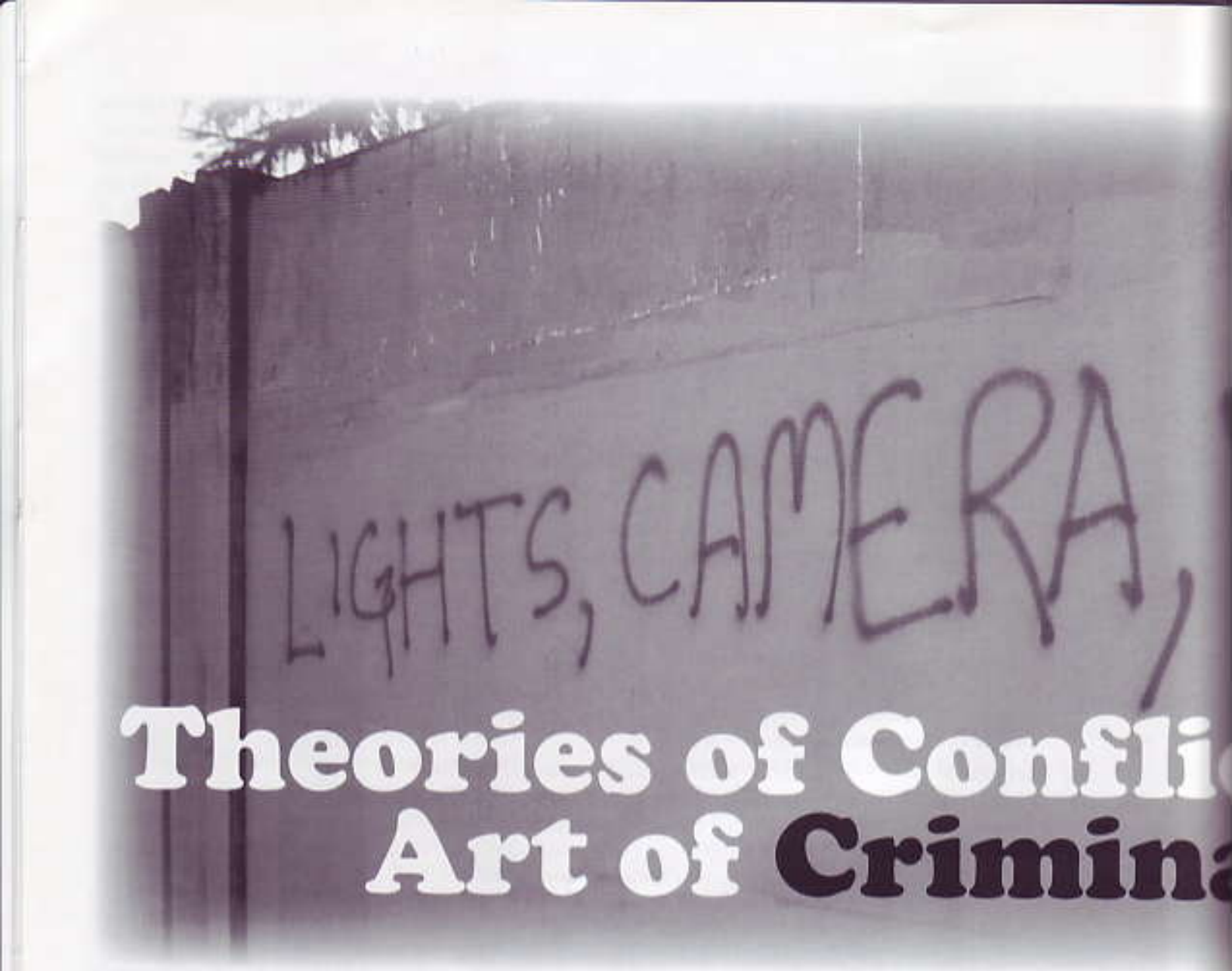

Theories of Confli
Art of Crimina

... litigation, which so closely resembles war ...

Clausewitz

When I was handed a new bar card, I thought the highest, indeed almost the only, function of the criminal defense lawyer was to try cases. More accurately, to engage the Crown in pitched battles in courtrooms where witnesses were lined up and fired on cue, like artillery-pieces. When the smoke cleared, I (and my client) would be left standing, or so I thought. All else was peripheral at best. This was my conception of the only proper role for the defense lawyer.[1] Nothing in my legal education prepared me to either confirm or dispel this notion.

Despite centuries of experience with the transparently adversarial Anglo-American system of justice, there is a paucity of theory to guide those who would try cases.[2] That this lacuna goes unrecognized does not make it any less so. This essay argues that great military thinkers articulate theories of conflict that contain vital lessons for the trial lawyer.

A general theory of conflict should discover the fundamental rules that govern any type of competitive enterprise, including litigation. Let's see what some thinkers, ancient and modern, have to say.

ct and the al Defense

by Joseph W. Varela

I. Clausewitz's Theory of the Battle

Carl von Clausewitz (1780-1831) was a Prussian nobleman who fought in the Napoleonic wars. His most important work, *On War*,[3] remains the Western world's most-studied treatise on conflict. Its influence extends beyond the Western nations, and beyond the military profession.[4] We might see what advice he offers the trial lawyer.

Clausewitz is regarded with some reason as the prophet and advocate of total war.[5] Clausewitz defines war as an "act of force to compel our enemy to do our will."[6] The proper aim of warfare is nothing less than the "destruction of the enemy's forces," which means that those forces are to be "put in such a condition that they can no longer carry on the fight."[7] If this is the proper aim of warfare, Clausewitz holds that the only allowable means is combat.[8] And disputes are to be decided, not by maneuvering and skirmishing, not by feints, but by the battle.

The battle is the sine qua non of the decision. Let's listen to Clausewitz:

> What is the battle? It is a struggle by the main force . . . it is a struggle for real victory, waged with all available strength.[9]
>
> [S]ince the essence of war is fighting, and since the battle is the fight of the main force, the battle must always be considered as the true center of gravity (schwerpunkt) of the war.[10]
>
> [T]he very concept of war will permit us to make the following unequivocal statements:
>
> 1. Destruction of the enemy forces is the overriding principle of war, and, so far as positive action is concerned, the principal way to achieve our object.
>
> 2. Such destruction of forces can usually be accomplished only by fighting.
>
> 3. Only major engagements involving all forces lead to major success.
>
> 4. The greatest successes are obtained where all engagements coalesce into one great battle.[11]

(Emphasis in original). It is clear that Clausewitz envisions conflict as the meeting of the main forces of the opponents in decisive battles. He plainly advises that the "decisive point" must be identified, and the main strength of the attack be concentrated there.[12] Although Clausewitz does allow that at times, a demonstration of willingness and ability to fight a battle can accomplish an objective, e.g. to cause the enemy to abandon a position,[13] and that possible engagements sometimes have to be taken as seriously by the enemy as real ones,[14] he sternly rejects surprise[15] and deception[16] as legitimate means of waging war.

Clausewitz does not disdain to use such tactics out of a sense of honor or fair play; it is rather that conflict is simply unimaginable without battle and slaughter:

> Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine that this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed ...[17]
>
> We are not interested in generals who win victories without bloodshed.[18]

Although Clausewitz himself notes the similarity of warfare to litigation,[19] he has no patience for some of the tactics recognized by the experienced trial lawyer, such as surprise and deception.[20]

Close reading of On War also gives the strong impression that Clausewitz would not approve of our pleading a case. He of all people would advise the beginning lawyer to prepare assiduously for trial, marshal all available resources, and then charge straight up the courthouse steps, to engage in all-consuming courtroom battles in which the goal is "destruction of the enemy's forces" in head-on collisions.

Pick a jury, slug it out with the prosecutor and may the best man win. Most prosecutors think like Clausewitz, and try their cases accordingly. Should defense lawyers?

II. Sun Tzu: Maneuver and Deception

Sun Tzu was a Chinese general and military thinker who is generally thought to have lived in the fifth century B.C.[21] His The Art of War [22] was written as a guide to Chinese military leaders. It has been read in East Asia since it was written, and has been available in Russian for centuries, but only in 1905 was it translated into English. As is the case with Clausewitz, it is also widely applied in areas removed from military matters.[23]

Sun Tzu differs sharply from Clausewitz in his prescription of the means of conflict:

> [T]o gain a hundred victories in a hundred battles is not the highest excellence;
>
> To subjugate the enemy's army without doing battle is the highest of excellence.[24]

But he is no shrinking violet when fighting must be done;[25] most of The Art of War and in particular Chapter VII ("Armed Struggle") is about preparations for and conduct of battle. He treats battle as only one of many options to be employed in conflict, indeed, as a last resort rather than as invariably necessary to resolve conflict. Not only do the two thinkers disagree on the necessity of battle; they also differ on where the battle is to be fought. Clausewitz requires that the commander concentrate all his forces where the enemy is the strongest, in order to provoke a decisive battle. Sun Tzu would have us do the opposite.

> To be certain to take what you attack, attack where the enemy cannot defend.
> To be certain of safety when defending, defend where the enemy cannot attack.[26]

He is telling trial lawyers to focus on the weak points of the prosecution's case, not necessarily the strong ones. If the witness' identification is strong, focus on his credibility. If you can't attack the search, attack the factors of possession.[27] If the evidence of guilt is overwhelming, work on punishment issues. If you don't have an expert, use the prosecutor's expert to help you.

There is no "damn-the-torpedoes" headlong rush to victory. Sun Tzu instructs us that we must first concentrate on defense, i.e., make ourselves invulnerable to attack, before ourselves attacking:

> In ancient times, those skilled in warfare made themselves invincible and then waited for the enemy to become vulnerable ...
>
> Those skilled in defense hide themselves in the most secret recesses of the Earth;
>
> Those skilled in attack flash forth from the highest reaches of the Heavens ...
>
> Therefore, they are able to protect themselves and achieve complete victory.[28]

Never does he advise engaging in tactics other than battle out of a position of weakness, nor does he suggest that deception can substitute for preparation. The emphasis is always on first limiting your own vulnerability, and then exploiting the opponent's.

In yet another area germane to the trial lawyer, that of the role of stratagem, surprise and deception, Sun Tzu strongly disagrees with Clausewitz. Recall that the Prussian rejected the use of deception, not out of any sense of honor or fair play, but because he could not imagine it contributing to victory. But for Sun Tzu, secrecy and the ability to dissemble are virtues; deception is not merely a useful stratagem; conflict is deception:

> Warfare is the Way of deception.
>
> Therefore, if able, appear unable; if active, appear not active; if near, appear far; if far, appear near.
>
> If they have advantage, entice them; if they are confused, take them; if they are substantial, prepare for them; if they are strong, avoid them; if they are angry, disturb them.[29]

It is safe to say that were Sun Tzu a defense lawyer, he would not approve of the passage of any reciprocal discovery statute. Pervading the entire work are the value of secrecy and the worth of dissembling. In practical terms, for the trial lawyer this means not letting the prosecution know any more about our case than we have to. A prosecutor who knows nothing about our defense knows neither where to attack our case, nor how to make his case safe from attack.

> The place of battle must not be made known to the enemy.
>
> If it is not known, then the enemy must prepare to defend many places.

> If he prepares to defend many places, then the forces will be few in number.
>
> Therefore, if he prepares to defend the front, the back will be weak.
>
> If he prepares to defend the back, the front will be weak.
>
> If he prepares to defend the left, the right will be weak.
>
> If he prepares to defend the right, the left will be weak.
>
> If he prepares to defend everywhere, everywhere will be weak.[30]

Substitute "the prosecutor" for "the enemy" in the above passage, and see how relevant it is to our practice. If we give away our defense(s), either by loose lips or as required by any applicable discovery rules, we will always lose this advantage. The prosecutor who knows nothing about our intended defense can be kept off balance.

To try a case or plead it? Sun Tzu would have no problem with pleading a case that should be pled:

> One who knows when he can fight, and when he cannot fight, will be victorious.[31]

His definition of "victory" is obviously situational and is correspondingly less rigid than is that of Clausewitz, for whom, as we have seen, victory in each conflict is not less than "destruction of the enemy's forces."

An important distinction must be made here. Sun Tzu is not saying that one must know when he will win, and then fight; and when he will lose, and then surrender. We do not always have to choose between battle and capitulation. One can know when not to fight and still be victorious. To put it another way, Sun Tzu is telling us that there is also victory in knowing when not to take a case to trial. And which experienced defense lawyer would disagree? Sometimes pleading a case for 20 years imprisonment is a victory— but only if done by one who "knows when he can fight, and when he cannot fight."

Sun Tzu is telling the trial lawyer that victory can be achieved, many times and in many different ways, without a courtroom battle. Indeed, by his rules, the greatest victories are achieved outside the courtroom:

> True excellence is to plan secretly, to move surreptitiously, to foil the enemy's intentions and balk his schemes, so that at last the day may be won without shedding a drop of blood.[32]

Suppress evidence, discover an informant's identity, make a presentation to a grand jury, dig up a witness' criminal record. The experienced lawyer knows that dismissals so obtained are greater victories than acquittals after trials. Trial lawyers like to try cases, but our clients prefer not to be tried at all.

Keep your client out of court. Win without fighting the Clausewitzian battle if you can. "To subjugate the prosecutor without doing battle is the highest of excellence." That's Sun Tzu's advice.

III. Musashi and the Mind of the Opponent

Miyamoto Musashi (1584 -1645) was the great Japanese wandering Samurai and master of Kenjutsu. His *Book of Five Rings*[33] is primarily a treatise on swordsmanship, but it has been reprinted in various languages and is studied as a general approach to conflict. One of his principles in particular has relevance for the trial lawyer.

Musashi held that:

> "To become the enemy" means to think yourself into the enemy's position.[34]

Musashi wants us to perform a kind of thought experiment.

To prepare to fight the prosecutor in court, the lawyer should ask himself, "How would I try this case if I were the prosecutor?" Sit down and do some hard thinking: "become the prosecutor." Imagine yourself as the opposing lawyer, going through each element of the case and each witness. Write the prosecutor's opening statement in your mind. What is the prosecutor's theory of guilt? What will he ask each witness to prove? How will he lay the evidentiary foundations? How will he meet your objections? Defense lawyers that have former careers as prosecutors may have an advantage here, but any lawyer with experience can, given some thought, put himself in the place of his opponent and anticipate his moves. This will confer an advantage when the trial is underway.

IV. John Boyd's Time-Based Theory of Conflict

America's most influential military thinker[35] was an Air Force colonel, John Boyd (1927-1997). As a fighter pilot in Korea, he noticed that while the Soviet MiG-15 was superior to the very similar American F-86 in acceleration, climbing, altitude and turning radius, the latter consistently outfought the MiG. Some of this difference could be explained by pilot training and experience, but Boyd suspected material causes as well.

Boyd applied the laws of thermodynamics to the problem and

wrote equations that, for the first time, made the way aircraft were designed and flown a quantitative science. This he called the "Energy-Maneuverability Theory" of aircraft performance. His most fundamental discovery indicated that while the MiG-15 appeared better in the ways that traditionally measured the performance of fighting aircraft, the F-86 could change its direction quicker than the MiG. In other words, the F-86 pilot could act and react quicker than his adversary, giving him a decisive advantage in combat. The lesson Boyd discerned was that all else being equal, the pilot with the more maneuverable aircraft would live to fight another day.

Boyd expanded his discovery into a general theory and prepared an oral briefing for military officers called "Patterns of Conflict."[36] The heart of the briefing was his articulation of the now-famous "OODA Loop": Observe, Orient, Decide, Act. This idea was the first explicit recognition in the history of military thought that time itself was central to conflict. More precisely, Boyd showed that conflict is a struggle to control the tempo of battle. Who can more quickly observe the situation, orient himself, decide what to do, and take timely action, disorients his opponent and wins. Boyd saw that maneuverability was as important to great armies in the field as it was to individual dueling pilots.[37] This time-based theory of conflict was adopted by Army and Marine Corps tacticians, and directed the disposition of coalition forces in both Iraq wars.[38]

Boyd's theory has been applied on the battlefield and in business,[39] but I am most interested in its application for the defense lawyer.

It seems to me that we are frequently guilty of letting the prosecution dictate the pace of a criminal case. Think of the typical situation. By the time we make our first appearance in court, the prosecutor has prepared a file in which there is an offense report and, frequently, witness statements. The police report itself represents an investigation in which witnesses have been interviewed and their statements filtered by Government agents. Our new client may have already been interviewed and his statement recorded. A search may have been conducted and incriminating records or tangible items seized. Some of these items may have already been sent to Government labs for analysis. There is a list of the client's prior convictions. There may already be publicity which has broadcast only the prosecution's version of events. In contrast, the defense lawyer will usually have had no opportunity to do any work by the first setting, and is in the unenviable position of being, in Boyd's terms, behind the prosecutor's OODA Loop.

A lawyer unversed in conflict theory may succumb to the temptation to "reset the case and see if the offer gets better." And when he arrives at the arraignment setting having done nothing in the interim, the prosecutor has discovered his client's out-of-state criminal record, or has found more victims, or has dug up extraneouses, or has otherwise compounded the defendant's problems. There is every reason for the offer to get worse.

How would Col. Boyd advise us? He would tell us to "get inside the prosecution's OODA Loop."

There is often some advantage to be gained from putting in considerable effort early in the case. Prosecutors seem to be used to the feeling of being ahead of the defense in time, and any indication that they are falling behind upsets them. They become disconcerted when it dawns on them that the defense knows more about one of their witnesses than they do, or when some legal research shows they have an admissibility problem they haven't yet considered, or when the defense otherwise demonstrates that it is pulling ahead.

We can investigate the prosecutor's witnesses before they even know who ours are, or even whether we have witnesses. A prosaic enough example is one that I observed years ago: A burglary was committed in which there was only one eyewitness, who was not the homeowner. The witness made a positive identification because he knew the defendant from the neighborhood. (There was no other evidence such as recovered property or a confession.) The name and date of birth of the witness were in the offense report. The defense lawyer quickly investigated the witness' criminal record, discovered three trips to the pen for admissible crimes,[40] and subpoenaed the pen packets from TDCJ. By the next setting, the defense lawyer was able to lay the witness' three pen packets on the table next to the State's file. The offer went down.

If you have a search or arrest warrant that is vulnerable, why not file a motion to suppress and a memorandum as early as possible? Although you are giving advance notice of your defense, the State can't patch things up, because the inquiry is limited to the four corners of the warrant or affidavit.[41] They may cut their offer or even dismiss the case.

Go to the scene and get photos early. Prosecutors do this on the eve of trial, if at all. Sometimes your investigation will yield evidence that contradicts the prosecutor's witnesses, but in any event, you are demonstrating that you are working the case harder than the prosecutor. As Boyd would say, you are getting inside his OODA loop.

V. Conclusion

Traditional legal education in America, even in courses where litigation skills are stressed, fails to equip lawyers with the theoretical tools to consider litigation as a specialized case of conflict. Texts on warfare by great military thinkers offer general theories of conflict to guide action in any competitive field of endeavor. These works can be profitably meditated upon by trial lawyers seeking guidance in solving the problems presented by litigation.

NOTE: This article first appeared in The Defender, a publication of the Harris County Criminal Lawyers Association, in December 2005. Reprinted with permission from the Harris County Criminal Lawyers Association.

endnotes

1 I'd lay money it was yours, too, when you started practicing. Certainly it is the image offered by popular books, films and television.

2 One possible exception is Francis Wellman's *The Art of Cross-Examination* (1905).

3 Vom Kriege (1832), published posthumously. See also Clausewitz, *Principles of War* (1812).

4 Numerous translations and interpretations exist. See, e.g., von Ghyczy, Tiha, Christopher Bassford, and Bolko von Oetinger, *Clausewitz on Strategy: Inspiration and Insight from a Master Strategist* (Wiley, 2001). Also, Mr. Jack Welch of General Electric has quoted Clausewitz as an inspiration in interviews.

5 Clausewitz was doubtless influenced by the effects of the new industrialization on war. He was even more influenced by seeing firsthand post-revolutionary France at war. This was the first instance in modern European history of a nation totally committed to a nationalistic war, and it shocked aristocratic military practitioners. Clausewitz witnessed the French humiliation of the proud Prussian military tradition, and was himself captured.

6 *On War*, Book I, Chapter i.

7 I, ii.

8 *Id.*

9 IV, ix.

10 *Id*

11 IV, xi. Dozens of similar statements permeate the entire work.

12 III, xi.

13 I, ii.

14 III, i.

15 III, ix.

16 III, x.

17 I, i.

18 IV, xi.

19 VI, i.

20 In this discussion I do not, by referring to such concepts as "surprise" and "deception," contemplate or advocate the use of unethical or illegal means. I instead refer to legitimate tactical decisions that trial lawyers are required to make on behalf of their clients.

21 He is therefore a contemporary of the founding of the Roman Republic, the Greek wars against Persia, and the lives of Confucius and Buddha. As he was writing, Malachi was writing in Judah.

22 *Ping-Fa* (c. 500 B.C.).

23 On a recent trip to a large bookstore, I noted no fewer than 11 separate editions for sale. There are also a number of applications in business. See, e.g., Krause, Donald, *The Art of War for Executives* (Perigee Trade, 1995).

24 *The Art of War*, Chapter III.

25 And neither am I. Readers of this essay may conclude that it is an apology for pleading clients guilty or dodging trials. On the contrary, it is an application of conflict theory to trials, and to alternatives to trials. If you must try a case, and many times you must, by all means try it, but try it according to Sun Tzu's rules.

26 VI.

27 See, e.g., *Chavez v. State*, 769 S.W.2d 284 (Tex.App. — Houston [1st Dist.] 1989, pet refd.); *Menchaca v. State*, 901 S.W.2d 640 (Tex.App. — El Paso 1995, pet. ref'd); *United States v. Ortega-Reyna*, 148 F.3d 540 (5th Cir. 1995).

28 IV. There is a parallel here with Clausewitz, who always discusses defense before moving on to attack in On War. But Sun Tzu expresses the concept as an integral part of his theory.

2 I. See also V.

30 VI. *Accord*, Alfred Thayer Mahan, *The Influence of Sea Power Upon History*, 1660-1783 (1890), Chapter XI, especially n. 10.

31 III.

32 IV.

33 *Go Rin No Sho* (1645). It was written a few weeks before Musashi's death. It is sometimes translated as "Book of the Five Elements."

34 Book of Five Rings, "The Fire Book."

35 In so saying I do not neglect Commander Alfred Thayer Mahan, USN, the "pen and ink sailor" whose books and articles revolutionized the world's navies.

36 Unfortunately Boyd never sat down to write a book of principles, as did Sun Tzu, Musashi and Clausewitz. What is known about his thinking comes from a distillation of his oral briefings, products of his design theories, unpublished papers, and the recollections of his colleagues.

37 Sun Tzu knew this 2,500 years ago. See *The Art of War*, Chapter VI at end.

38 Boyd contributed much more than this. At various times in his career, he was America's greatest fighter pilot, premier air combat instructor, designer of its most effective aircraft, most penetrating military strategist, and sharpest thorn in the side of the Pentagon. He also contributed to epistemology (*Destruction and Creation* (1976)). See generally, Coram, Robert, *Boyd: The Fighter Pilot Who Changed the Art of War*. New York: Little, Brown, 2002.

39 See Richards, Chet. *Certain To Win: The Strategy Of John Boyd, Applied To Business*. Philadelphia: Xlibris Corporation, 2004.

40 See *Theus v. State*, 845 S.W.2d 874 (Tex.Crim.App. 1992).

41 *Jones v. State*, 833 S.W.2d 118 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 678 (1993); *Hankins v. State*, 132 S.W.3d 380 (Tex.Crim.App. 2004).

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