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## The Partisan Ranger Act: The Confederacy and the Laws of War

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# The Partisan Ranger Act: The Confederacy and the Laws of War

*Winthrop Rutherford\**

## TABLE OF CONTENTS

Introduction .....	807
I. Origins of the Partisan Ranger Act.....	812
II. The Partisan Ranger Act .....	821
III. Union Response to the Partisan Ranger Act .....	825
IV. The Repeal of the Partisan Ranger Act .....	833
Conclusion.....	836

## INTRODUCTION

In his award-winning book, *Lincoln's Code: The Laws of War in American History*,<sup>1</sup> John Fabian Witt examines how the Lincoln administration charted a novel legal course by adopting codified laws of war for the Union armies—"Instruction for the Government of Armies of the United States in the Field" or "Lincoln's Code"—which shaped the meaning of emancipation, the Union's broader military policy, and international law thereafter—i.e., the Geneva Convention. The magnitude of violence during Civil War campaigns and the dilemma of how the war would affect the institution of slavery had undercut the relevance of mid-19th century laws of war orthodoxy—as used herein, "laws of war orthodoxy" or "orthodox laws of war"—for the Lincoln administration, prompting a reevaluation of those laws ending with Lincoln's Code. The premium placed by orthodox laws of war on bright-line rules to govern

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\* J.D., 2015, University of Virginia School of Law; M.A. (History), 2015, University of Virginia; B.A., 2011, University of Virginia. To my parents for fostering my passion in Civil War studies and to Professor Gary Gallagher at the University of Virginia for his guidance over the years.

1. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012).

battles between professional soldiers—as used herein, “conventional combat”—seemed ill-suited to the Civil War by the end of its second year. No comprehensive body of regulatory or statutory laws of war existed prior to Lincoln’s Code. Laws of war in 1861 meant the general consensus regarding the proper conduct of warfare—and corresponding punishments for infractions thereof—that precepts from domestic and international scholars formed, dominated by laws of war orthodoxy, and a collection of military regulations dominated.<sup>2</sup> Lincoln’s Code generally marked a formalistic point of departure from laws of war before that time as a government document purporting to comprehensively codify laws of war. Lincoln’s Code departed from laws of war orthodoxy substantively, notably in the Code’s development of the concept of military necessity—

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2. This Article refers to prevailing 18th and early 19th century laws of war theory, as expounded by Witt, as “orthodoxy” or “orthodox laws of war.” “The laws of war” refers to the approximate consensus at any given time as to the precepts of government adopted rules or regulations governing military conduct, shaping what constitutes acceptable or legal conduct distinct from conduct punishable as in violation by the laws of war or by civil authorities. By the end of the Civil War, orthodoxy no longer predominated the laws of war. Witt presents Emer de Vattel as the father of this movement as Vattel’s “The Law of Nations” crystallized the “limited war” spirit of the age. The “limited war” spirit represented a belief that enlightenment humanitarianism should constrain wars to diminish the ravages of war. Pursuant to the orthodox paradigm, war between civilized nations would not devolve into destructive struggles that wreaked havoc on nations’ populations and prosperity if nations opted to abide by morally neutral black letter rules. Reflecting and shaping military customs of the day, the rules Vattel and likeminded jurists propagated proscribed violence against civilians, killing outside the field of battle—i.e., by assassination, poisoning, using false uniforms to trick enemy soldiers—and violence against a surrendered enemy, collectively intended to result in “moderate” and “gentle” wars whereby most were exempt from the wars’ rigors. Treatises such as those Benjamin Franklin supported to abolish the rights of plunder and pillage, sought to effectuate laws of war orthodoxy ideals in America. Violence was the province of professional uniformed soldiers under a sovereign nation state’s direction engaged in set-piece battles in pursuit of limited national goals. Combatants without uniforms—thereby not representing a state—or participating in combat outside set-piece battles outside the guidance of a sovereign’s authorized officers, called “conventional combat,” fell outside the convention of Vattellian laws of war so were not party to the benefits such laws of war afforded soldiers to limit war’s brutality. Those participating in unconventional conflict threatened the civilized limited war paradigm ordered by clearly and easily applied bright line rules that reduced carnage and ensured the safety of mankind, and because they threatened the rules meant to preserve humanitarian order did not enjoy the privileges of its protection, such as prisoner exchange. *Id.* at 16–23, 44–45, 94.

the justified use of methods outside those accepted by, or in violation of, laws of war only as far as necessary to rationally advance a nation's war goals, and sooner end conflict. In Witt's account, the Confederacy did not engage to adapt laws of war to the Civil War's contingency, as he concludes, they "had no need to produce a new chapter in the laws of war," because "their aim was not to transform those laws but to embrace them in the form they had taken since the earliest days of the republic."<sup>3</sup>

Witt mischaracterizes the Confederate leadership as champions of laws of war orthodoxy. The history of the Partisan Ranger Act ("PRA"), whereby the Confederacy commissioned combatants for unconventional war, illustrates the Confederate leadership's willingness to adapt laws of war orthodoxy to address the Civil War's contingencies. Through the PRA, Confederate leaders effectively sought to broaden the scope of legally acceptable combat to accommodate the evolving reality of unconventional violence in the form of widespread guerrilla activity. Witt's narrative, and one's understanding of the laws of war after the 19th century, are more comprehensive if one addresses how the Confederacy's leadership experimented with similar legal forms as its Northern counterparts. Specifically, military necessity provided the motivation for the PRA's enactment and repeal.

The PRA was meant to channel unrestrained and unconventional violence from the amorphous unproductive form outside the purview of government control into a form that, Confederate leaders hoped, would rationally advance the Confederacy's war goals. The PRA's proponents endeavored to navigate carefully between the Scylla of promoting widespread unconventional violence and Charybdis of doing nothing, letting guerrilla activity proliferate unrestrained. When partisan rangers' military failures no longer rationally advanced the Confederacy's war goals, the Confederate leadership reverted to the prevailing orthodox position that unconventional combatants were not soldiers under the laws of war. Through the PRA, Confederate leaders put a central theme of Lincoln's Code into practice. Parallels exist between how the Northern and Southern leaderships experimented with promoting new forms of military activity. These experiments reciprocally interacted in an ongoing legal discussion throughout the war.

The reaction to the PRA informed a variety of Union policies, affecting the treatment of Southern civilians and discussions on Confederate sovereignty and collectively engendering legal uncertainty amongst Union military leaders that resulted in the promulgation of Lincoln's Code. Partisan rangers' status problematized Union policies that

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3. *Id.* at 223.

treated all unconventional combatants as guerillas and the scope of military jurisdiction in occupied states. Officers were forced to decide whether to treat partisan rangers as soldiers or as criminals and to determine the appropriate jurisdiction if partisan rangers were criminals. These decisions included the grander question of whether Union commanders should accept the Confederacy's interpretation of the laws of war, a departure from the prevailing understanding of laws of war orthodoxy. The presumption that Union commanders would recognize partisan rangers as soldiers under the laws of war was effectively the Confederacy's claim of sovereign authority to revise laws of war and a demand that Union leaders recognize that sovereign prerogative. The officers' response to this dilemma varied greatly; many maintained the right, pointing to the prevailing orthodox position on unconventional combatants, to bring partisan rangers before a military commission to be tried and executed as guerrillas or "bushwhackers."

To combat what Union commanders understood to be a breach in the laws of war by supporting unconventional combatants, such commanders justified an increasingly destructive policy of retaliation against civilians and propelled the Civil War into a more destructive and desperate conflict. Uncertainty over how to treat captured unconventional combatants and combat them in the field prompted the Lincoln administration to engage Francis Lieber, a noted legal scholar, to provide guidance. Lieber responded with a treatise on unconventional combatants, winning him gravitas with the administration; this appreciation translated into Lieber's appointment as the principal drafter of Lincoln's Code. Both the treatise and Lincoln's Code entitled partisan rangers to the same privileges as conventional soldiers under the laws of war and rebuked the Union officers' prevailing orthodox position.

Witt is not alone in passing over the PRA's import. Although a growing body of scholarship centers on unconventional or guerrilla warfare in the Civil War, relatively little scholarship exists on the PRA and its legal implications. Coverage of unconventional warfare in the Civil War scholarship shares certain core commonalities. Scholars place great emphasis on how experience with unconventional combatants affected development of official attitudes on military strategy—i.e., whether to hold local civilians accountable by military authorities—and the effect of the nearly incomprehensible iterations of unconventional military activity on civilians and communities without attention to the PRA.<sup>4</sup>

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4. Mark Grimsley and Mark Neely explore the Union's evolving counter-guerrilla strategies and policies regarding civilians, but neither explores the origins of, or Confederate perspective on, partisan ranger action. *See* MARK GRIMSLEY, *THE*

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HARD HAND OF WAR: UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS 1861–1865 (1995); MARK E. NEELY, JR., *THE CIVIL WAR AND THE LIMITS OF DESTRUCTION* (2007). Grimsley focuses on the interplay of official Union policy, combat experience, and informal attitudes of soldiers to explain why Union armies adopted a “hard war” to eliminate civilian support for the Confederacy. Grimsley defines “hard war” as actions against Southern civilians and property expressly to demoralize Southern civilians and the allocation of substantial military resources to accomplish the task. *See* GRIMSLEY, *supra*. Although acknowledging that guerrillas influenced Union policy, neither Grimsley nor Neely would go as far as Clay Mountcastle in asserting the impact of guerrillas. *See* CLAY MOUNTCASTLE, *PUNITIVE WAR: CONFEDERATE GUERRILLAS AND UNION REPRISALS* (2009). Mountcastle posits that the Union’s punitive strategy against the South during the war’s latter half must be understood as a response to guerrilla activity. To supplement quantitative analysis, Mountcastle addresses the psychological effects of guerrillas on Union soldiers and the gradual, nonlinear development of attitudes that prompted a punitive war. *See id.* Kenneth Noe investigates the deeply embedded cultural animosities between Union soldiers and pro-Confederate guerrillas that helped fuel the cycle of violence; Union soldiers deemed the local populace in Appalachia their cultural and social inferiors. Kenneth W. Noe, *Exterminating Savages: The Union Army and Mountain Guerrillas in Southern West Virginia, 1861–1862*, in *THE CIVIL WAR IN APPALACHIA: COLLECTED ESSAYS* 104 (Kenneth W. Noe & Shannon Wilson eds., 1st ed. 1997). Other historians employ different analytical lenses to address the Confederate and civilian perspectives. Michael Fellman provides insight into the nature of guerrilla war in Missouri, particularly the reciprocal actions and policies of Confederate and Union leaders to convey the complex breadth of unconventional war’s violence and the blurred lines between civilians and combatants, but he treats Missouri as a region almost distinct from the rest of the Confederacy. *See* MICHAEL FELLMAN, *INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR* (1989). Stephen V. Ash assesses Confederate civilian responses to Union invasions and posits that guerrilla warfare should be understood as an extension of the community and southern cultural traditions. *See* STEPHEN V. ASH, *WHEN THE YANKEES CAME: CONFLICT AND CHAOS IN THE OCCUPIED SOUTH, 1861–1865* (1995). Kenneth Noe also examined the socio-economic characteristics of guerrillas, finding that the guerrillas were often older and more well-established than others had generally believed. Kenneth W. Noe, *Who Were the Bushwackers?: Age, Class, Kin, and Western Virginia’s Confederate Guerrillas, 1861–1862*, in 49 *CIVIL WAR HISTORY* no. 1 at 5, 15 (2003). Robert Mackey and Daniel Sutherland stand out regarding the Partisan Ranger Act. Mackey argues that Confederate leaders embraced unconventional warfare, such as the partisan ranger service, to complement the conventional war. Dominant military theory and experiences in the Mexican-American War inclined Confederates to view unconventional war as an effective military policy. *See* ROBERT RUSSELL MACKAY, *THE UNCIVIL WAR: IRREGULAR WARFARE IN THE UPPER SOUTH, 1861–1865* (2004). The unconventional war effort ultimately failed because of the Union’s ability to adapt

This Article departs from existing scholarship by examining the PRA as a novel expression of competing legal forces in the history of America's laws of war that Witt in *Lincoln's Code* identified, but did not explore. This Article begins with an overview of unconventional combatants standing under orthodox laws of war prior to the Civil War to address antecedents for both positive and negative perspectives of the PRA. Additionally, this Article addresses how the rapid expansion of unconventional combat in the Civil War induced Virginia to raise partisan ranger units, previewing the motivations for, and limitations of, the PRA. Part II covers the PRA's passage and how the boundaries of acceptable military behavior constrained expectations of partisan rangers, but how they were also able to push those boundaries. Part III examines how Union perspectives on and responses to the PRA led Union leaders to examine laws of war orthodoxy, resulting in Francis Lieber's engagement and Lincoln's Code. This Article concludes with an analysis of why Confederate leaders soured on the use of partisan rangers, repealed the PRA, and reverted to the prevailing orthodox position on unconventional combatants.

#### I. ORIGINS OF THE PARTISAN RANGER ACT

Conflicting factors and historical trends created an array of attitudes about unconventional combatants in mid-19th century America.<sup>5</sup> At West Point and other military academies, students studied Napoleon's campaigns and were educated in the proper conduct of war by reading the European and American standard bearers of laws of war orthodoxy, including: Antoine-Henri Jomini in *The Art of War*; Dennis Hart Mahan in *Outpost*; and Henry W. Halleck in *Elements of Military Art and Science*.<sup>6</sup> Such works were produced to guide the conduct and strategy of large conventional armies that a centralized government organized and

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and implement successful counter-strategies, he argues. Sutherland names factors such as the reverence for the American Revolution's guerrillas and southerner's ties to the locality to explain a widespread preference among border citizens for guerrilla over conventional service. See DANIEL E. SUTHERLAND, *A SAVAGE CONFLICT: THE DECISIVE ROLE OF GUERRILLAS IN THE AMERICAN CIVIL WAR* (2009).

5. See MOUNTCASTLE, *supra* note 4, at 8–20 (for a survey of the antebellum experience with unconventional war).

6. ANTONINE-HENRI HOMINI, *THE ART OF WAR* (1838); DENNIS HART MANHAN, *ELEMENTARY TREATISE ON ADVANCED GUARD, OUTPOSTS, AND DETACHMENT SERVICE OF TROOPS* (1847); HENRY W. HALLECK, *ELEMENTS OF MILITARY ART AND SCIENCE* (1846).

outfitted. As a result, normative expectations of future Civil War leaders were shaped by the orthodoxy's preoccupation with conventional campaigns between 18th and early 19th century western European nation states rather than a state of war wherein individuals could act outside of government authorization and directives. In the orthodox paradigm, the protections the laws of war afforded to combatants only extended to individuals operating as an arm of the state, which uniforms and military bureaucracy denotes.

Combat that government-commissioned officers did *not* direct was outside the sovereign's control, incidentally eroding a sovereign's prerogative to direct violence to accomplish state goals. Such warfare, therefore, fell outside the prevailing understanding of the boundaries of 18th and early 19th century orthodox laws of war because unconventional combat raised the specter of individuals' unchecked emotion and chaos. Because unconventional warfare resembled criminality, adherents of orthodoxy generally viewed it as illegal; the state could execute unconventional combatants as bandits or murderers under military or civil law.<sup>7</sup>

Unconventional combat was not, however, understood to be wholly outside the boundaries of European laws of war orthodoxy, and even less so from the American variant thereof.<sup>8</sup> Various European legal scholars

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7. Vattel, for example, forbade citizens from waging unconventional warfare outright. HENRY HALLECK, *ELEMENTS OF MILITARY ART AND SCIENCE, OR, COURSE OF INSTRUCTION IN STRATEGY, FORTIFICATION, TACTICS OF BATTLES, ETC.* 37 (New York, D. Appleton & Co. 1860); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 163 (2005); EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 399–400 (London, G.G. & J. Robinson eds., rev. ed. 1797).

8. The American variant diverged from the European in the sacrosanct treatment of property rights—i.e., by Jurist James Kent, roughly the analogue of Vattel in this space—and experience with non-white combatants. The latter profoundly influenced attitudes about partisan rangers. Experience during the Revolution with Native Americans and Mexican guerrillas who fought outside the scope of European laws of war orthodoxy forced American military minds to grapple with the practicality of European laws of war orthodoxy when combating those who did not fight by European convention. This experience set a contradictory precedent by which American military men understood the utility of unconventional tactics, which Americans employed with effect against the British during the Revolution and Native Americans, but also instituted a novel and harsh response to punish unconventional combatants, such as the institution of commissions to treat punish Mexican guerrillas as criminals, which Witt points out, gave life to the idea of a war crime. WITT, *supra* note 1, at 71, 90, 107, 122–

developed regimes for unconventional combatants. Two notable Prussian officers produced texts—Johann von Ewald’s *Treatise on the Small War* and Andreas Emmerich’s *The Partisan in War or the Use of a Corps of Light Troops for an Army*<sup>9</sup>—covering unconventional war and the utility of “partisans” after serving in the British army during the American Revolution. In conventional 18th and early 19th century armies, light cavalry or infantry sometimes operated in a gray zone between conventional and unconventional combat by surprising enemy supply posts in quick lightning attacks or scouting behind enemy lines; such conduct was not considered a breach of laws of war orthodoxy.

Examples of unconventional combat are prominently in American military heritage. Even if reared on European laws of war orthodoxy, the nature of pre-Civil War military conflicts—particularly conflicts with Native Americans—forced familiarity with and respect for the efficacy of unconventional war amongst many American military men. Experience reinforced the prevailing orthodox position’s antipathy for unconventional combat for some but convinced others of its efficacy.<sup>10</sup> Exploits of

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24, 130. Witt briefly acknowledges the PRA represented a novel amendment to laws of war orthodoxy, writing:

[T]he official Confederate embrace of partisan rangers in the spring of 1862 revealed a potential flaw in the orthodox Enlightenment approach. For what the Confederacy had shown in the Partisan Ranger Act was that a belligerent could very easily extend commissions to irregulars and thus give them the status of soldiers deserving prisoner of war treatment.

*Id.* at 192.

9. JOHANN VON EWALD, *TREATISE ON THE SMALL WAR* (1790); ANDREAS EMMERICH, *THE PARTISAN IN WAR OR THE USE OF A CORPS OF LIGHT TROOPS FOR AN ARMY* (1789).

10. The U.S. Army developed an array of procedures to battle unconventional combat of Native Americans. Early colonists abandoned European style warfare to adopt the combat methods of their Native American foes; both sides engaged in surprise raids, attacks on settlements, and destruction of civilian supplies. Frustrated with the guerrilla tactics the Seminoles employed during the Second Seminole War (1835–1842), U.S. commanders, specifically General William J. Worth, resorted to destroying entire villages. Only once did the Seminoles face U.S. troops in a conventional battle that ended in a disastrous defeat at the battle of Okeechobee. U.S. armies under Zachary Taylor and Winfield Scott encountered stiff guerrilla resistance during the Mexican-American War (1846–1848). Troops developed strategies to combat the Mexicans. Several future Civil War commanders who had served in the U.S. Army understood the threat guerrillas posed and were versed in effective counter-guerrilla methods. Only later in the Civil War, however, did Union officers adopt the tactics deemed appropriate to employ only against the Native American and Mexican enemies to combat southerners. MOUNTCASTLE, *supra* note 4, at 15.

unconventional units—such as Francis “the Swamp Fox” Marion’s during the Revolution—incepted into the American military conscious, particularly in the South. A romantic view of unconventional combatants normalized unconventional combat in the American South.<sup>11</sup>

Precedent and nostalgia shaped Confederate leaders’ understanding of the laws of war and made them receptive to employing unconventional units. Laws of war—i.e., light cavalry—and practical—i.e., Marion’s troops—precedents substantiated an argument that because partisan rangers were government-authorized, organized, and disciplined, partisan rangers were essentially fungible with conventional soldiers. Since partisan rangers functioned in most respects like conventional soldiers, the laws of war should treat partisan rangers as conventional soldiers.<sup>12</sup> Francis Lieber agreed that partisan rangers shared the same rights as conventional soldiers, but this was the minority position amongst those raised on laws of war orthodoxy, outside the boundaries of the prevailing orthodox understanding of the laws of war. By and large, both Union and Confederate leaders in early 1861 envisioned the Civil War would unfold neatly within the boundaries established for conventional combat. Early strategies, therefore, anticipated a short war exclusively conventional armies fought on a small scale. The scope and intensity of the

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11. Historian Daniel Sutherland notes, “rebels had a slate of real and fictional heroes to document their selective version of the past,” notably popularized by the South’s foremost novelist, William Gilmore Simms, who published a biography of Francis Marion and historical romances celebrating the South’s Revolutionary partisans. SUTHERLAND, *supra* note 4, at 10. The Revolution’s examples influenced future partisan leaders, to which John Mosby attested in his memoirs: “I borrowed a copy of the ‘Life of Marion’, which was the first book I read, except as a task at school. I remember how I shouted when I read aloud in the nursery of the way the great partisan hid in the swamp and outwitted the British.” JOHN S. MOSBY, *THE MEMOIRS OF COLONEL JOHN S. MOSBY* 4 (Charles Wells Russell ed., 1917). In his romantic novel, *The Partisan Leader* (1836), Nathaniel Beverley Tucker envisioned a war between the North and South and chose a Virginia partisan commander as his protagonist. At one point a Virginian points out, “the dispositions of the people, and the strong fastnesses of the country, will make it a secure retreat to a partisan corps.” NATHANIEL BEVERLY TUCKER, *THE PARTISAN LEADER* 141 (Rev. Thos. A. Ware, ed., Richmond, West & Johnston 1862), [http://openlibrary.org/books/OL7000928M/The\\_partisan\\_leader](http://openlibrary.org/books/OL7000928M/The_partisan_leader) [<https://perma.cc/WEX8-E7Y3>].

12. IAN FREDERICK WILLIAM BECKETT, *ENCYCLOPEDIA OF GUERRILLA WARFARE* 4 (ABC-CLIO 1999).

unconventional conflict breaking out along the border-states took leaders in both the North and South by surprise.<sup>13</sup>

The escalating unconventional violence in western Virginia motivated Virginia's legislature to enact the "Virginia Ranger Act." The Act, on March 27, 1862, authorized the governor, John Letcher, to raise units of "rangers" referred to hereinafter as "state rangers." After Union troops drove Confederate forces out of western Virginia in a series of battles in the summer of 1861, pro-Confederate unconventional combatants became active throughout the region. Employing the raids, ambushes, and terror tactics associated with "Indian" fighting and unconventional predecessors from the Revolution, such combatants formed units, with names such as the "Moccasin Rangers," to clash with pro-Union unconventional combatant bands, with names such as the "Snake Hunters," civilians, and Union soldiers.<sup>14</sup>

The resulting non-state-directed guerilla violence troubled Virginia's legislature for two main reasons. First, such violence was often directed against civilians incumbent on the government to protect. Second, Virginia needed men in conventional service to effectively counter Union conventional forces. Necessity is the mother of invention, and the Virginia Ranger Act was intended to remedy this situation. The Virginia Ranger Act instructed state rangers to offer "the greatest protection to our loyal citizens" but harass occupying Union forces by "cutting off their marauding and foraging parties."<sup>15</sup> Strategic use of unconventional combatants could benefit numerically inferior conventional Confederate forces by forcing Union leaders to divert resources from campaigns against the Confederate capital in Richmond.<sup>16</sup>

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13. FELLMAN, *supra* note 4, at 23. Unconventional combatants did not lend themselves to easy categorization. Unionist guerrillas terrorized rebel neighbors; rebel guerrillas fought U.S. soldiers; unaffiliated bands used the war as a pretext to plunder—oftentimes, the cover of war permitted antebellum adversaries to continue family feuds or revisit class antagonisms. The variety of guerrilla organizations and extent of the terror they caused defies characterization or quantification. *Id.* at 23–29.

14. SUTHERLAND, *supra* note 4, at 31.

15. RANDALL OSBORNE & JEFFREY WEAVER, *THE VIRGINIA STATE RANGERS AND STATE LINE 4–5* (1994); An Act to authorize the organization of ten or more Companies of Rangers, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, 1861–62 (1862) [hereinafter *VSRA*], <https://babel.hathitrust.org/cgi/pt?id=njp.32101073363317;view=1up;seq=57> [<https://perma.cc/E6NC-8AT3>].

16. Mosby stated that "the military value of the species of warfare I have waged is not measured by the number of prisoners and material of war captured from the enemy, but by the heavy detail it has already compelled him to make."

The Virginia Legislature saw unconventional combatants as a resource to supplement conventional forces and consequently mandated state rangers to coordinate with conventional troops.<sup>17</sup> The Virginia Ranger Act proscribed recruitment only in areas under Union control, revealing the Virginia legislators' intent that state rangers would be a limited instrument to utilize citizens who could not, or would not, serve in the conventional Confederate army.<sup>18</sup> Recruitment could not interfere with or impair "the laws providing for the quota of Virginia to the Confederate Army."<sup>19</sup> Nevertheless, either as state rangers or guerillas, men flocked to

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MOSBY, *supra* note 11, at 262. The threat of guerrilla attacks forced Union forces to divert resources from campaigning armies, a boon for the numerically inferior Confederate armies. Letcher complained to a friend about the encroaching Union armies in Virginia, the ranger service could help keep some Northern troops away from Richmond. F. N. BONEY, JOHN LETCHER OF VIRGINIA: THE STORY OF VIRGINIA'S CIVIL WAR GOVERNOR 158 (U. Ala. Press 1966).

17. In the war's opening months, Turner Ashby demonstrated in Virginia that a disciplined unconventional unit could operate productively and cooperate with conventional forces; a cavalry Colonel in the conventional army reporting to the Secretary of War: "I need not speak of his qualities, for already he is known as one of the best partisan leaders in the service." This same cavalry officer offered a promising vision of employing partisan rangers and utilizing unconventional warfare to the Secretary of War, reporting that amongst the companies he assembled, "are some of the very best for the peculiar services of partisan and border war." Later he glowingly referred to Captain Ashby: "I need not speak of his qualities, for already he is known as one of the best partisan leaders in the service." 2 U.S. DEP'T OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. I, 953-54 (1880) [hereinafter WAR OF THE REBELLION, ser. I], <https://hdl.handle.net/2027/mdp.49015002000108> [<https://perma.cc/NET9-WTNV>]. Ashby and his "mountain rangers" operated near Harpers Ferry until Major General Joseph E. Johnston promoted him to lieutenant colonel of the 7th Virginia Cavalry. During the winter of 1861-1862, Ashby engaged in unconventional activities, seeking to inflict as much damage as possible on the Chesapeake and Ohio canals, a major Union supply route. Ashby, however, also served as Major General Thomas J. "Stonewall" Jackson's de facto cavalry commander during the spring of 1862 Valley campaign, operating as a conventional cavalry commander; he covered Jackson's retreat after the Battle of Kernstown on March 23, 1862. MILLARD K. BUSHONG, GENERAL TURNER ASHBY & STONEWALL'S VALLEY CAMPAIGN 34-36, 59, 99, 107 (1980). Ashby exemplifies the dual role that Confederate commanders later expected partisan rangers to play. Like Ashby, partisans were to engage in guerrilla style warfare, but operate in conjunction with, and nominally as, conventional military forces.

18. *VSRA*, *supra* note 15, § 3.

19. *Id.*

unconventional service to avoid conventional service, to the chagrin of army officers.<sup>20</sup> For Governor Letcher, the state rangers performed a vital service by protecting his constituents. The Virginia Ranger Act specified that the government would protect “loyal” citizens, which presumably did not include “disloyal” unionists. As many “loyal” Virginia men had left home to join the Confederate Army, Governor Letcher expected local militia and state rangers to defend loyal women and children against Northern invaders and disloyal Virginians.<sup>21</sup>

The manner in which state rangers’ organization and instructions dovetailed with those of conventional service signals the intention that the Virginia Ranger Act not drastically depart from orthodoxy. The state outfitted, paid, and organized the state rangers in the same way as soldiers in the Confederate army.<sup>22</sup> The Virginia Ranger Act prescribed rangers “conform their operations to the usages of civilized warfare” with the cryptic condition that “the enemy on their part shall conduct the war according to the usages of civilized war.”<sup>23</sup> Although state rangers reported directly to Governor Letcher, the Virginia Ranger Act provided they obey Confederate Army officers to maximize synergies of joint unconventional and conventional operations; state rangers were to act in parallel with, but more discreetly than, the conventional Confederate cavalry.<sup>24</sup> The exegesis of the Virginia Ranger Act was, paradoxically, that in order to remediate the intractable guerrilla conflict’s breach of laws of war orthodoxy, Confederate leaders sought to harness unconventional combatants on a heretofore unknown scale. The Virginia Ranger Act thereby shifted the boundaries of the laws of war away from the prevailing

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20. SUTHERLAND, *supra* note 4, at 92.

21. *VSRA*, *supra* note 15, § 3. As Letcher’s biographer, F. N. Boney, notes, “Bitter over the fate of that section [West Virginia] and fearful for the exposed Valley, Letcher enthusiastically organized the guerrillas, euphemistically designated rangers.” On February 5, 1862, Letcher had asked lawmakers to release militiamen from active service so they could return to normal inactive duty at home. The legislature complied on February 18, 1862, and ordered all white males 18–45 years of age to return to their counties in order to enroll in local militia groups. Letcher had actually begun commissioning ranger officers before the legislature’s permission on March 18–19, 1862. Letcher recruited men primarily from West Virginia because, he hoped, they would desist from action in Virginia to bring the war to West Virginia. BONEY, *supra* note 16, at 156–58.

22. *VSRA*, *supra* note 15, § 1. Ranger companies were structured to mirror conventional units with one captain, two lieutenants, and four sergeants and corporals, which the Virginia adjutant general supplied and paid upon receipt of enrollment list of the soldiers in the company.

23. *Id.* § 2.

24. *Id.* § 4.

orthodox position. Whether this boundary shift was a conscious decision to adapt laws of war away from orthodoxy or an unconscious perspective that laws of war orthodoxy treated partisan rangers as conventional soldiers is unknown. The authors of the Virginia Ranger Act, however, seemed to expect that Union officials would recognize state rangers as conventional soldiers under orthodox laws of war. As long as state rangers comported themselves and were organized similarly to conventional soldiers, it follows that these parties should be treated similarly under the laws of war. The Virginia Ranger Act purported to expand the scope of recognized activity under the orthodox laws of war by legitimizing unconventional combatants. Union treatment of state rangers and partisan rangers as guerillas showed that the Virginia Ranger Act tread on legally controversial grounds.

State rangers were conceptually and legally distinguished from guerillas because the Virginia Ranger Act obligated state rangers to operate in formal military units with a clear command structure in connection with, and by the orders of, conventional units.<sup>25</sup> Guerrillas engaged in combat on their own volition—often using war as an excuse to settle old scores—without government authority or oversight. In some ways, state rangers resembled French and Indian or Revolutionary War’s light infantry companies, which laws of war orthodoxy recognized as soldiers.<sup>26</sup>

State rangers did not have the desired military impact. They generally conducted themselves similarly to guerrillas, neither cooperating effectively with conventional forces nor behaving as disciplined conventional soldiers.<sup>27</sup> Despondent about the state rangers’ impotence, Confederate

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25. *Id.* §§ 1, 4.

26. MACKEY, *supra* note 4, at 7. In modern terms, they are akin to special forces.

27. In 1861 and early 1862, Governor Letcher received letters advocating for greater oversight of state ranger units. G. W. Berlin of Staunton wrote Letcher:

[T]he counties nearest the mountains, may be visited very soon by Confederate cavalry and rangers, many of whom enjoy a very inaccurate knowledge of the people and have sentiments and feelings of the great many of them and are consequently so prejudiced against the people as to lead them into not restrained into excesses. . . . and some of these rangers are in reality nothing but bands of cowardly thieves . . . . All those unconventional troops should be brought under strict—military discipline and the rules of civilized warfare, all those marauding bands of plundering parties should be [placed] under heavy penalty and all military expeditions even into the mountains should be under the command of a competent, just and honorable officers.

Brigadier General Henry Heth scathingly denounced the rangers in a letter to Governor Letcher on April 2, 1862:

I feel it my duty to inform you of certain facts arising from the organization of the irregular force known as “rangers,” authorized by an act of the Legislature of Virginia. *The companies of this organization which have come under my observation are simply organized bands of robbers and plunderers . . .* Many, especially the worthless, like the privilege of fighting, as they say, on their own responsibility, which, interpreted, means roaming over the country, taking what they want and doing nothing. . . . A guerrilla force without being closely watched becomes an organized and licensed band of robbers . . .<sup>28</sup>

Heth’s report is an expression of the prevailing orthodox position’s antipathy for unconventional combatants. State rangers and guerrillas were characterized as little better than criminals, ineligible for the privileges the laws of war afford because unconventional combat fell outside the realm of legally cognizable combat. Despite Heth’s appeal to Governor Letcher, which was a harbinger of later criticisms of the PRA, the state rangers’ ranks swelled as men who desired to remain at home rather than join the conventional army opted to become state rangers—or guerrillas—undermining conventional recruitment efforts on the eve of major Union offensives anticipated for the spring of 1862.<sup>29</sup>

The capture of state rangers forced Union commanders to interpret and expound upon the laws of war, setting the stage for ongoing legal disputes about the status of unconventional combat and Union occupation policy between Confederate and Union authorities. Brigadier General Benjamin F. Kelley’s proclamation to the people of Hampshire county and the Upper Potomac, dismissing recognition of unconventional combatants in any form under the laws of war, was a bellwether for prevailing orthodox position: “[I]f you attempt to carry on a guerrilla warfare against my troops, by attacking my wagon trains or messengers, or shooting my guards or pickets, you will be considered as enemies of your country, and treated accordingly.”<sup>30</sup> The nomenclature employed to describe unconventional combatants as “bushwhackers,” or “marauders”—

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Letter from G. W. Berlin esq. to John Letcher (July 4, 1862), in CORRESPONDENCE JULY-AUGUST 1862, GOVERNOR OF VIRGINIA CORRESPONDENCE, VHS.

28. Letter from Henry Heth to John Letcher (April 2, 1862), *quoted in* OSBORNE & WEAVER, *supra* note 15, at 10–11 (emphasis added).

29. SUTHERLAND, *supra* note 4, at 92.

30. 5 WAR OF THE REBELLION, ser. I, *supra* note 17, at 638–39.

carrying a criminal connotation—is telling of why Union authorities were adverse to grant state rangers or partisan rangers prisoners of war status.<sup>31</sup>

For Governor Letcher, there was no ambiguity. He believed in regarding state rangers as conventional soldiers and entitling them to the same privileges under the laws of war. When confronted by news that Union commanders sought to summarily execute several state rangers, Governor Letcher wrote the Confederate Secretary of War advocating retaliation:

[R]egularly commissioned under the law of Virginia in the ranger service, have been captured by the enemy and it is announced in their papers that they will be hung. If they shall be executed I think retaliation should follow promptly. . . . We must let Mr. Lincoln understand that for every man of this class who shall be executed we will execute in like manner one of corresponding grade selected from the prisoners in our custody.<sup>32</sup>

If Union commanders violated the laws of war by executing soldiers, the Confederacy retaliation was justified for Governor Letcher to force recognition of the state rangers' legal status. Although Governor Letcher remained a proponent of using unconventional combatants, he relented to pressure from Confederate army officers in August of 1862, including General Robert E. Lee, and assigned the state rangers to the Virginia State Line, Virginia's independent militia army.<sup>33</sup> The Virginia Ranger Act illuminated partisan rangers' practical limitations and legal baggage, but the experiment was enticing enough to Confederate leaders that Congress passed the PRA in April 1862.

## II. THE PARTISAN RANGER ACT

On April 8, 1862, a Confederate congressman from Virginia introduced a bill by unanimous consent to raise units of partisan rangers.<sup>34</sup> Pursuant to the original bill, partisan rangers would receive a commission of five dollars for every Union soldier killed, but the Senate Congressional Military Committee eliminated that section and then presented a substitute bill in

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31. Noe, *Who Were the Bushwackers?*, *supra* note 4, at 51.

32. Letter from John Letcher to George Randolph (May 27, 1862), *quoted in* OSBORNE & WEAVER, *supra* note 15, at 15.

33. BONEY, *supra* note 16, at 159.

34. 5 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 58th Cong., 2d Sess. 1861–1865, at 193 (1904) [hereinafter JOURNAL OF THE CONFEDERATE CONGRESS], <https://catalog.hathitrust.org/Record/007686617> [<https://perma.cc/6AK7-W6VB>].

which partisan rangers received the same pay, and were subject to the same regulations, as conventional soldiers.<sup>35</sup> The House of Representatives passed the revised bill on April 19 and the Senate followed suit on April 21.<sup>36</sup> The PRA came into effect as part of General Orders No. 30 the War Adjutant and Inspectors Office issued on April 28, 1862.<sup>37</sup> Similar to the Virginia Ranger Act, partisan ranger officers were granted a commission to raise and command independent units, and partisan rangers were expected to coordinate with the army.<sup>38</sup> Passed concurrently by Congress, the Confederate Conscription Act stipulated that applications for partisan ranger commissions be directed to conventional army generals, not to the War Department, placing partisan rangers service squarely under the purview of conventional service.<sup>39</sup> Signaling the intention that the PRA would govern all authorized unconventional combatants, the Conscription Act explicated that no authority existed outside the PRA to raise units for guerrilla activity.<sup>40</sup>

Like the Virginia Ranger Act, the PRA sought to contain and control unconventional combatants to avoid breaches in the laws of war that accompanied guerilla violence and to tap into a potentially valuable military resource. Before the PRA, the War Department had taken the position that “[g]uerrilla companies are not recognized as part of the military organization of the Confederate States, and cannot be authorized by this Department.”<sup>41</sup> Witt in *Lincoln’s Code* underscores the reticence of General Lee and Confederate President Jefferson Davis to deploy partisan rangers, noting that Union occupation left Confederate leaders with little practical choice but to hope to make use of unconventional combatants through the PRA.<sup>42</sup> There may have been doubts, but the

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35. WILFRED BUCK YEARN, *THE CONFEDERATE CONGRESS* 75 (1960); 2 *JOURNAL OF THE CONFEDERATE CONGRESS*, *supra* note 34, at 199. In the revised bill, partisan rangers, unlike conventional soldiers, could sell captured arms and munitions to Confederate quartermasters.

36. 5 *JOURNAL OF THE CONFEDERATE CONGRESS*, *supra* note 34, at 279, 285.

37. 1 *WAR OF THE REBELLION*, ser. IV, *supra* note 17, at 1094–95 [hereinafter PRA].

38. BECKETT, *supra* note 12, at 10; *VSRA*, *supra* note 15, §§ 1, 4; PRA, *supra* note 37, § 2. The PRA was vaguer about the duties of partisan rangers than the Virginia State Ranger Act. The PRA neither explicitly required partisan ranger units to obey orders of higher ranking army officers nor provide guidance on the relationship between partisan rangers and the local civilian populace.

39. PRA, *supra* note 37, § 1.

40. 1 *WAR OF THE REBELLION*, ser. IV, *supra* note 17, at 1098.

41. *Id.* at 1008.

42. WITT, *supra* note 1, at 190. Witt notes that Confederate leaders were reluctant after the American experience with guerrillas in Mexico, exacerbating

Confederate leadership was willing to back the position that partisan ranger service was not violative of the laws of war within a year of the war's outbreak. Confederate leaders had already embraced the use of privateers, which may have made them comfortable with asserting the laws of war and giving partisan rangers the same privileges as conventional soldiers. Privateers were functionally similar to partisan rangers because both could keep plunder from the enemy, unlike conventional combatants.<sup>43</sup> Although the PRA organized partisan rangers as conventional units, the partisan rangers' operational brief differed significantly from conventional soldiers. Partisan ranger service was meant to appeal to those who would have otherwise taken up arms as guerrillas, not those amenable to conventional service. Colonel John Imboden's recruitment advertisement in the *Richmond Examiner* displays the expectations of partisan rangers:

My purpose is to wage thermoactive warfare against our brutal invaders and their domestic allies; to hang about their camp and shoot down every sentinel, picket, courier and wagon-driver we can find; to watch opportunities for attacking convoys and forage trains, and thus rendering the country so unsafe that they will not dare to move except in large bodies. Our own Virginia traitors—men of the Pierpoint and Carlisle stamp—will receive our special regards. . . . It is only men I want—men who will pull the trigger on a Yankee with as much alacrity as they would on a mad dog; men whose consciences will not be disturbed at the sight of vandal carcase.<sup>44</sup>

Conventional soldiers were expected to engage exclusively with enemy combatants through accepted forms—i.e., a pitched battle in which agents

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violence with and against locals and leading to headaches for commanders. Guerrilla activity during the Mexican-American War forced commanders to innovate beyond orthodox laws of war to discipline soldiers because military tribunals were not authorized to adjudicate acts American soldiers committed against Mexican non-combatants and vice versa. *Id.* at 122–23.

43. See PRA, *supra* note 37, § 3. The dispute over recognition of the Confederate privateer commissions—whether to treat privateers as pirates or enemy sailors—went all the way to the U.S. Supreme Court, which ultimately recognized the legality of Confederate privateer commissions in 1863, granting privateers status as combatants rather than pirates under the laws of war. *The Prize Cases*, 67 U.S. (2 Black) 635 (1863); WITT, *supra* note 1, at 162–63. This outcome for Confederate privateers likely reinforced Confederate leaders' confidence that Union officers would recognize partisan ranger commissions.

44. *The Guerrillas in Western Virginia; A Proclamation by Col. Imboden*, RICHMOND EXAMINER, Oct. 26, 1862, reprinted in N.Y. TIMES.

of the state fought one another for state purposes wherein combatants were clearly delineated. Partisan rangers targeted non-combat support personnel, Union sympathizers, and Union soldiers behind enemy lines; creating a blend of vigilante, police, and conventional military activity. Officially, the Confederate government outfitted partisan rangers, but in reality, the majority of supplies, ammunition, weapons, and horses came from captured Union troops.<sup>45</sup> To be differentiated from guerrillas, partisan rangers were supposed to wear Confederate uniforms. “Uniform,” however, was defined loosely in practice, so partisan rangers could be readily, and often were, mistaken for guerillas.<sup>46</sup>

Through 1862, partisan rangers were held in high esteem amongst the Confederate leadership. A clerk in the Confederate War Department attested that President Davis was amenable to subordinating conscription to encourage partisan ranger recruitment in some areas: “[T]he President intends suspending the Conscription Act in Western Virginia, for the purpose, no doubt, of organizing an army of Partisan Rangers in that direction.”<sup>47</sup> Responding to a request for reinforcements by a general commanding conventional troops in southwestern Virginia, General Lee suggested, “[I]f you can raise a ranger force, under such competent officers as you may select and nominate, they will be commissioned by the President, and every exertion shall be made to arm the rangers as fast as they are raised.”<sup>48</sup> Lee’s order outlines the parameters envisioned for partisan rangers under the laws of war and in service to the Confederacy. As a supplement for conventional soldiers under the command of army officers, partisan rangers were legitimized as an arm of the conventional military. Because partisan rangers would be utilized for an array of conventional military services, the laws of war should treat them in the same way as conventional soldiers. Lee knew his position was legally novel—evidenced by his attaching of the PRA to his order—cementing the legal status the Confederate sovereign conferred on the partisan rangers. A further caveat by Lee—that the commander should personally

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45. The PRA permitted partisans to sell back captured military supplies to the War Department and keep any non-military items they confiscated; this attracted recruits and may have been a major factor holding partisan commands together. BRENT NOSWORTHY, *THE BLOODY CRUCIBLE OF COURAGE: FIGHTING METHODS AND COMBAT EXPERIENCE OF THE CIVIL WAR* 325 (2003); ROGER U. DELAUTER, JR., *MCNEILL’S RANGERS* 19 (1986).

46. John Munson, a partisan ranger in John Mosby’s famed 43rd Battalion Virginia Cavalry, recalled that “something gray” qualified as a uniform. JOHN W. MUNSON, *REMINISCENCES OF A MOSBY GUERRILLA* 25 (1983).

47. J.B. JONES, *A REBEL WAR CLERK’S DIARY* 173 (1935).

48. 12 *WAR OF THE REBELLION*, ser. I, pt. III, *supra* note 17, at 899.

select competent officers—highlights a concern that since partisan rangers did not operate as conventional units, the competence of their officers was paramount to prevent partisan rangers from turning into guerrillas. In the eyes of Lee and other conventional officers, the legal status of partisan rangers was contingent on practicality. If partisan rangers did not accomplish their practical purpose by operating as disciplined units in concert with conventional forces, partisan rangers would slide outside the realm of legitimacy the PRA created.<sup>49</sup>

### III. UNION RESPONSE TO THE PARTISAN RANGER ACT

The prevailing orthodox position's disdain for unconventional combatants informed Union perceptions and treatment of partisan rangers.<sup>50</sup> References to unconventional combatants by Union commanders and officials are loaded with connotations that unconventional combat is barbaric, obviating Union officers' duty to treat unconventional combatants as soldiers under the laws of war. In mid-March of 1862, West Virginia's provisional governor, Francis Pierpont, wrote Lincoln to suggest that those engaged in "guerrilla warfare"—this nomenclature generally captured all unconventional combatants—be treated as murderers at war's end.<sup>51</sup> Some

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49. The *New York Times* reported on April 24, 1862, that "rebel marauders and guerrillas are making their appearance, with the green leaves, in quite a number of the counties of Western Virginia." *Rebel Guerrillas in Western Virginia*, reprinted in N.Y. TIMES, Apr. 24, 1862, at 4, <https://www.nytimes.com/1862/04/24/archives/rebel-guerrillas-in-western-virginia.html> [<https://perma.cc/Y9U7-6TWM>]. Historian Daniel Sutherland asserts that the summer of 1862 marked the high point of support for guerrillas. Whether or not this is correct, guerrilla attacks increased in the late spring and early summer of 1862, particularly in Virginia. Because Union soldiers referred to partisans as guerrillas, however, the true extent of partisan rangers' early impact is difficult to gauge. See SUTHERLAND, *supra* note 4, at 94.

50. The nature of unconventional warfare engendered fear and hatred in Union soldiers, and stories of "bushwhacker" atrocities circulated amongst occupying troops as the war progressed; tales of mutilated corpses infuriated soldiers who believed they would be fighting rebels on fair terms. Compassion for their erstwhile countrymen quickly evaporated in Virginia, and Union soldiers blamed civilians and acted out on their frustration, anger, and fear. One scholar noted that in Virginia, "Union officers found it increasingly difficult to maintain troop discipline in the chaotic environment . . . soldiers looking to inflict hardship on local citizens looted and terrorized towns." MOUNTCASTLE, *supra* note 4, at 104–05.

51. Letter from Francis Pierpont to President Abraham Lincoln (Mar. 14, 1862), in THE ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS,

Union commanders concluded that since unconventional combatants' behavior abandoned the standards of civilized white society, unconventional combatants were not only criminals for breaching laws of war, but also undeserving of civil and military due process. A Union Assistant Secretary of War suggested to an officer stationed in Kentucky in May of 1862, "If guerrillas were shot without challenge as enemies of mankind their bands would soon disperse, and the assassination of sentinels and teamsters and other barbarities practiced in irregular warfare would soon cease."<sup>52</sup> That officer replied a few days later that he had given directions to shoot any unconventional combatants caught tampering with his supply lines.<sup>53</sup> George Crook, commander of a renowned counter-guerrilla unit, transposed the lessons he had learned fighting Native Americans in the West to fight unconventional combatants in Virginia, recalling later:

Their ["bushwhackers"] suppression became a military necessity, as they caused us to detach much of our active service for escorts, and even then no one was safe. . . . The question was how to get rid of them. Being fresh from Indian country where I had more or less experience with that kind of warfare, I set to work organizing for the task. I selected apt officers, and scattered them through the country to learn it and all the people in it, and particularly the bushwhackers, their haunts, etc.<sup>54</sup>

Native Americans were not practitioners of laws of war orthodoxy. That tactics used to fight Native Americans were necessary to fight partisan rangers further evidenced that partisan rangers fell outside the sphere of laws of war orthodoxy's protection for captured soldiers and enemy civilians.

As George Crook advanced through the ranks in the Union army operating in western Virginia, his attitude contributed to the development of punitive counter-guerrilla practices that flew in the face of the limiting spirit of orthodox laws of war by holding civilians accountable for unconventional activity.<sup>55</sup>

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[http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d1505300\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d1505300))).

52. 10 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 182.

53. *Id.*

54. GEORGE CROOK, GENERAL GEORGE CROOK: HIS AUTOBIOGRAPHY 87 (Martin F. Schmitt ed., 1946).

55. Crook noted in his memoirs that officers "would report that they had caught so-and-so, but in bringing him in he slipped off a log while crossing a stream and broke his neck, or that he was killed by an accident discharge of one of the men's guns." *Id.* A lieutenant colonel in the 3rd Potomac Home Brigade

The PRA presupposed a legal distinction between partisan rangers and other unconventional combatants, which elicited disdain from Union officers. Union General John C. Frémont in April of 1862 reported to Secretary of War Edwin M. Stanton that in western Virginia, “a systematic plan of guerrilla warfare has been arranged and organized . . . under the sanction of the Confederate Congress and the rebel legislature at Richmond. Those who have enlisted with the rebels are to be transferred to these ranger companies, as they are called.”<sup>56</sup> Brigadier General Robert H. Milroy characterized the Union’s rejection of the PRA, stating the purpose of partisan rangers was to rob, plunder, and devastate western Virginia based on “blank commissions.”<sup>57</sup> The *New York Times* bemoaned the burdens of legally distinguishing partisans from other unconventional:

They have urged all along that bushwhacking and guerrillism were legitimate and proper means of war; and *that when guerrillas and bushwhackers were captured, they must be treated by us as prisoners of war . . . .* The hypocrisy of the rebel Government in this, as in everything else, is now evident . . . . It is time we adopted the same policy in reference to rebel bushwhackers in Western Virginia and Missouri.<sup>58</sup>

The North’s most popular publication, *Harper’s Weekly*, characterized unconventional combat as the product of “the four highest crimes in the

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warned civilians that “the only way in which they could save their houses from conflagration was for them to defend their territory against incursions of all lawless bands of guerrillas.” 12 WAR OF THE REBELLION, ser. I, pt. I, *supra* note 17, at 457. Major General John Pope took a hard line on guerrillas in Virginia during mid-1862, issuing General Order No. 7, giving U.S. soldiers license to hold civilian populations responsible for guerrilla activity. 12 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 51. Lincoln gave Pope’s strict orders his blessing, reiterating through a warning to Confederates that the property of those supporting guerrillas would be liable to confiscation, and gave permission to the military governor of Tennessee, Andrew Johnson, to implement Pope’s orders. Daniel Sutherland, *Abraham Lincoln and the Guerrillas*, 42 PROLOGUE MAG. (Q. NAT’L ARCHIVES & RECS. ADMIN.) 19, 22 (2010), <https://www.scribd.com/doc/30243096/Abraham-Lincoln-and-the-Guerrillas-Prologue-Spring-2010> [<https://perma.cc/8PLK-NE7B>].

56. 12 WAR OF THE REBELLION, ser. I, pt. III, *supra* note 17, at 55.

57. *Id.* at 71–72. A few days later, General Kelley wrote Frémont to request a cavalry force “well acquainted with the public and private roads, mountain passes, streams, fords, and ferries,” to inhibit the formation of ranger companies. *Id.* at 62.

58. Public notice, *The Rebel Penalty for Bushwhacking*, N.Y. TIMES, Sept. 17, 1862, <https://www.nytimes.com/1862/09/17/archives/the-rebel-penalty-for-bushwhacking.html> [<https://perma.cc/E9CD-WNUK>] (emphasis added).

calendar—murder, rape, robbery, and arson.”<sup>59</sup> The publication said of General Frémont, who hanged several unconventional combatants without trial, “[his] method of treatment in Western Virginia will be the surest.”<sup>60</sup> Refusal to recognize partisan rangers was a refusal to accept the Confederacy’s prerogative to challenge the prevailing orthodox position on unconventional combatants.<sup>61</sup>

Desiring a coherent position on partisan rangers, Union General-in-Chief Henry W. Halleck approached Francis Lieber for legal advice on how the partisan rangers should be classified and treated under the laws of war.<sup>62</sup> Halleck’s letter requesting Lieber’s insight exudes contempt and frustration with the PRA:

[R]ebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops . . . to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war.<sup>63</sup>

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59. HARPER’S WEEKLY, Aug. 30, 1862.

60. GRIMSLEY, *supra* note 4, at 48–49; HARPER’S WEEKLY, May 17, 1862. Under Frémont, Union commanders implemented several new counter-guerrilla tactics in Virginia. Instead of an ad-hoc response to guerrilla and partisan action, Frémont designated units to specifically engage in counter-guerrillas operations, instructing his commanders to make “frequent and sudden attacks, by rapid marches without transportation, by surprises and severity, to destroy all bands forming and organized in your district, and by terrifying these marauders finally to uproot the whole system.” 12 WAR OF THE REBELLION, ser. I, pt. III, *supra* note 17, at 164–65. Frémont encouraged and outfitted unionist home guard units, which often operated in the same legal space as partisan rangers—commissioned unconventional—to provide for local defense and antagonize Confederate sympathizers. SUTHERLAND, *supra* note 4, at 96.

61. A Maryland Lieutenant Colonel mentioned he had killed men carrying commissions from the Governor of Virginia authorizing “guerrilla warfare.” 12 WAR OF THE REBELLION, ser. I, pt. I, *supra* note 17, at 457. That same officer underscored the barbarity of partisans, noting that the murdered partisan commander was wearing a Union uniform taken from one of the officer’s soldiers killed a month before. *Id.*

62. Halleck disliked the ad hoc status quo of Union policy regarding guerrillas as general-in-chief, and it troubled him as a regional commander. JOHN F. MARSZALEK, COMMANDER OF ALL LINCOLN’S ARMIES: A LIFE OF GENERAL HENRY W. HALLECK 167 (2004).

63. Letter from Major-Gen. H.W. Halleck to Francis Lieber (Aug. 6, 1862), in FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE

In Halleck's eyes, unconventional conduct by partisan rangers—i.e., attacking soldiers behind lines not in uniform—negated any legal claim partisan rangers had to be treated as conventional soldiers.

The issue for Halleck was not academic; Confederate authorities threatened that if partisan rangers were punished as “marauders and spies”—as Halleck gives the distinct impression he would like to do—“they will retaliate by executing our prisoners of war in their possession.”<sup>64</sup> Lieber responded with a detailed treatise, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*.<sup>65</sup> In the treatise, Lieber classified unconventional combatants and explained the legal standing of each class and its attendant rights under the laws of war. Lieber extrapolated from recent Euro-American military history to opine that the laws of war similarly recognized sanctioned partisans as conventional soldiers.

Heretofore, Lieber noted, the term “partisan” had been “vaguely used” in orthodox laws of war.<sup>66</sup> The proper definition, Lieber argues, pertains to government authorized partisans, who were simply “bodies detached from the main army.”<sup>67</sup> Similar to militia or *levies en masse*, sanctioned partisans were imbued with government authority, even if not engaged in the activity of conventional units. Guerrillas, on the other hand, “who form no integrant part of the organized army . . . take up arms and lay them down at intervals, and carry out petty war (guerilla) chiefly by raids, extortion, destruction and massacre,” did not enjoy the privileges of conventional soldiers under the laws of war.<sup>68</sup> If captured, “in fair fight and open warfare,” guerrillas, Lieber reasoned, should be treated “as the regular partisan is,” until specific crimes are proven; conventional soldiers or partisan rangers were not subject to a criminal determination when

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LAWS AND USAGES OF WAR, at iv (1862), <https://catalog.hathitrust.org/Record/000624895> [<https://perma.cc/ZU6P-AAUS>].

64. *Id.*

65. *See id.*

66. *Id.* at 11.

67. *Id.* Jon Fabian Witt points out that Lieber's classification tacitly rebuked laws of war orthodoxy by acknowledging the complex realities of 19th century conflict necessitated classification beyond that orthodox thinking provided. WITT, *supra* note 1, at 194.

68. LIEBER, *supra* note 63, at 18–19. Present throughout Lieber's commentary on the distinction between partisans and guerrillas is the assumption that a lack of organization inexorably leads to violence against prisoners and civilians. Because guerrillas are not supplied as formal units, Lieber reasons “they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands.” *Id.* at 19.

captured.<sup>69</sup> Lieber chided Halleck for failing to recognize a distinction between guerrillas and partisans, and recommended that partisans be considered as part of the conventional army:

The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on flanks of the enemy . . . but he is part and parcel of the army, and, as such, considered entitled to the privileges of the laws of war . . . .<sup>70</sup>

Guerrillas' operations were disorderly and random, but government control put partisan rangers on a different plane alongside conventional soldiers according to Lieber. Halleck gave the treatise his stamp of approval, ordering 5,000 copies be distributed to the Union army.<sup>71</sup> A few months later, Lieber restated the key points from his treatise in Lincoln's Code.<sup>72</sup> What had begun as a project to clarify the status quo culminated in Lincoln's Code, a significant revision of laws of war, by advancing the concept of military necessity.

Union commanders bristled at the Lincoln Code's directive to grant partisan rangers prisoner-of-war status. General Halleck ignored Lieber, excusing retaliation by Union troops against partisan rangers writ large. Halleck's action was contrary to Lincoln's Code because partisan rangers did not engage in "legitimate warfare" in October of 1863.<sup>73</sup> Halleck remarked, "It is not surprising that our people get exasperated at such men and shoot them down when they can. Moreover, men who act in this

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69. *Id.* at 20.

70. Lieber noted of Halleck, "[He] seems to consider partisan troops and guerrilla troops as the same." 2 WAR OF THE REBELLION, ser. III, *supra* note 17, at 307; 22 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 238.

71. FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 329 (1947).

72. Partisans are "detached from the main body for the purpose of making inroads into the territory occupied by the enemy" and, if captured, "are entitled to all the privileges of the prisoner of war," whereas those acting "without being part and portion of the organized hostile army . . . with the occasional assumption of the semblance of peaceful pursuits" are not entitled to prisoners of war status. Instructions for the Government of Armies of the United States in the Field, Gen. Orders no. 100, arts. 81–82, U.S. WAR DEP'T (ADJUTANT GENERAL'S OFFICE) (Apr. 24, 1863), [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) [<https://perma.cc/Z953-YAHD>].

73. 29 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 397.

manner in disguise, and within our lines, have, under the laws of civilized war, forfeited their lives.”<sup>74</sup> In this same message, Halleck named partisan rangers “guerrillas and robber bands” for refusing to fight in uniforms as conventional soldiers and for returning to their homes to feign non-involvement in battle.<sup>75</sup> In a similar tone, Brigadier General Edward Wild, who commanded Union troops in southern Virginia and northern North Carolina, issued a proclamation to the inhabitants of four counties in North Carolina:

All guerrillas are on a par with pirates, and are to be treated as such. The fact of their being paid by the State, and being called ‘Partisan Rangers,’ does not help the matter. Neither the Governor of the State nor Jefferson Davis can legalize such a style of warfare.<sup>76</sup>

By the latter half of the war, summary execution of unconventional combatants—including partisan rangers—was increasingly common.<sup>77</sup> In

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74. *Id.*

75. *Id.*

76. 29 WAR OF THE REBELLION, ser. I, pt. I, *supra* note 17, at 917.

77. Brigadier General William H. Powell, operating in the Valley and along Virginia’s border with West Virginia in the fall of 1864, refers to at least two instances in which he ordered unconventional troops executed. In retaliation to the murder of a soldier found with his throat slit, Powell had two “bushwackers” shot to death on October 4. Nine days later, Powell ordered the execution of one of John S. Mosby’s partisan rangers for the alleged “cold blooded murder” of two of his troopers by other Mosby’s rangers; Powell considered the partisan rangers a “gang of cut throats and robbers.” 43 WAR OF THE REBELLION, ser. I, pt. I, *supra* note 17, at 508–09. During the summer of 1864 campaign in the Shenandoah Valley, some Pennsylvania soldiers felt that, because of the disparate ratio between those Mosby’s men had killed rather than wounded, Mosby had crossed the line demarcating civilized warfare. Colonel Charles Russell Lowell, commanding a brigade in Merritt’s division, offered mixed emotions about the Union’s policies towards guerrillas to his wife on October 5, 1864:

Lieutenant Meigs was shot by a guerrilla, and by order the village of Dayton and everything for several miles around was burned. I am very glad my Brigade had no hand in it. Though if it will help end bushwhacking, I approve it, and I would *cheerfully* assist in making this whole Valley a desert from Staunton northward,—for that would have, I am sure, an important effect on the campaign of the Spring,—but in *partial* burnings I see less justice and less propriety. I was sorry enough the other day that my Brigade should have had a part in the hanging and shooting of some of Mosby’s men who were taken—I believe that some

spite of the pains Lieber took to distinguish between partisans and guerrillas, disagreements persisted.<sup>78</sup> Such disagreements rose to the highest military stratosphere. After Union troops captured some partisan rangers, Lieutenant General John C. Pemberton, commander of Confederate forces around Vicksburg, Mississippi, felt compelled to explain to his Union counterpart, “these officers and men are as much a part of the C.S. Army as are any others composing it and as much entitled to the benefits of the cartel as any of your prisoners whom I now hold.”<sup>79</sup>

The U.S. Congress even got involved in June 1864 when Ohio Representative James Garfield introduced “The Bill to Provide for the More Speedy Punishment of Guerrilla Marauders,” which passed on July 2, 1864.<sup>80</sup> The proposed bill licensed departmental commanders and general officers “to carry into execution all sentences against guerrillas for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of wars.”<sup>81</sup> In the Senate, Thomas Henricks proposed an amendment that “the term ‘guerrillas’ therein contained should not be held to include persons employed in the authorized service of the enemy,” which ostensibly excluded partisan ranger commanders’ broad license to mete out punishment.<sup>82</sup> Another Senator floated an amendment that the term “guerillas” did not include those “in the authorized service” of the Confederacy.<sup>83</sup> The Senate rejected this last condition, and passed the Act with a carve out for partisan rangers, ostensibly reconciled with Lincoln’s Code.

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punishment was deserved—but I hardly think we were within the laws of war, and any violation of them opens the door for all sorts of barbarity.

CHARLES RUSSELL LOWELL, *LIFE AND LETTERS OF CHARLES RUSSELL LOWELL* 353 (Edward Emerson ed., 1907).

78. For example, the *Daily Richmond Examiner* covered a disagreement between Union and Confederate authorities in late December 1863 over Major Edgar Burroughs, who had raised a force of partisan rangers in Virginia, but whom Union authorities held after his capture for allegedly breaking his parole. *DAILY RICHMOND EXAMINER*, Dec. 28, 1863.

79. 4 *WAR OF THE REBELLION*, ser. II, *supra* note 17, at 731.

80. 10 *THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS*, 68–69 (New York, Frank Moore ed., 1869), <https://hdl.handle.net/2027/mdp.39015078222489> [<https://perma.cc/63BY-34JW>].

81. *Id.*

82. *Id.*

83. *Id.* at 69.

## IV. THE REPEAL OF THE PARTISAN RANGER ACT

A convergence of factors sapped support for the partisan rangers. The PRA had not eliminated the guerrilla problem by channeling unconventional combat into a disciplined medium that was useful to the conventional Confederate army; guerrilla activity persisted throughout the Confederacy. Conventional army demands for conscripts to replenish the lost grew louder, prompting revisions to the PRA soon after its passage.<sup>84</sup> Initially, the potential conscripts had the choice between partisan ranger and conventional service. This choice proved appealing to those desirous of avoiding the conventional battlefield, but Congress amended the PRA to make conscripts ineligible for partisan ranger service.<sup>85</sup>

On September 1, 1862, a senator successfully proposed that Congress amend the PRA so that partisan rangers could only recruit “where the companies or regiments composing the military force of said district are filled to the maximum number.”<sup>86</sup> Congress continued to debate the efficacy of partisan rangers and the PRA’s effect on conscription after

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84. In late August 1863, General William W. Loring wrote the Confederate Secretary of War that “many conscripts and volunteers between eighteen and thirty-five years of age are coming out of Western Virginia and joining the State Line Partisan Corps and other irregular” rather than his command. Loring enclosed a request from the major of the First Battalion Virginia Mounted Rifles, who wished to transfer his entire command to the partisan service. 12 WAR OF THE REBELLION, ser. I, pt. III, *supra* note 17, at 939–40, <https://hdl.handle.net/2027/coo.31924077730145> [<https://perma.cc/V5V3-728A>]. Not only did ranger units detract from army operations, they likely lacked discipline and antagonized Confederate citizens. Less than a month later, James W. McSherry shared complaints similar to those Union commanders voiced, stating that “some of Floyd’s guerrilla bands are through the country, taking [from] the citizens and stealing every horse they can lay their hands on”; his choice of “guerrillas” belying respect for the partisan rangers as fellow Confederate soldiers. 19 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 628, <https://hdl.handle.net/2027/coo.31924080772233> [<https://perma.cc/JFG3-FVEN>]. Major General Samuel Jones reported in March 1863 that two partisan ranger companies on the border of Tennessee and Virginia “[had] been doing nothing for a long time.” 25 WAR OF THE REBELLION, ser. I, pt. II, *supra* note 17, at 671, <https://hdl.handle.net/2027/coo.31924085376626> [<https://perma.cc/E2KY-DXUT>]. Those units that did operate with discipline, military leaders reasoned by late 1863, were of better use fighting as conventional soldiers. *See, e.g.*, SPENCER C. TUCKER, *The 1st Virginia Partisan Rangers 1862–1863*, BRIGADIER GENERAL JOHN D. IMBODEN: CONFEDERATE COMMANDER IN THE SHENANDOAH 99–102, 110 (2003).

85. YEARNs, *supra* note 35, at 75.

86. SUTHERLAND, *supra* note 4, at 101; 2 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 34, at 251.

these amendments.<sup>87</sup> A growing chorus of army officers' complaints exacerbated lawmakers' doubts about the PRA. Echoing these doubts, a "Report of the Secretary of War" on January 3, 1863, noted:

The policy of organizing corps of Partizan Rangers has not been approved by experience. The permanency of their engagements and their consequent inability to disband and reassemble at call, precludes their usefulness as mere guerrillas. While the comparative independence of their military relations, and the peculiar rewards allowed them for captures, induce much license and many irregularities. *They have not unfrequently excited more odium and done more damage with friends than enemies.*<sup>88</sup>

The Secretary of War went on to discuss the possibility of converting existing partisan ranger units into conventional service. A letter to the editor of the *Richmond Examiner* from "a cavalrymen" shared the sentiments, declaring "the best interest of the service demands that all partisan organizations to be broken up . . . . Men are deserting daily and joining unconventional bands."<sup>89</sup> Although not necessarily a bellwether for public opinion, this letter suggests that people beyond the Confederate military and political brass began to question the PRA.

Calls from the highest echelons of the Confederate military in early 1864 sealed the PRA's fate. Shortly after a joint expedition with a partisan ranger unit in western Virginia, Brigadier General Thomas L. Rosser—who purportedly had exchanged bitter words with the partisan ranger commander about the proper role of partisan rangers and horses—wrote General Lee, condemning partisan ranger service and calling for disbandment:

Without discipline, order, or organization they roam broadcast over the country, a band of thieves, stealing, pillaging, plundering, and doing every manner of mischief and crime. They are a terror

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87. 2 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 34, at 251.

88. James A. Seddon, *Report of the Secretary of War*, CONFEDERATE STS. AM., WAR DEP'T 12 (Jan. 3, 1863), [http://openlibrary.org/books/OL24527486M/Report\\_of\\_the\\_Secretary\\_of\\_War](http://openlibrary.org/books/OL24527486M/Report_of_the_Secretary_of_War) [<https://perma.cc/7DWE-VBXD>] (emphasis added).

89. DAILY RICHMOND EXAMINER, Jan. 26, 1864. In late January 1863, a representative had presented "the memorial of sundry citizens of Newbern VA," to convey the negative public perception of the partisan rangers; the document was referred to the Committee on Military Affairs. 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 34, at 52, <https://hdl.handle.net/2027/nyp.33433081763827> [<https://perma.cc/397Q-H5Q8>].

to the citizens and an injury to the cause. They never fight; can't be made to fight. Their leaders are generally brave, but few of the men are good soldiers, and have engaged in this business for the sake of gain. The effect upon the service is bad, and I think, if possible, it should be corrected.<sup>90</sup>

General Lee and Major General J. E. B. Stuart, Lee's trusted cavalry commander, endorsed Rosser's suggestion in late January of 1864.<sup>91</sup> The Department of War forwarded the Rosser, Stuart, and Lee opinions to the chairman of the Congressional Military Committee on January 30, 1864.<sup>92</sup> Elaborating further on his opinion of partisan rangers in a report to the Confederate Adjutant and Inspector General in April of 1864, Lee wrote: "Experience has convinced me that it is almost impossible, under the best officers even, to have discipline in these bands of partisan rangers, or to prevent them from becoming an injury instead of a benefit to the service."<sup>93</sup> The broad condemnation by the military high command undoubtedly affirmed opinions of many supporters of the prevailing orthodox position—unconventional combatants were uncontrollable and outside the bounds of legality, regardless of whether they carried a government commission or not.

On January 14, 1864, a representative introduced a bill to repeal the PRA.<sup>94</sup> The House of Representatives and the Senate debated the particulars for a month.<sup>95</sup> The final bill, which went into effect on February

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90. 33 WAR OF THE REBELLION, ser. I, *supra* note 17, at 1081, <https://hdl.handle.net/2027/coo.31924077699811> [<https://perma.cc/3G2X-3ZJ7>]; MILLARD K. BUSHONG AND DEAN M. BUSHONG, *FIGHTIN' TOM ROSSER*, C.S.A 72 (1983).

91. 33 WAR OF THE REBELLION, ser. I, *supra* note 17, at 1082. Stuart took the orthodox laws of war stance, writing "such organizations [of partisan rangers], as a rule, are detrimental to the best interests of the army at large." Less blunt, Lee surmised: "The evils resulting from their organization [partisan rangers] more than counterbalance the good they accomplish." *Id.* at 1081. As early as March 1863, Stuart had instructed Mosby to eschew the term "partisan ranger" for "Mosby's Regulars" so that both the North and South would regard Mosby's men as conventional soldiers; Mosby ignored the advice. LEE A. WALLACE, *A GUIDE TO VIRGINIA MILITARY ORGANIZATIONS 1861–1865* 39 (1986).

92. 33 WAR OF THE REBELLION, ser. I, *supra* note 17, at 1082.

93. *Id.* at 1252.

94. 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 34, at 628.

95. Eastern state congressmen wanted to repeal the PRA earlier, but western congressmen deterred them, arguing that because the conscription laws were so poorly applied in the West, their constituents had little alternative but to join the partisan ranger units. *Id.* at 829; 3 JOURNAL OF THE CONFEDERATE CONGRESS, *supra*

17, 1864, converted mounted units into regular cavalry, united other bands with existing regular commands, and permitted the Secretary of War to exempt such units as he deemed proper from the Act's repeal.<sup>96</sup> Only two partisan ranger units, John S. Mosby's and John H. McNeill's commands, lived up to Confederate leaders' expectations enough to escape disbandment.<sup>97</sup>

### CONCLUSION

Unconventional guerrilla violence during the Civil War produced uniquely challenging legal quandaries about Confederate sovereignty and the Union military jurisdiction, and influenced Union treatment of civilians, creating questions about the boundaries of the laws of war. The embarrassment resulting from the PRA, between and among Union soldiers and Confederates, forced engagement with laws of war orthodoxy. The Confederacy ultimately reverted to the orthodoxy by repealing the PRA because the partisan ranger experiment had not born fruit, vindicating the orthodox-informed position that promoting

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note 34, at 791, <https://hdl.handle.net/2027/nyp.33433081763850> [<https://perma.cc/Z4Q7-3UGD>]; YEARNs, *supra* note 35, at 75.

96. YEARNs, *supra* note 35, at 75; 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 34, at 828–29.

97. Mosby's 43rd Battalion Virginia Cavalry stands apart in the accolades Confederate military leaders received as the prototypical partisan ranger for its professionalism and success, operating independently and with conventional units. General J.E.B. Stuart stated that Mosby's rangers were "the only efficient band of rangers [he knew] of." 33 WAR OF THE REBELLION, ser. I, *supra* note 17, at 1082. Although guerrillas and other partisan rangers promoted lawlessness, Mosby's rangers sought to uphold the tenants of military discipline and civil order, as laws of war orthodoxy expected. In the absence of local government and amid the chaos the presence of campaigning armies created, Mosby effectively acted as the local government, maintaining peace and stability. A Mosby subordinate, Major John Scott, attests:

[I]t is only natural that this district of country [Northern Virginia] should be infested by deserters, blockade-runners, and other disreputable characters, as well as by horse-thieves and cattle-lifters. To meet this evil, he [Mosby] has authorized the arrest of all soldiers not having regular leaves of absence, and awards their horses as prizes to their captors.

Scott later asserted that, because of the conduct of his men, Mosby won "a deep hold on the confidence and affection of the people of Northern Virginia." JOHN SCOTT, PARTISAN LIFE WITH COL. JOHN MOSBY 399 (London, Sampson Low, Son & Marston 1867).

unconventional units would only promote inappropriate violence amongst combatants and civilians. Although its field commanders maintained a strictly orthodox view of partisan rangers, the Lincoln administration stepped away from orthodoxy by adopting Lincoln's Code. The PRA's failure highlights the Union leadership's success with Lincoln's Code and its import as a framework to reconcile those themes. Against this backdrop, the PRA's enactment and repeal adds to the understanding of the dynamic mosaic of competing legal positions during the Civil War.