persons is not significantly increased by use;” and (3) “[t]he purpose of its use is one or more of the following:” self-defense and defense of others; to protect assets involving national security, or assets that are inherently dangerous to others; to prevent serious offenses against persons; to protect public health or safety; arrest or apprehension; and to prevent escape.⁶³ In comparison, the new SRUF simply states: “Deadly force is to be used only when all lesser means have failed or cannot reasonably be employed.”⁶⁴ By changing the definition from a list of elements that must be satisfied prior to using deadly force to a mere caveat requiring Soldiers to use lesser means if reasonable, the definition of “deadly force” is decidedly more aggressive.⁶⁵ This format modification may cause Soldiers to change the way they approach use of force issues, prompting them to omit important considerations like necessity and risk to innocent bystanders.

b. *Necessity*

While the previous RUF stated: “Deadly force is justified only under conditions of *extreme necessity*,”⁶⁶ the current SRUF provides only that “[d]eadly force is to be used only when all lesser means have failed or cannot reasonably be employed.”⁶⁷ The “necessity” concept is central to any discussion of deadly force.⁶⁸ The FBI uses the following definition of

⁵⁸ *Id.*

⁵⁹ See Martins, *supra* note 9 (analyzing several scenarios in which Soldiers hesitated to apply deadly force when such force, in hindsight, appeared to be clearly justified).

⁶⁰ Compare Montgomery, *supra* note 43 (article discussing measures taken by MNC-I to reduce the number of EOF incidents in Iraq), with Brady McCombs, *Tense Moments Revealed in Guard Border Incident*, ARIZ. DAILY STAR, Jan. 20, 2007, at 1 (article detailing a confrontation between federalized National Guard troops supporting the Border Patrol and an armed group attempting to cross the US-Mexican border. The National Guard troops, following their RUF, withdrew from the area and called on Border Patrol agents for reinforcement. Their actions are credited with preventing a gunfight.), and *Guardsmen to Be Honored for Border Actions*, ARIZ. DAILY STAR, Jan. 22, 2007, at 1 (reporting that the Soldiers were to be honored for their actions in a ceremony in late January 2007). Shortly after the incident on the Arizona-Mexico border, Arizona politicians, obviously unaware of the PCA’s restrictions, began to criticize the Soldiers’ actions, asking, “What are they [National Guard] here for if they are going to retreat from people with automatic weapons?” *Mixed Reports on National Guard Border Confrontation*, FOX NEWS, Feb. 1, 2007, http://www.foxnews.com/printer_friendly_story/0,3566,248124,00.html. Such comments illustrate how Americans lack familiarity with the concept of military forces operating within the United States. In an effort to clarify, the Governor’s office stated that under the RUF, “soldiers are not supposed to stop, arrest, or shoot armed illegal immigrants. They are instructed only to look, listen and report their location to the Border Patrol,” but that “the rules allow Guard members to use force when they believe they face an imminent threat and all other means are exhausted.” *Id.*

⁶¹ DOD DIR. 5210.56, *supra* note 33, at 9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c. The definition then goes on to detail the circumstances under which deadly force may be used, including self-defense and defense of others, assets vital to National Security, inherently dangerous property, and national critical infrastructure. *Id.*

⁶⁵ *Id.*

⁶⁶ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2 (emphasis added).

⁶⁷ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c.

necessity: “In evaluating the necessity to use deadly force, two factors are relevant: (1) The presence of an imminent danger to the agents or others, and (2) the absence of safe alternatives to the use of deadly force.”⁶⁹ Furthermore, the Department of Justice’s *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations*⁷⁰ states:

[T]he touchstone of the Department’s policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time. The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail.⁷¹

As with most of the changes in the current SRUF, the omission of the term “extreme necessity,” in and of itself, will likely not lead Soldiers and their commanders to believe that they may use deadly force without necessity. However, the cumulative effect of omitting many of these limiting terms is an SRUF that reads much more aggressively than previous versions.

2. Self-Defense

The old RUF authorized self-defense “[w]hen deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).”⁷² This language mirrors the holding in *Graham v. Connor*, in which the Supreme Court interpreted the Fourth Amendment as requiring the use of force to be evaluated under an “objective reasonableness” standard, requiring “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁷³ Indeed, the similarity between the language in *Graham v. Connor* and RUF was no accident. The RUF is used for operations within the United States, and therefore requires Soldiers to operate within the confines of the U.S. Constitution, the Fourth Amendment, and the Supreme Court’s interpretations of the application of the Fourth Amendment to use of force scenarios.⁷⁴

The current SRUF, however, provides for the “Inherent Right of Self-Defense.” It states:

Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.⁷⁵

This new definition matches verbatim the language in the SROE.⁷⁶ However, the application of the phrase “inherent right and obligation to exercise unit self-defense”⁷⁷ to the right of self-defense in domestic operations may not set the correct tone for domestic operations. The dictionary definition of inherent includes: “existing in someone or something as a natural and inseparable quality, characteristic, or right; innate; basic; inborn”⁷⁸ While legal sources as early as *Blackstone’s*

⁶⁸ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.

⁶⁹ See Hall, *supra* note 50.

⁷⁰ *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations*, <http://www.usdoj.gov/ag/readingroom/resolution14c.htm> (last visited Mar. 18, 2007).

⁷¹ *Id.*

⁷² DOD DIR. 5210.56, *supra* note 33, at 9.

⁷³ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁷⁴ U.S. CONST. amend. IV.

⁷⁵ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4a.

⁷⁶ *Id.* at enclosure A, para. 3a.

⁷⁷ *Id.* at enclosure L, para. 4a.

⁷⁸ WEBSTER’S NEW WORLD DICTIONARY 695 (3rd Coll. ed. 1988).

Commentaries observed that “[s]elf-defense . . . is justly called the primary law of nature, so it is not, neither can it be . . . taken away by the law of society,”⁷⁹ the rights afforded to law enforcement officials and military personnel may not be as expansive as those extended to individual citizens. In evaluating excessive use of force incidents, the Supreme Court has applied a reasonableness test, requiring “a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”⁸⁰ The Court in *Graham* held that the reasonableness test is applied in the following manner:

Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application’ . . . , its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.⁸¹

The Court goes on to clarify this test even further, stating: “the question is ‘whether the totality of the circumstances justify[es] a particular sort of . . . seizure.’”⁸² Furthermore, as the Court in *Garner* makes clear, “[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect’s fundamental interest in his own life need not be elaborated upon.”⁸³ As a result, in balancing the interests of the government with those of the individual, the court could determine that a law enforcement official failed to use lesser means of force in order to address the threat, even in cases where the right to self-defense was clearly implicated.⁸⁴ As such, the inclusion of “inherent right and obligation” instead of the previous “when reasonably necessary” language in the self-defense portion of SRUF may not comport with the more nuanced application of force in domestic operations.⁸⁵

3. When Directly Related to the Assigned Mission

Another addition to the current SRUF acts as an ambiguous qualifier to the use of deadly force in certain circumstances. Under the current SRUF, “Deadly force is authorized in defense of non-DOD persons in the vicinity, *when directly related to the assigned mission.*”⁸⁶ However, the previous RUF simply stated; “When deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the person(s).”⁸⁷ In addition, those provisions authorizing up to deadly force to prevent serious offenses against persons, to prevent escape, and aid in arrest or apprehension are all qualified by the same language: “Additionally, *when directly related to the assigned mission*, deadly force is authorized under the following circumstances”⁸⁸ Once again, this language is new and no similar provision requiring a connection to an assigned mission is found in previous versions of RUF.⁸⁹

⁷⁹ WILLIAM BLACKSTONE, 3 COMMENTARIES *4, quoted in PATRICK & HALL, *supra* note 52, at 16.

⁸⁰ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

⁸¹ *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

⁸² *Id.* (quoting *Garner*, 471 U.S. at 8–9); see also Seth D. DuCharme, Note: *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515 (2002). “It is important to emphasize that the perception of danger, not the actual existence of a threat, is the critical issue in determining whether an officer is entitled to the protection of a qualified immunity. . . . While the test is objective on its face, it still takes into account the uniquely difficult perspective of the actor and the variables inevitably surrounding the use-of-force incident.” *Id.* at 2532.

⁸³ *Garner*, 471 U.S. at 8–9.

⁸⁴ See, e.g., *Johnson v. Waters*, 317 F. Supp. 2d 726 (E.D. Tex. 2004). The court held that a constable who shot a woman laying in her bed in a dark room during a drug raid was unreasonable for the purposes of summary judgment. The constable argued that because the woman suddenly moved toward him, and because “he was caught in tense and uncertain circumstances,” his actions were “reasonable under the circumstances” *Id.* at 737. The court, however, held that “the record is devoid of any evidence that Defendant considered any other option before employing the use of deadly force.” *Id.*

⁸⁵ CJCSI 3121.01B, *supra* note 6, at 3. While this phrasing may be an appropriate reminder in combat ROE, there may be too many factors that need to be weighed in domestic operations to make such a broad statement applicable to SRUF.

⁸⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5(c)(2) (emphasis added).

⁸⁷ DOD DIR. 5210.56, *supra* note 33, at 9.

⁸⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5(d) (emphasis added).

⁸⁹ DOD DIR. 5210.56, *supra* note 33, at 9–10.

The addition of this language has injected unnecessary ambiguity into the SRUF. First, no where in the SRUF or accompanying documents is a definition of “directly related to the assigned mission” found. Therefore, commanders and Soldiers at all levels will be forced to determine whether using force to protect a civilian who is being beaten to death falls under their assigned mission. Some might argue that this addition is a positive development because it allows commanders on the ground the flexibility to tailor the mission to the current security situation. So, for instance, if the commander’s mission is to provide urgently needed security at a water purification site, the commander can limit the mission to that task, and inform the Soldiers that if they see civilian-on-civilian violence along the way, they should not stop, but report it through the headquarters to local law enforcement. On the other hand, the commander may elect to correlate the “assigned mission” to saving lives, alleviating human suffering, and mitigating great property damage.⁹⁰ However, this discretion comes at a heavy cost to commanders because the burden is on the commander (and the supporting JAs) to interpret the definition of assigned mission without any guidance from the SRUF. As a result, the application of this language will not be uniformly given the many meanings that can be assigned to this phrase.

The problem with the “assigned mission” language is evident in other scenarios. For instance, if a unit is assigned in purely a support role, is it appropriate for them to fail to intervene when witnessing a civilian being gravely harmed if such intervention is not part of their “assigned mission”? The ramification of television footage of U.S. Soldiers standing by as a civilian is beaten to death would most likely lead to outrage among U.S. citizens and humiliation among the military involved in the operation. The language requiring such an absurd result is unnecessary and should be clarified or removed.

4. Hostile Act and Hostile Intent

The terms “hostile act” and “hostile intent” are also new additions to the SRUF.⁹¹ In previous versions, the self-defense passage contained the only guidance regarding “hostile” individuals, stating that force could be used against “a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).”⁹² The new SRUF defines a “hostile act” as “[a]n attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG [U.S. government] property.” Meanwhile, “hostile intent” is defined as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.”⁹³

While these new definitions do provide additional clarity to the definition of a hostile person, they also introduce international law concepts into SRUF.⁹⁴ While these terms may arguably be similar to the “hostile person” language used by previous versions, the language, and not necessarily the meaning, may be the problem. First, the definitions are provided in the document, but then never appear again in the text, leaving one to wonder how these terms apply to the SRUF. Secondly, both “hostile act” and “hostile intent” are central terms used in SROE and are important to any ROE training.⁹⁵ Therefore, Soldiers and their leaders, who use these terms on a daily basis to describe civilians on the battlefield who have lost their protected status, associate these terms with combat scenarios. As a result, the potential for confusion during subsequent domestic operations may be significant.

⁹⁰ When defined so broadly, the practical effect is to allow Soldiers to use up to deadly force to prevent serious offenses against persons, to prevent escape, and allow for arrest and apprehension. Telephone Interview with Mr. Robert F. Gonzales, Domestic Operational Law Attorney, U.S. Army North (Jan. 17, 2008).

⁹¹ *Id.* at 2–3.

⁹² DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.3.1.

⁹³ *Id.*

⁹⁴ As discussed in Section II, the genesis of hostile intent and hostile act is, Article 51 of the U.N. Charter. *See supra* notes 17–24 and accompanying text.

⁹⁵ CJCSI 3121.01B, *supra* note 6, at enclosure A, para. 3e–f. Although the vast majority of Soldiers in Iraq and Afghanistan have properly applied these concepts, some journalists report that:

[o]n other occasions, U.S. troops have interpreted “hostile act” and “hostile intent” in dubious ways. In some instances, merely spotting military-aged men engaged in suspicious activities or gathered in a questionable location has been enough for them to be treated as “bad guys” and “terrorists.” In others, U.S. forces acting in legitimate self-defense during firefights, roadside attacks, and insurgent ambushes, have responded with overwhelming force in the general direction of the attacks without taking sufficient care to positively identify their targets.

Colin H. Kahl, *How We Fight*, FOREIGN AFF., Nov.–Dec. 2006, at 83, 93.

5. Using Deadly Force Against Those Impeding a Mission

In addition to carrying a combat connotation, hostile act/intent is defined not only as the threat of imminent use of force against U.S. forces, but “also includes the threat of force to *preclude or impede the mission* and/or duties of US forces, including the recovery of US personnel or vital USG property.”⁹⁶ This language may lead many Soldiers to the false assumption that they can use up to deadly force in order to clear a road, enforce a roadblock, or maintain order at an aid distribution site. However, this additional language seems superfluous, given that when a civilian uses force against a Soldier, regardless of whether it is to impede a mission or for some other motive, the Soldier will have the right to use self-defense in response. This right of self-defense is present regardless of whether the SRUF gives express permission to use force against those impeding the mission.⁹⁷ Likewise, under a separate paragraph, the SRUF already authorizes the use of force to “preserve vital U.S. government property.”⁹⁸

The authorization of force against those impeding a military mission is new to domestic operations.⁹⁹ This language is not found in any other versions of RUF, nor is it contained in any other federal law enforcement agency RUF. GARDEN PLOT RUF makes provision for the use of force against those impeding a mission, but also makes clear that “[i]f a mission cannot be accomplished without the use of deadly force, but deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed until sufficient non-deadly force can be brought to bear.”¹⁰⁰ By including the “impeding mission” language without a qualifier, the difficult questions become: What about those situations in which civilians use force to impede the mission, but the force is not directed against the Soldiers? Could Soldiers, for example, use up to deadly force to remove unarmed demonstrators blocking the only bridge out of a city? Although the answer should be no, the SRUF would not assist in arriving at this conclusion.

In Iraq or Afghanistan, if foreign nationals are impeding a crucial military mission through the use of less-than-deadly force, U.S. forces must consider the totality of the circumstances, including the level of force used and the importance of the mission. In such cases, the use of deadly force may be justified even when responding to less than deadly force, if the mission being thwarted is crucial to the success of the battle. However, the same may not hold true for Soldiers who are responding to civilians who are disrupting a convoy. If U.S. Soldiers encounter civilian interference in a domestic setting, they must, of course, use lesser means of force to eliminate the threat. However, if these lesser means fail, they would not be justified in using deadly force unless such use satisfied the Fourth Amendment. As such, the Supreme Court has determined that there are generally two situations in which force is authorized:

- 1) To protect themselves or others from immediate threats of serious physical injury; and/or,
- 2) To prevent escape of a person who may justifiably be characterized as ‘dangerous’ to the officers or to the community if allowed to remain at large.¹⁰¹

Neither of these general categories contemplates a situation in which deadly force is reasonable, unless there is a danger of death or serious bodily harm to the actual law enforcement officer or to the community. In the scenario presented above, if the demonstrators turn violent against the Soldiers, then the Soldiers will be justified in responding to such violence in self-defense. However, if the civilians are merely impeding the mission and not directing unlawful force against the Soldiers, then domestic law would not support using up to deadly force to remove them. The current SRUF language fails to make that clear.

⁹⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4c (emphasis added).

⁹⁷ See William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735 (2004) (opining that even in the absence of explicit rules for the use of force, attacks against service members conducting convoys would trigger their individual right to self-defense).

⁹⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c. Under paragraph 5c(3), deadly force is authorized to protect “assets vital to National Security.” *Id.* It is unclear, however, whether “vital USG property” is the same as “assets vital to National Security,” because there is no independent definition for “vital USG property” contained in the SRUF. *Id.*

⁹⁹ In addition to a lack of legal support in the United States, “[m]any countries do not share the aggressive American stance, woven into the fabric of the Standing ROE,” regarding “hostile intent” and the use of deadly force when a mission is being impeded. Stafford, *supra* note 13, at 1.

¹⁰⁰ DOD DIR. 3025.12, *supra* note 32, app. 8 (GARDENPLOT was superseded by CJCSI 3121.01B).

¹⁰¹ PATRICK & HALL, *supra* note 52, at 15; see also WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(d) (3d ed. 1996); MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

IV. Application of the SRUF to Domestic Operations

Before determining the proper application of SRUF to domestic crises, one must first explore the capacities in which U.S. forces may be employed in domestic operations. The use of federal military forces for law enforcement purposes is normally limited by the Posse Comitatus Act (PCA), which states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁰²

However, the use of military forces has generally been interpreted to mean “the direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel.”¹⁰³ More specifically, the PCA prohibits “direct active use of federal troops by civil law enforcement officers.”¹⁰⁴ The court in *United States v. Red Feather*¹⁰⁵ defined a “direct” role in law enforcement as: “arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities.”¹⁰⁶ On the other hand,

[a]ctivities which constitute a *passive* role which might *indirectly* aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities.¹⁰⁷

Given the rather expansive list of tasks that the Army and Air Force may perform without even implicating the PCA, military forces have an extensive history of involvement in domestic operations.¹⁰⁸ Even in those situations where the PCA does apply, there are several exceptions which operate to preclude its effect.

A. Exceptions to the PCA

Although the PCA prohibits direct military involvement in domestic law enforcement, statutes like the the Insurrection Act (formerly known as the Enforcement of the Laws to Restore Public Order Act (Restoration Act))¹⁰⁹ provide exceptions to

¹⁰² 18 U.S.C. § 1385 (2000). Although not explicitly prohibited in the PCA, 10 U.S.C. § 375 directed the DOD to establish policy that applied the PCA to both the Navy and Marine Corps. Department of Defense Directive 5525.5 states that the PCA “is applicable to the Department of the Navy and the Marine Corps as a matter of DOD policy.” U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS enclosure 4 (20 Dec. 1989).

¹⁰³ *United States v. Red Feather et al.*, 392 F. Supp. 916 (D.S.D. 1975).

¹⁰⁴ *Id.* at 922 (citing 7 CONG. REC. 3845–52, 4240–48, 4295–04, 4288 (1878)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 925.

¹⁰⁷ *Id.*

¹⁰⁸ For a discussion on the role of Posse Comitatus in federal law enforcement, see David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619 (1997) (analyzing the militarization of federal law enforcement through the incident at the Branch Davidian Compound in Waco, Tex.); see also CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW, No. 95-964 S (2000).

¹⁰⁹ 10 U.S.C §§ 331–334 (2000). In addition to the Insurrection Act, 18 U.S.C. § 831, allows federal forces to intervene in the event of a nuclear, biological, or chemical attack. In addition to materiel and equipment support, “[a]ssistance under this section may include . . . use of personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violation of this section; and . . . such other activity as is incident to enforcement of this section . . .” *Id.* Similarly, 10 U.S.C. § 382 allows the Attorney General to request assistance from the Secretary of Defense “during an emergency situation involving a biological or chemical weapon of mass destruction.” *Id.* The U.S.A. Patriot Act expanded “[this] exception to include emergencies involving other weapons of mass destruction,” instead of just chemical or biological. CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, THE USA PATRIOT ACT: A LEGAL ANALYSIS, RL 31377 (2002); see also John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). However, the updated statute only allowed for “the operation of equipment . . . to monitor, contain, disable, or dispose of the weapon involved or elements of the weapon,” and does not authorize federal forces to perform law enforcement functions. 18 U.S.C. § 831. These changes were short lived. The 2008 NDAA changed all of the language back to that found in the original Insurrection Act. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 23 (2008). For a discussion of the military’s role in defending against domestic terrorist attacks, see

the PCA. First, § 331 allows the President to use federal forces to intervene when “there is an insurrection in any State against its Government”¹¹⁰ Section 332 allows for the enforcement of federal authority. The Act states:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.¹¹¹

Section 333 has long allowed the President to use federal troops in order to “suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if it . . . hinders the execution of the laws of that State, and the United States . . . that any part or class of its people is deprived of a right . . . named in the Constitution.”¹¹² However, the 2007 Defense Authorization Act recently expanded § 333 by adding the following provision:

The President may employ the armed forces, including the National Guard in Federal service, to . . . restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that . . . domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order¹¹³

The significance of this expansion has yet to be determined, but from its broad language, it appears that the Insurrection Act may now allow federal forces to play a significant role in any domestic crisis.¹¹⁴

While the recent expansion of the Insurrection Act may foretell an increased invocation of presidential powers in the future, the prior application of the statute was rare.¹¹⁵ No President has invoked the statute since 1992, when the Rodney King verdict led to widespread rioting in Los Angeles.¹¹⁶ By invoking the Insurrection Act, the President was able to use federal forces to perform civilian law enforcement functions when the state government lacked the resources and personnel to accomplish the mission itself.

JEFFREY D. BRAKE, CONG. RESEARCH SERV. REPORT, TERRORISM AND THE MILITARY’S ROLE IN DOMESTIC CRISIS MANAGEMENT: BACKGROUND AND ISSUES FOR CONGRESS, RL 30938 (2003).

¹¹⁰ 10 U.S.C. § 331.

¹¹¹ *Id.* § 332.

¹¹² *Id.* § 333. However, prior to using federal troops, § 334 requires the President to immediately order the “insurgents to disperse.” *Id.* § 334.

¹¹³ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). The language has therefore changed from allowing Presidential intervention during an “insurrection” to allowing intervention to “restore public order” after a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” *Id.*

¹¹⁴ After Hurricane Katrina, many lawmakers wanted to expand the exceptions to the PCA in order to make military intervention and management of relief efforts easier. Alex Leary & Paul De La Garza, *Expanded Military Rule a Touch Issue*, ST. PETERSBURG TIMES, Sept. 27, 2005, at 1A. *But see* Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007, at 6 (characterizing the changes as “[p]ossibly the most sinister of . . . pro-totalitarian measures, this act would impose military domination over civil institutions and civilian life, and could ultimately target anyone as an ‘illegal enemy combatant’ to be dealt with accordingly.”); *Posse Politics*, GOVERNING MAG., Dec. 2006, at 18 (opining that the changes to the PCA give “fresh reason to fear that Washington will take control of . . . Guardsmen, even while they’re still at home”). Gutierrez’s rather extreme characterization illustrates some Americans’ suspicions regarding federal military troops operating within the United States.

¹¹⁵ The reluctance to use federal military forces in domestic military operations is reflected in Army doctrine. Field Manual (FM) 3-19.15, *Civil Disturbance Operations*, cautions:

The commitment of federal troops to deal with domestic civil disturbances must be viewed as a drastic measure of last resort. Their role should never be greater than what is absolutely necessary under the circumstances. Commanders should take every measure to avoid the perception of an invading force. A JTF designated to respond to a civil disturbance should project the image of a restrained and well-disciplined force whose sole purpose is to help restore law and order with minimal harm to the people and property and with due respect for all law-abiding citizens.

U.S. DEP’T OF ARMY, FIELD MANUAL 3-19.15, CIVIL DISTURBANCE OPERATIONS B-54 (18 Apr. 2005) [hereinafter FM 3-19.15].

¹¹⁶ For an in-depth discussion of the L.A. Riots, *see infra* Section V.A.

B. The Stafford Act

Along with the Insurrection Act, the Stafford Act¹¹⁷ serves as a basis for federal intervention in state operations when a natural disaster occurs within the state. The Act allows the President to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services)”¹¹⁸ Among the federal agencies, upon request from the governor, “the President may authorize the DOD to carry out emergency work for a period not to exceed ten days. The DOD emergency work is limited to work essential for the preservation of life and property.”¹¹⁹

Although the DOD may organize emergency efforts, the Stafford Act does not directly allow federal forces to perform law enforcement functions, and therefore is not an actual exception to the PCA.¹²⁰ However, if civil unrest were to develop in the aftermath of the disaster, the President, with the consent of the governor if the legislature is not in session, could invoke the powers granted him under Section 331.¹²¹ In addition, even if the federal troops are deployed in a purely humanitarian capacity, there is little doubt that they would be authorized to use force in defense of themselves and others when directly related to their assigned mission.¹²² Although the Stafford Act does not expressly allow for the employment of federal troops as law enforcement, the nature of a disaster relief mission may mean that federal troops are nonetheless interacting with the civilian population and regulating their conduct.

The PCA is a prohibition on the use of federal troops in a law enforcement capacity within the United States. However, military troops are allowed to act in a number of support roles that avoid triggering the PCA. In addition, the Insurrection Act and other statutes serve as express exceptions to the PCA. Finally, the Stafford Act, although not an exception to the PCA, does permit military forces to provide support during national disasters. Given the various exceptions and exclusions to the PCA, employing military forces in domestic operations is both complex and nuanced. Therefore, it is imperative that the SRUF used by these forces clearly reflect the domestic laws that govern the population with which they are dealing.

V. Practical Application of the SRUF to Domestic Operations

The United States has an extensive history of using federal forces to respond to domestic crises—both natural and manmade. From providing support and training to the FBI¹²³ to quelling the Los Angeles riots in 1992,¹²⁴ the past use of federal forces in both direct law enforcement and support roles provides valuable lessons on the proper application of the rules for the use of force. This section will review three types of domestic operations: response to civil disturbances, support to law enforcement, and response to natural disasters. Each case provides valuable lessons about the proper use of federal forces, the proper application of the RUF in these crises, and insight on how the current SRUF can best be applied.

A. Response to Civil Disturbances—the Need for Distinct RUF and Adequate Training

Once the President invokes the Insurrection Act, he may then use federal forces in a law enforcement capacity without violating the PCA. The most recent invocation of the former Insurrection Act took place in 1992 in response to the L.A. Riots.

¹¹⁷ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

¹¹⁸ *Id.* § 5192.

¹¹⁹ KEITH BEA, CONG. RESEARCH SERV. REPORT, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING, RL 33053 (2005).

¹²⁰ JENNIFER K. ELSEA, CONG. RESEARCH SERV. REPORT, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES, RS 22266 (2005); *see also* 42 U.S.C. §§ 5121–5206 (2000).

¹²¹ 10 U.S.C §§ 331–334 (2000).

¹²² Soldiers deployed from the 13th COSCOM out of Fort Hood, Texas to New Orleans, Louisiana, had the mission of providing logistical support to the victims of Hurricane Katrina, but were also authorized to use force in defense of themselves, others, and “to prevent non-DOD persons in the vicinity from the imminent threat of death or serious bodily harm, if directly related to the mission.” Major Deirdre Brou, Standing Rules for the Use of Force Brief (Sept. 5, 2005) (unpublished PowerPoint Presentation, on file with author). The units deployed from Fort Hood included the 21st Combat Support Hospital and elements of the 64th Corps Support Group, the 13th Corps Materiel Management Center, the 49th Movement Control Battalion, and the Special Troops Battalion, all of 13th Sustainment Command (Expeditionary). *Id.*

¹²³ Such assistance was either requested or made available at both the Ruby Ridge and Branch Davidian standoffs. *See infra* Section V.B.

¹²⁴ *See infra* notes 123–144 and accompanying text.

On 29 April 1992, a jury found four police officers not guilty in the Rodney King beating.¹²⁵ Within an hour of the verdict's announcement, an unruly crowd began to gather in an economically depressed section of Los Angeles.¹²⁶ Over the course of the next two days, widespread rioting and looting caused millions of dollars in property damage and the death of fifty-three people.¹²⁷ In response to a request by the governor of California, then-President Bush invoked the Insurrection Act and ordered the deployment of over 4200 U.S. Army Soldiers and Marines.¹²⁸ The President also federalized the California National Guard (CANG), which had been operating for the first day of the crisis in Title 32 (non-federal) status.¹²⁹ Operating as a single Joint Task Force (JTF), the Central Command required that all requests for law enforcement assistance be vetted through it.¹³⁰ Unfortunately, the commander of the JTF, Major General Marvin Covault, believed that the federal troops (and federalized National Guard troops) could not perform law enforcement functions without violating the PCA.¹³¹ The JTF was apparently unaware that the Presidential proclamation issued on 1 May provided an exception to the Act. As a result, CANG troops previously working in concert with local police to quell the riots now believed that they were forbidden from doing so.¹³² In addition, the process for determining whether or not a mission was classified as "law enforcement" or an authorized "support mission" was unnecessarily complex, leading to substantial backlogs in filling support requests.¹³³ In the end, effective use of federal troops was compromised by a misunderstanding of the laws governing Posse Comitatus.

Although many lessons emerged from the L.A. Riots, one of the most significant involves the importance of training federal troops on the practical application of rules for the use of force. Federal troops had deployed from Fort Ord, California to El Toro Marine Base, located on the outskirts of L.A., arriving on the afternoon of 2 May.¹³⁴ Almost immediately, the troops began "training for the civil disturbance missions and learning the applicable rules of engagement."¹³⁵ By the next morning, the troops were on the streets, having been given only hours to learn appropriate tactics, learn RUF, and adapt to their surroundings.¹³⁶ Although the Soldiers performed admirably, the lack of training in domestic operations resulted in the following situation:

Police officers responded to a domestic dispute, accompanied by marines. They had just gone up to the door when two shotgun birdshot rounds were fired through the door, hitting the officers. One yelled 'cover me!' to the marines, who then laid down a heavy base of fire The police officer had not meant 'shoot'

¹²⁵ WILLIAM H. WEBSTER, *A CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES* (Oct. 21, 1992).

¹²⁶ *Id.* at 11.

¹²⁷ James D. Delk, *The Los Angeles Riots of 1992*, in *SOLDIERS IN CITIES: MILITARY OPERATIONS ON URBAN TERRAIN* 89, 95 (Michael C. Desch ed., 2001); *Battle-torn L.A. Gropes Toward Order*, CHI. TRIB., May 2, 1992, at C1.

¹²⁸ WEBSTER, *supra* note 125, at 152. In Presidential Proclamation 6427, 57 Fed. Reg. 19,359 (May 5, 1992), and Executive Order 19,361, 57 Fed. Reg. 19,361 (May 5, 1992), the President first ordered the rioters to disperse, then authorized the intervention of U.S. forces to quell the disturbances. See also Lieutenant Colonel Christopher M. Schnaubelt, *The 1992 Los Angeles Riots: Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, at 88; Janet Cawley, *Bush Sends in Troops, Vows to Seek Justice*, CHI. TRIB., May 2, 1992, at C1; Douglas Jehl & John M. Broder, *Bush Sends Force at Request of Bradley, Wilson*, L.A. TIMES, May 3, 1992, at A1.

¹²⁹ Schnaubelt, *supra* note 128, at 88; Rich Connell & Jim Newton, *King Case Aftermath: A City in Crisis; Guard Takes Positions After Delays, SNAFUs*, L.A. TIMES, May 2, 1992, at A1. National Guard troops operate in three distinct statuses: Title 10 (federal active duty status), state active duty status, and Title 32 (non-federal duty status). ROGER ALLEN BROWN ET AL., *ASSESSING THE STATE AND FEDERAL MISSIONS OF THE NATIONAL GUARD* 10 (1995). When in Title 32 status, National Guard missions are "paid for by the federal government . . . [but] authorized by the Governor of the state and are under the control of the State Adjutant General or other authorized state National Guard officials." *Id.* at 9–10. The authorized missions include: "mandatory active and inactive duty training requirements and drills conducted within the boundaries of the United States in preparation for potential federal missions; full-time support for those members of the National Guard in military Technician or Active Guard and Reserve (AGR) status; and participation in Congressionally directed domestic operations." *Id.*

¹³⁰ Schnaubelt, *supra* note 128.

¹³¹ WEBSTER, *supra* note 125, at 152–53.

¹³² Schnaubelt, *supra* note 128, at 88.

¹³³ See *id.* fig. 2. This backlog can also be attributed to the lack of delegation to commanders on the ground. *Id.* "It appeared to many participants that the JTF headquarters insisted on total control of all decisions regarding military support without soliciting input from subordinate units, liaison officers, or the supported law enforcement agencies." *Id.*

¹³⁴ WEBSTER, *supra* note 125, at 152.

¹³⁵ *Id.*

¹³⁶ *Id.* The federal troops arrived on the heels of an incident in which National Guard troops fatally shot a civilian. In response, "Guard units were drilled on the rules of engagement, which state that Guard members may shoot to kill, but only if their lives or the lives of others are threatened." Jim Newton & Bob Pool, *Riot Aftermath; Under the Gun; Thousands of Troops are Caught in the Cross Fire Between Street Violence and Maintaining the Peace*, L.A. TIMES, May 6, 1992, at A7.

when he yelled ‘cover me’ to the marines. [He] meant . . . point your weapons and be prepared to respond if necessary. However, the marines responded instantly in the precise way they had been trained, where ‘cover me’ means provide me with cover using firepower Over two hundred bullets [were] fired into that house.¹³⁷

When Soldiers are not properly trained on, or confused about, SRUF, they will fall back on the combat training they received throughout their time in the military. This is particularly relevant today, when a large percentage of the military has deployed to Afghanistan or Iraq, but very few have even heard of SRUF.¹³⁸ If the SRUF is not clear about the level of force authorized, Soldiers will fill that information void with their past combat experience and training.¹³⁹ Additionally, when SRUF contain terms that are traditionally associated with combat operations, the chance for confusion is even greater.

Many leaders believe that “in combat you do not rise to the occasion, you sink to the level of your training.”¹⁴⁰ This is largely due to physical, sensory, and cognitive changes that occur when a Soldier is put in a situation involving great danger.¹⁴¹ When faced with fear-induced stress, a Soldier’s heart rate will increase dramatically.¹⁴² While a slight increase in heart rate can cause heightened awareness, fear-induced stress often causes a significant elevation in heart rate that has deleterious effects on the brain.¹⁴³ As such, the brain begins to shut down, causing memory loss, distorted vision, and an inability to reason.¹⁴⁴ Scientific studies of law enforcement officers under these circumstances have found that “74 percent of the officers involved in a deadly force encounter acted on automatic pilot. In other words, the actions of three out of four officers in combat were done without conscious thought.”¹⁴⁵ When acting on “autopilot,” the person is relying on the training he has received. But in order to function under such circumstances, a Soldier must have “rehearsed and trained, turning each action into ‘muscle memory,’ permitting himself to function at an expert level” under stressful conditions.¹⁴⁶

While “muscle memory” can be beneficial, it can also be detrimental. “We can teach warriors to perform a specific action required for survival without conscious thought but, if we are not careful, we can also teach them to do the wrong thing.”¹⁴⁷ In the case of the vast number of Soldiers who have trained for and executed extended combat operations in Iraq and Afghanistan, they have developed muscle memory regarding their reaction to threats of force. They have become intimately familiar with the terms “hostile act” and “hostile intent,” and have conducted the split-second analysis required in order to assess a threat and respond accordingly. While this analysis comports with international law, the standards may be different in domestic operations. Consequently, if these same Soldiers are then deployed in support of a domestic operation, they may retain their “combat muscle memory.” If federal forces are required to respond to a domestic crisis, they will have little time to train on application of SRUF. The confusion may be further compounded by the terminology of the RUF, which contains similar language to that found in ROE. As a result, when Soldiers are faced with a potentially deadly situation, their autopilot reflex may lead them to make a decision that is perfectly legal in combat, but not appropriate when applied in the United States against a person who is protected by the Fourth Amendment. Therefore, it is imperative that Soldiers receive unambiguous and distinct RUF, as well as RUF training that helps them forget their “combat muscle memory” and helps them develop “domestic operations muscle memory.”

¹³⁷ Schnaubelt, *supra* note 6, at 88 (quoting James D. Delk, FIRES AND FURIES: THE L.A. RIOTS 221–22 (1995)). While the appropriate level of force in this case may be debatable, the main concern remains that a lack of training and poor communication resulted in a potentially dangerous situation.

¹³⁸ Compare Michelle Tan, *By the Numbers: Who’s Fighting: Deployment Data Underscore the Strain of Combat Operations*, ARMY TIMES, Dec. 11, 2006, at 14 (“Since September 2001, a total of 683,380 [S]oldiers have deployed to Afghanistan or Iraq, 163,949 of them at least twice, the Defense Department data show.”), with STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE, RL 33095 (2005) (70,000 federal and National Guard troops deployed in support of Hurricane Katrina, the last major domestic operation requiring RUF).

¹³⁹ See LIEUTENANT COLONEL DAVE GROSSMAN, ON COMBAT 71 (2004).

¹⁴⁰ *Id.*

¹⁴¹ See Seth D. DuCharme, *supra* note 82 (citing Bruce K. Siddle, *Sharpening the Warrior’s Edge: The Psychology and Science of Training* 76–77 (1995)).

¹⁴² See GROSSMAN, *supra* note 139, at 31.

¹⁴³ *Id.*

¹⁴⁴ See *id.* Grossman introduced research that in an average person, 115–145 beats per minute (bpm) is the “optimal survival and combat performance level for: “complex motor skills,” “visual reaction time,” and “cognitive reaction time.” *Id.* However, once the heart rate goes above 175 bpm, the average person will experience deterioration of “cognitive processing, . . . loss of peripheral vision (tunnel vision), loss of depth perception, loss of near vision, [and] auditory exclusion.” *Id.* It is interesting to note that this data only applies to “hormonal or fear induced heart rate increases resulting from sympathetic nervous system arousal. Exercise induced increases will not have the same effect.” *Id.*

¹⁴⁵ See *id.* at 71.

¹⁴⁶ *Id.* at 35.

¹⁴⁷ *Id.* at 71.

B. Support to Civilian Law Enforcement—Lessons in RUF Development

1. Ruby Ridge and the “Special” Rules of Engagement

The importance of ensuring that SRUF comports with Fourth Amendment law cannot be overstated. When rules for the use of force stray from the established Fourth Amendment standards, Soldiers or law enforcement agents acting under those rules may violate the Constitution, breeding distrust among the public.¹⁴⁸ In addition, the individuals may be exposed to criminal and civil liability, while also exposing the government to financial liability. The confrontation at Ruby Ridge, Idaho demonstrates the significant consequences that can result when RUF strays from constitutional standards.

Randy Weaver, a member of the White Aryan Nation, had a long history of trouble with federal authorities.¹⁴⁹ Weaver built an isolated cabin in the hills of Idaho in an attempt to insulate his family from what he perceived to be excessive federal government interference.¹⁵⁰ Because of his association with extremist organizations, federal agents monitored Weaver and eventually arrested him for illegal manufacture and possession of an unregistered firearm in June 1990.¹⁵¹ United States Marshals tried unsuccessfully to get Weaver to surrender after he refused to appear for trial.¹⁵² On 21 August 1992, a surveillance team conducted reconnaissance on Weaver’s home in order to prepare for his future apprehension.¹⁵³ While conducting this reconnaissance, the agents were discovered and engaged in a firefight with Weaver, Weaver’s son Sammy, and Weaver’s friend, Kevin Harris.¹⁵⁴ In the exchange of gunfire, one agent was killed along with Weaver’s son, Sammy.¹⁵⁵ The U.S. Marshals Service immediately referred the issue to the FBI, and a hostage rescue team (HRT) deployed to the scene to begin planning for an assault.¹⁵⁶ The HRT commander and the FBI Associate Director drafted special ROE¹⁵⁷ for the mission. Instead of using the standard FBI rules for deadly force, which allowed for the use of deadly force in self-defense or defense of others, the ROE for this mission stated:

1. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.
2. If any adult in the compound is observed with a weapon after the surrender announcement is made, and is not attempting to surrender, deadly force can and should be employed to neutralize the individual.¹⁵⁸

The ROE went on to state that any subjects other than Weaver, his wife Vicki Weaver, or Kevin Harris, should be dealt with under the standard FBI ROE allowing use of force only in self-defense.¹⁵⁹

After stationing snipers in the hills around Weaver’s home, the HRT waited for Weaver to come out of the house.¹⁶⁰ Eventually, Weaver emerged and went to a barn on the property. At that point, a sniper shot him, causing a minor injury.¹⁶¹

¹⁴⁸ Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, PARAMETERS, Autumn 1997, at 82.

¹⁴⁹ U.S. DEP’T OF JUSTICE, REPORT REGARDING INTERNAL INVESTIGATION OF SHOOTINGS AT RUBY RIDGE, IDAHO, DURING ARREST OF RANDY WEAVER (n.d.) [hereinafter DOJ RUBY RIDGE REPORT]. Weaver first came to the attention of federal authorities in 1985, when he “made threats against the President and other government and law enforcement officials. The Secret Service was told that Weaver was associated with the Aryan Nations, a white supremacist group, and that he had a large cache of weapons and ammunition.” *Id.* § IIIA. Later in the year, Weaver “filed an affidavit with the county clerk, giving ‘legal and official notice that [he] believe[d] [he] may have to defend [him]self and [his] family from physical attack on [his] life’ by the FBI.” *Id.* Finally, in 1989, Weaver sold a government “informant two ‘sawed-off’ shotguns.” *Id.* This final act was the basis for the arrest warrant issued against him. *Id.*

¹⁵⁰ *Id.* § III A.

¹⁵¹ *Id.*; see also *Showdown Looms at Fugitive’s Stronghold*, CHI. TRIB., Aug. 23, 1992, at M2.

¹⁵² DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁵³ *Id.*

¹⁵⁴ *Id.*; *Federal Marshal is Slain in Idaho Near Mountain Home of Fugitive*, N.Y. TIMES, Aug. 22, 1992, at 9 (describing the firefight and resulting casualties).

¹⁵⁵ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; *U.S. Lawman Killed While Watching Home of Fugitive*, L.A. TIMES, Aug. 22, 1992, at A18; *U.S. Marshal Killed Amid Idaho Standoff*, CHI. TRIB., Aug. 22, 1992, at C2.

¹⁵⁶ DOJ RUBY RIDGE REPORT, *supra* note 149, § III B;

¹⁵⁷ *Id.* The FBI used the term rules of engagement for this mission, even though rules for the use of force would have been the more accurate term.

¹⁵⁸ *Id.* § III.C.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Weaver ran back to the cabin, at which time the sniper fired at Weaver, but instead shot and killed Vicki Weaver and seriously injured Kevin Harris.¹⁶² After an eight-day standoff, Harris surrendered.¹⁶³ Weaver surrendered the following day.¹⁶⁴ At trial, both Harris and Weaver were cleared of all charges relating to the standoff because of the FBI's unreasonable ROE, but Weaver was found guilty of the original charges from the warrant.¹⁶⁵

The HRT commander, Richard Rogers, and the Assistant Director of the FBI, Larry Potts, were responsible for drafting the modified ROE.¹⁶⁶ In the subsequent investigation, they revealed that they made the changes after assessing the probable threat and considering what level of force would adequately protect their agents. Rogers stated: "It appeared to me that it would have been irresponsible for me to send my agents into the situation without at least giving them a set of rules within the greater framework of the standard FBI rules, [sic] that would allow them to defend themselves."¹⁶⁷ Meanwhile, Potts believed "that this crisis was the most dangerous situation into which the HRT had ever gone."¹⁶⁸ He stated: "I was extremely fearful of sustaining casualties while attempting to establish a perimeter at the crisis site, since the subject possessed every tactical advantage. . . . I considered every armed adult in the vicinity of the Weaver cabin to be potentially hostile and a threat to HRT personnel."¹⁶⁹ In addition, Potts believed that the passage stating deadly force "can and should be employed" was simply a reflection of the heightened danger that the agents would encounter, and not a mandate to use deadly force.¹⁷⁰

The investigation found that although Potts and Rogers believed that the ROE "were merely a means of identifying the level of risk presented by the situation and were not intended to change or modify the FBI's standard deadly force policy,"¹⁷¹ the agents executing the mission believed that the new language was an expansion of the existing FBI deadly force rules. The FBI Special Agent in Charge of the mission believed that this was a "broadening of the FBI's deadly force policy . . . based upon these specific subjects having demonstrated their willingness to kill a Federal official to avoid capture."¹⁷² In other words, the Special Agent believed that the adult males had already been "declared hostile" for the purposes of the operation. In addition, the FBI Hostage Negotiator "was surprised and shocked by the Rules of Engagement. The Rules were the most severe he had ever seen in the approximately 300 hostage situations in which he had been involved."¹⁷³ And finally, many of the snipers "interpreted the Rules as a 'green light' to use deadly force against armed adult males."¹⁷⁴

In evaluating the ROE, the investigation determined that the language stating the agents "can and should" use deadly force against adult males "flatly contradict[s] the commands of [*Tennessee v. Garner* and *Graham v. Connor*], which require the careful evaluation of the risk posed by a suspect before law enforcement can employ deadly force."¹⁷⁵ The investigation determined that by designating adult males as hostile, the ROE circumvented the requirement that law

¹⁶² *Id.*

¹⁶³ *Id.*; *Fugitive's Friend Gives Up in Idaho*, N.Y. TIMES, Aug. 31, 1992, at A8; *Man Wanted in Idaho Siege Surrenders*, CHI. TRIB., Aug. 31, 1992, at C5.

¹⁶⁴ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; Ashley Dunn, *Surrender Ends Mountain Siege*, L.A. TIMES, Sept. 1, 1992, at A3; Timothy Egan, *White Supremacist Surrenders After 11-Day Siege*, N.Y. TIMES, Sept. 1, 1992, at B6; John E. Yang, *Idaho Siege Ends as Fugitive Gives Up in Killing of Marshal*, WASH. POST, Sept. 1, 1992, at A3.

¹⁶⁵ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; Timothy Egan, *July 4-10: 19-Days of Deliberation; A Jury Rebuffs U.S., Acquits 2 of Marshal's Death*, N.Y. TIMES, July 11, 1993, at 2 (the jury returned the verdict of not guilty on 8 July 1993 after nineteen days of deliberation).

¹⁶⁶ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁶⁷ *Id.* § IV F(2)(a).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* Potts went on to state:

These ROE were established to assist the HRT personnel in making a determination regarding what constituted a threat to them in this extraordinary circumstance. The ROE were not intended to supersede the FBI standard deadly force policy. The final determination regarding such implementation of deadly force must always remain with the individual . . . and each individual must make an individual, final determination of threat.

Id.

¹⁷⁰ *See id.*

¹⁷¹ *Id.* § F(1)(c).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* § IV F(3)(a)(3)

enforcement officials evaluate the threat at the time it is presented.¹⁷⁶ The DOJ noted that “[t]he Constitution allows no person to become ‘fair game’ for deadly force without law enforcement evaluating the threat that person poses, even when, as occurred here, the evaluation must be made in a split second.”¹⁷⁷

The Ruby Ridge incident demonstrates two dangers in the drafting of rules for the use of force. First, in the FBI’s attempt to draft special rules, they failed to ensure that the rules fully complied with the Fourth Amendment. The Fourth Amendment allows law enforcement to use deadly force in self-defense and defense of others, or in order to capture a dangerous fleeing felon. In this case, the rules were designed to allow agents to kill the “adult males” based on their past hostile conduct, essentially “declaring them hostile.” This international law concept, although permissible in armed conflict, does not comport with the Constitution. This is similar to the current SRUF, which contains international law concepts like “hostile act” and “hostile intent,” even though such terms may be inconsistent with Fourth Amendment law.¹⁷⁸

The second danger is that by drafting overly aggressive ROE in an attempt to highlight the agents’ right to use self-defense, some agents will become confused about what they are allowed to do. In this case, the drafters believed that the additional ROE was simply a tool to remind the agents of the dangers present in this operation. But the agents and snipers perceived the “can and should” language as an expansion of the existing rules and a *requirement* to use deadly force. As such, the language violated the constitutional requirement that law enforcement officers evaluate the threat at the moment it is presented and only then make an assessment as to the appropriate level of force needed to eliminate the threat. Much like these ROE, the current SRUF language can be interpreted as being more aggressive. While it is important for the SRUF to be clear regarding a Soldier’s right to self-defense, including more aggressive language may not be the way to achieve this goal. As DOJ stated in its investigation, “these Rules of Engagement created an atmosphere in which the sniper/observers were more likely to employ deadly force than had the FBI standard deadly force policy been in effect.”¹⁷⁹ If snipers who deal with the FBI deadly force policy every day get confused by additions to these rules, then there is a great likelihood that the SRUF will confuse Soldiers who are not accustomed to dealing with domestic operations. Therefore, the SRUF must clearly articulate the Fourth Amendment requirements for use of deadly force.

2. Assault on the Branch Davidian Compound in Waco, Texas—An Argument for Restraint

On 28 February 1993, members of the Bureau of Alcohol, Tobacco and Firearms (BATF) led an assault on the Branch Davidian compound in Waco, Texas in order to serve a warrant on cult leader David Koresh.¹⁸⁰ A gunfight erupted between the cult members and the agents, resulting in the death of four agents and the injury of twenty others.¹⁸¹ The Branch Davidians were successful in repelling the initial assault. After a two-month standoff, however, an FBI HRT led another assault on the compound.¹⁸² After they “punched large holes in the walls of the building, [the team] drove M-728 Combat Engineering Vehicles deep into the building” and launched pyrotechnic rounds into the building.¹⁸³ The building erupted into fire, causing the deaths of the compound’s seventy-four inhabitants.¹⁸⁴

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* The excessive use of force in this case led to a *Bivens* action against the agents for violation of both Kevin Harris’s and Vicki Weaver’s Fourth Amendment rights. The court, in *Harris v. Roderick et al.*, held that the agents were not entitled to qualified immunity for following the special rules of engagement because “[t]he order mandated an unconstitutional use of force, and no reasonable officer could have believed otherwise.” *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997). The Harris case was eventually settled out of court and Harris was paid \$380,000. *U.S. Settles Final Civil Lawsuit Stemming from Ruby Ridge Siege*, N.Y. TIMES, Sept. 23, 2000, at A12. The heirs of Vicki Weaver received a \$3.1 million settlement. Ken Fuson, *Conversations/Randy Weaver; He’s a Rallying Cry of the Far Right But a Reluctant Symbol*, N.Y. TIMES, Aug. 27, 1995, at 7.

¹⁷⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4c.

¹⁷⁹ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁸⁰ U.S. DEP’T OF TREASURY, REPORT OF THE DEP’T OF THE TREASURY ON THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS INVESTIGATION OF VERNON WAYNE HOWELL ALSO KNOWN AS DAVID KORESH (Sept. 1993).

¹⁸¹ *Id.* at 102; see also Pierre Thomas, *Raid on Cult Exploded in First Minute; ATF Plan Went Awry in Withering Gunfire*, WASH. POST, Mar. 27, 1993, at A1 (reporting four deaths, but only fifteen injuries to ATF agents).

¹⁸² H.R. REP. NO. 106-1037, at 1 (2000). This second assault took place on 19 April 1993. *Id.*

¹⁸³ *Id.* at 8; Stephen Braun, *Will Smoke in Waco Ever Clear?*, L.A. TIMES, Apr. 23, 1993, at A1.

¹⁸⁴ H.R. REP. NO. 106-1037, at 1.

In the resulting investigation into the Waco incident, much attention focused on the role of Special Forces personnel in planning and executing the raid.¹⁸⁵ A JTF stationed near Fort Bliss provided support to local, state, and federal entities under Section 1004 of the National Defense Authorization Act for Fiscal Year 1991.¹⁸⁶ This legislation allowed the Army to “provide equipment, training, and expert military advice to civilian law enforcement agencies” in support of counter-drug activities.¹⁸⁷ The FBI, in anticipation of the raid, requested training, communication, and medical support for the mission from the Special Forces element of the JTF.¹⁸⁸ The FBI stated that a methamphetamine lab allegedly housed on the compound provided the necessary drug nexus that allowed Special Forces personnel to participate.¹⁸⁹ After reviewing the request, senior Army lawyers determined that the proposed nexus—an alleged methamphetamine lab reportedly operated on the property six years prior—was too attenuated to justify direct military support.¹⁹⁰ As a result, the Special Forces unit provided medical and communications training and equipment, but declined to provide direct support for fear that it would violate the PCA.¹⁹¹

In its investigation into the “Tragedy at Waco,” the House Committee on Government Reform determined that:

Relations between civilian officials and the military with regard to Waco were characterized by disregard of the PCA on the part of the civilians, and by diligence on the part of the military. Two senior Army officers were asked to evaluate the FBI’s proposed operations plan for April 19, and consistently refused to do so, as such support would have made them direct participants in planning the arrest of the Branch Davidians, and would have therefore violated the PCA.¹⁹²

The incident at Waco demonstrates the eagerness of federal law enforcement officers to enlist the support of the military in purely civil law enforcement matters. As a result, it is important for commanders and their Judge Advocates to carefully analyze the legal basis for domestic missions prior to supporting them.

In this case, the careful mission analysis by the leaders and Judge Advocates avoided involvement in a disastrous mission in which “[t]he specter of members of the Army’s special operations forces accompanying BATF agents storming a religious compound, however misguided its leader, could have seriously compromised public support of the US Army.”¹⁹³ This same scrutiny must be applied to drafting RUF for domestic operations. “[T]he military’s fervor to compete the mission, so essential in desperate battles to take the high ground,”¹⁹⁴ can sometimes lead to hasty decisions regarding the level of support that can be given, or the aggressiveness of RUF that military forces will operate under. If the mission, and RUF for that mission, is not clearly defined, the consequences can be dire. Not only could errors result in ineffective support, but “[a]ny actual or perceived departure from applicable legal restrictions can lead to an unacceptable loss of confidence in the Army.”¹⁹⁵ Therefore, in order to preserve the public’s confidence in the Army, the legal basis for each concept in the SRUF must be firmly cemented in domestic law, and Judge Advocates must be able to draw on that domestic law to answer questions regarding its application.

¹⁸⁵ Lujan, *supra* note 148, at 82.

¹⁸⁶ Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1990). Congress extended and restated the authority for DOD support for counter-drug enforcement in 2002. National Defense Authorization Act for Fiscal Year 2002, 107 Pub. L. No. 107-107, § 1021, 115 Stat. 1012 (2001).

¹⁸⁷ Lujan, *supra* note 148 (citing H.R. REP. 97-71 (1981)).

¹⁸⁸ *Id.* The FBI requested that the medical and communications support accompany them on the mission. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* But see Michael Tackett, *Reno Again Defends Waco Strategy*, CHI. TRIB., Apr. 29, 1993, at N3 (reporting that then-Attorney General Janet Reno “said the Justice Department concluded that federal law prohibited the use of the military in a domestic law-enforcement situation.”).

¹⁹² *The Tragedy at Waco: New Evidence Examined*, H.R. REP. NO. 106-1037, at 1 (2000). “[A]dvice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics” is not a violation of the PCA because such generalized input is considered “passive.” *United States v. Red Feather et al.*, 392 F. Supp. 916 (D. S.D. 1975). However, in this case, “an Army general officer and a colonel were asked to review and comment upon the tactical details discussed within the proposed operations plan to insert tear gas into the Branch Davidian compound.” *Id.* at 61–62. Such intimate involvement in the planning would constitute “direct participation” in violation of the PCA. *Id.*

¹⁹³ Lujan, *supra* note 148, at 82.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

C. Response to Natural Disasters—Successfully Applying RUF in a Hurricane

The U.S. military often plays a vital role in recovery efforts following natural disasters. In recent years, support for hurricane victims has taken on a whole new level of importance. By invoking the Stafford Act,¹⁹⁶ the President may direct federal agencies to provide support to “state and local emergency assistance efforts” in the aftermath of a natural disaster.¹⁹⁷ As a part of this support, the DOD may send federal troops to provide logistical support and recovery assets to the stricken region.¹⁹⁸ Even though these forces may not perform policing functions without the Insurrection Act first being invoked, they will still be allowed to act in self-defense and defense of others. Therefore, Soldiers responding to such disasters must have clearly defined RUF based on domestic law.

Possibly the best example of the value of clear and concise rules for the use of force is the Hurricane Katrina recovery effort. On 27 August 2005, President Bush declared a federal emergency in Louisiana, two days before Hurricane Katrina devastated the coastal region.¹⁹⁹ This allowed Federal Emergency Management Agency (FEMA) to begin the flow of federal assistance under the Stafford Act.²⁰⁰ Shortly thereafter, the Secretary of Defense ordered active duty units, primarily from Fort Bragg and Fort Hood, to deploy to the area to provide supplies, transportation, and medical support during the recovery effort.²⁰¹ Over 20,000 federal troops, under the operational control of Joint Task Force Katrina, augmented the “nearly 50,000 National Guardsmen . . . [] operating in Louisiana and Mississippi.”²⁰² Although the JTF commander had command responsibility for the JTF and the joint operations area (JOA), he “had only a coordinating relationship with the Adjutant Generals of Louisiana and Mississippi; no formal command relationship existed”²⁰³ The governor of Louisiana was hesitant to request federalization of the National Guard Soldiers, partly because she feared that these Soldiers would not be able to continue in their capacity as law enforcement officers without violating the PCA.²⁰⁴ As a result, and adding to the confusion, National Guard Soldiers in Title 32 status operated under the rules for the use of force tailored to their home states, while the Title 10 Soldiers were operating under a modified version of the SRUF.²⁰⁵

The various rules for the use of force were tailored depending on the authorized missions for the Soldiers. The Title 32 Soldiers were authorized to conduct law enforcement actions, while federal forces received the following guidance in their RUF:

You will not engage in any civilian law enforcement matters, unless specifically authorized by your commander and only when certain exceptions apply. You may not apprehend or detain civilians unless you are in immediate danger of death or serious bodily injury. Any detained civilians must be turned over to civilian law enforcement personnel as soon as possible.²⁰⁶

¹⁹⁶ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

¹⁹⁷ *Id.* § 5192.

¹⁹⁸ *Id.*

¹⁹⁹ *Katrina Lessons Learned*, *supra* note 4, at 11.

²⁰⁰ *Id.*

²⁰¹ STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE 13, RL 33095 (2005); Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City’s Chaos; Confusion Reigns at Every Level of Government*, WASH. POST, Sept. 11, 2005, at A01 (reporting on the delayed deployment of these units as the President and governors negotiated control over the military).

²⁰² STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE 21, RL 33095 (citing National Guard Bureau Statistics). Joint Task Force Katrina was headed by First Army Commander Lieutenant General Russel L. Honore. *Id.*

²⁰³ *Katrina Lessons Learned*, *supra* note 4, at 21.

²⁰⁴ *Id.* at 22; Peter Gosselin & Doyle McManus, *Katrina’s Aftermath; Wider Powers for U.S. Forces in Disasters are Under Review*, L.A. TIMES, Sept. 11, 2005, at A36.

²⁰⁵ Interview with Lieutenant Colonel Joseph S. Dice, Director, Domestic Operational Law, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 23, 2007). The difference between the federal and state National Guard troops’ rules for the use of force was significant. While federal troops were acting only in self-defense, “Louisiana Gov. Kathleen Blanco declared war on looters who have made New Orleans a menacing landscape of disorder and fear. ‘They have M-16s and they’re locked and loaded,’ Blanco said of 300 National Guard troops who landed in New Orleans fresh from duty in Iraq. ‘These troops know how to shoot and kill, and they are more than willing to do so, and I expect they will.’” Allen G. Breed & David Espo, *Aid vs. Anarchy in New Orleans*, PHILADELPHIA ENQUIRER, Sept. 2, 2005, at A18.

²⁰⁶ *Katrina Lessons Learned*, *supra* note 4, at 8.

Adding to the already sensitive situation on the ground, the mayor of New Orleans ordered the police and military forces to conduct a forced evacuation of the city.²⁰⁷ From a military perspective, this presented uncertainty over what level of force could be used to execute the forced evacuation and whether federal forces could participate.²⁰⁸ Lieutenant General Honore, after determining that forced evacuation was a law enforcement action, issued a “fragmentary order (FRAGO) that stated: ‘No JTF Katrina task force service member will perform or assist with any type of forced evacuation of any citizen in the AO [area of operations].’”²⁰⁹ Ultimately, federal forces assisted in numerous voluntary evacuations, while police and National Guardsmen conducted the few forced evacuations that took place.²¹⁰

Another challenge faced by both the National Guard and federal forces was civil disorder. In addition to looting, Soldiers also came under fire from local gangs. In one highly publicized incident, Guardsmen came under fire from snipers while evacuating patients from a New Orleans Hospital.²¹¹ Instead of responding to these clear hostile acts with deadly force as their RUF would have allowed them to do, however, the National Guard opted to suspend evacuation operations from that location for two days.²¹² Only three days after the incident at the hospital, New Orleans police responded to a similar situation on the Danziger Bridge.²¹³ After receiving reports of gunfire, seven police officers responded to the scene, and allegedly shot six fleeing individuals, killing two.²¹⁴

Despite the lack of a unified command and varying RUF, the National Guard avoided a potentially major use of force issue. The Guard’s reaction may be attributed to the extensive experience that many of the National Guardsmen have in responding to domestic crises. In this case, they likely considered the resulting ramifications of engaging in a firefight in a U.S. city, even one that was largely abandoned. However, they were not compelled to continue to risk their lives under the circumstances. As a result, and in an effort to protect themselves, they elected to temporarily suspend evacuations from that area. Soldiers acting in a law enforcement capacity are certainly authorized to use force in self-defense and defense of others. However, when considering the use of force, these Soldiers must also consider the safety of the community and the ramifications that their actions will have on the greater mission. This is particularly true in domestic operations, where potential aggressors are protected by the Fourth Amendment. The current SRUF, with the addition of more aggressive language in some provisions, seems counter to the nuanced operations that the rules govern.

VI. Consequences of Excessive Use of Force

Domestic operations demand a clear and concise set of RUF because of the many limitations inherent in the use of federal troops within the United States. As highlighted above, when Soldiers are forced to interpret ambiguous and unfamiliar RUF, they will apply it inconsistently and sometimes incorrectly.²¹⁵ But what are the practical implications of an ambiguous set of RUF that leads to excessive use of force? While force protection must be of utmost concern in any operation, this protection cannot come at the cost of the constitutional rights of persons in the United States. If the RUF is unclear, the Soldiers participating may become ineffective and demoralized because of the confusion. Ambiguity may lead to ineffective and demoralized units participating in the action. In addition, the limitations on the use of federal forces within the boundaries of the United States are well-known and firmly rooted. Therefore, even one violation of the Fourth Amendment during a domestic crisis can have far-reaching effects on the public’s perception of the military.²¹⁶

²⁰⁷ *Id.*; Howard Witt & Michael Martinez, *Thousands Feared Dead in Lawless City; Feds Send Troops, Aid Amid Looting and Gunfire*, CHI. TRIB., Sept. 1, 2005, at C1.

²⁰⁸ *Katrina Lessons Learned*, *supra* note 4, at 8.

²⁰⁹ *Id.* at 5.

²¹⁰ *Id.*

²¹¹ Scott Gold et al., *Katrina’s Aftermath*, L.A. TIMES, Sept. 3, 2005, at A1. Aside from these documented incidents, however, many of the reports of widespread murders, rapes, and violence were later proven to be little more than urban legend. David Carr, *More Horrible Than Truth: News Reports*, N.Y. TIMES, Sept. 19, 2005, at C1.

²¹² *Katrina Lessons Learned*, *supra* note 4, at 29.

²¹³ Michael Kunzelman, *Policemen Indicted in Post-Katrina Shootings; 7 New Orleans Officers Charged in Incident in Which 2 Died and 4 Were Wounded*, WASH. POST, Dec. 29, 2006, at A9.

²¹⁴ *Id.* Four of the officers were charged with murder, while the other three were charged with attempted murder. As of 15 March 2007, they are all pending trial. Ann M. Simmons, *Death Penalty Dropped in Shooting*, L.A. TIMES, Feb. 2, 2007, at A16.

²¹⁵ See *supra* Section V and accompanying notes.

²¹⁶ These violations may also lead to individual and government liability. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that where a federal actor, acting under “color of federal law,” violates an individual’s right guaranteed under the

A. Ambiguous RUF Leading to Decreased Unit Morale

Regardless of the mission, Soldiers at all levels take pride in their units' successes and share in the disappointment of their units' failures. These Soldiers are even more invested when those successes and failures take place during a deployment. If Soldiers operating in a domestic environment are uncertain regarding the use of force, the uncertainty can lead to hesitation and ineffectiveness, putting both the Soldiers and the public in danger. In addition, a unit's morale can be significantly eroded if its Soldiers discover that their use of force decisions, although consistent with the RUF, may have actually violated the law.

The CANG support of the L.A. Riots provides a good illustration of how confusion can lead a unit to become paralyzed, thereby lessening its effectiveness and negatively impacting morale. Although the CANG originally operated in a Title 32 (non-federal) status, which allowed it to directly support law enforcement missions without violating Posse Comitatus,²¹⁷ after federalization, it became subject to the PCA. The CANG commanders, like the JTF commander, shared the mistaken belief that they were constrained by the PCA despite the President's invocation of the Insurrection Act.²¹⁸ This confusion paralyzed the CANG. "Prior to federalization, the National Guard in their Title 32 status responded to every request for assistance. After transformation to Title 10 status, the response rate dropped to approximately 20 percent owing to the perceived effect of Posse Comitatus."²¹⁹ In addition, Soldiers were confused as to whether or not they could patrol with loaded weapons.²²⁰ "The practical effect [of this confusion] was to leave some first line leaders with the perception they had to 'take casualties before they could'" load their weapons.²²¹ While these particular limitations were a result of the weapons arming policy, the ambiguous RUF contributed to the uncertainty, leaving Soldiers and commanders unsure about the appropriate use of force. The resulting confusion from the ambiguous RUF not only increased the risk to Soldiers, but also "led to underutilization of a potent force and to morale problems with the National Guard."²²²

Constitution, that individual may sue the defendant in his individual capacity for money damages. *Id.* at 396–97. Normally, however, defendants may receive qualified immunity, insulating them from personal liability, if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, even if a Soldier is not held personally liable, he will still be worried about the case until it is resolved and the subject of numerous criminal and civil investigations. In some cases, like the lawsuits stemming from the Ruby Ridge incident, the case could drag on for several years. All the while, both the Soldier and the unit will be distracted by a flurry of depositions and other litigation preparation.

Beyond the impact on individual Soldiers, litigation against the federal government can have significant consequences for the military's autonomy over creating RUF. When a Soldier or federal agent is sued under *Bivens* for excessive use of force, the court must determine if the excessive use of force constituted a Fourth Amendment violation. In so doing, the court will analyze the military's rules for the use of force and make a determination as to whether or not they comport with the Constitution. In the Ruby Ridge case, the civil court analyzed the rules of engagement and made a determination that the rules violated the Fourth Amendment. In making this determination, the court created federal precedent regarding what provisions federal rules for the use of force can and cannot contain.

Similarly, in *Sabino v. United States*, No. 03-CIV-80340-COOKE/MCALILEY (S.D. Fla. May 31, 2005), a civilian boat captain sued for damages after a member of the Coast Guard used excessive force in detaining her. In analyzing the case, the court interpreted the Coast Guard RUF and found that the seaman's "handling of the incident was not in conformity with approved Coast Guard policy requiring that a reduced level of force be used, particularly when an individual is handcuffed." *Id.* The court awarded the plaintiff nearly \$1.5 million in damages. The court, in analyzing the appropriateness of the Seaman's actions, made determinations regarding the appropriate level of force—determinations that, up until that point, were the exclusive purview of military commanders.

The potential for increased litigation for excessive force increases when SRUF is ambiguous. Every case involving use of force will create a new, and likely varying, definition on the limits of SRUF. As a result, military commanders and Soldiers could be faced with a bewildering body of inconsistent cases defining the constitutional limits on the use of force. Consequently, the power to define RUF will no longer be vested in the military, but instead defined by the courts. The only way to definitively prevent this from occurring is to ensure that Soldiers and commanders have clear SRUF that is consistent with the Fourth Amendment, thereby preventing excessive force incidents.

For a detailed discussion of the civil and criminal consequences resulting from excessive force, see Stafford, *supra* note 13, at 1.

²¹⁷ See, e.g., WEBSTER, *supra* note 125, at 152–54. The PCA limits federal troops from providing domestic law enforcement, so National Guard units operating in a Title 32 status are not limited by the Act.

²¹⁸ Lujan, *supra* note 185, at 82.

²¹⁹ *Id.*

²²⁰ Memorandum, Staff Judge Advocate, JTF-LA, U.S. Marine Corps, to JTF-LA J3, subject: Joint Task Force Los Angeles After Action Report—(GARDEN PLOT)—Staff Judge Advocate (7 May 1992) [hereinafter SJA JTF-LA AAR] (on file with author).

²²¹ *Id.*

²²² *Id.*

B. Loss of Confidence in the Military

In addition to affecting Soldiers, excessive force may lead to poor public perception of the military. The PCA was passed in 1878, primarily at the urging of a Southern Democratic contingent in Congress that wanted to end the U.S. Army's attempts in the South to enforce recently-enacted Reconstruction and civil rights laws.²²³ Over the years, this act has transformed into a symbol of federalism, while continuing to be an indication of the American public's skepticism of a federal military force conducting law enforcement operations.²²⁴ Although the Insurrection Act now provides for expanded exceptions to the PCA,²²⁵ skepticism remains. In fact, many militia groups throughout the United States still point to the rumored role of Army Special Forces in the Waco tragedy as an example of the need for strong prohibitions on military law enforcement action within the U.S. borders.²²⁶

The very nature of domestic operations—American military forces policing Americans—has such significant implications that even the mistakes of a few can have far-reaching effects. As one officer who commanded Soldiers during the L.A. Riots noted:

The actions of a single small unit during combat have been known to influence the outcome of a battle, but it would be highly unusual for one squad to be responsible for losing a campaign. During [operations other than war (OOTW)], however, the misconduct or mistakes or ineptitude of a handful of troops might negate the achievements of an entire brigade. Because public perception plays such a large role in determining the outcome of an OOTW mission, small-unit actions in such missions appear to have a significant potential for large-scale effects.²²⁷

Because the actions of individual Soldiers can have such a large effect on domestic missions, clear standards for the use of force must be established and consistently trained before the unit receives a mission to respond to a domestic crisis. If the SRUF contains unnecessarily aggressive or ambiguous language, Soldiers are more likely to use excessive force, thereby eroding the public's confidence in the military. Once the public perception of the military decreases, civilian leaders may call for greater restriction on the use of federal forces, thereby lessening the effectiveness of these units in providing assistance during a crisis. Alternatively, ambiguous SRUF could also force commanders to act too conservatively, fearful that they will unwittingly step outside the murky boundaries of the SRUF.²²⁸ Therefore, the best way to protect the military and civilians during domestic operations is to ensure they operate with clear and consistent SRUF.

VII. Proposal

The SRUF is designed to be a series of core concepts applicable to all domestic operations. As such, the SRUF is not, nor can it be, a complete articulation of the rules for the use of force applicable in any of the numerous types of operations that may occur. The mission-specific RUF for disaster relief operations are going to be much different than that needed in civil disturbance operations. However, for the concepts that the SRUF does cover, the language must be clear, unambiguous, and rooted in domestic law. The current SRUF contains international law concepts that may not be consistent with the Fourth Amendment. In addition, the sections dealing with deadly force, self-defense and hostile act/intent are ambiguous, allowing for unnecessary confusion. These issues can be resolved in two key ways: altering, or at least interpreting, the language of the current SRUF so that it is clearly consistent with domestic law, and providing periodic and realistic training to units that may be ordered to respond to domestic crises. None of the changes proposed in this section are radical, but rather are modest modifications based on language contained in previous versions of RUF.

By and large, the language in the SRUF is clear and consistent. The consolidation of the various RUF from counter drug operations, GARDEN PLOT, and DOD Use of Deadly Force rules into one universal set of SRUF is a positive

²²³ See MATT MATTHEWS, *THE PCA AND THE UNITED STATES ARMY: A HISTORICAL PERSPECTIVE* (2006).

²²⁴ *Id.*; see also CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW*, No. 95-964 S (2000).

²²⁵ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

²²⁶ See, e.g., MORRIS DEES, *GATHERING STORM* (1996). As the congressional investigation discovered, the Special Forces personnel did not provide direct support to the raid. However, this has not prevented a significant group of conspiracy theorists from accusing the government of a cover-up. *Id.*

²²⁷ Schnaubelt, *supra* note 128, at 88.

²²⁸ See Martins, *supra* note 9.

development.²²⁹ However, SRUF does not have to be consistent with SROE. Therefore, sifting out the terminology based on international law can resolve the shortfalls outlined in this article.

First, the language dealing with “hostile act” and “hostile intent” should be removed.²³⁰ These international law terms may lead to confusion among Soldiers operating in a domestic setting.²³¹ Specifically, the passage classifying a hostile act or hostile intent as “force used directly to preclude or impede the mission and/or duties of U.S. forces”²³² gives no indication of what level of force is authorized against those impeding the mission. In addition, assuming it authorizes up to deadly force, such a provision is not recognized under the Fourth Amendment.²³³ The only justifications for the use of deadly force are self-defense and defense of others, or to stop a fleeing felon who reasonably appears to “pose an imminent threat or death or serious bodily harm to DOD forces or others in the vicinity.”²³⁴

Second, the definition of “inherent right of self-defense” should be changed. The current definition allows service members to exercise self-defense “in response to a hostile act or demonstrated hostile intent.” As outlined above, this terminology should be removed so as to avoid potential confusion between international and domestic law concepts. Instead of the more combat-oriented “inherent right and obligation” language, domestic operations require less confrontational language. Finally, the definition must include “reasonably necessary” language to comport with Fourth Amendment precedent.²³⁵ Therefore, the following language similar to the previous DOD rules for deadly force²³⁶ should be reinstated:

Self-Defense and Defense of Others. When deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel (both DoD and non-DoD personnel) who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).²³⁷

This definition is more in keeping with the language of *Graham v. Connor*²³⁸ and is consistent with the FBI rules for deadly force,²³⁹ while at the same time leaving no doubt that Soldiers have the right of self-defense.²⁴⁰

In addition to self-defense, the language authorizing Soldiers to intervene to protect non-DOD personnel and civilians against serious injury or death only when “directly related to the assigned mission” should be either deleted or clarified. Although the addition of this language could be viewed as giving additional flexibility to the commander to focus his Soldiers on the assigned mission, the lack of any definitions will lead to uncertainty and inconsistent application. By making changes to the current SRUF language, and omitting the language not rooted in domestic law, the SRUF can be a clear, concise tool for commanders and Soldiers.

²²⁹ CJCSI 3121.01B, *supra* note 6, at enclosure L.

²³⁰ *Id.*

²³¹ See Martins, *supra* note 9, at 79–80 (arguing for clarification of the nebulous peacetime/wartime distinction, which “has grown too elusive to be of use in imparting ROE to soldiers.”). Just as with ROE, the SRUF must be purged of the nebulous terms that might confuse Soldiers. *Id.*

²³² CJCSI 3121.01B, *supra* note 6, para. 4c.

²³³ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force”).

²³⁴ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. c(1).

²³⁵ *Graham v. Connor*, 490 U.S. 386 (1989).

²³⁶ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.

²³⁷ *Id.*

²³⁸ 490 U.S. 386 (1989).

²³⁹ The FBI Rules for Deadly Force state:

Law enforcement officers . . . of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

Hall, *supra* note 50.

²⁴⁰ See Martins, *supra* note 9, at 80 (arguing that “[t]elling soldiers in capital letters that they may ‘take all necessary measures in self-defense’ is not a panacea.”). Soldiers deserve accurate language that details the rights *and* limitations of self-defense.

Even a flawless SRUF, however, will be ineffective without periodic, realistic training. In the event of a domestic crisis, commanders will have only hours to deploy troops and equipment, draft an operations order, and provide training on domestic operations and SRUF.²⁴¹ Therefore, it is imperative to train for these types of operations prior to receiving the call to deploy. The training, however, will only be effective if it is based on “clear and simple rules for the use of force,”²⁴² which is why the changes to SRUF language highlighted above are so critical. The FBI training materials warn that “[i]nadequate training can cause officers to use deadly force when it is not appropriate. Conversely, it may cause uncertainty and hesitation on the part of officers in circumstances that increase the danger to themselves and to the public.”²⁴³ This observation also applies to the many Soldiers deployed on short notice to chaotic urban environments.

In light of the extraordinary number of worldwide contingency operations currently competing for the attention of commanders, adding an additional training requirement may not be welcome. One way to mitigate this potential resistance is to prioritize training based on the likelihood of being called to respond to a domestic crisis. For instance, units that have recently returned from deployment and will not deploy in the near future should be targeted for realistic SRUF training, while deploying troops should remain focused on combat training.

The training, much like ROE training, should include a crawl, walk, run method of instruction.²⁴⁴ The crawl phase should include training on the SRUF and constitutional limitations on the use of force. The walk phase should include unit level situational training exercise lanes that allow first line leaders to train their Soldiers on domestic operations and law enforcement support. Finally, the run phase should include an installation-wide training event, in which a domestic crisis scenario is portrayed over the course of a day. Many of the skills learned during these training events are readily transferable to counter-insurgency operations, and yet the training will be separate and distinct from combat training so as to minimize the potential for confusion. Simple familiarization with the SRUF in a class setting will be ineffective, and may put Soldiers’ lives at risk when they are called upon to respond to a domestic crisis. Just as ROE training has evolved from just another “required class” to an integral part of any mission-readiness exercise, so too must SRUF training be expanded and improved to ensure that Soldiers at all levels gain familiarity with this important and complex aspect of the military mission.

VIII. Conclusion

The constant tension between protecting Soldiers and accomplishing the mission is not unique to combat. The SRUF, by mirroring SROE, has changed into a more combat-oriented set of rules. Some may argue that this new language is necessary to ensure that Soldiers understand their inherent right to self-defense. However, the result may be confusion in the minds of combat veterans who have been dealing with hostile threats from insurgents—not from Americans protected by the Fourth Amendment. Still another motivation may have been to provide clear, standardized rules that can be applied to any situation. However, an unintended consequence of this standardization has been to introduce international concepts that are not rooted in the Fourth Amendment.

The SRUF is merely a directive, and not U.S. law. “Consequently, if the Standing ROE or Rules of Deadly Force are not grounded in law, a serviceperson could be held liable . . . for exceeding the law.”²⁴⁵ As the examples set forth in Section V of this article make clear, if the military allows Soldiers to operate under an SRUF that does not comport with domestic law, it runs the risk of exposing both the Soldier and the government to liability, while possibly tarnishing the military’s reputation as a defender of the Constitution.²⁴⁶

Some question the wisdom of making any alterations to the current SRUF. Critics argue that the SRUF is merely a starting point, and that in the military decision-making process and RUF development, any ambiguities can be clarified. Certainly the commander, and not legalistic SRUF, sets the tone for the unit during a deployment. But while commanders have significant influence over their Soldiers’ proper use of force, they rely on clear, concise SRUF that are wholly consistent with domestic law in order to train their Soldiers. In addition, although SRUF are merely a starting point for mission-specific

²⁴¹ See *supra* notes 131–34 and accompanying text.

²⁴² Martins, *supra* note 9, at 20. Even though SRUF is only the starting point for the mission-specific RUF, “these rules can provide a base of understanding on which a larger system of contingent . . . [RUF] may rest.” *Id.*

²⁴³ Hall, *supra* note 50.

²⁴⁴ See generally Martins, *supra* note 9, at 82–93 (proposing a standardized ROE training plan that includes classroom and practical vignette training).

²⁴⁵ Stafford, *supra* note 13, at 16.

²⁴⁶ See Lujan, *supra* note 185, at 82; see also *supra* note 216 (discussing *Bivens* actions).

RUF, Soldiers' day-to-day training will be based on the SRUF. Mission-specific RUF will likely not be approved and disseminated until after the Soldiers have already deployed to the site of the domestic crisis.²⁴⁷ Therefore, accurate and understandable SRUF is a necessity, not a luxury.

In order to protect individual Soldiers while still meeting Fourth Amendment standards, the SRUF should be modified, or at least interpreted, so as to eliminate international law concepts and reflect Fourth Amendment precedent. The omission of important qualifiers and limitations has left the current SRUF more aggressive than prior versions. In addition, the omissions have injected ambiguity into vital terms like "deadly force" and the boundaries of self-defense. The modifications proposed in Section VII are certainly not revolutionary—the proposed language is a return to previous versions of the RUF. This change will not only protect civilians from excessive force, but also help Soldiers avoid putting themselves in unnecessarily dangerous situations. In addition, in order to truly protect Soldiers, leaders must provide realistic training that applies SRUF to possible scenarios found in domestic operations. Again, this proposed training is not a new concept—the model for this training is the ROE training that Army Judge Advocates have perfected over the last ten to fifteen years.²⁴⁸

By slightly modifying the current SRUF and developing realistic training for domestic operations, Judge Advocates can assist Soldiers in preparing for the next major domestic crisis. Without these vital tools, Soldiers deployed in future domestic operations may unwittingly undermine the support they have been tasked to provide.

²⁴⁷ Once domestic operations RUF is developed and approved by the Secretary of Defense for a particular mission, it is then forwarded to the U.S. Attorney General for approval. This process can take days to complete. Berry Interview, *supra* note 34. In addition, units typically have only hours to prepare to respond to a domestic crisis. During the L.A. Riots, federal military troops received RUF training just hours before they began patrolling the streets. *See supra* notes 125–147 and accompanying text.

²⁴⁸ *See, e.g.,* Martins, *supra* note 9.