

Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 3 • 2024



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Culture Is EVERYTHING

The Army's #1 focus, *Warfighting*, demands grit, resilience, and demonstrated excellence. To achieve this, our organization requires positive climates and healthy cultures built on trust, candidness, and teamwork.

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Issue 3 • 2024

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Cover: MAJ Alexandra Bearden (standing) converses with members of the 225th Officer Basic Course including 1LT Dylan Gahagan (seated front left), 1LT Karina Barajas (seated back left), 1LT Lloyd Hancock (seated front right), and 1LT Charles Thompson (seated back right) at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Credit: LTC Mary E. Jones)

Back Cover: Echo Company cadre conducts hot weather injury training in preparation for the judge advocate direct commission course. (Credit: CW2 Nathan L. Ramos)

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Then-LTG George Patton instructs troops in Sicily, Italy in 1943. (Source: Library of Congress)

MG Patton: What's the matter, Brad? I've been nominated by the President.

BG Bradley: I know . . . but it doesn't become official until it's approved by the Senate.

MG Patton: Well, they have their schedule and I have mine.⁴

Whether GEN Patton prematurely pinned on his lieutenant general rank is questionable. My assumption is the scriptwriter, Francis Ford Coppola,⁵ inserted this scene to illustrate GEN Patton's driving ambition and to foreshadow his eventual fall from grace. But every time I watch this movie, I wonder what I would have done had I been MG Patton's legal advisor and learned about this.

As an Army captain serving as a judge advocate (JA), I know I would have remained quiet—understandably, given the rank disparity. Even later, as a major JA, I probably still would not have said anything out of fear of losing the general's confidence. With experience as a lieutenant colonel, I gained more courage to speak the uncomfortable truth, but I also recall moments in my career when I awkwardly delivered advice that I knew would draw an adverse reaction from the senior officers I advised.

Some of us who have served as Army JAs or legal advisors may have encountered what I'll refer to as "Patton" moments—instances of largely undetected misconduct by Army officials that come to our attention. How we react in these moments can define our choice to place ethics over the perceived risk to our careers. Most of our careers are characterized by the delivery of mundane yet important legal advice. However, a review of past inspector general investigations illustrates that some of us have experienced, and will experience, pivotal Patton moments.

Effectively delivering difficult and seemingly mundane legal advice is a critical skill requiring some introspection. We all learn how to research and analyze legal and regulatory precepts in law school. However,

Court Is Assembled

Patton and Principled Counsel

By Margaret "Peggy" Baines

Sometimes, moments from a good movie can apply to our own experience, making them that much more unforgettable. One of my favorite movies is *Patton*, a 1970 biographical film about General (GEN) George S. Patton during World War II.¹ GEN Patton was best known for his larger-than-life, quirky personality and his history-making command of the Third Army in 1944. There, he famously led the unit's lightning trek across France, followed by its relief of the surrounded 101st Airborne Division in the Battle of the Bulge.² In one memorable scene, then-Major

General (MG) Patton arrives to take command of the II Corps from his predecessor, who had recently been relieved after the unit's defeat in the Battle of Kasserine Pass. While listening to Brigadier General (BG) Omar N. Bradley's³ description of his impressions of the embattled unit, MG Patton's aides are pinning the three stars of the lieutenant general rank on his collar even though the Senate had not yet approved this promotion. These words are spoken:

[BG Omar Bradley frowns as Patton pins on his new stars]

few law schools teach when and how to effectively deliver this analysis, and even fewer teach when and how to deliver to a military client. Some Army JAs and legal advisors seem to have been born with the ability to effectively deliver legal advice; their clients flock to them for advice on non-legal as well as legal issues. I learned, and continue to learn, this skill the hard way—through personal experience, both good and bad. Is experience the only way to learn this skill? Can't it be taught?

The Army Judge Advocate General's (JAG) Corps labels this skill "Principled Counsel," defined as "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."⁶ In this article, I offer my view on this skill based on my specialization in the ethics field and my years as a JA and then as a legal advisor for the Army. I have found that the delivery of principled counsel is a team sport, a skill to be practiced in collaboration with supervisors, mentors, and peers. These relationships provide the opportunity to learn from another's experiences, carrying the potential to enhance technical competence, effective communication, appropriate candor, and moral courage, all tenets of principled counsel.

The JAG Corps also promotes the delivery of principled counsel as a team sport. For example, one key method that The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, employs to teach principled counsel to new JAs consists of matching them with a mentor from the Graduate Degree Program (GDP), who has typically five to eight years of experience and who is preparing to assume a leadership role upon their return to the field. The two interact during structured small group seminar discussions and ideally outside of the classroom as well. The relationship facilitates principled counsel instruction for the new JAs, who learn from the GDP students' experience, as well as for the GDP students, who learn how to teach principled counsel to junior JAs.⁷ This relationship provides new JAs with an experienced person to consult outside the chain of command without fear of supervisory judgment.

I learned early in my career that the rugged individualism I prided myself on in law school, shrugging off study groups and other collaborative ventures, did not enhance my principled counsel skills and, in fact, had no place in the practice of law in the Army. As a new trial counsel, I was assigned a particularly busy jurisdiction. I coped by spreading myself thin, trying to accomplish everything to some degree. An ensuing court-martial acquittal and speedy trial violation⁸ made it obvious that this approach did not work. A mentor's advice opened my eyes to focus on the most important action facing me, namely the next court-martial, and to delegate actions of lesser importance (such as chapter actions and non-judicial punishments) to paralegals, ask fellow trial counsel with quieter jurisdictions for assistance, and to keep the chief of justice informed of my workload and priorities. Being everything to everybody resulted in providing defective counsel across the board; focusing on the important matters and asking for help resulted in principled counsel, and court-martial victories as well.

Teamwork enhances the effective communication of legal advice with appropriate candor and moral courage—perhaps the most important part of principled counsel. Teamwork is especially vital when faced with allegations of misconduct by Army officials. The most difficult part of delivering this advice is that there is no guarantee that the Army official will heed your advice and a good chance that the official will stop seeking your counsel should you present advice that will not be well received. Inspector general reports of senior official ethical misconduct often involve early warnings from a JA or legal advisor that were brushed aside. But the risk of being ignored or even ostracized must not deter the delivery of this principled counsel.

This communication begins by gathering as many facts as possible and thoroughly understanding the governing provisions. You must become absolutely certain that the Army official's action, if true, violated a statutory or regulatory provision. Consulting with the next legal advisor in your technical chain, as well as with subject matter experts in your office and perhaps a mentor as well, is vital—it is part of the

teamwork underlying the delivery of principled counsel.

Becoming absolutely certain that the Army official's action violated a provision is often problematic. For example, statutory and regulatory provisions in the practice of ethics often leave the final determination of officiality up to the senior official. In other words, whether an action supports the accomplishment of the Army mission is often the approval authority's call, not the JA/legal advisor's call.

I've seen many JAs/legal advisors make the mistake of determining themselves whether an action supports mission accomplishment, and, in doing so, erroneously communicating an appearance allegation as a clear-cut violation. If the commanding general (CG) is authorized to approve their spouse's invitational commercial air travel at Government expense⁹ to an event where the spouse's travel does not appear to clearly produce a "direct service for the Government"¹⁰—for instance, to a sporting venue where the CG has been asked to make an official presentation and the spouse's participation appears minimal—the "direct service" call is still up to the CG, not to the JA or legal advisor. The JA's or legal advisor's job is to point out the potential adverse appearance of the spouse's travel but not to determine whether the travel produces the requisite direct service. I have seen senior officials reconsider their decisions once informed that the ultimate call is theirs, not the JA/legal advisor's. Some officials want the shield of a JA/legal advisor's determination in these instances. A senior official once demanded that I revise my ethics opinion wherein I noted the potential appearance of impropriety that could result from his proposed course of action, but I left the final decision to him. Fortunately, my supervisor supported me when I declined.

Another aspect of educating yourself fully on the provisions governing the circumstances involves developing courses of action. This is especially helpful when a statute or regulation forces a "no" response to the proposed solution. In the spouse travel example, offering suggestions on augmenting the spouse's involvement at the sporting venue so the travel meets the "direct service" standard is a good example



Then-LTG George Patton. (Source: Library of Congress)

of principled counsel practice. Those whom we advise usually appreciate receiving courses of action rather than a simple legal objection when appropriate. Teamwork almost always enhances the development of these courses of action.

Suppose the official has already clearly committed a statutory or regulatory violation. A mentor of mine often cited this quote from famous baseball coach Tommy Lasorda as a metaphor for our work: “Sometimes you’ve just got to let an umpire know that you’re not satisfied with his decision. That they’ve missed the play in your opinion. Not that it’s going to do you any good, but you’ve got to let them know.”¹¹ While it is true that sometimes your counsel will not be heeded, just letting the official know that they “missed the play” (another term found in baseball)—that you, aided by your team of advisors, question the wisdom of their actions—a can plant the seed of change. Allegations of misconduct against senior officials must also be reported to the inspector general.¹²

The actual delivery of principled counsel is another aspect that benefits from teamwork. As with trial work and mock boards, strategizing with the next legal advisor in your technical chain and your trusted subordinates on how to conduct the meeting with the official is

helpful. Face-to-face discussions are usually preferred, and bringing in a subject matter expert with you provides credibility as well as a witness to any unexpected reactions.

These are just a few of my thoughts on developing principled counsel skills. At this point in my career, I believe I have improved my delivery of principled counsel with the help of my mentors, peers, and supervisors. I have learned in practice what the JAG Corps teaches, that principled counsel is not a skill to be practiced in isolation but rather with your team. At this stage of my development, as a member of GEN Patton’s staff during the unauthorized pinning of the 3-star rank, I would have immediately brought the incident to the attention of the next legal advisor in my technical chain, as well as to a mentor. After consulting with the subject matter experts in my office, I would have informed the general that his actions were not only improper, but also that they would have served to tarnish his image and cause others to doubt his integrity. And perhaps I would even suggest to MG Patton that he “Go forth and conquer but do so legally and ethically.” Well, maybe . . . **TAL**

Ms. Baines retired from her role as the Associate Deputy General Counsel, Ethics and Fiscal Law, U.S. Army Office of General Counsel, at the Pentagon, in November 2024.

Notes

1. PATTON (20th Century Fox 1970).
2. *The Battle of the Bulge*, U.S. ARMY AIRBORNE & SPECIAL OPERATIONS MUSEUM, <https://www.asomf.org/the-battle-of-the-bulge-asom> (last visited Oct. 28, 2024).
3. General Omar N. Bradley was a senior Army officer during and after World War II and was the first chairman of the Joint Chiefs of Staff. *Omar Bradley*, BRITANNICA (Aug. 14, 2024), <https://www.britannica.com/biography/Omar-Nelson-Bradley>.
4. *Patton: When an Oscar Movie Really Mattered*, LA TIMES (Feb. 13, 2009), <https://www.latimes.com/archives/blogs/the-big-picture/story/2009-02-13/patton-when-an-oscar-movie-really-mattered>.
5. *Patton*, IMDB, <https://www.imdb.com/title/tt0066206> (last visited Oct. 28, 2024).
6. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 40-16, Principled Counsel – Our Mandate as Dual Professionals (9 Jan. 2020).
7. Colonel Sean T. McGarry, *Can Principled Counsel Be Taught?*, ARMY LAW., no. 4, 2021, at 2.

8. The present day “speedy trial” standard is found in the *Manual for Courts-Martial*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (2024) (“The accused shall be brought to trial within 120 days after the earlier of (1) Preferral of charges; (2) The imposition of restraint . . . or (3) Entry on active duty under R.C.M. 204.”).

9. See U.S. DEP’T OF ARMY, DIR. 2020-14, ARMY SPOUSE TRAVEL (23 Oct 2020); U.S. DEP’T OF DEF., THE JOINT TRAVEL REGULATIONS (JTR): UNIFORMED SERVICE MEMBERS AND DoD CIVILIAN EMPLOYEES sec. 0305 (1 Oct. 2024) [hereinafter JTR].

10. See JTR, *supra* note 9, para. 030501.A.12 (“An authorizing official may issue any of the following individuals an [invitational travel authorization] under 5 U.S.C. § 5703 if all of the applicable requirements and limitations are met . . . For any other individual [not specifically identified in A.1-11], including a spouse, travel must be personally certified by an authority . . . that the travel meets the requirements of 5 U.S.C. § 5703 and the traveler is ‘legitimately performing a direct service for the Government’ . . .”). Unfortunately, there are few opinions defining what comprises a “direct service for the Government.”

11. Noah Scott, *Remembering Tommy: A Baseball Lifer in 5 Quotes*, PITCHERLIST (Jan. 16, 2021), <https://pitcherlist.com/remembering-tommy-a-baseball-lifer-in-5-quotes>. Tommy Lasorda, (22 September 1927 – 7 January 2021)) was an American professional baseball pitcher and manager. *Id.* He managed the Los Angeles Dodgers of Major League Baseball from 1976 through 1996. *Tommy Lasorda*, BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/lasorda-tommy> (last visited Oct. 28, 2024). He was inducted into the National Baseball Hall of Fame as a manager in 1997. *Id.*

12. U.S. DEP’T OF ARMY, DIR. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 7-11 (23 Mar. 2020) (“Commanders, IGs [Inspector Generals], or principal HQDA staff officials must forward directly to DAIG’s Investigations Division through IG channels any and all allegations of impropriety or misconduct (including criminal allegations) and complaints against senior officials—defined as general officers (including ARN-GUS, USAR, and retired general officers), promotable colonels, PUSMAs, and SES Civilians—within 2 working days of receipt when practicable.”); U.S. DEP’T OF DEF., DIR. 5055.06, INVESTIGATIONS OF ALLEGATIONS AGAINST SENIOR DoD OFFICIALS para. 3 (6 June 2013) (C1, 28 Apr. 2020) (“Allegations of misconduct against senior officials will be reported to the IG DoD within 5 workdays of receipt by a DoD Component . . .,” defining “senior official” as “An active duty, retired, Reserve, or National Guard military officer in grades O-7 and above, and an officer selected for promotion to O-7 whose name is on the O-7 promotion board report forwarded to the Military Department Secretary. A current or former member of the Senior Executive Service. A current or former DoD civilian employee whose position is deemed equivalent to that of a member of the Senior Executive Service (e.g., Defense Intelligence Senior Executive Service, Senior Level employee, and non-appropriated fund senior executive). A current or former Presidential appointee.”).



Affinity Groups Unite brown bag lunch attendees at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Photo courtesy of author)

News & Notes

JAG Corps Affinity Groups What They Are and Why They Exist

By Major Lynmarie Rivera and Mr. Fred L. Borch III

Mentorship is the bridge that connects the past, present, and future of the Corps.¹

In the 1970s and 1980s, as more Black and female attorneys joined a predominantly White and male Judge Advocate General's (JAG) Corps, they connected to help each other better navigate the world of Army law and lawyering.

Today, members of the JAG Corps have established volunteer JAG Corps "mentorship" groups that operate as non-Federal entity (NFE) volunteer organizations.² These "affinity groups" propose to make the JAG Corps a more cohesive, unified institution—and, therefore, a stronger force in our Army.

This article looks at the goals of the five affinity groups and describes the mentorship volunteer opportunities they offer to our Corps.

Origin of Affinity Groups

At the height of the COVID-19 pandemic, members of the JAG Corps united to formalize affinity groups with the mission of building a better and stronger organization through the power of mentorship. Army Regulation 600-100, *Army Profession and Leadership Policy*, defines mentorship as "[a] voluntary and developmental relationship

that exists between a person with greater experience and a person with less experience, characterized by mutual trust and respect."³ Understanding that leaders must invest time to develop the next generation and guided by a strong sense of community, the founding members of the Hispanic Mentorship Group (HMG)⁴ envisioned facilitating mentorship relationships between junior judge advocates (JAs), paralegals, legal administrators, and senior leaders. Furthermore, the groups aimed to provide a space to discuss sensitive issues, embrace cultural differences, and assist members in embarking upon military life.

The JAG Corps Hispanic Mentorship Group (HMG) was the first affinity group to formalize in the spring of 2020, and the JAG Corps Asian-Pacific American Network (APAN) quickly followed.⁵ Since then, the Affinity Groups Unite (AGU), an NFE volunteer organization, has developed and grown to include five groups open to all ranks, races, ethnicities, cultures, and orientations: Athena's Council Mentorship Group,⁶ Buffalo JAGs Mentorship Group,⁷ Hispanic Mentorship Group, JAG Corps Asian-Pacific American Network, and JAG Corps Pride Network.⁸ Dozens of members with diverse backgrounds actively participate in the groups.

Each affinity group has a specific mission and approach to help its members navigate unique challenges via mentorship and connection.

Purpose of Affinity Groups

The affinity groups create a sense of community by striving to facilitate mentorship relationships between members of our Corps. The overarching strategic vision is "to ensure that every member receives mentorship and information from experienced, caring senior mentors to inform their career and life decisions, resulting in increased satisfaction within the [JAG Corps]."⁹ Each group focuses on different interest areas and supports its members in different ways by hosting networking events and professional development sessions, sharing broadening opportunities, and highlighting opportunities for recognition.



(Credit: Vitalii Vodolazskiy-stock.adobe.com)

Role of Affinity Groups

The affinity groups support their members' leadership development by providing opportunities to serve as group coordinators for different events and foster camaraderie by allowing members to meet each other. Likewise, the affinity groups offer an opportunity to develop relationships with senior members in an informal setting. Social media is an essential tool that each group relies on to connect members across the globe for career advice, professional development, and to provide a space for members to discuss personal issues outside of the workplace. Moreover, enabling deeper relationships with legal administrators and paraprofessionals fosters collaboration both outside and inside the legal office.

Affinity groups also provide junior members with mentors who can provide personalized guidance and support. Mentors can identify similarities between themselves and their mentees and draw

from their own personal and professional experiences to offer valuable insights into the nuances of the professional environment. By doing so, mentors help mentees recognize areas for growth and development that may not otherwise be immediately apparent. This tailored approach to mentorship enables mentees to improve their performance and increase their professional confidence.

Open and honest discussion, generation of ideas, and candid feedback are staples of these groups.

Conclusion

Mentorship is a powerful tool to build and preserve the JAG Corps's legacy. Our responsibility is to inspire and guide the next generation of leaders and create safe spaces for collaboration and the discussion of ideas. Providing opportunities to discuss issues affecting legal professionals makes the Corps a better, stronger organization. We should continue to strive for excellence in

mentorship by asking all leaders to mentor others in the organization and create spaces that "allow strong and institutionally successful role models from various cultures and backgrounds to inspire, influence, and advise them on the ways and means to succeed in America's law firm."¹⁰ **TAL**

MAJ Rivera is an Associate Professor in the Criminal Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Mr. Borch is the former Regimental Historian and Archivist for The Judge Advocate General's Corps, and the former Professor of Legal History and Leadership at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Notes

1. Interview with First Lieutenant Rolando Mesa, 219th Officer Basic Course, in Charlottesville, Va. (May 24, 2023).
2. The views presented in this article do not constitute an official endorsement of the affinity groups as they are only intended to inform the Corps about the history and creation of these volunteer groups.
3. U.S. DEPT OF ARMY, REG. 600-100, ARMY PROFESSION AND LEADERSHIP POLICY 31 (13 May 2024).
4. These founding members include Brigadier General Jaime Arezaga, Colonel (Retired) Luis Rodriguez, Colonel (Retired) Jose Cora, Colonel Javier Rivera, and Mr. Nelson Ponce.
5. The founding members of the Asian Pacific American Network include Colonel (Retired) Ku Fansu, Colonel Sue McConnell, and Colonel (Retired) Eugene Kim.
6. The founding members of the Athena's Council Mentorship Group include Colonel (Retired) Kasia Stich and Colonel Jacqueline DeGaîne.
7. The founding members of the Buffalo JAGs Mentorship Group include Lieutenant Colonel (Retired) Paulette Burton, Chief Warrant Officer Three (Retired) Jessica Marrisette, and Colonel Tanasha Stinson.
8. The founding members of the JAG Pride Network include Captain Nell Robinson, Captain Shmuel Bushwick, and then-Major Vanessa Strobbe.
9. Colonel (Retired) Jose A. Cora, Hispanic Mentorship Group Mission, Vision, Governance and Strategic Initiatives Presentation to the Diversity, Equity and Inclusion Council, at slide 3 (Nov. 19, 2020) (unpublished PowerPoint presentation) (on file with authors).
10. Email from Colonel (Retired) Luis O. Rodriguez, to author (July 14, 2023) (on file with authors).

News & Notes



Photo 1 (NTC)

Then-1LT Fox Y. Whitworth (right) receives a disposition of forces orientation from a 1/1 Armored Brigade Combat Team operations officer while in the field at the National Training Center at Fort Irwin, CA. (Credit: LTC Jason D. Young)

Photo 2

Members of the I Corps Office of the Staff Judge Advocate partake in a challenging hike up the Lower Lena Lake Trail on the Olympic Peninsula northwest of Joint Base Lewis-McChord, WA. (Photo courtesy of CW3 R. Eric Boatwright)

Photo 3

Members of the 82d Airborne Division Office of the Staff Judge Advocate gather with members of the 82d Airborne Division to board a CASA aircraft for Fort Liberty's annual Law Day jump. (Credit: CPT Caleb Burton)



Photo 4

CPT Ryan C. Speray (third from left), administrative law attorney at XVIII Airborne Corps, helped propel the Fort Liberty Army Ten-Miler team to victory at the Pentagon. The Fort Liberty men's and women's teams won the Commander's Cup. (Photo courtesy of LTC Brian K. Carr)



Photo 5

224th Officer Basic Course. (Credit: Billie J Suttles, TJAGLCS)

Photo 6

SFC Alina Zamora (right), senior paralegal, 173d Infantry Brigade Combat Team (Airborne) (IBCT(A)), and CPT Joely M. Manning (left), then-commander, G Company, 1-503 Infantry Battalion, 173d IBCT(A), join more than 100 female paratroopers from the Army's 173d IBCT(A) at Aviano Air Base for the brigade's first all-female airborne operation. (Photo courtesy of SFC Alina Zamora)



Photo 7

CPT David Estes (left), operational law attorney, U.S. Army Southern European Task Force (Africa), Dino Maestrello (middle), sport official, U.S. Army Garrison Italy, and SSG Anthony Burton (right), signal intelligence voice interceptor, 522nd Military Intelligence Battalion, 207th Military Intelligence Brigade – Theater, pose after finishing the Army Ten-Miler shadow run at Caserma Del Din, Vicenza, Italy. (Credit: SGT Ashley Fletcher)





225th Judge Advocate Officer Basic Course
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 22 September - 12 December 2024

Photo 8

SSG Tiana M. Baker (center), senior paralegal NCOIC, 35th Air Defense Artillery (ADA) Brigade, celebrates her promotion with her 35th ADA and Eighth Army teammates on Osan Air Base, Republic of Korea. (Credit: SGT Jin Wook Hwang)

Photo 9

SFC Ronald Konapelsky, senior paralegal and security manager for Headquarters and Headquarters Company, 213th Regional Support Group, Pennsylvania Army National Guard, pitches during the Lehigh Valley Baseball League all-star game at Coca-Cola Park in Allentown, PA. (Credit: SFC Oriana White)

Photo 10

National Guard judge advocates (JAs) participated in the 2024 Cyber Shield Exercise near Virginia Beach, VA. JAs fielded questions and communicated with cyber operators real-time as the latter practiced defending state networks and infrastructure from cyber attacks. (Source: JAGCNet)

Photo 11

225th Officer Basic Course. (Credit: Jason F. Wilkerson, TJAGLCS)



Then-CPT Strassburg returns to Camp Eagle from a case at Camp Evans while serving as a part-time military judge in Vietnam. (Photo courtesy of COL (Ret.) Strassburg)

Pivotal Perspective

An Interview with Colonel (Retired) Tom Strassburg

By Major Alexander E. Hernandez

Colonel (Retired) (COL (Ret.)) Tom Strassburg, a distinguished member of our Regiment, kindly accepted my request to interview him for a Vietnam elective I took while attending the Naval War College. Then-Captain Strassburg served a year-long deployment in Vietnam from 1970 to 1971 in the 101st Airborne Division (Airmobile).

Before the interview, I anticipated learning about how COL (Ret.) Strassburg's experiences as a judge advocate (JA) in Vietnam compared to our generation's experiences in Iraq and Afghanistan. We did share a lot of laughs about these differences—suffice it to say, his forward operating base did not have a Green Bean with wifi. After our interview

ended, however, and I reflected on COL (Ret.) Strassburg's words, it was not the differences that stood out most, but the similarities. Although they had yet to be formally included in our doctrine, the Judge Advocate General's (JAG) Corps's four constants—principled counsel, stewardship, mastery of the law, and servant leadership¹—were present in COL (Ret.) Strassburg's recollections. More than fifty years later, COL (Ret.) Strassburg still appeared most visibly moved recalling the impact of the servant leadership he experienced while deployed. I share his words firsthand below to avoid doing injustice to his experience.

But first, I will set the scene: at the young age of seventy-nine, COL (Ret.) Strassburg was as quick with wit as he was with technology. If it were not for his overwhelming warmth and kindness, I would have felt embarrassed by how often I deferred to him on how to operate our

Zoom call. He shared his screen throughout the two-hour interview—which ended much too soon—to shuffle through photographs (he has a knack for photography). A minute into our conversation, my prepared questions were tossed aside as I enjoyed the privilege of listening to him describe his year in Vietnam as if it were yesterday.

Our conversation commenced with COL (Ret.) Strassburg sharing photos of his legal office at Camp Eagle, which hosted 101st Airborne Division (Airmobile) Headquarters in northern South Vietnam near the cities of Huế and Phu Bai. The excerpts of our conversation provided below are edited for brevity and clarity.

Major (MAJ) Hernandez: What brought you into the JAG Corps?

COL (Ret.) Strassburg: I came through what was then known as the excess leave program. I was commissioned out of the Reserve Officers' Training Corps (ROTC) program. In the summers I worked in a JAG office, even as a lieutenant. My first assignment as a JAG Corps officer was at then-Fort Dix (now Joint Base McGuire-Dix-Lakehurst, New Jersey, and I spent a year there. I had a variety of experiences: from courts-martial to claims to administrative law, you name it.

MAJ Hernandez: Because you joined the Corps during wartime, did you expect to be deployed?

COL (Ret.) Strassburg: Yes. In those days, you would go to an assignment for one year, and then you would likely go to Vietnam after that. So, yes, I expected I would be. And at that time—1970-71—there was still quite a bit going on over there.

MAJ Hernandez: What was your pre-deployment training like?

COL (Ret.) Strassburg: I think we had a three-day Vietnam familiarization and tactics course. We were out in the field with our M16s, and we went through some ambush situations. I had experienced some of that training in ROTC, but, you know, I thought, there's a war going on; I better pay attention to this!



Then-CPT Strassburg at his office desk at Camp Eagle in Vietnam. (Photo courtesy of COL (Ret.) Strassburg)

MAJ Hernandez: What was your arrival to Vietnam like?

COL (Ret.) Strassburg: There are some things you never forget. My arrival date in Vietnam was 21 September 1970. In those days, the division stayed there. They were rotating people in and out of units. I was scheduled to go to an engineer unit down in the southern part of Vietnam, and the living conditions were supposed to be pretty good. But one of my predecessors at the 101st Airborne Division—a very close friend of mine from the basic course—told his staff judge advocate (SJA) that he ought to get me to come to the 101st. So, when I got to Vietnam and said, "I'm supposed to go to the Engineer Command," they told me I'd been transferred to the 101st. It turned out to be one of the best things that ever happened to me.

MAJ Hernandez: I'm curious about how your family handled your deployment. You were married at that time, right?

COL (Ret.) Strassburg: Yes, I was married. I also had one daughter, and my wife was expecting our second daughter when I left. My family was concerned that I was going to a war zone, but that was just the way it was. I corresponded with my family from Vietnam and let them know that things were not too bad for me. I was

relatively safe from the enemy. As I say, I was very, very fortunate.

MAJ Hernandez: What was your office like on Camp Eagle?

COL (Ret.) Strassburg pulled up a photo of a young, smiling then-CPT Strassburg in a wooden shack with windows sealed by plastic. He's sitting at a desk in front of an open binder, a rotary phone, and a banker's lamp.

COL (Ret.) Strassburg: That was me at my desk. And you can see there is no screening up there because it's plastic. In my first full month in country, we had fifty-one inches of rain. It was pretty constant, and it would blow through the windows. Looking at this photo, I can't help but talk about that dial telephone on my desk. Of course, everything was analog. We didn't have push-button phones, and communication generally was a real problem. We could talk within the division, and we maintained contact with our JAG technical chain, but it was a challenge. Communication with the United States was difficult, which was necessary on a couple of occasions. That required a higher level of authorization, and a captain was not going to call anybody in the United States; that was out of the question. Even if you could get the authorization, the actual scheduling and technology to make the call was a challenge.



Then-CPT Strassburg stands before one of the officer hooches protected from the elements at Camp Eagle in Vietnam. (Photo courtesy of COL (Ret.) Strassburg)

We went on to discuss how much communication has changed. COL (Ret.) Strassburg mentioned how he and his wife would send cassette tapes back and forth so they could hear each other's voices.

MAJ Hernandez: What was your duty position while in Vietnam?

COL (Ret.) Strassburg: I had several roles. Initially, I was designated the chief of military affairs (or administrative law as we know it now). But, I mostly served as a defense counsel and a trial counsel. There was no Trial Defense Service in those days, so you served as both based on the circumstances. I am very much in favor of the idea of a separate defense corps, but I worked for one of the best SJAs, the late COL (Ret.) Richard S. Hawley, and he was completely even-handed. If you weren't doing a good job as defense counsel, he would let you know. Our clients got a good defense. In addition, with a special courts-martial caseload, which was substantial, they needed me to be a part-time military judge. That was very interesting work, and I got to travel

some because we held these cases all over the 101st area of operations.

The problem was that the power went out fairly frequently while trying cases. In those days, our court reporters were using the Stenomask technology, and in that humid, hot environment, the batteries were pretty much useless. So, if you did not have power, you could not do a record of trial.

MAJ Hernandez: How was your Office of the Staff Judge Advocate (OSJA) structured?

COL (Ret.) Strassburg: Then-LTC Hawley had a deputy, who was a major, and about eight captains, depending on the rotation. And that was nowhere near adequate to handle the caseload. But, the SJA had a very good relationship with our adjutant general. When anybody was assigned to the 101st who was a member of the bar, the SJA could interview them, and if he wanted to, he got them assigned to the OSJA—he wanted to get his cases tried.

Although they gave me the opportunity to move down south to what was known as a more desirable location in Vietnam, I decided to stay with the 101st.

Then-LTC Hawley was a fabulous leader. He had my back on a number of occasions, and it felt like leadership wouldn't get any better than this, so I stayed. I was happy to spend a whole year up there.

COL (Ret.) Strassburg shared photos of his "hooch," and he recalled memories—with astounding detail—about his living conditions. We laughed over his account of the informal duty roster to clear the always-full rat traps, and he explained the need to constantly fortify the buildings to manage the heavy rainfall.

There was not a whole lot else to do other than work. I can remember trying a case at eleven o'clock at night. Oftentimes, after the evening meal, there was time to write letters. But, again, we provided the full range of legal services. I also served as a foreign claims commissioner. I could approve claims up to a certain amount of money, and we had all kinds of them.

MAJ Hernandez: Is there a particular claims mission that stands out in your memory?

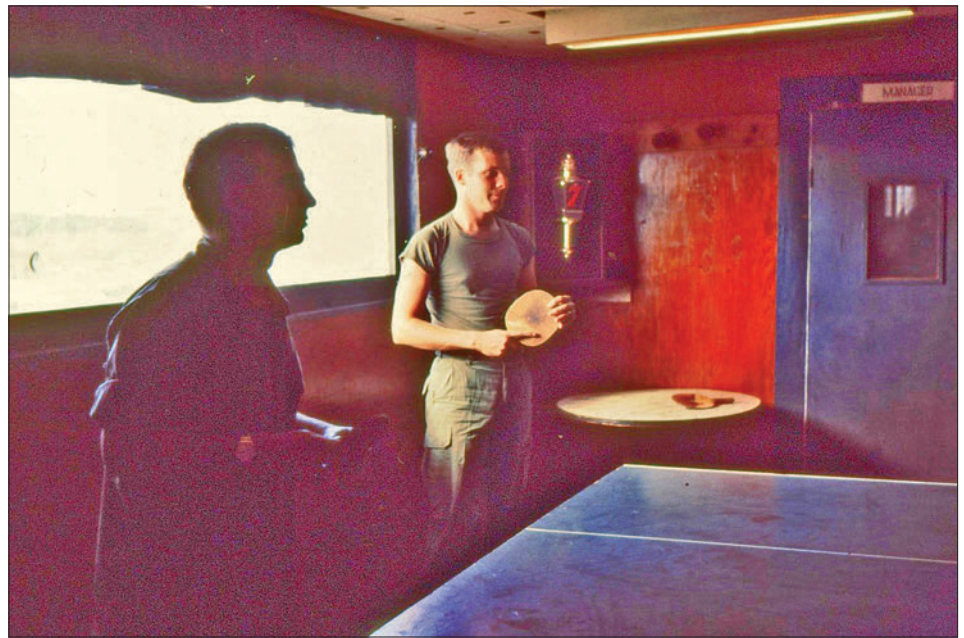
COL (Ret.) Strassburg: We had a case where, unfortunately, some Soldiers came back from Eagle Beach, an area on the South China Sea for 101st Soldiers that was a frequent recreation spot. A lot of drinking went on down there. On one occasion, U.S. Soldiers went through a Vietnamese village and tragically ran over and killed four local villagers. The locals were understandably upset, and they pretty much closed that road, which was our alternate main supply route. We had to do something as quickly as possible. So, we met with the province chief and negotiated and approved a large claim. It was the best we could do. We explained that we knew no amount of compensation could erase the incident, but it was something little we could do to help. But there's no excuse for what happened. Our Jeep was the first vehicle permitted on that road again after the incident.

COL (Ret.) Strassburg described more of his experiences traveling throughout Vietnam to support various missions. With a proud smile he noted that, as an airmobile division, the 101st had helicopters, which was his primary mode of travel. He described the air platforms with a level of detail you would expect from a pilot.

MAJ Hernandez: Were legal research resources available to you at Camp Eagle and in your travels?

COL (Ret.) Strassburg: When we needed to do serious legal research, we had to go down to the Saigon area to Military Assistance Command Vietnam Headquarters, which had a first-class law library. The digital world was just getting started. The Air Force created an automated legal research system called FLITE, the Federal Legal Information Through Electronics. I got exposed to that, and I thought, wow, this is really something. It was just the beginning, though. But in Vietnam, there was nothing like that. And it was years before you got anywhere close to what you have today.

COL (Ret.) Strassburg went on to share photos he took during his downtime. One captured his friends playing ping pong in the hastily made Officers' Club. Another captured the "Eagle Bowl," a wooden stage on Camp Eagle. As he pulled up the photo, he smiled. He



Two Soldiers play ping-pong at the officers' club at Camp Eagle in Vietnam. (Photo courtesy of COL (Ret.) Strassburg)



The Eagle Bowl served as the headquarters entertainment venue at Camp Eagle in Vietnam. (Photo courtesy of COL (Ret.) Strassburg)

recalled the Bob Hope show and others coming through Vietnam to keep the Soldiers connected with life back in the United States.

MAJ Hernandez: In class, we discussed the impact of political and civil tension back home on the Vietnam War. How did that impact your experience?

COL (Ret.) Strassburg: Fortunately, I redeployed to an OSJA at then-Fort Lewis (now Joint Base Lewis-McChord), Washington, where tensions were not high, so I did not personally experience animosity. But, a lot of veterans did. Soldiers were often blamed for the decisions of political leaders. And so, yeah, it was real, it happened, but I personally did not experience it.

MAJ Hernandez: What stands out most to you from your time in Vietnam?

COL (Ret.) Strassburg's expression shifted slightly, clearly moved by the memory playing through his mind.

COL (Ret.) Strassburg: Well, then-LTC Hawley got into Vietnam about three weeks before I did, so he left about three weeks before I did. When he left, it was a very emotional time for everybody because we loved him and didn't know what we might be getting into next. He was an exceptional leader.

MAJ Hernandez: Were you able to stay in touch with COL (Ret.) Hawley?

COL (Ret.) Strassburg: Oh, yes. Did we ever. You bet. I met his wife and learned more about his family in the years following Vietnam.

MAJ Hernandez: Were you able to stay in touch with fellow members of the 101st?

COL (Ret.) Strassburg: My wife and I went on a little tour after Vietnam to touch base with some of the people I served with because it really was a band of brothers. There's no comparison to the camaraderie and experience that you have in that sort of environment. It was all very, very meaningful. And we continue to stay in touch. The 101st JAG reunion five years ago was just amazing. To see what some of these people did and how famous they became as lawyers or entrepreneurs was really something. And they were all the same good, humble guys.

MAJ Hernandez: How did your expectations match reality from your time in Vietnam?

COL (Ret.) Strassburg: Well, thinking I would be assigned to the Engineer Command and ending up supporting the 101st was very different, needless to say. I'd heard about the 101st and where the operations were. I was frightened. I wasn't exposed to and prepared for that sort of environment. But once I got there and understood what was going on, it became very, very rewarding professionally. And again, memory

being such as it is, mine anyway, I would say, boy, that was a fascinating year.

[chuckling] Before I deployed, when I thought I was heading down south, I was told that I could bring an air conditioner and ship a lot of stuff over. So, I bought this air conditioner and brought it with me in this big crate box. Well, I had to get rid of it when I got reassigned to the 101st because I obviously couldn't use it at Camp Eagle.

MAJ Hernandez: You have talked a lot about leadership, and it was clearly an important part of your experience in Vietnam. Was there a primary leadership lesson you took away from your time in Vietnam and carried with you throughout your career?

COL (Ret.) Strassburg: Yes. It is something that COL (Ret.) Hawley lived by and something I tried to live by during my career. I hope I'm attributing this correctly, but I believe it was the late General (Ret.) Richard Cavazos who said you can't accomplish your mission if you don't take care of your troops. COL (Ret.) Hawley had my back. And I tried to do that for others. And I think that's probably the most important. You've got to take care of your people and you've got to stand up for your people. I hope that's what I did, and I feel very good about that. That's the leadership lesson that I hope everyone learns early.

MAJ Hernandez: What advice would you share with young JAs today?

COL (Ret.) Strassburg paused for just a moment.

COL (Ret.) Strassburg: Principled legal practice: you must be true to your values and be willing to speak up when somebody is going in the wrong direction. You have to stand up for what you know is right. The client might not always like to hear it, but we owe it to them, and we've got to do it.



As our time together concluded, I was left overwhelmed by COL (Ret.) Strassburg's graciousness, humility, and generosity with his time and experience. After returning from Vietnam, he had an illustrious career

in our Corps. He retired in 1991 after twenty-five years of service, with his final assignment as the commandant of The Judge Advocate General's School in Charlottesville, Virginia. He went on to work for Virginia Continuing Legal Education, where he led their publications department and eventually became executive director until he fully retired from the workforce. Of course, for COL (Ret.) Strassburg, fully "retired" means sitting on several boards, including his extensive participation in the Retired Army Judge Advocates Association. In 2022, The Judge Advocate General recognized COL (Ret.) Strassburg as a distinguished member of our Corps for his never-ending stewardship.

In anticipation of our conversation, I expected to learn how COL (Ret.) Strassburg's deployment experiences were drastically different from my own, and they were: he faced domestic civil unrest at home, communicating with loved ones only by letters, a draft Army, and the sheer number of casualties during the Vietnam War, which are all unfathomable to me. But as I listened to him speak, much of COL (Ret.) Strassburg's experience was still deeply relatable: he talked about mastering his craft, principled counsel, his hopes for the future of our Corps, and, most of all, leadership. COL (Ret.) Strassburg's experience—in both Vietnam and his career of service that followed—demonstrates why the four constants that guide our Corps matter regardless of the operating environment. From Vietnam to the Global War on Terrorism to the future fight, the four constants are, well . . . constant. **TAL**

MAJ Hernandez is a Military Professor at the U.S. Naval War College's Stockton Center for International Law in Newport, Rhode Island.

Notes

1. U.S. DEP'T OF ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS 1-2 fig. 1-1 (1 Sept. 2023).

What's It Like?

A View from the Forward Line of Own Troops

1st Infantry Division's Office of the Staff Judge Advocate at the Warfighter Exercise

By Major Uilisone F. Tua and Members of the 1st Infantry Division Office of the Staff Judge Advocate

In March 2024, the Office of the Staff Judge Advocate (OSJA) for the 1st Infantry Division (1ID) participated in its Warfighter Exercise (WFX 24-3), a crucial training event that units complete to meet their demand readiness objectives. The Department of the Army merged 1ID's WFX 24-3 with Austere Challenge 24 (AC 24) to create a multi-echelon exercise with U.S. Army Europe-Africa, V Corps, and 3d Infantry Division (3ID).

A group of first-term judge advocates (JAs) and paralegals from the 1ID OSJA participated in WFX 24-3/AC 24. For most of the participants, this was their first exposure to Army operations. Terms such as "coordinated firing line" or "shaping operations" were unfamiliar to them. However, with adequate preparation and access to the necessary resources, they efficiently manned all three command posts: division main, tactical command post, and rear command post.

Prior to the exercise, participants received a mission analysis brief from the 1ID National Security Law (NSL) team as well as briefs on the pertinent rules of engagement (ROE) and the division operational framework—a key operational aspect in division operations. They also participated in the 1ID Danger Ready command post exercises (CPXs). The CPXs enabled them to rehearse their battle drills and test their processes and systems before the warfighter. During the CPXs, they trained with their legal teammates from V Corps and

3ID. As a result, they were prepared to engage in the fight and achieve the following training objectives:

- 1. Become acquainted with the roles of the various staff sections:** Understand and appreciate each staff section's role in analyzing and facilitating decision-making.
- 2. Identify the legal support required for each warfighting function (WfF):** Gain an understanding of the roles of each WfF during the fight. Facilitate coordination across the division staff to ensure legal support is provided efficiently and in a timely manner.
- 3. Develop the ability to understand and follow the fight:** Synchronize with the staff and legal tech channels to ensure a shared understanding of the fight.

The 1ID Staff Judge Advocate, Colonel Lisa Satterfield-Scott, and the Chief of NSL, Major Uilisone Tua, joined the JAs and paralegals in the exercise. Each participant followed the fight and provided exceptional legal support to every WfF. Indeed, the team achieved mission success with the right attitude, a positive demeanor, and a willingness to train with and learn from the division staff.

Below are the participants' insights from the forward line of own troops (FLOT)¹ during their time at WFX 24-3/AC 24.



SSG Lavernne Johnson. (Photo courtesy of author)

Staff Sergeant Lavernne Johnson

Paralegal Specialist
Division Main Command Post

"With the right resources and opportunities, paralegals are unstoppable in division exercises."

In this exercise, the key to success was understanding the fight and each brigade's role in it. Where they will be on the map during each phase is important. Our NSL mission analysis brief provided that knowledge. It allowed us to understand any transition points during the operation. During the fight, I used the *Operational Law Handbook*² to research a potential law of armed conflict (LOAC) violation by the enemy. The attorney used my analysis as part of the report to higher headquarters.

I also drafted the legal reviews for the attorneys so they could focus on their additional responsibilities. For example, utilizing our legal review templates, I prepared legal reviews for military information support operations concepts of operations, which the attorney reviewed and ultimately approved. In addition, I had the opportunity to attend the seven-minute drills, where I recorded all the emerging legal issues and relayed them to the attorney on shift and all three command posts. I recorded them in my shift change report. The shift change report enabled synchronization within our team across each shift. With the right resources and opportunities, paralegals are unstoppable in division exercises. It was a pleasure collaborating with my Judge Advocate General's (JAG) Corps teammates.



SPC Victor Sanchez. (Photo courtesy of author)

Specialist Victor Sanchez

Paralegal Specialist
Rear Command Post

“I felt confident asking questions during the mission analysis brief since a JA gave it.”

As a paralegal, if something were to happen to any of my teammates, I need to be ready to step up. Access to resources and understanding the division’s mission prior to the exercise are critical to being able to do so. Understanding the flow charts in our battle drills and the ROE matrix helped. Also, receiving a briefing from our OSJA personnel on the mission analysis enabled me to grasp the division’s objectives and legal considerations. I felt confident asking questions during the mission analysis brief since a JA gave it. Understanding the operational concept is fundamental in providing legal support to the staff. Knowing the specific tasks for each brigade combat team (BCT) in the division’s mission was awesome. This was particularly important to understanding how the fight changes and where the priority of effort will be once the commander indicates a change in mission for one of the BCTs. Overall, the WFX 24-3/AC 24 exercise increased my confidence in interacting with other command and staff members, many of whom are more senior than me.



CPT Laura Bernier-Colon. (Photo courtesy of author)

Captain Laura Bernier-Colon

Joint Air-Ground Integration Center Legal Advisor
Division Main Command Post

“This experience provided me with a profound insight into the interconnectedness of the division staff in Army operations.”

Upon arriving at Fort Riley, I swiftly became engaged in fieldwork during the WFX 24-3/AC 24 exercise. This exercise imparted numerous invaluable lessons. The utilization of hand warmers to withstand cold temperatures emerged as a crucial factor. Access to important resources like deskbooks, the ROE matrix, and battle drills was critical to improving my understanding of Army operations.

I must say that without the OSJA mission analysis brief and legal resources, my survival during the exercise would have been doubtful. My legal colleagues showed exceptional camaraderie by embracing me as part of the team, even though I had limited knowledge and experience in Army operations. Their unwavering support and willingness to answer my questions bolstered my confidence to execute my tasks. The paralegals were efficient in gathering information and offering valuable insights. This experience provided me with a profound insight into the interconnectedness of the division staff in Army operations. I am eager to reunite with my teammates in a similar setting.



CPT Luke Martin. (Photo courtesy of author)

Captain Luke Martin

Fires Cell Legal Advisor
Division Main Command Post

“In a pivotal moment, I provided guidance on a targeting issue, an experience that underscored our role in military operations.”

This exercise was a valuable opportunity to interact with command and staff and better understand the division’s operational strategies. It also allowed me to brief a senior officer on the ROE, a task I never imagined myself undertaking in my initial assignment.

Through training and strategic planning, we honed our skills for success on the battlefield. Integrating with the division staff during planning stages, familiarizing myself with their WfFs and actively participating during combat proved crucial to achieving victory. In a pivotal moment, I provided guidance on a targeting issue, an experience that underscored our role in military operations. The division staff relied on us for prompt and accurate legal counsel, seeking advice on risk assessment and mitigation to ensure a successful outcome. Embracing both triumphs and setbacks, our team is committed to leveraging these experiences to better understand our role in large-scale combat operations (LSCO), executing our duties with proficiency and assurance.



CPT Jared Sprague. (Photo courtesy of author)

Captain Jared Sprague

Legal Advisor
Division Tactical Command Post

“Even when my current assignment is not in NSL, I must be prepared to serve as a legal advisor in military operations at any given moment.”

They often say immersion is the most effective way to learn a new language. As a legal assistance attorney, I was initially focused on the client services side of legal practice within a military setting. Then, the field exercise arrived and introduced me to a realm brimming with Army terminology.

Each day seemed like a whirlwind of battle rhythm activities. Through interactions with staff and my JAG Corps colleagues, I began to grasp the operational lexicon with guidance and support from mentors and peers, which pushed my growth. When called upon to offer a legal analysis on a specific target, I found myself confidently stepping up to the challenge. This experience illuminated the necessity of being well-rounded—even when my current assignment is not in NSL, I must be prepared to serve as a legal advisor in military operations at any given moment. Through this experience, I gained confidence and a newfound appreciation for the work of the command and staff and the intricacies of operations. In sum, I thoroughly enjoyed the experience and found it immensely rewarding.



CPT Francis Halloran. (Photo courtesy of author)

Captain Francis Halloran

Legal Advisor
Division Main Command Post

“Training the warfighter prepares them to perform their duties effectively and legally during combat.”

This is my first assignment in the JAG Corps, and I have already learned so much about Army operations. First, providing guidance on the ROE to the G5 planners during the military decision-making process (MDMP) is essential for operational success. Minimizing legal involvement, unless required by the ROE or other policy, by training the warfighter on LOAC is critical. Training the warfighters prepares them to perform their duties effectively and legally during combat. Our objective as the NSL team prior to and during the WFX 24-3/AC 24 is to empower the warfighter to accomplish their mission in alignment with the commander’s intent.

The division assets—attack aviation and fires—are critical in the maneuverability of down trace units. Assisting the brigades in their close fight requires a clear understanding of the ROE and the operational framework outlining the boundaries of fires. Coordination with partner forces and high command is critical in synchronizing efforts in time and space. Therefore, the division legal team must maintain constant communications with the legal teams at the BCTs and corps to ensure a shared understanding of the fight. It is always a great thing when the higher command enables the division’s fight.



CPT Michael Marcela. (Photo courtesy of author)

Captain Michael Marcela

Legal Advisor
Rear Command Post

“Ultimately, the exercise reinforced my initial observation that some of the most substantial and demanding legal work is encountered at the RCP.”

In general, I have found that the rear command post (RCP) has some of the most substantive and intensive legal issues, even though it may sound less appealing than the legal analysis in targeting or main command post operations.

Legal issues at the RCP frequently involved nonlethal targeting, effects, and operations. With approval from the chief of operations, my team gave the ROE brief during the RCP Update Brief every morning, providing crucial information on the main command’s firing boundaries. Notably, the RCP commander depends on legal for advice on detention operations. We developed a concise one-slider on legal requirements pertaining to the detention of civilians. The battle drills for chemical attacks facilitated the completion of our assigned tasks and the seamless reporting of LOAC violations to higher headquarters.

The concept of self-defense emerged as a significant aspect of the exercise, with national self-defense being a prerogative at the national level. ROE restricting cross-border fires are structured to safeguard this right based on policy considerations aimed at preventing conflict escalation.

Ultimately, the exercise reinforced my initial observation that some of the most substantial and demanding legal work is encountered at the RCP. This exercise provided our team with a valuable opportunity to engage in comprehensive training on legal support required in LSCO.



CPT Jesse Burbank. (Photo courtesy of author)

Captain Jesse Burbank

Joint Air-Ground Integration Center Legal Advisor
Division Main Command Post

“Without question, the exercise—over the course of two weeks—developed me into a better Soldier, a better attorney, and a better teammate.”

The WFX 24-3/AC 24 provided me with my first in-depth look at how a division tactical operations center (TOC) operates in a combat environment: the integration of 11D’s WfFs to support the operation, the component parts of MDMP that enable 11D to dynamically prosecute a mission, and the role of the JA in facilitating the division’s warfighting capabilities. As a new JA, the exercise showed me the striking level of expertise 11D brings to bear in a combat setting and taught me how JAs can best contribute to combat operations. Whether through providing counsel on ROE, performing LOAC analysis of prospective targets, or engaging proactively with core authorities to adapt the ROE to needs on the ground, the exercise highlighted the necessity of a knowledgeable and integrated JA to the mission’s success.

The Fort Riley OSJA team prepared thoroughly and executed skillfully. The team underwent mission analysis briefs before the exercise, participated in Danger Ready field exercises (a LSCO combat simulation), followed the fight closely as it unfolded, and thoroughly integrated with 11D’s WfFs to provide maximum value to the exercise. Each JA and paralegal was crucial to the success of the effort, and the team bonded closely over our shared mission. Without question, the exercise—over the course of two weeks—developed me into a better Soldier, a better attorney, and a better teammate.



Ultimately, the WFX 24-3/AC 24 trained and prepared these JAG Corps teammates for division operations. They are motivated and passionate to be involved in the next fight. Their determination and can-do spirits bound them as a cohesive unit. With adequate preparation and training, they evolved into seasoned consultants and essential personnel within division operations. These JAG Corps teammates stand primed and poised to leap into action and support the division in any LSCO.

Keep reaching for the stars, 11D OSJA.
Duty First! TAL

MAJ Tua is the Chief, National Security Law, for 1st Infantry Division and Fort Riley at Fort Riley, Kansas.

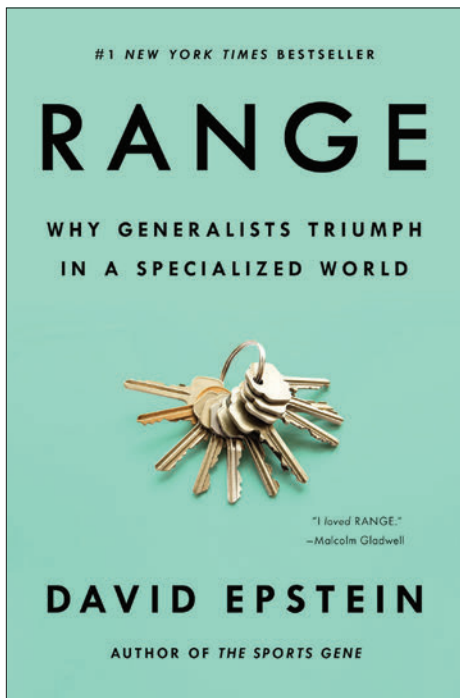
Notes

1. The forward line of own troops (FLOT) “is a line that indicates the most forward positions of friendly forces during linear operations at a specific time.” JOINT CHIEFS OF STAFF, JOINT PUB. 3-03, JOINT INTERDICTION ch. V, para. 2(c)(2) (26 May 2022).
2. NAT’L SEC. L. DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK (2024).



AROUND THE CORPS

CPT Caleb Burton prepares to board a CASA aircraft with his 82d Airborne Division Office of the Staff Judge Advocate for Fort Liberty's annual Law Day jump. (Credit: CPT Parker Holstein)



Book Review

Range Why Generalists Triumph in a Specialized World

Reviewed by Major Ian P. Smith

"The challenge we all face is how to maintain the benefits of breadth, diverse experience, interdisciplinary thinking, and delayed concentration in a world that increasingly incentivizes, even demands, hyperspecialization."¹

The development of expertise is claimed to be more important now than ever and often touted as a key to success.² A "push

to focus early and narrowly" and, especially in sports, a need to begin practicing "as early as possible" to develop expertise has arisen from the belief that "the more competitive and complicated the world gets, the more specialized we all must become to navigate it."³ However, this "push" has not been limited to sports, and many of us are familiar with the "ten-thousand-hours rule to expertise."⁴ This "rule," made popular in Malcolm Gladwell's book *Outliers: The Story of Success*,⁵ "represents the idea that the number of accumulated hours of highly specialized training is the sole factor in skill development, no matter the domain."⁶

Many examples exist of individuals who have demonstrated this "rule" as the key to their success, and, by starting as early as possible with "deliberate practice," they had a head start over those who take longer to begin their journey.⁷ Examples include Tiger Woods with golf, Mozart with piano, and the Polgar sisters with chess—brilliant individuals in their respective fields who developed their expertise through narrow and early focus.⁸ However, as David Epstein argues in his book, *Range*, it is much more accurate to say that these individuals are the "exceptions, not the rule."⁹

The "question" Epstein set out to explore in *Range* was "how to capture and cultivate the power of breadth, diverse experience, and interdisciplinary exploration, within systems that increasingly demand hyperspecialization, and would have you decide what you should be before first figuring out who you are."¹⁰ The result of this exploration is a wonderfully well-thought-out and organized book filled with stories and examples of people who were not early specialists but who nonetheless used their breadth of experience—their range—to accomplish incredible things.

Epstein does not claim that expertise is unimportant or without a place; rather, he argues that in most areas of life, "depth can be inadequate without breadth," and "the ability to integrate broadly" is "our greatest strength."¹¹ This review will explore several of the key takeaways from *Range* and seek to apply some of the principles to our roles as judge advocates (JAs).

Experience Does Not Necessarily Lead to Expertise

There is a place for deliberate practice, and one would be remiss to claim a person cannot improve in a wide variety of skills by spending hours and hours of repetition in the same area. Epstein makes no such claim, but he points out that the research shows "whether or not experience led to expertise . . . depended entirely on the domain in question."¹² Psychologists have separated the domains into two types of learning environments: "kind" and "wicked."¹³

Kind Learning Environments

A kind learning environment is one in which a "learner improves simply by engaging in the activity and trying to do better."¹⁴ "Narrow experience" is much more valuable when "[p]atterns repeat over and over, and feedback is extremely accurate and usually very rapid."¹⁵ Activities such as chess, golf, and even firefighting could be described as kind learning environments.¹⁶

In "kind" learning environments, "deliberate practice," "experience," and the "rush to early specialization in technical training" can lead to expertise at recognizing repeatable patterns.¹⁷ A 1940s experiment demonstrated this notion when a Dutch psychologist took chess players of different ability levels, flashed an image of a chessboard midgame for three seconds, and asked them to recreate the board.¹⁸ Unsurprisingly, the more skilled the players were, the more accurate they were in recreating the board.¹⁹

However, years later, a reenactment of the same experiment highlighted a weakness of the kind learning environment.²⁰ In this experiment, the chess boards showed "the pieces in an arrangement that would never actually occur in a game," and the more skilled players performed no better than the less skilled players.²¹ Without the recognized patterns the chess masters were used to, their expertise disappeared.²²

Epstein argues this is one of the main problems with kind learning environments: "When we know the rules and answers, and they don't change over time—chess, golf, playing classical music—an argument can be made for savant-like hyperspecialized practice from day one. But those are poor models of most things

humans want to learn.²³ Examples like Tiger Woods and the Polgar sisters give the “false impression that human skill is always developed in an extremely kind learning environment.”²⁴ In reality, most experiences, especially ones “which involved human behavior, and where patterns did not clearly repeat,” showed little increase in skill based on narrow experience or deliberate practice only in that domain.²⁵ As Epstein argues, “We have been using the wrong stories.”²⁶

Wicked Learning Environments

The converse of the kind learning environment is a “wicked” one,²⁷ where “the rules of the game are often unclear or incomplete, there may or may not be repetitive patterns and they may not be obvious, and feedback is often delayed, inaccurate, or both.”²⁸ In these domains, narrow experience does not improve skill, and the experience itself can sometimes “reinforce the exact wrong ideas.”²⁹ Epstein provides a potent example:

[There was] a famous New York City physician renowned for his skill as a diagnostician. The man’s particular specialty was typhoid fever, and he examined patients for it by feeling around their tongues with his hands. Again and again, his testing yielded a positive diagnosis before the patient displayed a single symptom. And over and over, his diagnosis turned out to be correct. As another physician later pointed out, “He was a more productive carrier, using only his hands, than Typhoid Mary.” Repetitive success, it turned out, taught him the worst possible lesson.³⁰

While this is an extreme example, the point is important: “The human tendency to rely on experience of familiar patterns can backfire horribly—like the expert firefighters who suddenly make poor choices when faced with a fire in an unfamiliar structure.”³¹ Epstein posits that the “trick” to combat the risk of falling into the trap of relying too heavily on experience is to evaluate an “array of options *before* letting intuition reign.”³²

Most experiences are more akin to wicked learning environments. Life is filled with situations where we are called on to adapt to our environments, and recognizing the “patterns” from our experiences can only get us so far. As Epstein put it, “There are unknowns, and luck, and even when history

While there may be some concern that the focus on breadth will come at the expense of depth, *Range* demonstrates that broad experience can be a huge advantage.

repeats, it does not do so precisely. . . . [We] are operating in the very definition of a wicked learning environment, where it can be very hard to learn, from either wins or losses.”³³ In this vein, one of the areas Epstein explores is education and how to maximize learning for range.

Range in Education

Focusing on one specific area or specialty was once understandable, perhaps even necessary, but as society has become increasingly complex, there is a “demand for knowledge transfer: the ability to apply knowledge to new situations and demands.”³⁴ Yet, even with increased complexity, society and education have responded by “pushing specialization, rather than focusing early training on conceptual knowledge.”³⁵

Epstein cites a study of college seniors with diverse degrees at one of America’s top state universities, which compared their grade point averages (GPAs) to their performance on a critical thinking test.³⁶ The test, which “gauged students’ ability to apply fundamental abstract concepts from economics, social and physical sciences, and logic to common, real-world scenarios,” revealed that the correlation between “broad conceptual thinking and GPA was about zero.”³⁷ The skills that helped students to get good grades at their university did not “include critical ability of any broad significance.”³⁸

Another fascinating study conducted at the U.S. Air Force Academy showed that “deep learning”—learning with the most long-term benefit—was best developed

in cadets who initially seemed to struggle but, over the long run, had a “deeper understanding of the material.”³⁹ The study, which spanned a decade, examined thousands of cadets who were randomly assigned to calculus sections taught by nearly a hundred different professors.⁴⁰ It

primarily focused on understanding the differences that individual teachers made.⁴¹ One group of Calculus I professors’ students consistently performed exceptionally well on their Calculus I examination. However, those same students underperformed in subsequent math and engineering courses that required Calculus I as a prerequisite.⁴² The converse was also true. A second group of cadets in Calculus I had professors whose students consistently appeared to underperform on the Calculus I exam, and they went on to do better in subsequent classes.⁴³ “What looked like a head start evaporated.”⁴⁴

A research team that evaluated sixty-seven early childhood development centers designed to “boost academic achievement” discovered that most of the programs taught kids “‘closed’ skills that can be acquired quickly with repetition of procedures,” but that other kids quickly catch up to, eliminating the “head start.”⁴⁵ The researchers instead recommended that the greatest benefit to small children would be to teach them “‘open’ skills that scaffold later knowledge. Teaching kids to read a little early is not a lasting advantage. Teaching them how to hunt for and connect contextual clues to understand what they read can be.”⁴⁶ What we learn is less important than how we learn. As Arturo Casadevall⁴⁷ said, “You have people walking around with all the knowledge of humanity on their phone, but they have no idea how to integrate it. We don’t train people in thinking or reasoning.”⁴⁸

In addition to evaluating the way we learn, with the push to focus early, Epstein

argues that while it is important to have a “sampling period” early, one should never stop being curious or afraid to “abandon a previous goal and change directions” if necessary.⁴⁹

Because personality changes more than we expect with time, experience, and different contexts, we are ill-equipped to make ironclad long-term goals when our past consists of little time, few experiences, and a narrow range of contexts. Each “story of me” continues to evolve. We should all heed the wisdom of Alice, who, when asked by the gryphon in wonderland to share her story, decided she had to start with the beginning of her adventure that very morning. “It’s no use going back to yesterday,” she said, “because I was a different person then.”⁵⁰

Range for JAs

There is a high demand for JAs today to have both breadth and depth, expertise and versatility—in a word, range.⁵¹ Early in their careers, JAs are expected to develop competence “in any environment, . . . in a variety of legal functions in a variety of assignments with increasing responsibility.”⁵² Many of the situations in which JAs will find themselves can be accurately described as “wicked environments,” where there are “unknowns” and the “rules” are not always clear or are incomplete. It is crucial that in those scenarios, JAs can draw on their diverse experiences to make informed decisions. While there may be some concern that the focus on breadth will come at the expense of depth, *Range* demonstrates that broad experience can be a huge advantage.

Conclusion

At the heart of *Range*, Epstein appeals to those who perhaps “feel behind” because they did not start specializing earlier, they took an untraditional or zigzagging path to get to where they are today, or they still do not “know exactly where [they are] going.”⁵³ He challenges the reader to “[c]ompare yourself to yourself yesterday, not to younger people who aren’t you.”⁵⁴ This challenge is relevant to everyone at every stage in life, but especially to those who do not know where they

are going and who feel discouraged when they look around and it appears that everyone around them has figured out their lives.

Epstein argues that you should “[a]pproach your own personal voyage and projects like Michelangelo approached a block of marble, willing to learn and adjust as you go, and even to abandon a previous goal and change directions entirely should the need arise.”⁵⁵ While there is nothing wrong with specializing, and it is important that we “specialize to one degree or another, at some point or other,” it is equally important to remember that everyone’s path is different, your “experience is not wasted,” and “[w]e learn who we are in practice, not theory.”⁵⁶ This book is insightful, interesting, and encouraging. The stories, studies, and anecdotes have far-reaching applications for a broad audience—especially in a wicked world. **TAL**

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Notes

1. DAVID EPSTEIN, *RANGE: WHY GENERALISTS TRIUMPH IN A SPECIALIZED WORLD* 13 (2019).
2. See Sean Mooney, *Why Expertise Matters and How to Find It*, FORBES (June 24, 2020), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/06/24/why-expertise-matters-and-how-to-find-it/?sh=629090ed48b1>; Lidiya Kesarovska, *Why Expertise Is Key to Success in Business*, LET’S REACH SUCCESS (May 24, 2022), <https://letsreachsuccess.com/expertise-business>.
3. EPSTEIN, *supra* note 1, at 6.
4. *Id.* at 5.
5. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 67 (Back Bay Books 2011) (2008).
6. EPSTEIN, *supra* note 1, at 5.
7. *Id.* at 5-6.
8. See *id.* at 5-6, 17.
9. *Id.* at 20.
10. *Id.* at 289.
11. *Id.* at 228, 289.
12. *Id.* at 20.
13. *Id.* at 20-21.
14. *Id.* at 21.
15. *Id.* at 20-21.
16. *Id.*
17. *Id.*
18. *Id.* at 24-25.

19. *Id.* at 25 (“A grandmaster repeatedly re-created the entire board after seeing it for only three seconds. A master-level player managed that half as often as the grandmaster. A lesser, city champion player and an average club player were never able to re-create the board accurately.”).

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 30.
24. *Id.* at 32.
25. *Id.* at 20.
26. *Id.* at 32.
27. *Id.* at 21.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 30.
32. *Id.* at 112.
33. *Id.* at 229-30.
34. *Id.* at 45.
35. *Id.* at 47.
36. *Id.*
37. *Id.* at 48.
38. *Id.*
39. *Id.* at 91.
40. *Id.*
41. *Id.*
42. *Id.* at 90-91.
43. *Id.* at 91-92.
44. *Id.* at 91.
45. *Id.* at 97.
46. *Id.*
47. Casadevall is the chair of molecular microbiology and immunology at the Johns Hopkins Bloomberg School of Public Health. *Id.* at 275-76.
48. *Id.* at 277.
49. *Id.* at 7, 65, 290.
50. *Id.* at 156.
51. See U.S. DEP’T OF ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS, at introduction (1 Sept. 2023) (“To succeed in today’s operational environment, judge advocates are versatile practitioners who are experts in their roles as lawyers, ethics advisors, counselors, law of armed conflict (also called law of war) subject matter experts, and rule of law practitioners.”).
52. OFF. OF THE JUDGE ADVOC. GEN., U.S. ARMY, JUDGE ADVOC. LEGAL SERVS. PUB. 1-1, PERSONNEL POLICIES para. 5-1(d)(1) (30 Sept. 2024).
53. EPSTEIN, *supra* note 1, at 290.
54. *Id.*
55. *Id.*
56. *Id.* at 161, 290.



(Credit: Aris Suwanmalee-stock.adobe.com)

Azimuth Check

Knowing and Avoiding Professional Responsibility Slips, Trips, and Falls

By Colonel (Retired) Thomas Schiffer and Mr. William (Rick) Martin

“Learn from the mistakes of others. You can’t live long enough to make them all yourself.”¹

In delivering principled counsel to your client, knowing what not to do becomes as important as knowing what to do. This is an azimuth check to help Judge Advocate General’s (JAG) Corps and Judge Advocate Legal Services (JALS) personnel gain awareness of common

errors and missteps that become matters for the Professional Responsibility Branch (PRB), Office of The Judge Advocate General, to review. This information is relevant not only to new attorneys and paralegals but also to supervisors who lead and mentor subordinates.

Most of the allegations that PRB reviews are complaints against captains and majors, but this does not shed much light on the matter. Captains and majors comprise the vast majority of attorneys practicing in the JAG Corps and JALS,² and they work under the supervision of lieutenant colonels and colonels. Captains and majors are not only (relatively) less experienced in military law, but they are also the attorneys who most frequently interact with individual clients, alleged victims, accused persons, respondents, and witnesses—in other words, those individuals interacting with the legal system who are most likely to file a complaint.

The most obvious errors judge advocates (JAs) commit are personal misconduct and its close friend, committing misconduct and not telling anyone about it. Attorney misconduct generates the largest number of professional responsibility (PR) cases. Nearly all misconduct cases are presented to PRB not as an allegation but as a report.³ The report is routinely followed by a command or law enforcement investigation. Once the investigation is complete, PRB reviews the investigation to assess whether Rule 8.4 (Misconduct) of the *Rules of Professional Conduct for Lawyers* applies to the facts.⁴ Rule 8.4 covers conduct regardless of whether the lawyer was acting as a lawyer or not and pertains to a broad (but not all-encompassing) range of misconduct or illegal conduct.⁵

To highlight the point: an attorney who solely commits a driving under the influence (DUI) offense likely does not implicate Rule 8.4, but an attorney who commits a DUI offense and then actively takes steps to deceive or misrepresent the fact of the DUI implicates Rule 8.4. An attorney does not have to be convicted of or even charged with a crime to violate this rule.⁶ Any credible information of a violent crime reflects adversely on the lawyer’s fitness to practice law and is therefore examined under this rule.⁷ A quick review of the comments to Rule 8.4 provides a thorough examination of all aspects of misconduct the rule covers.

Misconduct’s close friend, failure to report misconduct, violates an attorney’s duty to report through their legal tech chain to PRB if the attorney is being investigated by their licensing authorities.⁸ This

requirement is extended to “an allegation of misconduct, impropriety, or unfitness . . . in connection with their practice of law or in connection with any proceeding.”⁹ It also extends to any JALS lawyer charged with a criminal offense.¹⁰ Failure to report cases most frequently arise in off-duty offenses that are discovered later in time during security reviews and other Department of the Army level screening activities.

Aside from misconduct cases, attorneys are reviewed most frequently for “The Four C’s”: competency (Rule 1.1),¹¹ communication (Rules 1.2 and 1.4),¹² confidentiality (Rule 1.6),¹³ and conflicts (Rules 1.7, 1.8, and 1.9).¹⁴ PR competency reviews frequently include a thorough examination of the legal tech chain, too; a lack of competency allegation against an attorney immediately begs the question of whether the attorney was being properly supervised, managed, trained, and mentored prior to engaging in the alleged substandard conduct.¹⁵ Supervisors have an obligation to provide subordinate attorneys with engaged leadership, and subordinate attorneys have an obligation to use the legal tech chain and collaborate.

In allegations involving ineffective communication, oftentimes, it is not *what* is communicated but *how* it is communicated. JAs must ensure that their clients, both individuals and the command/Army, unambiguously understand and effectively receive their legal advice. In cases involving alleged victims, no matter the outcome of the action, JAs should conduct a thorough and compassionate closeout with the victim in every single case. Sympathetic communication prevents many issues.

Confidentiality problems can pop up in a variety of ways. They can arise from an ineffective downrange workspace that lacks proper privacy, such that attorneys are discussing command or individual client matters within earshot of those who do not have a need-to-know status (individuals can resolve this by fixing the workspace or relaying information in a more private setting). It can also originate from attorneys and paralegals with an “information is power” dynamic who want to impress peers or others with their knowledge of ongoing sensitive issues in the command (individuals can resolve this with training, awareness, and enforcement of standards). It can be a nuanced request,

such as an inspector general (IG) asking for a legal opinion during an IG investigation (individuals can resolve this by reporting the request through the legal tech chain to PRB). Alternatively, it can be very inane—someone shares something funny that happened at work about a case with a spouse, a group of friends, or in some other social setting because it is just a funny story (individuals can resolve by keeping the jokes within the circle of those who are working the case).

“The road to hell is paved with good intentions.”¹⁶ PRB utters this phrase in nearly every presentation and frequently in communications with JAG Corps leaders due to the regular occurrence of Rule 1.7, conflict of interest, incidents. In an effort to ingratiate themselves with the command and to be helpful, legal advisors (and paralegals) inadvertently develop attorney-client relationships with individual members of the command. Conflict of interest cases also arise when off-duty friends seek assistance, and the attorney inadvertently develops an attorney-client relationship with another member of the military community. Command legal advisors must remember that they represent the Army,¹⁷ not individuals; paralegals must also be mindful of Rule 5.5 (Unauthorized Practice of Law).¹⁸ Legal advisors and paralegals can help those seeking advice by referring them to the appropriate legal assistance, trial defense, or special victims counsel for assistance.

Lastly, remember, as professionals, we all have obligations to maintain the high standard of the legal profession.¹⁹ If you are faced with a PR dilemma or think you have observed a PR violation, consult with your legal tech chain.²⁰ Have faith and trust that the matter will be reviewed fairly and in accordance with Army Regulations 27-1, *Judge Advocate Legal Services*,²¹ and 27-26, *Rules of Professional Conduct for Lawyers*.²² **TAL**

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Notes

1. This quote is attributed to a range of people. *See You Must Learn from the Mistakes of Others. You Will Never Live Long Enough to Make Them All Yourself*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2018/09/18/live-long/> (last visited Oct. 23, 2024) (outlining the history and evolution of this quote from 1837 to present day).
2. For example, in the most recent consolidated date of rank roster of active component judge advocates published by the Plans, Programs, and Policies (P3) Office on 14 August 2024, there are 543 majors, 790 captains, and 81 first lieutenants in the JAG Corps, compared to about 130 colonels, about 260 lieutenant colonels, and 672 civilian attorneys. *See PLANS, PROGRAMS AND POLICIES (P3), JUDGE ADVOC. GEN.'S CORPS, CONSOLIDATED DATE OF RANK ROSTER OF ACTIVE COMPONENT JUDGE ADVOCATES* (14. Aug. 2024).
3. When discussing misconduct, the most common type of misconduct is criminal in nature. A report is generated by a law enforcement entity. That report then serves as the basis of a PR allegation.
4. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 8.4 (28 June 2018) [hereinafter AR 27-26] (Misconduct). In these cases, PRB reviews the investigation for potential violations of Rule 8.4(b-d).
5. *See id.*
6. *Id.* app. B, r. 8.4, cmt. (3).
7. *Id.*
8. *See id.* para. 7(i).
9. *See* Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-01 – Professional Responsibility, para. 2(e) (1 Mar. 2022) [hereinafter TJAG Policy Memorandum 22-01].
10. *Id.* para. 2(c).
11. AR 27-26, *supra* note 4, app. B, r. 1.1.
12. *Id.* app. B, r. 1.2, 1.4.
13. *Id.* app. B, r. 1.6.
14. *Id.* app. B, r. 1.7, 1.8, 1.9.
15. Supervisory lawyer responsibilities are addressed in Rule 5.1 (Responsibilities of Senior Counsel and Supervisory Lawyers), *id.* app. B, r. 5.1, and in Army Regulation 27-1, Chapter 12 (Mismanagement Inquiries). U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 12 (24 Jan. 2017) [hereinafter AR 27-1].
16. This proverbial idiom likely derives from St. Bernard of Clairvaux's writings in approximately 1150. CHRISTINE AMMER, *THE AMERICAN HERITAGE DICTIONARY OF IDIOMS* 378 (2d ed. 2013) (defining “road to hell is paved with good intentions”).
17. *See* AR 27-26, *supra* note 4, app. B, r. 1.13 (Department of the Army as Client).
18. *Id.* app. B, r. 5.5.
19. *See id.* app. B, r. 8.3 (Reporting Professional Misconduct); TJAG Policy Memorandum 22-01, *supra* note 9.
20. *See* TJAG Policy Memorandum 22-01, *supra* note 9, para. 2(c) (directing reporting through technical channels).
21. AR 27-1, *supra* note 15.
22. AR 27-26, *supra* note 4.



George Armstrong Custer. (Source: Library of Congress)

Lore of the Corps

The Court-Martial of George Armstrong Custer

By Dr. Nicholas K. Roland, Ph.D.

*When I was merging upon manhood, my every thought was ambitious—
not to be wealthy, not to be learned, but to be great!*

George Armstrong Custer is one of the most famous and controversial officers in the history of the U.S. Army. A Civil War hero, Custer is likely best remembered for his catastrophic defeat and death at the Little Bighorn on 25 June 1876. His widow and a sympathetic press did much to create a “Custer Myth” in the aftermath of his death, while later examinations of Custer highlighted both his impetuosity as a commander and his role in controversial incidents such as the Battle of the Washita in November 1868. What is generally lesser known is that Custer was court-martialed in 1867, but after less than a year’s suspension, he was restored to his command by Major General (MG) Philip Sheridan. Custer’s court-martial and light punishment raise several “what if” scenarios, both for the Native Americans he fought against and the men of the 7th Cavalry Regiment who ultimately perished under his command.

George A. Custer was born on 5 December 1839 in New Rumley, Ohio, a hamlet lying approximately sixty miles due west of Pittsburgh, Pennsylvania.² He spent much of his boyhood in Monroe, Michigan, before entering the United States Military Academy from Ohio in 1857.³ While at West Point, Custer came close to expulsion each year due to a high number of demerits. He graduated last in his class in June 1861.⁴

While awaiting orders, Custer served as the officer of the day on 29 June 1861, when he failed to stop a fight between cadets.⁵ In his first run-in with the military justice system, a court-martial found him guilty of neglect of duty and “conduct to the prejudice of good order and military discipline.”⁶ Fortunately for Custer, with a war looming and the testimony of his superior officer, Lieutenant (LT) William B. Hazen, to his general good conduct, his punishment was only an official reprimand.⁷ After the intercession of his congressman, Custer found himself carrying dispatches for Commanding General of the Army Lieutenant General (LTG) Winfield Scott, on the eve of the battle of First Manassas.⁸

While his early life and West Point years may have been inauspicious, Custer thrived in combat. He first demonstrated a



Then-LTC George Armstrong Custer with his wife, Elizabeth (Libbie). (Source: Library of Congress)

penchant for bold action during the Union's spring 1862 Peninsula Campaign. His combat exploits gained him notoriety, and he was soon promoted to General George McClellan's staff.⁹ By the summer of 1863, Custer was breveted (temporarily promoted) to brigadier general and took command of a cavalry brigade.¹⁰ In his first action as a brigade commander on 3 July 1863, at the Battle of Gettysburg, he led his outnumbered men in a charge that repulsed Confederate Major General J.E.B. Stuart's cavalry on the Union eastern flank.¹¹ Custer would again clash with Stuart at the Battle of Yellow Tavern in May 1864, with Soldiers under his command killing the Confederate general in the encounter.¹² He later played a key role in the Shenandoah Valley Campaign of 1864 and the Appomattox Campaign of 1865.¹³ While serving in these closing campaigns of the war, Custer gained the admiration of his commander, MG Philip Sheridan. In a show of appreciation, Sheridan purchased the parlor table upon which General Robert E. Lee and LTG Ulysses S. Grant signed the surrender agreement of the Army of Northern Virginia and presented it to Custer as a gift to his wife, Libbie.¹⁴ According to Sheridan's note accompanying the table, "There

is scarcely an individual in our service who has contributed more to bring about this desirable result than your gallant husband."¹⁵

Custer stayed in the Army after the war, eventually finding himself in the Great Plains in 1866 when he was promoted to lieutenant colonel and assigned to the newly formed 7th U.S. Cavalry Regiment.¹⁶ Beginning in the spring of 1867, Custer took part in an expedition against the Native Americans of the Central Plains.¹⁷ Led by MG Winfield Scott Hancock, the campaign's objective was to clear a corridor between the Platte and Arkansas rivers to construct what would become the Kansas Pacific Railway and white settlement along its route.¹⁸

"Hancock's War" marked Custer's first experience with Native American warfare. While he attempted to pursue and bring to battle elements marked as hostile by the Army, Custer was consistently eluded by his enemies. In early summer, LTG William T. Sherman, commander of the Military Division of the Missouri, ordered Custer to search for hostiles in a vast area in western Kansas and the territories of Nebraska and Colorado.¹⁹ Departing Fort Hays, Kansas, on 1 June with 300 men from six troops of his regiment, Custer traveled north to the Platte, then received instructions from Sherman to move south to the forks of the Republican River.²⁰ From the Republican River, Custer was to scout to the northwest and eventually arrive at Fort Sedgwick, seventy-five miles distant, or further west along the Union Pacific Railroad.²¹ In late June, he began to make a series of decisions that would lead to his court-martial.²²

George and Libbie Custer were an intensely devoted couple, with Libbie accompanying her husband as much as possible during his military career. Custer's correspondence during the 1867 campaign reveals his growing concern for Libbie's safety. Several frontier posts were attacked that summer, and word reached Custer's command in late June of a cholera outbreak on the frontier. On 22 June 1867, he wrote to her that "I never was so anxious in my life."²³ After arriving at the forks of the Republican River, Custer seems to have begun to make operational decisions based on his desire to see his wife and ensure her health and safety. At the same time, the grueling campaign revealed chronic issues of discipline, morale,

and mental health within the frontier army of the post-Civil War years.²⁴

While the volunteer armies of the Civil War were highly motivated and predominantly native-born, representing all walks of life, the Regular Army of the American Indian Wars was composed primarily of unskilled laborers, approximately half of whom were foreign-born.²⁵ Unit cohesion was difficult to achieve when operating in small, far-flung detachments on the frontier. Chronic problems with the quality of rations, low pay, grueling duty on isolated posts, and the ability to disappear into the mobile masses of westering settlers contributed to an astounding desertion rate within the Army—as high as 32.6 percent in 1871.²⁶ Custer's own regiment had 512 desertions between October 1866 and September 1867.²⁷ Alcohol abuse was common among both Soldiers and officers. On the march to the Platte in June, Major (MAJ) Wickliffe Cooper committed suicide with his service pistol while drunk.²⁸ Custer would struggle mightily to maintain morale and discipline within his formation during the campaign.

Before departing for the Republican River, Custer sent a letter to Libbie telling her to proceed west from Fort Hays to Fort Wallace, along the headwaters of the Smoky Hill River. With his command at the forks of the Republican River, he decided to resupply from Fort Wallace, approximately an equal distance southwest as Fort Sedgwick was to the northwest.²⁹ He sent a detail to Fort Sedgwick carrying dispatches to explain his need for supplies from Fort Wallace and sent his wagons and a guard detail south to Fort Wallace, with additional instructions to bring Libbie back with the supply train if she was located at the fort.³⁰

Meanwhile, reports of Native American raids along the Smoky Hill River to the south prompted LTG Sherman to send instructions to Fort Sedgwick (Colorado) for Custer to proceed to Fort Wallace (Kansas) rather than remaining further north.³¹ With Custer's detail to Fort Sedgwick already having departed to rejoin him at the Republican River, the post commander dispatched LT Lyman Kidder with a squad of troopers to carry these new orders to Custer.³²

The wagon train returning from Fort Wallace came under attack on 26 June 1867, but it was able to proceed on and

rejoin Custer.³³ Libbie had not been at the fort.³⁴ In accordance with LTG Sherman's original orders, the 7th Cavalry proceeded to a point northwest of Fort Sedgwick, where Custer belatedly learned of LT Kidder's mission and received Sherman's new orders to move south to Fort Wallace.³⁵ Fearing for Kidder's safety, Custer then doubled back to the southeast in a forced march to locate Kidder and reach Fort Wallace. Approximately thirty-five men deserted early on the morning of 7 July before the countermarch began, but there was no time to attempt to recover them.³⁶

After covering fifteen miles by noon, the command stopped for a short rest in the searing heat. At this point, the regiment was verging on mutiny, having been on campaign with poor rations and hardly a break for more than a month.³⁷ In broad daylight, thirteen men deserted the camp. Custer dispatched a party in pursuit with orders to use lethal force.³⁸ Seven on horseback escaped, but the six on foot were ridden down. When one of the deserters raised a carbine, a lightweight rifle with a shorter barrel, to fire on MAJ Joel H. Elliott, the pursuers opened fire. Three deserters were shot, with one mortally wounded. The remainder surrendered. Upon their return to camp, Custer loudly instructed his surgeon not to treat the wounded men but privately told him to attend to the casualties.³⁹ Aware that many in the command had planned to desert that evening, the officers of the 7th Cavalry stood guard that night.⁴⁰ According to Custer, "The effect was all that could be desired. There was not another desertion as long as I remained with the command."⁴¹

While continuing en route to Fort Wallace, Custer's men discovered the mutilated remains of LT Kidder and his detail, massacred by Native Americans on 1 or 2 July 1867.⁴² On 13 July, the 7th Cavalry finally reached Fort Wallace after covering 705 miles in six weeks of campaigning.⁴³ Libbie was still not there, and Custer received no news of her. While Libbie had been foremost in Custer's mind since departing Fort Hays, his concerns over her perhaps now began to impact his judgment.⁴⁴

Custer placed MAJ Elliott in command at Fort Wallace, instructed his company commanders to select a detail and equip it

with the best horses in the command, and departed on the evening of 15 July 1867 with three officers and seventy-two men bound for Fort Hays.⁴⁵ In the estimation of historian Jeffrey D. Wert, Custer's desire to be with Libbie was his overriding concern: "No other explanation of his risking the lives of men in a dangerous ride from Wallace seems credible."⁴⁶ Custer pushed the men relentlessly to the east.

Along the way to Fort Hays, on 16 July 1867, another trooper attempted to desert.⁴⁷ Custer sent Sergeant James Connelly and a detail after the man.⁴⁸ After capturing the deserter, the small group was ambushed by Native Americans while attempting to rejoin the main body. One Soldier was killed and another wounded; both were left behind by the Soldiers as they fled their attackers.⁴⁹ The sergeant reported the attack to Custer, who was determined to keep pushing onward despite his subordinates' pleas to try and locate their fallen comrades.⁵⁰ An infantry detail would later recover the dead Soldier's body as well as his wounded companion.⁵¹

Custer covered the 150 miles to Fort Hays in sixty hours, arriving in the middle of the night. He left most of the men at the frontier post to rest, then departed for Fort Harker with his brother, Tom, and three other men in two ambulances. Along the way, Custer encountered a supply train carrying dispatches instructing him to remain at Fort Wallace, but he interpreted a postscript in the correspondence to indicate that some other orders that he had failed to receive had also been sent. Custer continued to Fort Harker, awakened his immediate superior, district commander Colonel (COL) Andrew J. Smith, at 2:30 a.m., and gave him an update on his operations. After sending telegrams informing higher headquarters of the death of LT Kidder and his party, Custer boarded a train to Fort Riley. He and Libbie were finally reunited on the morning of 19 July 1867.⁵²

The same morning, a now fully awakened COL Smith ordered Custer via telegram to return to his command.⁵³ Due to a train delay, Custer and Libbie returned to Fort Harker on 21 July, where he was immediately arrested for leaving his command without authority. On 27 August, orders for a court-martial came from Army Headquarters in Washington.⁵⁴

Army Headquarters charged Custer with absence without leave (AWOL) and conduct to the prejudice of good order and discipline, with specifications relating to his alleged damage to Government horses for the purposes of private business, the improper use of Army ambulances, and failure to properly respond to the Native American attack on 16 July 1867.⁵⁵ An additional charge of conduct prejudicial to good order and discipline was filed by Captain (CPT) Robert West, an officer with a fondness for alcohol and a strong dislike for Custer.⁵⁶ The specifications for this charge accused Custer of ordering the killing of deserters without trial and preventing the wounded deserters from receiving medical aid, resulting in the death of one of the three wounded.⁵⁷ The court-martial convened on 15 September 1867, and Custer pled not guilty to all charges and specifications.⁵⁸ An old friend from West Point, CPT Charles C. Parsons, 4th U.S. Artillery, served as Custer's legal counsel.⁵⁹

During the trial, Custer argued that he had received verbal orders giving him wide latitude regarding his chosen routes and that his journey to Fort Hays and then to Fort Harker had been spurred by overriding guidance to confer with MG Hancock.⁶⁰ Without reliable postal service or telegraph lines, Custer argued, he could only meet with Hancock in person, necessitating his journey east.⁶¹ Custer claimed that the orders he had intercepted en route to Fort Harker had to be interpreted as incomplete, necessitating his continued journey east.⁶² As to his further movement to Fort Riley to see Libbie, he argued that COL Smith had verbally authorized it.⁶³

Custer also disputed the contention that he had overmarched the horses in his command, demonstrated that the use of ambulances as a mode of travel was common practice for officers in his district, and argued that his response to the Native American attack of 16 July 1867 was appropriate given the circumstances.⁶⁴ He explained that he had believed both Soldiers left behind to have been killed and understood that an infantry patrol would be sent to recover them, only later learning that one man had been left wounded.⁶⁵ He also argued that the odds of overtaking an enemy party after an attack occurring

several miles away were impossibly low and that he could not be charged simultaneously with failing to act against hostile Native Americans and with overworking his horses.⁶⁶ Finally, Custer responded that he had issued an order to kill the deserters to overawe the men in his command, many of whom he suspected of plotting to desert en masse, rather than as a literal command to the pursuers.⁶⁷ Custer introduced evidence showing that his superior, MG Hancock, had issued orders demanding the killing or capture of deserters within his district.⁶⁸ He also claimed that he had not prevented proper medical treatment of the wounded.⁶⁹

The substance of Custer's defense was that while he had perhaps been technically guilty of violating Army regulations in some cases, the circumstances he faced demanded extralegal solutions that were within the purview of a commander in the field.⁷⁰ COL Smith's recollection was unclear as to what he had authorized Custer to do upon his arrival to Fort Harker, but he admitted that he "made no objections to his going" to Fort Riley.⁷¹ On the other hand, Custer's own brother, Tom, a lieutenant in the 7th Cavalry, offered testimony that hurt his brother's contention that he had not literally meant for the deserters to be killed.⁷² From a historian's perspective, much of Custer's defense seems valid. Still, his movements to Forts Hays, Harker, and Riley seem to have used vague and contradictory orders to his own benefit so that he could visit Libbie and allay his concerns for her. On 11 October 1867, the court found Custer guilty of the first charge (AWOL) and the additional charge for unlawful killing of the deserters, ruling that he should be suspended for one year without pay.⁷³

The Custers were dismissive of the trial's results, with Libbie writing that it was "nothing but a plan of persecution for Autie" (Custer's nickname).⁷⁴ The latter charge seems unlikely given Custer's influence with the senior leadership of the Army and friendship with Secretary of War Edwin Stanton. For his part, when approving the findings of the court-martial, then-General of the Army Ulysses S. Grant said: "The reviewing officer, in examining the testimony in the case, is convinced that the Court, in awarding so lenient a sentence for the offences of which the

accused is found guilty, must have taken into consideration his previous services."⁷⁵ LTG Sherman commented that "the levity of the sentence, considering the nature of the offenses of Brvt. Major General Custer if found guilty, is to be remarked on."⁷⁶

Unfortunately for Custer, the trial's aftermath did not allow the case to quietly disappear from the news. Newspapers offered differing opinions on the justness of the trial and its outcome, and a letter from Custer defending himself and criticizing the conduct and composition of the court-martial appeared in an Ohio newspaper on 28 December 1867.⁷⁷ Custer also went on the offensive and filed charges against CPT West for drunkenness on duty.⁷⁸ In a divisive trial, CPT West was found guilty and suspended from rank and pay for two months.⁷⁹ At West's urging, a local court in turn filed murder charges against Custer for the death of the deserter, but the case was ultimately dismissed.⁸⁰

MG Sheridan, ever supportive of his protégé, allowed the Custers to live in his quarters at Fort Riley during the winter of 1868 while he was on leave.⁸¹ As early as April 1868, he attempted to bring Custer back to duty, a request likely denied by Grant due to Custer's public letter criticizing the court-martial. Finally, with a frontier war reignited on the Central Plains in the summer of 1868, Sheridan determined that he needed an aggressive commander to lead the effort.⁸² With LTG Sherman's blessing, on 25 September 1868, MG Sheridan sent orders for Custer to report to his command, cutting short his suspension by two months.⁸³

On 27 November 1868, Custer led the 7th Cavalry in an attack on a large Cheyenne encampment at the Washita River (Texas and Oklahoma).⁸⁴ Reports of Native American casualties varied, but Custer claimed to have killed 103 Cheyenne fighters and taken fifty-three captives.⁸⁵ An influential Cheyenne advocate for peace, Black Kettle, was killed while trying to flee Custer's troopers.⁸⁶ Whether purposeful or inadvertent, nearly all sources agree that women and children perished in the attack, causing some to accuse Custer of perpetrating a massacre.⁸⁷

Presaging later events, after dividing his forces and launching an initially

successful surprise attack, Custer's command came under a severe counterattack from several hundred Cheyenne as well as Arapaho and Kiowa warriors encamped nearby and had to conduct a fighting withdrawal.⁸⁸ MAJ Elliott and twenty men were cut off and killed during the fighting.⁸⁹ Nonetheless, Custer considered the Washita River battle to be a great success.⁹⁰

Custer later took part in Army expeditions to Yellowstone in 1873 and led an expedition in the Black Hills in 1874.⁹¹ The latter action ultimately ignited the conflict known as the Great Sioux War of 1876.⁹² Besides the few skirmishes he had participated in during 1867 and 1873, the Washita River battle was Custer's primary combat experience versus Plains warriors before the Little Bighorn Campaign.⁹³ On 25 June 1876, as part of a large pincer movement against the Sioux and allied tribes on the Northern Plains, Custer impetuously attacked a massive Native American encampment on the Little Bighorn River in what is now eastern Montana.⁹⁴ Having divided his force into four elements before attacking the village from two directions, Custer and his contingent of more than 200 men were cut off, routed, and annihilated by Sioux, Arapaho, and Cheyenne warriors.⁹⁵ The remaining troops of the 7th Cavalry were besieged and suffered heavy casualties until the approach of reinforcements.⁹⁶

The outcome of George Custer's court-martial lends itself to some intriguing counterfactuals. What if he had been removed from command or dismissed from the Army in 1867? A comparison to other court-martial cases in the nineteenth century reveals that some officers of high standing suffered stricter punishments for arguably lesser offenses. For instance, MG John C. Frémont, a popular hero in antebellum America known as the "Pathfinder of the West," was court-martialed in 1848 for failing to recognize the authority of a superior officer in California during the Mexican-American War.⁹⁷ For what was essentially a disagreement over seniority, Frémont was convicted of mutiny, disobedience of orders, and insubordination.⁹⁸ While President Polk exercised his power of clemency, Frémont was incensed and resigned from the Army.⁹⁹ During the Civil



Depiction of Custer's death, created by Henry Steinegger. (Source: Library of Congress)

War, Brevet MG Joseph Warren Revere, grandson of Paul Revere, was court-martialed and dismissed from the Service for allegedly marching his brigade away from the scene of the fighting at the Battle of Chancellorsville. Although President Lincoln reinstated Revere, the convicted officer also chose to resign.¹⁰⁰

Custer was arguably on another level of popularity and influence in comparison to Frémont or Revere, perhaps most crucially within the Army and Federal Government itself. Like his benefactors Sherman and Sheridan, Custer experienced a meteoric rise during the Civil War, and he had the trust of many senior leaders. Custer deflected responsibility for the events leading to the court-martial, referring to it obliquely in his memoirs of his frontier service as “certain personal and

official events,” and he and Libbie clearly believed that his conviction was unjust.¹⁰¹ Despite their objections to the court-martial in both public and private, Libbie informed a friend at the time of the trial that Custer had understood the likely consequences of his actions and risked a court-martial anyway, perhaps with the belief that his status in the Army would protect him from punishment.¹⁰²

Would the disaster at the Little Bighorn have been avoided with someone else in command? Most historians consider Custer's military career to have been marked by a combination of skill, a degree of rashness in combat, and a desire for personal glory. In the words of one historian, “Custer's military philosophy, eminently successful on scores of fields, was to pitch in against any odds and then extricate himself and

his command later if the going got too rough.”¹⁰³ At the same time, a fellow Civil War cavalryman vouched for his prudence, remarking that “He knew the whole art of war.”¹⁰⁴ Whichever of Custer's characteristics as a commander predominated, until 1876, Custer had won fame for himself with repeated battlefield successes. Unfortunately for the men who rode with him, Custer's characteristic failure to take heed of the enemy situation, perhaps spurred on by arrogance from repeated successes and a burning desire for glory, meant that the young general's luck eventually ran out on the fields overlooking the Little Bighorn River.

While it is difficult to parse the evidence at a space of 156 years, in retrospect, Custer's court-martial offers two lessons to Army officers of the 21st century. The first is the importance of

disciplining subordinates appropriately, perhaps especially those who have achieved “rock star” status within an organization. Although he was convicted, Custer seems to have benefited from command influence and favoritism in his sentencing, arguably to the detriment of his men in later years. The second lesson is the danger of unbridled ambition and egocentrism in a military professional. Custer probably behaved the way he did because he believed he could get away with it. Army leaders must guard against these behaviors, both in themselves and in subordinates, lest future lives be lost to leaders who become detached from the fundamental requirements of military leadership. Custer’s court-martial can, therefore, be seen as a cautionary tale about military justice, leadership, and the potentially deadly consequences of the failure to properly discipline popular leaders. **TAL**

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Notes

1. ROBERT M. UTLEY, CAVALIER IN BUCKSKIN: GEORGE ARMSTRONG CUSTER AND THE WESTERN MILITARY FRONTIER 13 (2001) (quoting George A. Custer, 1867).
2. *Id.* at 13-14; EZRA J. WARNER, GENERALS IN BLUE: LIVES OF THE UNION COMMANDERS 108-09 (1992).
3. UTLEY, *supra* note 1, at 15.
4. WARNER, *supra* note 2, at 108-09.
5. JEFFREY D. WERT, CUSTER: THE CONTROVERSIAL LIFE OF GEORGE ARMSTRONG CUSTER 39-44, 312 (1996).
6. WARNER, *supra* note 2, at 422.
7. WERT, *supra* note 5, at 39.
8. Hazen rose to division command in the Civil War and later served on the Western frontier. Despite his testimony on Custer’s behalf, Hazen and Custer disliked one another and became embroiled in a public dispute in 1874. WERT, *supra* note 5, at 39-44, 312.
9. WARNER, *supra* note 2, at 109.
10. *Id.*
11. UTLEY, *supra* note 1, at 24.
12. *Id.* at 28.
13. *Id.* at 30-31.
14. *Id.* at 33.
15. *Id.*
16. LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER 6-7 (1968).
17. *Id.* at 16-30.
18. *Id.* at 6-13, 16, 36.
19. WERT, *supra* note 5, at 257.
20. *Id.* at 257-58.
21. *Id.* at 258.
22. *Id.* at 258-59.
23. *Id.* at 259.
24. FROST, *supra* note 16, at 54-55.
25. UTLEY, *supra* note 1, at 26.
26. *Id.* at 27.
27. *Id.* at 99.
28. *Id.* at 42.
29. WERT, *supra* note 5, at 258-59.
30. *Id.*
31. *Id.*
32. *Id.*
33. THE CUSTER STORY: THE LIFE AND INTIMATE LETTERS OF GENERAL GEORGE A. CUSTER AND HIS WIFE ELIZABETH 205 (Marguerite Merington ed., 1950) [hereinafter THE CUSTER STORY].
34. *Id.*
35. *Id.* at 207.
36. WERT, *supra* note 5, at 39-44, 259-60.
37. *Id.* at 259-60.
38. *Id.*
39. *Id.*
40. THE CUSTER STORY, *supra* note 33, at 205.
41. *Id.* at 206.
42. WERT, *supra* note 5, at 260-61.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 261-62.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 262.
53. *Id.*
54. *Id.*
55. FROST, *supra* note 16, at 96-103.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 218-28.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 207-14, 228-37.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 149.
71. *Id.*
72. *Id.* at 150-55.
73. *Id.*
74. WERT, *supra* note 5, at 263; THE CUSTER STORY, *supra* note 33, at 213.
75. John O. Shoemaker, The Custer Court-Martial 21 (Dec. 1, 1962) (U.S. Army Command and General Staff College, Fort Leavenworth, Kansas), <https://apps.dtic.mil/sti/pdfs/AD1111857.pdf>.
76. WERT, *supra* note 5, at 263.
77. *Id.* at 264.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 266-68.
82. *Id.*
83. *Id.*
84. Stephen Black, *Washita, Battle of the: The Encyclopedia of Oklahoma History and Culture*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry?entry=WA037> (last visited Oct. 10, 2024).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. WARNER, *supra* note 2, at 109.
92. *Id.*
93. *Context and Story of the Battle: Little Bighorn Battlefield*, NAT’L PARK SERV. (Mar. 23, 2023), <https://www.nps.gov/libi/learn/historyculture/battle-story.htm>.
94. *Id.*
95. *Id.*
96. *Id.*
97. Cody K. Carlson, *This Week in History: John C. Fremont is Court-Martialed for Mutiny*, DESERET NEWS (Feb. 3, 2016), <https://www.deseret.com/2016/2/3/20581683/this-week-in-history-john-c-fremont-is-court-martialed-for-mutiny>.
98. *Id.*
99. *Id.*
100. WARNER, *supra* note 2, at 395-96.
101. See generally GEORGE A. CUSTER, MY LIFE ON THE PLAINS OR, PERSONAL EXPERIENCES WITH INDIANS (1874).
102. THE CUSTER STORY, *supra* note 33, at 212.
103. WARNER, *supra* note 2, at 110.
104. WERT, *supra* note 5, at 229.



AROUND THE CORPS

Former SFC Chris Masuda, senior paralegal noncommissioned officer, U.S. European Command, stands with COL Joseph Mackey, Director, The Judge Advocate General's Legal Center, after graduating with Honors from Officer Candidate School (OCS) at Fort Moore, GA, and earning his commission as a second lieutenant. COL Mackey was the guest speaker at the OCS graduation and promoted 2LT Masuda into the Army Officer Corps. (Source: JAGCNet)



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Practice Notes

An Overview of the Deductive Changes Process and Areas of Potential Challenge

By Ms. Valerie Mullaley

Government contracts typically contain a changes clause that permits the contracting officer to make unilateral changes to certain aspects of the contract, provided those changes are within the “general scope” of the contract.¹ When such changes decrease the cost or time to perform part of the work under the contract, the contracting officer must make an equitable adjustment to the contract price and/or performance period to reflect the reduction.² These “deductive changes” have proven more difficult to classify and quantify than their additive changes counterpart, requiring careful analysis by contracting officers and their legal advisors.³

As with changes that add work, disputes may arise when contracting officers initiate unilateral changes that decrease work. The performing contractor may challenge the contracting officer’s classification of the reduced work as a deductive change rather than a partial termination for convenience, challenge the Government’s entitlement to a price reduction, or challenge the contracting officer’s determination of the amount of the price reduction. Potential offerors may challenge the deductive change as a material contract change that requires competition. If challenged, the Government bears the burden of proof.⁴ To ensure a defensible determination, contracting officers must understand the process and areas of

potential challenge when using the changes clause to unilaterally decrease work under the contract.

1. The Deductive Change Must Be Within the General Scope of the Contract

Before proceeding with any change under the changes clause, additive or deductive, the contracting officer must establish that the change falls within the “general scope” of the contract.⁵ There are two potential challenges here: (i) the performing contractor may allege that the deductive change is a cardinal change outside the purview of the changes clause, or (ii) the contractor’s competitor may protest the modification as outside the scope of the original competition.⁶

Although the performing contractor generally would not challenge a deductive change as outside the general scope of the contract,⁷ contracting officers must be cognizant of the possibility. Cardinal changes occur “when the Government effects an alteration in the [contract] work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for” by the parties.⁸ A cardinal change constitutes a breach of contract⁹ and opens a host of separate issues for consideration.

An allegedly improper deductive change may also give rise to a protest by the performing contractor’s competitor for falling outside the general scope of the contract. In *Poly-Pacific Technologies, Inc.*, the Government Accountability Office (GAO) sustained a protest that alleged a modification reducing the scope of work was improper where it affected the field of competition.¹⁰ The GAO found that the U.S. Air Force improperly relaxed a requirement by suspending the contractor’s obligation to recycle acrylic plastic media once it became unusable.¹¹ Although the protester did not compete under the original solicitation, it asserted that the deductive change materially altered the contract such that it constituted an improper sole-source award for which the protester was currently able to perform.¹²

The GAO agreed, finding that the solicitation required offerors to provide technical solutions and pricing for leasing the plastic media and disposing and recycling the spent blast material and that the

agency had materially changed the contract by relaxing the recycling requirement.¹³ The GAO looked at factors such as the “magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract” to determine whether there was “a material difference” between the original contract and the modified contract.¹⁴ The GAO further considered whether relaxing the recycling requirement was reasonably anticipated under the solicitation and whether a modification that removed the recycling requirement “materially changed the field of competition.”¹⁵ Ultimately, the GAO determined that removing the recycling requirement created an improper sole-source award where another contractor could now perform the reduced work.¹⁶ Even though the agency still required the plastic media and removal of spent blast media, that did not give the agency “unlimited latitude to modify the way in which it contracts to meet those requirements” where the change resulted in work materially different than that anticipated in the solicitation.¹⁷

Although the decision has garnered some criticism, with some contending that deductive changes are not proper protest issues,¹⁸ the case remains GAO precedent.¹⁹ Contracting officers must consider how the deductive change affects competition before relying on the changes clause as a mechanism to decrease work and reduce associated costs.

2. The Deductive Change Must Fall Within a “Designated Area” of a Changes Clause

After determining that the deductive change falls within the general scope of the contract, the contracting officer must ensure the change fits within a “designated area” permitted under the applicable changes clause incorporated into the contract.²⁰ The various changes clauses identify the types of changes authorized for certain contract types and procurements. For example, in a fixed-price, supply contract, the contracting officer may only invoke the changes clause to make changes to: “(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured

for the Government in accordance with the drawings, designs, or specifications; (2) Method of shipment or packing; (3) Place of delivery.”²¹ The contracting officer could not, then, use the changes clause in a fixed-price, supply contract to unilaterally decrease the quantity of supplies.²²

Where a change causes a decrease that falls outside the authorized “designated areas”²³ of the applicable changes clause in the contract, the contracting officer cannot rely on the changes clause as authority to unilaterally deduct work from the contract and must instead consider other authority, such as a partial termination for convenience, or enter into a bilateral modification. Because contracting officers are generally well versed on the limitations of the changes clause and only use this authority when the change falls within a permissive designated area, this issue holds little risk of challenge.

3. The Deductive Change Must Be Either a Specification Change or a Minor Change

To rely on the changes clause as authority for a unilateral decrease to the contract, the Government must show, in addition to proving the deductive change is within the general scope of the contract and fits within a designated area of the applicable changes clause, that the decrease is either a specification change or a minor change to the contract. This determination influences whether the decreased work should be classified as a partial termination for convenience instead of a deductive change.

No hardline rule governs whether to classify the work reduction as a partial termination for convenience or as a deductive change,²⁴ as each determination is fact-specific.²⁵ The determination of the proper clause “does not depend on which clause provides the greatest benefit to the Contractor;” instead, “the choice of clause is determined by the extent of the work being deleted.”²⁶ The Corps of Engineers Board of Contract Appeals identified two objective tests to determine the appropriate classification of these work decreases.²⁷ The first test examines the identifiability of removed work.²⁸ With regard to supplies, when the Government reduces the number of units to be delivered or eliminates particular line



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items or “other identifiable, segregable items of work,” the contracting officer should rely on the termination for convenience clause.²⁹ Specifications changes, however, usually fall within the authority of the changes clause.³⁰

The second test examines whether the decreased work is a major or minor change in relation to the entirety of the contract.³¹ Decreases of 20 percent or more of the work have generally been treated as a major change, for which a partial termination for convenience in lieu of a deductive change order is appropriate.³² Decreases of less than 10 percent usually constitute a minor change for which a deductive change is appropriate.³³ Contracting officers should be wary, however, of relying on percentages in making these determinations and consider the totality of the circumstances in deciding whether to classify the change as major or minor.³⁴

If the contracting officer cannot demonstrate that the decreased work is a specification change or a minor change relative to the entire scope of the contract, the reviewing board or court may determine that the change should have instead been treated as a partial termination for convenience.³⁵ Although the reviewing body will give deference to the contracting officer’s classification,³⁶ the performing contractor may challenge the contracting officer’s

classification as a deductive change rather than a partial termination for convenience when its contract is not profitable.³⁷ On a loss contract, a partial termination for convenience benefits the contractor because “the contractor is entitled to reasonable profit on the work performed even if that rate of profit is lower than that actually earned or bid on the project.”³⁸ Contracting officers should expect challenges under these circumstances and should, therefore, walk through the analysis and prepare contemporaneous documentation to support the classification.

4. The Contractor Must Have Recognized Cost Savings from a Deductive Change for the Government to Reduce the Contract Price

Once the contracting officer has determined that the deductive change fits within the general scope of the contract, fits within a designated area of the applicable changes clause, and constitutes a specification change or a minor change, the contracting officer must next determine whether the contractor recognized a cost savings. If the contractor did not realize some cost savings, the contracting officer cannot pursue a downward equitable adjustment.

Because the “purpose of an equitable adjustment is to . . . make [the contractor] whole, whether the change is an additive or deductive one,”³⁹ price adjustments are typically measured by the “cost impact of the contractor.”⁴⁰ Thus, the contracting officer should review downward adjustments from the contractor’s perspective. Contractors may challenge the contracting officer’s determination, arguing that it did not realize any cost savings and that the Government, therefore, cannot reduce the contract price.⁴¹ If the contractor does not realize some cost savings from the change, the Government is not entitled to a price reduction under the changes clause.⁴²

5. The Contracting Officer Must Select the Proper Calculation Method

Once properly categorized as a deductive change for which the contractor recognized some cost savings, the contracting officer faces an additional hurdle with quantifying the reduction. This determination is ripe

for challenges based on the competing interests of the Government recouping costs associated with unperformed work and the contractor retaining the contract price.

Ultimately, the adjustment must be equitable, making the contractor whole.⁴³ The price reduction “should not increase the plaintiffs’ loss nor decrease it at the expense of the Government.”⁴⁴ The Defense Acquisition University Pricing Guide iterates this point, stating the “contractor should not be left in a better or worse cost or profit position on the unchanged work after the change than it was before the change.”⁴⁵

To calculate the equitable downward adjustment in contract price, the contracting officer should ordinarily rely on the “would have cost” method.⁴⁶ This method utilizes the contractor’s *current* estimate rather than the price provided in the contractor’s original proposal.⁴⁷ The contract price is reduced by “the reasonable cost of performing the deleted work” based on that current estimate.⁴⁸ Determining reasonable costs involves “both an objective element in terms of what it would have cost a prudent businessman in a similar overall competitive situation and a subjective element as to what it would have cost the particular contractor involved.”⁴⁹

Although the “would have cost” method generally applies to deductive changes, one exception to this method occurs when the Government completely deletes severable work.⁵⁰ In these situations, the entire price of the severable work in the contract, rather than the estimate of what it would have cost the contractor to perform the work, should be used to determine the downward adjustment.⁵¹

Conclusion

Deductive changes can quickly turn into complex contract actions. To ensure an equitable and defensible determination, contracting officers should carefully consider the various issues posed by characterizing a decrease in work as a deductive change. As a threshold issue, the contracting officer should make an affirmative determination that the change fits within the general scope of the contract and within a designated area of the applicable changes clause in the contract. Then, the contracting officer can address the more complicated

issues of characterizing proper decreased work and determining the quantum of the price reduction—always with an eye on making the contractor whole as a result of the Government-directed, unilateral deductive change. **TAL**

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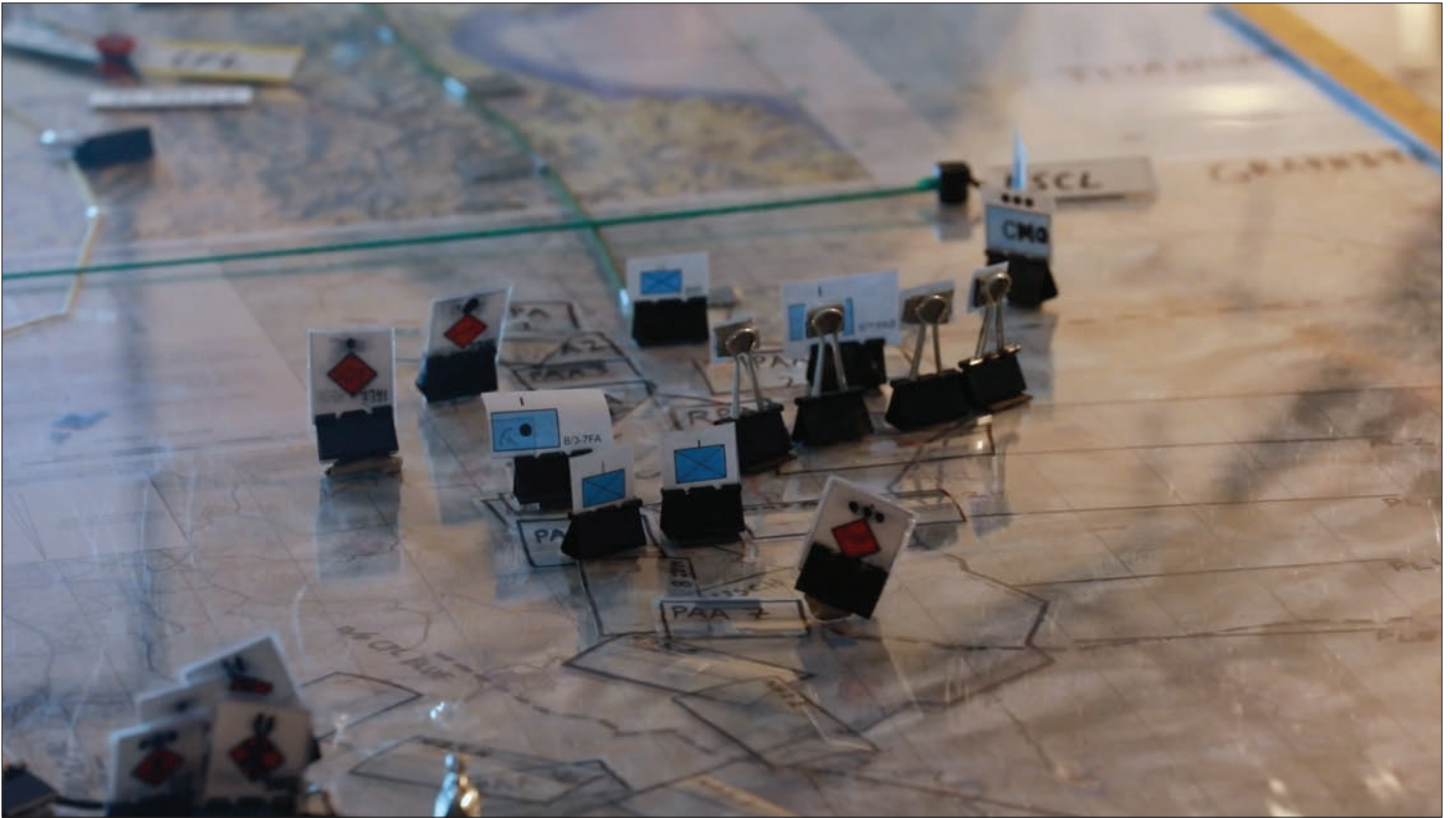
Notes

1. FAR 43.201(a) (2024). FAR Subpart 43.205 requires contracting officers to insert a specific changes clause based on contract type (e.g., fixed-price, cost-reimbursement, or time-and-materials or labor-hours) and what the Government is actually procuring (e.g., supplies, services, dismantling/demolition/improvement removal, or construction). FAR 43.205 (2024).
2. See, e.g., FAR 52.243-1(b), 52.243-2(b), 52.243-3(b), 52.243-4(d), 52.243-5(c) (2024).
3. John C. Person, *Deductive Changes*, BRIEFING PAPERS, July 2001, at 1, 1 (examining characterization and quantification of deductive changes).
4. If the awardee appeals, the Government bears the burden of proving both entitlement and quantum by a preponderance of the evidence. See J.S. Alberici Constr. Co., Inc., GSBCA No. 11024, 91-3 BCA ¶ 24,205 (“In claiming a downward equitable adjustment . . . the Government has the burden of proof.”) (citing *Nager Elec. Co. v. United States*, 442 F.2d 936 (Ct. Cl. 1971)). If a potential offeror protests the deductive change as requiring competition, the Government must prove that the “modification does not materially change the requirements of the contract or result in a fundamental change to the nature of the work.” See *Poly-Pacific Techs., Inc.*, B-296029, 2005 CPD ¶ 105 (Comp. Gen. June 1, 2005).
5. FAR 43.201(a) (2024).
6. See *Navistar Def., LLC v. United States*, 146 Fed. Cl. 499, 510 (Fed. Cl. 2019) (discussing the two tests to determine whether a material departure from the scope of the original procurement occurred). The boards and courts often conflate these separate tests, but distinguishing the two will assist contracting officers in assessing whether the changes clause is appropriate authority to reduce work under the contract. For a detailed discussion on these determinations, see JOHN CIBINIC, JR. ET AL., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 347-54 (5th ed. 2016).
7. RALPH C. NASH, JR. & STEVEN W. FELDMAN, *GOVERNMENT CONTRACT CHANGES* § 4.3 (2022) (defining “general scope”).
8. *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 (finding no cardinal change in a challenge to assessed liquidated damages where construction of an addition was “essentially the same work the parties bargained for” at award); see *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014) (stating that a cardinal change occurs when the work is “materially different from that specified in the contract”).
9. *Bell/Heery*, 739 F.3d at 1335.

10. *Poly-Pacific Techs., Inc.*, B-296029, 2005 CPD ¶ 105 (Comp. Gen. June 1, 2005).
11. *Id.* at 3.
12. *Id.* at 4; see also *AT&T Comm’ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (“A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract’s changes clause.”) (citations omitted).
13. *Poly-Pacific Techs., Inc.*, 2005 CPD ¶ 105, at 5.
14. *Id.* at 4.
15. *Id.*
16. *Id.* at 6.
17. *Id.* at 5.
18. See, e.g., *Vernon J. Edwards, Postscript: Deductive Changes Outside the Scope of the Contract*, NASH & CIBINIC REP., Oct. 2005, ¶ 48 (“Deletions and partial terminations are . . . beyond the scope of the Comptroller General’s protest authority.”).
19. See, e.g., *Zodiac of N. Am., Inc.*, B-414260, 2017 CPD ¶ 107 (Comp. Gen. Mar. 28, 2017) (relying on *Poly-Pacific Technologies, Inc.* to demonstrate the GAO’s jurisdiction to review protester’s allegation that the agency improperly relaxed requirement following awardee’s two failed first article tests on inflatable combat raiding craft and assault craft and ultimately denying protest because specification change was minor and within general scope of contract) (citing *Poly-Pacific Techs., Inc.*, B-296029, 2005 CPD ¶ 105 at 3-4).
20. FAR 43.201(a) (2024).
21. FAR 52.243-1(a) (2024).
22. *Mark J. Garrette, Jr., Post-Award Deletions of Work: Partial Termination for Convenience or Deductive Change?* CONTRACT MGMT., Sept. 2014, at 46, 51 (citing *Celesco Indus. Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604; *Ideker, Inc.*, ENG BCA Nos. 4602, et. al., 87-3 BCA ¶ 20,145 (“Particularly in the supply contract context, reduction of the number of units of supplies to be delivered, elimination of line items or other identifiable, segregable items of work is generally accomplished under the [termination for convenience] clause, whereas specification changes are normally made pursuant to the ‘Changes’ clause.”) (citations omitted)).
23. FAR 43.201(a) (2024).
24. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974 (finding termination for convenience clause appropriate authority where the discontinued work satisfied both the identifiable, segregable test and the major test because there was no change to the specifications and the deleted work amounted to approximately 20 percent of the overall work).
25. *Kinetic Eng’g & Constr., Inc.*, ASBCA No. 30726, 89-1 BCA ¶ 21,397 (“Whether work should be deleted under the Changes clause or the Termination for Convenience clause is best left to the circumstances of each case.”) (citing *American Constr. & Energy, Inc.*, ASBCA No. 34934, 88-1 BCA ¶ 20,361; *Celesco Indus., Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604).
26. *Jimenez, Inc.*, VABCA Nos. 6351, et al., 02-2 BCA ¶ 32,019 (“When major portions of contract work are deleted, the Termination for Convenience clause must be used.”) (citations omitted).
27. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.
28. *Id.*

29. *Id.*

30. *Id.* This is further supported by the plain language of FAR 52.243-1(a) (2024), which includes specification changes as a designated area of change permitted under the changes clause.
31. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.
32. See *id.*; *Person*, *supra* note 3, at 3.
33. *Person*, *supra* note 3, at 3.
34. See *id.*
35. See *id.* (noting that a major change is usually classified as a partial termination for convenience).
36. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.
37. *Person*, *supra* note 3, at 4.
38. See *id.* (finding, as a “general rule, on a profitable contract, deletion of work through a deductive change is better for the contractor, while on a loss contract, a partial termination for convenience is better”).
39. *Historical Servs.*, DOT BCA Nos. 72-8, et al., 72-2 BCA ¶ 9,582, at 44,789.
40. *Temco Helicopters, Inc.*, IBCA Nos. 2594-A, et al., 89-2 BCA ¶ 21,796, at 109,661 (“A contract modification resulting in a deductive change to a fixed-price contract must be priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government.”); accord *CIBINIC ET AL.*, *supra* note 6, at 594.
41. See, e.g., *Temco Helicopters Inc.*, 72-2 BCA ¶ 9,582, at 109,661.
42. See *CIBINIC ET AL.*, *supra* note 6, at 603 (citing *Temco Helicopters, Inc.*, IBCA Nos. 2594-A, et al., 89-2 BCA ¶ 21,796).
43. *Historical Servs.*, 72-2 BCA ¶ 9,582, at 44,789.
44. *Nager Elec. Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971) (citations omitted).
45. 4 DEF. ACQUISITION UNIV., *CONTRACT PRICING REFERENCE GUIDE: ADVANCED ISSUES* 173 (2021).
46. See *EJB Facilities Servs.*, ASBCA No. 57547, 13-1 BCA ¶ 35,399, at 173,676.
47. *Id.* (citing as examples, “*Osborne Constr. Co.*, ASBCA No. 55030, 09-1 BCA ¶ 134,083 at 168,513 (bid amount irrelevant to pricing deductive change); *Olympiareinigung*, 04-1 BCA ¶ 32,458 at 160,563 (amount allocated in bid for deleted work irrelevant to pricing a deduction); *Fordel Films*, 79-2 BCA ¶ 13,913 at 68,298 (contractor not bound by costs estimated in proposals in pricing a downward adjustment); *Celesco*, 79-1 BCA ¶ 13,604 at 66,683 (deduction should be based on the contractor’s current estimate or ‘would have’ cost for performing the deleted work); *S.N. Nielsen Co. v. United States*, 141 Ct. Cl. 793, 797 (Ct. Cl. 1958) (proper way to price deleted work is to ascertain what the work would have cost, not what it was estimated to cost when the contract was formed)”).
48. *Historical Servs.*, 72-2 BCA ¶ 9,582, at 44,789.
49. *Id.* (citations omitted).
50. *CIBINIC ET AL.*, *supra* note 6, at 606 (citing *Gregory & Reilly Assocs., Inc.*, FAACAP 65-30, 65-2 BCA ¶ 4,918); see *EJB Facilities Servs.*, 13-1 BCA ¶ 35,399, at 173,676 (finding contract was not severable and therefore “would have cost” rule was proper method to determine price reduction).
51. *CIBINIC ET AL.*, *supra* note 6, at 606.



U.S. Army and Philippine Army soldiers conduct a targeting working group decision board during the Joint Pacific Multinational Readiness Center exercise on 7 June 2024. (Credit: SGT Samantha Aguridakis)

Practice Notes

Applying Vague Law to Violence How the Joint Force Can Master Proportionality Before a High-Intensity War

By Major John C. Tramazzo

Introduction: There Are Mixed Messages About Mitigating Civilian Harm

U.S. military forces deserve clear guidance on their leaders' tolerance for collateral damage. Unfortunately, there appear to be mixed messages about proportionality as the Department of Defense (DoD) simultaneously applies lessons learned in Afghanistan and contemplates armed conflict with a peer or near-peer adversary. On one hand, senior military officers are stressing the importance of increased offensive capabilities, "rings of fire," and "unrepentant lethality."¹ On the other, Pentagon leaders expect the joint force

to operate in a manner that is more protective of civilians than is required by the law of armed conflict (LOAC).² In particular, the DoD's August 2022 Civilian Harm Mitigation and Response Action Plan (CHMR-AP) reinforces several misconceptions as to what the law of proportionality requires.³

In the training environment, many commanders and staffs reflexively refrain from taking actions that may be lawful in the large-scale combat operations (LSCO) context.⁴ As then-Major Jason Young described for the Lieber Institute for Law & Land Warfare while assigned to the Joint Multinational Readiness

Center in Hohenfels, Germany, many commanders and staff officers are unwilling to employ large-caliber or unobserved fires to destroy a high-value enemy asset in the vicinity of a civilian object or in an urban area.⁵ His observations reflect a growing concern that the joint force lacks a fundamental understanding of how LOAC should apply in a high-intensity war.

This article provides further observations regarding the confusion that sometimes exists when warfighters apply the law to the operational function of fires. It zeroes in on the proportionality rule and the inherent dilemmas associated with applying it during LSCO. It differentiates between how the law of proportionality applied during the wars in Iraq and Afghanistan and how it should apply in a future war. Finally, it offers two recommendations that geographic combatant commanders, Service component commanders, theater special operations commanders, and other likely target engagement authorities can implement to mitigate the risks associated with misconceptions about the law. It urges increased engagement between general or flag officers and their subordinates on the topic of collateral damage, and it proposes the issuance of theater-specific, scenario-based tactical guides for use in training.

The Proportionality Rule Is Well-Established in Law but Vague and Difficult to Apply

Articles 51 and 57 of the 1977 Additional Protocol (AP I) to the Geneva Conventions require combatants to refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be “excessive in relation to the concrete and direct military advantage anticipated.”⁶ In addition, Article 57 of AP I requires combatants to “take all feasible precautions” to minimize the incidental loss of civilian life, injury to civilians, and damage to civilian objects.⁷

The United States has not ratified AP I and, therefore, is not bound by it, but U.S. officials acknowledge that both the general proportionality rule and the obligation to “take feasible precautions” reflect customary international law.⁸ For example, the DoD accepts large portions of AP I as legitimate

statements of customary international law and relies on these rules to train commanders and military lawyers.⁹ Further, the DoD *Law of War Manual* recognizes the duty to “take feasible precautions to reduce the risk of harm to the civilian population,” but the United States considers the word “feasible” to mean “practicable or practically possible.”¹⁰ The obligation does not require everything that is capable of being done.

These highly elastic rules often require subjective and imprecise determinations, and they implicate profound, competing moral obligations. As Professor William Fenrick, the former legal advisor to the International Criminal Tribunal for the former Yugoslavia, observed, “The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.”¹¹ Proportionality does not necessarily require a mathematical comparison, nor does the rule demand a balancing test, but the law prohibits attack when “there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other.”¹² In essence, proportionality acknowledges that unavoidable civilian harm is sometimes legally justified.

The proportionality rule obligates commanders to reconcile humanitarian imperatives with military requirements. As the late Israeli scholar Yoram Dinstein explained, proportionality requires “pondering dissimilar considerations—to wit, civilian losses and military advantage—[which] is not an exact science.”¹³ The U.S. military incorporates science and technology (i.e., empirical data, probability, and complex modeling) into doctrine and practice to mitigate civilian harm.¹⁴ But, lawful targeting also requires substantial operational art (i.e., intuition, moral reasoning, and experience).¹⁵ For instance, throughout the U.S.-led campaign to destroy the Islamic State in Iraq and Syria, operational commanders continuously balanced the military advantages gained by killing various Islamic State of Iraq and Syria (ISIS) leaders in urban centers like Raqqa and Mosul with more tenuous concerns about generating propaganda fodder or creating more jihadists than they eliminated.¹⁶

The proportionality rule and the requirement to take feasible precautions are contextual. The application of the law should differ from conflict to conflict and even from engagement to engagement. In Syria, the death of one ISIS member may not justify damage to a single civilian object. On the other hand, in an armed conflict between the United States and a peer adversary, the destruction of a high-value unit or target (e.g., a Russian TOS-1 rocket launcher or a Chinese DF-17 missile) could justify high levels of collateral damage.¹⁷ In a high-intensity war, commanders and staff officers will “need to intuitively know and confidently apply the actual rules of war, unhindered by the lingering hangover of constrained [counterinsurgency rules of engagement]” that the joint force is most familiar with.¹⁸

The Problem: The Joint Force Is Primed for Restraint

Two decades of low-intensity conflict in Afghanistan, Iraq, Syria, Somalia, Yemen, and Libya generated an intellectual war-fighting capability gap.¹⁹ Experts have expressed concerns about “insufficient legal expertise” within the joint force.²⁰ Most commanders and staffs are accustomed to “non-combatant casualty cutoff values” and collateral estimates of zero, an indication that senior leaders would not tolerate any collateral damage resulting from offensive strikes.²¹ In recent counterterrorism operations, combatant commanders accepted increased risk to their own forces to prevent incidental harm to civilians. For example, when special operations forces targeted ISIS leader Abu Ibrahim al-Hashimi al-Qurayshi in Syria in 2021, U.S. Central Command (CENTCOM) opted to launch a complex raid instead of a precision airstrike into Qurayshi’s multi-story dwelling.²² The raid was a success, but it resulted in the loss of a highly capable MH-60M Black Hawk helicopter in the Syrian desert.²³

The CENTCOM commander was not wrong considering the context in which he made decisions.²⁴ As Professors Michael Schmitt and Sean Watts noted in 2015, international law “imposes obligations and requires precautions that can [sometimes] expose combatants to tangibly greater



The CDEM is excellent for deliberate, precision attacks like the USS *Porter's* (pictured) Tomahawk strike on Syrian military bases in 2017. However, the next war will likely be marked by fluid battlespaces and a shift from deliberate to dynamic targeting. (Credit: SP3 Ford Williams)

danger.²⁵ Operational advantages over non-state actors like ISIS, including air superiority and exquisite intelligence, enabled battlefield precautions, precision warfare, and “zero tolerance” policies for civilian harm. Further, no responsible commander wants to kill civilians even though, under some circumstances, the law permits it.

Civilian harm will be unavoidable in a LSCO, a reality of armed conflict that the DoD *Law of War Manual* recognizes.²⁶ International law permits belligerents to take innocent lives and destroy civilian property to achieve military objectives.²⁷ But how, exactly, does one decide if or when a particular military aim justifies the taking of innocent lives?²⁸

History reveals how difficult it is to apply the law of proportionality.²⁹ In 1999, divergent views on collateral damage frustrated U.S. and allied efforts to quickly defeat Slobodan Milošević in Kosovo. In describing policymakers’ and partner nations’ conservative interpretations of the law, the North Atlantic Treaty Organization (NATO) Air Commander, Lieutenant General Michael Short, observed after the war that “concern for collateral damage drove [NATO] to extraordinary degree, and it will drive the next generation of warriors even more so.”³⁰ In November 2001, disagreements over collateral damage disrupted early targeting efforts in Afghanistan. *The Washington Post* reported on a dispute between operational commanders and the CENTCOM staff judge advocate

who purportedly refused to permit certain strikes against Taliban targets.³¹ Conflicting perspectives about proportionality required General Tommy Franks to resolve disputes and resulted in major delays and missed opportunities.³²

In a LSCO, U.S. commanders and staff will not have the luxuries of time or security to debate the law of targeting.³³ Tactical decision cycles will be more compressed than previous conflicts.³⁴ Peer adversaries will prioritize attacks on long-distance communications systems and U.S. command posts.³⁵ Wargames in the Indo-Pacific repeatedly reveal that the United States would lose “dozens of ships, hundreds of aircraft, and thousands of [personnel]” in a matter of days.³⁶

Interviews and interactions with officers currently attending intermediate level education programs reveal the same uncertainties that manifest during Combat Training Center (CTC) rotations. For example, during a series of unclassified tabletop exercises and wargames at the U.S. Naval War College, many participants from all Services hesitated to strike high-value enemy targets.³⁷ Some students opted for inaction based on relatively dense operating environments and concerns over how tactical decisions resulting in civilian harm could reverberate at the strategic level.³⁸ Many officers are intuitively inclined to exercise restraint and forego a thorough assessment of whether the expected collateral

damage would be excessive in relation to the military advantage anticipated.

A future war, regardless of whether it occurs in Europe or Asia, will be defined by lethality and density.³⁹ Considering how much firepower the joint force’s operational tasks would require and how congested the likeliest areas of operations are with civilians and civilian objects, tactical commanders and senior leaders alike must grapple with how to evaluate various military advantages and collateral concerns.⁴⁰ As Captain Wayne Hughes wrote in *Fleet Tactics*, “Nothing about battle can be understood without grasping the impact of its violence.”⁴¹ Decision makers at all echelons of the joint force need high quality training repetitions with the proportionality rule and meaningful feedback before an international armed conflict erupts.

Some may argue that the Collateral Damage Estimation Methodology (CDEM)⁴² is sufficient to govern future targeting decisions. The CDEM is excellent for deliberate, precision attacks like the USS *Porter's* Tomahawk strike on Syrian military bases in 2017.⁴³ New technology, like the Digital Precision Strike Suite Collateral Estimation algorithm and the Digital Imagery Exploitation Engine tool, will improve deliberate targeting.⁴⁴ However, the next war will likely be marked by fluid battlespaces and a shift from deliberate to dynamic targeting.⁴⁵ In the absence of meaningful guidance from senior leaders, some tactical commanders might kill 100 civilians to destroy a high-value enemy target, “while another might . . . opt for a lesser allowance of killing ten civilians.”⁴⁶ Still, many others may not attack at all and will assume unnecessary risk to their own forces. Neither the CDEM nor algorithmic warfare tools can substitute genuine human understanding of the laws applicable to dynamic targeting.⁴⁷

As the ongoing war in Ukraine makes clear, a future conventional war will be dynamic, destructive, and deadly for civilians.⁴⁸ In a war between the United States and the People’s Republic of China (PRC) in the Western Pacific, for example, the joint force would presumably seek to destroy enemy surface warships, missile sites, merchant shipping, sea lines of communication, choke points for energy and trade, sea- and land-based logistics, and PRC resupply

and sustainment capabilities.⁴⁹ Degraded communications, contested airspace, and imperfect intelligence will challenge the joint force and demand decentralized decision-making in battle.⁵⁰ Emerging stealth technology, Global Positioning System (GPS) spoofing, and the presence of maritime militia will further complicate efforts to characterize the environment and increase the likelihood of incidental harm.⁵¹ Commanders and staffs must deliberately prepare to apply proportionality to future targeting dilemmas.

In a LSCO, on-scene commanders will probably lack access to, or the time to seek, legal advice and a higher headquarters' approval to conduct offensive attacks.⁵² Warfighters will need more than vague legal principles, lengthy handbooks, and generic rules of engagement (ROE) to navigate future battlefield dilemmas. Tactical commanders need meaningful guidance from senior leaders on how to value military advantages relative to expected collateral concerns.⁵³

The Remedies: Personal Engagement and Scenario-Based Tactical Targeting Guides

To alleviate confusion and promote future compliance with the law, senior leaders within the geographic combatant commands, Service component commands, theater special operations commands, and other warfighting headquarters (e.g., corps, divisions, multi-domain task forces, fleets, carrier strike groups) can implement two immediate measures. Senior leaders can engage more frequently with operational and tactical level commanders and staff officers on the topic of collateral damage. Also, senior commanders can issue scenario-based tactical guides for use in training.

Operational Commanders Need Mentorship on Proportionality

War with a peer competitor will be unlike anything the modern U.S. military has experienced, and winning will be an absolute necessity.⁵⁴ Thus, senior leaders must cultivate an understanding of how the law applies in high-intensity engagements through focused education at all echelons. In targeting meetings, commanders' roundtables, professional development sessions, town

8	<p>Is the <i>attack</i> expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated?</p> <p>If yes, DO NOT ATTACK If no, proceed to step 9.</p>
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Figure 1.⁵⁵ Targeting checklists, like this one from the *Newport Rules of Engagement Handbook*, and generic rules of engagement will not help warfighters apply the law of armed conflict intuitively.

halls, and after-action reviews in training environments, senior commanders should engage with their subordinates on potential targeting dilemmas within their area of operations. As Professor David Glazier, a legal scholar who spent twenty-one years as a surface warfare officer, noted in 2021, “Troops . . . deserve the best possible guidance on the internationally recognized rules governing conflict . . .”⁵⁶ Commanders at all echelons must de-emphasize “legislative” ROE and, instead, challenge subordinates to consider realistic scenarios so that they may internalize principles, not just memorize external, written texts.⁵⁷

While LOAC provides a sufficient framework to navigate targeting dilemmas,⁵⁸ senior leaders must fill the framework with their operational beliefs and expectations. The commanding general of U.S. European Command, Service component commanders in Europe, Sixth Fleet commander, and Special Operations Command-Europe should address whether the destruction of civilian (or uncharacterized) vehicles would be excessive in relation to the destruction of a Russian tank column with over-the-horizon missiles. In the Indo-Pacific, senior commanders ought to address whether the destruction of a civilian community, airport, tourist infrastructure, or wind turbine would be excessive in relation to the destruction of a land-based People’s Liberation Army (PLA) missile site with over-the-horizon RGM-84 or UGM-84 Harpoon missiles.

These hypothetical dilemmas are not unrealistic. Chinese cruise ships like *The Coconut Princess* regularly ferry hundreds of passengers from the port city of Sanya to places like the tiny Woody Island to sunbathe, dive, and fish.⁵⁹ An additional 1,500 civilians live on Woody Island⁶⁰ alongside the PLA Navy’s “Unit 92155,” an air defense brigade armed with HQ-9 surface-to-air missiles featuring a 200-kilometer range.⁶¹ Senior commanders should address

whether it would be reasonable to bombard Unit 92155 with naval fires or whether precision missiles are required.

As the *Newport Rules of Engagement Handbook* notes, “Scenario-based ROE training will ensure that ROE are understood and applied properly by all units and members of the [force].”⁶² Some tactical units already conduct scenario-based training exercises supported by tactical aids developed by command judge advocates.⁶³ Scenario-based training events led by JAs are helpful, but they typically reveal the JA’s opinions on proportionality, not the senior commander’s guidance and intent. As retired Brigadier General Mark S. Martins once noted, “Understanding . . . LOAC is a matter of training, not of lawyering.”⁶⁴ Personal engagements between senior-level commanders and warfighters will facilitate a deeper understanding of the law and its contextual nature. The opportunity to regularly ask senior leaders about collateral damage will stimulate confidence in the practical application of theater ROE, which do not, and should not, delineate specific tactics.

Scenario-Based Tactical Guides Will Enrich Training

Additionally, senior-level commanders should develop scenario-based tactical guides for the employment of force in LSCO. Scenario-based tactical guides will operationalize key legal principles for training purposes and will promote intuitive application of the law on future battlefields. In July 2009, General Stanley McChrystal issued a tactical directive in his capacity as the NATO commander in Afghanistan.⁶⁵ Subsequent commanders updated the directive to account for changes in the operating environment.⁶⁶ In those directives, the commanders described specific tactical expectations to illustrate broader operating principles (e.g., prohibitions on entering Afghan houses without Afghan National Security Forces to promote the local government’s legitimacy; a preference for



Game board pieces representing ships are positioned during a wargame reenactment of the Battle of Jutland at U.S. Naval War College in Newport, Rhode Island. (Credit: U.S. Naval War College)

foot patrols over mounted patrols to signal humanity and care).⁶⁷ Senior commanders serving today should not wait for a future war to clarify their expectations regarding the conduct of kinetic strikes in Europe or Asia.

Forward-looking, scenario-based tactical guides that specifically address LSCO targeting dilemmas will stimulate necessary debate, facilitate meaningful planning, and establish a foundation for competent judgment.⁶⁸ Theater-specific, scenario-based tactical guides should address issues relating to the employment of unobserved fires in urban terrain, the destruction infrastructure (e.g., bridges, dams), subterranean threats, and other targeting predicaments.⁶⁹ Digital versions of tactical guides can hyperlink to video footage from previous U.S. attacks in urban areas, media coverage of airstrikes against high-value terrorist targets in which civilians were killed, and even news reports about Russian missile attacks in Ukraine to

provoke thinking and genuine understanding within their organizations. In the same way that Army Doctrine Publication 6-22, *Army Leadership and the Profession*, links leadership philosophies to historic applications of core principles,⁷⁰ senior commanders can define the command's collateral damage expectations by endorsing past targeting decisions and condemning others.

Even experts in the law of targeting typically fail to reach "judgment consensus" when faced with hypothetical targeting dilemmas.⁷¹ Grappling with theater-specific vignettes will increase the likelihood that warfighters will incorporate the law and commander's intent in executing future strikes. Warfighting commands can leverage advances in modeling and simulation technology to expose tactical commanders to the proportionality dilemmas described in the guide and to reinforce the commander's guidance on incidental harm.⁷²

Tactical guides might even raise completely fictional dilemmas so long as warfighters would readily comprehend the essential, underlying guidance. Senior leaders can borrow from P.W. Singer and August Cole's concept of "useful fiction" to pose plausible, hypothetical dilemmas.⁷³ By expressing collateral damage expectations through narrative and scenario-based tactical guides, senior leaders can also bridge the gap between generations. As Second Lieutenant Allison Annick wrote for the U.S. Naval Institute, "[T]he use of [fictional intelligence or FICINT] in schoolhouses allows for a broader assemblage of knowledge and creativity in considering possible threats."⁷⁴

Conclusion: Senior Leaders Must Create Shared Understanding

Generals and admirals "cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce," but

senior commanders are obligated to manage uncertainty and to create shared understanding.⁷⁵ Joint targeting doctrine requires senior commanders to “articulate risk tolerance sufficiently to let on-scene commanders understand . . . intent.”⁷⁶ There is currently a lack of clarity at various echelons about how much incidental harm to tolerate in a high-intensity conflict.⁷⁷ Some believe that restraint and legitimacy will not be decisive factors in a LSCO.⁷⁸ Others argue that preventing collateral damage is “one of the most important military objectives in contemporary warfare,” regardless of the conflict’s intensity.⁷⁹ Increased engagement on the topic of collateral damage and scenario-based tactical guides will alleviate confusion and promote confidence in targeting.

In his 1884 short story, *A Premature Burial*, Edgar Allen Poe wrote, “The boundaries which divide Life from Death are at best shadowy and vague. Who shall say where the one ends, and where the other begins?”⁸⁰ The law of proportionality implicates these same shadowy and vague boundaries. In the absence of meaningful targeting guidance from senior leaders, warfighters will continue to demonstrate the dangerous symptoms of counterterrorism and counterinsurgency hangover—reluctance, hesitation, and uncertainty. Mastery of the proportionality rule may not be possible unless senior leaders establish logical parameters. Warfighters certainly deserve legal maneuver space, but senior commanders should articulate where that space begins and ends. **TAL**

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Notes

1. See, e.g., *U.S. Four-Star General Warns of War with China in 2025*, REUTERS (Jan. 28, 2023), <https://www.reuters.com/world/us-four-star-general-warns-war-with-china-2025-2023-01-28>; see also Jon Harper, *Army Leader Warns About Potential Land War with China*, NAT’L DEF. (Mar. 17, 2021), <https://www.nationaldefensemagazine.org/articles/2021/3/17/army-leader-warns-about-potential-land-war-with-china>; Mallory Shelbourne, *Davidson: China Could Try to Take Control of Taiwan in Next Six Years*, USNI NEWS (Mar. 9, 2021), <https://news.usni.org/2021/03/09/davidson-china-could-try-to-take-control-of-taiwan-in-next-six-years>; Sam LaGrone, *CNO Gilday’s New Guidance Sets Clear Goals to Bring Lethality to Surface Force*, USNI NEWS (Jan. 11, 2021), <https://news.usni.org/2021/01/11/cno-gildays-new-guidance-sets-clear-goals-to-bring-lethality-to-surface-force>; Carol V. Evans, *Providing Stability and Deterrence: The U.S. Army in INDOPACOM*, PARAMETERS, Spring 2021, at 25; Sydney J. Freedberg, Jr. & Andrew Eversden, *Firepower & People: Army Chief on Keys to Future War*, BREAKING DEF. (Oct. 10, 2022), <https://breakingdefense.com/2022/10/firepower-people-army-chief-on-keys-to-future-war-exclusive>. The term “unrepentant lethality” appears in General Mike Minihan’s March 2022 Air Mobility Command strategy. GEN. MIKE MINIHAN, AIR MOBILITY COMMAND, AIR MOBILITY COMMAND STRATEGY (29 Mar. 2022) (“We will center our efforts on a foundation of unrepentant lethality.”). My inclusion of the term unrepentant lethality is intended to show a need for clearer guidance on collateral damage tolerance from senior leaders.

2. Memorandum from Sec’y of Def. to Senior Pentagon Leadership et al., subject: Civilian Harm Mitigation and Response Action Plan (CHMR-AP) 3 n.1 (Aug. 25, 2022) (“Nothing in this plan is intended to suggest that existing DoD policies or practices are legally deficient or that the actions to be implemented pursuant to this plan are legally required, including under the law of war. The U.S. military routinely implements heightened policy standards and processes that are more protective of civilians than, and supplementary to, law of war requirements, without such standards and processes modifying or creating new legal requirements.”).

3. See, e.g., Lt. Gen. (Ret.) David A. Deptula, *In a Dangerous World, New Pentagon Mitigation Plan Would Hobble U.S. Forces*, DEF. OP. (Sept. 13, 2022), <https://defenseopinion.com/in-a-dangerous-world-new-pentagon-mitigation-plan-would-hobble-u-s-forces/183>. Unfortunately, even U.S. joint doctrine now reflects an institutional unwillingness to accept any collateral damage. Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3162.02 warns that engagements resulting in collateral damage “negatively affect the ability of the joint force to achieve the commander’s objectives.” CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3162.02A, METHODOLOGY FOR COMBAT ASSESSMENT encl. D, para. 1a (16 July 2021) [hereinafter CJCSI 3162.02A]. The instruction assumes that collateral damage results from either: “(1) lack of positive identification (2) munition malfunction (3) secondary explosions and/or (4) human error.” *Id.* The instruction does not acknowledge that, in some situations, commanders may intentionally kill innocents or damage civilian objects to achieve military objectives.

4. John Spencer, Urban Warfare Project, *Attacking the City of Razish*, MODERN WAR INST., at 54:07-59:06 (May 29, 2020), <https://mwi.westpoint.edu/attacking-city-razish>; John Spencer, Urban Warfare Project, *Attacking the City of Dara Lam*, MODERN WAR INST., at 24:03-26:39 (July 10, 2020), <https://mwi.usma.edu/attacking-city-dara-lam>.

5. Major Jason D. Young, *Civilian Harm Mitigation and Response Action Plan: Observations from a Combat Training Center*, ARTICLES OF WAR (Apr. 21, 2023), <https://lieber.westpoint.edu/chmr-ap-observations-combat-training-center>.

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(4)(b), 57(2)(a)(iii), (2)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

7. *Id.* art. 57(2)(a)(ii).

8. OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 189 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL]; see also Michael J. Matheson, *Remarks on the United States*

Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 AM. U. J. INT’L L. & POL’Y 419, 426-27 (1987) (“We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

9. David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L. J. ONLINE 151 (2010), <http://yalelawjournal.org/forum/opting-out-of-the-law-of-war-comments-on-withdrawing-from-international-custom> (noting that “[a] significant consequence of the rules of [customary international law] is that states train their militaries in them. The United States, which did not ratify Additional Protocol I, nevertheless accepts portions of it as legitimate statements of customary international law and build these rules into its law-of-war training and [judge advocate] practice.”).

10. LAW OF WAR MANUAL, *supra* note 8, at 190.

11. William Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMPAR. & INT’L L. 539, 545 (1997).

12. PROGRAM ON HUMANITARIAN POL’Y & CONFLICT RSCH. AT HARV. UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 98, r. 14 cmt. 7 (2013).

13. Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 122 (2004); see also Int’l Crim. Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1271, ¶¶ 48, 50 (June 8, 2000) [hereinafter *Final Report*].

14. For a sense of how the DoD incorporates science into targeting doctrine, see, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, at xiii (31 Jan. 2013) [hereinafter JP 3-60]. See also U.S. DEP’T OF AIR FORCE, DOCTRINE PUB. 3-60 TARGETING ch. 3 (12 Nov. 2021) [hereinafter AFDP 3-60] (noting that “successful dynamic targeting . . . requires a great deal of prior planning . . .”). For an example of how the DoD incorporates science in practice, see Major Kyle David Borne, *Targeting in Multi-Domain Operations*, MIL. REV. May-June 2019, at 60. See also Lieutenant Colonel John Cherry, Squadron Leader Kieran Tinkler & Michael Schmitt, *Avoiding Collateral Damage on the Battlefield*, JUST SECURITY (Feb. 11, 2021), <https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield>.

15. See James Kraska, *Command Accountability for AI Weapon Systems in the Law of Armed Conflict*, INT’L L. STUD. 97, 415 (arguing that “some tactical situations pose particularly complex problems that may require exceptionally nuanced trade-offs, special empathy, or choices among seemingly divergent ethics”); see also Anaïs Maroonian, *Contextualization of the Principle of Proportionality in International Humanitarian Law: Criteria and Examples*, ARTICLES OF WAR (Mar. 6, 2023), <https://lieber.westpoint.edu/contextualization-principle-proportionality-ihl-criteria-examples> (describing how the legal principle of proportionality requires a balancing of two competing interests).

16. See, e.g., MICHAEL JOSEPH MCNERNEY ET AL., RAND CORP., UNDERSTANDING CIVILIAN HARM IN RAQQA AND ITS

IMPLICATIONS FOR FUTURE CONFLICTS (2022); John Spencer & Jayson Geroux, *Urban Warfare Project Case Study #2- Mosul*, MODERN WAR INST. (Sept. 15, 2021), <https://mwi.usma.edu/urban-warfare-project-case-study-2-battle-of-mosul>.

17. Robin Geiss, *The Principle of Proportionality: Force Protection as a Military Advantage*, 45 ISR. L. REV. 71 (2012).

18. Lieutenant General (Ret.) Charles Pedo & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV., Mar.-Apr. 2021, at 6, 7 (arguing that an institutional misunderstanding of the law of war represents a critical "warfighting capability gap" in the U.S. Army and that, "mastery of the law of war may very well mean the difference between victory and defeat").

19. *Id.*

20. MIRANDA PRIEBE ET AL., RAND CORP., MULTIPLE DILEMMAS: CHALLENGES AND OPTIONS FOR ALL DOMAIN COMMAND AND CONTROL 29 (2020).

21. See Major General (Ret.) Charles Dunlap, *Civilian Casualties, Drones, Airstrikes and the Perils of Policy*, WAR ON THE ROCKS (May 11, 2015), <https://warontherocks.com/2015/05/civilian-casualties-drones-air-strikes-and-the-perils-of-policy>.

22. *Hearing to Receive Testimony on the Posture of United States Central Command and United States Africa Command Before the S. Comm. on Armed Servs.*, 117th Cong. 18 (2022) (statement of Gen. Kenneth F. McKenzie, Jr., U.S. Marine Corps, Commander, U.S. Central Command) (stating "Rather than target [Abu Ibrahim al-Hashimi al-Qurayshi] with an airstrike, we accepted increased risk to U.S. forces by launching a raid, expressly planned to separate noncombatants in the objective area from the ISIS leader and his subordinates."); see also Tactical Directive from Headquarters, Int'l Sec. Assistance Force, Kabul, Afghanistan (6 July 2009) [hereinafter 2009 Tactical Directive] ("I recognize that the carefully controlled and disciplined employment of force entails risk to our troops.")

23. Stefano D'urso & David Cenciotti, *U.S. MH-60M Helicopter Used in Raid to Kill ISIS Leader in Syria Blown Up on the Ground by U.S. Forces*, THE AVIATIONIST (Feb. 3, 2022), <https://theaviationist.com/2022/02/03/u-s-mh-60m-helicopter-used-in-raid-to-kill-isis-leader-in-syria-blown-up-on-the-ground-by-u-s-forces>.

24. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 157 (2015) (arguing that "it is a state's duty to accept greater risks for its own military forces as a means to limit harm to noncombatants in the course of armed conflict").

25. Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 173 (2015).

26. LAW OF WAR MANUAL, *supra* note 8, § 1.4.2.1.

27. *Id.* U.S. nuclear weapons policy supports the conclusion that even "extensive" incidental harm may not be "excessive." See, e.g., Written Statement of the Government of the United States of America, Legality of Threat or Use of Nuclear Weapons (Request for Advisory Opinion) (June 20, 1995), 95 I.C.J. 23 ("Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate.").

28. Luke A. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT'L SEC. J. 577, 578 (2015) (noting that "few writers have sought to explain and predict how those commanders actually make decisions as human beings limited by their cognitive capacities in a suboptimal decision-making environment").

29. Patrick Tomlin, *Subjective Proportionality*, ETHICS, Jan. 2019, at 254.

30. Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, 78 INT'L L. STUD. 19, 24 (2002); see also *Final Report*, *supra* note 13, ¶ 19 ("[S]triking an ammunition depot or a terrorist training camp would not be prohibited because a farmer is plowing a field in the area. On the other hand, a very significant military advantage would be necessary to justify the collateral death or injury to thousands of civilians."); see also Wesley K. Clark, *No Formulas: Bosnia, Haiti, and Kosovo*, in COMMANDING HEIGHTS: STRATEGIC LESSONS FROM COMPLEX OPERATIONS 49 (Michael Miklaucic ed., 2010) [hereinafter COMMANDING HEIGHTS]; Timothy Cross, *The Balkans Revisited: Kosovo, 1999*, in COMMANDING HEIGHTS, *supra* at 55. NATO forces intentionally bombed the central studio of the state-owned broadcasting corporation in Belgrade to disrupt command, control, and communications and attacked radio relay buildings, towers, and electrical power transformer stations. *Final Report*, *supra* note 13, ¶ 72; Judith A. Miller, *Commentary*, 78 INT'L L. STUD. 107, 110 (2002). During Operation Allied Force, General Clark unapologetically assumed responsibility for "inevitable accidents and collateral damage," including an inadvertent strike on the Chinese embassy, which he believed were lawful in relation to the military advantages gained by striking these targets from the air. Clark, *supra* at 53.

31. Thomas E. Ricks, *Target Approval Delays Irk Air Force Officers*, WASH. POST (Nov. 18, 2001), <https://www.washingtonpost.com/wp-srv/nation/Airwar18.html>; see also Michael N. Schmitt, *Target Approval Delays Cost Air Force Key Hits: Law, Policy, Ethics and the Warfighter's Dilemma*, 1 J. MIL. ETHICS 113 (2002); Anaïs Maroonian, *Proportionality in International Humanitarian Law: A Principle and a Rule*, ARTICLES OF WAR (Oct. 24, 2022), <https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule> (describing how the principle of proportionality invites highly open-ended legal inquiries).

32. See Schmitt, *supra* note 31.

33. MARK F. CANCELED ET. AL., CTR. FOR STRAT. & INT'L STUDS., THE FIRST BATTLE OF THE NEXT WAR WARGAMING A CHINESE INVASION OF TAIWAN 3-4 (2023) (arguing that "delays and half measures by the United States would make the defense [of Taiwan] harder, increase U.S. casualties, allow China to create a stronger lodgment, and raise the risk of escalation").

34. DAVID C. GOMPERT ET AL., RAND CORP., WAR WITH CHINA: THINKING THROUGH THE UNTHINKABLE 34 (2016).

35. Milford Beagle et al., *The Graveyard of Command Posts*, MIL. REV., May-June 2023, at 10.

36. See CANCELED ET AL., *supra* note 33, at 3.

37. See Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J. L., ETHICS & PUB. POL'Y 309 (2005) (describing the tendency among military leaders and international lawyers to apply obsolete legal principles from previous conflicts to present fights and future scenarios).

38. Joshua W.M. Bunte, *Exploring Organizational Factors Influencing the Moral-Self of U.S. Navy Commanding Officers 146-47* (2018) (Ph.D. dissertation, Northcentral University) ("According to one rear admiral (lower half) with 38 years of service and ten operational deployments in the surface warfare community, 'most guys are quick to give their life for their country, but not their job for a moral dilemma.'").

39. OFF. OF DIR. OF NAT'L INTEL., THE FUTURE OF THE BATTLEFIELD (2021) [hereinafter FUTURE OF THE BATTLEFIELD].

40. See, e.g., TERRENCE K. KELLY ET AL., RAND CORP., EMPLOYING LAND-BASED ANTI-SHIP MISSILES IN THE WESTERN PACIFIC (2013).

41. WAYNE P. HUGHES & ROBERT GIRRIER, FLEET TACTICS AND NAVAL OPERATIONS (2018) (ebook).

42. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01D, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (21 May 2021) (CUI).

43. See Jim Garamone, *Trump Orders Missile Attack in Retaliation for Syrian Chemical Strikes*, U.S. DEP'T OF DEF. (Apr. 6, 2017), <https://www.defense.gov/News/News-Stories/Article/Article/1144601/trump-orders-missile-attack-in-retaliation-for-syrian-chemical-strikes>.

44. For an explanation of these tools, see DIR., OPERATIONAL TEST & EVALUATION, FY 2021 ANNUAL REPORT 267-73 (2021).

45. ROBBIN F. LAIRD, TRAINING FOR THE HIGH-END FIGHT: THE STRATEGIC SHIFT OF THE 2020s (2021). In accordance with Joint Publication 3-60, *Joint Targeting*,

The targeting process can be generally grouped into two categories: deliberate and dynamic. Deliberate targeting normally supports the joint force's future plans effort, which is overseen by the plans directorate of a joint staff. Normally, the future operations directorate focuses on 24 hours out to 72 hours. This is a critical linkage during targeting execution. Dynamic targeting is normally employed in current operations planning because the nature and time frame associated with current operations (usually the current 24-hour period) typically require[] more immediate responsiveness than is achieved in deliberate targeting.

JP 3-60, *supra* note 14 at II-1.

46. Scott Graham, *The Non-Combatant Casualty Cut-off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, INT'L CRIM. L. REV., 2018, at 1, 26 (concluding that the NCV methodology is a strategically and legally sound measure to control target engagement and mitigate civilian casualties).

47. Frank Wolfe, *Pentagon Removed Non-Combatant Casualty Cut-Off Value From Doctrine in 2018*, DEF. DAILY (June 11, 2021), <https://www.defensedaily.com/pentagon-removed-non-combatant-casualty-cut-off-value-doctrine-2018/pentagon>; see also MILAN VEGO, JOINT OPERATIONAL WARFARE: THEORY AND PRACTICE III-25 (2009) (noting that, "computers . . . cannot replace the human mind and the skills and experience of operational commanders and their staffs"); U.S. DEP'T OF DEF., INSTR. 3000.09, AUTONOMY IN WEAPONS SYSTEMS (25 Jan. 2023); Jeffrey S. Thurner, *No One at Controls: Legal Implications of Fully Autonomous Targeting*, JOINT FORCE Q., 4th Quarter, 2012, at 77 (establishing that human operators will retain control over kinetic targeting decisions for the foreseeable future).

48. See, e.g., Guy Faulconbridge, *Ukraine War, Already with up to 354,000 Casualties, Likely to Last Past 2023 – U.S. Documents*, REUTERS (Apr. 12, 2023), <https://www.reuters.com/world/europe/ukraine-war-already-with-up-354000-casualties-likely-drag-us-documents-2023-04-12>; see also Michael Beckley & Hal Brands, *What Will Drive China to War?*, THE ATLANTIC (Nov. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/us-china-war/620571> (“Tamping or reversing Chinese aggression in the Western Pacific could require a massive use of force.”).
49. Evans, *supra* note 1, at 31.
50. See, e.g., Dmitry Filipoff, *Fighting DMO, Part 1: Defining Distributed Maritime Operations and the Future of Naval Warfare*, CTR. FOR INT’L MARITIME SEC. (CIMSEC) (Feb. 20, 2023), <https://cimsec.org/fighting-dmo-pt-1-defining-distributed-maritime-operations-and-the-future-of-naval-warfare>; see also Scott Pence, *Fighting as Intended: The Case for Austere Communications*, JOINT FORCE Q., 3d Quarter, 2021, at 4, 8 (describing a “communications-denied operational environment” as the convergence of anti-space, electronic warfare, cyber warfare, and information warfare effects).
51. See Yusuke Saito, *Reviewing Law of Armed Conflict at Sea and Warfare in New Domains and New Measures: Submarine Cables, Merchant Missile Ships, and Unmanned Marine Systems*, 44 TUL. MAR. L.J. 107, 120 (2019) (noting that “the extensive practice of deception in the past has significantly affected the safety of peaceful shipping”); see also H.I. Sutton, *This Is What a Chinese Stealth Warship Looks Like on Radar*, USNI NEWS (Sept. 27, 2021), <https://news.usni.org/2021/09/27/this-is-what-a-chinese-stealth-warship-looks-like-on-radar>; Chris Parry, *Maritime Operations and Missions: The Falklands Case*, in FROM THE NORTH ATLANTIC TO THE SOUTH CHINA SEA 323, 335 (Julian Pawlak & Johannes Peters eds., 2021) (noting that “the proliferation of high-end modular weapons and sensor systems in an increasing diversity of civilian platforms will further complicate ISTAR (Intelligence, Surveillance, Target Acquisition and Reconnaissance) functions”); FUTURE OF THE BATTLEFIELD, *supra* note 39, at 4 (describing how GPS spoofing misdirects platforms); see, e.g., Brett Tingley, *Scores of ‘Dark Vessels’ Belonging to China’s Maritime Militias are Operating in Contested Waters*, THE DRIVE (Feb. 22, 2022), <https://www.thedrive.com/the-war-zone/44390/scores-of-dark-vessels-belonging-to-chinas-maritime-militias-are-operating-in-contested-waters>.
52. MIRANDA PRIEBE, ALAN J. VICK, JACOB L. HEIM & MEAGAN L. SMITH, RAND CORP., *DISTRIBUTED OPERATIONS IN A CONTESTED ENVIRONMENT*, at ix (2019) (describing how attacks on U.S. long-distance communications systems, including satellites and long-distance fiber, may result in significantly degraded communications); see also Jennifer O’Connor, Gen. Counsel, U.S. Dep’t of Def., *Applying the Law of Targeting to the Modern Battlefield*, (Nov. 28, 2016), <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf> (describing how, in the last war, judge advocates provided real-time legal advice to target engagement authorities).
53. Kevin Varley, *Taiwan Tensions Raise Risks in One of Busiest Shipping Lanes*, BLOOMBERG (Aug. 2, 2022), <https://www.bloomberg.com/news/articles/2022-08-02/taiwan-tensions-raise-risks-in-one-of-busiest-shipping-lanes>.
54. John A. Warden III, *Winning a Peer War*, ÆTHER: J. STRATEGIC AIRPOWER & SPACEPOWER, Spring 2022, at 126.
55. *Newport Rules of Engagement Handbook*, 98 INT’L L. STUD. 1, Annex A, app. 5, at 37 (2022) [hereinafter *Newport ROE Handbook*].
56. David Glazier, *The DoD Law of War Manual: What Is It Good For?*, JUST SEC. (July 28, 2015), <https://www.justsecurity.org/24977/dod-law-war-manual-good-for>.
57. See Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3 (1994).
58. See Colonel Andrew M. McKee & Lieutenant Colonel Jason M. Elbert, *Embrace the Crucible Exercise: An Intentional Approach to Training Opportunities*, ARMY LAW., no. 2, 2022, at 9, 9 (noting that at the fifth Major General John Fugh Symposium, hosted by The Judge Advocate General’s Legal Center and School, “[t]here was overwhelming agreement . . . that the current LOAC is sufficient to govern future conflict.”).
59. *Vietnam Demands China Stop Cruises in South China Sea*, REUTERS (Mar. 13, 2017), <https://www.reuters.com/article/us-vietnam-china-southchina-sea-idUSKBN16K0CD>; see also Taylor M. Fravel, *China’s Strategy in the South China Sea*, CONTEMP. SE. ASIA, Dec. 2011, at 292.
60. Greg Torode & Manuel Mogato, *One Thing People Don’t Realize About the Disputed Islands on the South China Sea*, BUS. INSIDER (May 29, 2015), <https://www.businessinsider.com/r-civilians-emerge-as-pawns-in-south-china-sea-legal-chess-game-2015-5>.
61. *China Puts Missile Bases on Disputed South China Sea Islands, Analysts Say*, RADIO FREE ASIA (Jan. 25, 2023), <https://www.rfa.org/english/news/southchinasea/woody-island-missiles-01252023013003.html>.
62. *Newport ROE Handbook*, *supra* note 55, at 13.
63. See J06 Office of the Staff Judge Advocate, U.S. INDO-PACIFIC COMMAND, <https://www.pacom.mil/Contact/Directory/J0/J06-Staff-Judge-Advocate> (last visited Oct. 22, 2024).
64. Martins, *supra* note 57, at 90-91 (noting that by 1993, soldiers in Somalia were conducting regular, scenario-based ROE training in anticipation of similarly complex targeting problems).
65. 2009 Tactical Directive, *supra* note 22, at 1.
66. See, e.g., ISAF Commander Issues Updated Tactical Directive, DVIDS (Aug. 4, 2010), <https://www.dvidshub.net/news/53927/isaf-commander-issues-updated-tactical-directive>.
67. See *id.*; Joseph H. Felter & Jacob N. Shapiro, *Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint*, DAEDALUS, Winter 2017, at 44.
68. See JP 3-60, *supra* note 14, at xiii; AFDP 3-60, *supra* note 14.
69. See, e.g., Haley E. Mercer, *Shaping the Deep Fight: Operational Implications for the 21st Century Subterranean Conflict* (2019) (Monograph, School of Advanced Military Studies, U.S. Army Command and General Staff College), <https://apps.dtic.mil/sti/trecms/pdf/AD1083592.pdf>; Michael N. Schmitt, *Attacking Dams – Part I: Customary International Law*, ARTICLES OF WAR (Jan. 31, 2022), <https://lieber.westpoint.edu/attacking-dams-part-i-customary-international-law>; Janine Fetchik & Matt Montazzoli, *Unobserved Fires and the Law of Armed Conflict*, ARTICLES OF WAR (Mar. 3, 2023), <https://lieber.westpoint.edu/unobserved-fires-law-armed-conflict>.
70. U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION (31 July 2019).
71. Daniel Statman et. al., *Unreliable Protection: An Experimental Study of Experts’ In Bello Proportionality Decisions*, 31 EUR. J. INT’L L. 429, 429 (2020) (showing that “groups of experts [in international humanitarian law] failed to reach judgment convergence when faced with proportionality dilemmas”).
72. Steven C. Gordon & Douglas D. Martin, *Modeling and Simulation for Collateral Damage Estimation in Combat*, in 5805 SPIE, PROCEEDINGS: DEFENSE AND SECURITY: ENABLING TECH. FOR SIMULATION SCI. IX, 309 (2005); see also Lauren C. Williams, *Navy Wants Simulators that Measure Learning, Not Just Reps*, DEF. ONE (Apr. 3, 2023), <https://www.defenseone.com/defense-systems/2023/04/navy-wants-simulators-measure-learning-not-just-reps/384773>.
73. August Cole & P. W. Singer, *Thinking the Unthinkable with Useful Fiction*, J. FUTURE CONFLICT, Fall 2020, at 1, 2 (defining “useful fiction” as the deliberate blending of narrative and nonfiction in packages that range from books and short stories to bespoke illustrations, videos, and graphic novellas).
74. Allison Annick, *Fidnt: Anticipating Tomorrow’s Conflict*, PROCEEDINGS, Mar. 2021, at 417.
75. 2009 Tactical Directive, *supra* note 22, at 2; accord U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND, at viii (31 July 2019).
76. JP 3-60, *supra* note 14, at II-21.
77. See, e.g., Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, AM. J. POL. SCI., Jan. 2012, at 167, 168 (arguing that “the consequences of mistreating civilians are a first-order policy concern”); see also Michael Gallagher, *Prepare Now for War in the Pacific*, PROCEEDINGS, July 2021, at 421, 421 (arguing that “we must communicate often and honestly with the American people about the stakes [of a war with China]”).
78. See Paul Lushenko, *The Pentagon’s Reckoning with Civilian Casualties Is a Good Start – But It’s Only a Start*, MODERN WAR INST. (Sept. 12, 2022), <https://mwi.usma.edu/the-pentagons-reckoning-with-civilian-casualties-is-a-good-start-but-its-only-a-start> (arguing that legitimacy is always central to U.S. military operations); see also Stephen E. O’Rear, *Legitimacy As an Operational Factor: An Alternative Analysis* (Oct. 23, 2006) (Department of Joint Military Operations, U.S. Naval War College), <https://apps.dtic.mil/sti/tr/pdf/ADA463914.pdf> (arguing that legitimacy should be considered a principle of war and not an operational factor); DANIEL PATRICK O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER 177-78* (1975); Christopher J. McMahon, *Maritime Trade Warfare: A Strategy for the Twenty-First Century?*, NAVAL WAR COLL. REV., Summer 2017, at 14, 14 (describing the “two very different views” on whether maritime warfare is a viable strategy in the twenty-first century and arguing that, under the right circumstances, it can work); HUGHES & GERRIER, *supra* note 41, at 19 (noting that “considering the death and destruction wrought by naval warfare, it may be that the very decisiveness of battle at sea, which so often leads tacticians to try to avoid it, is actually a virtue for which the civilized world can be grateful”).
79. Lushenko, *supra* note 78; see also Geoffrey Corn & Robert Ashley, *LOAC and Legitimacy: When Combat Becomes a Supporting Effort to Information*, ARTICLES OF WAR (Jan. 18, 2022), <https://lieber.westpoint.edu/loac-legitimacy-combat-supporting-effort>.
80. EDGAR ALLAN POE, *The Premature Burial*, in XXI THE WORKS OF EDGAR ALLAN POE: TALES OF MYSTERY AND IMAGINATION 237, 238 (Henry Frowde ed., 1903).



(Credit: Maksym Yemelyanov-stock.adobe.com)

Practice Notes

Massachusetts Appellate Tax Board Rules that the SCRA Prohibits Local Taxes on Leased Vehicles

By Mr. Matthew A. Morris

The Servicemembers' Civil Relief Act¹ (SCRA) "postpones or suspends certain civil obligations to enable Service members to devote their full attention to duty and relieve stress on their families."² This includes various financial safeguards for active-duty Service members, including protections against default judgments in civil cases, provisions to prevent foreclosures, and mechanisms to reduce interest rates on pre-service loans.³ The SCRA also provides

that "[t]he personal property of a [Service member] or the spouse of a [Service member] shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the [Service member] is serving in compliance with military orders."⁴

Despite the broad reach of the SCRA, active-duty Service members still need to rely on state and local governments to recognize and honor the protections provided. Before the recent

Massachusetts Appellate Tax Board (ATB) case, *LtCol Jonathan L. Riggs v. Board of Assessors of the Town of Bedford (Riggs)*,⁵ the consensus among state and local governments in Massachusetts and nationwide was that the SCRA's protection against local excise taxes applied only to vehicles *owned* by an active-duty Service member or their spouse and did not apply to *leased* vehicles.⁶ Lieutenant Colonel (LtCol) Jonathan L. Riggs, an active-duty Marine officer, disagreed with this interpretation and retained us as his counsel to represent him pro bono before the ATB in his dispute with the Town of Bedford, Massachusetts.

The questions presented to the ATB in *Riggs* were (1) whether a lessee of a vehicle has standing to pursue an appeal from a local assessor's decision to deny an application for abatement of excise tax and (2) whether the SCRA's protection against local excise taxes extends to a motor vehicle leased by an active-duty Service member. The ATB found in favor of LtCol Riggs on both questions, which set a new precedent for excise tax cases under the SCRA in Massachusetts and provided much-needed guidance for local tax cases outside of the Commonwealth. To the best of our knowledge, *Riggs* is the first and only case in the country to specifically provide that the SCRA's protections apply to vehicles leased by active-duty Service members.

Factual Background

LtCol Riggs is a West Virginia resident who was serving a temporary assignment as an active-duty Marine officer at the 1st Battalion, 25th Marines at Fort Devens, Massachusetts.⁷ On or about 29 August 2017, LtCol Riggs leased a Chevrolet Silverado from GM Financial (GM) through Best Chevrolet, Inc. in Hingham, Massachusetts.⁸ The Town of Bedford (Bedford) subsequently charged GM a \$350 motor vehicle excise tax related to the Silverado.⁹ GM passed this cost through to LtCol Riggs, sending him a bill for \$350.¹⁰ LtCol Riggs paid the bill, notified the Bedford Assessor and GM that he should be exempt from paying the tax under the SCRA, and requested a tax refund.¹¹

In December 2018, LtCol Riggs' counsel sent a letter to Bedford's associate assessor, which summarized the position

that LtCol Riggs should be exempt from the tax under the SCRA.¹² After the assessor denied the application for abatement, Riggs appealed Bedford's denial in a Petition under Formal Procedure to the ATB.¹³ In March 2021, Riggs, through counsel, filed a motion for summary judgment with the ATB.¹⁴ On 12 October 2021, the ATB allowed the motion for summary judgment and issued a decision for LtCol Riggs, granting an abatement of the excise tax.¹⁵ On 9 March 2023, the ATB promulgated its Findings of Fact and Report in support of its decision.¹⁶

Analysis

LtCol Riggs asked the ATB to consider a question of first impression on both a statewide and national level: "Does the SCRA protect against the imposition of local property tax on a motor vehicle leased by an active-duty Service member on active-duty orders in Massachusetts and domiciled in another state?"¹⁷ We maintained that this question must be answered affirmatively because the language of the personal property tax relief provisions in the SCRA broadly applies to "[t]he personal property of a Service member or the spouse of a Service member"¹⁸ and because the SCRA broadly defines "taxation" as "licenses, fees, or excises imposed *with respect to motor vehicles* and their use."¹⁹

Riggs argued that the Bedford excise tax "falls squarely within the scope of the property tax exemption of the SCRA" because (a) "it is an excise imposed concerning a motor vehicle of a nondomiciliary Service member" and (b) there is no limiting language in the statute that supports the interpretation that leased vehicles are ineligible for the property tax exemption.²⁰ Riggs further argued that "[l]easing a vehicle as opposed to owning the vehicle outright is a distinction without a difference in this case because LtCol Riggs will ultimately bear the burden of the excise tax when GM charges him back for the taxes that GM paid on his behalf."²¹

In support of Riggs' position that the SCRA should protect against the imposition of local property taxes on leased vehicles, we cited two U.S. Supreme Court cases: In *California v. Buzard*, the Court held that "[t]he very purpose of [the

SCRA] in broadly freeing the nonresident [Service member] from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the states where he was present solely in compliance with military orders."²² In *Dameron v. Brodhead*, the Court held that the SCRA's protections against the imposition of local excise taxes on property owned by active-duty Service members were not limited to instances of multiple taxation but instead were broadly intended to "free[] [Service members] from both income and property taxes imposed by any state by their presence there as a result of military orders."²³

In our letter to Bedford's associate assessor, which was incorporated into the motion for summary judgment, we argued that the "consistent theme of these cases is that it is the Service member's state of original residence—and not the state in which the Service member is temporarily stationed—that has the 'sole right of taxation' with respect to property or income of an active-duty Service member."²⁴

The ATB divided its analysis into two discrete but interrelated questions: (1) Does LtCol Riggs have standing to challenge the tax, and (2) Does the SCRA protect against local excise taxes on vehicles leased by active-duty Service members outside their home states? Although the ATB framed these as two distinct issues, whether LtCol Riggs has standing to challenge the tax is inextricably connected to the substantive protections under the SCRA. The ATB addressed both questions by focusing on the out-of-pocket impact on the Service member rather than the technical distinction between the lessor and lessee.

LtCol Riggs Has Standing as a "Person Aggrieved"

In its response to the motion for summary judgment, Bedford argued that LtCol Riggs lacked standing to challenge the tax because he was the lessee of the vehicle rather than the lessor.²⁵ Bedford contended that GM, as the assessed taxpayer, is the only party with standing to bring this appeal and that LtCol Riggs was not an appropriate "aggrieved party" to appeal an abatement denial under Massachusetts General Laws, chapter 59, section 64.²⁶

LtCol Riggs responded to Bedford's jurisdictional argument by asserting that he "derives standing from the [SCRA] and the Supremacy Clause in Article VI of the [U.S.] Constitution" and that he has standing under Massachusetts law as a "person aggrieved" because his "pecuniary interests are or may be adversely affected."²⁷ LtCol Riggs argued that even though he was not the vehicle owner, "his pecuniary interests were adversely affected because the incidence of the tax ultimately fell upon him."²⁸

The ATB agreed with LtCol Riggs on the standing issue, ruling that he has standing to appeal the abatement denial because the incidence of the tax ultimately fell upon him.²⁹ In reaching its conclusion in favor of LtCol Riggs on the standing issue, the ATB cited the Supreme Court's holding in *First Agricultural National Bank v. State Tax Commission* that "a sales tax which, by its terms, must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser."³⁰ In *First Agricultural Bank*, the Court determined that the ultimate question is "On whom does the incidence of the tax fall?" regardless of how a state court characterizes the tax.³¹

Both the Supreme Court and the ATB were careful to clarify that the inquiry regarding the incidence of the tax is for the limited purpose of determining Federal immunity from state taxation.³² Accordingly, this inquiry should not affect whether a taxpayer has standing to appeal personal property or real estate tax as a "person aggrieved"³³ in a case that arises purely under Massachusetts law.³⁴

The SCRA Protects Against Local Excise Taxes on Vehicles Leased by Active-Duty Service Members Outside Their Home States

On the issue of whether the SCRA should be broadly interpreted to afford protections to vehicles leased by active-duty Service members, Bedford argued that the two cited Supreme Court cases, *Buzard* and *Dameron*, are inapposite because they relate to situations in which the Service member owned, not leased, the assessed personal property.³⁵ Bedford acknowledged that there was not a single case that directly addressed whether the SCRA applied to leased vehicles, but it cited a Question and Answer (Q&A)-format article by U.S. Navy Judge Advocate

General's Corps Captain (Retired) Samuel Wright, entitled *The SCRA Protects You from Having to Pay Personal Property Tax on the Vehicle that You Own, but Not a Vehicle You Lease*.³⁶ In this article, Captain Wright advised an active-duty U.S. Navy lieutenant, temporarily on assignment in Virginia, to "purchase an automobile instead of leasing it" because the SCRA protects against the imposition of local taxes on personal property, and a leased vehicle is not technically the Service member's personal property.³⁷

In LtCol Riggs' Reply to Bedford's Opposition to Motion for Summary Judgment, we asked "why the U.S. Supreme Court would hold that the purpose of the statute is to 'relieve [a Service member] of the burden of supporting the governments of the states where he was present solely in compliance with military orders' while simultaneously prohibiting lessee Service members from the benefits of this interpretation."³⁸ In response to Bedford's citation of Captain Wright's article, we argued that a practical guide in a Q&A format should not dictate the outcome of this case because it is directed to whether a Service member should purchase or lease a vehicle rather than the more complex inquiry of whether the SCRA should be interpreted to apply to leased vehicles.³⁹

The ATB agreed with LtCol Riggs that the SCRA "is specifically designed to limit the power of states to enact a tax on individuals or entities that would otherwise be subject to state tax."⁴⁰ The ATB ruled that "the imposition of the excise violated Federal law providing specific rules for the treatment of the property of Service members who are stationed outside of their state of residence."⁴¹ Like its analysis of the standing issue, the ATB's analysis of the SCRA's protections focused on the tax's broad impact on affected Service members rather than the technical definition of the assessed taxpayer. Accordingly, the ATB allowed LtCol Riggs' motion for summary judgment, issued a favorable decision, and granted a complete abatement of the excise tax.⁴²

Recommendations to Active-Duty Service Members

Based on the ATB's decision in *Riggs*, we offer the following recommendations to

active-duty Service members and their representatives:

1. For active-duty Service members considering whether to purchase or lease a vehicle outside of their residence: We agree with Captain Wright that purchasing the vehicle should result in an uncontroversial exemption from local taxes in the Service member's temporary residence. However, many non-tax reasons exist for which a Service member may prefer to lease a vehicle rather than purchase it. For example, Service members who could be deployed overseas on short notice would probably choose the flexibility of a short-term lease to purchasing a vehicle outright. Accordingly, we would never advise a Service member to buy a vehicle they would otherwise prefer to lease purely based on local tax protection under the SCRA. For those Service members who would like to lease and share our conviction that the SCRA should protect against local taxes on leased vehicles outside the Service members' home states—and are comfortable with the potential time and expense associated with a tax dispute—we recommend that they discuss the possibility of a local tax exemption with their local assessor and the lessor before signing the lease.

2. For active-duty Service members who have already been billed and paid local taxes outside their home states to the lessor: We recommend that these Service members send letters to their lessors and local assessors requesting an abatement of local excise taxes. We also advise that these Service members consider citing *Riggs* as authority for their position. Although LtCol Riggs does not bind local tax assessors and appellate tax boards outside of Massachusetts as precedent, this case serves as an insightful roadmap for how other jurisdictions should apply local tax exemptions under the SCRA.

It is impossible to predict whether this case will directly impact local tax assessors' and appellate tax boards' interpretations of the SCRA outside of Massachusetts. In the absence of specific case law in this area, however, *Riggs* provides a basis for an exemption to which any Service member stationed outside their home state should be entitled.

Conclusion

Although the amount of the tax at issue, in this case, was relatively small, LtCol Riggs was always convinced that the SCRA should protect him from paying any excise taxes to the Town of Bedford and refused to give up on his challenge. As a direct result of LtCol Riggs' confidence in the merits of his position and refusal to yield to the assessment, the ATB has now provided Service members with long-awaited clarity on the SCRA's protection against local taxes on leased vehicles.

The ATB's ruling clarifies that active-duty Service members stationed in Massachusetts and domiciled elsewhere are not responsible for excise taxes assessed on motor vehicles *owned or leased* by those Service members. Because the scope of the SCRA's protection to local taxes on leased vehicles was a question of first impression, Service members stationed outside of Massachusetts should consider citing *Riggs* in support of their position that assessors outside of the Service members' home states are prohibited from imposing property taxes on leased vehicles. **TAL**

At the time the ATB case was decided (March 2023), Mr. Morris was a Tax Partner at Sherin and Lodgen LLP, a law firm based in Boston, Massachusetts. Mr. Morris is now Director of Tax Controversy for a national retail company.

The author thanks his colleague, attorney Julia Royce, for her valuable contributions to this article. The briefs for this case are unavailable on Westlaw, but Ms. Royce can provide copies on request via email to jroyce@sherin.com.

Notes

1. Soldiers' and Sailors' Civil Relief Act Amendments of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (codified as amended at 50 U.S.C. §§ 501-96).
2. See *Servicemembers' Civil Relief Act*, OFF. OF COMPTROLLER OF CURRENCY, <https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/servicemembers-civil-relief-act/index-servicemembers-civil-relief-act.html> (last visited Oct. 10, 2024).
3. 50 U.S.C. § 3931 (2016) (protection against default judgments in civil cases); 50 U.S.C. § 3937 (2016) (six percent cap for interest on obligations incurred before service date); 50 U.S.C. § 3953 (2023) (protection against foreclosure).
4. 50 USC § 4001(d)(1) (2022).

5. LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023).
6. See MASS. DEP'T OF REV., LOCAL TAX BENEFITS: VETERANS AND ACTIVE SERVICEMEMBERS § 3.2.1 (2009) ("This exemption applies just to property owned by the servicemember. If the servicemember leases a vehicle, the owner/lessor is billed for the excise and the terms of the lease govern whether that cost is passed along to the servicemember/lessee."); *Motor Vehicle Excise Information*, SEC'Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/divisions/cis/tax/motor-excise.htm> (last visited Oct. 10, 2024) ("Leased vehicles are also not eligible for this exemption . . ."); *Active Duty Military Motor Vehicle Exemption*, CRAVEN CTY. N.C., <https://www.cravencountync.gov/2270/Active-Duty-Military-Motor-Vehicle-Exemp> (last visited Oct. 10, 2024) ("Exemptions cannot be claimed on leased vehicles unless they have a tax situs on a military base in an area of exclusive Federal jurisdiction."). The view that the SCRA does not protect against the imposition of local taxes on leased vehicles is shared by Captain (Retired) Samuel Wright, U.S. Navy Judge Advocate General's Corps. See Captain Samuel F. Wright, *The SCRA Protects You from Having to Pay Personal Property Tax on Vehicle that You Own, But Not a Vehicle You Lease*, SERV. MEMBERS L. CTR. L.R. 20055, June 2020.
7. *Riggs*, 2023 WL 2603776, at *1.
8. *Id.*
9. *Id.*
10. *Id.*
11. See *id.*
12. This statement is based on the author's professional experiences as LtCol Riggs' counsel in this matter [hereinafter Professional Experiences].
13. *Riggs*, 2023 WL 2603776, at *1.
14. Professional Experiences, *supra* note 12.
15. *Id.*
16. *Id.*
17. See Appellant LtCol Jonathan L. Riggs' Reply to Appellee's Opposition to Motion for Summary Judgment, at 4, LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
18. See Appellant LtCol Jonathan L. Riggs' Motion for Summary Judgment, Exhibit A, at 2 (letter to Bedford associate assessor dated Dec. 4, 2018) (quoting 50 U.S.C. § 4001(d)(1)) (emphasis added), LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
19. *Id.* (quoting 50 U.S.C. § 4001(g)(2) (2022)) (emphasis added).
20. *Id.*
21. *Id.* at 2-3.
22. *California v. Buzard*, 382 U.S. 386, 393 (1966).
23. *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953).
24. Appellant LtCol Riggs' Motion for Summary Judgment, Exhibit A, at 2 (letter to Bedford associate assessor dated Dec. 4, 2018) (quoting *Dameron*, 345 U.S. at 326), LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL

- 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
25. See Bedford's Opposition to Lt. Col. Riggs' Motion for Summary Judgment, at 3, LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
26. *Id.* at 3; MASS. GEN. LAWS ch. 59, § 64 (2016).
27. Appellant LtCol Jonathan L. Riggs' Reply to Appellee's Opposition to Motion for Summary Judgment, at 2-3, LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
28. *Id.* at 3.
29. See LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776, at *2 (Mass. App. Tax. Bd. Mar. 9, 2023).
30. *First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 347 (1968).
31. *Id.* at 347-48 (reversing the Massachusetts Supreme Judicial Court's decision in *First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n*, 229 N.E.2d 245 (Mass. 1967) that the bank, as purchaser, was not entitled to relief because the incidence of the sales tax falls upon vendors).
32. See *Riggs*, 2023 WL 2603776 at *3 (discussing 229 N.E.2d 245).
33. See MASS. GEN. LAWS ch. 59, § 64 (2016).
34. See *Riggs*, 2023 WL 2603776 at *3 ("We see no reason, however, for changing our conclusion on the incidence of the sales tax in a situation where Federal immunity from State taxation is not involved.") (quoting *Supreme Council of Royal Arcanum v. State Tax Comm'n*, 260 N.E. 2d 822, 824 (Mass. 1970)).
35. Professional Experiences, *supra* note 12.
36. *Id.*; see Wright, *supra* note 6, at 5 ("Section 4001(d) (1) does not exempt the leasing company from the obligation to pay the personal property tax, nor does it exempt you from the obligation to reimburse the leasing company for the personal property tax the company pays.")
37. See Wright, *supra* note 6, at 5.
38. Appellant LtCol Jonathan L. Riggs' Reply to Appellee's Opposition to Motion for Summary Judgment, at 2-3 (citing *California v. Buzard*, 382 U.S. 386, 393 (1966)), LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776 (Mass. App. Tax. Bd. Mar. 9, 2023) (on file with author).
39. *Id.* at 4.
40. LTC Jonathan L. Riggs v. Bd. of Assessors of the Twn. of Bedford, No. F337365, 2023 WL 2603776, at *4 (Mass. App. Tax. Bd. Mar. 9, 2023).
41. *Id.* at *2.
42. See *id.*





AROUND THE CORPS

SPC Jeter Rosario, a paralegal specialist assigned to 2d Battalion, 87th Infantry Regiment, 2d Brigade Combat Team, 10th Mountain Division, assembles the M249 during weapons qualifications for the Expert Infantry, Soldier, and Field Medical Badges (E3B) at Fort Drum, NY. (Credit: PVT Makenna Tilton)



(Credit: Vojtech Vlk-stock.adobe.com)

Practice Notes

Wills with LexisNexis

Empowering Paralegals and Avoiding Professional Responsibility Pitfalls

By Major Ceara L. Riggs

Until recently, Drafting Libraries – Wills (DL Wills) was the U.S. Army’s will drafting software of choice. This program, which appeared to have been created at the same time as *Duck Hunt*¹ with an interface that mirrored the *Choose Your Own Adventure*² book series, enabled an experienced legal assistance attorney or paralegal to draft a will for any state in less than fifteen minutes. A central permissions authority needed to grant individual users access to the software.³ Yet, even upon receiving access, limited options and a lack of internal program guidance made it difficult for users to verify whether the drafted wills incorporated the latest state law and fully met the client’s intent.⁴

On 1 October 2021, LexisNexis became the Army’s new technology platform for drafting estate planning documents, with full functionality in all jurisdictions available by the end of 2022.⁵ Upon release, all Department of Defense Judge Advocate Legal Services members could immediately access the estate planning program through their LexisNexis accounts, including both lawyers and nonlawyer assistants.⁶ Unlike DL Wills, LexisNexis eliminated the permission requirement to download and install the software before accessing estate planning preparation documents.⁷ Accordingly, anyone with an internet connection and access to LexisNexis can use the software. LexisNexis also offers a user-friendly interface

to navigate between will drafting sections and easily make changes, corrections, or updates as needed.⁸ Perhaps most importantly, and arguably most concerningly, LexisNexis offers an “i” button that practitioners can click to receive drafting notes, better develop their estate planning practice, and accurately answer client questions specific to any jurisdiction.⁹

This increased functionality and legal practice support, combined with unrestricted availability to lawyers and nonlawyers alike, is the subject of this practice note. These changes open the door for supervising attorneys to empower legal assistance offices’ exceptionally valuable assets—their paralegals—to increase their engagement in estate planning drafting and preparation. Yet, how a lawyer trains and supervises their subordinates to draft estate planning documents while preventing the unauthorized practice of law can become challenging with such an accessible, easy-to-use, and informative program. Fortunately, the *Rules of Professional Conduct for Lawyers (Rules)* do not prohibit delegating functions to paralegals; instead, they permit paralegals to “conduct any law-related services at which they are competent, supervised, and authorized by appropriate authority.”¹⁰ Nevertheless, lawyers continue to spend significant amounts of their time drafting wills, which can result in less time spent doing what their paralegals cannot: providing legal advice and counseling.¹¹ With proper training and supervision, our Judge Advocate General’s (JAG) Corps’s competent, motivated, and professional paralegals can use LexisNexis to save lawyers and clients time, increase the efficiency of the office, and empower the legal assistance practice to expand into more complex areas.

Navigating the Relevant Rules of Professional Conduct

Competence

Competence must be the primary focus when considering how best to supervise and train paralegals to create estate planning documents. Despite LexisNexis’s wide accessibility and permissive use, Army Regulations and state bar rules still direct minimum competency requirements. Rule

1.1 of the *Rules* states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹² Lawyers can obtain this competence through self-study.¹³ To this end, several resources are available, including LexisNexis training events, resources, practice tips, The Judge Advocate General’s Legal Center and School’s *Estate Planning Deskbook*,¹⁴ legal assistance continuing education, and repeated practice using the program.

These competency requirements apply to lawyers and extend to their nonlawyer assistants, including paralegals, secretaries, clerks, investigators, and law student interns.¹⁵ According to Rule 5.3(b), “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”¹⁶ This requires lawyers to provide sufficient instruction and supervision to ensure paralegals are competent in creating legal documents, including wills, healthcare powers of attorney, advanced medical directives, and other estate planning documents. The lawyer should be responsible for the paralegal’s work product, as paralegals might not have legal training and may not be subject to professional discipline.¹⁷ Accordingly, as a baseline, it is prudent for a lawyer to train themselves and their paralegals using the standardized resources mentioned above. Then, before paralegals can independently draft estate planning documents, lawyers and supervisors must observe, evaluate, and critique their prepared documents to ensure competency, consistency within the office, and compliance with civilian and military rules of professional conduct.

The Unauthorized Practice of Law

When using a program as user-friendly and accessible as LexisNexis, competency and supervisory requirements are especially important to prevent paralegals from inadvertently engaging in the unauthorized practice of law. The unauthorized practice of law in the military is, in relevant part, two-fold. It prohibits (1) a lawyer from assisting a person who is not a member

of the bar in performing an activity that constitutes the unauthorized practice of law and (2) a paralegal from practicing law.¹⁸ The practice of law includes out-of-court services such as “rendering any service requiring the use of legal knowledge.”¹⁹ The *Rules* specifically include providing a document or instrument that is legal in nature, such as a will or power of attorney, in the practice of law.²⁰ With the information and support that LexisNexis practice tips provide, paralegals and their lawyers, as supervisory attorneys, can potentially wade into the dangerous proverbial waters of the unauthorized practice of law.

Nevertheless, the *Rules* (and the JAG Corps) recognize paralegals’ exceptional value. Although the *Rules* are meant to protect the public from unqualified individuals rendering legal services, they expressly permit a lawyer to “employ[] the services of nonlawyer assistants and delegat[e] functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”²¹ The *Rules* even contemplate that nonlawyer assistants may conduct law-related services and permit them to do so as long as they are “competent, supervised, and authorized . . . provided they do not engage in the unauthorized practice of law.”²² Herein lies the risk inherent in paralegals preparing estate planning documents.

Recognizing that the primary purpose of the *Rules* is to protect the public, a paralegal must, at the outset, make clear to clients that they are not a lawyer. A client cannot expect a “nonlawyer assistant to be able to take certain actions to advance his or her case”²³ outside of creating the requested estate planning documents and passing them to the supervising lawyer for review, refinement, and, when necessary, legal advice and counseling.²⁴ In other words, there is a clear difference between a paralegal drafting a healthcare proxy and a paralegal answering a client’s questions about whether they need a healthcare proxy. The first, assuming the paralegal is competent, supervised, and authorized, is a permitted law-related service; the second may be the unauthorized practice of law regardless of whether the paralegal did so innocently or deliberately.

A typical conversation in legal assistance offices—and the first opportunity to engage in the unauthorized practice of law—starts with a client asking a paralegal, “Do I need a will?”²⁵ Regardless of whether the answer is yes or no, any response other than, “I can’t answer that question, but if you’d like to consult an attorney or for our office to draft you a will, I can schedule an appointment for you,” would likely constitute the unauthorized practice of law. Yet, assuming a paralegal provides the answer above, nearly all their subsequent actions can provide faster service to the client, save the attorney time, and increase the office’s ability to see more clients and address more complex issues.

Maximizing Talent and Technology

After making their role clear, the paralegal can begin drafting documents. While doing so, the paralegal must balance providing excellent customer service with avoiding the unauthorized practice of law. This can become especially tricky if, as may happen across legal assistance offices, the paralegal has more experience than the attorney. For example, if a client asks whether they should list their spouse or their more responsible sibling as executor, a paralegal may know that the most responsible person should be named executor. Nonetheless, sharing that knowledge, if it is perceived as advice, could mean the paralegal has engaged in the unauthorized practice of law.²⁶ While a paralegal can complete the LexisNexis interview under the supervision of an attorney, they are not authorized to give legal advice—even if the paralegal has heard an attorney provide the same response to a question hundreds of times.²⁷

To some extent, using the LexisNexis “i” buttons can protect a paralegal from engaging in the unauthorized practice of law without continuous attorney oversight. For example, in Pennsylvania, a testator, a person who has a will or given a legacy, is not required to include their city, county, or state of residence to effectively execute a will.²⁸ Accordingly, the automated template interview prompts the question, “Does Testator wish to include their city, county, and state of residence?”²⁹ An “i” button follows this question.³⁰ When the user—paralegal or attorney—clicks the “i” button, a sidebar

opens to provide additional guidance.³¹ That guidance, which the paralegal can read directly to the client without engaging in the unauthorized practice of law, tells the client that this is an optional provision, explains the difference between residence and domicile, and describes the role of various factors and the client’s intent in determining residency and domicile.³² The paralegal might know all of this information, but the unauthorized practice of law is largely a reflection of the client’s perception.³³ A client is more likely to perceive information as advice if a paralegal answers the question based on their professional experience rather than indicating that “LexisNexis says . . .”

In practice, a paralegal may come to this question in the interview and ask the client whether they wish to include their city, county, and state of residence. A client may respond with, “I don’t care,” or “What do you think?”³⁴ This invites an easily undetectable opportunity for the paralegal to engage in the unauthorized practice of law. Saying “I recommend” differs significantly from reading the LexisNexis drafting note. The first is legal advice, and the second is a recitation of factual information. It is still prudent office practice to require the paralegal to note the client’s question and inform the reviewing attorney for their follow-up.³⁵ However, sharing relevant drafting notes with the client allows them to make more educated decisions and complete more of the draft prior to attorney review. This can increase the client’s ability to comprehensively consider their options while decreasing the amount of time the attorney spends counseling the client.

Practitioners who have spent years (if not decades) using DL Wills might point out that this process was possible with DL Wills. While true, the LexisNexis software makes the process more efficient and practicable. For example, when a paralegal completed a will using DL Wills, the attorney had to navigate through the entire program and every question again to make any changes or adjustments. This could amount to more than two hours of work.³⁶ In contrast, LexisNexis provides several features that further empower paralegals to generate the estate planning documents a client wants and empower attorneys to effectively and efficiently verify the accuracy

of the documents. An efficient office can retrieve the client intake questionnaire from the client; have the paralegal prepare the requested documents in advance; have the attorney review the documents; return them to the client for review, corrections, and questions;³⁷ and then set the client’s appointment with the attorney to advise on any remaining questions and finalize the will. Although this may include more steps than existing processes in some legal assistance offices, the trade-off for time is a better product that more effectively utilizes paralegals’ skills and capabilities.

First, the LexisNexis feature that allows users to navigate directly to any section of the automated template enables paralegals to make note of client questions or concerns regarding specific sections.³⁸ The attorney can then go directly to those sections to review them rather than being forced to click through every single interview screen. Second, when a section is complete in the automated template, a green bubble with a white checkmark populates to indicate completion.³⁹ A white bubble indicates a section that has yet to be started.⁴⁰ This allows a paralegal to complete the will to the best of their ability with no ambiguity regarding what still needs to be addressed. Third, the “Answer Summary” feature provides a summary view of all of the interview questions and the answers provided, which allows attorneys to quickly check that all the client’s information and concerns are included and addressed in the will without having to hunt for the same information in the drafted document itself.⁴¹

Conclusion

Hopefully, this article has encouraged paralegals to get the “reps” necessary to become competent in LexisNexis will drafting while remaining confident that they and their attorneys are avoiding any violations of the *Rules*. It is practical, not aspirational, for paralegals to draft all the estate planning documents a client needs without engaging in the unauthorized practice of law. The LexisNexis estate planning automated templates make it especially so by providing easy-to-navigate resources and information. By providing proper training and supervision, attorneys can ensure competency, empower action, and motivate everyone

in a legal assistance office to increase the team's offerings to clients. **TAL**

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Notes

1. DUCK HUNT (Nintendo 1984).

2. See, e.g., EDWARD PACKARD, *THE CAVE OF TIME* (1979); see also *About Us*, CHOOSE YOUR OWN ADVENTURE, <https://www.cyoa.com/pages/aboutus> (last visited Oct. 7, 2024).

3. This statement is based on the author's recent professional experiences as an Associate Professor, Administrative Law Division, The Judge Advocate General's Legal Center and School, in Charlottesville, Virginia [hereinafter Professional Experiences].

4. *Id.*

5. E-mail from Melissa Halsey, Chief, Legal Assistance Pol'y Div., to Chiefs of Legal Assistance (Jan. 19, 2022, 14:30 EST) (on file with author). The previous program, Drafting Libraries (DL) Wills, ceased operations and updates. *Id.* While personnel were not directed to stop using DL Wills immediately, they were encouraged to switch to LexisNexis sooner rather than later to prevent service interruption and out-of-date application of estate planning law. *Id.*

6. See Practice Note 1, Off. of Judge Advoc. Gen. Legal Assistance Pol'y Div. (on file with author).

7. See *JAGCNet to LexisNexis Single-Sign On*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/jagc.nsf/LexisLogin.xsp> (last visited Oct. 7, 2024). The only requirement to access LexisNexis is that users accept the terms of service. See *id.* Specifically, these terms state, in relevant part,

Use LexisNexis prudently; limit use to the amount necessary to support your research or mission. These services are provided for official use only; unauthorized use will result in your JAGC-funded LexisNexis account being disabled. Use of LexisNexis is limited to the performance of your official duties in support of the military's legal mission. Under no circumstances is personal use, civilian practice, or personal professional development permissible All members of the Army Judge Advocate General's Corps including attorneys, paralegals, law clerks, legal interns, court reporters, legal administrators, administrative assistants, legal technicians, librarians, and volunteer personnel when carrying out official business within the parameters of responsibilities as outlined throughout Army Regulation 27-1, whether civilians, active duty, reserve, or Army National Guard.

Id.

8. Professional Experiences, *supra* note 3.

9. LEXISNEXIS, TRUST AND ESTATES USER GUIDE 2 (2022). The LexisNexis program has an "Additional information button"—or "i" button—which provides supplemental help for users to answer an interview question, including legal questions and drafting notes. *Id.*

10. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 5.5 cmt. (6) (28 June 2018) [hereinafter AR 27-26].

11. Professional Experiences, *supra* note 3.

12. AR 27-26, *supra* note 10, r. 1.1.

13. *Id.* r. 1.1 cmt. (3).

14. ADMIN. & CIV. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, ESTATE PLANNING DESKBOOK (2016).

15. See AR 27-26, *supra* note 10, para. 7(a)(1)(j) ("[N]onlawyer legal personnel include, but are not limited to: legal administrators (MOS 270A), paralegal Soldiers (MOS 27D), court reporters, legal interns, and civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions.").

16. *Id.* r. 5.3(b).

17. See *id.* r. 5.3 cmt. (3).

18. See AR 27-26, *supra* note 10, r. 5.5. "A lawyer's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a lawyer may perform legal assistance duties even though the lawyer is not licensed to practice in the jurisdiction within which the lawyer's duty station is located." See *id.* r. 5.5 cmt. (3).

19. *Id.* r. 5.5 cmt. (2).

20. *Id.*

21. *Id.*

22. *Id.* r. 5.5 cmt. (6).

23. *Id.* r. 5.5 cmt. (7).

24. See *id.*

25. Professional Experiences, *supra* note 3.

26. See AR 27-26, *supra* note 10, r. 5.5.

27. See *id.*

28. See 20 PA. CONS. STAT. § 2502 (2024).

29. E.g., *Will for Individual with Spouse (Optional Trust(s) for Spouse and/or Children) (PA)*, AUTOMATED TEMPLATES: LEXIS+, <https://plus.lexis.com/practical-guidance-trusts-estates> (last visited Oct. 7, 2024) (log into Lexis+; select "Practical Guidance"; select "Trust and Estates"; select "estate Planning Forms with Military Language Resource Kit"; select "Pennsylvania" jurisdiction; choose your form; view the "Testator" section of the automated template).

30. See *id.*

31. *Id.*

32. See *id.* To understand the depth and breadth of the provided guidance, the full content of this drafting note follows:

Use the optional provisions to memorialize the testator's current residence or domicile. A declaration that the testator "currently resides" in a stated jurisdiction specifies the testator's current physical address, which may be either temporary or permanent. Alternatively, by stating that

the testator "is a resident of" a stated jurisdiction, the testator declares that jurisdiction to be their legal residence or domicile. Although generally guided by the intent of the individual, other factors used to establish domicile include:

- Voter registration
- Car registration
- State of residency on the individual's tax returns
- Address on passport

If the testator declares themselves as a resident of a specified jurisdiction, it is generally advisable to draft the will in accordance with the laws of such jurisdiction.

In some circumstances, such as when there is a strong possibility the testator may move to another jurisdiction, it may be advisable to omit from the will any express statement that the testator resides in a certain state, as well as any other references to that state. The absence of express references to a certain state may reduce the risk of more than one state claiming the testator is a resident. However, if the testator owned real property in other states, an ancillary probate proceeding must be commenced in each state where real property exists in order to transfer ownership or otherwise dispose of the real property. Note, however, that the real property would not be subject to ancillary probate in another jurisdiction if, at the testator's death, the testator owned the property jointly with survivorship rights and the joint tenant is living, or in a trust.

Id.

33. See AR 27-26, *supra* note 10, r. 5.5 cmt. (7).

34. Professional Experiences, *supra* note 3.

35. *Id.*

36. *Id.*

37. Even though they have yet to be executed, these drafted documents are still military instruments. As such, they should be provided to the client as a locked PDF with a "DRAFT" watermark to prevent the client from making any alternations that would require additional time to identify and review. All changes to the drafted documents should be made by personnel in the servicing legal assistance office.

38. LexisNexis Legal, *Overview of Automated Templates on Lexis+*, YOUTUBE, at 2:46 (Apr. 8, 2022), <https://www.youtube.com/watch?v=XUkEDjfZD00>.

39. *Id.* at 3:03.

40. *Id.* at 3:15.

41. *Id.* at 4:04.



A U.S. Senate committee hearing room. (Credit: Katherine Welles-stock.adobe.com)

Practice Notes

Five Things Every Judge Advocate Should Know About Federal Law (But May Be Afraid to Ask)

By Mr. Michael Jones

This is the third article in a series by Michael Jones concerning legislative affairs. The first piece in the series, A Primer for Judge Advocates on the National Defense Authorization Act, can be found in issue 3, 2022. The second piece in the series, The Army's Legislative Proposal Process: Advancing Army Initiatives Through Law, can be found in issue 1, 2023.

Judge advocates (JAs) at all levels should have a good working knowledge of the U.S. Code and how to find and research current and past Federal laws. After all, the U.S. Code provides the underlying foundation for many aspects of military legal practice.¹ Unfortunately, many attorneys may feel they do not have a strong

grasp of Federal law or how to research and employ it as part of their practice. This lack of understanding may result in researchers overlooking essential sources of information or failing to fully capture the precise nature of a statutory provision. During my tenure as the legislation attorney for the Office of the Judge Advocate

General (OTJAG), I have identified several areas where JAs can improve in applying and researching Federal law. So, without further ado, below are five things that every JA should know about Federal law.

1. What is the U.S. Code, and where can I find the best tools for researching it?

The U.S. Code compiles most of our current Federal public laws.² It contains “the general and permanent laws of the United States, organized into titles based on subject matter.”³ Currently, the U.S. Code consists of fifty-four separate titles and five appendices.⁴ When a new law amends an existing law, the U.S. Code is updated to reflect this change.⁵ The U.S. Code combines the original law with its amendments and removes the language that has been repealed or replaced.⁶ In short, it is the master list of Federal laws for the United States. The Office of Law Revision Counsel (OLRC), U.S. House of Representatives, prepares the U.S. Code and the Government Printing Office (GPO) publishes it.⁷ Updated versions of the U.S. Code are published every six years.⁸

JAs have many sources available to them to look up a specific section or research aspects of the U.S. Code. Practitioners who routinely access the U.S. Code primarily do so via the website that the OLRC maintains: uscode.house.gov.⁹ This website provides the full text of the official version of the U.S. Code and allows users to search the text and download entire titles and chapters.¹⁰ This site also provides classification tables, which identify where recently enacted laws will appear in the U.S. Code and which existing sections they amend (if any).¹¹ The OLRC produces this website using the same database it maintains for GPO to publish the print edition.¹² It is generally the most current version of the U.S. Code available for searching and browsing online, as OLRC staff updates it continuously throughout a congressional session.¹³

2. What is positive law codification?

Positive law has a legally significant and unique meaning in the context of the U.S. Code.¹⁴ Approximately half of the U.S. Code is positive law, while the other half is non-positive law.¹⁵ In essence, with regard to the U.S. Code, positive law and its

codification are primarily an organizational construct. Both positive and non-positive law titles contain laws, but the two types of titles are the result of different processes.¹⁶

Positive law codification is “the process of preparing and enacting a codification bill to restate existing law as a *positive law title* of the U.S. Code.”¹⁷ The resulting positive law conforms to Congress’s policy, intent, and purpose that existed in the original enactments; the restatement simply improves the law’s organizational structure, eliminates obsolete provisions, clarifies ambiguous provisions, resolves inconsistent provisions, and corrects technical errors.¹⁸ These positive law titles are *themselves* Federal law and can stand alone as legal evidence of the law.¹⁹ In other words, a positive law title is a comprehensive law that Congress has passed in the form of a title of the U.S. Code, and the organization, structure, designations, and text of the law are exactly as they appear in the U.S. Code.²⁰

Conversely, a non-positive law title compiles numerous separately enacted statutes that the editors of the U.S. Code have arranged into the title.²¹ These titles are not laws themselves—Congress has not enacted the title into law via positive law codification—and they serve only as *prima facie* evidence of the statutes that comprise them.²² The code itself explains further in § 204(a) of Title 1, which provides that,

The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish *prima facie* the laws of the United States, general and permanent in their nature Provided, however, [t]hat whenever titles of such Code shall have been enacted into *positive law* the text thereof shall be legal evidence of the laws therein contained²³

Consider a hypothetical document that contains separate but related factual sentences regarding a particular topic. While the facts are accurate, they overlap or even conflict in certain areas, and they could be better organized. If you wanted to rely on a specific factual statement within the document, you would first need to ensure that no other sentences amend or modify it.

This hypothetical document is one way to think about the structure and organization of a non-positive law title. If an editor were to take all those related sentences in the hypothetical document, organize them into a single presentation or theme, remove duplications, eliminate inconsistencies, place them into a logical structure, and have this new version approved as official, their process would be akin to positive law codification. The underlying information remains essentially the same, but the organization and content are altered to improve accuracy and usability.

Suppose Congress needs to modify a provision of non-positive law. In that case, Congress will directly amend the existing, underlying statute as it appears in the *Statutes at Large*.²⁴ In contrast, when Congress modifies a provision of positive law, it will amend the U.S. Code directly.²⁵ The U.S. Code currently has twenty-seven positive law titles, including Title 10—*Armed Forces* and Title 37—*Pay and Allowances of the Uniformed Services*.²⁶

3. What are statutory notes, and why should JAs care?

If a JA were tasked with researching the law concerning the rights of a victim under the Uniform Code of Military Justice (UCMJ), they would probably begin by looking at 10 U.S.C. § 806b (Article 6b of the UCMJ), which details a list of victim rights.²⁷ While some may be tempted to analyze the statutory text of § 806b and consider their inquiry complete, if they utilize the OLRC’s U.S. Code website and scroll down just a bit further within § 806b, they come upon a section titled “Statutory Notes and Related Subsidiaries.”²⁸ Within this section, users will find a provision titled “Notice to Victims of Alleged Sex-Related Offense of Pendency of Further Administrative Action Following a Determination Not to Refer to Trial by Court-Martial,” which further expounds on the victim notification requirements and includes specific actions that must be taken as part of the notification process.²⁹ This provision is an example of a statutory note.

A statutory note is a valid provision of law that is set out as a “note” under a U.S. Code section rather than as part of the U.S. Code section itself.³⁰ Creating the note is



(Credit: Tony Webster)

an editorial decision and does not affect the content's meaning or validity.³¹ In other words, a statutory note is a legitimate statutory provision organized separately from the other statutory text for clarity or order. JAs should neither question nor disregard the legal impact of statutory notes, as they often provide useful additional authorities or important clarifications.³²

When researching sections of the U.S. Code, checking for statutory notes to ensure you have considered all the relevant information on a topic is a helpful habit. As with the example above, if a practitioner failed to discover the existence of the note in 10 U.S.C. § 806b (Article 6b of the UCMJ), they would be unaware of a critical provision relating to the intersection of the notice requirements in cases not referred to court-martial and the Privacy Act of 1974 (5 U.S.C. § 552a).³³

4. What is a committee or conference report, and how do they relate to Federal statutes?

When researching unclear or ambiguous legal provisions, JAs may be asked to determine Congress' intent concerning a specific law or portion of a law. Congressional intent can help determine how to interpret or apply a particular provision of law. It can be gleaned from the statutory text itself, or it may be taken from other sources that

are commonly referred to as "legislative history."³⁴

Two significant sources of legislative history are the committee report and the conference report.³⁵ Almost every major piece of Federal legislation has reports associated with it, as each chamber's associated committee typically prepares one.³⁶ Reports generally consist of a reprint of the bill's text, a description of the purposes of the various provisions, and reasons for the committee's recommendations on the bill.³⁷ There is often a "section-by-section" analysis of the bill that can be very useful to researchers.³⁸ When a conference committee is appointed to draft a compromise bill that is acceptable to both the House and the Senate, it will issue a conference report.³⁹ Conference reports are extremely useful when researching legislative history because they come at the end of the legislative process and report on the final version of the bill's text.⁴⁰

For example, in December 2022, Congress passed the National Defense Authorization Act for Fiscal Year 2021 (2021 NDAA).⁴¹ Accompanying that bill was a conference report that included a reprint of the legislative text and additional information and explanation on various provisions.⁴² For example, the 2021 NDAA contained section 542, entitled "Qualifications of Judges and Standard of Review

for Courts of Criminal Appeals."⁴³ The conference report included the following language for that provision:

Qualifications of judges and standard of review for Courts of Criminal Appeals (sec. 542)

The House bill contained a provision (sec. 540J) requiring a minimum of 12 years of experience in law practice to qualify as a military judge on the Court of Criminal Appeals. The provision would also amend Article 66 of the Uniform Code of Military Justice (10 U.S.C. 866) to require the Court of Criminal Appeals, when considering appeals of court-martial convictions, to consider whether the finding is correct only upon a specific showing by the accused of deficiencies of proof. Under the provision, the Court could set aside and dismiss a finding if convinced that the finding was against the weight of the evidence. Further, the provision would require the entire Court of Criminal Appeals to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence.

The Senate amendment contained a similar provision (sec. 532).

The Senate recedes with an amendment that would remove the requirement for the entire Court of Criminal Appeals to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence and would amend Article 67 of the Uniform Code of Military Justice (10 U.S.C. 867) to authorize the United States Court of Appeals for the Armed Forces to review such a determination.⁴⁴

As evidenced by the text above, the report language offers further explanation and background information on the provision and how the two chambers arrived at the final version of the language. When JAs are tasked with interpreting an ambiguous provision or simply trying to understand how Congress arrived at the final text of

a provision of law, committee reports and conference reports often provide valuable insight. While reports are not technically part of the U.S. Code itself, they are part of a code section's legislative history and are a valuable tool for statutory research and interpretation.

5. Where can I find a “master list” of statutory definitions for military terms?

The Rosetta Stone is one of the British Museum's most famous artifacts.⁴⁵ The stone provided essential clues that helped experts learn to read Egyptian hieroglyphs, materially enhancing their understanding of the ancient writings.⁴⁶ If there is anything close to a Rosetta Stone for JAs regarding the U.S. Code, it is 10 U.S.C. § 101. This section provides the closest thing to a master list of definitions used throughout Title 10.⁴⁷ It defines more than fifty common terms critical to military practice, provides construction rules,⁴⁸ and is updated frequently to reflect new or amended terms.⁴⁹

For example, 10 U.S.C. § 101(a)(4) defines “Armed Forces” as “the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.”⁵⁰ Similarly, 10 U.S.C. § 101(a)(5) defines “uniformed services” as (A) the Armed Forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the Public Health Service.⁵¹

While some practitioners may use these terms interchangeably within the military, they have distinct meanings in the U.S. Code. Improper use can inadvertently include or exclude military elements and result in confusion, potential denial of rights and benefits, or material increases or decreases in certain costs. This is just one of many examples that demonstrate how 10 U.S.C. § 101 can inform a JA's research or legal products. When researching the meaning of a military term, 10 U.S.C. § 101 is a good place to start, especially if you are searching for a precise legal definition within a statutory provision.

Conclusion

Much of a JA's legal practice includes work with regulations, instructions, and case law. However, Federal statutes provide the underpinning for many of these legal resources.

Understanding how Federal law is structured, organized, and interpreted provides a significant advantage when performing legal research or advising military clients. While this article was not intended to make you an expert on all aspects of Federal law, it will hopefully inform your practice and improve your research abilities. **TAL**

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Notes

1. See generally 10 U.S.C. (organizing and defining the roles and missions of the Department of Defense and the U.S. Armed Forces).
2. *The United States Code*, U.S. SENATE, https://www.senate.gov/pagelayout/legislative/one_item_and_tasers/usCode_page.htm (last visited Oct. 4, 2024).
3. *About the United States Code and This Website*, OFF. OF L. REVISION COUNSEL, https://uscode.house.gov/about_code.xhtml (last visited Oct. 4, 2024).
4. *Id.*
5. *The United States Code*, *supra* note 2.
6. *Id.*
7. *About the United States Code and this Website*, *supra* note 3.
8. *How to Find the U.S. Code*, U.S. SENATE, https://www.senate.gov/legislative/HowTo/how_to_us_code.htm (last visited Oct. 4, 2024).
9. *U.S. Code*, OFF. OF L. REVISION COUNSEL, <https://www.uscode.house.gov> (last visited Oct. 4, 2024). This assertion is based on the author's recent professional experiences as the Legislative Attorney, Office of the Judge Advocate General from Aug. 2019 to present [hereinafter Professional Experiences].
10. *How to Find the U.S. Code*, *supra* note 8.
11. *See id.*
12. *About the United States Code and this Website*, *supra* note 3.
13. *See id.*
14. *Positive Law Codification*, OFF. OF L. REVISION COUNSEL, <https://uscode.house.gov/codification/legislation.shtml> (last visited Oct. 4, 2024).
15. See Sam Wice, *When to Refer to the U.S. Code Versus the Underlying Statute*, NOTICE & COMMENT: YALE J. ON REGUL. (July 25, 2018), <https://www.yalejreg.com/nc/when-to-refer-to-the-u-s-code-versus-the-underlying-statute>.
16. See *Positive Law Codification*, *supra* note 14.
17. *Id.* (emphasis added).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

23. 1 U.S.C. § 204(a) (emphasis added).
24. *Positive Law Codification*, *supra* note 14.
25. See Wice, *supra* note 15.
26. See *Positive Law Codification*, *supra* note 14.
27. UCMJ art. 6b(a) (2021).
28. See 10 USC 806b: Art. 6b. Rights of the Victim of an Offense Under This Chapter, U.S. CODE, [https://uscode.house.gov/view.xhtml?req=\(title:10%20section:806b%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title10-section806b\)&f=tree-sort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:10%20section:806b%20edition:prelim)%20OR%20(granuleid:USC-prelim-title10-section806b)&f=tree-sort&edition=prelim&num=0&jumpTo=true) (last visited Oct. 4, 2024).
29. See *id.*; *Detailed Guide to the United States Code Content and Features*, OFF. OF L. REVISION COUNSEL, http://uscode.house.gov/detailed_guide.xhtml#xhtml (last visited Oct. 4, 2024).
30. See *Detailed Guide to the United States Code Content and Features*, *supra* note 29.
31. *Id.*
32. *See id.*
33. See 10 U.S.C. § 806b note.
34. ARTHUR J. RYNEARSON, LEGISLATIVE DRAFTING STEP-BY-STEP 147 (2013).
35. *Legislative History Research Guide*, GEORGETOWN L. LIB. (Sept. 26, 2024), <https://guides.ll.georgetown.edu/c.php?g=278869&p=1862825>.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *See id.*
41. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat 3388.
42. See H.R. REP. NO. 116-617 (2020).
43. § 542, 134 Stat. at 3611.
44. H.R. REP. NO. 116-617, at 1605 (2020).
45. *Everything You Ever Wanted to Know About the Rosetta Stone*, BRITISH MUSEUM (July 14, 2017), <https://www.britishmuseum.org/blog/everything-you-ever-wanted-know-about-rosetta-stone>.
46. *Id.*
47. See 10 U.S.C. § 101 et seq.
48. 10 U.S.C. § 101(g).
49. See 10 U.S.C. § 101.
50. 10 U.S.C. § 101(a)(4).
51. 10 U.S.C. § 101(a)(5).

Hurricane Isabel approaches North Carolina's coast on 18 September 2003. (Credit: NASA)



No. 1

Navigating Domestic Climate Crises Responses for the Operational Judge Advocate

By Major Emily E. Bobenrieth

Today, no nation can find lasting security without addressing the climate crisis. We face all kinds of threats in our line of work, but few of them truly deserve to be called existential. The climate crisis does.¹

The recent emergence of sweeping and pointed national climate change policy reflects the gravity of this threat to U.S. national security.² Despite deliberate action by President Biden and the Department of Defense (DoD) to address climate change, there is a void in secondary, practice-oriented sources to assist the Title 10 operational judge advocate (JA) in navigating a unit's sudden and unexpected domestic deployment in response to extreme weather events. Furthermore, resources explaining the intricacies and analysis associated with Defense Support of Civil Authorities (DSCA) tend to be outdated and difficult to find.

While providing Federal support to states in the wake of a disaster is not new, climate change presents unique challenges to these missions. As extreme weather events become more frequent and devastating,³ local entities are more likely to become overwhelmed by response requirements. Federal resources will, therefore, be called upon to augment local efforts more than ever. Adding to the complexity of this challenge is the fact that advisors at the operational level are often first- or possibly second-term

captains with limited experience as a JA, let alone in advising on DSCA. This article serves as an updated resource to specific portions of DSCA most likely to impact a brigade-level JA and offers helpful practice tips and methods of conducting legal mission analysis in the wake of increased requests for Federal assistance.⁴

After providing a brief background of climate change and its importance in U.S. national security and a short overview of DSCA, it briefly explains the request and approval procedures for Title 10 forces to support local entities in a crisis. It then offers tools for the JA advising a responding command and an explanation of the chain of command in these operational scenarios. Finally, it explains the Immediate Response Authority (IRA) of commanders to provide instant assistance to local civil authorities in circumstances of time-sensitive crises.

Background and Importance

The U.S. military's shift in its mission from counterinsurgency operations to large-scale near-peer conflict requires a shift in legal



A view of heavy rain destruction during flood rescue and recovery operations in Boulder, CO, on 16 September 2013. U.S. Soldiers with 4th Combat Aviation Brigade, 4th Infantry Division, assisted state and local emergency response efforts under IRA. (Credit: SGT Jonathan C. Thibault)

focus for JAs.⁵ In addition to anticipating the competitive actions of hostile state actors, preparation and training must also include the impacts of climate change. Climate change is one of the most significant and enduring threats to national security.⁶ However, unlike a near-peer state, climate change's security impact is not only guaranteed to affect the territorial integrity and daily lives of U.S. citizens, but its impact is arguably irreversible.⁷

Mark Nevitt, a leading scholar at the intersection of climate and security, proposes that climate change's impact on U.S. national security and stability will manifest in two ways: as a "threat accelerant" and a "catalyst for conflict."⁸ As a threat accelerant, climate change will strain existing environmental stressors; as a "catalyst for conflict," it will undermine political stability via the emergence of climate refugees and competition for resources.⁹ From the domestic

standpoint, local authorities will be unable to respond to the intensifying weather and climate threats, ensuring increased reliance on DoD assets to assist in response efforts.¹⁰ This will, in turn, act as a "threat accelerant," placing strain on the DoD's resources and capabilities as these requests become more frequent and robust.¹¹

Defense Support of Civil Authorities and the Stafford Act

Generally, states are primarily responsible for using their internal resources to respond to disasters within their borders. The use of Federal resources to support state and local response continues to be the exception to this rule.¹² The historical hesitation of Federal intervention in state and local crises originates in federalism.¹³ The Tenth Amendment of the U.S. Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States, respectively, or to the people."¹⁴ "Reserved powers" include police powers; under police powers, states are primarily responsible for preparing for, responding to, and paying for disasters/emergencies within their borders.¹⁵ Therefore, the Federal Government will not become involved until and unless the state requests help because its internal response efforts are overwhelmed.

DSCA is defined as "support provided by military forces . . . in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities."¹⁶ DSCA encompasses all DoD domestic response authority and procedures.¹⁷ It is a melding of legal authority and policy that enables the DoD to execute domestic missions. These missions are not limited to natural disaster relief; they also include assistance to local law enforcement.¹⁸

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)¹⁹ is just one of the many statutory authorities that encompass DSCA. It provides the statutory authority for employing Federal forces for domestic disaster relief efforts.²⁰ The Stafford Act does not authorize the use of Federal forces to maintain law and order.²¹ Rather, Federal resources under the Stafford Act are limited to activities such as rescue, evacuation, emergency medical treatment, restoration of public services, debris removal, and distribution of food and supplies.²²

Summary of the DSCA Request and Approval Process

When a natural disaster hits, Federal assistance is provided when it is clear that either local relief efforts have fallen short or are anticipated to fall short.²³ Requests must be made in writing from the local civil authority to the Executive Secretary of the Department of Defense.²⁴ The local civil authority requesting assistance must be the state governor or their delegated official; requests from lower-level local officials will not suffice.²⁵

The decision to provide Federal relief under DSCA falls on the Secretary of Defense and must include the analysis of six criteria: cost, appropriateness, risk, readiness, lethality, and legality.²⁶ The request must also include an offer to reimburse the DoD at the earliest available opportunity.²⁷ If the request is granted, the DoD will coordinate with the requesting agency, the Federal Emergency Management Agency (FEMA), and on-scene personnel to determine what support to provide.²⁸

Mobilization and Deployment

There are several aspects to a successful domestic deployment, from preparing and training the formation to conducting anticipatory analysis of legal issues and instituting evaluation systems once deployed. The below suggests best practices, recommendations, and tools collected from various sources to ensure operational and legal success.

Train and Prepare the Force

Domestic deployments will require legal preparation and training that spans multiple

disciplines, from operational law to Federal law to legal assistance. Accomplishing each of these quickly, correctly, and thoroughly is of critical importance.

1. Establishing the Rules for the Use of Force

While distilling the rules for the use of force (RUF) for the specific mission is the commander's responsibility,²⁹ predictably, commanders will look to their JA to spearhead this process. JAs are responsible for supporting their organizations in carrying out their planning responsibilities by providing legal advice on all aspects of mission planning.³⁰ Severely condensed and chaotic timelines associated with a disaster response will likely not allow for the traditional military decision-making process.³¹ Even so, every effort should be made to involve the S4, S3, and S2, primarily to ensure that RUF development considers all aspects of operations and intelligence.

A JA should identify whether other units will be assigned to their area of operation. A catastrophic weather event will likely require more than one Title 10 unit to deploy to the same area with a similar, yet distinct, mission. The JA must collaborate with the S3 to identify other units tasked within the anticipated area of operation and, if possible, make contact with that unit's JA before deployment. This connection is critical not only for RUF development but also for follow-on coordination.

Once RUF development is complete, the commander's approval is required. The approval authority for the RUF may be a higher headquarters (division or corps). Coordination with the staff judge advocate throughout and before submitting RUF for approval is key. Both the RUF and weapons posture should be clearly annotated on RUF cards: pocket-sized cards that must be created (ideally laminated) and issued to all deploying Soldiers. Given the severely abbreviated timeline, it may be easiest to hand out RUF cards as Service members load planes or vehicles (assuming providing them at an in-person training is impossible).

Appearances are more important than ever during domestic operational deployments. Any indication or perception that Title 10 forces exceed their authority can cause public anxiety and confusion.³²

Therefore, the importance of effectively training RUF to the lowest level cannot be overstated. Overwhelmingly, Soldiers are used to operating under the permissive umbrella of the standing rules of engagement (SROE).³³ Ensuring all deploying personnel internalize the restrictive and prescriptive nature of the standing rules for the use of force (SRUF) is key to avoiding future issues. Deployments in response to natural disasters are unique in that a response may be needed in a matter of hours. Therefore, legal offices should have a standing brief on the SRUF and the Posse Comitatus Act (PCA),³⁴ both of which may only need minor tweaks and corrections based on unique aspects of the assigned mission. To better ensure comprehension of the RUF and the consequences of failing to adhere to RUF, JAs should rely heavily on the use of vignettes with their audience rather than solely reiterating the letter of the law.³⁵

2. Individual Legal Readiness

Finally, to the extent possible given time constraints, deploying Soldiers should have the opportunity to execute any powers of attorney and wills before departure.³⁶ This may require a request for support from the legal assistance office, ensuring the maximum number of attorneys and paraprofessionals to expediently process these actions.

Legal Planning

Legal planning for a DSCA mission should include preparation to anticipate and track legal issues before and during the mission. Efforts to predict legal issues in advance will help a JA plan what personnel, resources, materials, and equipment are required to provide legal support throughout all deployment phases.³⁷

1. Preparing for the Operation: The Legal Planning Matrix

One method to assist in planning is to use the legal planning matrix (LPM).³⁸ The LPM is derived from the legal preparation of the battlefield (LPB), a systematic approach to anticipating legal issues that Lieutenant Colonel (Retired) Geoffrey Corn developed while a professor at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.³⁹ Orig-

inally developed to anticipate and plan for an armed conflict,⁴⁰ LPB can be modified to assist in weather-related domestic relief scenarios. The DSCA LPM contemplates six⁴¹ functional legal areas for a domestic relief response and cross-sections those areas with each phase of the operation. These six legal areas are legal personnel/equipment, command and control/authorities, standard rules of force/posse comitatus act, staff integration and coordination, force administration and support, and force discipline/military justice.⁴² The operational phases are mobilization and pre-deployment, load-out, the relief mission, civil unrest, and redeployment.⁴³ These legal areas and phases are unique to DSCA missions. JAs should analyze the legal concerns for each phase to anticipate requirements and issues before they develop.

For a complete demonstration of the use of the LPM, see Appendix A. JAs are encouraged to use this model as a tool to think through, to the fullest extent possible, legal problems in the preparation phase of deployment.

2. During the Operation: The Running Estimate

Running estimates are long-standing doctrinal tools that all members of a staff use, including legal personnel. They facilitate the continuous assessment of the operational environment and track ongoing legal issues. JAs are directed to employ running estimates,⁴⁴ as doing so allows a commander to understand legal concerns and limitations.⁴⁵ At baseline, running estimates contain facts, assumptions, friendly force statuses, enemy activities and capabilities, civil considerations, and conclusions/recommendations with associated risks.⁴⁶ However, the doctrine allows flexibility for each staff section to manage information related to their individual areas of expertise.⁴⁷ In order to be most effective, the legal estimate should be tailored to not only meet the needs of each specific staff element but also to a specific mission.

Colonel Ryan Howard and Major M. Keoni Medici created a helpful example of a legal running estimate.⁴⁸ Appendix B provides a running estimate modified to fit the needs of a weather-related DSCA mission. Like all running estimates, this

DSCA-specific tool prompts the user to identify legal and mission authorities, legal support status, specified/implied/essential tasks, constraints, significant events in the last and next twenty-four hours, ongoing relief missions, and brigade orders.⁴⁹ This running estimate acknowledges weather-specific constraints on the legal mission, including the legal basis for the mission (IRA or FEMA), connectivity and power issues, and SRUF limitations.⁵⁰ Additional tailoring is encouraged to meet the specific needs of a particular mission.

Command and Control: The Dual-Status Commander

During DSCA missions, advising JAs will be expected to understand and explain the unique existence of the dual-status commander (DSC). Two of the most significant shortcomings in the Federal response to Hurricane Katrina were the failure to integrate military support from different Services or components and a lack of unity of command.⁵¹ Unity of command requires every mission to fall within the authority of a single, responsible commander.⁵² In other words, two commanders may not simultaneously exercise the same command relationship over the same force.⁵³ This did not exist in August 2005, and the confusion it caused directly impacted the Katrina relief effort. To address this issue, Congress enacted legislation establishing the DSC in 2006.⁵⁴

A DSC is a commissioned officer of the Regular Army or Air Force, or a federally recognized Army National Guard or Air National Guard officer, authorized by the Secretary of Defense, and with the consent of the applicable governor, to exercise legal command over state National Guard and Federal active-duty forces.⁵⁵ This individual holds a commission in both the active and National Guard components.⁵⁶ A DSC may not command both Federal and state military personnel at the same time. Instead, this “dual status” authorizes the DSC to command Federal and state forces in a mutually exclusive manner.⁵⁷ In other words, a DSC may not give an order to both Title 10 and Title 32 forces on the same document. Their command and control of one chain of command must be entirely separate from the other.

DSC-led joint task forces are intended for use in both pre-planned and no-notice

events, including natural disasters.⁵⁸ Certain conditions must be met, however, to employ an established DSC. If the response to an incident includes or has the potential to include both Title 10 and 32 forces, The Adjutant General (TAG) for the governor of the affected state will recommend activating the DSC to the governor.⁵⁹ The governor will then contact the Secretary of Defense, while TAG contacts the chief of the National Guard Bureau.⁶⁰ Once approved and activated, this dual status typically requires two deputy commanders: a National Guard officer in state status and a Federal military officer.⁶¹ A DSC provides the benefit of a single state and Federal commander in an operating space and mitigates the likelihood of confusion or duplicating efforts.⁶² The DSC provides a unity of effort, enabling the smooth execution of the relief mission. However, the DSC is not intended for use in civil disturbance operations, homeland defense operations, or for Federal military commanders to provide assistance under their immediate response authority.⁶³

The increased frequency of natural disasters requiring a joint state and Federal response necessitated pre-identified DSCs in fifty states and three U.S. territories.⁶⁴ These DSCs are appointed via nomination and an agreement, which dictates the Federal and state forces’ legal, operational, fiscal, and administrative responsibilities.⁶⁵ Typically, the DSC is a general officer, vetted and agreed upon by both the governor (or delegate) and the President (or delegate).⁶⁶ A detailed memorandum of agreement (MOA) is created in tandem to this process to establish the legal and operational responsibilities of each party with regard to the DSC.⁶⁷

In cases where a disaster affects multiple states, there cannot be a single DSC to command the entire response. In a multi-state response, it may be necessary to employ multiple DSCs, each of whom would have control within the boundaries of their state.⁶⁸ All DSCs activated in response to a disaster operate under the operational control of the U.S. Northern Command (USNORTHCOM) commander for their Title 10 chain of command.⁶⁹ DSCs also have a state chain of command through TAG to the governor.⁷⁰

A JA will need to identify the DSC as well as request, read, and understand



U.S. Soldiers with the 4th Combat Aviation Brigade, 4th Infantry Division, evacuate elementary school students in the wake of extreme flooding on 14 September 2013 during emergency response efforts under IRA. (Credit: SSG Wallace Bonner)

the standing MOA. Moreover, the ability to explain the role of the DSC to their commander is of paramount importance, especially if the DSC is of another component or Service. Identifying the DSC's legal advisor is critical for technical chain coordination as the mission progresses. National Guard and Federal staff should integrate, to the greatest extent possible, to best support both their title-specific deputy and the DSC. This integration should include synchronized battle rhythms as well as integrated processes and procedures.⁷¹

Immediate Response Authority

In circumstances where this formal request for assistance process would result in loss of life, human suffering, or great property damage, commanders have the authority to respond immediately to requests for assistance from civil authorities.⁷² IRA is rooted in the military's historical role of providing

immediate or emergency assistance to the civilian community in times of overwhelming disaster.⁷³ While IRA is not founded in statute,⁷⁴ the U.S. Supreme Court's interpretation of the common law principle of necessity by a military commander has long supported its employment.⁷⁵

While examples of commanders exercising IRA exist,⁷⁶ its use is historically rare. Nevertheless, in the wake of rapidly worsening climate crises, IRA has the potential to become a more frequent occurrence. Therefore, the operational legal advisor must comprehensively grasp IRA's analytic framework to best advise commands receiving these urgent requests.

Requests and Approval for Immediate Assistance

IRA's present-day authority derives from DoD Directive 3025.18.⁷⁷ In situations warranting IRA, civil authorities must

still request assistance.⁷⁸ Absent a request, Federal commanders may not provide support.⁷⁹ "Civil authority" is defined as "any elected or appointed officer or employee of the government of the United States, the governments of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and [U.S.] Virgin Islands, Guam, insular areas, and political subdivisions thereof."⁸⁰ Therefore, a request for assistance under IRA may originate from *any* local elected leader (e.g., a mayor, school board president, or Federal judge).⁸¹ Assistance provided under IRA allows the initial assistance request to be oral, followed by a written request.⁸² This written request can take any form, from an email to a handwritten note. In June 2016, Rainelle, West Virginia, experienced overwhelming flooding that transformed entire communities into lakes.⁸³ The flooding caused catastrophic property damage and killed at least



Members of the 811th Ordnance Company, 321st Ordnance Battalion, 38th Regional Support Group, perform rescue efforts in partnership with local and state emergency first responders in Rainelle, WV, on 24 June 2016. (Credit: MAJ Sean Delpech)

twenty-five people.⁸⁴ Mayor of Rainelle Andrea Pendleton handwrote her request for immediate Federal assistance on a piece of lined notebook paper.⁸⁵

The request should include an offer to reimburse, though this is not required. Mayor Pendleton's request had no offer to reimburse.⁸⁶ However, this did not delay the commander's response. In fact, DoD Directive 3025.18 states that response will not be delayed due to lack of reimbursement.⁸⁷ If a civil authority does not make an offer to reimburse, the receiving commander must send a request for reimbursement.⁸⁸

DoD Directive 3025.18 provides some legal maneuverability regarding what kind

of "commander" may authorize an IRA request. While the directive states a request should be directed to the installation commander,⁸⁹ nothing indicates it is required. The directive bestows IRA to "Federal military commanders, heads of DoD components, and/or responsible DoD civilian officials."⁹⁰ The *Manual for Courts-Martial* defines "commander" as "a commissioned or warrant officer who, by virtue of rank and assignment, exercising primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a 'command.'"⁹¹ This is the same definition for "commander" found in Army

Regulation 600-20, *Army Command Policy*, paragraph 1-6;⁹² and Navy JAG Instruction 5800.7G, paragraph 0106.⁹³ IRA, therefore, provides the opportunity for commanders at all levels to receive, consider, and act upon a request for immediate assistance.⁹⁴ On 23 June 2016, First Lieutenant Nicholas Kranz, commander of the 811th Ordnance Company, received Mayor Pendleton's written request and immediately activated his company to evacuate citizens from the rising waters.⁹⁵

Evaluation Criteria to Exercise IRA

A commander's IRA is a vehicle to prevent unnecessary loss of life and property when time does not allow for a traditional request for assistance. Although IRA may be interpreted broadly to fulfill this humanitarian need, it must also be balanced with the principle of federalism. To assist with this analysis, a commander should consider the following criteria in DoD Manual 3025.01:

- (1) whether action is needed to save lives, prevent human suffering, or mitigate great property damage;
- (2) whether the time to act does not permit obtaining higher headquarters approval;
- (3) whether military actions do not involve the use of lethal force or subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory;
- (4) whether actions must not subject DoD personnel to undue risk;
- (5) whether commitment by the request to reimburse DoD is not a factor;
- (6) the ability, if known, of non-defense entities to respond to the urgency of the request;
- and (7) whether responding should not jeopardize DoD missions.⁹⁶

All seven of these factors must be met to employ IRA.

Change 2 to DoD Directive 3025.18 removed the requirement that the approving commander be "local," providing commanders the flexibility to respond to requests for assistance even if the requests are outside the traditional "local" area.⁹⁷ While the physical distance between commander and disaster is no longer dispositive, it should still be a consideration in determining the DoD's ability to support the request. With



The Second General Support Aviation Battalion, 4th Aviation Regiment, 4th Combat Aviation Brigade, 4th Infantry Division, takes a celebratory flyby to say “thank you” to the Colorado National Guard and all the emergency agencies involved in flood rescue operations after concluding its mission under IRA in Boulder, CO, on 19 September 2013. (Credit: SGT Jonathan C. Thibault)

any IRA assessment, recency is key. Relief provided under this authority should be within hours of the catastrophic event.⁹⁸ This may inherently limit a commander’s ability to effectively respond if the location of the disaster is too far away.

A commander may also rely on other informational resources (news, intelligence reports, etc.) to determine if a request warrants the exercise of IRA. Finally, while a company commander may conduct this evaluation and approve a request, practically speaking, the request should be pushed to the brigade level, at a minimum, for situational awareness. While further approval beyond the receiving command-

er is not required, IRA does require rapid and prescriptive reporting requirements described below.

Notification Requirements

The use of IRA requires immediate notification to the National Joint Operations and Intelligence Center (NJOIC).⁹⁹ The notification must include seven key details: the civil authority requesting support and the time of the request, the type of support requested, an incident description, the type of support provided, the status of personnel responding, the duration of support, and the cost of support.¹⁰⁰ The JA should be prepared to assist in drafting, or at a minimum

reviewing, this notification. The NJOIC will, in turn, notify USNORTHCOM and/or U.S. Indo-Pacific Command (USIN-DOPACOM) of the response and reassess the situation no later than seventy-two hours after receipt of the request.¹⁰¹ While commanders may not normally continue support under IRA beyond seventy-two hours, should the need for assistance persist, it may continue with constant reassessment and reporting.¹⁰²

Fiscal Concerns

Exercising IRA means initially acting without FEMA’s support or financial reassurance. DoD expenditures for actions taken pursuant

to a traditional FEMA request for assistance receive FEMA reimbursements.¹⁰³ However, this reimbursement mechanism is not generally available for IRA.¹⁰⁴ Rather, DoD doctrine states that IRA assistance will be provided on a cost-reimbursable basis.¹⁰⁵ As mentioned above, reimbursement assurance by the requesting entity is not necessary, nor should a response be delayed due to fiscal concerns.¹⁰⁶ Therefore, the responding unit's existing operations and maintenance funds for the current fiscal year will initially fund a command's response.¹⁰⁷ JAs should, therefore, advise commands of the high likelihood that unit funds will be spent and possibly not be reimbursed.

Conclusion

Active-duty DoD components should not view domestic disaster relief missions as an unusual occurrence; worsening climate crises mean this is no longer a "them" problem. Extreme weather events are not just likely; they are inevitable and will require Federal resources otherwise unavailable to local and state entities. JAs are in the best position to advise their commands on these missions when armed with the knowledge, tools, and historical context to ensure mission success. The clear and present threat that climate crises pose and the policy initiatives to prioritize planning for its effects put the force on notice that it is not a matter of if, but when. This article offers a foundational resource for the anticipatory planning and eventual execution of robust domestic relief missions. Confronting the legal complexities of this unconventional threat now will help ensure mission success when the call for help eventually sounds, and your command answers. **TAL**

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Notes

1. Lloyd J. Austin III, U.S. Sec'y of Def., Address at the 2021 Leaders' Summit on Climate (Apr. 22, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2582828/secretary-austin-remarks-at-climate-change-summit>.
2. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 9 (2022) [hereinafter 2022 NSS]; NAT'L INTEL. COUNCIL,

NATIONAL INTELLIGENCE ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO U.S. NATIONAL SECURITY THROUGH 2040, at I (2021) [hereinafter NIE]; U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2022) [hereinafter 2022 NDS]; U.S. DEP'T OF DEF., SUSTAINABILITY REPORT & IMPLEMENTATION PLAN 1 (2020); U.S. DEP'T OF DEF., CLIMATE ADAPTATION PLAN 1 (2021); U.S. DEP'T OF DEF., CLIMATE RISK ANALYSIS 2 (2021) [hereinafter CRA]; U.S. DEP'T OF DEF., DIR. 4715.21, CLIMATE CHANGE ADAPTATION AND RESILIENCE 1 (Aug. 31, 2016); U.S. DEP'T OF ARMY, ARMY CLIMATE STRATEGY IMPLEMENTATION PLAN FISCAL YEARS 2023-2027 (2022) [hereinafter ARMY IMPLEMENTATION PLAN]; U.S. DEP'T OF NAVY, CLIMATE ACTION 2030 1 (2022) [hereinafter NAVY CLIMATE ACTION]; U.S. DEP'T OF AIR FORCE, CLIMATE ACTION PLAN (2022) [hereinafter AF CAP].

3. Jesse E. Bell et al., *Changes in Extreme Events and the Potential Impacts on Human Health*, 68 J. AIR WASTE MGMT. ASSOC. 265 (2018) (stating that extreme weather and climate-related events have been increasing in frequency and intensity in the United States over the last several decades).

4. This article will only focus on domestic responses. The author recognizes the potential for international response requirements under Foreign Humanitarian Assistance. While this area is relevant and necessary to evaluate in the wake of climate change, it falls outside the scope of this article.

5. See Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* MIL. REV., Mar.-Apr. 2021, at 6.

6. See CRA, *supra* note 2, at 2; 2022 NSS, *supra* note 2, at 9; Jim Garamone, *Hicks Defines Need to Focus DOD on Climate Change Threats*, DO D NEWS (Aug. 30, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3510772/hicks-defines-need-to-focus-dod-on-climate-change-threats>.

7. John Comiskey et al., *Climate Security: A Pre-Mortem Scenario Planning to Homeland Defense*, 2020 Homeland Defense Academic Symposium, NORAD-NORTHCOM North American Defense and Security Academic Alliance 2 (2020), <https://www.northcom.mil/Portals/28/ComiskeyLarranagaCarlsonFinalwDisclaimer.pdf>; 2022 NSS, *supra* note 2, at 9; NIE, *supra* note 2, at 4.

8. Mark P. Nevitt, *On Environmental Law, Climate Change, & National Security Law*, 44 HARV. ENV'T L. REV. 321, 321 (2020).

9. *Id.* at 325, 345.

10. See 2022 NDS, *supra* note 2, at 4.

11. See CRA, *supra* note 2, at 8; 2022 NDS, *supra* note 2, at 4.

12. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5208; CTR. FOR L. AND MIL. OPERATIONS (CLAMO), THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW 4 (2021) [hereinafter DOPLAW HANDBOOK].

13. See Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 7-8.

14. U.S. CONST. amend. X (original style retained).

15. See *Berman v. Parker*, 348 U.S. 26 (1954) (stating "[p]ublic safety, public health, morality, peace and qui-

et, law and order . . . are some of the more conspicuous examples of the traditional application of the police power" (however, these examples do not constitute the full scope of state police powers)); Major Vo-Laria N. Brooks, 283d SOLO: Defense Support of Civil Authorities, at slide 9 (2021) (unpublished PowerPoint presentation) (on file with author).

16. JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES I-2 (29 Oct. 2018) [hereinafter JP 3-28].

17. See U.S. DEP'T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18]; see also U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (8 Feb. 2019) [hereinafter DoDI 3025.21].

18. See JP 3-28, *supra* note 16, at I-2.

19. 42 U.S.C. §§ 5121-5208.

20. JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RSCH. SERV., RS22266, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 4 (2012) [hereinafter USE OF FEDERAL TROOPS].

21. *Id.*

22. *Id.* at 5.

23. JP 3-28, *supra* note 16, at I-4.

24. DoDD 3025.18, *supra* note 17, at 3.

25. 44 C.F.R. § 206.35a (2022); DOPLAW HANDBOOK, *supra* note 12, at 4; JP 3-28, *supra* note 16, at I-4.

26. DoDD 3025.18, *supra* note 17, at 4.

27. *Id.*

28. MICHAEL J. VASSALOTTI & LAWRENCE KAPP, CONG. RSCH. SERV., IF11324, DEFENSE PRIMER: DEFENSE SUPPORT OF CIVIL AUTHORITIES (2022) [hereinafter DEFENSE PRIMER].

29. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES FOR THE USE OF FORCE FOR US FORCES, encl. L, para. 3 (13 June 2005).

30. JOINT CHIEFS OF STAFF, JOINT PUB. 3-84, LEGAL SUPPORT, at I-13 (2 Aug. 2016).

31. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS paras. 2-92 to 2-94 (31 July 2019) [hereinafter ADP 5-0] (describing the military decision-making process as an orderly, analytical process consisting of seven steps where each step requires inputs, and a series of sub-steps; this useful but intricate process takes more time than a unit will likely have when called to assist in foreign disaster relief).

32. See Crispin Burke, *4 Lessons the Military Learned in the Wake of Hurricane Katrina*, TASK & PURPOSE (Aug. 27, 2015), <https://taskandpurpose.com/news/4-lessons-the-military-learned-in-the-wake-of-hurricane-katrina> (stating the military should have taken more of a support role to the National Guard in the Katrina response and the failure to do so resulted in the appearance that Federal forces were leading the efforts, which should never have been the case); The author conducted multiple interviews with key personnel surrounding lessons learned from the Katrina response. These interview notes are on file with the author.

33. See NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK ch. 5, para. V(3)(c) (2024).

34. 18 U.S.C. § 1385.

35. See, e.g., Anya Samek et al., *Using Vignettes to Improve Understanding of Social Security and Annuities*, NAT'L BUREAU OF ECON. RSCH. (Aug. 2019), <https://www.nber.org/papers/w26176> (demonstrating that exposure to vignettes leads individuals to better understand complex topics by 10 to 15 percentage points).
36. See CTR. FOR L. AND MIL. OPERATIONS (CLAMO), THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS 1998-1999, at 34 (2000) [hereinafter HURRICANE MITCH].
37. *Id.* at 35.
38. *Id.* at 36.
39. *Id.* at 198 (Then-MAJ Geoffrey Corn, professor in the International and Operational Law Division at the then-named Judge Advocate General's School in Charlottesville, Virginia, developed the LPB concept to be used in an elective that was offered during the 46th Graduate Course. It was later printed for distribution during that year's Worldwide Continuing Legal Education conference).
40. *Id.*
41. *Id.*
42. See *infra* Appendix A.
43. *Id.*
44. ADP 5-0, *supra* note 31, para. 5-12.
45. Major Ryan Howard & Captain Keoni Medici, *The Running Estimate*, OPERATIONAL L.Q., June 2017, at 8 (CAC/EAMS-A access required).
46. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 7-11 (May 2022) [hereinafter FM 6-0].
47. *Id.* para. 2-9.
48. Howard & Medici, *supra* note 45, at 8. The development of this running estimate was based on then-Major Howard and then-Captain Medici's observations at the Joint Readiness Training Center at Fort Polk, Louisiana. *Id.*
49. See *infra* Appendix B.
50. *Id.*
51. Trent O. Dudley, *The Evolution of Dual Status Command Authorities: A New Construct for Implementation 3* (2016) (Air War College, Air University), <https://apps.dtic.mil/sti/pdfs/AD1036952.pdf>.
52. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 2-100 (31 July 2019) [hereinafter DOC. PUB. 6-0].
53. *Id.*
54. 32 U.S.C. §§ 315, 325 (2006).
55. JP 3-28, *supra* note 16 at C-1; Colonel John T. Gereski & Lieutenant Colonel Christopher R. Brown, *Two Hats are Better Than One: The Dual Status Commander in Domestic Operations*, ARMY LAW., June 2010, at 72, 73.
56. Dudley, *supra* note 51, at 3.
57. JP 3-28, *supra* note 16, at C-1.
58. N. AM. AEROSPACE DEF. COMMAND (NORAD) & U.S. N. COMMAND (USNORTHCOM), INSTR. 10-127, NORAD AND USNORTHCOM TITLE 10 SUPPORT TO DUAL STATUS COMMANDER LED JOINT TASK FORCE PROGRAM 8 (24 Mar. 2022) [hereinafter INSTR. 10-127].
59. *Id.* at 9.
60. *Id.* NORAD and USNORTHCOM Instruction 10-127 details the process in which the governor requests and SECDEF approves activation of the DSC. *Id.*
61. JP 3-28, *supra* note 16, at C-7.
62. Gereski & Brown, *supra* note 55, at 77.
63. JP 3-28, *supra* note 16, at C-1.
64. THE NAT'L GUARD, DUAL STATUS COMMANDER (DSC) FACT SHEET (2020).
65. Gereski & Brown, *supra* note 55, at 75.
66. *Id.*
67. JP 3-28, *supra* note 16, at C-2; Gereski & Brown, *supra* note 55, at 75.
68. JP 3-28, *supra* note 16, at C-2; CTR. FOR L. AND MIL. OPERATIONS (CLAMO), THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC DISASTER RESPONSE 2017: HURRICANES HARVEY, IRMA, AND MARIA: LESSONS LEARNED FOR JUDGE ADVOCATES 154 (2017) [hereinafter 2017 DISASTER RESPONSES].
69. INSTR. 10-127, *supra* note 58, at 13.
70. *Id.*
71. Gereski & Brown, *supra* note 55, at 77.
72. DoDD 3025.18, *supra* note 17, at 5.
73. See Winthrop, *supra* note 13, at 4, 8.
74. *Id.* at 5.
75. See *Mitchell v. Harmony*, 59 U.S. 115 (1851) (describing the doctrine of necessity as a response to events that are immediate and impending, where the action of the civil authority would be an inadequate response; the Court reasons that necessity is related to the "public service"); *United States v. Russell*, 80 U.S. 623, 627-28 (1871) (justifying the Federal seizure of private vessels for military service during the Civil War on the basis of necessity; the Court states that necessity is justified in cases of "public danger").
76. See Winthrop, *supra* note 13, at 3-5 (citing multiple examples of the use of IRA: in 1995 the commander of Hamilton Air Force Base provided personnel to build levees and evacuate civilians immediately following the devastating flood in Yuba-Marysville, California; the 1994 Flint River Flood in southwest Georgia left 40,000 people homeless, and the commander of the Marine Corps base in Albany, Georgia, provided personnel to assist in rescue efforts; immediately following the Oklahoma City bombing in April 1995, the commander of Fort Sill, Oklahoma, relied on IRA to provide two MEDEVAC helicopters and two bomb detection dog teams hours before President Clinton declared the event a national emergency).
77. DoDD 3025.18, *supra* note 17.
78. *Id.* para. 4(d).
79. 2017 DISASTER RESPONSES, *supra* note 68, at 19.
80. JP 3-28, *supra* note 16, at GL-6.
81. E-mail from Robert Gonzales, Senior Nat'l Sec. L. Att'y, U.S. Army North, to author (Nov. 23, 2022, 00:58 EST) (on file with author). U.S. Army North's (NORTHCOM's) interpretation of "civil authority" is broad, and explicitly includes all elected governmental positions, regardless of the nature or area of responsibility. *Id.* Thus, a request should be considered regardless of the office from which the request originates. *Id.*
82. DoDD 3025.18, *supra* note 17, at 3.
83. Brian Godette, *U.S. Army Reserve's 811th Soldiers Answer the Call in West Virginia*, DVIDS (June 27, 2016), <https://www.dvidshub.net/news/202550/us-army-reserves-811th-soldiers-answer-call-west-virginia>.
84. *Id.*
85. *Id.*
86. *Id.*
87. DoDD 3025.18, *supra* note 17, at 5.
88. U.S. DEP'T OF DEF., MANUAL 3025.01, DEFENSE SUPPORT OF CIVIL AUTHORITIES: DoD INCIDENT RESPONSE, vol. 2, para. 5.6(b) (Aug. 11, 2016) (C1, Apr. 12, 2017) [hereinafter DoDM 3025.01].
89. DoDD 3025.18, *supra* note 17, at 3. The installation commander includes a civilian installation commander. *Id.*
90. *Id.*
91. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 2a (2024) [hereinafter MCM].
92. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-6 (24 July 2020) [hereinafter AR 600-20].
93. U.S. DEP'T OF NAVY, JAGINST 5800.7G, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0106(a) (15 Jan. 2021) (C2, 1 Dec. 2023).
94. E-mail from Robert Gonzales, Senior Nat'l Sec. L. Att'y, U.S. Army North, to author (Jan. 11, 2023, 09:11 EST) (on file with author).
95. Godette, *supra* note 83.
96. DoDM 3025.01, *supra* note 88, para. 5.5(b).
97. See DoDD 3025.18, *supra* note 17.
98. DoDD 3025.18, *supra* note 17, para. 4-5; Winthrop, *supra* note 13, at 7.
99. U.S. Army NORTHCOM directs that the DoD official approving the initial response do so through their higher headquarters. *Admin and Logistics*, in CHAIRMAN OF THE JOINT CHIEFS OF STAFF, SUPPORT OF CIVIL AUTHORITIES EXORD 4.B.4.A (2019). The email address for this notification is mbx.njoic-battle-captain-nmcc@mail.mil and the phone number is 703-692-4595. *Id.* This notification is expected within two hours of the decision to exercise IRA. *Id.*
100. DoDM 3025.01, *supra* note 88, para. 5.5(d); 2017 DISASTER RESPONSES, *supra* note 68, at 14.
101. DEFENSE PRIMER, *supra* note 28, at 1.
102. DOPLAW HANDBOOK, *supra* note 12, at 42.
103. U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION vol. 11A, ch. 19, 19-9 (July 2015).
104. *Id.* FEMA has, on occasion, provided reimbursement to the DoD for IRA activities via "ratification" of the DoD action after the fact. Winthrop, *supra* note 13, at 7 n.47. However, FEMA is under no obligation to do so, and this retroactive approval cannot be relied on. *Id.*
105. DoDD 3025.18, *supra* note 17, at 5.
106. *Id.*
107. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 301, 135 Stat. 1541, 1625 (2021) (appropriating operations and maintenance funds for the use of the Armed Forces and other activities and agencies of the DoD for expenses not otherwise provided for); DoDM 3025.01, *supra* note 88, para. 5.6(a); CONT. & FISCAL L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW HANDBOOK 2-10 (2022).

Appendix A*

Legal Panning Matrix (DSCA)

Phases of Operation \ Legal Areas	Legal Personnel/ Equipment	Command & Control/Authorities	SRUF/PCA	Staff Integration and Coordination	Force Admin. And Support	Force Discipline/MJ
Mobilization and Pre-deployment	<ul style="list-style-type: none"> ▪ # of paralegals deploying/rear-D ▪ location of paralegals ▪ # of laptops/ printers (inventory) ▪ office supplies/ tables/chairs 	<ul style="list-style-type: none"> ▪ try to determine command structure prior to arrival ▪ I.D. sister units operating in AO 	<ul style="list-style-type: none"> ▪ vignette development ▪ production on SRUF cards ▪ weapons posture? 	<ul style="list-style-type: none"> ▪ make contact with deploying sister units/ components ▪ SRUF development ▪ operational planning 	<ul style="list-style-type: none"> ▪ coordinate with division LAO for wills/POA assets to be available prior to deployment 	<ul style="list-style-type: none"> ▪ identify legal flags and ensure those identified do not deploy ▪ maintain a legal rear-D to manage actions
Load Out	<ul style="list-style-type: none"> ▪ location of legal equipment in transit ▪ process to recover once on ground 	n/a	<ul style="list-style-type: none"> ▪ Distribution of SRUF cards 	<ul style="list-style-type: none"> ▪ share load-out plan 	<ul style="list-style-type: none"> ▪ notary equipment needed? 	<ul style="list-style-type: none"> ▪ assist command with any AWOLs
Relief Mission	<ul style="list-style-type: none"> ▪ legal personal not co-located ▪ connectivity issues 	<ul style="list-style-type: none"> ▪ I.D. CoC once on ground ▪ read/ understand DSC MOA 	<ul style="list-style-type: none"> ▪ changes to mission/SRUF ▪ PAO coordination 	<ul style="list-style-type: none"> ▪ integrate with National Guard staff ▪ attend all update briefs 	n/a	<ul style="list-style-type: none"> ▪ manage investigations into violation of SRUF/ PCA
Civil Unrest	<ul style="list-style-type: none"> ▪ legal personal not co-located ▪ connectivity issues 	<ul style="list-style-type: none"> ▪ Title 10/32 authority delineation/use of resources 	<ul style="list-style-type: none"> ▪ changes to mission/SRUF ▪ PAO coordination 	<ul style="list-style-type: none"> ▪ track ongoing operations and any PCA issues that arise 	n/a	<ul style="list-style-type: none"> ▪ manage investigations into violations of SRUF/ PCA
Redeploy	<ul style="list-style-type: none"> ▪ inventory and load equipment 	<ul style="list-style-type: none"> ▪ determine when the operational command structure ceases 	n/a	<ul style="list-style-type: none"> ▪ coordinate with S3 on the redeployment plan 	n/a	n/a

Attempting to predict legal issues for a mission is critical for operational success. The legal planning matrix (LPM) is one tool that can assist in this effort. Not every square or section must be filled, as certain phases of an operation may not apply to a legal area.

*Adapted from CTR. FOR L. AND MIL. OPERATIONS (CLAMO), THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS 1998-1999, app. A (2000).

Appendix B*

DSCA Legal Running Estimate

OPERATION:	UNCLASSIFIED // FOUO	DATE:																								
FACTS: <table border="1" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> Key Authorities: 1. Legal Basis for Operation: FEMA Order? IRA? 2. MOU for DSC? 3. Command Relationships 4. SRUF/PCA 5. DoDD 3025.18/3025.21/Stafford Act 6. Fiscal and Procurement Authorities: DRF? O&M? </td> <td style="width: 50%; vertical-align: top;"> Legal Support: 1. Provide legal support for which core competencies? 2. Provide legal support personnel consolidated or dispersed? 3. Legal resources include personnel and equipment? </td> </tr> </table>		Key Authorities: 1. Legal Basis for Operation: FEMA Order? IRA? 2. MOU for DSC? 3. Command Relationships 4. SRUF/PCA 5. DoDD 3025.18/3025.21/Stafford Act 6. Fiscal and Procurement Authorities: DRF? O&M?	Legal Support: 1. Provide legal support for which core competencies? 2. Provide legal support personnel consolidated or dispersed? 3. Legal resources include personnel and equipment?	Last 24 Hours: • Key SIGACTs, Legal Reviews, etc. • Status of Projects – SRUF training; Claims Mission Next 24 Hours: • Events: Key Leader Engagements, Working Groups, etc.																						
Key Authorities: 1. Legal Basis for Operation: FEMA Order? IRA? 2. MOU for DSC? 3. Command Relationships 4. SRUF/PCA 5. DoDD 3025.18/3025.21/Stafford Act 6. Fiscal and Procurement Authorities: DRF? O&M?	Legal Support: 1. Provide legal support for which core competencies? 2. Provide legal support personnel consolidated or dispersed? 3. Legal resources include personnel and equipment?																									
ASSUMPTIONS: • MOU for DSC is signed.		<table border="1" style="width: 100%; text-align: center;"> <thead> <tr> <th colspan="4">Missions</th> </tr> <tr> <th>Type</th> <th>Start</th> <th>Personnel</th> <th>Issues</th> </tr> </thead> <tbody> <tr> <td>SEARCH & RESC</td> <td></td> <td></td> <td></td> </tr> <tr> <td>EVAC</td> <td></td> <td></td> <td></td> </tr> <tr> <td>RD CLEARANCE</td> <td></td> <td></td> <td></td> </tr> <tr> <td>Assistance to LE</td> <td></td> <td></td> <td></td> </tr> </tbody> </table>	Missions				Type	Start	Personnel	Issues	SEARCH & RESC				EVAC				RD CLEARANCE				Assistance to LE			
Missions																										
Type	Start	Personnel	Issues																							
SEARCH & RESC																										
EVAC																										
RD CLEARANCE																										
Assistance to LE																										
TASKS (Specified, Implied, Essential): Specified: 1. SRUF/PCA training/advising 2. Review all operations 3. Report key legal events 4. Manage investigations Implied: 1. Advise on Title 10/32 authorities 2. Monitor all operations 3. Coordinate with sister services/components 4. Provide legal assistance. 5. Establish relationships with local civilian organizations Essential: 1. Manage Investigations 2. Track and Report Significant Legal Events		<table border="1" style="width: 100%; text-align: center;"> <thead> <tr> <th colspan="4">Investigations</th> </tr> <tr> <th>Subject(s)</th> <th>Event</th> <th>Date Appointed</th> <th>Status</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table>	Investigations				Subject(s)	Event	Date Appointed	Status																
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CONSTRAINTS (Limitations, Restrictions): Legal Parameters of Conflict 1. What limitations and restrictions exist given the authorities outlined in facts? 2. Key SRUF limitations 3. PCA 4. Connectivity/power?		<table border="1" style="width: 100%; text-align: center;"> <thead> <tr> <th colspan="4">BDE Orders</th> </tr> <tr> <th>#</th> <th>Date Published</th> <th>Legal Review (Y/N)</th> <th>Legal Objections?</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table>	BDE Orders				#	Date Published	Legal Review (Y/N)	Legal Objections?																
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Closing Argument

The Five-Tool Judge Advocate

Mastering the Essential Pillars of Principled Counsel and Leadership

By Colonel Christopher B. Burgess with Lieutenant Colonel Scott L. Goble

With the 2024 Fall Classic (i.e., World Series) recently behind us¹ and this year's passing of legendary actor James Earl Jones,² my mind—as a lifelong baseball fan—has been drawn to baseball and the movie *Field of Dreams*.³ In my mind's eye, I watched Jones deliver that now-classic speech in a voice uniquely his, standing on that field of dreams tucked away in the cornfields of Iowa:

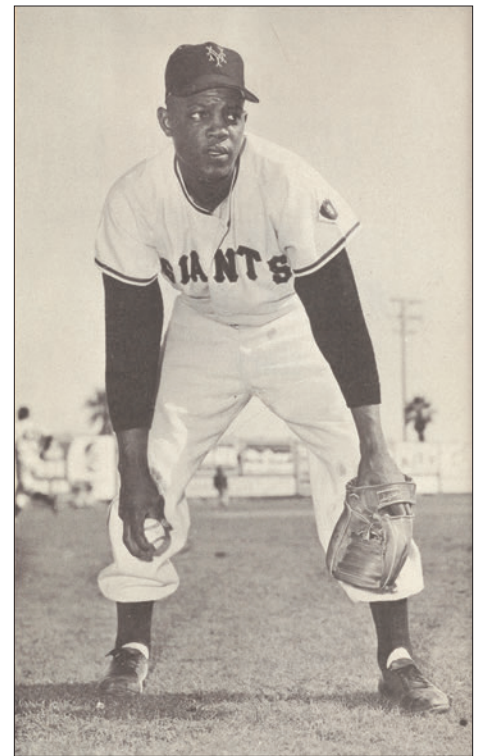
The one constant through all the years, Ray, has been baseball. America has rolled by like an army of steamrollers. It has been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time. . . . It reminds us of all that once was good, and that could be again.⁴

His words seem as true today as they did when I first watched that baseball classic many years ago. Like so many before us, we find ourselves facing a change to our legal practice that many of us have known for decades. The advent of the Office of Special Trial Counsel (OSTC) has erased one aspect of the way we practice law in the U.S. Army Judge Advocate General's (JAG) Corps like a blackboard. Now, it is up to us to decide how it will be rebuilt. In these changing times, what is the key tool—or tools—that principled counsel can use to ensure success today? And is it really that different from how we as a Corps have excelled in the past when faced with change?

Sports, and, especially for me, baseball, can perhaps answer that question. Baseball

and lawyering are about more than what happens on the field itself (or for judge advocates (JAs), in a courtroom, during a legal briefing to a staff judge advocate, or while providing legal advice and associated risks to a commander). You can see it on the Little League field and the Big League diamond: the game that has been our country's pastime for generations reflects our lives and, I would posit, helps us conceptualize the work demands we face every day. Success in baseball is not much different than success in lawyering, leading, and, ultimately, identifying the hallmarks of principled counsel. It requires a delicate balance of skill, strategy, desire, learning, shared understanding, emotional intelligence, humility, and mental toughness. Certain baseball players stand out as "five-tool players": athletes who excel in the five fundamentals of power, average, fielding, throwing, and speed.⁵ Some players come to mind who contributed significantly to the team and led successful careers by dominating in only one or two areas.⁶ They are the masters of speed on the base paths, go big or go home, the all-or-nothing home run or strike out. But, a player with all five tools is rare not just because of their athleticism but also for their versatility, consistency, and game-changing potential.

The concept of a five-tool JA and principled counsel mirrors the five-tool baseball player. Like Willie Mays, one of the all-time greats and arguably one of only a few true five-tool baseball players,⁷ the successful JA cultivates, refines, and ultimately strives to master a diverse set of



Willie Mays was one of the all-time greats and arguably one of only a few true five-tool baseball players. (Source: New York Public Library Digital Collections)

tools to include, but not limited to, strategic vision, operational excellence, communication and influence, adaptability, and ethical integrity.

Looking at just a small slice of the JAG Corps's 249-year history, its evolution over the past forty-four years reflects how our military legal services have adapted to meet emerging challenges and effectively address evolving requirements to best serve our clients and the commanders we advise. The evolutions include establishing the Trial Defense Service in 1980,⁸ the Trial Counsel Assistance Program in 1982,⁹ brigade judge advocates as we know them today in 2006,¹⁰ and the Special Victims' Counsel program in 2015,¹¹ to name just a few. As America has rolled by like an army of steamrollers, our Nation, our Army, and our JAG Corps have—at times—been erased like a blackboard, rebuilt, and erased again to meet the needs of our country. But the constant through the years has been those same tools JAs have used from the beginning of the JAG Corps to the present day. Now, as OSTC rebuilds the way we practice military justice, it is

more important than ever to remember the keys to rebuilding to meet the needs of today and showcase the Corps's ability to evolve with principled counsel as the lynchpin to our success.

The Role of Evolution in Baseball and Lawyering in the Army

Baseball, like lawyering and leading, is a game of constant adjustment, adaptation, evolution, and, ultimately, a dignified departure from the game. A player may enter the season as an elite power hitter, but as opponents study and analyze his tendencies, he is forced to evolve his approach. Teams must adapt to rule changes, technological advances, and the shifting dynamics of player performance.

In the same way, legal professionals—especially in the military—require the ability to adapt to new circumstances, to change, to evolve. The successful JAs, like the best players, are those who embrace change and can pivot from the way it has always been done to continue thriving in new and challenging environments. Thus, just as a baseball player who cannot adapt will struggle, a JA who cannot respond to change will find it difficult to maintain effectiveness.

1. Strategic Vision (Hitting for Power)

In baseball, hitting for power changes the outcome of a game with a single swing. Similarly, in leadership (regardless of rank), strategic vision represents the long-term impact of a leader's decisions.¹² A JA with strategic vision understands not only the legal framework but also the broader military and national objectives. Just as a power hitter seeks to alter the course of a game by driving the ball deep, a JA with strategic vision can reshape their office's, the Army's, and our Nation's future by aligning legal advice with long-term strategic goals.

This type of vision requires the ability to see around corners and adapt accordingly. In baseball, this might mean a hitter adjusting to different pitching styles or new equipment. For JAs, it involves anticipating shifts in military policy, societal changes, or political landscapes and positioning their teams to navigate these changes successfully. JAs with strategic vision can turn challenges into opportunities, much like a power hitter capitalizes on the right pitch.

Strategic vision is also deeply connected to emotional intelligence.¹³ A JA with strategic vision understands not only the broader picture but also the emotional and psychological dynamics within their team in ways that inspire and motivate others. The ability to align emotional intelligence with long-term planning creates a lawyering and leadership style that is powerful, adaptable, and effective in driving organizational success.

2. Operational Excellence (Fielding)

In baseball, fielding requires precision, agility, and the ability to respond to unpredictable plays. The smallest shift in a fielder's precise mechanics, movement, or positioning can mean the difference between getting an out or giving up a hit.¹⁴ Just as a fielder must make split-second decisions to maintain control, JAs must also maintain control to achieve operational excellence. Operational excellence involves meticulous attention to detail, a commitment to upholding standards, and the ability to manage the complexities of an ever-changing legal landscape. JAs who achieve operational excellence can balance day-to-day responsibilities while remaining agile in their approach and ready to change course when necessary.

Within operational excellence, followership plays a critical role.¹⁵ In baseball, a successful fielder is part of a coordinated team. The best in the field understand their unique role in supporting the manager and their teammates, including the pitcher, infielders, and outfielders, to achieve a common goal.¹⁶ In the same way, JAs must foster a culture where every member of the team understands their role and the real value they bring by doing that job in concert with their team. But in the end, great lawyer leaders nurture followership by recognizing the value of everyone's contribution and ensuring everyone has the tools to succeed.

3. Communication and Influence (Hitting for Average)

Hitting for average in baseball is about consistency—maintaining reliable performance at the plate to help the team succeed. For JAs, communication and influence are the equivalent. Effective JAs consistently

deliver clear, persuasive, and actionable advice, influencing decisions and outcomes across the organization. Just as a consistent hitter builds trust by getting on base frequently, JAs build credibility by consistently communicating effectively with their teams and to those they advise or represent.

Communication is not just about what is said but also how it is delivered, which makes emotional intelligence an essential component of this tool for the JA. Just as a hitter adapts his approach to different pitchers and game situations, JAs must adapt their communication based on the needs of their team, the nature of the situation, and the overall legal context. The ability to adjust communication styles based on context is key to influencing and maintaining alignment within the team.

4. Adaptability (Base Running)

In baseball, players face a constantly evolving landscape where pitchers develop new techniques, teams shift their defensive strategies, and athletes must physically adjust to maintain peak performance. While adaptability can impact all aspects of the game, it is the essence of base running, which requires agility, quick thinking, and the ability to capitalize on opportunities as they arise. The parallel for JAs is the continuous ability to adapt to change. Just as base runners must instantly read the field and make split-second decisions, adaptable JAs balance day-to-day responsibilities with the ability to adjust their course on the fly when necessary in response to new challenges, changing priorities, and evolving legal precedents, shifts in policy, or the changing demands of their civilian and military leaders.¹⁷

Adjusting and being adaptable is not easy. We as a Corps, and for that matter as a society, can be resistant to change. Change is hard. It makes our once-solid path shaky. But it is the one thing we all know the future will bring. So why resist it? Why focus on a rearview mirror reflecting on how good it once was? Rather than resist change, the adaptable JA can embrace it. Like those who led our Corps through change in years past, the adaptable JA can view the recent creation of OSTC as yet another example of finding opportunity for growth rather than a threat to the status quo.

5. Ethical Integrity (Throwing)

In baseball, a strong and accurate throw versus a weak and errant one can change the course of a game. Failing to do the routine things routinely well can be the difference between an expected outcome and the start of a catastrophic inning. In the JAG Corps, ethical integrity shapes the direction of decisions and actions in the same way throwing does in baseball. Ethical integrity is about making routine decisions that are grounded in moral principles and align with an unbending standard of ethics and justice. JAs who prioritize ethical integrity ensure that—both individually and collectively as a team—they operate with transparency, fairness, and a commitment to doing what is right over what is easy.

Much like an accurate and strong arm on the field, ethical integrity is not just about following the rules; it is about understanding why those rules are in place. This is true in any practice area, but especially so as military justice evolves with the development of OSTC. It is about protecting a process, not an outcome. This approach ensures that every decision is made with the team's and organization's welfare in mind, rather than personal or short-term gains. Ethical integrity allows JAs to earn trust, a critical element in influencing people or guiding teams.¹⁸

Conclusion: Becoming a Five-Tool JA

As you put down this article (for non-baseball fans, if you have made it this far), we should all keep working on our tools to find the opportunities wherever they present. Those who embrace innovation, learn from setbacks, and continuously refine their approach become the most impactful. Just as a five-tool player excels in all aspects of the game, a five-tool JA must strive to master the essential pillars of principled counsel—strategic vision, operational excellence, communication and influence, adaptability, and ethical integrity—not only to personally rise to the challenges of change but also become more integral members of their teams.

In lawyering and leading, these pillars of principled counsel are not and have never been just about professional development; they are about ensuring the entire organization's success. Both baseball

players and Army lawyers who fail to adjust to change often see their effectiveness diminish over time, while those who continuously evolve can sustain long and successful careers and leave the organization better for their time in it.

How will you help lead through turbulent times? How will you navigate the complexities of change the Corps is facing now or around the next bend? Maybe, like Shohei Ohtani, the most dynamic pitcher/hitter in the last fifty years,¹⁹ you may be told that you cannot take the assignment you think you want. How will you respond? This past year, Ohtani was told that he could not pitch to allow his elbow to recover from Tommy John surgery. Rather than take a back seat, Ohtani responded by becoming the first player in history to hit fifty home runs and steal fifty bases in a season.²⁰ While his role was different this past year, his approach and fundamentals were the same. Whatever role you play this year, mastery of your fundamentals—our core constants—will be your guide to making a positive impact felt for years to come. **TAL**

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Notes

1. See *MLB Announces 2024 Postseason Schedule*, MLB (Aug. 1, 2024), <https://www.mlb.com/press-release/press-release-mlb-announces-2024-postseason-schedule>.
2. *James Earl Jones, Acclaimed Actor and Voice of Darth Vader, Dies at 93*, AP NEWS (Sept. 9, 2024), <https://apnews.com/article/james-earl-jones-dies-19ea259ff3f44b91b2ed8730b702c23f>.
3. *FIELD OF DREAMS* (Universal Pictures 1989).
4. *Id.*
5. See David Adler, *Let's Build the Best 5-Tool Player in Baseball*, MLB (Aug. 24, 2024), <https://www.mlb.com/news/building-the-best-5-tool-player-in-baseball-in-2024>.
6. Jim Thome—a one-tool player for most of his career and a member of the Baseball Hall of Fame—thrived for over two decades in baseball due to his prolific power, hitting 612 home runs. *Jim Thome*, BASEBALL REFERENCE <https://www.baseball-reference.com/players/t/thomeji01.shtml> (last visited Oct. 30, 2024). Terrance Gore made a career as a pinch runner relying

solely on this one tool of speed. He played eight seasons with four teams; in that time he only had sixteen hits and no home runs, yet he made it to the play-offs in five of his eight years and won two World Series championships. See *Terrance Gore*, BASEBALL REFERENCE, www.baseball-reference.com/players/g/gorete01.shtml (last visited Oct. 30, 2024).

7. See Gordon Hecht, *The Five-Tool Player*, YOUR SOURCE NEWS (June 30, 2024), <https://yoursourcenews.com/2024/06/the-five-tool-player>; Anthony Schullo, *Say Hey: Willie Mays and His Unparalleled Legacy*, YOUTINI (July 15, 2024), <https://youtini.com/guide/say-hey-willie-mays-and-his-unparalleled-legacy>.

8. Colonel Sean T. McGarry, *United States Army Trial Defense Service and Military Justice Next*, ARMY LAW., no. 2, 2023, at 11, 12.

9. *History of the U.S. Army Legal Services Agency*, JAGCNET, <https://www.jagcnet.army.mil/Sites/usalsa.nsf/homeDisplay.xsp?open&documentId=D-731B99A5E47C74685257BD4006E0592> (last visited Oct. 8, 2024).

10. Pol'y Memorandum 06-7, Off. of Judge Advoc. Gen., subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (10 Jan. 2006).

11. Colonel Evah K. McGinley, *Ten Years In: Special Victims' Counsel Practice in the Era of the Office of Special Trial Counsel*, ARMY LAW., no. 2, 2023, at 27, 28.

12. See Pamela Reynolds, *Strategic Leadership*, PRO. & EXEC. DEV.: HARV. DIV. OF CONTINUING EDUC. (Jan. 8, 2024), <https://professional.dce.harvard.edu/blog/strategic-leadership>.

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14. See Joseph Johnson, *What Is Fielding in Baseball? Understanding Baseball Fielding Positions and Techniques*, CRASHBURNALLEY, <https://crashburnalley.com/what-is-fielding-in-baseball> (last visited Oct. 30, 2024).

15. See Lieutenant Colonel Amelia Duran-Stanton & Colonel Alicia “Ali” Masson, *Lessons in Followership: Good Leaders Aren't Always Out Front*, ARMY MAG.: ASS'N OF U.S. ARMY (May 18, 2021), <https://www.usa.org/articles/lessons-followership-good-leaders-arent-always-out-front>.

16. See Rob Gray et al., *Investigating Team Coordination in Baseball Using a Novel Joint Decision Making Paradigm*, FRONTIERS IN PSYCH., vol. 8, June 2017, at 1, 1.

17. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 8-8 (31 July 2019).

18. *Id.* paras. 5-44 to 5-47.

19. See Juan Toribio, *Otherworldly Ohtani Creates 50-50 Club in a 6-for-6 Game for the Ages*, MLB (Sept. 20, 2024), <https://www.mlb.com/news/shohei-ohtani-reaches-50-homers-50-steals>.

20. *Id.*



AROUND THE CORPS

SGT Dawn Montalvo, then-paralegal specialist assigned to U.S. Army South, judges Junior Reserve Officers' Training Corps (JROTC) cadets during the Thunderbird Classic at LTC Karen Wagner High School in San Antonio, TX. Seven noncommissioned officers (NCOs) from U.S. Army South, 410th Contracting Support Brigade, and U.S. Army North were among thirty NCOs who volunteered to judge the largest JROTC drill competition in the state of Texas. (Credit: SSG ShaTyra Cox)

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