

Army Lawyer

U.S. Army Judge Advocate General's Corps

July/August 2018



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The 300 Meter Target

Army Lawyer

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July/August 2018

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On the cover: First Lieutenant Daniel Tully of the 91st Legal Operations Detachment holds the Officer Basic Course's guidon during morning PT in Charlottesville. (Credit: Chris Tyree).

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Jeri Lane D'Aurelio, now a captain, swings easily across bars during her Direct Commission Course training at Ft. Benning, Georgia. (Credit Dan Torok).

Introducing . . . The NEW Army Lawyer



(Courtesy: University of Virginia).

*Don't throw the past away
You might need it some rainy day
Dreams can come true again
When everything old is new again
—Everything Old is New Again, Peter Allen*

It was August 1971 when our Corps published the very first edition of *The Army Lawyer* (TAL). It promised to “provide practical, how-to-do-it information . . . publish comments on recent developments in the law and provide a forum for short articles from the field . . . [and] carry news of subjects of current general interest” to the Judge Advocate General’s Corps (JAGC). Its ambitious twenty-nine pages included information on the newly appointed Judge Advocate General and Assistant Judge Advocate General, Major General (MG) George Prugh and MG Harold E. Parker; a report on a pilot legal assistance program conducted at Fort Monmouth and Fort Dix, New Jersey; a trial judiciary note comparing certain information on court-martial cases

tried before and after the effective date of the Military Justice Act of 1968; a listing of certain personnel actions, including recent retirements and promotions; and even advice on telephone etiquette! Yes, sound advice cautioned against such responses as “hasn’t he returned your call, yet? I gave him the message last week.”

The August 1971 *TAL* sought to “consolidate other publications into a single, convenient source,” eliminating updates such as the PP&TO Newsletter. The August 1971 *TAL* also solicited the Corps to embrace their Regiment’s new law journal and contribute to it by sending in practice notes and articles.

Finally, *TAL* published in August 1971, along with the approximately 530 subsequent monthly editions, were distributed in hard copy format to every active duty judge advocate. Every month a copy would magically land in the attorney’s inbox—wherever you might be in the world.

In June 2015, this ritual ended. Like many periodicals, *TAL* converted to a digital only publication and has remained so since that date.

Just as in August 1971, this July/August 2018 edition of *TAL*—and all that follow—will be available in hard copy for everyone. This new hard copy version is a glossy, full color magazine full of practical advice, news about our Corps, and interesting practice notes. Did you recently complete a PCS? Check out the Life Hack department—“Buy or Rent?” Interested in the Army’s new Security Force Assistance Brigades (SFAB)? Flip to the article written by our first SFAB Brigade Judge Advocate, MAJ Eric Trudell. Taking over your first supervisory position? Read MAJ Mary Jones’ piece on managing civilian personnel. And don’t forget to read the Corps News

and learn about the achievements of fellow members of our team.

As it was in August 1971, this new edition of *TAL* will consolidate some of our other publications, including the *Quill & Sword*. Similarly, what rang true in the past rings true today: this “is your publication.” So please send your ideas, achievements, photos, and articles to the editor at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-mlr-editor1@mail.mil.

To every judge advocate, legal administrator, paralegal, and JAGC civilian, on behalf of MG Risch, RCSM Martinez, Mr. Steddum, Mr. Shea, and the entire JAGC leadership team, we hope that this hard copy publication finds its way into your inbox, your office waiting rooms, gathering areas, metro bus commute bags, night stands, kitchen counters, and coffee tables. We hope that you will earmark your favorite articles, congratulate a friend who published her first article or practice note in *TAL* or perhaps that old friend who is retiring after twenty years of service.

We hope that you enjoy the new *TAL*, and the editions that follow. We all owe a debt of gratitude to the visionary editorial staff of the LCS—for this “new” old legal journal—and for making each of us more “READY” for the next fight.

Be Ready,
The Judge Advocate General





AROUND THE CORPS

Judge advocate MAJ Courtney Cohen issues commands to paratroopers in her role as jumpmaster aboard a UH-60 Blackhawk helicopter during Law Day at Fort Bragg, North Carolina last year. Her husband, MAJ Jack Cohen, also a judge advocate, is pictured in the foreground left (Credit: Sergeant First Class Alexander A. Burnett, 82nd Airborne Division PAO).



MSG Daarius Jackson; SGT Desmond H. Bradley jr, (JB Elmendorf-Richardson, AK) (Distinguished Leader Award); SGT Abreante Hill, (Fort Hood, TX) (Distinguished Honor Graduate); SGT Elizabeth M. Koss (Fort Bragg, NC) (Distinguished Honor Graduate); SGT Joshua W. McConnell, (SVPN at Grafenwoehr, Germany) (Distinguished Leader Award); 1SG Christopher Champion.

SGTs Devetra Bland and Ana Hairston, cadre of 27D Advanced Individual Training (AIT), graduated Drill Sergeant School in April 2018.

SGT Joshua J. Clark, Wiesbaden, Germany, graduated from the 55th Basic Court Reporter Course as the Distinguished Honor Graduate, achieving an overall academic average of 98.53 percent. **SGT Ashanti B. Wallace**, Fort Shafter, Hawaii, graduated from the course as the Honor Graduate, achieving an overall academic average of 98.33 percent.

MSG Daarius Jackson and **SGT Desmond H. Bradley Jr.**, both from Joint Base Elmendorf-Richardson, Alaska, and **SGT Joshua W. McConnell**, Grafenwoehr, Germany, received the Distinguished Leader Award from their Advanced Leadership Course. **SGT Abreante Hill** Fort Hood, Texas, and **SGT Elizabeth M. Koss** Fort Bragg, North Carolina, each received the Distinguished Honor Graduate Award from the course.

In January, **SSG Christopher Willen** of Harrisburg, Pennsylvania, received the Advanced Leadership Course Distinguished Honor Graduate and Distinguished Leader Awards. **SSG Liza Rosado** from Menands, New York, received the Iron Soldier award. **SSG Michael Holmes**, from Reading, Massachusetts, received the Senior Leadership Course Distinguished Leader Award.

CSM Jason Young and **SGT Giovanni DiPuglia** of Fort Sam Houston, Texas, and **SSG Christina Garcia** of Fort Jackson, South Carolina, earned the Distinguished Leader Award from the January 2018 Advanced and Senior Leadership classes. **SGT Amy Acuna** of Fort Bragg, North Carolina, and **SSG Stephen Mossey** of Fort Carson, Colorado, were named Distinguished Honor Graduates.

News & Notes

CPT Marc C. Beudoin was named the Distinguished Graduate of the 204th Judge Advocate Officer Basic Course (OBC) and recipient of the American Bar Association Award for Professional Merit for the Highest Overall Class Standing. He also received the American Bar Association's Legal Assistant for Military Personnel (LAMP) Committee Award for the highest class standing in Legal Assistance and The Judge Advocate General's School Award for Distinguished Accomplishment for the Highest Class Standing in International and Operational Law.

CPT Robert M. Leedham was named an Honor Graduate of the 204th OBC. He received The Judge Advocate General's School Award for Professional Merit for the Second Highest Class Standing and The Judge Advocate General's Award for Distinguished Accomplishment for the Highest Class Standing in Criminal Law. Other Honor Graduates were **CPT Aaron G. Yee**, **CPT Matthew E. Faust**, and **CPT Issac A.**

Brown. CPT John R. Lystash received The Judge Advocate General's School Award for Distinguished Accomplishment for the Highest Class Standing in Contract and Fiscal Law.

The 2018 Judge Advocate Officer Advanced Course Graduation Ceremony was held on 15 December 2017. **CPT Michael D. Owen** was named the Distinguished Graduate. **CPT Stephen Q. Preston**, **CPT Grant M. Jensen**, **CPT Timothy A. Spurrier** and **CPT Jonathan M. Brent** were all named Honor Graduates.

CW4 Jim Carroll was the Distinguished Honor Graduate of class 18-03 of the Army Knowledge Management Qualification Course, also earning the 1E Skill Identifier. **CW2 Jessica Marrisette** was the Distinguished Honor Graduate of class 18-04 of the Army Knowledge Management Qualification Course, also earning the 1E Skill Identifier.

The 27D AIT Class of 003-18 graduated in February 2018. The Distinguished Honor Graduate was **SGT Carl Akers**. Honor Graduates were **SPC Andrew Eckstone** and **PV2 Javier Marias**. The Iron Soldier award winner was **PVT Kristin Howell**, and the Values Leader Award went to **PVT Garrett Lovelace**.

The 27D AIT Class 004-18 Distinguished Honor Graduate was **PVT John Nichols**. Honor Graduates were **PFC Kelly Jenkins**, **SPC David Murn**, and **PVT Samuel Simmerman**. The Iron Soldier Award and Values Leader Award went to **PVT Logan Pauley**.

The 27D AIT Class 005-18 Distinguished Honor Graduate was **PFC Melisa Flores**. The Honor Graduate was **SPC Ryan Lease**. The Iron Soldier winner was **PFC Melisa Flores**. The Values Leader Award went to **PFC Joseph White**, who was also the Essay Winner.

The 27D AIT Class 006-18 Distinguished Honor Graduate was **PFC Christen Webster** and the Honor Graduate was **PVT Christopher Levely**. The Iron Soldier winner was **PVT Charles Thomas**. The Values Leader Award went to **PVT Lucas Keeley** and the Essay Winner was **PFC Christen Webster**.

CW4 Tammy Richmond was selected as Commander, HHC, U.S. Army Warrant Officer Career College. **CW3 Ken Adams** was selected as Executive Officer, 1st Warrant Company, U.S. Army Warrant Officer Career College.

CW5 Debbie Sharp (ARNG) was selected as Assistant Deputy Commandant (National Guard) for the U.S. Army Warrant Officer Career College.

MAJ Nancy Lewis was a recipient of the Ms. J.D. Road Less Traveled Award, which recognizes an outstanding woman who has used her law degree in a non-traditional way.

MAJ David Lai, a military professor in the U.S. Naval War College's Stockton Center for the Study of International Law, has been selected to be one of four American



Members of TJAGLCS who successfully completed the German Armed Forces Proficiency Badge show their medals and certificates.



CSM Jason Young, SGT Giovanni Dipuglia (Fort Sam Houston, TX) (DLA); SSG Christina Garcia (Fort Jackson, SC)(Distinguished Leader Award); SGT Army Acuna (Fort Bragg, NC) (Distinguished Honor Graduate); SSG Stephen Mossey (Fort Carson, CO) (Distinguished Honor Graduate); CSM Jeremiah Fassler.

presenters at the 7th Annual International Four Societies Conference in Tokyo, Japan.

The ABA Committee on Legal Assistance for Military Personnel announced the winners of their 2017 Distinguished Service

Award. The winners include the **Fort Gordon Legal Assistance Office (LAO)** in the group category and **Ms. Traci Voelke**, Fort Belvoir Legal Assistance Attorney, in the individual category. The Fort Gordon LAO was recognized for their program of



SGT Joshua J. Clark, Wiesbaden, Germany, left, poses with 1SG Leroy D. Anderson of the student detachment. Clark graduated the 55th Basic Court Reporter Course as the Distinguished Honor Graduate, achieving an overall academic average of 98.53 percent.

outreach to both the local client base and to the local legal community. Ms. Voelke was recognized for establishing an in-court representation program allowing military families to file for guardianships and conservatorship for disabled children reaching the age of majority.

Members of the JAG Corps gathered to participate in the 2018 Bataan Memorial Death March, which consisted of a 26.2 mile march through the high desert terrain of the White Sands Missile Range in the Military Heavy Category with over

thirty-five pounds in their rucksacks. The memorial march is conducted in honor of the heroic service members who defended the Philippine Islands during World War II. Those participating included **SSG Angie Trejo**, **SPC Kody Yongue**, **SFC Maria Johnson**, **WO1 Beatriz Hendricks**, **CW2 Carlos Garcia**, and **SGM David Ventura**.

MAJ Brett Farmer (DSJA) and **CPT David Thompson** (SVC/FSO), of the 1st Armored Division OSJA briefed New Mexico Military Institute Cadets about opportunities in the Army JAG Corps in March

2018. MAJ Farmer and CPT Thompson also answered questions about the Educational Delay Program.

COL Erik Christiansen (SJA) and **CPT Andy Rouchka** of the United States Military Academy OSJA visited the Valley Forge Military Academy in April 2018 and briefed Cadets about the role of the JAG Corps in the Army.

Also in April, **CPT Jordan Stapley**, (Chief, Legal Assistance), and **COL Joseph Fairfield**, (SJA of Task Force Phantom), delivered a lecture to members of the Texas A&M Corps of Cadets on the laws of armed conflict and rules of engagement.

In February 2018, retired **MG Kenneth D. Gray**, the 15th Deputy Judge Advocate General, received the ABA 2018 Spirit of Excellence Award at the Vancouver Midyear Meeting, for his contributions and commitment to racial and ethnic diversity in the legal profession.

Retired **BG Malinda Dunn** was inducted at the 2018 U.S. Army Women's Foundation Hall of Fame during the 10th Annual U.S. Army Women's Summit on Capitol Hill.

Members of TJAGLCS conducted the test for the German Armed Forces Proficiency Badge in Charlottesville, Virginia, on the weekend of 14 April 2018. The following servicemembers earned the award: **Capt Douglas Arnett**, USAF - Silver; **MAJ Nathan Bastar**, USMC - Silver; **MAJ Brandon Bergmann**, USA - Gold; **MAJ Kyle Burgamy**, USA - Silver; **MAJ Todd Chard**, USA - Silver; **Capt Russell Clarke**, USMC - Gold; **MAJ Mary Jo Gneshin**, USA - Silver; **MAJ Christopher Goren**, USA - Silver; **MAJ Hsienjan Huang**, USA - Silver; **MAJ Timothy Minter**, USA - Silver; **Capt Kathleen O'Hara**, USMC - Gold; **SFC Mark Pena**, USA - Silver; **MAJ Joy Premo**, USA - Silver; **MAJ Adam Rose**, USA - Silver; **MAJ Jon Siegler**, USA - Bronze; **MAJ Greg Vetere**, USA - Silver; **SSG Crystal Young**, USA - Gold; and **MAJ Sean Zehtab**, USA - Gold.



(Credit: iStock.com/XtockImages)

Court is Assembled

Principled Lawyering

By Lieutenant General N. Charles Pedo

In matters of style, swim with the current; in matters of principle, stand like a rock.

—Thomas Jefferson

Colonel Willis Everett faced a daunting task: Defend seventy-four Nazi SS soldiers accused of murdering eighty-four American Soldiers in 1944 at Malmedy, Belgium. The Battle of the Bulge was now over. In its aftermath, the American Army found the frozen bodies of eighty-four members of the 285th Forward Artillery Observer Battalion half buried in the snow, apparently gunned down by the *Kampfgruppe Peiper*—named in honor of its infamous leader, Joachim Peiper.

The trial of the SS soldiers was held in 1946 at the former concentration camp at Dachau to a panel of American military officers.

Stymied by the lack of confessions during the investigation, the prosecutor and investigators adopted the “schnell procedure.” The accused were taken, hooded, into a room lit only with candle. Once the hood was removed, the accused were informed that a judgment of guilt and sentence to death had been entered, and that if

they chose to provide evidence about who actually pulled the trigger, their sentence might be commuted. Beatings and other stories of abuse also circulated.

Confessions followed from these mock trials, which served as the actual evidence at trial. Defense counsel’s objections to these tactics fell upon deaf ears.

Most of the soldiers were convicted and forty-three were sentenced to death.

The “rest of the story” is extraordinary in its scope and result, but all of it rests on Colonel Everett’s sense of *principle*—his abiding sense that the principle of due process and fundamental fairness had been violated and must be championed, despite the personal cost and his unsympathetic Nazi clients.

Due to Colonel Everett’s persistence, the Senate Armed Services Committee eventually took notice, as did Kenneth Royall, the first Secretary of the Army.

Outrage over the unethical and illegal interrogation tactics ensued, newspaper articles begat congressional hearings which ultimately led to an office call with Secretary Royall—who in an amazing coincidence had been the defense counsel in the Nazi saboteur cases in 1942 and who saw his clients quickly sent to the electric chair. Calculate the astronomical odds of finding, sitting in the Secretary of the Army’s chair, a former defense counsel who had represented equally unsympathetic clients and who had been similarly concerned about the fairness of the judicial proceedings.

The death sentences were ultimately commuted.

But for Colonel Everett’s principled lawyering, it seems clear that many of the convicted, who were not directly culpable for the murders, would have been hanged or shot based on tainted evidence.

The Hard Right

“To thine own self, be true.” Shakespeare’s famous turn of a phrase reminds each of us that the person who stares at us in the mirror is only as good as the person staring back. Colonel Everett’s dogged defense of his clients is just one example of principled lawyering in our Corps’ storied history.

Examples such as Colonel Everett serve to inspire and remind us that our ability to look ourselves in the mirror with humble

satisfaction is truly a function of whether we have been honest—true to ourselves, true to our sense of right, true to our *principles*.

And what animates this sense of right? What gives meaning to the notion of a principled lawyer? What served as Colonel Everett's foundation, his true north?

Timeless Virtues

The timeless common virtues of Honor and Integrity are the bedrock of our dual professions. In the practice of law and the profession of arms, there is nothing more sacred than your Honor and Integrity. With the seemingly fickle ebb and flow of modern relativism, shifting mores and disruptions of a consumable and distracting popular culture, Honor and Integrity don't always catch headlines or may, in fact, sometimes lose their luster and primacy in the crush of everyday life.

But the imperatives of these virtues do not tarnish or fade, and are indeed, needed most when we encounter forces that threaten them. But like any virtue they are strengthened by practice, so we should and must talk and write about Honor and Integrity in meaningful ways, if we continue to "live them" every day, if we aspire to personify them, and inculcate them in those we lead. If we do this, these elemental virtues will retain center stage.

It is my experience that the examples of such principled lawyers as Colonel Everett provide our guideposts—our beacons, like a lighthouse on a shore.

As members of the oldest and simply the best law firm in the United States, we are fortunate indeed. Our Corps' history is rich with examples of Soldier-lawyers who, when it was unpopular to speak truth and stand up for undiluted justice, did just that. When the average mortal might have yielded to popular momentum, these principled Soldier-lawyers did not waiver in what they knew to be right.

Other inspiring examples of judge advocates adhering to the harder right course, against the odds, include CPT Aubrey Daniel, who prosecuted LT William Calley in the My Lai trials. He withstood withering public scrutiny and unpopularity throughout one of the longest and most arduous criminal trials in military justice history. But CPT Daniel did not waiver. He tried a

solid case and never lost sight of the moral imperative to seek justice for the murdered innocent and defenseless women, children, and old men of a Vietnamese hamlet.

A more recent example is MG Thomas Romig, our former TJAG, who navigated the rough waters of new standards in detainee treatment and interrogation practices after 9/11 and revelations of abuses at the Bagram prison in 2001 and the Abu Ghraib prison in 2004. His adherence to high character was most evident in his resistance to the so-called "torture memos." His actions reflect the best in the principled lawyer. His May 2013 Decker Lecture is important reading for those looking for inspiration in the practice of principled lawyering. A link to his lecture is on the Legal Center and School's Lifelong Learning page.

The ultimate lesson to learn from these and so many other wonderful examples of the principled lawyer is that the bar of expectation is high—as it should be—and that we, each of us, is equal to the task. Our ranks are brimming with legal professionals who cherish and live by these foundational virtues. I encourage every member of our Corps to recognize these qualities in those around you, and to cultivate these traits, every day, in yourself.

Each of us must be animated by the light that Honor and Integrity cast brightly—every day—in every interaction—with every person we meet. There can be no respite—no downtime—no momentary lapse in these virtues.

It is powerfully important that we remind and inspire each other to relentlessly lead, coach, and mentor, by word and deed, these timeless truths.

Remember too that examples of principled lawyering are not lessons in the sort of zealotry that would turn principled disagreements or trivial disputes into a violation of integrity or ethical standard. Quite the contrary.

The artful lawyer must know when **real** principle and issues of moment are at stake. The art of warfighting and lawyering amid the day-to-day complexity, fast pace and pressures of soldiering is one of pragmatism and cost-benefit analysis. The paths we chart for our clients and commanders to be able to say "yes with honor" is not paved with absolutes. We are obliged to give the

best, principled advice, often with imperfect knowledge within inflexible timeframes.

True North

As Daniel Day Lewis' President Lincoln observed in the eponymous movie,

"A compass, I learnt when I was surveying, it'll point you true north from where you're standing, but it's got no advice about the swamps and desert and chasm that you'll encounter along the way. If in pursuit of your destination, you plunge ahead, heedless of obstacles, and achieve nothing more than to sink in a swamp...What's the use of knowing true north?"¹

The essential point is to be able to recognize when a fundamental core value is truly at stake in the crosshairs and is in need of a champion.

The practice of law in uniform is a higher calling—one that demands that you represent what you believe and what you know to be right. You must be someone who can distill the wheat from the chaff, the central issue of the moment from the distraction. The practice of law requires principled lawyers with staying power, discernment, and nuance.

As we soldier and lawyer for the most powerful and best Army in the world, let us remember our special calling as Soldier-lawyers. I am proud to serve with some of the most principled lawyers in the world. I challenge you to constantly remind each other of your values-based practice. Infuse every new counsel and paralegal with the tools, the standards, and the expectations that will make them Soldier-lawyers of high character.

The principled lawyer will then stare back at you, and smile with warm satisfaction. **TAL**

Lieutenant General Pede is the 40th Judge Advocate General of the United States Army.

Notes

1. LINCOLN (DreamWorks Pictures 2012).



First Lieutenant Liyue Huang-Sigle works with peers during her Direct Commission Course at Fort Benning, Georgia (Credit: Dan Torok, TJAGLCS).

Up Close

From Tianamen Square to the JAG Corps The Journey of First Lieutenant Liyue Huang-Sigle

By Major Laura A. Grace

*“A dream doesn’t become reality through magic; it takes sweat, determination and hard work.”
—Colin Powell*

As the Army National Guard’s 35th Infantry Division (35ID) redeploys after a nine-month deployment to Kuwait in support of Operation Spartan Shield (OSS), 1LT Liyue Huang-Sigle, a member of the

legal team, reflects on the sweat, determination, and hard work it took to be able to serve with the 35ID Team. Her life-long journey and diverse background brought a unique perspective to the mission, but it

appears as though the organization’s leadership had just as much of an impact on her as she did the mission.

In December 2017, Huang-Sigle was featured in an Army article spotlighting citizen-Soldiers, which highlighted her background. Born and raised in Shanghai, China, Huang-Sigle was prohibited from attending college because of her involvement in the 1989 Tiananmen Square protests. Unable to attend college as planned, she worked for a trade company that imported timber from Malaysia. On a business trip to Malaysia, she met her husband, a United States citizen. At the age of thirty, she moved to Malaysia and married several years later. She lived in Malaysia for ten years. Although she did not speak English when she arrived, she learned English well enough to take the British equivalent of the SAT/ACT and ultimately, received an LLB—a Bachelor of Laws—through the University of London. While she fought for democracy in China, she says that she did not really understand what democracy meant until she studied law at the University of London.

At the age of forty, Huang-Sigle moved to the United States to allow her daughter to attend school. Living in the United States, she gained a deeper knowledge and appreciation of what democracy and freedom mean. “When I came to the United States, the legal principles of democracy, human rights, and justice, all came to life. The fear and suffocation I experienced in China magically disappeared.” She sought legal jobs, but could not practice law in the United States with an LLB. Undeterred, she earned a law degree from the University of Kansas in 2013. It was during this time that she decided she wanted to serve in the U.S. military.

Huang-Sigle says her desire to serve stems from her belief that “failure to protect our country, our values, our political system, and our way of life, will allow evil to prevail.” She also wants to “educate and liberate the minds of those still in China, empower them to pursue freedom and happiness.” Her parents and brother still live in China. She keeps in touch with them through Chinese social media



Huang-Sigle at her first drill in Missouri, two months before her Officer Basic Course training (Credit: Courtesy Liyue Huang-Sigle).

called WeChat (the Chinese equivalent of Facebook). She is often reproached by her family and strangers if she criticizes the communist regime. “While my family is understandably in fear of being punished by association with me, the strangers are simply acting out of patriotism, [or] some of them might be Internet police.”

Huang-Sigle was determined to join the U.S. military to fight for the freedom she now enjoys. However, her husband, aware of the physical demands of military

service and need for an age waiver, tried to dissuade her from joining. As a compromise, she joined the National Guard instead of full-time service in the Active Component. She admits that with respect to the physical demands, her husband was right. Before joining the U.S. military, she never exercised, stating, “life in China was hard, especially without the convenience of a car. Avoiding physical activity was a daily goal.” She says she was the slowest runner/marcher at the Officer Basic Course (OBC),

but never quit and continued to improve, scoring a 280 on her last Army Physical Fitness Test. “Self-discipline is one of my strengths,” she says.

While at OBC, Huang-Sigle was surprised to learn that she would deploy two months after graduating. She was still busy learning military etiquette and absorbing new knowledge. The sum total of her military experience prior to the deployment was OBC training and three battle drills with her unit. She credits OBC professors with easing her fears and she began to look forward to the deployment. She also praises her National Guard colleagues with teaching and inspiring her. “My supervisors were very generous in giving me guidance and advice, especially LTC Paul Boyd.” LTC Boyd served as the Deputy Staff Judge Advocate, 35ID. Her biggest source of inspiration was CPT Kalah Paisley, Chief of Legal Assistance, calling her the “sunshine of the entire JAG Office.” “CPT Paisley showed me that I didn’t need a reason to do good, and that anything that makes the world a better place is worthwhile. She showed me that being a boss was not only about giving orders and getting tasks done, but to make your subordinate a better person, and help them succeed in life outside of the military.”

Operation Spartan Shield is a combined forces contingency operation within Central Command’s (CENTCOM) area of responsibility (AOR). It serves as the U.S. Army Central Command (ARCENT) forward element representing ARCENT throughout the Geographic Combatant Command. Recently, National Guard units have assumed command of ARCENT’s intermediate division headquarters, Task Force Spartan (TF-Spartan) at Camp Arifjan, Kuwait. TF-Spartan supports OSS, Operation Enduring Resolve, Operation Inherent Resolve, and theater security cooperation in the CENTCOM AOR. TF-Spartan has become an enduring National Guard division mission with 29ID, 35ID, and currently 28ID, postured and prepared to conduct contingency operations and command forces throughout the ARCENT AOR. The 35ID, headquartered in Fort Leavenworth, Kansas, relieved 29ID in summer 2017, assuming command of approximately 12,000 Soldiers in 12 countries, including Kuwait and Jor-

dan. This is the first time 35ID has deployed since WWII. 35ID was replaced by 28ID in February 2018.

The TF-Spartan Legal Team supports the AOR's legal assistance and special victim's prosecutor teams, as well as the administrative law, military justice, contracting, and operational law missions. Huang-Sigle worked for ARCENT in Kuwait, initially as an administrative law attorney. As part of her duties, she had an opportunity to travel to Jordan to make a presentation to allied forces. Huang-Sigle also served as a legal assistance attorney, where she enjoyed helping Soldiers with typical legal assistance problems like navigating divorce and custody proceedings, landlord-tenant issues, drafting wills, and defending Soldiers in administrative actions. Her background and civilian immigration law practice experience was especially helpful in assisting Soldiers with applications for U.S. citizenship. She felt fulfilled knowing she was lifting a Soldier's burden, enabling the Soldier to focus on the mission. CPT Tim Hoffman, a member of her unit, said that Huang-Sigle's life experience allowed her to help Soldiers navigate the path from permanent residence to U.S. citizenship, instead of referring the issues to a civilian attorney. CPT Hoffman commented that despite twenty years of legal experience, he was surprised at the volume of immigration and family law issues that came through the office.

Huang-Sigle believes her past experiences have made her less critical of others and more sympathetic to their ordeals. Born in the midst of the Chinese cultural revolution, starvation was the main theme of her childhood. She believes that although China appears to have one of the strongest economies in the world, the majority of the people living at the bottom are still struggling for survival. "This life experience made me more sensitive to others' hardship, sympathetic to the less fortunate, and acutely aware of the social injustice." Summarizing her deployment experience, Huang-Sigle says, "I was a subordinate to some, and leader to others. Most importantly, I was a member of a team that taught me the skills and values that do not exist in the Chinese culture, such as respect but not unconditional submission."



Huang-Sigle in front of the Johnson County Courthouse in Olathe, Kansas, in 2015 where she used to live and applied for commission. Huang-Sigle had a general law practice primarily servicing the local Asian community (Credit: Courtesy Liyue Huang-Sigle).

When asked what advice she has for new judge advocates (JAs), 1LT Huang-Sigle said that she would advise them "not to be afraid of being different, because that's what we Americans are. We are all different from one another. We appreciate the new elements you bring to the pool of talent. We are a group of people who are always looking to learn and grow just like you." Huang-Sigle notes that she uses the word "we" and not "they" because she went from seeing herself as an outsider, constantly seeking affirmation and approval, but was assured by her colleagues, with their warmth and respect, that she had always been one of them. Finally, she would advise new JAs to enjoy the learning experience. "It will benefit you for life."

Huang-Sigle's sweat, determination, and hard work led her to a rewarding experience deployed with 35ID. Although

new to the JAG Corps, she was able to use her background to help Soldiers "Be Ready," while learning from experienced JAs.

"It was an honor seeing 1LT Huang-Sigle grow in her military experience," said LTC Boyd. "But even more than that, it was her appreciation of democracy and development as an officer who brought to bear her work ethic and love for the United States." **TAL**

Major Grace serves as a Strategic Initiatives Officer in the Office of the Judge Advocate General in Washington, D.C.



German General Anton Dostler is tied to a beam shortly before his execution (Credit: The U.S. National Archives and Records Administration).

Lore of the Corps

“To Be Shot To Death By Musketry” The Trial and Execution of General Anton Dostler

By Mr. Frederic L. Borch III

“Ready. Aim. FIRE.” With that last command, a party of eight American Soldiers fired their rifles at a German Army officer tied to a wooden post. It was 1 December 1945 and General Anton Dostler, his head covered by a black hood as required by military regulations, was killed instantly.

His execution by firing squad near Rome, Italy, was the final page in the story of a horrific war crime ordered by Dostler some twenty-one months earlier—the murder of fifteen American prisoners of war (POWs) who had surrendered after being captured behind enemy lines.

The *Dostler* case is unique because it is the only instance in history in which a German general officer was tried and executed for war crimes on the sole authority of the United States. For judge advocates, it also is a fascinating example of an attempt to use the doctrine of superior orders as a defense to a war crime.¹

Killing Prisoners of War

Anton Dostler violated the Law of Armed Conflict on 24 March 1944 when, while serving as the commander of the 75th German Army Corps, he ordered his men to execute the members of an Office of Strategic Services (OSS) team that had been taken prisoner.

Two days earlier, fifteen American Soldiers—two officers and thirteen enlisted men—had left the island of Corsica on U.S. Navy Patrol Torpedo boats and, after reaching the Italian mainland, had paddled rubber boats to the beach, and then quietly waded ashore. The men were members of the 2677th Special Reconnaissance Battalion (part of the OSS) and had landed at Stazione di Framura, about sixty miles north of La Spezia. Since the Allied front at the time was at Cassino, with a further front at the Anzio beachhead, the Americans had landed 250 miles behind the front—and well behind German lines. Their mission, called Operation *Ginny*, was to destroy a tunnel on the railroad line between La Spezia and Genoa. The rail line was vital to the Germans because it was being used to supply their forces fighting on the Cassino and Anzio fronts.²

Allied bombers had tried—but failed—to destroy the rail line and now the plan was to cut the line by blowing up one of its tunnels. But, while stealth was essential to the success of *Ginny*, and the fifteen Soldiers were all of Italian ancestry and had been selected because most spoke some Italian, they did not attempt to disguise their identities. On the contrary, all were dressed in regulation Army field uniforms (including military insignia) and they carried no civilian clothes.³

Unfortunately, the Americans had bad luck. They were captured on the morning of 24 March, less than two days after

landing, after a patrol made up of Italian Fascist militiamen and German soldiers surprised them. After a short firefight, the outnumbered Americans surrendered and were taken to La Spezia, where they were confined near the headquarters of the 135th Fortress Brigade. This unit, commanded by German Army Colonel Kurt Almers, was subordinate to the 75th German Army Corps commanded by General Dostler.⁴

Soon after arriving in La Spezia, the captured American Soldiers were questioned in English by two German Naval Intelligence officers, Captain Friedrich Klaps and Lieutenant George Sessler. The Germans tricked the commander of the *Ginny* mission, First Lieutenant Vincent Russo, into revealing the details of the American sabotage operation by telling him that his fellow officer had already told them everything. In fact, no one on the team had talked. But by the time Russo realized he had been fooled, it was too late.⁵

In the meantime, the 135th Fortress Brigade had reported to higher headquarters that it had fifteen American POWs. The next day, 25 March 1944, the brigade received a telegram that stated: "The captured Americans are to be shot immediately." It was signed by Dostler.⁶

Almers, Klaps, and Sessler were shocked by the order to kill POWs; they quickly asked Dostler to reconsider his order, or at least stay the execution. The reply came from the 75th Army Corps commander later that same day: the Americans were to be shot before 7 a.m. the next morning—26 March. Officers of the 135th Fortress Brigade tried twice more to reach Dostler by telephone in order to plead with him to rescind his execution order but these attempts were unsuccessful.⁷

The next morning, some forty-five hours after they had been captured, the fifteen Americans were shot by a German Army firing squad. Their execution could not have been more summary: they had not been tried, nor given any hearing whatsoever.⁸

Military Commission Trial

Dostler was captured at the war's end. The military commission that tried him was convened by General Joseph T. McNarney, Commanding General, U.S. Army Forces

Mediterranean Theater. The trial began on 8 October 1945, in the "great dank Palace of Justice" in Rome, Italy.⁹ The charge against the fifty-four-year-old Dostler: ordering "a group of United States Army personnel" to be "shot summarily," in violation of "the laws of war."¹⁰

When the military commission was called to order, Major General L. C. Jaynes, the president of the tribunal, immediately faced a challenge from the defense. Dostler's counsel, Col. C. O. Wolfe and Maj. C. K. Emery,¹¹ argued to Jaynes and the commission that they had no jurisdiction to try the accused, because the 1929 Geneva Conventions required a POW to be tried at the same type of tribunal that the State detaining that prisoner would use for its own personnel.¹² This meant, said the defense, that Dostler must be tried by a court-martial.

The prosecution countered that while the defense counsel were correct about the Geneva Convention provision, it did not apply to Dostler because he had not been a POW when he ordered the execution of the *Ginny* team. Consequently, the protections of that Convention provision did not apply to him and a military commission was the proper forum.¹³

Jaynes and his fellow commissioners agreed with the prosecution, and the case proceeded.

For the two prosecutors, Major F. W. Roche and First Lieutenant W. T. Andress, the case against Dostler was clear cut: the dead Americans had been Soldiers, were properly dressed as such, and were on a legitimate military operation when they were captured. Consequently, they were entitled to be treated as POWs and their execution without trial was in violation of a rule of international law that was at least 500 years old.¹⁴

The prosecutors called a number of witnesses to testify, including a captain in the OSS who explained the legitimate military reasons for the sabotage mission against the tunnel. The two German officers who had interrogated the Americans also took the witness stand. They confirmed that the fifteen men had been dressed in U.S. Army uniforms and carried military equipment. Three German soldiers also testified about attempts made by Almers and others at the 135th Fortress Brigade to

get Dostler to rescind his execution order, and about the execution itself. Finally, the prosecution offered into evidence two written statements made by Dostler and the notes of an interview with him.¹⁵

In presenting its case, the defense first offered evidence that the *Ginny* mission personnel had not been wearing a proper military uniform (the defense claimed the Americans were not wearing distinctive military insignia recognizable at a distance) and consequently were not entitled to POW status. The defense also argued that the stealthy nature of the sabotage mission meant that the deceased Americans were really spies rather than legitimate combatants.¹⁶

The problem with this defense was that it was directly contradicted by the earlier testimony of the two German Navy officers that the *Ginny* team members were properly clothed. And, as the prosecution quickly pointed out, since the law of war required that even spies be given a lawful trial prior to execution, this line of defense was of little value to Dostler.¹⁷

Since the facts really were not in dispute—Dostler had ordered the Americans to be killed, and they had been executed—Dostler's lawyers ultimately relied on the defense of "superior orders" to win an acquittal. Their claim was that Dostler's special oath of obedience to Hitler (which no one doubted he had taken) required him to obey the *Fuhrerbefehl* ("Leader Order") of October 1942. This order claimed that, as the irregular warfare of Allied commando units was in violation of the Geneva Conventions, German troops who encountered "groups of British saboteurs and their accomplices . . . will exterminate them without mercy wherever they find them." The *Fuhrerbefehl* insisted that even if these commandos "appear to be soldiers in uniform" they must be killed and must not be allowed to surrender.¹⁸

Finally, Hitler's order stated that if members of an Allied commando unit fell into the hands of the *Wehrmacht* "through different channels (for example, through the police in occupied territories)," they could not be kept, even temporarily. Instead, *Wehrmacht* personnel were to immediately deliver the commandos to the *Sicherheitsdienst*, the "Security Service" of the *Schutzstaffel* (SS).¹⁹



Dostler's lifeless body slumps from a pole after his execution by firing squad (Credit: The U.S. National Archives and Records Administration).

Dostler took the stand and, under oath, testified that he had no choice when it came to ordering the execution of the members of the *Ginny* mission: They had been caught while carrying out a commando-type mission and his oath to Hitler required him to obey the *Fuhrerbefehl* of October 1942, even if that order violated international law.²⁰

This defense of “superior orders” was not without merit, since the 1940 version of U.S. Army Field Manual 27-10, which governed the rules of land warfare, stated that an individual would not be punished for a war crime if that crime was committed under the orders of his government or higher

commander.²¹ That manual, however, had been amended in 1944 and now stated that an individual who violated “the accepted laws and customs of war may be punished therefore . . . however, the fact that the act was done pursuant to order of a superior . . . may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.”²²

Relying on this language, the prosecution countered that ordering the execution of POWs without trial was such an egregious violation of the law of war that it could never be excused by the defense of superior orders. The prosecution also stressed that Dostler’s reliance on the *Fuhrerbefehl*

as a defense was misplaced: Since the *Ginny* team members had not been killed at the time they were captured, Dostler in fact was disobeying Hitler’s order when he ordered their execution. This was because the *Fuhrerbefehl* clearly stated that commandos who had fallen into the hands of the *Wehrmacht* were to be turned over to the *Sicherheitsdienst*. It follows that even if Dostler and his defense counsel were correct about the law, it could not help Dostler since he had violated the *Fuhrerbefehl* in failing to deliver his prisoners to the SS.²³

On 12 October 1945, after a four-day trial, Anton Dostler was found guilty and sentenced “to be shot to death by musketry.”

As the *New York Times* reported, when the verdict was announced, the courtroom “was gaudily illuminated by photographers’ spotlights and packed with several hundred Italian as well as Allied soldiers and military observers, Red Cross workers, and a number of American civilians.” This was because, explained the *Times*, the guilty verdict in *Dostler* was understood by all those who witnessed the event to be extremely important precedent for future war crimes trials. Why? Because Anton Dostler’s conviction meant that blaming one’s superior, in this case Adolf Hitler, would not allow the actual perpetrator to escape responsibility for his war crimes.²⁴

The actual execution was carried out in the town of Aversa, Italy, on 1 December 1945, after Gen. McNarney had approved the findings and sentence of the military commission and denied requests from Dostler’s lawyers that his life be spared.

The execution was not some *ad hoc* affair, but instead closely followed the requirements of War Department Pamphlet 27-4, which provided a clear and detailed procedure for carrying out the sentence of “to be shot to death by musketry.” Those participating in the Dostler execution understood that they were about to witness a historical event. After all, why else would Army Signal Corps photographers and a film crew have arrived to record the execution?²⁵

The officer charged with carrying out the execution, and the eight men and one sergeant who had volunteered to serve on the firing squad, had previously rehearsed the execution procedures so that all would go smoothly. As required by regulations, the officer in charge watched the loading of eight rifles in his presence. He made sure that no more than three but no fewer than one rifle was loaded with blank ammunition, and then had the rifles placed at random in a rack provided for that purpose. The idea behind this loading procedure was to ensure that the eight Soldiers who fired their rifles at Dostler would never be certain who had actually fired the fatal bullet (although one wonders whether an experienced rifleman in fact would know whether he had fired a blank round).²⁶

Shortly after sunrise on 1 December, Dostler was delivered to the execution party

by the prisoner guard. The officer in charge then read out loud the charge against Dostler, the finding, and the sentence. Next, a chaplain was given a brief time to talk to Dostler. Things moved quickly after that: A black hood was placed over Dostler’s head and he was tied to a post with his arms behind his back. In accordance with the regulation, the medical officer in attendance then attached a four-inch white target to Dostler’s uniform; he placed it over Dostler’s heart.²⁷

Then, with the firing party in place a short distance from the post to which Dostler was now tightly secured, the officer in charge gave three commands. At the command “Ready,” the Soldiers unlocked their rifles. At the command “Aim,” the firing party took aim at the target on Dostler’s body. As the last command, “FIRE,” was shouted for all to hear, the execution party fired simultaneously. The shots rang out in unison, and Dostler slumped over. The medical officer then went forward and officially pronounced him to be dead.²⁸

Aftermath

As the first and only German general officer to be executed solely on the authority of the United States, the *Dostler* case remains unique in history. His fate so alarmed Field Marshal Albert Kesselring, who almost certainly knew about Dostler’s decision to execute the American prisoners, and probably approved the killings as Dostler’s superior commander, that Kesselring lied about his involvement in the affair at his own trial in Venice in 1947.²⁹ But Kesselring’s perjury simply proves the deterrent effect of the Dostler military commission, since it was now clear for all to see that the execution of POWs would not be excused regardless of circumstances.

Today, the *Dostler* military commission remains a very real example of what happens to those who commit war crimes against POWs. It also shows how a military commission can be an effective tool in fixing responsibility for violations of the Law of Armed Conflict. **TAL**

Notes

1. U.N. War Crimes Commission, *Law Reports of Trials of War Criminals* Vol. 1, (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf.

2. *Id.* at 25.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. For more on Operation Ginny, see Don Smart, *OSS Operation Ginny Met With Tragic End During Italian Campaign*, *WORLD WAR II HIST. MAG.* Sep. 2005, at 32-36.

9. Virginia Lee Warren, *Dostler Sentenced to Die for Shooting OSS Men*, *N.Y. TIMES*, Oct. 13, 1945, at 1.

10. U.N., *supra* note 1, at 22-23.

11. Cecil K. Emery, a member of The Judge Advocate General’s Department, was a graduate of the 8th Officer Course at The Judge Advocate General’s School in Ann Arbor, Michigan. He was from Des Moines, Iowa. *THE JUDGE ADVOCATE GENERAL’S SCHOOL, STUDENT AND FACULTY DIRECTORY* 86 (1946).

12. Geneva Convention Relative to the Treatment of Prisoners of War, art. 63, JULY 27, 1929, 47 Stat. 2021, No. 846.

13. U.N., *supra* note 1, at 23-24.

14. *Id.* at 25-26.

15. *Id.* at 26.

16. *Id.*

17. *Id.*

18. *Id.* at 34.

19. *Id.*

20. *Id.* at 28-29.

21. U.S. WAR DEP’T, *FIELD MANUAL 27-10, RULES OF LAND WARFARE*, para. 347 (1 Oct. 1940).

22. U.S. WAR DEP’T, *FIELD MANUAL 27-10, RULES OF LAND WARFARE*, para. 345.1 (15 Nov. 1944).

23. U.N., *supra* note 1, at 31-32.

24. Warren, *supra* note 9, at 6.

25. *Nazi General Anton Dostler Execution—Italy 1945*, YOUTUBE (Dec. 16, 2009), <https://www.youtube.com/watch?v=4iEY6WoGm6A>.

26. U.S. WAR DEP’T, *PAM. 27-4, PROCEDURES FOR MILITARY EXECUTIONS* para. 12 (12 JUNE 1944).

27. *Id.* para. 17.

28. *Id.*

29. KERSTIN VON LINGEN, *KESSELRING’S LAST BATTLE* 61 (2009).



A U.S. Soldier of the 173rd Airborne Brigade writes coordinates while conducting a pre-missions brief during exercise Saber Junction 16 at the U.S. Army's Joint Multinational Readiness Center (JMRC) in Hohenfels, Germany (Credit: Sgt. Matthew Hulett, U.S. Army).

WRITECOM

Writing Battle Drills

By Major Jess B. Roberts

Lawyers in the Army constantly grapple with thorny legal issues in garrison and in deployed environments. Legal issues emerge twenty-four hours a day, hail from all corners of the globe, and are as varied as the geography from which they spring. Military attorneys are extremely self-reliant and are often able to deliver written legal advice with little assistance, if any. Most aspiring counsel develop oral and

written communication skills in law school, birthed from rigorous writing requirements and the feared Socratic Method. It is probably safe to say that a good percentage of judge advocates left law school with a decided streak of independence and an instinct to retain control of their legal work. Thus, it should not be surprising to learn that many judge advocates prefer to work alone while drafting legal documents.

Many attorneys feel in order to get things perfect, they have to do it themselves. While the ability to work alone is necessary in some circumstances, there might be a better way to handle legal writing in the field. When things are quiet, going it alone might make sense. Self-imposed professional isolation loses its luster when operational emergencies hit, unforeseen surges in work present themselves, or family issues cause one to lose the ability to produce. An infantry Soldier serving in a line unit rarely engages enemy forces alone and without support from fellow Soldiers. In most cases, Army doctrine requires that American forces outnumber an enemy force during armed conflict. Soldiering is a team sport. Legal writing in the Army Judge Advocate General's Corps should be as well. This is especially true when operating in a time of heightened stress caused by unforeseen catastrophic events. When the opportunity arises (and as a matter of routine), try to involve everyone in the office. This article proffers a battle drill that should help most brigade-level legal teams write together to produce a superior legal product.

A brigade judge advocate often withholds the work related to research, drafting, and proofing of legal documents to themselves. This is a necessity at times. However, there are opportunities to build the bench. A brigade legal team deploys together, conducts physical training together, and often eats together. Why not write together? Try the Surge Writing Drill to gauge your team's ability to work together. There are six stages in the Surge Drill. Three overarching areas of emphasis apply during the drill and help to form the basis of a strong writing team. If brigade legal teams employ this battle drill, writing together in concert will become automatic—and the products will necessarily be better than those produced alone. This article first defines and explains what a Surge Battle Drill is and a few concepts involved in the drill. Next, the article articulates all of the steps and methods for evaluating the drill, followed

by some suggestions and references to use in creating Surge Battle Drills for writing. The article concludes with an illustrative example to show how the Surge Battle Drill can make your legal team better and more prepared for any legal contingency.

The Surge Battle Drill

What is the Surge Battle Drill? Once every two weeks, execute a cradle-to-grave legal operation utilizing the surge theory to address a novel legal issue. In other words, take the brigade-level legal team out of their normal comfort zone and surge in order to meet a tight deadline.

What is a cradle-to-grave legal action? Cradle-to-grave means the legal team rapidly takes a legal issue from its inception to an acceptable legal resolution. The team rapidly moves through research, analysis, proofreading, packaging, and delivery. The key is that the legal team independently executes the task from start to finish.

Legal offices always surge, so what is unique about this battle drill?

Find an analogy that resonates with your team. Surge, swarm, time of heightened legal work emphasis, find a theme your troops will remember. One analogy that seems to resonate with Soldiers is the wolf pack theory. While a bit on the corny side, love it or hate it, the legal team will not forget the analogy. The theory is simple: In the wild, a wolf pack will go about their daily lives in an independent fashion for the most part. Some eat, some sleep, and others wander about the countryside. However, when the leader identifies a threat or an opportunity, every single member of the pack stops what they are doing and focuses the combined strength of the pack. Legal offices are similar in some respects. On any given day, paralegals might be typing charge sheets, captains will likely be reviewing investigations, and the brigade judge advocates are likely held hostage at non-legal meetings. All is calm, all is normal. Shake the team out of the normal operating procedure and execute a battle drill to simulate legal emergencies.

Yes, legal emergencies do exist for some legal offices. Think about the Army balloon (JLENS) that broke free, dragging a long “tether” across parts of Maryland and Pennsylvania, and knocking out power to

thousands. The legal team that worked for that command considered the incident to be a time of increased legal activity and stress. Believe me, I know: I was the command judge advocate. Do not create fictional legal scenarios for the battle drill. The team has enough work. Use actual work that the brigade commander cares about. Escaped balloons do not happen every day. Do your best to find something that needs to happen quickly. For example, utilize a hot administrative law issue that is of interest to the commander. The main point is to show the team that when the time comes to surge in reality, they are up to the task. The legal team should rapidly execute the below six steps when the battle drill begins. The brigade judge advocate should consider three areas of emphasis during the drill: base documents, legal team dynamics, and time management.

The six stages in the Surge Battle Drill:

1. Receive the novel legal issue (time management)
2. Conduct the analysis and research (base documents)
3. Craft a response (base documents)
4. Proof read (legal team dynamics)
5. Package (legal team dynamics)
6. Deliver an accurate legal document (time management)

The brigade judge advocate should set the timeline. Give the office three hours to conduct the drill the first time. Decrease the time allowed by thirty minutes each time the drill is conducted until you can execute a drill in an hour. The entire legal team should conduct an After Action Review of the six battle drill steps in light of three overarching areas of emphasis: base documents, legal team dynamics, and time management. For example, assess whether the team utilized the correct regulations and memos (base documents). Did everyone feel like they had a valuable role to play, or were there any idle team members at any point during the drill (legal team dynamics)? Likewise, determine if the team met the time limit (time management).

Do not let the simplicity of the exercise fool the team. The battle drill is similar to the Army Physical Fitness Test. Executing two minutes each of push-ups and sit-ups

and a two-mile run is also a simple concept. However, it takes months of hard work and sweat in order to master it. The leader of the office creates a PT plan, identifies weaknesses, and seeks to improve the overall performance of the office. The same is true with the writing battle drill. Base documents, legal team dynamics, and time management are three areas of emphasis that form the basis of a highly functional writing section. Focus on these areas well in advance of any battle drills.

Base Documents

The office must possess a basic understanding of the required legal references and documents needed to carry out their legal mission. An office can operate under a theory predicated on a series of knee-jerk reactions where staff members search unorganized archives of documents or fall back on an organized tried-and-true set of templates and references. Battle drills allow your office the opportunity to vet resources and authorities. The way something becomes “tried and true” is to drill it.

Provide Examples of Legal Writing that Meets the Standard

The legal team should use identified templates during the battle drill. These documents will not appear out of thin air. Create Army Regulation (AR) 25-50¹ compliant templates that are ready to use on short notice. Include completed documents that inexperienced members of the team can reference when drafting new legal products. For example, provide an example of a completed AR 15-6 legal review and keep samples in a folder labeled—you guessed it—“Samples.” Inexperienced counsel and paralegals gain a better understanding of what is required when they can read an actual memo that meets the standard of the brigade judge advocate. The sample memos should be clear and easy to read. Employ plain writing that Soldiers, commanders, and civilians can read and understand. Plain writing is writing that is “clear, concise, [and] well-organized . . .”² Require each member of the team to provide examples of memos that meet the requirements of AR 25-50. Choose documents that passed the review of the various levels of the command to include in your “Samples”

folder. For example, use signature blocks, letterhead, and memos that address each of the office's core practice areas and common tasks. Do not recreate the wheel.

References

Supervisors should tailor their base document list to meet specific office's tasks. Talk to your team, ask them for recommendations. What documents or references do the paralegals recommend; how about the captains? Of primary import, ask the team to assemble a legal writing battle book. This does not have to be complex. The very first thing to place in the writing battle book is AR 25-50, *Preparing and Managing Correspondence*. Many Soldiers are unaware that the military provides guidance on what writing references should be on hand. The Department of Defense *Manual for Written Material: Correspondence Management*,³ provides guidance and recommends three useful references: the *U.S. Government Printing Office Style Manual*,⁴ *Merriam-Webster's New Collegiate Dictionary*,⁵ and the *Chicago Manual of Style*.⁶ Again, the brigade judge advocate needs to identify key reference documents. Each member of the team will serve as an expert on identified references and will draw from the references when called upon. For example, if there is a question on verb-subject agreement, the team member assigned as the expert for the Chicago Manual of Style will provide a citation on point. This process needs to be low-threat. Are there more references out there? Certainly, add them as needed. Again, start simple. This process is about exposing the paralegals and young attorneys to the basic resources.

Use a Hard Copy Battle Book

Does the battle book need to be printed out? Absolutely. Commercial power, high-speed internet, and a brick-and-mortar office will not always be available. Be prepared for austere conditions. Place the above-mentioned references in a battle book, right underneath your commanding general's priorities, which should appear as the very first document in the writing battle book. Doing so will help the legal team keep the big picture in mind. The legal office often plays an important role that focuses on detail, but there is a bigger

picture. Including the priorities of the commander reinforces the concept. What else needs to be in the writing battle book? At a minimum:

- AR 25-50, *Preparing and Managing Correspondence*
- AR 15-6, *Procedures for Administrative Investigations and Boards of Officers*
- AR 600-8-4, *Line of Duty, Procedures and Investigations*
- AR 735-5, *Army Accountability Policies*
- (Chapter 13 Financial Liability Investigations of Property Loss)
- AR 600-8-24, *Officer Transfers and Discharges*
- AR 600-37, *Unfavorable Information*
- AR 27-10, *Military Justice*
- DOD 5500.07-R, *The Joint Ethics Regulation*

Include samples of AR 15-6 appointment memos, financial liability of property loss appointment memos, and charge sheets. If your brigade created guides for investigating officers, include those too. The list is clearly not exhaustive; again, the whole legal team needs to think about the office mission and make recommendations. The office needs to understand that hard copy forms will not be as attractive as digital forms. That is okay. Tell your team to picture themselves in the field with no power, filling out an AR 15-6 investigation at night with only a red-lens flashlight for light. True field conditions. Use fill-in-the-blank charge sheets, investigation appointment memos, etc. Is there more that needs to be in the battle book? Yes! Each office will be a little different. The 32d Army Air and Missile Defense Command (AAMDC) will possess a slightly different collection of documents from those held by the 75th Ranger Regiment. Elementary? Perhaps, but the operators are preparing for austere conditions; judge advocates need to do the same.

It goes without saying that the battle book should be digital as well. Make sure you have a way to transport your digital data forward if you are traveling Outside the Continental United States (OCONUS). If you are working in a joint environment, coordinate with sister-services early. Each service imposes different requirements in order to gain access to their systems. Assign

a team member to manage digital writing references as well. Be prepared to operate on and off the grid. Place pertinent system access forms in the battle book, list technical points of contact, technical operating requirements, and helpful hints. All of these factors come into play when you step off a flight and your brigade commander needs a legal review in thirty minutes. What is easy in your office within the Continental United States (CONUS) is not so easy OCONUS. Printing a document is often harder than drafting a document when you first arrive in a new destination for an exercise or deployment. Be ready.

Legal Team Dynamics

An office needs to move at the speed of trust. The office will move at a snail's pace when trust is low. This is especially true when attempting to write as a team. Everyone in the office needs to understand that good writing only comes from good editing. Good editing only occurs when everyone from the rank of private to major feels comfortable providing constructive feedback. Trust is necessary. Trust naturally occurs when all parties treat everyone with respect. Every single person has something valuable to contribute. There is no room for snarky comments, passive-aggressive nonsense, or elitism. When these ugly attributes appear, trust erodes and legal actions will not move. Everyone starts to second-guess their work and self-worth. Therefore, assess your team keeping in mind the following questions. Does every member feel like they are an important part of the team? Do they feel involved? Does each member of the team feel like they can edit the leader's work? Candid feedback from subordinates drops to zero if the leader's specialty is sending heat rounds for all infractions, real or perceived.

Give each member of the team ownership of the written product that leaves the office. Granted, there will be times when the senior attorney is the only one that needs to see certain legal documents. However, nine times out of ten there is no reason that the whole team cannot be involved. There are two areas that lend themselves to creating a cohesive team when it comes to legal writing. Engage the team in the areas of proofreading and ghost emails.

Proofreading Section

Assign a team member to handle proofreading. That individual can task others to review documents, set timelines, and identify templates that should serve as standards for routine office items. For example, ask for three days to proof a routine commanding general (CG) action. Ask for an hour lead-time to proof a document for short turn-around CG-level documents. Perhaps the Standard Operating Procedure (SOP) will mandate that documents be delivered in hard copy and saved on the shared drive. This is not rocket science. The point is that the whole office needs to be on the same page. In the Army, clients generally receive legal products two ways. Legal work is delivered via written memorandum in a packet or sent in an email. Assign a Soldier to handle all things AR 25-50. This Soldier is responsible for proofing every page, line, and header of office memos. The Soldier should be able to trouble-shoot digital formatting issues and provide digital and hard copy memo examples that other Soldiers can follow. The office should come together and talk basic SOPs; but beware: SOPs can become overly cumbersome. Keep the process simple so the team can easily move from one task to the next.

Ghost Email

What is a ghost email? These emails are force multipliers when legal offices are operating at maximum capacity. In sum, multiple clients want the right answer quickly. A ghost email is formed when the brigade judge advocate gives a subordinate oral legal guidance and requests that a comprehensive draft email capture the correct references and supporting documents for the leader's signature. The ghost email should address the following:

1. Bottom Line Up Front/Course of Action
2. Analysis of the Law
3. Legal Recommendation
4. Conclusion
5. Attachments (Use only attachments that support the analysis clearly labeled; for example, pertinent regulations, legal documents, etc. Highlight key provisions of text.)
6. The team member drafting the ghost email will draft, compile pertinent doc-

uments, and forward everything to the senior paralegal and the brigade judge advocate. The brigade judge advocate will review, edit, and provide oversight of the process. The ghost email should provide the brigade judge advocate with an eighty-percent solution. Ghost emails save time and allow the rest of the legal team to see how the brigade judge advocate prefers to prepare and deliver legal matters. Allow the team in the circle of trust. The team will quickly sync after several ghost email endeavors as long as the brigade judge advocate gives adequate feedback to get to that point.

Exercise Time Management

The exercise of time management is an art. How hard do you push the team? Does everything need to be done immediately? Is everything a priority? Talk to the office and create a list of legal actions and give proposed timelines. Ask the whole legal office to speak about their piece of the action and provide realistic timelines. Look for ways to improve. Make certain that everyone knows when actions are required. Backwards plan and allow for set-backs. Designate and train "second chairs" for each role in a cross-training fashion in case a team member is unavailable for a real legal emergency. The senior paralegal and brigade judge advocate set the timelines.

Conclusion

Does the writing battle drill work? Yes. Earlier I alluded to the JLENS incident that occurred during my time as the 32d AAMDC Command Judge Advocate. The 32d AAMDC is headquartered at Fort Bliss, Texas, and controls brigade, battalion, and battery assets all around the globe. My legal team was accustomed to working novel legal issues with short suspense times. The battle drill outlined in this article sprang from our collective experience serving together.

On the day that JLENS broke free, I was off post at a meeting with local law enforcement. My legal team could not speak to me via phone for an hour due to the nature of the meetings. Yet in my absence, the team provided me ghost emails for our commanding general, the deputy commanding officer, the chief of staff, and two

different staff judge advocates. They drafted an initial AR 15-6 appointment memo, pushed pertinent regulations on digits, provided points of contact at the scene of the event, and began coordinating efforts with our higher headquarters and all subordinate commands impacted by the event. All this was ready and waiting for me when I rejoined the team. Why is this relevant? I did not ask the team to take the actions; I did not even know my unit's asset was aloft as I was in a meeting. My team knew what to do and began to execute on their own. All of their actions were completed within an hour. When I exited the meeting, I quickly reviewed the legal products, made minor edits, and forwarded the prepared legal products to the stakeholders. I did all of this from the meeting site from my government-issued Blackberry and iPad. My team allowed me to act instantly. Brigade judge advocates in the field face far worse legal emergencies than the JLENS incident. Prepare now and don't wait for your unit's "balloon" to break free. The Surge Battle Drill is one tool that allows your wolf pack to prepare for the unknown. Be ready! **TAL**

Major Roberts is the Professional Communications Program Director at TJAGLCS.

Notes

1. U.S. DEP'T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE (6 July 2015).
2. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).
3. Available at <http://www.esd.whs.mil/CMD/MFWM/>.
4. Available at <http://www.gpoaccess.gov/stylemanual/index.html>.
5. Available at <http://www.merriam-webster.com/dictionary.htm>.
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(Credit: iStock.com/badmanproduction)

Life Hack

Buy or Rent

Revisiting the American Dream

By Major John Goodell

Do not buy a home at your next duty station. Seriously. Although we have been told home ownership is the cornerstone of the American Dream, homes are generally terrible investments. Home ownership is not a sensible investment for transient populations. Home ownership for Soldiers is actually, in most cases, a really bad investment.

Recognizing home ownership is a sacrosanct concept, this note may seem heretical and will likely generate hate mail from the field. Before you fire up the emails, let me confess that I own a home. Three years ago, I made a conscious decision to lose money on a mediocre investment because it was the best thing for my family (finding a fenced-in yard that will accommodate four dogs is like finding a unicorn in Charlottes-

ville, Virginia). Before discounting the ramblings of a guy who owns four dogs, review the math behind why home ownership is often a terrible investment—especially for military:

1. Fees. Both buying and selling a house trigger numerous fees—fees that will eat you out of house and home (pun intended). Sellers pay more than just the six percent realtor commissions. Add in staging and maintenance costs, title fees, and attorney's fees (sadly, not paid to you despite the fact that you are an attorney), home sellers typically see ten percent of the sale price go to cover sales-related expenses.¹ Moreover, unless you can pay for your house outright, you are going to have a mortgage where the first few years of your payments are essentially going toward interest and not the

principal on the house.² Accordingly, unless the home has appreciated by more than ten percent, you will have to bring money to closing—potentially tens of thousands of dollars—just to sell this “investment.”

2. Mortgage Interest. If you decide to buy, the mortgage you use should be the shortest in duration possible. A fifteen-year fixed rate mortgage uses a first payment where sixty-six percent is paid to the principal of the home and thirty-four percent is paid in interest; with a thirty-year mortgage, you can swap those two numbers.³ For an apples-to-apples comparison, I am going to use the same interest rate for both loans, which is almost never the case as the shorter duration loan typically carries a lower rate. The basic math with a 4.5% mortgage loan looks more or less like Table 1 on the next page.

Even if you selected the shorter 15-year loan, you still paid \$94,246.98 in interest on a \$250,000 loan; if you chose the thirty-year mortgage, you paid almost as much interest as principal. If you have less than stellar credit, you will pay a considerably higher interest rate, making the math much harder.⁵ Moreover, this situation has the potential to get significantly worse in the near future as the Federal Reserve continues to raise rates to combat potential inflation.⁶

3. Taxes. “But wait, MAJ Goodell, you can deduct your mortgage interest from your taxes, so you aren’t being totally honest with us.” Well, that was partially true in the past, to the extent deductible items exceeded the standard deduction. However, Congress passed the Tax Jobs and Cuts Act of 2017, which essentially doubled the standard deduction to \$24,000 for married filing jointly couples.⁷ Unless your mortgage interest and other deductible amounts exceed this threshold, you will pay the exact same tax as if you rented. A final note on taxes: people often forget that owning a home means paying property taxes. This is a hidden cost that can set the homeowner back several thousand dollars per year.⁸ When comparing home ownership to renting, remember that home ownership is more than just the principal and interest payments.

4. Veterans Administration (VA) Loan Funding Fee. Another hidden cost that hits many Soldiers’ wallets is the VA Loan Funding Fee, which requires up to 3.3% of the loan amount as a fee for the privilege

of not putting any money down.⁹ A Soldier using the VA Loan for \$250,000 is going to pay up to \$8,250 in fees to the VA before making their first mortgage payment. The alternative is to pay a twenty percent down payment or pay Private Mortgage Insurance (PMI), which is typically between 0.5% and 1.0% of the loan and does not go to the principal of the loan.¹⁰ Soldiers who cannot make a twenty percent down payment should carefully review their finances before committing to a VA or PMI backed loan. These programs help borrowers qualify for a loan, but they come with fees and costs that make home ownership a less valuable “investment.”

5. *Costs of Being a Landlord.* The primary counterargument to these issues is clear: “When I have a Change of Station (PCS), I will continue to hold on to my house and rent it out.” Because American homes only appreciate at approximately three percent per year on average,¹¹ for a transient population like the military, this means that if you buy a house, you need to be willing to be the owner for the long haul; the math outlined above does not change, and what is worse, now you are a landlord with a large mortgage debt and a potentially difficult tenant. Every time something goes wrong with your investment, you have to pay to fix it. If you are renting your house out near a large military installation, as the landlord, you face the obvious, increased risk of multiple tenants over short periods of time. In addition to the time and money spent advertising the home for rent, this also means an increase in the likelihood that the property experiences stretches of time where it goes unrented, and the homeowner must cover the mortgage payment out of pocket. However, vacancy is not the only problem.

Whatever tax savings you earn from depreciation when you file your taxes are effectively offset when you consider the capital gains you will pay in the end when you sell the house.¹² You are going to pay ten to twenty percent more for insurance as a landlord than you did as the home owner.¹³ Plus, instead of getting your landlord to fix the broken toilet, now you have to find the plumber to fix the broken toilet. Having likely moved far away after a PCS, you may have difficulty getting someone to fix that toilet. Factoring these mundane

Table 1

	Loan 1 (30 years)	Loan 2 (15 years)
Amount Financed	\$250,000.00	\$250,000.00
Monthly Principal & Interests :	\$1,266.71	\$1,912.48
Total Monthly Payments :	\$456,016.78	\$344,246.98
Payment Savings :	\$0.00	\$111,769.80 ⁴

upkeep costs as well as bigger ticket items like roofing or siding replacements, homeowners can expect to spend an average of approximately two percent on maintenance costs for the property every year.¹⁴ Alternatively, you could hire a property manager to coordinate these issues, alleviating you of the stress but adding yet another fee. These fees typically run six to eight percent,¹⁵ but potentially higher in military areas with high demand.

6. *In Sum.* If you or your clients are still determined to own your piece of the American Dream, I strongly encourage you “do the math,” so that you know exactly what owning your home will really cost you. The internet has lots of dynamic calculators to help you make this analysis.¹⁶ Go into this enormous investment—and assumption of debt—with eyes wide open.

Our parents’ and grandparents’ generations became wealthy with housing; however, when they offer advice that housing is a “sure path to wealth,” they conveniently overlook that they had three major factors available to them: reasonable housing prices, falling interest rates for a thirty-five year period, and a low cost-to-earnings ratio.¹⁷ Additionally, they were likely living in this investment for long periods of time. Times have changed.¹⁸ Unless this will be the service member’s forever home, it is almost always better to rent below the applicable Basic Allowance for Housing (BAH) rates than to buy... and consider saving the difference in your TSP, using the power of compounding interest to grow your nest egg. **TAL**

MAJ John Goodell is an associate professor in the Administrative and Civil Law Department, The Judge Advocate General’s Legal Center and School, United States Army, Charlottesville, Virginia.

Notes

1. Benjamin H. Harris ET AL., *New Perspectives on Homeownership Tax Incentives*. 1315–32. (Tax Policy Center, Tax Note 2013), <http://www.taxpolicycenter.org/publications/new-perspectives-homeownership-tax-incentives/full>.
2. <https://www.suzeorman.com/blog/4-signs-you-should-rent-not-buy/>.
3. <https://themortgagereports.com/19308/15-year-vs-30-year-mortgage-rates-comparison>.
4. <https://www.mortgagecalculator.org/calculators/which-loan-is-better.php>. I did not assign any fees or closing costs in this analysis. The math used here is exceedingly basic to prove the underlying point about interest paid, and I assumed a 4.5% rate because that this is roughly the current rate available at many banks. *Id.*
5. Orman, *supra* note 2.
6. March 1, 2018. US mortgage rates up for 8th week; 30-year at 4.43 percent. <https://federalnewsradio.com/business-news/2018/03/us-mortgage-rates-up-for-8th-week-30-year-at-4-43-percent/>.
7. <https://www.forbes.com/sites/kellyphilipserb/2017/12/17/what-the-2018-tax-brackets-standard-deduction-amounts-and-more-look-like-under-tax-reform/#e31d47614017>.
8. <http://www.tax-rates.org/taxtables/property-tax-by-state>.
9. https://www.benefits.va.gov/homeloans/documents/docs/funding_fee_table.pdf.
10. https://www.investopedia.com/articles/pf/07/avoid_pmi.asp.
11. <https://www.census.gov/hhes/www/housing/census/historic/values.html>.
12. <https://www.irs.gov/pub/irs-pdf/p527.pdf>. See also <https://www.nolo.com/legal-encyclopedia/taxes-when-landlords-sell-rental-real-estate.html>.
13. <http://homeguides.sfgate.com/landlords-insurance-vs-homeowners-insurance-49557.html>.
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15. <https://www.zillow.com/blog/investing-101-estimating-rental-property-expenses-94824/>.
16. <https://www.nytimes.com/interactive/2014/up-shot/buy-rent-calculator.html?abt=0002&abg=1>.
17. <https://www.millennial-revolution.com/rent/renting-will-make-you-rich>.
18. *Id.*



The Afghan flag flies over the entrance to the presidential palace in Kabul, Afghanistan (Credit: Department of Defense).

Practice Notes

The Rule of Law Fifteen Years of Lessons

By Lieutenant Commander Jeremy Snellen & Major Thomas B. Nachbar

Despite our Army's doctrinal shift to decisive action against near-peer adversaries, we remain heavily engaged in Rule of Law (RoL). There is little to suggest this will change as RoL remains an important component of phase IV operations, even in a decisive action contingency. The first edition of the *Rule of Law Handbook: A Prac-*

itioner's Guide for Judge Advocates, published in 2007, defined a "rule of law operation" as "the legal aspect of stability operations."¹ By 2015, the *Handbook* had not become any more specific, instead relying on the definition provided by the Army's stability operations doctrine: "[B]road categories of actions designed to support host-nation in-

stitutional capacity, functional effectiveness and popular acceptance of a legal system and related government areas."²

While various policies and handbooks have come up short in defining for judge advocates (JAs) what exactly constitutes a RoL operation, there is now more than a decade of experience among JAs within all the services—as well as among a growing cadre of civilians who have worked to build the RoL in countries like Iraq and Afghanistan—that JAs can rely upon to not only define what RoL is, but help in identifying different models. Although there is no single theory or technique that guarantees success in RoL programs, informed experience can assist JAs in being as productive as possible, or at least avoid being unnecessarily destructive, when undertaking activities related to strengthening the "rule of law." This note provides a general overview of RoL missions, reviews the three primary types of RoL missions, outlines lessons from fifteen years of RoL efforts before concluding that well-measured RoL efforts that are reasonable in scope and duration will continue to have a place in the judge advocate mission set notwithstanding intensity of the contingency responded to.

Four Types of RoL Efforts

There is considerable disagreement on what exactly constitutes a RoL activity (or operation). Further, there is still no specific doctrine for how to conduct RoL activities, but there is, moreover, no shortage of current RoL efforts, although they look very different from the ones undertaken years ago (the demands of which prompted the original edition of the *Rule of Law Handbook*).

Any number of programs could be described as RoL efforts, but even in the relatively broad world of U.S. military-related stability operations, there have been at least three dominant models for RoL efforts: large-scale institutional efforts (frequently focusing on civilian justice systems as part of counterinsurgency); military-to-military engagements (frequently focusing on military justice reform or LOAC and human rights training); and,

small-scale efforts conducted within operational commands that could be described as “legal liaison” efforts. We will briefly consider each in turn.

Large-Scale Institutional RoL

In the wake of the coalition invasions of Iraq and Afghanistan in the early 2000s, there was widespread understanding that a major engine of both insurgencies was the breakdown of the RoL.³ At that time, programs sought to develop the host nation legal systems as a means to deal with insurgents. Doing so was part of a process of shifting responsibility for the insurgencies to the fledgling governments in both countries while re-casting the insurgencies as criminal enterprises.⁴ It also provided a process for dealing with the thousands of detainees held in coalition and Iraqi detention facilities.⁵

In both Iraq and Afghanistan there were large efforts by the coalition to build civilian judicial institutions both to prosecute insurgents and to handle common criminal or even civil disputes.⁶ These efforts eventually evolved into large RoL operations with JAs advising civilian justice officials across the countries under the auspices of the Law and Order Task Force-Iraq (LAOTF-I)⁷ and the RoL Field Force-Afghanistan (ROLFF-A)/NATO RoL Field Support Mission (NROLFSM).⁸ A feature of these efforts was their focus on *civilian* justice institutions, as prosecuting insurgents is a natural offshoot of the rebranding of an insurgency to a criminal enterprise. Notwithstanding, these efforts can at times result in tension with the host-nation military’s traditional understanding of its mission.

Military-to-Military Efforts

Another type of RoL program, conducted both as part of long-term security cooperation efforts and in the context of interventions, has been aimed at building the legal features of host nation militaries. Examples include reform of the Colombian military justice system as part of Plan Colombia,⁹ United States Southern Command’s ongoing inclusion of respect for human rights as a key focus area, a multitude of Law Of Armed Conflict and human rights training events conducted annually by the Defense Institute for International Legal Studies (DIILS),¹⁰ and the National Guard Bureau State Partnership

Program, which links “a State’s National Guard with the partner nation’s military/security forces in a cooperative, mutually beneficial relationship.”¹¹ Engagements focus on military services as well as interpersonal familiarization; they also can happen at the ministry level, such as through the Department of Defense (DoD) Ministry of Defense Advisors (MODA) program.¹²

Military-to-military efforts are distinguished from large-scale institutional RoL by a focus on military institutions (which fits the DoD role in the “whole of government” approach to security sector reform) and the absence of ongoing U.S. military intervention in the host nation.¹³ These efforts can span years, or even decades, and may exist as part of a relatively stable U.S. security cooperation relationship. They will frequently be undertaken as part of a U.S. embassy-led country engagement plan.

Legal “Liaison” Efforts

The converse of long-term, stable and programed RoL efforts are the types of informal legal interactions that take place with any host nation in the course of conducting contingency operations with that host nation.¹⁴ Examples of these “legal liaison” activities include accompanying the commander on key leader engagements with host nation security ministries, police chiefs, and judges; working with host nation security officials to obtain arrest warrants for insurgents or terrorists; or following up on cases resulting from previous arrests of insurgents or terrorists. Many JAs who expected to serve only as legal advisors to their commanders have found themselves unexpectedly thrust into these legal liaison roles, roles for which they generally have little training.

These types of RoL efforts are distinct in that the goal is typically to use the host nation legal system as a way to produce an operational effect against an adversary as part of contingency operations, while large, institutional efforts focus on the means of doing so. While it is possible that maturation of the host nation legal system will result from its use in this way, there is frequently little formal provision for doing so—any development is more likely be a result of relationship building than as part of a deliberate and resourced RoL plan.

In addition to host nation legal considerations, these legal liaison roles can result from U.S. legal requirements. For instance, the Leahy Act requirements that accompany U.S. assistance frequently involve some legal aspect (particularly in their remediation), and commanders are likely to be sensitive to any allegation that host nation forces are engaging in human rights violations even in the absence of Leahy Act requirements.¹⁵

Combinations

Legal liaison RoL efforts will almost run concurrently with a large scale RoL effort as the liaison at the unit or local level will be a necessary piece of the overall RoL line of effort. Additionally, informal legal liaison duties will frequently result in some kind of military-to-military development program, like the deployment of a Military Transition Team (MTT) to conduct training. The key, though, is to recognize the different resources and motivations underlying the different types of programs. A long-term security cooperation arrangement will be planned and executed, and will have objectives along a different strategic timeline, than will a liaison role that seeks to achieve immediate operational and tactical effects.

Fifteen Years of Lessons Learned

Even if there is no widespread agreement about how to conduct RoL programs—or even exactly what constitutes a “RoL program”—the last decade-plus of experience suggest some enduring truths and provide some reliable guidance for those engaged or preparing to be engaged in RoL programs. The awareness of these eight features of the RoL landscape in today’s world can assist in planning both for new RoL efforts and in implementing existing ones. Here are some issues JAs will have to grapple with in an ever changing military environment.

1) *RoL considerations will be part of every operation.* After a decade dominated by “small wars,” and counterinsurgency, the RoL (and the legitimacy it provides) retains center stage.¹⁶ The goal of stability operations is the transfer of power to the host nation, but even as the U.S. begins to reconsider its focus on such conflicts, it is unlikely that the emphasis on RoL will change. Public attention to the lawfulness of military operations is likely to remain



U.S. Army SSG Jorge Solano, 1st Platoon, Company D, 1st Battalion, 181st Infantry Regiment, Massachusetts security forces and native of Worcester, Mass., stands guard during a diplomatic visit to Tepe Sardar, an Afghanistани monument of sacred architecture, outside Ghazni. The U.S. assisted Ghazni Province, where the monument is located, to identify and restore particularly relevant Islamic archaeological sites. (Credit: U.S. Air Force Senior Airman Courtney Witt).

a permanent aspect of U.S. interventions, especially with the increased transparency that technology and media outlets provide. Increased reliance on “by-with-and-through” means more and closer coordination with indigenous partner forces and with that cooperation will come increased interest in their compliance with the RoL.¹⁷

It is a virtual certainty that any intervention will require some efforts directed to the RoL, so planning for it—whether part of an intervention or an individual or unit deployment is vital.

2) *United States Government institutional structures that would allocate RoL tasks more deliberately among the entirety of the interagency will likely not be in place for the foreseeable future.* The approach to RoL in the context of intervention that has dominated the 21st century has been one of improvisation and adaptation. As coalition forces discovered quickly in the aftermath of the 2003 invasion of Iraq, neither established military institutions (such as Civil Affairs, the military organization doctrinally designated to

manage RoL efforts) nor civilian agencies had been adequately resourced to drive RoL in non-permissive environments.¹⁸ Later in Iraq, there was a movement to shift to a civilian-focused stability and development effort, but the processes and resources were not in place. In 2009-2010 Afghanistan, when troop levels increased and plans were redrawn, the strategic framework placed in-theater lead for RoL with the State Department, with DoD filling the gap where execution was required in less permissive areas. But this interagency structure fell apart rather quickly.

There have unfortunately not been any examples of civilian United States Government agencies having the planning capacity, manpower, or expertise necessary to conduct a large-scale RoL program, and there is no indication that civilian agencies will have such capabilities in the foreseeable future.¹⁹ Nor has there been an effort to build a robust Civil Affairs capability. JAs presented with RoL challenges or tasks can do little to change this reality and should

work to ensure that resources and goals are realistically aligned.

3) *Currently DoD is not doing large institutional RoL efforts directed at the civilian sector in Afghanistan or Iraq.* Current RoL efforts are largely military-to-military security cooperation type programs and liaison type activities. For instance, in Afghanistan, a small cadre of JAs and Ministry of Defense Advisors focus their scaled down mission around the security ministries. The main element consists of assisting the Afghan National Defense and Security Forces (ANDSF) (so both MOD and MOI) on their own internal RoL efforts. This involves mostly mentorship when dealing with instances of gross violations of human rights (GVHR) and anti-corruption. There are also a small number of JAs assigned to the National Security Justice Development Directorate (NSJDD), formerly the Justice Center in Parwarn (JCIP). Those NSJDD advisors are performing a train and advise type RoL mission there, but that court has a national level counterterrorism focus and

is housed on a complex adjacent to Bagram Air Field. The DIILLS still executes selective security cooperation activities in Afghanistan, as they do in many other countries, and typically these are focused on LOAC training to segments of MOD and MOI.²⁰ Not only are civilian justice institutions not the focus of military efforts; they are categorically excluded by virtue of fiscal restrictions within the Afghan National Security Forces Fund appropriation.²¹

The overall military footprint in Afghanistan pales in comparison to prior levels, and RoL operations reflect that trend. Fewer boots on the ground also means fewer force protection assets that might accompany JAs outside the confines of ministerial compounds. But in addition to the reduced footprint, the RoL drawdown can be partly attributed to the USG assessments in the wake of these programs which raised concerns about the effectiveness of large-scale DoD RoL programs.²²

4) *RoL efforts frequently lack connection to strategic goals and sustainability.* Because “more rule of law” and host nation development are generally considered a good thing, RoL programs during a contingency operation have a tendency to spawn offshoots which are divorced from larger strategic goals. Often these RoL offshoot programs are targets of opportunity (such as a host nation initiative in partner assistance). Unless one can identify how those programs contribute to campaign objectives, and build in a process linking the program to a defined objective, they are likely to fail.

Similarly, RoL advances are slow. This means RoL programs must account for sustainability, from both the USG and host nation perspective. Introducing a complex step (by host nation standards) into a process that is unsustainable does nothing more than create a vacuum down the road and potentially undermine or politicize the traditional justice institutions. Creating organic, sustainable host nation competencies requires engaging with the host nation during program/project selection securing commitments to share costs (possibility through loans), and agreeing to sustain projects after transfer. It is also important to examine the holistic structure to confirm whether civilian agencies, or Non-Governmental Organization (NGO) partners, are both willing

and able to assume RoL projects when the military footprint decreases, or else any gains made during the program are likely to evaporate. In these instances military resources may be better deployed along a different line of effort, or the immediate RoL effort can be tailored to provide tactical effects rather than long-term outcomes.

5) *If detention is a component of the program, prepare for host nation transfer.* Many JAs have found themselves keeping their feet in both detention and RoL programs, as the planning for eventual transition of detention operations to the host nation requires integration of their criminal processes. Part of that planning should be to account for how host nation criminal justice institutions will handle cases that arise as the result of partner, or combined, military operations. Evidence based operations (EvBO) constituted a huge challenge in both Iraq and Afghanistan, but it did eventually improve in Afghanistan as capturing units began to incorporate Afghan legal methodology and evidentiary standards into their detention processes.

6) *Metrics are elusive and frequently misguided.* Identifying appropriate metrics is a difficult aspect of operational planning generally, but RoL programs, which seek effects that generally take place over very long periods of time, are particularly susceptible to being pulled off track by bad metrics. It is tempting to measure things that are easily measured, easily controlled, and can be measured over the short term, such as project throughput.²³ This requires the judge advocate to be fluent in discussing Measures of Performance (MoP) versus Measures of Effectiveness (MoE). For example, measuring the number of police trained or courthouses built, common MoPs that are easily measured, can lend itself not only to misspending but also to corruption; measuring conviction rates can provide an incentive to deny process in order to produce results.

Whereas a useful MoE would analyze the population’s perception of its safety or of the legitimacy of host nation institutions,²⁴ which do not commonly change over the course of a short period of time (such as a one-year or shorter military deployment). MoEs, as difficult as they are to develop and measure are necessary to suc-

cessful efforts and must be considered when developing the RoL plan or line of effort.

Ideal metrics feature a combination to ensure projects are properly launched and managed (MoPs) while MOEs are structured to ensure those new structures are advancing the RoL goals (typically improved faith in government to properly address societal needs).

Bad metrics not only miss the point, they can be affirmatively harmful by providing incentives in place to short-circuit the RoL in order to produce results. This command desire for metrics may be a RoL “canary”—if you are serving as a liaison to host nation security institutions and someone starts asking for metrics related to the RoL, you might have a RoL program on your hands even if you were not planning for one. Lastly, consider incorporating the metrics from other interagency RoL players or even international organizations working in theater, as they likely have a better aligned timeline for results and more experience with metrics of this type.

7) *The DoD is a hammer and is likely to remain a hammer. Look for nails.* In keeping with the focus on putting civilian agencies first in RoL, it is always wise to begin with what DoD does well and build out from there for maximum impact. Are civilian RoL practitioners in need of security or mobility? It is possible that military assets might be useful for providing that security and mobility to other efforts instead of re-creating RoL efforts with a military face. Such efforts might not be “RoL programs” in their own right, but they can advance the desired effect without building a new RoL program within a military organization. It is possible that the civilians will simply be absent (or will not have their own RoL law programs), but it is equally possible that civilian RoL programs will exist but be limited by elements of their programs in which the DoD excels.²⁵ Look for opportunities to generate more efficient (and coordinated) programs. At the very least, doing so can serve as a starting place for discussions about how military and civilian RoL efforts can work together to achieve common ends.

8) *Coordination is key.* It is hard to over-emphasize the role of coordination in RoL programs. If you are part of an intervention,

you should be looking for your Civil Affairs colleagues, who will hopefully have an established relationship with the host nation government. Anywhere there is a DoD RoL program (whether as part of an intervention or not), there is almost certainly going to be a coordinated civilian agency. Coordination with those agencies and among those efforts is necessary to avoid both confusing host nation partners and, occasionally, RoL fratricide (when two RoL programs are working at essentially cross purposes).

Many informal RoL programs (such as liaison roles) consist of little more than talking. But it also may be that coordination with civilian USG agencies will uncover relative strengths and weaknesses, or even relationships with different host nation institutions, who are also unlikely to be well coordinated. It is entirely possible that your host nation counterparts will be unaware of allied RoL development efforts being conducted by other USG agencies.

Conclusion

Judge Advocates are unlikely to receive much formal RoL guidance or assistance when asked to engage a host nation's legal system in order to generate effects. Most programs are going to be fairly discrete, and there will be temptation to grow them. But proper scope, reasonable expectations, and appropriate metrics can provide a solid foundation to a RoL program that not only enhances the host nation's legal system but also provides tangible contributions to campaign objectives and—perhaps most importantly—builds lasting relationships between U.S. and host nation security and justice institutions. The RoL is built over time and it is largely unresponsive to scale—a ten-year RoL program cannot be shortened to one year by providing ten times the resources. Judge advocate involvement in RoL programming may be to simply explain the how and why of RoL and its relationship to the commander's objectives, but it also may be to serve as a liaison or project manager. Even if most view “rule of law” as amorphous and largely outside a judge advocate's core disciplines, providing that kind of understanding and availability is a major part of what it means to be a commander's legal advisor. **TAL**

Lieutenant Commander Snellen is currently assigned as the Navy Liaison Officer, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Major Nachbar serves as a Professor of Law and Senior Fellow with the Center for National Security at the University of Virginia.

Notes

1. CTR. FOR LAW AND MIL. OPERATIONS, THE JUDGE ADVOCATE GEN'S LEGAL CTR. & SCH., U.S. ARMY, JA, RULE OF LAW HANDBOOK 3 (2015) [hereinafter RoL HANDBOOK 2015].
2. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, Stability (3 Aug. 2016) [hereinafter JOINT PUB. 3-07].
3. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTER-INSURGENCY paras. (Dec. 2016). (“[An] insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government. . . over time, counterinsurgents aim to enable a country or regime to provide the security and rule of law that allows the establishment of social services and economic activity”).
4. Thomas B. Nachbar, *The Use of Law in Counterinsurgency*, 213 MIL. L. REV. 140, 153-54 (2012)
5. Thomas B. Nachbar, *The U.S. Military's Role in Rule of Law Development*, in PROMOTING THE RULE OF LAW: A PRACTITIONER'S GUIDE TO KEY ISSUES AND DEVELOPMENTS 143, 155-56 (Leila Mooney, ed., 2013)
6. *Id.*
7. Law and Order Task Force Iraq was a joint military and civilian (Department of Justice) organization providing legal and logistical support to CCCI at Rusafa, among other locations. The Multinational Force-Iraq commander and DoJ created LAOTF-I in early 2007. The goal was to increase judicial throughput (number of cases adjudicated by Central Criminal court of Iraq), improve the prospect of conviction, and improve Iraqi detention conditions. The concept of operations included the partnering of Iraqi investigators and prosecutors with international ones (mostly U.S. judge advocates), with the hope of creating a cadre of very skilled Iraqi justice sector officials.
8. The RoL Field Force-Afghanistan (ROLFF-A)/NATO RoL Field Support Mission (NROLFSM) was formally established in 2010 as a dual-hatted command with NROLFSM reporting directly to the Commander of ISAF (COMISAF) and the ROLFF-A reporting to the Commander, Combined Joint Interagency Task Force 435. Both entities shared a common mission of providing essential field capabilities, liaison and security to Afghan and international civilian providers supporting the building of Afghan criminal justice capacity, increasing access to dispute resolution, thereby helping to improve the efficacy of the Afghan Government. From 2012-2014, these RoL field teams engaged with nearly fifty district and municipal leaders to execute RoL enhancement activities or provide direct support to civilian RoL providers.
9. Andrew R. Atkins, *Doctrinally Accounting for Host Nation Sovereignty During U.S. Counterinsurgency Security Operations*, 212 MIL. L. REV. 70, 91-94 (2012); Nagesh

Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 51, 95-102 (2011).

10. See DIILS Charter, <https://globalnetplatform.org/diils/diils-charter>.
11. <http://www.nationalguard.mil/Portals/31/Documents/J-5/InternationalAffairs/StatePartnershipProgram/SPP-101-1-Sept-2017.pdf>
12. <http://www.dsca.mil/programs/institutional-programs>.
13. JOINT PUB. 3-07, *supra* note 2, para. 2
14. We will, for clarity, exclude from this category legal engagements with host nation and partner forces that are not connected to ongoing contingency operations in the host nation. While such engagements might be legal, they do not generally involve the kind of development or operational objectives generally attributed to “rule of law” efforts.
15. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN'S LEGAL CTR. & SCH., U.S. ARMY, JA, OPERATIONAL LAW HANDBOOK, (17th ed. 2017), 52-53 (2017).
16. “Small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.” MARINE SMALL WARS MANUAL (1940)
17. <http://www.centcom.mil/ABOUT-US/POSITION-STATEMENT/>.
18. RoL HANDBOOK 2015, *supra* note 1, at 68.
19. See generally, ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING, Part V, (Simon & Schuster 2017).
20. DEP'T OF DEF. & DEP'T OF STATE, FOREIGN MILITARY TRAINING REPORT, FISCAL YEARS 2016 AND 2017 (2017), <https://defenseoversight.wola.org/primarydocs/fmtr2017.pdf>; U.S. GOV'T ACCOUNTABILITY OFF., BUILDING PARTNER CAPACITY, INVENTORY OF DoD SECURITY COOPERATION AND DEPARTMENT OF STATE SECURITY ASSISTANCE EFFORTS (2017), <https://www.gao.gov/assets/690/683682.pdf>.
21. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135. (2017).
22. *Rule of Law in Afghanistan: U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than \$1 Billion*, Special Inspector General For Afghanistan Reconstruction, SIGAR Report, 15-68-Audit Report (2015), <https://www.sigar.mil/pdf/audits/SIGAR-15-68-AR.pdf>; *Support for Afghanistan's Justice Sector: State Department Programs Need Better Management and Stronger Oversight* (Special Inspector General For Afghanistan Reconstruction, SIGAR Report 14-26-Audit Report (2014), https://www.sigar.mil/pdf/audits/SIGAR_14-26-AR.pdf.
23. RoL HANDBOOK 2015, *supra* note 1, ch 5.
24. Given the limited footprint of many U.S. operations, it may be impossible to have adequate contact with the population to measure such features of the RoL.
25. It is also possible that the converse will be true. In some locations, DoD assets might be dependent on DoS mission mobility and security assets, or at least be subject to Department of State mobility and security rules.



AROUND THE CORPS

A judge advocate in the Direct Commission Course fires his weapon on the range at Fort Benning, Georgia (Credit: Dan Torok, TJAGLCS).



Staff Sgt. Wendell Myler, a cyber warfare operations journeyman assigned to the 175th Cyberspace Operations Group of the Maryland Air National Guard monitors live cyber attacks on the operations floor of the 27th Cyberspace Squadron, known as the Hunter's Den, at Warfield Air National Guard Base, Middle River, Md. (Credit: U.S. Air Force photo by J.M. Eddins Jr.).

No. 1

Game of Code

The Use of Force Against Political Independence in the Cyber Age

By Major Chris H. Kinslow

Every American should be alarmed by Russia's attacks on our nation. There is no national security interest more vital to the United States of America than the ability to hold free and fair elections without foreign interference.¹

It is the middle of March. You are making one final trip to the grocery store for last-minute party supplies prior to what will certainly be a well-deserved Patriumland Independence Day feast. Patriumland is a new country, about the size of Rhode Island, emerging ten years ago after the partial breakup of two neighboring countries. It is a constitutional democracy. The independence that you now celebrate was the result of the will of Patriumland's proud people.

Your feast is well-deserved because you have just endured six months of constant political rhetoric between several different presidential candidates. The election was extremely divisive, pitting brother against sister, mother against daughter. Many citizens were concerned that a peaceful transfer of power might not occur. In the end, one candidate emerged victorious, and the others conceded defeat. The country, proud and resilient, began stitching up those ripped relationships. Suddenly, your phone vibrates erratically in what could only be a breaking "push" notification from your Patriumland Daily News smartphone application. You quickly check the headline and immediately know that you will forever remember where you were when you learned that foreign hackers usurped the people's true choice for president.

In the days that follow, Patriumland's security agencies ascertain that a rival nation planned and directed a cyber operation that hacked into Patriumland's electronic voting system and actually changed votes to reflect that nation's presidential pick. Several members of parliament have called for a military response.

The threat of an operation like the one in fictional Patriumland is real.² As elections move toward increased use of cyberspace, including such mechanisms as electronic voter registration and voting, the danger increases that a cyber operation will manipulate the election process.³ A foreign power's capability to install its choice of political candidate without firing a single conventional weapon necessitates a hard look at the interpretation and application of international law governing intervention in a country's political independence. The international community should adopt the concept that certain foreign cyber operations conducted against a state's political independence can rise to an armed attack, thereby allowing a military response as part of a state's right of self-defense. As such, existing tests used to determine whether a particular act qualifies as an armed attack must be updated to reflect the realities of current methods of force.

Many U.S. officials recognize the potential threat, as evidenced both by a recent Senate Armed Services Committee hearing⁴ and by the Office of the Director of National Intelligence and the Department Homeland Security in the following statement: “The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of emails from U.S. persons and institutions . . . [with the intent] to interfere with the U.S. election process We believe . . . that only Russia’s senior-most officials could have authorized these activities.”⁵

Considering emerging cyber threats, this paper evaluates under what conditions a state could consider intervention in the political process to be the equivalent of an armed attack. Section II provides background on the topic’s international law framework. Section III continues by discussing interference with political independence. Section IV introduces the effects-based test and looks broadly at the Department of Defense’s (DoD) position on cyber operations as potential armed attacks. Finally, Section V addresses the concepts of force and self-defense as applied to cyber operations targeting political independence and suggests a test that officials might use to determine whether a particular incident of intervention constitutes an armed attack, thereby opening avenues for the use of force—either through self-defense or by United Nations (UN) Security Council resolution under the UN Charter.

II. Background

Scholars have devoted a significant amount of academic research to determining what constitutes the use of force and an armed attack in the law of armed conflict—including in the context of cyber operations.⁶ Although this paper is concerned directly with the narrow subset of emerging cyber operations affecting political independence, there are established rules regarding the use of force in international law that guide the discussion.

A. The Use of Force

The UN came into existence in the wake of two world wars with one of the express purposes in its charter being “to save succeeding generations from the scourge

of war.”⁷ To that end, the drafters set out a baseline rule in Article 2(3) of the UN Charter requiring that states use peaceful means to resolve disputes.⁸ Building upon that concept, Article 2(4) of the UN Charter goes on to direct that states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁹

Breaking the clause down to address the hypothetical situation in Patriumland, the key terms are “use of force” and “political independence.”¹⁰ It seems simple enough to say that a nation using force against another nation’s political independence is a violation of Article 2(4) of the UN Charter.¹¹ However, the drafters provide no definition within the Charter for this seemingly broad classification of actions that could violate the use of force standard, and consequently, much confusion and debate has ensued in subsequent years.¹² Political independence, too, is left undefined, and visions of a foreign army marching into a nation’s capital must be reconciled with the reality of less obvious exercises of this type of interference.¹³

Even if the practitioner is able to articulate an argument that an act was an illegal use of force, there is no flow chart in the Charter directing the reader to a follow-on page for further instructions.¹⁴ There are, however, two provisions in the UN Charter that clearly provide exceptions to the prohibition on the use of force contained within Article 2(4).¹⁵ First, Articles 39 and 42, respectively, authorize the Security Council to: (1) classify a state’s activities as acts of aggression or threats and breaches of the peace; and (2) further determine whether armed forces are necessary to maintain or restore peace.¹⁶ Since the UN Charter is designed to maintain world peace, the five permanent members of the Security Council¹⁷ have veto authority against any potential resolution involving, among other things, a use of force.¹⁸ As such, political and ideological alignments may make it extremely difficult for a state to secure a Security Council resolution authorizing the use of force.

Article 51 of the UN Charter provides a second rationale for the legal use of force by preserving a state’s right to self-defense after falling victim to an armed attack.¹⁹ Notably, the plain text of Article 51 does

not grant an *authority* to use force.²⁰ Rather, it restricts the Charter’s applicability over instances of a state’s exercise of the “inherent right of . . . self-defense.”²¹ However, as Article 51 can be reasonably read to limit a state’s use of force in self-defense preconditioned upon an event of certain magnitude, that event being an armed attack, lawyers and diplomats have spent considerable time attempting to delineate the parameters of what constitutes an armed attack.²²

A primary point of contention within international law is whether all uses of force are armed attacks.²³ One argument is that there is no difference between the two, while the other argues that use of force is a large category of activities containing a smaller subset of events that qualify as armed attacks.²⁴ This difference between the two interpretations results from whether the gravity of a use of force determines when an armed attack occurred.²⁵

Another important concept for understanding the rights preserved by Article 51 is a state’s ability to legitimately use force under a self-defense rationale when faced with an imminent threat. Adherents to this principle of customary international law assert that the UN Charter did not restrict the customary right of self-defense to situations where an attack has already occurred.²⁶ The test advocated by then-Secretary of State Daniel Webster regarding the *Caroline* incident is generally cited as the embodiment of the principle of anticipatory self-defense.²⁷ It states that the threat must be “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”²⁸ In contrast, current U.S. policy on self-defense is that the use of force may be necessary after exhaustion of reasonable peaceful means and that it be proportionate to the threat.²⁹ This is regardless of whether an attack has or has not yet occurred.³⁰

B. Cyber Operations

Traditional instruments of employing force are joined today by cyber threats, which nations are working to address through the law of armed conflict. Under DoD policy, cyber operations are defined as “[t]he employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace.”³¹ Some examples of cyber operations include intelligence

gathering, gaining access to a network, and introducing malicious code for immediate or future use.³²

Other activities within cyberspace that do not have a purpose of “achieving objectives or effects” are not considered cyber operations under U.S. policy.³³ These activities include such things as broad information distribution, air traffic control, and facilitation of command and control operations.³⁴ Likewise, targeting an adversary’s cyberspace capabilities through non-cyberspace methods would not be considered a cyber operation.³⁵ United States policy accepts that cyber operations may constitute forcible or non-forcible means, depending both upon the type of operation and the operation’s effect.³⁶

III. Political Independence and Interference

As previously discussed, it can be difficult to determine when actions qualify as uses of force against political independence and when those uses of force equal an armed attack. Although the concept of political independence is broad, defining it will limit the field of potential interventions that may be included for analysis. In treaty law, Article 3 of the *Montevideo Convention* provides a detailed description of what might be described as the concept of political independence: “[T]he state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently organize itself as it sees fit, legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”³⁷

In her article concerning non-forcible interference in domestic affairs, Lori Damrosch defines political independence as “respect for the political freedoms of the target state’s peoples.”³⁸ She contends, however, that the concept of political independence “should be understood against the backdrop of the political rights of its inhabitants.”³⁹ Under this conceptual framework, what comprises political independence in a democracy will differ from that of an autocratic society.⁴⁰ In the former, the native population’s will is primary to the political process by design, whereas in the latter, the political destiny of the country is controlled by a limited number of individuals.⁴¹

Drawing from these concepts, for the purposes of this paper, political independence in a democracy is defined as the population’s meaningful self-determination of its own government. Interference in that self-determination may manifest itself in a wide spectrum of both forcible and non-forcible foreign activities. Propaganda designed to influence public opinion,

instigating, assisting, or participating in acts of civil strife when the acts . . . involve a threat or use of force.”⁴⁷ Regarding the principle of non-intervention, the declaration states that “armed intervention and all other forms of interference . . . against the personality of the state or against its political . . . [elements] are in violation of international law.”⁴⁸

It can be difficult to determine when actions qualify as uses of force against political independence and when those uses of force equal an armed attack.

covert operations to replace government officials through peaceful means, training of antigovernment militias, and invasion by a hostile army are just a few of many potential examples of interference in political independence.

A. Intervention as a Violation of International Law

Understanding the concept of political independence, it is helpful to attempt to delineate the left and right limits of interventions in that political independence that might constitute violations of international law—taking into account not all interventions that violate international law are uses of force. Looking again to the *Montevideo Convention*, it provides, “No state has the right to intervene in the internal or external affairs of another.”⁴² However, experts have long disagreed about what types of intervention are illegal under international law.⁴³

In 1970, the UN General Assembly set forth the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (the declaration).⁴⁴ The declaration restates the prohibition against political interference as a violation of international law.⁴⁵ Further, the declaration states the duty of countries to “refrain from any forcible action which deprives peoples . . . their right to self-determination and freedom and independence.”⁴⁶ The declaration also sets out a duty of states to “refrain from organizing,

Though certain interventions may be violations of international law, it does not follow that all illegal interventions allow a state to respond in self-defense. This paper’s background section mentions three terms key to determining under what conditions a state, or group of states, may exercise legal uses of force—armed attack, aggression, and use of force. While all three terms are contained within the UN Charter, there is no consensus on how they interact.⁴⁹ Aggression, the term utilized in Security Council determinations under Article 39, is not directly applicable to this paper’s self-defense analysis and is used only where past proceedings have yielded insight into scenarios that may amount to a use of force or armed attack.

B. Going from International Law Violation to Armed Attack

There are at least two schools of thought regarding when an illegal use of force rises to an armed attack.⁵⁰ Under the rule adopted by the majority of the International Court of Justice (ICJ) in its judgment of the *Nicaragua* case, the term armed attack is reserved for only those “most grave” uses of force.⁵¹ The U.S., however, rejects this gravity threshold, asserting that any use of force can qualify as an armed attack.⁵² Regardless of the rule used, however, incursions into a nation’s political independence under ostensibly peaceful circumstances, while perhaps coercive in nature, are seldom broadly accepted as uses of force.⁵³

IV. The Effects-Based Test for the Use of Force in Cyber Operations

Cyber operations provide a new challenge to determining what constitutes a use of force. As identified in the *DoD Law of War Manual*, international law regarding cyber operations is not well-settled and will continue to develop over time.⁵⁴ During a

is difficult to point to the direct physical injury and property damage caused by the attack. Instead, the use of force is determined by the resulting effect on national security through the degradation of military readiness and sustainability of operations.⁶¹ Thus, while the U.S. clearly employs an effects-based test, the differences in the appli-

the cyber realm, this could include such things as states and their agents hacking various platforms in order to gain access to emails or other materials for purposes of intelligence gathering, conducting information operations with the intelligence gained through such activities, or spreading false news.⁶⁶ Notably, activities within this family may be illegal pursuant to the internal laws of states and the international law principle of non-intervention.⁶⁷ However, illegality does not necessarily equate to a use of force or armed attack.⁶⁸ Even if accomplished through deception, as by the spreading of false news, the country in this instance has gained position by swaying public opinion.

In contrast, hacking to undermine the game itself presents a much more forceful example. A non-cyber instance of this concept consists of training and arming a proxy group to unseat and replace, through threat of or actual violence, the existing government.⁶⁹ In the cyber realm, this example is more like targeting voter registration and election systems in order to actually change the votes already cast or even add non-existent voters that could then be exploited by a complementary covert human element.⁷⁰ In contrast to activities that influence the citizenry, the foreign power has replaced the choice of the voting public with a candidate of its own, thereby depriving the population of meaningful self-determination.

Both hacking for position and hacking to undermine the game lie somewhere in a spectrum of interference that includes all activities that qualify as interventions, with smaller subsets of possible uses of force inclusive of, but not limited to, coercion and armed attack.⁷¹

B. Alternate Views on Force

1. *Force as Physical Violence Limiting the Right of Self-Defense.* In 1989, Judge Abraham Sofaer expressed the U.S.' position on armed attack as part of an international law lecture at The Judge Advocate General's School in Charlottesville, Virginia.⁷² Judge Sofaer was then-legal advisor for the U.S. Department of State.⁷³ Using essentially the same language later contained in the *DoD Law of War Manual*,⁷⁴ Judge Sofaer said, "The United States has long assumed that the inherent right of self-defense

In the context of cyber operations, there should be a fundamental distinction between what might be termed hacking for position and hacking to undermine the game itself.

2017 hearing of the Senate Armed Services Committee, Senator John McCain made clear that the U.S. must have a policy addressing what constitutes "an act of war or aggression in cyberspace that would merit a military response, be it by cyber or other means."⁵⁵ Until now, the U.S. has generally applied the use of force concept to cyber operations as an effects-based test.⁵⁶

The effects-based test focuses on activities that cause "direct physical injury and property damage."⁵⁷ For the most part, examples given previously by U.S. officials of cyber operations effects that constitute uses of force are very clear-cut, such as triggering a nuclear meltdown, causing airplanes to crash, and disrupting dam operations to flood cities.⁵⁸ Such clear examples of uses of force are helpful in establishing the premise that the U.S. considers that cyber operations may sometimes rise to a use of force, but their utility abates when considering more nuanced uses of force.

This is not to say that the DoD's use of force analysis of cyber operations is limited to those clearly articulated examples. By drawing from a 1999 DoD Office of General Counsel (OGC) assessment, the DoD recognizes that certain cyber operations may not have a "clear kinetic parallel" and that factors other than the effects of the cyber operation may be relevant to a use of force determination.⁵⁹ For illustrative purposes, the DoD provides the example of a cyber operation that cripples a military logistics system.⁶⁰ In that example, it

capability of the test to direct versus indirect consequences of cyber operations reflect the current ambiguity in international law and policy regarding when cyber operations may be considered armed attacks.⁶²

V. Updating the Use of Force Paradigm

One theme central to the practice of law, at least in common law nations, is the idea that old law (drafters' intent, previous legal decisions, and practice) ought to weigh heavily in the consideration of novel legal issues.⁶³ As such, lawyers rightly draw upon historical ideas regarding uses of force, armed attack, and aggression when contemplating emerging cyber operations. However, these techniques may prove inadequate or counterintuitive in the face of a revolution in the methods and means of warfare.

A. Not All Political Interference is Equal

Intervention in the political process by nations in furtherance of competing national policies and ideologies can be considered a type of gamesmanship, wherein each actor uses its pieces to gain advantage on the field of play. In the context of cyber operations, there should be a fundamental distinction between what might be termed hacking for position and hacking to undermine the game itself.⁶⁴ The former belongs to a family of activities carried on by governments long prior to the advent of the Internet in attempts to spread their ideology and obtain a favorable position in world politics.⁶⁵ In

potentially applies against any illegal use of force⁷⁵ Two sentences prior to making that statement, however, Judge Sofaer says, “General Assembly interpretive declarations make clear that ‘force’ means physical violence, not other forms of coercion.”⁷⁶ This interpretation limits the potential activities that might constitute a use of force to those involving physical violence.⁷⁷ Although Judge Sofaer’s statement accurately states a longstanding U.S. position, it is interesting that the *DoD Law of War Manual*, contemplating both kinetic and non-kinetic examples, does not contain the same restrictive language as to the definition of force.⁷⁸

2. *Getting to Armed Attack Without Physical Violence.* There is at least modest support for a view of force that includes “intermediate,” political, and economic coercion as potential uses of force that could invoke the right of self-defense.⁷⁹ The Report of the Special Committee on Friendly Relations, prepared during preparation of UN General Assembly Resolution 2625, made it clear that there was significant debate over whether or not to define force in the resolution.⁸⁰ It is also clear that, in the end, there was no decision as to what should or should not be included in a definition of force.⁸¹ Rather, the report states, “[t]here was no agreement whether the duty to refrain from economic, political, or any other form of pressure against the political independence . . .” of a nation should be included in the definition of force.⁸²

Although the debate is helpful in establishing the long-running ambiguity in the concepts of force and armed attack in the law of armed conflict, it is unlikely that economic and political coercion will be accepted as uses of force in the near future.⁸³ The use of force may be viewed as equal to armed attack, as in the U.S. view, or constitute a lesser act. Either way, the winning interpretation controlling resort to self-defense right now is that armed attack must involve some level of physical violence.⁸⁴ National security law expert Matthew Waxman points out the trouble with this interpretation, writing that “[a] significant problem with [requiring violent consequences] is that in a world of heavy economic, political, military, and social de-

pendence on information systems, the ‘non-violent’ harms of cyber-attacks could easily dwarf the ‘violent’ ones.”⁸⁵ Similarly, the National Research Council’s report on *Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* states “Actions that significantly interfere with the functionality of [the information technology] infrastructure can reasonably be regarded as uses of force, whether or not they cause immediate physical damage.”⁸⁶

As the previous quotes suggest, there is no need to adopt the minority view that coercions are uses of force in order to address the utility of expanding armed attack to include uses of force that do not have a physical violence component. Instead, the only requirement is that there be agreement that a sovereign may be required to exercise self-defense against an attack on the self-determination right (and, therefore, political independence) of the population it governs regardless of the attack’s form. Concentrating on the scale and effects of destructive cyber operations instead of relying merely on the means of delivery already stretches physical violence outside of logical limits.⁸⁷ Rather than continuing to finesse the armed attack standard into greater feats of contortion, the legally responsible course of action is to admit that the world has indeed changed and that physical violence is no longer a condition precedent to armed attack and the right of self-defense.

3. *Textual Troubles with Limiting Force to Physical Violence under the UN Charter* Other considerations are immediately apparent when attempting to reconcile the interplay between Articles 51 and 2(4) of the UN Charter. As previously mentioned, Article 51 explicitly states that the Charter does not limit a state’s right of self-defense in response to an armed attack.⁸⁸ If the reader interprets armed attack to be limited to acts involving kinetic violence, and also reads Article 51 to limit a state’s right of self-defense to only those instances of armed attack, then reading Article 2(4) use of force as anything other than armed attack means that a state could be subjected to an illegal use of force without having a corollary right to self-defense.⁸⁹

Limiting the definition of use of force to only physically violent armed attacks not only potentially precludes self-defense, as

discussed above, but also presumably precludes any action by the UN Security Council. This interpretation, however, cannot be true, as it is in conflict with Article 39, which gives the Security Council discretion to determine whether diplomatic, economic, or military measures are required when responding to an actual or threatened breach of the peace or act of aggression—actions which presumably would constitute uses of force.⁹⁰ If a threatened breach of the peace, for example, is not a use of force, then the untenable result would be that the UN Charter allows the Security Council to make war without a preceding threat or use of force from some party.

C. Self-Defense Against Cyber Operations Targeting Political Independence

1. *Recent DoD Guidance On Cyber Operations.* The DoD General Counsel (GC) recently released a memorandum addressing several issues regarding the DoD’s use of cyber capabilities.⁹¹ Among those issues discussed, the GC states that the Article 2(4) prohibition on use of force applies to “cyber actions that generate effects that would equate to a use of force or armed attack if caused by traditional means.”⁹² This point generally reflects what is current policy in the *DoD Law of War Manual*.⁹³ Second, the GC recognizes that coercive activities short of uses of force, including those affecting political independence, are violations of international law.⁹⁴ However, the GC is silent on whether activities affecting political independence can rise to a use of force.⁹⁵

The traditional U.S. view of use of force has arguably served it well. As adversaries continue to close the technological gap between U.S. cyber capabilities and their own, however, the United States may out of national interest re-examine its view of force as physical violence in order to create an option of countering asymmetrical cyber threats through traditional kinetic means of warfare.

An interpretation limiting uses of force and armed attack to acts of physical violence must be rejected in applying *jus ad bellum* concepts to cyber operations against political independence.⁹⁶ In effect, using a cyber operation to trigger a dam to flood a town is an armed attack the same as if the actor had dropped a bomb. Likewise, the hostile take-

over of another country's government by cyber operation should be treated the same as if an armed force had taken the capital.

2. *Drawing a Line Between Mere Interference and a Use of Force*. Crucial to maintaining peace, though, is ensuring that there are legally defensible constraints preventing a country from claiming every interference is a use of force or armed attack. The current effects-based test provides a useable framework in setting such constraints. In the context of political independence, however, it is a fallacy to try to compare the effects of a cyber operation with the effects of kinetic weapons as a measure of whether an armed attack⁹⁷ has occurred.

At the root level, decision makers are using the test to determine whether the gravity of the effects caused by the cyber operation rise to the level of an armed attack.⁹⁸ Therefore, when making a use of force calculation involving political independence, decision makers must consider the gravity of actual or potential⁹⁹ effects on a country's political independence without regard to the kinetic or non-kinetic nature of those effects.¹⁰⁰

Next, it is crucial that leaders differentiate interventions solely based upon peacefully influencing a population from those operations that undermine the political process.¹⁰¹ On the spectrum of interference, the more an operation focuses on changing the mind of the electorate through peaceful influence, the less support available to proclaim it a use of force. Again, this is not to say that such activities are not illegal under a country's laws or in international law. Nor is it to say that countries cannot respond in a manner not amounting to a use of force against such activities.¹⁰² Rather, the distinction is whether an operation invites a military response under the UN Charter or customary international law.¹⁰³

Under this test, the Patriumland parliament could make a colorable argument that the hypothetical coup constituted an armed attack and therefore invited military response as an option. It is hard to think of something more crucial to the political independence of a functioning democracy than the ability of its citizens to determine their leaders. Given that the cyber operation targeted that political independence

through the selection of Patriumland's most visible leader, the president, the gravity of the operation's effect is huge. Likewise, the attacking country achieved its objective, not by swaying the hearts and minds of the population through propaganda, but rather by undermining the legitimacy of the voting process.

VI. Conclusion

Cyber operations interfering with a sovereign state's political process are a hot topic in today's news and will likely continue to be such in future political contests.¹⁰⁴ As the risk to the actual or perceived legitimacy of the political process increases, the more likely it is that government officials will attempt to equate such cyber operations as uses of force and armed attacks.¹⁰⁵ The U.S. government should adopt a test for cyber operations against political independence that allows the branches of government to articulate the conditions upon which a use of force has occurred with a single voice.¹⁰⁶

When considering self-defense in response to interference with political independence, leaders should consider physical violence as a factor rather than a prerequisite and focus instead on the gravity of the effect. However, those same leaders must also be careful to refrain from labeling historically equivalent non-force acts of influencing the opinions and ideologies of population, though potentially illegal, as uses of force.

Weapons will continue to evolve as long as there are humans to make them. For the purposes of armed attack, it matters not whether a weapon fires a lead bullet or lines of code. International law on armed attack and the use of force will remain relevant in a changing world by recognizing the validity of self-defense against non-kinetic threats to political independence and by integrating concepts of force that account for the effects of those threats.¹⁰⁷ **TAL**

Major Kinslow is presently assigned as the Deputy Staff Judge Advocate, 311th Signal Command, Honolulu, Hawaii.

Notes

1. *Transcript of Foreign Cyber Threats to the United States: Hearing to Receive Testimony Before S. Comm. on Armed Services 115th Congress at 4* (2017) [hereinafter *Hearing*].
2. See generally *Hearing*, *supra* note 1. See generally Press Release, Dir. of Nat'l Intelligence, Joint Statement from the Dep't of Homeland Sec. & Office of the Dir. of Nat'l Intelligence on Election Sec. (Oct. 07, 2016) [hereinafter *DNI Press Release*], <https://www.odni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement>.
3. *Id.*
4. See generally *Hearing*, *supra* note 1.
5. *DNI Press Release*, *supra* note 2.
6. See generally U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL (May 2016) [hereinafter *LoW MANUAL*].
7. U.N. Charter Preamble.
8. U.N. Charter art. 2, ¶ 3.
9. U.N. Charter art. 2, ¶ 4.
10. Certainly the other requirements, such as that the act be that of a state, within the clause are important but are not within the scope of this paper.
11. See generally U.N. Charter art. 2(4).
12. See generally U.N. Charter. See also Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 427 (2011).
13. See generally U.N. Charter.
14. See generally U.N. Charter.
15. U.N. Charter arts. 39, 42.
16. *Id.*
17. Permanent members of the United Nations Security Council include the United States, China, Russia, Great Britain, and France. U.N. Charter art. 23.
18. *Id.* art. 27, ¶ 3.
19. *Id.* art. 51.
20. *Id.*
21. *Id.*
22. See generally *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 101-04 (June 27) [hereinafter *ICJ Judgment*]; See also *LoW MANUAL*, *supra* note 5, at 1.11.5.2 n.230 (May 2016).
23. *TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 45* (Michael N. Schmitt ed. 2013) [hereinafter *TALLINN*].
24. *Id.* at 45
25. *Id.* at 47.
26. *LoW MANUAL*, *supra* note 6, para. 1.11.5.1 n.229.
27. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 367 (1963).
28. http://avalon.law.yale.edu/19th_century/br-1842d.asp.
29. *LoW MANUAL*, *supra* note 6, at 1.11.5.
30. *Id.* para. 1.11.5.
31. *Id.* para. 16.1.2.
32. *Id.* para. 16.1.2.1.
33. *Id.* para. 16.1.2.2.

34. *Id.*
35. LoW MANUAL, *supra* note 6, at para. 16.1.2.2.
36. *Id.* para. 16.2.1.
37. Convention on Rights and Duties of States art. 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
38. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 48 (1989).
39. *Id.* at 37.
40. Since this paper focuses on political independence as related to a democratic system of government, it is unnecessary to explore the philosophical debate over what interventions against an autocratic government for the ostensible benefit of the native population are illegal uses of force targeting political independence.
41. Damrosch, *supra* note 38, at 37.
42. Convention on Rights and Duties of States art. 8, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
43. *Summary Records of the 56th Meeting*, [1950] 2 Y.B. INT'L L. COMM'n 159-62, U.N. Doc. A/CN.4/SER.A/1950.
44. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter G.A. Res. 2625].
45. *Id.*
46. *Id.* (emphasis added).
47. *Id.*
48. G.A. Res. 2625, *supra* note 44.
49. G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965) [hereinafter G.A. Res. 2131].
50. TALLINN, *supra* note 23, at 47.
51. TALLINN, *supra* note 23, at 47. *See ICJ Judgment, supra* note 22, at 191.
52. TALLINN, *supra* note 23, at 47. *See LoW MANUAL, supra* note 6, at para. 16.3.3.1.
53. TALLINN, *supra* note 23, at 46. *See also Waxman, supra* note 12, at 428-30.
54. LoW MANUAL, *supra* note 6, at para. 16.1.
55. *Hearing, supra* note 1, at 6 (statement of Sen. John McCain, Chairman, S. Comm. on Armed Services); *See also Hearing, supra* note 1, at 55-56 (statement of Sen. Debra Fischer, Member, S. Comm. on Armed Services).
56. LoW MANUAL, *supra* note 6, at para. 16.3.1. *See also Waxman, supra* note 12, at 434-37.
57. LoW MANUAL, *supra* note 6, at para. 16.2.1 n.9.
58. *Id.* para. 16.3.1.
59. *Id.* para. 16.2.2.
60. *Id.* para. 16.3.1. *See also LoW MANUAL, supra* note 6, para. 16.3.1 n.21, citing Dep't of Def., Office of the Gen. Counsel, *An Assessment of International Legal Issues in Information Operations* (2nd ed., Nov. 1999), reprinted in 76 U.S. NAVAL WAR COLLEGE INT'L LAW STUDIES 459, 483 (2002).
61. LoW MANUAL, *supra* note 6, para. 16.3.1.
62. *See Waxman, supra* note 12, at 434-35, 437, 448-49.
63. *See Precedent*, BLACK'S LAW DICTIONARY (9th ed. 2009).
64. *See generally Hearing, supra* note 1, at 39 (statement of James Clapper, Dir. of Nat'l Intelligence).
65. Damrosch, *supra* note 38, at 2-5 (1989). *See also Hearing, supra* note 1, at 39 (statement of James Clapper, Dir. of Nat'l Intelligence).
66. LoW MANUAL, *supra* note 6, at para. 5.26; TALLINN, *supra* note 23, at 46; *see also Hearing, supra* note 1, at 39 (statement of James Clapper, Dir. Of Nat'l Intelligence).
67. Memorandum from the General Counsel of the DoD to Commanders of the Combatant Commands et al., subject: International Law Framework for Employing Cyber Capabilities in Military Operations (Jan. 19, 2017) [hereinafter GC Memorandum].
68. *Id.*
69. *See G.A. Res. 2625, supra* note 44. *See also G.A. Res. 2131, supra* note 49.
70. *See generally Hearing, supra* note 1 (statement of Sen. John McCain, Chairman, S. Comm. on Armed Services).
71. *See ICJ Judgment, supra* note 22, at 205.
72. Judge Abraham Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93 (1989). LoW MANUAL, *supra* note 6, at 1.11.5.2 n.230.
73. *Id.* at 8.
74. LoW MANUAL, *supra* note 6, para. 16.3.3.1.
75. Sofaer, *supra* note 72, at 93.
76. *Id.* at 92-93. *See also Waxman, supra* note 12, at 421, 427.
77. Notably, the U.S. position espoused by Judge Sofaer, while limiting uses of force to acts of physical violence, broadens armed attack to "include forms of aggression historically regarded as justifying resort to defensive measures." Abraham Sofaer, *International Law and the Use of Force*, 82 AM. SOC'Y OF INT'L L. PROCEEDINGS 420, 422. "Those forms of aggression include "both direct and indirect complicity in all forms of violence, not just conventional hostilities." *Id.*
78. *See generally LoW MANUAL, supra* note 6, para. 16.2.2.
79. Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 987-88 (1974). Examples of intermediate coercion given in the Comment include ideological, such as hostile propaganda, and indirect, including fomenting of civil strife. *Id.* at 990. Of note, to coerce, as defined by Merriam-Webster, means to achieve by force or threat. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/coerce> (last visited Mar. 17, 2017). Likewise, the definition of force does not require physical violence. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/force> (last visited Mar. 17, 2017); *See also Waxman, supra* note 12, at 449; *See also U.N. CAOR Special Comm. on Friendly Relations*, U.N. Doc. A/AC.125/SR.100 to 114 (1970); Rep. of the Special Comm. on Friendly Relations and Cooperation Among States, U.N. GAOR, 24th Sess., Supp. No. 19, at 12, U.N. Doc. A/7619 (1969).
80. Rep. of the Special Comm. on Friendly Relations and Cooperation Among States, U.N. GAOR, 24th Sess., Supp. No. 19, at 15, 20, 32-33 U.N. Doc. A/7619 (1969).
81. *Id.* at 15.
82. *Id.*
83. TALLINN, *supra* note 23, at 46.
84. Waxman, *supra* note 12, at 427-28.
85. *Id.* at 436.
86. Comm. on Offensive Info. Warfare, Nat'l Research Council, Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities 253-254 (2009) [hereinafter NRC Committee Report].
87. Scale and effects is the terminology used in the Tallinn manual, taken from the *Nicaragua* court, to determine when a cyber operation rises to an armed attack. *See TALLINN, supra* note 23, at 54
88. U.N. Charter art. 51.
89. Comment, *supra* note 79, at 987-95; *See generally U.N. Charter art. 39.*
90. U.N. Charter art. 39. *See generally U.N. Charter.*
91. GC Memorandum, *supra* note 67.
92. *Id.*
93. LoW MANUAL, *supra* note 6, para. 16.3.1, 16.3.3.1.
94. GC Memorandum, *supra* note 67.
95. *Id.*
96. *See* Harold Hongju Koh, Legal Adviser, Dep't of St., *International Law in Cyberspace: Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Legal Conference* (Sept. 18, 2012), reprinted in 54 HARVARD INT'L L. J. ONLINE 7 (Dec. 2012).
97. Admittedly, the advent of cyber operations that use force against political independence stretches the term armed attack beyond its logical meaning. In the future, perhaps use of force will supplant armed attack in common usage when describing legitimate use of self-defense.
98. TALLINN, *supra* note 23, at 55. *See also ICJ Judgment, supra* note 22, at 195.
99. Potential is not to be mistaken here as anticipatory self-defense or as preemptive strikes under the so-called "Bush Doctrine." *See* Robert Jervis, *Understanding the Bush Doctrine*, POL. SCI. Q. 365 (2003) for a discussion of the Bush Doctrine.
100. *See generally LoW MANUAL, supra* note 6, at para. 16.2.2.
101. This proposed factor examines means and methods and answers the "how" after determining that the gravity of the effect otherwise qualifies it as an armed attack. It answers whether the effect was accomplished through forcible means. It is a constraint on the effects-based test that was unnecessary when making determinations based upon physical destruction. Effects that are attributed to a change, absent coercion, in people's hearts and minds do not allow a legitimate military response.
102. LoW MANUAL, *supra* note 6, at para. 16.3.3.3. Examples include retorsion and countermeasures; *Id.* para. 16.3.3.3 n.33; *see also* <http://opiniojuris.org/2016/07/25/russia-and-the-dnc-hack-a-violation-of-the-duty-of-non-intervention/>.
103. TALLINN, *supra* note 23, at 48-51.
104. *See* Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 164 (2009).
105. *See generally Hearing, supra* note 1.
106. *Id.*
107. *See generally Waxman, supra* note 12, at 425.



Members of the 1st Security Force Assistance Brigade salute during the SFAB's Activation Ceremony hosted at the National Infantry Museum in Fort Benning, Georgia, in February (Credit: U.S. Army photo by Patrick A. Albright).

No. 2

Hit the Ground Running

Advising the First (and 1st) Security Force Assistance Brigade

By Major Eric Trudell

The Army Lawyer Editorial Board recently corresponded with MAJ Eric Trudell, the first Judge Advocate assigned to the Army's newest unit, the 1st Security Force Assistance Brigade (SFAB). The following questions and answers offer some insight into the Army's latest legal undertaking.

What is the mission of the SFAB?

What we've been doing for the past sixteen years in Afghanistan hasn't worked. A revolving door of advisors from ad hoc units with inconsistent levels of experience and training has not proven as effective as we would like. As General Mark Milley noted, "We made it happen. But it wasn't as good as it could have been." The Army created SFABs to change that.

By implementing General Milley's vision of specialized units better able to advise conventional foreign security forces (FSF), the Army created SFABs to take the place of the piecemeal advisor teams created from different brigade and battalion headquarter elements. At just over 800 strong, the 1st SFAB possesses a depth of knowledge and experience not seen in any other conventional brigade in the Army.

How is the SFAB organized, and what does the legal shop look like?

Similar to a typical infantry brigade combat team (BCT), the SFAB contains six battalions consisting of 50 to 170 Soldiers at full strength. There are two infantry battalions, as well as cavalry, field artillery, engineer, and support battalions. These battalions are organized into different advisor teams that include: combat advisor teams (CATs), brigade advisor teams (BATs), and logistic advisor teams (LATs). These mission-specific teams contain primary advisors and enablers.

A typical CAT consists of primary advisors, with specific combat arms specialties, in the ranks of staff sergeant to captain. These primary advisors are enabled, supported, and sustained by non-commissioned officers with different warfighting specialties. These enablers include medics, fires supporters, logisticians, signal personnel, engineers, and intelligence personnel. An SFAB company, commanded by a major, consists of four CATs with the company commander and the headquarters forming a fifth team.

A BAT, tasked with advising an FSF brigade commander and the commander's staff, contains an SFAB battalion commander and staff. Battalion commanders in the SFAB are senior lieutenant colonels in their second battalion command. These commanders were selected for their leadership, experience, and temperament.



The 1st SFAB legal team, SFC David Dawley, left, and MAJ Eric Trudell, center, discuss emerging legal issues with their partner forces (Credit: Courtesy MAJ Eric Trudell).

The Army specially selected these commanders for the challenges of advising foreign forces and leading the more senior personnel in an SFAB. A team of experienced logisticians make up a LAT and are tasked with advising FSFs on all aspects of logistics as well as providing support capabilities to other advisor teams.

In addition to the advising capabilities each battalion brings, an SFAB headquarters can field two corps advisor teams headed by the brigade commander and deputy commander (DCO) respectively. These corps advisor teams consist of the brigade primary and special staff officers as well as their NCOs. The brigade judge advocate (BJA) is thus dual-hatted as a legal counsel to the leaders within the SFAB and as a member of the corps advisor team responsible for advising FSF legal and law enforcement personnel. For 1st SFAB's initial deployment to Afghanistan, the BJA wears a third and fourth hat, serving as the Command Judge Advocate (CJA) to the Task Force Southeast Commanding Gener-

al and as the Rule of Law lead. In this latter role, the BJA is responsible for coordinating efforts among civilian law enforcement professionals and for reporting and investigating violations of human rights.

A sergeant first class (SFC) senior paralegal is the only other organic member of the 1st SFAB legal section. The senior paralegal serves as a secondary advisor in support of the attorney's advising efforts and plays an integral role in developing the systems used by the FSF legal and investigative offices. The 1st SFAB paralegal, SFC David Dawley, has already served as a senior paralegal in both special operations and conventional units. He brings invaluable experience, greatly contributing to the success of the brigade's legal mission.

The local Office of the Staff Advocate (OSJA) provides a trial counsel (TC) while in garrison, who is not assigned to the SFAB, but is responsible for handling military justice issues within the brigade. In Afghanistan, this support comes from the USFOR-A Headquarters.

What does the SFAB, and perhaps more specifically, a legal team assigned to the SFAB, do while deployed?

Advisors, including legal advisors, are more than just experts in US tactics, equipment, and systems. Advisors must also become experts in these same areas of the partner force. For the 1st SFAB legal section, this means having or developing a working knowledge of the Afghan civilian legal system, the Afghan military justice system, administrative and criminal investigative procedures, and the Afghan approach to compliance with the Law of Armed Conflict (LOAC). They must also be able to use this information to develop a long-term strategy to effectively engage with their counterparts to create real improvement in the Afghan National Army (ANA) and Afghan National Police (ANP).

There are two primary advisory missions for a US Army JA deployed to Afghanistan. The first is to improve the equitable, expeditious administration of

justice in both the Afghan civilian and military justice systems. There must be transparency, accountability, and oversight for both systems. The second is to assist in the prevention of violations of LOAC and human rights by the ANA and ANP. Advisors must assist partners in transitioning away from the current reactive reporting and remediation efforts. The people of Afghanistan must see the government, its military, and its police forces as a legitimate source of authority and security in order to reduce the influence of extra-governmental forces in the country.

To accomplish these missions, the legal section partners with both civilian and Army judges, prosecutors, and defense counsel as well as an ANA Corps Staff Judge Advocate and the Inspector General (IG). Consider how difficult it can be to synchronize these offices in the US Army, then try doing it in a foreign language with corruption, forced retirements, resource scarcity, and force protection requirements added for good measure.

Why do we need an SFAB?

Security Force Assistance Brigades are specifically designed and manned to meet the precise mission of advising FSFs. One of the Army's previous solutions to the advising mission was to take senior leadership from the ranks of a BCT to deploy as advisor teams. This left the majority of the BCT without key leadership, effectively eliminating the brigade's ability to deploy or train in the way they were designed.

The true value of SFABs lie in their ability to free BCTs to deploy and engage near-peer threats. In short, readiness of the Army to meet our national defense strategy relies on the success of the SFABs' ability to create capable FSFs. These regional security forces can then provide stability in local hotspots — thereby preventing the combat power of our BCTs from being undermined by seemingly indefinite counterinsurgencies.

What are the problems you've encountered as the legal advisor?

This assignment has been professionally and intellectually challenging. When you are building an airplane in flight, every single day can make you feel like you are crash



Members of the 1st Security Force Assistance Brigade train at Fort Polk, Louisiana prior to their deployment to Afghanistan (Credit: U.S. Army).

landing because you are constantly learning new areas of foreign law while still maintaining subject matter expertise in all of our Corps' competencies. Some days it feels as though there is a mountain of challenging tasks waiting for you to climb.

An advisor must first be humble and willing to learn. An advisor cannot help solve his foreign partner's problem if he or she doesn't first understand the framework their partner is operating in. There are cultural, political, and personal forces at work that if not understood and accounted for, any solution an SFAB advisor develops has little chance for success. Empathy in understanding a counterpart's challenges in implementing an advisor's well-developed strategy is absolutely imperative in guiding your partner to success.

For example, you quickly learn that a counterpart may have every intention of implementing the guidance provided by their U.S. partner, yet that counterpart may simply be hamstrung by their own system. Once you fully comprehend the rubric in which they operate, only then can you develop an effective advising strategy. The importance of engaging your fellow advisor teammates to shape conditions for your own advising efforts cannot be overstated.

Additionally, one of the most difficult things about advising FSFs is resisting the urge to do everything for them. Your fellow SFAB advisors are all exceptionally motivated, high-performing experts in their

fields. They want to first and foremost accomplish their mission. It can be tempting to step-in and make things happen using the resources at your disposal; however, this is not conducive to creating a partner force with long term operational viability. You have to both encourage your partner to successfully work within their current system and empower them to continually improve how they operate.

What advice do you intend to give to your replacement (and to future judge advocates filling this role in an emerging legal requirement)?

Being an SFAB legal advisor does not currently have any established blueprint. Right now, my biggest piece of advice for the 2nd and 3rd SFAB BJAs would be that there is absolutely nothing that you will not be expected to do. You must be versatile. You are expected to know everything a senior JA major knows, while being able to impart this knowledge to further enable the Army's most qualified officers and NCOs.

You cannot simply be a solid attorney. You must immediately gain the trust of everyone you work with, to include senior foreign military and civilian counterparts. Because of the numerous dynamics at play, you do not have time to grow into your new job. Be prepared to know all the JAG Corps' areas of legal practice and study the laws of the nations you will be working with before you ever set foot on their soil. **TAL**



No. 3

Think Before You Fire

Dispelling the Myths and Re-evaluating a Supervisor's Need to Terminate Civilian Employment

Major Mary E. Jones

I. Origin of the Myth

There is a myth that federal employees are afforded too many statutory protections that make removing an employee impossible. “From Fiscal Year 2000-2014, over 77,000 full-time, permanent federal employees were [removed from federal service] as a result of performance and/or conduct issues.”¹ Clearly, the myth that an employee cannot be removed is, in fact, false. Although these statistics indicate a relatively small percentage of the civilian workforce has been removed,² supervisors clearly have been successful at completing terminations. In 2015, the Merit Systems Protection Board (MSPB)³ addressed the myth in their annual report,⁴ confirming that this widely-held myth is circulating throughout federal service.

In 1978, President Jimmy Carter also vowed to “bring efficiency and accountability to the federal government” and signed the Civil Service Reform Act (CSRA) into law.⁵ In pertinent part, the CSRA codified the brick and mortar foundation of civil service known as the merit system principles,⁶ and established prohibited personnel practices,⁷ which serve as the “thou shall not” list of acts forbidden from occurring within the federal workplace. As a starting point, supervisors need to look no further than the CSRA to understand the general parameters of acceptable behavior and conduct in the workplace.

In drafting the CSRA, Congress went a step further by “recogniz[ing] the importance of due process and an outside review procedure to ensure that [removals] were merit-based and comported with constitutional requirements”⁸ As a result, the CSRA established the MSPB, “an independent, quasi-judicial [federal] agency . . . that serves as the guardian of Federal merit systems.”⁹ One of the primary tasks of the MSPB is to hear appeals filed by employees regarding employment decisions, including removal actions.¹⁰ As such, the MSPB provides a forum for employees to exercise their constitutionally protected due process rights.

The Fifth Amendment to the United States Constitution guarantees that “no person shall be deprived of life, liberty, or property, without due process of law.”¹¹ The Supreme Court has held, in *Cleveland Board of Education v. Loudermill*, that federal employees have a property interest in their public employment. Further “[the legislature] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards [defined as notice and opportunity to respond].”¹²

This means that in order for a supervisor to propose removal of an employee from federal service, the proposing official (typically the supervisor) must provide four things to the employee: (1)

at least thirty days advance written notice of the proposed removal action¹³ “in sufficient detail to allow the employee to make an informed reply”¹⁴; (2) reasonable time to answer orally and in writing before being removed¹⁵; (3) notification of the employee’s right to retain representation¹⁶; and (4) a written decision stating the specific basis for removal.¹⁷ “To require more than this prior to [removal] would intrude to an unwarranted extent on the government’s interest in quickly removing an unsatisfactory employee.”¹⁸ With these requirements firmly established, supervisors have clear guidance to understand the primary protections afforded to employees in the workplace; yet, the myth that an employee cannot be fired remains.

One theory to the myth’s persistence is that supervisors believe employees are afforded too many statutory protections that make removing an employee exceedingly complex. However, in 2015, the MSPB studied this theory and found surprisingly different results.¹⁹ “Overall, only ten percent of [proposing and deciding] officials strongly felt that employees had too many rights while fifteen percent strongly disagreed with that statement. The most common view, held by forty-two percent of officials was neutral.”²⁰ One year later, another MSPB study found similar results: “Approximately one-third agreed that Federal employees have too many rights; one-third disagreed; and one-third neither agreed nor disagreed.”²¹

Therefore, not only does this theory appear incorrect based on this study, but practically, supervisors need only look at two statutory provisions for guidance on how to remove an employee from federal service. Title 5 of the United States Code (U.S.C.), Chapter 43 (Chapter 43) outlines the process for removing an employee based on unacceptable performance.²² Title 5 U.S.C. Chapter 75 (Chapter 75) outlines the process for removing an employee based on their conduct or performance in order to promote the efficiency of the service.²³ The MSPB study concluded that “[t]he rules for both performance-based and conduct-based actions are clear and precise. It is simply a matter of [supervisors] having the courage to pursue the course required.”²⁴

Another theory to the myth’s persistence is that supervisors believe it takes too long to remove an employee. By statute, employees generally cannot be removed from federal service sooner than thirty days from the date of the notice of proposed removal.²⁵ Since the timeline is clear, the larger issue is how much time passes before an agency removes an employee depends more on the decisions made by agency officials than it does on the [thirty]-day proposal period set forth by statute.²⁶ This study showed that “for more than two-thirds of removal actions, the agency took over six weeks to effectuate the action. Almost one-fifth of removal actions took over six months to effectuate. (Only twenty-three percent of removal actions were effectuated in five weeks—thirty five days—or less.)”²⁷

It seems that the disconnect between the theories (of complexity and timeliness) and the findings of this study suggests there are larger, more pervasive issues at hand. First, supervisors may not fully understand the removal processes within Chapters 43 and 75 or their roles within each and, second, supervisors may be failing to implement the process effectively. With the reasons for the disconnect seemingly identified, we can finally begin to dispel the myth.

II. Dispelling the Myth

Supervisors must do two things to dispel the myth: implement effective systems and change the mindset of the organization. Much of what I covered here may seem amorphous; however, I encourage all readers to refer to the associated graphics to see the entire process.

A. Develop and Implement an Effective System

Supervisors must first develop and implement an effective system for addressing an employee’s conduct or behavior that does not promote the efficiency of the service (under Chapter 75) and an employee’s unacceptable performance (under Chapter 43). Yet, in order to develop and implement an effective system, supervisors must first understand the processes associated with Chapters 43 and 75.

Under Chapter 43, an employee can be removed from federal service for their un-

acceptable performance of a critical element (major duty) of their performance plan.²⁸ Therefore, in order to remove an employee under Chapter 43, the employee must understand their major duties and what they must do to fully perform those duties. Then, when the employee fails to fully perform a major duty, the supervisor must do four things: (1) put the employee on notice of their specific performance deficiency; (2) provide the employee with a meaningful opportunity to improve that deficiency; (3) offer assistance with overcoming that deficiency; and (4) be warned that continued failure to perform their critical duties at a fully successful level could result in a change to lower grade or removal from federal service. This process is known as a Performance Improvement Plan (PIP).²⁹ Unlike Chapter 75, which does not link the employee’s behavior or conduct to a critical element,³⁰ only Chapter 43 requires the use of a PIP before removal can occur.³¹ Since a PIP can be challenging to write and implement, supervisors often shy away from Chapter 43, which can be time consuming, and instead elect Chapter 75 as the mechanism to remove an employee from federal service.

Under Chapter 75, an employee can be removed from federal service for behavior or conduct that does not promote the efficiency of the service.³² Therefore, unlike Chapter 43 which only addresses *unacceptable* performance, Chapter 75 addresses both an employee’s *poor* performance and conduct. On its face, some supervisors believe that Chapter 75 provides greater flexibility, however, Chapter 75 poses its own challenges.

Not only must a removal action under Chapter 75 be supported by a higher burden of proof (preponderance of evidence)³³ than Chapter 43 (substantial evidence)³⁴ but, if the employee appeals their removal, the MSPB may reduce the penalty of removal if it finds the penalty to be too harsh.³⁵ The MSPB cannot mitigate the penalty of removal under Chapter 43.³⁶ Chapter 75, unlike Chapter 43, also requires that the deciding official consider relevant *Douglas* factors when determining an appropriate penalty.³⁷ Other than these key distinctions, there are very few procedural differences, if any, between a removal action under Chapters 43 and 75.

Another resource available to assist supervisors is Performance Management and Appraisal Program (DPMAP), the new performance management program that is currently being implemented across the Department of Defense (DoD). Performance Management and Appraisal Program DPMAP provides supervisors with a roadmap for addressing performance management in four phases—planning, monitoring, evaluating, and recognizing/rewarding.

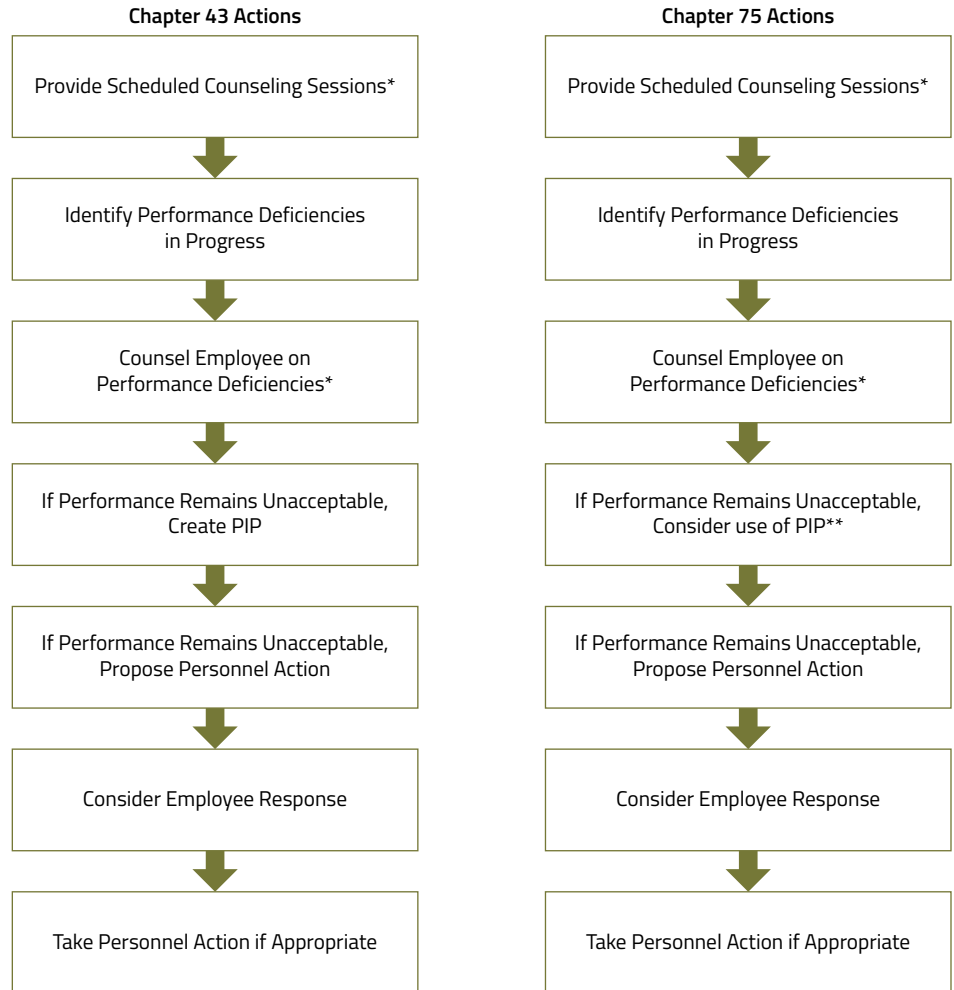
Under the planning phase, and within the first thirty days of an employee’s appraisal cycle, supervisors are responsible for establishing an employee’s performance plan,³⁸ often referred to as an initial counseling in the Army. The performance plan is the written expression³⁹ of critical performance elements⁴⁰ (what the employee is required to do) and performance standards⁴¹ (how well the employee is required to do it). Together, they establish performance parameters for the employee. This initiates a pathway to developing a solid and effective relationship between the employee and the supervisor. However, it also develops a record of putting the employee on notice of what is expected in the event that the supervisor proposes future disciplinary action, including removal. It can be fatal to the removal of a civilian employee if they were not given a performance plan, preferably during their initial counseling.

Once the performance plan is established, the supervisor implements it under the monitoring phase. It is important for the supervisor to recognize that, just as the organization’s mission can change, the performance plan is intended to be a “flexible, living document”⁴² that evolves. If there is a change to the performance plan (i.e. the supervisor’s standards and expectations), then the supervisor needs to communicate that change to the employee in writing, preferably using a DoD Form 2906.

Implementing the performance plan requires the supervisor do three things: (1) routinely monitor and assess an employee’s performance to determine whether the employee is accomplishing their critical elements and, if so, whether the employee is performing at a Fully Successful⁴³ level; (2) develop an employee’s performance; and (3) address an employee’s poor performance. Monitoring

Appendix A: Charts Describing Approaches to Addressing Poor Performance

Similarities and Differences Between Actions Taken Under 5 U.S.C. Chapter 43 and Chapter 75¹



* Employees should receive counseling at intervals required by the agency’s performance appraisal system, as well as whenever the employee does something well or poorly. These are not features unique to poor performers, but rather are a supervisor’s responsibility toward all employees.

** A PIP is not required for Chapter 75 action, but can be used to demonstrate the extent to which the employee was on notice of expectations prior to the poor performance that formed the basis for the action. The level of detailed guidance provided in earlier counseling sessions may play a role in determining if a PIP is appropriate for a Chapter 75 action.

1 U.S. Merit SYS. Prot. Bd., Addressing poor performers and the law, a Report to the President & the Congress of the United States, 6–7 (Sept. 2009) (citing 5 U.S.C. § 7701 (c)(2)).

employee work performance is inherent in what it means to be a supervisor, yet this is the primary area where supervisors most often fail. It is that failure which ultimately perpetuates the myth that employees cannot be removed.

During performance discussions, the supervisor and employee should discuss the employee’s performance deficiencies and develop a mutually agreeable course of action to attempt to fix the deficiency.⁴⁴ If

the supervisor believes that the employee’s level of performance might constitute unacceptable performance, which could trigger the PIP and lead to a Chapter 43 action (possibly including removal), the supervisor should contact the Labor Management/ Employee Relations (LMER) Specialist and the labor counselor as early as possible for guidance. This is why it is crucial for the supervisor to be educated about the different disciplinary processes; develop and



maintain good records regarding their observations of the employee's performance, conduct, and behavior; and communicate their intent to take action to their servicing LMER specialist. Doing so will alleviate the disconnect between the previously discussed theories (of complexity and timeliness) and the larger, more pervasive issues (of supervisors not understanding the processes under Chapter 43 and 75 or their roles within each and failing to implement the processes effectively).

B. Change the Mindset

Second, the myth that employees cannot be removed has as much to do with senior leader responsibilities as it does supervisor responsibilities. In recognizing that supervisors and senior leaders have different perspectives, levels of experience, and interactions with and relations to employees of the organization, it is not surprising that "those who set the tone for culture [of the organization] and support [of the members of the organization] did not perceive heavy obstacles to the same degree as first-line supervisors or managers."⁴⁵ According to an MSPB study, "the greatest perceived barriers to removal [for supervisors] were the agency's culture toward taking such actions and the level of support given by [supervisors] and leaders."⁴⁶

There is evidence to show that allowing poor performers and employees that commit misconduct to remain in an

organization degrades the workforce and the organization's ability to complete the mission. There is also evidence to show that supervisors perceive a disconnect with the level of support provided to them by senior leaders. These findings indicate a need to enlighten leaders at all levels and change the mindset of how we conduct performance management. Only by developing a performance management system where leadership philosophies are clear and supportive of the organization, will the myth that employees cannot be removed truly be dispelled.

III. Conclusion:

Leaders at all levels should emphasize that "[e]ffectively dealing with . . . [employees] is more than a willingness to fire someone. It also means recognizing employees' training needs early, distinguishing between that which can and cannot be trained, and providing the most effective assistance to employees as is practical."⁴⁹ To accomplish this, supervisors should look to DPMAP for guidance on how to implement the evaluating and recognizing/rewarding phases of performance management and place greater emphasis on DoD's core values of "leadership, professionalism and technical knowledge through dedication to duty, integrity, ethics, honor, courage and loyalty."⁵⁰

However, when corrective actions are inappropriate or prove to be ineffective, leaders and supervisors must deliberately

and smartly utilize all tools available to maintain the effectiveness of the workforce. In some cases, that involves removing an employee using Chapter 43 or Chapter 75 procedures. The data shows that supervisors do in fact remove thousands of employees every year. The myth is nothing more than a myth. Through a collaborative effort of supervisors and senior leaders, an organization can dispel the myth that employees cannot be fired, and change the mindset to support a culture of high performance and mission success. Everyone will be better off once we do so. **TAL**

Major Jones currently serves as a professor in the Administrative Law Department at TJAGLCS.

Notes

1. MERIT SYS. PROTECTION BOARD, WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? (May 2015) citing OFF. OF PERFORMANCE MGMT., CENTRAL PERSONNEL DATA FILE (analysis of data).
2. OFF. OF PERFORMANCE MGMT., FEDSCOPE HUMAN RESOURCES DATA, <https://www.fedscope.opm.gov> (Dec. 2016) (The federal workforce is approximately 629,000 employees: 170,412 – Department of the Air Force, 251,035 – Department of the Army, and 207,246 – Department of the Navy).
3. MERIT SYS. PROTECTION BOARD, ANNUAL REPORT FOR FY 2016 (Jan. 2017).
4. MERIT SYS. PROTECTION BOARD, WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? (May 2015).
5. Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

6. 5 U.S.C. § 2301.
7. 5 U.S.C. § 2302(b).
8. S. Res. 2640, 95th Cong. (1978) (enacted).
9. MERIT SYS. PROTECTION BOARD, ABOUT MSPB, <https://www.mspb.gov/About/about.htm> (last visited on Apr. 2, 2018).
10. MERIT SYS. PROTECTION BOARD, ANNUAL REPORT FOR FY 2016 (Jan. 2017) (In 2016, the MSPB decided 2,267 adverse action appeals (including terminations) and received 259 petitions for review of Administrative Judge initial decisions on adverse actions (including terminations); MERIT SYS. PROTECTION BOARD, Adverse Actions: *The Limited Powers of the U.S. Merit Systems Protection Board* (Dec. 2016) (From FY 2005 to FY 2015 more than eighty percent of agency adverse action decisions were upheld).
11. U.S. CONST. amend. V.; *Griffin v. Illinois*, 351 U.S. 12 (1956) (explaining that the constitutional guarantee of due process follows the tradition set forth in the Magna Carta).
12. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).
13. 5 U.S.C. § 4303(b)(1)(A) (The proposed action must identify “specific instances of unacceptable performance by the employee on which the proposed action is based and the critical elements of the employee’s position involved in each instance of unacceptable performance.”); 5 U.S.C. § 7513(b)(1) (“At least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action.”).
14. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198 (1997).
15. 5 U.S.C. § 4303(b)(1)(C); 5 U.S.C. § 7513(b)(2) (“[A] reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.”).
16. 5 U.S.C. § 4303(b)(1)(B); 5 U.S.C. § 7513(b)(3).
17. 5 U.S.C. § 4303(b)(1)(D) (“[I]n the case of a . . . removal . . . , specifies the instances of unacceptable performance by the employee on which the . . . removal is based, and unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.”); 5 U.S.C. § 7513(b)(1)(4) (“A written decision and the specific reasons thereof at the earliest practicable date.”); H. R. 2810, 115th Cong. § 1097(b)(2)(A) (2018) (enacted) (“Any notice provided to an employee under . . . § 7513(b)(1) shall include detailed information with respect to the right of the employee to appeal an action brought under the applicable section; the forums in which the employee may file an appeal described in clause (i); and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file an appeal.”).
18. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).
19. MERIT SYS. PROTECTION BOARD, ADVERSE ACTIONS: THE RULES AND THE REALITY (Aug. 2015).
20. *Id.* at 6.
21. MERIT SYS. PROTECTION BOARD, ADDRESSING MISCONDUCT IN THE FEDERAL CIVIL SERVICE: MANAGEMENT PERSPECTIVES, 3 (Dec. 2016).
22. 5 U.S.C. § 4301(3) (defining unacceptable performance as “performance of an employee which fails to meet established performance standards in one or more critical elements of such employee’s position.”).
23. 5 U.S.C. § 7513.
24. MERIT SYS. PROTECTION BOARD, ADDRESSING POOR PERFORMERS AND THE LAW, 26 (Sept. 2009).
25. 5 U.S.C. § 7513(b)(1-2).
26. MERIT SYS. PROTECTION BOARD, ADVERSE ACTIONS: THE RULES AND THE REALITY, 4 (Aug. 2015) (“[A] proposing official can offer an employee an opportunity to reply that is two or three times as long as the mandatory 7 days, or the deciding official can extend the offered reply period, without automatically causing the agency to delay the effective date of the action.”); MERIT SYS. PROTECTION BOARD, ADVERSE ACTIONS: THE RULES AND THE REALITY, 5 (Sept. 2009) (“Half of the removal action deciding officials reported that they provided an extension. [N]early two thirds of those . . . were for an additional 15 days or more. These extensions . . . when added to the initial period to reply, most likely delayed the agency’s ability to effectuate the action immediately upon the expiration of the 30-day waiting period.”).
27. MERIT SYS. PROTECTION BOARD, ADVERSE ACTIONS: THE RULES AND THE REALITY, 4 (Aug. 2015).
28. 5 U.S.C. § 4301(3).
29. 5 C.F.R. § 432.104; DPMAP, vol. 431, p. 23 (defining Performance Improvement Plan (PIP)) as “a strategy developed for an employee at any point . . . when performance becomes unacceptable in one or more elements.”). The supervisor should consult with the LMER specialist before issuing a PIP to the employee to ensure that organization specific requirements are met.
30. *Moore v. Department of the Army*, 59 M.S.P.R. 261, 26 (1993).
31. Robert Erbe, The Discipline Advisor: *Concentrate on improving performance management to address poor performance*, CYBERFEDS (Jan. 10, 2018), <http://www.cyberfeds.com/CF3/servlet/GetStory?docid=22711101&printer=1> (“While PIPs are not required for Chapter 75 actions, they will greatly assist in establishing notice under Douglas factor 9, as seen in *Fairall v. Veterans Administration*, 33 M.S.P.R. 33 (MSPB 1987), *aff’d* 844 F.2d 775 (Fed. Cir. 1987).”).
32. 5 C.F.R. § 752.403.
33. 5 U.S.C. § 7701(c)(1)(b).
34. 5 U.S.C. § 7701(c)(1)(A); MERIT SYS. PROTECTION BOARD, ADDRESSING POOR PERFORMERS AND THE LAW, 35 (Sept. 2009) citing H.R. Conf. Rep. 95-1717, 139 (“When enacting the CSRA, the conference report indicates this lower burden of proof was used “because of the difficulty of proving that an employee’s performance is unacceptable.”).
35. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567-68 (Fed. Cir. 1985); *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 320-21 (1981) (“If the MSPB finds a penalty excessive, it will correct the penalty to the maximum penalty that the MSPB finds is ‘within the parameters of reasonableness’ based on its own analysis of the Douglas factors.”).
36. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567-68 (Fed. Cir. 1985).
37. MERIT SYS. PROTECTION BOARD, ADDRESSING POOR PERFORMERS AND THE LAW, 35 (Sept. 2009) citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06. (The Douglas factors is a list of twelve factors that a deciding official should consider when determining the appropriate penalty under Chapter 75.); *Halper v. U.S. Postal Service*, 91 M.S.P.R. 170 (2002) (“A failure to consider all of the relevant Douglas factors will result in the adjudicator performing the assessment using the Douglas factors and modifying the penalty if necessary.”).
38. 5 C.F.R. § 430.206(b)(2).
39. U.S. Dep’t of Def., DD Form 2906, DOD Civilian Performance Plan, Progress Review & Appraisal (Mar. 2016).
40. 5 C.F.R. § 430.203 (defining critical elements as “a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee’s overall performance is unacceptable.”). Performance elements must also be “quantifiable or verifiable” and “clearly aligned with organizational goals.” U.S. OFFICE OF PERS. MGMT., WORKFORCE COMPENSATION & PERFORMANCE SERVICE, A HANDBOOK FOR MEASURING EMPLOYEE PERFORMANCE: ALIGNING EMPLOYEE PERFORMANCE PLANS WITH ORGANIZATIONAL GOALS, 39 (Sept. 2011).
41. 5 C.F.R. § 430.203 (defining performance standards as the “management-approved expression of performance threshold(s), requirements, or expectation(s) that must be met in order to be appraised at a particular level of performance.”).
42. U.S. DEP’T OF DEF., INSTR. 1400.25, DoD CIVILIAN PERSONNEL MANAGEMENT & APPRAISAL PROGRAM, vol. 431, § 3.3(e) (Feb. 4, 2016); *Smallwood v. Dep’t of Navy*, 52 M.S.P.R. 678, 685 (MSPB 1992) (“[A]n agency may change an employee’s performance standards at any time so long as it does so according to a reasonable standard and makes the employee aware of the modification.”).
43. DD Form 2906 (the performance appraisal form) defines Fully Successful as “The summary rating of all element ratings of between 4.2 and 3.0 results in a rating of record of “3”-Fully Successful, with no element rated “1.” Performance standards must be written at a Fully Successful level. DODI 1400.25, Vol. 431 (DoD Civilian Personnel Management System: Performance Management and Appraisal Program) says: the performance standard must “objectively express how well an employee must perform their duties to achieve performance”. The standard should include “specific, measurable, achievable, relevant and timely criteria, which provide the framework for developing effective results and expectations.”
44. *Id.* at § 3.9(a) (“Assistance should be provided to the employee early on, whenever there is a need for improvement . . . or any time there is a decline in performance. . . [including] provid[ing] closer supervision and feedback, special assignments, on-the-job training,” and mentorship).
45. MERIT SYS. PROTECTION BOARD, ADDRESSING MISCONDUCT IN THE FEDERAL CIVIL SERVICE: MANAGEMENT PERSPECTIVES, 7 (Dec. 2016).
46. *Id.* at 1.
47. MERIT SYS. PROTECTION BOARD, ADDRESSING POOR PERFORMERS AND THE LAW, 8 (Sept. 2009).
48. *Id.* at 10.
49. *Id.* at iv.
50. DEP’T OF DEF., DoD PERFORMANCE MANAGEMENT AND APPRAISAL PROGRAM: PARTICIPANT GUIDE, *Top 10 Things You Need to Know*, Rev. 2 (July 2016).



No. 4

The 300 Meter Target

Army Futures Command, The Judge Advocate View

By Major Robert Meek and Lieutenant Colonel Jeff Dietz

The Secretary of the Army, Dr. Mark Esper, in testimony before the House Armed Services Committee in March 2018, announced the establishment of the Army Futures Command, “the most significant organizational change to the Army’s structure since 1973.” To maintain the Army’s land power dominance, Army senior leaders have committed to concentrating our efforts on Readiness, Modernization, and Reform—ensuring the Army is ready, now and in the future, to defeat enemy ground forces in defense of our vital national interests.

Secretary Esper announced the Army will focus on three things. First, establishing the Army Futures Command to reform our acquisition process through unity of command, unity of effort, and increased accountability. Second, through efforts of eight cross functional teams, we will focus these additional resources towards six modernization priorities to ensure future overmatch. Third, Army leadership will strengthen our relationship with industry, our allies, and the top intellectual and innovative talent our nation has to offer. Secretary Esper referenced that collectively, these improvements and others will help our lethality and future readiness by delivering integrated solutions for increased lethality and capabilities to the Soldier when and where they are needed.

These efforts began October 2017 when the Army established a task force to explore all options to establish unity of command and unity of effort to consolidate the modernization process under one roof. The task force drew talent from experts across the Army.

The legal team assigned to the task force was made up of expert Civilian attorneys and judge advocates from both active and reserve components. Through the course of the task force developing policy courses of action, war gaming, and course of action refinement, members of the task force legal team provided legal advice and policy recommendations on a wide-range of issues, including: command authority, acquisition authority, labor and employment, ethics, contracting, procurement integrity, and stationing.

Concurrent with the task force, the Army also established the Cross-Functional Team (CFT) Pilot. The CFTs were created in support of the authority of the Chief of Staff of the Army to assist the Secretary of the Army in the development and approval of materiel requirements. The concept for the CFT is to develop a materiel requirement, through teaming, agility, and rapid feedback to improve the decision making for an acquisition program of record. The CFTs are generally responsible for ensuring that planned capabilities are technologically feasible, affordable, and available to Soldiers. Each CFT aligns with the Chief of Staff’s modernization priorities: Soldier Lethality; Next Generation Ground Combat Vehicle; Future Vertical Lift; Synthetic Training Environment; Air Missile Defense; Long Range Precision Fires; Precision Navigation and Timing; and Network Interoperability. The task force legal team provides the full spectrum of legal advice and assistance to the CFTs, in coordination with the standard program counsel, the Office of The Judge Advocate General, and the Office of the General Counsel.



AFC Task Force Legal Team, from left to right: Lieutenant Colonel Jeff Dietz; Major Kurt Gurka; Major Bruce Mayeaux; Colonel Lou" Chiarella; Major Rob Meek; Ms. Wendy Saigh; and Ms. Katie MacKenzie (Credit: Courtesy LTC Jeff Dietz).

With initial establishment in the summer of 2018, the Army Futures Command will be an opportunity for judge advocates and Department of the Army Civilian attorneys to build their skills in a new, pioneering, and agile command. It will be an opportunity to influence the new command's culture, processes, and procedures and to provide advice to commanders and employees on the leading edge of modernizing the future force. **TAL**

MAJ Meek is currently assigned as General Law Attorney, Army Futures Command Task Force, in Arlington, Virginia. LTC Dietz serves as Deputy Chief, Legal Team, Army Futures Command Task Force, in Crystal City, Virginia.

Modernizing the Army

Army Futures Command will be the fourth Army Command and will be tasked with driving the Army into the future to achieve clear overmatch in future conflicts. The existing Army Commands (ACOMs) are:

- Army Forces Command: Force provider of the Army—trains, prepares a combat ready, globally responsive Total Army Force of U.S. Army Soldiers to build and sustain Army readiness to meet Combatant Command requirements.
- Army Training and Doctrine Command: Architect of the Army—recruits, trains designs, acquires, and builds the Army.
- Army Materiel Command: Sustains the Army—provides materiel readiness by equipping and sustaining the force.

The Army Futures Command will modernize the Army for the future—will integrate the future operational environment, threat, and technologies to develop and deliver future force requirements, designing future force organizations, and delivering materiel capabilities.

Characteristics

- Custodian of Army modernization efforts; linking operational concepts to requirements to acquisition to fielding.
- Bring concepts and requirements definitions together with engineering and acquisitions functions into one team.
- Small agile headquarters focused on flexibility, collaboration, and speed. Focus of faster innovation, experimentation, and demonstration.
- Enable rapid prototyping -- failing early and cheaply, and then increase learning with increased operational inputs

Structure

- Each Army Futures Command subordinate organization currently exists as an organization within TRADOC, AMC, ASA (ALT) or Army Test and Evaluation Command.
- Army Futures Command's subordinate organization will remain at their current locations but will be realigned to ensure all Army major commands remain closely linked.
- Cross Functional Teams (CFTs) will report to the Army Futures Command. Program Managers will remain under the control of ASA (ALT) but teamed with the CFTs.
- Command group headquarters will be located near innovative and agile industrial and academic institutions to align with these organizations and in a place where the command will inculcate the culture needed to develop the innovation and synergy required to lead the Army's modernization effort.

Organization

Army Futures Command will have three subordinate organizations:

- Futures and Concepts will identify and prioritize capability development needs and opportunities.
- Combat Development will conceptualize and develop solutions for identified needs and opportunities.
- Combat Systems will refine, engineer, and produce developed solutions.
- All acquisition authority is derived from Army Acquisition Executive (AAE), to whom the Program Managers report. Futures Command is responsible for requirements and supports the Program Managers. Program managers remain under the control of ASA (ALT) but matrixed against the CFTs.

Source: Army Futures Command Task Force



AROUND THE CORPS

Jonathan Neenan, now a captain in the U.S. Army Reserves, navigates the confidence course with the assistance of his peers during his Direct Commissioning Course at Ft. Benning, Georgia (Credit: Dan Torok, TJAGLCS).



The Schofield Barracks Tax Center, pictured left, closed after leadership at the U.S. Army Garrison-Hawaii determined the number of free or low cost tax sites available to service members, retirees, and families outweighed the cost of having Soldiers run the center as volunteers (Credit: Karen A. Iwamoto, Oahu Publications).

Closing Arguments

Tax Centers

Keep 'em or Cut 'em?

By Lieutenant Colonel Edward Linneweber & Major John Goodell

Lieutenant Colonel Edward Linneweber (EL): Be Ready: The time has come to reduce—if not eliminate—our tax assistance services to ensure we remain ready. We—the Army, professional stewards of public resources—must focus our limited resources on mission readiness, not on replicating widely available services. There's a plethora of methods that exist for Soldiers to file their

taxes. Additionally, the true costs of providing these services, when fully accounting for the taxpayer costs of borrowed military manpower (BMM), exceeds the value of the benefit provided. They are horribly inefficient.

Major Houston John Goodell (JG): Our tax centers do in fact contribute to mission readiness. They ensure Soldiers are in

compliance with federal law and provide a meaningful service to the military community. The budgetary impact is minimal, at best, despite what the haters suggest. Plus, they provide a meaningful leadership training opportunity for young judge advocates.

EL: Our tax services do provide a helpful community service, but a service that is already readily available and easily obtainable through multiple sources, from the H&R Block around the corner to Military One Source, which offers free filing to most Soldiers. Many commercial preparations services also provide online or phone assistance twenty-four hours a day, perhaps better meeting the needs of our busy Soldiers, especially one wishing to complete their taxes outside of duty hours.

JG: Admittedly, many Soldiers are eligible to complete a 1040 EZ and free tax preparation services, which merely requires an income below \$66,000 and no other revenue or taxable assets. However, luring a Soldier in the door by promising a free 1040 EZ or fast cash back and then charging the Soldier numerous fees once the return exceeds the baseline is problematic. For many Soldiers, they will need to pay for their taxes to be filed because they have a more complicated return (by the way, we want our Soldiers to have more complicated returns because it often means they are accumulating more assets and taking care of themselves and their families financially). Offering an alternative for Soldiers that is completely free without restrictions is a tremendous benefit—especially our junior enlisted Soldiers who cannot afford to cough up a couple of hundred dollars to have their return prepared.

EL: But we provide the service very inefficiently. The Army budget for tax centers continues to shrink, suggesting improving inefficiency. It costs the American taxpayer over \$74,000 annually for each E-4 Specialist.¹ Assuming Soldiers report to the tax center in December for training, the E-4 working in the tax center for five

months costs the taxpayer almost \$31,000. The NCOs and officers supervising are even more expensive. One installation calculated that the total cost of running their installation tax center (when properly accounting for BMM costs) exceeded the value of the services provided by the tax center. In essence, it would be cheaper for the taxpayer to pay commercial tax services directly than it is to run installation tax centers.

JG: Those same Soldiers are—far more often than not—already a sunk cost, which is to say that their units are sending their Soldiers who are either transitioning from the Army or are not capable of deploying. Given the new Secretary of Defense’s policy on deployability,² much of the latter category is also likely headed toward a transition for civilian life. While we are on the topic of transitioning to civilian life, working at a tax center gives Soldiers, whose careers are ending, a viable alternative to work on the outside. If we are serious about the Soldier for Life initiative and combating worryingly high homelessness and suicide rates among veterans, why would we take away a practical skill set for junior enlisted Soldiers, many of whom have served in Military Occupational Specialist positions that do not transition well to civilian life. The Army Installation Management Command budget for tax centers this year was \$529,000,³ which is a farcically trivial sum compared to just about everything else the big green machine buys (anyone know the budget for the Future Combat System or the RAH66 Comanche or even heard of these failed programs costing taxpayers tens of billions of dollars?⁴), and this money provides employment for a lot of Army spouses. This means more money in the pockets of Army families, and more importantly, this is an excellent gesture to generate goodwill for spouses who are unable to hold down steady careers due to the Army’s emphasis on moving every couple of years. If the Army wants to retain its talent, it should provide as many job opportunities to spouses of Soldiers within its own ecosystem as it possibly can.

EL: If only temporary hires (often spouses) and volunteers work in our tax centers, then our tax centers may be worthwhile efforts. However, continued operation of tax centers impacts readiness. The



Spc. Kayla Potter and Pfc. Jonathan Estrada of the 25th Combat Aviation Brigade, 25th Infantry Division, discuss taxes in 2017 at the Schofield Barracks Tax Center before its closure (Credit: Karen A. Iwamoto, Oahu Publications).

BMM Soldiers in tax centers have wartime missions. The American public trusts that our Army will “be ready” to meet that wartime mission. Using BMM in the tax center—to include using a judge advocate as an officer-in-charge—detracts from the Army’s readiness to complete that wartime mission. They are a once important and valuable activity no longer needed because of changes in technology, society, and the marketplace. We need to refocus those efforts to help us Be Ready.

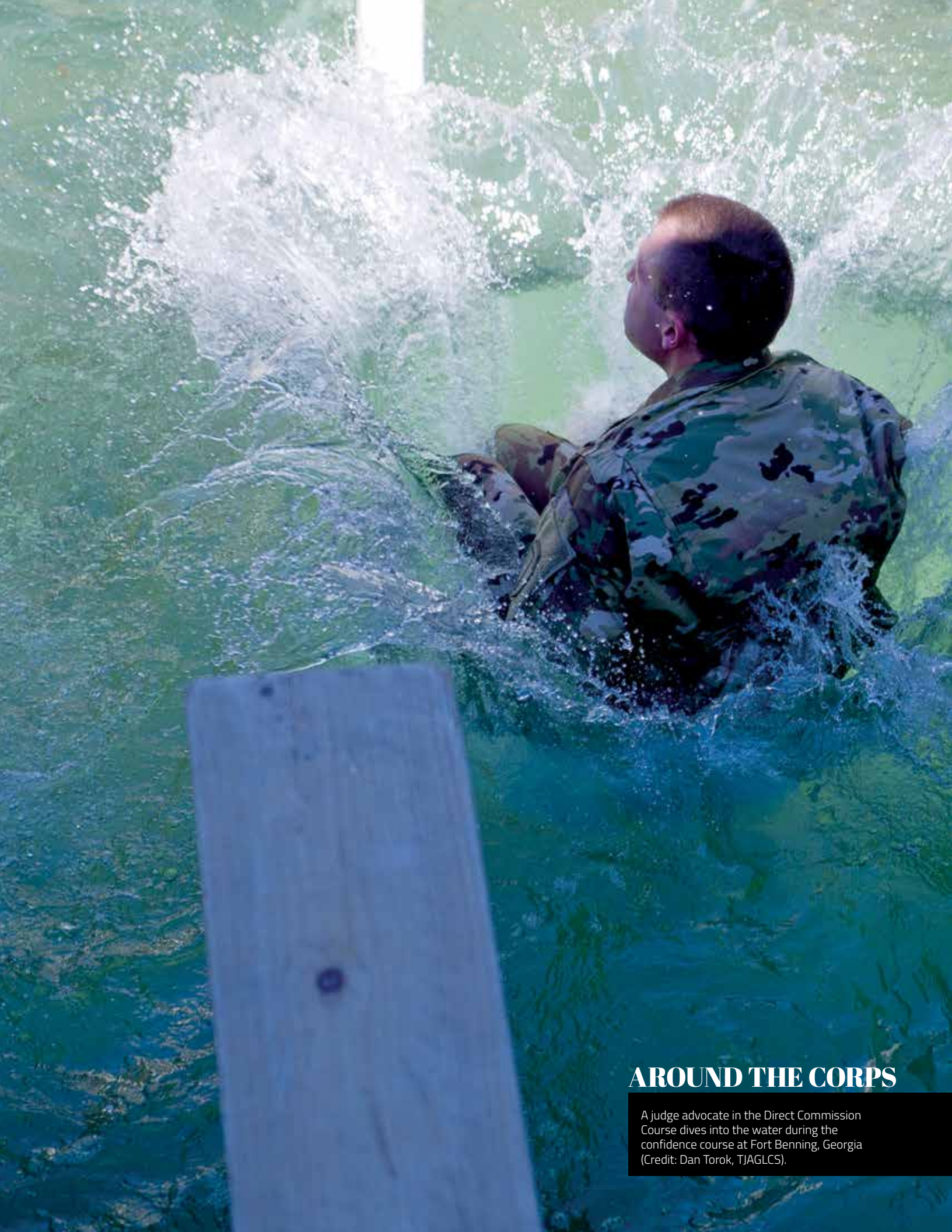
JG: There are two major readiness arguments in favor of keeping the tax center: First, some of the Soldiers sent to a tax center have struggled from a discipline perspective. Once they have different leadership, they flourish with an improved attitude and an opportunity for a second chance. After this detail, they have the opportunity to return to their previous unit where they may get new leadership or perhaps their Tax Center Officer-in-Charge can assist them with a change of unit to comport with the Army’s guidance on rehabilitative transfer outlined in Army Regulation 635-5, paragraph 1-16.⁵ Furthermore, the cost of retraining a new Soldier to replace one that leaves the military is more than \$72,000;⁶ that far outweighs the cost of labor for a Soldier working in the tax center.

Secondly, tax centers provide our junior judge advocates an incredible

opportunity to develop as leaders in a low threat environment. In many cases, they will supervise teams of more than twenty individuals—an opportunity they may not encounter again until they are Colonels. As anyone who has experienced toxic leadership in the Corps could attest, leadership is critically important to our mission success. Taking away the tax centers denies opportunities for junior judge advocates to develop and sharpen this skill; however, the repercussions will not be felt for a generation. By then, it will be too late to offset this void. **TAL**

Notes

1. See the Office of the Under Secretary of Defense Deputy Comptroller memorandum dated 16 June 2017. http://comptroller.defense.gov/Portals/45/documents/rates/fy2018/2018_k.pdf
2. <https://www.defense.gov/News/Article/Article/1444961/mattis-new-policy-cracks-down-on-force-deployability/>.
3. Email correspondence with the Office of the Judge Advocate General - Legal Assistance Policy Division, dated 29 March 2018. On file with the authors.
4. <https://warontherocks.com/2014/12/top-10-failed-defense-programs-of-the-rma-era/>.
5. https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/AR635-200_Web_FINAL_18JAN2017.pdf.
6. <http://www.usarec.army.mil/hq/apa/faqs.htm#cost-per>.



AROUND THE CORPS

A judge advocate in the Direct Commission Course dives into the water during the confidence course at Fort Benning, Georgia (Credit: Dan Torok, TJAGLCS).



AROUND THE CORPS

Major Joy Premo, associate dean of students, teaches during a course at TJAGLCS. More than 5,000 students, from Civilian attorneys within the Department of Defense to National Guard judge advocates, come to the school each year to study military law (Credit: Chris Tyree).



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