

# Army Lawyer



U.S. Army Judge Advocate General's Corps

Issue 1 • 2025

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Integration with a  
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A woman with blonde hair, wearing a military flight helmet with a yellow visor and a communication microphone, is looking out of the side window of a helicopter. She is wearing a camouflage flight suit and a metal wristwatch. The view outside the window shows a coastal town with buildings, parking lots, and a beach, with the ocean in the background under a clear blue sky. The helicopter's interior structure, including rivets and a yellow strap, is visible in the foreground.

## AROUND THE CORPS

CPT Sarah Laycock, chief of legal assistance at the Office of the Staff Judge Advocate, U.S. Army Aviation Center of Excellence & Fort Novosel, is pictured aboard a UH-60 Black Hawk during an orientation flight near Navarre Beach, FL. (Photo courtesy of LTC Kyle V. Burgamy)



# Army Lawyer

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Issue 1 • 2025

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Cover: SPC Dillon Naquin, a U.S. Army paralegal specialist with 18th Medical Command, studies his map during the U.S. Army Pacific Best Paralegal Warrior Competition in Wahiawa, HI. (Credit: SPC Taylor Gray)

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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For additional submission information and FAQs, visit:

<https://tjaglcs.army.mil/tal>



MAJ Amanda Dixon (standing, second-from-left), legal exchange officer with 3rd (UK) Division, stands with members of the 3rd (UK) Division legal team, including Lieutenant Colonel (UK) Andy Farquhar (kneeling, right), former deputy director of the Legal Center, The Judge Advocate General's Legal Center and School, in Charlottesville, VA. (Photo courtesy of author)

# Court Is Assembled

## Mastering Multinational Integration with a Winning Mindset

By Colonel Andrew M. McKee

The Judge Advocate General's (JAG) Corps mission statement requires Judge Advocate Legal Services (JALS) personnel to operate "in support of a ready, globally responsive, and regionally engaged Army."<sup>1</sup> The JAG Corps unsurprisingly achieves this part of its mission by stationing and rotating forces worldwide. By extension, the JAG Corps's support to commanders at echelon will bring JALS personnel into contact with allies and unified action partners across all strategic contexts: competition, crisis, and armed conflict.<sup>2</sup> As members

of our Corps around the world, these personnel are engaged in or supporting multinational operations and developing legal interoperability.<sup>3</sup> Army interoperability doctrine acknowledges that the Army will have limited time to integrate with allies and partners, which means now is the time to develop interoperability to adequately prepare for conflict.<sup>4</sup> However, the Army's approach to interoperability is quite broad, and it entails an overwhelming amount of information to master.<sup>5</sup>

One personal experience drove this breadth of the Army's broad interoperability mandate home for me. The moment was memorable because it was exceptionally humbling.

There we were, having just completed Warfighter Exercise 21-4 in April 2021. As the 1st Armored Division (1AD) staff judge advocate, I felt very proud of how the division staff and the national security law team performed during the exercise. The exercise was a major multinational warfighter with 1AD fighting as the U.S. division alongside the 3rd United Kingdom Division and 3rd French Division as part of a coalition that III Corps (U.S.) led. The exercise design placed us along the North Atlantic Treaty Organization's (NATO) eastern flank in opposition to a near-peer adversary. The exercise culminated in a ten-month training cycle and reflected a significant investment in our time, resources, and energy.

During the after-action review (AAR), our division continued to take a hard look at itself, reflecting an organization at the peak of its warfighting abilities but still willing to seek opportunities to improve. As the AAR wound down, the division command sergeant major interjected with a comment along these lines: "We talk about these problems as if they are new, but did anyone here read any NATO STANAGs to prepare for this exercise? NATO has been solving these problems for years and already has doctrine for almost all of the issues we have been discussing."<sup>6</sup> In full confession, I had not read any NATO STANAGs up to that point, likely because I had not even heard of them, despite having recently been stationed in Europe. I rushed out of the AAR to search "STANAG" online and learned that a "STANAG" is a NATO standardization agreement.

My assignments since that experience have afforded me opportunities to learn more about NATO, NATO STANAGs, and the vast breadth of knowledge already



developed among our NATO allies. Each new experience and each new lesson serve as reminders that we do not know what we do not know. Being aware of our own ignorance can present a barrier that can impede taking the risk of an assignment in unfamiliar locations. Moreover, current political tensions in the world increase the risk that our ignorance could come at a cost. Despite the enormity of the risk and the significant amount of new information to master, how can our JALS personnel, especially, but not exclusively, young judge advocates (JAs) and paralegals who have yet to gain extensive repetitions and experience, prepare themselves to operate worldwide as part of a multinational team? What can inspire a young JA or paralegal to leap into developing legal interoperability when achieving a mastery of the law challenges even seasoned JAs?

Any of our legal professionals can succeed in an overseas assignment with the right mindset. The task is massive, but not insurmountable. Success is rewarding, bringing new friendships, a deeper understanding of other cultures and approaches (and likely a deeper understanding of your own culture and approaches), and the satisfaction of accomplishing a difficult task. The best part is that each JA and paralegal has complete agency over their mindset, making success in this area imminently achievable by every single member of the JALS team. Below, I offer three traits that members of our Corps can adopt to successfully approach multinational integration.

## Openness

The first component of a winning mindset for multinational integration is being *open* to the experience. Every trip to a foreign country is an opportunity to travel—both to a new location and to a place outside of one's comfort zone. These opportunities that the JAG Corps offers its members to engage in the most consequential practice on earth—in locations all over the earth—are unique and often once-in-a-career experiences. Every engagement with a multinational partner is also an opportunity to travel outside one's comfort zone. These opportunities can be disorienting, especially at the outset. It is understandable



CPT Megan Holt (right), U.S. Army Europe and Africa national security law attorney, while on an observer mission to the United Kingdom for a multinational exercise. (Photo courtesy of author)

and expected to feel timid while adjusting to a culture shock and hesitant to misstep or risk unintended offense. However, if you embrace the initial discomfort, you will adapt to respond with more certainty and less discomfort over time.

## Humility

The second component of a winning mindset for multinational integration is *humility*. Multinational integration involves forming relationships. Having gotten comfortable with the idea of being uncomfortable, approaching new experiences with a humble attitude is critical to helping form those relationships necessary for success.<sup>7</sup> Approaching the multinational environment with a full awareness of one's knowledge gaps and a willingness to learn from others regardless of expertise in other legal domains will prevent alienating allies and contribute to building comfort and trust.

Army Doctrine Publication 6-22 states, "A leader with the right level of humility

is a willing learner, maintains accurate self-awareness, and seeks out others' input and feedback."<sup>8</sup> A JALS professional in a multinational setting is expected to contribute an appropriate level of expertise in U.S. law and the customs, courtesies, and procedures of the U.S. Army. However, those personnel lack the same level of expertise in host-nation law, customs, courtesies, procedures, history, and culture. Exercising humility will help cultivate a healthy self-awareness of these completely understandable deficiencies and drive the humble leader to seek resources to learn more about one's teammates. Humble leaders ask questions—asking questions with a genuine interest and respect for your international partners' customs, personalities, capabilities, ambitions, sensitivities, history, languages, religions, and cultural habits builds rapport. This rapport, in turn, feeds the mutual confidence that allows teams to embrace and understand their differences and build the cohesion necessary for successful teamwork and unity of effort.<sup>9</sup>





CPT Phil Tonseth, V Corps Office of the Staff Judge Advocate national security law attorney, poses while at Exercise Northern Spirit. (Photo courtesy of author)

## Fearlessness

The third component of a winning mindset for multinational integration is to be *fearless*. According to Army doctrine, humility exists on a continuum where too little humility represents arrogance while too much humility is interpreted as passivity or timidity (among other issues). To put this into an Army leadership construct, being open to new opportunities and experiences and being humble about your knowledge gaps are components of “being” in a BE-KNOW-DO construct, whereas fearlessness is the path to translating those attributes into action, or “doing.”<sup>10</sup>

Due to our career model, the knowledge requirements of our dual professions, and other critical demands on our time and attention, very few JALS members will be bonafide experts in the multinational context in which they must operate at the outset of an assignment or mission. Waiting to gather sufficient expertise prior to accomplishing the critical tasks is a recipe for failure. Therefore, operating in the multinational context requires a willingness to take action despite not having perfect information. Multinational partners are willing to give substantial grace for well-intended actions undertaken with a spirit of humility. Having already started your journey with the appropriate dose of humility, JALS

members can take action without fear of embarrassment or failure. Further, if things do not go quite right on the first attempt, the humble JALS member willing to learn from well-intentioned errors will undoubtedly make the necessary corrections for the next iteration. Further, the secret power of the legal tech chain will be there to ensure these are merely opportunities to learn and grow rather than complete mission failures.

The U.S. Army and the Army JAG Corps are expeditionary organizations. We will fight on the future battlefield with allies and partners. We will win on the future battlefield in no small part because of our ability to form and sustain strong relationships with our teammates from other friendly nations. Take a moment to consider your JAG Corps, and the significant number of teammates assigned overseas. Once upon a time, each of these members of our Corps considered their first overseas assignment and weighed the risks of discomfort with the opportunity to take on an exciting challenge. As you consider your next assignment, remember those who previously seized the opportunity with an open mindset, ample humility, and fearlessness illuminated the path. I look forward to welcoming you to Europe or Africa in the future!<sup>11</sup> **TAL**

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*COL McKee is the Judge Advocate for U.S. Army Europe & Africa in Wiesbaden, Germany.*

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## Notes

1. U.S. DEP'T OF ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS 1-1 (1 Sept. 2023) [hereinafter FM 3-84].

2. *Id.* para. 2-18 & fig.2-1.

3. *See id.* paras. 2-29 to 2-32; *id.* para. 2-30 (“Interoperability is the ability to act together coherently, effectively, and efficiently to achieve tactical, operational, and strategic objectives.”).

4. U.S. DEP'T OF ARMY, REG. 34-1, INTEROPERABILITY para. 1-8(b) (9 Apr. 2020).

5. *See id.* para. 1-8(c) (“The foundation of interoperability is broad, spanning all Army [warfighting functions], with human, procedural, and technical domains.”).

6. This comment itself was possibly planted by the senior mentor, himself a former NATO Land Command (LANDCOM) commander.

7. The human dimension builds the basis of mutual understanding and respect that is fundamental to unity of effort and operational success.

8. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 2-31 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

9. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-16, THE ARMY IN MULTINATIONAL OPERATIONS paras. 1-15 to 1-18 (15 July 2024).

10. ADP 6-22, *supra* note 8, at ix fig.1 (Logic Map).

11. Although my comments are focused on Europe, I have served in three other geographic combatant commands (CONUS/NORTHCOM; INDOPACOM; and CENTCOM) and I believe this approach to be valid regardless of geographic location.



# News & Notes



**Photo 1**

SSG Darius Harris, paralegal NCOIC assigned to Headquarters and Headquarters Company, 11th Corps Signal Brigade, III Armored Corps, participates in an Army Combat Fitness Test at Fort Cavazos, TX. SSG Harris won the 2024 Best Paralegal of the Year Competition. (Credit: SGT Asher Atkinson)

**Photo 2**

LTC Mel L. Williams, staff judge advocate, 7th Army Training Command (7ATC), presents a certificate of appreciation to Ms. Waltraud Bayerlein, vice president of the Higher Regional Court of Nuremberg, in Vilseck, Germany, after nearly a decade of partnership between the court and 7ATC. (Credit: SGT Collin Mackall)

**Photo 3**

During Joint Pacific Multinational Readiness Center (JPMRC) 25-02 exercise in Alaska, CPT Seth Corley (left) and MAJ Jerome Trageser (right) conduct a Future Operations to Current Operations handover for the day's actions. JPMRC 25-02 included Airborne, Air Assault, Airland, and Ground Assault Operations within the first 24 hours with temperatures dipping to -40° F. (Photo courtesy of SSG Johnnie Luna)









#### Photo 4

226th Officer Basic Course. (Credit: Billie J. Suttles, TJAGLCS)

#### Photo 5

SSG Demetris Edwards, paralegal NCOIC assigned to the 1st Combat Aviation Brigade, demonstrates how to clear a room of hostiles at the Jana Wendy Shooting Training Center of the National Forest Service near Tuchola, Poland. (Credit: SGT Jacob Nunnenkamp)

#### Photo 6

227th Officer Basic Course. (Credit: Billie J. Suttles, TJAGLCS)

#### Photo 7

MAJ Curtis Cranston (center) received the Major General Harold "Harry" J. Greene Acquisition Writing Award in the category of Innovation for his essay, *Driving Innovation: Propelling the U.S. Department of Defense's Acquisition of Hybrid-Electric Tactical Vehicles to Win the Wars of Tomorrow*. Also pictured from left to right: Hon. Douglas R. Bush (ASA (ALT)); COL(R) Sue Myers (spouse of MG "Harry" Greene); LTG Robert Collins (Principal Military Deputy, ASA (ALT)); and CSM Robert Haynie (ASA (ALT) Sergeant Major). (Photo courtesy of MAJ Curtis Cranston)



8



9





**Photo 8**

73d Graduate Degree Program. (Credit: Jason F. Wilkerson, TJAGLCS)

**Photo 9**

SGT Jiyah Warner, then-paralegal specialist, 21st Theater Sustainment Command, fires an HK P8 A1 service pistol during a

drill for the Schützenschnur, or German Armed Forces Badge, for a marksmanship event in Ohrdruf, Germany. (Credit: SPC Samuel Signor)

**Photo 10**

LTC Jay Hackett (left), commander for Headquarters and Headquarters Battalion,

34th Infantry Division, Task Force Spartan, presents a coin to SSG Tayler Grossman (right), paralegal specialist assigned to Headquarters Support Company, during a Soldier and NCO of the Month recognition ceremony in the U.S. Central Command's area of operations. (Credit: SSG Mahsima Alkamooneh)





MG (Ret.) William B. Dyer. (Photo courtesy of author)

# Pivotal Perspective

## What Army Commanders Need from Their Legal Advisors

*By Major General (Retired) William B. Dyer III with Brigadier General Michael J. Deegan*

The second half of my thirty-nine-year military career was divided between, on one hand, serving as the legal advisor to colonel-, brigadier general-, and major general-level commanders and, on the other, consuming legal advice as a brigadier general- and major general-level commander. It was not until I became a consumer of

legal advice that I fully appreciated the mission-enabling nature of sound legal advice as I navigated complex issues and exercised my best judgment in taking the prudent risk the Army expects of senior leaders.

My experiences on both sides of the fence—lawyer/advisor and commander/advisee—made clear that commanders

need certain attributes and actions from their judge advocates (JAs), which nest well under the U.S. Army Judge Advocate General's (JAG) Corps four constants: principled counsel, mastery of the law, stewardship, and servant leadership.

### Principled Counsel

#### ***Accountability: Own Legal Actions and Their Outcomes***

The number of actions that require legal input has increased dramatically since I became a JA in 1992. Yet the nature of the actions and the JAs available to process those actions largely remain the same. As a new brigade judge advocate, I recall discovering a significant backlog of administrative separation actions in various stages of completion. My commander was not pleased. But rather than ignore or pass off the problem, I owned it. Though identifying a shortcoming in our brigade's legal processes



was painful, the hard work and candid assessment that followed strengthened the unit by executing legitimate actions.

### ***Rigorously Understand and Pursue the Commander's Intent***

Most commanders want to operate in the ethical midfield. However, the Army expects commanders—particularly general officer-level commanders—to use their years of experience, proven judgment, and input from key advisors to take prudent risks. A command's legal advisors are among these key advisors.

Commanders expect legal advisors to develop courses of action (COAs), identify each COA's legal and possibly ethical risk, and determine who owns the risk. The objective is never "finding a way to yes" but advancing the commander's intent within the boundaries of law, regulation, and policy. Legal advisors should understand the differences between law, regulation, and policy and the fact that exceptions to regulations and policies may exist.

A few years ago, my legal advisor informed me I was prohibited from taking a certain action because it was contrary to a regulatory provision. I asked the legal advisor for the proponent of the regulation. Luckily, I knew a senior leader in the agency, so I called the person and described the action I wished to take. They shared that they routinely grant exceptions to the regulation and identified the person to staff the request. We received the exception relatively quickly after the agency received it. Of course, I was happy that the action could go forward, but I was disappointed that I had to make inquiries that were more appropriate for my legal advisor to make.

When developing COAs, legal advisors must exhaust all possibilities for accomplishing the commander's intent, and they must not assume that every commander is prepared to turn away from a potentially good COA because of some level of risk. Red team the COAs with fellow JAs before presenting them to the commander, and then let the commander decide. Legal advisors should not substitute their risk tolerance for the commander's risk tolerance.

## **Mastery of the Law**

### ***Professional Competence***

Commanders do not expect their legal advisors to be experts in every area of the law. However, they do require their JAs to know enough about each of the core legal functional areas to spot issues. When such instances arise, commanders expect their legal advisor to have the fortitude to inform them of a potential legal issue with a certain COA and that they will conduct research and follow up with additional information and analysis.

In other words, do not shoot from the hip. As the former Deputy Judge Advocate General, Major General Thomas Ayres used to say, "Crap at the speed of light is still crap."

As a senior commander, damage done by acting on incomplete or incorrect legal advice can have far-reaching consequences, impact large numbers of Soldiers, and call into question the commander's judgment. Your commander needs your complete and thoughtful analysis—every time.

### ***Simple, Straightforward Legal Advice***

Your commander knows you are intelligent. Your greatest worth is not in reciting black-letter law or providing appellate-level analysis of legal issues. Your greatest skill is the ability to connect the breadcrumbs. Look around the corner. Think deeply about precedents, nuances, and decisions' second- and third-order effects.

This deeper thinking and reliance on instincts honed over years of legal counseling are where the JA earns a place in the commander's inner circle. Though commanders are educated and experienced, JAs bring something very special to their analysis and deliberation. Get comfortable providing that insight and advice clearly and concisely.

Below is a good template for briefing a senior commander either in writing or orally:

1. Identify the legal issue;
2. Provide the recommended COA(s);
3. Analyze the facts;
4. Provide the applicable law(s), policy, and/or regulation(s);

5. List the COA(s) and the risks associated with each; and
6. Conclude with the recommended COA(s).

Use clear and concise language that avoids legal jargon and keep it as short as possible.

### ***Coordinate Certain Legal Advice with Your Technical Chain***

Just like JAs pitch ideas about bettering the Regiment to JAG Corps senior leaders, commanders do the same to their senior leaders. Prudent commanders ensure that their recommendation is legally sound and within the bounds of the decision-maker's authority before offering it to their senior leader.

When a commander asks their legal advisor to "run the traps" or vet an idea for legal obstacles, they want you to perform the necessary legal research. But, that's just the first step. Once you believe you have the answer, impliedly, the commander also wants you to present your conclusions to the senior leader's legal advisor for their input.

If that legal advisor agrees with your determination, you can inform your commander that they have a sound legal basis for recommending this to their senior leader.

## **Stewardship**

### ***Be a Team Player: Play Well with Others, Not Just the Boss***

A commander sees a legal advisor as primarily their counsel. However, the commander knows that other staff sections need and expect your legal advice. They do not expect you to act as an internal auditor or an extension of the Inspector General, but they do need you to identify potential issues. They also want you to help fix problems in other staff sections, not just fix the blame. Other staff officers will be more willing to bring you issues in a nascent stage if they feel you are a team player.

### ***Prevent Mission Creep: Being a Team Player Doesn't Mean Taking on Other Staff Sections' Work***

Commanders should see you and your team as critical thinkers who adeptly fix





BG Michael J. Deegan. (Photo courtesy of author)

problems. This could easily translate to your legal office compensating for another, weaker staff section. As a legal advisor to a unit criticized by higher headquarters for responding beyond the deadline to Freedom of Information Act (FOIA) requests, I faced this issue. One frustrated requester brought a lawsuit to compel the release of the information requested and for attorney's fees and court costs. My commander put me in charge of fixing the tardy FOIA response time, even though FOIAs fall under the G-1's authority.

I complied and worked on the problem with the help of the G-1. We identified the appropriate personnel to work on FOIA requests and formalized procedures to streamline response time. I then back-briefed the commander. To my surprise, he shifted the responsibility for FOIAs to the Office of the Staff Judge Advocate (OSJA). Instead of refusing, I informed him that we could do it. Still, I explained to him the ramifications of such—less attention to command discipline issues and, thus, slower processing times for those actions (e.g., administrative boards, letters of reprimand, 15-6 investigations). Correctly, the commander decided to keep FOIA processing within the G-1.

Of course, you need to be the team player your commander and staff colleagues need you to be, but you must also be on guard when performing other staff's duties. Mission creep can last for years and strain your office's limited resources and time. It can also produce overburdened subordinates, which can lower morale quickly.

### Servant Leadership

#### *Develop Your Subordinates: It Is Not All About You*

Some senior legal advisors presume their commander only wants to receive legal advice directly from them. That's a false presumption. While some issues certainly demand input directly from the senior legal advisor, those are generally infrequent.

Commanders are in the business of developing subordinates, and the best commanders enable subordinates to engage in the fray. They expect the same from you.

This lesson hit home when I was in my first job advising a 2-star commander; I knew my chief of justice was better prepared than I was to answer the flurry of questions we would face. In our office call with the commanding general (CG), my young major began briefing actions.

Throughout the meeting, the CG gave me occasional glances as I sat, mostly silent and uncomfortable, and allowed the major to field the questions.

As we left the CG's office, he motioned for me to stay behind. Halfway expecting to be fired or at least scolded, he nodded in the direction of the departed major and whispered, "That was good leadership." Not only did that lesson never leave me, but it also inspired me to find opportunities for those who would benefit from them and who, in many cases, knew the issues or the subject matter better than I did. It was a powerful and productive lesson that benefitted me greatly as a senior legal advisor and commander.

With the tables turned, I understood that my SJA colonel was not the only one on my team with a voice, a keen intellect, and an ability to convey complex issues and recommendations. I was delighted to hear from his deputy, section heads, and especially junior captains. I also ensured my SJA knew that I viewed that as good leadership.

### Conclusion

We live in exciting but dangerous and complicated times. Commanders need their legal advisor to provide sound, timely advice to make informed decisions. Legal advisors can best serve their commander and subordinates by following the Corps's four constants and the principles outlined above. Doing so ensures that the JAG Corps will retain its reputation as a group of trusted professionals willing to provide premier legal services to defend the U.S. Constitution and keep America safe. **TAL**

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*MG (Ret.) Dyer recently retired as the Commander of the 108th Training Command in Charlotte, North Carolina.*

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*BG Deegan is the Assistant Judge Advocate General for Military Law and Operations (Individual Mobilization Augmentee) at the Office of The Judge Advocate General at the Pentagon.*

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(From left to right) Maj. Steve Warburton, then-MAJ Chris Chatelain, Maj. James Trescothic-Martin, and Capt. Kathleen Brook attend the British Army Legal Services 75th Anniversary Dinner in London, England. (Photo courtesy of author)

# What's It Like?

## Robo Gen<sup>1</sup> from a Legal Exchange Officer in the United Kingdom

By Lieutenant Colonel Christopher M. Chatelain

The U.S. Army Judge Advocate General's (JAG) Corps has more than 9,700 active duty, Reserve, National Guard, and civilian attorneys, legal administrators, and paralegals.<sup>2</sup> Of this population, only four serve as legal exchange officers, with three of these positions created in the past five years.<sup>3</sup> Two of those exchange positions help maintain the "special relationship"<sup>4</sup> between the United States and the United Kingdom (U.K.). Not surprisingly, the JAG Corps's small but growing prioritization of exchange officers comes at a time when the Department of Defense placed increased

importance on interoperability with allies and partners.<sup>5</sup> In an era of heightened geopolitical competition between major powers, adversary exploitation of rapidly evolving domains and technologies, and instability from transboundary challenges,<sup>6</sup> unity of effort between allies and partners has never been so complex or important for U.S. national security interests. This article seeks to demystify legal exchange officer positions—explaining how and why the Military Personnel Exchange Program (MPEP) works, highlighting how the JAG Corps leverages legal exchange officers,

and then illustrating how these efforts translate into legal interoperability by way of example with the British Army Legal Services (ALS).

U.S. law and policy authorize and govern U.S. exchange officer positions. Exchange officers typically serve as part of a reciprocal, one-for-one exchange of U.S. and partner-nation army personnel.<sup>7</sup> Section 311 of Title 10 of the U.S. Code creates The Defense Personnel Exchange Program (DPEP) as a security cooperation program permitting mutual exchange of defense personnel.<sup>8</sup> Based on this authorization, the Secretary of Defense delegated authority to administer the MPEP, a component of DPEP, to the Service secretaries via Department of Defense Directive 5230.20.<sup>9</sup> Based on this delegation, the U.S. Army governs its contribution to the MPEP through Army Regulation 614-10.<sup>10</sup>

The MPEP has three primary purposes to help achieve national security cooperation goals and combatant commanders' theatre campaign plans. First, the MPEP strengthens alliances and coalitions by building partner capacity and maintaining or enhancing friendly relationships.<sup>11</sup> Second, the MPEP increases U.S. and partner-nation cooperation by integrating U.S. and partner-nation personnel.<sup>12</sup> Third, the program prepares U.S. officers and noncommissioned officers for future assignments in support of multinational operations.<sup>13</sup>

Many stakeholders have responsibilities related to executing the MPEP. The deputy chief of staff (DCS), G-3/5/7 has general staff responsibility for the Army MPEP.<sup>14</sup> The Army Service Component Commands (ASCCs) develop, plan, and integrate Army exchange programs that support their combatant commanders' theatre campaign plan.<sup>15</sup> Through the ASCCs, the DCS, G-3/5/7 serves as the lead agent for negotiating MPEP memoranda of agreement (MOAs) with partner nations.<sup>16</sup>

Once the DCS, G3/5/7 establishes





Members of the 3rd United Kingdom Legal Branch (wearing 1st Cavalry Division baseball hats) pose with members of the 1st Cavalry Division Office of the Staff Judge Advocate after Exercise WARFIGHTER 23.4 at Fort Cavazos, Texas. (Photo courtesy of author)

a country program, U.S. Army Human Resources Command (HRC) selects and assigns U.S. Army personnel for the MPEP positions.<sup>17</sup> Positions are nominative, and HRC must ensure that MPEP nominees satisfy the selection criteria outlined in the exchange program's corresponding MOAs.<sup>18</sup> Once HRC identifies nominees, the ASCCs forward their information to the partner/host nation for approval or disapproval.<sup>19</sup> For Army legal exchange officers, the Talent Management Office performs these duties for HRC.<sup>20</sup> Simultaneously, partner nations' military attachés submit their Army exchange personnel nominees to the recipient Department of the Army (DA) command and through the DCS, G-2 for approval.<sup>21</sup> Once nations agree upon specific exchange personnel, ASCCs have overall responsibility for MPEP coordination and support activities within their combatant commands' area of responsibility.<sup>22</sup>

Recognizing the importance of allies and partners, the JAG Corps leverages the MPEP to enhance legal interoperability. The JAG Corps Strategy highlights that "[a]lliances and partnerships are among the greatest sources of our military strength."<sup>23</sup> Accordingly, the JAG Corps contributes to maintaining and expanding the Army's network of allies and partners through the interrelated concepts of security cooperation and legal interoperability.<sup>24</sup> With exchanges being one of the JAG Corps's

five legal interoperability lines of effort (LOEs),<sup>25</sup> legal exchange officers constitute a critical component of the JAG Corps's contribution to multinational interoperability.

The JAG Corps defines legal interoperability as "[t]he achievement of shared understanding of respective authorities, permissions, restrictions, obligations, and interpretations of international and domestic law and policy that enables the Combined Force to act together lawfully, coherently, effectively, and efficiently, to achieve tactical, operational, and strategic objectives."<sup>26</sup> Practically, this means that "[w]e must be able to successfully support the integration of allied and partner capabilities into a single, lawfully-conducted, unified operation across each and every warfighting function."<sup>27</sup>

With ASCCs responsible for MPEP programs within their theaters, the ASCCs' Offices of the Staff Judge Advocate ensure that legal exchange officers' security cooperation and legal interoperability activities align with their theater's LOEs. For example, the U.S. Army Europe and Africa (USAREUR-AF) Office of the Judge Advocate (OJA) nests its legal exchange officers' activities within USAREUR-AF's LOEs. One of those LOEs is to increase the scale, capability, and interoperability of allies and partners through activities such as multinational exercises, multinational

training and education, and senior leader engagements.<sup>28</sup>

These laws, policies, and procedures result in one of the most impactful, challenging, interesting, and rewarding jobs that the JAG Corps has to offer. By way of illustration, MPEP Position UK-69 establishes an exchange of national security law attorneys between 3rd (U.K.) Division, the U.K.'s warfighting division, and III Armored Corps.<sup>29</sup> The corresponding position descriptions for the U.S. and British lawyers focus on participation in partner country exercises and enhancing legal interoperability through working-level defense engagement.<sup>30</sup>

At the individual level, the judge advocate (JA) exchange officer principally works for the British Army. An MPEP officer should not be confused with a liaison officer. The ALS only has 109 lawyers,<sup>31</sup> but they exchange one British attorney to utilize a U.S. Army JA in their premier warfighting division. As such, the JA must pull their weight in the day-to-day workload expected of a British Army lawyer. This includes deploying with British Army division and brigade headquarters on exercises, advising commanders on British military disciplinary and administrative law, attending and leading unit training, attending routine divisional staff meetings, maintaining marksmanship on an assigned SA-80 assault rifle (comparable to the M4 carbine), participating in unit physical



fitness sessions and British Army physical fitness tests, and all the other tasks inherent with being part of a British divisional staff officer and British Army soldier.

Being a JA legal exchange officer, however, involves more than being a legal advisor for a foreign military. Interoperabil-

ity has three essential elements—technical, procedural, and human.<sup>32</sup> Fundamentally, the human domain of interoperability involves cultivating lasting personal and professional relationships. Shared hardship from field exercises, arduous professional military education, and strenuous physical training create enduring trust and confidence within a team. Sharing a proverbial and literal foxhole inherently brings people together. I spent approximately a quarter of my two-year assignment on various field exercises, often living in crew shelters and Warrior armored vehicles with British soldiers of all ranks and backgrounds. I attended the British Army Winter Mountain Foundations Course, climbing the frigid Scottish Highlands with fellow members of the 3rd (U.K.) Division staff. And, I sweated alongside the division staff during grueling physical fitness sessions. In doing so, I developed lifelong friendships based on respect, trust, and confidence.

Moreover, maintaining the type of enduring relationships envisioned by the MPEP involves more than having a shared military experience. The MOU that governs the U.S.-U.K. program contains candidate selection criteria aimed at rooting military families in their host nation.<sup>33</sup> As such, my family attended British schools, participated in British sports groups, had British neighbors, and attended British Army family events. In doing so, my entire JAG Corps

family developed roots in the U.K. that will persist long after my tour. Beyond these aims, a legal exchange officer must leverage their connection with the ASCC, and U.S. Army writ large, to create opportunities that enhance the procedural and human domains of interoper-

ability between organizations. The officer should establish opportunities for combined training between the United States and allied nations, leveraging relationships to optimize those opportunities for increased interoperability. For example, I helped generate short-term exchanges where JAs accompanied ALS officers on British Army warfighting exercises, and vice versa. In one instance, I worked with the Joint Readiness Training Center JA observer coach/trainer and a rotational brigade JA to embed an ALS officer into the U.S. brigade legal section during a training rotation at Fort Johnson, Louisiana. Similarly, I worked with the USAREUR-AF OJA and the 7th Mission Support Command to embed a Reserve JA with an ALS officer during a British armored brigade combat team's warfighting exercise at Salisbury Plains Training Area, England.

These short-term exchanges build a wider bench of JAG Corps and ALS officers with multinational expertise. The opportunities provide first-hand insight into their ally's capabilities. They enable an understanding of how an ally provides legal support to operations. Finally, they widen both armies' networks of multinational lawyers for future operations and exercises. Legal exchange officers are uniquely situated to identify and create these opportunities and see them through to completion.

Likewise, with one foot in both armies, an MPEP officer is uniquely situated to unite key leaders and subject matter experts from allied nations. For example, I helped bring together Mr. Fred Borch, our recently retired JAG Corps regimental historian, field grade officers from USAREUR-AF, and about a quarter of the ALS's officers, including the ALS head of operational law, during an ALS-led staff ride in Germany to study the International Military Tribunal and subsequent Nuremberg trials occurring immediately after World War II. This event aided JAG Corps and ALS officers in building personal relationships. It also provided the ALS officers with unique insight into America's past contribution to international tribunals and contemporary lessons learned from the U.S. experience with the Guantanamo Military Commissions.

Although a small contingent, legal exchange officers significantly increase legal interoperability with partners and allies at a time when national security requires transformative cooperation.<sup>34</sup> To overcome the most complex and grave threats to rules-based international order in recent history, like-minded allies and partners are working collectively to address our shared challenges.<sup>35</sup> This strategic goal cannot be accomplished without legal interoperability, which is the purpose of the modest cohort of legal exchange officers. The MPEP enables this cohort, thereby providing the JAG Corps with a vital tool to enhance multinational legal interoperability in a direct and lasting way. Thus, to our partners and allies working together for a safer world, the senior JAs at the Office of The Judge Advocate General and ASCCs who support the MPEP program, and the U.S., U.K., Australian, and Polish legal exchange officers of past, present, and future—THANK YOU, CHEERS, TA, and DZIEKI! **TAL**

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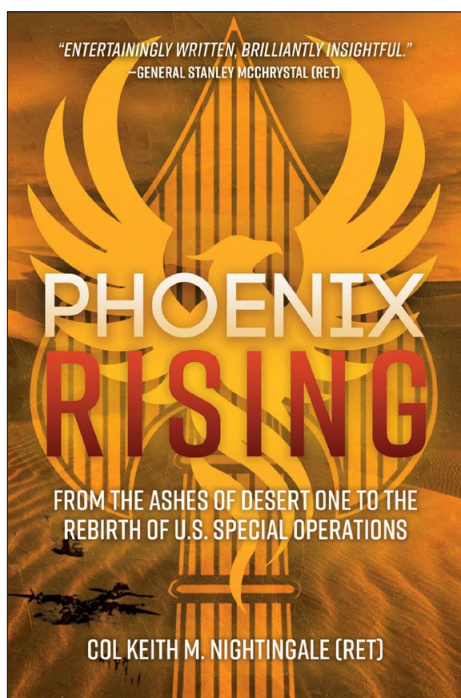
**In an era of heightened geopolitical competition between major powers, adversary exploitation of rapidly evolving domains and technologies, and instability from transboundary challenges, unity of effort between allies and partners has never been so complex or important for U.S. national security interests.**



## Notes

1. “Gen” is British Army slang for “trustworthy information.” However, “gen” has varying degrees of trustworthiness. “Scoff House Gen” has the lowest degree of trustworthiness. “Scoff house” is slang for “dining facility.” Telling incorrect “scoff house gen” does not result in adverse social consequences except for mild public ridicule. “Eyebrows gen” assures a higher level of trustworthiness. If the “eyebrows gen” turns out to be incorrect (also known as “duff gen”), the person telling the “duff gen” must shave off his or her eyebrows. “Robo gen” assures an even higher degree of trustworthiness, such that a person telling “robo gen” must shave his or her head to look like Robocop without a helmet. The British Army has other, less common adaptations of “gen,” which vary based on unit. If the inaccurate or untruthful individual fails to perform the consequence related to the appropriate level of “gen,” significant social implications ensue. Although the author did not suffer any consequences from providing “duff gen,” these assertions are nevertheless based on the author’s recent professional experience as an exchange officer with the British Army as part of the Military Personnel Exchange Program from July 2022-July 2024 [hereinafter Professional Experiences].
2. JALS Strength Report, 2024 Worldwide Continuing Legal Education, at slide 3 (Sept. 2024) (unpublished PowerPoint presentation) (on file with author).
3. The JAG Corps has an O-5 stationed with the British Army Headquarters, an O-4 stationed with the 3rd (U.K.) Division, an O-4 stationed with the Polish Armed Forces General Command, and an O-3(P) stationed with 1st (Australian) Division. The position with the 1st (Australian) Division is not reciprocal. Additionally, the Bundeswehr has assigned a non-reciprocal military legal advisor to The Center for Law and Military Operations. Professional Experiences, *supra* note 1.
4. See *History of the U.S.-U.K. Special Relationship and U.S. Policy*, U.S. EMBASSY & CONSULATES IN THE U.K., <https://uk.usembassy.gov/our-relationship/policy-history> (last visited Jan. 15, 2025).
5. U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA sec. IV (2022) [hereinafter NDS]; see also *Secretary Hegseth’s Message to the Force*, U.S. DEP’T OF DEF. (Jan. 25, 2025), <https://www.defense.gov/News/Releases/Release/Article/4040940/secretary-hegseths-message-to-the-force>.
6. NDS, *supra* note 5, sec. II.
7. U.S. DEP’T OF ARMY, REG. 614-10, ARMY MILITARY PERSONNEL EXCHANGE PROGRAM WITH MILITARY SERVICES OF OTHER NATIONS para. 1-6 (14 July 2011) [hereinafter AR 614-10].
8. 10 U.S.C. § 311; see U.S. DEF. SEC. COOP. UNIV., HANDBOOK, SECURITY COOPERATION PROGRAMS 30 (2021).
9. U.S. DEP’T OF DEF., DIR. 5230.20, VISITS AND ASSIGNMENTS OF FOREIGN NATIONALS (22 June 2005).
10. See AR 614-10, *supra* note 7.
11. *Id.* para. 1-5(b).
12. *Id.* para. 5(c).
13. *Id.* para. 5(d).
14. *Id.* para. 1-4(b).
15. *Id.* para. 1-9.
16. *Id.* paras. 1-4(b)(2), 2-1, 2-2(7)(c) (the DCS, G-3/5/7 also obtains concurrence from the Office of the Secretary of Defense Policy before finalizing or altering programs).
17. *Id.* para. 3-2.
18. *Id.*; see also Memorandum from James Hennessey Jr. & Timothy Thompson, subject: Memorandum of Understanding Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland on the Reciprocal Exchange of Army Personnel, sec. IV (17 Feb. 1988) [hereinafter U.S.-U.K. MOU].
19. AR 614-10, *supra* note 7, para. 3-3.
20. Professional Experiences, *supra* note 1.
21. *Id.* paras. 2-2(f), 5-3.
22. *Id.* para. 1-4(g).
23. OFF. OF THE JUDGE ADVOC. GEN., THE STRATEGY OF THE JUDGE ADVOCATE GENERAL’S CORPS 2022 [hereinafter JAGC STRATEGY].
24. *Id.*
25. Lieutenant Colonel Andrew Farquhar & Lieutenant Colonel Christopher T. Franca, U.S. Army JAG Corps & British Army Legal Services Exchange Officer Working Group, at slide 7 (May 2022) (unpublished PowerPoint presentation) (on file with author).
26. THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, BEST PRACTICES OF MULTINATIONAL LEGAL INTEROPERABILITY SMARTBOOK A-3 (2024).
27. Lieutenant Colonel Justin Marchesi, *Foundations of Multinational Legal Interoperability*, ARMY LAW., no. 5, 2021, at 2, 3.
28. U.S. Army Europe and Africa, USAREUR-AF AOR and Operational Approach, at slide 2 (May 2023) (unpublished PowerPoint presentation) (on file with author).
29. See Memorandum from Deputy Chief of Staff, G-3/5/7, subject: Execution Approval for a Reciprocal Military Personnel Exchange Program Position with the United Kingdom (U.K.-69) (June 8, 2020).
30. See Position Description, U.K.-69, Deputy Chief of Staff, G-3/5/7, subject: For U.S. Army Participant with the British Army; Position Description, U.K.-69, Deputy Chief of Staff, G-3/5/7, subject: Position Description for British Army Participation with the U.S. Army.
31. E-mail from Major Matthew Gosnell to author (Aug. 23, 2023) (on file with author).
32. U.S. DEP’T OF ARMY, REG. 34-1, INTEROPERABILITY para. 1-8(c) (9 Apr. 2020).
33. U.S.-U.K. MOU, *supra* note 18, sec. 4(a)(v).
34. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 16 (Oct. 2022).
35. NDS, *supra* note 5, at 14.





# Book Review

## Rebirth into New Domains

### A Review of *Phoenix Rising: From the Ashes of Desert One to the Rebirth of U.S. Special Operations*

By Major Sydney M. Haanpaa

*Given the nature of operations, the object of planning is not to eliminate uncertainty but to develop a framework for action in the middle of it.<sup>1</sup>*

## Rebirth into Multiple and All-Domain Operations

Keith Nightingale's *Phoenix Rising*<sup>2</sup> is a compelling account of the planning, training, and execution of Operation Eagle Claw. As the deputy operations officer of the Joint Task Force (JTF), Nightingale provides a first-hand account of the operation through personal journal entries. *Phoenix Rising* then transitions to an opinionated, linear account of the institutional barriers and biases that subsequently undermined the full effectiveness and utilization of Special Operations Forces (SOF) up until Operation Neptune Spear against Osama Bin Laden in 2011. Nightingale proffers that although Operation Eagle Claw was ultimately unsuccessful in rescuing the Iranian hostages, the "disaster of Desert One worked as the catalyst" that enabled the creation of the Joint Special Operations Command, the ultimate success of Operation Neptune Spear, and the "rise of SOF as a valued part of the defense establishment."<sup>3</sup>

Upfront, Nightingale clearly articulates that the diary entries reflect his in-the-moment perception of issues and individuals.<sup>4</sup> Filled with pithy and satirical commentary, his entries are honest, unapologetic, and refreshingly relatable for anyone who has served as a junior staff officer. For example, he aptly describes how observers in a small meeting room line the wall, "all eagerly leaning forward to be included in the deliberating of the almighty" while musing that their "primary contribution is to raise the carbon dioxide level."<sup>5</sup> On another occasion, he recalls the staff taking bets on how long it would take before an unprofessional cup on the briefing table is noticed, musing, "Do people of such rank and position have a sense of humor? (Later, yes it was noticed, empirical evidence indicates that a sense of humor was not present)."<sup>6</sup> Moreso, his reflections highlight the intangible importance of creativity, resourcefulness, and dedication when it comes to solving novel, complex, and dynamic issues.

Prospective readers should not turn to *Phoenix Rising* for an objective or linear account of Operation Eagle Claw. Instead, military readers should critically evaluate Nightingale's conclusions<sup>7</sup> as significantly influenced by the thematic frustrations that

he experienced as the deputy operations officer. Therefore, this review will draw from both Nightingale's subjective reflections and the Special Operations Review Group's *Rescue Mission Report (Holloway Report)* to highlight two critical concepts of joint operations: command and control (C2) and interagency coordination. As multi-domain<sup>8</sup> and joint all-domain<sup>9</sup> operations become a strategic priority for the Department of Defense, Nightingale's account is an example for judge advocates (JAs) of how C2 and interagency coordination can either frustrate or reinforce mission success. In turn, JAs will be able to identify unknown risks, forecast the associated impact, and appropriately advise in a dynamic, multi-domain or joint all-domain environment.

## "Get Your C2 Right Up-Front"<sup>10</sup>

Understanding a command structure or the nature of the command's relationship to other commands is impactful in all stages of an operation, from planning to execution. As a joint function, the concept of C2 encompasses the operation of a joint force, the exercise of authority over subordinate forces, and a means for allocating resources and managing risk.<sup>11</sup> It is also an element of joint planning that is usually identified as part of the operational design and refined for each course of action developed in the planning process.<sup>12</sup>

Aptly titled "In the Beginning,"<sup>13</sup> Nightingale's first entry draws the audience into the conception of Operation Eagle Claw. The requirement is simply stated: "to rescue the hostages in Iran."<sup>14</sup> Nightingale asserts that there was no available capability to action the requirement. Specifically, the Joint Chiefs of Staff "concluded it had in reality no capabilities other than nuclear weapons or mass conventional forces, neither of which were rational tools to respond."<sup>15</sup> Then-Army Chief of Staff, General Edward Meyer, issued the initial planning guidance: "We need a specialized force for a reasonable chance to free our hostages."<sup>16</sup> The scope and understated complexity of the Joint Chiefs' intent was refined by the JTF planners, "Fly 15,000 miles around the world, the last 850 miles in hostile airspace, and arrive undetected . . . Free, without injury, 60+ American



citizens from their guards without injury to any civilians . . . .<sup>17</sup> The planners then identified the forces and capabilities in their operational approach, outlined the course of action, and memorialized their work in “the Book.”<sup>18</sup> While Nightingale recalls that “the Book” annotated each critical commander decision point, it is unclear if the concept ever included an outline of the JTF’s command structure or the supporting/supported relationships between other command elements.<sup>19</sup>

The palpable tension between components rears its head as the JTF shifts into exercising the plan with the identified mobility assets and ground forces. The training is the first time that the individual elements would “confirm their planning assumptions and coalesce to work out joint issues.”<sup>20</sup> Accordingly, the helicopters aboard the USS *Nimitz* were directed to stress the equipment to determine the assets’ limitations and expose risks.<sup>21</sup> Despite such direction, the JTF commander is informed that the *Nimitz* commander did not comply with training profiles.<sup>22</sup> Although the JTF elevated the issue to the Joint Chairman and the commander-in-chief of the Pacific Command was directed to comply, the JTF was prohibited from visiting the ship to validate the training. Subsequently, when the mission launched, none of the helicopters had flown more than ninety minutes.<sup>23</sup> As highlighted by Nightingale, the mechanical issues encountered during mission execution would have been identified with the proper training.<sup>24</sup> Arguably, a clearly defined command relationship would have also reinforced the JTF mission as a priority.

Interestingly, Nightingale never reflects on how a defined C2 within the planning and training phase of the operation could have reduced friction. Although Nightingale dismisses the conclusions of the *Holloway Report* because its outcome was “pre-ordained and lacked real integrity,”<sup>25</sup> the report does fairly identify C2 as an issue. Specifically, the *Holloway Report* determined that C2 relationships beneath the JTF commander were “not clearly emphasized” and became “tenuous and fragile at intermediate levels.”<sup>26</sup> The report further discusses how the lack of clear command relationships

impacted the planning, training, and execution phases of the operation.<sup>27</sup>

Thus, *Phoenix Rising* serves as a cautionary tale for any JA serving on a joint staff or in a unit involved in multi-domain operations. In a focus paper on C2 in a joint environment, the Joint Staff J7 notes that “form follows function” when crafting a task organization.<sup>28</sup> Rather than relying on established task organizations, flexible and adaptable C2 is created when the organization takes into account how the “logical battlespace geometry” aligns with a concept of an operation.<sup>29</sup> Instead of defining C2 upfront to ensure “unity of command of the force and unity of effort with partners,” Nightingale’s account assumes that the very existence of the JTF inherently created relationships with other commands.<sup>30</sup> Just as Nightingale’s JTF planned a rescue mission “before ‘Joint,’ Nunn-Cohen, and Goldwater-Nichols were on the books,”<sup>31</sup> multi-domain and joint all-domain operations will likely present nuanced and novel questions about C2 structures.<sup>32</sup>

### **“I Thought We Were on the Same Team”<sup>33</sup>**

Although *Phoenix Rising* broadly showcases the importance of interagency cooperation for joint operations, a critical reader will recognize the delicate nuances involved in unified action. Current joint doctrine provides a suggested framework for planners, but application requires that a practitioner consider the following, at a minimum: What is the overall U.S. Government strategy? What are the missions of specific agencies, and how will that drive their perspective on success? What external factors shape that agency or organization’s interpretation of the strategy?<sup>34</sup>

Specifically, *Phoenix Rising* includes two vignettes to consider: the Department of State’s complete lack of cooperation and the Central Intelligence Agency’s (CIA) tenuous cooperation. From the beginning of Operation Eagle Claw, planners struggled with the lack of intelligence on the exact location of the hostages.<sup>35</sup> This critical information requirement lingered as an outstanding question throughout the majority of the planning, training, and execution of the operation.<sup>36</sup> Although it was generally known that the hostages

were being detained at the U.S. embassy, the absence of a precise location within the twenty-seven acre complex or details on the internal structure of the embassy buildings increased the risk and lowered the probability of operational success.<sup>37</sup>

Nightingale recalls how attempts to liaise with the Department of State were abruptly terminated after two weeks of initial cooperation due to the increasingly “hostile” and “uncooperative” nature of the State employees.<sup>38</sup> He questioned the lack of cooperation, musing, “I thought we were on the same team . . . . It’s their employees who are hostages, and we (the military) are working to bring them back.”<sup>39</sup>

While at face value, the frustration is reasonable, it is based on a flawed assumption that the Department of State shared his perspective, specifically, that the military was the best method to achieve the strategic goal of freeing the hostages. In reality, the Secretary of State, Cyrus Vance, was a staunch supporter of negotiation and diplomacy as the most successful means of resolving the hostage crisis.<sup>40</sup> Thus, as the JTF was being established in mid-November 1979, the Department of State was working on diplomatic resolution through negotiations with Iranian foreign ministers and prioritizing diplomatic sanctions over military solutions.<sup>41</sup> While Nightingale conjectures that the Department of State’s non-participation was a result of either personalities or “historic antipathy toward ‘things military,’” a more interesting analysis would be a reflection of how the diverging priorities could have been enjoined under a unified line of effort.<sup>42</sup>

Nightingale’s account also identifies the CIA as an uncooperative stakeholder. The CIA was initially invited to the table because “[it] was a true joint interdepartmental effort” and the agency was the proponent of the best possible intelligence.<sup>43</sup> Yet, Nightingale described meetings with the Agency men as “the longest-running non-conversation in the same language ever held in this building,” and generally unproductive.<sup>44</sup> He theorized that the lack of information was compounded by the intelligence community’s competing desire to retain the integrity of their assets.<sup>45</sup> Additionally, he believed the lack of cooperation was influenced by the prevailing belief



that the military operation would never be approved.<sup>46</sup> Although Nightingale's astute perception is actually reinforced in the CIA director's recollection of the crisis,<sup>47</sup> he fails to consider the extent to which the JTF's organization impeded interorganizational cooperation. Although intentionally limited to a review of the Department of Defense, the *Holloway Report* identified that the lack of external "centralized and integrated intelligence support" and the urgency of planning requirements resulted in fragmented and undeveloped intelligence.<sup>48</sup> The *Holloway Report* also proffers that an inter-agency Intelligence Task Force would have resolved this issue by creating a centralized authority to supervise and coordinate the various intelligence activities.<sup>49</sup> While not prescriptive, current joint doctrine also underscores the importance of centralized interorganizational cooperation within a joint force command.<sup>50</sup>

## Conclusion

*Phoenix Rising* offers a rare, unfiltered perspective on Operation Eagle Claw. Although the book's discussion of the special operations enterprise culminates with the successful Operation Neptune Spear, it also serves as an example of important considerations as the Department of Defense shifts focus to multi-domain and joint all-domain operations. In multi-domain operations, there will likely be uncertainty about who owns C2 over the operation and the supporting or supported organizations. Multi-domain and joint all-domain operations will also likely involve personnel from a variety of entities beyond the joint force. Understanding the nuances and complexities that Nightingale faced during the planning and execution of Operation Eagle Claw will only better inform JAs' perspectives as the military paradigm undergoes another transformation. **TAL**

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## Notes

1. U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, PLANNING AND ORDERS PRODUCTION para. 1-3 (04 Nov. 2024).

2. KEITH M. NIGHTINGALE, PHOENIX RISING: FROM THE ASHES OF DESERT ONE TO THE REBIRTH OF U.S. SPECIAL OPERATIONS (2020).

3. *Id.* at 281.

4. *Id.* at xiii.

5. *Id.* at 5.

6. *Id.*

7. Compare *id.* at 182 (concluding that five obstacles prevented the success of the operation, specifically: most service principals were not willing to commit resources and risk beyond what was required; there was minimal sharing of personnel and assets or assumption of responsibility from senior officers; the JTF was constrained by operational security concerns and the lack of a budget; senior civilian leadership priorities were not reflected in the support for the JTF's endeavors; the "start-stop of the program throughout its existence marred credibility and attracted a non-supporting attitude"), with SPECIAL OPERATIONS REV. GRP., JOINT CHIEFS OF STAFF, RESCUE MISSION REPORT 60 (1980) [hereinafter HOLLOWAY REPORT], <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB63/doc8.pdf> (concluding that "the ad hoc nature of the organization and planning is related to most of the major issues and underlies the [report's] conclusions" and that a specific operational security plan based on "selective disclosure rather than minimum disclosure" would have better enabled the JTF).

8. See ANDREW FEICKERT, CONG. RSCH. SERV., IF11409, DEFENSE PRIMER: ARMY MULTI-DOMAIN OPERATIONS (MDO) (2024), <https://crsreports.congress.gov/product/pdf/IF/IF11409/10>.

9. See U.S. DEP'T OF DEF., SUMMARY OF THE JOINT ALL-DOMAIN COMMAND & CONTROL (JADC2) STRATEGY 2 (2022), <https://media.defense.gov/2022/mar/17/2002958406/-1/-1/1/summary-of-the-joint-all-domain-command-and-control-strategy.pdf>.

10. DEPLOYABLE TRAINING DIV., JOINT CHIEFS OF STAFF, JTF C2 AND ORGANIZATION 4 (2d ed. 2020) [hereinafter J7 FOCUS PAPER].

11. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT CAMPAIGNS AND OPERATIONS, at III-1 (18 June 2022).

12. See JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING, at IV-19 (1 Dec. 2020) (C1, 1 July 2024).

13. NIGHTINGALE, *supra* note 2, at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 15.

18. *Id.* at 19.

19. See *id.*

20. *Id.* at 91.

21. *Id.* at 122.

22. *Id.* at 184.

23. *Id.* at 185.

24. *Id.*

25. *Id.* at 191.

26. HOLLOWAY REPORT, *supra* note 7, at V.

27. *Id.* at 15-17.

28. J7 FOCUS PAPER, *supra* note 10, at 4.

29. *Id.*

30. *Id.* at 1.

31. NIGHTINGALE, *supra* note 2, at 187.

32. See MIRANDA PRIEBE ET AL., RAND CORP., MULTIPLE DILEMMAS FOR THE JOINT FORCE: JOINT ALL-DOMAIN COMMAND AND CONTROL 1 (2020), [www.rand.org/t/RR381-1](http://www.rand.org/t/RR381-1) (examining how all-domain operations necessitate experimentation with alternative C2 structures).

33. NIGHTINGALE, *supra* note 2, at 26.

34. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTER-ORGANIZATIONAL COOPERATION, at I-5 (12 Oct. 2016) [hereinafter JOINT PUB. 3-08].

35. NIGHTINGALE, *supra* note 2, at 25.

36. See *id.* at 25, 81.

37. See *id.* at 81.

38. *Id.* at 26; see also *id.* at 188 ("State was opposed to any rescue attempt and would not cooperate out of principle.").

39. *Id.* at 26.

40. See MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE IRAN HOSTAGE CRISIS: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM 169-174 (2007) (ebook); *The Iranian Hostage Crisis*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/departmenthistory/short-history/iraniancrises> (last visited Apr. 25, 2025).

41. See Betty Glad, *Personality, Political and Group Process Variables in Foreign Policy Decision-Making: Jimmy Carter's Handling of the Iranian Hostage Crisis*, 10 INT'L POL. SCI. REV. 35, 37-50 (1989) (explaining how the initial American response was a "dual track strategy" that prioritized negotiations and sanctions and specifically outlining Secretary of State Cyrus Vance's main concerns with military action).

42. NIGHTINGALE, *supra* note 2, at 188-89.

43. *Id.* at 24-25.

44. *Id.*

45. *Id.* at 27.

46. *Id.* at 183. Such organizational apprehension did not occur in Operation Neptune Spear. See Siobhan Gorman & Julian E. Barnes, *Spy, Military Ties Aided bin Laden Raid*, WALL ST. J. (May 23, 2011), <http://online.wsj.com/article/SB10001424052748704083904576334160172068344.html> (highlighting the cooperation between the CIA and the military forces, "reflect new-found trust between two traditionally wary groups").

47. See Albert F. Eldridge, *Spymasters Warning*, 48 BULL. OF THE ATOMIC SCIENTISTS 43, 43 (1992) (detailing that Stanfield Turner acknowledged that the CIA did not always provide effective intelligence).

48. HOLLOWAY REPORT, *supra* note 7, at 20.

49. *Id.*

50. JOINT PUB. 3-08, *supra* note 34, at II-31 ("[A] decentralized approach makes internal synchronization of the staff's activity more difficult. It incurs the highest risk of functional stovepiping and a disjointed or duplicative effort with external entities.").



# Lore of the Corps

## In Memoriam

### Remembering the Recently Departed Members of the Regiment

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

The following members of our Regiment, in alphabetical order, passed away in 2024.

**ACEVEDO, Kenneth** (1972–2024). Master Sergeant (MSG) Kenneth “Ace” Acevedo of Arnold, Pennsylvania, passed away on 26 November 2024. He was fifty-one years old.

MSG Acevedo was born on 17 December 1972 in New York, New York. He enlisted in the U.S. Army in 1990, and his military assignments included assistant operations noncommissioned officer (NCO), U.S. Army Reserve Legal Command, Gaithersburg, Maryland; paralegal non-commissioned officer in charge (NCOIC), U.S. Army Reserve Legal Command, Gaithersburg, Maryland; paralegal NCOIC, U.S. Army Central, Camp Arifjan, Kuwait; and paralegal NCO, 10th Legal Operations Detachment, Gaithersburg, Maryland. MSG Acevedo was assigned to the U.S. Army Reserve Legal Command at the time of his death.

MSG Acevedo graduated from the Senior Leader Course, Advanced Leader Course, and Basic Leader Course. His military awards include the Meritorious Service Medal (x2), Army Commendation Medal (x3), Army Achievement Medal (x4), Army Reserve Components Achievement Medal (2d Award), Army Superior Unit Award, National Defense Service Medal (x2), Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, NCO Professional Development Ribbon (x3), and the Army Service Ribbon.

He is survived by his parents, Domingo

Acevedo and Lydia Rodriguez of Puerto Rico, and his in-laws, Bruce and Helen Kozik of Pennsylvania. He is preceded in death by his wife, Laura Ann Kozik, and brother, Wilfredo “Freddie” Acevedo.<sup>1</sup>

**BENJAMIN, Brandon Taylor** (1994–2024). Staff Sergeant (SSG) Brandon Taylor Benjamin of Fort Benning, Georgia, passed away on 17 February 2024. He was thirty years old.

SSG Benjamin was born in Gloversville, New York, on 3 February 1994 to Kendall Wade Benjamin and Tina Sawyer Benjamin. Upon graduation from high school in 2012, he enlisted as a paralegal specialist in the U.S. Army.

His previous military assignments include senior drill sergeant, 2d Squadron, 15th Cavalry Troop, Fort Benning, Georgia; drill sergeant, 2d Squadron, 15th Cavalry Troop, Fort Benning, Georgia; paralegal NCO, 2d Battalion, 5th Special Forces Group, Fort Campbell, Kentucky; paralegal NCO, 65th Medical Brigade, Camp Humphreys, Republic of Korea; paralegal specialist, 65th Medical Brigade, Camp Humphreys, Republic of Korea; and paralegal specialist, 1st Battalion, 509th Infantry Regiment, Fort Johnson, Louisiana. He graduated from the Advanced Leaders Course, Basic Leaders Course, Drill Sergeant School, and Airborne School.

His military awards and decorations include the Army Commendation Medal (three oak leaf clusters), Army Achievement Medal (2 oak leaf clusters), Army Good

Conduct Medal (3x), National Defense Service Medal, Iraq Campaign Medal with Campaign Star, Global War on Terrorism Service Medal, Korean Defense Service Medal, NCO Professional Development Ribbon, Army Service Ribbon, Overseas Service Ribbon, and the Army Parachutist Badge.

Brandon is survived by his wife, Erika Benjamin; his son, Alexander Benjamin; his stepson, Calvin Neill; and his parents, Kendall and Tina Benjamin.<sup>2</sup>

**BROWN, Henry L.** (1925–2024). Colonel (COL) (Retired) (Ret.) Henry “Roy” L. Brown of Huntsville, Alabama, passed away on 21 January 2024. He was ninety-eight years old.

COL (Ret.) Brown was born on 5 April 1925 in Great Falls, South Carolina, to William Henry Brown and Edna Tarlton Brown. He graduated from Great Falls High School in 1943 and joined the U.S. Navy on 4 April 1943. COL (Ret.) Brown served on the USS *Yorktown* (CV-10), participating in the Philippine operation, Iwo Jima, and Okinawa Campaigns. He was also part of a force that occupied Japan immediately after the end of World War II. Following the end of WWII, he earned his bachelor’s degree from the University of South Carolina under the GI Bill and graduated from the University of South Carolina School of Law in 1951.

COL (Ret.) Brown joined the U.S. Army Judge Advocate General’s (JAG) Corps in 1955, serving more than twenty-two years before he retired from military service. During his time with the JAG Corps, he served at Fort Benning, Georgia; Fort Jackson, South Carolina; The Judge Advocate General’s School in Charlottesville, Virginia; Huntsville, Alabama; and the Pentagon. He served overseas tours in Italy, Vietnam, and Hawaii. After retiring from the Army, he continued practicing law in Huntsville. COL (Ret.) Brown received a multitude of medals and commendations for his exemplary military service in both the U.S. Navy and the U.S. Army, including four Legion of Merit awards. Over the past decade, he served on the board of directors for the USS *Yorktown* (CV-10) Association, now a Medal of Honor Museum in Charleston Harbor.



COL (Ret.) Brown is survived by his wife of almost sixty-seven years, Lucy Clardy Brown; his children, Jessica B. Arenth (Roy), Melissa B. Gilliland, and Stephanie B. Patton; six grandchildren; and thirteen great-grandchildren.<sup>3</sup>

**CHRISTIAN, Chad Ryan** (1987–2024). Chad Ryan Christian passed away on 25 March 2024. He was thirty-seven years old.

Mr. Christian was born on 26 January 1987 in Huntsville, Alabama, to Robert and Marsha Christian. He attended the University of Alabama in 2010, graduating with a bachelor of science in finance and operations research and a bachelor of science in applied finance. Mr. Christian joined the Reserve Officers' Training Corps (ROTC) and was subsequently commissioned as a second lieutenant into the U.S. Army. As a Funded Legal Education Program recipient, he attended Vanderbilt Law School in Nashville, Tennessee, where he graduated with his juris doctor in 2018.

Mr. Christian's military assignments include contract law attorney, Army Contracting Command, Redstone Arsenal, Alabama; trial counsel, 1st Infantry Division, Fort Riley, Kansas; military justice attorney, 1st Infantry Division, Fort Riley, Kansas; legal assistance attorney, 1st Infantry Division, Fort Riley, Kansas; maneuver branch officer-in-charge (OIC), 7th Army Training Command, Rose Barracks, Germany; company executive officer, 172d Infantry Brigade, East Camp, Germany; and platoon leader, 2d Battalion, 28th Infantry Regiment, Grafenwoehr, Germany.

Mr. Christian's military awards and decorations include the Bronze Star, Army Commendation Medal (5th Award), Army Achievement Medal (2nd Award), Meritorious Unit Citation, National Defense Service Medal, Global War on Terrorism Service Medal, Afghanistan Campaign Medal (two campaign stars), Humanitarian Service Medal, and Combat Action Badge. He also graduated from the Officer Basic Course and the Air Assault Course.

He is survived by his wife, Rachel; his parents, Robert and Marsha Christian; his brothers, Alan (Kristin) Christian and Tanner (Claire) Christian; his sisters, Amanda (John) Evans and Whitney (Huy) Huynh;

his nephews, nieces, grandmother, and many beloved aunts, uncles, and cousins.<sup>4</sup>

**CULLEN, Peter Martin** (1959–2024). COL (Ret.) Peter M. Cullen of Washington, D.C., passed away on 5 January 2024. He was sixty-four years old.

COL (Ret.) Cullen was born in Toledo, Ohio, on 8 November 1959 to Patrick and Doreen (Greasley) Cullen. He grew up in Portstewart and Castlerock, County Derry, Northern Ireland, attending boarding school at St. MacNissi's College, Garron Tower. He attended University College in London, England, where he earned a bachelor of laws in 1981. He attended the University of Maine School of Law in Portland, Maine, where he earned his juris doctor in 1985.

COL (Ret.) Cullen was commissioned in the U.S. Army JAG Corps in September 1985. His military assignments included chief, U.S. Army Trial Defense Services, Fort Belvoir, Virginia; executive officer, Office of The Judge Advocate General, Pentagon; staff judge advocate, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky; chief, combat developments, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; staff judge advocate, 2d Infantry Division, Camp Red Cloud, Republic of Korea; deputy staff judge advocate, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky; chief, criminal law, XVIII Airborne Corps, Fort Bragg, North Carolina; deputy staff judge advocate, 2d Infantry Division, Camp Red Cloud, Republic of Korea; plans officer, Pentagon; Plans Officer, U.S. Army Legal Services Agency, Falls Church, Virginia; chief, military justice, Air and Missile Defense Command, Darmstadt, Germany; legal center OIC, Air and Missile Defense Command, Babenhausen, Germany; branch office OIC, Medical Command, Landstuhl, Germany; trial counsel, Theater Army Area Command, Kaiserslautern, Germany; and chief, Administrative Law Division, Support Command, Kaiserslautern, Germany. He graduated from the Army War College, Command and General Staff College, the Judge Advocate Officer Graduate Course, Airborne Course, and Air Assault Course. He retired on 31 October 2014 after more than twenty-nine years of service.

COL (Ret.) Cullen is survived by his wife, Sarah Buescher; siblings, Kevin (Lesley) Cullen of Noosaville, Queensland, Australia, Una Perrin of Pentlepoir, Wales, United Kingdom, Mark Cullen of Tenby, Wales, United Kingdom, Christopher (Suzanne) Cullen of Holywood, Northern Ireland; and nieces and nephew Emily Perrin, Isabella Cullen, and Tom Cullen.<sup>5</sup>

**CULPEPPER, Deborah Ann** (1947–2024). Deborah "Deb" Ann Culpepper, of Yakima, Washington, passed away on 7 April 2024. She was seventy-six years old.

Ms. Culpepper was born on 23 August 1947 in Columbus, Indiana, as the first child of Norman and Joan (Robinson) Edwards. She received a bachelor's degree in political science from Vanderbilt University in 1969 and a juris doctor from the University of Arkansas School of Law, where she met her future husband and business partner, Van Culpepper. Following law school, Ms. Culpepper and her husband served as judge advocates (JAs) in the Army JAG Corps. Through that service, they had the opportunity to live in multiple locations, including Seoul, South Korea. Their final assignment was in Tacoma, Washington, after which the Culpeppers moved to Yakima, Washington, and opened a law practice and raised their children.

Ms. Culpepper is survived by her son, Christopher; daughter, Elizabeth (Schiller); granddaughters, Bella and Tessa; brother, Mark (Martha) Edwards; and Max, her beloved four-legged black labrador. She was preceded in death by her parents and, in 2023, her husband of fifty years, Van.<sup>6</sup>

**DARBASIE, Farley** (1951–2024). MSG (Ret.) Farley Darbasie, of Temple, Texas, passed away on 11 August 2024. He was seventy-three years old.

MSG (Ret.) Darbasie was born on 15 July 1951 in Trinidad to Cynthia Darbasie and the late Daniel Darbasie. He dedicated twenty-two years of his life to serving proudly in the U.S. Army, where he honed his leadership skills and developed a deep appreciation for history and the arts.

MSG (Ret.) Darbasie enlisted in the Army in 1978 as a legal specialist. His military assignments included II Armored Corps, Fort Cavazos, Texas; 25th Infantry





MSG (Ret.) Farley Darbasie. (Credit: Legacy.com)

Division (Light), Schofield Barracks, Hawaii; U.S. Total Army Personnel Command, Alexandria, Virginia; and 3d Infantry Division, Katterbach, Germany. After retiring from the military, he transitioned into a new chapter as a tax preparer at Fort Cavazos, a role in which he continued to serve his community with diligence and care.

Beyond his professional achievements, MSG (Ret.) Darbasie's passions extended into art, history, and chess. His love for chess reflected his strategic mind, always seeking out the next move both on the board and in life, teaching others the beauty of patience and foresight.

MSG (Ret.) Darbasie is survived by his wife, Jenee Steadman; his daughter, Danielle; his mother, Cynthia; his sister, Dianne; and his brother, Curtis.<sup>7</sup>

**DEBERRY, Thomas Patrick** (1943–2024). COL (Ret.) Thomas Patrick Deberry of Marietta, Georgia, passed away on 1 July 2024. He was eighty-one years old.

COL (Ret.) DeBerry was born at Camp Wheeler, Georgia, on 26 May 1943. He was the only child of Thomas Graham DeBerry and Henrietta Wolfe DeBerry. He grew up in Morgantown and Fairmont, West Virginia. He attended West Virginia University and West Virginia University College of

Law. After graduation, he joined the U.S. Army JAG Corps.

COL (Ret.) DeBerry served in the Vietnam War and in assignments at The Judge Advocate General's School in Charlottesville, Virginia, and Fort Huachuca, Arizona, among many others. He especially enjoyed his tenure as the staff judge advocate in West Berlin, Germany, at the height of the Cold War. He received many honors and decorations, including the Legion of Merit, the Bronze Star, the Meritorious Service Medal, and the Army Commendation Medal.

Following his retirement from the Army, he worked as an assistant professor of law and associate director for the Institute for Continuing Legal Education of the State Bar of Georgia. He later started a business that provided continuing legal education. He also opened his own law office in the Atlanta area and practiced for many years in business law, workers' compensation, and veterans' affairs.

COL (Ret.) DeBerry will be remembered for his sense of humor, keen intellect, and curiosity. He was a marksman, sailor, traveler, conversant in German, and an avid coin collector. He is survived by his wife, Mary Wood DeBerry; three daughters and two sons-in-law; eight grandchildren; and three great-granddaughters.<sup>8</sup>

**DURKEE, Victor Earl** (1996–2024).

Sergeant (SGT) Victor Earl Durkee of Memphis, Tennessee, passed away on 12 April 2024. He was twenty-seven years old.

SGT Durkee was born on 28 July 1996 in Memphis, Tennessee, to Mark and Lori Durkee. He enlisted in the U.S. Army in January 2016, serving as an infantryman with the 82nd Airborne Division, where he deployed to Afghanistan (2017–2018) and Iraq (2020). SGT Durkee joined the U.S. Army Reserve in 2020 as part of the 139th Legal Operations Detachment, where he served as the NCOIC of the Millington, Tennessee, team and reclassified as a paralegal specialist before becoming a court reporter in 2022. SGT Durkee was a member of the 139th Legal Operations Detachment when he passed away.

SGT Durkee's military awards include the Army Commendation Medal with "C" device, Army Commendation Medal (2d



SGT Victor E. Durkee. (Credit: Dignity.com)

Award), Army Achievement Medal (3d Award), Joint Meritorious Unit Award, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Service Medal, Afghanistan Campaign Medal with Campaign Star, NATO Medal, and Inherent Resolve Campaign Medal. SGT Durkee was authorized to wear the Combat Infantryman Badge and Parachutist Badge. He graduated from the Basic Leader Course and Court Reporter Course.

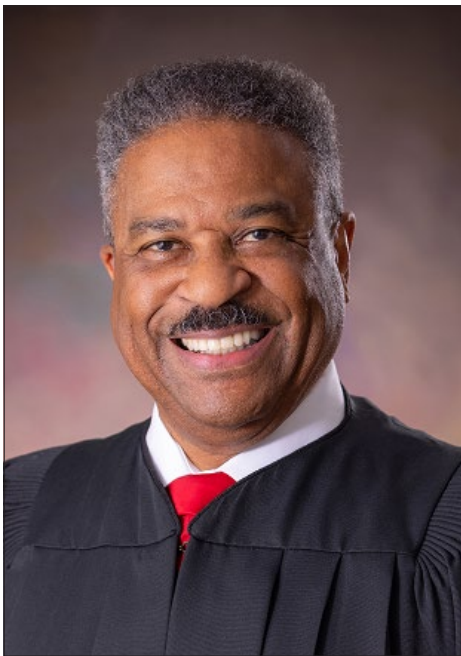
SGT Durkee is survived by his fiancée, Lacey Davidson; his parents, Mark and Lori Durkee; and his siblings, Josh and Murphy Durkee, Kayla and Joe Stevenson, Elijah Durkee, Jayden Johnson, Sam Durkee, Emalee Johnson, Phillip Easter, Thomas Wasmund, and Jamie Estep. SGT Durkee also leaves behind grandparents, aunts, uncles, cousins, nieces, nephews, and countless friends, including his brothers and sisters in arms.<sup>9</sup>

**EDWARDS, Jules D. III** (1957–2024).

COL (Ret.) Jules D. Edwards III of Lafayette, Louisiana, passed away on 15 October 2024. He was sixty-six years old.

Jules D. Edwards III was born on 14 November 1957 in New Orleans, Louisiana, to Jules D. Edwards Jr. and Lona Broussard Edwards. He received his bachelor of arts





COL (Ret.) Jules D. Edwards. (Credit: City Court of Lafayette, LA)

in sociology in 1981 and his juris doctor in 1984 from Loyola University of New Orleans. He earned a master's degree in strategic studies from the U.S. Army War College in 2005.

After earning his law degree, he spent several years in private practice. He worked as an indigent defender in New Orleans, an assistant district attorney, and counsel to the Louisiana Senate Select Committee on Crime and Drugs. He was elected to the 15th Judicial District Court in Lafayette, Louisiana, as a state district court judge in 1993, rising to the position of chief judge from 2001 to 2003. He retired from the court in 2020 and became the Lafayette City Court judge in 2023, a position he held until his passing.

COL (Ret.) Edwards began his military career in the U.S. Marine Corps Reserve in 1977, serving as a rifleman and a wireman and attaining the rank of corporal. In 1981, he began his career in the Louisiana Army National Guard as a field artillery officer in the historic Washington Artillery, the 141st Field Artillery Battalion, in New Orleans, Louisiana.

After completing the Judge Advocate Officer Basic Course, COL (Ret.) Edwards became an assistant staff judge advocate for the 256th Infantry Brigade in 1986. He was

appointed as the brigade's inspector general in 1990 and was mobilized for Operation Desert Shield/Storm. He also served as the equal opportunity advisor for the Louisiana National Guard.

In 2001, the Adjutant General of the State of Louisiana appointed COL (Ret.) Edwards to serve as the state judge advocate, a position he held until his retirement in 2007. He served as such during response and recovery operations for Hurricane Katrina. COL (Ret.) Edwards coordinated with senior officials at the National Guard Bureau in support of the effort to provide additional troops, equipment, and JA support to aid in the unprecedented relief effort.

After his retirement, COL (Ret.) Edwards continued to serve the military forces of the State of Louisiana as a military judge in a State Guard capacity.

He is survived by his wife of thirty-seven years, Orida; their three children, Jules IV, Juliesa, and Julien Sr.; and one grandson, Julien Jr.<sup>10</sup>

**GILLIGAN, Francis A. (1939–2024).** COL (Ret.) Francis “Fran” A. Gilligan of Arlington, Virginia, passed away on 6 July 2024. He was eighty-four years old and in his sixty-seventh year of Federal service.

COL (Ret.) Gilligan enlisted in the New York National Guard as a seventeen-year-old in 1957, then commissioned through ROTC as an infantry second lieutenant from Alfred University in 1961. He delayed his entry into active duty to attend law school at the State University of New York – Buffalo. While in law school, he was selected for the new Excess Leave Program and received a Regular Army Commission on 5 September 1963. In addition to his law degree, he earned his master of law degree and doctor of juridical science from George Washington University in 1970. He also received a master of military art and science degree from the Command & General Staff College in 1978 and graduated from the U.S. Army War College.

COL (Ret.) Gilligan served in the U.S. Army JAG Corps for twenty-seven years and held numerous positions, including trial counsel, defense counsel, appellate counsel, 101st Airborne Division staff judge advocate, deputy commandant of The

Judge Advocate General's Legal Center and School, chief of criminal law for the Department of the Army and chairman of the Joint Service Committee, and the Army's chief trial judge. After his prestigious military career, COL (Ret.) Gilligan served for fifteen years as the senior legal advisor at the Court of Appeals for the Armed Forces. Most recently, he served as the director of training at the Office of Military Commissions for almost eighteen years.

COL (Ret.) Gilligan was widely known throughout the Department of Defense as a military justice expert and a prolific author, having written ten books, over forty articles, and numerous Army publications on criminal law, evidence, and related topics. A lifelong educator, he taught law students, lawyers, and judges at numerous institutions, including The Judge Advocate General's Legal Center and School, the Army War College, the Universities of Maryland and Virginia, Catholic University Law School, and George Washington University Law School.

COL (Ret.) Gilligan is survived by his beloved wife, Barbara, of sixty-three years; his two daughters, Cheryl, and her spouse, Phil Natsios, and Kelly, and her spouse, Brigadier General (Ret.) Paul Bontrager; four grandchildren (and spouses); and seven great-grandchildren.<sup>11</sup>

**GLADDING, Edward J. (1976–2024).** Major (MAJ) (Ret.) Edward J. Gladding of Nashville, Tennessee, passed away on 29 September 2024. He was forty-eight years old.

MAJ (Ret.) Gladding was born on 31 January 1976 in Sacramento, California, and grew up in Reno, Nevada. After graduating from Reno High School, he obtained a degree in communications from the University of Nevada, Las Vegas. He then earned a law degree from the University of the Pacific McGeorge School of Law in Sacramento, California, where he excelled in oral advocacy at mock trials and served as an editor for the *McGeorge Law Review*.

After law school, he embarked on a career as a litigation attorney in private practice, but his desire to continue his family's legacy of military service led him to join the U.S. Army JAG Corps in 2009. He was stationed at various locations, including



MAJ (Ret.) Edward J. Gladding. (Credit: Sykes Funeral Home)

Fort Benning, Georgia; Fort Riley, Kansas; Camp Carroll, Republic of Korea; Fort Irwin, California; and Wiesbaden, Germany, before concluding his career at Fort Campbell, Kentucky.

Throughout his distinguished military career, he received two Meritorious Service Medals, three Army Commendation Medals, the National Defense Service Medal, the Global War on Terrorism Service Medal, the Korea Defense Service Medal, the Army Service Ribbon, and two Overseas Service Ribbons.

He is survived by his spouse, Christina Gladding; his son, James Gladding; his daughter, Catrina Gladding; his parents, Edward and Phyllis Gladding; and his brother, Ryan Gladding.<sup>12</sup>

**LOPEZ, Kristal** (2004–2024). Specialist (SPC) Kristal Lopez of Lancaster, South Carolina, passed away on 19 March 2024. She was nineteen years old.

Kristal Lopez was born in Louisville, Colorado, on 18 September 2004 to Brenda Lara and Victor Lopez. After graduating from Lancaster High School, SPC Lopez enlisted in the South Carolina Army National Guard in February 2022.

SPC Lopez served as a paralegal specialist with the 151st Signal Battalion, South

Carolina Army National Guard, Greenville, South Carolina, at the time of her passing.

SPC Lopez is survived by her mother and stepfather, Brenda Lara and Evaristo Mejia Hernandez; her father, Victor Lopez; two sisters, Karla Wilson and Elizabeth Mejia Lara; her brother, Caleb Mejia Lara; her maternal grandparents, Candelaria Bastidas and Martin Lara; her aunt, Thalia Lara; and her nephew, Ashton Wilson.<sup>13</sup>

**LORENZ, Theodore Ernest** (1965–2024). COL (Ret.) Theodore “Ted” Lorenz of Penn Valley, Pennsylvania, passed away on 21 February 2024. He was fifty-eight years old.

COL (Ret.) Lorenz was born on 6 April 1965 in Hempstead, New York. His family moved to Northern New Jersey later, and he was class president and a champion cross-country runner at Metuchen High School. He graduated from high school in 1983, enlisted in the military in 1987, and completed basic and advanced individual training at Fort Jackson, South Carolina. After his initial training, he served with the New Jersey Army National Guard, 50th Armored Division, located in New Brunswick, New Jersey. He received his bachelor’s degree in political science from the University of Maryland in 1987 and his juris doctor, cum laude, from the Widener University School of Law in 1992. He also received a master of strategic studies, with honors, from the U.S. Army War College in 2020.

COL (Ret.) Lorenz served in the U.S. Army Reserve for more than twenty-eight years, retiring in December 2023. Prior to his retirement, he was the staff judge advocate for the 377th Theater Support Command in New Orleans, Louisiana, where he oversaw the legal operations for the largest Reserve unit in the Department of Defense. He also served as the commander of the 87th Legal Operations Detachment, headquartered in Salt Lake City, Utah, and the deputy commander of the 153d Legal Operations Detachment, headquartered in Horsham, Pennsylvania.

In 2007, then-CPT Lorenz deployed with the 82nd Airborne Division to Afghanistan in support of Operation Enduring Freedom, initially serving as a command judge advocate at Kandahar Airfield. He also served as the chief of claims

while at Bagram Airfield, where he oversaw claims operations for all of Afghanistan. COL (Ret.) Further, Lorenz conducted human rights training missions in Uganda and Uzbekistan, as well as a humanitarian assistance mission in Guatemala.

In his civilian capacity, COL (Ret.) Lorenz served as the general counsel for the Defense Acquisition University located on Ft. Belvoir, Virginia. Prior to that, he served as the senior associate general counsel with the Defense POW/MIA Accounting Agency and as an associate counsel for the Defense Logistics Agency.

He is survived by his wife, Anne, and two sons, Stephen and Brian.<sup>14</sup>

**MAXWELL, Philip** (1977–2024). Lieutenant Colonel (LTC) Philip Maxwell passed away on 1 May 2024 in Alexandria, Virginia. He was forty-six years old.

LTC Maxwell was born on 16 October 1977 in Superior Township, Michigan. In 1999, he graduated from Tufts University with a Bachelor of Arts degree. In 2003, he graduated with a master of public policy degree, and in 2005, he graduated with a juris doctor, both from the University of Michigan. He subsequently received his LL.M. from The Judge Advocate General’s Legal Center and School in 2016.

LTC Maxwell began his military service in 2006. After completing the Judge Advocate Officer Basic Course, his first duty station was Fort Sill, Oklahoma, where he served as a legal assistance attorney and command judge advocate for the 214th Field Artillery Brigade. He then served as trial counsel and assistant staff judge advocate at the Military Surface Deployment & Distribution Command at Scott Air Force Base. LTC Maxwell was then assigned to Eighth Army in South Korea as an administrative law attorney, operational law attorney, and chief of legal assistance. After that, he served as a defense counsel and senior defense counsel at Fort Sam Houston before being assigned as the chief of administrative law for 1st Cavalry Division. After completing the Graduate Course, LTC Maxwell served as the brigade judge advocate for the Combat Aviation Brigade, 4th Infantry Division, and subsequently as a fellow at the International Institute for Humanitarian Law in San Remo, Italy.



After his year-long fellowship, he was assigned as an assistant legal counsel at U.S. Africa Command in Stuttgart, Germany. LTC Maxwell's final assignment was deputy chief of plans within the Office of The Judge Advocate General at the Pentagon. He deployed to both Iraq and Afghanistan.

LTC Maxwell received numerous awards and decorations during his career. They include the Bronze Star Medal, Defense Meritorious Service Medal, Meritorious Service Medal (with four oak leaf clusters), Army Commendation Medal (with two oak leaf clusters), National Defense Service Medal, Afghanistan Campaign Medal (with one bronze campaign star), Iraq Campaign Medal (with one bronze campaign star), Global War on Terrorism Service Medal, Korean Defense Service Medal, Military Outstanding Volunteer Service Medal, Army Service Ribbon, Overseas Service Ribbon (with Roman numeral "5"), NATO Medal, Meritorious Unit Citation (with one oak leaf cluster), Parachutist Badge, and the Army Staff Identification Badge.

LTC Maxwell was an empathetic and selfless leader, a dedicated Soldier, and a cherished member of the JAG Corps family. He is survived by his son, Louis Titus Maxwell, his father, Dr. Donald Maxwell, and his siblings.<sup>15</sup>

#### **MOORE, Jaime Alicia** (1983–2024).

SSG Jaime Alicia Moore of Sweeny, Texas, passed away on 19 April 2024. She was forty years old.

SSG Moore, née McElyea, was born on 6 August 1983 in Athens, Alabama, to Alice and James McElyea. She enlisted in the U.S. Army in 2009 as a paralegal specialist.

SSG Moore's military assignments include paralegal NCO, Joint Communication Support Element, MacDill Air Force Base, Florida; special victim paralegal, U.S. Army Legal Services Agency, Fort Johnson, Louisiana; paralegal NCO, 2d Stryker Brigade Combat Team, Fort Carson, Colorado; paralegal NCO, 4th Division Sustainment Brigade, Fort Carson, Colorado; paralegal specialist, 97th Military Police Battalion, Fort Riley, Kansas; paralegal specialist, 1st Infantry Division, Fort Riley, Kansas; and paralegal specialist, 2d Infantry Division, Camp Red Cloud, Korea. SSG Moore

deployed to Afghanistan twice (in 2012 and 2014).

SSG Moore's military awards and decorations include the Army Commendation Medal (with two oak leaf clusters), Army Achievement Medal (with five oak leaf clusters), Army Good Conduct Medal (fourth Award), National Defense Service Medal, Afghanistan Campaign Medal (campaign star), Global War on Terrorism Service Medal, Korean Defense Service Medal, Noncommissioned Officer Professional Development Ribbon, Army Service Ribbon, and the NATO medal. She was a graduate of the Basic Leader Course and Advanced Leader Course.

She is survived by her husband, Steven Moore; son, Mason James Moore; parents, Alice and James McElyea; sister, Tammi Gates and brother-in-law, Mike; brothers, Scott McElyea and sister-in-law, Susie; Jimmy McElyea and sister-in-law, Cheryl; Jeff McElyea and sister-in-law, Char; and in-laws, Linda and Chester Moore.<sup>16</sup>

#### **NEDED OG, Daniel J.** (1975–2024).

Sergeant First Class (SFC) (Ret.) Daniel J. Nededog of Fayetteville, North Carolina, passed away on 10 August 2024. He was forty-eight years old.

SFC (Ret.) Nededog was born on 17 October 1975 to Antonio C. Nededog and the late Delia S.N. Nededog. He enlisted in the U.S. Army on 18 September 2008 and served as an infantryman at Fort Richardson, Alaska. He later joined the JAG Corps as a paralegal. SFC (Ret.) Nededog spent most of his career at Fort Bragg, North Carolina. He served as a senior brigade paralegal with the 82nd Airborne Division.

SFC (Ret.) Nededog is survived by his wife, Zina; his daughter, Erin; his father and stepmother, Antonio C. and Ellen; his brothers, sisters, and their spouses, Anthony P. and Misty, Geraldine S.N. Serralta, Marie N. and Francisco Guerrero, Denise N. and Benjamin Eseroma, Andrew J. and Imee, and Sean C. and Kayla; his mother-in-law, Soledad "Laling" B. Duenas; his brothers-in-law and their spouses, Steven P. and Shannon Duenas, and Robert A. and Deborah Duenas; and many other nephews, nieces, cousins, friends, loved ones, and Soldiers.<sup>17</sup>

#### **O'HARE, Patrick Dennis** (1952–2024).

COL (Ret.) Patrick "Pat" D. O'Hare of Charlottesville, Virginia, passed away on 27 February 2024. He was seventy-one years old.

COL (Ret.) O'Hare was born on 7 December 1952 to Joseph and Joan Brannon O'Hare. He obtained his bachelor of arts from the University of Dayton in 1974 and his juris doctor from Washington and Lee University in 1982.

COL (Ret.) O'Hare served in the JAG Corps for more than twenty years, culminating in his final assignment as the director of The Judge Advocate General's Legal Center in Charlottesville, Virginia. He also served as the director of the Combat Developments Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia; staff judge advocate, National Training Center and Fort Irwin, Fort Irwin, California; regional defense counsel, Fort Lewis, Washington; deputy staff judge advocate, 2d Infantry Division, Republic of Korea; professor of law, Criminal Law Division, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; instructor, Criminal Law Division, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; trial attorney, U.S. Army Legal Services Agency, Falls Church, Virginia; appellate attorney, U.S. Army Legal Services Agency, Falls Church, Virginia; trial counsel, Combined Arms Center, Fort Leavenworth, Kansas; and legal assistance officer, Combined Arms Center, Fort Leavenworth, Kansas. After his retirement from the military, COL (Ret.) O'Hare continued his career as a civilian at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, where he retired in 2021.

He is survived by his beloved wife of forty years, Sara Deaver O'Hare, and son, Patrick Andrew O'Hare, and daughter-in-law, Emily, of Richmond, Virginia. He is also survived by his brothers, Joseph O'Hare III of Silver Spring, Maryland, Kevin O'Hare of Falls Church, Virginia, and Michael O'Hare of Montgomery Village, Maryland.<sup>18</sup>

**PARTIN, John Patrick** (1944–2024). John Patrick Partin of Columbus, Georgia, passed

away on 22 November 1944. He was eighty years old.

Mr. Partin was born on 27 July 1944 in Tullahoma, Tennessee. An excellent student, he attended Vanderbilt University and graduated in 1966. While at Vanderbilt, he met his future wife, Vicky, and was president of the Sigma Chi fraternity. He then attained his juris doctor from the University of Virginia in 1969.

Mr. Partin entered the U.S. Army JAG Corps in June 1969 and began his career at Fort Benning, Georgia. He served as assistant trial counsel for the court-martial of First Lieutenant William L. Calley from his arrival at the post in September 1969 until the conclusion of the trial in March 1971.

After four years on active duty, Mr. Partin was awarded the Meritorious Service Medal and received an Honorable Discharge. In 1973, he joined a law firm with Milton Hirsch, remaining in Columbus, Georgia, and practiced law for the next forty-four years. He held various offices in the Columbus Bar Association, including serving as president in 1993.

Along with his wife, Vicky, he was very involved in philanthropy, his church, and the local community. Mr. Partin was an active member at St. Thomas Episcopal Church, where he served as a lay reader, eucharistic minister, and senior warden, as well as on the Personnel and Endowment Committees. He also served on the Diocesan Council for the Episcopal Diocese of Atlanta. Among other activities, he played a key role in bringing Habitat for Humanity to Columbus and served as its first president. John was a referee for youth and high school soccer in the 1980s and 1990s, held various positions on the Columbus Community Development Advisory Council, and was also a member of Beallwood Area Neighborhood Development. In 2017, he delivered the 11th Annual George S. Prugh Lecture in Military Legal History at The Judge Advocate General's Legal Center and School about his experience as assistant prosecutor in *United States vs. Calley*.

He is survived by his wife of fifty-seven years, Vicky; his son, Shane; his daughter-in-law, Anne; and his two brothers, Steve and Randy.<sup>19</sup>



COL (Ret.) Joseph Anthony Piasta. (Credit: Daniels Chapel of the Roses)

**PIASTA, Joseph Anthony II (1951–2024).**

COL (Ret.) Joseph “Joe” Anthony Piasta II, of Santa Rosa, California, passed away on 6 July 2024. He was seventy-three years old.

COL (Ret.) Piasta was born on 11 July 1951 in Tulsa, Oklahoma. He was the oldest of six children, with siblings John, Mary, Fran, Karen, and Polly. The family moved to Orange, California, where he excelled academically and graduated from Servite High School.

COL (Ret.) Piasta was the first in his family to attend college, enrolling in the University of San Francisco (USF), where he served as student-body president, an Army ROTC cadet, and a football player. He graduated with honors from both college and law school. At USF, COL (Ret.) Piasta met and fell in love with his future wife and native San Franciscan, Kathy Portman. He later received a master of law degree, *summa cum laude*, from George Washington University.

COL (Ret.) Piasta joined the U.S. Army JAG Corps in 1976 and moved to Fort Belvoir, Virginia. He served on active duty until 1981 and became an outstanding trial counsel. After leaving active duty, he began his private practice career of forty years, including twenty-five years as an adjunct professor at USF Law School. He built a

reputation of professionalism, integrity, and excellence across the local legal community.

COL (Ret.) Piasta also served in the U.S. Army Reserve for thirty years. He mobilized to active duty in 2003 for nine months in support of Operation Iraqi Freedom, serving as the staff judge advocate for the 91st Training Division. He took great pride in training, mentoring, and inspiring the next generation of military officers, including three of his children, who served in Iraq and Afghanistan and received Bronze Star Medals. For his exemplary service, he received several recognitions, including the Legion of Merit, Meritorious Service Medal, and Army Commendation Medal (with two oak leaf clusters).

COL (Ret.) Piasta is survived by his beloved wife, Kathy, of forty-eight years; his seven children, Mary, Edward, Ann, Theresa, Frank, Joan, and John; and his nine grandchildren, Robert, Constantine, William, Joseph, Colin, Violette, Elizabeth, John, and Everett.<sup>20</sup>

**RADOSH, Burnett H. (1935–2024).** COL (Ret.) Burnett H. Radosh passed away on 26 March 2024 in Arlington, Virginia. He was eighty-eight years old.

COL (Ret.) Radosh was born on 29 March 1935 in New York, New York, to Louis and Esther Radosh, and was raised in Brooklyn and Neponsit, Queens. He graduated with his bachelor's degree from the University of Chicago in 1953 and his *legum* baccalaureus from the New York University School of Law in 1956.

After graduating from law school, COL (Ret.) Radosh joined the U.S. Army as an enlisted Soldier, with infantry training at Fort Benning, Georgia. He became a law clerk in the Fort Benning JAG office, and within six months of his enlistment, he was appointed a first lieutenant in the Army JAG Corps.

In 1961, COL (Ret.) Radosh moved to France on the USNS *Patch*, a troop ship. After two years in France, he was assigned to Charlottesville, Virginia, and Fort Bragg, North Carolina. While in North Carolina, he spent one year with the 82nd Airborne Division before being detailed to go on his first tour to Vietnam. COL (Ret.) Radosh's second tour in Vietnam was with the 25th Infantry Division at Cù Chi. Following his



second tour in Vietnam, he was stationed in Northern Virginia, where he held various assignments, including working at the Pentagon for the Office of The Judge Advocate General. He retired from the U.S. Army on 30 June 1980.

COL (Ret.) Radosh is survived by his two sons, Alaric and Jeremy, and their families; his brother, Edward, and his family; and his nephew, Lee, and niece, Laura, along with their families.<sup>21</sup>

**RICHARDS, Kathryn Leigh** (1978–2024). Kathryn “Kate” Leigh Richards of Linden, North Carolina, passed away on 25 May 2024. She was forty-five years old.

Ms. Richards was born on 22 July 1978 in Jonesboro, Georgia. She graduated with a master’s degree in forensic psychology from Argosy University.

Ms. Richards served as the victim/witness liaison for I Corps, Joint Base Lewis-McChord, Washington, before being medically retired in April 2020. Prior to serving as the I Corps victim/witness liaison, Ms. Richards worked for the U.S. Attorney’s Office in Flagstaff, Arizona, a maximum-security prison in South Carolina, and the U.S. Attorney’s Office in Alaska as a victim advocate. She dedicated her career to being a victim advocate, providing support and compassion to those in need.

Ms. Richards is survived by her husband, Norman (Norm) Richards; their daughters, Addison Grace Richards and Sophia Ann Richards; her mother, Marilyn Manning Plunkett; her sister and brother-in-law, Allison and Lee Attaway, and their son, Kyle Attaway; her sister, Jessica Plunkett; her best friend, Shannon Johnson, and multiple aunts, uncles, and cousins.<sup>22</sup>

**ROSENSHEIN, Norman** (1943–2024). Norman Rosenshein passed away on 22 April 2024. He was eighty years old.

Mr. Rosenshein was born in Monticello, New York, on 25 April 1943. He lived in Woodburne, New York, until 1964, when he was drafted during the Vietnam War. After being discharged in 1966, he moved to Elizabeth, New Jersey, and started working at Columbia Broadcasting System (CBS). In 1967, he married Freda M. (Plotkin) Rosenshein, and they settled in Elizabeth. They had two daughters, Esther



Mr. Norman Rosenshein. (Credit: Jewish War Veterans of the USA Foundation)

and Belle. He left CBS in 1980 to become the vice president of engineering at Unitel Video. In 2001, his granddaughter, Flora, the joy of his life, was born. Freda and Norman stayed in Elizabeth until 2003, when they moved to Linden, New Jersey. In 2006, they moved to Charlottesville, Virginia, and Mr. Rosenshein began working for the U.S. Army at The Judge Advocate General’s Leadership Center and School as a senior television engineer.

Mr. Rosenshein was involved in community service, particularly with The Jewish War Veterans of the United States. He held every post, including national commander, and was dedicated to making sure veterans received the rights and benefits to which they were entitled. He will always be remembered as a kind and loving man who always had a smile for everyone. He believed in giving everything he could, and he always did. Mr. Rosenshein is survived by his wife, Freda; his daughters, Esther and Belle; his granddaughter, Flora; his brothers, Joel and Alan; and many nieces, nephews, and cousins.<sup>23</sup>

**SMITH, Matthew Louis** (1987–2024). SFC Matthew Louis Smith of Kapolei, Hawaii, passed away on 22 April 2024. He was thirty-seven years old.



SFC Matthew Louis Smith. (Credit: Epps Funeral Home)

SFC Smith was born on 8 January 1987 in Lake Wales, Florida. He graduated with a bachelor of arts in legal studies from the University of Central Florida in 2009 before enlisting in the U.S. Army in 2013.

SFC Smith’s military assignments included administrative law paralegal, Headquarters, U.S. Army Pacific, Fort Shafter, Hawaii; military justice NCO, 8th Theater Sustainment Command, Fort Shafter, Hawaii; court reporter, 8th Theater Sustainment Command, Fort Shafter, Hawaii; military justice operations NCOIC, 8th Theater Sustainment Command, Fort Shafter, Hawaii; and court reporter, Fort Cavazos, Texas. SFC Smith was among the first enlisted Soldiers to apply—and be selected—for the Funded Legal Education Program in 2020. SFC Smith was two weeks shy of graduating law school from the University of Hawaii at the time of his passing.

SFC Smith was a recipient of the inaugural Judge Advocate Legal Services Award in 2019. He graduated from the Advanced Leader Course, Court Reporter Course, and Basic Leader Course. His military awards include the Meritorious Service Medal, Army Commendation Medal, Army Achievement Medal (with two oak leaf clusters), Army Good Conduct Medal (2d

Award), National Defense Service Medal, Global War on Terrorism Service Medal, NCO Professional Development Ribbon (x2), and Army Service Ribbon.<sup>24</sup>

**STUDER, Eugene Amandus** (1947–2024). LTC (Ret.) Eugene “Gene” Amandus Studer passed away on 1 November 2024 at his home on Vashon Island, Washington. He was seventy-seven years old.

Raised in a military family, LTC (Ret.) Studer was born on 20 September 1947 at Fort Monmouth, New Jersey, to Rosario (Duarte) Studer and COL (Ret.) Robert Studer (U.S. Army). He was the oldest of four, with two sisters, Rita and Maria, and his brother, Mark. LTC (Ret.) Studer followed his father’s path into the U.S. Army, attending St. John’s University in Minnesota for one year before attending the United States Military Academy. While at the academy, he met the love of his life, Nancy Marilyn Feyereisen. After he graduated and commissioned as a second lieutenant, they were married on 6 June 1970 at Fort Myer, Virginia. They had three children: Jennifer, Matthew, and Marah.

A Soldier and scholar, LTC (Ret.) Studer dedicated his life to the pursuit of justice. He graduated from Santa Clara University Law School with a juris doctor in 1977 and furthered his legal education with an LL.M. from the University of Pennsylvania in 1983. Primarily serving as a defense attorney, LTC (Ret.) Studer’s military service was varied and complex. He retired from the Army in 1992 after twenty-two years of active-duty service. LTC (Ret.) Studer continued his career in medical malpractice at the U.S. Attorney’s office, where he served as an assistant U.S. attorney. He then moved to Abbey, Putnam, Albo, and Causey law firm, practicing maritime and personal injury law, defending workers and the underserved. He spent the final part of his career practicing medical malpractice law at the Johnson, Graffe, Keay, Moniz & Wick law firm.

LTC (Ret.) Studer was preceded in death by his parents, COL (Ret.) Robert Studer, Rosario Duarte Studer, and his sister, Rita Dudley. He is survived by his wife, Nancy Marilyn Studer (Feyereisen); his children, Jennifer Studer (Peter) Houston, COL (Ret.) Matthew (Kari) Studer,

and Marah (Sebastien Gaetan) Studer; his former son-in-law, Stewart (Jody) Todd; his brother, Mark (Nancy) Studer; his sister, Maria Studer; and his grandchildren, John Houston, Alex Todd, Emily Houston, Owen Todd, Maxwell Studer, Ellery Studer, Vivian Studer and Milo Studer.<sup>25</sup>

**TICHENOR, Carroll Jay** (1939–2024). COL (Ret.) Carroll “Cal” Jay Tichenor passed away on 3 June 2024. He was eighty-four years old.

COL (Ret.) Tichenor earned a bachelor’s degree in accounting from the University of Oregon. He worked during college as a communications clerk for the Oregon State Police Office before earning his juris doctor from the University of Oregon School of Law. He was admitted to the State Bar of Oregon in 1964.

After graduating from law school, COL (Ret.) Tichenor began his legal career as a commissioned officer for the U.S. Army JAG Corps. He served in Vietnam and was the lead prosecutor for the trial of COL Oran K. Henderson, the brigade commander during the My Lai massacre. Another career highlight was his service as the staff judge advocate for U.S. Eighth Army (Korea) from 1987 to 1989. He received many decorations and honors during his thirty years of service and was respected by his peers, subordinates, and commanding officers throughout his military career. He retired from active duty in 1994. For a man who did not particularly enjoy travel, he lived and served with his family in five countries and eleven U.S. states.

COL (Ret.) Tichenor began his civilian service by working as a deputy district attorney, and he was eventually elected as a circuit court judge in Yamhill County. He retired in 2015, yet he continued to serve as a senior judge. He reluctantly fully retired in 2018 to work on his golf game, cheer on his adored U of O Ducks, and spend time with his family.

COL (Ret.) Tichenor is survived by his beloved wife, Sue; his daughter, Dena, and her partner, Robin; his daughter, Dawn, and her husband, Tom; his daughter, Darcy, and her husband, Andy; his loving son-in-law, Mark; his sixteen brilliant grandchildren; his two devoted and possibly better golfer brothers, Don and John, and

their lovely wives, Carol and Ann; and his many nieces and nephews.<sup>26</sup>

**WOLF, Myron Auer** (1946–2024). Myron “Mickey” Auer Wolf passed away on 30 September 2024. He was seventy-seven years old.

Mr. Wolf was born in Cincinnati, Ohio, on 11 October 1946 to Aileen Schaengold Wolf and Stuart Auer Wolf. He served as a legal clerk in the U.S. Army and was part of the prosecution team for the trial of William Calley in 1971. He graduated from Miami University in 1968 and the University of Cincinnati College of Law in 1975 after his service in the Army. He planned to be an attorney from a young age, and he accomplished that goal and practiced law in Hamilton, Ohio, for forty-two years. He was president of the Butler County Bar Association and served on the Hamilton Community Foundation scholarship committee. He moved to Marco Island, Florida, in 2017 when he retired from the practice of law.

Mr. Wolf’s family was an important part of his life. He was a loving husband and a devoted father. He was an avid sports fan and loved watching the Cincinnati Bengals and The Ohio State University football teams. Mr. Wolf was an avid reader, movie-goer, and fan of Broadway theatre. In early life, he played squash, tennis, and golf, and he took up running. He enjoyed fishing, boating, and world travel. Keeping in touch with family and friends was paramount to him.

Mr. Wolf is survived by his wife of fifty-five years, Sara Straight Wolf; their two sons, Michael Wolf of Chicago and Stephen Wolf of Los Angeles; Stephen’s partner, Sebastian Korob; his sister, Jacqueline (Thomas) Kihm; and his aunt and cousins.<sup>27</sup> **TAL**

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*Dr. Roland is the Regimental Historian, Archivist, and Professor of Legal History and Leadership at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. *Notice of Passing*, JAGCNET (Dec. 20, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=BCD3629F73F6788985258BF900601E64>.



2. *Notice of Passing – Staff Sergeant Brandon Taylor Benjamin*, JAGCNET (Mar. 4, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=C03A7965A6CDE66285258AD6004408E1>.
3. *Notice of Passing – Colonel (Retired) Henry L. “Roy” Brown*, JAGCNET (Jan. 30, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=A5F588C8D-B16758685258AB40068F355>.
4. *Notice of Passing – Captain Chad Ryan Christian*, JAGCNET (Apr. 30, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=268E2112E41E192085258B0F00655E44>.
5. *Notice of Passing – Colonel (Retired) Peter Martin Cullen*, JAGCNET (Jan. 9, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=1F0D4F99CD4F6AD085258A9F00759740>.
6. *Deborah Ann Culpepper*, YAKIMA HERALD-REPUBLIC, <https://obituaries.yakimaherald.com/obituary/deborah-culpepper-1089715690> (last visited Jan. 20, 2025).
7. *Notice of Passing*, JAGCNET (Sept. 23, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=720EB7FF3608363F-85258BA1005728F5>.
8. *Notice of Passing*, JAGCNET (July 25, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=30669B39BDD-7E39F85258B6500495353>.
9. *Notice of Passing – Sergeant Victor Earl Durkee*, JAGCNET (Apr. 23, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=7ED0A94655D3FD5D85258B0800406334>.
10. *Notice of Passing*, JAGCNET (Oct. 24, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=93D0A8ECF9714A7385258B-C0006C8ACB>.
11. *Notice of Passing*, JAGCNET (July 25, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=24B4062BE446273D85258B650048BED5>.
12. *Notice of Passing*, JAGCNET (Oct. 18, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=801D722CBA566FC885258B-BA006938B1>.
13. *Notice of Passing – Specialist Kristal Lopez*, JAGCNET (Apr. 8, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=17D-C0ABF9AFAAB2485258AF90050A031>.
14. *Notice of Passing – Colonel (Retired) Theodore “Ted” Lorenz*, JAGCNET (Feb. 26, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=F26148900F4C-F59685258ACF00439DD8>.
15. *Notice of Passing – Lieutenant Colonel Philip (Phil) Maxwell*, Personnel, Plans & Training Office (PPTO) – Office of The Judge Advocate General (OTJAG), JAGCNET (May 9, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=317567DB955CDE2A85258B18003E1E9E>.
16. *Notice of Passing – Staff Sergeant (Retired) Jaime Alicia Moore*, JAGCNET (Apr. 30, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=56BC-755909C6B99F85258B0F0065848B>.
17. *Notice of Passing*, JAGCNET (Aug. 20, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=40F324A4D240AF7C85258B-7F00426B6D>.
18. *Notice of Passing – Colonel (Retired) Patrick Dennis O’Hare*, JAGCNET (Mar. 4, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=57153DBDAE7A27E-B85258AD6005B596D>.
19. *John Partin*, LEGACY.COM, <https://www.legacy.com/obituaries/name/john-partin-obituary?pid=208102546> (last visited Jan. 30, 2025).
20. *Notice of Passing*, JAGCNET (Sept. 23, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=4386D53AC-611164C85258BA10056EBF8>.
21. *Notice of Passing – Colonel (Retired) Burnett H. Radosh*, JAGCNET (May 17, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=8535E5A95A02B6D485258B20006AA4BC>.
22. *Notice of Passing – Mrs. Kathryn “Kate” Leigh Richards*, JAGCNET (June 4, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=7503E07A4392118485258B32006DED9B>.
23. *Norman Rosenshein*, HIGGINS & BONNER, <https://www.higginsandbonner.com/obituary/Norman-Rosenshein> (last visited Jan. 30, 2025).
24. *Notice of Passing – Sergeant First Class Matthew Louis Smith*, JAGCNET (June 3, 2024), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentid=9B079D279669F14B85258B31006CFB8B>.
25. *Eugene Amandus Studer (Gene)*, SEATTLE TIMES, <https://obituaries.seattletimes.com/obituary/eugene-studer-1091817002> (last visited Jan. 30, 2025).
26. *Carroll Jay “Cal” Tichenor*, LEGACY, <https://www.legacy.com/us/obituaries/name/carroll-tichenor-obituary?id=55288950> (last visited Jan. 30, 2025).
27. *Myron Auer Wolf*, DIGNITY MEMORIAL, <https://www.dignitymemorial.com/obituaries/marco-island-fl/myron-wolf-12012253> (last visited Jan. 30, 2025).



Governor Bert T. Combs. (Credit: Abbie Rowe)

# Lore of the Corps

## Coming Full Circle

### Governor Bert Combs's Journey from Fort Knox to Kentucky Leadership and Back

By Mr. Brandon Borgemenke

On a sunny May afternoon in 1960, Governor Bert T. Combs stood on the grounds of Fort Knox, dedicating a new grave marker

for Abraham Lincoln's grandmother, Bathsheba Lincoln.<sup>1</sup> This moment, bridging Kentucky's past and present, also served

as a poignant reminder of Combs's own journey; from a young Army judge advocate (JA) to the Commonwealth's highest office, Combs gravitated back to this familiar military installation as governor years after his formative service in the Nation's oldest law firm. Combs's story is one of coming full circle, a journey that began and ended with service, both in and out of uniform, animated by the desire to be a force for justice.

Bert Thomas Combs was born in 1911 in Manchester, Kentucky, tucked away in the lush mountains of eastern Kentucky.<sup>2</sup> Academic excellence and a strong work ethic marked his early life. In high school, Combs and his sister rode their pony, lovingly named "Turkey," to school, allowing him to graze in the woods near the school.<sup>3</sup> Combs worked his way through college, first at Cumberland College and then at the University of Kentucky Law School, where he graduated second in his class in 1937.<sup>4</sup> This legal education would prove invaluable in his future military and political careers.

When World War II erupted, Combs answered the Nation's call. Leaving his Prestonsburg law practice in September 1942, he enlisted in the U.S. Army as a private.<sup>5</sup> The events at Pearl Harbor prompted Combs's desire to contribute to the war effort and moved him to join the Service.<sup>6</sup> Combs matriculated into the Army through the Volunteer Officer Candidate program.<sup>7</sup> Initiated in 1942, the program allowed men who had previously been deferred from military service to apply for officer training.<sup>8</sup> Under this scheme, candidates like Combs could enter basic training with the opportunity to attend Officer Candidate School and retain the option to return to civilian life if not selected or commissioned.<sup>9</sup>

After completing his basic training at Aberdeen Proving Ground, Maryland, Combs attended Officer Candidate School in 1943 at the Judge Advocate General's School in Ann Arbor, Michigan, for training to become a JA.<sup>10</sup> Graduating as a second lieutenant in three months' time, Combs was assigned to Fort Knox, his first-choice duty station.<sup>11</sup> At Fort Knox, Combs served as the staff judge advocate,



which allowed him to drive to Lexington every weekend to visit his wife, Mabel, and newborn daughter, Lois.<sup>12</sup>

By early 1945, then-First Lieutenant Combs served in the South Pacific on General Douglas MacArthur's staff in the

particularly in his emphasis on the rule of law and equitable application of justice.

During his tenure as governor, Combs's journey came full circle, bringing him back to Fort Knox. The 1960 dedication of Bathsheba Lincoln's grave marker

## **His journey from Army private to JA captain, from wartime legal investigator to peacetime governor, exemplifies how military legal service can prepare individuals for future challenges in civilian government.**

War Crimes Department.<sup>13</sup> Rising to chief of the investigating section, Combs assisted in the investigation and prosecution of Japanese war criminals.<sup>14</sup> This role allowed him to apply his legal expertise to complex international legal issues, an experience that would later prove valuable in his political career. His exemplary service earned him the Bronze Star and the Philippine Medal of Merit.<sup>15</sup> Combs was promoted to captain in the fall of 1945.<sup>16</sup> As a JA, Combs honed his legal skills by working in military justice assignments to operational law assignments.

Upon his discharge in 1946, Combs decided to return home to Kentucky.<sup>17</sup> This homecoming set the stage for his rapid ascent in Kentucky's legal and political spheres. He resumed his law practice in Prestonsburg, served as city attorney and Commonwealth's attorney, and, in 1951, filled a vacancy on the Kentucky Court of Appeals (then the state's highest court).<sup>18</sup> In each of these roles, Combs drew upon his JAG Corps experience and applied the discipline, attention to detail, and legal acumen he developed during his military service.

Combs's gubernatorial ambitions emerged in 1955, though his initial bid was unsuccessful.<sup>19</sup> Undeterred, he ran again in 1959 and emerged victorious.<sup>20</sup> As governor from 1959 to 1963, Combs left an indelible mark on Kentucky by championing education, conservation, and infrastructure improvements.<sup>21</sup> His approach to governance was notably influenced by his legal background and JAG Corps experience,

was more than a historical commemoration; it symbolically linked Combs's civilian leadership to his military and legal roots.<sup>22</sup> Standing on the grounds upon which he once served as a young staff judge advocate, now as the Commonwealth's highest-ranking official, Combs embodied the ideal of the citizen-Soldier turned public servant. This event at Fort Knox encapsulated the essence of Combs's remarkable journey. From a young man leaving home to serve his country as a military lawyer to a seasoned leader returning to honor the past and shape the future, Combs's life traced a path of service that continually brought him back to his Kentucky roots and legal foundations.

Combs's story resonates with JAs who parlay their military legal experience into public leadership roles. His journey from Army private to JA captain, from wartime legal investigator to peacetime governor, exemplifies how military legal service can prepare individuals for future challenges in civilian government.

Bert T. Combs passed away in 1991 at the age of eighty, leaving behind a legacy of service both in and out of uniform.<sup>23</sup> Yet, his story did not end there. In a fitting tribute, part of the Mountain Parkway—a highway system he championed as governor—was renamed the Bert T. Combs Mountain Parkway.<sup>24</sup> This highway, like Combs's own journey, connects the rural Eastern Kentucky of his youth with the broader world he came to serve, much as his JAG Corps experience connected his

local legal knowledge with a global perspective.

Today, as JAs continue to mill about the offices, fields, and forests at Fort Knox, they unknowingly follow in the footsteps of a man who began his own journey of service on those very grounds. Bert Combs's life serves as an inspiring example for military lawyers and all Service members of how one can translate military legal experience into meaningful civilian leadership, and how the call to serve can bring us full circle, back to where we began. **TAL**

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### **Notes**

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5. *Id.* at 3-4.
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7. *Id.*
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9. *Id.*
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11. *Id.* at 19-20.
12. *JAGS Alumni Notes*, THE JUDGE ADVOC. J., Mar. 1945, at 58.
13. Ky. Hist. Soc'y, *supra* note 2, at 3-4.
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15. *Id.* at 4.
16. *List of Promotions*, THE JUDGE ADVOC. J., Fall-Winter 1945, at 43.
17. Ky. Hist. Soc'y, *supra* note 2, at 4.
18. *Id.*
19. *Id.*
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21. *Bert Combs Dies at 80; Ex-Kentucky Governor*, WASH. POST, Dec. 5, 1991, at D11.
22. *Lincolniana Notes*, *supra* note 1, at 188-89.
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A U.S. Army AH-64 Apache assigned to 1-229th Attack Battalion "Tigarsharks," 16th Combat Aviation Brigade, 7th Infantry Division, prepares to perform a deck landing on the USS *Ronald Reagan* (CVN 76) during deck landing qualifications while underway in the Strait of Juan de Fuca. (Credit: SGT Brandon Bruer)

## Practice Notes

# A Waterproof Guide to the Law of the Sea and the Law of Naval Operations

*By Colonel Susan McConnell and Lieutenant Colonel John C. Tramazzo*

The U.S. Army's primary mission is to "organize, train, and equip its forces to conduct . . . land combat."<sup>1</sup> However, no military Service can ignore the "interconnectedness of sea and land."<sup>2</sup> A majority of people on earth live on land masses near or surrounded by water.<sup>3</sup> Further, recent incidents involving cutting undersea cables, which impact communications on land, and ground-based attacks on commercial vessels in the Red Sea highlight the domain overlap.<sup>4</sup>

Indeed, as Field Manual 3-0 reflects, the Army must be prepared to operate in a maritime environment.<sup>5</sup> The maritime domain includes littoral regions where salt water and wind might impact operations on land. It also includes the Arctic region, where ice can render roadways, seaports, and airfields unusable. In a

future armed conflict, Army forces may be required to conduct offensive operations under these conditions, and they may be required to defend against enemy amphibious assaults. In our view, Army commanders and staffs, including judge advocates (JAs), must grapple with the unique challenges associated with the sea. This includes understanding the law of the sea and the law of naval operations.

We had the pleasure of studying these issues at the U.S. Naval War College from August 2022 to June 2023.<sup>6</sup> The U.S. Navy's Senior Service College (i.e., the College of Naval Warfare) and Intermediate-Level Education Course (i.e., the College of Naval Command & Staff) are co-located at Naval Station Newport in Rhode Island. Senior officers from all six Services and



approximately seventy nations attend the “senior course,” while officers in the grade of O-4 from all Services and approximately ninety nations attend the “junior course.” The core curriculum for each cohort includes military history, strategic theory, security decision-making, joint maritime operations (including operational maritime law), and leadership in the profession of arms.<sup>7</sup>

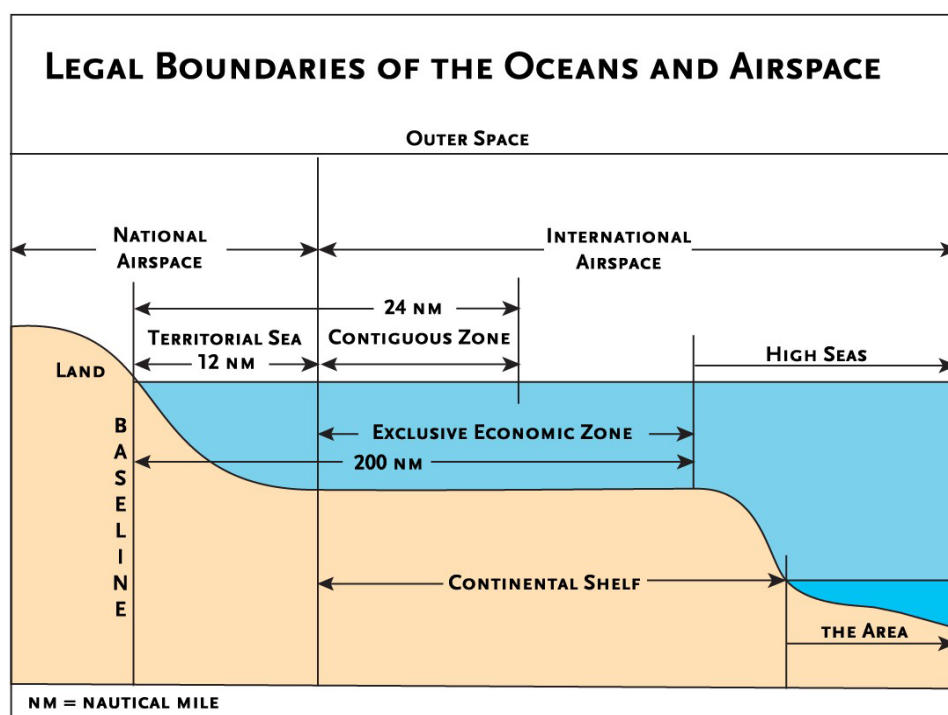
After a year of considering strategic, operational, and some tactical-level issues from a naval perspective, we compiled a list of materials and recommendations for Army JAs interested in learning more about the law of the sea and the law of naval operations and for those who may provide legal advice in support of multi-domain operations in the future.

## The Law of the Sea

The contemporary law of the sea proceeds from the three 1958 Geneva Conventions on the Law of the Sea.<sup>8</sup> Those treaties left several critical issues (e.g., the width of “territorial seas”) unsettled. Thus, between 1973 and 1982, the United Nations (U.N.) convened a conference to update the 1958 treaties.<sup>9</sup> The resulting U.N. Convention on the Law of the Sea (UNCLOS) came into effect in 1994 after ratification by the requisite sixty countries.<sup>10</sup>

UNCLOS is considered a constitution for the world’s oceans, including the airspace above and the seabed and subsoil below them. Although the United States has not ratified UNCLOS, it recognizes that most of the Convention’s provisions reflect customary international law (CIL) and are binding on all nations.<sup>11</sup> The 2022 *National Security Strategy* includes a vow that the United States will “stand up for freedom of navigation and overflight, support environmental protection, and oppose destructive distant water fishing practices by upholding international laws and norms, including the customary international law rules in [UNCLOS].”<sup>12</sup>

UNCLOS and CIL govern military operations in the maritime domain, which includes “the oceans, seas, bays, estuaries, islands, coastal areas, seabeds, and littoral zones, including the airspace above these geographical areas.”<sup>13</sup> UNCLOS and CIL also regulate maritime navigation,



U.S. DEP'T OF NAVY ET AL., NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1-3 (Mar. 2022).

commerce, and the conservation, regulation, and exploitation of ocean resources.<sup>14</sup> Understanding this body of law is critical considering ongoing disputes and malign behavior in vital locations like the South China Sea and the Persian Gulf.<sup>15</sup> As some scholars have argued, “[T]he threat of naval war is growing.”<sup>16</sup> Additionally, as the Arctic Ocean melts, the law of the sea will impact how states traverse newly navigable waterways and conduct or protect new commercial activity.<sup>17</sup>

To deepen their understanding of the law of the sea, we recommend that practitioners read the full text of UNCLOS,<sup>18</sup> the 1983 U.S. Ocean Policy Statement,<sup>19</sup> Senate Treaty Document 103-39,<sup>20</sup> the 1989 USSR-U.S. Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage,<sup>21</sup> and the U.S. Position on UNCLOS (prepared in 2021 by Professor Raul (Pete) Pedrozo for the Stockton Center’s *International Law Studies*).<sup>22</sup> We also recommend *A Practical Guide to the Law of the Sea* by James P. Benoit,<sup>23</sup> Tuft University’s internet-based policy primer on the law of the sea,<sup>24</sup> and *The Law of the Sea and Naval Operations*, a straightforward law review article written

in 1997 by Professors John Astley III and Michael N. Schmitt.<sup>25</sup> These documents and resources are vital to understanding the laws applicable to the maritime domain.

## The Law of Naval Operations

The Navy proclaims it will “fly, sail, and operate—safely and responsibly—wherever international law allows.”<sup>26</sup> Many other nations’ navies do the same. Navigational freedom allows access to strategic areas of the world, facilitates support of deployed forces, enables military forces to operate worldwide, and ensures uninterrupted global commerce.<sup>27</sup> However, this freedom is increasingly under threat. As the Chief of Naval Operations wrote in his 2021 Navigation Plan, “China and Russia are undermining the free and open conditions at sea that have benefited so many for so long.”<sup>28</sup> The growing challenges that these nations and their actions bring to freedom of navigation have an outsized impact on U.S. maritime operations. Unlike land operations, which occur on states’ territory, only some naval operations occur in areas subject to the territorial sovereignty of states. Many naval operations occur in areas *not* subject to the territorial sovereignty



7th Special Forces Group performs an amphibious assault demonstration during the Hyundai Air and Sea Show and U.S. Army SaluteFest in Miami Beach, FL. (Credit: MSG Justin P. Morelli)

of any state (i.e., international waters and international airspace). Military interactions in these global commons are ordinary occurrences for naval personnel, which is why an understanding of the law of naval operations is essential for them.

The law of naval operations includes those facets of international law, U.S. domestic law, U.S. military regulations, and the domestic law of other nations affecting military planning and operations at sea. During the deterrent or pre-hostilities phase of an operation, naval forces must respect the sovereignty of nations regarding their national airspace and territorial seas.<sup>29</sup> During the hostilities phase of an operation, when the law of armed conflict (LOAC) governs the situation, the movement of military forces may be conducted without regard to the sovereign territorial rights of the enemy belligerent nation.<sup>30</sup> However, the traditional sovereignty of other states (e.g., neutral states) must continue to be respected as a matter of law.<sup>31</sup>

To deepen an understanding of these foundational legal principles, we recommend that practitioners review the Second Geneva Convention,<sup>32</sup> the 2023 *Newport Manual on the Law of Naval Warfare*,<sup>33</sup> the Chief of Naval Operations' 2024 Navigation Plan,<sup>34</sup> the 2022 U.S. Indo-Pacific Strategy,<sup>35</sup> Navy Warfare Publication 1-14M (*The*

*Commander's Handbook on the Law of Naval Operations*),<sup>36</sup> the *Newport Rules of Engagement Handbook*,<sup>37</sup> (particularly its provisions on maritime operations), and the *U.S. Freedom of Navigation Program*.<sup>38</sup>

### The Army's Role in the Maritime Domain

Finally, as Field Manual 3-0 makes clear, "Army and joint force planning must reflect an understanding of the dynamic nature of the threats and constraints to land forces in maritime regions."<sup>39</sup> Army forces rely on maritime capabilities for deployment and sustainment.<sup>40</sup> Maritime forces depend on the joint force for protection and to "secure geographic choke points," "influence populations," and "mitigate long timelines associated with maritime movement."<sup>41</sup>

The Army is adapting its doctrine to integrate with the Navy's "distributed maritime operations" concept, which relies on small, dispersed naval formations.<sup>42</sup> Additionally, the Army must prepare to support the U.S. Marine Corps's "expeditionary advanced base operations" (EABO) concept, which relies on "stand-in forces" in the littorals and the U.S. Air Force's "agile combat employment" (ACE) concept.<sup>43</sup> Army forces can enable maritime operations in multiple ways. Some of these ways include attacks against land-based threats to

naval assets, protecting ports and defending land areas that control maritime choke points, denying maritime areas with surface-to-surface fires and surface-to-air fires, integrating joint all-source intelligence to identify threats to maritime capabilities, and providing directed logistics support to maritime-oriented forces operating from land. The Army's multi-domain task forces, for example, are designed to support the sea Services with long-range fires and non-kinetic capabilities (e.g., electronic warfare support, cyber and space operations).<sup>44</sup>

JAs supporting multi-domain operations must be prepared to advise on issues relating to expeditionary basing and operational contracting; information operations; strikes against maritime targets; rules applicable to stopping, boarding, and searching vessels; rules applicable to the treatment of shipwrecked persons; support to displaced civilians; and command authorities (rules of engagement, collective self-defense, detention operations, etc.). By articulating the legal bases for operations, JAs can enable warfighting commands and counter adversaries' incorrect claims that U.S. forces act in violation of international law. The legitimacy of U.S. operations is tied to international law and the narratives around it.

We recommend that Army JAs familiarize themselves with Joint Publication 3-32 (*Joint Maritime Operations*),<sup>45</sup> Army Field Manual 3-0's provisions relating to the maritime domain, particularly chapter 7 (*Army Operations in Maritime Environments*),<sup>46</sup> and other Services' multi-domain operating concepts.<sup>47</sup>

### Conclusion

The United States is a maritime power that relies on the sea for food, security, projecting power, and facilitating economic prosperity. The oceans connect societies and businesses and create opportunities for cooperation, even with strategic competitors. The U.S. military plays a vital role in defending our Nation's access to the sea by ensuring the openness of these massive global commons. Army forces are rapidly posturing to enable operations in the maritime domain, particularly in the Indo-Pacific theater, where China seeks to degrade U.S. influence and impede its freedom of



movement. Army JAs must also prepare to enable multi-domain operations across the competition continuum. An understanding of the law of the sea and the law of naval operations is vital in this “decisive decade.”<sup>48</sup> **TAL**

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3. See FM 3-0, *supra* note 1, para. 7-1.
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7. *College of Naval Warfare Core Curriculum*, U.S. NAVAL WAR COLL., <https://usnwc.edu/college-of-naval-warfare/Core-Curriculum> (last visited Dec. 9, 2024); *College of Naval Command and Staff Core Curriculum*, U.S. NAVAL WAR COLL., <https://usnwc.edu/college-of-naval-command-and-staff/Core-Curriculum> (last visited Dec. 9, 2024).
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29. See, e.g., Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415.
30. See generally OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ch. V (12 June 2015) (C1, 31 July 2023) (addressing the conduct of hostilities).
31. Convention Concerning the Rights and Duties of Neutral Powers in Naval War, *supra* note 29, art. 1.
32. Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, arts. 22-27, Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 85.
33. James Kraska et al., *The Newport Manual on the Law of Naval Warfare*, 101 INT'L L. STUD. 1 (2023).
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38. *U.S. Freedom of Navigation Program*, 97 INT'L L. STUD. 70 (2021).
39. See FM 3-0, *supra* note 1, para. 7-1.
40. *Id.* para. 1-91.
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43. U.S. MARINE CORPS, TENTATIVE MANUAL FOR EXPEDITIONARY ADVANCED BASE OPERATIONS paras. 1.1, 1.3 (9 May 2023) [hereinafter TENTATIVE MANUAL FOR EABO]; U.S. DEP'T OF AIR FORCE, DOCTRINE NOTE 1-21, AGILE COMBAT EMPLOYMENT (23 Aug. 2022) [hereinafter AFDN 1-21].
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A "Rhino Tank," modified with SGT Cullin's solution to cut through the hedgerows of Eastern France during World War II. (Source: Normandy Archives)

## Practice Notes

# Where Have All the Sergeant Cullins Gone? Future Innovation at the Tactical Level

*By Colonel Ryan W. Leary*

In 1944, shortly after the successful invasion of Western Europe, the Army had a capability gap that threatened to slow the advance of forces deeper into Europe and potentially weaken the D-Day momentum enjoyed by Allied forces.<sup>1</sup> Our Army could not rapidly transit tanks through hedgerows, pervasive throughout Eastern France, without either canalizing forces to road networks or exposing the vulnerable tank underbelly to enemy forces.<sup>2</sup> Sergeant (SGT) Curtis Cullin famously developed an innovative solution to this problem; he repurposed scrap steel from German road-blocks and affixed steel prongs on the front of U.S. tanks, which

enabled tanks to easily cut through hedgerows and support infantry advances into the interior of France.<sup>3</sup> When General Omar Bradley witnessed these "Rhino Tanks" in action, he ordered a full-scale retrofitting of the majority of tanks in the First Army in advance of Operation Cobra.<sup>4</sup>

To be fully prepared for our next conflict against a near-peer adversary in a multi-domain environment, we must be agile enough to innovate on two levels; we must conduct large end-item innovation at the strategic level and iterative, fast-paced innovation at the tactical level to fill smaller capability gaps that could give our



force the edge on the battlefield.<sup>5</sup> As we prepare for the next conflict, a question to consider is whether we have the authority to enable a modern-day SGT Cullin—to solve capability gaps at the tactical level and elevate those innovations to strategic leaders who can magnify the impact of those innovative solutions, at scale, across the force. This article briefly highlights the necessity of pushing research, development, testing, and evaluation (RDT&E) authority and funding sources to the tactical level. It then proposes potential enabling solutions that would provide a pathway for tactical-level innovation.

### **Why Innovate at the Tactical Level?**

With the advent of multi-domain operations and the resurgence of major nation-states competing on the global stage, identifying capability gaps and developing innovative solutions to maintain a competitive advantage will be critical to success during both the competition stage and armed conflict.<sup>6</sup> Further, by demonstrating our adaptability and the cost of engaging in combat with our joint force, we may be able to deter future conflict with our near-peer adversaries.<sup>7</sup> While innovation across major combat and communications systems will be key to successful competition, to reduce the risk of vulnerability, we must also be able to assess shortcomings by employing existing and future systems well below the strategic level.

Leaders at the operational and tactical levels recognize this requirement, are developing an innovative culture, and are placing a premium on a Soldier's ability to find innovative solutions at the tactical level.<sup>8</sup> During my service as the staff judge advocate at the 101st Airborne Division (Air Assault), the division commander drove innovation by standing up EagleWerx: an innovation center that partners with regional educational facilities to develop innovative solutions and affords Soldiers within the division a space to work on and cultivate ideas based on capability gaps they identify at their level.<sup>9</sup>

### **The Fiscal Authority Problem**

In our current scheme of laws and authorities, commanders at the tactical level lack the authority to pursue innovative

solutions beyond the initial identification of a capability gap. More specifically, under fiscal law provisions, agencies may only spend appropriations for purposes Congress specifically designates.<sup>10</sup> While the operations and maintenance (O&M) appropriation provides seemingly broad authority to expend funds,<sup>11</sup> when a more

**While innovation across major combat and communications systems will be key to successful competition, to reduce the risk of vulnerability, we must also be able to assess shortcomings by employing existing and future systems well below the strategic level.**

specific appropriation exists for a particular purpose, agencies must use that appropriation.<sup>12</sup> In the case of developing innovative solutions for capability gaps, the RDT&E appropriation is more focused on researching, developing, and testing those potential solutions.<sup>13</sup> It is, therefore, the proper appropriation to utilize for this purpose. The fiscal year 2024 Further Consolidated Appropriations Act states that the RDT&E funds are for “expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment.”<sup>14</sup> Therefore, after tactical-level units identify gaps in capabilities that necessitate modifications or additional development, they require a unit or level of command with access to RDT&E to support and ultimately underwrite the development or testing needed to move from the capability gap identification phase to the solution development phase.

While some tactical-level units have access to procurement authority or can conduct small-scale development,<sup>15</sup> most conventional units at the tactical level only have access to standard O&M funds; they would, therefore, be unable to develop any material solution to any capability gap they identify at their level.

### **Risk of Pushing Innovation Authority to the Tactical Level**

As presented, empowering subordinate Service members and leaders to innovate and encouraging bottom-up innovation sounds like an easy win for everyone—it encourages creativity, empowers junior members of our organization to become

part of the solution to challenges they see at their level, and better suits our equipment for our operational requirements. So, why not just push down that fiscal authority by allocating RDT&E funds to units across the force?

Practically speaking, broad-based innovation in the defense enterprise is extraordinarily expensive, and the RDT&E funds provided to the Department of Defense (DoD) are targeted at large-scale, systematic programs and solutions.<sup>16</sup> RDT&E is also a limited resource. Even though the last RDT&E appropriation provided by Congress included \$17 billion for the Army,<sup>17</sup> when you look across priorities for modernizing the force, enabling multi-domain operations, and competing in space, it becomes clear how challenging it would be for tactical-level units to compete for resources to support an innovation that may not ultimately provide an impact that compares to those broader initiatives.

Consequently, to seed the innovation of the next SGT Cullin and to avoid missing an opportunity to fill capability gaps that could be crucial in our next conflict, we must develop a new approach that affords tactical-level innovation and development without taxing the already overburdened RDT&E system for the DoD.<sup>18</sup>



A U.S. Soldier holds a drone during the 173rd Airborne Brigade's Innovation Symposium as part of the inaugural Vicenza Military Community (VMC) Innovation Week hosted by U.S. Army Southern European Task Force, Africa and the 173rd Airborne Brigade at Caserma Del Din, Italy. (Credit: PFC Jamaris Casado)

### Potential Solutions to the Tactical Innovation Authorities Gap

With a full appreciation for the limitations on our ability to push down RDT&E authority to conventional units below the strategic and operational level, some solutions would minimize this risk while still allowing the junior members of our organization to identify capability gaps, develop their own solutions, and potentially transmit those solutions to similar formations across the force. Two potential options would achieve these goals.

The first is to create an authority that permits O&M funding for RDT&E purposes up to a certain threshold amount, similar to how components may use O&M funds for investment items up to \$350,000 under the existing expense-investment threshold.<sup>19</sup> The second is to budget for and provide a small amount of RDT&E at an appropriate level and encourage organizations to submit innovation proposals to

receive RDT&E for particular projects.

#### *Establish a Threshold for Using O&M to Support RDT&E Initiatives*

Pursuant to the tenets of fiscal law discussed above, whereby an agency must use the most specific appropriations for expenditures that fall within that purpose, units are ordinarily required to use procurement funds to acquire investment items.<sup>20</sup> Recognizing, however, the limited access that lower levels have to procurement resources and their need to obtain lower-cost investment items to conduct ordinary operations, Congress annually authorizes agencies to expend O&M funds for investment items whose value does not exceed \$350,000.<sup>21</sup>

To encourage tactical-level innovation and enable commanders to fill capability gaps that, on their face, may not seem to rise to the level appropriate for Service labs and program executive offices, Congress

could authorize O&M funds, up to a certain amount, per innovation project (e.g., \$500,000) and limit the total cap on this authority's use per year (e.g., \$1.5 million). This approach makes funds immediately accessible to commanders at all levels and provides a built-in cap on annual expenditures. It also incentivizes a deliberate and measured approach to innovation at the tactical level because commanders must weigh the decision to fund RDT&E projects against all other requirements funded from their base budget.

#### *A Shark Tank<sup>22</sup> of Tactical-Level Innovation*

The second solution—to request an additional small amount of RDT&E funding in the annual appropriation—would enable each Service to manage its portion of that funding and support the tactical-level innovations of its choice. It would not be difficult to establish a process whereby units submit their proposals or pitch them to a



board of decision-makers.<sup>23</sup> As mentioned above, U.S. Central Command, XVIII Airborne Corps, and 25th Infantry Division have all developed and executed similar endeavors to encourage and promote Service member innovation.<sup>24</sup> With this new funding scheme, decision-makers running these Shark Tank-like programs could then easily provide their portion of RDT&E funding to selected projects. Similar to how General Bradley recognized how effective the Rhino Tank would be if every element in his Corps had that capability, this approach would afford strategic-level leaders to examine the impact of these innovations when distributed at scale across the force.

## Conclusion

History assures us that our next conflict will not be exactly like the last. Furthermore, in large-scale combat operations in a multi-domain environment, the pace at which a joint force can adapt will be critical to achieving success. By financially empowering the innovative spirit and vision of our Soldiers and leaders at the tactical level, we can prevent the hedgerows of the next conflict from stifling our momentum on the battlefield. Whatever approach we choose to help close the capability gaps at our tactical level, we should not delay in implementation so that we can, hopefully, minimize any necessary in-stride adaptations and maximize our advantage in the next fight. **TAL**

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## Notes

1. History, *D-Day in HD: Discover the Hedgerows*, YouTube (June 10, 2014), <https://www.youtube.com/watch?v=8gC2aVqocjk>; see also Scott Bryan, *Company C in Normandy's Hedgerows*, WWII HIST., June 2017, at 38.

2. Logan Nye, *Why Some of the Allies Toughest Fighting in Normandy Came After D-Day*, BUS. INSIDER (June 30, 2020), <https://www.businessinsider.com/why-allies-toughest-fighting-in-normandy-came-after-dday-2020-6>.

3. *Rhino Tank*, NAT'L MUSEUM OF THE U.S. ARMY, <https://www.thenmusa.org/armyinnovations/rhino-tank> (last visited Dec. 19, 2024).

4. *Id.*

5. See Exec. Order No. 14265, 90 Fed. Reg. 15621 (Apr. 9, 2025) ("Modernizing Defense Acquisitions

and Spurring Innovation in the Defense Industrial Base"). While there is a recognition by policy makers of the need to review and reform our acquisitions process, we must also consider the value and necessity of innovation that occurs well below the program level outside of the defense industrial complex and the resources required to support and sustain that capability in our force.

6. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at x (1 Oct. 2022). Field Manual 3-0 establishes multi-domain operations as the Army's operational concept and provides that the Army's purpose in this environment is to employ capabilities to create "relative advantages that achieve objectives, defeat enemy forces, and consolidate gains on behalf of joint force commanders." *Id.* para. 1-9.

7. U.S. DEP'T OF ARMY, CHIEF OF STAFF PAPER #1, ARMY MULTI-DOMAIN TRANSFORMATION: READY TO WIN IN COMPETITION AND CONFLICT (16 Mar. 2021); see also ANDREW FEICKERT, CONG. RSCH. SERV., DEFENSE PRIMER: MULTI-DOMAIN OPERATIONS (2021).

8. U.S. Central Command created Innovation Oasis, a competition to highlight Service members' ideas for possible implementation. See *U.S. Central Command Announces Innovation Oasis Finalists*, U.S. CENT. COMMAND (Oct. 4, 2022), <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3179383/us-central-command-announces-innovation-oasis-finalists>. The XVIII Airborne Corps hosts the Dragon's Lair, a regular competition among its Soldiers to view and discuss their innovative ideas that solve problems they are facing at their level. See XVIII AIRBORNE CORPS, U.S. DEP'T OF ARMY, DRAGON INNOVATION NEWSLETTER (2022), [https://www.nsin.mil/assets/downloads/DragonInnovationNewsletter\\_26MAY22.pdf](https://www.nsin.mil/assets/downloads/DragonInnovationNewsletter_26MAY22.pdf); Maxine Baen, *Army Invites Innovators to Enter 7th Dragon's Lair*, U.S. ARMY (June 20, 2022), [https://www.army.mil/article/257540/army\\_invites\\_innovators\\_to\\_enter\\_7th\\_dragons\\_lair](https://www.army.mil/article/257540/army_invites_innovators_to_enter_7th_dragons_lair). 25th Infantry Division developed Lightning Labs to help connect Soldiers with academic and industry partners to drive innovation and modernization. Major Jason Hinds et al., *Lightning Labs: Innovation and Experimentation*, INFANTRY, Fall 2023, at 28.

9. EagleWerx's stated mission is to "champion a network that accelerates Soldier-integrated innovation. We connect people and resources to empower all Screaming Eagles to provide novel ideas that solve tactical problems." *EagleWerx*, U.S. ARMY FORT CAMPBELL, <https://home.army.mil/campbell/index.php/eaglewerx> (last visited Dec. 31, 2024). EagleWerx derives its authority to connect Soldiers to resources through cooperative research and development and educational partnership agreements with local universities. *Id.* These authorities, however, fall short of allowing the 101st Airborne Division (Air Assault) from meaningfully developing beyond the capability gap identification stage.

10. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, CHAPTER 3: AVAILABILITY OF APPROPRIATIONS: PURPOSE 3-11 (4th ed. 2017) [hereinafter PURPOSE]; see also The Purpose Statute, 31 U.S.C. § 1301a.

11. See Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, titl. II, 138 Stat. 460, 465. The language that accompanies the grant of operations and maintenance funds states, "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law." *Id.*

12. PURPOSE, *supra* note 10, at 3-407.

13. See MARCY E. GALLO, CONG. RSCH. SERV., IF10553, DEFENSE PRIMER: RESEARCH, DEVELOPMENT, TEST, AND EVALUATION (Nov. 19, 2024).

14. Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, titl. IV, 138 Stat. 460, 478.

15. 10 U.S.C. § 167; see also *Acquisition Authority*, SPECIAL OPERATIONS FORCES ACQUISITION, TECH. & LOGISTICS, <https://www.socom.mil/SOF-ATL/Pages/Acquisition-Authority.aspx> (last visited Dec. 31, 2024) (providing a statement from Special Operations Command Acquisition Technology and Logistics that discusses their unique authority to conduct development for Special Operations Forces' peculiar requirements).

16. *The Department of Defense Releases the President's Fiscal Year 2023 Defense Budget*, U.S. DEP'T OF DEF. (Mar. 28, 2022), <https://www.defense.gov/News/Releases/Release/Article/2980014/the-department-of-defense-releases-the-presidents-fiscal-year-2023-defense-budg>. Army Research Labs' broad listing of projects includes: weapon science, energy science, cyber and computational science, and photonics and quantum science. *What We Do*, DEVCOM: ARMY RSCH. LAB., <https://www.arl.army.mil/what-we-do> (last visited Dec. 31, 2024). A list of Army Program Executive Offices responsible for developing and ultimately acquiring the Army's future capabilities and platforms is also available at *Program Executive Offices (PEO)*, USAASC, <https://asc.army.mil/web/peos> (last visited Dec. 31, 2024).

17. Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, titl. IV, 138 Stat. 460, 478.

18. While requesting additional RDT&E funding in future budget proposals is certainly an option, it would be difficult to expand the budget beyond current levels for this authority when there are no concrete examples of how that funding would be used. Further, additional funding would potentially come at the cost of more strategic priorities—an untenable position in the midst of our force modernization posture.

19. See Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, sec. 8039, 138 Stat. 460, 491.

20. See *id.* div. A, titl. III.

21. See *id.* sec. 8039, 138 Stat. at 491; see also U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010201.D (Jan. 2011).

22. ABC's *Shark Tank* is a popular television show that provides inventors and business entrepreneurs an opportunity to propose their business plan to highly successful business moguls. See *Shark Tank: About*, ABC, <https://abc.com/show/535e2b07-18a9-4d94-9803-9ed8257b9d23/about-the-show> (last visited Dec. 31, 2024). If one of these moguls determines an idea has the potential for future business success, they can offer a monetary investment in exchange for a portion of company ownership. See *id.*

23. For example, FORSCOM could run an annual competition across all FORSCOM elements where divisions submit proposals for innovative solutions to some of their tactical-level problems. The decision authority for this competition could then look at, among other criteria, cost, impact across all of FORSCOM, and ease of implementation before awarding amounts of RDT&E to further develop the proposed projects.

24. See *supra* note 8 and accompanying text.





## AROUND THE CORPS

CPT Simeon Lyons, 21st Theater Sustainment Command judge advocate, provides insights on services available to Soldiers during a company-level leader luncheon hosted by Installation Management Command-Europe's Army Substance Abuse Program at the Clock Tower Café on Kleber Kaserne in Kaiserslautern, Germany. (Credit: Linda Lambiotte)





(Credit: Frimufilms-freepik.com)

## Practice Notes

# Bicycling While Intoxicated Overseas

*By Mr. R. Peter Masterton*

Captain (CPT) Doe, an Army officer stationed in Germany, meets his friends one day after work and drinks several beers before returning home on his bicycle. Someone informed him that the German legal limit of intoxication while operating a bicycle is much higher than that for automobiles, and he believes he is well under this limit.<sup>1</sup> The U.S. military police stop him at a random sobriety checkpoint and measure his blood alcohol level, which is .10 grams of alcohol per 100 milliliters of blood. This is over the American military limit for drunk driving under the Uniform Code of Military Justice (UCMJ). Still, CPT Doe thinks nothing of the incident because he was operating a bicycle. Shortly thereafter, his commander tells him that administrative action is being taken against him based on the military offense of drunk driving. CPT

Doe is surprised to find out that the UCMJ offense applies not only to driving motorized vehicles but also to riding non-motorized vehicles like his bike.

This article will describe the rationale for applying the military drunk driving statute to the operation of bicycles and the consequences of that application for Service members. It will also discuss the application of this statute overseas and how it compares to foreign law.<sup>2</sup>

### **The Military Drunk Driving Statute Applies to Bicycles**

Article 113 of the UCMJ (Article 113) makes it a crime to operate “any vehicle” while “drunk” or when the alcohol concentration in the offender’s blood is above a specific limit.<sup>3</sup> Overseas, this limit is

.08 grams of alcohol per 100 milliliters of blood, although the Secretary of Defense may set a lower limit by regulation.<sup>4</sup>

Article 113 relies on Title 1 of the U.S. Code to define vehicles.<sup>5</sup> Under this definition, a vehicle includes “every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.”<sup>6</sup> This is a comprehensive definition. For example, in *United States v. Kiff*, a Federal court held that container trailers loaded on railcars constituted “vehicles” under this meaning.<sup>7</sup> While many courts have refused to extend the definition to aircraft or watercraft,<sup>8</sup> it clearly applies to all means of land transportation, such as bicycles.<sup>9</sup>

Opinions differ regarding whether drunk driving prohibitions should extend to bicyclists. Bicycling while intoxicated is not illegal in some U.S. jurisdictions,<sup>10</sup> and some members of the legal community argue it should not be because, unlike drunk operators of motor vehicles, drunk bicyclists are unlikely to kill or injure other drivers.<sup>11</sup> Others argue that the risk drunk bicyclists pose to themselves is justification enough for a prohibition and that their erratic movements can endanger others on public highways by causing equally erratic reactions.<sup>12</sup>

The military prohibition on bicycling while intoxicated likely stems from concerns for Service members’ health and safety. The increased penalty that accompanies drunk driving when it results in personal injury—even if the accused is the only one injured—demonstrates the likely motivation behind these prohibitions.<sup>13</sup> Other possible motivations for criminalizing drunk bicycling may be concern for good order and discipline within the force and maintaining the military’s reputation. This reasoning is consistent with other military offenses. For example, drunkenness that is service discrediting or prejudicial to good order and discipline is an offense under military law.<sup>14</sup> Service members who operate bicycles while intoxicated can adversely affect good order and discipline and discredit the service by their unsafe acts. Moreover, Service members who intentionally injure themselves to avoid duty or do so under circumstances that are service discrediting or prejudicial to good order

and discipline have also violated military law.<sup>15</sup> Service members may commit these exact offenses if they injure themselves by bicycling while drunk.

### The Consequences of Bicycling While Intoxicated Overseas

In the United States, Service members who operate vehicles, including bicycles, while drunk are usually prosecuted in state or Federal civilian courts.<sup>16</sup> Overseas, such offenses are often prosecuted under Article 113.<sup>17</sup> However, the rules governing the application of U.S. military versus foreign law overseas are often quite complex.

In most locations where large numbers of U.S. Service members are stationed, a status of forces agreement (SOFA) gives the United States the authority to prosecute Service members under the UCMJ.<sup>18</sup> Host nations can also prosecute offenses committed within their territory.<sup>19</sup> Under most SOFAs, if a U.S. Service member commits a crime that violates host nation law but not U.S. military law, the host nation will have sole jurisdiction over the offense.<sup>20</sup> The U.S. military has sole jurisdiction if the Service member’s crime violates U.S. military law but not host nation law.<sup>21</sup> As described in more detail below, the United States would have sole jurisdiction over CPT Doe’s drunken operation of a bicycle in Germany because he had a blood alcohol level above the U.S. military limit but below the host nation limit (he violated U.S. law but not German law).

In many cases, drunk bicycling offenses will constitute a violation of both U.S. military and host nation law. In those cases, concurrent jurisdiction exists between the host nation and the U.S. military. SOFAs will usually determine which entity has primary jurisdiction. In most situations involving drunk bicycling, the host nation will have the primary right to exercise jurisdiction under the relevant SOFA. The only exception is the unusual case where an intoxicated Service member rides a bicycle while on official duty.<sup>22</sup> Even if the host nation does have primary jurisdiction, it is often willing to waive this right and allow the U.S. Armed Forces to handle the case under military law.<sup>23</sup> U.S. policy is to maximize jurisdiction when its Service members commit crimes in foreign nations.<sup>24</sup> The

summaries that follow show how these overlapping rules apply in different countries.



A German bicycle lane. (Credit: Fabian Deter)

### Germany

As mentioned at the outset of this article, German laws on the drunken operation of bicycles are significantly different from Article 113. In Germany, the North Atlantic Treaty Organization (NATO) SOFA permits both the U.S. military and German authorities to prosecute drunk bicycling offenses.<sup>25</sup> Although Germany will generally have the primary right to prosecute,<sup>26</sup> the German Supplementary Agreement to the NATO SOFA contains an automatic waiver of this right once the German authorities are notified of the offense; however, German authorities have the ability to recall this waiver within twenty-one days.<sup>27</sup>

Under German law, sanctions may be assessed against those who operate a bicycle while drunk only if the operator’s blood alcohol concentration is at or above 1.6 “promille,”<sup>28</sup> which is equivalent to an American measurement of .15 grams of alcohol per 100 milliliters of blood.<sup>29</sup> When U.S. Service members operate bicycles with a blood alcohol level over the military limit (.08 grams per 100 milliliters of blood) but under the German limit (.15 grams of alcohol per 100 milliliters of blood), they are subject to punishment solely under U.S. military law.<sup>30</sup> However, when Service members are at or above the German limit, they are subject to both German and U.S. jurisdictions.<sup>31</sup>

In cases where the United States handles the offense through court-martial<sup>32</sup>



or nonjudicial punishment<sup>33</sup> under Article 113, the offender will be subject to several administrative sanctions. For Soldiers in the U.S. Army, this will include a general officer memorandum of reprimand.<sup>34</sup> The U.S. Armed Forces have a robust regulatory scheme for granting driving privileges to its Service members stationed in Germany, including obtaining a U.S. Forces Certificate of License to drive privately owned vehicles.<sup>35</sup> The U.S. Armed Forces will revoke this certificate when a military court convicts a Service member under Article 113 or if a Service member receives nonjudicial punishment for drunk bicycling.<sup>36</sup> In addition, the U.S. Armed Forces will notify the issuing agency of the offender's U.S. license of the revocation,<sup>37</sup> although the decision to suspend the offender's state license is within that agency's discretion.<sup>38</sup>

In the unusual case where German officials prosecute the case, the result will be similar. In Germany, drunk bicycling constitutes a criminal offense.<sup>39</sup> As a result, the offender will be subject to the military administrative penalties mentioned above, including revocation of driving privileges<sup>40</sup> and notification of the offender's U.S. state driver's agency.<sup>41</sup> Additionally, Army Service members will be issued a general officer memorandum of reprimand.<sup>42</sup>



A bicyclist in Amsterdam. (Credit: rawpixel.com)

### Netherlands

In the Netherlands, the NATO SOFA also permits both the U.S. military and Dutch authorities to prosecute Service members for drunk bicycling.<sup>43</sup> As in Germany, the Netherlands usually has the primary right to prosecute.<sup>44</sup> However, the Netherlands has

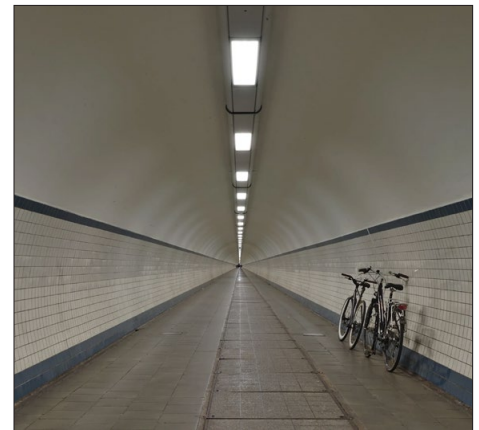
also entered into a supplemental agreement to the NATO SOFA, which waives this primary right unless "it is of particular importance that jurisdiction be exercised by the Netherlands authorities."<sup>45</sup>

Under Dutch law, it is illegal to operate a bicycle with a blood alcohol concentration at or above .5 promille,<sup>46</sup> which is equivalent to the American measurement of .047 grams of alcohol per 100 milliliters of blood.<sup>47</sup> The only authorized punishment for drunk bicycling in the Netherlands is an administrative fine.<sup>48</sup> U.S. Service members who operate bicycles with a blood alcohol level of .047 grams per 100 milliliters or higher but below the UCMJ limit of .08 grams per 100 milliliters will be subject only to Dutch jurisdiction.<sup>49</sup> If the level is .08 or above, they will be subject to both Dutch and U.S. military jurisdiction.<sup>50</sup>

If Dutch authorities take action against a Service member for bicycling while intoxicated, it will not constitute a criminal prosecution because the offender is only subject to a fine. As a result, Army Soldiers may not receive the written reprimand from a general officer mentioned above.<sup>51</sup> The U.S. Armed Forces in the Netherlands have a relatively robust system for granting driving privileges; personnel are required to obtain a U.S. Armed Forces license to operate privately owned vehicles.<sup>52</sup> The U.S. Armed Forces will suspend or revoke this license based on a "[c]onviction by host-nation courts or authorities."<sup>53</sup> A Dutch fine for bicycling while intoxicated probably would not constitute such a conviction, especially if the blood alcohol level was below the proscribed limit under Article 113. There is no requirement to report a Dutch fine for drunk bicycling to U.S. state driver's licensing authorities unless the U.S. Armed Forces revoke the offender's driving privileges for a year or more.<sup>54</sup>

In cases where U.S. military commanders punish offenders by court-martial or nonjudicial punishment under Article 113, offenders will face many of the same administrative sanctions in the Netherlands as they would in Germany. Army Soldiers will be issued a written reprimand from a general officer.<sup>55</sup> In addition, the offender's U.S. Armed Forces driver's license may be suspended or revoked.<sup>56</sup> The U.S. Armed Forces are required to report revocations

of one year or more to the offender's U.S. state driver's agency,<sup>57</sup> even though that agency might not take any action against the offender.<sup>58</sup>



Antwerp, Belgium. (Credit: Trougnouf)

### Belgium

The NATO SOFA also permits both the U.S. military and Belgium to prosecute drunk bicycling incidents that occur in Belgium.<sup>59</sup> As in Germany and the Netherlands, Belgium generally has the primary right to prosecute.<sup>60</sup> While there is no supplementary agreement of general application, the United States still attempts to request the release of jurisdiction over drunk bicycling cases in Belgium.<sup>61</sup>

As in the Netherlands, Belgian law prohibits operating a bicycle with a blood alcohol concentration at or above .5 promille,<sup>62</sup> equivalent to an American measurement of .047 grams of alcohol per 100 milliliters of blood.<sup>63</sup> However, like the Netherlands' law, a fine is the only punishment for drunk bicycling under Belgian law.<sup>64</sup> Service members who operate bicycles at or above this Belgian limit but below the U.S. military limit (.08 grams per 100 milliliters of blood) are subject only to Belgian jurisdiction.<sup>65</sup> Service members who operate bicycles at or above the U.S. military limit are subject to concurrent Belgian and U.S. military jurisdiction.<sup>66</sup>

If Belgian authorities take action against a Service member for bicycling while intoxicated, the case will not constitute a criminal prosecution because the offender is only subject to a fine.<sup>67</sup> As a result, Army Soldiers may not be subject to the written reprimand from a general

officer mentioned above.<sup>68</sup> The U.S. Armed Forces in Belgium do not have the same robust driver licensing scheme that exists in Germany or the Netherlands; rather, the U.S. Armed Forces in Belgium are only authorized to suspend on-post driving privileges.<sup>69</sup> Unless the U.S. Armed Forces revoke an offender's on-post driving privileges for a year or more due to a Belgian fine for drunk bicycling, there is no requirement to notify the offender's U.S. state driver's licensing agency of the Belgian fine.<sup>70</sup>

In cases where Belgium waives its primary right to exercise jurisdiction and Service members are prosecuted under Article 113, they will face some of the same administrative sanctions as they would in Germany. Army Soldiers will receive a written reprimand from a general officer.<sup>71</sup> Service members convicted under Article 113 may have their on-post driving privileges suspended;<sup>72</sup> however, such suspensions might not be reported to their U.S. state driver's licensing agencies,<sup>73</sup> and the offenders are unlikely to lose their U.S. state driver's licenses.<sup>74</sup>



Transfagarasan Pass, Romania (Credit: itoldya-pixabay)

### Romania

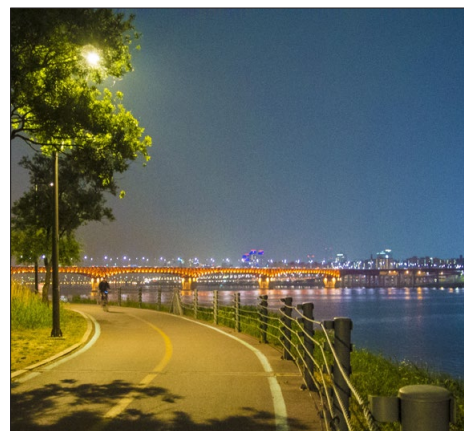
In Romania, the NATO SOFA also allows both the U.S. military and Romanian authorities to prosecute drunk bicycling cases.<sup>75</sup> As in Germany, the Netherlands, and Belgium, the Romanians generally have the primary right to exercise jurisdiction.<sup>76</sup> Romania has entered into two supplements to the NATO SOFA.<sup>77</sup> In one of these supplements, Romania agreed to automatically waive its right

to exercise jurisdiction thirty days after notification of an offense and will only withdraw this waiver in serious cases of "particular importance and major interests of Romania."<sup>78</sup>

Under Romanian law, fines can be issued for anyone who operates a bicycle while intoxicated; the limit is 0.0 promille, or *any* blood alcohol concentration.<sup>79</sup> However, the only penalty is a fine.<sup>80</sup> Service members who operate a bicycle with any level of intoxication that is below the U.S. military limit (.08 grams per 100 milliliters of blood) are subject only to Romanian prosecution.<sup>81</sup> Those who operate bicycles at or above the U.S. military limit are subject to both U.S. military and Romanian jurisdiction.<sup>82</sup>

If Romanian authorities take action against a Service member for bicycling while intoxicated, the case will not constitute a criminal prosecution because the offender is only subject to a fine. As a result, Army Soldiers probably will not receive the written reprimand from a general officer mentioned above.<sup>83</sup> The U.S. Armed Forces have no separate regulatory scheme for granting driving privileges to its Service members stationed in Romania; U.S. Service members rely on one of the supplements to the NATO SOFA to use their U.S. state driver's licenses to operate vehicles in Romania.<sup>84</sup> Romanian authorities have no obligation to notify U.S. state driver's licensing agencies when they fine U.S. Service members for bicycling while intoxicated.<sup>85</sup>

In situations where the U.S. Armed Forces handle the case through court-martial or nonjudicial punishment under Article 113, the offender will be subject to some of the same administrative penalties applicable to a Service member in Germany. Army Soldiers will receive a written reprimand from a general officer.<sup>86</sup> However, because the U.S. Armed Forces do not regulate driving privileges in Romania, there is no explicit requirement to report Romanian drunk bicycling fines to the offenders' U.S. state driver's licensing agencies,<sup>87</sup> and the offenders are unlikely to lose their U.S. state driver's licenses.<sup>88</sup>



Seoul, South Korea. (Credit: Seoul Guide Korea)

### Republic of Korea

The SOFA between the Republic of Korea (ROK) and the United States has many of the same provisions as the NATO SOFA.<sup>89</sup> As a result, the U.S. Forces Korea (USFK) can prosecute drunk bicycling cases involving its Service members stationed in the ROK under Article 113.<sup>90</sup> The ROK can also prosecute these offenses and generally has the primary right to exercise jurisdiction.<sup>91</sup> Although the U.S. military may ask Korean officials to waive this right, Korean officials can choose not to grant the request.<sup>92</sup>

Korean law makes it an offense to operate any vehicle, including a bicycle, with a blood alcohol level at or above .03 grams per 100 milliliters of blood.<sup>93</sup> The penalties for these types of offenses include fines and imprisonment.<sup>94</sup> U.S. Service members who operate a bicycle at or above the Korean limit but below the U.S. military limit (.08 grams per 100 milliliters of blood) are subject only to Korean jurisdiction.<sup>95</sup> Service members who are at or above the U.S. military limit will be subject to both Korean and U.S. military jurisdiction.<sup>96</sup>

If Korean authorities convict a Service member for bicycling while intoxicated, it will constitute a criminal conviction. The offender will be subject to all of the military administrative penalties for drunk driving, including, for Army Soldiers, a written reprimand from a general officer.<sup>97</sup> USFK has a robust system of regulating the driving privileges of its personnel, including issuing USFK operator's permits for privately owned vehicles.<sup>98</sup> Individuals convicted by Korean authorities for bicycling



while intoxicated will have their driving privileges revoked for one year.<sup>99</sup> USFK commanders will notify offenders' U.S. state driver's agencies.<sup>100</sup>

In cases where USFK handles the case through court-martial or nonjudicial punishment under Article 113, the result will be the same. Army Soldiers will be issued the written reprimand from a general officer mentioned above.<sup>101</sup> Offenders will lose their USFK driving privileges.<sup>102</sup> In addition, offenders' U.S. state driver's licensing agencies will be notified,<sup>103</sup> although the offenders might not lose their U.S. state driver's licenses.<sup>104</sup>

## Conclusion

The consequences of a drunk bicycling prosecution under military law and host nation laws may vary dramatically. The countries discussed above provide a representative sampling of these similarities and differences and demonstrate the challenges facing commanders, Service members, and their lawyers in navigating this area of the law.

Some countries, such as Romania, the ROK, Belgium, and the Netherlands, prohibit drunk bicycling at an intoxication level much lower than that proscribed by Article 113. In these countries, the host nation will have sole jurisdiction if the Service member's level of intoxication violates host nation law but is under the level prohibited by Article 113. If the Service member's level of intoxication violates both host nation law and Article 113, the U.S. military and the host nation will have concurrent jurisdiction.

Other countries, like Germany, permit drunk bicycling at an intoxication level higher than what Article 113 prohibits. In these countries, the U.S. military will have sole jurisdiction if the Service member's level of intoxication violates Article 113 but does not violate the host nation's law. If the Service member's level of intoxication violates both Article 113 and host nation law, the U.S. military and the host nation will have concurrent jurisdiction.

If the U.S. military and the host nation have concurrent jurisdiction, the host nation will usually have the primary right to prosecute. However, the host nation may

waive its jurisdiction and allow the U.S. military to handle the case.

If the U.S. military prosecutes a Service member for drunk bicycling under Article 113, the accused will be subject to a number of administrative penalties. These may include revocation of overseas driving privileges and, for Soldiers in the U.S. Army, service of a written reprimand from a general officer. If the host nation prosecutes the same case, the accused may not be subject to the administrative penalties normally associated with drunk operation of vehicles, especially if the prosecution results in an administrative fine rather than a criminal conviction. Even if the host nation prosecution results in a criminal conviction, the accused may not lose driving privileges because the U.S. Armed Forces' regulation of Service members' driving privileges varies from country to country.

Judge advocates (JAs) should understand the rules and consequences of drunk bicycling under both military and host nation law. Because there are often significant differences between the two, JAs must be prepared to explain these differences to the commanders and Service members they advise. **TAL**

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## Notes

1. Under German law, fines can be assessed against those who operate a motor vehicle with a blood alcohol concentration at or over .5 promille ("per thousands" or grams of pure alcohol per kilogram of blood). See Straßenverkehrsgesetz [STVG] [Road Traffic Act], Mar. 5, 2003, BGBl I at 919, last amended by Gesetzes, Oct. 23, 2024, BGBl 2024 I at 323, § 24a (Ger.), [https://www.gesetze-im-internet.de/stvg/\\_24a.html](https://www.gesetze-im-internet.de/stvg/_24a.html). This is equivalent to an American blood alcohol measurement of .047 grams of alcohol per 100 milliliters of blood. However, German law only requires sanctions be assessed against those who operate bicycles with an alcohol concentration at or over 1.6 promille (equivalent to an American measurement of .15 grams of alcohol per 100 milliliters of blood. See *id.* § 316, [https://www.gesetze-im-internet.de/stgb/\\_316.html](https://www.gesetze-im-internet.de/stgb/_316.html) (prohibiting operation of any vehicle, including a bicycle, when unable to do so safely because of intoxication); 5 MÜNCHENER KOMMENTAR ZUM STGB [MUNICH COMMENTARY ON ROAD TRAFFIC LAW] § 316 at 44 (3d ed. 2019) (describing case law setting the 1.6 promille limit for bicycles). See also Kathleen S., *Alkohol am Steuer: Sanktionen gemäß Bußgeldkatalog* [Drinking and Driving: Sanctions According to the Catalog of Fines], BUSSGELDKATALOG [GERMAN FINE CATALOG], (Aug. 11, 2024), <https://www.bussgeldkatalog.de/>

alkohol (motor vehicles); Kathleen S., *Bußgeldkatalog – Alkohol auf dem Fahrrad* [Catalog of Fines – Drinking Alcohol on the Bike], BUSSGELDKATALOG [GERMAN FINE CATALOG], (Aug. 11, 2024), <https://www.bussgeldkatalog.de/promillegrenze-fahrrad>. The German units are based on weight of alcohol relative to weight of blood while the American units are based on weight of alcohol relative to volume of blood. As a result, the conversion involves using the specific gravity of whole blood, which is 1.06. See *Units of Breath and Blood Alcohol Concentration*, LION LAB'Y LTD., <https://www.lionlaboratories.com/testing-for-alcohol/alcohol-measurement-units> (last visited Dec. 31, 2024) (supporting the author's calculations to compare limits).

2. The author would like to thank the following people for their assistance in researching host nation laws: Joerg Modellmog (Germany), Jarin Nijhof (the Netherlands), Marianne Schoonjans and Robert Vedra (Belgium), Flavius Graur Vartopeanu (Romania), and Leslie Feist and Chun Cha (Korea).

3. UCMJ art. 113(a)(2) (2024).

4. See *id.* art. 113(b)(1)(B).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 51(c)(1) (2024) [hereinafter MCM].

6. 1 U.S.C. § 4.

7. See *United States v. Kiff*, 377 F. Supp. 2d 586, 590 (E.D. La. 2005) (holding that theft from the trailers constituted theft from a "vehicle" under the relevant Federal statute).

8. *E.g. McBoyle v. United States*, 283 U.S. 25, 27 (1931) (refusing to extend the term "vehicle" to aircraft). In this case, the accused was convicted under the National Motor Vehicle Theft Act for transporting an aircraft from Illinois to Oklahoma. *Id.* Overturning the conviction, the Court ruled that an airplane is not covered by either the term "motor vehicle" in the National Motor Vehicle Theft Act or the more general definition of "vehicle" in 1 U.S.C. § 4. See *id.* at 26. In *In re Barnick*, the court denied an assertion that injuries caused by a debtor's drunken operation of a motor boat could not be discharged in bankruptcy because it constituted operation of a "motor vehicle" under the Bankruptcy Code existing at the time. *In re Barnick*, 353 B.R. 233, 246 (Bankr. C.D. Ill. 2006) (refusing to apply the term "vehicle" to a water vessel).

9. See 353 B.R. at 239. The court in *Barnick* held that the term "vehicle," defined in 1 U.S.C. § 4, had nothing to do with the compound term "motor vehicle" in the Bankruptcy Code. *Id.*

10. See, *e.g.*, *Monsanto v. Wells*, 902 P.2d 1266 (Wash. Ct. App. 1995).

11. See Rick Bernardi, *Is BUI Like DUI?* BICYCLE L. (Nov. 30, 2012), <https://www.bicyclelaw.com/is-bui-like-dui>.

12. See *City of Columbus v. Brown*, No. 05AP-344, 2005 Ohio App. LEXIS 5508, at \*10-12 (Ohio Ct. App. Nov. 17, 2005) (finding the Columbus, Ohio, city code criminalizing drunk bicycling constitutional based on dangers to offenders and others).

13. See *United States v. Driver*, 36 M.J. 1020, 1023 (N.M.C.M.R. 1993).

14. See UCMJ art. 134 (2024); see also MCM, *supra* note 5, pt. IV, ¶ 98.

15. See UCMJ arts. 83, 134 (2024); MCM, *supra* note 5, pt. IV, ¶¶ 7, 107.

16. Drunk driving offenses occurring off military installations are usually prosecuted by state officials under state law. While the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prohibit a state government and the Federal Government from prosecuting an individual for the same offense, *Gamble v. United States*, 587 U.S. 678 (2019), the military generally does not prosecute crimes under the UCMJ that have already been prosecuted by state authorities. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 4-2 (20 Mar. 2024) [hereinafter AR 27-10]. Drunk driving offenses occurring on military installations are usually prosecuted before a U.S. magistrate judge using the Assimilated Crimes Act. See 18 U.S.C. § 13; AR 27-10, *supra*, para. 23-5(a); see also Major Aaron L. Lykling, *The Disposition of Intoxicated Driving Offenses Committed by Soldiers on Military Installations*, ARMY LAW., Jan. 2013, at 5, 8 (explaining that most military installations in the United States refer on-post drunk driving offenses for prosecution in Federal magistrate court and describing the advantages of doing so); Major Dean W. Korsak, *Optimizing Military Installation Jurisdiction*, 81 A.F. L. REV. 133, 170-72 (2020).

17. UCMJ art. 113 (2024).

18. DIETER FLECK ET AL., *THE HANDBOOK OF THE LAW OF VISITING FORCES* 223 (2d ed. 2018).

19. See *id.*

20. See *id.*

21. See *id.*

22. See *id.* at 224-27. Normally the U.S. Armed Forces, as the "sending state," will have primary jurisdiction in these cases only when (1) the offense was solely against the security of property of the U.S. Armed Forces or the person or property of a Service member, Civilian, or dependent of the U.S. Armed Forces or (2) the offense arose out of an act done in performance of an official duty. *Id.* For all other offenses, the "receiving state" (the host nation) will have primary jurisdiction. *Id.* In the normal case where an off-duty Service member operates a bicycle while intoxicated, the host nation would have primary jurisdiction.

23. *Id.* at 227-31.

24. See U.S. DEP'T OF ARMY, REG. 27-50, U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5820.4G, U.S. DEP'T OF AIR FORCE, INSTR. 51-706, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-7 (15 Dec. 1989) [hereinafter JOINT SOFA REGULATION].

25. See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, art. VII, para. 1, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846 [hereinafter NATO SOFA].

26. See *id.* art. VII, para. 3. The United States will only have the primary right of jurisdiction if the offense occurred in the performance of official duties or the offense was solely against the person or property of another Service member, Civilian, or dependent of the U.S. Armed Forces. *Id.*

27. See Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany (Revised Supplementary Agreement), art. 19, Aug. 3, 1959, amended Mar. 18, 1993, 14 U.S.T. 531, BGBl 1994 II S. 2594, 2598. In several German states, this waiver does not require prior notice for minor offenses, including drunk driving. See Letter from Rheinland Pfalz Ministerium der

Justiz to Landesjustizverbindungsstelle, Office of the Staff Judge Advocate, HQ, 21st Theater Army Area Command, subject: Strafgerichtsbarkeit nach dem NATO- Truppenstatut und seinen Zusatzvereinbarungen [criminal jurisdiction under the NATO Status of Forces Agreement and its supplementary agreements] (Nov. 22, 1995) (on file with author); Letter from Bayerisches Staatsministerium des Innern to Zentrale Bussgeldstelle im Bayerischen Polizeiverwaltungsamt Viechtach, subject: Vollzug des NATO-Truppenstatute [implementation of the NATO Status of Forces Agreement] (Nov. 18, 2006) (on file with author).

28. See *supra* note 1 and accompanying text.

29. As mentioned at the outset of this article, the German units are based on weight of alcohol relative to weight of blood, while the American units are based on weight of alcohol relative to volume of blood. See *supra* note 1 and accompanying text. As a result, the conversion involves using the specific gravity of whole blood, which is 1.06. See *supra* note 1; Raymond J. Trudnowski & Rodolfo C. Rico, *Specific Gravity of Blood and Plasma at 4 and 37 Degrees Celcius*, 5 CLINICAL CHEMISTRY 615, 615 (1974).

30. See NATO SOFA, *supra* note 25, art. VII, para. 2(a).

31. See *id.* art. VII, para. 1.

32. See MCM, *supra* note 5, pt. IV, ¶ 51(d). The maximum penalty for drunk driving resulting in injury includes eighteen months confinement, a dishonorable discharge, and total forfeitures of pay and allowances. *Id.*

33. See UCMJ art. 113 (2024). Nonjudicial punishment under Article 15 of the UCMJ is authorized for "minor offenses," which ordinarily include those with maximum punishments that do not include a dishonorable discharge or confinement for over one year. MCM, *supra* note 5, pt. V, ¶ 1(e). This punishment is ordinarily appropriate for drunk bicycling under Article 113 that does not result in personal injury because the maximum punishment for this offense includes only six months confinement, a bad-conduct discharge, and total forfeitures of pay and allowances. *Id.* pt. IV, ¶ 51(d).

34. U.S. DEP'T OF ARMY, REG. 190-5, U.S. DEP'T OF NAVY, CHIEF, NAVAL OPERATIONS INSTR. 11200.5D, U.S. DEP'T OF AIR FORCE, INSTR. 31-218(I), U.S. MARINE CORPS, ORDER 5110.1D, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-7(a)(1) (22 May 2006) [hereinafter JOINT TRAFFIC REGULATION].

35. See U.S. ARMY IN EUROPE AND AFRICA, REG. 190-1, U.S. NAVAL FORCES EUROPE/U.S. NAVAL FORCES AFRICA/U.S. SIXTH FLEET INSTR. 11240.6AC, U.S. AIR FORCES IN EUROPE, U.S. AIR FORCES AFRICA INSTR. 31-202, DRIVER AND VEHICLE REQUIREMENTS AND THE INSTALLATION TRAFFIC CODE FOR THE U.S. FORCES IN GERMANY para. 2-1 (1 Oct. 2024) [hereinafter U.S. FORCES GERMANY JOINT DRIVER REGULATION].

36. *Id.* para. 2-15(a)(4)(b).

37. *Id.* para. 2-15(d).

38. See Lykling, *supra* note 16, at 10; Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military NJP*, 60 A.F. L. REV. 115, 134-35 (2007).

39. See Straßenverkehrsgesetz [STVG] [Road Traffic Act], Mar. 5, 2003, BGBl I at 919, last amended by Gesetzes, Oct. 23, 2024, BGBl 2024 I at 323, § 316 (Ger.), [https://www.gesetze-im-internet.de/stgb/\\_316.html](https://www.gesetze-im-internet.de/stgb/_316.html).

40. See U.S. FORCES GERMANY JOINT DRIVER REGULATION, *supra* note 35, para. 2-15(a)(4)(b). A revocation is

required for a civilian court conviction for drunk driving. *Id.* A revocation is also required if German civil authorities prohibit a person from driving in Germany. *Id.* para. 2-16.

41. *Id.* para. 2-15(d).

42. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1).

43. See NATO SOFA, *supra* note 25, art. VII, para. 1.

44. See *id.* art. VII, para. 3. The United States will only have the primary right of jurisdiction if the offense occurred in the performance of official duties or the offense was solely against the person or property of another Service member, Civilian, or dependent of the U.S. Armed Forces. *Id.*

45. Exchange of Notes (with annex) Constituting an Agreement Relating to the Stationing of United States Armed Forces in the Netherlands, annex, para. 3, Aug. 13, 1954, 6 U.S.T. 103, 251 U.N.T.S. 91 [hereinafter Dutch Supplement]. If a drunk bicycling incident results in personal injury, the Dutch may decide to exercise jurisdiction.

46. See Wegenverkeerswet [Road Traffic Act 1994] art. 8, para. 2(b), <https://wetten.overheid.nl/BWBR0006622/2021-10-19> (last visited Dec. 31, 2024) (Neth.). It is prohibited to conduct any vehicle (motorized or not) with an alcohol limit of .5 promille. *Id.*; see also *Mobility, Public Transport and Road Safety: Road Safety*, GOV'T OF THE NETHERLANDS, <https://www.government.nl/topics/mobility-public-transport-and-road-safety/road-safety/alcohol-drugs-and-driving> (last visited Dec. 31, 2024).

47. See *supra* note 1.

48. Wegenverkeerswet, *supra* note 46, art. 8.

49. See NATO SOFA, *supra* note 25, art. VII, para. 2(b).

50. See *id.* art. VII, para. 1.

51. See *supra* note 34 and accompanying text; see also UCMJ art. 113 (2024). Such reprimands are required when Soldiers are convicted by a "civilian court" of "drunk or impaired driving either on or off the installation." JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1). A Dutch fine for drunk bicycling would probably not be considered such a conviction, especially if the offender's blood alcohol level is below the limit specified in UCMJ Article 113.

52. See U.S. DEP'T OF ARMY, ARMY IN EUROPE REG. 550-35, REGULATIONS ON PERSONAL PROPERTY, LOCAL CURRENCY, AND MOTOR VEHICLES FOR U.S. PERSONNEL IN THE NETHERLANDS para. 27 (8 Mar. 2023) [hereinafter ARMY IN EUROPE MOTOR VEHICLE REGULATION IN NETHERLANDS].

53. *Id.* para. 29(d)(1).

54. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-11, app. B.

55. See *id.* para. 2-7.

56. ARMY IN EUROPE MOTOR VEHICLE REGULATION IN NETHERLANDS, *supra* note 52, para. 30(d)(2).

57. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-11, app. B.

58. See Lykling, *supra* note 16, at 10; see also Wilde, *supra* note 38, at 134-35.

59. See NATO SOFA, *supra* note 25, art. VII, para. 1.

60. See *id.* art. VII, para. 3. The United States will only have the primary right of jurisdiction if the offense occurred in the performance of official duties or the



offense was solely against the person or property of another Service member, Civilian, or dependent of the U.S. Armed Forces. *Id.*

61. See JOINT SOFA REGULATION, *supra* note 24, para. 1-7.

62. Loi du 16 Mars 1968 relative à la police de la circulation routière [Law of March 16, 1968 relating to road traffic policing] art. 34, § 1, <https://www.code-de-la-route.be/fr/reglementation/1968031601~invynqx4tj#hvbzg6930d>; *Driving Under the Influence*, CODE DE LA ROUTE, <https://www.code-de-la-route.be/fr/infractions-routieres/conduite-sous-influence> (last visited Dec. 31, 2024).

63. See *supra* note 1 and accompanying text.

64. See *Driving Under the Influence*, *supra* note 62.

65. See NATO SOFA, *supra* note 25, art. VII, para. 2(b).

66. See *id.* art. VII, para. 1.

67. See *Driving Under the Influence*, *supra* note 62.

68. Army Soldiers are required to receive a written reprimand from a general officer only if they are “convicted” by a civilian court of “drunk or impaired driving either on or off the installation.” JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1). A Belgian fine for drunk bicycling probably would not be considered to be such a conviction, especially if the blood alcohol level is below the limit specified in Article 113 of the UCMJ.

69. In Belgium, driving on NATO installations is regulated by the Supreme Headquarters Allied Powers Europe (SHAPE). SUPREME HEADQUARTERS ALLIED POWERS EUROPE DIRECTIVE 100-001, TRAFFIC AND PARKING REGULATIONS para. 1-1 (27 Aug. 2019) [hereinafter SHAPE TRAFFIC REGULATION], <https://www.shape2day.com/resources/site1/General/SES/SD100001Traffic%20and%20Parking%20Regulations.pdf>. Driving while impaired by alcohol is a violation of a SHAPE regulation and can result in suspension of the privilege to drive on SHAPE installations. *Id.* ch. 6, para. 1-5. Bicyclists must adhere to the same traffic laws as motor driven vehicles. *Id.* ch. 6, para. 1-7(b).

70. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-11, app. B.

71. See *id.* para. 2-7.

72. See SHAPE TRAFFIC REGULATION, *supra* note 69, ch. 6, para. 1-5.

73. The U.S. Armed Forces are required to notify the offender’s U.S. state driver’s agency only if on-post driving privileges are revoked for a year or more. JOINT TRAFFIC REGULATION, *supra* note 35, app. B.

74. See Lykling, *supra* note 16, at 10; see also Wilde, *supra* note 38, at 134-35.

75. See NATO SOFA, *supra* note 25, art. VII, para. 1.

76. The United States will only have the primary right of jurisdiction if the offense occurred in the performance of official duties or the offense was solely against the person or property of another Service member, Civilian, or dependent of the U.S. Armed Forces. *Id.* art. VII, para. 3.

77. Agreement between the United States of America and Romania Regarding the Status of United States Forces in Romania, Oct. 30, 2001, T.I.A.S. 13170 [hereinafter Romanian SOFA]; Agreement Between the United States of America and Romania Regarding the Activities of United States Force Located in the Territory of Romania, 6 Dec. 2005, T.I.A.S. 06-721.

78. Romanian SOFA, *supra* note 77, art. III, paras. 1, 3.

79. Government Emergency Ordinance 195/2002, art. 102, para. 37(3)(a), Monitorul Oficial Al Romaniei [Official Gazette of Romania], Part I, no. 670 (Aug. 3, 2006).

80. See *id.*

81. See NATO SOFA, *supra* note 25, art. VII, para. 2(b).

82. See *id.*, art. VII, para. 1.

83. U.S. Army Soldiers are only required to receive reprimands from a general officer when they are “convicted” by a civilian court of “drunk or impaired driving either on or off the installation.” JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1). A Romanian fine for drunk bicycling would probably not be considered such a conviction, especially if the blood alcohol level were below that required under Article 113 of the UCMJ.

84. See Romanian SOFA, *supra* note 77, art. XV.

85. See *id.*

86. JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1).

87. *Id.* para. 2-11, app. B.

88. See Lykling, *supra* note 16, at 10; Wilde *supra* note 38, at 134-35.

89. Compare Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 17 U.S.T. 1677, T.I.A.S. 6127, 674 U.N.T.S. 163 [hereinafter U.S. Korea SOFA], with NATO SOFA, *supra* note 25.

90. See U.S. Korea SOFA, *supra* note 89, art. XXII, para. 1(a).

91. The United States will only have the primary right of jurisdiction if the offense occurred in the performance of official duties or the offense was solely against the person or property of another Service member, Civilian, or dependent of the U.S. Armed Forces. *Id.* art. XXII, paras. 1(b), 3.

92. See *id.* art. XXII, para. 3(c).

93. 도로교통법 [Road Traffic Act], art. 44, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=50713&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=50713&lang=ENG) (last visited on Dec. 31, 2024).

94. See *id.* art. 148-2(3).

95. See U.S. Korea SOFA, *supra* note 89, art. XXII, para. 2(b).

96. See *id.* art. XXII, para. 1.

97. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1).

98. See U.S. DEP’T OF ARMY, U.S. FORCES KOREA REG. 190-1, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-1 (18 Feb. 2021) [hereinafter USFK TRAFFIC REGULATION].

99. See *id.* para. 2-3(c)(2)(b).

100. See *id.* para. 2-3(d)(4).

101. See JOINT TRAFFIC REGULATION, *supra* note 34, para. 2-7(a)(1).

102. See USFK TRAFFIC REGULATION, *supra* note 98, para. 2-3(c)(2)(b).

103. See *id.* para. 2-3(d)(4).

104. See Lykling, *supra* note 16, at 10; Wilde, *supra* note 38, at 134-35.

A NASA spacecraft carrying a satellite payload launches atop a SpaceX Falcon 9 rocket from Space Launch Complex 40 at Cape Canaveral Space Force Station in Florida. (Credit: Denny Henry, NASA)





## Feature

# Countering Space-Based Weapons of Mass Destruction

*By Major Brian D. Green*

How should the United States respond if another country attempts to station a nuclear weapon in outer space? Although the Outer Space Treaty of 1967 (OST) forbids stationing nuclear weapons and other weapons of mass destruction (WMD) in outer space, prohibition does not guarantee prevention.<sup>1</sup> Certain powerful states, possessing significant space and nuclear capabilities, habitually violate international law and have tested capabilities that probe the OST's boundaries. For example, since February 2024, U.S. Government officials have warned the public that Russia may be preparing to violate this core OST mandate.<sup>2</sup> This chilling prospect is far from inconceivable. This article will outline the reasons why a state might seek to station a nuclear weapon in outer space, why a state might refrain from doing so, and detail a range of legal response options for the United States and the rest of the world to consider. If another country does decide to flout international law by placing a nuclear weapon in orbit, installing it on a celestial body, or otherwise stationing it in outer space, other states must be prepared to act with all lawful means at their disposal to deter

and defeat such actions. Only then may humanity be protected from the threat of space-based nuclear weapons.

### Nuclear Space Threats

#### *Russia*

Russia's full-scale invasion of Ukraine in 2022, accompanied by its nuclear saber-rattling against countries that might seek to intervene, has raised the specter of nuclear war to a level perhaps not seen since the Cuban Missile Crisis.<sup>3</sup> Like the Soviet Union during the Cold War, Russia developed an "escalate to de-escalate" doctrine<sup>4</sup> that could lead it to employ relatively low-yield "tactical" or "non-strategic" nuclear weapons<sup>5</sup> to gain an offensive advantage or to compensate for conventional battlefield losses<sup>6</sup>—of which it has suffered many in the Ukraine conflict.<sup>7</sup> Although some analysts believe Russia now has a higher threshold for nuclear use,<sup>8</sup> the continuing bellicose rhetoric of Russian officials,<sup>9</sup> combined with Russia's illegal claims to have annexed Crimea and four

other Ukrainian oblasts,<sup>10</sup> suggests that the threshold may still be too low for comfort.<sup>11</sup> Russian leaders also claim to be developing new kinds of nuclear or nuclear-capable weapons,<sup>12</sup> and Russia has violated numerous arms control treaties and commitments,<sup>13</sup> culminating in Vladimir Putin's February 2023 announcement that Russia was suspending its participation in the strategic arms reduction treaty known as New START.<sup>14</sup> In general, Russia under Putin, as under Soviet leaders before him, has taken an instrumentalist approach to international law.<sup>15</sup>

In addition, Russia, China, and other countries have been developing and testing a wide variety of space-based and counterspace weapons.<sup>16</sup> As then-Lieutenant General B. Chance Saltzman said in his confirmation hearing to become the U.S. Space Force's second Chief of Space Operations, "I'm worried about the pace with which they are making those changes, China first amongst them but Russia also which is committed to investing heavily in the kinds of capabilities that are going to disrupt, degrade or even destroy our on-orbit capabilities."<sup>17</sup>

A key demonstration of such capabilities occurred in November 2021, when Russia conducted its first-ever direct-ascent anti-satellite (ASAT) missile test to successfully destroy a satellite in low Earth orbit (LEO), irresponsibly doubling the debris conjunction risk for the International Space Station and endangering the lives of the ISS crew, including Russian cosmonauts.<sup>18</sup> Indeed, although he did not explicitly claim that Russia had violated the OST, the immediate response of General James Dickinson, then-Commander, U.S. Space Command (USSPACECOM), was that "Russia has demonstrated a *deliberate disregard* for the security, safety, stability, and long-term sustainability of the space domain for all nations."<sup>19</sup> Although many countries condemned the test,<sup>20</sup> Russia displayed no remorse. The Russian Ministry of Defense claimed that the fragments "did not pose and will not pose a threat to orbital stations, spacecraft, or space activities" and that they were "immediately taken under surveillance until they were destroyed."<sup>21</sup> Meanwhile, state television host Dmitry Kiselyov broadcasted that Russia now had

the ability to destroy the entire U.S. Global Positioning System (GPS) satellite constellation.<sup>22</sup>

Russia's co-orbital ASAT testing and "inspector satellite" stalking of U.S. intelligence satellites also suggest a willingness to flout the New START restrictions on interference with national technical means of treaty verification by conducting uncomfortably close approaches with a capability designed to fire a high-velocity projectile in orbit.<sup>23</sup> Russia allegedly launched its newest version of this type of orbital weapon on 16 May 2024—mere weeks after insisting that the United Nations (U.N.) Security Council should ban all placement of weapons in space while vetoing a resolution to reaffirm the OST's ban on stationing nuclear weapons in space.<sup>24</sup>

Russia's Security Council veto was all the more troubling because of what it sought to conceal. On 14 February 2024, the House Permanent Select Committee on Intelligence Chairman, Congressman Mike Turner of Ohio, alleged that there was a serious national security threat that should be made known to the public.<sup>25</sup> The next day, White House Deputy Press Secretary John Kirby acknowledged that this threat was "an anti-satellite capability that they're developing," while stating, "We are not talking about a weapon that can be used to attack human beings or cause physical destruction here on Earth" and parrying press questions about whether the capability was "nuclear-capable."<sup>26</sup>

As details were sparse, some commentators initially speculated that this could be a nuclear-powered electronic warfare system rather than a satellite designed to produce a nuclear detonation in space.<sup>27</sup> While a nuclear-powered space weapon would be troubling, it would not necessarily be illegal. However, Assistant Secretary of Defense for Space Policy Dr. John F. Plumb added more details when he testified to Congress in May. He stated,

Russia is also developing a concerning [ASAT] capability related to a new satellite carrying a nuclear device that Russia is developing. This capability could pose a threat to all satellites operated by countries and companies around the globe, as well as to the vital

communications, scientific, meteorological, agricultural, commercial, and national security services we all depend upon.<sup>28</sup>

This characterization suggests that a satellite-mounted "nuclear device" will be the key mechanism by which the "ASAT capability" threatens "all satellites" in orbit. The remainder of this article will therefore focus on the very real risk that Russia will attempt to place a nuclear weapon in orbit, and argue that such threats demand a serious, deliberate, and full-spectrum response.

### China

Russia is not alone in flouting international law and posing a nuclear threat to the United States. Like Russia, China tends to discount the idea of a rules-based international order to which China is accountable, preferring instead to engage in "legal warfare" in which the law is just one more weapon in the Chinese Communist Party's arsenal.<sup>29</sup> For example, China recently violated international law and U.S. sovereign airspace by flying a high-altitude spy balloon across Alaska, Canada, and the continental United States.<sup>30</sup> It continues to assert, and at times violently enforce, illegal maritime claims in and around the South and East China Seas,<sup>31</sup> fires potentially blinding lasers at Philippine coastguardsmen and Australian military pilots,<sup>32</sup> attempts to expand its land territory through border skirmishes and redrawing maps,<sup>33</sup> and has been engaged in an ongoing genocide and crimes against humanity against the Uyghur people in Xinjiang province, in violation of the Genocide Convention and *jus cogens* requirements of customary international law.<sup>34</sup>

China is also rapidly building its nuclear arsenal to achieve parity with the United States, with the U.S. Department of Defense (DoD) estimating that China "has surpassed 600 operational nuclear warheads in its stockpile as of mid-2024 and will have over 1,000 operational nuclear warheads by 2030, much of which will be deployed at higher readiness levels."<sup>35</sup> This is in spite of China's recent reaffirmation that it would "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date."<sup>36</sup> And, of course, the DoD assesses, "The PRC





The risk of the International Space Station (pictured) colliding with space debris doubled as a result of Russia's November 2021 ASAT missile test. (Credit: NASA)

continues to develop counterspace capabilities—including direct-ascent [ASAT] missiles, co-orbital satellites, [electronic warfare], and directed-energy systems—to contest or deny another nation's access to and operations in the space domain.”<sup>37</sup>

Despite China's longstanding claim of a “no first use” policy for nuclear weapons, its rapid expansion of nuclear capability could still enable it to commit malign conventional aggression. Chinese officials have threatened nuclear strikes against the United States during previous diplomatic confrontations.<sup>38</sup> According to Dr. Jonathan D.T. Ward, a writer and strategist with extensive experience living and working in China, and whose writings about the coming “decisive decade” in Sino-U.S. relations informed the 2022 U.S. *National Security Strategy*:

China's 2021 test of a hypersonic missile and fractional orbital bombardment system, as well as its expanding

nuclear silos in its western regions . . . would allow them to rely much more aggressively on conventional capabilities and even lean much more heavily into an expanding conflict below the threshold of nuclear war.<sup>39</sup>

Thus, just as Russia forestalls direct foreign intervention in the war in Ukraine by brandishing its nuclear weapons, China could threaten to use its expanding nuclear and counterspace arsenals to prevent other countries from intervening in its conquest of Taiwan, or to radically turn the tide of a war it is losing.<sup>40</sup> In these scenarios, China would challenge law-abiding states to defend Taiwan without risking devastating reprisals on their own vital interests. It would also contradict China's pledge that nuclear weapons “should serve defensive purposes, deter aggression, and prevent war.”<sup>41</sup>

As a result of these adversaries' threatening and often illegal activities, the 2022

U.S. *National Security Strategy* describes China as the “pacing challenge” for the U.S. military to deter, and Russia as an “acute threat” to be managed.<sup>42</sup> Their demonstrated willingness to violate international law, combined with their rhetoric and development of novel nuclear, space-based, and counterspace weapons, should cause U.S. and allied political and military leaders to consider what to do if Russia, China, or another country such as North Korea chooses to violate another fundamental precept of international law by stationing a nuclear weapon in outer space.

### **International Law Forbids Stationing a Nuclear Weapon in Outer Space**

#### ***Treaty Requirements***

The OST, to which all major spacefaring countries (including Russia and China) are parties, forbids states parties to place nucle-



Mr. Dean Rusk (2nd from right), Secretary of State of the United States, signs the Outer Space Treaty at a White House ceremony. At the table (right to left): President Lyndon B. Johnson of the United States; Ambassador Arthur J. Goldberg, Permanent Representative of the United States to the U.N.; Sir Patrick Dean, Minister of State for Foreign Affairs and Permanent Representative of the United Kingdom to the UN; and USSR Ambassador to the United States Anatoly F. Dobrynin. (Credit: U.N. Photo)

ar weapons or other WMD in orbit around the Earth, install them on the Moon or other celestial bodies, or station them in outer space in any other manner.<sup>43</sup> The Limited Test Ban Treaty of 1963 also prohibits states parties from detonating a nuclear device in or beyond the Earth's atmosphere, including outer space, or underwater, or in any environment if it would cause radioactive debris to be present outside the state's territory.<sup>44</sup> In addition, the Environmental Modification Convention prohibits using environmental modification techniques as a weapon of war, including by deliberately manipulating natural processes in outer space—a prohibition that could reasonably be understood to encompass exoatmospheric nuclear detonations that create harmful artificial radiation belts.<sup>45</sup> The Soviet Union was among the first signatories and

depositories to all three treaties, and Russia remains bound by them.<sup>46</sup>

Despite these clear prohibitions, neither the OST nor the Limited Test Ban Treaty is self-enforcing. Although the OST and the subsequent Liability Convention assign responsibility and liability for damage caused by space objects to launching states,<sup>47</sup> and the OST includes requirements to exercise due regard, avoid harmful contamination, and engage in international consultations if states parties foresee potential harmful interference resulting from space activities,<sup>48</sup> the treaty texts contain no penalties or enforcement mechanisms for a breach of these duties—or of the OST's Article IV ban on stationing WMD in outer space. As for the Limited Test Ban Treaty, the International Court of Justice (ICJ) has opined that it is presumptively limited

in scope to testing scenarios and does not necessarily constrain its parties' actions in wartime.<sup>49</sup>

#### ***A FOBS Loophole?***

Article IV's scope is also limited by its own text and subsequent state practice. The fact that it requires states parties "not to place in orbit around the Earth any objects carrying nuclear weapons . . . or station such weapons in outer space"<sup>50</sup> suggests that there must be a degree of permanency to the weapons' placement in outer space for a violation to occur. The ban has been narrowly construed since its inception. In 1968, the Soviet Union tested a "fractional orbital bombardment system" (FOBS), in which ballistic missiles would be launched into an orbital trajectory but descend to strike their targets before completing a full



orbit.<sup>51</sup> This would, in theory, have made it easier to avoid the United States and allies' northern-tier missile warning network by sending intercontinental ballistic missiles to strike them from the south.<sup>52</sup> However, U.S. leaders concluded at the time that the testing and even the wartime use of this system would not violate the OST.<sup>53</sup>

More recently, China has tested a similar capability, mated to a hypersonic glide vehicle whose speed and maneuverability could enable it to evade modern missile defenses.<sup>54</sup> It is also unclear whether China's capability is only a FOBS or if it can function as a multiple-orbital bombardment system (MOBS) if left in an orbital trajectory for a longer period.<sup>55</sup> As with the earlier Russian FOBS tests, the non-nuclear Chinese test did not violate the OST, and it probably would not violate the OST even if it were to deploy a nuclear weapon on only a partial orbital or sub-orbital trajectory. However, it increases China's potential to violate the OST by placing a nuclear weapon into orbit and keeping it there with very little warning. Journalists have also speculated that China's *Shenlong* reusable spaceplane, which has deployed and recaptured other objects in orbit, could also be used for short-notice orbital bombardment.<sup>56</sup>

Recognizing the muted international response to their exploitation of the FOBS loophole and other provocations, countries such as Russia and China might be tempted to test the limits of other countries' strategic patience, space domain awareness, and willingness to enforce international law by placing a nuclear weapon in orbit. As outer space becomes more clearly recognized as a warfighting domain, it is vitally important to deter the deployment of, and be prepared to defend against, a nuclear-armed satellite and other possible space-based WMD.

#### **Why the Space WMD Bans Make Sense**

One may ask, what makes the possibility of a space-based nuclear weapon uniquely dangerous? After all, the U.S. nuclear triad of land-based intercontinental ballistic missiles, submarine-launched ballistic missiles, and bomber aircraft is designed to be able to strike anywhere in the world at high speed and with minimal warning or detection.<sup>57</sup> Why shouldn't a state opt to add a fourth domain of outer space to deliver its nuclear

weapons?

There are two crucial differences: illegality and the inherently indiscriminate and offensive nature of space-based nuclear weapons. First, even the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the ICJ recognize that terrestrial nuclear weapons programs may lawfully exist for deterrence and self-defense.<sup>58</sup> But space-based nuclear weapons are unlawful under the OST, at least for all its parties, which include all states that are known or believed to possess nuclear weapons.<sup>59</sup>

In addition, while individual nuclear weapons may conceivably be used in a terrestrial conflict in a way that their effects are largely localized and proportionate under the circumstances, a nuclear weapon detonated in Earth's orbit would inevitably cause severely deleterious effects for a large number of satellites, irrespective of their state of registry. In addition to ending or significantly reducing many satellites' useful lifespan, the nuclear radiation could render them unable to conduct station-keeping, collision avoidance, or end-of-life disposal maneuvers, thus exacerbating the problem of long-lived orbital debris and the risk of a "Kessler cascade."<sup>60</sup> For all these reasons, the treaty prohibitions against stationing or detonating a nuclear weapon in outer space remain utterly sound and should be honored by all nations.

#### **Potential Motivation to Deploy Nuclear Weapons in Space**

Why might a state attempt to station a nuclear weapon in outer space? Why would a state be willing to risk the international opprobrium that would ensue? Perhaps more importantly, why would a state be willing to put its own space assets—and potentially even its own astronauts—at risk from the effects of a nuclear detonation in outer space? Didn't the world learn enough about the harmful effects of exoatmospheric and high-altitude nuclear testing in the run-up to the Limited Test Ban Treaty that it should now be unthinkable to seek to detonate a nuclear device in space in the first place?

As to the first of these questions, a country might want to have a nuclear weapon in outer space for a variety of reasons. A space-based nuclear weapon could take different forms, depending on whether

it is designed to be detonated in outer space or deliver a nuclear payload to a target on Earth. A space-based nuclear bombardment system could be used for coercive leverage as an orbital sword of Damocles, hanging over the heads of any country below.

What if the weapon were intended to be used against targets in outer space rather than on Earth? The nuclear device tests that preceded the Limited Test Ban Treaty had a variety of effects on space systems, mostly harmful.<sup>61</sup> In outer space, they created artificial radiation belts that shortened the lives of many other satellites in orbit.<sup>62</sup> For example, U.S. and Soviet exoatmospheric nuclear testing degraded the functional life of Telstar-1, the first commercial communications satellite, and Ariel-1, the United Kingdom's first satellite.<sup>63</sup> On Earth, they created electromagnetic pulse effects that disrupted communications and energy transmission, often inadvertently harming the countries that conducted them.<sup>64</sup> The effects of a nuclear detonation in space are impossible to localize and may run afoul of the law-of-armed-conflict principles of distinction and proportionality depending on how they are used in war.<sup>65</sup>

Perhaps if a country believed it could conduct a nuclear attack in space that would inflict more harm on its enemies than on itself, it would consider the attack as in its interest to commit. As with the kamikaze attacks of World War II or the suicide bombings of modern terrorists, perhaps if a country had relatively little to lose in space, but could cause a disproportionate amount of damage to its foes through an indiscriminate nuclear attack, it would do it. North Korea and Iran, with their nascent space programs and burgeoning missile programs, might most closely fit this profile, although Iran has not yet announced a nuclear weapon capability.<sup>66</sup> Russia, with its deteriorating space program,<sup>67</sup> high tolerance for losses on its own side,<sup>68</sup> and disregard for the interests of other states, might also resort to such measures *in extremis*, or even for offensive advantage. Any of these states might see a nuclear attack in space as an effective way to counter other countries' attempts to assure resiliency in space through widely proliferated satellite constellations such as Starlink.<sup>69</sup>



Launch of Shenzhou 13 a Chinese spaceflight to the Tiangong space station. (Source: Creative Commons)

One potential upside to China's growth as a major spacefaring nation is that its own extensive use of space probably reduces the appeal of a nuclear strike in space. Indeed, in response to Vladimir Putin's recent intimations about nuclear readiness, Chinese foreign ministry spokesman Wang Wenbin reiterated the five major nuclear powers' agreement that a nuclear war "cannot be won and must never be fought."<sup>70</sup> However, China's FOBS development requires recognition of the risk that China could

someday seek to bombard another country with space-based nuclear weapons, even if they are not in orbit for long.

### Response Options in International Law

In international law, states have a variety of means available to respond to internationally wrongful acts. Options, ranging from least to most severe, may include diplomacy, retorsion, countermeasures, or even the use of force in self-defense.

This article will discuss these options and then look at historical examples of state responses to other states' development of WMD for insights into potentially appropriate responses to WMD in outer space. Vignettes will include the Israeli strikes on under-construction Iraqi and Syrian nuclear reactors, U.S. and coalition use of force to end Iraqi and Syrian chemical weapons programs, the Stuxnet cyberattack on Iran's nuclear program, and the international response to North Korea's nuclear weapons program.

### Diplomacy

In international relations theory, a state's "instruments of national power" are often summarized with the acronym DIME to represent the state's means of exerting diplomatic, informational, military, and economic leverage over other states or institutions.<sup>71</sup> Diplomacy, the "D" in DIME, refers to the way a state conducts its foreign policy, and it encompasses statements and actions by the head of state, the foreign minister or secretary of state, ambassadors, and other political appointees and career diplomats in the country's foreign service.<sup>72</sup> It also includes the negotiation and enforcement of treaties and other international agreements.<sup>73</sup> It is often seen as a "soft" instrument of national power, insofar as it largely relies on state officials speaking with each other, with the public, or in international forums, to advance their respective foreign policy interests.<sup>74</sup> However, if a state's diplomacy takes the form of coercive threats, backed up by the economic and military instruments of power, it can become "harder."<sup>75</sup>

When a state believes another state has wronged it, diplomacy is often one of the first means of recourse. The affected state may engage in private back-channel communications to complain of the wrong and request redress, including by a *démarche*—a strongly worded diplomatic letter demanding the other state cease its bad behavior.<sup>76</sup> If the state views these means as insufficient to produce the desired change, it may lodge its complaint in public.<sup>77</sup> This may even take the form of a proposed U.N. General Assembly or Security Council resolution, or a request for action by another treaty-monitoring body.



What would the right diplomatic strategy for addressing space-based nuclear weapons look like? Initially, it should focus on deterring any state from developing or deploying them. This campaign would include continuing to promote accession to the OST among countries that have not ratified it yet, emphasizing the treaty's benefits for ensuring peaceful coexistence in space, and advocating for continued adherence to treaties such as the Limited Test Ban Treaty and the NPT. If a country appeared to be developing space-based WMD, those who detected it could privately warn the bad actor to stop or could reveal what they know to other countries to build international pressure against the illegal weapons development.

Venues for discussions within the U.N. should include the Committee on the Peaceful Uses of Outer Space, the Conference on Disarmament, the First Committee, the Security Council, and the General Assembly. Although Russian and Chinese diplomats representing their countries' permanent seats on the U.N. Security Council and other bodies are often intransigent on space security matters,<sup>78</sup> they may be marginally more receptive to arguments directed against the likes of Iran or North Korea rather than themselves.<sup>79</sup> Even if they refuse to cooperate, presenting a draft Security Council resolution to condemn and authorize action against space-based WMD would put them on the record as having accepted, abstained from voting on, or vetoed the resolution.<sup>80</sup>

In fact, that has already happened. On 24 April 2024, the United States and Japan presented a Security Council resolution, backed by sixty-five total co-sponsors, to reaffirm that all OST parties should comply with the treaty's ban on stationing WMD in outer space and should not develop WMD intended for placement in space; Russia vetoed the resolution, and China abstained.<sup>81</sup> Subsequently, the General Assembly passed a non-binding resolution to the same effect.<sup>82</sup>

Could a country simply withdraw from the OST or decline to ratify it in the first place to evade the prohibition? Perhaps. By nature, treaties are only binding as a matter of affirmative consent between their parties.<sup>83</sup> However, some treaty provisions have become so widely followed that even

non-parties have affirmed them as customary international law.<sup>84</sup> Even as he exercised Russia's veto of the proposed U.N. Security Council resolution discussed above, Russian U.N. ambassador Vasily Nebenzia affirmed that the OST's Article IV obligation remained binding and averred that the U.N. Security Council resolution was therefore unnecessary.<sup>85</sup>

In the wake of Russia's veto, the United States and like-minded countries should begin seeking to promote the notion that OST Article IV's ban on space-based nuclear weapons has crystallized into customary international law, and seek to garner official statements from as many states as possible affirming the same. Although the formation of customary international law may be hindered by persistent objections from leading states such as Russia, any existing state party to the OST would be on shaky ground to raise such an objection, given that they have already agreed to the rule in the treaty.<sup>86</sup> If they decided to disregard the rule anyway, having it widely recognized as customary international law could help to enhance the international legitimacy of any response to the breach.

Of course, diplomacy without a credible promise of action to back it up is ineffective at best, and often counterproductive. Recall former President Barack Obama's stern warnings that Syrian dictator Bashar al-Assad would cross a "red line" if he used chemical weapons against his own people again—and the lack of meaningful consequences when Syria crossed that "red line."<sup>87</sup> It wasn't until years later, when the United States, France, and Britain launched strikes destroying Syria's chemical weapons facilities that Syria finally stopped using chemical weapons against civilians—and even then, only for a time.<sup>88</sup> Diplomatic messaging must be accompanied by follow-through. If leaders determine that additional legislative support is necessary or desirable to accomplish that follow-through, they should seek to build and gain assurance of that support before committing to act. This is especially important if leaders perceive a significant risk of escalation.

It remains to be seen what options the world might pursue now that Russia has vetoed the Security Council resolution calling for compliance with the OST's WMD

ban. If diplomacy fails to deter a country from developing space-based WMD, it would face similar challenges in dissuading the weapon's deployment or use. Therefore, additional options must be considered to strengthen the diplomatic hand.

### **Retorsion**

Retorsion refers to unfriendly but lawful ways a state may respond to another state's unwelcome acts.<sup>89</sup> These are means within a state's inherent legal authority, such as the ability to unilaterally impose or advocate for other countries to support international economic sanctions and the ability to expel another country's diplomats or prosecute their spies.<sup>90</sup> The United States and its allies have made extensive use of retorsion to respond to Russian aggression in Ukraine. While not desiring for NATO members or any other countries to become a party to the conflict, the free world has imposed unprecedented economic sanctions against Russia and many of its key officials, expelled Russian diplomats suspected of spying, reduced participation with Russia in many international cooperative endeavors and forums, expanded the NATO alliance to include Finland and Sweden, and sold, lent, and donated hundreds of billions of dollars' worth of military equipment, training, and humanitarian relief aid to Ukraine.<sup>91</sup> While Russia continues to criticize these actions, it has not conducted an overt armed attack on any NATO member in response.

Retorsion is appealing because it sends a stronger message than diplomacy alone and imposes tangible consequences on a bad actor. Its measures can be calibrated to the needs of the situation and easily stopped if the offending country ceases its bad behavior. Retorsion should certainly be considered as part of a response to space-based WMD development. For instance, individuals involved in any space WMD program could be targeted with travel bans, international arrest warrants for crimes they are suspected to have committed, asset seizures, or financial restrictions on foreign transactions.

However, just as retorsion has been insufficient to end the conflict in Ukraine, it may be inadequate to counter the threats posed by space-based WMD. States hit with economic sanctions often find ways to avoid them, diverting trade and finan-

cial transactions through friendlier third countries and developing indigenous supply chains that can maintain resilience despite a fall-off in international trade.<sup>92</sup> If a country is committed to developing space-based nuclear weapons, diplomacy and sanctions may delay them, but they will not ultimately prevent them from doing so.

For example, even though most countries adhere to the NPT,<sup>93</sup> Russia and China have stymied international efforts to protect Ukraine's Russian-occupied Zaporizhzhia nuclear power plant and restrict the development of fissile material for nuclear weapons;<sup>94</sup> several countries besides the original NPT-recognized nuclear powers have developed their own nuclear weapons;<sup>95</sup> and Iran may be on the verge of a nuclear breakout.<sup>96</sup> No amount of economic or diplomatic pressure has caused these countries to forswear the buildup of their own nuclear arsenals.

### Countermeasures

When a state violates an international obligation without using force, a state injured by the violation may respond with countermeasures. In the international law context, countermeasures are measures, short of the use of force, "that would otherwise be contrary to the international obligations of an injured state vis-à-vis the responsible state, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation."<sup>97</sup> In other words, they are analogous to self-defense, but limited to non-forcible means. Although these means would normally be considered wrongful in the absence of another state's provocation, the wrongfulness of a countermeasure may be precluded if it is directed against another state's breach of an international obligation, and if it is necessary and proportionate to overcome the breach.<sup>98</sup> A countermeasure should, if possible, be temporary and reversible, so that the states involved may resume fulfilling the obligations they owed each other before the breach that provoked the countermeasure.<sup>99</sup>

The ICJ has opined that the state exercising a countermeasure must also warn the offending state to stop before it undertakes the countermeasure.<sup>100</sup> As an example of this, the United States notified Russia of countermeasures the United States planned

to take in response to Russia's violations of the New START Treaty.<sup>101</sup> However, some states have denied that notification is always a requirement; they observe that, at least in the case of countermeasures in cyberspace, it may undermine the effectiveness of the countermeasure to provide notice to the offender because the originally offending state could take the notification as a cue to start circumventing the countermeasure.<sup>102</sup> This argument should apply in the space context as well. If a state conducting a countermeasure reasonably expects the state committing the original breach to evade a countermeasure if it becomes aware of it, yet that the countermeasure would likely be effective if unannounced, the state undertaking the countermeasure should not be required to give notice in a way that would defeat the purpose of the countermeasure.

What might countermeasures look like in space? The U.N. Charter recognizes that "*complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*" are all "measures not involving the use of armed force."<sup>103</sup> While this section is in the chapter that enumerates the powers of the Security Council, its language defining these measures as "not involving the use of armed force" is not expressly restricted to its context. Thus, space electromagnetic warfare techniques or defensive and offensive cyber operations that disrupt or deny satellite communications would not involve the use of force. Therefore, they could potentially qualify as valid countermeasures, provided they met the other criteria of necessity and proportionality and were directed at achieving the cessation of another country's breach of international law.

It should be noted that, ordinarily, intentionally causing harmful interference with satellite communications violates international law. The International Telecommunication Union (ITU) Constitution prohibits causing harmful interference with radiofrequency communications.<sup>104</sup> However, it also recognizes that military radio installations "retain their entire freedom," while providing that they "must, so far as possible, observe statutory provisions

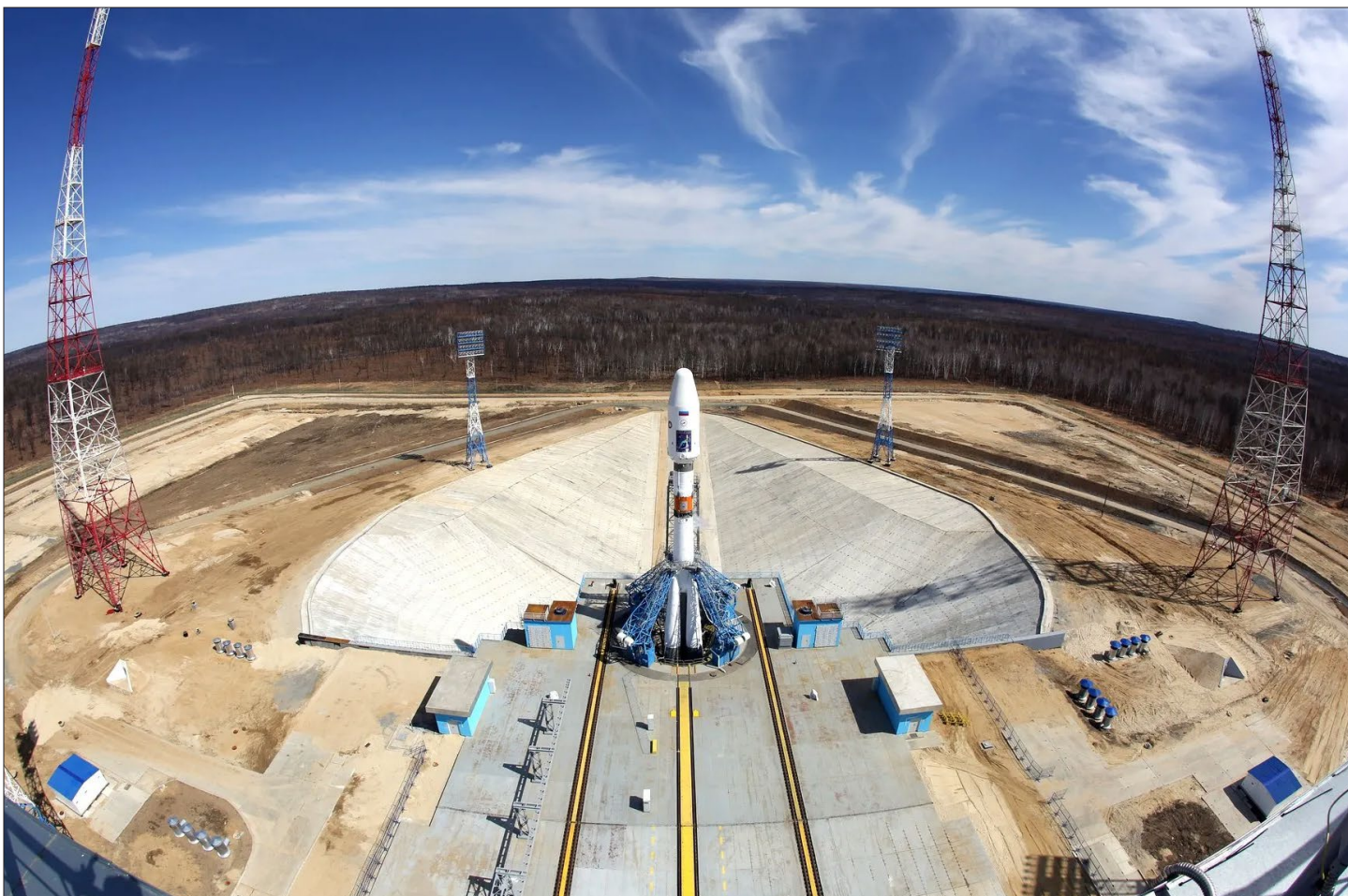
relative to . . . the measures to be taken to prevent harmful interference."<sup>105</sup>

Construing the "entire freedom" for military radio installations broadly, as the language itself suggests, it would appear that the ITU Constitution encourages military radio installations to avoid causing unintentional harmful interference in accordance with their country's domestic laws. However, if a military radio installation's purpose is to conduct communications jamming in the context of an armed conflict, it would not be "possible," consistent with mission requirements, to avoid causing harmful interference.<sup>106</sup> Therefore, intentional satellite communications jamming, when done by a military unit for a valid military purpose, would not necessarily violate the ITU Constitution.<sup>107</sup>

However, even if military satellite jamming were considered to violate the ITU Constitution under some circumstances, if a state sought to jam a satellite's signals to induce the satellite's launching state to cease its own violations of international law (in this case, stationing WMD in outer space), the jamming could be a lawful countermeasure.<sup>108</sup> Under these circumstances, any perceived wrongfulness of the jamming would be precluded. Thus, military units could legitimately conduct electromagnetic spectrum operations against a satellite with a WMD payload or its supporting infrastructure if appropriate authorities determined it constituted a threat hostile to national interests.<sup>109</sup>

Similarly, while the OST requires consultations if a country believes its planned space activity or experiment "would cause potentially harmful interference with activities of other States Parties in the *peaceful* exploration and use of outer space,"<sup>110</sup> the OST would not appear to require consultations if a country expected to cause harmful interference with *non-peaceful* uses of outer space. Traditionally, most military uses of space, such as missile warning, reconnaissance, weather, communications, and navigation, have been regarded as peaceful insofar as they are not used for aggression in the space domain, even if they support terrestrial military operations. However, WMD stationed in orbit in violation of Article IV of the OST should not be entitled to claim protection under the consultation requirement as a "peaceful" use of space.





A Russian Soyuz-2.1a launch vehicle with a payload of three satellites is pictured at Vostochny Cosmodrome in Russia. (Source: RIA Novosti).

Thus, a country seeking to negate the use of orbital WMD should not be required to notify the offender beforehand under either the OST itself or the modified countermeasures doctrine described above.

While countermeasures are an appealing avenue for action, their efficacy for dealing with space-based WMD threats may also be questioned because they tend to be temporary and reversible. While countermeasures are encouraged to be reversible,<sup>111</sup> the nature of countermeasures such as radiofrequency jamming and certain actions in cyberspace means that they may cease to be effective as soon as the jammer stops radiating, the targeted satellite moves out of range, or the operator uploads a software patch. A more permanent solution may therefore be required for a persistent threat like orbital WMD.

### **Self-Defense**

The U.N. Charter requires states to settle their disputes by peaceful means “in such a

manner that international peace and security, and justice, are not endangered”<sup>112</sup> and to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the [U.N.]”<sup>113</sup> However, it also states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the [U.N.], until the Security Council has taken the measures necessary to maintain international peace and security.”<sup>114</sup> In doing so, it recognizes the pre-existing right of states to national and collective self-defense when force is threatened or used against them.

Despite the conditional language “if an armed attack occurs” in Article 51 of the U.N. Charter, most countries recognize that the right of self-defense also applies against imminently threatened attacks. In

the famous “*Caroline Case*” formulation, the United States and the United Kingdom agreed that the anticipatory use of force could be justified as self-defense, but only when the threat is “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.”<sup>115</sup> The standard is grounded in even older standards of the requirement for necessity in self-defense, such as Hugo Grotius’s argument in his 1625 treatise, *De Jure Belli ac Pacis*:

[A]pprehensions from a neighbouring power are not a sufficient ground for war. For to authorize hostilities as a defensive measure, they must arise from the necessity, which just apprehensions create; apprehensions not only of the power, but of the intentions of a formidable state, and such apprehensions as amount to a moral certainty.<sup>116</sup>

After World War II ended, the Nuremberg war crimes tribunal applied the *Caroline* standard as customary international law in ruling against Nazi claims that their invasion of Norway and Denmark was justified as preventive self-defense.<sup>117</sup>

As discussed below, the logic of anticipatory self-defense justified Israel's strikes against the Syrian nuclear reactor that was under construction in 2007, as well as strikes by various nations against Syria's chemical weapons facilities in more recent years. More controversially, it has also been cited to support the Israeli strike against Iraq's Osirak nuclear reactor in 1981 and the U.S.-led invasion of Iraq in 2003.

The preceding examples help to cast light on state practice as an element of customary international law. The Statute of the International Court of Justice requires the court to apply "international custom, as evidence of a general practice accepted as law."<sup>118</sup> When no treaty provision is in place to govern states' behavior, state practice and *opinio juris* can be examined to assess whether an unwritten rule of customary international law exists and, if so, whether a state's behavior has violated that rule.<sup>119</sup> State practice can also provide evidence of how states interpret their obligations under treaties.<sup>120</sup> Thus, it is useful to examine various instances of how states have conducted self-defensive actions to counter WMD in the past and draw out lessons that could support action against space-based WMD.

#### *The Cuban Missile Crisis*

In the early 1960s, the Soviet Union began covertly sending missiles into Cuba to target the United States with nuclear weapons from a much shorter distance and with a much-reduced warning time.<sup>121</sup> When the United States discovered the plot, with help from space-based surveillance capabilities, a period of brinkmanship between U.S. President John F. Kennedy and Soviet Premier Nikita Khrushchev ensued.<sup>122</sup> To break the stalemate, President Kennedy imposed a "quarantine" of Cuba to prevent further arms transfers, while offering in private to remove U.S. Jupiter missiles from Turkey.<sup>123</sup> The Kennedy administration sought to distinguish the quarantine on arms shipments to Cuba from a naval blockade, which attempts to

prevent all maritime trade with the targeted state and has traditionally been considered an act of war.<sup>124</sup> This high-risk "carrot and stick" combination induced Khrushchev to back down and remove the missiles from Cuba.<sup>125</sup>

Similarly, serious and overt threats to use military force against space-based WMD might be useful in a crisis. However, the situations are markedly different. Whereas the Soviet Union was able to extract its missiles from Cuba relatively easily, it would likely not be nearly as feasible to safely remove a nuclear-armed satellite from orbit, to deactivate it in a verifiable manner, or to move it to a disposal orbit where it would no longer pose a threat to active satellites. Deorbiting such an object could cause a disaster similar to the crash of the Soviet nuclear-powered spy satellite Cosmos 954, whose debris irradiated hundreds of miles of northern Canadian territory in 1978 and resulted in millions of dollars in damages.<sup>126</sup> Leaving it in outer space would make it difficult to assess any purported deactivation, and it may not be capable of exiting its initial orbit to pass into deep space where it would no longer endanger other spacecraft. The WMD satellite's owner may also simply deny its nature and purpose and refuse to do anything about it, particularly if it doubts the credibility of any threats.<sup>127</sup>

#### *Israeli Strike on Osirak Nuclear Reactor*

In 1981, Iraqi dictator Saddam Hussein had begun to build a nuclear reactor at Osirak, Iraq, with help from French contractors.<sup>128</sup> When Israel learned that it was being fueled, Israeli Prime Minister Menachem Begin became alarmed.<sup>129</sup> Iraq had joined coalitions of Arab states against Israel numerous times before—in 1948, 1967, and 1973—and Hussein continued to express anti-Israeli rhetoric and support Palestinian terrorism.<sup>130</sup> If Iraq developed a nuclear weapon, Israel was likely to be one of its first potential targets. Prime Minister Begin authorized a daring long-distance raid in which Israeli F-16A fighter jets struck and destroyed the reactor.<sup>131</sup> U.S. officials publicly condemned the attack at the time, as did the U.N. Security Council.<sup>132</sup>

However, after Saddam Hussein later invaded Kuwait and was expelled by the

U.S.-led coalition in Operation Desert Storm, then-Secretary of Defense Dick Cheney sent a letter thanking the raid's architect, former Israeli Air Force Chief David Ivry, for making the coalition's job much easier.<sup>133</sup> Saddam Hussein had restarted his efforts to develop a nuclear capability, which the United States itself had to terminate in 1991, 1993, and again in 2003.<sup>134</sup> Thus, the passage of time, combined with continued Iraqi aggression and pursuit of WMD, softened the views of U.S. leadership as to the justification for Israel's action. Likewise, a preemptive attack against illegal space-based WMD may be controversial when it occurs. However, opposition to such a strike can be mitigated with adequate intelligence sharing or public disclosure of the nature of the threat, as well as by conducting the strike in a responsible manner that leaves little or no collateral damage and does not result in escalation.<sup>135</sup>

#### *Operation Iraqi Freedom*

After suffering nearly 3,000 casualties in the terrorist attacks of September 11, 2001, the United States saw a need to more proactively counter terrorist threats, especially if those terrorists could potentially obtain access to WMD.<sup>136</sup> Al-Qaeda's operatives had turned civilian airliners into flying bombs when they crashed them into the World Trade Center towers, the Pentagon, and a field in Pennsylvania.<sup>137</sup> U.S. authorities shuddered to think of what they might do with access to chemical, biological, radiological, or nuclear weapons.<sup>138</sup> One potential source of such weapons was the aforementioned Saddam Hussein, who, despite the loss of his nuclear program, had a record of killing Iranians and his own civilians with chemical weapons; had attempted to conceal the extent of his chemical weapons program from international inspectors; was continuing to shelter notorious terrorists such as Abu Musab al-Zarqawi; had regularly attacked U.S. and allied forces enforcing the no-fly zones over northern and southern Iraq; and had plotted to assassinate former U.S. President George H.W. Bush.<sup>139</sup> These and other activities violated a variety of U.N. Security Council Resolutions.<sup>140</sup>

U.S. Secretary of State Colin Powell addressed the U.N. Security Council to



argue that Saddam Hussein was a threat to the world and should be removed from power.<sup>141</sup> When the Security Council took no action, the United States, in concert with a broad coalition of nations, launched Operation Iraqi Freedom, which commenced on 19 March 2003, and notified the Security Council on 20 March that the coalition was doing so in self-defense, among other reasons.<sup>142</sup> The coalition quickly defeated the Iraqi military, deposed Saddam Hussein, and began rebuilding the country.<sup>143</sup>

Unfortunately, the aftermath of Hussein's downfall proved to be substantially more challenging than the initial invasion. Moreover, Hussein's stockpile of illegal chemical weapons turned out to be much smaller and more decrepit than Western leaders and intelligence analysts had believed.<sup>144</sup> While the invasion of Iraq made sense to most Americans at the time based on what we knew then, many later criticized the war as a mistake in light of how costly the counterinsurgency became and how small a threat, in hindsight, the chemical weapons posed.<sup>145</sup>

The Iraq war and its reappraisal remind us that it is critically important to develop reliable intelligence and sound judgment about the threats we perceive and how to deal with them. The more distant an adversary is, in terms of both capability and intent, from threatening or using force against us, the more challenging it is to justify military action in self-defense, particularly in the case of preemptive action. However, we should also be careful not to unduly minimize past threats just because they no longer seem so dangerous in hindsight.

#### *Israeli Strike on Syrian Nuclear Reactor*

In 2007, Israeli intelligence identified an undeclared nuclear reactor under construction in eastern Syria, with North Korean nuclear scientists present at the site.<sup>146</sup> Israeli Prime Minister Ehud Olmert feared that the Assad regime intended to use it to create fissile material for a nuclear weapon, with Israel as the most likely target.<sup>147</sup> The fact that Syria, unlike Iraq, shared a border with Israel, made it an even more pressing threat than the Osirak reactor had been. Having learned some lessons from the Osirak strike, this time, Israeli officials quickly



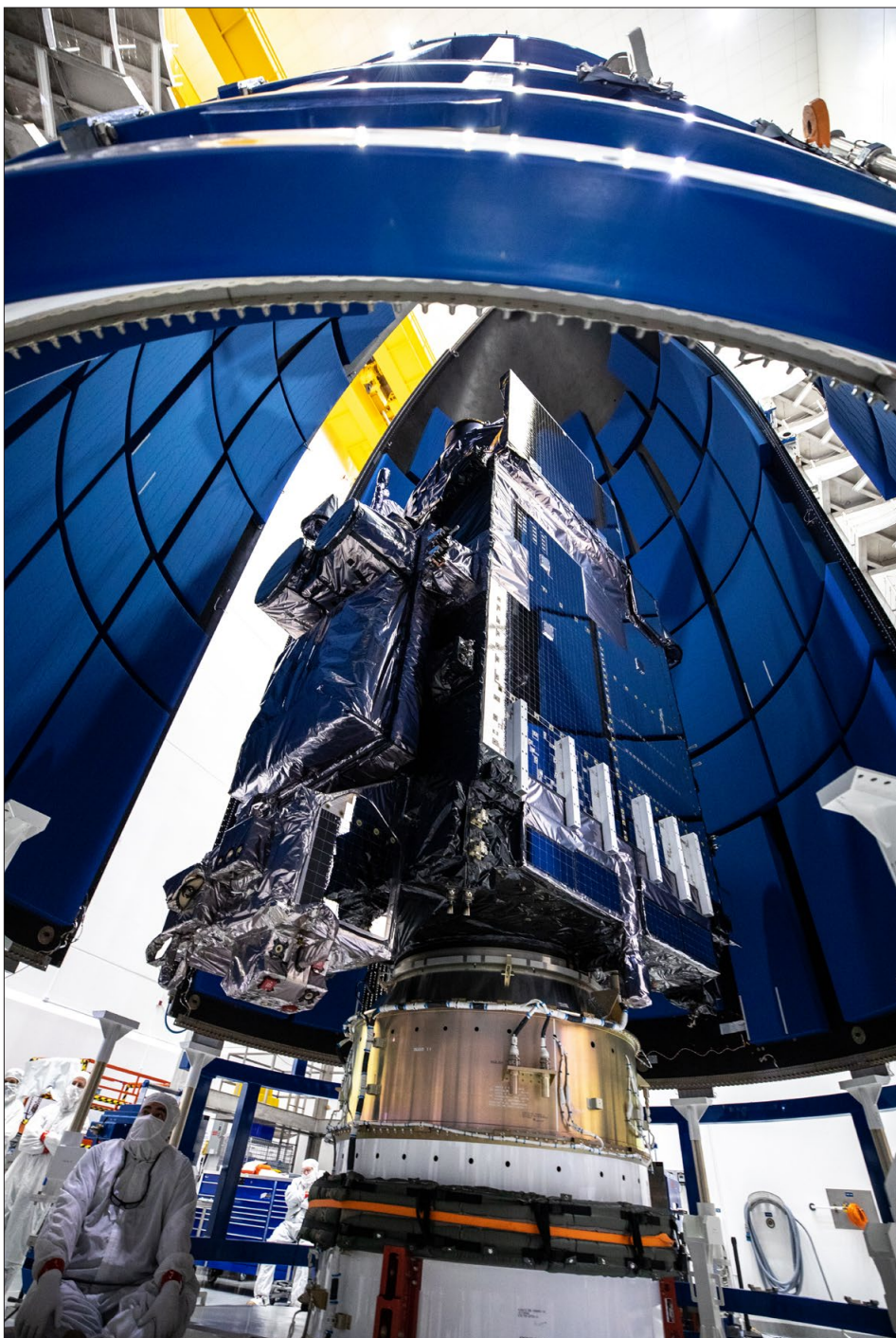
U.S. and Canadian forces clean up Cosmos 954 radioactive debris. (Source: Royal Canadian Air Force)

approached U.S. authorities, shared their intelligence findings, and sought to gain U.S. support for an Israeli airstrike against the Syrian reactor.<sup>148</sup> Unlike in 1981, the U.S. administration and key allies recognized the nuclear reactor as a mortal threat to Israel, shared intelligence that corroborated the Israeli assessment, and pledged not to condemn or interfere with Israel's action.<sup>149</sup> In a raid on 6 September 2007, Israeli Air Force fighters quickly turned the illegal nuclear site into rubble.<sup>150</sup>

Factors that helped the world to see this strike as justified included the illegality of Syria's covert actions under the NPT; Syria's history and ongoing stance of hostility toward Israel; Syria's geographic proximity to Israel; the accurate intelligence data and assessments shared between Israel and the United States; and Israel's well-founded judgment that lesser means, such as exposure of Syria's malfeasance to the International Atomic Energy Agency (IAEA), would be ineffective.<sup>151</sup> Israel's precision attack also resulted in little or no

collateral damage, thus satisfying the law-of-armed-conflict principles of distinction and proportionality.

Just as Israel was threatened by the possibility of a hostile nuclear-armed power on its border, the whole world would be threatened by the existence of a nuclear weapon in space. Whether intended for detonation in orbit or for nuclear bombardment of terrestrial targets, such a weapon would be profoundly destabilizing, as well as patently illegal for any party to the OST. Therefore, countries that believe themselves threatened by the placement of a nuclear weapon in outer space should develop the means to destroy it before it becomes operational, just as Israel destroyed the Iraqi and Syrian nuclear reactors. As the U.S. Department of Justice Office of Legal Counsel opined in 2002, "[A]s the magnitude of the possible harm caused by an attack increases, the probability that the attack will occur may be reduced and still justify an exercise of the right to anticipatory self-defense."<sup>152</sup>



Payload fairings are fitted around a satellite to secure and protect it during its launch atop the Atlas V 541 rocket at Cape Canaveral Space Force Station. (Credit: Ben Smegelsky, NASA)

#### *U.S., Coalition, and Israeli Strikes on Syrian Chemical Weapons Facilities*

At various points in the Syrian Civil War that began in 2011 and continues in part to this day, Syrian dictator Bashar al-Assad used chemical weapons against both rebels opposing his regime and Syrian civilians not participating in the conflict.<sup>153</sup>

In 2012, U.S. President Barack Obama warned that such behavior was crossing a red line and needed to stop.<sup>154</sup> However, when Assad attacked rebels in Damascus with sarin gas in August 2013, President Obama deferred to Congress to authorize the use of military force to punish Assad, and Congress did not grant such an

authorization.<sup>155</sup> Instead, special envoy John Kerry accepted Russia's offer to mediate and monitor the situation and pressured Assad into signing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, also known as the Chemical Weapons Convention (CWC).<sup>156</sup>

Despite Syria's putative accession to the CWC, Assad continued attacking Syrian civilians with chemical weapons over each of the next five years,<sup>157</sup> even after President Donald Trump authorized missile strikes against an airfield used in Assad's 2017 chemical attack.<sup>158</sup> Still undeterred, Assad's forces dropped barrels full of toxic chemicals to poison rebels and civilians at Douma in April 2018.<sup>159</sup> This time, French and British forces joined the U.S. Air Force and Navy in striking targets that included chemical weapons research laboratories in the heart of Damascus.<sup>160</sup> These strikes, along with ongoing efforts at deterrence, set back Syria's chemical weapons program for another year. However, after President Trump decided to disengage from Syria,<sup>161</sup> Assad used them once again.<sup>162</sup> Finally, as the Assad regime collapsed in December 2024, Israel launched airstrikes to finish off the Syrian chemical weapons facilities and keep them from falling into the hands of the militants who toppled Assad.<sup>163</sup>

Lessons from this episode include the risks associated with negotiating with Putin's Russia and the demonstration that in some situations, the military instrument of national power—especially when wielded in concert with allies—is far preferable to diplomacy alone. Like the OST, the text of the CWC does not provide for the use of military force as an enforcement mechanism.<sup>164</sup> However, illegal WMD create risks to civilian populations that many nations find especially intolerable. Therefore, Syria's repeated use of chemical weapons in violation of the CWC demanded a harsher response than merely sending inspectors or filing reports with the U.N. The multinational military response degraded Syria's chemical weapons capabilities and restored deterrence against their further use—but once it appeared that the United States was no longer interested in Syria, deterrence vanished. Thus, the international community must remain vigilant and poised to act



repeatedly against WMD threats if these threats are to remain under control.

#### *Stuxnet Cyberattack on Iranian Nuclear Program*

Iran's ongoing efforts to develop a nuclear capability have provoked a wide variety of reactions from other states, including economic sanctions,<sup>165</sup> U.N. Security Council resolutions,<sup>166</sup> IAEA inspections,<sup>167</sup> the ill-fated Joint Comprehensive Plan of Action (JCPOA),<sup>168</sup> and even assassinations of Iranian nuclear scientists and military officers.<sup>169</sup> One of the most notable incidents involved the cyber worm known as Stuxnet, which is widely believed, though not acknowledged, to have been developed by U.S. and Israeli intelligence agencies.<sup>170</sup> The Stuxnet code infected the control systems for Iranian nuclear centrifuges and caused them to spin out of control, reportedly physically damaging or destroying around 900 centrifuges in fourteen Iranian nuclear facilities.<sup>171</sup>

The Stuxnet event illustrates both the promise and the peril of seeking to affect nuclear programs via cyberspace. It caused a significant setback in Iran's nuclear enrichment program, destroying numerous centrifuges without causing any direct collateral damage. However, it did not permanently eliminate Iran's path to a nuclear capability, and once Iran discovered it, Iran was able to protect itself from further damage.<sup>172</sup> Similarly, cyber methods may offer a subtle, sophisticated, and difficult to detect and attribute way of impairing an adversary's space-based nuclear weapons capability. However, they may be challenging to implant, and, if discovered, could potentially be turned against their original developer or third parties.

#### *North Korean Nuclear and Missile Developments*

North Korea has been hostile to the United States, the Republic of Korea (ROK), and the free world, often including the U.N. itself, since its inception. Exchanging Japanese occupation for Soviet occupation at the end of World War II, the Communist-dominated portion of the Korean peninsula soon launched a war of aggression against the ROK, its neighbor to the south.<sup>173</sup> U.S. and U.N. forces inter-

vened to restore South Korean sovereignty over the ROK's internationally recognized territory, and hostilities were suspended with the declaration of an armistice in 1953.<sup>174</sup> However, the ruling Kim dynasty in Pyongyang has remained implacably opposed to the mere existence of ROK, the United States, and democratic values ever since. It continues to threaten South Korea and the United States, occasionally resorting to the unprovoked use of force.<sup>175</sup>

To back up its threats, North Korea has developed nuclear weapons, having conducted six known underground nuclear detonation tests to date.<sup>176</sup> It has also rapidly advanced its long-range ballistic missile capabilities in tandem with its space launch program, having developed multiple inter-continental ballistic missile (ICBM) variants capable of hitting most of the continental United States.<sup>177</sup> It frequently tests ballistic missiles by shooting them up into outer space such that they splash down in the seas on either side of Japan.<sup>178</sup> It is unknown whether North Korea has successfully mated a nuclear weapon with an ICBM, but its demonstration of both technologies likely indicates that their integration is not far off if it has not already occurred.

U.S. and allied efforts to isolate, sanction, condemn, and deter North Korea over the past seven decades of armistice have met with mixed success at best. While the primary goal of deterring another massive attack on the ROK seems to have succeeded so far, North Korea's continuing bellicose rhetoric and increasingly fearsome nuclear and missile arsenal suggest that we may not always be so lucky.<sup>179</sup> If North Korean dictator Kim Jong-Un gives the order to finish what his grandfather Kim Il-Sung started in 1950, his forces could potentially launch an attack at any time, resuming the Korean War and causing inconceivable amounts of suffering.<sup>180</sup>

North Korea's ability to develop extensive nuclear weapons and ICBM programs despite international sanctions illustrates how even an impoverished rogue state can protect its illegal nuclear weapons development through concealment, lies, and threats while deterring any possibility of a preemptive anti-nuclear strike, such as those Iraq and Syria experienced. Fears about how the Kim regime would retaliate against the

ROK deterred preemptive actions even before the North Korean nuclear breakout. They became insurmountable once North Korea's nuclear weapon capability was confirmed.

#### *Closing Thoughts on Preemptive Self-Defense*

Comparing the North Korean nuclear situation to a potential space-based nuclear weapons development situation, we see some similarities and some differences. In both situations, there are substantial risks to acting preemptively to neutralize a weapon possessed by a known nuclear power. Even if a space-based nuclear weapon itself were not fully activated, the possibility that its owner might retaliate in space or another domain would need to be accounted for. If a space-based nuclear weapon's owner wanted to deny its nature and purpose and claim to be the innocent victim of aggression, it could accuse any state that attempted to negate the weapon of interfering with its peaceful use of outer space—and undertake reprisals accordingly. The state that acted to negate the weapon would also need to explain its action to counter this false narrative and be prepared to deal with any further retaliation that might ensue. Professor Louisa Handel-Mazzetti has helped to lay the legal groundwork for preemptive self-defense through her argument that stationing a nuclear weapon in outer space is inherently an unlawful threat of force in violation of Article 2(4) of the U.N. Charter.<sup>181</sup>

Neutralizing an illegal space-based nuclear weapon might also be substantially less escalatory than attempting to neutralize a well-defended terrestrial nuclear program. Strikes against hardened nuclear facilities, perhaps underground and defended by anti-aircraft missiles, within a nation's sovereign territory, would require a massive investment in resources and would undoubtedly invite counterstrikes if the targeted country were not sufficiently chastened. In contrast, neutralizing an illegal space-based nuclear weapon would not have to involve penetration into enemy territory,<sup>182</sup> human casualties, or the types of damage that tend to provoke genuine grief and outrage among the populace and condemnation by other countries. Rather, most countries, even

if normally aligned with the country that stationed a nuclear weapon in space, might privately breathe a sigh of relief that such a menace was neutralized.

One might also ask whether preemptively neutralizing a space-based nuclear weapon would risk harmful escalation by threatening the nuclear balance of power. U.S. policy takes pains to avoid interference with other countries' nuclear command and control,<sup>183</sup> and Western countries such as the United States do not go about attacking potentially hostile nuclear ballistic missile submarines, ICBM launchers, or nuclear bomber bases and depots just because of the possibility that they could launch a devastating nuclear strike some day. However, those capabilities are largely recognized as legitimate tools of deterrence and self-defense, which a nuclear state has the authority to possess.<sup>184</sup> A nuclear weapon stationed in outer space, by contrast, would be manifestly unlawful and destabilizing. Because of its prohibition in the OST and its indiscriminate nature affecting all spacefaring nations, it would make no sense for responsible and law-abiding states to respond in kind by fielding a comparable capability that they could never justify using. Thus, targeted efforts to neutralize the illegal space weapon would be preferable to traditional forms of nuclear deterrence that rely on achieving some degree of parity in delivery methods for a first- or second-strike capability.

The degree of international acquiescence to any preemptive action against space-based WMD will likely depend in part on what means are chosen to carry it out, and their foreseeable long-term effects. For example, a kinetic strike that causes large amounts of long-lived, possibly radioactive, space debris would be less likely to garner international support or toleration than a non-kinetic strike, perhaps with some form of directed-energy weapon or cyber mechanism. The latter method could, in theory, render the weapon harmless without splintering it into thousands of shards of space shrapnel—and may also be more difficult to detect and attribute, mitigating the risk of retaliation. Non-kinetic actions to disable the capability before launch, or kinetic or non-kinetic actions to neutralize it in the early launch phase before it achieves orbit, should also

be considered.<sup>185</sup> However, launch disruptions might carry a higher risk of discovery or terrestrial damage.

Certain prior U.S. policy proclamations, such as the ban on destructive direct-ascent ASAT testing (now echoed by dozens of other countries and endorsed in a U.N. General Assembly Resolution)<sup>186</sup> and the tenet-derived responsible behaviors in space,<sup>187</sup> suggest significant reluctance to cause permanent harm to any other country's satellite—particularly if collateral damage is expected. However, if that other country's satellite contains an illegal WMD payload, it could be more responsible to neutralize it than to leave it alone.

As General Stephen Whiting, Commander, USSPACECOM, recently argued at the 40th Space Symposium, "It's time that we can clearly say that we need space fires, and we need weapon systems. We need orbital interceptors. . . . We call these weapons. And we need them to deter a space conflict and to be successful if we end up in such a fight."<sup>188</sup> A new U.S. Space Force doctrinal document also makes clear that the United States needs space superiority to ensure "the enemy is no longer able to act in a meaningful or dangerous way against friendly celestial lines of communication,"<sup>189</sup> which may require "seeking out and destroying an enemy's spacecraft, systems, and networks."<sup>190</sup> It is difficult to imagine a target more worthy of such destruction than a satellite with an illegal WMD payload.

When it comes to defending against a nuclear FOBS or MOBS, the announcement of a new "Golden Dome for America"<sup>191</sup> is also a heartening sign. Building on the legacy of President Reagan's Strategic Defense Initiative, the Golden Dome initiative directs planning for a next-generation missile defense architecture with significant space-based components that will enable identification, tracking, and interception of "ballistic, hypersonic, advanced cruise missiles, and other next-generation aerial attacks from peer, near-peer, and rogue adversaries."<sup>192</sup> If such a system is fielded and operates as intended, it could potentially interdict a FOBS-type threat in the pre-launch, boost, or terminal phases.<sup>193</sup>

Finally, effective deterrence must rely on more than legal arguments that self-defense is a valid option. It must be backed up

by hard power, and the training, ability, and willingness to employ it in a disciplined and lethal way. Even if the first Russian satellite that provoked so much consternation is not already armed, it could be followed by one or more successors with a live nuclear payload.<sup>194</sup> Before that happens, we must urgently build the capability to deny any attempt to deploy or use a space-based nuclear weapon before it lays waste to the world's satellite constellations, imperils our cities and military forces with orbital bombardment, or enables terrestrial military adventurism by presenting a constant threat to render space unusable. This will require significant investment in counterspace systems, space domain awareness, and an operational test and training infrastructure to prepare U.S. Space Force Guardians acting in concert with other joint and combined forces to face and defeat the threat.

## Conclusion

In this new and dangerous era of great-power competition, irresponsible states threaten to cast aside the hard-won legal prohibitions on space-based WMD that the international community collectively achieved during the Cold War. The United States and its allies must use all lawful means at our disposal to protect our space assets, our homelands, our allies, and our modern way of life from these threats—and to deter or prevent them from materializing in the first place. These means may include elements of diplomacy, retorsion, countermeasures, and, if necessary, anticipatory self-defense, as circumstances and capabilities warrant. This article has detailed some of the ways to do so, recognizing the risks and benefits of each type of action. What we cannot afford is inaction. We must not allow WMD to be stationed in outer space. *Si vis pacis, para bellum.* **TAL**

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and do not necessarily reflect the views of the Department of Defense, the Department of the Air Force, the Department of the Army, or any of their components or members. The citation of secondary sources in this article should not be construed to confirm or deny the veracity of any of their contents.

## Notes

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IV, cl. 1, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST]. The OST does not specify any penalty for states that violate this prohibition.

2. See, e.g., *Press Briefing by Press Secretary Karine Jean-Pierre and White House National Security Communications Advisor John Kirby*, WHITE HOUSE (Feb. 15, 2024) [hereinafter *White House Press Briefing*], <https://www.whitehouse.gov/briefing-room/press-briefings/2024/02/15/press-briefing-by-press-secretary-karine-jean-pierre-and-white-house-national-security-communications-advisor-john-kirby-3>; *Fiscal Year 2025 Budget Request for National Security Space Programs: Hearing before the H. Armed Servs. Comm., Subcomm. on Strategic Forces*, 118th Cong. 4 (May 1, 2024) (statement of Dr. John F. Plumb, Assistant Sec'y of Def. for Space Pol'y) [hereinafter *Plumb Statement*], <https://docs.house.gov/meetings/AS/AS29/20240501/117236/HHRG-118-AS29-Wstate-PlumbJ-20240501.pdf>; Jim Garamone, *Military Experts Highlight Space Opportunities, Threats at Aspen Conference*, DoD NEWS (July 18, 2024), <https://www.spacecom.mil/Newsroom/News/Article-Display/Article/3844275/military-experts-highlight-space-opportunities-threats-at-aspen-conference>.

3. Zoë Richards & Patrick Smith, *Biden Warns Risk of Nuclear 'Armageddon' Is Highest since Cuban Missile Crisis*, NBC NEWS (Oct. 6, 2022), <https://www.nbcnews.com/politics/joe-biden/biden-warns-risk-nuclear-armageddon-highest-cuban-missile-crisis-rcna51146>; David Sanger, *Biden's Armageddon Moment: When Nuclear Detonation Seemed Possible in Ukraine*, N.Y. TIMES (Mar. 11, 2024), <https://www.nytimes.com/2024/03/09/us/politics/biden-nuclear-russia-ukraine.html>.

4. Mark B. Schneider, *Escalate to De-escalate*, PROC., U.S. NAVAL INST. (Feb. 2017), <https://www.usni.org/magazines/proceedings/2017/february/escalate-de-escalate>; Amy F. Woolf, CONG. RSCH. SERV., R45861, *RUSSIA'S NUCLEAR WEAPONS: DOCTRINE, FORCE, AND MODERNIZATION 1* (Mar. 1, 2022), <https://crsreports.congress.gov/product/pdf/R/R45861/10>.

5. Regarding terminology, the U.S. Department of State has noted, "The United States no longer uses the term 'tactical nuclear weapon' preferring the term 'non-strategic nuclear weapon' because we do not envision any use of nuclear weapons to be tactical in character or effect. We note that all nuclear weapons can have strategic implications. The use of any nuclear weapon would fundamentally alter the nature of a conflict." U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 9 n.1 (2022) [hereinafter *ADHERENCE REPORT*], <https://www.state.gov/adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments>. Despite the potential for nuclear weapons of any size to have

strategic implications, the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Apr. 8, 2010, S. Treaty Doc. No. 111-5 [hereinafter *New START Treaty*], does not define the term "strategic offensive arms." However, it focuses on the following types of arms that generally possess intercontinental range: nuclear-armed or nuclear-capable intercontinental ballistic missiles (ICBMs), sea-launched ballistic missiles (SLBMs), heavy bombers, and their associated nuclear warheads and launchers. *Id.* at 11.

6. Micah McCartney, *China Responds to Putin's Nuclear Weapons Warning*, NEWSWEEK (Mar. 14, 2024), <https://www.newsweek.com/china-responds-putin-nuclear-weapons-warning-1879113> (citing former Russian president Dmitry Medvedev as endorsing a nuclear strike on Ukraine if Ukraine were to successfully repel Russia's invasion).

7. Boldizsar Gyori, *Russia Has Spent \$200 Billion on Full-Scale War in Ukraine, Suffered 700,000 Casualties*, AUSTIN SAYS, KYIV INDEP. (Dec. 9, 2024), <https://kyivindependent.com/russia-has-spent-200-billion-on-full-scale-war-in-ukraine-suffered-700-000-casualties-austin-says> (citing Russian casualties as having reached at least 700,000 by U.S. estimates and over 750,000 by Ukrainian estimates). In early January 2025, the Ukrainian Armed Forces estimated that Russian casualties exceeded 800,000, while United Kingdom Defence Intelligence offered a slightly more conservative estimate of "over 790,000 casualties." Maya Mehrara, *Russia's Losses in Ukraine Pass Grim Milestone*, NEWSWEEK (Jan. 7, 2025), <https://www.newsweek.com/russias-losses-ukraine-pass-grim-milestone-2010764>.

8. Kristin Ven Bruusgaard, *Myths and Misconceptions around Russian Military Intent, Myth 9: 'Russian Nuclear Strategy Is Best Described as "Escalate to De-Escalate,"* CHATHAM HOUSE (Aug. 23, 2022), <https://www.chathamhouse.org/2022/07/myths-and-misconceptions-around-russian-military-intent/myth-9-russian-nuclear-strategy>. This analysis contends that Russia has improved its conventional capabilities to the point that it would reserve nuclear use to counter threats to its own vital national interests, such as preventing a conventional defeat on its own territory. See *id.*

9. See McCartney, *supra* note 6 (citing Medvedev's statements). More recently, as some NATO members have signaled a greater potential willingness to train Ukrainian forces in Ukraine or to permit Ukraine to use their weapons against targets deeper into Russia and Crimea, Russia announced its forces would begin conducting tactical nuclear weapons drills. *Russia Begins Nuclear Drills in an Apparent Warning to West over Ukraine*, ASSOCIATED PRESS (May 22, 2024), <https://apnews.com/article/russia-nuclear-drills-ukraine-war-62ad37602b0cf2901bf82a75e593294d>.

10. In October 2022, Vladimir Putin signed documents purporting to absorb the regions ("oblasts") of Kherson, Donetsk, Luhansk, and Zaporizhzhia into the Russian Federation—despite not even occupying all those territories, let alone legitimately governing them. Adam Schreck, *Putin Signs Annexation of Ukrainian Regions as Losses Mount*, ASSOCIATED PRESS (Oct. 5, 2022), <https://apnews.com/article/russia-ukraine-putin-international-law-donetsk-9fcd11c11936dd700db94ab725f2b7d6>.

11. OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF THE UNITED STATES INTELLIGENCE

COMMUNITY 15 (Feb. 5, 2024), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2024-Unclassified-Report.pdf> ("Moscow will be more reliant on nuclear and counterspace capabilities for strategic deterrence as it works to rebuild its ground force.").

12. Schneider, *supra* note 4 (describing Russian claims to have developed a "nuclear-armed, fast, drone submarine"); Woolf, *supra* note 4, at 22-29; see also Karoun Demirjian, *Here Are the Nuclear Weapons Russia Has in Its Arsenal*, WASH. POST (Oct. 5, 2022), <https://www.washingtonpost.com/world/2022/10/05/russia-nuclear-weapons-military-arsenal/>; Ashish Dangwal, *Russia's 'Monster Missile' Sarmat ICBM to Be Tested by End Of 2022; 1st Regiment to Be Deployed after Gauging Outcome*, EURASIAN TIMES (Nov. 8, 2022), <https://eurasianimes.com/russias-monster-missile-sarmat-icbm-to-be-tested-by-end-of-2022>; Associated Press, *Russia Simulates Nuclear Strike after Opting out of Treaty*, GUARDIAN (Oct. 25, 2023), <https://www.theguardian.com/world/2023/oct/25/russia-simulates-nuclear-strike-after-opting-out-of-treaty>. On 21 November 2024, Russia attacked Dnipro, Ukraine, with an experimental, conventionally armed "Oreshnik" intermediate-range ballistic missile, "the first time such a weapon was used in a war." *Russia Has Used Its Hypersonic Oreshnik Missile for the First Time. What Are Its Capabilities?*, AP (Dec. 9, 2024), <https://apnews.com/article/russia-oreshnik-hypersonic-missile-putin-ukraine-war-345588a399158b9eb0b56990b8149bd9>.

13. U.S. DEP'T OF STATE, NEW START TREATY ANNUAL IMPLEMENTATION REPORT (2023), <https://www.state.gov/wp-content/uploads/2023/01/2022-New-START-Implementation-Report.pdf> (stating for the first time that the United States "cannot certify the Russian Federation to be in compliance with the terms of the New START Treaty" because Russia refused to permit U.S. inspections or convene a timely session of the Bilateral Consultative Committee); ADHERENCE REPORT, *supra* note 5 (accusing Russia of violating its obligations under the Biological Weapons Convention and the Treaty on Open Skies, and raising compliance concerns with Russia's activities and reporting failures under the Threshold Test Ban Treaty, the Vienna Document on Confidence- and Security-Building Measures, and Presidential Nuclear Initiatives committing to the reduction of nonstrategic nuclear weapons); U.S. DEP'T OF STATE, COMPLIANCE WITH THE CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION CONDITION 10(C) REPORT 16 (2022) [hereinafter *CWC ADHERENCE REPORT*], <https://www.state.gov/wp-content/uploads/2022/04/Condition-10-c-Report.pdf> (noting that Russia "retains an undeclared chemical weapons program and has used chemical weapons" to attempt assassinations twice in recent years—including in the United Kingdom in March 2018). Russia also reneged on its commitment to respect Ukraine's territorial sovereignty in exchange for Ukraine's sending Soviet-era nuclear weapons back to Russia. Jamie McIntyre, *In 1994, the US Succeeded in Convincing Ukraine to Give up Its Nukes but Failed to Secure Its Future*, WASH. EXAMINER (Jan. 13, 2022), <https://www.washingtonexaminer.com/policy/defense-national-security/in-1994-the-us-succeeded-in-convincing-ukraine-to-give-up-its-nukes-but-failed-to-secure-its-future>; see also Lorne Cook & Harriet Morris, *NATO Freezes a Cold War-Era Security Pact after Russia Pulls Out, Raising Questions on Arms Control*, ASSOCIATED PRESS (Nov. 7, 2023), <https://apnews.com/article/russia-treaty-arms-control-cold-war-39038fa5a73a4a33bccc6a5c60be341> (describing NATO's response to

Russia's withdrawal from the Treaty of Conventional Armed Forces in Europe).

14. Mary Ilyushina, Robyn Dixon & Niha Masih, *Putin Says Russia Will Suspend Role in New START Nuclear Accord with U.S.*, WASH. POST (Feb. 21, 2023), <https://www.washingtonpost.com/world/2023/02/21/putin-speech-ukraine-state-of-nation/>. In November 2023, Russia also revoked its ratification of the Comprehensive Test Ban Treaty (CTBT). *Putin Signs Bill Revoking Russia's Ratification of a Global Nuclear Test Ban Treaty*, ASSOCIATED PRESS (Nov. 2, 2023), <https://apnews.com/article/russia-putin-nuclear-test-ban-9029a57a951df5f7a5039abc472c75a9>. The CTBT has never entered into force because several other key nuclear states, including the United States, have not ratified it.

15. Colonel Theodore Richard, *Can International Law Constrain Russian Behavior?*, LAWFIRE (Nov. 8, 2023), <https://sites.duke.edu/lawfire/2023/11/08/col-ted-richard-on-can-international-law-constrain-russian-behavior/>.

16. *Fiscal Year 2023 Priorities and Posture of United States Space Command, Hearing Before the S. Armed Servs. Comm.*, 117th Cong. (2022) (statement of Gen. James H. Dickinson, Commander, U.S. Space Command), <https://www.armed-services.senate.gov/imo/media/doc/USSPACECOM%20FY23%20Posture%20Statement%20ASCS%20FINAL.pdf>. General Dickinson stated,

Our competitors are also developing and proliferating satellites and satellite attack capabilities to hold our space and strategic capabilities at risk. These counterspace capabilities include cyber, electronic warfare (EW), directed-energy weapons, anti-satellite missiles, and space-based weapons, which enable our competitors to achieve a range of effects. These effects range from degrading space services temporarily to damaging or destroying satellites permanently in and through space that jeopardize our capabilities in other domains.

*Id.* at 4.

17. Charles Pope, *Senate Confirms Saltzman to be Space Force's Next Chief of Space Operations*, SEC'Y AIR FORCE PUB. AFFS. (Sept. 30, 2022), <https://www.spaceforce.mil/News/Article/3176090/senate-confirms-saltzman-to-be-space-forces-next-chief-of-space-operations>.

18. OST art. IX requires states parties to conduct their activities in outer space "with due regard to the corresponding interests of other States Parties," and to engage in international consultations if they have reason to believe their planned activity or experiment "would cause potentially harmful interference" with the peaceful space activities of other states parties. OST, *supra* note 1, art. IX. See also Mark Carreau, *Russian Anti-Sat Test Doubled ISS Debris Threat*, NASA SAYS, AVIATION WEEK (Jan. 18, 2022), <https://aviationweek.com/defense-space/space/russian-anti-sat-test-doubled-iss-debris-threat-nasa-says>. A new ISS crew arrived in orbit just four days before the ASAT test, joining Russian cosmonauts Commander Anton Shkaplerov and Flight Engineer Pyotr Dubrov. *The Station Crew Welcomed Four New Members*, NASA SPACE STATION (Nov. 11, 2021), <https://blogs.nasa.gov/spacestation/2021/11/11/the-station-crew-welcomed-four-new-members>.

19. *Russian Direct-Ascent Anti-Satellite Missile Test Creates Significant, Long-Lasting Space Debris*, U.S. SPACE COMMAND PUB. AFFS. (Nov. 15, 2021) [hereinafter *Russian DA-ASAT Test*], <https://www.spacecom.mil/Newsroom/News/Article-Display/Article/2842957/russian-direct-ascent-anti-satellite-missile-test-creates-significant-long-last> (emphasis added).

20. See, e.g., *id.*; Anurag Roushan, *UK Condemns Russia's Anti-satellite Missile Test, Claims It Puts Space Missions at Risk*, REPUBLIC WORLD (Nov. 16, 2021), <https://www.republicworld.com/world-news/uk-news/uk-condemns-russias-anti-satellite-missile-test-claims-it-puts-space-missions-at-risk.html>; *France Says Russian Anti-satellite Test Is 'Destabilising, Irresponsible'*, REUTERS (Nov. 16, 2021), <https://www.reuters.com/article/uk-usa-russia-space-france-idUKKBN2112F2>. Later, by a 155-to-9-vote margin with nine abstentions, the U.N. General Assembly passed a resolution condemning such tests and calling on all countries to refrain from intentionally destroying satellites in direct-ascent ASAT tests. Jeff Foust, *United Nations General Assembly Approves ASAT Test Ban Resolution*, SPACE NEWS (Dec. 13, 2022), <https://spacenews.com/united-nations-general-assembly-approves-asat-test-ban-resolution>.

21. *The Russian Military Confirmed that They Shot Down a Soviet Satellite During Testing*, INTERFAX (Nov. 16, 2021), <https://www.interfax.ru/russia/803293> (translated by Google).

22. Tracy Cozzens, *Russia Issues Threat to GPS Satellites*, GPS WORLD (Nov. 29, 2021), <https://www.gpsworld.com/russia-issues-threat-to-gps-satellites>. Kiselyov's claim was probably exaggerated. Russia's destructive ASAT test took place about 480 kilometers above the Earth, whereas the GPS constellation operates about 20,200 kilometers above mean sea level in medium Earth orbit (MEO)—an area about 42 times farther away than the Nudol's target in November 2021. *Space Segment*, GPS.GOV, <https://www.gps.gov/systems/gps/space> (June 28, 2022). Cf. Ankit Panda, *The Dangerous Fallout of Russia's Anti-Satellite Missile Test*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 17, 2021), <https://carnegieendowment.org/2021/11/17/dangerous-fallout-of-russia-s-anti-satellite-missile-test-pub-85804>.

23. W.J. Hennigan, *Exclusive: Strange Russian Spacecraft Shadowing U.S. Spy Satellite*, GENERAL SAYS, TIME (Feb. 10, 2020), <https://time.com/5779315/russian-spacecraft-spy-satellite-space-force>; BRIAN WEEDEN, SECURE WORLD FOUND., *Russian Co-Orbital Anti-Satellite Testing* (July 2023), [https://swfound.org/media/207608/fs23-05\\_russian-co-orbital-asat-testing\\_0723.pdf](https://swfound.org/media/207608/fs23-05_russian-co-orbital-asat-testing_0723.pdf); Morgan McFall-Johnsen, *A Russian 'Inspector' Satellite Appears to Be Chasing a Secret US Military Satellite in a Game of Cat and Mouse*, BUS. INSIDER (Apr. 28, 2023), <https://www.businessinsider.com/russian-inspector-satellite-chasing-secret-us-military-satellite-cat-mouse-2023-4> (quoting General Dickinson's characterization of Russia's Kosmos-2558 launch into close orbital proximity with USA-326 as "really irresponsible behavior").

24. Jeff Foust, *U.S. Claims Recently Launched Russian Satellite Is an ASAT*, SPACE NEWS (May 21, 2024), <https://spacenews.com/u-s-claims-recently-launched-russian-satellite-is-an-asat>; *For Second Time Since Late April Security Council Fails to Adopt First-Ever Resolution on Preventing Arms Race in Outer Space*, UN MEETINGS COVERAGE (May 20, 2024), <https://press.un.org/en/2024/sc15700.doc.htm>.

25. *House Intelligence Committee Chairman Turner Statement on Serious National Security Threat*, HOUSE PERMANENT SELECT COMM. ON INTEL. (Feb. 14, 2024),

<https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=1360>.

26. *White House Press Briefing*, *supra* note 2.

27. Geoff Brumfiel, *A New Russian Weapon System for Targeting Satellites Is Under Development*, NPR (Feb. 15, 2024), <https://www.npr.org/2024/02/15/1231861013/a-new-russian-weapon-system-for-targeting-satellites-is-under-development>; The Aerospace Advantage, *Special Edition: Russian Nukes in Space?*, MITCHELL INST. FOR AEROSPACE STUDIES, at 3:43 (Feb. 20, 2024), <https://mitchellaerospacepower.org/episode-169-special-edition-russian-nukes-in-space-understanding-the-threat-and-implications>.

28. Plumb Statement, *supra* note 2, at 4.

29. Dean Cheng, *Winning without Fighting: Chinese Legal Warfare*, HERITAGE FOUND. (May 21, 2012), <https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare>; U.S.-CHINA ECON. & SEC. REV. COMM'N, 2023 REPORT TO CONGRESS: EXECUTIVE SUMMARY AND RECOMMENDATIONS 16-17 (2023), [https://www.uscc.gov/sites/default/files/2023-11/2023\\_Executive\\_Summary.pdf](https://www.uscc.gov/sites/default/files/2023-11/2023_Executive_Summary.pdf).

30. *Secretary Blinken's Call with People's Republic of China (PRC) CCP Central Foreign Affairs Office Director Wang Yi*, U.S. DEP'T OF STATE (Feb. 3, 2023), <https://www.state.gov/secretary-blinkens-call-with-peoples-republic-of-china-prc-ccp-central-foreign-affairs-office-director-wang-yi>; *Transcript: Senior Defense Official Holds a Background Briefing on High-Altitude Surveillance Balloon*, U.S. DEP'T OF DEF. (Feb. 2, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3287204/senior-defense-official-holds-a-background-briefing-on-high-altitude-surveillance>; Jake Tapper, *Transcript: State of the Union*, CNN (Feb. 5, 2023), <https://transcripts.cnn.com/show/sotu/date/2023-02-05/segment/01> (interviewing U.S. Secretary of Transportation Pete Buttigieg and Senator Marco Rubio after a U.S. Air Force pilot shot down the balloon off the coast of South Carolina). The Chicago Convention on International Civil Aviation, to which China is a party, provides, "No state aircraft of a contracting State shall fly over the territory of another State . . . without authorization . . . ." Convention on International Civil Aviation, art. 3(c), Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter *Chicago Convention*].

31. BUREAU OF OCEANS & INT'L ENV'T & SCI. AFFS., U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 150, PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 1 (2022), <https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf>; Steven Stashwick, *Chinese Vessel Rams, Sinks Philippine Fishing Boat in Reed Bank*, DIPLOMAT (June 14, 2019), <https://thediplomat.com/2019/06/chinese-vessel-rams-sinks-philippine-fishing-boat-in-reed-bank> (describing how a Chinese vessel rammed and sank a Philippine fishing boat in the Philippines' exclusive economic zone, and mentioning how other Chinese vessels have attacked Japanese and South Korean coast guard patrol craft); Tom Sharpe, *China Is Pushing the Naval 'Grey Zone'. Sooner or Later, the Shooting Will Start*, TELEGRAPH (Nov. 21, 2023), <https://www.telegraph.co.uk/news/2023/11/21/china-plan-navy-australia-frigate-divers-war-grey-zone> (describing how a Chinese destroyer used high-powered sonar in an acoustic attack against Australian naval divers); Dzirhan Mahadzir, *China Coast Guard Vessel Collides with Filipino Supply Ship in South China Sea*, U.S. NAVAL INST. NEWS (Oct. 22, 2023), <https://news.usni.org/2023/10/22/china-coast-guard-vessel-collides-with-filipino-sup>



ply-ship-in-south-china-sea (describing how a China Coast Guard vessel collided with a supply boat and a Chinese Maritime Militia vessel bumped a Philippine Coast Guard patrol vessel in unsuccessful efforts to prevent the resupply of Philippine Marines stationed at the grounded *Sierra Madre* on Second Thomas Shoal). In two separate incidents in March 2024, Chinese water cannon attacks injured Philippine sailors and damaged their vessel. Micah McCartney, *Injured Allied Navy Sailors Given Combat Medals After China Clash*, NEWSWEEK, <https://www.newsweek.com/injured-allied-navy-sailors-given-combat-medals-after-china-clash-1884460> (Mar. 28, 2024); Nectar Gan & Kathleen Magramo, *Only Pirates Do This: Philippines Accuses China of Using Bladed Weapons in Major South China Sea Escalation*, CNN (June 20, 2024), <https://www.cnn.com/2024/06/20/asia/philippines-footage-south-china-sea-clash-china-intl-hnk/index.html>.

32. China is a party to the Convention on Certain Conventional Weapons and all its amendments and protocols. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III), Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW]. Protocol IV prohibits states from employing laser weapons designed to cause permanent blindness and requires them to take feasible precautions to avoid causing blindness when using laser weapons. Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons) arts. I-II, Oct. 13, 1995, T.I.A.S. No. 09-721.2, 1380 U.N.T.S. 370. However, a Chinese coast guard vessel reportedly fired military-grade lasers at crew members of a Philippine coast guard vessel in February 2023, roughly a year after a Chinese naval ship lased a Royal Australian Air Force P-8A Poseidon surveillance aircraft. Katharine Murphy, *'Act of Intimidation': Morrison Condemns Chinese Navy for Shining Laser at Australian Surveillance Plane*, GUARDIAN (Feb. 19, 2022), <https://www.theguardian.com/australia-news/2022/feb/20/act-of-intimidation-morrison-condemns-chinese-navy-for-shining-laser-at-australian-surveillance-plane>; Brad Lendon, *Philippine Coast Guard Says Chinese Ship Aimed Laser at One of Its Vessels*, CNN (Feb. 13, 2023), <https://www.cnn.com/2023/02/13/asia/philippines-china-coast-guard-laser-intl-hnk-ml/index.html>.

33. Naman Kothari, *Maps as Weapons: Legal Implications of Territorial Claims*, OXFORD POLITICAL REV. (Mar. 30, 2024), <https://oxfordpoliticalreview.com/2024/03/30/maps-as-weapons-legal-implications-of-territorial-claims>; Aadil Brar, *US Reacts After China Renames Neighbor's Territory*, NEWSWEEK, <https://www.newsweek.com/china-india-renaming-territory-neighbor-arunachal-1887173> (Apr. 8, 2024).

34. Michael R. Pompeo, Sec'y of State, *Determination of the Secretary of State on Atrocities in Xinjiang*, U.S. DEP'T OF STATE (Jan. 19, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang>. Cf. Jerry Dunleavy, *After Holding Out, Biden Administration Acknowledges Ongoing Uyghur Genocide in China that 'Cannot Be Ignored'*, WASH. EXAMINER (Mar. 10, 2021), <https://www.washingtonexaminer.com/news/biden-administration-acknowledges-genocide-uyghurs-china-cannot-be-ignored> (citing Secretary of State Anthony Blinken's agreement with his predecessor's assessment); UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, OHCHR

ASSESSMENT OF HUMAN RIGHTS CONCERNS IN THE XINJIANG UYGHUR AUTONOMOUS REGION, PEOPLE'S REPUBLIC OF CHINA ¶¶ 143-48 (2022), <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf> (finding that "[s]erious human rights violations have been committed," "[a]llegations of patterns of torture or ill-treatment . . . are credible, as are allegations of individual incidents of sexual and gender-based violence," and that China has imposed "far-reaching, arbitrary and discriminatory restrictions on human rights and fundamental freedoms, in violation of international norms and standards," resulting in an overall conclusion that China's arbitrary and discriminatory detention of Uyghurs and other Muslims "may constitute international crimes, in particular crimes against humanity").

35. U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2024, at IX (2024) [hereinafter CHINA MILITARY POWER REPORT], <https://media.defense.gov/2024/Dec/18/2003615520/-1/-1/0/military-and-security-developments-involving-the-peoples-republic-of-china-2024.pdf>; see also OFF. OF DIR. OF NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 15 (2025), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2025-Unclassified-Report.pdf>.

36. *Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races*, WHITE HOUSE BRIEFING ROOM (Jan. 3, 2022) [hereinafter *Joint Statement*], <https://web.archive.org/web/20250106231502/https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races> (citing Article VI of the Nuclear Non-Proliferation Treaty).

37. CHINA MILITARY POWER REPORT, *supra* note 35, at 68.

38. Barton Gellman, *U.S. and China Nearly Came to Blows in '96*, WASH. POST (June 20, 1998), <https://www.washingtonpost.com/archive/politics/1998/06/21/us-and-china-nearly-came-to-blows-in-96/926d105f-1fd8-404c-9995-90984f86a613> (citing a former U.S. defense official as being told by a senior Chinese military officer, "In the 1950s, you three times threatened nuclear strikes on China, and you could do that because we couldn't hit back. Now we can. So you are not going to threaten us again because, in the end, you care a lot more about Los Angeles than Taipei."); Joseph Kahn, *Chinese General Threatens Use of A-Bombs if U.S. Intrudes*, N.Y. TIMES (July 15, 2005), <https://www.nytimes.com/2005/07/15/washington/world/chinese-general-threatens-use-of-abombs-if-us-intrudes.html> (quoting Maj Gen Zhu Chenghu as saying, in his personal capacity, that any U.S. missile or precision munition strikes on China's territory should result in nuclear retaliation).

39. JONATHAN D.T. WARD, THE DECISIVE DECADE: AMERICAN GRAND STRATEGY FOR TRIUMPH OVER CHINA 180 (2023).

40. Gregory Weaver, *The Role of Nuclear Weapons in a Taiwan Crisis*, ATLANTIC COUNCIL (Nov. 22, 2023), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-role-of-nuclear-weapons-in-a-taiwan-crisis>; see also THOMAS HAMILTON, RAND, PAF-1P-797, EVEN SMALL NUCLEAR DETONATIONS IN SPACE CAN THREATEN COMMERCIAL LOW EARTH ORBIT SATELLITES 2 (2024).

41. *Joint Statement*, *supra* note 36. Of course, Chinese Communist Party rhetoric, unfortunately reinforced in certain respects by most other countries' accession

to the "one China principle," maintains that "the [People's Republic of China (PRC)] is the sole legitimate government of China and that Taiwan is an integral part of Chinese territory that cannot be allowed independence and must eventually be unified with the PRC." Phillip C. Saunders, *Three Logics of Chinese Policy Toward Taiwan: An Analytic Framework*, in CROSSING THE STRAIT: CHINA'S MILITARY PREPARES FOR WAR WITH TAIWAN 35 (Joel Wuthnow et al. eds., 2023). Thus, China would argue that even a forcible unification with Taiwan (which U.S. policy opposes) would be a matter of internal affairs, not of international aggression.

42. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 12, 20 (2022), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf>. Although this document softened the characterization of China from the "pacing threat" described by then-Secretary of the Air Force Frank Kendall, officials in the second Trump administration and Congress have again begun to describe China as the "pacing threat." See John A. Tirpak, *Kendall Says Countering China Is Why He's Coming Back to Pentagon*, AIR & SPACE FORCES MAG., May 25, 2021, <https://www.airandspaceforces.com/kendall-motivation-air-force-china>; David Vergun, *Leaders Describe Host of Threats to Homeland, Steps to Mitigate Them*, DoD NEWS (Apr. 1, 2025), <https://www.defense.gov/News/News-Stories/Article/Article/4142304/leaders-describe-host-of-threats-to-homeland-steps-to-mitigate-them> (quoting Navy Admiral Alvin Holsey, Commander, U.S. Southern Command); Rogers: *We Must Reestablish Deterrence Against China*, OPENING STATEMENTS: HOUSE ARMED SERVS. COMM. (Apr. 9, 2025), <https://armedservices.house.gov/news/documentsingle.aspx?DocumentID=5047> (remarks of Committee Chairman Mike Rogers).

43. OST, *supra* note 1, art. IV, cl. 1. While "weapons of mass destruction" are not defined in the treaty, they are usually understood to encompass nuclear, chemical, and biological weapons. Daryl Kimball, *The Outer Space Treaty at a Glance*, ARMS CONTROL ASS'N (Oct. 2020), <https://www.armscontrol.org/factsheets/outerspace>. While much of this article's analysis would apply to space-based biological or chemical weapons as well, the article's primary focus is on nuclear weapons because of the potential magnitude of their effects in the space domain and the limited number of people who could potentially be affected by a chemical or biological attack in outer space at any time.

44. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, July 26, 1963, 14 U.S.T. 1313, T.I.A.S. 5433 [hereinafter Limited Test Ban Treaty].

45. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques arts. I-II, Dec. 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 151 [hereinafter ENMOD].

46. For a further discussion of the Russian Federation's accession to Soviet-era treaties, see Christian Packard, *Falling Back to Earth: The Return of State Predominance in Russian National Space Legislation in the Roscosmos Era*, 44.1 J. SPACE L. 76, 85 (2020), <https://airandspace.law.olemiss.edu/wp-content/uploads/2023/06/8.-Article-3-Packard-pp-76-to-145.pdf>.

47. OST, *supra* note 1, art. VII; Convention on International Liability for Damage Caused by Space Objects arts. II-III, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention]. A launching state is any state that launches or procures the launch

of a space object, or from whose territory or facility the object is launched into space.

48. OST, *supra* note 1, art. IX.

49. The ICJ has opined that: “the treaties dealing exclusively with . . . testing of nuclear weapons, without specifically addressing their threat or use . . . could . . . be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 62 (July 8) [hereinafter *Legality of the Threat or Use of Nuclear Weapons*].

50. OST, *supra* note 1, art. IV, cl. 1.

51. Michael Listner, *FOBS, MOBS, and the Reality of the Article IV Nuclear Weapons Prohibition*, SPACE REV. (Oct. 17, 2022), <https://www.thespacereview.com/article/4466/1>.

52. *Id.*

53. *Id.* (describing how Secretary of Defense Robert McNamara analyzed the situation, rejecting the argument from Edward C. Welsh, the executive secretary of the National Aeronautics and Space Council, that sending a weapon on a fractional orbital trajectory would still constitute placing it in orbit).

54. Theresa Hitchens, *It's a FOBS, Space Force's Saltzman Confirms Amid Chinese Weapons Test Confusion*, BREAKING DEF. (Nov. 29, 2021), <https://breakingdefense.com/2021/11/its-a-fobs-space-forces-saltzman-confirms-amid-chinese-weapons-test-confusion>; see also CHINA MILITARY POWER REPORT, *supra* note 35, at 65, 101, 109-10.

55. A nuclear MOBS, by remaining in outer space through more than one orbit around the Earth, would more clearly violate the OST than a FOBS would.

56. Gabriel Honrada, *China's Space Plane Puts Mysterious Wingmen in Orbit*, ASIA TIMES (Dec. 21, 2023), <https://asiatimes.com/2023/12/chinas-space-plane-puts-mysterious-wingmen-in-orbit>.

57. See *America's Nuclear Triad*, U.S. DEP'T OF DEF., <https://www.defense.gov/Multimedia/Experience/Americas-Nuclear-Triad> (last visited Apr. 23, 2025).

58. Article I of the NPT begins, “Each nuclear-weapon State Party to the treaty,” and Article VIII gives these nuclear-weapon states privileged status by requiring amendments be passed by their unanimous consent, along with a majority of all states parties. Treaty on the Non-Proliferation of Nuclear Weapons arts. I, VIII, Jan. 7, 1968, 21 U.S.T. 483, 721 U.N.T.S. 161. *Cf.* *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 49, at 242-46 (recognizing that neither environmental protection requirements nor the law of war principle of proportionality prohibit the use of nuclear weapons in self-defense, and that the U.N. Charter ban on the threat or use of force was only agreed to prohibit the threat of *illegal* use of force, not the threat of use of nuclear weapons in self-defense or to deter unlawful attacks).

59. The list of declared nuclear weapons states includes the United States, Russia, China, the United Kingdom, France, India, Pakistan, and North Korea. *World Nuclear Forces*, STOCKHOLM INT'L PEACE RSCH. INST. (2020), <https://www.sipri.org/yearbook/2020/10>. All have ratified the OST, as has Israel, which neither confirms nor denies whether it has nuclear weapons. *Id.*; OST, *supra* note 1. Iran, which may be on the verge of producing a nuclear weapon, and which has recently achieved successful space launches after an

initial string of failures, has signed but not ratified the OST. U.N. Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., *Status of International Agreements relating to Activities in Outer Space as at 1 January 2024*, U.N. Doc. A/AC.105/C.2/2024/CRP.3 (Apr. 15, 2024) [hereinafter *Space Treaties Status*], [https://www.unoosa.org/res/oosadoc/data/documents/2024/aac\\_105c\\_22024crp/aac\\_105c\\_22024crp\\_3\\_0\\_html/AC105\\_C2\\_2024\\_CRP03E.pdf](https://www.unoosa.org/res/oosadoc/data/documents/2024/aac_105c_22024crp/aac_105c_22024crp_3_0_html/AC105_C2_2024_CRP03E.pdf).

60. Donald Kessler & Burton Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 J. GEOPHYS. RES. A6, 2645 (1978) (positing that collisions between space objects will eventually lead to an exponential increase in the amount of orbital debris). As a real-world illustration of this hypothesis, the collision of the Iridium-33 and Cosmos-2251 satellites in February 2009 produced over 2,000 pieces of trackable debris, which remain a significant component of the orbital debris population fifteen years later. *Update on Three Major Debris Clouds*, ORBITAL DEBRIS Q. NEWS, Apr. 2010, at 4, <http://orbitaldebris.jsc.nasa.gov/newsletter/pdfs/ODQNV14i2.pdf>; *Goldstone Radar Measurements of the Orbital Debris Environment*, ORBITAL DEBRIS Q. NEWS, Feb. 2024, at 3, 4, <https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/ODQNV28i1.pdf>; see also Matt Field, *A Nuclear Blast in Space Would Wipe Out Satellites*, WALL ST. J. (Nov. 26, 2011), <https://www.wsj.com/articles/SB10001424052970204531404577050403048374584>; Brett Tingley, *Russian Plans for Space-Based Nuclear Weapon to Target Satellites Spark Concern in US Congress*, SPACE (Feb. 15, 2024), <https://www.space.com/russia-space-nuclear-weapon-us-congress>.

61. See, e.g., Gilbert King, *Going Nuclear Over the Pacific*, SMITHSONIAN MAG. (Aug. 15, 2012), <https://www.smithsonianmag.com/history/going-nuclear-over-the-pacific-24428997>.

62. *Id.*

63. J.S. Mayo et al., *The Command System Malfunction of the Telstar Satellite*, 42 BELL SYS. TECH. J. 1631, 1639-40 (1963) (“Because the average dose rate encountered in the Telstar orbit was found to be approximately two orders of magnitude greater than expected at the time of launch . . . and because only a part of the transistors in the command decoder were screened, ionization damage remains the prime suspect as the cause of circuit malfunction, . . . . A large part of these high-energy electrons are believed to have been introduced by the high-altitude nuclear explosion of July 9, 1962.”); Richard Hollingham, *The Cold War Nuke that Fried Satellites*, BBC (Feb. 24, 2022), <https://www.bbc.com/future/article/20150910-the-nuke-that-fried-satellites-with-terrifying-results>; EDWARD CONRAD ET AL., DEF. THREAT REDUCTION AGENCY, DTRA-1R-10-22, COLLATERAL DAMAGE TO SATELLITES FROM AN EMP ATTACK, DEFENSE THREAT REDUCTION AGENCY 11-14 (2010), <https://apps.dtic.mil/sti/pdfs/ADA531197.pdf>.

64. Liz Boatman, *Sixty Years After, Physicists Model Electromagnetic Pulse of a Once-Secret Nuclear Test*, AM. PHYS. SOC'Y NEWS (Nov. 10, 2022), <https://www.aps.org/publications/apsnews/202212/pulse.cfm> (describing street light outages in Honolulu); Vasilii Greetsai et al., *Response of Long Lines to Nuclear High-altitude Electromagnetic Pulse (HEMP)*, 40 IEEE TRANSACTIONS ON ELECTROMAGNETIC COMPATIBILITY 4, 4 (1998) (describing how Soviet high-altitude nuclear testing over Kazakhstan caused the failure of a 500-kilometer stretch of communications line).

65. The principle of distinction obliges belligerents to distinguish between enemy combatants and valid

military objectives, which may be targeted, and protected civilians and civilian objects, which may not. OFF. OF GEN. COUNSEL, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 2.5.2 (31 July 2023), <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/dod-law-of-war-manual-june-2015-updated-july%202023.pdf>. The principle of proportionality requires belligerents to refrain from attacks in which the anticipated collateral harm to civilians and civilian objects would outweigh the concrete and direct military advantage of the strike, and to take feasible precautions to reduce the risk of such harm. *Id.* § 2.4.1.2. While nuclear weapons are exempted from the First Additional Protocol to the Geneva Conventions, to which the United States is not a party in any case, see *id.* § 6.18.3, the United States argued to the ICJ that customary international law would apply to use of nuclear weapons as well, and the ICJ concurred that these principles did not operate as an absolute ban on the threat or use of nuclear weapons. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 49, at 245, 257-60.

66. Intriguingly, while North Korea has ratified the OST, Iran has signed but not ratified it, raising questions as to whether Iran would even consider itself bound to follow Article IV. *Space Treaty Status*, *supra* note 59.

67. Clara Moskowitz, *Are Russia's Recent Space Woes a Sign of Larger Problems?*, SPACE (Feb. 15, 2012), <https://www.space.com/14588-russian-space-failures-larger-problems.html>. *Cf.* Eric Berger, *A Domestic Newspaper Warns of the Russian Space Program's "Rapid Collapse,"* ARS TECHNICA (Dec. 17, 2021), <https://arstechnica.com/science/2021/12/a-state-aligned-russian-newspaper-reviews-the-space-program-and-its-scathing>; Bruce Einhorn, *Russia's Alternative to GPS Satellites Is Outdated and Outnumbered*, BLOOMBERG (Sept. 20, 2023), <https://www.bloomberg.com/news/articles/2023-09-20/russia-s-glonass-satellite-system-badly-needs-an-upgrade>; Isabel Keane, *Russia's First Lunar Mission in 47 Years Smashes into Moon in Failure*, N.Y. POST (Aug. 20, 2023), <https://nypost.com/2023/08/20/russias-luna-25-space-craft-smashes-into-the-moon-in-failure>.

68. See, e.g., Stavros Atlamazoglou, *After a Lull, Russian Casualties in Ukraine Are Skyrocketing Again*, NAT'L INTEREST (Apr. 16, 2025), <https://nationalinterest.org/blog/buzz/after-a-lull-russian-casualties-in-ukraine-are-skyrocketing-again> (describing respective U.S. and UK estimates of Russian casualties in Ukraine as approximately 790,000 to over 920,000, with the deadliest months happening in late 2024 and early 2025); *Russian DA-ASAT Test*, *supra* note 19. *Cf.* Derek Richardson, *Russian Anti-Satellite Test Forces ISS Crew to Shelter in Place*, SPACEFLIGHT INSIDER (Nov. 15, 2021), <https://www.spaceflightinsider.com/missions/iss/russian-anti-satellite-test-forces-iss-crew-to-shelter-in-place> (noting that the seven-member International Space Station crew, including Russian cosmonauts Anton Shkaplerov and Pyotr Dubrov, had to take emergency actions to shelter from the new debris field caused by Russia's destructive ASAT test). Russia also routinely jams global navigation satellite services and expects that others will do the same to them in a conflict. Tracy Cozzens, *Russia Expected to Ditch GLONASS for Loran in Ukraine Invasion*, GPS WORLD (Feb. 17, 2022), <https://www.gpsworld.com/russia-expected-to-ditch-glonass-for-loran-in-ukraine-invasion>. *Cf.* EUR. UNION AVIATION SAFETY AGENCY, SIB No. 2022-02R1, GLOBAL NAVIGATION SATELLITE SYSTEM OUTAGE LEADING TO NAVIGATION / SURVEILLANCE DEGRADATION



(Feb. 17, 2023), [https://ad.easa.europa.eu/blob/EASA\\_SIB\\_2022\\_02R1.pdf](https://ad.easa.europa.eu/blob/EASA_SIB_2022_02R1.pdf); Brendan Cole, *NATO Nations Hit by GPS Attack Blamed on Russia*, NEWSWEEK (Mar. 2, 2024), <https://www.newsweek.com/nato-gps-russia-attack-blamed-1875276>.

69. W.J. Hennigan, *The Warning*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/interactive/2024/12/05/opinion/nuclear-weapons-space.html>.

70. McCartney, *supra* note 6. *C.f. Joint Statement, supra* note 36.

71. See JOINT CHIEFS OF STAFF, JP 1, VOL. 1, JOINT WARFIGHTING I-3 (27 Aug. 2023) (“The United States leverages its diplomatic, informational, military, and economic instruments of national power to pursue its national interests.”). Some commentators have identified additional instruments of national power, such as financial, intelligence, law, and development. See, e.g., Peter C. Phillips & Charles S. Corcoran, *Harnessing America’s Power*, JOINT FORCES Q., 4th Q., 2011, at 38, [https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-63/jfq-63\\_38-46.Phillips-Corcoran.pdf](https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-63/jfq-63_38-46.Phillips-Corcoran.pdf); Jeremy S. Weber, *Playing the MIDFIELD: It’s High Time to Recognize Law as an Instrument of National Power*, JAG REPORTER (Nov. 4, 2019), <https://www.jagreporter.af.mil/Portals/88/2019%20Articles/Documents/20191104%20Weber-Midfield.pdf>.

72. See *Diplomacy: The U.S. Department of State at Work*, U.S. DEP’T OF STATE (June 2008), <https://2009-2017.state.gov/r/pa/ei/rls/dos/107330.htm>.

73. *Id.*

74. See Michael J. Zwiebel, *Why We Need to Reestablish the USIA*, MIL. REV., Nov.-Dec. 2006, at 130.

75. See *id.*

76. FOREIGN SERV. INST., U.S. DEP’T OF STATE, PROTOCOL FOR THE MODERN DIPLOMAT 30 (July 2013) (defining *démarche*), <https://2009-2017.state.gov/documents/organization/176174.pdf>.

77. See, e.g., U.S. DEP’T OF STATE, *supra* note 30.

78. See, e.g., Therese Hitchens, *Russia Spikes UN Effort on Norms to Reduce Space Threats*, BREAKING DEF. (Sept. 1, 2023), <https://breakingdefense.com/2023/09/russia-spikes-un-effort-on-norms-to-reduce-space-threats>.

79. In some instances where the behavior of rogue states has been raised to the U.N. Security Council for action, Russia and China have refrained from exercising their vetoes. See, e.g., the Security Council resolutions against Iraq discussed *infra* note 143, as well as Security Council Resolution 1973 authorizing a no-fly zone over Moammar Qaddafi’s Libya. S.C. Res. 1973, ¶¶ 6-12 (Mar. 17, 2011). However, China and Russia subsequently expressed regret over NATO airstrikes in Libya, claiming that the actions exceeded the scope of the resolution they abstained from voting on. *Russia, China Urge Adherence to Libya Resolutions*, REUTERS (June 16, 2011), <https://www.reuters.com/article/idUSLDE75F13V>.

80. For instance, Ukraine presented a draft U.N. Security Council resolution condemning Russia’s armed aggression in February 2022, which Russia promptly vetoed. *Russia Blocks Security Council Action on Ukraine*, UN NEWS (Feb. 26, 2022), <https://news.un.org/en/story/2022/02/1112802>. Although no Security Council resolution resulted, a subsequent U.N. General Assembly resolution enabled 141 countries to call for an immediate end to Russia’s conquest of Ukraine. *General*

*Assembly Resolution Demands End to Russian Offensive in Ukraine*, UN NEWS (Mar. 2, 2022), <https://news.un.org/en/story/2022/03/1113152>.

81. Aila Slisco, *US Hints Russia ‘Hiding Something’ After Nuclear Space Weapons Ban Blocked*, NEWSWEEK (Apr. 24, 2024), <https://www.newsweek.com/us-hints-russia-hiding-something-after-nuclear-space-weapons-ban-blocked-1893987>; *Security Council Fails to Adopt First-Ever Resolution on Arms Race in Outer Space, Due to Negative Vote by Russian Federation*, UN (Apr. 24, 2024) [hereinafter *Security Council Fails*], <https://press.un.org/en/2024/sc15678.doc.htm>.

82. *Threat of Mass-Destruction Weapons in Space, New Technology in Military Domain Inform General Assembly’s Adoption of 72 First Committee Texts*, UN (Dec. 2, 2024), <https://press.un.org/en/2024/ga12660.doc.htm> (describing how the resolution passed by a vote of 167 to 4, with six abstentions).

83. UNITED NATIONS, 2011 TREATY EVENT FACT SHEET NO. 1, TOWARDS UNIVERSAL PARTICIPATION AND IMPLEMENTATION (2011).

84. For example, the United States has recognized many aspects of the U.N. Convention on the Law of the Sea (UNCLOS) as constituting customary international law, even though our Senate has not ratified it and even though some of these provisions were examples of “positive law” created by the treaty without merely codifying pre-existing customary international law.

85. See sources cited *supra* note 81.

86. U.N. SCOR, 79th Sess., 9616th mtg. at 3, U.N. Doc. S/PV.9616 (Apr. 24, 2024), <https://undocs.org/en/S/PV.9616>.

87. Patrice Taddonio, “The President Blinkered”: Why Obama Changed Course on the “Red Line” in Syria, PBS FRONTLINE (May 25, 2015), <https://www.pbs.org/wgbh/frontline/article/the-president-blinkered-why-obama-changed-course-on-the-red-line-in-syria>; see also Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <https://www.nytimes.com/2013/09/01/world/middleeast/syria.html>.

88. Phil Stewart & Tom Perry, *U.S. Says Air Strikes Cripple Syria Chemical Weapons Programme*, REUTERS (Apr. 14, 2018), <https://www.reuters.com/article/us-mideast-crisis-syria-idUSKBN1HJ0ZS>. But see Lara Jakes, *U.S. Concludes Syria Used Chemical Weapons in May Attack*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/world/middleeast/syria-chemical-weapons-us.html>. After the surprising collapse of the Assad regime in December 2024, Israel conducted airstrikes targeting other suspected Syrian chemical weapons facilities to prevent terrorists from acquiring them. Mick Krever, *Israel Strikes Syria 480 Times and Seizes Territory as Netanyahu Pledges to Change Face of the Middle East*, CNN (Dec. 11, 2024), <https://www.cnn.com/2024/12/10/middleeast/israel-syria-assad-strikes-intl/index.html>.

89. INT’L LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES 128 (2001) [hereinafter ARTICLES ON STATE RESPONSIBILITY], [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

90. See *id.*; Michael N. Schmitt, *Lieber Institute White Paper: Responding to Malicious or Hostile Actions Under International Law*, ARTS. OF WAR (Apr. 26, 2022), <https://lieber.westpoint.edu/white-paper-responding-malicious-hostile-actions-international-law>.

91. Steven Erlanger, *Sweden Enters NATO, a Blow to Moscow and a Boost to the Baltic Nations*, N.Y. TIMES (Mar. 7, 2024), <https://www.nytimes.com/2024/03/07/world/europe/sweden-nato-neutrality.html>; Rachel Wilson, Lou Robinson & Henrik Pettersson, *Ukraine Aid: Where the Money Is Coming from*, in *Four Charts*, CNN (Oct. 6, 2023), <https://www.cnn.com/2023/10/05/world/ukraine-money-military-aid-intl-dg/index.html> (detailing nearly \$350 billion in total foreign commitments to Ukraine, of which almost \$100 billion was military aid).

92. Olivia Allison & Gonzalo Saiz, *Track and Disrupt: How to Counter Sanctions-Evasion Networks*, ROYAL UNITED SERV. INST. (Nov. 10, 2023), <https://www.rusi.org/explore-our-research/publications/commentary/track-and-disrupt-how-counter-sanctions-evasion-networks>; FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF TREAS., FIN-2022-ALERT001, FINCEN ADVISES INCREASED VIGILANCE FOR POTENTIAL RUSSIAN SANCTIONS EVASION ATTEMPTS (2022), <https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Sanctions%20Evasion%20FINAL%20508.pdf>; Christopher Condon, *Yellen Takes Aim at Russian Sanctions Evasion at G-7 Gathering*, BLOOMBERG (May 11, 2023), <https://www.bloomberg.com/news/articles/2023-05-11/yellen-takes-aim-at-russian-sanctions-evasion-at-g-7-gathering>; *Treasury Hardens Sanctions with 130 New Russian Evasion and Military-Industrial Targets*, U.S. DEP’T OF TREAS. (Nov. 2, 2023), <https://home.treasury.gov/news/press-releases/jy1871>.

93. The International Atomic Energy Agency (IAEA) heralds the NPT as “the centrepiece of global efforts to prevent the spread of nuclear weapons” and states, “With 191 States parties, it is the most widely adhered to treaty in the field of nuclear non-proliferation, peaceful uses of nuclear energy and nuclear disarmament.” *The IAEA and the Non-Proliferation Treaty*, IAEA, <https://www.iaea.org/topics/non-proliferation-treaty> (last visited Apr. 24, 2025).

94. Gabriela Rosa Hernández & Daryl G. Kimball, *Russia Blocks NPT Conference Consensus Over Ukraine*, ARMS CONTROL ASS’N (Sept. 2022), <https://www.armscontrol.org/act/2022-09/news/russia-blocks-npt-conference-consensus-over-ukraine>.

95. India, Pakistan, and North Korea have all tested nuclear weapons and are not parties to the NPT. *International Day Against Nuclear Tests*, UNITED NATIONS (Aug. 29, 2023), <https://www.un.org/en/observances/end-nuclear-tests-day/history>. South Africa developed nuclear weapons, but gave them up before joining the NPT. *Id.* Israel is suspected to have nuclear weapons, but neither confirms nor denies they exist. *Id.*

96. In early 2023, the Associated Press reported that Iran had stockpiled 87.5 kilograms of 60 percent-enriched uranium, even as International Atomic Energy Agency (IAEA) inspectors had detected uranium particles enriched up to 83.7 percent—not far below the 90 percent needed for weapons-grade purity—and former Under Secretary of Defense for Policy Colin Kahl testified to Congress that “it would take about [twelve] days” for Iran “to produce one bomb’s worth of fissile material.” Stephanie Liechtenstein, *UN Report: Uranium Particles Enriched to 83.7% Found in Iran*, ASSOCIATED PRESS (Feb. 28, 2023), <https://apnews.com/article/iran-nuclear-uranium-enrichment-germany-israel-c9b3669a7721bd8929d465117c81b70f>.

97. ARTICLES ON STATE RESPONSIBILITY, *supra* note 89, at 128.

98. *Id.* at 128-29.

99. *Id.* at 128-31.

100. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 56, ¶ 85 (Sept. 25) [hereinafter Gabčíkovo-Nagymaros Project], <https://icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (“[T]he injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it.”).

101. Bureau of Arms Control, Deterrence, & Stability, *U.S. Countermeasures in Response to Russia’s Violations of the New START Treaty*, U.S. DEP’T OF STATE (June 1, 2023), <https://www.state.gov/u-s-countermeasures-in-response-to-russias-violations-of-the-new-start-treaty>.

102. See, e.g., *Application of International Law to States’ Conduct in Cyberspace: UK Statement*, UK FOREIGN, COMMONWEALTH & DEV. OFF. ¶ 19 (June 3, 2021), <https://www.gov.uk/government/publications/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement#countermeasures>; Michael Schmitt, *France’s Major Statement on International Law and Cyber: An Assessment*, JUST SEC. (Sept. 16, 2019), <https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment> (noting that, like the United Kingdom, “France rejected an absolute duty to notify the State against which countermeasures are to be taken before mounting them” and also observing that Estonia diverges from the International Law Commission’s position by stating that collective countermeasures are permissible).

103. U.N. Charter art. 41 (emphasis added).

104. The ITU Constitution states, “All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Member States . . . which operate in accordance with the provisions of the Radio Regulations.” CONSTITUTION OF THE INTERNATIONAL TELECOMMUNICATION UNION art. 45, cl. 1. The U.S. National Space Policy also asserts,

Purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation’s rights. Consistent with the defense of those rights, the United States will seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and its allies. Any purposeful interference with or an attack upon the space systems of the United States or its allies that directly affects national rights will be met with a deliberate response at a time, place, manner, and domain of our choosing.

NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 3-4 (2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/12/National-Space-Policy.pdf>. Thus, it both acknowledges the wrongfulness of purposeful interference against U.S. and allied space systems even when that interference does not constitute an “attack,” while upholding the U.S. right to counter such interference as it sees fit.

105. CONSTITUTION OF THE INTERNATIONAL TELECOMMUNICATION UNION art. 48.

106. For a discussion of electromagnetic warfare and other operations involving the electromagnetic spectrum, see generally U.S. DEP’T OF AIR FORCE, DOCTRINE PUB. 3-85, ELECTROMAGNETIC SPECTRUM OPERATIONS (14 Dec. 2023), [https://www.dctrine.af.mil/Portals/61/documents/AFDP\\_3-85/AFDP%203-85%20Electromagnetic%20Spectrum%20Ops.pdf](https://www.dctrine.af.mil/Portals/61/documents/AFDP_3-85/AFDP%203-85%20Electromagnetic%20Spectrum%20Ops.pdf).

107. Sarah M. Mountin, *The Legality and Implications of Intentional Interference with Commercial Communication Satellite Signals*, 90 INT’L L. STUD. 101, 138 (2014) (explaining how the terms of Article 48 of the ITU Constitution “clearly suggest military exigency or necessity (such as measures taken in armed conflict) may supersede the obligation to prevent harmful interference”), paraphrasing Robert W. Jarman, *The Law of Neutrality in Outer Space* 41 (2008) (unpublished LL.M. thesis, McGill University Institute of Air and Space Law), <https://apps.dtic.mil/sti/tr/pdf/ADA485937.pdf>.

108. See ARTICLES ON STATE RESPONSIBILITY, *supra* note 89, at 128-30. The International Law Commission commentaries note that countermeasures do not have to be reciprocal: “There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.” *Id.* at 129. In this case, electromagnetic spectrum countermeasures would be far preferable to the reciprocal act of stationing another nuclear device in orbit, which would breach an international obligation owed to the rest of the world and not only to the offending State.

109. See discussion of U.S. National Space Policy, *supra* note 104.

110. OST, *supra* note 1, art. IX (emphasis added),

111. According to ICJ dicta, countermeasures must be reversible. Gabčíkovo-Nagymaros Project, *supra* note 100, ¶ 87 (“[O]ne other condition for the lawfulness of a countermeasure [is] that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.”). However, the *Articles on State Responsibility* provide some flexibility on this point, stating that countermeasures “shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.” ARTICLES ON STATE RESPONSIBILITY, *supra* note 89, art. 49, § 3 (emphasis added). In the case of countermeasures against space-based WMD, the only way to make the responsible state resume performing its obligation may be to permanently negate the space-based WMD capability.

112. U.N. Charter art. 2(3).

113. *Id.* art. 2(4).

114. *Id.* art. 51. This article also requires states to report the measures they take in exercising their right of self-defense to the Security Council, which may take “at any time such action as it deems necessary in order to maintain or restore international peace and security.” *Id.* However, if a permanent Security Council member or a rogue state aligned with a Security Council member has committed the armed attack or threat thereof that necessitated the self-defensive measures in the first place, the Security Council is unlikely to act. See discussion *supra* note 80.

115. The quotation is from U.S. Secretary of State Daniel Webster, writing to the British Minister in Washington, Henry Fox, in the aftermath of the British-Canadian raid that destroyed the American steamship *Caroline*, which was ferrying arms to rebels

seeking Canadian independence. 29 BRITISH AND FOREIGN STATE PAPERS, 1840–1841, 1129 (1857).

116. HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE 227 (John Morrice tr., Richard Tuck ed., Liberty Fund 2005).

117. *Judgement: The Invasion of Denmark and Norway*, YALE L. SCH. (2008) <https://avalon.law.yale.edu/imt/juddenma.asp>.

118. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060.

119. *Identification of Customary International Law*, [2018] 2 Y.B. INT’L L. COMM’n 89, 89-90, U.N. Doc. A/CN.4/SER.A/2018/Add.1.

120. See, e.g., Vienna Convention on the Law of Treaties, arts. 7, 31, 46, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The United States has signed but not ratified this treaty, but it generally accepts the principle that a state’s behavior provides evidence of how that state interprets its treaty obligations.

121. *The Cuban Missile Crisis, October 1962*, OFF. OF THE HISTORIAN: U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1961-1968/cuban-missile-crisis> (last visited Apr. 25, 2025).

122. See *id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Andrew Brearley, *Reflections Upon the Notion of Liability: The Instances of Kosmos 954 and Space Debris*, 34 J. SPACE L. 291 (2008).

127. See, e.g., Guy Faulconbridge, *Russia Denies US Reports Moscow Plans to Put Nuclear Weapons in Space*, REUTERS (Feb. 20, 2024), <https://www.reuters.com/world/europe/russia-denies-us-claims-that-moscow-plans-deploy-nuclear-weapons-space-2024-02-20>.

128. John T. Correll, *Air Strike at Osirak*, AIR & SPACE FORCES MAG. (Apr. 1, 2012), <https://www.airandspaceforces.com/article/0412osirak>.

129. See *id.*

130. *Arab-Israeli Wars*, BRITANNICA, <https://www.britannica.com/event/Arab-Israeli-wars> (last visited Apr. 25, 2025); *Saddam Hussein’s Support for International Terrorism*, WHITE HOUSE, <https://georgewebush-whitehouse.archives.gov/infocus/iraq/decade/sect5.html> (last visited Apr. 25, 2025).

131. Correll, *supra* note 128.

132. See *id.*

133. YAAKOV KATZ, *SHADOW STRIKE: INSIDE ISRAEL’S SECRET MISSION TO ELIMINATE SYRIAN NUCLEAR POWER* 98-99 (2019).

134. Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 169-70 (2002) [hereinafter 26 Op. O.L.C. 143], <https://www.justice.gov/sites/default/files/olc/legacy/2013/07/26/op-olc-26.pdf#page=153> (describing President George H.W. Bush’s decision to strike a nuclear site near Baghdad on 17 January 1993); *Paul Wolfowitz on the Afghanistan and Iraq Wars and a Life in Foreign Policy*, UNCOMMON KNOWLEDGE, 23:07-24:46 (May 1, 2024), <https://podcasts.apple.com/us/podcast/paul-wolfowitz-on-the-afghanistan-and-iraq-wars-and/id1378389941?i=1000654111114> (in which former Under Secretary of Defense Paul Wolfowitz



describes how Saddam Hussein might have obtained a nuclear weapon capability within two years had he not invaded Kuwait).

135. Of course, a country capable of placing a nuclear weapon in orbit may have more ability to retaliate than Iraq or Syria did when Israeli strikes killed their nuclear assets in the cradle.

136. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002); *History: 9/11 Investigation*, FBI, <https://www.fbi.gov/history/famous-cases/911-investigation> (last visited Apr. 25, 2025).

137. *History: 9/11 Investigation*, *supra* note 136.

138. *Hearing before S. Select Comm. on Intel.*, 108th Cong. (2003) (Statement of Robert S. Mueller III, Dir., Fed. Bureau of Investigation), <https://archives.fbi.gov/archives/news/testimony/war-on-terrorism> ("My greatest concern, Mr. Chairman, is that our enemies are trying to acquire dangerous new capabilities with which to harm Americans. Terrorists worldwide have ready access to information on chemical, biological, radiological, and nuclear—or CBRN—weapons via the Internet. Acquisition of such weapons would be a huge morale boost for those seeking our destruction, while engendering widespread fear among Americans and our allies.").

139. *Saddam Hussein's Defiance of United Nations Resolutions*, GEORGE W. BUSH WHITE HOUSE ARCHIVE, <https://georgewbush-whitehouse.archives.gov/infocus/iraq/decade/sect2.html> (last visited Apr. 25, 2025).

140. *Id.*; see also 26 Op. O.L.C. 143, *supra* note 134 (providing a comprehensive argument for the U.S. President's domestic and international legal authority to use military force in Iraq).

141. Steven R. Weisman, *Threats and Responses: Security Council; Powell, U.N. Speech, Presents Case to Show Iraq Has Not Disarmed*, N.Y. TIMES (Feb. , 2003), <https://www.nytimes.com/2003/02/06/world/threats-responses-security-council-powell-un-speech-presents-case-show-iraq-has.html>.

142. MARJORIE ANNE BROWN, CONG. RSCH. SERV., RS21323, THE UNITED NATIONS SECURITY COUNCIL – ITS ROLE IN THE IRAQ CRISIS: A BRIEF OVERVIEW 6 (2003); *The Iraq War*, GEORGE W. BUSH PRESIDENTIAL LIB., <https://www.georgewbushlibrary.gov/research/topic-guides/the-iraq-war> (last visited Apr. 25, 2025); Permanent Rep. of United States to the U.N., Letter dated Mar. 20, 2003, from the Permanent Rep. of the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003), <https://digitallibrary.un.org/record/490434?ln=en&v=pdf> ("The actions that coalition forces are undertaking . . . are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area."); see also Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 435-36 (2004).

143. The Security Council subsequently authorized humanitarian relief efforts, determined that Iraq no longer posed a threat to Kuwait, welcomed the establishment of the new Iraqi Governing Council, and authorized a multinational force to stabilize Iraq. S.C. Res. 1472, ¶ 4 (Mar. 28, 2003); S.C. Res. 1490 (July 3, 2003); S.C. Res. 1500 (Aug. 14, 2003); S.C. Res. 1511 ¶ 13 (Oct. 16, 2003).

144. See, e.g., C.J. Chivers, *The Secret Casualties of Iraq's Abandoned Chemical Weapons*, N.Y. TIMES

(Oct. 14, 2014), <https://www.nytimes.com/interactive/2014/10/14/world/middleeast/us-casualties-of-iraq-chemical-weapons.html> (reporting that between 2004 and 2011, U.S. forces discovered 5,000 chemical munitions left over from the Hussein regime, and that seventeen U.S. troops were wounded by them over six separate occasions); Jason Breslow, *Colin Powell: U.N. Speech Was a "Great Intelligence Failure,"* PBS (May 17, 2016), <https://www.pbs.org/wgbh/frontline/article/colin-powell-u-n-speech-was-a-great-intelligence-failure>.

145. See Breslow, *supra* note 144; Carrol Doherty & Jocelyn Kiley, *A Look Back at How Fear and False Beliefs Bolstered U.S. Public Support for War in Iraq*, PEW RSCH. CTR. (Mar. 13, 2023), <https://www.pewresearch.org/politics/2023/03/14/a-look-back-at-how-fear-and-false-beliefs-bolstered-u-s-public-support-for-war-in-iraq>.

146. Stephen Farrell, *Israel Admits Bombing Suspected Syrian Nuclear Reactor in 2007, Warns Iran*, REUTERS (Mar. 21, 2018), <https://www.reuters.com/article/idUSKBN1GX09P>.

147. See *id.*

148. See *id.*

149. KATZ, *supra* note 133, at 111-23.

150. Farrell, *supra* note 146.

151. KATZ, *supra* note 133, at 111-23. In *Shadow Strike*, Katz details the debate within the U.S. Government about the best way to respond. Defense Secretary Robert Gates and Secretary of State Condoleezza Rice both favored reporting Syria's nuclear reactor construction to the U.N. with a warning that there would be severe consequences if Assad did not terminate the project himself. *Id.* By contrast, Vice President Dick Cheney believed the United States should conduct the strike itself. *Id.* President George W. Bush at first intended to follow the advice of Gates and Rice, but ultimately chose a course similar to what Deputy National Security Advisor Elliot Abrams recommended: when Olmert confronted him with the existential nature of the threat, Bush told Olmert, "We will not get in your way." *Id.* at 121.

152. 26 Op. O.L.C. 143, *supra* note 134, at 186.

153. See TOBIAS SCHNEIDER & THERESA LÜTKEFEND, GLOB. PUB. POL'Y INST., NOWHERE TO HIDE: THE LOGIC OF CHEMICAL WEAPONS USE IN SYRIA (Feb. 2019), [https://www.gppi.net/media/GPPI\\_Schneider-Luetkefend\\_2019\\_Nowhere\\_to\\_Hide\\_Web.pdf](https://www.gppi.net/media/GPPI_Schneider-Luetkefend_2019_Nowhere_to_Hide_Web.pdf).

154. See *id.* at 8; Taddonio, *supra* note 87.

155. Baker & Weisman, *supra* note 87; Larry Kaplow, *History of U.S. Responses to Chemical Weapons Attacks in Syria*, NPR (Apr. 13, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/13/602375500/history-of-u-s-responses-to-chemical-weapons-attacks-in-syria>.

156. Taddonio, *supra* note 87; *Syria and the OPCW*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS (Jan. 24, 2024), <https://www.opcw.org/media-centre/featured-topics/opcw-and-syria>.

157. Yonette Joseph & Christina Caron, *Burning Eyes, Foaming Mouths: Years of Suspected Chemical Attacks in Syria*, N.Y. TIMES (Apr. 8, 2018), <https://www.nytimes.com/2018/04/08/world/middleeast/syria-chemical-attacks-assad.html> (documenting how Assad conducted one or more chemical weapon attacks against Syrians every year between 2013 and 2018, in some cases attacking with improvised chlorine bombs not covered by the CWC). The Organization for the

Prohibition of Chemical Weapons estimates that Syria conducted nineteen chemical weapons attacks between 2013 and 2018. *Fact-Finding Mission*, OPCW, <https://www.opcw.org/fact-finding-mission> (last visited Apr. 25, 2025).

158. Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

159. Org. for Prohibition of Chem. Weapons [OPCW], *Report of The Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, On 7 April 2018*, OPCW Doc. S/1731/2019 (Mar. 1, 2019).

160. Helene Cooper, Thomas Gibbons-Neff & Ben Hubbard, *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

161. Luis Martinez, Elizabeth McLaughlin & Conor Finnegan, *Trump Orders US Troops to Leave Syria as White House Declares Victory over ISIS*, ABC NEWS (Dec. 19, 2018), <https://abcnews.go.com/Politics/trump-announce-us-withdraw-troops-syria-official-story?id=59906876>.

162. Jakes, *supra* note 88.

163. Jack Nicas, *Israel, Seeing an Opportunity, Demolishes Syria's Military Assets*, N.Y. TIMES (Dec. 10, 2024), <https://www.nytimes.com/2024/12/10/world/middleeast/israel-strikes-syria.html>.

164. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, T.I.A.S. No. 97-525, 1974 U.N.T.S. 45.

165. *Iran Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/iran-sanctions> (last visited Apr. 25, 2025).

166. Kelsey Davenport, *UN Security Council Resolutions on Iran*, ARMS CONTROL ASS'N (Feb. 2025), <https://www.armscontrol.org/factsheets/Security-Council-Resolutions-on-Iran>.

167. *Verification and Monitoring in Iran*, INT'L ATOMIC ENERGY AGENCY, <https://www.iaea.org/newscenter/focus/iran> (last visited Apr. 25, 2025).

168. The JCPOA is a multinational effort initiated by the Obama Administration in which Iran affirmed that "under no circumstances will Iran ever seek, develop or acquire any nuclear weapons" in exchange for sanctions relief. Permanent Rep. of the United States to the U.N., Letter dated 16 July 2015 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, annex, U.N. Doc. S/2015/544 (July 16, 2015) (Joint Comprehensive Plan of Action, Vienna, 14 July 2015), <https://documents.un.org/doc/undoc/gen/n15/225/49/pdf/n1522549.pdf>. President Trump withdrew the United States from the JCPOA in 2018, alleging that it allowed Iran to continue a variety of malign activities and was not in the national security interests of the United States. *President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal*, TRUMP WHITE HOUSE (May 18, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal>. Iran subsequently proceeded to maintain "a stockpile of enriched uranium more than 20 times the limit set by the JCPOA"

and export weapons in alleged violation of U.N. Security Council Resolution 2231. *Effort to Restart Iran Nuclear Deal 'at a Standstill' Security Council Hears*, UN NEWS (Dec. 18, 2023), <https://news.un.org/en/story/2023/12/1144917>. C.f. Max Burman, *Iran Pulling Out of Nuclear Deal Commitment after U.S. Strike That Killed Soleimani*, NBC NEWS (Jan. 5, 2020), <https://www.nbcnews.com/news/world/iran-pulling-out-nuclear-deal-following-u-s-strike-killed-n1110636>.

169. Barak Ravid, *After Suspicious Deaths of Iranian Officers, Israel Warns of Threat to Tourists*, AXIOS (June 15, 2022), <https://www.axios.com/2022/06/15/alleged-assassinations-iran-israel-warns-tourists>; Ronen Bergman & Farnaz Fassihi, *The Scientist and the A.I.-Assisted, Remote-Control Killing Machine*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html>.

170. Paulius Ilevičius, *Stuxnet Explained—The Worm That Went Nuclear*, NORDVPN (Mar. 10, 2022), <https://nordvpn.com/blog/stuxnet-virus>; ZERO DAYS (Magnolia Pictures, 2016); Ellen Nakashima & Joby Warrick, *Stuxnet Was Work of U.S. and Israeli Experts, Officials Say*, WASH. POST (June 2, 2012), [https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gjQAlnEy6U\\_story.html](https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gjQAlnEy6U_story.html).

171. Ilevičius, *supra* note 170; David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), <https://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>. For an analysis of whether this use of Stuxnet should be considered a use of force, see Andrew C. Foltz, *Stuxnet, Schmitt Analysis, and the Cyber "Use-of-Force" Debate*, 67 J. FORCE Q. 40 (2012) (concluding that it probably was a use of force, but noting that Iran did not characterize it as an armed attack).

172. Mark Hosenball, *Experts Say Iran Has 'Neutralized' Stuxnet Virus*, REUTERS (Feb. 14, 2012), <https://www.reuters.com/article/markets/experts-say-iran-has-neutralized-stuxnet-virus-idUSL2E8DE9NL>.

173. *Korean War*, HISTORY, <https://www.history.com/articles/korean-war> (last visited Apr. 25, 2025).

174. *Id.*

175. *North Korea's Kim Threatens to Destroy South Korea with Nuclear Strikes If Provoked*, VOICE OF AM. (Oct. 4, 2024), <https://www.voanews.com/a/north-korea-s-kim-threatens-to-destroy-south-korea-with-nuclear-strikes-if-provoked/7810110.html>. See generally MICHAEL RUBIN, *DANCING WITH THE DEVIL*, ch. 3 (2014) (describing North Korea's 1976 axe murders of two U.S. Service members in the demilitarized zone, its 2010 torpedoing of a South Korean naval vessel that killed forty-six, and its shelling of Yeongpyon Island that killed two South Korean marines).

176. *A Timeline of North Korea's Nuclear Tests*, CBS NEWS (Sept. 3, 2017), <https://www.cbsnews.com/news/north-koreas-nuclear-tests-timeline>.

177. Despite U.N. sanctions against any ballistic missile testing, North Korea has conducted more than 100 tests since 2022 alone, including flight tests of the solid-fueled Hwasong-18 and the liquid-fueled Hwasong-17, both of which are believed to be able to reach virtually all U.S. territory. Hyung-Jin Kim & Mari Yamaguchi, *North Korea Conducts First Long-Range Missile Test in Months, Likely Firing a Solid-Fueled Weapon*, ASSOCIATED PRESS (Dec. 18, 2023), [https://apnews.com/article/north-korea-missile-launch-bc0391e-](https://apnews.com/article/north-korea-missile-launch-bc0391e-981b2eedce5dc17734e27ee0c)

981b2eedce5dc17734e27ee0c; Wesley Rahn, *What Do We Know about North Korea's 'Monster Missile'?*, DEUTSCHE WELLE (Mar. 25, 2022), <https://www.dw.com/en/what-do-we-know-about-north-koreas-monster-missile/a-61259183>.

178. See, e.g., Jack Kim, *North Korea Long-Range Ballistic Missile Test Splashes Down Between Japan and Russia*, REUTERS (Oct. 30, 2024), <https://www.reuters.com/world/asia-pacific/north-korea-fires-ballistic-missile-yonhap-2024-10-30>.

179. Hyung-Jin Kim, *North Korea Launches a Suspected Intermediate-Range Ballistic Missile that Can Reach Distant US Bases*, ASSOCIATED PRESS (Jan. 14, 2024), <https://apnews.com/article/north-korea-missile-tensions-c3edad4693574d533d893803792d76fe>; Kim & Yamaguchi, *supra* note 177; Hyung-Jin Kim, *North Korea's Kim Says Military Should 'Thoroughly Annihilate' US and South Korea if Provoked*, ASSOCIATED PRESS (Jan. 1, 2024), <https://apnews.com/article/north-korea-kim-us-missiles-nuclear-6c8834f71ac43bb9d0addc404fe00f18>; Robert L. Carlin & Siegfried S. Hecker, *Is Kim Jong Un Preparing for War?*, 38 NORTH (Jan. 11, 2024), <https://www.38north.org/2024/01/is-kim-jong-un-preparing-for-war>.

180. Edward Wong & Julian E. Barnes, *U.S. Is Watching North Korea for Signs of Lethal Military Action*, N.Y. TIMES (Jan. 25, 2024), <https://www.nytimes.com/2024/01/25/us/politics/north-korea-war-kim.html>.

181. Louisa Handel-Mazzetti, *Deterrence Doesn't Fly in Space: Nuclear Weapons in Outer Space as a Threat of Force*, ARTS. OF WAR (May 2, 2025), <https://lieber.westpoint.edu/deterrence-doesnt-fly-space-nuclear-weapons-outer-space-threat-force>.

182. Notably, OST Article II prohibits countries from making territorial claims in outer space, although efforts to neutralize space-based WMD before or at the outset of their launch could involve territorial incursions.

183. See, e.g., Memorandum from Sec'y of Def. to Secretaries of the Mil. Dep'ts et al., subject: Tenet Derived Responsible Behaviors in Space (Feb. 9, 2023) [hereinafter Tenet Derived Responsible Behaviors in Space], <https://media.defense.gov/2023/mar/03/2003172200/-1/-1/1/tenet%20derived%20responsible%20behaviors%20in%20space%20osd070983-22%20final.pdf>.

184. Legality of the Threat or Use of Nuclear Weapons, *supra* note 49, ¶ 48 (recognizing that "States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitat[ing] that the intention to use nuclear weapons be credible").

185. See, e.g., Ashton B. Carter & William J. Perry, *The Case for a Preemptive Strike on North Korea's Missiles*, TIME (July 8, 2006), <https://time.com/archive/6939453/the-case-for-a-preemptive-strike-on-north-koreas-missiles>. Dr. Perry had served as Secretary of Defense in the Clinton administration and Dr. Carter would later serve as Secretary of Defense under President Obama.

186. *FACT SHEET: Vice President Harris Advances National Security Norms in Space*, WHITE HOUSE BRIEFING ROOM (Apr. 18, 2022), <https://web.archive.org/web/20241006152522/https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/18/fact-sheet-vice-president-harris-advances-national-security-norms-in-space> (describing then-Vice President Kamala Harris's announcement of a ban on

destructive direct-ascent ASAT testing); Jeff Foust, *United Nations General Assembly Approves ASAT Test Ban Resolution*, SPACENEWS (Dec. 13, 2022), <https://spacenews.com/united-nations-general-assembly-approves-asat-test-ban-resolution>; Jeff Foust, *European Union Nations Join ASAT Testing Ban*, SPACENEWS (Aug. 24, 2023), <https://spacenews.com/european-union-nations-join-asat-testing-ban>; CHING WEI SOOI, SECURE WORLD FOUND., *DIRECT-ASCENT ANTI-SATELLITE MISSILE TESTS: STATE POSITIONS ON THE MORATORIUM, UNGA RESOLUTION, AND LESSONS FOR THE FUTURE*, at iii (2023), <https://swfound.org/media/207711/direct-ascent-antisatellite-missile-tests-state-positions-on-the-moratorium-unga-resolution-and-lessons-for-the-future.pdf> (describing how Norway and Costa Rica became the thirty-sixth and thirty-seventh countries to pledge direct-ascent ASAT test bans in October 2023).

187. Tenet Derived Responsible Behaviors in Space, *supra* note 183, attach., tab A. This document requires all DoD Components, unless otherwise directed, to avoid actions in conducting rendezvous and proximity operations that could harmfully interfere with the function of the other space object or significantly increase collision risk; to take all practicable steps to avoid interfering with satellite command and control that would increase its risk of loss; and to prevent interference with capabilities contributing to strategic stability, such as missile warning and nuclear command, control, and communications (NC3) systems, among other things. *Id.*

188. General Stephen Whiting, Remarks at Space Symposium 40 Keynote Address (Apr. 8, 2025), [https://www.spacecom.mil/Portals/57/Gen\\_%20Whiting%20Keynote%20transcript\\_1.pdf](https://www.spacecom.mil/Portals/57/Gen_%20Whiting%20Keynote%20transcript_1.pdf).

189. U.S. SPACE FORCE, SPACE WARFIGHTING: A FRAMEWORK FOR PLANNERS 7 (Apr. 8, 2025), <https://www.spaceforce.mil/News/Article-Display/Article/4156245/ussf-defines-path-to-space-superiority-in-first-warfighting-framework>.

190. *Id.* at 4.

191. Whiting, *supra* note 188, at 1-2. President Donald J. Trump, *The Iron Dome for America*, WHITE HOUSE (Jan. 27, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/the-iron-dome-for-america>; Sandra Erwin, *Golden Dome Replaces Iron Dome: Pentagon Renames Missile Defense Initiative*, SPACENEWS (Feb. 28, 2025), <https://spacenews.com/golden-dome-replaces-iron-dome-pentagon-renames-missile-defense-initiative>.

192. *The Iron Dome for America*, *supra* note 191.

193. *Id.*

194. Plumb Statement, *supra* note 2, at 4.





## AROUND THE CORPS

CPT Jonathon Hesterman, a trial counsel assigned to 8th Military Police Brigade, 8th Theater Sustainment Command, speaks to the panel during the first ever opening statement contest at Wheeler Army Airfield, HI. (Credit: SSG Kavon Prunty)





(Credit: Ralf1403-pixabay.com)

# Closing Argument

## Global Lawyering for a Global Fight Legal Considerations During Integrated Deterrence

By Major General Robert A. Borcharding, Colonel Joseph M. Fairfield, Colonel Ryan W. Leary, Colonel Dustin P. Murphy, and Lieutenant Colonel Brian D. Lohnes

The wisdom in the statement attributed to Sun Tzu that “every battle is won before it is ever fought”<sup>1</sup> aptly applies to the modern conflict continuum. In the article *Legal Considerations Before and During LSCOs*,<sup>2</sup> the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff discussed how military lawyers should prepare to provide legal advice during large-scale combat operations (LSCOs). Specifically,

we examined the expectations placed on operational attorneys in LSCOs and how to prepare for the challenges we might face. Our current *National Defense Strategy* (NDS) directs the joint force to compete head-on with our pacing threat of China while simultaneously managing acute and developing global threats through integrated deterrence.<sup>3</sup> Integrated deterrence is a comprehensive strategy that generates

warfighting advantages by synchronizing operations across warfighting domains, theaters, the spectrum of conflict, instruments of national power, the interagency, private sector, and allies and partners.<sup>4</sup>

For Army judge advocates (JAs), it is also important to understand the relationship between integrated deterrence and multi-domain operations (MDO) because the Army’s capstone doctrinal publication, Field Manual (FM) 3-0, *Operations*, establishes MDO as its primary operating concept. MDO involves the synchronized use of capabilities across all domains—land, air, sea, space, and cyber—to create strategic advantages, which are integral to the effectiveness of integrated deterrence.

As the goal of integrated deterrence is to maintain our advantage against global competitors and ultimately prevent future conflict, lawyers must understand how they can support current operations during the competition phase of the conflict continuum.

Operations, activities, technological advancements, and investments during competition pose novel legal challenges that require JAs to be agile, creative, adaptive, and thorough when providing advice. Their role is vital in providing commanders with sound legal counsel and thus supporting the seamless and effective execution of integrated deterrence efforts. The following examples—irregular warfare (IW), the joint warfighting concept (JWC), and competing with money—illustrate areas where attorneys supporting operations within the context of competition will be asked to weigh in with their advice and stand as exemplars of navigating the complex environment of integrated deterrence.

### IW and Competing Below the Level of Armed Conflict

The NDS directs us to compete with our adversaries in a manner that dissuades them from considering aggression to further their national objectives, while concurrently cautioning that conflict is “neither inevitable nor desirable.”<sup>5</sup> Accomplishing this nuanced goal—considering the full capability and most common methods of



employing the joint force—is no easy task. While our senior leaders have several tools available, including a whole-of-Government approach and strengthening alliances to amplify our strength, another option is to employ IW across the competition continuum.<sup>6</sup> IW offers leaders an opportunity to influence our adversaries in a manner that prevents a perceived need to respond militarily and could ultimately assist in preventing conflict. For operational attorneys, using IW to support our NDS highlights how the legal and policy frameworks that apply during competition and integrated deterrence overlap in a complex way. During an IW campaign, JAs must prepare to provide commanders and leaders with comprehensive advice that spans multiple legal competencies and requires identifying the line that separates law from policy.

While IW is not a novel concept, it stands out as a useful tool as we increasingly focus on competing with global competitors in a manner that supports integrated deterrence without triggering conflict. Our joint doctrine defines IW as “a form of warfare where states and non-state actors campaign to assure or coerce states or other groups through indirect, non-attributable, or asymmetric activities.”<sup>7</sup> One of the initial challenges with advising on the conduct of IW is that the broad definition contemplates a similarly broad range of activities, including military information support operations (MISO), cyberspace operations, countering threat networks, countering-threat finance, use of surrogates, civil-military operations, and security cooperation.<sup>8</sup> Consequently, the first, and arguably the most important, task of the supporting JA is to define the particular activity or activities occurring during an IW operation to assess the legal and policy frameworks that apply to their analysis.

After answering the question, “What are we actually doing here?,” a JA supporting the planning and execution of an IW operation must look at these activities through multiple legal lenses. As is the case for most operations, the JA should ascertain the underlying legal authority that authorizes each activity. While an execution order (EXORD) in which the Secretary of Defense delegates authority to subordinate commanders is a good place to start, look

behind the EXORDs to better understand the applicable statutory or constitutional authority and determine reporting requirements, approval authority, and any fiscal limitations.<sup>9</sup> Furthermore, fully understanding the source of authority will ensure the proper approval level for a particular operational activity; even if a category of

operations forces alike during our campaign of integrated deterrence.

### **Joint Warfighting Concept**

In 2019, the Secretary of Defense tasked the Joint Staff to develop the JWC to address strategic conflict.<sup>11</sup> The JWC framework seeks to solve the problem of how the joint

## **Operations, activities, technological advancements, and investments during competition pose novel legal challenges that require JAs to be agile, creative, adaptive, and thorough when providing advice.**

activity is delegated to a certain level of command, it is important to look closely at the IW activity in context to make sure that it does not rise to the level of use of force and potentially require a higher level of approval. With a comprehensive understanding of the activity, a JA can also apply a fiscal law framework to ensure the IW activity is funded properly.

Due to the diversity of activities under the IW umbrella, JAs will also need to be aware of the policy limitations that apply in different ways to different activities. A distinction certainly exists between policy and legal limitations, and a JA’s advice should be clear in that distinction. For example, specific implementing policies apply when creating and managing new surrogate force programs under 10 U.S.C. § 127d.<sup>10</sup> JAs advising on IW operations should become familiar with these policies to inform their comprehensive counsel.

This brief, and perhaps oversimplified, overview serves to emphasize the critical need for JAs to understand the tools our military leaders may use to meet integrated deterrence objectives and the associated legal issues that will materialize while planning and executing operations during competition. While operational attorneys may believe IW is unique to special operations forces or managed at the strategic level, IW will be present at all levels and available to conventional and special

force will deter peer adversaries.<sup>12</sup> It serves as a guide for the Services to integrate, synchronize, and communicate across multiple domains—land, sea, air, space, and cyberspace—by gaining new “intellectual tools needed to incorporate innovation and adaptation” that “ensure[s] we have the right technology, leaders, and [authorities].”<sup>13</sup>

The JWC further shapes the Services’ force design and development to compete and fight across multiple domains. Each Service uses its own doctrinal concept to guide force design and development to conduct joint operations.<sup>14</sup> The Navy implements its “distributed maritime operations” concept for land and sea.<sup>15</sup> The Air Force’s “future operating concept” is its future airpower concept to deter aggression.<sup>16</sup> The Army’s MDO is the “rapid and continuous integration of all domains of warfare to deter [in competition] . . . . If deterrence fails, Army formations, operating as part of the joint force . . . achieve . . . strategic objectives.”<sup>17</sup>

Operating as a joint force during competition is further advanced through integrated deterrence, which incorporates the JWC: “Integrated deterrence . . . [works] seamlessly across warfighting domains, theaters, the spectrum of conflict, all instruments of U.S. national power, and our network of alliances and partnerships . . . enabled by combat-credible forces . . . .”<sup>18</sup> To achieve integration, synchronization, communication, and technological

advancements through integrated deterrence or along the spectrum of conflict, the Department of Defense (DoD) uses rapid data collection, the cloud, artificial intelligence (AI), machine learning (ML), and advanced communication systems to enable decisive and fast decision-making across the multiple domains; in other words, the Combined Joint All Domain Command and Control (CJADC2) concept. CJADC2 is the backbone of this integration and synchronization within the JWC.

Lawyers are pivotal to achieving the JWC's strategic goals over multiple domains. Adversaries are challenging the rules-based order and international norms. According to the *Joint Operating Environment 2035*, the future world order will be defined by the conditions listed in Figure 1 below.<sup>19</sup>



Figure 1.<sup>19</sup>

As the ways to warfare, struggle for competition, and technology change, and as the world order becomes more complex—especially with rapid data collection, AI, and ML—it will become paramount that lawyers promote the rule of law around the world.

This changing world order, multi-domain integration and synchronization dilemma, and technological advances present numerous challenges for lawyers. The following, each discussed below, are just

a few: (1) How do lawyers provide sound legal advice in a time-compressed environment with an influx of data? (2) How do lawyers incorporate JWC principles through integrated deterrence to provide commanders with options and articulate risks? (3) How do we share intelligence and information with allies and partners? And (4) How do lawyers ensure that technological advancements and adaptation comply with domestic and international law?

### ***1. How do lawyers provide sound legal advice in a time-compressed environment with an influx of data?***

During counterinsurgency operations, commanders and lawyers often had days to assess patterns of life and intelligence while applying collateral damage estimates (CDE). This will not be the case during the next conflict or war. The global concept of operations requires legal integration across multiple areas of responsibility, multiple domains, and multiple relationships, with allies and partners unifying their efforts.<sup>20</sup> AI-enabled intelligence-gathering tools and data will rapidly flow to the commander, who will have only minutes to decide. Lawyers will have to educate the force on the basic law of war principles, and commanders will have to be comfortable applying proportionality and distinction without a full CDE analysis (unless one is required). This will become paramount in a degraded environment where a commander may not have an attorney nearby.

Additionally, lawyers will have to quickly adapt to apply the influx of intelligence to the environment, communicating with allies, partners, and attorneys from other Services and combatant commands.

### ***2. How do lawyers incorporate JWC principles through integrated deterrence to provide commanders options and articulate risks?***

The 2022 NDS states the DoD will “employ an integrated deterrence approach that draws on tailored combinations of conventional, cyber, space, and information capabilities.”<sup>21</sup> In addition to these conventional capabilities, we can employ unconventional methods, including IW and lawfare. China, Russia, Iran, North Korea, Hamas, and Hezbollah (to name a few) all

challenge international norms and laws in competition and through conventional capabilities. Lawyers will have to navigate domestic and international laws and incorporate policy restrictions to formulate options and risks to the commander. There will be times when lawyers may want to pursue a change in laws or policies or request delegations of authorities to streamline integrated operations across domains.

### ***3. How do we share intelligence and information with allies and partners?***

Alignment with allies and partners is crucial for deterring aggression and achieving strategic objectives. The challenge is sharing intelligence and data under the JWC-CJADC2 framework. Allies and partners will need access to the same intelligence, data, and communications systems. Putting our allies and partners on the same systems will speed up the flow of information sharing; however, lawyers will need to understand the laws and policies regarding intelligence sharing. Requests for exceptions to restrictions on sharing intelligence may come across a lawyer's desk. Understanding what information the request must contain, the JA can quickly review the request to expedite the process.

### ***4. How do lawyers ensure that technological advancements and adaptation comply with domestic and international law?***

As fast as technological advancements occur, the joint force strives to solve urgent problems while simultaneously seeking to develop, design, test, and incorporate new technologies into our force. AI and ML, coupled with autonomous weapons and robotics, add a new layer of complexity to an already complex multi-domain and global concept of operations. This provides lawyers with opportunities to advise on policy formulation while ensuring that the development and incorporation of AI into systems comply with international and domestic law, including law of war. Forward-thinking commanders seek ways to keep pace with data and adversarial competitors in the space, cyber, AI, and unconventional innovative spheres by operationally modifying and testing, or developing, weapons as defined in Army regulation.<sup>22</sup> Rapid innovation



initiatives—such as off-the-shelf technological modifications using 3D printing or incorporating AI/ML—require practitioners to understand the definition of weapons, the policy, procedures, and requirements of law of war legal reviews, and to initiate the review process early.

It will become essential for lawyers to understand and use technological advancements as they continue to reshape military operations. States' use of AI systems and algorithms as a decision support tool that recommends targets to an analyst exemplifies this trend.<sup>23</sup> Being the lawyer-in-the-loop from AI to analyst to commander may become challenging; lawyers must develop a comprehensive understanding of the technology to provide accurate advice that supports lawful and ethical military decision-making in these increasingly complex operational environments.

To further complicate these environments, the United States may sometimes have to rely on allies' and partners' resources, authorities, or capabilities. The joint force builds this interoperability by competing with money.

### Competing with Money

Combatant commanders have a statutory responsibility to take action to deter conflict.<sup>24</sup> The NDS is anchored in building relationships and increasing interoperability with our allies and partners.<sup>25</sup> In the competition phase of the conflict continuum, combatant commanders, particularly those assigned a terrestrial area of responsibility,<sup>26</sup> deter conflict by strengthening ties and increasing interoperability with allies and partners. While there are many tools combatant commanders can use to build these relationships, money reigns supreme. To operationalize this use of money for competition's sake, combatant commands develop theater security cooperation plans (TSCP).<sup>27</sup> Like the adage, "Bring lawyers, guns, and money,"<sup>28</sup> operational fiscal lawyers play a key role in assisting combatant commanders by identifying the most appropriate security cooperation (SC) authority to meet the commander's intent of deterring conflict by increasing interoperability.

SC is defined as interactions with foreign security establishments to build

security relationships that promote specific U.S. security interests, develop allied and partner nation military and security capabilities for self-defense and multinational operations, and provide U.S. forces with peacetime and contingency access to allied and partner nations.<sup>29</sup> SC includes both DoD-administered cooperation programs under Title 10 of the U.S. Code and DoD-implemented Department of State security assistance programs under Title 22 of the U.S. Code. While most Title 10 SC authorities were consolidated under Chapter 16 of Title 10 with the National Defense Authorization Act for Fiscal Year 2017,<sup>30</sup> many SC authorities still exist in the DoD's annual appropriation and elsewhere throughout Title 10.<sup>31</sup> Likewise, the DoD-administered Title 22 SC authorities are generally consolidated in the Foreign Assistance Act of 1961<sup>32</sup> and the Arms Export Control Act of 1976,<sup>33</sup> but other state assistance authorities are provided under the Department of State's annual appropriation. Further complicating this web of SC authorities, each authority is governed by numerous policies that delegate and provide guidance on the use of the authority.<sup>34</sup>

Today's operational fiscal lawyers must understand this large menu of SC authorities to help their clients identify the appropriate authority for the desired effect. It is common for the staff to develop an SC activity and incorrectly bin it under what they believe to be the correct authority. For example, an operational fiscal lawyer working in a combatant command legal office may receive a Section 321 "training with" packet for review that includes U.S. forces training with a partner nation, but it also mentions that the purpose of the event is to "build the capacity of the partner nation's forces." For seasoned operational fiscal lawyers, this language should trip Purpose Statute<sup>35</sup> warnings: the statutory purpose of Section 321 activities is "to train U.S. forces," not to build capacity.<sup>36</sup>

Identifying that the proposed SC activity is beyond the scope of the proposed authority, however, is only half the battle. Today's best operational fiscal lawyers identify the issue and then bring an alternative solution to accomplish the activity's intent. In the above hypothetical, a great

operational fiscal lawyer identifies that the proposed scope is beyond the authority of Section 321 and recommends either changing the stated purpose of the event or changing the SC authority to Section 333 "authority to build capacity."<sup>37</sup>

By studying and understanding the web of SC authorities and implementing policies and using critical thinking to develop creative solutions, operational fiscal lawyers bring great value to executing a TSCP. Today's best operational fiscal lawyers enable combatant commanders to compete with money and directly contribute to the NDS's goal of reinforcing relationships and preparing allies and partners to pursue mutually beneficial national security objectives with interoperable forces.

### Conclusion

Attorneys are critical in supporting integrated deterrence efforts within the modern conflict continuum. As articulated in FM 3-0, MDO synchronize capabilities across all domains to create strategic advantages essential for effective deterrence. Today's Army JAs must adeptly navigate complex legal frameworks to ensure compliance with international and domestic laws while helping commanders minimize and mitigate risks. By understanding and addressing the legal challenges associated with operations during the competition phase, attorneys provide commanders with the guidance needed to execute integrated deterrence seamlessly, effectively, and legally. By supporting efforts such as using IW to compete below the level of armed conflict, implementing the JWC, and increasing interoperability with U.S. allies and partners by competing with money, JAs demonstrate their vital role in maintaining our strategic edge and preventing future conflicts. **TAL**

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## Notes

1. While most often attributed to Sun Tzu's seminal work, *The Art of War*, this exact quote does not appear in its most popular English translations. See, e.g., SUN TZU, *THE ART OF WAR* (Lionel Giles trans., Allandale Online Pub., 2020) (n.d.); SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford Univ. Press 1971) (n.d.). Nonetheless, the sentiment behind the quote—that preparation is imperative to success—is a foundation of Tzu's philosophy. See Tzu (Giles trans.), *supra*, ch. III, para. 17 (“He will win, who, prepared himself, waits to take the enemy unprepared.”).
2. Rob Borcharding & Drew Kernan, *Large-Scale Combat Operations Symposium – Legal Considerations Before and During LSCOs*, ARTICLES OF WAR (May 24, 2023), <https://lieber.westpoint.edu/legal-considerations-before-during-lscos>.
3. U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, at iii (2022) [hereinafter NDS].
4. *Id.* at 1.
5. *Id.* at 2. While this particular quote refers to China, the principle goal of integrated deterrence against all adversaries is to make restraint a more appealing option when compared to the costs of aggression.
6. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-1 (18 June 2022) [hereinafter JP 3-0] for a more detailed explanation of the competition continuum.
7. JOINT CHIEFS OF STAFF, JOINT PUB. 1-0, JOINT WARFIGHTING, vol. 1, at II-7 [hereinafter JOINT WARFIGHTING].
8. CATHERINE A. THEOHARY, CONG. RSCH. SERV., IF12565, DEFENSE PRIMER: WHAT IS IRREGULAR WARFARE? (2024).
9. See, e.g., 10 U.S.C. § 164; 50 U.S.C. § 3038.
10. See Memorandum from Deputy Sec'y of Def. to Chief Mgmt. Officer of Dep't of Def. et al., subject: Directive-Type Memorandum (DTM) 18-005 – Authority for Support of Special Operations for Irregular Warfare (IW) (Aug. 3, 2018) (C4, Mar. 16, 2023) (listing the requirements for establishing and running an IW program governed by 10 U.S.C. § 127d).
11. *The Fiscal Year 2022 National Defense Authorization Budget Request from the Department of Defense*, 117th Cong. 5 (2021) (statement of General Mark A. Milley, Chairman of the Joint Chiefs of Staff, Department of Defense).
12. JOINT WARFIGHTING, *supra* note 7, at i.
13. *Id.* at I-2, VI-3. *Joint Warfighting* uses the term “doctrine,” but here we replace it with “authorities” because JAs will have to navigate through a myriad of laws, policies, orders, and command and control issues.
14. Thomas A. Walsh & Alexandra L. Huber, A *Symphony of Capabilities: How the Joint Warfighting Concept Guides Service Force Design and Development*, JOINT FORCE Q., Oct. 2023, at 5.
15. U.S. DEP'T OF NAVY, CHIEF, NAVAL OPERATIONS, CHIEF OF NAVAL OPERATIONS NAVIGATION PLAN FOR AMERICA'S WARFIGHTING NAVY (2024).
16. U.S. DEP'T OF AIR FORCE, AIR FORCE FUTURE OPERATING CONCEPT EXECUTIVE SUMMARY (6 Mar. 2023).
17. U.S. DEP'T OF ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY IN MULTI-DOMAIN OPERATIONS 2028, at iii (6 Dec. 2018).
18. NDS, *supra* note 3, at 1.
19. JOINT CHIEFS OF STAFF, JOINT OPERATING ENVIRONMENT (JOE) 2035: THE JOINT FORCE IN A CONTESTED AND DISORDERED WORLD 5 fig.2 (14 July 2016).
20. For a discussion on the global concept of operations, see JOINT WARFIGHTING, *supra* note 7, at IV-1.
21. NDS, *supra* note 3, at 10.
22. See generally U.S. DEP'T OF ARMY, REG. 27-53, LEGAL REVIEW OF WEAPONS AND WEAPON SYSTEMS (23 Sept. 2019) (setting forth the requirements for submitting legal reviews of weapons and weapons systems).
23. See, e.g., Geoff Brumfiel, *Israel Is Using an AI System to Find Targets in Gaza. Experts Say It's Just the Start*, NPR (14 Dec. 2023, 4:58 am), <https://www.npr.org/2023/12/14/1218643254/israel-is-using-an-ai-system-to-find-targets-in-gaza-experts-say-its-just-the-st>.
24. 10 U.S.C. § 164(b).
25. NDS, *supra* note 3, at 14-16. It is hard to understate how important building relationships and increasing interoperability with allies and partners is to U.S. national defense. The term “allies and partners” appears forty-five times in the NDS. See *id. passim*.
26. Specifically, USAFRICOM, USCENTCOM, USEUCOM, USINDOPACOM, USNORTHCOM, and USSOUTHCOM—the combatant commands formerly known as “Geographic Combatant Commands.”
27. U.S. DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 14 (Dec. 29, 2016).
28. WARREN ZEVON, *Lawyers, Guns and Money, on Excitable Boy* (Asylum Records, 1978).
29. 10 U.S.C. § 301.
30. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).
31. I.e., the Counter ISIS Train and Equip Fund (CTEF). Originally codified by the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014), the CTEF authority has been updated and amended in each subsequent appropriations act.
32. 22 U.S.C. § 2151 et seq.
33. International Security Assistance and Armed Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729.
34. By way of example, the SC authority to “train with friendly foreign partners” is codified at 10 U.S.C. § 321 and is governed by 2017 implementing guidance and delegations from the Secretary of Defense, 2017 delegation and guidance from the Deputy Secretary of Defense, 2019 additional guidance and delegations from the Under Secretary of Defense for Policy (USD(P)), the 2014 DoD Leahy Law implementing guidance, 2017 guidance and delegation from the Secretary of Defense on effecting congressional notifications for security cooperation activities, 2017 USD(P) guidance and delegation of authority on the payment of incremental expenses for high income countries, guidance on Joint Training Resources in *Chairman of the Joint Chiefs of Staff Manual* 3511.01A, and guidance published annually by the Joint Staff J-7 on information required to effect congressional notification. Finally, at the time of writing, the DoD is in the process of updating all the implementing guidance for the use of Section 321.
35. 31 U.S.C. § 1301. The Purpose Statute stipulates that appropriations must be applied only to the objects for which the appropriations were made, except as otherwise provided by law.
36. 10 U.S.C. § 321(c).
37. 10 U.S.C. § 333. “Foreign security forces: authority to build capacity” authorizes the Secretary of Defense to provide training and equipment to build the capacity of friendly foreign partners. See *id.*





## AROUND THE CORPS

MAJ Robert Wald, chief of justice for 7th Army Training Command, tells a joke to a group of fourth grade students attending Grafenwoehr Elementary School at Rose Barracks, Vilseck, Germany, during a *Star Wars*-themed mock trial that educated the class on the criminal justice system. (Credit: SPC Andrew Clark)



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