THE THIRTY-SEVENTH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

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Thank you, Colonel Brookhart, for that introduction and for allowing me to join you today for this lecture. I, too, would like to recognize

* This is an edited transcript of a lecture delivered on 25 March 2009 by Mr. Daniel J. Dell'Orto, Senior Vice President, General Counsel, and Secretary of AM General LLC, to members of the staff and faculty, distinguished guests, and officers attending the 57th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

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Military awards include the Defense Distinguished Service Medal, the Legion of Merit (two awards), the Meritorious Service Medal (four awards), the Joint Service Commendation Medal, the Army Commendation Medal, and the Army Achievement Medal. In 1985, the American Bar Association honored him as the Outstanding Young Military Lawyer of the Army. Civilian awards include the Department of Defense Medal for Distinguished Public Service (two awards), the Secretary of Defense Medal for Exceptional Public Service, and the Department of the Air Force Decoration for Exceptional Civilian Service.

Mr. Dell'Orto is a member of the Bar of the State of New York and has been admitted to practice before the Supreme Court of the United States, the United States Tax Court, the United States Court of Appeals for the Armed Forces, and the United States Army Court of Criminal Appeals.

many distinguished guests in this audience but also friends in this audience, people I've served with over the years, both on active duty and since I retired from active duty to become a civilian employee of the Department of Defense.

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Major General Hodson participated in the ROTC Program and was commissioned initially as a coastal artillery officer during World War II, or shortly before World War II. He was called to active duty in May of 1941, and he served as a Judge Advocate in the European Theater in World War II; and as you've heard, he was The Judge Advocate General of the Army from 1967 to 1971, and he served as the first Chief Judge of what was then called the Army Court of Military Review, more recently the Army Court of Criminal Appeals. He was not only someone who had an outstanding career as a Judge Advocate, he was one of the principal architects of the United States military justice system and his leadership molded the United States Army Judge Advocate General's Corps into the institution it is today through some very critical and momentous years in the '50s and '60s. It is an honor to present this lecture because I, like some of you, attended the Hodson Lecture while a student in the Grad Course, in particular as a member of the 31st Graduate Course, more infamously known as "the wurst of the 31st," that's w-u-r-s-t, because the year that we graduated a significant bulk of us went on to Europe, ergo "the wurst."

Now most often the person who presents this lecture is a distinguished professor or jurist. In honor of General Hodson's contributions in the field of military justice, that person will present an academic argument on an interesting, developing criminal law topic, but one should not infer from such a presentation that Major General Hodson's accomplishments were limited to jurisprudence. Rather it is important to acknowledge how he shaped the role Judge Advocates play in the Armed Forces. For example, when Major General Nardotti gave this lecture in 1995, which I believe was the year of General Hodson's death, he told the story about General Hodson serving as a major in the 52d Medium Port Facility in New York City for a few months before deploying to the European Theatre in World War II. As General Nardotti indicated, at the 52d Medium Port, however, not all aspects of the operation were running smoothly. When the command examined the situation, they discovered that they did not have a standing operating procedure, an SOP. General Hodson, at this time a major, decided to do

something about the problem and he wrote an SOP, which was contrary to the contemporary thinking that people in the JAG Corps should not be involved in fixing a problem unless it was 100% legal. He saw it differently. There was a need and a Judge Advocate had the ability to solve the problem. It did not matter that it was a nonlegal problem. This is an interesting philosophy that reinforces what we as a Corps have said over the years, as General Nardotti concluded.

It is evident that General Hodson stuck to this philosophy throughout his career. If you read General Nardotti's account of General Hodson's career, you can see it when General Hodson worked with Congress on the Military Justice Act of 1968 and when he advised the Secretary of the Army on the My Lai Massacre. General Hodson's leadership and advice shaped the role Judge Advocates now play in the Army, and it is indeed in honor of those contributions that I offer these remarks today.

Today, I'd like to offer a few reflections on my experience and some thoughts on the duties of the government lawyer advising policymakers. I've just completed a thirty-seven-plus year career in government, with thirty years as a government lawyer in the Executive Branch. For the past nine, I've served as the Principal Deputy General Counsel of the Department of Defense with two stints as the Acting General Counsel, totaling almost one and a half years. It is a little difficult to explain to a layperson what exactly the General Counsel of the Department of Defense is or what the General Counsel's deputies do. A layperson's experience with lawyers is usually limited to watching lawyers on television, and that's if they're lucky. *Perry Mason*, *L.A. Law*, *Boston Legal*, *Law and Order*, *The Practice*, *Judge Judy*—these shows feature prosecutors, defense counsel, generally civil litigators, and judges, and on occasion, Judge Advocates. Fortunately or unfortunately, they haven't yet made a show about DoD lawyers, both uniformed and civilian, advising policymakers except insofar as the *E Ring* had a character in my former role during its brief run, who happened to be a female, who was far more attractive than I. Now if they did, you could call it *OGC*, and that has a nice ring to it, and I think it sounds at least as interesting as *CSI*, but it is not obvious what OGC does. I can tell you when I went up to interview to be the military assistant in my last active duty assignment, I had virtually no idea what went on in that office. The office has not been around all that long in our nation's history. It's not generally a public place that people come and visit, and it's not dramatized on TV. I have often thought, however, particularly recently, that were it not for the classification level and sensitivity of what is

accomplished each and every day by the attorneys in the Office of the DoD General Counsel, a filming of what occurs in that office on any given workday would be of extreme interest to any lawyer.

Now the role of the Office of General Counsel is to give advice, and it is somewhere in between advocating and judging and not dissimilar to what takes place in the Staff Judge Advocate's Office. On the one hand, there are situations in which the advisor advocates. In negotiations with other departments and agencies, in negotiations with counterparts from other countries, the DoD lawyer has to muster the best arguments supporting the department's and the administration's policies and ensure that the interests of the department and the millions who serve in it are represented. As one British diplomat put it, describing his efforts during World War I, the Navy acted and the Foreign Office had to find the argument to support the action. It was anxious work. On the other hand, there are situations where the advisor judges, like an umpire calling balls and strikes. Policymakers circulate potential policies for clearance and coordination. When a potential course of action would contravene a law, it is the job of the lawyer to nonconcur, or as they say in another variant of bureaucratese, pose a legal objection. Department of Defense lawyers practice on the spectrum in between these models, and most cases, I believe, do not fit neatly in one mold or the other. A good counselor is neither Mr. Yes nor Dr. No; in fact, to fulfill his duties properly I believe that he must do much more than simply say yes or no. A good lawyer should get involved in the process and advise the client on how best to get to yes early in the client's decision-making process. In most situations, there is some way, some lawful way, for the client to achieve his objective. It may require additional authorization higher up the chain of command; for instance, an exception to policy in the case of constraints in the DoD directive. However, there is rarely a reasonable objective that is unlawful and in such an instance legislation generally would be needed.

The position of the lawyer as an active participant in the process, helping the client get to yes, comes with a requirement for precision; namely, the lawyer must be clear about the nature of his advice. The lawyer has to say what the law requires. He must distinguish his prudential and his legal advice. If the client does not know which advice is given merely as a good idea and which is given as a legal requirement, the client will not know the extent of his freedom of action. In my past life, which ended but two short days ago, I regularly addressed CAPSTONE, otherwise referred to as "The Charm School," the course

that newly appointed general and flag officers attend.[2] Generally, I speak for only a brief portion of the forty-five minutes that I spend with these senior military officers from all of the services and select senior civilian officials. Mostly I entertain their questions on all manner of subjects, much as we will do shortly in this setting, and they have many questions as do the three-stars I address as I participate in the Pinnacle Course that the Commander, JFCOM[3] hosts twice a year in Norfolk, Virginia, for those newly appointed three-stars. But there is one thing I take great care in explaining to them and that is what they have a right to expect from their lawyers. During the past three decades, all of the JAG Corps, the Corps of all the services, have done a great job in promoting the notion that lawyers bring value to the table in many ways. I know that throughout my time as an Army JAG, successive TJAGs[4] emphasized our dual roles as lawyers and Soldiers, never advocating that we compromise the former but always challenging us to embrace the latter. And successive generations of Judge Advocates have followed that lead to the point that all of you from all of the services have become virtually indispensable to commanders at all levels of command. And therein lies my concern for all of us who practice law at any level within DoD, and it is this concern that I have expressed not only to your general and flag officer clients but to the senior officials I have advised and to the legal community, whether it be the senior lawyers I have supervised within DoD, including Defense Agency lawyers, or The Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant and the General Counsels of the Military Departments and the Counsel to the Commandant.

As a starting point for a discussion that I hope we can pick up during the question-and-answer session, please ask yourself: Who within any of your organizations, or our organizations, has the broad view of the organization, its problems, and its challenges? Certainly the commander does, and in my recent case, the Secretary of Defense. In many large organizations, but not all, the deputy commander or deputy executive or executive officer does. If your organization has a public affairs official, he or she probably has such a perspective as would the head of the organization's legislative affairs shop, if you have one. Now consider

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[2] *See generally* Welcome to CAPSTONE, http://www.ndu.edu/CAPSTONE/ (last visited May 6, 2009) (explaining the purpose, history, and curriculum of the course).
[3] Joint Forces Command.
[4] The Judge Advocate General of each branch of the U.S. Armed Forces.

the remainder of the staff, whether the S1, G1, J1,[5] or in OSD's case, the Undersecretary for Personnel and Readiness or that official's military department's equivalent on the Secretary's or the Chief's staff or any of the functional heads of the intel[ligence], operations, or logistics staff. All of them focus almost exclusively on their functional areas of responsibility and therefore only a slice, however important that slice might be, of the overall total organization.

But not the attorneys. At all levels and in all organizations you either have a finger in every functional slice of the pie or you are observing it pretty closely. Indeed, as with the organizational leader, you have what a former boss of mine called a 360-degree view of the organization. Thus you have a great perch from which to observe and formulate the advice you will provide your client. That client knows this, and unless your personalities are clashing or he or she is generally unfriendly to lawyers, that client will seek you out for the full range of your advice, both legal and nonlegal, or otherwise called policy. And we've encouraged that.

So what do I mean by that? Well those of you who have been prosecutors, defense counsel, or trial judges, or appellate counsel or appellate judges, can recall instances usually involving defense counsel arguments in which counsel makes a very cogent, rational argument for why a particular result should obtain and yet the judge, perhaps after the prosecutor's objection, will respond to counsel's argument words to the effect of, "Well, Captain Joe Bag of Doughnuts, that is an excellent argument, but it is your idea of what the policy should be, not what the law is." It is this tendency I see too often in lawyers in government and DoD practice today when a client seeks legal advice on a proposed course of action and the lawyer responds with, "You shouldn't do that." What the client has heard is, "I can't do that," whatever "that" is. Thereafter, the client goes to his boss and says, "My lawyer told me I can't do that." Now at that point the boss may pick up the phone and call his or her lawyer, who in our system often is the technical supervisor of the lawyer who gave the advice, and ask that superior lawyer for his view on the issue; and at that point the more senior attorney may respond with, "Well I don't believe that there is a legal prohibition against doing what your subordinate proposes, but I do believe it would not be a wise thing to do for the following reason." Now pick one or more. If a media outlet

[5] The S1, G1, and J1 staff handle personnel issues. *See* U.S. DEP'T OF ARMY, FIELD MANUAL (FM) 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

learns of this decision, you'll see it in tomorrow's paper cast in a very unflattering light, on tonight's news, or on a Web site by the time you sit back down. Your boss won't like it. It would not be in line with the administration's view on this. Congressman So-and-So will complain and so on and so forth.

And therein is the rub. I have no problem with a commander asking a lawyer what he thinks about an issue, but you as a lawyer have to be careful enough, you have to be diligent enough, and you have to be precise enough to answer the question in two parts. The first part should be your express view of whether the law permits or prohibits what the commander proposes to do, and the second part should be your opinion about all of the policy and other implications of what is proposed if the commander is indeed seeking that opinion from you, as well he might. In my view your first responsibility is to draw the box that reflects your interpretation of what the law permits. If the commander operates inside that box, he is operating within the bounds of the law; outside the box and we are in a legally prohibited area based upon your interpretation of the law. In some instances the box will be quite large, offering the commander great latitude; and in others, it will be rather small and constrain him to a significant degree. In still others, the lines that define the boundaries of that box may be fuzzy, and that is okay, too. As long as you draw that box based on what you believe the Constitution, our statutes, our executive orders, our regulations, et cetera, say, then you are doing your job; but when you fail to make the distinction between the legal and nonlegal analysis, you are failing your client and usurping your client's authority. Remember, whether your boss or your client is a presidentially appointed, Senate-confirmed, senior DoD official or a military officer appointed to command by proper authority, he or she is the one entrusted with the responsibility to command or to make decisions based upon his statutory or delegated authority. You or I as a lawyer were not provided with that authority.

Now all of what I have said is in the abstract, so let's apply it in practice to what I believe are some of the most consequential decisions of the last nine years. On 11 September 2001, I started the day thinking about antitrust law. General Dynamics and Northrup Grumman were bidding for Newport News Shipbuilding, the nation's only nuclear aircraft career builder. I was preparing for a meeting with lawyers and corporate executives to discuss the antitrust issues raised by a potential merger, and I was preparing for that meeting when the news broke about a small plane crashing into the World Trade Center. I was curious. I

grew up in New York. I remember seeing the foundations laid for the Twin Towers. When I saw the footage of the smoking tower, I remember being puzzled that a small plane could cause so much smoke and so large a hole in the building. Then I saw the live footage of the second airplane hitting the second tower. At first I thought that was the news station playing back video of the first plane's impact. When I realized it was a second plane, I knew immediately that this could not be an accident. I knew our country was at war. I canceled my meeting, and I was walking back to my office when the plane hit the Pentagon. I may have been the only person in the Pentagon who did not feel it or hear it. I got back to my office and found out that the Pentagon had been hit. I went into the command center to support Secretary Rumsfeld and General Myers, who was then the Vice Chairman of the Joint Chiefs; General Shelton, the Chairman, was out of the country at the time. The halls were filling with smoke. Smoke also started to fill the National Military Command Center and we were uncertain about whether we could stay and work at the Pentagon, both because the building was on fire and because we didn't know if more attacks were coming.

Secretary Rumsfeld decided that some of us would go to an alternate command site, and I was to go with Deputy Secretary Wolfowitz and others. As we got into our helicopter, lifted off, and flew from the Pentagon over downtown Washington, I remember noticing that it was a beautiful day, perfect early fall weather, and much to my pleasant surprise, contrary to other reports of bombings in Washington, including at the State Department, there was no other smoke rising from the city. At the other command site, we monitored news reports, participated in video teleconferences, and braced for more attacks, which thankfully did not come. We flew back around nine o'clock that night. There were six fires still burning at the Pentagon as we circled the building and landed close to the crash site. I left at two in the morning, went home, and that was my day on 11 September 2001.

September 11th has been called a black swan: an unexpected event with a high impact that fundamentally changes how people think. Pundits chide their opponents with talk of a pre-11 September mindset. September 11th was a fulcrum upon which our nation's thoughts and actions turned. It was the day our country realized that we were at war. Attorney General Holder put it this way in his recent confirmation hearing more than seven years after the events of that day, and I quote, I don't think there's any question but that we are at war, and I think to be honest, I think our nation didn't realize that we were at war when, in fact,

we were. When I look back at the '90s and the embassy bombings, the bombing of the *Cole*, I think we as a nation should have realized that at that point we were at war. We should not have waited until 11 September of 2001 to make that determination, end of quote. Now what is the role of the government lawyer advising on this decision? My first point is that the decision to wage war against al Qaeda was well precedented in state practice in the law of war; and although certainly there are aspects of the war against al Qaeda that are novel, many aspects of this current struggle have precedent in state practice and international law. Take, for example, the core concept war against non-state actors. The United States has a history of using military force against non-state actors. During the Civil War, the Union did not recognize the Confederacy as a state. The Confederate Army was considered a non-state actor and we waged war against it. The U.S. Army fought against bands of Native Americans, which also were not considered sovereign nations. President Wilson ordered thousands of U.S. troops against Poncho Villa after his raid on Columbus, New Mexico, in 1916. More recently, harking back to the Attorney General's remarks, President Clinton ordered cruise missile strikes against al Qaeda facilities in the Sudan and Afghanistan in 1998, after the attacks against our embassies in Kenya and Tanzania.

Another idea which has long been contemplated in state practice in the law of armed conflict is the problem of an enemy who does not wear uniforms and attempts to disguise himself as a civilian. Traditionally, these sorts of persons have been known as unprivileged belligerents and their situation has been considered since the very foundation of the modern law of war. Francis Lieber is regarded as the founder of the law of war because of his efforts during the Civil War in drafting General Order Number 1, later known as the Lieber Code. However, before he was asked to do this, Lieber was asked by Major General Halleck to opine on the matter of guerrilla warfare. General Halleck presented the following question: "The rebel authorities claim the right to send men, in the garb of peaceful civilians, to waylay and attack our troops, to burn bridges and houses, and 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." Lieber discussed the many colorful names by which this type of fighter was known at the time: the freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, the armed prowler, and the so-called bushwhacker. They used colorful language back then. The law of war

has progressed greatly since Lieber's Code; however, the idea that those who follow the rules of war and attempt to distinguish themselves from noncombatants should receive privileges if captured and those who do not should not has been a fundamental principle of the law of war. This issue later arose in the United States' objection to the ratification of Additional Protocol I to the 1949 Geneva Conventions. President Reagan opposed ratification of Protocol I on the grounds that it improperly conferred privileges and lawful combatant status upon terrorist groups.

Interestingly, both the *New York Times* and the *Washington Post* published editorials at the time supporting the President's rationale that we must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law. In an editorial titled, "Denied: A Shield for Terrorists," the *New York Times* praised President Reagan's decision not to submit Protocol I to the Senate because it would legitimize terrorism. The *Washington Post* also supported President Reagan's decision in an editorial titled, "Hijacking the Geneva Conventions," and it stated worst of all was the impact of the new rules on the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations. The changes granted status as combatants and, when captured, as prisoners of war to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants; in brief, to those whom the world knows as terrorists.

Another aspect of the armed conflict with al Qaeda that has precedent in international law is the issue of the use of force against non-state actors in the territory of another state. This is precisely the case of the destruction of the *Caroline* in 1837. International law scholars have considered Daniel Webster's exchange of letters with Lord Ashburton regarding the *Caroline* as the quintessential formulation for the use of force in anticipatory self-defense. Less remembered is the fact that the *Caroline* involved the use of force by a state against non-state actors based in another state. Insurgents from a revolution in Canada had sought refuge across the border in the United States. The British crossed the border and destroyed the *Caroline*, a steamship that had been used by the insurgents. The United States protested the violation of its sovereignty and territory and the British claimed that they had acted in lawful self-defense. As states go to war against non-state actors, those non-state actors may seek refuge in the territory of other states. How

states must balance rights of self-defense against rights of territorial inviolability in such cases has long been an issue in international law.

My second point is that going to war against al Qaeda had many legal consequences. Armed conflict is a far more permissive legal framework than peacetime law. Armed conflict allows for targeting with deadly force. It allows for the detention of captured fighters for the duration of hostilities. It allows for interrogation without defense counsel. It allows for spying without warrant. It allows for trial by military commission. These are potent authorities and they should not be used lightly.

My third point is that the legal judgment recognizing that one is in a state of armed conflict with al Qaeda is different from the policy decision to fight that armed conflict. The decision to go to war against al Qaeda was not a legal decision made by Executive Branch lawyers. A legal opinion does not spend blood and treasure. The decision to go to war was a policy decision made by Congress when it recognized in a joint resolution on September 18, 2001 that the United States had suffered an attack and authorized the use of military force, and this policy decision was made by the President as well when he exercised the use of force pursuant to that authorization. The important thing to remember is that just because our nation *may* exercise authorities pursuant to an armed conflict does not mean that we *must* exercise those authorities. This is a separate decision requiring a separate analysis, and most importantly, a matter to be decided by those entrusted and charged with that responsibility under our law.

As I stated only a few days ago during my retirement ceremony at the Pentagon, in the days, months, and years since 9/11 I have thought often about the events of that tragic day. In the immediate aftermath of the attack, I felt a considerable amount of guilt over the fact that the attack had occurred. After all, for almost five full years prior to the attack I had served in either the Office of the DoD General Counsel or the Office of the Air Force General Counsel. I had had the opportunity to read much of the world's daily intelligence reporting in all of my positions in those offices. I was there shortly after the bombing of OPM-SANG[6] and Khobar Towers in Saudi Arabia. I was there for the East Africa bombings and the attack on the U.S.S. *Cole*. I had a sense for the size of the World Trade Center for I had observed, as I said earlier, its

[6] Office of the Program Manager, Saudi Arabian National Guard.

construction in the early 1970s and had noted how deep its foundation extended into the ground. I knew that at 100-plus stories it was close to the height at which many of us have parachuted from military aircraft in airborne training and exercises, and in the days after the attack, I read many of the accounts from survivors of the Twin Towers and watched the videos of the attack, noting that an undetermined number of people in those buildings were faced with a choice, if one can call it a choice, of staying put with fire raging around them or jumping from the seventy-fifth or the eighty-ninth or the hundredth story of those buildings; how some of the bodies of those who made that fateful decision to jump were sliced in two as their fall caused them to impact with street signs; and for several summers thereafter as I participated in an annual, 100-mile, two-day bike ride along the south shore of Long Island with guys I have known for much of my life and stopped in the local eating and drinking establishments we frequent during this very social event, I noticed pictures of people in uniform, and as I looked more closely, I further noticed that they were not pictures of servicemembers but rather pictures of firemen and policemen who died that day attempting to rescue the civilians who were the victims of that attack, and I will not ever forget that.

Much has transpired in the seven-plus years since 9/11, and I commend all of you for the work you have done in helping sort through the tough legal issues with which we wrestle every day in support of those making the decisions about how we will conduct the war against those who planned and perpetrated that attack and those providing substantial support to those who planned and perpetrated that attack or who may be planning yet another attack. That we have not suffered a subsequent attack is in no small measure a result of our engaging this enemy on ground far away from our home soil and in a way that keeps him on his heels countering our offensive action and capabilities. Again, it is your dedication to getting to the right legal answer at all levels of our department that has aided your client in taking that fight to the enemy.

Please allow me one last anecdote before I conclude this lecture and take your questions. My first assignment as a Judge Advocate was at Fort Benning, Georgia. During that assignment and several years later during his second assignment to Fort Benning, Colonel (now retired) Earle Lasseter was the Staff Judge Advocate. Only a small number of those who served under Colonel Lasseter ultimately continued our JAG service until retirement, those including Fred Borch, who's in our audience today. Most of our colleagues in the Fort Benning JAG Office,

which recently burned to the ground, elected to move on to the civilian practice of law in firms, corporations, or state and local governments. This past November, principally through the efforts of those who had returned to civilian pursuits, a significant number of us returned to Fort Benning for a weekend reunion, and as you might expect, we had a great time; but the one thing that stood out for me about that weekend is how to a person, man and woman, those once young and novice lawyers, now middle-aged and fairly accomplished, described their Fort Benning JAG experience as the most enjoyable and rewarding part of their legal careers. My concluding point is my wish that for all of you JAGs in the audience today, with all you have done, all the places you have been, and all that you have experienced in your careers, when all is said and done you are able to say that your JAG experience was the most enjoyable and rewarding part of your legal career—wherever that career may take you.