

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 5 • 2021



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## AROUND THE CORPS

Judge advocates from the 82d Airborne Division participated in the annual commemoration of World War II's Operation Market Garden. As part of the commemoration, the judge advocates jumped into Holland and France with allied force members. Pictured here is Military Justice Advisor Captain Patrick McCarthy collecting sand from the beaches of Normandy, France. (Photo courtesy of MAJ Brian Hartley)

# Army Lawyer

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Issue 5 • 2021

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On the cover: U.S. Army judge advocates engage with U.K. legal officers in the United Kingdom. (Credit: Captain Anthony Hill, Royal Artillery, British Army)

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# Court is Assembled

## Foundations of Multinational Legal Interoperability

By Lieutenant Colonel Justin M. Marchesi

**In a world of constant competition and rapid change,** the United States stands with its allies and partners across the globe on defense matters of all varieties. This steadfast commitment to our shared security

and prosperity provides a critical strategic advantage over the oppressive authoritarian regimes of our most problematic strategic competitors.<sup>1</sup> For our armies, it requires that we hone and maintain our ability to act to-

British Brigadier Darren Stewart, Head of Operational Law at British Army Headquarters, visited the U.K. Legal Advisers supporting 2nd Brigade Combat Team, 1st Cavalry Division, during Combined Resolve XIII at the Joint Multinational Readiness Center at Hohenfels, Germany in January 2020. Also pictured: COL J.J. Merriam & LTC Justin Marchesi, U.S. Army judge advocates. (Credit: SGT Fiona Berndt)

gether coherently, effectively, and efficiently to achieve a myriad of tactical, operational, and strategic objectives.<sup>2</sup>

While multinational interoperability is most visibly pursued through equipment compatibility and standardization programs, essential human and procedural dimensions exist alongside these other more tangible efforts.<sup>3</sup> By striving to achieve mutual understanding and respect for our national cultures, histories, and traditions, we enable the fundamentals that allow unity of effort and operational success in a coalition environment. To these ends, the Judge Advocate General's (JAG) Corps is uniquely suited to proactively develop our capacity

for *legal* interoperability with our allies and partners by leveraging the appreciation for the rule of law and the rules-based international order that is deeply engrained in our national identities.

As a practical application of our mastery of the law,<sup>4</sup> we must be able to successfully support the integration of allied and partner capabilities into a single, lawfully-conducted, unified operation across each and every warfighting function. While we are more alike than we are different, important nuances in our legal, policy, and cultural frameworks impact the operational capabilities and limitations of each nation's forces in a coalition environment. These include issues such as subtle, but important, differences in our concepts of self-defense and the law of armed conflict; the intricacies of regional human rights regimes that might impact detention, intelligence, and civilian risk mitigation strategies; variances in substantive and procedural due process requirements for criminal and administrative investigations; and the inherent constitutional constraints imposed by fiscal law that can counterintuitively limit U.S. operations in ways that differ significantly from the more permissive rules that apply to most of our allies and partners.

While complex, our differences are not insurmountable. Year after year, the JAG Corps consistently refines the robust strategic engagement programs already in place with many of our closest allies and partners in an effort to foster mutual understanding. These efforts include long-term military personnel exchange program positions;<sup>5</sup> short-term training and exercise integration opportunities;<sup>6</sup> information and lesson sharing arrangements;<sup>7</sup> and many other formal and informal engagement events.

Significant organizational effort is committed to each of these institutional lines of effort, but success of the legal interoperability program writ large also depends on a cultural commitment within the JAG Corps itself. In line with the guiding principles of the JAG Corps Constants,<sup>8</sup> individual Judge Advocate Legal Services members have a responsibility to master the legal aspects of their practice areas and to consider the broader application of that law on future operations the Army might be called upon to conduct. Through institu-

tional education, organizational training, and a personal commitment to lifelong learning, we must grow our understanding of each practice area into cross-disciplinary mastery that can be further informed through simple comparison with the laws, policies, and practices of our allies and partners.

This is a progressive process that should take place over the course of an entire career as we tap the reservoir of our intellectual curiosity to develop an understanding of how our laws, policies, and cultural identities might mesh with those of our international allies and partners. In most cases, this will not begin with deep, formalized, and time consuming comparative study. Rather, in the course of our normal duties, we should strive to simply take a few moments to consider how other countries might approach the same challenges we grapple with every day. Leaders and mentors play an important role in stoking the fire underlying our innate thirst for knowledge, and they help create an unremitting cycle of actively sought-out experience and guided self-development across the Judge Advocate Legal Services community.

Taken in the aggregate, these legal interoperability efforts enable the delivery of holistic legal advice to the combined force that creates an invaluable degree of certainty to commanders: reasonable expectations, verified operational facts and assumptions, and reliable behavior by every element of the collation. This naturally reduces the friction of ill-founded legal and cultural assumptions and makes clear the true operational potential of the whole force. By deliberately creating a base of understanding and shared multinational experience amongst the legal leaders of tomorrow, we will be ready and able to provide world-class legal support to multinational efforts and to ensure conditions are set for success in what will undoubtedly be the coalition environment of battlefield-next. **TAL**

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*LTC Justin Marchesi is the Solf-Warren Professor and Chair of the National Security Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. See, e.g., U.S. DEP'T OF NAVY ET AL., *ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER* (2020); U.S. DEP'T OF DEF., *SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* (2018).
2. See U.S. DEP'T OF ARMY, REG. 34-1, *INTEROPERABILITY* para. 1-6.a (9 Apr. 2020) [hereinafter AR 34-1]; NATO, AAP-06, *NATO GLOSSARY OF TERMS AND DEFINITIONS (ENGLISH AND FRENCH)* (2013).
3. AR 34-1, *supra* note 2, para. 1-8.c.
4. The Judge Advoc. Gen.'s Corps, U.S. Dep't of Army, *Four Constants* (2021), [https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE-75266852586C5004A681F/\\$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE-75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf) [hereinafter *Four Constants*].
5. At present, four formal Military Personnel Exchange Program positions have been established under Army Regulation 614-10 for majors and lieutenant colonels in the United Kingdom, Australia, and Poland, with future expansion to other allied and partner countries under consideration. See U.S. DEP'T OF ARMY, REG. 614-10, *ARMY MILITARY PERSONNEL EXCHANGE PROGRAM WITH MILITARY SERVICES OF OTHER NATIONS* (14 July 2011).
6. Coordinated primarily through the geographic Army Service Component Commands, these efforts span the range of exercise opportunities during Combat Training Center rotations, major allied and partner nation exercises, and various local training events.
7. These were coordinated and executed through the Unified Combatant Commands, Army Service Component Commands, and the Center for Legal and Military Operations.
8. The Four Constants are Mastery of the Law, Principled Counsel, Servant Leadership, and Stewardship. *Four Constants, supra* note 4.



*Taps* is played in honor and memory of those who were lost on September 11th, 2001. (Credit: Jason Wilkerson, TJAGLCS)

# 9/11 Remembrance

## September 11th, 2001 Remembrance at TJAGLCS

By Fred L. Borch III & Lieutenant Colonel Jess Rankin

On 10 September 2021, The Judge Advocate General's Legal Center and School (TJAGLCS) held a joint and allied remembrance marking the twenty years since al-Qaeda's attacks on New York City and

the Pentagon. After introductory remarks from TJAGLCS Commanding General Brigadier General Alison Martin and Regimental Historian Mr. Fred Borch, representatives from the Army, Navy, Air Force,

Marine Corps, and Coast Guard, along with their counterparts from the United Kingdom and Germany, talked briefly about how their respective services and countries responded in the days, weeks, and months after the terrorist attack.

The event began with the playing of the North Atlantic Treaty Organization (NATO) hymn and the National Anthem. After an invocation by Chaplain (Major) Joshua Chittim, Brigadier General Martin provided a brief overview of what happened on the morning of September 11th. She highlighted the shock felt not only by Americans but by everyone in the world after the horrific attacks on the World Trade Center and the Pentagon. The 9/11 attack in the United States triggered Article 5 of the NATO Charter, providing evidence of this sense of shared shock. Article 5 pro-

vides for collective defense for all NATO members.<sup>1</sup> Thus the attacks on the World Trade Center and the Pentagon were also an attack on every NATO ally.

Mr. Borch followed with remarks about the impact of 9/11 on the United States. Within hours of the attack, authorities closed all airspace in the United States and Canada. Three days after the attack, Congress passed the Authorization for the Use of Military Force—which authorized then-President George W. Bush to invade Afghanistan to destroy al-Qaeda and the Taliban.<sup>2</sup> Mr. Borch continued by mentioning that, in November 2001, President Bush issued a Military Order that created military commissions to prosecute terrorists—commissions that exist to this day at Guantanamo Bay, Cuba.<sup>3</sup> Mr. Borch closed by mentioning that structural changes in the government followed the 9/11 attacks, including the enactment of the PATRIOT Act,<sup>4</sup> the creation of the Department of Homeland Security, and the establishment of the Director of the Office of National Intelligence.

After pausing for a moment of silence at 8:46 a.m.—to commemorate the moment when American Airlines Flight 11 crashed into the north tower of the World Trade Center—the ceremony continued with Lieutenant Colonel Jess Rankin highlighting the efforts of New York National Guard Soldiers in the hours after the attack. By the evening of September 11th, more than 1,500 Soldiers were serving in New York City, providing security, logistical, and medical support to those in need.

Captain Keith Gibel, U.S. Navy, summarized the Navy’s response. Naval aviators flew combat air patrol missions and set sail to guard America’s cities. The hospital ship U.S.N.S. *Comfort* deployed to New York City to provide much needed medical and logistical support for the thousands of first responders, firefighters, police officers, and other volunteers working at Ground Zero.

Marine aviators began making combat air patrols over the United States—a first in Marine Corps history according to Lieutenant Colonel David Seagraves, U.S. Marine Corps. Marine aircraft had previously flown such patrols only outside the United States. Marines at the Pentagon set up a command center near the building and, working alongside fellow Service members



Lieutenant Commander Emily Miletello, U.S. Coast Guard Judge Advocate. (Credit: Jason Wilkerson, TJAGLCS)



Captain Keith Gibel, U.S. Navy Judge Advocate. (Credit: Jason Wilkerson, TJAGLCS)

and civilians, played a large role in the rescue and recovery effort.

“All available boats. This is the United States Coast Guard. Anyone who wants to help with the evacuation of lower Manhattan, report to Governors Island.”<sup>5</sup> With this powerful quote, Lieutenant Commander Emily Miletello, U.S. Coast Guard, explained in the aftermath of the attacks, the only way for Americans to leave

lower Manhattan was by water. The Coast Guard, using its own vessels and with the assistance of some 150 tugboats, ferries, and recreational vehicles, ultimately evacuated some 500,000 people from the chaos and confusion of lower Manhattan.

Major Ryan Fisher, U.S. Air Force, noted the Air Force’s primary response to the 9/11 attacks began on 7 October, when U.S. Air Force B-1, B-2, and B-52 bombers,

flying sorties around the clock, conducted air strikes against Taliban and al-Qaeda targets as part of Operation ENDURING FREEDOM.

The ceremony closed with reflections from representatives from the United Kingdom and Germany. Lieutenant Colonel Andrew Farquhar explained that British Prime Minister Tony Blair immediately publicly pledged Britain “would stand ‘full square alongside the U.S.’ in the battle against terrorism.”<sup>6</sup> Ultimately, some 150,000 members of the British Armed Forces would go on to serve in Afghanistan. “Today, we are all Americans.”<sup>7</sup> Lieutenant Colonel Jan Ganshow explained that Germany also immediately stood in solidarity with the United States—and that Germany would and must honor its obligations under the NATO Treaty. Members of the German armed forces would also serve in Afghanistan alongside Americans in the fight against terrorism.

Lieutenant Colonel Rankin then noted that, at 9:03 a.m., United Airlines Flight 175 hit the south tower of the World Trade Center, and that, at 9:37 a.m., American Airlines Flight 77 crashed into the Pentagon. At 10:03 a.m., United Airlines Flight 93 crashed into a field outside Shanksville, Pennsylvania, after passengers on that flight fought the terrorists to regain control of the airplane. While they did not succeed in taking control, the heroic passengers did prevent an attack on either the White House or the Capitol.

September 11th, 2001 was not just an American tragedy, but a global one. Citizens of more than seventy-eight countries were killed that day, including individuals from the United Kingdom and Germany. The ceremony closed with the playing of *Taps*—a somber but fitting end, twenty years after a day of great loss, sacrifice, and heroism. **TAL**

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Lieutenant Colonel Andrew Farquhar, British Army Legal Services Exchange Officer. (Credit: Jason Wilkerson, TJAGLCS)



Major Ryan Fisher, U.S. Air Force Judge Advocate. (Credit: Jason Wilkerson, TJAGLCS)

## Notes

1. N. Atl. Treaty Org. Charter, art. 5.
2. Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).
3. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 13, 2001).
4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct

Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

5. Lieutenant Michael Day, U.S. Coast Guard (Sept. 11, 2001), <https://www.smithsonianmag.com/history/911-flotilla-boats-evacuated-500000-new-yorkers-safety-180978614/>.

6. N.Y. Times, Reuters, AP, Agence France-Presse, *Reaction from Around the World*, N.Y. TIMES (Sept. 12, 2001), <https://www.nytimes.com/2001/09/12/us/reaction-from-around-the-world.html>.

7. *Today, We Are All Americans*, LE MONDE (Sept. 12, 2001).





# News & Notes

## Photo 1

Members of 2-2 Stryker Brigade Combat Team and 7th Infantry Division work hard at the National Training Center Rotation 21-09. 2-2's rotation was the 400th unit to go through NTC. The team photo in front of the 2-2 painted rock features (L to R): SPC Zachary Brown, CPT Sophia Chua-Rubinfeld, CPT Jonathon Krisko, PFC Taylor Cheff, CPT Shawn Delancey, and MAJ Timothy Davis (OC/T).

## Photo 2

SPC Kadeem Gadson (L) CPT Michael Robinson (R), Fort Jackson Trial Defense Service, completed a 12-mile ruck in 2 hours and 33 minutes.

## Photo 3

On 20 August 2021, the OSJA for SE-TAF-AF along with members of the 173d Airborne and the Camp Darby team, toured the open air World War I battleground of Cinque Torri. The paralegals led the





President Truman's decision to test and subsequently use a nuclear bomb during World War II.

**Photo 6**

The 1st Armored Brigade Combat Team, 1st Armored Division, brigade legal section successfully completed National Training Center Rotation 21-10 and celebrated with a group photo on Painted Rocks. Pictured: SFC Shane Wheeler (OC/T), CPT Christian Hewitt (NSL JA), SSG Jasmine Warren (16 BEB Paralegal NCO), MAJ Carlos Ramirez-Vazquez (BJA), Maj (UK) Jon Harris (UK Legal Exchange Officer), and MAJ Tim Davis (Sr. Legal OC/T). Not pictured: SSG Naphese Govan (Acting NCOIC), SGT Sebastian Van Rooyen (6-1 Cav Paralegal NCO), and SGT Michlo Boccanegra (4-70 AR Paralegal NCO).



**Photo 7**

In memoriam of the Army JAG Corps members lost in combat throughout twenty years of the Global War on Terror, the Order of the JAGWAR administered a memorial "Triple-R Challenge" on the 20th anniversary of the 9/11 attacks at Fort Bragg, NC. XVIII Airborne Corps judge advocates, paralegals, and civilians were joined by spouses and friends to undertake this grueling event to honor our fallen fellow dual professionals.



**Photo 8**

7th Legal Operations Detachment Soldiers were presented with The Humanitarian Service Medal for distinguished participation in support of COVID-19 operations. On 12 September 2021, COL Sean M. Connolly, Commander, 7th LOD, presented Medals to LTC Mark Boone, LTC John Flammer, SFC Raymond Barry, CPT August Montgomery, CPT Sean Glendening, and SSG Arthur Taylor for meritorious service of a humanitarian nature in July 2020. Pictured (L to R): LTC Anece Baxter-White, Deputy Commander, 7th LOD; LTC Mark Boone; LTC John Flammer; COL Connolly; SFC Barry; CPT Montgomery; and SFC Eric Radder, Acting CPLNCO, 7th LOD. Not pictured: CPT Glendening and SSG Taylor.

historical tour of the artillery sites, preserved trenches, and observation posts; the judge advocates then led the discussion on leadership and lessons learned.

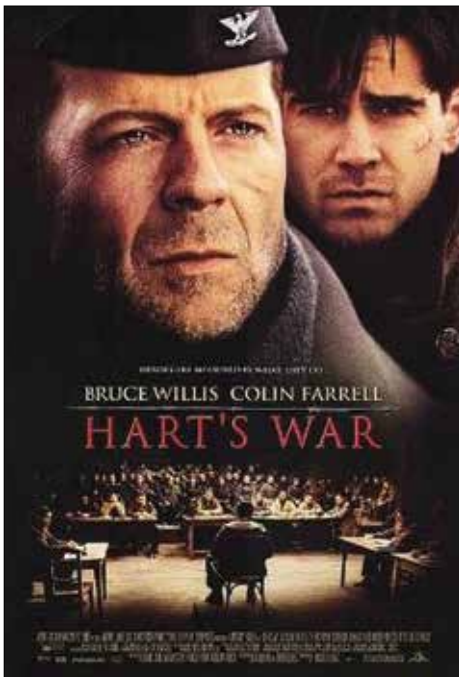
**Photo 4**

CPT Pete Couto and SPC Patrick Ancarrow, SETAF-AF, earned the coveted Expert Soldier Badge! Over the course of three weeks, they completed a tough two-week train-up and an extremely challenging week of testing. The ESB assessed their medical,

tactical, and physical skills culminating in a 12-mile road march. Pictured (L to R): Mr. Brent Fitch, MAJ Robert Gotheridge, CPT Pete Couto, SPC Patrick Ancarrow, CPT Zach Zilai, and MAJ Joey Smith.

**Photo 5**

On 17 November 2021, the 1st Armored Division & Fort Bliss OSJA conducted a staff ride to the Trinity Site located outside of White Sand Missile Range, New Mexico. Once there, the OSJA conduct analysis of



# “Book” Review

## Top Ten Military Justice Movies

Reviewed by Major Benjamin M. Joslin

*Life imitates art far more than Art imitates life.*<sup>1</sup>

**When I deployed to Afghanistan in October 2020**, Department of Defense policy required fourteen days of Restriction of Movement (ROM) before most overseas travel due to the COVID-19 pandemic.<sup>2</sup> For me, that meant two weeks in a hotel room. Realizing I would need a hobby to pass the time in ROM, I decided to watch every military justice movie I could find.

This article lists my ranking of the top ten military justice movies, which I define as films featuring a court-martial or military tribunal as central to the plot. While there are certainly more serious topics to write about, each film on this list should cause military justice practitioners both reflection and enjoyment. Moreover, these films provide real-world lessons for judge advocates (JAs) and paralegals on a range of relevant topics. The films were selected based on their intriguing stories and profound messages. The list will include some plot features and context of each movie; but, to avoid spoilers, it will not discuss the results of the featured trials.

### 10. *Judgment at Nuremberg* (1961)

This stunning and thought-provoking film is an adapted version of a true story, The Justice Case,<sup>3</sup> in the Nuremberg Military Tribunals.<sup>4</sup> Four Nazi judges are tried in a U.S. military tribunal convened in Nuremberg, Germany in 1948 for “murder, brutalities, torture, atrocities.”<sup>5</sup> The prosecutor at the tribunal, a U.S. Army JA colonel, notes that the judges have come full circle to sit where they are as defendants. “Here, they’ll receive the justice they denied others. They’ll be judged according to the evidence presented in this courtroom.”<sup>6</sup> The tribunal is comprised of three American judges. This, according to the prosecutor, is because “only a Judge knows how much more a court is, than a courtroom. It is a process, and a spirit. It is the House of Law.”<sup>7</sup>

The prosecution’s case is that the accused “share responsibility for the most malignant, most calculated, most devastating crimes in the history of all mankind.”<sup>8</sup> On the other hand, the defense counsel paints his clients as dutiful patriots who merely performed their job as non-combatants: “Should [these judges] have carried out the laws of their country, or should they have refused to carry them out and become traitors? This is the crux of the issue at the bottom of this trial.”<sup>9</sup> Through video evidence, the prosecution clearly establishes that the Nazis committed horrible crimes against humanity during the Holocaust. It further establishes that the accused judges swore oaths of allegiance to Adolf Hitler and wore swastikas on their robes. But the prosecution struggles to provide evidence

of a direct, concrete link between the defendants and the atrocities committed. This challenge is likely due to several factors, including the extensive murders by the Nazis of those who might otherwise be witnesses, the reluctance of living Germans to admit insider knowledge of the Nazi system, and the separation between the judges’ roles and the actual commission of the terrible Nazi crimes. However, just as it appears that the prosecution’s case may fall short, one of the defendants insists on taking the stand over his own counsel’s objection. Will the outcome of this case reflect accountability for those who facilitated crimes against humanity, or will the complexities of international criminal law keep the defendants free from criminal responsibility?

Two key professional development points resonate from this film. First, “[t]he basis of this case is, of course, the conflict between allegiance to international law and to the laws of one’s own country.”<sup>10</sup> Most Soldiers, and all JAs, are familiar with the basic principle that Soldiers have a duty to disobey unlawful orders.<sup>11</sup> But what if the orders are lawful under domestic law, yet unlawful according to international law? Can (and should) Soldiers or others involved in the system be held criminally liable?<sup>12</sup> Second, how far do aiding and abetting laws extend criminal liability past the actual perpetrator of the offense?<sup>13</sup> In this case, the defense counsel argues that it would set an unsustainable precedent to hold judges criminally responsible for Nazi atrocities committed outside their presence. On the other hand, if the judges facilitated a system that they knew was producing horrific crimes against humanity, why should the law allow them to escape criminal responsibility?

The presiding judge in *Judgment at Nuremberg* delivers an important speech at the end of the film, explaining the decisions reached and the tribunal’s rationale. It is a must-watch for JAs and paralegals.

### 9. *The Rack* (1956)

“Every Soldier has his breaking point, his horizon of endurable anguish.”<sup>14</sup> A decorated infantry captain arrives home from the Korean War, where he has served for three years—including two in a Chinese prisoner of war (POW) camp. Soon after his return

he is served with court-martial charges for “collaborating with the enemy.”<sup>15</sup>

The accused’s assigned defense counsel, an Army JA lieutenant colonel, believes there may be a valid defense: “I don’t know how I would have held up in your position, but I kind of think I might have done about the same. I think anyone would have who went through what you did.”<sup>16</sup>

At trial, prosecution witnesses reveal that the accused served as a Chinese propaganda spokesperson in the camp, and even signed leaflets attempting to convince Americans to fight for the enemy: “Turn

defense to Article 103b (formerly 104), Uniform Code of Military Justice (UCMJ), “Aiding the Enemy.”<sup>22</sup> The court members in *The Rack* resolve the question of whether the defense applies in this case, and they are likely correct based on the letter of the law.<sup>23</sup> However, military justice practitioners will benefit from a robust discussion as to whether duress should protect the accused from criminal responsibility here.<sup>24</sup> Could lack of mental responsibility also be a relevant defense in this case?<sup>25</sup> Next, many JAs have given Code of Conduct<sup>26</sup> briefings to Soldiers.<sup>27</sup> The Code of

**“We find ourselves having to judge a man who committed certain acts under duress, where the mind can be placed upon ‘the rack,’ and made to suffer agony for which there is no measure . . . . Therefore, although he does not deny his part in the misdeeds that were committed, he does deny that they were committed willingly, willfully, or knowingly.”**

your guns against those officers who are leading you in this unjust and criminal war.”<sup>17</sup> Another witness testifies that the accused foiled a POW escape plot by revealing it to the Chinese guards. However, on cross, the witnesses concede that the accused seemed “terrified” during the rare occasions they saw him in the camp, and they “could not possibly know under what circumstances he signed the leaflet.”<sup>18</sup> The defense counsel admits his client committed the acts in question, but argues that it was only because he reached his breaking point: “We find ourselves having to judge a man who committed certain acts under duress, where the mind can be placed upon ‘the rack,’ and made to suffer agony for which there is no measure . . . . Therefore, although he does not deny his part in the misdeeds that were committed, he does deny that they were committed willingly, willfully, or knowingly.”<sup>19</sup> Will the court members have any sympathy for an officer who turned against his country, regardless of the circumstances?

“Coercion or duress” is<sup>20</sup> (and was, at the time of the Korean War)<sup>21</sup> a complete

Conduct was written and published in the aftermath of the Korean War to provide a “simple, easily understood code to govern [American Soldiers’] conduct while a prisoner of war.”<sup>28</sup> The Code is clear that Soldiers may “give no information nor take any part in any action which might be harmful to [their] comrades,” but also uses terms that imply our government recognizes a gray area when it comes to Soldiers subjected to physical or mental torture.<sup>29</sup> Specifically, The Code instructs Soldiers to “resist by all means available,” and “evade answering further questions to the utmost of [their abilities],” suggesting there is a difference between a collaborator and a resister, who only after having been physically or mentally tortured, complies with a captor’s demand in order to preserve life or limb.<sup>30</sup> Had the Code existed during the Korean War, would the accused’s conduct in *The Rack* have complied with it?<sup>31</sup> And how does the Code interplay with criminal law, if at all?<sup>32</sup>

Watch *The Rack* until the end to see the court-martial’s findings: “The accused will rise and face the court.”<sup>33</sup>

## **8. The Court-Martial of Billy Mitchell (1955)**

In today’s military, there are several fora in which Soldiers can lawfully make recommendations for policy change, pitch their ideas for systemic improvement, and even lodge complaints against their superiors.<sup>34</sup> In the 1920s, that may not have been the case.

Based on a true story, *The Court-Martial of Billy Mitchell* opens with a shot of the filing cabinet where the real life “Record of Trial, Colonel William Mitchell” is stored.<sup>35</sup> “Billy” Mitchell is the passionate commander of the underfunded and underappreciated U.S. Army “Air Service.” He advocates regularly to higher headquarters for more focus and funding on the Army’s air assets. “One of these days, half the world will be in ruins from the air. I want this country to be in the other half.”<sup>36</sup> Unfortunately, his pleas fall on deaf ears: “Where’s the money coming from? There’s not even enough to go around for the Army and Navy now.”<sup>37</sup>

Colonel Mitchell writes a letter a day seeking more funding, but after multiple high-profile aviation accidents result in preventable pilot and aircrew deaths, he decides he must take more drastic action: “I would not be keeping faith with my dead comrades if I kept quiet any longer.”<sup>38</sup> Colonel Mitchell convenes the press and states, “These accidents are the direct result of incompetence, criminal negligence, and the almost treasonable administration of our national defense by the Navy and the War Department.”<sup>39</sup> He is promptly court-martialed for allegedly violating the 96th Article of War, the predecessor to today’s Article 134, UCMJ.<sup>40</sup> Article 96 was “[t]he catch-all clause [] [c]over[ed] everything from kicking a horse to kissing a sergeant.”<sup>41</sup> At trial, the prosecution attempts to keep the case simple and straightforward: “Did or did not the accused make the newspaper statements attributed to him? If he did, he’s guilty.”<sup>42</sup> On the other hand, the defense argues that Colonel Mitchell can’t be guilty if his public statements regarding the military’s incompetence were true.<sup>43</sup>

Does the court-martial panel—a “who’s who”<sup>44</sup> of senior general officers—care about the truth in Colonel Mitchell’s statements, or do they take the prosecution’s view that this is a simple case of a Soldier improperly bypassing the chain of command?

*The Court-Martial of Billy Mitchell* features at least two key legal issues worth discussion. First, does the truth or non-truth of Colonel Mitchell's public statement impact his guilt or innocence? In other words, may witnesses be called by both sides to corroborate or refute Colonel Mitchell's assertions regarding the "incompetence" of the Navy and War Department? In this movie, the court members vote to allow such "justification" witnesses, since "the whole foundation of our legal system and of our country for that matter, rests on the right of a man to defend himself."<sup>45</sup> Would such witnesses be allowed in a modern court-martial for an offense similar to Colonel Mitchell's? The truthfulness of a statement made in violation of Articles 88, 89, and 91, UCMJ, is immaterial, but what about Article 134?<sup>46</sup> Second, where does a Soldier's right to raise important issues end and criminal conduct begin? Colonel Mitchell testifies,

I've been wearing the uniform of the United States Army most of my adult life, and I've worn it with pride. But if being a good Soldier is your kind of good Soldier, unable to think for himself and say what he thinks, of being narrow and blind and insensible to a higher duty, you can have the uniform and all that goes with it.<sup>47</sup>

Of course, Soldiers should raise safety and national security issues when they see them, but they also do not have the right to go directly to the media whenever they disagree with a military policy or decision, as Mitchell did. Is there a clear line?<sup>48</sup> In Colonel Mitchell's case, history has looked kindly upon him. He is widely considered "one of the greatest airmen in history."<sup>49</sup>

### 7. *Hart's War* (2002)

In late 1944, Lieutenant Thomas Hart, a Yale law student-turned Army staff officer, is captured by the Germans and sent to a POW stalag deep in enemy territory. There, Hart witnesses captured Tuskegee Airmen<sup>50</sup> face severe taunting and discrimination from their own countrymen. One night, an aggressively racist U.S. Soldier in the camp is found dead, and a Black pilot is seen standing over the body.

German guards move to summarily execute the pilot, but the Prisoners' Representative,<sup>51</sup> a fourth-generation-military West Point graduate colonel, knows the pilot is innocent. He intervenes and requests the German camp commandant to allow the U.S. POWs to administer internal justice, arguing that the suspected killer has a right to a trial. The commandant acquiesces,

**"Note the time. Captain, I'm sorry, but you're a sick man. I'm relieving you as Captain of this ship."**

seeing an opportunity to sow division and discord between Americans: "Ah, a trial. A court-martial. Like in your American movies? Yes? That should be fun."<sup>52</sup> Lieutenant Hart is detailed as defense counsel.

Testimony at trial reveals deep-seated prejudices in some U.S. Soldiers, to the camp commandant's delight. One prosecution witness suggests "colored" men cannot control themselves.<sup>53</sup> Another witness falsely claims he personally witnessed the accused snap the neck of the decedent.<sup>54</sup> Meanwhile, Hart zealously advocates for his client by raising due process objections. The court-martial is apparently playing right into the hands of the German commandant. "He might have been better off in Alabama. Lynchings are over in minutes. The kind of *justice* he's suffering here is far crueler."<sup>55</sup> However, on the eve of closing arguments, Hart learns that the senior ranking U.S. officer has a bigger purpose for this trial. The colonel admonishes Hart: "make any summation you like," but do not "fuck with this operation in any way."<sup>56</sup> Can Hart preserve his innocent client's life while still facilitating the mission?

This film provokes reflection on multiple topics familiar to JAs, including the Geneva Convention Relative to the Treatment of Prisoners of War<sup>57</sup> and the Code of Conduct,<sup>58</sup> but the key lessons in *Hart's War* come from the featured court-martial. First, the case is a reminder that racism in the military justice system can come from many sources—including witnesses. During World War II, *de jure* racism was military policy, with segregated units and facili-

ties.<sup>59</sup> *De jure* discrimination is, of course, no longer military policy, but race can still play a subtle role in all aspects of the justice process,<sup>60</sup> and it is important for military justice practitioners to maintain awareness of this fact. Second, an underlying theme in the *Hart's War* trial is the balance between military necessity and justice. The accused pilot's due process is severely limited due

to mission requirements. Does the purpose of the military justice system shift during wartime?<sup>61</sup> When a contradiction exists between military mission and due process, which should prevail?

Hart is unwilling to stand by while his innocent client is denied justice, but struggles to reconcile a strong defense with the best interests of his country's war efforts. This clash contributes to a great plot and an even better ending.

### 6. *The Caine Mutiny* (1954)

The U.S.S. *Caine* is a minesweeper serving in the Pacific theater during World War II. After eighteen months of combat, the "men act like a bunch of cutthroats and the decks look like a Singapore junk."<sup>62</sup> A new captain comes on board, seeking to run a tight ship by the book, regardless of the cost. At first, he cleans things up nicely; but his disciplinary focus quickly gives way to obsession over minutia at the expense of the mission. While he is busy personally reprimanding a Soldier for an untucked shirttail, the *Caine* turns in a circle and cuts its own towline. In another incident, the captain's compulsive behavior results in combat ineffectiveness during a key mission.

The captain's pattern becomes more apparent and severe. The executive officer and other officers of the ship consider whether their boss may be mentally unstable. They debate relieving him under "Article 184 of Naval Regulations": "It is conceivable that most unusual and extraordinary circumstances may arise in which the relief from duty of a commanding offi-

cer by a subordinate becomes necessary.<sup>63</sup> One night during a dangerous storm, the captain insists that the *Caine* must continue to “run with our stern to the wind” even though this course puts it at grave risk of going down. On the brink of disaster, and with perhaps no other choice to save the men and the ship, the executive officer orders the helmsman to turn against the wind. He says, “Note the time. Captain, I’m sorry, but you’re a sick man. I’m relieving you as Captain of this ship.”<sup>64</sup> The executive officer maneuvers the ship safely out of the storm, but when the *Caine* returns to U.S. soil he is promptly court-martialed for mutiny.

The assigned defense counsel assesses the case and bluntly tells his client: “You have an excellent chance of being hanged.”<sup>65</sup> Will the members find that the accused properly invoked “Article 184” to save the *Caine* and its men, or find him guilty of mutiny on penalty of death?

The court-martial depicted in *The Caine Mutiny* contains fantastic courtroom scenes and top-notch entertainment value. This trial certainly serves as a reminder to both sides to prepare their witnesses for cross-examination. Above all, though, this film raises the question of whether any possible conditions would allow for a lawful and appropriate relief of a failing commander in the field by subordinates in a modern U.S. Army unit. Cut off from communication during combat, could a real world executive officer relieve their company commander due to mental instability or a repeated failure to safely perform the mission? The Army does not have an equivalent of the fictional “Article 184 of Naval Regulations,” but practitioners researching and discussing this question would do well to begin with Army Regulation 600-20, paragraph 2-9,<sup>66</sup> Article 94, UCMJ,<sup>67</sup> and Rule for Courts-Martial 916(c),<sup>68</sup> outlining the defense of “Justification.”<sup>69</sup>

As for the accused executive officer of the *Caine*, his fate rests on the deposed ship captain’s performance under cross-examination by a stellar JA defense attorney.

#### 5. *Paths of Glory* (1957)

“The paths of glory lead but to the grave.”<sup>70</sup> So goes the elegy from which the title of this film derives. *Paths of Glory* is based on a book of the same name, written by a World

War I veteran and loosely based on a true story.<sup>71</sup>

“By 1916, after two grisly years of trench warfare . . . successful attacks are measured in hundreds of yards, and paid for in lives by hundreds of thousands.”<sup>72</sup> A French division commander receives orders to take “the Ant Hill.” “It’s the key to the whole German position in this sector.”<sup>73</sup> Unfortunately, it’s a suicide mission, since what’s left of the Division “is in no position to even hold the Ant Hill, let alone take it.”<sup>74</sup> But orders are orders, especially when another star and a Corps command are on the table.

Disregarding the predicted casualty rate of more than half the attacking force and the extremely low odds of mission success, the commanding general passes the order down the chain with gusto, but with little assistance or guidance, saying “All France is depending on you.”<sup>75</sup> The operation predictably fails. Scores of soldiers are killed, others are forced to retreat, and many more are unable to even leave their own trenches because of suppressing German machine-gun fire. However, rather than reflect on the impossibility of the mission, the commanding general instead convenes a court-martial. He orders one man randomly chosen from each company in the first wave of the attack to be “tried, under penalty of death, for cowardice.”<sup>76</sup>

A bold colonel (the commander who courageously led the failed mission) volunteers to serve as defense counsel. Coincidentally, before the war he was “perhaps the foremost criminal lawyer in all of France.”<sup>77</sup> In this case, he faces an altogether new challenge: blatant unlawful command influence.<sup>78</sup> The commanding general, who has already made his position well known to the jurors—“if those little sweethearts won’t face German bullets, they’ll face French ones!”<sup>79</sup>—personally observes the trial.

The prosecution’s case is simple: orders are orders. “The failed attack was a stain on the flag of France. A blot on the honor of every man, woman, and child in the French nation.”<sup>80</sup> On the other hand, the defense counsel attempts to argue the nuance of the situation: when a Soldier faces definite death for no possible military benefit, certainly he shouldn’t be expected to continue to advance alone. Can the members reach

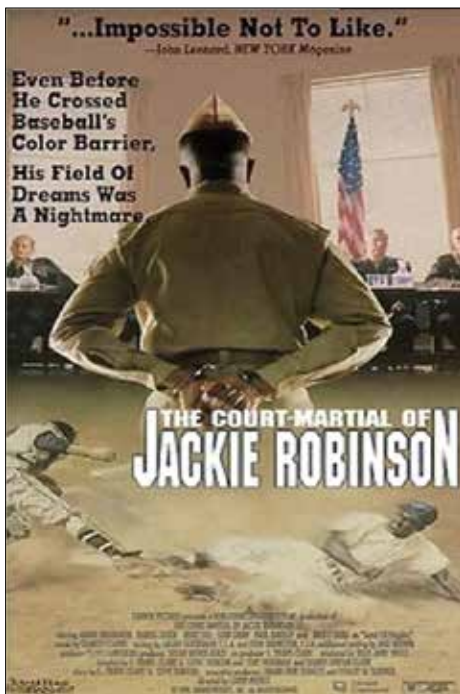
any verdict other than the one their commanding general clearly wants?

Every JA is familiar with the modern prohibition on unlawful command influence in the military. This film highlights why military justice can never be just if there is unlawful command influence. The convening authority in *Paths of Glory* is personally interested in the outcome of the trial out of career-based self-interest. He appoints his own staff as court-martial jurors and makes clear to them his preferred outcome. While real-world examples in the modern U.S. Army are unlikely to be this extreme, even minor hints or perceptions of unlawful command interest in a specified outcome can have determinative effects on case results. If the commanding general in this film had a staff judge advocate, what would they have advised? What would they have done in the event that this advice was not followed? The second military justice question raised in *Paths of Glory* is whether all orders apparently relating to a military mission are lawful. Even an order purportedly connected to a lawful command end can be unlawful if its sole purpose is to accomplish some private end, or it is arbitrary and unreasonable.<sup>81</sup> In this film, was the commanding general’s order to attack the Ant Hill in this film a lawful one, even though he knew it was a “suicide mission”?

It is highly unlikely that the defense counsel in *Paths of Glory* would have been successful with any motions to dismiss for unlawful command influence or an unlawful order. As counsel himself put it during closing argument, “[t]he attack yesterday morning was no stain on the honor of France, and certainly no disgrace to the fighting men of this nation. But this court martial is such a stain, and such a disgrace.”<sup>82</sup>

#### 4. *The Court-Martial of Jackie Robinson* (1990)

Jackie Robinson is an Army second lieutenant, stationed at Camp Hood, Texas—“where Satan’s step-brother, Jim Crow, reigns supreme”<sup>83</sup>—during World War II. Though he was an athletic stand-out in college, he has not yet considered joining the Brooklyn Dodgers as the first African-American person to ever play Major League Baseball.<sup>84</sup>



Lieutenant Robinson serves as a platoon leader in a tank battalion preparing to deploy overseas. One afternoon, he boards an inter-post bus and sits in a middle seat. When ordered to move to the back of the bus by the racist bus driver, Lieutenant Robinson declines. He responds calmly and correctly, “I’ll sit where I please. Regulations forbid segregation on any Army transportation.”<sup>85</sup> The driver reports him to the Military Police (MP), who are no help at all. They gratuitously use the n-word toward Lieutenant Robinson, and do not accord him nearly the respect due to a superior commissioned officer. Lieutenant Robinson, understandably reaching the limits of his patience, tells one MP sergeant: “call me [the n-word] again, and I’ll break you in two.”<sup>86</sup> He also becomes frustrated—and voices his frustration—with an MP captain at the station after being treated like a second-class citizen and called the n-word repeatedly. Lieutenant Robinson is soon placed under arrest. The MP captain says, “[t]his is the south, boy. Custom and tradition die hard.”<sup>87</sup>

Court-martial charges subsequently preferred against Lieutenant Robinson include: insubordination, disturbing the peace, conduct unbecoming an officer, and violation of an order. The accused is represented by a fiery JA lieutenant, who notes:

“The charges *should* read ‘overt discrimination, disrespect to an officer, unlawful detention, and harassment.’ Lieutenant Robinson should be sitting on the other side of this courtroom.”<sup>88</sup> Conversely, the prosecutor attempts to move the trial away from any racial connotation, and seeks to streamline the case solely as an issue of good order and discipline. Will the Camp Hood jury, six out of seven of whom are White officers in a segregated Army in the Jim Crow south, reach a just verdict in an unjust prosecution?

Based on a true story, this movie serves as another reminder of the relatively recent *de jure* racial discrimination in our armed forces and the importance of being aware of conscious or subconscious racial biases in all stages of the justice process. Often-times, case files can be impacted by racial biases before they ever even reach a JA. If this case file reached a trial counsel’s desk today, how would the trial counsel respond? Would they find probable cause that Lieutenant Robinson committed any offenses, or would they open an investigation into Equal Opportunity discrimination by the MPs? *The Court-Martial of Jackie Robinson* is also a reminder that the cases we try do not just impact individual lives, but can also change history. Jackie Robinson’s military trial undoubtedly impacted his incredible life story in many ways, perhaps even influencing his successful baseball career as the first African-American player in the major leagues. In real life, “[t]he character and resiliency Robinson displayed at his court-martial when his reputation, career, and freedom was on the line were precisely the qualities that Branch Rickey, President and General Manager of the Brooklyn Dodgers, was looking for when he selected Robinson” to be the first African-American player in Major League Baseball.<sup>89</sup> Had Lieutenant Robinson’s defense counsel not prepared so thoroughly, and so passionately and eloquently defended him, one never knows how baseball (and American) history may have been different.

### 3. *Breaker Morant* (1980)

Based on a true story, this film is about war, peace, colonial empires, rules of engagement, and scapegoating operational-level Soldiers for strategic-level failures. It is also

a fantastic courtroom drama. At the turn of the twentieth century, the British Army is in South Africa fighting the Boer War. “The issues are complex, but basically the Boer population (mostly Dutch) wishes to retain their independence from England.”<sup>90</sup> By 1901, the British Empire occupies most of Boer territory, but the Boers resist total defeat through effective guerilla warfare.

Australian Lieutenant Breaker Morant—so-named because of his penchant for breaking horses—serves in an elite British mounted infantry unit designed specifically to defeat the Boer guerillas. One day, Morant’s commander informs him that the rules of engagement concerning captured Boers have changed: “New orders. From [the senior British officer in South Africa] Lord Kitchener . . . No prisoners. The gentlemen’s war is over.”<sup>91</sup> Lieutenant Morant is initially surprised at the change, but he embraces it when he is placed in charge after his commander is mutilated and killed by Boer guerillas. He subsequently orders the execution of a total of seven captured or surrendered enemies. Additionally, in a separate incident, Lieutenant Morant orders the killing of a German missionary whom he suspects of being a direct participant in hostilities working with the Boer. When word of all this gets out, political considerations force Lord Kitchener to take the matter seriously, despite the fact that the Boer prisoners were executed under his very own orders. Kitchener promptly convenes a court-martial. “I’m trying to put an end to this useless war. The Boer leaders must see this court-martial as a demonstration of our impartial justice. If these three Australians have to be sacrificed to help bring about a peace conference, it’s a small price to pay.”<sup>92</sup> Lieutenant Morant and two others in his unit are tried for murder on penalty of death.

The accused are represented by an Australian major. He has never tried a criminal case, let alone a court-martial, but he was a “solicitor” back home.

The assigned defense counsel tells his clients: “I handled land conveyancing and wills.”<sup>93</sup>

The accused Soldiers are not impressed. “Wills. Might come in handy.”<sup>94</sup>

In this court-martial, “obedience to orders” appears to be a complete defense,

even if the accused knew or should have known of the order's unlawfulness.<sup>95</sup> Additionally, the defense convincingly beats the murder charge relating to the missionary. Therefore, the case boils down to a single question: whether the accused were operating under orders when they executed surrendered enemy prisoners. The defense case—an uphill battle, to say the least—is that Lord Kitchener issued verbal orders contradicting the British *Manual for Military Law*.<sup>96</sup> Defense counsel even requests Lord Kitchener himself as a witness, to “settle, once and for all, the matter of whether or not orders were issued to shoot prisoners.”<sup>97</sup> Will the court do “impartial justice” by executing the accused officers, or will it find that they acted in accordance with the rules of engagement, and spare their lives at the potential expense of Lord Kitchener's peace conference?

This film is a case study in why Soldiers must disobey unlawful orders, including unlawful rules of engagement. An order to kill prisoners is clearly an order to violate the laws of armed conflict and the UCMJ.<sup>98</sup> Throughout the film, there is no doubt that Breaker Morant and his co-accused committed cold-blooded murder of captured Boer prisoners. But this film should cause military justice practitioners to reflect on levels of responsibility for war crimes. Soldiers in the field, at the lowest levels, are the easiest to scapegoat. However, leaders set culture and policy. Adherence to an unlawful order is not a defense under modern military law, but it is an extenuating factor. Even in today's military, would the accused's claims of acting under Lord Kitchener's verbal order fall on deaf ears, or would Lord Kitchener be relieved, investigated, and tried?

Additionally, this film presents important questions about the nature of armed conflict and the rules of engagement against a guerilla force. Rules of engagement are based on complex considerations including law, policy, and mission. In this film, Lord Kitchener initially determined that the rules of engagement were too restrictive to enable mission success. However, his updated rules clearly violated the law. How can JAs effectively advise commanders in such circumstances? Rules of engagement must be tactically sound, easily understandable,

and must enable mission accomplishment. But above all else, they must be legal.

Viewers will find out at the end of this film whether the accused are acquitted or become “scapegoats of the empire.”<sup>99</sup> For Breaker Morant's part, he certainly felt his wartime service put him in an impossible situation: “If you encounter any Boers, you really must not loot ‘em. And if you wish to leave these shores, for pity's sake, don't shoot ‘em!”<sup>100</sup>

## 2. *King and Country* (1965)

“A proper court is concerned with law. It's a bit amateur to plead for justice.”<sup>101</sup> This movie is about the horrors of war, depicted not through scenes of battle, but through a field court-martial held in the trenches. A young man volunteers to join the British Army in 1914 for “king and country.”<sup>102</sup> During three years of combat on the front lines, all other members of his unit are killed, including some right in front of him. He narrowly escapes death himself only to receive a letter from a neighbor telling him that his wife has left him. He visits his unit's medical officer, declaring that he can't eat, can't sleep, and can't stop shaking. The doc examines the young private for only five minutes, diagnoses him with “cold feet,”<sup>103</sup> and sends him back to duty, later explaining, “Do you expect me to leave wounded soldiers to die while I cross question cowards?”<sup>104</sup>

Soon thereafter, the young soldier deserts his unit rather than return to combat yet again. Within twenty-four hours he is caught by the military police, brought back to the trenches, and tried in a hastily convened court-martial. The private's assigned defense counsel, a battle-hardened combat arms officer, believes his own client should be sentenced to death. Upon receiving his assignment to defend a deserter, he laments: “We're all on trial for our lives. The only thing that makes him original is that he's failed. Failed as a man and as a soldier.”<sup>105</sup> Nevertheless, the assigned defense counsel puts on a masterful extenuation case, including an effective cross-examination of the medical officer, who continues to insist the accused did not suffer from “shell shock.”<sup>106</sup> Defense counsel inquires:

Is there an exact moment in the life of a soldier before which he is not suffering from shell shock and after which he is? An exact boundary about which no two doctors will ever disagree? An exact boundary on the one side of which a man is required by Army law to pull himself together, or on the other, if he cannot, he is liable to be shot as a criminal? Is there?<sup>107</sup>

During a compelling closing argument, counsel argues that his client has “seen it all. A man can only take so much. So much blood, so much filth, so much dying . . . He had one instinct, only, left . . . The instinct to walk away from the guns.”<sup>108</sup> The officer later tells his client, “Don't thank me for doing my duty. I had to. Just as you should have done yours.”<sup>109</sup> How does a war-numb court-martial panel balance the understandable motives of this broken soldier with the need to maintain good order and discipline in the trenches?

Every attorney knows on an academic level that defense attorneys must zealously advocate for their clients regardless of personal feeling. This film depicts an assigned defense counsel performing this duty wholeheartedly, even though he personally believes his client should be shot. Can all military justice practitioners say that they would do the same? This movie causes important reflection on whether personal feelings sometimes impact our performance in court, even subtly or subconsciously. Additionally, this movie highlights a unique and important aspect of the military justice system: the impact of combat on conduct. Formerly known as “shell shock,” and now known as “post-traumatic stress,” many Soldiers act completely out of character after experiencing the death of their friends, near-death themselves, and even after carrying out assigned missions to kill the enemy.<sup>110</sup> Deterrence of desertion is absolutely essential, especially on the front lines of a deadly conflict, but military justice practitioners should never overlook extenuating factors relating to post-traumatic stress. How would today's military justice system treat a similar case?

The ending of this film takes an unexpected turn, showing just how far soldiers



can be expected to go in the performance of their duties for “king and country.”

### 1. *A Few Good Men* (1992)

The all-time classic. This film is to the Judge Advocate General’s Corps as *Top Gun*<sup>111</sup> is to fighter pilots, as *Band of Brothers*<sup>112</sup> is to the Airborne.

An underperforming Marine stationed at Guantanamo Bay, Cuba, requests a transfer to a less demanding unit. His O-6 commander, a rising star in the Marine Corps, declines the request: “A transfer. I’m sure that’s the thing to do. Wait. I’ve got a better idea. Let’s transfer the whole squad off the base . . . the whole Division . . . get me the President on the phone, we’re surrendering our position in Cuba.”<sup>113</sup> Instead, the colonel orders a method of extreme (and prohibited) corrective training to help get the struggling Marine back on track—a “Code Red.”<sup>114</sup> The next night, two “recruiting poster Marines”<sup>115</sup> enter the floundering Marine’s room, tie him up, stuff a rag down his throat, tape his mouth shut, and attempt to shave his head. As ordered, their intent is to just teach him a lesson and remind him to get his priorities—“unit, Corps, God, country”<sup>116</sup>—back in line, but things go horribly wrong. The struggling Marine has a severe lung reaction to the Code Red, blood starts dripping from his mouth, and he dies.

In a parallel to *Breaker Morant*, the chain of command denies issuing the orders, and the two young Marines are promptly arrested and charged with murder. Seeking to avoid a lengthy investigation and trial that could reflect negatively on the prestigious colonel, the government offers to deal. However, the accused Marines will not admit to any crime—they were just following orders: “We did nothing wrong, sir. We did our job and if that has consequences, then I’ll accept them. But I won’t say that I’m guilty.”<sup>117</sup> The case goes to a jury.

At trial, the prosecutor gives one of the best opening statements of all time, movie or otherwise, military or civilian trial. “The facts of the case are these . . .”<sup>118</sup> Throughout the court-martial, the defense team of three Navy JAs suffers a series of setbacks, on everything from overruled objections, to surprise details, to even losing a key witness to suicide. Crucially, they are unable to

establish any facts in evidence that the two accused ever received an order to perform the Code Red. Tom Cruise’s character, as defense counsel, laments to co-counsel: “I mean, let’s pretend for a minute that it would actually matter to this court that the guys were given an order. We can’t prove it ever happened . . . We’re gonna lose. And we’re gonna lose huge.”<sup>119</sup> The accused are looking squarely at life sentences, with little hope left. However, after much internal deliberation, and as a last possible resort, the defense team decides to put the O-6 commander on the stand.

*A Few Good Men* contains accuracies (“Article 39(a)” and “Rule 802” are used correctly),<sup>120</sup> and there are certainly inaccuracies (“Conduct Unbecoming a Marine” is not a thing),<sup>121</sup> but the film is still indispensable for all JAs. One extremely important, but often overlooked, lesson from *A Few Good Men* is the meticulous trial preparation put in by the defense team. The defense spends untold hours—most after their duty day—combing through each line of the case file, preparing cross-examinations, and brainstorming trial strategy. Experienced trial practitioners know that there is no substitute for absolutely thorough preparation in a contested court-martial. There are no second chances in front of a military jury, and there is little margin for error.

In this film, the defense team knows their clients’ entire futures are on the line; and, from preparing their cases to zealously advocating in court, they perform their duty well. Is preparation time in military justice cases typically correlated to the result? Trial attorneys may also see an important lesson in the famous cross-examination of the Marine colonel. While it is undoubtedly rare for witnesses to make new admissions contrary to their interests in court, a well-prepared cross-examination of an untruthful witness can put them into a situation where they either continue an obvious lie, or make an admission. An expert cross-examination can spell out key facts step-by-excruciating-step, leading fact-finders to infer a conclusion favorable to the cross-examiner without the need to ask the “ultimate question.” In this film, the defense counsel deems it necessary to actually ask the ultimate question, giving the witness an opportunity to admit or falsely



deny the decisive fact. Nevertheless, the cross-examination of the colonel teaches military justice practitioners that thorough, small-fact-focused preparation is absolutely essential to a good cross-examination of a potentially untruthful witness. In this case, would a one-question cross-examination of “Isn’t it true you ordered the Code Red?” have been equally as successful?

Kevin Bacon, as trial counsel, says: “Colonel . . . do you solemnly swear that the testimony you will give in this general court-martial will be the truth, the whole truth, and nothing but the truth, so help you God?”

Jack Nicholson as the Marine colonel: “Yes I do.”<sup>122</sup>

Most JAs know exactly what happens next. Those who do not must watch this all-time great military justice movie. **TAL**

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### Notes

1. Oscar Wilde, *The Decay of Lying: An Observation, in Intentions* 1, 29 (Thomas B. Mosher 1904) (1891).
2. Memorandum from Under Sec’y of Def. to Senior Pentagon Leadership, Def. Agency and Dep’t of Def.

Field Activity Dirs., subject: Force Health Protection Guidance (Supplement 12)—Department of Defense Guidance for Personnel Traveling During the Coronavirus Disease 2019 Pandemic (6 Aug. 2020).

3. 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, at iv (1951) (“This trial has become known as the Justice Case, because all of the defendants held positions in the Reich system of justice.”).

4. *United States v. Alstotter*, Trials of War Criminals Before the Nuremberg Military Tribunals (1947). See also Fred L. Borch III, *The Nuremberg Trials at 75*, ARMY LAW., no. 6, 2020, at 16, 20 (referencing “Case No. 3: Justice Case”).

5. JUDGMENT AT NUREMBERG, at 14:50 (Roxlom Films Inc. 1961).

6. *Id.* at 15:45.

7. *Id.* at 13:55.

8. *Id.* at 15:00.

9. *Id.* at 19:20.

10. *Id.* at 2:39:40.

11. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHMARK para. 5-8-1 (29 Feb. 2020) [hereinafter DA PAM. 27-9].

12. Captain Robert E. Murdough, “I Won’t Participate in an Illegal War”: Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Illegal Orders, ARMY LAW., July 2010, at 6, 7 (exploring similar questions).

13. See UCMJ art. 77 (1950) (providing that a person who “aids, abets, counsels, commands, or procures” an offense’s commission is equally guilty as the perpetrator of the offense).

14. THE RACK, at 1:02:10 (MGM 1956). This film is not based on any one true story. However, after the Korean War, “the services proceeded cautiously with 192 cases” of collaboration with the enemy against Service members returning from Prisoner of War (POW) camps. Albert S. Johnston III & George J. Noumair, *POW Collaboration—104 or Treason*, 6 CATHOLIC U. L. REV. 56 (1957).

15. THE RACK, *supra* note 14, at 42:00.

16. *Id.* at 39:45.

17. *Id.* at 47:15.

18. *Id.* at 49:00.

19. *Id.* at 1:01:44.

20. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(h) (2019) [hereinafter MCM].

21. JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 653–54 (1953).

22. Today’s Article 103b is similar to Article 104 during the Korean War. *Cf.* UCMJ art. 104 (1951), with UCMJ art. 103b (2016).

23. THE RACK, *supra* note 14. See also DA PAM. 27-9, *supra* note 11, at para. 5-5 (providing the military judge’s instruction on the “duress” defense).

24. See generally *Coercion: A Defense to Misconduct While a Prisoner of War*, 29 IND. L.J. 603 (1954) (discussing whether duress should protect the accused from criminal responsibility). This article recognizes that “the problem of the prisoner who in the face of inhumane treatment gives military information, informs on fellow prisoners, or even joins the enemy forces is not new in the history of warfare,” and argues that “coer-

cion should not automatically be the basis for complete exculpation, but rather should constitute a mitigating factor.” *Id.* at 605, 614.

25. MCM, *supra* note 20, R.C.M. 916(k).

26. See Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 20, 1955), last amended by Exec. Order No. 13,286 (Feb. 28, 2003) [hereinafter Code of Conduct].

27. U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl.F-1 (10 Dec. 2017) (listing “SJA” as the “Delivery method” for mandatory “Code of Conduct” training for “all personnel”).

28. Memorandum from Sec’y of Def. to the Chairman, Def. Advisory Comm. on Prisoners of War, subject: Terms of Reference (17 May 1955).

29. Code of Conduct, 20 Fed. Reg. 6057.

30. *Id.*

31. “If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades.” *Id.* art. IV. “I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.” *Id.* art. V.

32. Unlike the UCMJ, the Code of Conduct is “more a credo than a code of law.” George S. Prugh Jr., *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678, 707 (1956).

33. THE RACK, *supra* note 14, at 1:36:45.

34. For instance, Federal law and Department of Defense Directive 7050.06 allow military members to make “protected communications” to members of Congress and Inspectors General free from reprisal. See 10 U.S.C. § 1034; U.S. DEP’T OF DEF., DIR. 7050.06, MILITARY WHISTLEBLOWER PROTECTION (17 Apr. 2015).

35. For an overview of the real-life trial, see Fred L. Borch III, *The Trial by Court-Martial of Colonel William “Billy” Mitchell*, ARMY LAW., Jan. 2012, at 1.

36. THE COURT-MARTIAL OF BILLY MITCHELL, at 6:44 (United States Pictures 1955).

37. *Id.* at 06:55.

38. *Id.* at 34:05.

39. *Id.* at 34:14.

40. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 529 (1921). See also Borch, *supra* note 35, at 3 n.16.

41. THE COURT-MARTIAL OF BILLY MITCHELL *supra* note 36, at 40:00.

42. *Id.* at 46:05.

43. *Id.* at 46:13.

44. *Id.* at 38:35.

45. *Id.* at 1:08:15.

46. DA PAM. 27-9, *supra* note 11, para. 3A-12-1.d (providing in the standard instruction for Article 88: “The truth or falsity of the statement(s) is immaterial.”); *Id.* para. 3A-13-1.d (providing in the standard instruction for Article 89: “Truth is no defense.”); *Id.* para. 3A-15-3.d (Article 91), (providing in the standard instruction for Article 91: “Truth is no defense.”).

47. THE COURT-MARTIAL OF BILLY MITCHELL *supra* note 36, at 1:34:28.

48. For a starting point on this question, see U.S. DEP’T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM (8 Oct. 2020).

49. Borch, *supra* note 35, at 8.

50. Williams Alexander Percy, *Jim Crow and Uncle Sam: The Tuskegee Flying Units and the U.S. Army Air Forces in Europe During World War II*, 67 J. MIL. HIST. 773 (2003). The Tuskegee Airmen were “America’s first all-black flying units, the 99th Fighter Squadron and the 332nd Fighter Group, trained [and their name derived from their training location] at segregated Tuskegee Army Air Field in Tuskegee, Alabama.” *Id.* While serving their country in combat overseas, the Tuskegee Airmen “experienced both positive and negative racial relationships with other fighter and bomber units of the Army Air Forces.” *Id.*

51. Both the 1929 and 1949 versions of The Geneva Conventions Relative to the Treatment of Prisoners of War (GPW) call for a leader to be appointed among POWs, known as the “Prisoners’ Representative.” See Convention of July 27, 1929, Relative to Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 GPW]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 GPW]. Article 43 of the GPW in effect during World War II stated that “the senior officer prisoner of the highest rank shall be recognized as intermediary between the camp authorities and the [prisoners].” 1929 GPW, *supra*, art. 43. This is consistent with current U.S. military policy which states that the senior U.S. member will take command of fellow prisoners. Code of Conduct, 20 Fed. Reg. 6057, art. IV.

52. HART’S WAR, at 55:03 (Cheyenne Enterprises, David Foster Productions, David Ladd Films, & Metro-Goldwyn-Mayer 2002).

53. *Id.* at 1:06:25.

54. *Id.* at 1:06:50.

55. *Id.* at 1:20:22.

56. *Id.* at 1:39:50, 1:39:35.

57. Percy, *supra* note 50.

58. Code of Conduct, 20 Fed. Reg. 6057. The Code was not in effect at the time of World War II. *Id.*

59. MORRIS J. MACGREGOR JR., INTEGRATION OF THE ARMED FORCES, 1940–1965, at 17 (2001).

60. On 16 June 2020, The Judge Advocate General of the Army, Lieutenant General Charles Pedo, testified before Congress:

As good as our [military] justice system is, we can never take for granted its health or its fairness. . . . We have brought our justice system much closer to the full realization of equal justice for all. But close is never good enough. In May 2019, the [Government Accountability Office] found racial disparities in our justice system . . . . This report raises difficult questions . . . . We must understand how preconceptions and prejudice can affect both the investigation and disposition of misconduct . . . . I believe our justice system is one of the best in the world, but I also know it is not perfect. A justice system must be both just for, and seen to be just, by all.

*Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on Armed Servs.*, 116th Cong. (2020) (statement of Lieutenant Gen. Charles N. Pedo, The Judge Advoc. Gen., U.S. Army).

61. MCM, *supra* note 20, pt. 1, ¶ 3 (2019) (stating “The purpose of military law is to promote justice, to assist

- in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”).
62. THE CAINE MUTINY, at 25:40 (Columbia Pictures 1954).
63. *Id.* at 1:11:12.
64. *Id.* at 1:24:30.
65. *Id.* at 1:29:35.
66. U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-9a(1) (24 July 2020) (stating that Army commanders will remain in command unless dead, disabled, retired, reassigned, or absent).
67. Mutiny or Sedition, 10 U.S.C. § 894.
68. MCM, *supra* note 20, R.C.M. 916(c).
69. “A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.” *Id.* See also DA PAM. 27-9, *supra* note 11, para. 5-20.
70. Thomas Gray, *Elegy Written in a Country Churchyard*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44299/elegy-written-in-a-country-churchyard> (last visited Sept. 13, 2021).
71. HUMPHREY COBB, PATHS OF GLORY 181 (Penguin Classics 2010) (1935) (“All the characters, units, and places mentioned in this book are fictitious. However, if the reader asks, ‘Did such things really happen?’ the author answers, ‘Yes,’ and refers him to the following sources which suggested the story . . . .” Cobb goes on to cite to sources discussing the “Souain corporals affair,” a real-world court-martial in 1915 resulting in the French Army executing four corporals for refusing to carry out impossible orders.).
72. PATHS OF GLORY, at 1:55 (Bryna Productions 1957).
73. *Id.* at 3:20.
74. *Id.* at 3:48.
75. *Id.* at 12:55.
76. *Id.* at 36:20.
77. *Id.* at 11:05.
78. Today, Article 37, UCMJ, and Rule for Courts-Martial 104 prohibit any person, especially commanders, from coercing or influencing the action of a court-martial by “unauthorized means.” UCMJ art. 37 (2019); MCM, *supra* note 20, R.C.M. 104 (2019). That said, it is unlikely that the commanding general’s clear and direct influence over the court-martial results in this film would have actually been “unlawful” under French military law in World War I.
79. PATHS OF GLORY, *supra* note 72, at 35:45.
80. *Id.* at 52:53.
81. DA PAM. 27-9, *supra* note 11, paras. 3-16-1 n.3, 3-16-2 n.3; 3-16-3 n.2.
82. PATHS OF GLORY, *supra* note 72, at 54:40.
83. THE COURT-MARTIAL OF JACKIE ROBINSON, at 45:03. (Turner Pictures, Von Zerneck-Sertner Films 1990).
84. For a full history of the real-life court-martial of Second Lieutenant Jackie Robinson, see generally Major Adam Kama, *The Court-Martial of Jackie Robinson*, ARMY LAW., no. 1, 2020, at 68.
85. THE COURT-MARTIAL OF JACKIE ROBINSON, *supra* note 83, at 54:05.
86. *Id.* at 57:35.
87. *Id.* at 1:01:10.
88. *Id.* at 1:13:10.
89. Kama, *supra* note 84, at 69.
90. BREAKER MORANT, at 0:14 (South Australia Film Corporation, Australian Film Commission, 7 Network, Pact Productions Pty. Ltd. 1980).
91. *Id.* at 44:25.
92. *Id.* at 1:03:35.
93. *Id.* at 13:00.
94. *Id.* at 13:06.
95. This is consistent with prior U.S. military law. “From 1914 until 1944, U.S. Service members could assert the defense of superior orders as a complete defense to a crime so long as they could demonstrate they acted in accordance with superior orders.” Major M. Keoni Medici & Major Joshua P. Scheel, *Training the Defense of Superior Orders*, ARMY LAW., no. 6, 2020, at 34, 35. However, the defense has evolved. Under modern U.S. military law, “following a superior’s orders is not a get-out-of-jail-free card.” *Id.* at 36. The defense of superior orders may not be invoked if “the order was illegal and the accused actually knew it was illegal or a person of ordinary sense and understanding would, under the circumstances, know the order was illegal.” DA PAM. 27-9, para. 5-8-1, n.1.
96. BREAKER MORANT, *supra* note 90, at 45:25.
97. *Id.* at 59:24.
98. See, e.g., 1949 GPW, *supra* note 51 (stating “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . .”). See also UCMJ art. 118 (2016) (criminalizing the killing of another without legal justification or excuse).
99. BREAKER MORANT, *supra* note 91. The film *Breaker Morant* is based on a true story, as documented in the book, GEORGE WITTON, SCAPEGOATS OF THE EMPIRE: THE TRUE STORY OF BREAKER MORANT’S BUSHVELDT CARBINEERS (1907).
100. BREAKER MORANT, *supra* note 90, at 1:41:28.
101. *Id.* at 56:45.
102. KING AND COUNTRY, at 12:42 (B.H.E. Productions Limited 1964).
103. *Id.* at 40:36.
104. *Id.* at 40:20.
105. *Id.* at 07:20.
106. Shell-shock, now known as Post-Traumatic Stress Disorder, confused doctors and commanders in the British Army during World War I. “By the winter of 1914–15, ‘shell shock’ had become a pressing medical and military problem. Not only did it affect increasing numbers of frontline troops serving in World War I, British Army doctors were struggling to understand and treat the disorder.” Edgar Jones, *Shell-Shocked*, MONITOR ON PSYCH., June 2012, at 18.
107. KING AND COUNTRY, *supra* note 102, at 39:05.
108. *Id.* at 52:20.
109. *Id.* at 1:03:05.
110. “Research on Vietnam veterans suggests an association between psychological problems, including posttraumatic stress disorder (PTSD), and misconduct . . . [and in a study of Marines deployed to Iraq or Afghanistan in the early 2000’s,] PTSD was associated with an increased risk for both demotions . . . punitive discharges . . . .” Robyn Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY, 2010, at 1.
111. TOP GUN (Paramount Pictures, Don Simpson/Jerry Bruckheimer Films 1986).
112. BAND OF BROTHERS (DreamWorks, DreamWorks Television, HBO Films, Playtone, British Broadcasting Corporation 2001).
113. A FEW GOOD MEN, at 17:49 (Columbia Pictures, Castle Rock Entertainment, David Brown Production 1992).
114. “A Code Red is a disciplinary engagement . . . [used by] the men in a Marine’s unit to get him back on track.” *Id.* at 25:52.
115. *Id.* at 05:54.
116. *Id.* at 28:21.
117. *Id.* at 51:32.
118. *Id.* at 1:05:44.
119. *Id.* at 1:22:23.
120. See UCMJ art. 39(a) (1990) (a court session without members, for example, a motions hearing); MCM, *supra* note 20, R.C.M. 802 (1984) (off-the-record conferences between the military judge and counsel for both sides).
121. A FEW GOOD MEN, *supra* note 113, at 2:11:15. Under the UCMJ, “Conduct Unbecoming an Officer” is an offense, but not “Conduct Unbecoming a Marine.”
122. *Id.* at 1:54:52.



New Jersey National Guard Soldiers and Airmen arrive near the U.S. Capitol to set up security positions in Washington, D.C., on 12 January 2021. National Guard Soldiers and Airmen from several states traveled to Washington to provide support to federal and district authorities leading up to the 59th Presidential Inauguration. (Credit: Master Sergeant Matt Hecht)

# Azimuth Check

## Leading Lawyers and Advising Senior Leaders During Crisis

### Reflections on the Army's January 2021 Civil Disturbance Operations Response

By Colonel (Retired) Gail A. Curley

**The time since February 2020 has been full of major surprises on the domestic operations front.** After responding to the

global pandemic last spring, the National Security Law Division (NSLD) spearheaded the Office of The Judge Advocate General's

(OTJAG) legal support to the Army for nation-wide civil disturbance operations (CDO) beginning in late May 2020 and continuing into the fall. The shocking attack on the Capitol on 6 January immediately pulled the Headquarters, Department of the Army, into an unprecedented crisis as the Secretary of the Army (SecArmy) is the equivalent of the Governor for the District of Columbia National Guard (DCNG). Thus, when civil authorities requested DCNG support to reestablish security and protect the Capitol, the Acting Secretary of Defense (SecDef) approved the request and directed SecArmy to coordinate the provision of all National Guard (NG) support. In the succeeding two weeks, governors sent

approximately 25,000 NG Soldiers and Airmen to Washington, D.C., to serve under the direction of the Commander, DCNG and under the coordinating authority of SecArmy.

There are many lessons learned and insights from OTJAG's response that are worth sharing with legal personnel as best practices for advising clients and responding to crisis. These insights fall into two categories: 1) leading the legal team and 2) advising senior clients.

## **Leading the Legal Team**

### ***Assemble a Dedicated Team***

The National Security Law Division was engaged in its normal daily business when the crisis on 6 January occurred. Immediately, NSLD transformed into a legal operations center to provide support to The Judge Advocate General (TJAG), the Army Operations Center, and—ultimately—SecArmy. We pulled in additional judge advocates (JAs) from the Administrative Law Division, OTJAG; designated two JAs as “battle captains”; instituted a battle rhythm; created knowledge management systems; started creating products; and developed portfolios. As many of our teammates were teleworking due to the pandemic, the extraordinary events of 6 January brought everyone physically into the Pentagon to flatten communications and improve collaboration. This was difficult, but necessary. In essence, we recreated the battle drill that we used in March 2020 for our response to COVID-19. We also drew heavily from lessons learned during the civil disturbances in Washington, D.C., in June 2020. One of those lessons learned was to send a JA liaison officer to embed in the DCNG; we ultimately sent two JAs who became crucial enablers.

### ***Building and Expanding the Network Is Critical***

While getting our internal operations started, we simultaneously built and expanded the technical chain network. Communication is always critical and this crisis was no different. We quickly identified the key attorneys at various headquarters including the DCNG, National Guard Bureau (NGB), Joint Staff, Army

Office of the General Counsel (OGC), and the Department of Defense (DoD) OGC. Because we had previously established good working relationships with these attorneys during COVID-19 and the previous CDOs, the network was already in place. We led from below by flattening communications, including setting up regular syncs on Microsoft Teams, sharing information through knowledge management (KM) systems, participating in syncs hosted by other legal offices, and always asking ourselves, “who else needs to know?” For example, NGB OGC conducted a daily teleconference with JAs from the fifty-four States and territories; this was a tremendous opportunity to share critical information with the JAs who were advising commanders as units moved into Washington, D.C., and began operations. The DoD OGC also held regular phone syncs that provided the opportunity to learn about higher level issues and emergent requests for NG support; it also provided an invaluable opportunity to communicate Army concerns directly to the DoD General Counsel and other senior lawyers.

### ***The Legal Work Must Be Done Well***

The NSLD used the time period from 6 to 11 January to establish an operational cell, educate our teammates on the unique authorities of SecArmy over the DCNG, and to establish—in coordination with other key players—governing principles for the civil disturbance operation (CDO). Those governing principles were that 1) SecArmy is the coordinating authority for the entire NG response (per Acting SecDef written delegation); 2) the Commanding General (CG), DCNG will provide tasks to out-of-state NG personnel (even though they remained under the command and control of their governors); and 3) all NG personnel will follow the DCNG Rules for the Use of Force and the arming decisions of SecArmy and the CG, DCNG (with the consent of the governors).

12 to 20 January was an extraordinary period where SecArmy led CDO for the DoD. On 12 January, the Acting SecDef delegated essentially all of his authorities over the CDO response to SecArmy, which meant that SecArmy was responsible for approving all requests for assistance from

federal agencies and for coordinating with the Chief, NGB to request NG members from across the nation to provide support. On the same day, SecArmy requested a dedicated legal advisor for CDO, so TJAG, Lieutenant General Charles N. Pede, directed me to start working in SecArmy's office. The NSLD Deputy Chief, Colonel Josh Berry, led our legal operations center while I accompanied SecArmy to various meetings, including: a planning session with the Secret Service and other agencies for the presidential inauguration; a meeting with the Speaker of the House of Representatives; a trip to the D.C. Armory to meet with key leaders to discuss sensitive issues including arming; and two interagency rehearsal of concept (ROC) drills for the inauguration. These meetings were important for discerning critical facts and to understanding the perspectives and concerns of senior leaders.

During this timeframe, NSLD worked on several memorandums and letters for SecArmy's signature before the inauguration. Because of the uniqueness of SecArmy's oversight of the DCNG, there is no established orders process for conveying operational orders and guidance to the CG, DCNG, and the 25,000 NG members operating under his direction. Thus, SecArmy communicated all of his key decisions via memorandums and letters that NSLD drafted—and which were extensively coordinated with multiple stakeholders—including the Office of the Under Secretary of Defense for Policy, DoD OGC, Joint Staff, NGB, Army OGC, and DCNG. These documents included approvals for NG support to the federal agencies and civil authorities, as well as employment guidance on use of military equipment, arming, and quick reaction forces. It was essential that NSLD wrote the memos and letters—we had “the pen”—to ensure that all important pieces were addressed, including documenting verbal approvals to ensure that there was a record of all decisions. We were then able to adjudicate edits and comments from the legal enterprise in a collaborative manner. Likewise, once SecArmy signed documents, it was important for NSLD to rapidly disseminate them to the legal enterprise and to make them accessible in our KM systems.

## Advising Senior Clients

### *An Effective Lawyer Understands the Client's Intent and Risk Tolerance*

Senior leaders are generally concerned about the strategic environment, clearly communicating their intent, and risk. In this case, SecArmy worked diligently to understand the strategic environment and to assess the potential risks involved in his decisions. The Secretary of the Army met and spoke continuously with numerous senior government officials in the days leading up to and through the Inauguration to understand their concerns. This was key to his understanding of the situation, the requirements for NG support, and to his risk calculus for how NG support would be provided. The final ROC drill for the Inauguration was attended by Cabinet-level officials and was crucial for ensuring that the various law enforcement agencies—U.S. Secret Service, U.S. Capitol Police, Metropolitan Police Department, and U.S. Park Police—and the DCNG were fully synchronized and aware of each other's capabilities and plans. The senior leaders discussed, by time and geography, how the Inauguration would be conducted, including how the agencies would react if unplanned incidents occurred. The ROC drills helped provide a common operating picture and ensured unity of effort.

### *Access to the Client is Essential*

As the legal advisor, it was necessary to understand SecArmy's intent and risk tolerance on multiple issues. Being in the room was essential to obtaining that understanding—both in terms of attending the key meetings and having ready, in-person access to the client. It was very important for the legal team to take a prudential perspective in preparing the memorandums and documents that SecArmy signed. We continually thought about what others—Congress, the public, the media—might think when they looked back on the NG response and protection mission. We tried to thoroughly document all decisions and the factors and coordination surrounding those decisions. This was challenging since some decisions were made verbally, but we were diligent in ensuring that decisions were reduced to writing.

### *Lawyers Get Paid from the Neck Up*

We were working very long hours and fatigue was a factor for all personnel. After about a week, I realized that I needed to get sufficient sleep in order to provide the best possible legal advice. After all, lawyers get paid to think clearly, and being exhausted impairs cognitive function. The same was true for the OTJAG team, and our battle captains took care to manage the shifts so personnel were able to get adequate rest.

### *Having a Smartbook is Essential*

While automated KM is a critical aspect of running an effective legal operations center and providing a common operating picture across the legal enterprise, equally critical for me was having a physical binder with all the key documents in it. I was able to quickly turn to the most important documents—Acting SecDef memos, SecArmy memos, and requests for assistance from civil authorities—in meetings to ensure that senior leaders were aware of the latest decisions or requests. Likewise, I carried multiple copies of NSLD's legal products, including authorities charts, that I could hand to senior leaders when needed. Given the fast pace of operations and the need to operate while on the move, having an old-fashioned smart book was a key to success.

### *Trust Is the Coin of the Realm*

At the end of the day, trust between client and lawyer is what really matters. It is hard to surge trust. In this case, we were able to build on TJAG's already established trusting relationship with SecArmy and on NSLD's close relationships with the HQDA G-33/Army Operations Center team. We were fortunate in that SecArmy had complete confidence in the legal abilities and judgment of his attorneys and accepted all of our advice and recommendations without hesitation. I think that fully understanding his perspective and intent was instrumental to the effectiveness of the legal advice and support we provided; and that understanding came from having unfettered access and from actively listening to what SecArmy, the Chief of Staff of the Army, and other senior leaders said.

As St. Francis of Assisi so famously said, "[do not so much seek] to be understood, as to understand."<sup>1</sup> It is critical for

lawyers to listen to their clients and fully digest what they hear. Listening develops the lawyer's understanding of the client's intent and risk tolerance. The lawyer should then apply their critical thinking skills and judgment to the factual situation and meet in person with the client to discuss the legal advice. That is an ideal recipe for how lawyers and clients develop mutual trust and respect. Relationships matter—SecArmy constantly sought to meet or speak with key leaders outside the Army so he could understand their perspectives. The same should be true for military legal advisors. They must have unfettered access to their clients and listen. They must also develop their legal networks before there is a crisis so they know who to call when a crisis occurs.

Trust is also necessary within the legal team. The Judge Advocate General trusted the NSLD team to prepare thorough, well-written legal products concerning complicated legal issues that OTJAG had never previously handled. However, as I learned at the start of COVID-19, a group of smart, dedicated JAs and paralegals can move mountains and deliver perfectly-targeted legal advice in a crisis. That was borne out once again in January 2021. **TAL**

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*COL Curley retired after 30 years of active duty service in the U.S. Army, serving as the Chief, National Security Law Division, Office of The Judge Advocate General, at the Pentagon in Washington, D.C., in her final active duty position. She is currently the Marshal of the U.S. Supreme Court in Washington, D.C.*

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## Notes

1. St. Francis of Assisi, *Peace Prayer* (n.d.), <https://www.loyolapress.com/catholic-resources/prayer/traditional-catholic-prayers/saints-prayers/peace-prayer-of-saint-francis/>.



When Nancy Hunter was in her first assignment at the Navy Postgraduate School in Monterey, she obtained her private pilot's license; in this flying club photograph, she is standing at the far left. (Photo courtesy of author)

# Lore of the Corps

## Lieutenant Colonel Nancy A. Hunter's Career of "Firsts"

By Fred L. Borch III

**In 1967, Navy Lieutenant Nancy A. Hunter transferred from the Navy Supply Corps to the Army Judge Advocate General's (JAG) Corps.** This alone was a "first" in history, in that no female naval officer had ever entered our Corps through an inter-service transfer. But more "firsts" were to follow in Nancy Hunter's career as an Army lawyer. Over the next five years, then-Captain (CPT) and later-Major (MAJ) Hunter became the first female judge advocate (JA) to be certified as a trial judge and the second female JA to serve in Vietnam.<sup>1</sup>



Major Nancy A. Hunter, Faculty and Staff, TJAGSA, 1974–1975; she is in the third row, third from the left. (Photo courtesy of author)

When she left Southeast Asia, she was awarded the Bronze Star Medal—yet another first for a woman in the Corps. While teaching administrative and criminal law as the first female member of the Corps on the faculty of The Judge Advocate General’s School (TJAGSA), Hunter also was the first woman on the faculty to earn a Masters of Law at the University of Virginia while assigned to TJAGSA. When she retired as a lieutenant colonel (LTC) in 1979, Nancy Hunter had completed a truly remarkable career.

Born in Dearborn, Michigan, Nancy Anne Hunter (née Petrick) went to high school in Cheyenne, Wyoming. For some years, as a “good Catholic girl,” she wanted

to be a nun. Then, as she put it, “I discovered boys and beer.”<sup>2</sup> After finishing high school early, 16-year-old Hunter started college at the University of Wyoming in 1956. A year later, she was in college at Columbia University in New York City. While she liked Columbia, she discovered that she did not have the money to finish her education in New York; so, she moved to Colorado, where her mother was living. She then enrolled in nearby University of Colorado in Boulder.<sup>3</sup>

Hunter managed to complete her degree in 1959, graduating with a degree in business—although she had focused her studies on accounting. She wanted to work as an accountant and had an interview with

Texaco on the Colorado campus. Imagine her surprise when the man conducting the interview told her that she could “never have a career as a woman accountant” and would “get further ahead as an executive secretary.”<sup>4</sup> Hunter was so angry at the end of the interview that she marched across the street to the Navy Recruiting Station and enlisted. She was nineteen years old.<sup>5</sup>

After completing the 16-week Officer Candidate School in Newport, Rhode Island, Hunter commissioned as an ensign in the U.S. Navy Supply Corps on 3 August 1959. Her first assignment, after completing the 26-week Navy Supply School basic course in 1960, was as the disbursing officer





Lieutenant Nancy Hunter was Navy Supply Corps officer prior to her inter-service transfer to The Judge Advocate General's Corps in 1967. (Photo courtesy of author)

at the Naval Post Graduate School in Monterey, California.

Almost three years later, in May 1963, then-Lieutenant (Junior Grade) Hunter reported to Alexandria, Virginia, to assume duties as a budget and program analysis officer for the Contract Administration Services (CAS). While working full-time at the CAS, Hunter decided to enroll in Georgetown University's night law school program, which permitted a student to complete a law degree in four years—this meant two hours of class every day, five nights a week.<sup>6</sup>

At the time, Virginia permitted a law student to sit for the bar examination before graduating from law school, and Nancy

Hunter decided to take advantage of this provision. As a result, she took and passed the Virginia bar examination in Roanoke, Virginia, in August 1966.

Wanting to serve as a lawyer in the Navy, Lieutenant Hunter immediately requested that she be allowed to transfer from the Supply Corps to the Restricted Line for Special Duty (Law). The Navy did not yet have a JAG Corps—and would not have a Corps until 1967—so all Navy lawyers were Restricted Line for Special Duty.<sup>7</sup> On 9 September 1966, the Navy replied: Lieutenant Hunter could not transfer from the Supply Corps to the Restricted Line for law because she had not completed her law degree.<sup>8</sup>

Based on the September 1966 letter, Nancy Hunter intended to reapply for a transfer to the Restricted Line after she earned her law degree in May 1967. Imagine her dismay when she received a second letter, dated 1 November 1966, informing her that a law degree would not be sufficient: she still would not be permitted to use her talents and skills as a lawyer in the Navy—because she was a woman. As the letter explained, “women officers are restricted in their duty assignments to the extent that they may not serve aboard combat ships or aircraft.”<sup>9</sup> Consequently, because “there appears to be no requirement or justification for women officers being designated as restricted line specialists,”<sup>10</sup> any



Captain Nancy Hunter's inter-service transfer from the Navy to the Army is unique in JAG Corps history. In this photograph, taken in 1967, she wears an Army uniform and crossed-sword-and-pen insignia for the first time. (Photo courtesy of author)

request to transfer to the Restricted Line for Special Duty (Law) would be denied.<sup>11</sup> In short, the Navy did not want female lawyers in naval uniforms.

Having served eight years as a naval officer—and having enjoyed her time in uniform—Nancy Hunter was not happy with the Navy's decision about her future. Luckily for her, someone in the Army JAG Corps heard about her predicament and suggested that she apply for a commission as an Army lawyer. Lieutenant Hunter quickly filled out paperwork for an inter-service transfer and, when the Navy did not object, Navy Lieutenant Hunter became Regular Army CPT Hunter. Officially, she was a member of the Women's Army Corps (WAC), with detail to the JAG Corps. But this status meant that CPT Hunter wore crossed-pen-and-sword insignia on the lapels of her uniform. At the time, there were fewer than ten women on active duty in the Army JAG Corps.<sup>12</sup>

Some years later, when asked why she left the Navy for the Army, Hunter was gracious enough to reply that she "felt there were greater opportunities for [her] in the Army."<sup>13</sup> Certainly a true statement, but not the whole truth.

After a two-week orientation for new WAC officers at Fort McClellan, Alabama, now-Captain Hunter reported to Charlottesville, Virginia, for the 47th Judge Advocate Officer Basic Course. When she graduated in 1967, she reported to Camp Zama, Japan. Serving as the Claims Judge Advocate, Hunter was responsible for the administrative processing of all Army claims in Japan. This meant roughly \$3,000 to \$4,000 a month to military claimants—a sizable amount when one remembers that in those days a private made \$102 a month.<sup>14</sup> Part of her duties included paying claims involving lost and war-damaged personal effects of Soldiers who had been wounded in Vietnam and were recovering in one of the four major Army hospitals in Japan.<sup>15</sup>

In July 1970, now-MAJ Hunter returned to the United States and Charlottesville, where she completed the Military Judge Course. She had asked to be a military judge because she liked criminal law and, after the enactment of the Military Justice Act of 1968 and the creation of the military judge position, the Corps needed trial judges—especially for special courts-martial. Consequently, when MAJ Hunter volun-

teered to be a judge, it made sense for her to be sent to the course.<sup>16</sup>

A month later, on the last day of August 1970, Hunter deployed to Vietnam for a twelve-month tour of duty as a special court-martial judge. She asked to be assigned to Vietnam because, as she put it, "the war was going on and [she] wanted to serve—that's what people were doing who were in the service."<sup>17</sup>

Assigned to the 4th Transportation Command, a 5,000-Soldier unit conducting operations throughout Vietnam, MAJ Hunter's primary duty was to serve as a military judge. But she also functioned as a "Command Judge Advocate . . . managing an under-strength and overworked staff efficiently and effectively."<sup>18</sup>

Despite her command judge advocate duties, MAJ Hunter presided over some sixty special courts-martial over the next twelve months. Her superiors were effusive in their praise of her abilities in the courtroom. Colonel Paul J. Halin, who endorsed her officer efficiency report in November 1970, wrote that "she presides as a judge in outlying areas and has been most successful obtaining the respect and admiration of her contemporaries for her professional acumen."<sup>19</sup> Judge Advocate LTC Thomas E. Murdock, who was the general court-martial circuit judge with overall responsibility for military judges in Hunter's area of operation, was just as complimentary. "Her calm manner and wise decisions and rulings," he wrote, "earned for her the respect and admiration of all attorneys appearing in her court, as well as the commanders in areas where she presided."<sup>20</sup> Perhaps more importantly, wrote Murdock, Hunter "actively sought opportunities to try cases in remote areas where facilities were often less than adequate, and security questionable."<sup>21</sup>

At the end of this assignment, MAJ Hunter was awarded the Bronze Star Medal—apparently the first female JA in history to be so decorated. She was the second female JA to serve in a combat zone since World War II.<sup>22</sup> This entitled her to wear two Overseas Service Bars on the lower right sleeve of her Army green uniform coat.<sup>23</sup>

In August 1971, MAJ Hunter reported for duty at The Judge Advocate General's School. As she remembers it, the assign-

ment was offered to her and she welcomed it until she arrived at TJAGSA and was put in the Civil Law Division. This made no sense to MAJ Hunter. Why was she not assigned to the Criminal Law Division?

After a short time in the Civil Law Division, Hunter took matters into her own hands. She removed the paper sayings from some Chinese fortune cookies that she knew were going to be served to TJAGSA faculty and re-stuffed the cookies with paper slips that read: "Help, I'm a prisoner in the Civil Law Division."<sup>24</sup>

Someone in authority must have seen her handiwork as, a short time later, MAJ Hunter was moved to the Criminal Law Division. She served in that division as the Senior Instructor and Assistant Chief until July 1975. Her boss was then-LTC Hugh Overholt. He would later serve as The Judge Advocate General from 1985 to 1989.

While teaching criminal law, MAJ Hunter enrolled in the Master of Laws program at the University of Virginia (UVA). She was awarded her LL.M. degree on 26 May 1975, just prior to departing TJAGSA for her next duty station. While many faculty at TJAGSA and The Judge Advocate General's Legal Center and School have earned an LL.M. from UVA, Nancy Hunter was the first female JA to earn an LL.M. in this manner.<sup>25</sup>

When she left Charlottesville in 1975, MAJ Hunter was viewed "as one of the best instructors"<sup>26</sup> and implemented changes in the curriculum that "prepared criminal law instructors and students to meet their new responsibilities."<sup>27</sup> She also was widely known as an expert on plea bargaining and published an article titled *A New Pretrial Agreement* in *The Army Lawyer*.<sup>28</sup>

Now certified as a general court-martial judge, MAJ Hunter reported for duty at Fort Ord, California.<sup>29</sup> From then until she retired in 1979, she presided over both general and special courts-martial. One trial, the court-martial of Private (PVT) Charles Gretches, stands out—not because of the crime, which was Absent Without Leave for more than ninety days—but because of those who participated in the proceedings. The trial counsel was then-CPT Thomas J. Romig, who was attending law school under the Funded Legal Education Program (FLEP). The defense counsel was

FLEP CPT Scott C. Black. Major Walter B. Huffman, the senior defense counsel at Fort Ord, was assisting CPT Black. Romig, Black, and Huffman would all go on to serve as Judge Advocates General: Huffman from 1997 to 2001, Romig from 2001 to 2005, and Black from 2005 to 2009.

It was a contested judge-alone trial with LTC Hunter presiding. She found PVT Gretches not guilty. According to now-retired Major General Huffman, it was a tough loss for now-retired Major General Romig.<sup>30</sup>

Having served a combined twenty years in the Navy and the Army, LTC Hunter elected to retire in 1979. Today, she lives in California and is active in her community. It seems unlikely that any JA in the future will be able to duplicate her number of "firsts" in a career. **TAL**

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

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## Notes

1. Major Ann Wansley was the first female judge advocate to deploy to Vietnam.
2. Interview with Nancy A. Hunter (Sept. 1, 2021) (on file with author) [hereinafter Hunter Interview].
3. *Id.*
4. *Id.*
5. *Id.*
6. *MAJ Nancy Hunter Is Unique Figure Among Army Lawyers*, CHALLENGER [Camp Zama, Japan], May 1, 1969, at 2.
7. Restricted Line for Special Duty is a designation given to a line officer in the Regular Navy (and Reserve) who is restricted in the performance of duty by having been designated for aviation maintenance, engineering, oceanography, intelligence, information warfare, or some other special duty. An unrestricted line officer may command a ship; however, a restricted line officer may not. Unrestricted line officers have combat warfare specialties, including naval aviation, flight officer, surface warfare officer, and submarine officer. *Restricted Line Officer*, WIKIPEDIA, [www.en.wikipedia.org/wiki/Restricted\\_line\\_officer](http://www.en.wikipedia.org/wiki/Restricted_line_officer) (last visited Oct. 29, 2021).
8. Letter from K.C. Walser, Dep't of Navy, Bureau of Naval Pers., to Lieutenant Nancy A. Hunter, Supply Corps, subject: Transfer to the Restricted Line for Special Duty (Law); Information Concerning, 9 Sep. 1966.
9. Letter from K.C. Walser, Dep't of Navy, Bureau of Naval Pers., to Lieutenant Nancy A. Hunter, Supply Corps, subject: Transfer to the Restricted Line for Special Duty (Law); Information Concerning, 1 Nov. 1966.
10. *Id.*

11. *Id.*

12. *MAJ Nancy Hunter Is Unique Figure Among Army Lawyers*, *supra* note 6.

13. *Id.*

14. *Monthly Basic Pay and Allowances*, DEF. FIN. & ACCT. SERV. (1 Oct. 1967), <https://www.dfas.mil/Portals/98/MilPayTable1967.pdf>.

15. At the time, hospitals were located at Kishine Barracks, North Camp Drake, Camp Zama, and Camp Oji. *Need Any Legal Aid Today*, CHALLENGER [Camp Zama, Japan], n.d. [1969], at 2.

16. Hunter Interview, *supra* note 2.

17. *Id.*

18. U.S. Dep't of Army, DA Form 67-6, Officer Efficiency Report, Nancy A. Hunter, 25 Mar. 1970 to 5 Nov. 1970, Part XI.a.

19. *Id.* Part XI.b.

20. *Id.* encl. Thomas E. Murdock, 4 Aug. to 5 Nov. 1970.

21. *Id.*

22. The first female judge advocate to serve in a combat zone was Phyllis Propp (later-Phyllis Propp-Fowle), who also was the first female judge advocate in history. For more on Lieutenant Colonel Propp-Fowle, see Fred L. Borch, *Women in the Corps: A Short History of Female Judge Advocates*, ARMY LAW., no. 1, 2020, at 13–14.

23. Under Army Regulation 670-1, one Overseas Service Bar is authorized for wear for each six-month period of duty in Vietnam from July 1958 to March 1973. U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 21-29 (26 Jan. 2021).

24. Hunter Interview, *supra* note 2.

25. Email from Nancy Hunter to author (Sept. 6, 2021, 7:13 PM) (on file with author).

26. Off. of The Judge Advoc. Gen., General Orders No. 20, 19 June 1975, Citation for Award of the Meritorious Service Medal, Nancy A. Hunter, 27 Aug. 1971 to 16 Jul. 1975.

27. *Id.*

28. Major Nancy Hunter, *A New Pretrial Agreement*, ARMY LAW., Oct. 1973, at 73. General Orders No. 20, *supra* note 26.

29. Off. of The Judge Advoc. Gen., Special Orders Number 71, Certification as General Court-Martial and Special Court-Martial, MAJ Nancy A. Hunter, 8 Nov. 1974.

30. Email from Walter B. Huffman to author (Sept. 10, 2021, 3:15 PM) (on file with author).



Members of the 545th Brigade Engineer Battalion, 45th Infantry Brigade Combat Team, Oklahoma Army National Guard, reenlist in front of the U.S. Capitol building in Washington, D.C., on 21 Jan. 2021. At least 25,000 National Guard men and women were authorized to conduct security, communication, and logistical missions in support of Federal and District authorities leading up to and through the 59th Presidential Inauguration. (Credit: Sergeant Anthony Jones)

## Practice Notes

# “Thus Always to Tyrants!” Extremism in the Military—An Application of the New Extremism Framework, and the Way Ahead

*By Captain Anthony J. Iozzo & Captain Nell E. Robinson*

*We will not tolerate actions that go against the fundamental principles of the oath we share, including actions associated with extremist or dissident ideologies. Service members, DoD civilian employees, and all those who support our mission, deserve an environment free of discrimination, hate, and harassment. It is incumbent upon each of us to ensure that actions associated with these corrosive behaviors are prevented. Commanders, supervisors, and all those who hold a leadership position within the Department have a special responsibility to guard against these behaviors and set the example for those they lead.<sup>1</sup>*

Not so long ago, if you were driving around Joint Base Myer-Henderson Hall, located next to the hallowed grounds of Arlington National Cemetery in Virginia, you might pass by a pickup truck belonging to an active duty U.S. Army Soldier with a sticker prominently displayed on its back window. The sticker portrays a Roman numeral three encircled by stars and further emblazoned with the phrase, “When tyranny becomes law, rebellion becomes duty.” At first blush, the sticker could be an ambiguous display of patriotism, and to its bearer, it may be so. However, the sticker displays the logo of the Three Percenters. Just what the Three Percenters and similar organizations represent has been prominently debated—even among the members of these organizations—since the U.S. Capitol insurrection on 6 January 2021, over one year ago.<sup>2</sup> The arrests of current and former military personnel related to the storming of the Capitol accelerated the Department of Defense’s (DoD) ongoing examination of extremism within its ranks.

This article first provides an overview of extremist organizations and their connections to the military. It then provides an in-depth description of the Three Percenters organization and analyzes the truck sticker situation presented above by applying the newly-updated DoD Instruction (DoDI) and the Department of the Army (DA) regulation, current as of this writing.<sup>3</sup> This guidance is as dynamic as the issue at large, and should it evolve, the analysis below can still help judge advocates (JAs) and commanders think through these issues in similar situations. Finally, the article discusses the potential next steps for the DoD and Army as the country continues to grapple with the implications of last year’s U.S. Capitol insurrection.

### **Extremist Organizations, Generally**

What renders a group “extremist”? Most federal definitions categorize extremist groups as motivated by immutable characteristics of one or more groups of people or by anti-government sentiment. The Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) define “racially or ethnically motivated violent extremism” as “the potentially unlawful use or threat of force or violence in furtherance

of ideological agendas derived from bias, often related to race or ethnicity, held by the actor against others or a given population group.”<sup>4</sup> They define “anti-government or anti-authority extremism” as the “potentially unlawful use or threat of force or violence in furtherance of ideological agendas, derived from anti-government or anti-authority sentiment, including opposition to perceived economic, social, or racial hierarchies, or perceived government overreach, negligence, or illegitimacy.”<sup>5</sup> According to the Director of National Intelligence, citing the U.S. Code, domestic violent extremists, regardless of their motivations, are U.S.-based actors who conduct or threaten activities that are dangerous to human life in violation of state or federal criminal law, appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping.<sup>6</sup>

The DoD and Army have their own definitions of extremism, which will be discussed later in this article. One notable difference from the FBI and DHS definitions, however, is that the DoD and Army definitions include non-violent forms of extremist activity.<sup>7</sup> The DoD and Army guidance aligns with the FBI and DHS definitions by including those activities and organizations driven by bias, as well as those driven by anti-government and anti-authority sentiment.<sup>8</sup> Arguably, the Proud Boys and Nazi-inspired groups would fall under the former category, while the Oath Keepers and the Three Percenters would fall under the latter category.<sup>9</sup> Though the DoD and Army guidance articulates definitions of extremism, neither entity maintains a standing list of organizations or groups meeting these definitions, and neither entity has officially categorized any of the aforementioned groups as extremist.<sup>10</sup>

### **Extremist Activity in the Military**

Historically, the DoD has not possessed widespread mechanisms to track extremist activity, which has made quantifying the scope of military extremism challenging.<sup>11</sup> Recent process improvements, including coordinated flagging systems, have allowed the DoD to begin to identify the problem’s scope.<sup>12</sup> In December 2021, DoD’s Coun-

tering Extremist Activity Working Group (CEAWG), to be discussed further below, announced that the military subjected fewer than 100 personnel to official action related to extremist activity over the past year.<sup>13</sup> However, a December 2021 DoD Inspector General (IG) report, issued in response to the Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA), showed that the services are still scrambling to revise processes for collecting and reporting prohibited extremist activity.<sup>14</sup>

The DoD IG report presented a snapshot of military extremism between January 2021 and September 2021.<sup>15</sup> According to data provided by each service, there were 294 allegations of extremist activity, leading to 281 investigations; 92 punitive or administrative actions (including referral to command for appropriate action); 75 unsubstantiated allegations; and 86 ongoing investigations at the time of the report.<sup>16</sup> Across the Army specifically, there were 81 investigations into alleged extremism, which resulted in 18 punitive or administrative actions, 2 separations, 10 unsubstantiated allegations, and 51 ongoing investigations at the time of the report.<sup>17</sup> The Army categorized the allegations as: 33 related to racially-motivated extremism, 34 related to anti-government or anti-authority extremism, and 14 criminal gang activity or affiliation.<sup>18</sup> The IG report noted that DoD has not yet implemented a uniform tracking system, and the DoD IG did not verify the data each service provided.<sup>19</sup>

Other data suggests an uptick in awareness during recent years, if not incidents themselves. In a 2019 *Military Times* poll, 36 percent of 1,630 active duty troops said they had witnessed white nationalism or racism in the military.<sup>20</sup> Just one year prior, only 22 percent of respondents had witnessed white nationalism or racism in the military.<sup>21</sup> The survey participants reported incidents including tattoos affiliated with white supremacist groups, Nazi-style salutes, swastikas drawn on Service members’ cars, and Ku Klux Klan stickers.<sup>22</sup> Notably, these surveys only gathered data related to racial and ethnic extremism, but not anti-government sentiment or extremism related to sexual orientation or gender identity. According to data reported by *NPR*, the FBI investigated 68 current and former military members

for extremist behaviors involving both anti-government and racist motivations in 2020.<sup>23</sup> A “senior defense official” relayed to *NPR* that of these 68 investigative subjects, “the vast majority” were former Service members that were no longer serving.<sup>24</sup>

There have also been high-profile stories in the media, even before last year’s U.S. Capitol insurrection. *Frontline* and *ProPublica* covered the then-Marine who bragged online about “cracking open three skulls” during the 12 August 2017 Charlottesville, Virginia, “Unite the Right” event.<sup>25</sup> The Marine, who was separated from the Marine Corps, was involved in Atomwaffen Division, a hate group responsible for 5 murders and founded by a member of the Florida Army National Guard.<sup>26</sup> In February 2019, authorities arrested an active duty Coast Guard officer who was “inspired by racist murders” to stock assault weapons with the intent to “exact retribution on minorities.”<sup>27</sup> A *Task and Purpose* investigation revealed 40 cases of extremism between 2016 and 2021 in currently serving or recently-separated military personnel.<sup>28</sup> In reports published in 2019, the *Huffington Post* identified 11 military personnel belonging to Identity Evropa—the white nationalist group that organized “Unite the Right”—and an additional active duty Soldier with alleged ties to Atomwaffen Division.<sup>29</sup> Together, these survey results, FBI data, and news stories raised concerns among stakeholders about the military’s blind spots vis-à-vis extremism within its ranks, even before 6 January 2021.

Congress certainly had repeatedly rung alarm bells prior to the rioters storming the Capitol. Section 530 of the Fiscal Year 2020 National Defense Authorization Act (NDAA),<sup>30</sup> directed the Secretary of Defense to study how recruits are screened for extremist and gang-related activity. On 14 October 2020, the DoD provided the Section 530 report (Pentagon Report) to Congress, including a sixty-page report describing the threat posed to the DoD by domestic extremists, especially white supremacists and white nationalists.<sup>31</sup>

The whole country heard the alarm bells last year on 6 January 2021, when current and former Service member involvement in the U.S. Capitol insurrection galvanized these efforts to understand and combat

the influence of extremist organizations in the military.<sup>32</sup> According to *CBS News*, at least 81 of the over 700 individuals facing criminal charges from the insurrection have military experience.<sup>33</sup> Five individuals (one active duty Marine, two Army Reservists, and two National Guard Soldiers) were serving at the time of the insurrection,<sup>34</sup> including an Army Reserve noncommissioned officer who allegedly is an “avowed white supremacist and Nazi sympathizer” charged with civil disorder and aiding and abetting.<sup>35</sup> Authorities have also connected at least 119 of the defendants to various groups widely viewed as extremist, including the Proud Boys, the Oath Keepers, Q’Anon-affiliations, and the Three Percenters.<sup>36</sup> According to a report by the George Washington University Program on Extremism, Capitol riot defendants with military experience were four times more likely to be associated with extremist groups than defendants without military experience.<sup>37</sup>

On 5 February 2021, Secretary of Defense Lloyd Austin ordered commands to conduct a one-day stand-down to address extremism within the ranks, using (the now-previous) DoDI 1325.06 as the basis for these discussions.<sup>38</sup> Following the stand-down, in an April 2021 memorandum, Secretary Austin directed DoD to undertake four immediate actions: 1) review and update of DoDI 1325.06 and its definition of extremism, 2) update the transition checklist to include provisions for training on potential targeting of Service members and veterans by extremist groups, 3) review and standardize accession screening questionnaires to ensure collection of specific information related to current or previous extremist behavior, and 4) commission a study on extremist behavior within the Total Force.<sup>39</sup> The memorandum also established the DoD’s aforementioned CEA WG, charged with overseeing these immediate actions and developing mid- and long-term objectives related to four lines of effort: military justice and policy, support and oversight of the insider threat program, screening capability, and education and training.<sup>40</sup>

On 20 December 2021, Secretary Austin announced that the CEA WG had completed its examination of extremism within the military and published its full report and recommendations.<sup>41</sup> Secretary

Austin also announced the publication of the updated DoDI 1325.06, *Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces*.<sup>42</sup> In making these announcements, Secretary Austin underscored the belief that very few DoD Service members and civilians participate in extremist activities, but even a small number can have a disproportional impact on readiness of the force.<sup>43</sup>

The December 2021 CEA WG report provides a status of each immediate action directed by Secretary Austin and set forth six additional recommendations. The CEA WG introduced the revised DoDI 1325.06 and outlined the updates to this guidance, to include more comprehensive definitions of “extremist activities” and “active participation,” an emphasis on the role of commanders, and specific guidance on social media and online activities.<sup>44</sup> The revised DoDI is discussed in further detail below. The CEA WG report also announced DoD’s plans to update extremism policies applicable to DoD civilian employees and contractor personnel.<sup>45</sup>

The CEA WG report also announced that the DoD Transition Assistance Program will now contain anti-extremism messaging emphasizing a Service member’s oath of office, and encourages separating Service members to report extremist activities to law enforcement under new mechanisms.<sup>46</sup> The DoD is also developing standardized transition training to inform separating troops on how to respond to potential recruiting efforts by extremist organizations.<sup>47</sup> Finally, the DoD is partnering with the Department of Veterans Affairs, DHS, the Office of Personnel Management, and the U.S. Intelligence Community to ensure a coordinated effort to prevent and detect extremist activities affecting recently-separated Service members.<sup>48</sup>

The DoD is looking at incoming Service members as well. The DoD is adding questions on accessions screening forms regarding violent acts and membership in “racially-based entities.”<sup>49</sup> Additionally, a new DoD–FBI partnership provides various DoD recruiting and law enforcement commands access to an FBI portal on extremist groups, activities, symbols, and tattoos.<sup>50</sup> This partnership will enable new military applicants to be flagged by the FBI database

during their accession if they exhibit potential extremist behaviors.<sup>51</sup>

While the DoD is flexing its bureaucratic power to study and address military extremism, real life examples, like the Three Percenters sticker on the Soldier's truck, will continue to percolate. So who are the Three Percenters? Are they extremists? Can the Soldier's command order the Soldier to remove the sticker? Can they, or should they, take any other action? The following presents a detailed overview of the Three Percenters organization, a review of the newly-updated DoD guidance and current DA regulation, and a real-world application of this framework to the Three Percenters organization. This application illustrates how commanders and JAs can think through these multifaceted issues when examining any potential extremist organizations, behaviors, or activities.

### **The Three Percenters— In Their Own Words**

The Three Percenters are a self-proclaimed "organization focused on creating a national network that strengthens and aids communities and individuals, and helps shape the future by preserving, protecting, and defending our country's founding principles, including our God-given rights to Life, Liberty, and the pursuit of Happiness."<sup>52</sup> The organization's history explains an origin inspired by the purported 3 percent of colonists that fought against British forces in the Revolutionary War. They declare themselves the modern-day 3 percent and "the last defense to protect the citizens and Constitution of the United States if there ever comes a day when our government takes up arms against 'WE the People.'"<sup>53</sup>

As recently as 20 February 2021, the Three Percenters were comprised of a National Council and subordinate chapters organized by region, state, and county. However, approximately six weeks after the 6 January 2021 U.S. Capitol insurrection, the National Council announced their dissolution and took down their website.<sup>54</sup> Their website had included by-laws describing the organization's structure, operations, training, and goals.<sup>55</sup> The section's analysis is based on these by-laws, which can be found on *milSuite*,<sup>56</sup> and includes quotations extracted from them. As of this writing,

regional and state chapters of the Three Percenters still appear operational, and their published by-laws mirror those of the former National Council.<sup>57</sup>

The Three Percenters argue that they are not a militia and their goals are benign. They state that they do not wish to overthrow the incumbent government, incite a revolution, or create violence. However, they do contemplate violence against the government. Though the Three Percenters state that they are "very pro-government," they qualify this sentiment on the condition that the government "abides by the Constitution, doesn't overstep its bounds, and remains 'for the people and by the people.'"<sup>58</sup> They also express a goal to "reign in an overreaching government and push back against tyranny."<sup>59</sup> In articulating their "three principles," they clearly contemplate the use of force, by noting that "we will defend ourselves when necessary."<sup>60</sup> Their list of internal offenses provides that members can be punished for "targeting innocents," thus implying they will engage with what they perceive to be enemy combatants.<sup>61</sup> The Three Percenters end their by-laws with the Latin phrase, "Sic Semper Tyrannis!" or "Thus Always To Tyrants!"<sup>62</sup>

The Three Percenters encourage training and education in areas that are commensurate with military training. They emphasize the importance of physical readiness and encourage members to hone their skills in firearm safety, marksmanship, advanced tactics, radio operations, first aid, and land navigation.<sup>63</sup> Additionally, the National Council's website carried links to online vendors selling tactical gear, including trauma kits and supplies to treat gunshot wounds, communications equipment, and various scopes and sights for firearms.

The Three Percenters ask all of their members to swear to one of two oaths that are reminiscent of a military oath. They have a standard oath for members that is closely aligned to the U.S. Army's Oath of Enlistment, except that the members swear to uphold the Three Percenters' "three principles," rather than swearing to obey orders of the President of the United States and superior officers.<sup>64</sup> Additionally, the Three Percenters ask their members affiliated with the military or law enforcement to take a specialized oath that includes promises to

not obey certain orders; this includes disobeying orders to disarm citizens; conduct subjectively illegal searches of citizens; impose subjectively unjustified martial law or a state of emergency; blockade cities; and infringe on citizens' rights to free speech, peaceful assembly, and to petition the government.<sup>65</sup> As of this writing, these same oaths can still be found online in state chapter by-laws.<sup>66</sup>

The Three Percenters also encourage their members to be politically engaged. In their mission statement, the Three Percenters emphasize the importance of educating their members on "the Constitution, political arena, [and] local laws . . ."<sup>67</sup> The organization lists several ways in which members can take action to be politically engaged, including organizing petitions to protest laws, executive actions, and orders they believe to be unconstitutional; participating in local, state, and federal elections; attending local meetings hosted by political candidates and incumbent officeholders; and organizing protests and counter-protests for or against political causes.<sup>68</sup>

Some advocacy organizations classify the Three Percenters as an anti-government militia movement.<sup>69</sup> Although the Anti-Defamation League (ADL) acknowledges that Three Percenters-affiliated organizations sometimes form non-paramilitary groups and online networks, they also create and join traditional militia-style groups.<sup>70</sup> The ADL roots the organization's origin in the "New World Order" conspiracy beginning in the early 1990s. According to this conspiracy, the Federal Government is collaborating with worldwide governmental and nongovernmental organizations to strip U.S. citizens of their rights and freedom in order to be made subjects of a "New World Order."<sup>71</sup> The Three Percenters and similar organizations see it as their role to prevent this.

Last summer, Canada even went so far as to officially classify the Three Percenters as a terrorist organization.<sup>72</sup> In doing so, Canadian officials stated that Three Percenters-affiliated organizations pose a "significant threat" to Canadian domestic security and cited the 6 January 2021 U.S. Capitol insurrection as part of their motivation.<sup>73</sup>

For commands to successfully combat the threat of extremism in the ranks, they

must be aware of groups like the Three Percenters. This is essential in helping commanders begin to assess what, if any, action they can and should take. Commanders should analyze the Three Percenters and similar organizations using guidance on both political activities and extremist organizations.

### Political Activities

In advising commanders on their left and right limits in restricting political activities, JAs should look to two authorities—Department of Defense Directive (DoDD) 1344.10 and Army Regulation (AR) 600-20, paragraph 5-15.<sup>74</sup> These two authorities provide similar guidance, though AR 600-20 is more specific and restrictive. Active duty Soldiers may express their personal opinion on political candidates and issues, as long as they do it off-duty and not in uniform.<sup>75</sup> They may join both partisan and nonpartisan political clubs and attend meetings when not in uniform but cannot serve in an official capacity in a partisan political club.<sup>76</sup> Soldiers can also attend partisan and nonpartisan political rallies, debates, conventions, or other activities as a spectator (you got it—not in uniform).<sup>77</sup> However, Soldiers cannot officially participate at a partisan political rally, debate, or convention.<sup>78</sup> Official participation is any activity more than passive attendance as a spectator. Partisan political activity is defined as any activity supporting or relating to candidates or issues identified with national or state political parties or ancillary organizations.<sup>79</sup> Conversely, nonpartisan political activity is any activity supporting or relating to candidates or issues *not* identified with national or state political parties or ancillary organizations.<sup>80</sup> Soldiers may display a partisan or nonpartisan political bumper sticker on their private vehicle, but they cannot display a large partisan or nonpartisan political sign, banner, or poster on the top of their vehicle.<sup>81</sup>

So, how does this political activities framework inform the command's ability to address a potential member of the Three Percenters? The command can counsel the Soldier on partisan and nonpartisan political activities and order them to refrain from official participation in any partisan political event or activity that the Three

Percenters organize or execute.<sup>82</sup> The Three Percenters are not aligned with any one political candidate, party, or specific substantive issues tied to a candidate or party, so they are not a traditional partisan political organization. However, they seem to engage in a hybrid of partisan and nonpartisan political activities by encouraging their members to protest laws and executive actions, vote in elections, participate in protests and counter-protests, and attend local government meetings. Thus, it is incumbent on the Soldier, with the command's guidance, to monitor the specific activity and use this analytical framework in determining the authorized level of involvement.

However, the Three Percenters' political activities do not readily enable the command to order the Soldier to remove the sticker from his pickup truck. As mentioned, the sticker portrays the Three Percenters logo, along with the phrase "When tyranny becomes law, rebellion become duty." The sticker is on the vehicle's back window and is larger than a traditional bumper sticker. At first, this sticker may seem to fit into the category of prohibited sticker displays, since Soldiers cannot display large political stickers on their vehicles. However, this particular sticker does not represent any partisan or nonpartisan candidates or issues, and thus is not a prohibited political display.

The command can counsel the Soldier on partisan and nonpartisan political activities and help the Soldier determine their authorized activities based on this guidance. However, under the political activities regulations, they cannot order the sticker's removal. Given the Three Percenters' rhetoric, the command must also examine the organization using an extremist activity framework.

### Extremist Activities

The two main authorities to examine under the extremist framework are the newly-updated DoDI 1325.06 and AR 600-20, paragraph 4-12, dated 24 July 2020, current as of this writing.<sup>83</sup> The updated DoDI directs each Service to update its respective punitive regulation in order to implement its guidance "where necessary,"<sup>84</sup> and further states that this new guidance does not invalidate the Services' current policies or

punitive regulations.<sup>85</sup> On the same day that Secretary Austin announced the publication of the revised DoDI, the Under Secretary of Defense for Personnel & Readiness instituted a 19 January 2022 suspense for the Services to draft guidance implementing the revised DoDI and submit to his office.<sup>86</sup> It is unclear whether this will drive the Army to substantively change its definitions of active participation and extremist activities, because it appears that the DoDI was fortified using much of the language already included in AR 600-20, paragraph 4-12.<sup>87</sup> If JAs interpret any guidance between the revised DoDI and the current Army regulation to be in conflict, they must favor the DoDI over that of the Army regulation.<sup>88</sup>

The updated DoDI 1325.06 expands both the types of conduct considered active participation and the definition of extremist activities.<sup>89</sup> Three of the six extremist activities the DoDI sets forth relate to advocating or engaging in unlawful force or violence to achieve various goals: advocating or engaging in unlawful force, violence, or other means to deprive individuals of their constitutional or statutory rights,<sup>90</sup> advocating or engaging in unlawful force or violence to achieve political, religious, discriminatory, or ideological goals,<sup>91</sup> and advocating, engaging in, or supporting domestic or foreign terrorism.<sup>92</sup> The other three types of extremist activities do not require the contemplation of force or violence, but relate to illegal or unconstitutional actions towards individuals, classes, or governments: "[a]dvocating, engaging in, or supporting the overthrow of the government . . . by force or violence[,] or seeking to alter the form of the government by unconstitutional or other unlawful means[;]"<sup>93</sup> advocating or encouraging DoD personnel (including contractors and both civilian and military employees) to violate any Federal, State, Municipal, or Territorial laws, "or to disobey lawful orders or regulations, for the purpose of disrupting military activities . . . or personally undertaking the same[;]"<sup>94</sup> and "[a]dvocating widespread unlawful discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation."<sup>95</sup>

The current Army regulation defines extremist activities in nine different categories that largely capture the same conduct



contained in the DoD's revised definition,<sup>96</sup> but also includes two additional categories: expressing a duty to engage in violence against the DoD or the United States in support of a terrorist or extremist cause, and support for persons or organizations that promote or threaten the unlawful use of force or violence, or criminal activity.<sup>97</sup> These categories provide additional definitions beyond those in either the former or current version of DoDI 1325.06.<sup>98</sup>

The revised DoDI also expanded its definition of active participation to include fourteen categories of prohibited conduct towards extremist activities that covers advocacy, recruitment, fundraising, leadership, information-sharing, and more.<sup>99</sup> The definition restricts the level of attendance and engagement that personnel may have with extremist-related events, without a total prohibition. Department of Defense personnel may not *actively* demonstrate or rally in support of extremist activities, but may observe demonstrations or rallies as a spectator.<sup>100</sup> They also cannot “[attend] a meeting or activity with the knowledge that the meeting or activity involves extremist activities, *with the intent to support those activities,*” when the meeting is a breach of law and order, likely to result in violence, or attendance is prohibited by military order.<sup>101</sup> Otherwise, DoD personnel may attend these meetings.

The DoDI was also revised to reflect the age of social media. The guidance prohibits “posting, liking, sharing, re-tweeting, or otherwise distributing content” related to extremist activities if done with the intent to promote or endorse such activities.<sup>102</sup> Importantly for the truck sticker analysis below, DoDI 1325.06 also prohibits “[k]nowingly displaying paraphernalia, words, or symbols in support of extremist activities [or groups] that support extremist activities, such as flags, clothing, tattoos, and bumper stickers on or off a military installation.”<sup>103</sup> The guidance also includes a “catch-all” provision which prohibits knowingly taking any action in support of extremist activities when the conduct is prejudicial to good order and discipline or service-discrediting.<sup>104</sup>

Specifically prohibited active participation in AR 600-20, paragraph 4-12, similarly includes 1) “[p]articipating in public

demonstrations or rallies[;]” 2) attending a meeting knowing it involves an extremist cause “[w]hether on or off duty [and] [w]hether in or out of uniform [if] [i]t constitutes a breach of law and order[,] it is likely to result in violence[,]” or it violates a command’s order; 3) fundraising; 4) “recruiting or training members . . . ,” 5) assuming a leadership role; 6) distributing literature; 7) or “receiving financial assistance” from a person who engages in such activities.<sup>105</sup>

Though neither DoDI 1325.06 nor AR 600-20, paragraph 4-12, totally prohibit personnel from being members of or participating in extremist organizations and activities, they both authorize and encourage commanders to prohibit and order Service members from carrying out *any* activities that are contrary to the good order and discipline of the unit, or pose a threat to the health, safety, and security of military personnel or an installation, regardless of whether or not the conduct is a specifically prohibited activity.<sup>106</sup> As mentioned, the DoDI also includes a catch-all provision that prohibits taking any action in support of, or engaging in, extremist activities, when such conduct is prejudicial to good order and discipline or is service-discrediting.<sup>107</sup> The Army regulation similarly notes that *any* Soldier involvement with an extremist group, to include “membership, receipt of literature, or presence at an event,” could threaten good order and discipline and requires commanders to address this involvement, even where it is not specifically prohibited.<sup>108</sup>

Accordingly, JAs should advise commanders that the extremism guidance regulates Soldiers’ activities, whether or not the Soldiers are affiliated with a potential extremist organization. The attributes of organizations are indeed relevant, such as when determining if a commander should counsel a Soldier for “mere membership” in an organization, or if the Soldier’s involvement in an organization rises above mere membership. By emphasizing the Soldier’s activities, rather than simply an organization’s attributes, the regulatory framework ensures that commanders intervene in concerning situations involving Soldiers without any ties to any potentially extremist organizations.

In applying this and any forthcoming guidance to a real-life situation, JAs should

understand how the First Amendment of the U.S. Constitution’s protection of free speech and expression apply to members of the armed services.<sup>109</sup> Although this complex topic merits a separate article, the following is a brief overview of the key points to consider. Commanders and JAs should be particularly alert for constitutional issues when considering regulations and policies governing off-duty social media postings, as well as those prohibiting demonstrating or rallying in support of extremist activities (versus merely observing these events as a spectator).

Notably, the First Amendment does not protect military or civilian speech deemed by the courts to be dangerous, obscene, or fighting words.<sup>110</sup> Importantly though, the courts have imposed a less stringent standard for what constitutes dangerous speech in the military context.<sup>111</sup> Speech by military personnel is considered dangerous so as to be unprotected by the First Amendment if it “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, or morale of the troops.”<sup>112</sup> The updated DoDI 1325.06 recognizes these differing standards by noting that the policy prohibits certain activities that may be protected by the First Amendment in the civilian context.<sup>113</sup>

For speech not considered dangerous (or obscene or fighting words), the First Amendment applies, but its protection is “less comprehensive in the military context, given the different character of the military community and mission.”<sup>114</sup> In criminal cases, the U.S. Court of Appeals for the Armed Forces (CAAF) has held there must be a balance “between the essential needs of the armed services and the right to speak out as a free American.”<sup>115</sup> For example, in a case involving charges under Article 134, Uniform Code of Military Justice (UCMJ), the CAAF held that a “direct and palpable connection between the speech and military mission or military environment” is required to meet the Article 134 element requiring that the act prejudiced good order and discipline or brought discredit on the armed forces.<sup>116</sup> In other words, the military prosecutor must establish a tie between the speech in question and the military; otherwise, the CAAF would consider the speech

as constitutionally-protected and reject criminal sanctions under Article 134.

In civil cases, the legal progeny affords even less protection to military speech and more deference to military regulations and administrative actions that “place burdens on, or exact administrative consequences for speech, expression, and the exercise of religion that would not pass constitutional muster in the civilian context.”<sup>117</sup> For example, in *Brown v. Glines*,<sup>118</sup> the Air Force removed an officer from active duty for circulating petitions without his commander’s permission. The Court held that the regulation requiring permission did not violate the First Amendment because it restricted speech no more than reasonably necessary to protect the substantial governmental interest unrelated to suppression of free speech, that is, the interest of “maintaining the respect for duty and discipline that is essential to military effectiveness.”<sup>119</sup> The Court emphasized that the military commander “must have authority over the distribution of materials that could adversely affect [morale, discipline, and readiness].”<sup>120</sup> The regulatory framework places a tremendous responsibility on commanders to exercise “calm and prudent judgment” in balancing constitutional protections for freedom of expression with the maintenance of good order and discipline and national security.<sup>121</sup>

Commanders do possess the full range of disciplinary and administrative options in addressing substantiated active participation in extremist activities.<sup>122</sup> The framework also requires commanders to act when they receive a credible report of apparent extremist activities, even if it is unclear whether the Soldier is actively participating in prohibited conduct. Commanders must notify their servicing JA, the U.S. Army’s Criminal Investigation Division (CID) (or another Service’s counterpart), and potentially other military and civilian intelligence offices as needed.<sup>123</sup> They must also counsel the Soldier on the extremist policies.<sup>124</sup> Though commanders must assess whether a Soldier’s activities necessitate intervention, CID is ultimately responsible for identifying extremist organizations.<sup>125</sup> However, CID does not maintain a running list of organizations categorized as extremist.<sup>126</sup> Thus commanders should consult with their legal advisor when receiving information from any source about suspect-

ed extremist activities and when taking any action pursuant to DoDI 1325.06 and AR 600-20, paragraph 4-12.

Turning back to the example of the Three Percenter, the extremist framework provides the command both greater authority to restrict behavior and more autonomy in deciding whether to do so, than DoDD 1344.10’s political activities guidance does. Under the extremism regulations, the command can order the Soldier to remove the Three Percenter sticker from their private vehicle if they determine that its display jeopardizes the unit’s readiness, good order and discipline, morale, health, safety, or security, regardless of whether the Three Percenter can be considered extremist.

If the Soldier were to challenge this action on constitutional grounds, the courts would likely analyze whether the sticker interferes with the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale.<sup>127</sup> Even if the sticker did not present a clear danger, a court could still uphold the action if it restricted the Soldier’s speech no more than necessary to protect a substantial government interest such as unit morale, discipline, or readiness.<sup>128</sup> The Three Percenter and similarly-situated organizations attract polarizing opinions on the implications of their beliefs, values, and goals. This polarization, greatly amplified after the 6 January 2021 U.S. Capitol insurrection, can present risk to the unit from within. Soldiers’ strong opinions about the Three Percenter and similar organizations may cause distraction and internal tension and negatively affect good order and discipline, and communal morale.

There are also potential risks to the unit from outside the organization. In light of the current news cycle rhetoric about extremist and fringe organizations, the command may reasonably deem it prudent to require the sticker’s removal in order to preserve the unit’s perceived professionalism. Should the sticker remain on the Soldier’s truck, the public may, fairly or not, attribute the Three Percenter’s beliefs, values, and goals to the unit. Further, any indirect association between the Three Percenter and the unit, no matter how remote, could present a safety risk to the unit and to the installation.

The command could also determine that the Three Percenter possess enough attributes of an extremist organization to require further intervention. If so, they must, at a minimum, counsel the Soldier on the extremist policies and report their concerns to CID and their servicing judge advocate.

The Three Percenter could be considered an extremist organization that either: 1) expresses a duty to engage in violence against the DoD or United States in support of a terrorist or extremist cause under AR 600-20, paragraph 4-12a(6), or 2) encourages military or civilian personnel to violate laws or disobey lawful orders or regulations for the purpose of disrupting military activities under DoDI 1325.06, enclosure 3, paragraph 8c(1)(e), and AR 600-20, paragraph 4-12a(8).

The Three Percenter also possess troubling indicators of an organization that contemplates participating in activities that could precipitate the violent overthrow of the U.S. Government by force or violence or seeks to alter the form of government by unconstitutional means under DoDI 1325.06, enclosure 3, paragraph 8c(1)(d), and AR 600-20, paragraph 4-12a(9). However, they explicitly state that they do not want to implement their own government, overthrow the incumbent government, incite a revolution, or create violence. Similarly, the Three Percenter could be analyzed as an organization that advocates for the use of force or violence to achieve goals that are political, religious, discriminatory, or ideological under DoDI 1325.06, enclosure 3, paragraph 8c(1)(b), and AR 600-20, paragraph 4-12a(5). However, the group does not seem to advocate for blanket violence inasmuch as they contemplate hypothetical violence against the government, which will be discussed. They also do not seem to fit into any other category of extremism offered in DoDI 1325.06, enclosure 3, paragraph 8c(1) or AR 600-20, paragraph 4-12a.

### **A Duty to Use Violence Against the Government**

As stated, this definition is an additional category of extremism not included in either the former or current version of DoDI 1325.06.<sup>129</sup> Should any revisions to AR 600-20 remove this definition, this analysis can still illustrate how to think through these issues.

The Three Percenters openly express a duty to engage in violence against government entities in order to “rein in an overreaching government and push back against tyranny.”<sup>130</sup> They emphasize this perceived duty by declaring themselves “the last defense to protect the citizens and Constitution of the United States if there ever comes a day when our government takes up arms against ‘WE the People.’”<sup>131</sup> Though they categorize any hypothetical use of force as self-defense, they repeatedly affirm their mission throughout their by-laws. By contemplating taking up arms against one or more government entities—no matter how remote the possibility—the Three Percenters necessarily envision themselves as a non-State armed group engaged in hostilities against the government, making them hypothetical enemy belligerents.<sup>132</sup> A Soldier belonging to the Three Percenters in this scenario would have a dangerous conflict of interest and potentially be a national security threat.

However, it is unclear if the Three Percenters’ declared duty to engage in violence against the government is “in support of a terrorist or extremist cause” under AR 600-20, paragraph 4-12a(6). The regulation does not further define the term “terrorist.” The DoDI defines “terrorism” as “the unlawful use of violence or threat of violence, often motivated by religious, political, or other ideological beliefs, to instill fear and coerce individuals, governments, or societies in pursuit of terrorist goals.”<sup>133</sup> The Three Percenters’ articulated duty can reasonably be interpreted as an attempt to influence the government to refrain from enacting policy and passing laws that the Three Percenters deem to be overreaching or unconstitutional. Regardless of this prong’s ambiguity, the Three Percenters do plainly condone violence against the government in certain situations.

#### ***Encouraging Military Personnel to Disobey Orders***

The Three Percenters encourage military personnel to disobey orders that *they* perceive to be unlawful. They ask members who are current members of the military or civilian law enforcement to take a specialized oath disavowing certain future orders given to them in their military or

law enforcement capacity.<sup>134</sup> The Three Percenters imply that these hypothetical orders are unlawful, but there are likely scenarios in which they believe lawful orders to be unlawful.<sup>135</sup> They could then encourage military-affiliated members to disobey lawful orders should those orders conflict with the Three Percenters’ desired mission set. Thus, it is wholly inappropriate for a Soldier to swear to any oath inasmuch as it conflicts with the execution of their current or future military duties. Accordingly, under their inherent authority, the command could order the Soldier to refrain from swearing to the oath and to refrain from executing any task that may be inconsistent with their Oath of Enlistment or Office.<sup>136</sup>

The Three Percenters’ request for members to disobey certain orders can reasonably be said to be “for the purpose of disrupting military activities.”<sup>137</sup> In their hypothetical armed conflict, the Three Percenters would be fighting against the government, and they would necessarily want their military-affiliated members to break ranks, join their cause, and thus disrupt the government’s capability to fight back.

In summary, the command cannot order the Soldier to remove the Three Percenters sticker due to the organization’s political activities, but can order the Soldier to remove the sticker if they determine that its display risks the unit’s good order and discipline or health and welfare. The command can counsel the Soldier on both partisan and nonpartisan political activities and order the Soldier to refrain from official participation at any partisan political event. The command may also determine that the Three Percenters possess enough attributes of an extremist organization to require further intervention. If the command does make this determination, they must, at a minimum, counsel the Soldier on the extremist guidance, and report their concerns to CID. The command can also order the Soldier not to swear to any oath and or execute any task that may be inconsistent with their Oath of Enlistment or Office.

#### ***What’s Next?***

The analysis above illustrates how commanders and JAs alike should think through these issues when faced with a Soldier’s potential ties to an extremist organiza-

tion. There are also several areas where commanders and JAs can anticipate new developments.

#### ***Remaining CEAWG Recommendations***

Judge advocates can expect additional regulatory guidance, prevalence data, and training requirements stemming from the CEAWG’s additional recommendations contained in the December 2021 report. By 31 March 2022, the DoD will publish an updated DoDI 1438.06 with a definition of extremist activities applying to DoD civilian employees, to align closely with the definition applicable to Service members.<sup>138</sup> The DoD is also reviewing existing authorities to determine how best to provide notice to contractor personnel on prohibited extremist activities.<sup>139</sup> The DoD is further developing a comprehensive training and education plan based on the new definitions of extremist activities and active participation contained in revised DoDI 1325.06, to include targeted trainings for certain personnel, including legal advisors.<sup>140</sup> Finally, the Institute for Defense Analyses (IDA), chartered by the DoD to conduct the study, will issue a final report in June 2022 on extremist activity across the force.<sup>141</sup> The final report will include recommendations pertaining to military, civilian, and contractor personnel.<sup>142</sup>

#### ***Proposed UCMJ Article Prohibiting Extremism***

Secretary Austin also directed the CEAWG to explore whether to amend the UCMJ to explicitly criminalize extremism—a measure that Congress has also debated.<sup>143</sup> The FY22 NDAA directed Secretary Austin to submit a report to Congress within 180 days containing “such recommendations as the Secretary considers appropriate with respect to the establishment of a separate [UCMJ article], on violent extremism.”<sup>144</sup> Stakeholders have diverse opinions on whether this is a needed change. Many believe that the current UCMJ articles already cover prohibited conduct.<sup>145</sup> Notably, the CEAWG’s December 2021 report does not include any analysis on this issue.<sup>146</sup>

#### ***Social Media***

The DoD’s updated guidance on social media and online conduct in DoDI 1325.06

garnered a lot of public attention.<sup>147</sup> The July 2020 revision of AR 600-20 also contains a robust new cyber extremism section.<sup>148</sup> The Army regulation is more tailored than the DoDI social media provision, but it also prohibits a wide range of online activities to include the promoting a meeting or activity via social media with the knowledge that event involves an extremist cause.<sup>149</sup> Commentators have suggested that these regulations provide commanders too much discretion to decide when a social media post violates these regulations.<sup>150</sup> According to DoD spokesperson John Kirby, DoD is not monitoring accounts; rather the new regulation allows DoD to act when a prohibited online activity comes to light through various streams of reporting.<sup>151</sup> On a related note, DoD has received recommendations to use artificial intelligence and machine learning technology to analyze extremists' online targeting of military personnel, which raises privacy and due process concerns.<sup>152</sup> Thus, despite assurances that the DoD is not conducting widespread monitoring of social media accounts, JAs and commanders should certainly expect continued tension between the military's prerogative to protect good order and discipline, and security, and troops' constitutional rights.

### **Larger Implications: Extremism and the Other "Corrosives"**

It is not lost on stakeholders that the U.S. Capitol insurrection and subsequent increased attention to military extremism came on the heels of the 6 November 2020 Report of the Fort Hood Independent Review Committee.<sup>153</sup> That report found that the command climate at Fort Hood had been permissive of sexual assault and sexual harassment, and that the Army Sexual Harassment/Assault Response and Prevention (SHARP) program is structurally flawed.<sup>154</sup> Moreover, 54 percent of respondents expressed concerns about the treatment of women and minorities in the Army.<sup>155</sup> Many survey respondents volunteered information about the prevalence of racism and sexism, even when the survey had not specifically requested that data.<sup>156</sup>

In the extremism stand-down order, Secretary Austin specifically linked racism, sexism, and extremism by stating that DoD

personnel "deserve an environment free of discrimination, hate, and harassment."<sup>157</sup> In response to the Fort Hood report, the Fort Bliss commanding general initiated Operation Ironclad "to care for our people and preserve readiness" by eliminating the "three corrosives of Sexual Harassment and Sexual Assault; suicide; and extremist speech, behavior, and activities."<sup>158</sup> The connections between EO, SHARP, and extremism concerns within the Army are also evident in how AR 600-20 ties the definition of extremism to equal opportunity (EO) protections.<sup>159</sup> The connections are also evidenced by the recent push to rename military installations named for Confederate generals.<sup>160</sup> In 9 July 2020 remarks to Congress, Chairman of the Joint Chiefs of Staff General Mark Milley directly linked the effort to rename bases named after officers who "turned their back on their oaths" and "committed treason" to the need to eliminate symbols and manifestations of racism and discrimination from the armed forces.<sup>161</sup> In developing and promulgating additional initiatives to combat extremism, DoD leadership will likely also consider how potential programs could also address SHARP and EO concerns.

### **Conclusion**

The DoD will continue to face challenges as this problem's scope is more informed by data and feedback. The updated guidance still does not identify any specific groups as extremist and allows participation with extremist activities up to certain prohibited thresholds, which troops and commanders may struggle to identify.<sup>162</sup> Nevertheless, the highest levels of leadership were tracking the issue of military extremism years ahead of the U.S. Capitol insurrection, and continue to do so now. Extremism is as much an American problem as it is a military problem. An optimistic view is that the military is leading the way in addressing and, hopefully, preventing these corrosive behaviors. A realistic view is that our Army, our military, and our country should expect to grapple with the many aspects of these difficult issues for years to come.

Regardless of whether the command ordered the Soldier to remove the Three Percenters sticker, regardless of whether the Soldier displaying Three Percenters

sticker can be considered active participation in an extremist activity under DoD and DA policy, and regardless of whether the Three Percenters' subordinate chapters survive the next news cycle, this analysis can serve as a playbook for assessing similar organizations and activities and their proximity to our Army. Current DoD and DA guidance gives commanders both immense responsibility to examine these activities and latitude in assessing whether action is needed. Crucially, the guidance directs commanders to intervene and counsel Soldiers even if the observed behavior does not violate the extremism provisions. Recognizing warning signs and engaging in an open discussion with Soldiers is an important prevention strategy. In contrast, choosing not to engage could exacerbate a Soldier's isolation and alienation, which could drive future, more dangerous extremist activities. Because of this, it is all the more important to facilitate some semblance of consistency, predictability, and fairness in the application of these principles across the force. Hopefully, Service members and leaders alike share ideas not only to root out dangerous behavior, but also to learn from those having differing opinions. **TAL**

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### **Notes**

1. Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Stand-Down to Address Extremism in the Ranks (5 Feb. 2021) [hereinafter Extremism Stand-Down Memorandum].
2. See generally *The Capitol Siege: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Jan. 21, 2022, 4:53 PM), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories#database>.
3. See U.S. DEP'T OF DEF. INSTR. 1325.06, HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (27 NOV. 2009) (C2, 20 Dec. 2021) [hereinafter DoDI 1325.06]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (24 July 2020) [hereinafter AR 600-20].
4. U.S. DEP'T OF JUST. & U.S. DEP'T OF HOMELAND SEC., DOMESTIC TERRORISM: DEFINITIONS, TERMINOLOGY, AND METHODOLOGY 2 (2020).

5. *Id.*
6. OFF. OF THE DIR. OF NAT'L INTEL., (U) DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 (2021), <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.
7. See DoDI 1325.06, *supra* note 3; AR 600–20, *supra* note 3, para. 4–12. See also U.S. DEP'T OF ARMY, VIOLENT EXTREMISM GUIDE FOR ARMY LEADERS AND ARMY SECURITY PROFESSIONALS (2020) (providing additional definitions and discussions of extremism and related terms).
8. DoDI 1325.06, *supra* note 3, encl. 3, para. 8; AR 600–20, *supra* note 3, para. 4–12.
9. Jaclyn Diaz, *Members of Right-Wing Militias, Extremist Groups Are Latest Charged in Capitol Siege*, NPR (Jan. 19, 2021, 5:54 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/19/958240531/members-of-right-wing-militias-extremist-groups-are-latest-charged-in-capitol-si>.
10. See AR 600–20, *supra* note 3, para. 4–12e(2)–(3). The U.S. Army's Criminal Investigation Division is responsible for identifying extremist organizations and activities, but they do not currently maintain a by-name list of such organizations.
11. Mark Satter, *Divide over Scope of Military's Extremism Problem Impedes Culture, Policy Changes*, ROLL CALL (May 20, 2010, 5:30 AM), <https://www.rollcall.com/2021/05/20/divide-over-scope-of-militarys-extremism-problem-impedes-culture-policy-changes>; See also Kyle Rempfer, *The Army Doesn't Know How Many Extremists It Has Booted*, ARMY TIMES (Feb. 19, 2021), <https://www.armytimes.com/news/your-army/2021/02/19/the-army-doesnt-know-how-many-extremists-it-has-booted>.
12. U.S. DEP'T OF DEF., REPORT ON COUNTERING EXTREMIST ACTIVITY WITHIN THE DEPARTMENT OF DEFENSE 8 (2021), <https://media.defense.gov/2021/Dec/20/2002912573/-1/-1/0/REPORT-ON-COUNTERING-EXTREMIST-ACTIVITY-WITHIN-THE-DEPARTMENT-OF-DEFENSE.PDF> [hereinafter CEA WG REPORT]. See also INSPECTOR GEN., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE PROGRESS ON IMPLEMENTING FISCAL YEAR 2021 NDAA SECTION 554 101 REQUIREMENTS INVOLVING PROHIBITED ACTIVITIES OF COVERED ARMED FORCES (2021), <https://media.defense.gov/2021/Dec/02/2002902153/-1/-1/1/DODIG-2022-042.PDF> [hereinafter DoD IG REPORT].
13. CEA WG REPORT, *supra* note 12, at 8.
14. DoD IG REPORT, *supra* note 12, at 4.
15. *Id.*
16. *Id.* at 7.
17. *Id.* at 6–7.
18. *Id.* at 7.
19. *Id.* at 4, 6.
20. Leo Shane III, *Signs of White Supremacy, Extremism up Again in Poll of Active-Duty Troops*, MIL. TIMES (Feb. 6, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops>.
21. Leo Shane III, *One in Four Troops Sees White Nationalism in the Ranks*, MIL. TIMES (Oct. 23, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/10/23/military-times-poll-one-in-four-troops-sees-white-nationalism-in-the-ranks>.
22. *Id.*
23. Tom Bowman, *Defense Official: Scores of Current and Former Military Probed in Extremism*, NPR (Jan. 15, 2021, 8:07 PM), <https://www.npr.org/2021/01/15/957503046/defense-official-scores-of-current-and-former-military-probed-in-extremism-cases>.
24. *Id.*
25. A.C. Thompson & Ali Winston, *U.S. Marine to Be Imprisoned over Involvement with Hate Groups*, PROPUBLICA (June 20, 2018, 4:13 PM), <https://www.propublica.org/article/vasilios-pistolis-imprisoned-marine-hate-groups>.
26. *Id.* See also A.C. Thompson et al., *Ranks of Notorious Hate Group Include Active-Duty Military* (May 3, 2018), <https://www.pbs.org/wgbh/frontline/article/ranks-of-notorious-hate-group-include-active-duty-military>.
27. Pete Williams, *White Supremacist Coast Guard Officer Sentenced to 13 Years in Prison*, NBC NEWS (Jan. 31, 2020, 5:46 PM), <https://www.nbcnews.com/news/us-news/white-supremacist-coast-guard-officer-sentenced-13-years-prison-n1127636>.
28. Paul Szoldra, *These Are the Faces of Extremism in the Military*, TASK & PURPOSE, <https://taskandpurpose.com/news/us-military-extremism/> (Apr. 23, 2021, 4:47 PM).
29. Christopher Mathias, *After HuffPost Investigation, 4 White Nationalists out of U.S. Military—But Others Allowed to Remain*, HUFFPOST (Aug. 7, 2019, 6:39 PM), [https://www.huffpost.com/entry/white-nationalists-military-kicked-out-huffpost-investigation\\_n\\_5d4b0f83e4b0066eb70b9945](https://www.huffpost.com/entry/white-nationalists-military-kicked-out-huffpost-investigation_n_5d4b0f83e4b0066eb70b9945).
30. National Defense Authorization Act for the Fiscal Year 2020, Pub. L. No. 116–92, §530, 133 Stat. 1198, 1358 (2019).
31. ANDREE E. ROSE ET AL., OFF. OF PEOPLE ANALYTICS, LEVERAGING FBI RESOURCES TO ENHANCE MILITARY ACCESSIONS SCREENING AND PERSONNEL SECURITY VETTING (2020), in OFF. OF THE UNDER SEC'Y OF DEF. FOR PERS. & READINESS, REPORT TO ARMED SERVICES COMMITTEES ON SCREENING INDIVIDUALS WHO SEEK TO ENLIST IN THE ARMED FORCES (2020) [hereinafter PENTAGON REPORT]. The report recommended that the DoD should use the FBI's database to analyze questionable tattoos; provide an unclassified version of the FBI's training on extremism; create a Federal Government-wide definition of domestic extremism; have the DoD's Accessions Policy join the Publicly Available Electronic Information Group; update the government form used for background checks; and add a military separation code for domestic extremism. *Id.* The DoD has begun to implement all but the last recommendation, which it is reviewing. *Id.* See also CEA WG Report, *supra* note 12, generally.
32. See Tom Bowman, *Capitol Riot Prompts a Reckoning over Extremism in the Ranks*, NPR (Feb. 10, 2021, 5:09 AM), <https://www.npr.org/2021/02/10/965951696/capitol-riot-prompts-a-reckoning-over-extremism-in-the-ranks>. See also Todd South, *Extremism in the Ranks is a "Threat," but the Pentagon's Not Sure How to Address It*, MIL. TIMES (Feb. 21, 2021), <https://www.militarytimes.com/news/your-military/2021/02/21/extremism-in-the-ranks-is-a-threat-but-the-pentagons-not-sure-how-to-address-it>.
33. Eleanor Watson & Robert Legare, *Over 80 of Those Charged in the January 6 Investigation Have Ties to the Military*, CBS NEWS (Dec. 15, 2021, 6:32 PM), <https://www.cbsnews.com/news/capitol-riot-january-6-military-ties/>.
34. DANIEL MILTON & ANDREW MINES, "THIS IS WAR": EXAMINING MILITARY EXPERIENCE AMONG THE CAPITOL HILL SIEGE PARTICIPANTS (2021). As noted by Milton and Mines, there are several possible explanations for why there were so few currently serving personnel as opposed to prior service. According to their report, the potential reasons include "lack of interest, logistical hurdles, or the deterrent effect of current military policies" including DoDI 1325.06 and the Uniform Code of Military Justice. *Id.* at 22.
35. Ryan Lucas, *Active-Duty Marine Corps Major Charged in Capitol Riot*, NPR (May 13, 2021, 3:48 PM), <https://www.npr.org/2021/05/13/996602525/active-duty-marine-corps-major-charged-in-capitol-riot>; *The Capitol Siege: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR: ALL THINGS CONSIDERED, <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (Aug. 13, 2021, 11:51 AM). See also Meryl Kornfield, *Alleged Capitol Rioter That Grew "Hitler" Mustache Still Active in Army*, WASH. POST (March 15, 2021, 1:12 PM), <https://www.washingtonpost.com/nation/2021/03/14/army-nazi-sympathizer-capitol-riot/>.
36. *The Capitol Siege*, *supra* note 2.
37. MILTON & MINES, *supra* note 34, at 8.
38. Extremism Stand-down Memorandum, *supra* note 1.
39. Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Immediate Actions to Counter Extremism in the Department and the Establishment of the Countering Extremism Working Group (9 Apr. 2021) [hereinafter SecDef April Memorandum].
40. *Id.*
41. Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Countering Extremist Activities within the Department of Defense (20 Dec. 2021) [hereinafter Countering Extremist Activities Memorandum]; CEA WG REPORT, *supra* note 12. See also David Vergun, *DOD Issues Guidance on Plans to Counter Extremist Activity in the Force*, DoD NEWS (Dec. 20, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2880115/dod-issues-guidance-on-plans-to-counter-extremist-activity-in-the-force/>.
42. Countering Extremist Activities Memorandum, *supra* note 41; DoDI 1325.06, *supra* note 3.
43. Countering Extremist Activities Memorandum, *supra* note 41.
44. CEA WG REPORT, *supra* note 12, at 11.
45. *Id.* at 12.
46. *Id.*
47. *Id.*
48. *Id.* at 13.
49. *Id.* at 14.
50. *Id.*
51. *Id.*
52. Three Percenters, *The Three Percenters—Original—National By-Laws: A Guide to Being a Three Percenter 7* (2020), <https://www.milsuite.mil/book/thread/257251> (log-in required to access this source) [hereinafter National By-Laws].
53. *Id.* at 9.

54. Tess Owen, *This Three Percenter Militia Group Just Cancelled Itself Because of the Capitol Riots*, VICE: NEWS (Feb. 26, 2021, 4:02 PM), <https://www.vice.com/en/article/3anmkv/this-three-percenter-group-just-cancelled-itself-because-of-the-capitol-riots>. The National Council claimed that their organization was misunderstood and that subordinate chapters held different values and morals.

55. The website was previously found at the following URL: <https://thethreepercenters.org>. See National By-Laws, *supra* note 52.

56. See National By-Laws, *supra* note 52.

57. See, e.g., California Three Percenters, Bylaws and Standard Operating Procedures (June 28, 2018), <https://www.californiathreepercenters.org/our-by-laws>; Washington 3%, The Washington State Three Percenters, Bylaws (n.d.), <https://wa3percent.org/index.php/laws>.

58. National By-Laws, *supra* note 52, at 8.

59. *Id.*

60. *Id.*

61. *Id.* at 31.

62. *Id.* at 43.

63. *Id.* at 36.

64. *Id.* at 9. The full oath is:

We ask all Three Percenters to take and keep the following oath under any and all circumstances: "I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same. I swear (or affirm) to uphold the three principles of a Three Percenter: have moral strength, be physically ready, and no first use of force."

*Id.*

65. *Id.* at 10. The by-laws continue:

Any member who is prior or current military/law enforcement should always remember, reflect, and abide by the sworn oath they took. We also propose that these individuals who are current military and/or law enforcement take and keep the following oath from the Oath Keepers organization under any and all circumstances:

1. I will NOT obey orders to disarm the American people.

2. I will NOT obey orders to conduct illegal searches of the American people.

3. I will NOT obey orders to detain American citizens as "unlawful enemy combatants" or to subject them to military tribunal.

4. I will NOT obey orders to impose unjustified martial law or a "state of emergency" on a state.

5. I will NOT obey orders to invade and subjugate any state that asserts its sovereignty.

6. I will NOT obey any order to blockade American cities and thus turning them into giant concentration camps/civilian war zones.

7. I will NOT obey any order to force American citizens into any form of detention camps under ANY pretext.

8. I will NOT obey orders to assist or support the use of any foreign troops on U.S. soil

against the American people to "keep the peace" or to "maintain control.

9. I will NOT obey any orders to confiscate the property of the American people, including food and other essential supplies.

10. I will NOT obey any orders which infringe on the right of the people to free speech, to peaceably assemble, and to petition their government for a redress of grievances.

*Id.* at 9–10.

66. See, e.g., California Three Percenters, *supra* note 57; Washington 3%, *supra* note 57.

67. National By-Laws, *supra* note 52, at 7.

68. *Id.* at 37.

69. See *Three Percenters*, ADL, <https://www.adl.org/resources/backgrounders/three-percenters> (last visited Jan. 9, 2022); *Antigovernment Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment> (last visited Jan. 9, 2022).

70. *Three Percenters*, *supra* note 69.

71. *Id.*

72. David Ljunggren, *Canada Puts U.S. Three Percenters Militia on Terror List, Cites Risk of Violent Extremism*, REUTERS, <https://www.reuters.com/world/americas/canada-puts-us-right-wing-three-percenters-militia-group-terror-list-2021-06-25/> (June 25, 2021, 10:57 AM).

73. *Id.*

74. See AR 600-20, *supra* note 3, ch. 5; see also U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (19 Feb. 2008).

75. AR 600-20, *supra* note 3, para. 5-15a(1)(a).

76. *Id.* para. 5-15a(1)(c).

77. *Id.* app. B-2i.

78. *Id.* app. B-3a.

79. *Id.* glossary, sec. II.

80. *Id.* glossary, sec. II.

81. *Id.* app. B-2h, B-3k.

82. The Soldier may attend a partisan political event as a passive spectator when not in uniform.

83. DoDI 1325.06, *supra* note 3; AR 600-20, *supra* note 3, para. 4-12.

84. DoDI 1325.06, *supra* note 3, at para. 4b(1).

85. *Id.* at para. 7b.

86. Memorandum from Under Sec'y of Def. to Secretaries of the Military Depts. et al., subject: Implementing of Change 2 to Department of Defense Instruction 1325.06, "Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces" (20 Dec. 2021).

87. See DoDI 1325.06, *supra* note 3; AR 600-20, *supra* note 3, para. 4-12.

88. U.S. DEP'T OF ARMY, REG. 25-30, ARMY PUBLISHING PROGRAM para. 2-1c (14 June 2021).

89. DoDI 1325.06, *supra* note 3, encl. 3, para. 8c.

90. *Id.* para. 8c(1)(a).

91. *Id.* para. 8c(1)(b).

92. *Id.* para. 8c(1)(c). The DoDI further defines terrorism in the glossary as: "The unlawful use of violence or threat of violence, often motivated by religious, political, or other ideological beliefs, to instill fear and coerce individuals, governments or societies in pursuit of terrorist goals." *Id.*

93. *Id.* para. 8c(1)(d).

94. *Id.* para. 8c(1)(e).

95. *Id.* para. 8c(1)(f).

96. The DoD's expansion of its definition of extremist activities is an instance of the proverbial tail wagging the dog, as its definition is now a closer reflection of the definition that the Army had already promulgated.

97. AR 600-20, *supra* note 3, para. 4-12a.

98. See U.S. DEP'T OF DEF. INSTR. 1325.06, HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (27 Nov. 2009) (C1, 22 Feb. 2012) [hereinafter 2012 DoDI 1325.06]; See also DoDI 1325.06, *supra* note 3, encl. 3; AR 600-20, *supra* note 3, para. 4-12a.

99. See DoDI 1325.06, *supra* note 3, encl. 3, para. 8c(2)(a)–(n).

100. *Id.* para. 8c(2)(g).

101. *Id.* para. 8c(2)(h) (emphasis added).

102. *Id.* para. 8c(2)(m).

103. *Id.* para. 8c(2)(l).

104. *Id.* para. 8c(2)(n).

105. *Id.* para. 4-12b. Soldiers also may not attend extremist meetings if they are in a foreign country or violate off-limits restrictions. *Id.* para. 4-12b(2)(c), (f).

106. DoDI 1325.06, *supra* note 3, encl. 3, para. 9a; AR 600-20, *supra* note 3, para. 4-12c. Both publications articulate examples such as an order to remove flags, posters, or other displays, and an order making areas or activities off-limits if any of the aforementioned conditions are satisfied.

107. DoDI 1325.06, *supra* note 3, encl. 3, para. 8c2(n).

108. AR 600-20, *supra* note 3, para. 4-12e.

109. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Its protection extends to expression of ideas even those "the vast majority of society finds offensive or distasteful." *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (citing *Virginia v. Black*, 538 U.S. 343, 358 (2003)).

110. *Wilcox*, 66 M.J. at 447 (citing *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)).

111. *Id.* at 448 (citing *Brown*, 45 M.J. at 395).

112. *Id.* (citing *Brown*, 45 M.J. at 395). Compare this with the civilian standard, whether "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)). See also *Brandenburg v. Ohio*, 395 U.S. 444, 447(1969) (defining the civilian clear and present danger standard as speech "directed to inciting or producing imminent lawless action . . . likely to incite or produce such action."). In line with this distinction, the newly updated DoDI 1325.06 notes that the military can prohibit extremist activities that courts would likely consider constitutionally-protected activities for civilians. DoDI 1325.06, encl. 3, para. 8.

113. DoDI 1325.06, *supra* note 3, encl 3, para. 8a.
114. *Wilcox*, 66 M.J. at 446 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974); *United States v. Priest*, 45 C.M.R. 338, 344–46 (1972); *United States v. Gray*, 42 C.M.R. 255, 258 (1970)).
115. *Wilcox*, 66 M.J. at 447 (citing *Priest*, 45 C.M.R. at 344–46).
116. *Id.* at 448 (citing *Priest*, 45 C.M.R. at 343) (discussing UCMJ art. 134 (1950)).
117. *Id.*
118. *Brown v. Glines*, 444 U.S. 348 (1980).
119. *Id.* at 354–58.
120. *Id.*
121. DoDI 1325.06, *supra* note 3, para. 3.
122. See DoDI 1325.06, *supra* note 3, encl. 3, para. 9b; AR 600-20, *supra* note 3, para. 4-12d.
123. See DoDI 1325.06, *supra* note 3, encl. 3, para. 9d; AR 600-20, *supra* note 3, para. 4-12e–f.
124. AR 600-20, paragraph 4-12e, requires commanders to inform Soldiers that 1) any participation in extremist organizations or activities will result in being reported to law enforcement authorities and 2) CID has the responsibility to identify extremist organizations. Commanders should arrange equal opportunity policy training, and advise Soldiers on the wide-ranging potential consequences of participation in extremist organizations and activities, to include possible reclassification or bar to continued service as well as potential impact on evaluations, consideration for leadership positions, access to information technology systems, and security clearance determinations. DoDI 1325.06, enclosure 3, paragraph 9c, encourages commanders to intervene early and counsel their Service members, but does not mandate it.
125. AR 600-20, *supra* note 3, para. 4-12e(2).
126. *Id.* para. 4-12e(2)–(3). The Criminal Investigation Division does not disseminate a public list of extremist organizations. They also will likely not open an investigation unless they have some evidence the Soldier is engaging in a prohibited activity; thus, mere display of a sticker will not likely trigger an investigation.
127. See *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008).
128. See *Brown v. Glines*, 444 U.S. 348, 354–58 (1980). See also *Wilcox*, 66 M.J. at 448.
129. See 2012 DoDI 1325.06, *supra* note 98; DoDI 1325.06, *supra* note 3, encl. 3; AR 600-20, *supra* note 3, para. 4-12a(6).
130. National By-Laws, *supra* note 52, at 8.
131. *Id.* at 9.
132. See OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (12 June 2015) (C3, 13 Dec. 2016).
133. DoDI 1325.06, *supra* note 3, glossary. Similarly, the U.S. Code defines domestic terrorism as “activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.” 18 U.S.C. § 2331 (LEXIS through PL 116-282, approved 12/31/20).
134. As mentioned, this oath includes promises to disavow future orders to “disarm the American people,” “conduct illegal searches of the American people,” “impose unjustified martial law or a ‘state of emergency’ on a state,” “invade and subjugate any state that asserts its sovereignty,” and “blockade American cities and thus turning them into giant concentration camps/civilian war zones.” National By-Laws, *supra* note 52, at 9–10.
135. Articles 91 and 92 of the Uniform Code of Military Justice (UCMJ) note that an order is inferred to be lawful and is only unlawful if unconstitutional, contrary to other law or lawful superior orders, or beyond the authority of the issuer. UCMJ art. 91 (1950); UCMJ art. 92 (1950). If lawfulness is in question, a military judge makes the determination. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16c.(2)(a) (ii) (2019). Any refusal to execute a lawful order could result in a violation of Articles 91, 92, or 94 of the UCMJ. UCMJ art. 91 (1950); UCMJ art. 92 (1950); UCMJ art. 94 (1950).
136. The revised DoDI also specifically notes that extremist activities are inconsistent with the responsibilities and obligations of military service, as well as the oaths of office and enlistment... DoDI 1325.06, *supra* note 3, encl. 3, para. 8a.
137. See DoDI 1326.06, *supra* note 3, encl. 3, para. 8c(1) (e); AR 600-20, *supra* note 3, para. 4-12a(8).
138. CEAWG REPORT, *supra* note 12, at 16.
139. *Id.* at 17.
140. *Id.* at 16.
141. *Id.* at 14. To date, the Institute for Defense Analyses (IDA) has reviewed DoD policies and data and consulted with experts from across and outside the government. The IDA’s review also included “DoD information-collection systems and data, approaches used for other forms of violence by other federal agencies, and behavioral pathways to extremist activity.” *Id.*
142. *Id.* at 14.
143. See SecDef April Memorandum, *supra* note 39; KRISTY KAMARCK, CONG. RSCH. SERV., IN 11779, FY2022 NDAA: EXTREMISM IN THE MILITARY (2021).
144. National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81, § 549M (2021) (Recommendations on separate punitive article in the Uniform Code of Military Justice on violent extremism).
145. Eugene R. Fidell & Lieutenant Colonel (Retired, U.S. Air Force) Rachel VanLandingham, *Military Personnel and the Putsch at the U.S. Capitol*, JUST SEC. (Jan. 13, 2021), <https://www.justsecurity.org/74165/military-personnel-and-the-putsch-at-the-u-s-capitol/>. See also AR 600-20, para. 4-12 d (listing six UCMJ articles as potential options for dealing with a Soldier’s violation of extremism-related prohibitions).
146. See generally CEAWG REPORT, *supra* note 12.
147. See, e.g., Helene Cooper, *Pentagon Updates Its Rules on Extremism in the Military* N.Y. TIMES (December 20, 2021), <https://www.nytimes.com/2021/12/20/us/politics/pentagon-military-extremism-rules.html>.
148. AR 600-20, *supra* note 3, para. 4-12h.
149. *Id.*
150. A Martinez, *The Pentagon Is Taking Steps to Stop Extremism Within Its Ranks*, NPR (Dec 21, 2021, 5:16 AM) <https://www.npr.org/2021/12/21/1066169829/the-pentagon-is-taking-steps-to-stop-extremism-within-its-ranks>; Kat Stafford & James LaPorta, *Decades of DOD Efforts Fail to Stamp Out Bias, Extremism*, AP NEWS (Dec. 29, 2021), <https://apnews.com/article/business-donald-trump-lloyd-austin-veterans-arrests-aa564fe473dd4c347189bb39ad8a9201>.
151. See Cooper, *supra* note 147.
152. Marek N. Posard et al., Rand Corp, *Reducing the Risk of Extremist Activity in the U.S. Military 12* (2021), <https://www.rand.org/pubs/perspectives/PEA1447-1.html>.
153. CHRISTOPHER SWECKER ET AL., FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE (2020).
154. *Id.* at iii.
155. *Id.* at 121.
156. SWECKER ET AL., *supra* note 152.
157. See *Extremism Stand-Down Memorandum*, *supra* note 1.
158. Lieutenant Colonel Allie Payne, *Ft. Bliss Announces “Operation Ironclad” to Fight Sexual Harassment, Sexual Assault, Extremism, Racism and Suicide*, EL PASO HERALD-POST (Feb. 24, 2021) <https://elpaso-heraldpost.com/ft-bliss-announces-operation-ironclad-to-fight-sexual-harassment-sexual-assault-extremism-racism-and-suicide>.
159. See AR 600-20, *supra* note 3, para. 4-12.
160. AR 600-20, *supra* note 3, para. 4-12. See National Defense Authorization Act for the Fiscal Year 2021, Pub. L. No. 116-283, § 370, 134 Stat. 3388 (2021). David A. Bryant, *Commission to Rename Installations Named After Confederates to Meet in March*, KILLEEN DAILY HERALD (Feb. 28, 2021), [https://kdhnews.com/commission-to-rename-installations-named-after-confederates-to-meet-in-march/article\\_edab6902-7962-11eb-bac5-7fe993128943.html](https://kdhnews.com/commission-to-rename-installations-named-after-confederates-to-meet-in-march/article_edab6902-7962-11eb-bac5-7fe993128943.html).
161. Helene Cooper *Milley Calls for “Hard Look” at Renaming Bases Honoring Confederates*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/politics/milley-trump-confederate-base-names.html>. See also David Petraeus, *Take the Confederate Names off Our Army Bases*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/06/take-confederate-names-off-our-army-bases/612832/#correction%201> (June 9, 2020, 11:43 AM) (noting that Henry L. Benning argued for dissolution of the union and formation of a Southern slavocracy, John Brown Gordon was likely one first leaders of the Ku Klux Klan, and the “irony of training at bases named for those who took up arms against the United States, and for the right to enslave others . . .”).
162. DoDI 1325.06, *supra* note 3, encl. 3, para 8c; Karoun Demirjian, *The Pentagon Vowed to Confront Extremism in the Ranks. A year After Jan. 6, Experts Say More Must Be Done*, WASH. POST (Jan. 5, 2022), <https://washingtonpost.com/national-security/2022/01/05/january-6-military-extremism/>.



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## Practice Notes

# Civilian Casualties

### Practical Application of the Law of Prevention and Response

*By Lieutenant Colonel Peter C. Combe II*

Prevention of, and response to, civilian casualties during an armed conflict has garnered significant attention in the past several years. This has ranged from negative public opinion surrounding civilian casualties caused during U.S. military operations,<sup>1</sup> to academic discussion of the law surrounding protection of civilians—including whether, and how, Department of Defense (DoD) efforts fall short.<sup>2</sup> Additionally, highly respected non-governmental organizations (NGO) have lauded the efforts of the Congressional Armed Services Committees to improve reporting, oversight of, and response to civilian casualties, while at the same time request-

ing that Congress strengthen existing statutorily-required reporting requirements.<sup>3</sup>

While highlighting some of this substantive law, this article seeks to elucidate gaps or inconsistencies in the applicable law and policy with which the judge advocate (JA) must contend in the practice of operational law. This article begins with a brief discussion of the domestic legal and policy framework governing the DoD's efforts to prevent and respond to civilian casualties. From there, it follows a discussion of the legal and policy gaps most frequently encountered at the Joint Task Force level and some of the



practical ways in which the JA may address those gaps or inconsistencies.

### **Domestic Law and Policy: A Patchwork**

For the past twenty years, the DoD has been involved in non-international armed conflict (NIAC).<sup>4</sup> In such conflicts, the conduct of hostilities is primarily guided by the five fundamental principles of the Law of War<sup>5</sup>: Military Necessity, Distinction, Proportionality, Humanity, and Honor.<sup>6</sup> On the other hand, in an international armed conflict (IAC), the full panoply of the Geneva Conventions—and all attendant protections for civilians—will apply.<sup>7</sup> That said, as a matter of policy, and in light of operational realities, the United States often applies measures to ensure greater protection for civilians than that required by the Law of War.<sup>8</sup> The charge for the operational JA when confronting this patchwork of law and policy is twofold: 1) they must understand the applicable policy framework, as it may vary from one theater of operations to the next, and 2) they must articulate which protective measures are a matter of law and which are a matter of policy and may be waived (and by whom).

In the specific context of preventing and responding to civilian casualties, international law provides little guidance by way of response. On the contrary, U.S. domestic law and policy provide some relatively clear guideposts, though not without gaps. Though the DoD has a number of policies to “operationalize” the requirement to protect civilians,<sup>9</sup> these efforts are piecemeal and scattered across various policy and doctrine publications. Until then-President Barack Obama published Executive Order (EO) 13732 prescribing the U.S. policy to address civilian casualties, there was little in the way of a comprehensive policy framework for how to mitigate, respond to, and learn from civilian casualties.<sup>10</sup>

#### **Presidential Back and Forth**

Executive Order 13732 provides a number of requirements of particular interest to JAs, including taking feasible precautions in conducting attacks—which involves steps such as issuing warnings or adjusting the timing of attacks.<sup>11</sup> These steps mirror the obligations in Additional Protocol I<sup>12</sup>

which, by its terms, would not apply to a NIAC.<sup>13</sup> Thus, EO 13732 represents a policy decision to apply certain IAC rules to a NIAC. The EO also requires assessments to assist in the reduction of civilian casualties, to review or investigate allegations of civilian casualties, and to acknowledge U.S. responsibility for those casualties which can be confirmed.<sup>14</sup> The EO also requires engagement with NGOs, in particular the International Committee of the Red Cross (ICRC) and foreign partners, to further refine strike processes and procedures.<sup>15</sup> Then-President Obama’s EO outlines policy requirements for preventing and responding to civilian casualties, which can be broadly broken out into four categories or functional responsibilities:

1. Precautions during planning and execution;<sup>16</sup>
2. Assessment, and taking responsibility for U.S.-caused civilian casualties;<sup>17</sup>
3. Engagement with stakeholders to develop, and share best practices; and<sup>18</sup>
4. Reporting, both to the public and to Congress.<sup>19</sup>

Section 3 of EO 13732 required the Director of National Intelligence to publicly release a report of all combatant and non-combatant deaths resulting from strikes by any U.S. Government agency.<sup>20</sup> However, in 2019, then-President Trump issued an executive order that revoked the public reporting requirement for Section 3 of EO 13732.<sup>21</sup> That said, then-President Trump’s EO included provisions to comply with various Congressional and public reporting requirements in the Fiscal Year (FY) 2018 and FY 2019 National Defense Authorization Acts (NDAA). Thus, while the four broad requirements defined above remain, it is in somewhat modified form.<sup>22</sup> In addition to this presidential back and forth, in both the FY 2018 and FY 2019 NDAs, Congress legislated requirements in the four broad functional responsibilities defined above.

#### **Congress Steps In**

In the FY 2018 NDAA, in the period intervening between EO 13732 and then-President Trump’s EO, Congress passed a provision requiring an annual report to Congress

on civilian casualties caused by U.S. military operations—a report which will be unclassified, but may include a classified annex where appropriate.<sup>23</sup> The report is required to include reporting of civilian casualties occurring both within and outside of Declared Theaters of Active Armed Conflict.<sup>24</sup> The report must also describe the process by which DoD investigates allegations of civilian casualties, and the steps DoD takes to mitigate the occurrence of civilian casualties. Finally, the Secretary and DoD are required to consider information from all available sources, including NGOs, when assessing whether reports of civilian casualties are confirmed. Congress followed up on these reporting requirements in the FY 2019 NDAA, which was passed in August 2018.

Specifically, two provisions bear fleshing out. Section 1062 of the FY 2019 NDAA levies additional reporting requirements on the DoD with regards to civilian casualties. These improvements are primarily intended to increase the specificity of reporting, broadening the scope to include lethal strikes and “each specific mission, strike, engagement, raid or incident.”<sup>25</sup> Furthermore, the FY 2019 NDAA requires the annual report to differentiate between the numbers of civilians injured and those killed, the making of any *ex gratia* payments as recompense, and any modifications to reports from previous fiscal years.<sup>26</sup> Congress also requires that the report be unclassified and released to the public at the same time as it is made to Congress; though, the NDAA does allow for the Secretary of Defense to decline public release, should he certify in writing that doing so would pose a threat to the national security interests of the United States.<sup>27</sup> Finally, Congress mandated that the DoD both establish a uniform policy or guidance on dealing with civilian casualties, and appoint an official within the DoD to oversee compliance with said policy.<sup>28</sup>

#### **DoD Efforts: Fits and Starts**

Despite the statutory deadline of 180 days from passage of the NDAA to provide a report describing the policy developed by the DoD, no such policy has yet been completed.<sup>29</sup> That said, the DoD has made significant efforts toward the development of said

policy. This includes the appointment of the Deputy Under Secretary of Defense for Policy as the civilian official responsible for coordination, developing, and overseeing compliance with that policy.<sup>30</sup> The DoD has also taken a number of steps toward the development of a comprehensive policy to prevent, assess, and respond to civilian casualties, many of which predate the FY 2019 NDAA.

These efforts include engagement with NGOs (such as the ICRC) to provide an overview of current DoD policies and procedures, as well as soliciting concerns and input from NGOs.<sup>31</sup> The DoD also conducted a number of activities subsequent to the passage of the NDAA, including a Joint Staff-hosted tabletop exercise, engagement with other federal departments and agencies, and engagements with NGOs.<sup>32</sup> That said, the DoD has yet to publish a complete and comprehensive policy that addresses the four functional responsibilities that appear in EO 13732 and the FY 2018 and FY 2019 NDAs.

Instead, the DoD points to a number of Joint publications for the proposition that DoD policy encapsulates these four requirements—some of which provide positive authority and guidance,<sup>33</sup> and some of which do not.<sup>34</sup> The DoD also points to the Combatant Commands as shouldering the load with respect to policy development to this point. In particular, the DoD report on policy development points to commonalities in practices as between U.S. Central Command (USCENTCOM) and U.S. Africa Command (USAFRICOM).<sup>35</sup> However, the DoD acknowledges that there is still some variance amongst the Combatant Commands (CCMD) as to the specifics of their respective civilian casualty policies.<sup>36</sup> Thus, while there may be some commonality in these CCMD policies and processes, there is no universally applicable policy standard. Regardless, the role of the operational JA includes advice and counsel in each of the four categories or efforts described in domestic law and Presidential policy. The question then, is this: In practice, how does the operational JA advise on these areas where the proverbial “rubber meets the road”?

### **The Law in Practice: Gaps and Inconsistencies**

In each of the four areas defined in law and policy, the JA is a critical supporting effort; though primary responsibility most often does and should reside with other staff directorates. By understanding the inputs and output of each responsibility, the JA plays a central role in the development and implementation of DoD policy, thereby, enhancing efforts to prevent and respond to civilian casualties. The Subunified Command/Joint Task Force level is uniquely situated to impact each of the four functions defined by domestic law and policy.<sup>37</sup> The JA is an integral part of this process due to their ability to think critically about hard problems and develop creative solutions.<sup>38</sup> Furthermore, while the attorney’s relationship with the commander is critical, it can be argued that the attorney’s relationship with the staff is more important.

### **Precautions During Planning and Execution**

During planning and execution, the JA provides support by identifying relevant legal and policy authorities, and associated shortfalls.<sup>39</sup> This includes, but is not limited to, the law of war, domestic legal considerations, and policy restraints and constraints. These considerations can vary from ensuring target nomination, validation, and engagement criteria are met,<sup>40</sup> to consideration of other law of armed conflict matters—such as the highly circumstance-dependent matter of proportionality or compliance with policies and orders governing collateral damage.<sup>41</sup>

While the law certainly matters, so do the facts;<sup>42</sup> and JAs should relentlessly seek them out. This can take the form of requesting all the intelligence supporting a strike, or questioning the underlying intelligence or rationale for targeting a particular individual. One area which can hamper this access is having the appropriate “read-ins” to access intelligence at either the Special Access Program (SAP) or Sensitive Compartmented Information (SCI) level.<sup>43</sup> The JA should not simply accept what the J2 (Intelligence Directorate) or J3 (Operations Directorate) personnel provide. These officers are well versed in their respective disciplines, but it is the JA’s job and expertise to assess the underlying facts and provide

the necessary legal advice. The JA cannot provide adequate legal advice without a full and complete understanding of the facts, including all foundational intelligence—whether SAP/SCI or otherwise.

### **Assessment and Responsibility**

Upon receipt of allegations, the focus shifts to an assessment, in which there are a host of legal considerations. The JA must first be prepared to advise in situations in which an alleged instance of civilian casualties amounts to a war crime; in which case, the incident must be reported through both operational and legal channels and then turned over to a military criminal investigative organization.<sup>44</sup> Should the JA determine that war crime reporting is inappropriate, the command may then shift to conducting an assessment.

The geographic CCMDs, in particular USCENTCOM and USAFRICOM, drive the process of assessing civilian casualties.<sup>45</sup> Understanding the nuances of each CCMD policy is critical to the operational JA. For instance, the DoD has mentioned a binary “credible/non-credible” assessment terminology and alluded to it as uniform across the DoD.<sup>46</sup> While this is supported by several documents,<sup>47</sup> it appears that USAFRICOM has shifted to using the terms “substantiated/unsubstantiated.”<sup>48</sup> It is unclear how this new terminology differs from the credible/non-credible dialectic, as it is still based on assessing facts as “more likely than not.”<sup>49</sup> Regardless, there is variance in the CCMD assessment methodologies. Furthermore, as the DoD continues to develop its own policy in coordination with the CCMDs, many of the precepts in the draft policy may be adopted by the CCMDs, thereby introducing further fluidity to the assessment and reporting process.

Further considerations at this stage can include whether an investigation is appropriate<sup>50</sup> or whether there is already sufficient information available to assess the claim. Should the commander appoint an investigation, the JA will play a role in advising both the investigating officer and the commander taking final action.<sup>51</sup> The JA will also advise on the assessment itself—which will often include a legal opinion related to both compliance with applicable law and rules of engagement, as well as

whether the evidence presented supports the credibility assessment.<sup>52</sup> The standard most frequently applied in assessing whether a reported civilian casualty occurred is whether the allegation is more likely than not to be true.<sup>53</sup>

Often, commands may not have access to the specific locations or persons involved in a strike resulting in civilian casualties;<sup>54</sup> however, NGOs often do.<sup>55</sup> When feasible, in accordance with EO 13732, commands should seek to include information from these NGOs in their assessments.<sup>56</sup> However, the operational JA should be prepared to deal with a few contentious issues with regard to NGOs. The first is that the DoD often has access to information to which NGOs do not—such as sensitive intelligence information, the revelation of which could compromise intelligence sources and methods.<sup>57</sup> While this has been criticized for a lack of transparency,<sup>58</sup> there is little the operational JA can do to address this concern. The second—and related—concern, is that the DoD may have not conducted the strike at issue, but there is no other department or agency in a position to take responsibility.<sup>59</sup> Finally, NGOs often advocate for full administrative investigations in all instances of civilian casualties—a contention which is not necessitated by law or policy in the absence of evidence indicating a war crime.<sup>60</sup>

#### ***Development and Sharing of Best Practices***

The next functional responsibility, directed by law and policy, is to refine and share best practices for preventing and responding to civilian casualties. Any investigation into civilian casualties should include recommendations to avoid similar incidents in the future.<sup>61</sup> These recommendations will most often focus on the conduct or execution of a strike or operation and can include recommendations to modify or implement new strike Standard Operating Procedures or Tactics, Techniques, and Procedures. These recommendations might also identify gaps in a command's target development and vetting process, or internal strike cell operations.

However, improvements in processes should not be limited to those recommended during the course of an investigation. Commands should seek to refine both strike and casualty assessment processes when-

ever the opportunity presents.<sup>62</sup> In other words, processes should be reviewed and/or improved—even if there is no recommendation or approval to do so as part of a command operation. Such improvements could include identification of another key billet holder required in the strike cell or a modification to a strike cell Standard Operating Procedure during an annual/semi-annual revision. The JA should raise the issue as appropriate and defer to the staff director or commander empowered to make the final decision. The second caveat is to not confine improvements to the planning and execution of a strike.

Assessment methodologies should be examined and refined as well. The JA should highlight where additional expertise is needed to conduct the assessment. For instance, an operative fact might include the range at which a particular weapon presents a danger of wounding or death.<sup>63</sup> The JA would not normally possess the necessary expertise to assess these facts. Thus, it may be appropriate for a trained individual to participate in all civilian casualty assessments.<sup>64</sup> Perhaps there are multiple intelligence disciplines supporting the conclusion that an individual is a civilian, but a trained J2 all-source analyst will be better positioned to opine upon the overall intelligence picture than a JA.

Non-governmental organizations are specifically identified in Presidential and DoD policy as entities that provide critical input to the development of sound policy and best practices regarding preventing and responding to civilian casualties.<sup>65</sup> Accordingly, NGOs should be included where feasible in policy development. A risk of this inclusion may include the introduction of substantive provisions which do not reflect the U.S. Government or DoD position on certain rules of international law. For instance, discrepancies or debates about the law governing a person's status as a combatant or a civilian. One such area of disagreement has to do with the construct of Direct Participation in Hostilities (DPH).<sup>66</sup> The ICRC occupies a special position in international law, and is charged under the Geneva Conventions with monitoring compliance with the Law of War.<sup>67</sup> Pursuant to this role, the ICRC published interpretive guidance as to the meaning of the Geneva

Conventions, including the concept of DPH.<sup>68</sup> In addition to a three-factor test, the ICRC also subscribes to what is often pejoratively referred to as the “revolving door,” of civilian protection.<sup>69</sup> Neither of these constructs is consistent with the U.S. view on DPH.<sup>70</sup> This is also by no means the only area of law on which the U.S. Government and NGOs disagree.<sup>71</sup>

In engaging with NGOs, the operational JA should politely but firmly articulate the U.S. position on the law. Second, and in light of the DoD's engagement with NGOs and academics,<sup>72</sup> DoD attorneys and JAs must be prepared to advise policy makers on the law; they should ensure there is clarity between measures the U.S. undertakes as a matter of legal obligation and those it implements as a matter of sound policy for prevention and response to civilian casualties.<sup>73</sup>

#### ***Public and Congressional Reporting***

As discussed, the DoD is required to provide reports on the annual civilian casualty statistics and efforts,<sup>74</sup> as well as the development of a comprehensive DoD policy to prevent and respond to civilian casualties.<sup>75</sup> Many sub-unified commands and combatant commands also issue public press releases of their civilian casualty statistics and assessments.<sup>76</sup> It is not uncommon for allegations of civilian casualties to languish for years, or be reported years after the fact.<sup>77</sup> Nor is it uncommon for a particular incident to receive heightened scrutiny, which necessitates rapid action to move that particular incident to the head of the assessment line. There is little role for the operational JA in this reporting process, with one caveat. When a particular allegation is the subject of an investigation, either administrative or criminal, the JA will often have the best visibility on the status and timing of that investigation.

The JA in this circumstance will primarily play the role of liaison between the various stakeholders. They will need to 1) assist and relay information from investigators to the staff and commanders, 2) keep commanders and staff apprised of the status of the investigation and elucidating potential options, and 3) relay investigative status and approximate timeline for completion to higher headquarters and external stake-

holders (such as NGOs). The JA should also review public and congressional reports to ensure accuracy in characterization of legal and policy standards.

## Conclusion

Domestic law and policy governing the DoD's prevention of and response to civilian casualties is in significant flux. The lack of a comprehensive, DoD-wide policy on prevention of and response to civilian casualties has led to a legal and policy environment characterized by a patchwork of requirements that are often fluid across both time and geographic CCMDs; they also contain various gaps or inconsistencies, which the JA must be prepared to address. In each of the four functional areas dictated by law and policy, the JA is a critical supporting effort and is uniquely positioned to assist their own command and the DoD in its efforts to minimize civilian casualties.

An integral part of this effort is understanding the legal and policy gaps and inconsistencies. The lack of a comprehensive DoD policy has resulted in differing policy standards across CCMDs, as well as a fluid and somewhat unpredictable policy environment as the DoD works toward the development of a DoD-wide policy. The JA must also be prepared to deal with discrepancies between the international legal standards advocated by NGOs or foreign partners and those held by the U.S. Government. Finally, there are questions of the practical application of law and policy. The JA can and should advise on 1) feasible precautions during planning and execution; 2) the factual and policy basis for an assessment of civilian casualty allegations, as well as steps to improve the assessment process; 3) the sharing and adoption of best practices across the four functional areas; and 4) reporting of the status and outcome of assessments to higher headquarters, Congress, and the public. **TAL**

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*role of the operational judge advocate (JA) in preventing, mitigating, and addressing civilian casualties.*

## Notes

1. Missy Ryan, *U.S. Military Made \$2 Million in Civilian Casualties Payments in Afghanistan in Recent Years*, WASH. POST (Aug. 17, 2020), [https://www.washingtonpost.com/national-security/us-military-made-2-million-in-civilian-casualties-payments-over-5-years-in-afghanistan/2020/08/17/cd550af0-d025-11ea-af07-1d058ca137ae\\_story.html](https://www.washingtonpost.com/national-security/us-military-made-2-million-in-civilian-casualties-payments-over-5-years-in-afghanistan/2020/08/17/cd550af0-d025-11ea-af07-1d058ca137ae_story.html).
2. See, e.g., Rita Siemion & Daniel R. Mahanty, *The Pentagon's 2018 Civilian Casualties Report: What's in It and What's Next*, JUST SEC. (May 2, 2019), <https://www.justsecurity.org/63898/the-pentagons-2018-civilian-casualties-report-whats-in-it-and-whats-next/>.
3. Letter from Am. C.L. Union et al. to Sen. James Inhofe et al., subject: Congress on Strengthening Civilian Casualty Reporting (May 2, 2019), <https://www.humanrightsfirst.org/sites/default/files/Civcas-Letter-2019-05-02.pdf> [hereinafter Letter to Congress]. Rather than having any individual signatory, "signing" organizations include the American Civil Liberties Union, Center for Civilians in Conflict, Human Rights Clinic (Columbia Law School), and Human Rights Watch, among others.
4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Common Article 3]. These types of conflicts are routinely termed "non-international armed conflict," or "NIAC."
5. Various terms are used to describe the same general construct: Law of War, Law of Armed Conflict, and International Humanitarian Law. For the sake of consistency, this article uses the term Law of War. See generally U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (12 June 2015) (C3, 13 Dec. 2016) [hereinafter DoD LAW OF WAR MANUAL].
6. *Id.* § 2.1.
7. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].
8. Exec. Order No. 13732, sec. 1, 81 Fed. Reg. 44,483 (July 1, 2016) [hereinafter EO 13732].
9. See, e.g., DoD LAW OF WAR MANUAL, *supra* note 5, paras. 5.7.1, 5.7.2, 5.10.3; NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 71, 105–06, 185–87 (2020).
10. EO 13732, *supra* note 8.
11. *Id.* sec. 2(a)(iv).
12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Though the United States is not a signatory to Additional Protocol I, it does consider the treaty to be reflective in many instances of customary international law. See, e.g., Dupuis et al., *The Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. Int'l L. Rev. 415, 419–31 (1987) (remarks of Michael J. Matheson, Deputy Legal Advisor, U.S. Dep't of State).

13. Additional Protocol I, *supra* note 12, art. 1.3.
14. EO 13732, *supra* note 8, at sec. 2(a)–(b).
15. *Id.* sec. 2(b).
16. *Id.* sec. 2(a)(i)–(iv).
17. *Id.* sec. 2(a)(v), (b)(i)–(ii).
18. *Id.* sec. 2(b)(iii)–(iv).
19. *Id.* sec. 3.
20. Reporting by the Director of National Intelligence appears to contemplate inclusion in the report of strikes or other operations resulting in civilian casualties conducted under the authority of the Central Intelligence Agency pursuant to the Covert Action Statute. 50 U.S.C. § 3093. See, e.g., David Welna, *Trump Restores CIA Power to Launch Drone Strikes*, NPR (Mar. 14, 2017, 4:28 PM), <https://www.npr.org/2017/03/14/520162910/trump-restores-cia-power-to-launch-drone-strikes>. For a more fulsome discussion of the covert action statute generally, see generally Major Peter C. Combe II, *The Covert Action Statute: The CIA's Blank Check?*, 9 J. Nat'l Sec. L. & Pol'y 29 (2017).
21. Exec. Order No. 13862, 84 Fed. Reg. 8789 (Mar. 6, 2016) (amending Exec. Order No. 13732).
22. See, e.g., Welna, *supra* note 20. For instance, this difference in reporting agencies may be at the root of the discrepancy described by some commentators regarding civilian casualties in Yemen. See, e.g., Abdulrasheed Al-Faqih & Kristine Beckerle, *U.S. Fails to Acknowledge Killing Yemeni Civilians*, JUST SEC. (May 15, 2020), <https://www.justsecurity.org/70151/u-s-fails-to-acknowledge-killing-yemeni-civilians/>. While outside the scope of this article, it is interesting to note that this apparently relieves the Director of National Intelligence from reporting on civilian casualties caused by agencies other than the Department of Defense; begging the question of how to account for those operations when discussing U.S. Government-caused civilian casualties.
23. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1057, 131 Stat. 1283, 1572 (2017).
24. The term Declared Theaters of Active Armed Conflict (DTAAC/ODTAAC) originally appeared in 10 U.S.C. § 130f, which required prompt reporting to Congress of any lethal "sensitive" military operations occurring ODTAAC. This statute was amended in 2018 to remove the terms DTAAC/ODTAAC, and instead requires reporting within 24 hours of any "sensitive" military operations occurring outside of Syria, Iraq or Afghanistan. See, e.g., John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 1062, 132 Stat. 1636, 1970 (2018). This creates an apparent conflict, as the 2019 DoD report pursuant to this section applies the term "DTAAC" to those three countries, as well as Libya, Somalia, and Yemen. U.S. DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2019 (2020) [hereinafter ANNUAL REPORT ON CIVILIAN CASUALTIES].
25. *Id.* at (a)(1).
26. *Id.* at (a)(5).
27. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 1062, 132 Stat. 1636, 1970 (2018).
28. *Id.* § 936.

29. U.S. DEP'T OF DEF., REPORT ON CIVILIAN CASUALTY POLICY (2019) [hereinafter REPORT ON CIVILIAN CASUALTY POLICY].

30. *Id.* at 3.

31. *Id.* at 4.

32. *Id.* at 9–10.

33. See, e.g., U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM (2 JULY 2020) [hereinafter DoDD 2311.01]; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3150.25G, JOINT LESSONS LEARNED PROGRAM (31 Jan. 2018) [hereinafter CJCSI 3150.25G].

34. See, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, JOINT FIRE SUPPORT (10 Apr. 2019) [hereinafter JP 3-09].

35. REPORT ON CIVILIAN CASUALTY POLICY, *supra* note 29, at 13.

36. *Id.* at 16.

37. JOINT CHIEFS OF STAFF, JOINT PUB. 3-84, LEGAL SUPPORT fig.I-1 (2 Aug. 2016).

38. See, e.g., JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (2 Aug. 2016).

In essence, we “threw” lawyers at very difficult problems, and they produced solutions in virtually every case—often under very challenging circumstances and in an uncertain security environment. . . . I tried to get all the lawyers we could get our hands on—and then sought more.

*Id.* at II-6 (quoting Major General David Petraeus).

39. *Id.* at I-14.

40. JP 3-09, *supra* note 34, at II-6 (discussing target nomination); *id.* at IV-13 (discussing target validation and Target Engagement Authority); *id.* at I-4 to -5 (discussing target engagement standards and processes).

41. See, e.g., DoD LAW OF WAR MANUAL, *supra* note 5, para. 5.10.2.3.

42. See, e.g., Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922).

43. See, e.g., 1 U.S. DEP'T OF DEF., MAN. 5205.07, DoD SPECIAL ACCESS PROGRAM (SAP) SECURITY MANUAL: GENERAL PROCEDURES encl. 5 (18 June 2015) (C2, 30 Sept. 2020); 1 U.S. DEP'T OF DEF., MAN. 5105.21, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF INFORMATION AND INFORMATION SYSTEMS SECURITY encl. 3 (19 Oct. 2012) (C2, 6 Oct. 2020).

44. See generally DoDD 2311.01, *supra* note 33.

45. REPORT ON CIVILIAN CASUALTY POLICY, *supra* note 29, at 13.

46. *Id.* at 14.

47. See, e.g., U.S. AFRICA COMMAND, INSTR. 3200.03, REPORTING AND RESPONDING TO CIVILIAN CASUALTY ALLEGATIONS AND INCIDENTS (1 Feb. 2019) [hereinafter ACI 3200.03]; COMBINED JOINT TASK FORCE, OPERATION INHERENT RESOLVE MONTHLY CIVILIAN CASUALTY REPORT (29 Oct. 2020) [hereinafter CJTF REPORT].

48. *U.S. Africa Command Civilian Casualty Assessment Quarterly Report; 2nd Quarter, 2020*, U.S. AFR. COMMAND, <https://www.africom.mil/civilian-casualty-report/us-africa-command-civilian-casualty-assessment-quarterly-report-2nd-quarter-2020> (last visited Oct. 1, 2021) [hereinafter CIVCAS REPORT].

49. In light of non-governmental organization (NGO) critiques, the Department of Defense (DoD) is also

re-evaluating this binary assessment methodology.

See, e.g., CTR. FOR CIVILIANS IN CONFLICT, IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 35-37 (2020); Siemion & Mahanty, *supra* note 2; REPORT ON CIVILIAN CASUALTY POLICY, *supra* note 29, at 14.

50. See, e.g., ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 9. There is no requirement in either international or domestic law, or policy, to investigate every allegation of civilian casualties. See, e.g., CTR. FOR CIVILIANS IN CONFLICT, *supra* note 49, at 2. This “duty” appears to be based upon a conflation of civilian casualties with actions constituting a war crime or other violation of the Law of War. See, e.g., *id.* at 55, n.206. This is bolstered by the “Breakout Box,” which appears to indicate the authors’ perception that AR 15-6 investigations were always conducted prior to the implementation of the Civilian Casualty Assessment Report process. *Id.* at 39.

51. See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS ch. 2, sec. 2 (1 Apr. 2016) [hereinafter AR 15-6]. This regulation is most frequently used in Joint environments, and it requires legal support to the investigating officer (IO) and to the appointing officer taking final action. Ordinarily, the JA who provided advice on the strike or operation, the IO’s legal advisor, and the Commander’s advisor should be different attorneys.

52. See, e.g., ACI 3200.03, *supra* note 47. Ordinarily, the JA reviewing the assessment should be a different JA than the one who advised on the planning and execution of a strike or raid.

53. ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 6.

54. *Id.* at 16.

55. CTR. FOR CIVILIANS IN CONFLICT, *supra* note 49, at 40, 43.

56. ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 16; CTR. FOR CIVILIANS IN CONFLICT, *supra* note 49, at 15.

57. ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 16.

58. See, e.g., Daphne Eviatar, *The Fatal Flaw in DoD’s Latest Civilian Casualties Report*, JUST SEC. (May 14, 2020), <https://www.justsecurity.org/70139/the-fatal-flaw-in-dods-latest-civilian-casualties-report/>.

59. See, e.g., Welna, *supra* note 20. This circumstance appears to be recognized by NGOs, as the Letter to Congress recommends consolidating authorities for the use of lethal force within the DoD. See Letter to Congress, *supra* note 3.

60. See, e.g., discussion *supra* note 50; DoDD 2311.01, *supra* note 33.

61. See, e.g., AR 15-6, *supra* note 51, para. 3-11; ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 16.

62. CJCSI 3150.25G, *supra* note 33.

63. This is known as the Collateral Effects Radius (CER) or Collateral Hazard Area (CHA). See, e.g., Major Steven P. Dillenburger, *Minimization of Collateral Damage in Airdrops and Airstrikes* (Sept. 28, 2012) (Ph.D. dissertation, Air Force Institute of Technology, Air University), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a566426.pdf>.

64. See, e.g., JOINT STAFF J-7, JOINT TARGETING STAFF FAMILIARIZATION COURSE SYLLABUS (2020), [\[jcs.mil/Portals/36/Documents/Doctrine/training/jts/jt\\\_staff\\\_syllabus31jan20.pdf?ver=gr\\\_II5kMRsYHFnk-2c9YupA%3d%3d\]\(https://www.jcs.mil/Portals/36/Documents/Doctrine/training/jts/jt\_staff\_syllabus31jan20.pdf?ver=gr\_II5kMRsYHFnk-2c9YupA%3d%3d\).](https://www.</a></p></div><div data-bbox=)

65. EO 13732, *supra* note 8, § 2(b)(i); Memorandum from Off. of the Under Sec’y of Def. to Sec’y of the Mil. Dep’ts et al., subject: Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (31 Jan. 2020).

66. DoD LAW OF WAR MANUAL, *supra* note 5, paras. 5.8.3, 5.8.4. The rule governing Direct Participation in Hostilities indicates that a civilian, ordinarily immune from attack, forfeits that protected status for such time as the civilian at issue directly participates in hostilities against a belligerent party.

67. See GC IV, *supra* note 7 (relating to the protection of civilians, in which the International Committee of the Red Cross is mentioned in no fewer than sixteen articles).

68. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NATION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

69. *Id.* at 47–58, 70. These three factors are: 1) threshold of harm; 2) direct causation; and 3) belligerent nexus. All three of these factors must be present for an individual to be considering “directly participating,” pursuant to the ICRC’s formulation of the rule.

70. Under DoD’s view, these three factors are important; but none are dispositive. See, e.g., DoD LAW OF WAR MANUAL, *supra* note 5, paras. 5.8.3, 5.8.4.

71. See, e.g., Sean Watts, *Interpretation in the Updated GC III Commentary*, LIEBER INST. (Dec. 15, 2020), <https://lieber.westpoint.edu/interpretation-updated-gcii-commentary/>.

72. REPORT ON CIVILIAN CASUALTY POLICY, *supra* note 29, at 13.

73. Thus countering any assertion that U.S. policy preferences have become or reflect customary international law. See, e.g., DoD LAW OF WAR MANUAL, *supra* note 5, para. 8.1.4.2.

74. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1057, 131 Stat. 1283, 1572 (2017); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 1062, 132 Stat. 1636, 1970 (2018).

75. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 936 (2018).

76. CIVCAS REPORT, *supra* note 48; CJTF REPORT, *supra* note 47.

77. See, e.g., *U.S. Africa Command Civilian Casualty Assessment Quarterly Report; 3rd Quarter, 2020*, U.S. AFR. COMMAND, <https://www.africom.mil/civilian-casualty-report/us-africa-command-civilian-casualty-assessment-quarterly-report-3rd-quarter-2020> (last visited July 19, 2021); ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 24, at 6.



Members of the Diversity, Equity, and Inclusion Council speak to JAG Corps leaders at the Worldwide Continuing Legal Education forum on the Council's initiatives. (Credit: Jason Wilkerson, TJAGLCS)

## Practice Notes

# The DEI Field Board

## Your Voice Could Define the Future Army JAG Corps

*By Colonel Lance S. Hamilton*

The 40th Judge Advocate General of the Army, Lieutenant General (LTG) Charles N. Pede, established the U.S. Army Judge Advocate General's (JAG) Corps Council on Diversity, Equity, and Inclusion (DEI Council) on 17 July 2020. One of the purposes of this Council is to enable each member of our regiment to help shape the future of our JAG Corps.<sup>1</sup> Leveraging the Department of Defense's ongoing efforts to address diversity and inclusion<sup>2</sup> and, in part, the media blitz and civil unrest following the killing of George Floyd,<sup>3</sup> LTG Pede acted swiftly and established the DEI Council to address issues of diversity, equity, and inclusion within the Army JAG Corps. He directed the DEI Council to take a comprehensive look at

our regiment to determine if we were an inclusive organization that validates "our commitment to what is right, fair, and just" in our efforts to take care of our Soldiers, Civilians, and Family members.<sup>4</sup> To accomplish this with any degree of authenticity or resolve, LTG Pede realized "[t]he voices of our Corps, from around the world, must be heard."<sup>5</sup> Moreover, he acknowledged that "[h]ow we [as members of the regiment] value each other—and how we each perceive the resulting treatment—matters" and "how we treat each other [ultimately] reflects our [core] values."<sup>6</sup>

Once established, the DEI Council initially engaged in a series of internal listening sessions to gain perspective on the full scope and

depth of the issues and concerns surrounding diversity, equity, and inclusion that it needed to address. Council members were also eager to educate themselves on those topics, come to a common understanding of those terms,<sup>7</sup> and fully comprehend the distinction between equality and equity.<sup>8</sup> The DEI Council next conducted a series of voluntary listening sessions with groups of Judge Advocate Legal Services (JALS) personnel from around the globe to amplify their voices. Each of these sessions were exceptionally valuable, generating open and frank dialogue among the participants. These sessions provided the DEI Council with a much broader understanding of issues affecting diversity, equity, and inclusion that members of our Corps believe exist.<sup>9</sup> All JALS members were further encouraged to participate in an anonymous survey to address their concerns.<sup>10</sup> Coupled with the results of the survey and information and comments received during various panel discussions with representatives from diverse groups, including civilians, enlisted personnel, retired judge advocates, informal mentorship groups, and the JAGC Pride network,<sup>11</sup> the DEI Council believed it was sufficiently enlightened to move forward in addressing many diversity, equity, and inclusion matters affecting the Army JAG Corps.

The DEI Council then began focusing on the task to propose—with the help of subordinate advisory boards from the field—its own ideas for making “our organization more inclusive of . . . diversity”<sup>12</sup> by looking initially at six areas: recruiting and accessions, training and education, retention, promotions, assignments, and obstacles to inclusion.<sup>13</sup> As the best source of input across the regiment, these subordinate advisory boards (i.e., Field Boards), would assist the DEI Council in reviewing, studying, and analyzing these initial focus areas. Armed with all of this information, the DEI Council could effectively identify and assess problems and opportunities, and then recommend solutions.<sup>14</sup>

### Developing the Field Boards

The DEI Council appointed a Field Board committee to propose the best structure for and internal operation of the Field Boards. The committee extensively analyzed and debated the most effective and efficient

way to establish representative and diverse groups from across the regiment to form Field Boards and begin addressing the six focus areas. The committee considered, among other things, the following before presenting options to the DEI Council for a decision:

1. Whether to seek only volunteers or allow staff judge advocates (SJA), deputy staff judge advocates (DSJA), command paralegal noncommissioned officers (NCO), or senior civilians to submit names and recommend Field Board members;
2. Whether volunteers submit their application directly to the DEI Council, or require vetting through the SJA, DSJA, command paralegal NCO, or senior civilian;
3. Whether the DEI Council should establish eligibility criteria;
4. Whether applicants should provide relevant demographic information, including race, gender, sexual orientation, and geographic location to ensure maximum diversity within each Field Board;
5. Whether to require a maximum or minimum size for each Field Board;
6. Whether to require a maximum or minimum length of service on a Field Board;
7. Whether the DEI Council should limit the number of Field Boards to ensure its ability to monitor progress;
8. Whether a member of the DEI Council would participate on each Field Board to facilitate discussions;
9. Whether to create only geographic boards to maximize attendance during meetings;
10. Whether to create only rank/grade boards to generate better, more open discussions;
11. Whether to establish geographic boards by rank/grade;
12. Whether subject matter experts or DEI Council members would instruct each Field Board on the six focus areas;
13. Whether Field Boards should address all the focus areas during meetings or address each issue separately; and
14. Whether Field Boards meet weekly, monthly, or other.

The Field Board committee focused on ensuring three main tenets for the effective use of the Field Boards. First, the Field Board must be structured to ensure autonomy, but still remain under the overall direction of the DEI Council. Second, the Field Board must be designed to ensure every member of the JALS has a legitimate opportunity to participate as a member of a Field Board at some point. Third, the Field Board must be structured and designed to elicit candid feedback and facilitate open, honest conversations among Field Board members.

### Organizing the Field Boards

The DEI Council accepted most of the Field Board committee’s recommendations, including its recommendation to develop an online application to facilitate a worldwide call for volunteers to serve on a Field Board. The online application ensured the compliance with The Judge Advocate General’s expressed desire to receive input from the voices across JALS. The application form was basic, yet sufficiently comprehensive to obtain the applicant’s relevant information regarding race, gender, technical supervisory chain, and geographic location. The application also allowed volunteers to briefly describe their desire to serve on a Field Board.<sup>15</sup> While informative, the brief description did not impact a volunteer’s participation on the Field Board. Due to the number of applications received, the DEI Council established nine Field Boards to accommodate all volunteers.<sup>16</sup>

The Field Boards were organized into ten to fifteen member groups according to rank/grade.<sup>17</sup> The DEI Council agreed this structure would foster the greatest communication among Field Board members. The DEI Council, however, remains open to reconfigure the Field Board structure if necessary to maintain the efficacy of the Field Boards. Council members were then assigned to assist each Field Board as the Council’s designated points of contact for enduring support, and tasked to schedule an initial meeting with their respective Field Board.

The DEI Council elected to relinquish control over the internal direction and governance of the Field Boards, thereby promoting the maximum amount of au-

tonomy and ingenuity for board members to identify and assess problems effectively and to offer noteworthy solutions. The goal is not to micromanage the Field Boards' freedom of thought, expression, or creativity.<sup>18</sup> The DEI Council points of contact, therefore, only participated in the initial meeting with each Field Board to explain their duty in analyzing the six focus areas, establish basic ground rules, recommend a listening session for their first meeting, and instruct the board to identify a Field Board leader and deputy leader.<sup>19</sup>

### **Field Board Ground Rules<sup>20</sup>**

Each Field Board is governed by the same ground rules:

1. Every Field Board member is to be respected, whether you agree or disagree;
2. Every Field Board member has a valuable opinion;
3. Every Field Board member needs to be heard;
4. Every Field Board member must be considerate of others;
5. All Field Board members should feel comfortable in sharing their experiences or opinions;
6. Disrespect for opinions of others is grounds for removal from the Field Board; and
7. Field Board members are on equal footing during Field Board discussions when voicing opinions or voting on matters—a difference in rank/grade does not equate to a more valuable opinion.

The DEI Council understands these basic rules serve to reinforce the value of all JALS members and their diversity of thoughts and opinions. To be effective in addressing the six focus areas and provide meaningful feedback, Field Boards members must treat each other with the inherent dignity and respect due every person.<sup>21</sup>

### **Field Board Meetings and Battle Rhythm**

The Field Boards' primary responsibility is to discuss, analyze, assess, and recommend solutions to the DEI Council on matters affecting diversity, equity, and inclusion in the JAG Corps in the six focus areas.<sup>22</sup>

The Field Board leaders and deputy leaders were encouraged to utilize any appropriate medium (e.g., Microsoft Teams or Zoom) to conduct meetings. The meeting schedule was up to each Field Board; however, the DEI Council recommended a minimum of

## **Realizing the significance of diversity, equity, and inclusion across our formations, however, the desire for swift action had to be tempered with the desire for deliberate and comprehensive review of each topic.**

two meetings per topic area to ensure suitable discussion on these important issues.

The goal is for Field Boards to have sufficient time to understand the issue and time to meet and discuss each issue. Realizing the significance of diversity, equity, and inclusion across our formations, however, the desire for swift action had to be tempered with the desire for deliberate and comprehensive review of each topic. The DEI Council, therefore, established a two-month battle rhythm for the Field Boards for each of the six focus areas.

During week one, the Field Boards receive a substance briefing from a subject matter expert who explains the topic in detail and outlines the current status, or implementation, of the topic area within the JALS. Field Board members are free to ask questions and engage in discussion with the subject matter expert during the meeting. These meetings are also recorded for the benefit of those board members unable to attend the live meeting.

During weeks two through seven, Field Boards are instructed to meet as often as necessary to engage in meaningful discourse while evaluating the topic and to begin formulating input for the DEI Council. Board members, through their respective Field Board leader, are free to seek additional information from their points of contact on the DEI Council as necessary throughout this period. The goal for each Field Board is to work as a team and hone feedback on the most salient points for the DEI Council to consider.

During week seven, Field Board leaders are required to compile notes from the monthly meetings and submit reports to their respective DEI Council points of contact. Each Field Board is required to submit a presentation with four to five focus points

for the Council to consider. For each point, the Field Board provides a brief discussion and then sets forth its recommended solutions.

The DEI Council then schedules a meeting with each Field Board leader to discuss the recommendations. During this meeting, the Field Board not only presents its issues and recommendations on the topic but also provides additional, unsolicited comments, observations, and recommendations for the Field Board to consider and address.

### **Anticipating the Future of Field Boards**

At this time, the Field Boards have addressed and submitted reports on the first focus area of recruiting and accessions. The DEI Council met with the Field Boards to discuss their recommendations and the Council will begin meeting to analyze and discuss those recommendations. The Field Boards have also received their subject matter expert presentation on the second focus areas—training and education—and will commence internal meetings to address the topic.

The outstanding input received from each Field Board during its presentation is a clear indication of the tremendous effort by Field Board members to make a difference. This effort also proves LTG Pede's decision to use subordinate advisory boards to address issues of diversity, equity, and inclusion was profound. Since assuming duties as the 41st Judge Advocate General of the Army, Lieutenant General Stuart W. Risch



has reaffirmed the Corps's commitment to continue this comprehensive look at our regiment and work to ensure that we are, in fact, an inclusive organization that validates and takes care of our Soldiers, Civilians, and Family members, and always strives to do what is right, fair, and just.<sup>23</sup>

Accordingly, it is now time for others to step forward and volunteer to participate on a Field Board. The DEI Council has not had to place any limits on participation, other than a desire to participate. As a member of the JALS you have a voice and your voice does matter! Your willingness and a bit of courage to highlight and discuss issues affecting diversity, equity, and inclusion within our Corps could make a difference.

While the Field Boards continue to analyze the remaining focus areas of our Corps, JALS members may have knowledge of practices that support and foster diversity, equity, and inclusion, which are essential for our shared understanding. This knowledge or input may enable our JAG Corps not only to adjust or change current or past practices but also to develop new initiatives. Your voice, your input, your knowledge could keep us on the correct path to remain the best law firm in the world. **TAL**

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## Notes

1. Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Establishment of the U.S. Army Judge Advocate General's Corps Council on Diversity, Equity, and Inclusion (17 July 2020) [hereinafter Establishment of DEI Council Memo].

2. Since at least 1997, the Department of Defense has been mandated to conduct human relations training for all members of the Armed Forces, including race relations, equal opportunity, and opposition to gender discrimination. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, § 571, 110 Stat. 2422, 2532 (1996). 10 U.S.C. § 656 also directs the Secretary of Defense to "implement a plan to accurately measure the efforts of the Department of Defense . . . to achieve a dynamic, sustainable level of members of the armed forces (including reserve components) that, among both commissioned officers and senior enlisted personnel of each armed force, will reflect the diverse population of the United States eligible to serve in the

armed forces, including gender specific, racial, and ethnic populations." 10 U.S.C. § 656(a).

3. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/>.

4. Establishment of DEI Council Memo, *supra* note 1.

5. *Id.*

6. *Id.*

7. *The Army People Strategy, Diversity Equity, and Inclusion Annex* defines the key terms:

a. Diversity—All attributes, experiences, cultures, characteristics, and backgrounds of the total force which are reflective of the Nation we serve and enable the Army to deploy, fight, and win.

b. Equity—The fair treatment, access, opportunity, choice, and advancement for all Soldiers and Civilians while striving to identify and encourage drivers and identify and eliminate barriers that have prevented the full participation of the total force.

c. Inclusion—The process of valuing and integrating each individual's perspectives, ideas, and contributions into the way an organization functions and makes decisions; enabling workforce members to achieve their full potential in focused pursuit of organizational objectives.

U.S. DEP'T OF ARMY, THE ARMY PEOPLE STRATEGY: DIVERSITY, EQUITY, AND INCLUSION ANNEX 1, at 4 (2020).

8. Most people use these terms interchangeably; however, there is a difference between equality and equity. It is easiest to comprehend the distinction by using an academic analogy. *Equality*, for example, is providing each student with the same books, supplies, equipment, and instruction, whereas *equity* seeks the best outcome for each individual student through the appropriate degree of coaching, teaching, mentoring, or accommodation. See *Equity in Education*, BROTHERS ACAD., [https://brothersacademy.org/equity-in-education/?gclid=EAlalQobChMlhpW139aG8wIVu-y1Ch-0p7Q6tEAAYASAAEgLuZfD\\_BwE](https://brothersacademy.org/equity-in-education/?gclid=EAlalQobChMlhpW139aG8wIVu-y1Ch-0p7Q6tEAAYASAAEgLuZfD_BwE) (last visited Nov. 18, 2021).

9. See THE JUDGE ADVOC. GEN., U.S. ARMY, ANNUAL HISTORICAL SUMMARY OF THE JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY 43-44 (2021) [hereinafter ABA SUBMISSION].

10. Off. of The Judge Advoc. Gen., U.S. Army, Defense Organizational Climate Survey (6 Oct. 2020-6 Nov. 2020). See also Karen H. Carlisle et al., *The JAG Corps DEI Council Established*, ARMY LAW., no. 3, 2021, at 28.

11. ABA SUBMISSION, *supra* note 9, at 43-44.

12. Establishment of DEI Council Memo, *supra* note 1, para. 3.

13. Establishment of DEI Council Memo, *supra* note 1.

14. *Id.*

15. *DEI Field Board Application*, JAGCNET (Oct. 20, 2020), <https://www.jagcnet2.army.mil/Sites/DivInc.nsf/homeContent.xsp?open&doctype=announcement&documentId=2A21B6764A0FB5FC85258607006556A9>.

16. The DEI Council received applications from Active, Reserve, and National Guard components, as well as civilian members of the JALS. Based upon the total number of applicants, the DEI Council deemed separate component boards inappropriate to facilitate

the diversity of thought and comprehensive analysis desired for each of the six focus areas.

17. Memorandum from Karen Carlisle, Co-Chair, Diversity, Equity & Inclusion Council, to Field Board Members, subject: OTJAG Diversity, Equity and Inclusion Field Boards (n.d.) [hereinafter Field Board Members Memo]; *JAG Corps Diversity, Equity & Inclusion Council Field Board Member Roster*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/DivInc.nsf/homeContent.xsp?open&doctype=announcement&documentId=77212AE41FC44337852587030051C159> (last visited Dec. 29, 2021) (field board member assignments are available via login to Department of Defense members). Currently, the nine Field Boards consist of one or more members from the following ranks or grades:

Board One—Colonel, Chief Warrant Officer Five, Command Sergeant Major or Sergeant Major, Grade Series 15;

Board Two—Lieutenant Colonel, Master Sergeant, Grade Series 14;

Board Three and Board Four—Major, Chief Warrant Officer Three, Grade Series 12, Grade Series 11;

Board Five, Board Six, and Board Seven—Captain, First Lieutenant, Chief Warrant Officer Two, Warrant Officer One, Grade Series 12, Grade Series 11;

Board Eight—Sergeant First Class, Staff Sergeant, Grade Series 9; and

Board Nine—Sergeant, Specialist, Private First Class, Grade Series 7.

18. Field Board Members Memo, *supra* note 17.

19. The Field Board leader and Field Board deputy leader assume primary responsibility for ensuring the Field Board complies with its official purpose to assist the DEI Council in recommending ideas to make our organization more inclusive of diversity. See *supra* note 13 and accompanying text; Establishment of DEI Council Memo, *supra* note 1.

20. The DEI Council agreed the Field Boards should follow the governing principles established for listening sessions conducted across the Army JAG Corps concerning respect and consideration of others.

21. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 2-14 (31 July 2019) (C1, 25 Nov. 2019).

22. See *supra* note 13 and accompanying text (Recruiting and Accessions, Training and Education, Retention, Promotions, Assignments, and Obstacles to Inclusion). Establishment of DEI Council Memo, *supra* note 1.

23. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., TJAG & DJAG Sends, Vol. 41-01—Message to the Regiment (12 July 2021) ("People are and will remain [our] #1 priority.")



(Credit: NASA/NOAA/GOES Project)

## Practice Notes

# Mitigating the Risk of Future Climate Change

## The U.S. Army and Carbon Neutrality

By Major Patrick A. Doyle

In *Juliana v. United States*, a group of plaintiffs sued the U.S. Government and several of its agencies—specifically including the Department of Defense (DoD)—asserting that it has continued to “permit, authorize, and subsidize” activities that produce greenhouse gases and cause climate change.<sup>1</sup> Then, in 2016, after much pretrial litigation, a federal district judge in Oregon denied the government’s motion to dismiss and set the case for trial.<sup>2</sup> A three-judge panel of the Ninth Circuit Court of Appeals dismissed the case in January 2020, but the litigation continued until February 2021 when the Ninth Circuit denied the plaintiff’s request for a rehearing *en banc*.<sup>3</sup>

The Army should take notice of the potential trend illustrated by *Juliana* and proposed domestic legislation in the Green New Deal.<sup>4</sup> At least ninety-nine members in the House of Representatives already support Green New Deal legislation, which would push the U.S. Government and its agencies hard in the direction of carbon neutrality.<sup>5</sup> The litigation against the Government could be substantial if a Green New Deal that was actually enacted into law allowed citizen suits or otherwise waived the Federal Government’s sovereign immunity.

All this provides at least anecdotal evidence that the U.S. Government is likely going to come under increasing pressure to

reduce or offset its carbon emissions—and, of all the government agencies, the DoD is by far the biggest user of fossil fuels.<sup>6</sup> To get ahead of the emerging threat of carbon-use litigation illustrated by *Juliana* and the Green New Deal, the Army should use the Army Compatible Use Buffer (ACUB) program to create carbon offsets and move toward carbon neutrality.

### **What is the ACUB Program?**

The ACUB program is a land management strategy that allows the Army to partner with states and non-federal entities to limit encroachment on military training areas by creating environmental buffer zones around the installation.<sup>7</sup> The ACUB program enables non-federal conservation entities, often with financial help from the Army, to acquire the rights to the land surrounding the installation.<sup>8</sup> The land then provides a barrier to protect the installation's training areas from suburban development and provides alternate habitat for threatened or endangered species.<sup>9</sup>

The Army currently uses ACUBs on a relatively routine basis to prevent environmental litigation by protecting endangered species and their habitats.<sup>10</sup> The Army also uses ACUBs to avoid environmental nuisance litigation by creating a buffer between the noise pollution caused by military training and civilian communities.<sup>11</sup> Although not currently in practice, the statutory authority for the ACUB program may also allow for novel uses—such as carbon offsets through land management projects.

### **Statutory Authority Includes Anticipated Environmental Restrictions**

The ACUB program dates to the Private Lands Initiative between Fort Bragg, North Carolina, and the Nature Conservancy.<sup>12</sup> Soldiers at Fort Bragg were having difficulty training because the base's training areas also happened to be some of the last remaining habitat for an endangered species—the red-cockaded woodpecker.<sup>13</sup> The partnership proved successful, and Congress codified the ACUB in the Fiscal Year 2003 National Defense Authorization Act.<sup>14</sup>

The statute, now found at 10 U.S.C. § 2684a, allows the military departments to enter into agreements concerning land in

the vicinity of military installations for two primary purposes.<sup>15</sup> The first is to prevent any development or use of land that would be incompatible with the mission of the installation.<sup>16</sup> The second is to preserve habitats in a manner that would, “eliminate or relieve current or anticipated environmental restrictions that would or might otherwise restrict, impede, or otherwise interfere, whether directly or indirectly, with current or anticipated military training, testing, or operations on the installation.”<sup>17</sup>

The second purpose—to preserve habitats to relieve anticipated environmental restrictions—would allow the Army to use this statutory authority to create carbon offsets in response to anticipated laws, regulations, or international agreements requiring carbon neutrality.

### **Forest Management Projects Can Provide Carbon Offsets**

Carbon offsets are a credit that an individual or organization can claim when it takes one action that cancels out the carbon emissions created by a different action.<sup>18</sup> Land managers can leverage forests to provide carbon offsets.<sup>19</sup> Forests can trap—or sequester—large amounts of carbon dioxide (CO<sub>2</sub>)—a greenhouse gas—through photosynthesis.<sup>20</sup>

### **Types of Forest Management Projects that Provide Carbon Offsets**

There are two types of forest management projects that may be useful to create carbon offsets around military installations: avoided conversion and improved forest management. Reforestation is another common type of carbon offset project and involves planting forests from seeds and saplings, but it may not be the most efficient for the Army because large, mature forests often already exist in the areas surrounding military installations.<sup>21</sup> Avoided conversion projects prevent the conversion of forested land into non-forested land, such as single-family housing developments.<sup>22</sup> Improved forest management projects use land management practices to maintain a forest's ability to sequester carbon while still allowing for some selective timbering, ranching, and farming.<sup>23</sup>

### **Current Applications in the Private Sector**

The private sector is already partnering with private landowners to provide carbon offsets.<sup>24</sup> Companies that produce large amounts of greenhouse gases, such as some major airlines, pay private landowners to maintain their forest to sequester carbon and, therefore, offset their airplanes' carbon emissions.<sup>25</sup> The airline industry may enter into carbon offset contracts and cite their “corporate responsibility” to help sell their products; however, more than likely, their actions may also be motivated by the fear of litigation originating from international agreements—such as the Carbon Offsetting and Reduction Scheme for International Aviation.<sup>26</sup>

### **Using the ACUB to Acquire Conservation Easements to Prevent Deforestation**

Army installations often tend to be in remote, sparsely populated parts of the country.<sup>27</sup> Historically, many of these locations were selected as optimal for training and testing because the surrounding population was sparse, and the risk of encroachment was low.<sup>28</sup> The Army can continue to take advantage of these remote locations to protect the undeveloped land around its installations to create carbon offsets.

### **What Is a Conservation Easement?**

A conservation easement is an agreement where a landowner partners with a private organization or public agency to convey away certain rights to their land to preserve it for specific conservation values.<sup>29</sup> The landowner may grant the easement voluntarily, or they may receive compensation from the partner or certain tax advantages.<sup>30</sup> Organizations such as the Nature Conservancy and private or public land trusts commonly obtain conservation easements to protect endangered or threatened species and their habitats.

### **ACUBs to Prevent Deforestation**

The Army can create carbon offsets using ACUBs as avoided conversion forestry projects. This could be as simple as maintaining the existing forested land around its installations. The Army would be able to claim these projects as carbon offsets because the forested land would seques-

ter CO<sub>2</sub>. The more acreage the Army can protect, the more it can claim offsets for its training and operational activities.

To take advantage of these opportunities, Army installations would need to work with non-government entities and non-Federal Government agencies to pursue the mutually beneficial goal of protecting the land around installations. There are multiple non-government organizations who already focus on managing and protecting forested land—such as the Georgia-Alabama Land Trust, which is already working to preserve the longleaf pine ecosystems around Fort Stewart and Fort Benning in Georgia.<sup>31</sup>

## Conclusion

The amount of CO<sub>2</sub> and other greenhouse gases in the atmosphere are rising and gaining the attention of the scientific community and policy makers around the world.<sup>32</sup> *Juliana* arguably displays a trend that the Army cannot ignore. Furthermore, members of Congress are already trying to push the Green New Deal legislation into law.<sup>33</sup> The Army can reduce its risk from a likely increase in carbon-use litigation by using land management strategies, such as the ACUB program, to use the forested land already existing around military installations to offset the carbon emissions from military training and operations. **TAL**

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## Notes

1. Plaintiff's Complaint for Declaratory and Injunctive Relief at 1-5, *Juliana v. United States* (D. Or. Aug. 12, 2015) (No. 6:15-cv-01517-TC), 2015 WL 4747094. Ashton Carter was named as a defendant in his official capacity as then-Secretary of Defense.
2. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).
3. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); Petition for Rehearing *En Banc* of Plaintiffs-Appelees, *Juliana v. United States* (9th Cir. Mar. 2, 2020) (No. 18-36082), *reh'g denied*, 2021 U.S. App. LEXIS 3688 (9th Cir. Feb. 10, 2021).
4. *The Green New Deal*, GREEN PARTY US, [https://www.gp.org/green\\_new\\_deal](https://www.gp.org/green_new_deal) (last visited Sept. 28, 2021). Notably, the Green New Deal's policy platform already targets the military and its budget. *Id.*

5. Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019).

6. Neta C. Crawford, *The Pentagon Emits More Greenhouse Gases than Any Other Part of the US Gov't*, LIVE SCI. (June 12, 2019), <https://www.livescience.com/65698-defense-department-climate-change.html>.

7. *Army Compatible Use Buffer (ACUB) Program*, U.S. ARMY ENV'T COMMAND, <https://aec.army.mil/index.php/conserve/ACUB> (July 1, 2020) [hereinafter *ACUB Program*].

8. *Id.* Landowners will agree to maintain the land consistent with the purpose of the buffer zone; and, in exchange, they will often receive lucrative tax benefits. *How We Work: Private Lands Conservation*, NATURE CONSERVATORY, [https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/?tab\\_q=tab\\_container-tab\\_element\\_670](https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/?tab_q=tab_container-tab_element_670) (last visited July 19, 2021) [hereinafter *How We Work*].

9. *ACUB Program*, *supra* note 7.

10. The Army uses Army Compatible Use Buffer (ACUB) zones at Joint Base Lewis-McChord to protect the Streaked Horned Lark, Taylor's Checkerspot Butterfly, and the Mazama Pocket Gopher. *See, e.g.*, Jeffrey R. Foster, Presentation at the Cascadia Prairie-Oak Conference, Army Compatible Use Buffer: Cooperative Recovery of ESA-Listed Species in the Vicinity of a Military Installation (Oct. 28, 2015), [https://cascadiaprairieoak.org/wp-content/uploads/2015/12/Foster\\_ArmyCompatibleUseBuffer\\_CPOP2015Conf.pdf](https://cascadiaprairieoak.org/wp-content/uploads/2015/12/Foster_ArmyCompatibleUseBuffer_CPOP2015Conf.pdf).

11. *See, e.g.*, *Compatible Use Planning Makes for Good Neighbors*, KNOX REG'L DEVELOPMENTAL ALL., <https://growknox.org/good-neighbors/> (last visited Oct. 5, 2021).

12. Graci Bozarth, *Winning on All Fronts: A Case Study for the Army's Compatible Use Buffer Program at Fort Riley, Kansas*, 48 URBAN LAW. 143, 145-46 (2016).

13. *Id.*

14. *Id.*

15. Agreements to Limit Encroachments and Other Constraints on Military Training, Testing, and Operations, 10 U.S.C. § 2684a (2008).

16. *Id.*

17. *Id.*

18. Peter Miller, *Carbon Offsets 101*, NAT'L RES. DEF. COUNCIL (Sept. 30, 2019), <https://www.nrdc.org/experts/peter-miller/carbon-offsets-101>.

19. Christine Yankel, *FAQ: Forest Carbon Projects*, CLIMATE TRUST, [https://climatetrust.org/forest-carbon-projects-faq/?gclid=CjwKCAjwvZv0BRA8EiwAD9T2VZOax5CY9smMmXLNGIz7\\_ru4BjzB-cl\\_fg-tYFgmkpVDmL1zV6SfFxoCf7MQAvD\\_BwE](https://climatetrust.org/forest-carbon-projects-faq/?gclid=CjwKCAjwvZv0BRA8EiwAD9T2VZOax5CY9smMmXLNGIz7_ru4BjzB-cl_fg-tYFgmkpVDmL1zV6SfFxoCf7MQAvD_BwE) (Feb. 8, 2018).

20. Rajan Parajuli et al., *An Introduction to Forest Carbon Offset Markets*, N.C. STATE EXTENSION PUBL'NS, <https://content.ces.ncsu.edu/an-introduction-to-forest-carbon-offset-markets> (July 15, 2019).

21. *Id.*

22. *Id.*

23. *Id.*

24. *See, e.g.*, Parajuli et al., *supra* note 20.

25. *See, e.g.*, *CarbonChoice Carbon Offset Program*, UNITED, <https://www.united.com/ual/en/us/fly/company/global-citizenship/environment/carbon-offset-pro>

- gram.html (last visited July 20, 2021). United Airlines advertises that it will "purchase carbon offsets on behalf of [their] customers so all their corporate air travel with [them will be] 100% carbon neutral. Through [their] partnership with Conservation International, these carbon offsets support projects designed to help reduce greenhouse gases and provide social and economic benefits to communities around the world." *Id.*

26. Parajuli et al., *supra* note 20. The Carbon Offsetting and Reduction Scheme for International Aviation (CORSA) is a United Nations-brokered international agreement that aims to make international air travel carbon neutral. Agreements like CORSA symbolize an increasing emphasis on carbon neutrality, and civil cases like *Juliana* show how easily carbon-use issues can lead to litigation for the U.S. Government.

27. *See, e.g.*, *White Sands Missile Range*, NAT'L PARK SERV., <https://www.nps.gov/whsa/learn/historyculture/white-sands-missile-range.htm> (Sept. 12, 2016).

28. *Id.* As perhaps the best example of this point, White Sands Missile Range in New Mexico was chosen for the world's first atomic weapon test largely for its isolated location. *White Sands Missile Range*, U.S. ARMY, <https://www.wsmr.army.mil/Trinity/Pages/TrinityHistory.aspx> (May 20, 2021, 7:23 AM).

29. *How We Work*, *supra* note 8.

30. *Id.*

31. *Georgia-Alabama Land Trust Partnership (ACUB)*, GA.-ALA. LAND TRUST, <https://www.galandtrust.org/acub> (last visited Sept. 30, 2021).

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33. Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. (2019).



The North Atlantic Treaty Organization Headquarters in Brussels, Belgium. (Credit: Lisa Ferdinando)

## Practice Notes

# Legal Operations

## The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition<sup>1</sup>

*By Rodrigo Vázquez Benítez, Colonel Kristian W. Murray, & Brigadier General Pavel Kriz*

### NATO's Purpose

The purpose of the North Atlantic Treaty Organization (NATO) is to safeguard the freedom and security of its Alliance members by political and military means.<sup>2</sup> In the military domain, the Alliance accomplishes this purpose by maintaining and developing its individual and collective ability to deter and resist armed attack, by

consulting together whenever the security of one of the Alliance nations is threatened, and by defending Alliance territory and population from armed attack, as set out in Articles 3, 4, and 5 of the North Atlantic Treaty.<sup>3</sup>

The Alliance operates in an environment of adversaries who actively attempt to influence the decision-making process and to

undermine NATO legitimacy by attacking the Rules-Based International Order (R BIO) to seek regional and global instability.<sup>4</sup> However, in contrast, the cornerstone of all NATO military operations is legal legitimacy based upon compliance with international law and adherence to the rule of law.<sup>5</sup> Unfortunately, NATO's adversaries perceive the Alliance's focus

ately targeting civilians and petitioning international organizations for redress, as the Taliban has done against NATO in Afghanistan;<sup>9</sup>

3. Attempting to shape and manipulate customary international law for their own benefit to gain territory and frustrate Allied freedom of maneuver by claiming historical rights over land and

## Challenges

In the context of strategic competition, the challenges posed by hybrid threats—and their materialization in Hybrid Warfare and Grey Zone environments<sup>13</sup>—have blurred the traditional border between peace and war.<sup>14</sup> This, added to the contexts of 1) an increased use of asymmetric/non-conventional warfare techniques—in peacetime, crisis, and conflict—and 2) an enhanced role of (perceived) legitimacy, have made law a particularly attractive area to be exploited in conjunction with other instruments of power across the Diplomatic, Intelligence, Military, Economic, Financial, Information and Legal (DIMEFIL) spectrum.<sup>15</sup> When it comes to strategic competition, this exploitation of what could be defined as the “legal domain”<sup>16</sup> is referred to by the NATO ACO OLA as “legal operations.”<sup>17</sup>

Strategic Competition is a challenge currently felt across all NATO's core tasks. Since 2015, NATO's response to hybrid threats has been focused on improving Alliance situational awareness through intelligence and information sharing and strengthening its deterrence and defense posture.<sup>18</sup> The North Atlantic Treaty Organization is also enhancing its crisis response procedures to guide decision-making in crises. It supports the comprehensive strengthening of Allied resilience to protect our societies and institutions, as well as to deter hybrid attacks by denying their success or by showing the capability to oppose them.<sup>19</sup> These sometimes-preparatory hybrid actions seek to exploit vulnerabilities, precondition and disrupt NATO's ability to take timely decisions, and weaken the Alliance's resilience and ability to withstand or counter a conventional attack. While individual elements or actions may not necessarily be illegal or pose a threat in their own right, when combined they can threaten individual Allies or the Alliance and its cohesion.

The use of hybrid strategies in conflict is not new in human history; what is new for NATO is the way and the strengths in which its opponents apply a wide range of political, civil, and military instruments in a combined, systematic, and coherent manner. These strategies are aimed at particular vulnerabilities of targeted nations and international organizations in order to

## **NATO's adversaries purposely seek to exploit the Alliance's compliance to the rule of law and its compliance to law of armed conflict (LOAC) principles, purposely provide disinformation or distort the rule of law to justify their own policies, and purposely conduct malign hybrid activities below the Article 5 “armed attack” threshold in order to facilitate political objectives.**

on legal legitimacy as a critical vulnerability to exploit and a method to subvert the Alliance's political and public support. Specifically, NATO's adversaries purposely seek to exploit the Alliance's compliance to the rule of law and its compliance to law of armed conflict (LOAC) principles, purposely provide disinformation or distort the rule of law to justify their own policies, and purposely conduct malign hybrid activities below the Article 5 “armed attack” threshold in order to facilitate political objectives.<sup>6</sup>

The North Atlantic Treaty Organization's adversaries' malign activities all have a direct and unique legal operations component which transcends the tactical, operational, and strategic domains. In the future, one can imagine multiple examples of how NATO adversaries will conduct malign legal operations to undermine Alliance activities as they have done in the past. Examples include adversaries doing the following:

1. Violating the LOAC for their own benefit by employing civilian human shields,<sup>7</sup> as the Islamic State of Iraq and Levant has done in Iraq and Syria;<sup>8</sup>
2. Producing propaganda that blames NATO and its commanders for deliber-

maritime territories in the Arctic, the High North, and the South China Sea, as China<sup>10</sup> and Russia<sup>11</sup> have both done and continue to do; and

4. Utilizing their own domestic law to conduct influence operations and justify military interventions, as Russia has done prior to its invasion of Crimea—and continues to do in Ukraine—by granting passports and pension rights to Ukrainian Russian-speaking minorities and subsequently alleging that their human rights were being systematically violated.<sup>12</sup>

Within this context, the law, and by extension lawyers, must work to identify and assess NATO adversaries' misuse of the law and recommend appropriate lawful responses to adversaries' malign legal activities. They must do this by providing principled nuanced advice on ways and means to achieve strategic and operational goals grounded in the law and ethics to preserve this legitimacy of Allied military operations. This is one of the primary responsibilities of the NATO Allied Command Operations Office of Legal Affairs (ACO OLA) and the focus of this article.

achieve strategic objectives.<sup>20</sup> Furthermore, some hybrid strategies aim at complicating, delaying, and eventually impeding timely decision-making; others undermine the ability of an Ally, or the Alliance as a whole, to respond to such a threat swiftly, firmly, and effectively.<sup>21</sup>

In this context, the use of legal operations allows any potential opponent to have a significant impact while avoiding the use of kinetic means, and, hence, remain under the threshold of the use of force. Several state and non-state actors are increasingly using the legal domain in a context of strategic competition to achieve their strategic objectives and interests, not only tampering with the RBIO, but also destabilizing international relations.<sup>22</sup>

### Legal Operations

Legal operations may be broadly defined as the use of law as an instrument of power. The term encompasses any actions in the legal domain by state or non-state actors aimed at, among others, gaining—or undermining the opponent’s—legitimacy, advancing/undermining interests, or enhancing/denying capabilities, at the tactical, operational, strategic and/or (geo)political levels. Legal operations may be used across the whole peace-crisis-conflict spectrum through, and in combination with, a wide range of DIMEFIL tools that are not necessarily of a legal nature.

For instance, legal operations may support or materialise a psychological or an information operation against a military commander by falsely accusing them—inside or outside the courtroom—of committing crimes in the conduct of his duties; supporting a broader influence operation; or providing citizenship or pension rights to minorities of a neighbour state.<sup>23</sup> They could also serve to hamper the activities of a competitor or opponent by passing new laws that allow for imposing sanctions on its leadership or embargoes on its assets, or by using international mechanisms to demand responsibility/accountability for its violations of international law.<sup>24</sup> Other instruments of power can be used to change international law itself by applying diplomatic, political, economic, and even military pressure on other actors to accept new practices or interpretations more

favorable to the state actor—such as current challenges to the interpretation of the Law of the Sea in particular regions.<sup>25</sup> They may also consist of a “legal preparation of the battlefield”—i.e., actions aimed at shaping in advance the (appearance of) legality or legitimacy of an action normally involving the use of force, and thus minimise the consequences or limiting or delaying retaliation.<sup>26</sup>

Legal operations may thus encompass both the classical legal actions detachable from the conduct of hostilities and those which, on the contrary, are directly or indirectly involved in the achievement of the desired end-effects of an actor against another actor. They can be used as stand-alone actions, in conjunction with other instruments of power, or be part of a wider hybrid or conventional warfare strategy.

As opposed to legal operations, the commonly used term “Lawfare” is defined as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>27</sup> Although this concept is often used to describe some of the actions encompassed by the term “legal operations,” it is less comprehensive, more limited in scope, and the object of intense academic controversies.<sup>28</sup>

### The Preservation of the Rule of Law

As a result of NATO’s commitment to countering hybrid threats, ACO OLA has recognised the need to anticipate, detect, identify, assess, and respond to hostile legal operations through a uniformed methodology while recognizing the sovereign powers of the Allies, embracing the rule of law, and stressing the importance of a stable international legal framework. The latter are particularly relevant.

As expressed in the preamble to the North Atlantic Treaty, the NATO Allies are “determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”<sup>29</sup> The preservation of the rule of law and a stable RBIO is, thus, one of the underpinning values of the Alliance.

Legal operations are a neutral concept, in the sense that their use might not necessarily entail an illegitimate use of the law. For instance, using or enhancing the law

to enforce currently existing prohibitions, using domestic or international courts to demand responsibility/accountability for violations of the law, or passing new legislation or adopting new international instruments with the aim of preventing further breaches or erosion of the rule of law or the RBIO, represent what could be categorised as “white” legal operations. This is the use of law as an instrument of power not to challenge our values-based system, but to reinforce it.

Nonetheless, the use of law as an instrument of power does carry the risk of eroding the rule of law and, hence, any activities in the legal domain by the Allies must always look carefully at the overall system and how their individual and collective actions—not necessarily using the legal instrument of power—affect the integrity of the rule of law and the stability of the RBIO.

### Operationalization

Departing from the concept of legal operations, the methodological framework used by ACO OLA for its analysis is the “Legal Operations Response Cycle” (LORC).<sup>30</sup> Broadly, the response cycle is composed of four main phases to be followed when defending against any given hostile legal operation: Identification; Assessment; Strategy Definition; and Response. However, the LORC is only a process that needs to be integrated into (and supported by) effective actions and tools and wider processes to achieve success.

In this sense, legal vigilance, which is essential for the detection at an early stage of hostile legal operations and their potential effects before they are fully displayed, has become an integral part of the work of any NATO military legal advisor. Moreover, legal operations—like other activities in hybrid environments—are characterized by the need to include in their identification, assessment, and response a variety of actors within all instruments of power in the DIMEFIL spectrum. These would need to “interoperate” when assessing or responding to a hostile legal operation. For this reason, legal operations form part of planning, training, and exercising, which is essential for the awareness and readiness of all actors potentially involved, and contributes to increasing NATO’s resilience

and deterrence posture.<sup>31</sup> These activities underpin ACO OLA's efforts in the field of legal operations, with legal vigilance as its main effort, and the preservation of the RBIO and the rule of law at its core.

## Conclusion

The use of law as an effective instrument of power is not a new phenomenon, as demonstrated by the success of Hugo Grotius's *Mare Liberum*. In 1493, Pope Alexander VI used a papal decree to divide

to the effects of globalization and almost ubiquitous public and personal access to information and opinion, perceptions of legality and legitimacy have gained renewed importance; thus, strategic competition has highlighted the relevance of law as an essential instrument of power amongst the other instruments in the DIMEFIL spectrum. The North Atlantic Treaty Organization's opponents, including state and non-state actors, use legal operations extensively across the spectrum of peace to

**Allies must be vigilant and work individually and collectively to detect where its competitors are adapting and undermining the RBIO. As they pledged in the preamble of the North Atlantic Treaty, they must work actively to strengthen and safeguard our rule of law system, denying the advantages that competitors can obtain by using instruments of power under—and above—the threshold of armed conflict.**

the world's newly discovered continents and oceans between Spain and Portugal.<sup>32</sup> By the seventeenth century, Portugal's sovereign control over parts of the Atlantic and Indian Oceans gave it a monopoly on the East India trade. Not being able to confront militarily the then-mighty Portuguese navy, and in order to challenge its monopoly, the Dutch East India Company hired the scholar Hugo Grotius, who developed a new legal doctrine advocating for the freedom of oceanic navigation.<sup>33</sup> This new doctrine was published in *Mare Liberum (Freedom of the Seas)* in 1609<sup>34</sup> and was intensely promoted by the Dutch East India Company. Grotius's novel arguments, which laid the foundations of the modern law of the sea and immensely benefited the Dutch East India Company, were accepted and remain controlling to this day.<sup>35</sup>

Our times face similar novelty. Traditional, kinetic deterrence is so successful that state and non-state actors are engaging in new, hybrid tactics to compete below the threshold of armed conflict. Moreover, due

war all over the globe.

Consequently, the Alliance should not shy away from engaging its competitors in this "new" legal domain. Rather the opposite, Allies must be vigilant and work individually and collectively to detect where its competitors are adapting and undermining the RBIO. As they pledged in the preamble of the North Atlantic Treaty, they must work actively to strengthen and safeguard our rule of law system, denying the advantages that competitors can obtain by using instruments of power under—and above—the threshold of armed conflict. In order to achieve this effect, legal operations response, vigilance, training, education and exercises, and awareness are essential activities that NATO and its members should undertake and integrate in their tasks and processes; their ultimate aim should be to preserve the Alliance's resilience, strengthen its defence and deterrence posture, and support and protect the fulfilment of its purpose. **TAL**

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## Notes

1. This article was originally published in the *North Atlantic Treaty Organization (NATO) Legal Gazette*. See Rodrigo Vázquez Benítez, *Legal Operations: The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition*, NATO LEGAL GAZETTE, Oct. 2020, at 138. It has been revised and reprinted with permission of the *NATO Legal Gazette*. The views presented in this article are solely those of the authors and do not necessarily represent the views of the NATO.
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10. Sascha-Dominik (Dov) Bachmann & Andres Munoz Mosquera, *China's Strategic Preconditioning in the Twenty-First Century*, WILD BLUE YONDER (Apr. 13, 2020), <https://www.airuniversity.af.edu/Wild-Blue-Yonder/Article-Display/Article/2145001/chinas-strategic-preconditioning-in-the-twenty-first-century/>.

11. Elena Cirkovic, *Russia, International Law, and the Melting of the Arctic*, VÖLKERRECHTSBLOG (Jan. 22, 2018), <https://voelkerrechtsblog.org/russia-international-law-and-the-melting-of-the-arctic/>.

12. Dan Altman, *The Long History of "Green Men" Tactics—And How They Were Defeated*, WAR ON THE ROCKS (Mar. 17, 2016), <https://warontherocks.com/2016/03/the-long-history-of-green-men-tactics-and-how-they-were-defeated/>. See generally Jurij Harduk & Tomasz Stepniewski, *Russia's Hybrid War with Ukraine: Determinants, Instruments, Accomplishments and Challenges*, 2 STUDIA EUROPEJSKIE 37 (2016).

13. See Josep Baques, *Towards a Definition of the 'Gray Zone' (GZ) Concept*, INSTITUTO ESPAÑOL DE ESTUDIOS ESTRATÉGICOS 26 (2017) (Spain).

The hybridization (or blurring) between military and civilian, or between military convention and the more typical role of the irregular forces, constitutes a new way of promoting and, if necessary, managing conflicts. The concept of a Hybrid Threat includes several possibilities, from the Hybrid War (HW) to Gray Zone (GZ). While the HW is a type of war, the GZ is characterized by being neither White (conflicts cease to be managed according to bona fide parameters) nor Black (without crossing the thresholds that would allow or demand an armed response, either from a legal point of view—taking into account the parameters of international law—and/or from a political and strategic perspective—taking into account US/NATO parameters . . . .

*Id.* (translated to English). See also A.B. Munoz Mosquera & N. Chalanouli, *Decoding Gray Zone Environments in LEGAL RESILIENCE* (forthcoming 2021/2022).

14. See NATHAN FREIER, STRATEGIC COMPETITION AND RESISTANCE IN THE 21ST CENTURY: IRREGULAR, CATASTROPHIC, TRADITIONAL AND HYBRID CHALLENGES IN CONTEXT 19 (2014). See also Munoz Mosquera & Chalanouli, *supra* note 13.

15. Diplomatic, Intelligence, Military, Economic, Financial, Information and Legal, or "DIMEFIL," is a concept that refers to the multiple available instruments of state power. See Katerina Oskarsson, *The Effectiveness of DIMEFIL Instruments of Power in the Gray Zone*, 1 OPEN PUBL'NS (2017). While DIMEFIL is not an agreed upon NATO term, since 1983, NATO has included these concepts in its strategic concept.

See strategic concept/concept stratégique, ALLIED ADMIN. PUBL'N (AAP-06 2019), [https://www.coemed.org/files/stanags/05\\_AAP/AAP-06\\_2019\\_EF.pdf](https://www.coemed.org/files/stanags/05_AAP/AAP-06_2019_EF.pdf) ("The course of action accepted as a result of the estimate of the strategic situation. It is a statement of what is to be done in broad terms sufficiently flexible to permit its use in framing the military, diplomatic, economic, psychological and other measures which stem from it.")

16. See generally Aurel Sari, *Hybrid Warfare, Law, and The Fulda Gap* 161, in COMPLEX BATTLE SPACES (Christopher Ford & Winston Williams eds., 2019). See also Andres B. Munoz Mosquera & Abraham Munoz Bravo, *The Legal Domain: A Need for Hybrid Warfare Environments*, NATO, Dec. 2017, at 9–10.

17. A. Munoz Mosquera et al., *The Path to Legal Resilience in LEGAL RESILIENCE* (forthcoming 2021/2022).

18. *Deterrence and Defence*, NATO, [https://www.nato.int/cps/en/natohq/topics\\_133127.htm](https://www.nato.int/cps/en/natohq/topics_133127.htm) (June 25, 2021, 3:18 PM).

19. *Id.*

20. FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARS (2007). See also Memorandum from the Ministry of Defence, subject: Written Evidence—Ministry of Defence (Feb. 12, 2016), [data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/russia-implications-for-uk-defence-and-security/written/28854.pdf](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/russia-implications-for-uk-defence-and-security/written/28854.pdf).

Hybrid warfare can be characterised as a comprehensive strategy based on a broad, complex, adaptive and often highly integrated combination of conventional and unconventional means. It uses overt and covert activities, which can include military, paramilitary, irregular and civilian actors, targeted to achieve (geo) political and strategic objectives. Hybrid warfare is directed at an adversary's vulnerabilities, focused on complicating decision making and conducted across the full spectrum (which can encompass diplomatic, political, information, military, economic, financial, intelligence and legal activity) whilst creating ambiguity and deniability. Hybrid strategies can be applied by both state and non-state actors.

*Id.* para. 15.

21. Bachmann & Mosquera, *supra* note 6, at 86.

22. Khan, *supra* note 9.

23. Altman, *supra* note 12.

24. Bachmann & Mosquera, *supra* note 6, at 72–75.

25. Munoz & Chalanouli, *supra* note 13.

26. *Id.*

27. Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFS. 146, 146 (2008). A contraction of the words "law" and "warfare," lawfare is an academic concept developed by Major General (Retired) Charles Dunlap between 2001 and 2011.

28. See generally Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT'L L. 61 (2010).

29. North Atlantic Treaty, 4 Apr. 1949, pmbl. (emphasis added).

30. Mosquera et al., *supra* note 17.

31. *Id.*

32. The decree was issued on 26 September 1493 and then modified by the Treaty of Tordesillas in 1494. See

generally José Antonio Martínez Torres, "Gobernar el Mundo": La polémica Mare Liberum versus Mare Clausum en las Indias Orientales (1603–1625), 74 ANUARIO DE ESTUDIOS AMERICANOS 71 (2017). See also Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT'L L.J. 231, 244–45 (2017) (quoting CHARLES GIBSON, SPAIN IN AMERICA 15–18 (1966) ("discussing Alexander VI's papal donations in three celebrated bulls of 1493, which resulted in the Treaty of Tordesillas in 1494")).

33. See generally Torres, *supra* note 32.

34. HUGO GROTIUS, THE FREE SEA 13 (David Armitage & Knud Haakonssen eds., Richard Hakluyt trans., 2004).

35. United Nations Convention on the Law of the Sea art. 89, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (1982) ("No State may validly purport to subject any part of the high seas to its sovereignty."). See also *id.* arts. 89–94, 96–98.



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## Practice Notes

# Empower Yourself, Empower Your Team Attacking Assumptions and Rethinking Risk in TSP Fund Selection

*By Major John Loscheider & Major Courtney Cohen<sup>1</sup>*

Every new Army recruit is also an investor. In fact, they invest in government securities, bonds, international corporations, and virtually every company in the entire U.S. stock market. Now that the blended retirement system (BRS) is the retirement plan for all new recruits and many mid-career Service members, Soldiers are automatically enrolled and have money invested monthly into the Thrift Savings Plan (TSP). Whether Soldiers like this reality or not, selecting from fund options is essential for Soldiers to understand and critical for leaders to appreciate. Why? The difference between investment allocation choices can significantly impact overall financial well-being, a comfortable retirement, and even the financial future of Soldiers' beneficiaries. Indeed, "investment allocation is one of the most important factors affecting the *growth* of your account."<sup>2</sup> This article aims to familiarize readers with the basics of asset allocation within the TSP, address some of the assumptions that underlie the funds, and give TSP investors ideas to tailor their asset allocation to their specific risk tolerance and personal situation.

### What Is Asset Allocation?

Asset allocation, in basic terms, describes the ratio of different types of stocks and bonds in one's portfolio. Stocks are shares of ownership

in a specific company, such as Microsoft, Apple, or Wal-Mart, the value of which fluctuate as the companies perform—for better or worse—over time. Bonds, on the other hand, are more of a loan to an entity or company from the investor (imagine a bank or investor loaning money to the company at a specific interest rate). Because of these differences, stocks are more volatile than bonds. While stocks have historically provided investors greater returns than bonds, they are also much more susceptible than bonds to sharp downward turns. Conversely, bonds provide greater stability and less volatility, although their long term prospects for growth pale in comparison to historical stock returns. In a portfolio with a combination of stocks and bonds, bonds offer a layer of stability, dulling the sometimes sharp fluctuations in market value that stocks produce.

Generally, young investors have more time to wait out volatile markets, meaning they should weight their retirement portfolio heavily in stocks. A long "investment horizon" (i.e., more time to wait until you need the money)—coupled with the long-term past performance of stocks—can lead to a winning combination for retirement. Conversely, as retirement age approaches, preserving the accumulated wealth in one's account becomes more important, especially since watching the value of one's account fall in volatile

markets could be detrimental to retirement plans—and one’s sanity. Therefore, the percentage of bonds in an overall portfolio should typically increase with age. Then, when it is close in time to when the money will be needed, the bonds will smooth (although not necessarily stop) dramatic account value fluctuations.

### Everything Starts with Risk

Risk, in general terms, is exposure to a danger, such as financial loss. Risk is often discussed in comparison to return, which is the possibility of financial gain. The volatility of a particular investment generally indicates its level of risk. For example, a company’s stock price fluctuates up and down daily, based on good or bad earnings, profit, new products, new competition, or for a variety of other reasons.<sup>3</sup> The intensity of swings in a stock’s price over time determines its volatility. High-volatility investments usually indicate high potential for both significant financial gain and significant financial loss. In other words, investors who take bigger risks can sometimes see even bigger returns in exchange for assuming that risk. In broadest terms, the overall goal of investing is to mitigate risk while maximizing returns.

Another element of risk to consider besides market fluctuation is the risk of not having enough money for retirement. This risk can arise from multiple sources. First, a portfolio too heavily weighted in stocks too close to retirement could mean that a sharp market downturn forces the investor to continue working or accept a lower standard of living in retirement. Second, a portfolio too heavily weighted in cash and bonds in one’s early investment years could mean the investments fail to grow to a retirement-worthy sum or, worse, fail to beat inflation, which constantly diminishes the purchasing power of one’s savings.<sup>4</sup> Third, there is a risk that, despite prudent investment decisions, an individual simply does not invest enough money throughout one’s working years.<sup>5</sup> Therefore, every investor must determine how much risk they can tolerate at each stage of their life, also known as their “risk profile.” Relevant factors influencing one’s risk profile include age, quality of life expectations, retirement goals, and individual preferences and behaviors.

### What Options Exist Within the TSP?

There are five core funds in the TSP (namely G, F, S, C, and I) as well as 10 Lifecycle funds (L-funds) which own different proportions of the five core funds. Of the five core funds, the G Fund and F Fund are similar to bond funds, although the G Fund will never lose money.<sup>6</sup> The C Fund and the S Fund are composed of stocks of virtually every company traded on U.S. markets, with C Fund holding stocks of roughly 500 of the biggest companies and S fund holding stocks of the remaining smaller, publicly-traded companies. The I Fund holds stocks of major non-U.S. companies from over twenty different developed countries.<sup>7</sup>

The newest additions to the TSP funds are the L-Funds. L-funds are “professionally determined investment mixes” of the five core funds, and those mixes automatically become less risky as the fund nears its target date.<sup>8</sup> For example, the L-2065 fund is the most aggressive L-fund and assumes participants will want to withdraw money (i.e., retire) on or around 2063 or later, so it holds a very high percentage of stocks now—currently around 99 percent. Every three months, fund administrators incrementally lower the risk profile of the fund by exchanging stock and bond funds for a higher proportion of the risk-appropriate G fund. By the year 2050, for example, the percentage of stocks in the L-2065 fund will have decreased from 99 percent to 78 percent, whereas the G fund will account for over 16 percent of the fund. L-funds are a fire-and-forget missile of the investment world, allowing investors to continually invest in the same, single fund their entire career and never worry about having to make adjustments for risk as they near retirement.

Literally 100 percent of newly-accessed Soldiers will have monthly contributions flowing into their TSP account after 60 days of service. Until September 2015, the default fund was the safe, and therefore relatively low-performing, G-fund.<sup>9</sup> Today, if a Soldier does not log on to TSP.gov and dictate how money should be invested, the funds will automatically be invested in the appropriate L-fund for the Service member’s age.<sup>10</sup> And thankfully so. The younger demographics of the military should embrace the risk-reward qualities of the L-funds, especially

compared to the slow-growing G fund. After all, market volatility will always exist; younger investors with a long investment horizon should view temporary downward trends as an opportunity to buy stocks and stock funds at discounted prices.

### Roth v. Traditional: A Not-So-Taxing Choice

As TSP investors, Soldiers must now choose *when* they want to pay taxes on their TSP contributions. There are three choices: Roth, traditional, or a mix of both. If making Roth contributions, Soldiers pay income tax on the contributions before the money is invested, but they can withdraw the money, tax-free, in retirement.<sup>11</sup> If making traditional contributions, the Soldier does not pay income tax on the money before it is invested; but, they must pay taxes when they withdraw money at their then-existing income tax rate. Any Government contributions, such as the 1 percent automatic and any matching contributions, are characterized as traditional, regardless of the Soldier’s choice between Roth and traditional contributions.

What choice is best? While individual circumstances may differ, Roth is generally a prudent choice for most Soldiers.<sup>12</sup> Paying tax now on TSP contributions and withdrawing the money tax free can be a lucrative strategy because certain tax-exempt service payments, such as housing and subsistence allowances, artificially lower the overall tax rates Soldiers pay on their current earnings. Additionally, because tax rates can change year-to-year, paying taxes now can serve as a hedge against the possibility of rising tax rates in the future. For more information, the TSP website has a comparison calculator, although users may find it of limited efficacy since the inputs require significant assumptions about current and future tax rates.<sup>13</sup> At the end of the day, the choice to *invest* is most important, so the choice of tax treatment should not stifle one’s desire to save for retirement. After having established a baseline understanding of investing generally, it is important to tackle some assumptions or common misperceptions about investing in the TSP.

### First Assumption: The L-Fund Is Best for Me

While the L-Fund is a great default option for TSP participants, an individual’s

risk tolerance, personal financial situation, and other investments might change that assumption. Specifically, the percentage of cash and bond holdings (G and F funds) in the L-funds might over- or under-shoot an individual's risk tolerance. If an investor cannot stand the idea of a shrinking portfolio balance or even feels compelled to check the portfolio balance constantly, they might find the age-appropriate L-fund is too aggressive and decide to own a higher proportion of safer investments, such as the G and F fund.<sup>14</sup>

Conversely, some investors might think the L-funds are too conservative, especially if one considers life expectancy and military pensions. Military retirees are generally expected to live at least as long as the general U.S. population.<sup>15</sup> Additional factors, such as one's current health, income, and gender, may cause a retiree's life expectancy to increase by a significant amount.<sup>16</sup> Increases in life expectancy increase one's investment time horizon, suggesting that holding a higher percentage of stocks vis-à-vis bonds for longer periods of time might be beneficial. Yet, the L-funds do the opposite, sharply increasing the percentage of bonds as the target date approaches to a final composition of less than 30 percent stock funds when the target date is met.<sup>17</sup> Given that the conventional wisdom is to hold 60 percent stock funds at the start of retirement,<sup>18</sup> this would be an extremely conservative stock-to-bond ratio that runs the risk of inflation outpacing portfolio performance, further exacerbated by increases in life expectancy. Likewise, these risks become even more pronounced when one factors in the prospect of a military pension, either under the legacy system or BRS. A military pension is an inflation-adjusting annuity that is backed by the U.S. Government, meaning it should be viewed similarly to a large cash or G fund holding. If a Soldier is entitled to a military pension, the cash-and-bond qualities of that pension skew their overall portfolio conservatively, meaning they should be comfortable with higher stock percentages in their TSP investments.

***Second Assumption: I Don't Have the Time or Training to Pick Funds on My Own***

Investing in the TSP is simple and accessible for everyone. The limited number of fund

options tend to make choices easier. If an individual has a low risk tolerance, short investment horizon, or wants to preserve their account balance at the expense of long-term growth, they should own a higher percentage of cash and bonds (G and F funds). If an individual has a high risk tolerance, a long investment horizon, or a vested military pension, they ought to consider owning a higher percentage of stocks (C, S, and I funds). However, investors should know that only the lifecycle funds rebalance automatically as the investor ages. If the five core funds are owned outright, the individual is responsible for rebalancing the stock-to-bond ratio to keep a desired mix of investments and adjust for changes in risk tolerance.

***Third Assumption: I Don't Need to Invest in the TSP***

While investing in the TSP is not a requirement per se, every new Soldier is automatically invested through agency automatic contributions, so they should have a baseline of knowledge about how it works. Moreover, investing in the TSP is a great idea for everyone due to the miracle of compound interest, the opportunity cost of not investing, the uncertainty of a military or civilian pension, and agency matching contributions. First, retirement accounts (like the TSP) represent an enormous benefit for individuals to save and grow their wealth. Compound interest is the monetary phenomenon by which the interest earned on one's principal begins to generate its own interest.<sup>19</sup> Over time, compound interest amplifies gains and causes account values to grow—exponentially. Second, and conversely, the Internal Revenue Service (IRS) sets yearly limits on investments in tax-advantaged accounts like the TSP, and one can never travel back in time, literally or figuratively, to contribute to a prior year's TSP limit that was left unfulfilled. Third, investing in the TSP is a smart idea because military pensions are not guaranteed. Indeed, only about 19 percent of individuals who begin military service will retire from the military,<sup>20</sup> and most civilian companies are moving away from pensions in favor of 401(k)-style retirement plans.<sup>21</sup> For those who are not vested in a military pension, investing in the TSP is a simple and effective way to hedge against the prospect of changing jobs, medical

disability, non-selection for promotion, or post-military civilian employers that do not offer a pension. Fourth, Service members now have an option to instantly boost their pay—that is, if they invest at least 5 percent of their base pay into the TSP, they receive an automatic 4 percent pay raise in the form of agency matching contributions! As an added benefit, the TSP funds are extremely low cost and diverse, representing stocks and bonds of thousands of companies from around the world.<sup>22</sup> There is no need to ever transfer funds out of the TSP only to invest them with an investment advisor who might promise flexible or fanciful strategies at a significantly higher cost.

***Fourth Assumption: I Must Choose Between an Individual Retirement Account (IRA) and the TSP Because I Cannot Invest in Both***

Wrong! An IRA is a separate and distinct form of tax-advantaged account that individuals can use to save and invest for retirement. IRAs have many characteristics of the TSP, including traditional or Roth tax options; although, Roth accounts are limited to those investors with an adjusted gross income below certain thresholds.<sup>23</sup> An IRA can be established with virtually any civilian brokerage company (such as Charles Schwab or Vanguard) and the fund options are virtually unlimited, depending on the brokerage company selected. Based on IRS limits which change periodically, individuals can contribute up to \$6,000 in an IRA and up to \$20,500 in the TSP in 2022.

***Fifth Assumption: Once I Invest in the TSP, I'm Stuck with Those Options for the Rest of My Life or, Conversely, Once I Separate or Retire from the Military, I Must Move My Money out of the TSP***

Soldiers are generally free to keep their money invested in the TSP or transfer it as they see fit. First, individual contributions always belong to the Soldier and any matching contributions are vested after completing two years of military service.<sup>24</sup> In many cases, Soldiers are eligible to transfer money from other 401(k)s into the TSP, which is a great option considering the rock-bottom costs of TSP funds. Second, if considering a transfer out of the TSP, individuals should think twice. Very little evidence, if any, exists which proves financial managers can

outperform broad market indexes (like the C, S, I, or F funds) over long periods of time.<sup>25</sup> While personal financial managers may tout more fund options than the TSP, they typically receive a fee for managing your account. Unsurprisingly, the funds they would select are almost assuredly more expensive and, in some cases, outrageously expensive when compared to the TSP. Does a .04 percent fee matter compared to a .25 percent or even 1.5 percent fee? Absolutely. These seemingly small numbers might ruin your financial future by robbing you of over 40 percent of your earnings during your lifetime of investing.<sup>26</sup> Fees matter, and the TSP is among the lowest fee providers in the marketplace.

## Conclusion

Military life can be challenging, disruptive, uncomfortable, and stressful at times. Financial considerations are often a root cause or an amplifier of the stressors associated with military life. Fortunately, the TSP is a tool that leaders and Soldiers can—and should—utilize to mitigate these financial stressors. Since every new Army recruit is an investor, they should know some of the basics surrounding TSP funds, risks, tax characterization of contributions, and asset allocation. Whether in a legal assistance capacity, command advisory capacity, or the proverbial water-cooler talk around the office, judge advocates should share their knowledge of the TSP with Soldiers and leaders. As the common Wall Street adage goes: a rising tide lifts all ships.<sup>27</sup> **TAL**

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## Notes

1. The authors of this article are not investment advisors, and their opinions should not be considered investment advice. This article is solely for informational and educational purposes. For additional information on the blended retirement system, see Major Courtney M. Cohen, *The Blended Retirement System: What Leaders Need to Know*, ARMY LAW., no. 4, 2019, at 23.
2. See SUMMARY OF THE THRIFT SAVINGS PLAN 12 (2021), <https://www.tsp.gov/publications/tspb08.pdf> (emphasis added) [hereinafter TSP SUMMARY].

3. Lately, the markets have shown this to be true. For example, COVID-19 had a dramatic impact on world markets, especially from February 2020 through June 2020, frequently causing daily fluctuations of five percent or more across broad market indexes. See, e.g., Matt Phillips & Jeanna Smialek, *Markets Plunge as a Global Recession Appears Almost Inevitable*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/business/stock-market-coronavirus-federal-reserve.html>.

4. Inflation causes prices to rise marginally over time, typically 2 to 3 percent per year, and can have a major impact on portfolios over time. For example, \$10 in 1920 would require \$129.24 in 2020 to maintain the identical purchasing power of that amount. See, e.g., *Inflation Calculator*, US INFLATION CALCULATOR, <https://www.usinflationcalculator.com/> (last visited Sept. 30 2021).

5. While each individual's circumstances may differ, some financial advisors recommend individuals invest 15 percent (or more) of their pay during their working years. See generally *How Much Should I Save for Retirement?*, FIDELITY (July 29, 2021), <https://www.fidelity.com/viewpoints/retirement/how-much-money-should-i-save>.

6. As with the risk discussion earlier, one should be rewarded for taking risks. Therefore, the F fund should be expected to outperform the G fund over long periods of time. See, e.g., Lyn Alden, *Why the F Fund Has Been the Worst Performing TSP Fund Lately*, FEDSMITH (Oct. 10 2018, 3:17 PM), <https://www.fedsmith.com/2018/10/10/f-fund-worst-performing-tsp-fund-lately/> (asserting that, despite recent lackluster F Fund performance, "historically, the F Fund has given investors better returns over the long run than the G Fund in exchange for a little more risk").

7. Note that there may be a benchmark shift to the I fund in the near future, to include the addition of smaller international companies as well as companies from emerging markets. See Ian Smith, *FRTIB Moving Forward With I Fund Change*, FEDSMITH (Nov. 14, 2019, 8:19 AM), <https://www.fedsmith.com/2019/11/14/frtib-moving-forward-i-fund-change/>.

8. See *Lifecycle (L) Funds*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/funds-lifecycle/> (last visited Oct. 18, 2021).

9. See TSP SUMMARY, *supra* note 2.

10. *Id.*

11. If it's a "qualified withdrawal," meaning five years have passed since 1 January of the calendar year in which you made your first Roth contribution and you have reached age 59 ½, have a permanent disability, or have died. *Traditional and Roth Contributions*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/making-contributions/traditional-and-roth-contributions/> (last visited Oct. 18, 2021).

12. High-earning spouses, senior military members, or a large variety of personal circumstances may upend this assumption. See an investment advisor and/or tax professional for specific advice.

13. See *Contribution Comparison Calculator*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/PlanningTools/Calculators/contributionComparison.html> (last visited Sept. 30, 2021). Additionally, for a discussion with comparisons, see TSP SUMMARY, *supra* note 2, starting at page 8.

14. See, e.g., Carolyn Marsh, *Two Asset Allocation Rules You Need to Follow at Any Age*, FORBES (Apr. 23, 2015, 2:39 PM), <https://www.forbes.com/sites/greatspeculations/2015/04/23/two-rules-of-asset-allocation-to-fo>

low-at-any-age/#781740695ea8 (suggesting that younger investors are investing less in stocks in stark contrast to target date fund providers, which are moving toward more aggressive stock-bond allocations in their funds).

15. See OFF. OF ACTUARY, DEP'T OF DEF., STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM, FISCAL YEAR 2017, at 279-80 (2018), [https://actuary.defense.gov/Portals/15/Documents/MRS\\_StatRpt\\_2017%20v4.pdf?ver=Ey-Li\\_moEtY6jgX9GeLMxw%3D%3D](https://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2017%20v4.pdf?ver=Ey-Li_moEtY6jgX9GeLMxw%3D%3D). See also *Actuarial Life Table*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/STATS/table4c6.html> (last visited Oct. 18, 2021).

16. See sources cited *supra* note 15.

17. See, e.g., L 2040, *Composition Tab*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/funds-lifecycle/l-2040/?tab=composition> (last visited Oct. 18, 2021).

18. Rebecca Lake, *The 60/40 Portfolio Is Dead for Retirement Planning*, US NEWS & WORLD (Apr. 23, 2019), <https://money.usnews.com/investing/investing-101/articles/why-the-60-40-portfolio-is-dead-for-retirement-planning> (suggesting that the "classic approach" of 60% stocks in retirement runs a risk of not having enough growth potential in light of increasing life expectancies).

19. Jason Fernando *Compound Interest*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/compoundinterest.asp> (Feb. 16, 2021).

20. U.S. DEP'T OF DEF., THE UNIFORMED SERVICES BLENDED RETIREMENT SYSTEM 1 (2018), <https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/BRS%20Frequently%20Asked%20Questions%2003282018.pdf?ver=2018-03-28-235150-797v>.

21. Jennifer A. Kingson, *Companies Are Racing to Dump Their Pension Plans*, AXIOS (Aug. 7, 2019), <https://www.axios.com/companies-are-racing-to-dump-their-pension-plans-679828fc-65df-401f-956d-8b57eb1f5438.html> ("Among Fortune 500 companies, only 81 sponsored a pension plan in 2017, down from 288 in 1998 . . .").

22. Costs for the administration of the TSP are subsidized by forfeited agency contributions and earnings as well as loans against accounts. See *Administrative and Investment Expenses*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/tsp-basics/administrative-and-investment-expenses/> (last visited Oct. 18, 2021).

23. For 2021, the adjusted gross income for married filing jointly must be less than \$198,000 to contribute this amount. See *Amount of Roth IRA Contributions That You Can Make for 2021*, IRS, <https://www.irs.gov/retirement-plans/amount-of-roth-ira-contributions-that-you-can-make-for-2021> (last updated June 26, 2021).

24. Your account balance must also be greater than \$200, otherwise TSP will send a check to your last address for the amount once you separate from service. *Leaving the Federal Government*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/changes-in-your-career/leaving-the-federal-government/> (last visited Oct. 18, 2021).

25. See, e.g., Mark Hulbert, *This Is How Many Fund Managers Actually Beat Index Funds*, MARKETWATCH (May 13, 2017, 10:46 AM), <https://www.marketwatch.com/story/why-way-fewer-actively-managed-funds-beat-the-sp-than-we-thought-2017-04-24>.

26. See SEC. & EXCH. COMM., HOW FEES AND EXPENSES AFFECT YOUR INVESTMENT PORTFOLIO (n.d.), [https://www.sec.gov/investor/alerts/ib\\_fees\\_expenses.pdf](https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf).

27. See generally Ken Alessi, *A Rising Tide Raises All Ships*, LINKEDIN (July 15, 2019), <https://www.linkedin.com/pulse/rising-tide-raises-all-ships-ken-alessi>.



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## No. 1

# Confronting Russian Cyber Proxies

## Rapid Attribution and Coercive Diplomacy

By Major Kevin D. Anderson

*Whenever boldness encounters timidity, it is likely to be the winner, because timidity in itself implies a loss of equilibrium.<sup>1</sup>*

Over the last two decades, Russia's use of cyber proxies has expanded on a global scale and impacted nearly all aspects of international relations. From effectively shutting down a neighboring government and its financial sector in response to moving a World War II era statue,<sup>2</sup> to disrupting communication platforms in Eastern Europe in concert with kinetic operations,<sup>3</sup> to gaining access to American critical infrastructure,<sup>4</sup> Russia is actively pursuing its strategic objectives through cyber proxies. To date, the United States has tried a variety of methods to hold Russia accountable for its cyber activities including: indicting Russian intelligence officers;<sup>5</sup> sanctioning the assets of individual Russian officials; and implementing broader economic sanctions.<sup>6</sup> However, the United States implemented these actions months—if not years—after the incidents first became known and, therefore, had little utility in dissuading future Russian aggression.<sup>7</sup>

Much of the United States' delay and ambiguity in response seems, at least in part, due to a burdensome attribution process that imposes unrealistic legal standards to effectively react to cyber activities.<sup>8</sup> The speed with which cyber incidents occur, the obfuscation of actors, and plausible deniability through cyber proxies make current legal regimes untenable. As stated in the National Defense Strategy of 2018, adversaries are "using other

areas of competition short of open warfare to achieve their ends (e.g., information warfare, ambiguous or denied proxy operations, and subversion). These trends, if unaddressed, will challenge our ability to deter aggression."<sup>9</sup> This assessment is especially relevant to Russia as one of the most sophisticated cyber actors known to use cyber proxies to challenge the United States.

The United States should move away from the current international legal standards of proxy attribution to confront Russia and its use of cyber proxies. Instead, a new policy—one grounded in a *strategy* of rapid attribution and coercive diplomacy—should be used to supplement the current void of applicable international law. The National Cyber Strategy of 2018 identified the United States' need to build a cyber-deterrence initiative, but failed to give concrete policy prescriptions for dealing with cyber aggression.<sup>10</sup> New standards of rapid attribution and coercive diplomacy would complement international law and induce Russia to adhere to acceptable norms of behavior in cyberspace.

This article aims to identify strategy prescriptions to counter Russian cyber proxy activities by assessing Russia's strategic outlook and use of cyber proxies, identifying various shortcomings of international law, and proscribing a rapid attribution and coercive diplomacy strategy. This strategy will include specific recommen-

**The United States should move away from the current international legal standards of proxy attribution to confront Russia and its use of cyber proxies. Instead, a new policy—one grounded in a *strategy* of rapid attribution and coercive diplomacy—should be used to supplement the current void of applicable international law.**

dations for rapid attribution and decisively engaging Russia through coercive diplomacy, particularly economic sanctions on the Russian oil and gas sector. Such attribution and sanctions will deter Russia from future cyber activities against the interests of the United States and begin to rein in the proxy actors working under Russia.

**Assessment of Russian Cyberspace Activities**

***Why States Use Proxies to Conduct Foreign Affairs***

States use proxy relationships as a way to accomplish national objectives while limiting cost, reducing the risk of “direct conflict,” maintaining some “plausible deniability,” and “projecting power.”<sup>11</sup> In any proxy relationship, there are two parties involved: the principal and the agent. The relationship is premised on the mutual benefit of both parties that exceed the costs of conducting business; however, the principal (i.e., the state) is the chief beneficiary and directs the agent.<sup>12</sup> Additionally, the relationship between the agent and the principal must be intentional for the principal to be held responsible for the actions of the agent.<sup>13</sup> Therefore, an actor who operates on behalf of a principal, for the principal’s benefit, with some formalized relationship, will impute its actions to the principal and is considered a proxy.<sup>14</sup>

Proxy relationships can be particularly attractive to states because they provide “war on the cheap.”<sup>15</sup> States generally use proxies to accomplish a specific task that allows the state to utilize and benefit from a resource without having to maintain the overhead costs associated with continual

employment.<sup>16</sup> As more actors enter the realm of cyberspace and gain technical sophistication, competition between proxies will increase and theoretically drive costs down even further.<sup>17</sup>

Using proxies also puts distance between an aggressor state and target state. Proxies provide states an outlet to pursue foreign policy objectives at a lower cost and with a reduced threat of escalation.<sup>18</sup> As in the Cold War, direct confrontation between the United States and the Soviet Union created too great a risk of escalation, but competition via proxies occurred without escalating to direct conflict between the superpowers (e.g., the Russian–Afghan War, or American intervention in Vietnam).<sup>19</sup> A principal state can use proxies to escalate or deescalate engagements with the presumption of effective control of the proxy.<sup>20</sup>

Finally, proxies provide states with some level of plausible deniability for its actions in cyberspace. Plausible deniability benefits states in “situations in which a target state is able to attribute an attack to an actor, but unable to prove a link between such an actor and a state sponsor.”<sup>21</sup> However, as states become more sophisticated and confident in their attribution processes, the cover and appeal of plausible deniability diminishes.<sup>22</sup>

***Actions Russian Cyber Proxies Have Taken Against U.S. Interests***

Many cyber exploits attributable to Russia are well-known, but specific instances over the last five years are worth highlighting to demonstrate the pervasiveness of Russian-aligned cyber proxy activity. The cases below demonstrate an active attempt

to undermine the political stability of the United States, target critical infrastructure, and wreak havoc globally.

As demonstrated in Table 1,<sup>23</sup> over the past five years, Russian state agencies have worked with several proxy groups to execute strategic objectives through cyber means against the United States. As stated in the United States Summary of the 2018 National Defense Strategy, “revisionist powers . . . are competing across all dimensions of power. They have increased efforts short of armed conflict by expanding coercion to new fronts, violating principles of sovereignty [and] exploiting ambiguity.”<sup>24</sup> Cyber proxies have become a valuable resource for the Russian government because they can accomplish political objectives economically while providing Russia plausible deniability from attribution.<sup>25</sup> Finally, Russia recognizes its relative economic, political, and military shortcomings compared to the United States and utilizes cyber proxies to asymmetrically offset its weaknesses and challenge the United States.

***Russian Strategic Outlook***

Russia’s current approach to the cyber realm is informed by past events, especially its defeat in the Cold War. At the end of the Cold War, and in the decades since, Russia has recognized its inability to compete with the United States and its North Atlantic Treaty Organization (NATO) allies economically, militarily, and even ideologically in international politics.<sup>26</sup> The sway and intrigue of international communism and Marxism was largely lost with the dissolution of the Soviet Union.<sup>27</sup> However, many in Russia did not believe the end of the Cold War was evidence of liberal democracy triumphing over Marxism, rather they perceived the West had effectively subverted the Soviets through various sources of national power and messaging.<sup>28</sup>

This belief led Russia to find asymmetric means to counter a perceived and ever growing threat of domination from the United States and Europe.<sup>29</sup> In the immediate aftermath of the Cold War “Russia initially sought to integrate into the Western system in the early 1990s,” however, Russia’s outlook has since changed to “view the U.S.-led [international] order as a threat to Russia’s core interests in its per-



**Table 1. Significant Russian Cyber Proxy Events**

| Date                 | Suspected Proxy | Russian Govt. Affiliation                        | Target/Attack  | Type of Attacks        | Attribution & Russian Response                    |
|----------------------|-----------------|--|--|------------------------|---|
| Sept. '20            | Strontium       | Suspected support from the GRU (APT 28)          | Approximately 200 organizations associated with the presidential election process in the US  | Espionage/ login theft | Suspected, denial by Russia                       |
| Jan '19              | The Dukes       | Suspected support from FSB, SVR (APT 29)         | Democratic National Convention (DNC) of 2018   | Spear phishing         | Suspected, no known response                      |
| Apr. '18             | Sandworm        | Suspected support from GRU (Military Unit 74455) | Networking equipment globally, FBI took control of botnet with over 500k users   | Sabotage               | Suspected, denial by Russia                       |
| Mar. '18             | Energetic Bear  | Suspected FSB support                            | U.S. energy, nuclear power, water supply, and critical manufacturing since 2014  | Espionage              | Suspected, sanctioned by the US                   |
| July '17             | Sandworm        | Suspected support from GRU (Military Unit 74455) | NotPetya, ransomware that spread through tax software. Estimated between \$4-8 billion in damage caused  | Sabotage/ ransomware   | Suspected, sanctioned by the US                   |
| June '16             | The Dukes       | Suspected support from FSB, SVR (APT 29)         | Hack of several DNC emails, research, and internal correspondence for the upcoming 2016 Presidential election                                      | Espionage              | Suspected, denial by Russia, sanctioned by the US |
| Apr., June, July '15 | The Dukes       | Suspected support from FSB, SVR (APT 29)         | Compromised unclassified Whitehouse networks, unclassified legacy DoD network, unclassified network associated with the U.S. Joint Chiefs of Staff | Espionage              | Suspected, denial by Russia                       |

ceived sphere of influence.<sup>30</sup> Recognizing its relative position, Russia has sought to find asymmetric means to counter an ever growing threat of domination from the United States and Europe.<sup>31</sup> To counteract their disadvantages at the end of the Cold War, and to build national power before reentering international power politics, Russia first needed to influence and control its domestic populace.

Like many authoritarian regimes, Russia sees itself in a constant state of competition and attack.<sup>32</sup> Russia perceives its foes, led by the United States, as constantly competing for the hearts and minds of the Russian citizenry and testing Russia's domestic ideological hegemony.<sup>33</sup> Accordingly, Russia has taken aggressive steps to counter any assumed usurpation by sponsoring state news agencies, intimidating sources critical of the Kremlin, and launching effective and widespread media campaigns that reflect the government's interests.<sup>34</sup> The Russian government has projected the perception of a constant ideological struggle with foreign states on its populace in a controlled manner to ensure support for its political objectives.<sup>35</sup> By proliferating the idea of an ideological siege, the Kremlin has attempted to embolden citizens to assist the state or to placidly accept Russia's political messaging.<sup>36</sup>

Russia has adopted a whole of government approach, known as "political warfare," to counter the perceived threat from the United States. Political warfare refers to "the employment of military, intelligence, diplomatic, financial, and other means—short of conventional war—to achieve national objectives."<sup>37</sup> In reality, political warfare is similar to the multi-domain campaign of the United States in that it harnesses the powers of diplomacy, information, military, and economics (or DIME), to achieve strategic objectives across the spectrum of conflict.<sup>38</sup> As a component of political warfare, Russia uses "information warfare" to achieve its international political objectives.<sup>39</sup> As part of its larger political warfare strategy, the Russian perspective on information warfare encompasses exploiting computer networks and associated platforms, as well as "electronic warfare, psychological operations, and information operations."<sup>40</sup>

Recognizing its power projection shortcomings, the 2010 Military Doctrine of the Russian Federation emphasized "the prior implementation of measures of information warfare in order to achieve political objectives without the utilization of military force and, subsequently, in the interest of shaping a favorable response from the world community to the utiliza-

tion of military force."<sup>41</sup> For Russia, "the main battlespace is the mind and, as a result, new-generation wars are to be dominated by information and psychological warfare, in order to achieve superiority in troops and weapons control, morally and psychologically depressing the enemy's armed forces personnel and civil population."<sup>42</sup> It is through a "siege" lens that Russia views the rest of the world and justifies the use of information warfare to influence and undermine its perceived adversaries.<sup>43</sup> Arguably, Russia believes pursuing information warfare mirrors the actions of its adversaries and is, therefore, an appropriate response to those perceived threats.

**How Russia Views and Uses Cyberspace**

In 2013, General Valery Gerasimov, the Russian Chief of the General Staff, wrote an often cited—and nearly as often misunderstood—article stating, "The very 'rules of war' have changed [because of cyber and information operations]. The role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness."<sup>44</sup> As many scholars have noted, Gerasimov was not writing his article to articulate a new Russian way of war, rather he recognized that cyber operations can rapidly dissemi-

nate information to shape public opinion and topple authoritarian regimes (including Russia) as part of a larger information campaign.<sup>45</sup> Under current doctrine, the United States “treats information operations and cyberspace operations as distinct zones organized under different Department of Defense directives, other near peer competitors, such as . . . Russia do[es] not.”<sup>46</sup> Russia recognizes the power of information platforms (i.e., social media) to disseminate information leading to strategic effects. Cyberspace presents the Russian government the means to rapidly execute its information warfare operations to achieve strategic objectives in near real-time.<sup>47</sup> Russia seeks to exploit the utility of information warfare to rapidly shape conflicts, but also understands its own vulnerabilities to the same threats.

#### **Why Russia Uses Cyberspace**

The short answer is economics. To highlight the difference in economic spending power, in 2019, the United States

especially economical when conducting activities through proxies. A state can draw from a talented pool of individuals to meet specific needs and forego the costs of training associated with gaining and maintaining the required expertise.<sup>51</sup> Cyberspace is a relatively inexpensive means to compete with and counter the United States’ advantage in other domains of conflict.

#### **Who Are Russian Cyber Proxies?**

During the Soviet-era, Russia heavily invested in its human capital; and, in the 1990s and early 2000s, many former Soviet bloc countries had highly educated societies—particularly in mathematics and computer science.<sup>52</sup> Since the collapse of the Soviet Union, there have been massive economic struggles throughout former Soviet bloc countries, leading to a highly-educated and under-employed populace.<sup>53</sup> As economic struggles continued following the end of the Cold War, many qualified information technology professionals turned

Russia, cyber actors (which include cyber criminals, hacktivists, and state-sponsored hacking teams) are continually operating from within its sphere of influence with the nascent understanding that, as long as they avoid attacking Russian assets or run counter to the interests of the Kremlin, most activities will be tolerated.<sup>56</sup> As John Carlin, former Assistant U.S. Attorney General for National Security, stated, “[w]hat you’re seeing is one of the world’s most sophisticated intelligence operations when it comes to cyber espionage using the criminal groups for their intelligence ends and protecting them from law enforcement.”<sup>57</sup>

The blending of nongovernmental groups with various intelligence agencies has become the *modus operandi* for Russian cyber activities. At one moment, cyber actors will conduct independent cybercriminal activity, and in the next moment, they are enlisted to help the Russian government meet specific political objectives.<sup>58</sup> Table 2 contains a list of the most prominent Russian intelligence agencies commonly found working with proxies in the cyber realm, creating advanced persistent threats (APT), along with some of the names of the proxy groups.<sup>59</sup>

#### **Current International Law Has Limited Utility to Counter Russian Cyber Proxies**

##### **Actions Taken by Russian Cyber Proxies Do Not Constitute a Use of Force**

As discussed above, Russia has significantly departed from expected norms of behavior between states, but its actions do not rise to the level considered a “use of force” under current international legal standards. Article 2(4) of the United Nations Charter states, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>60</sup>

The term “force” in Article 2(4) has generally meant “armed force” directed against the territorial integrity of a state by an armed aggressor.<sup>61</sup> United Nations General Assembly Resolution 3314 (Definition of Aggression) provided examples of force between states, including “invasion or attack

### **Russia recognizes the power of information platforms (i.e., social media) to disseminate information leading to strategic effects. Cyberspace presents the Russian government the means to rapidly execute its information warfare operations to achieve strategic objectives in near real-time.**

spent \$732 billion (3.4 percent of Gross Domestic Product (GDP)) on defense compared to Russia’s \$65.1 billion (3.9 percent of GDP).<sup>48</sup> Recognizing its comparative position, Russia has invested in less expensive technologies that counter big, expensive U.S. weapons and systems.<sup>49</sup> Russia’s asymmetric approach is not new. It has been developing weapons to counter American power projection capabilities for decades: submarines and cruise missiles to sink aircraft carriers, service-to-air missiles to counter strategic stealth bombers, hypersonic projectiles to defeat anti-missile weapons, etc.<sup>50</sup> In addition to being a cheaper alternative than procuring advanced weapon systems, cyber capabilities can be

to more nefarious forms of employment, giving rise to a substantial and influential cybercrime apparatus within Russia and its former satellite states.<sup>54</sup>

Russia’s attitude toward these cybercrime syndicates has developed into what Tim Maurer, Director of the Cyber Initiative for the Carnegie Endowment, describes as a “sanctioning regime” for cyber proxies. Under a sanctioning regime, “a state consciously, but indirectly, benefits from a malicious activity targeting a third party, an activity which the state could stop but chooses not to. Sanctioning describes environments where the state directly creates a fertile ground for such malicious activity to occur in the first place.”<sup>55</sup> In the case of

**Table 2. Russian Intelligence and Proxy Affiliation**

| Intelligence Agency   | Intelligence Functions  | Groups Associated with Agency (APT, common names)  |
|---|---|--|
| FSB: Federal Security Service of the Russian Federation                                   | <ul style="list-style-type: none"><li>Political</li><li>Economic</li><li>Military</li><li>Political Security</li></ul>        | <ul style="list-style-type: none"><li>APT 29</li><li>Office Monkeys, CozyCar, The Dukes, and CozyDuke</li></ul>  |
| SVR: Foreign Intelligence Service of the Russian Federation                               | <ul style="list-style-type: none"><li>Strategic Foreign</li><li>Military</li><li>Counter</li><li>Political Security</li></ul> | <ul style="list-style-type: none"><li>APT 29</li><li>Office Monkeys, CozyCar, The Dukes, and CozyDuke</li></ul>  |
| GRU: Main Intelligence of the General Staff of the Armed Forces of the Russian Federation | <ul style="list-style-type: none"><li>Political</li><li>Economic</li><li>Counter</li></ul>                                    | <ul style="list-style-type: none"><li>APT 28</li><li>Tsar Team, Sofacy Group, Pawn Storm, Sednit, and Strontium, Military Unit 74455, Military Unit 26165</li><li>Also possible affiliations: Turla and Sandworm</li></ul> |

by armed forces . . . bombardment . . . [or] blockade of ports . . . .<sup>62</sup> While the list is not exhaustive, traditional concepts of force are still the guiding principles when determining if a force-threshold meets international legal standards. Under current definitions, Russia's actions do not meet the international legal threshold for a use of force.

The United States uses an “effects-based” test to determine whether a cyber-activity rises to the level of force, meaning a cyber-activity is compared to traditional kinetic operations.<sup>63</sup> Under the United States’ view, a cyber-activity must “proximately result in death, injury, or significant destruction [to] be viewed as a use of force.”<sup>64</sup> The *Tallinn Manual 2.0* echoes the United States approach in Rule 69, stating that “[a] cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.”<sup>65</sup> Therefore, because Russian cyber-activities have not crossed the kinetic effects threshold, or met the United Nation’s international standard for a use of force, Russia’s actions cannot be considered a use of force by the United States. Designating Russian actions below the threshold of force is significant because it limits the United States’ ability to invoke measures in self-defense to counter Russian aggression.

**Actions Taken by Russian Cyber Proxies Are Not International Wrongful Acts**

Article 2 of the Articles on Responsibility of States for International Wrongful Acts (ARSIWA) states, “[t]here is an inter-

nationally wrongful act of a State when conduct consisting of an action or omission: a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the State.”<sup>66</sup> Further, “[t]he characterization of an act of a State as internationally wrongful is governed by international law” not the domestic law of a state.<sup>67</sup> However, international law has specifically left the issue of espionage unaddressed, thus creating a void in applicable international law.<sup>68</sup>

The *Tallinn Manual 2.0* defines cyber espionage as “any act undertaken clandestinely or under false pretenses that uses cyber capabilities to gather, or attempt to gather, information.”<sup>69</sup> The idea of peacetime espionage has almost become *opinio juris* as an acceptable norm of state behavior because it is so pervasive and accepted.<sup>70</sup> The United States’ previous responses to cyber intrusions support the notion that cyber activities are not “internationally wrongful acts, but instead [are] a species of espionage that is generally unregulated by international law.”<sup>71</sup> While Russia’s cyber actions against the United States may appear egregious, they fall within the scope of espionage and are outside the purview of international wrongful acts.<sup>72</sup>

**International Attribution Requirements for Proxy Forces Are Too Stringent**

Attributing cyber proxy activities to a state presents a trifecta of problems. First, to attribute a cyber-action to a state through proxy action, it must be determined what level of control the state has over the proxy

or non-state actor.<sup>73</sup> Second, if the responsible state does exert the requisite control, it is unclear how certain (i.e., what standard of proof) a victim-state must be before taking counter-actions against the responsible state.<sup>74</sup> Third, applicable attribution models are based on cases dealing with clear uses of force, while cyber-activities rarely meet the use of force threshold.<sup>75</sup> Combining these three factors outlines the limited utility international law provides when attempting to attribute cyber proxy activity to a state.

The test to determine the level of control required for attributing proxy conduct to a state is based on the International Court of Justice (ICJ) case, *Nicaragua v. United States*.<sup>76</sup> The *Nicaragua* case dealt with the United States’ involvement in supporting proxy forces (contras) against the Nicaraguan government during the Cold War.<sup>77</sup> The case held that states must have “effective control” over the non-state actors when the alleged breach of international law occurs for their actions to be attributable to the state.<sup>78</sup> The ICJ held that, even though the United States was “financing, organizing, training, supplying and equipping . . . the contras, . . . [selecting] . . . its military or paramilitary targets, and . . . planning . . . the whole of its operation[s],” there was still insufficient evidence to demonstrate the United States had “effective-control” of the proxies.<sup>79</sup> According to the ICJ in *Nicaragua*, proxies must be “completely dependent” on the sponsoring state for its actions to be imputed on a sponsoring state.<sup>80</sup> Given the limited information that has been released regarding attribution

of Russian activities, it is unlikely to meet the high burden of “effective-control” set by *Nicaragua*, and thus limiting the applicability of international law regarding proxies.

The various evidentiary standards required to establish attribution of proxy action to a state under international legal standards are just as opaque as the “effective-control” standards. The ICJ has addressed the standard of proof issue in three cases and appears to adopt a “sliding scale of evidence based on the severity of the offense.”<sup>81</sup> In recent cases, the ICJ has put forth “decisive legal proof,” “conclusive evidence,” “balance of probabilities,” and “balance of the evidence,” as acceptable standards of proof, depending on the “seriousness of the allegations” in recent cases.<sup>82</sup> Some scholars have synthesized these rulings and suggest the ICJ’s baseline standard is a “clear and convincing” standard where “the party with the burden of proof . . . [must] convince the arbiter in question that it is *substantially* more likely than not that the factual claims that have been made are true.”<sup>83</sup> A shifting evidentiary standard does not provide a realistic framework to assign attribution to Russia for the actions of its proxies.

Finally, the effective-control test and the varying burdens of proof standards provide few parallels to cyber activities since the underlying actions addressed by the ICJ involved obvious uses of force and were conducted by military or paramilitary groups that were executing kinetic operations in a geographic space.<sup>84</sup> Cyber activities generally do not rise to a level considered a use of force, are typically conducted by clandestine operators, and the actions occur in the digital ether of ones and zeros. Russian cyber proxy activities need to be addressed with a new policy and strategy-driven approach to rapidly identify aggressors in cyberspace and which also has inherent flexibility to counter actions against the interests of the United States that fall below the threshold of force.

## Discouraging Russia’s Use of Cyber Proxies Through Coercive Diplomacy

### *Implement a Rapid Attribution Strategy*

The National Cyber Strategy states, “[t]he United States will formalize and make routine how we work . . . to attribute and deter malicious cyber activities with integrated strategies that impose swift, costly, and transparent consequences when malicious actors harm the United States . . . .”<sup>85</sup> To address Russian cyber proxy activity, an attribution strategy focused on American security through an aggressive cyber foreign policy is essential. As Harold Koh, former legal advisor for the Department of State, aptly stated, questions of attribution “are as much questions of a technical and policy nature rather than exclusively or even predominantly questions of law. Cyberspace remains a new and dynamic operating environment, and we cannot expect that all answers to the new and confounding questions we face will be *legal* ones.”<sup>86</sup>

A new attribution policy should be grounded in foreign policy and power politics by 1) examining the cyber activity for common or key indicators attributable to a known state or proxy actor; and 2) determining which state stands to gain geopolitically from a specific activity against the interests of the United States. Once the United States has made its assessment, the responsible state should be identified and attributed through a public announcement. Under this attribution regime, the United States will have the flexibility to exercise different levers of national power to counter cyber aggressors long before attempting to meet a high international legal standard of proof. As another former legal advisor to the Department of State, Brian Egan noted, “a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber-operation to another State. . . . [T]here is no international legal obligation to reveal evidence on which attribution is based prior to taking appropriate action.”<sup>87</sup> When making an attribution claim for malicious cyber activity, the United States should act in its security interests, make a reasoned decision, and promptly confront cyber aggressors with the best information

available. In other words, the United States should not allow imperfect information to delay and compromise public attribution and an appropriate response.

After the United States has publicly attributed a cyber activity to a state, the *burden should shift* to the accused state to rebut the allegation.<sup>88</sup> The accused state would have two options: 1) demonstrate it has not sanctioned the activity and is therefore not responsible; or, 2) actively work with the United States to hold the perpetrators accountable before retaliation measures are enacted.<sup>89</sup> If the accused state simply denies the suspected malicious activity without providing any additional evidence, or is non-cooperative, then coercive diplomatic actions should be considered and initiated against that state.<sup>90</sup>

It may be argued that a policy with a lower attribution standard and corresponding coercive measures is destabilizing; however, the opposite is true. “The proof necessary for attribution in cyber exploitation involving State responsibility certainly need not stand up in court,” and remains a state’s prerogative.<sup>91</sup> The United States has taken a cautious approach to publicly attributing cyber activity, which has, in turn, emboldened aggressors.<sup>92</sup> Publicly announcing attribution means “attackers are no longer invisible and there will be consequences for their actions. This message reshapes opponent thinking about the risk and potential costs of cyber actions against the United States.”<sup>93</sup>

The United States operating with greater attribution freedom to address malicious cyber activity directly could have a stabilizing effect by establishing cyber norms.<sup>94</sup> As the United States more rapidly attributes cyber proxy activity to states, and standardizes the processes and responses to malicious cyber activity, expectation management and cost analysis on the part of adversaries will determine whether challenging the United States is still beneficial.<sup>95</sup> As of yet, the United States’ responses have not effectively deterred actions by malicious cyber actors. The implementation of stringent economic consequences by the United States may provide more incentive for Russia to exercise its “sanctioning regime” and reign in cyber proxies acting on its behalf.

### ***Consequential Coercive Diplomacy Through Economic Sanctions***

“Economic sanctions provide a range of tools . . . to alter or deter the objectionable behavior of a foreign government, individual, or entity in furtherance of U.S. national security or foreign policy objectives,” and have been a central tenet of the United States’ policy to rein in Russia.<sup>96</sup> Currently, the United States has a robust economic sanctions regime imposed on Russia, primarily in response to Russian aggression against Ukraine (and also used to address Russia’s other nefarious behaviors).<sup>97</sup> However, there is some debate as to the effectiveness of these sanctions against Russia.

Most sanctions on Russia do not broadly target the Russian economy or entire sectors. Rather, they consist of broad restrictions against specific individuals and entities, as well as narrower restrictions against wider groups of Russian companies. Overall, more than four-fifths of the largest 100 firms in Russia (in 2018) are not directly subject to any U.S. or [European Union] sanctions, including companies in a variety of sectors, such as transportation, retail, services, mining, and manufacturing.<sup>98</sup>

Some suggest the sanctions on Russia were purposely designed to be relatively weak so as not to harm the Russian populace at large but to instead focus on members of specific companies, industries, and members of government.<sup>99</sup> However, further analysis shows that when sanctions are targeted against a specific industry and broadly enforced, the sanctions have tangible consequences.<sup>100</sup> It is exactly these types of industry-specific and broadly-enforced sanctions that could, in reaction to malicious cyber activity, be implemented to quickly deter Russia and force the Kremlin to rein in its proxies.

The Russian economy is heavily dependent on fossil fuel exports, making up roughly 60 percent of Russia’s exports and 30 percent of its gross domestic product.<sup>101</sup> Russia is the largest single energy supplier to the Europe Union, accounting for 27 percent of oil imports and 41 percent of natural gas imports.<sup>102</sup> However, the United States and Europe remain strong allies against Moscow.

The United States can impose upon its target the near-equivalent of a siege

if it makes economic sanctions *total* and *secondary*, meaning applied as well to third parties who traffic with the target. That is because the United States, given its unique economic position, is capable of dividing the world into those who choose to trade with America and those who choose to trade with the target.<sup>103</sup>

The United States should work with its European allies to implement sanctions on Russian oil and gas exports to stop malicious cyber activities. While the specific methods of enacting sanctions are beyond the scope of this article, the United States should specifically seek out methods to exploit Russia’s vulnerable single-commodity-based economy in reaction to malicious cyber activity. Sanctions against Russia’s oil and gas sectors would be particularly effective because those sectors have enormous influence in the Russian government.<sup>104</sup> As discussed, with the proper economic pressures in place—and given the right incentives—the Russian government’s cyber proxy “sanctioning regime” could exercise its ability to identify perpetrators and stop their activity.<sup>105</sup>

### **Conclusion**

Current cyber threats posed by proxy actors against the United States operate in an underdeveloped section of international law. Accordingly, international relations and statecraft provide useful tools for addressing malicious cyber activity. The United States must exercise the options at its disposal to maintain a favorable balance of power in cyberspace by employing pressure through other domains that adversaries cannot match, particularly economic means. As James Lewis, a preeminent scholar in the cyber field, stated, “[t]he most effective actions to date in causing state attackers to recalculate risk have not depended on the Department of Defense or Cyber Command, but on attribution, indictments and the threat of sanctions.”<sup>106</sup>

Publicly attributing malicious cyber activity to a state in a timely manner and holding that state responsible through a burden-shifting model is likely to cause some backlash against the United States. However, actions taken in cyberspace that do not neatly fit into a recognized area of international law are bound to create ambiguity and

unease. As states continue to develop norms in cyberspace, the United States should harken back to the proverb by Thucydides: “The strong do what they can, and the weak suffer what they must.”<sup>107</sup> The United States should not be constrained by inapplicable and unresponsive international legal regimes. Rather, the United States should confront cyber adversaries through a policy of rapid attribution and coercive diplomacy to deter future aggression, thereby building international law and norms that support the interests of the United States. **TAL**

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Professor Brian Linn delivers the Prugh Lecture at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, in April 2021. (Credit: Jason Wilkerson, TJAGLCS)





## No. 2

# Atrocities, Abuses, and Adjudication

## Military Law Meets Military History

*By Brian McAllister Linn*

In common with many historians, my parents wanted me to go to law school. But I disappointed them in this respect and, to the dismay of my Quaker mother, I became not only a historian—but a military historian. This article is a personal overview of my encounters with Army military justice over four decades in conjunction with my research on other topics. Yet the frequency with which I bumped into military law brought with it a recognition of how foundational it is to understanding the history of the U.S. Army. This recognition is not original. In fact, some recent scholarly work argues that military law has imposed gender, sexual, moral, and cultural paradigms.<sup>1</sup> But these subjects are far beyond the scope of either my research or my interests. Instead, I will discuss some accidental stumbles into the realm of military justice over the course of four decades as a historian of the U.S. Army.

### **Authority**

My first encounter with the importance of military law was in 1979 when I started my doctoral research on the U.S. Army's experience in the Philippine War of 1899 to 1902.<sup>2</sup> This conflict, which, depending on your political orientation is also called the Philippine Insurrection and the Philippine–American War, might be better termed the “lawyers war.” The first general officer to arrive in the Philippines was a lawyer. Major General Elwell S.

Otis, who commanded the Army in the Philippines from 1899 to 1901, was a graduate of Harvard Law School. When he was not directing military operations or establishing government, Otis revised the islands' civil code.<sup>3</sup> Otis's successor was Arthur MacArthur, who had read for the law and whose stentorian lectures on legal issues did much to alienate the lawyer who succeeded him, Judge William Howard Taft. In contrast, Taft was so impressed with Lieutenant Colonel Enoch Crowder's work in resolving disputes over religious holdings that he later made him the Army's Judge Advocate General.<sup>4</sup> Another prominent lawyer-turned-officer-turned-civil-official was Colonel James F. Smith. His success in establishing the first colonial government on Negros Island served as introduction for his later tenure as Governor General of the Philippines.<sup>5</sup>

In addition to providing a disproportionate number of policy makers, officer-lawyers also played a significant role in the regional counter-guerrilla campaigns that typified the war.<sup>6</sup> The war's most effective field commander, J. Franklin Bell, was both a lawyer and a former judge advocate (JA). John J. Pershing, who was credited with the pacification of the Moro, or Muslim provinces, was also a lawyer. A less well-known, but equally important figure, was lawyer-turned-officer Lieutenant William T. Johnston. As provost marshal of Union Province, Johnston's detailed analysis of

the guerrillas' recruitment, taxation, intelligence, and command system was cited by MacArthur as the most thorough explanation of the resistance.<sup>7</sup>

The Philippine War was also the lawyer's war from the perspective of judicial proceedings. Army officers took over the judiciary. A typical example was Captain William E. Birkhimer—a Civil War veteran with a law degree who, in 1899, was appointed Associate Justice of the Philippine Supreme Court. Army provost marshals and provost courts played a vital role in imposing colonial law and order throughout the archipelago. The precedent was set when the Army occupied Manila in August 1898 and immediately appointed a provost marshal general for the city. This officer not only enforced the law but supervised the departments relating to fire, health, public works, streets, sanitation, public illumination, licenses, and municipal revenue. Lawyers were everywhere. The Army's superior and inferior provost courts tried and punished civilian offenses under the occupation. Indicative of their heavy judicial responsibilities, between July 1899 and January 1900, the inferior court heard almost 6,000 cases involving 10,500 people.<sup>8</sup> Far from being instruments of oppression, the majority of these offenses were breaking curfew, gambling, or violation of sanitation ordinances—and the usual penalty was a token fine. The 8,000 convictions issued by the inferior provost courts totaled only a cumulative 58 years of incarceration.<sup>9</sup> The efficient rule of the provosts was a major factor in turning Manila from the pesthole of the Orient into one of the healthiest cities in Asia.

As the Army occupied the archipelago, provost courts and provost marshals extended their jurisdiction. Most had no legal training; serving as provost was simply another duty assumed by troop commanders, along with customs official, fiscal supervisor, engineer, police chief, and so on. But they often had to negotiate the law, balancing Army directives with older Spanish legal texts and traditional customs. The correspondence of Lieutenant William B. Cochran, provost marshal at Aparri, Luzon, provides an idea of the complexity of these town provost duties. Between 5 and 7 June 1899, he wrote for advice on

two cases. The first was a suit over alleged adultery, but neither Cochran nor anyone in the town knew the applicable divorce laws. The second involved the killing of Cosme de la Cruz, a case complicated by two women accessories. One of these was de la Cruz's concubine, the other was her daughter, who happened to be the killer's common-law wife. Although they were clearly guilty of conspiracy in hiding the body, Cochran concluded they had acted in accordance with local concepts of duty and honor and chose not to prosecute.<sup>10</sup>

Provost marshals played a key role in pacification in the last two campaigns of the Philippine War. General Bell created an elite squad, including William T. Johnston and other lawyers, to smash the resistance in Batangas Province. Bell sent his provosts into known insurgent strongholds where they conducted investigations, held trials, and punished insurgents. Johnston went so far as to form a paramilitary unit of suspected insurgents and deployed them to hunt their former comrades.<sup>11</sup>

The Philippine War is also something of a legal landmark due to General MacArthur's implementation of General Orders No. 100 in December 1901.<sup>12</sup> Sometimes known as the Lieber Code, it had been issued in 1863 to outline the rights and responsibilities of Union forces occupying the former Confederacy.<sup>13</sup> MacArthur later argued that his recourse to General Orders No. 100, more than anything else, pacified the archipelago. This claim, widely accepted by the general's supporters, contains an element of truth. General Orders No. 100 was interpreted in the field, as MacArthur had intended, as authorizing such punitive measures as burning property, mass arrests, fining, imprisonment, enhanced interrogation, and summary execution. But MacArthur failed to note that many of the provisions of the 1863 ordinances orders had been in effect since the American troops arrived in 1898. Moreover, in the months prior to MacArthur's proclamation, several district commanders had authorized General Orders No. 100.<sup>14</sup>

### Atrocities

Lawyers and legal codes aside, the Philippine War is most known (at least according to American undergraduate textbooks)

as an unremitting catalog of racist-inspired atrocities.<sup>15</sup> According to some, the Army waged a campaign of extermination against helpless Filipinos.<sup>16</sup> This "civilize them with a Krag" mythology<sup>17</sup> was founded by contemporary anti-imperialists, such as Mark Twain, and reemerged with Vietnam when academics dubbed the Philippines "Our First My Lai."<sup>18</sup> The alleged atrocities in the Philippines were, again, a focal point for journalists and academics drawing parallels with Iraq and Afghanistan.<sup>19</sup>

I spent several months trying to understand one such atrocity. In the town of Balangiga on the island of Samar, between 19 and 20 January 1902, U.S. Marines under the authority of Major Littleton W. T. Waller executed twelve Filipino civilians.<sup>20</sup> Waller authorized these killings without any semblance of a trial, nor did he consult with his superior officer. The incident—or, more correctly, war crime—occurred after Waller took a party of Marines into the interior of Samar's wilderness for what should have been a pretty routine short hike (a similar Army patrol had marched across the entire island without losing a man). The inexperienced and impulsive Waller soon became lost, abandoned his troops, and floundered about until an Army patrol rescued the exhausted and helpless Marines. By that time, a dozen of Waller's troops were dead. Army officers testified that the only reason the rest survived was because their Filipino guides had helped them. Waller, who was running a fever of 105 degrees, thought otherwise. He sent an officer over to Leyte, grabbed eleven prisoners, brought them back, and ordered his adjutant, Lieutenant John H. A. Day, to execute them. Day had previously executed a civilian he suspected of being a spy, and he promptly shot the guides. The incident might have remained quiet, except that a Marine officer—probably Day—subsequently boasted about it to Army officers, thus prompting a full investigation.<sup>21</sup>

The courts-martial transcripts of Waller and Day are a compendium of contradictory testimony, convoluted legal arguments, and incomprehensible narrative. Waller was defended by Major Edwin F. Glenn, who was himself under investigation for war crimes. The verdicts were clearly a travesty of justice. Although

Waller denied authorizing the execution of the spy, Day was acquitted on the grounds he was following Waller's orders.<sup>22</sup> Waller claimed the executions were justified under General Orders No. 100. Despite the evidence against him that he had violated both the spirit of and the law itself, he was also acquitted.<sup>23</sup> During his defense, Waller revealed that the Army commander in Samar, Brigadier General Jacob "Hell Roaring Jakey" Smith, had ordered him to "take no prisoners" and "make the interior of Samar a howling wilderness."<sup>24</sup> These revelations created a national sensation and prompted a Senate inquiry into American troop conduct in the Philippines that exposed a number of war crimes. The Marine Corps soon portrayed Waller as a victim of Army conspiracy and recast his bungling foray into Samar's mountains as a heroic ordeal. Over time, this view of Waller as heroic "warfighter" and scapegoat became so enmeshed in Philippine War lore that even anti-imperialist authors have defended him.<sup>25</sup>

The Waller case did not end with his acquittal. Army Judge Advocate General, George W. Davis,<sup>26</sup> in what may have been a masterpiece of judicial fence sitting, declared that Waller's court-martial was illegal. Citing Article 122 of the Articles of War, he argued that—as a Marine—the Army could not try Waller; but he also declared Waller's defense under General Orders No. 100 to be equally illegal since, as a "detachment commander," Waller had no authority to execute, or even try, prisoners.<sup>27</sup> That was not enough to placate a furious President Theodore Roosevelt. He issued an official order—to be read out at every Army formation—that both Waller's actions and his acquittal had "sullied the American name."<sup>28</sup>

Roosevelt was not the only authority to find fault with military justice. The fallout from the courts-martial of Waller and other officers, along with the revelations of burning, torture, and killings, aroused both public and legal scorn. In a 1903 essay in the influential *North American Review*, Wilbur Larremore claimed attorneys regaled each other with tales of inept or corrupted courts-martial and "the sentiment of lawyers towards the methods of military justice is frankly contemptuous."<sup>29</sup> At the heart of

the bizarre military system were two legal contradictions. First, that the convening authority was allowed to appoint the time, members, location, and a JA. Second, that the JA—simultaneously prosecutor, defense attorney, and procedural advisor—required no legal training. Moreover, the JA's legal ignorance was shared by the rest of the court. In spite of these shortcomings, military officers insisted their system was superior to civilian law in its fairness, efficiency, and process. Larremore ascribed this complacency to a deep reverence for authority and "a strong feeling of caste."<sup>30</sup> The first attribute led them to defer to the wishes of the superior convening the court. The second, an "indulgent professional sympathy" for financial irregularities or brutality to enlisted or indigenous personnel, meant courts routinely "white-washed" guilty officers and, often solely on their word, invariably sentenced Soldiers.<sup>31</sup> Larremore made several suggestions for improvement, but there was no sustained effort to change court-martial procedures. Two years after he wrote, the Army's Judge Advocate General noted the Service had court-martialed over half of its enlisted personnel, an average maintained throughout the decade.<sup>32</sup>

### Abuse

After studying the Philippine War, I became interested in what happened to the U.S. Army in the Pacific between that war's conclusion and the four decades that culminated in the Japanese attacks on 7 December 1941. And once again, I found that military law—this time in relationship to civilian law—played a significant role in the history. During this period, Hawaii was designated a "territory," and thus fell under the legal precedents of earlier territories preparing for statehood. But the Philippines, an "insular area," served as an important laboratory for case law regarding the status of American forces overseas.

When President Roosevelt declared the Philippine War officially over on 4 July 1902, he seemingly also separated the Army from the civil government. Congress had recently passed the Philippine Organic Act that made the Philippine Commission responsible for establishing and maintaining the insular government.<sup>33</sup> The Commission

was under the direction of the Bureau of Insular Affairs, which was an agency of the War Department. The civil and military authorities reported through separate channels, but ultimately, their disputes had to be resolved by the civilian Secretary of War. The presence of the politically powerful Taft, first as head of the Philippine Commission—and later as Secretary of War, ensured the civil government's priorities usually trumped those of the military. Further complicating the Army's duties, General Orders No. 152, issued three days after Roosevelt's proclamation of peace, subjected military forces to "the call of the civil authorities for the maintenance of law and order."<sup>34</sup> Even at the time of Roosevelt's proclamation, the civil government's Philippine Constabulary could not suppress the multitude of bandits, sects, gangs, insurgents, and other violent dissidents that kept the archipelago in permanent turmoil; and, almost immediately, the Commission "called" for support. Within a year, almost two-thirds of the Army's Philippine Scouts were on detached duty with the civil government.<sup>35</sup>

General Orders No. 152 placed Soldiers in legal limbo. Some officers believed it contravened the Posse Comitatus Act,<sup>36</sup> an understandable view given the lack of clarity by federal courts on what American laws were applicable in an insular possession such as the Philippines. As Brigadier General Tasker H. Bliss pointed out in 1905, officers who had arrested or fired on insurgents received only the negative protection that they had not yet been prosecuted in the civil courts.<sup>37</sup> Army officers believed, with good reason, that Philippine courts were prejudiced against military personnel. To secure legal immunity, they wanted a declaration of martial law to precede any military commitment to pacification operations. Since declaring martial law would be an admission of the government's inability to govern, it refused these requests and appealed up to the War Department. The civil-military dispute came to a head, perhaps not surprisingly, on the island of Samar. After both Constabulary and Scouts failed to suppress a rebellion against the corrupt and oppressive provincial government, the Commission had to turn the island over to military authority. With

the colonial authorities desperate, Army commanders were able to leverage concessions, giving them virtual legal autonomy on Samar. Their rapid suppression of the rebellion coincided with the ending of all but token local violence in the parts of the archipelago under civil responsibility. With lawlessness reduced to a level manageable by the Constabulary, the Army turned its attention to defending the archipelago from foreign attacks.<sup>38</sup> But in the meantime, the civil and military authorities had become embroiled in a far-reaching case on the legal status of U.S. Soldiers overseas.

On 24 July 1904, Private Homer E. Grafton—a sentry assigned to guard supplies on the island of Guimaras—shot two Filipinos he alleged to have attacked him with knives. Grafton was charged under the 62d Article of War of “willfully and feloniously” killing, tried by a general court-martial, and acquitted on 25 August 1904.<sup>39</sup> Three days later, the provincial prosecuting attorney charged Grafton with “the crime of assassination.”<sup>40</sup> In doing so, the prosecuting attorney insisted that because the Philippine Penal Code distinguished between the offense of “assassination” and homicide offense charged under Article 62, there could be no claim that Philippine civilian prosecution constituted double jeopardy. The civil judges—there was no trial by jury under the Philippine Penal Code—sentenced Grafton to twelve years’ imprisonment.<sup>41</sup>

To the shock of the Philippine bureaucrats, the Army refused to accept this verdict and a subscription for the private’s defense soon totaled in the thousands. In part, Grafton was a catalyst for years of military resentment at perceived civil government arrogance and duplicity. But, as the editor of the *Army and Navy Journal* recognized, Grafton’s case was “simply a common effort for common defense in which the interest of one is the interest of all.”<sup>42</sup> Both military and public pressure forced the War Department to appoint a counsel to argue the case before the Supreme Court. In 1907, the Grafton case reached the Supreme Court, which ruled unanimously that the court-martial verdict had constituted a legitimate trial, that “assassination” was the same as homicide, and that Grafton’s conviction violated constitutional prohi-

bitions against double jeopardy.<sup>43</sup> What the Supreme Court did not rule on was whether American Soldiers sacrificed other constitutional rights, including trial by jury, when stationed in the Philippines. For the Army, the lesson was clear: In the future, “[e]very offender whose act falls within the scope of military jurisdiction should be tried by court-martial and never surrendered to a bastard civil tribunal like that which usurped the rights of Grafton.”<sup>44</sup> Consequently, when the Army was deployed to Cuba in 1907, then-Secretary of War Taft issued a special order that exempted American Soldiers from the jurisdiction of Cuban courts.

Fifty years after the Grafton case, another case where an Army private shot an Asian civilian, this time in Japan, also reached the Supreme Court.<sup>45</sup> But there were important differences. Grafton was a model Soldier admired by both his officers and his comrades, who was judged to have acted in self-defense. Specialist 3 William S. Girard was a marginal Soldier of limited intelligence. His guilt in shooting Naka Sakai, an impoverished mother of six children scavenging scrap metal, was never in question. Indeed, his behavior—enticing Mrs. Sakai by throwing brass cartridge shells, then threatening her, then shooting her when she ran away—appalled most of his fellow Soldiers.

What made the incident a *cause célèbre* was that a Japanese deputy, citing the recent Japanese-American status of forces treaty, challenged American jurisdiction.<sup>46</sup> A series of mistakes by one officer—trying to cover up the crime, refusing to divulge crucial details, overruling his legal officer and denying Japanese jurisdiction—sparked widespread protests across Japan and threatened the new Japanese-American basing agreement.

Acting on legal advice, Army Headquarters in Japan recommended turning Girard over to the Japanese, but the Secretary of Defense blocked this. Various opportunistic Congressmen announced intended legislation to ensure no American Soldier could be tried in a foreign court. Tensions increased when federal judge Joseph C. McGarraghy declared that Japan’s courts had no jurisdiction over American service personnel.<sup>47</sup> With Japanese-American

relations deteriorating and the international media castigating American criminality, the Girard case was rushed to the Supreme Court. That august body determined there was no constitutional bar to trying Girard in a Japanese court.<sup>48</sup> And—in what one suspects was a secret agreement—the Japanese court found Girard guilty of manslaughter, but gave him a slap-on-the-wrist suspended three-year sentence.<sup>49</sup> The Army followed with an undesirable discharge and shipped him out as fast as possible.<sup>50</sup>

On the surface, these two cases (only fifty years apart) share only the superficial resemblance of two Army privates tried and convicted for killing local civilians. Why did they become so important? Both cases occurred after prolonged civil-military conflict over the rights and obligations of American service personnel overseas. Both cases reached the highest political, judicial, media, and public arenas. In many ways, as one officer concluded about the Girard case, both served as a “catalyst for a lot of things that were just waiting to happen.”<sup>51</sup>

Grafton’s trial by civil court occurred after almost five years of perceived humiliations by the civil government. Ever since Taft arranged General MacArthur’s recall in 1901, civil officials had routinely used back-channel communications to Washington to assert control over military forces. Army resentment had been steadily growing due to its almost permanent appropriation of the Philippine Scouts, refusal to either establish clear legal guidelines or declare martial law, and its employment of troops against rebels who were often victims of the civil government’s own corruption, brutality, and injustice. And, with the politically powerful Major General Leonard Wood now in the Philippines, the U.S. Army finally had an advocate even more powerful than the civil government’s appointees. Thus, the decision by the Filipino judges to assert their prerogatives was both judicially suspect and badly timed. Moreover, the Grafton case was one that the Army could take to the public as a patent injustice—an American citizen condemned by a Filipino court under Spanish laws—and in clear violation of the rights granted all American citizens by the U.S. Constitution.

The *Girard* case, on the other hand, was an Army-created disaster. The United

States had just signed a politically-sensitive status of forces agreement with Japan deemed crucial to its Cold War national security.<sup>52</sup> Senior military leaders should have been attuned to any action that would impugn Japan's recently acknowledged legal sovereignty. Instead, Eighth Army's leadership allowed its recently appointed public relations officer—described as a “strict West Point colonel” punching a ticket for higher command—to take control of the case.<sup>53</sup> This officer suppressed information and reneged on an agreement with a friendly correspondent, all but ensuring the media opposition. Despite the escalating public relations fiasco, Eighth Army headquarters continued to support this officer, almost derailing the status of forces arrangement. Only the rapid action of the Supreme Court and the political acumen of the Japanese court resolved the controversy. The Army Public Information School, which made the *Girard* case a part of their curriculum, concluded in its extensive report that such scandals almost inevitably result from an officer promotion system which “puts a totally unqualified man into a politically and diplomatically sensitive position; and secondly, which tolerates an obvious misfit when he is discovered.”<sup>54</sup>

### Adjudication

My next—and for this article, my last—encounter with military law lies in the field of adjudication. I recognize that adjudication is defined as “a formal judgment on a disputed matter.”<sup>55</sup> But, at the risk of legalistic hairsplitting, I define “formal judgments” as legal codes—such as the Articles of War, *Manual for Courts-Martial*, and the Uniform Code of Military Justice (UCMJ)—and “continuing disputes” as the debates over the enforcement of these codes in practice. Many of the ongoing challenges and reforms to American military justice have reflected the evolving dynamic between the Army's need to impose discipline and the individual rights of Soldiers. This dynamic has been of great interest to historians, for it encompasses class and caste barriers, command and leadership, officer-enlisted relations, misconduct, punishment, and a host of other human issues.

Historians of the “Old Army” of the nineteenth century—such as Edward M.

Coffman, William Skelton, and Samuel J. Watson—have explored the enforcement of discipline through both legal and extra-legal measures. As gentlemen, officers believed their status depended on absolute subordination by enlisted personnel. They were quick to impose their authority through courts-martial. This is reflected in the large number of courts-martial between 1823 and 1828: 7,058 courts-martial over five years in an army that averaged barely 5,000 enlisted men—almost a quarter of the total force.<sup>56</sup> Much more common were extralegal punishments such as branding, mutilation, hanging by the thumbs, carrying a rock or heavy log for hours, straddling a sharp wooden beam (the punishment horse), binding in a “stress position” with a rag forced into the mouth (bucking-and-gagging), and so forth.<sup>57</sup> Watson, the leading authority on the pre-Civil War frontier army, concluded of such chastisements that “although few enlisted men were killed, their routine subjugation to casual blows and elaborate punishments meant that they, rather than Native Americans, suffered the most frequent violence at the army's hands.”<sup>58</sup> On the rare occasion officers were court-martialed for such offenses, they were inevitably acquitted—except in the rare instances when public outrage forced a harsher sentence.

As long as the Regular Army's enlisted ranks were composed of men drawn from the margins of society, the American public accepted that they needed to be kept under rigid control. But when citizen-Soldiers—not only the sons of American families, but also voters—were conscripted into the Army, military justice became far more contested. Volunteers in Mexico and the Civil War admired the Regulars' drill, but were appalled at the brutal punishments they endured. While they concluded that this was necessary both because of the mercenary motives of the Soldiers and the aristocratic pretensions of the officers, it did not result in a favorable opinion of the Regular Army. On the contrary, when these Volunteers returned to civilian life, they spread to their friends an image of the Regular Army that both confirmed American anti-standing army sentiments and reinforced the idea that respectable citizens did not consort with Soldiers.

The campaign in Cuba in 1898 was fought almost entirely by Regulars. But in the Philippines, the United States relied primarily on volunteers drawn from 1) the state militias and 2) a 35,000-man national volunteer force. Only late in the conflict, when the war was won in most districts, were Regulars deployed to mop up the last of the areas of resistance. These national, or U.S. Volunteers, were commanded by Regular officers; and, like the Regulars, they were subject to the Articles of War, last revised in 1874. Some colonels, such as William E. Birkhimer, who was also a lawyer by education, rigorously imposed Old Army discipline on their regiments and were much hated for it by their men.<sup>59</sup> But others, including many who would rise to high command in World War I, recognized that the Old Army enforcement of regulations was counterproductive. Rather than rely on external discipline imposed by the punitive sanctions of the Articles of War, successful volunteer commanders (such as Colonel Robert L. Bullard) appealed to an internal discipline based on patriotism, respect, and pride.<sup>60</sup> Colonel Luther R. Hare of the 33d U.S. Volunteer Infantry took this even further. He made it clear that effectiveness—defined as marksmanship, tactics, and fieldcraft—were far more important than spit-and-polish drill. The “Fighting 33d's” impressive performance in the boon-docks validated Hare's priorities.

Beyond that, the rigors of field service and the loss of personnel convinced many commanders that the judicial system was impeding effectiveness. The great majority of courts-martial in the Philippines were for minor offenses involving avoiding onerous duty, drunkenness, fighting in quarters, petty theft, and so on. General courts-martial were relatively rare, but this was in part a concession to practicality. The Manila city provost marshal reported 526 general courts-martial cases between 1 July 1899 and 31 July 1900. The majority were Soldiers who had been imprisoned for crimes in Manila and been left behind when the regiments took the field. In many cases, the paperwork was lost or incorrect, and it was impossible to summon witnesses back. Also, the demands of courts-martial interfered with more important duties, with the result that dozens of Soldiers were sitting

out the war in prison. To relieve congestion—and to prevent officers dumping their malefactors in Manila—the provost marshal sent all those he could back to their commanders for trial in regimental summary courts, and he created his own summary court for the rest.<sup>61</sup>

Recognizing that some malingerers committed infractions sufficient to warrant a general court-martial and get out of the field, regimental commanders showed a similar practicality. Frustrated by so many “scavengers,” a battalion in the 32d Infantry Regiment, U.S. Volunteers, advised an overly-prosecutorial lieutenant that “discipline can be better sustained by prompt action and quick punishment than long and tedious confinement awaiting trial by General Court Martial.”<sup>62</sup> The regimental adjutant provided some idea of what constituted “prompt action and quick punishment” when he advised another officer that he would “prefer that [they] administer summary punishment, such as standing a man on a barrel, in the sun for a couple [of] hours, or putting him in stocks for a while, or something of that kind [their] ingenuity may devise.”<sup>63</sup>

In contrast, officers imposed strict sanctions on those convicted of crimes against Filipinos. One private who stole a pair of slippers valued at less than a dollar was given six months’ imprisonment and a dishonorable discharge.<sup>64</sup> This contrast between light punishments for internal misdeeds and vigorous prosecution of offenses against civilians reflected the U.S. Army’s wish to present itself to the Filipinos as an impartial, fair, but rigorous instrument of the law. The Army’s experience with both motivated volunteer Soldiers prompted an extensive intra-Army debate over whether Soldiers were thinking individuals who gave their consent or unthinking mechanisms motivated by fear of punishment through the Articles of War.<sup>65</sup>

In World War I, the widespread use of courts-martial as a means of imposing officer authority was a continuing source of resentment. Even more controversial was the treatment of those found guilty. Letters to the editor published in the newspapers like the *New York Times* charged that confessions had been extorted through physical coercion; deplored excessive sen-

tences—such as twenty-five years of hard labor for being out of uniform; and accused the Army of circumventing the judicial process by sending alleged violators on suicide missions.<sup>66</sup> These allegations were not simply the complaints of disgruntled veterans. Acting Judge Advocate General Samuel Ansell claimed that, in one year, the Army had conducted over 350,000 special courts-martial and 28,000 general courts-martial.<sup>67</sup> Richard S. Faulkner’s exhaustive study revealed enlisted men had an 85 percent conviction rate in general and special courts-martial and a 94 percent conviction rate in summary courts-martial.<sup>68</sup> That three-quarters of these sentences were later reduced by convening authorities indicated that even Army officers found them excessive.<sup>69</sup>

In the months following the Armistice, Ansell urged extensive revisions in the court-martial manual and the creation of a civilian-staffed Court of Military Appeals. His agenda was taken up by lawyers, academics, and influential politicians. But as Citizen-Soldiers mustered out, Judge Advocate General Enoch Crowder and the War Department were able to placate critics with minimal reforms to the Articles of War. However, perhaps without recognizing it, the Service had issued a promissory note to treat future Citizen-Soldiers with far more justice and mercy.<sup>70</sup>

This promissory note would be called in at the end of World War II, when there was a torrent of veteran and public abuse at the military justice system. The twin accusations that the courts-martial process was a tool of command influence and a means of imposing “the caste system” were too loud to be ignored. A barrage of anecdotal evidence—petitions, letters to Congress, surveys, newspaper articles—revealed widespread Soldier discontent with the justice system and prompted the War Department to create the Doolittle Board.<sup>71</sup>

The accusation that their military justice system was little more than a means to protect the “officer caste” outraged many Regulars. In their view, wartime military justice had been, if anything, insufficiently harsh. Judge Advocate Colonel Frederick Bernays Weiner complained that the Army’s execution of just one Soldier for desertion indicated trials were so lenient

that they encouraged shirking.<sup>72</sup> To its defenders, any procedural injustices were attributable to recently commissioned citizen-officers who pressed charges to compensate for their poor leadership. Now that these for-the-duration officers had been discharged, the professionals’ ethics, experience, and paternalistic concern for their troops would ensure both discipline and justice would flourish once again. This “blame the citizen-officer” exculpation—which is still asserted today—quickly became a dogma, despite the absence of supporting statistical evidence. But, whatever its merits when applied to the Regular Army officer corps in total, the argument was indefensible in light of numerous, highly-publicized incidents of senior officer abuse. The most infamous was the case of Lieutenant Colonel James A. Kilian who, as commandant of Lichfield Reinforcement Depot, condoned, and indeed encouraged, his staff to brutalize enlisted Soldiers. The Army compounded this relations disaster by giving Kilian a judicial slap on the wrist while sentencing his subordinates to jail; the Army then tried to promote him.<sup>73</sup> Only when Congress refused to promote the entire list of lieutenant colonels did the Service back down; but, by that time, the damage was done.<sup>74</sup>

The Kilian case was exceptional, but there is ample indication that the postwar Regular officer corps had taken no notice of Soldier complaints and was relying on the military justice system to preserve its prerogatives. A not untypical example was provided by Colonel Remington Orsinger during the occupation of Trieste in 1947. Among many other instances, this doughty commander court-martialed a veteran sergeant for allegedly addressing a senior officer while his hands were on his hips. After two courts voted for acquittal, Orsinger assembled a third, which obligingly busted the offender to private. That the colonel luxuriated in his palace while his troops huddled in rotting tents only compounded the injustice.<sup>75</sup>

Such blatant assertion of the traditional Regular Army officer caste privileges might have been acceptable if, as was true after World War I, the postwar force had required only a small number of lifetime privates recruited from the illiterate, the

immigrants, and the unemployed. But, by the end of the war, there were over 500 Military Occupational Specialties, many of which had not existed in 1941. Even more serious was the need for entry-level managers to officer the future force. But with the war over, the Service now had to compete with the booming postwar civilian sector. Skilled labor fled in the thousands, and young men were so disinclined to an Army career that West Point could not meet its annual quotas. The Army had to request the continuation of Selective Service. When it was finally abolished in 1948, the Army's leaders soon begged for its reinstatement: without the threat of conscription, they could not secure sufficient volunteers. With the outbreak of the Korean War, the ineffectiveness of the volunteer system was exposed. The Army had to immediately call up its Reserve, many of them veterans, and ship them into combat with minimal training. The Selective Service machinery accelerated to full throttle, calling in hundreds of thousands in a few months. From 1951 until its abolition in 1973, the great majority of the Service's incoming personnel—both officers and enlisted—were either draftees or motivated to volunteer to avoid conscription. Both the reinstatement of the draft and the need for skilled labor pulled the Army further into the civilian world, and thus continued the pressure to civilianize military law. The greatest result of both veteran outrage and the Service's need to recruit and retain a skilled labor and managerial force was the UCMJ of 1950.<sup>76</sup>

The Regular Army's initial response to the UCMJ was not positive. The most moderate criticism came from military lawyers who pointed out that it was often ambiguous and would need to be clarified by case law. Another problem was the increased need for legal officers and the additional time required for trials. The Army Board of Review soon averaged 700 cases a month, of which three-quarters requested counsel. Judge Advocate General E. M. Brannon estimated that courts-martial now took three times longer. Individual JAs often encountered commanders who still believed it was their duty, and their right, to dispense justice.<sup>77</sup> One innovative JA sought to express the correct hierarchy by making

the law officer's desk a foot higher than the court bench.<sup>78</sup>

Far more acerbic objections to the new system came for those in the field, most commonly that the UCMJ impeded the authority of the commander to impose discipline. One officer complained in 1950 that the new legal protections for enlisted personnel were both cumbersome and expensive: "God knows how much money it costs to induct, train, ship, watch over, court martial, punish, talk to, hospitalize, and discharge these people in one year, yet the line officers and myself spend half their time on this work."<sup>79</sup> There is some evidence that officers and noncommissioned officers sometimes circumvented the entire judicial process. Lieutenant General Eugene P. Forrester recalled, "We were taking the dregs of society in. It was the idea of a lot of people that the only way to make the bastards function was to wave a rail over their heads."<sup>80</sup>

The Korean War brought the UCMJ into the public eye on several levels, in part because between 1950 and 1953 there were almost a million courts-martial.<sup>81</sup> Not surprisingly, there were renewed accusations of command influence and judicial ineptitude. That many of these were justified is apparent in the orders issued by the Adjutant General in December 1952:

Deviations from the provisions of Article 37 and devices created to circumvent the spirit of the law never remain hidden from public view. Officers, warrant officers, and enlisted men who have witnessed specific malpractices in the administration of justice are quick, upon their return to civilian life, to pass on their observations and criticisms to the press, to Congress, and to the Department of the Army.<sup>82</sup>

Officers who interfered with the legal process not only put the Army in an "indefensible" position, but they posed "a serious threat to the present system. It is entirely possible, if abuses continue, that Congress may act to strip commanders of their power to appoint courts martial."<sup>83</sup> How well this order was heeded, or enforced, may be seen from a 1958 Judge Advocate General's

report on the Infantry School that the convening authority was also the rater of half the officers serving on courts-martial—and that he had rated several immediately after they had delivered verdicts.<sup>84</sup>

Far more insidious was the accusation that the UCMJ had directly contributed to the Army's failure to decisively win the Korean War. The most famous, or infamous, such attack was Eugene Kinkaid's 1959 *Every War but One*; but, as Susan Carruthers acidly noted, "Kinkaid said little that the army sources on whom he relied hadn't been saying for years"<sup>85</sup> An only slightly less strident critique was T. R. Fehrenbach's 1963 *This Kind of War*, a perennial on Chief of Staff reading lists.<sup>86</sup> The Kinkaid-Fehrenbach interpretation was simple: a decadent civilian society had raised "soft" youth, civilian do-gooders, and politicians prevented the Army from disciplining them; the result being battlefield defeat and national humiliation. In many ways, this canard represented the Regular Army reaction to the civilianization of the force due to Cold War expansion, conscription, and the dilution of the officer corps's West Point's oligarchy by Reserve Officers' Training Corps graduates and World War II veterans. The myth of the postwar garrison army unfit to fight became a fixture in Army lore, revived in the Task Force Smith narrative, itself a slogan periodically revived as a clarion call to readiness.<sup>87</sup>

The Vietnam War prompted a similar critique of the UCMJ. The Military Justice Act of 1968 substantially strengthened the power of military judges, and further reduced the ability of commanders to influence their verdicts.<sup>88</sup> Yet some argued these changes had not gone far enough. A task force commissioned by the Secretary of Defense found clear racial disparities in the rates of trial and punishments. In 1970, two senators sponsored legislation to completely transfer military justice from command to a separate Court-Martial Command.<sup>89</sup>

The external critique of the UCMJ and military justice was far less vitriolic than the internal condemnation playing out in *Army* magazine in the early 1970s. Officers high and low declared that the new restrictions to curb command influence had made it impossible to counteract the epidemic of racial, drug, and disciplinary problems. Of-

Officers were so terrified of being accused of influencing verdicts, they refused to charge recalcitrant Soldiers without support from higher authority and a legal opinion from a JA. Captain Robert B. Killebrew declared in 1971, the “present system of military justice serves neither discipline nor justice.”<sup>90</sup> He estimated it took over three months for a commander to receive authorization to even fine a misfit, and the restrictions on pretrial confinement allowed bullies to intimidate their barracks mates for weeks. He pleaded for a military justice system that allowed commanders to quickly punish, incarcerate, or separate the incorrigibles and allow them time to train and lead the good Soldiers.

Killebrew was a comparative rarity in that he was a company-grade officer. The most savage attacks on the UCMJ came from “Old Army” survivors of the pre-World War II force. Colonel George G. Eddy believed the UCMJ was symbolic of a decades-long campaign “to hamstring commanders in their efforts to maintain effective discipline.”<sup>91</sup> Lieutenant Colonel Garland declared that “military commanders have been and are now capable of determining when an article has been violated and which punishment should be meted out.”<sup>92</sup> Waxing nostalgic for the 1927 *Manual for Courts-Martial*, he found the entire idea of the UCMJ an insult to the Regular Army officer corps’s professional integrity. Garland’s demand for a return to past standards was shared by Lieutenant General Hamilton H. Howze, scion of a martial dynasty and a key figure in the development of airmobile operations. Like Garland, Howze insisted the pre-UCMJ courts-martial had been quick and fair because the wisdom and experience of the senior officer would ensure that justice prevailed. But, as the title of his 1971 article, *Military Discipline and National Security*, made clear, Howze believed the state of military law had reached a crisis level. Since 1945 the “vast watering down of the disciplinary system” had so “crippled the commander” that the armed forces could no longer be relied on to fulfill their missions.<sup>93</sup> Howze referenced a variety of indicators of the breakdown of morale, authority, and combat effectiveness ranging from My Lai to drug use to sloppy uniforms. All these were

emblematic of a generational war between disobedient youth (and junior officers) and senior Regular Army officers and noncommissioned officers. Only when the Army’s leadership stood up to civilian interference and public opinion, and insisted on the separation of military from civilian law, would discipline be restored and the armed forces recover.<sup>94</sup> Implicit in the Old Army critique of the UCMJ was the conviction that their generation’s paternalistic dispensation of justice had been fair, while today’s junior officers lacked the essential moral qualities necessary for military leadership.

The Old Army condemnation of military justice elicited a strong response. Major General G. W. Putnam, a contemporary of Howze, recalled most pre-World War II trials as perfunctory, punitive, and predetermined. He cited numerous incidents to refute Howze’s vision of the Old Army as happy, disciplined, and well-officered. The UCMJ might have its problems, Putnam believed, but it was much fairer than the old manuals and could not be blamed for the Army’s current problems.<sup>95</sup> The appeal of officers such as Garland and Howze for a return to Old Army regulations provoked much scorn. One enlisted man opined that most officers’ objections to the UCMJ were indicative of their vast ignorance of either military or civil law. An even stronger critique came from a young lieutenant. Having lost the Vietnam War through their “unqualified leadership,” senior leaders “were trying to blame the law for the ills of the Army and the country.”<sup>96</sup> Captain Jack E. Lane cited such recent examples of corruption and bad leadership from the World War II generation as the convictions of both the Army’s provost marshal and its command sergeant major. Given nearly one hundred incidents of command influence at Fort Leonard Wood, Missouri, alone, Lane wondered how any officer could question the necessity for the UCMJ and its protections for the enlisted Soldier?<sup>97</sup>

The debate in *Army* over the UCMJ’s effects on discipline subsided after political efforts to liberalize the code were defeated and the Supreme Court upheld the validity of courts-martial.<sup>98</sup> In what may be a fitting epilogue, Captain Killebrew—whose 1971 article had ignited much of the discussion—wrote on both the problems and benefits

of the UCMJ.<sup>99</sup> As a company commander, he still found the administration of justice overly cumbersome and protracted, but had come to terms with the process. And, revealingly, he had concluded that not only was “frequent use of the UCMJ self-defeating” but too often substituted for leadership. Most of the troops in the Volunteer Army were immature and badly instructed, and they frequently committed Article 15 offenses without recognizing the consequences. He had found that turning offenders over to noncommissioned officers for extra training, rather than charging them, was more effective and less demoralizing to potentially good Soldiers. Reversing his earlier claim that the legal code was too lenient, he now asserted, “the most striking thing is that the UCMJ is generally adequate to enforce a much stricter degree of discipline than the one somebody is usually griping about.”<sup>100</sup> Judge Advocate General George S. Prugh commended both Killebrew’s endorsement of the UCMJ and his advice to avoid excessive reliance on it for discipline.<sup>101</sup> Two years later, when Prugh’s successor wrote an article extolling the UCMJ and military justice, there was no hostile response. Like Killebrew, the Army officer corps agrees that the UCMJ was a benefit to discipline as opposed to a detriment.<sup>102</sup>

## Conclusion

If my own experience is any guide, military historians encounter military law only when it becomes a political, public, or internal problem. This was certainly the case with the Philippine War atrocity scandals and, to a lesser extent, the public pressure to revise the Articles of War after World War II. But on closer examination, historians must recognize that the connection between military law and American military organizations means that military law is crucial to understanding a host of issues—ranging from how an Army is organized and how it functions, to whether commanders are good or bad leaders, to whether judicial reform is thought to be critical for success in the next war.

Military justice continues to provide a convenient target for both internal and external critics. Yet it would be hard to argue—as Howze and others did—that



military law's evolution toward greater protections for military personnel, less command influence, and greater procedural rigor have not been beneficial. Anyone who has studied the court-martial records of the pre-World War I era will quickly find, as Larremore noted, rampant command influence, caste bias, and punitive sanctions. This is not just the all-too-common tendency of today's historians to impose their own morality on the past. There are numerous contemporary criticisms of the Old Army's judicial practices. Perhaps the most acerbic verdict was given by George van Horn Moseley. A few weeks after joining his cavalry regiment in 1899, he came to the conclusion that the reason no court-martial was allowed to remain in session after early afternoon was because no officer could be expected to be sober by then.<sup>103</sup> Such rough justice might have been acceptable for the rough Soldiers of the frontier Army, but it simply will not suffice play for a service that has promised for decades to allow Soldiers to be all they can be. **TAL**

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## Notes

- ANDREW BYERS, *THE SEXUAL ECONOMY OF WAR: DISCIPLINE AND DESIRE IN THE U.S. ARMY* (2019); ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* (2005); KELLIE WILSON-BUFORD, *POLICING SEX AND MARRIAGE IN THE AMERICAN MILITARY: THE COURT MARTIAL AND THE CONSTRUCTION OF GENDER AND SEXUAL DEVIANCE, 1950–2000* (2018).
- BRIAN McALLISTER LINN, *THE PHILIPPINE WAR, 1899–1902* (2000); BRIAN McALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899–1902* (1989).
- Born in Maryland in 1838, Elwell Stephen Otis served in the Civil War and the Indian campaigns of the 1870s, including the Battle of Little Big Horn. Appointed a major general in 1898, Otis arrived in

the Philippines in late August that same year to be the commander of the Department of the Pacific and the governor of the Philippines. Otis maintained a “delicate peace with Filipino nationalists” as the United States took control of the islands. Vernon L. Williams, *Otis, Elwell Stephen*, in *REFERENCE GUIDE TO UNITED STATES MILITARY HISTORY 1865–1919*, at 196 (Charles R. Shrader ed., 1993).

- A graduate of the U.S. Military Academy, Crowder earned a law degree at the University of Missouri in 1886. He served in the Philippines as a judge advocate and Associate Justice of the Philippine Supreme Court from 1898 to 1901. Then-Major General Enoch Crowder was the Judge Advocate General from 1911 to 1923; he also served as Provost Marshal General during World War I. DAVID LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955).
- PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES & THE PHILIPPINES* (2006).
- The correlation between legal training and pacification operations was already established in the U.S. Army. Colonel George Henry Sharpe, a Yale Law School graduate who had practiced law before the Civil War, headed the Bureau of Military Information from 1863 to 1865. This agency gathered intelligence on the enemy and also conducted counterintelligence by interrogated prisoners of war and refugees. While the Bureau of Military Information was disbanded in 1865, the Army established a Military Intelligence Division in 1888 and the 1892 Army regulations required all brigade and division provost marshals to maintain “secret service” on campaigns. U.S. CENT. INTEL. AGENCY, *INTELLIGENCE IN THE CIVIL WAR* (2007), <https://www.cia.gov/static/44d5b357dc66ed40f2fbbd53f3bc7a29/Intelligence-in-the-Civil-War.pdf>.
- Lieutenant William T. Johnston, A Brief Record of Services Since 1898, [1902?] (on file with U.S. National Archives); Lieutenant William T. Johnston, *Investigation into Methods Adopted by the Insurgents for Organizing and Maintaining a Guerrilla Force*, 21 May 1900, in 1 ANNUAL REPORT OF THE WAR DEPARTMENT 1900 pt. 7, at 257–64; LINN, *U.S. ARMY AND COUNTERINSURGENCY*, *supra* note 2, at 41–45, 156.
- Lieutenant George P. Whitsett to AG, *Provost Marshal General, 29 August 1900*, in 1 ANNUAL REPORT OF THE WAR DEPARTMENT 1900 pt. 10, at 282–83.
- Id.*
- Lieutenant William B. Cochran to AG, 3d District, Dep't of N. Luzon, 5, 7 June 1899 (on file with U.S. National Archives).
- LINN, *THE PHILIPPINE WAR, 1899–1902*, *supra* note 2, at 299–305. The reputation of provosts was tainted by Major Edwin F. Glenn, a graduate of Columbia University's law school and the 6th Separate Brigade's judge advocate. Roaming between Samar and Leyte, Glenn kidnapped, tortured, and murdered civilians—including a Filipino priest—and defended the actions under General Orders No. 100 and the alleged savagery of the enemy. *See* General Court-Martial No. 33401 (Edwin F. Glenn) (on file with U.S. National Archives).
- Headquarters, War Dep't, Gen. Orders No. 100 (14 Apr. 1863).
- Id.*
- See* LUIS H. FRANCA, *HISTORY OF THE PHILIPPINES: FROM INDIOS BRAVOS TO FILIPINOS* (2013) (arguing that war crimes and mistreatment of Filipinos during the Philippine War was linked to White racism).
- See* KRAMER, *supra* note 5 (arguing that racial politics of empire in Philippines was resulted in ruthless military campaigns against Filipinos).
- Id.*
- The phrase originated in *The Soldier's Song*, a popular tune sung by American Soldiers during the Philippine War:  

In the days of dopey dreams—happy, peaceful Philippines,  
 When the bolomen were busy all night long.  
 When ladrones would steal and lie, and  
 Americanos die,  
 Then you heard the soldiers sing this evening song:  
 Damn, damn, damn the insurrectos!  
 Cross-eyed kakkac ladrones!  
 Underneath the starry flag, civilize 'em with  
 a Krag,  
 And return us to our own beloved homes.
- See* *Military Order of the Carabao*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Military\\_Order\\_of\\_the\\_Carabao](https://en.wikipedia.org/wiki/Military_Order_of_the_Carabao) (Sept. 8, 2021). The “Krag” refers to the Krag-Jorgensen rifle, a bolt-action weapon used by the U.S. Army during the war in the Philippines. LINN, *THE PHILIPPINE WAR, 1899–1902*, *supra* note 2, at 322.
- See* Stuart C. Miller, *Our Mylai of 1900: Americans in the Philippine Islands*, 7 *TRANS-ACTION* 19 (1970); MARK TWAIN, *MARK TWAIN'S WEAPONS OF SATIRE: ANTI-IMPERIALIST WRITINGS ON THE PHILIPPINE-AMERICAN WAR* (Jim Zwick ed., 1992).
- Ben Arnoldy, *Columnist Compares Iraq War to Philippines. Blogosphere Objects.*, CHRISTIAN SCI. MONITOR (July 29, 2009), <https://www.csmonitor.com/World/Global-News/2009/0729/columnist-compares-iraq-war-to-philippines-blogosphere-objects>; Ross Douthat, *The War We'd Like to Forget*, N.Y. TIMES (July 26, 2009), <https://www.nytimes.com/2009/07/27/opinion/27douthat.html>; Paul Kramer: *Iraq, Afghan Wars Parallel Philippine Invasion*, COLUMBIAN COLL. OF ARTS & SCI. (April 12, 2006), <http://hnn.us/roundup/entries/23962.html>; GREGG JONES, *HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA'S IMPERIAL DREAM* (2012).
- LINN, *THE PHILIPPINE WAR, 1899–1902*, *supra* note 2, at 315–19.
- Id.* at 318–19.
- General Court-Martial No. 10196 (John H. A. Day).
- General Court-Martial No. 30313 (Littleton W. T. Waller).
- LINN, *THE PHILIPPINE WAR, 1899–1902*, *supra* note 2, at 319. *See also* David L. Fritz, *Before the “Howling Wilderness”: The Military Career of Jacob Hurd Smith, 1862–1902*, 43 *MIL. AFFS.* 186 (1989).
- JOSEPH L. SCHOTT, *THE ORDEAL OF SAMAR* (1964); STANLEY KARNOW, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 189–94* (1989).
- For more on George Davis, who served as the Judge Advocate General from 1901 to 1911, see Fred L. Borch, *From Frontier Cavalryman to the World Stage: The Career of Army Judge Advocate General George B. Davis*, *ARMY HIST.*, Winter 2010, at 6.
- LINN, *THE PHILIPPINE WAR, 1899–1902* (2000), *supra* note 2, at 319.
- Headquarters, War Dep't, Gen. Order No. 80 (16 July 1902) (on file with U.S. National Archives). For

- the court-martial and the Judge Advocate General's opinion, see General Court Martial 30310 (Littleton W. T. Waller) (on file with U.S. National Archives). For a sample of works on Samar and the Waller Affair, see LOUISE BARNETT, ATROCITY AND AMERICAN MILITARY JUSTICE IN SOUTHEAST ASIA: TRIAL BY ARMY 61–87 (2010); Thomas A. Bruno, *The Violent End of Insurgency on Samar, 1901–1902*, ARMY HIST., Spring 2011, at 30; Kenneth R. Young, *Atrocities and War Crimes: The Cases of Major Waller and General Smith*, 12 LEYTE-SAMAR STUD. 64 (1978); THE PHILIPPINE WAR, 1899–1902, *supra* note 2, at 305–21.
29. Wilbur Larremore, *American Courts-Martial*, 177 N. AM. REV. 607 (1903).
30. *Id.*
31. *Id.*
32. *Id.* See also Report of the Judge Advocate General, in 1 WAR DEP'T, ANNUAL REPORT OF THE WAR DEPARTMENT 1905, at 479. Some commands tried an average of four out of five Soldiers annually. EDWARD M. COFFMAN, THE REGULARS: THE AMERICAN ARMY, 1898–1941, at 119–20 (2007).
33. Philippine Organic Act, 32 Stat. 691 (1902).
34. Headquarters, Div. of the Phil., Gen. Order No. 152, 7 July 1902 (on file with U.S. National Archives). BRIAN McALLISTER LINN, GUARDIANS OF EMPIRE: THE U.S. ARMY AND THE PACIFIC, 1902–1940, at 23–49 (1997).
35. John A. Hixon, *Philippine Scouts*, in HISTORICAL DICTIONARY OF THE U.S. ARMY 366–67 (Jerold E. Brown, ed) (2001).
36. Posse Comitatus Act, 18 U.S.C. § 1385.
37. Memorandum from Tasker H. Bliss to Sec'y of War, No. 23160, 17 Nov. 1905 (on file with U.S. National Archives). Bliss was not a lawyer, but was later made an Honorary Doctor of Laws at Harvard, Bucknell, and Western Reserve universities. HENRY BLAINE DAVIS, JR., GENERALS IN KHAKI 42–43 (1998).
38. ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 1860–1941, at 153–58 (1998).
39. *Grafton v. United States*, 206 U.S. 333, 341 (1907).
40. *Id.* at 342.
41. *Id.* at 344.
42. *Defense of Grafton and the Army*, ARMY & NAVY J., Mar. 2, 1907, at 44.
43. *Grafton*, 206 U.S. at 354–55.
44. *Lessons of the Grafton Case*, ARMY & NAVY J., June 18, 1907, at 44. On the legal implications, see Captain Edward Sigerfoos, *Are Members of the Military Forces in the Philippines Entitled to a Trial by Jury?*, 43 J. MIL. SERV. INST. 222–33 (1908); *Grafton Case and Cuban Service*, ARMY & NAVY J., Feb. 23, 1907, at 697.
45. *Wilson v. Girard*, 354 U.S. 524 (1957).
46. *Id.* at 526.
47. *Girard v. Wilson*, 152 F. Supp. 21, 36 (D.D.C. 1957).
48. *Wilson v. Girard*, 354 U.S. 524 (1957).
49. SP-3 William S. Girard File, Box 3, Biographical Files, Record Group 407 (on file with U.S. National Archives); Girard Case Files, Adjutant General's Office (AGO) 250.4, Boxes 15–17, Command Information (CINFO) 1958, Entry NND 957387, Record Group 319 (on file with U.S. National Archives). For the political importance of *Girard v. Wilson*, see William S. Girard Files 1-4, Box 254, CF/GF, Dwight D. Eisenhower Papers, Eisenhower Presidential Library, Abilene, Kansas.
50. SP-3 William S. Girard File, Box 3, Biographical Files, Record Group 407 (on file with U.S. National Archives).
51. Letter from C. R. Revie to George S. Meloy, 6 July 1957 (on file with U.S. National Archives).
52. Security Treaty Between the United States and Japan, 28 April 1952, 3 U.S.T. 3329, reprinted in AM. J. INT'L L. SUPP., July 1952, at 96.
53. Letter from Frank C. Castagneto to George V. Underwood, 17 May 1963 (on file with U.S. National Archives).
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55. *Adjudication*, LEXICO, <https://www.lexico.com/en/definition/adjudication> (last visited Oct. 21, 2021).
56. SAMUEL J. WATSON, PEACEKEEPERS AND CONQUERORS: THE ARMY OFFICER CORPS ON THE AMERICAN FRONTIER, 1821–1846, at 41 (2013).
57. RANDY STEFFEN, THE HORSE SOLDIER: THE REVOLUTION, WAR OF 1812, THE EARLY FRONTIER 1776–1850, at 32–35 (1977).
58. WATSON, *supra* note 56, at 41. See also EDWARD M. COFFMAN, THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784–1898, at 196–97 (1986); LORIE FOOTE, THE GENTLEMEN AND THE ROUGHS: VIOLENCE, HONOR, AND MANHOOD IN THE UNION ARMY (2010); WILLIAM B. SKELTON, AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784–1861, at 270–78 (1992); RICHARD BRUCE WINDERS, MR. POLK'S ARMY: THE AMERICAN MILITARY EXPERIENCE IN THE MEXICAN WAR 61–63 (1997).
59. An 1870 graduate of the U.S. Military Academy, William E. Birkhimer served in the Philippines from 1899 to 1901. He was decorated with the Medal of Honor for most distinguished gallantry in action at San Miguel de Mayam on 13 May 1899. GEORGE W. CULLEM, 5 BIOGRAPHICAL REGISTER OF THE OFFICERS AND GRADUATES OF THE UNITED STATES MILITARY ACADEMY 167 (1910).
60. Robert L. Bullard, *The Citizen Soldier—The Volunteer*, 39 J. MIL. SERV. INST. 153–67 (1906). JAMES PARKER, THE OLD ARMY: MEMORIES, 1872–1918, at 370–71 (1929).
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63. Letter from Major Robert E. Spence to Lieutenant Miller, 3 January 1900, Letter Sent 35, 2d Battalion, Letters Sent Book, 32d Infantry Regiment (U.S. Volunteers) Records.
64. JOHN SCOTT REED, THE US VOLUNTEERS IN THE SOUTHERN PHILIPPINES: COUNTERINSURGENCY, PACIFICATION, AND COLLABORATION, 1899–1901, at 165–95 (2020).
65. *Id.*
66. George Gleason Bogert, *Courts-Martial Criticisms and Proposed Reforms*, 5 CORNELL L.Q. 18, 18–19 (1919–1920); Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 54–55 (1919).
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69. *Id.* See also Walter Wilson, *War and the Common Soldier*, NEW REPUBLIC, May 22, 1935, at 36–39.
70. Fred L. Borch, *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917–1920*, ARMY LAW., Mar. 2017, at 1; Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I (2017).
71. Paul Jones, *Barrack-Room View of the Brass*, SATURDAY EVENING POST, Jan. 5, 1946, at 96; War Dep't, Special Memorandum No. 11–209, subject: Voluntary Comments About “The Army” Made by a Group of Army Officers November–December 1946 (20 Jan. 1947) (on file with U.S. National Archives). For the Doolittle Board, see WAR DEP'T, THE REPORT OF THE SECRETARY OF WAR'S BOARD ON OFFICER-ENLISTED RELATIONSHIPS (May 27, 1946).
72. Frederick Bernays Weiner, *Lament for a Skulker*, COMBAT FORCES J., July 1954, at 33–38.
73. Antonio Monea, *The Beast of Lichfield: Colonel James A. Kilian and the Infamous 10th Reinforcement Depot*, ARMY LAW., no. 3, 2019, at 20–22.
74. *The Malady Lingers On*, ARMY & NAVY BULLETIN, Mar. 8, 1947, at 4; JACK GIECK, LICHFIELD: THE U.S. ARMY ON TRIAL (1997). For an example of the continuing prevalence of the “blame the citizen-officer” narrative, see DON VANDERGRIF, THE PATH TO VICTORY: AMERICA'S ARMY AND THE REVOLUTION IN HUMAN AFFAIRS 75 (2002).
75. Robert Ruark, *A Very Loud Whistle Stirs up an Ill Wind for Lt. Gen. Lee*, ARMED FORCE, Aug. 16, 1947, at 3; Robert Ruark, *Ruark Nears End of His European Journey with a Final Look at Paris*, ARMED FORCE, Sept. 20, 1947, at 3.
76. 1 JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775–1950, at 127–255 (1992). For an extensive examination of the post-World War II draft, see GEORGE Q. FLYNN, THE DRAFT, 1940–1973 (1993).
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## No. 3

# Crossing Borders in Cyberspace

## Regulating Military Cyber Operations and the Fallacy of Territorial Sovereignty

By Major Jeffrey D. Randall

In the early weeks of October 2020, sprawling across 100 countries, an enhanced form of cyber weapon called a botnet began positioning itself to influence the U.S. Presidential election.<sup>1</sup> Nicknamed *Trickbot*, the weapon was a for-rent botnet that had surreptitiously implanted malicious software into nearly 250 million systems across the globe, massing computing power through hundreds of millions of “zombie” computers.<sup>2</sup> Through its continent-spanning, decentralized design, *Trickbot*’s threat structure aggregated worldwide computing power.<sup>3</sup> As it began directing that computing power toward U.S. voter registration and electronic polling infrastructure, U.S. Cyber Command (USCYBERCOM) identified the botnet’s activities.<sup>4</sup> United States Cyber Command quickly “flooded” *Trickbot*’s systems by deploying software into information infrastructure spread across the planet.<sup>5</sup> That act preemptively cut off *Trickbot*’s opportunities to influence election computer infrastructure and helped preserve the integrity of the ensuing election.<sup>6</sup> However, in undertaking its operation, legal advisors at USCYBERCOM had to confront a key, unsettled legal question<sup>7</sup>: Could the United States take preemptive action against a cyber threat located on other countries’ soil without those foreign states’ consent?

The *Trickbot* disruption operation was not the first time US-CYBERCOM had confronted this question in a publicly-known operation. In Operation GLOWING SYMPHONY, which took place four years prior, U.S. cyber operators remotely infiltrated Islamic State (ISIS) militants’ computer networks, data storage accounts, and smartphones located in at least five countries.<sup>8</sup> The Islamic State had been utilizing systems in these particular states to store and disseminate propaganda.<sup>9</sup> Upon gaining access to those foreign systems, U.S. cyber operators deleted troves of propaganda material, severed the terrorists’ access to data, and dropped software into programs to deplete batteries and disrupt hardware functionality.<sup>10</sup> As such, Operation GLOWING SYMPHONY presented the same critical question of international law as the *Trickbot* disruption operation: Is consent or other justification required before undertaking cyber operations in computer systems located in another state?

Despite the “un-territorial” nature of most cyber activities,<sup>11</sup> some states have taken the position that cyberspace is governed by a universal law of trespass flowing from the broader concept of territorial sovereignty, a principle that recognizes a state’s internal control over its territory.<sup>12</sup> Accordingly, government leaders and their legal advisors must analyze whether territorial sovereignty operates as a

binding rule of exclusion under international law, thereby requiring consent or other justification to legally create cyber-based effects in foreign systems. Those same leaders and advisors must also consider that, if territorial sovereignty imposes no such rule, what baseline international rules should states apply to cross-border cyber operations?

This article argues that, while states have historically used the term “violation of territorial sovereignty” with fluency in international disputes, international law lacks a customary trespass rule flowing from the broader principle of territorial sovereignty. Accordingly, states should advance non-intervention and use of force as the governing principles in cyber operations because they readily translate from analogous clandestine operation cases, supply states sufficient normative protections, and maximize states’ freedom of action. Those three characteristics are critically important in an offense-dominated domain where geography has become largely irrelevant.

This article explains that argument in three parts. In “The Infirmary of an International ‘Trespass’ Rule,” the article examines *de facto* patterns of prohibited conduct in leading cases involving purported territorial sovereignty violations, finding such cases fail to evince an international rule of trespass. “Regulating by Analogy: Comparing Approaches” argues that legal advisors should look to historical clandestine operations in which non-intervention and use-of-force principles provide legal guideposts for out-of-system cyber operations. And last, “The Need for Freedom of Action” demonstrates that non-intervention and use of force would ensure the most balanced baselines for transboundary cyber operations because they accommodate freedom of action against cyber threats while providing sufficient normative protections. This final section also explores how states could expand the “unable or unwilling” anticipatory self-defense doctrine to justify legitimate non-consensual operations if the international community eventually embraces a rule of territorial sovereignty in cyberspace.

### **The Infirmary of an International “Trespass” Rule**

Sovereignty serves as a fundamental principle of international law and encompasses the

“[c]ollection of rights held by a state, first in its capacity as the entity entitled to exercise control over its territory and second in its capacity to act on the international plain, representing that territory and its people.”<sup>13</sup> As such, territorial sovereignty serves as a common organizing principle among states.<sup>14</sup> Consequential to the internal rights over a given territory, sovereignty affords a state, *vis-a-vis* other states, “the legal personality necessary to create and be bound by international law.”<sup>15</sup> Under the *Lotus* rule, a state’s freedom is only circumscribed through treaties on specific matters, or by collective custom, the latter imposing universal rules known as customary international law.<sup>16</sup>

While states have signed treaties imposing certain boundaries in the sea and air domains, no treaty governs cross-border land movements, nor has the international community adopted a universal, domain-transcendent treaty governing cross-border movements generally.<sup>17</sup> Despite this absence, some states and academics have asserted that a customary international rule of trespass forbids states from crossing one another’s borders without consent, arguing that “[a] violation of sovereignty occurs whenever one State physically crosses into the territory . . . of another State without either its consent or another justification in international law . . . .”<sup>18</sup> Applied to cyberspace, those states and academics assert that territorial sovereignty functions as a rule of exclusion and would thus forbid nonconsensual effects in another state’s cyber system.<sup>19</sup>

In contrast, other academics and at least one state assert that the notion of territorial sovereignty, while an organizing principle in international law, lacks sufficient *opinio juris* and state practice to function as a binding rule of trespass against cross-border interference.<sup>20</sup> Instead, they argue states should apply the traditional concepts of the use of force and non-intervention to govern cyber operations.<sup>21</sup> As such, the international community remains divided on the role of territorial sovereignty in cyberspace.<sup>22</sup>

To resolve the dispute surrounding the threshold international law governing cross-border cyber operations, state leaders and their legal advisors must look to seminal historical cases associated with purported “territorial sovereignty” violations

to determine whether states can extrapolate a rule of interstate trespass from existing precedent.<sup>23</sup> Although the term “violation of territorial sovereignty” appears with regularity in international disputes, the following analysis highlights that the substance of those violations consistently involves *de facto* violations of the use of force and non-intervention, and international law regularly ignores any associated territorial trespass or activities below the non-intervention and use of force thresholds.<sup>24</sup> In sum, state practice has failed to demonstrate the existence of any stand-alone customary international law of trespass flowing from the broader principle of territorial sovereignty.

### **Overt Military Activities**

International cases referencing violations of territorial sovereignty involving overt military forces consistently demonstrate *de facto* threat or use-of-force violations, rather than recognizing an international trespass rule. For example, the International Court of Justice (ICJ) case of *Corfu Channel* involved a British aircraft carrier, warship, and cruisers sweeping for mines located as close as 500 meters from Albania’s coastline.<sup>25</sup> While labeled a “violation of territorial sovereignty,” the case’s objective facts demonstrated a violation of the threat of the use of force.<sup>26</sup> Indeed, in responding to Albania’s argument that Great Britain “made use of an unnecessarily large display of force, out of proportion to the requirements of the [mine] sweep,” the ICJ reasoned that “it does not consider that the action of the British Navy was a demonstration of force *for the purpose of* exercising political pressure on Albania.”<sup>27</sup> Accordingly, the ICJ inappropriately ruled that *Corfu Channel* did *not* involve a threat of the use of force solely upon the inappropriate considerations of the offending state’s purpose and intent, rather than a *de facto* evaluation of the cross-border effects.

Similarly, in *Nicaragua v. United States*, the ICJ improperly characterized helicopter strafing, mine laying, and speedboat attacks on sea ports and oil installations as “violations of territorial integrity,”—another clear use of force.<sup>28</sup> Critically, the ICJ omitted comment on other non-consensual incursions below the use of force threshold,<sup>29</sup> suggesting that—like in *Corfu Channel*—the

ICJ may have relied on a less consequential characterization of certain activities to avoid risks to its institutional credibility. Other scholars have pointed out that other ICJ cases like *Corfu Channel*, *Nicaragua v. United States*, and *Certain Activities Carried Out by Nicaragua in the Border Area of Costa Rica* have entailed large-scale military forces and often involve threats of, or actual, forcible border alterations—harms distinct from those posed by cyber activities.<sup>30</sup> In conclusion, when evaluated objectively, historical precedent involving alleged violations of territorial sovereignty in overt military force cases have more commonly and more accurately involved *de facto* violations of primary rules like the threat or use of force.<sup>31</sup>

If territorial sovereignty actually imposed a rule against international trespass, the very sorts of unfriendly, non-consensual incursions that a peacetime trespass rule would be expected to prohibit are clandestine incursions, like espionage. However, international law has historically tolerated surreptitious border incursions as long as those incursions avoid breaching use of force or non-intervention thresholds.<sup>32</sup> While few clandestine cases reach the public eye, one example involved U.S. embassy and consulate rescue operations in Iran in 1980.<sup>33</sup> In that instance, the Central Intelligence Agency (CIA) dispatched operatives to Iran in light aircraft, inserting agents into Iran to purchase vehicles, conduct rescue force reconnaissance, install landing strip lights in the desert, and take soil samples for a later-aborted military rescue operation.<sup>34</sup> The CIA undertook those time-sensitive operations during a period of significant Iranian unrest when hostages remained under Iranian control.<sup>35</sup> After these activities came to light in the press, the international community “neither challenged nor condemned” the operations.<sup>36</sup> These activities mimicked the same class of activities that the ICJ ignored in *Nicaragua v. United States*.

Despite that international law “[f]requently segregates unlawful parts from otherwise lawfully conducted missions,”<sup>37</sup> the CIA’s activities in Iran never received legal objections because, presumably, they did not constitute standalone international wrongs. Similar to the disregarded activities in *Nicaragua v. United States*, the tolerance in the Iranian case echoes the general principle

that international law ignores cross-border clandestine activities like espionage, even though they involve non-consensual border crossings and localized activities on a foreign state’s territory. Such tolerance is irreconcilable with the idea that territorial sovereignty imposes an internationally-recognized rule of trespass.

Some critics argue that, like the Iran case above, most state cyber operations do not “contribute to the crystallization of new customary law” because “[they] are highly classified or otherwise shielded from observation by other states.”<sup>38</sup> Yet, states have been undertaking clandestine operations for centuries. Such deep-rooted state practice ensures clandestine activities *have* influenced the law. Indeed, in some instances, clandestine activities have contributed to positive international law. For example, Additional Protocol (AP) I recognizes states’ need for clandestine operations and preserves combatant immunity for clandestine operatives in most instances.<sup>39</sup> If non-consensual clandestine activities were considered patently illegal, explicit textual tolerance in AP I—not to mention protected status—would be highly irregular. Rather than not contributing to new customary international law, the circumstances surrounding states’ clandestine activities simply mean that some areas of practice, norms, and legal limits may remain visible to the state (i.e., through cleared government actors), but opaque to non-governmental commentators. Instead of arguing that those characteristics render clandestine activities irrelevant to customary international law,<sup>40</sup> states should examine those instances when clandestine activities *do* trigger legal objection under the auspices of “territorial sovereignty,” and examine whether those cases evidence the existence of a rule distinct from use of force or non-intervention.

Indeed, like in the Iran case, international law generally tolerates cross-border clandestine activities—except in instances where they breach use of force and non-intervention thresholds. While these cases are often improperly characterized as territorial sovereignty violations, legal objections in these cases only arise when the clandestine methods are forcible or usurp a state’s political prerogatives.<sup>41</sup> One use of force example involved French operatives in

1985 secretly infiltrating New Zealand and planting explosives on the Greenpeace ship, the *Rainbow Warrior*, as its crew was readying the ship to disrupt French nuclear tests in the South Pacific.<sup>42</sup> When the explosives blew car-sized holes in the vessel, inadvertently killing a crew member and sinking the ship, New Zealand launched an investigation that ultimately exposed France’s involvement.<sup>43</sup> In a protest at the United Nations (U.N.), New Zealand complained of a “violation of [its] territorial sovereignty.”<sup>44</sup>

Despite the label, international reactions solely focused on France’s forcible methods, rather than its collateral border incursion, territorial infringement, explosives smuggling, or other activities.<sup>45</sup> New Zealand charged the officers with manslaughter and illegal explosives use, but withheld complaint of any illegal border crossing or explosives smuggling.<sup>46</sup> In referencing their forcible methods, one of the French operatives invoked a use-of-force doctrine in acknowledging the bombing was “disproportionate,” largely since the French government had rejected the option of damaging the propeller shaft as a less forcible means to accomplish the operation.<sup>47</sup> Most importantly, despite New Zealand labeling the matter a violation of territorial sovereignty, the effects in the case involved “death, injury, or significant destruction”—criteria that characterize the use of force.<sup>48</sup> Accordingly, the case demonstrates not proof of a trespass rule flowing from territorial sovereignty, but rather an example of otherwise internationally permissible clandestine activities that ripened into an indiscriminate and disproportionate use of force.<sup>49</sup>

In other clandestine operations, states similarly and improperly invoke territorial sovereignty when the *de facto* violated legal interest is non-intervention.<sup>50</sup> Like the use-of-force prohibition, non-intervention is a rule designed to protect state sovereignty. The U.N. Charter reflects the non-intervention principle and prohibits other states from intervening in “matters which are essentially within the domestic jurisdiction of any state . . . .”<sup>51</sup> Extraterritorial abductions are emblematic of such cases.<sup>52</sup> One famous clandestine example involved Israeli Mossad agents undertaking secret activities to infiltrate Argentina and abduct Adolf Eichmann. Eichmann was the architect of the Holocaust

who fled Germany after World War II to enjoy safe harbor under the Argentinian president's personally-supervised domestic asylum policy for former Nazi leaders.<sup>53</sup> Once the Mossad agents completed their abduction and Argentina discovered Israel had secretly captured and spirited Eichmann to Jerusalem, Argentina protested at the United Nations.<sup>54</sup> In its complaint to the Security Council, Argentina characterized the invasion of its legal interest not as one of territorial trespass, but rather "the *exercise of jurisdictional acts* [on its] territory . . ."<sup>55</sup> The U.N. Security Council deviated slightly from how the international wrong was characterized, stating that "[t]he transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic . . ."<sup>56</sup> The U.N. Security Council's assessment focused on the illegal intervention in a high-stakes political matter and never addressed Israeli agents' nonconsensual border crossing, logistics preparations, or Israeli probing of local Argentines for helpful information; rather, its focus was solely upon the jurisdiction usurpation.<sup>57</sup> Such omissions show that the international wrong in the Eichmann case consisted of Israel supplanting Argentina's jurisdictional prerogatives—not by virtue of a foreign power's nonconsensual border crossing, physical presence, or other localized activities.<sup>58</sup>

The foregoing cases demonstrate that territorial sovereignty does not impose a rule of border-based international trespass. Despite international law's tendency to disaggregate unlawful activities from integrated military operations and treat each unlawful activity according to the rule violated,<sup>59</sup> the Iran case never elicited *any* international challenge. Nor did the localized clandestine activities in *Eichmann* or *Rainbow Warrior* receive any legal treatment whatsoever. In sum, territorial sovereignty represents a baseline concept protected by other rules, like the use-of-force and non-intervention prohibitions—not a rule in and of itself. Whether employed for political convenience or otherwise, the concept of territorial sovereignty simply lacks independent legal force.

### **The Tallinn Manual 2.0 Environmental Harm Approach**

Rather than carefully examining international precedent involving clandestine military

operations, the *Tallinn Manual 2.0* improperly advances a territorial sovereignty-as-rule approach to cyber operations by, primarily, analogizing cyber activities to indiscriminate environmental harms.<sup>60</sup> The precedent on which the *Tallinn Manual 2.0* primarily relies involved instances in which pollution, radiation, and falling space debris crossed borders into another state and caused harm therein. In those cases, the ICJ has cited territorial sovereignty as a basis to impose strict liability on offending states.<sup>61</sup> From that precedent, the *Tallinn Manual 2.0* authors assert that territorial sovereignty functions as a universal border rule that forbids nearly all nonconsensual, cross-border cyber activities.

Indeed, while both pollution and cyber operations can cross borders undetected with the potential of causing physical harm, environmental harms are *inherently* indiscriminate and *per se* physically harmful.<sup>62</sup> Military cyber operations are not. In fact, "[m]ilitary cyberspace operations can be carried out in a manner that fully comports with and respects the principles of distinction, necessity[,], proportionality . . ."<sup>63</sup> and non-intervention.<sup>64</sup> The carefully-tailored battery depletion and data manipulation in Operation GLOWING SYMPHONY is one example of how states are fully capable of calibrating their operations and avoid indiscriminate effects and comply with the traditional principles animating state tolerance of clandestine action on their territory, like proportionality, necessity, and discrimination.<sup>65</sup> As the preceding section demonstrated, states have historically tolerated clandestine operations when they comply with these traditional use-of-force principles,<sup>66</sup> while condemning them on the same principles when they do not.<sup>67</sup> Military cyber operations, unlike environmental harms, simply are not inherently indiscriminate or *per se* physically harmful, rendering the latter poor factual analogs for a rule governing cross-border cyber operations.

In summary, the foregoing cases illustrate that territorial sovereignty imposes no *per se* trespass rule against cross-border military incursions. Rather than a trespass rule, non-intervention and traditional use of force doctrines like distinction, necessity, and proportionality animate the international community's responses.<sup>68</sup> States may impute liability for indiscriminate harms

like pollution and radiation, but states have historically viewed those harms factually and qualitatively distinct from military operations. The next section demonstrates how the traditional use-of-force and non-intervention principles in the physical domain provide states with a firm legal groundwork to assess the lawfulness of cyber operations.

### **Regulating by Analogy: Comparing Approaches**

When government leaders and their legal advisors look past labels to the *de facto* patterns of prohibited conduct in clandestine action cases, they find sound precedent to regulate cyber operations. Rather than traditional overt military operations, transboundary cyber operations mimic historical clandestine operations in both form and function. Like operatives infiltrating a foreign state, cyber operations involve deliberately accessing a security gap in a foreign computer system through a software "exploit."<sup>69</sup> As in physical clandestine operations, cyber operations' surreptitious nature is necessary to mission effectiveness, since exposure renders the operation vulnerable to defense.<sup>70</sup> After a cyber operator gains system access, a given software exploit can insert a malicious file or "payload" into the foreign system, like an operative secretly smuggling weaponry to an objective.<sup>71</sup> The payload then enables a cyber operator to delete or manipulate data, disable functionality, or remain latent for future use.<sup>72</sup> Like other clandestine operations, cyber operations' surreptitious nature, combined with their tailored "force, targeting, and timing," can be particularly effective at directly shaping conditions to achieve military advantages.<sup>73</sup> Indeed, offensive cyber operations have become the digital analog to historical territorial clandestine operations.

### **Applying Legal Principles from Military Clandestine Operations**

Accordingly, the operation of non-intervention and use of force prohibitions in historical clandestine operations supply precedent to guide military cyber operations. For permissive precedent, cases like the disregarded pre-hostage raid activities in Iran demonstrate that international law is likely to tolerate low-grade operations undertaken on foreign soil in time-sensitive



contexts. As such, the *Trickbot* disruption, which produced *de minimis* physical effects against the backdrop of an impending 2020 Presidential election, would be unlikely to elicit legal challenge, nor would the calibrated data and hardware operations of Operation GLOWING SYMPHONY. Additionally, other precursor activities—like the largely-ignored explosives smuggling in *Rainbow Warrior*—find cyber parallels with activities involving inserting malicious, but latent, software into foreign systems.<sup>74</sup> Such operations would likely remain internationally permissible, absent destructive effects (like those in *Rainbow Warrior*).<sup>75</sup>

*Rainbow Warrior* illustrates the idea that states historically assess clandestine activities by their actual effects—not what the activities could have involved. This concept is critical in cyberspace when an intrusive cyber exploit may retain a number of destructive functionalities. Retaining these functionalities alone does not increase legal risk, at least so long as they remain latent. Legal advisors can look to aspects like these to support the legality of state cyber operations.

Other aspects of the same historical cases also provide states initial prohibitive guideposts. For example, the *Rainbow Warrior* case demonstrates that preemptive destruction of private property, absent compelling justification, will be viewed as disproportionate and unlawful.<sup>76</sup> Applied to cyber operations, North Korea's 2014 crippling attack on Sony's computer infrastructure to protect minimal security interests in its dictator's public image would similarly be subject to condemnation.<sup>77</sup> Other cases, like the Eichmann abduction,<sup>78</sup> illustrate that internationally unlawful coercion can occur in cases implicating only a single individual or entity, if it amounts to usurping a state's decision-making authority in significant domestic prerogatives. Accordingly, cyber operations that impose chilling effects on political decisions in representative governments, like Russia's 2007 debilitating denial of service attack against Estonia for a Russian statue removal, would remain similarly indefensible under international law.<sup>79</sup> While these constitute only a few examples, they provide ready groundwork for government leaders and their legal advisors to develop an international legal regime for cross-border cyber operations.<sup>80</sup>

### **Problems with the Tallinn Manual 2.0 Approach**

In contrast, the *Tallinn Manual 2.0's* cross-border harm approach imposes a historically unsupported prohibition on nearly all transboundary operations. Such an approach disregards states' historical tolerance for localized clandestine operations that comply with traditional use-of-force principles, like discrimination, proportionality and necessity. Indeed, the *Tallinn Manual 2.0* approach would lead to the absurd result that the United States would be responsible for damage to terrorists' and *Trickbot's* operators' computers, purely on the basis of crossing into foreign territory and harming digital infrastructure therein. That kind of blanket prohibition effectively "[e]quates a mugger's knife of a citizen on the street with a surgeon's removal of a tumor from that ailing citizen, because both actions involve one human being's putting a knife into another."<sup>81</sup> Such an approach ignores key characteristics of military cyber operations that have traditionally conditioned states' responses to clandestine operations in the physical domain and provides neither historically-supported, nor desirable, legal baselines.

In contrast to environmental harms, clandestine activity cases supply government leaders and their legal advisors the most analogous precedent to assess cyber operations. States remain able to control and calibrate their cyber operations, rendering those operations more closely aligned to physical domain clandestine operations than the indiscriminate environmental harms upon which the *Tallinn Manual 2.0's* approach relies. Not only do clandestine operation cases provide a workable precedent, but the next section demonstrates that cyberspace necessitates the freedom of action that a territorial sovereignty rule would prohibit.

### **The Need for Freedom of Action**

Unlike territorial sovereignty, non-intervention and use-of-force principles supply states with critical features that enable them to most effectively regulate cyber activities. This section argues that one of those features is the ability to maximize responsible states' freedom of action in a rapid and dynamic domain. While avoiding a rule of sovereignty enables this freedom of action, this section also acknowledges

that states may ultimately coalesce around a rule of sovereignty and explores the "unable and unwilling" anticipatory self-defense doctrine as an alternative legal construct for states to retain the operational flexibility necessary to defend their interests against cyber threats.

### **Cyber Threats: Practical Protection Through Freedom of Action**

In addition to providing circumscribed normative protections, use-of-force and non-intervention ensure states retain freedom of action to defend against non-state threats in the cyber domain. Under a territorial sovereignty approach, states would be restricted from preemptive cross border cyber operations—even when such operations would have no impact in the foreign state's internal affairs.<sup>82</sup> Such an obligation is particularly imperiling in the cyber domain where non-state threats, like ISIS and *Trickbot*, remain geographically dispersed, but retain the ability to aggregate cross-border activities for malicious purposes.

In the terrorism context, cyberspace offers an anonymous, worldwide sanctuary to disseminate violent messaging, raise money, and exercise command and control (C2), which undermines states' abilities to prevent nefarious activity through physical actions in any particular state.<sup>83</sup> Terrorist cells use software called The Onion Router (ToR) or the Invisible Internet Project to anonymize internet access.<sup>84</sup> That software simultaneously provides users access to a "sub-internet" called the "Dark Web," linking individuals together inside an unindexed internet in which groups can buy weapons, control dispersed networks, distribute radical materials, and fund their operations through virtual currency black markets.<sup>85</sup> Based on the territorial transcendent nature of the terrorism threat, states require a legal construct that allows for freedom of action to engage terrorist threats through cyberspace, like in Operation GLOWING SYMPHONY.

Aside from terrorist groups, large scale ransomware crews, like those responsible for *Trickbot*, increasingly capitalize on the decentralized Internet of Things (IoT) to evade single host-nation disruption efforts. As one example, *Trickbot's* operators recently began to shed the system's server-based

C2 architecture in favor of a hive model that leverages asynchronous, decentralized C2 across all IoT systems.<sup>86</sup> Such structure enables those crews to leverage worldwide computing power while eluding efforts to dismantle their illicit network.<sup>87</sup> State actors like Russia and North Korea are increasingly developing their own, similar “hivenets” for both widespread malware infection and large scale distributed denial of service attacks.<sup>88</sup> States require freedom of action to defend against borderless cyber threats like *Trickbot*.

Applying a sovereignty rule to USCYBERCOM’s *Trickbot* operation showcases how unwieldy the construct would be against a malicious cyber actor, like *Trickbot*. Under a non-intervention/use-of-force approach, the United States would retain freedom of action to undertake operations against *Trickbot* without triggering any international law prohibitions; the United States simply must ensure its operations are calibrated to avoid intervening in a foreign state’s internal affairs or causing significant destruction. In contrast, territorial sovereignty as a rule would saddle the United States with the requirement—during a time of concentrated voter registration and pre-election polling—of requesting the consent of every state in which it wished to impose cyber effects across a 250-million-system hivenet.<sup>89</sup> Some states may refuse to grant consent. Some may have been infiltrated by intelligence services of malicious state actors aligned with *Trickbot*.<sup>90</sup> Even for consenting states, each request would have to navigate bureaucracies and approval levels, preventing preemptive measures and potentially allowing *Trickbot* operators to insulate their software against U.S. cyber operations.<sup>91</sup> The insurmountable hurdles of a normative approach to cyber threats would undermine, not further, state security, and increase the likelihood of harm and escalation, vice reducing it.<sup>92</sup> As such, use of force and non-intervention provide the most desirable baseline for transboundary cyber operations because they accommodate freedom of action while simultaneously circumscribing the scope of lawful activities to necessary, discriminate, and proportionate means.

### ***Territorial Sovereignty and the “Unable or Unwilling” Doctrine***

Despite territorial sovereignty’s lack of substance as a rule, and states’ difficulties in

defining the rule’s content, some states have embraced the *Tallinn Manual 2.0* approach and have asserted that sovereignty, as a rule, applies to cyber operations.<sup>93</sup> Under that approach, unilateral cross-border action in cyberspace will remain unavailable absent host nation or U.N. consent, threat of armed attack, or the exhaustion of all domestically-available safeguards.<sup>94</sup> Considering the speed of data, interconnectivity of cyberspace, and mutability of malicious actors, states will seek a legal safety valve to justify anticipatory cross-border operations that may otherwise breach a rule of territorial sovereignty in cyberspace.

One legal theory that may provide relief in the face of a restrictive rule of territorial sovereignty is the “unable or unwilling” doctrine.<sup>95</sup> The “unable or unwilling” is a self-defense doctrine that justifies a victim state’s anticipatory defensive actions in third-party states unable or unwilling to suppress an imminent threat.<sup>96</sup> The doctrine evolved from the famous *Caroline* case in which the British justified its anticipatory self-defense actions on U.S. soil, in part, because the United States was “unable” to prevent insurrectionists from using U.S. territory to launch cross-border attacks against British Canada.<sup>97</sup> Properly employed, the doctrine requires proportional balancing of the victim state’s security interests with the territorial state’s sovereignty interests.<sup>98</sup>

In the cyber domain, many states currently struggle with the technical capacity to detect and eliminate malicious cyber activities, rendering many effectively “unable” to prevent malicious actors from co-opting private infrastructure within their territory.<sup>99</sup> And the irrelevance of geography in data transmission supplies states with a firm position to characterize known cyber threats as “imminent.”<sup>100</sup> Because the cyber domain lends itself to satisfying these precursor legal requirements, the “unable or unwilling” doctrine would provide significant utility to states otherwise restricted from out-of-system operations necessary because of a territorial sovereignty rule.<sup>101</sup>

Early state practice in cyberspace already suggests that sovereignty-as-a-rule proponent states may already be implicitly relying on the logic undergirding the “unable or unwilling” doctrine. For example, in late 2019, France deployed “white worm”

software into hundreds of thousands of computers in Latin America to dislodge a Paris-based botnet threatening users in Europe and other states, despite having adopted a “system penetration” rule for territorial sovereignty in cyberspace.<sup>102</sup> While France never publicly explained the reasons underlying its operation, logic contemplated by the “unable or unwilling doctrine” would have theoretically enabled France to justify what would otherwise function as what it would see as violations of other states’ territorial sovereignty.<sup>103</sup> If the international community coalesces around a sovereignty rule in cyberspace, other states will likely follow France’s lead as they seek the freedom of action necessary to maintain their own security in a persistently transnational threat domain.

However, the “unable or unwilling” legal defense suffers from a number of problems and should therefore function as a safety valve to an otherwise undesirable sovereignty construct, rather than as a primary aspect to an international cyber sovereignty regime. First, cyber threats almost *inherently* provide a hurdle to the procedural checkpoints of the doctrine, making potential abuse of the doctrine a near certainty. Further, the doctrine leaves significant ambiguity between legally-permissible anticipatory self-defense and illegal preemptive operations. Data speed, system co-optation, and the difficulty of discerning intent through code exacerbate the problems of distinguishing preemption from anticipatory self-defense.<sup>104</sup> Moreover, the “unable or unwilling” proportionality analysis still requires states to define territorial sovereignty violations in order to balance any violation against its own security interests. This presents a problem when historical “sovereignty violations” suggest themselves to be a mislabeled legal fiction whose substance demonstrates little qualitative or quantitative difference from interests protected under widely-accepted use-of-force and non-intervention principles. Nonetheless, if states do ultimately rally around a rule of sovereignty, an expansion of the “unable or unwilling” doctrine will likely prove itself to be of critical utility as states collectively seek the freedom of action necessary to maintain security in the dynamism of the cyber domain.

In summary, non-intervention and use-of-force principles provide the most balanced, and historically honest baseline for operations in cyberspace. Those rules allow for the conceptual flexibility to preempt trans-territorial cyber threats without the foreseeable impediments imposed through consent or U.N. Charter requirements. However, if states ultimately unite around a sovereignty approach, further developing the “unable or unwilling” legal defense will become critical for states to maintain their security interests. But because that approach injects more layers of exploitable ambiguity and circuitry into a cyberspace baseline than simply relying on traditional non-intervention and use of force principles, states should focus their efforts on those latter rules.

## Conclusion

In conclusion, government leaders and their legal advisors confront key questions when assessing the international legality of any cross-border cyber operation: Does, or should, territorial sovereignty impose a trespassory restriction on operations in other states’ systems? If not, what precedent can legal advisors reference in discerning applicable law? And, finally, do any ideal baseline rules or principles emerge from that precedent?

This article addressed those issues in three sections. First, territorial sovereignty-as-a-rule suffers from two key infirmities. One, the idea of any form of a geography-based, international trespass rule fails to reconcile with international law’s historical tolerance for clandestine incursions. Two, the *de facto* substance of territorial sovereignty violations has involved patterns of conduct traditionally prohibited under use-of-force and intervention prohibitions. Seminal cases involving purported violations of territorial sovereignty evince interests already protected under use-of-force and non-intervention principles, rendering sovereignty-as-a-customary international rule a fallacious legal construct.

However, as advanced in section two, when government leaders and their legal advisors disregard sovereignty-as-a-rule and instead look to the substance of permissible and prohibited conduct in historical clandestine operations, they find a solid groundwork of workable precedent. Because cyber

operations remain subject to calibration and control, the function of both non-intervention and use-of-force principles in historical clandestine operations cases readily translate as guideposts for military cyber operations. Accordingly, states should look to precedent involving clandestine operations to guide their legal assessments, vice the indiscriminate harm analogs underlying the *Tallinn Manual 2.0* approach.

Apart from providing a factually analogous body of workable precedent, use-of-force and non-intervention principles provide states with a properly balanced international framework for cyber operations. Some argue that a rule of sovereignty would help stabilize state activities in cyberspace. But, the reality is that states have not historically honored a customary international rule of territorial sovereignty. Grafting one onto a domain in which geography is largely irrelevant will deny precedent of a long-standing international tolerance for clandestine incursions and place law-abiding states at significant asymmetric disadvantage.<sup>105</sup> Non-intervention and use of force rules afford states freedom of action against trans-territorial threats like *Trickbot* and *ISIS*.<sup>106</sup> The need for freedom of action in cyberspace means that, even in the event that states unite around a prohibitive rule of territorial sovereignty, they will seek legal bases to justify cross-border operations to secure state interests. While the “unable or unwilling” doctrine can provide such relief, a more honest and less problematic legal construct would simply involve focusing on use of force and non-intervention and abandoning the fallacy of territorial sovereignty in cyberspace. **TAL**

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## Notes

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*Strong*, *FORBES* (July 14, 2019, 12:00 P.M.), <https://www.forbes.com/sites/leemathews/2019/07/14/stealthy-trickbot-malware-has-compromised-250-million-email-accounts-and-is-still-going-strong/?sh=1c3d0dfe4884>.

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5. *Attacks Aimed at Disrupting the Trickbot Botnet*, *KREBSONSECURITY* (Oct. 2, 2020, 2:20 PM), <https://krebsonsecurity.com/2020/10/attacks-aimed-at-disrupting-the-trickbot-botnet/>.
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7. Colonel (Retired) Gary Corn, *Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses*, *JUST SEC.* (Feb. 11, 2020), <https://www.justsecurity.org/68622/punching-on-the-edges-of-the-grey-zone-iranian-cyber-threats-and-state-cyber-responses/> (comparing France’s statement on sovereignty’s application to cyberspace with the United Kingdom’s rejection of the concept’s application).
8. Ellen Nakashima, *U.S. Military Cyber Operation to Attack ISIS Last Year Sparked Heated Debate over Alerting Allies*, *WASH. POST* (May 9, 2017, 6:33 AM), [https://www.washingtonpost.com/world/national-security/us-military-cyber-operation-to-attack-isis-last-year-sparked-heated-debate-over-alerting-allies/2017/05/08/93a120a2-30d5-11e7-9dec-764dc781686f\\_story.html](https://www.washingtonpost.com/world/national-security/us-military-cyber-operation-to-attack-isis-last-year-sparked-heated-debate-over-alerting-allies/2017/05/08/93a120a2-30d5-11e7-9dec-764dc781686f_story.html).
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10. Dina Temple-Raston, *How the U.S. Hacked ISIS*, *NPR* (Sept. 26, 2019, 5:00 AM), <https://www.npr.org/2019/09/26/763545811/how-the-u-s-hacked-isis>.
11. See generally Jennifer Daskal, *The Un-Territoriality of Data*, 125 *YALE L.J.* 326 (2015) (describing the non-physical nature of cyberspace and particularly the legal problems associated with linking territorial jurisdiction with data location).
12. E.g., FRENCH MINISTRY OF THE ARMIES, *INTERNATIONAL LAW APPLIED TO OPERATIONS IN CYBERSPACE* (2019), <https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf> [hereinafter *FRENCH MINISTRY OF THE ARMIES*].
13. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448 (8th ed. 2012). Even though states may manifest drastically different governmental systems, territorial sovereignty provides a common organizing principle since all states retain control over territory. *Id.*
14. Gary P. Corn & Robert Taylor, *Sovereignty in the Age of Cyber*, 111 *AM. J. INT’L L.* 207, 209 (2017) (describing the concept of “external sovereignty”).

15. *Id.*
16. S.S. *Lotus* (Fr. v. Tur.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (standing for the proposition that where neither treaty, nor customary law, binds a state in a particular matter, the state retains freedom of action).
17. See, e.g., CONVENTION ON INTERNATIONAL CIVIL AVIATION, Dec. 7, 1944, 15 U.N.T.S. 295 (international treaty whereby states have explicitly agreed to limit themselves from entering another state's airspace absent consent or other justification); UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (international treaty wherein states have agreed to various obligations for transiting portions of the world's oceans, to include obligations against entering a state's territorial sea and the airspace above a state's territorial waters except for under specific modes of operation, or with consent or other justification).
18. E.g., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 17, 19 (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0].
19. *Id.* at 19, 67; FRENCH MINISTRY OF THE ARMIES, *supra* note 12, at 7 (the French position also includes system penetration).
20. Corn, *supra* note 7; Jeremy Wright, U.K. Att'y Gen., Check Against Delivery, Address Before the Chatham House Symposium on Cyber and International Law in the 21st Century (May 23, 2018) [hereinafter Chatham Symposium].
21. See Corn, *supra* note 7; see Chatham Symposium, *supra* note 20.
22. Compare Chatham Symposium, *supra* note 20 ("Some . . . argue for the existence of a cyber specific rule of a 'violation of territorial sovereignty' in relation to interference in the computer networks of another state without its consent. Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government's position is therefore that there is no such rule as a matter of current international law."), with FRENCH MINISTRY OF THE ARMIES, *supra* note 12, at 7 ("Any unauthorised penetration by a State of French systems or any production of effects on French territory via a digital vector may constitute, at the least, a breach of sovereignty.").
23. Such analysis presumes those cases illuminate state practice and *opinio juris* as the elements of customary international law. Sean Kanuck, *Sovereign Discourse on Cyber Conflict Under International Law*, 88 Tex. L. Rev. 1571, 1584 (2010); see also Corn & Taylor, *supra* note 14, at 209–11 (states cannot laterally apply concept of territorial sovereignty to cyberspace taken from other domain-specific treaty texts because each domain involves different versions of territorial sovereignty "borders" corresponding to the unique priorities and circumstances of that domain).
24. GEOFFREY S. CORN ET AL., U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 138 (2015) (while assessing "[international law] violations is supposed to be a *de facto* one, the actual characterization by the nation-states involved is often a political decision that differs from the facts").
25. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, ¶¶ 32–36 (Apr. 9).
26. *Id.*
27. *Id.* (emphasis added).
28. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶¶ 38, 81–86, 251 (June 27).
29. See generally *id.*
30. Corn & Taylor, *supra* note 14, at 212 n.15.
31. *Id.*
32. E.g., S.S. *Lotus* (Fr. v. Tur.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 209–10 (Sept. 7); Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. Rev. 217, 217–18 (1999).
33. Stansfield Turner, *Covert Common Sense: Don't Throw the CIA Out with the Ayatollah*, WASH. POST (Nov. 23, 1986).
34. *Id.*
35. See *id.*
36. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 72 (1992).
37. *Id.*
38. Michael N. Schmitt, *Taming the Lawless Void: Tracking the Evolution of International Law Rules for Cyberspace*, TEX. NAT'L SEC. REV., Autumn 2020, at 33, 36.
39. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, §44, ¶ 3.
40. Schmitt, *supra* note 38, at 36.
41. *Id.*
42. Paul Brown, *Felling of a Warrior*, GUARDIAN (July 15, 2005, 6:34 AM), <https://www.theguardian.com/environment/2005/jul/15/activists.g2>.
43. French Agent "Sorry" for Sinking Rainbow Warrior, LOCAL (Sept. 6, 2015, 11:02 AM), <https://www.thelocal.fr/20150906/french-agent-sorry-for-sinking-rainbow-warrior>.
44. REISMAN & BAKER, *supra* note 36, at 66.
45. *Id.* at 66–67 (describing New Zealand and French reactions).
46. *Id.* at 66.
47. Brown, *supra* note 42.
48. E.g., OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, 1014 n.9 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter DoD LAW OF WAR MANUAL] (describing use of force criteria when evaluating cyber operations). See TALLINN MANUAL 2.0, *supra* note 18, at 329 (describing any threat or use of force in another state's territory as offending Article 2(4) of the U.N. Charter).
49. See REISMAN & BAKER, *supra* note 36, at 66–67. One likely reason for avoiding invocation of use-of-force was New Zealand's reliance on France for staple food shipments that France had threatened to cut off during the dispute. See *id.*; CORN ET AL., *supra* note 24 (describing that, while classifying "[international law] violations is supposed to be a *de facto* one, the actual characterization by the nation-states involved is often a political decision that differs from the facts").
50. See, e.g., Corn & Taylor, *supra* note 14, at 209 (while non-intervention has historically involved forcible methods, the principle can involve both forcible and non-forcible means, so long as it involves coercion in a state's internal affairs, or *domaine reserve*. The concept of *domaine reserve* implies "those matters of governance and jurisdiction committed to the sole responsibility of the state and its official actors").
51. U.N. CHARTER art. 2, ¶ 7.
52. See, e.g., MALCOM SHAW, INTERNATIONAL LAW 680 (7th ed. 2014) (pointing out that "[u]nlawful apprehension of a suspect by state agents acting in the territory of another state . . . constitute[s] a breach of international law and the norm of non-intervention involving state responsibility").
53. UKI GOŇI, THE REAL ODESSA: HOW PERÓN BROUGHT THE NAZI WAR CRIMINALS TO ARGENTINA 95, 125–34, 241, 291 (2002); BILL O'REILLY & MARTIN DUGARD, KILLING THE SS: THE HUNT FOR THE WORST WAR CRIMINALS IN HISTORY 53–54, 60–63 (2018).
54. U.N. SCOR, 15th Sess., 865th mtg., ¶ 34, U.N. Doc. S/PV.865 (June 22, 1960).
55. *Id.* (emphasis added).
56. S.C. Res. 138, pmb. (June 23, 1960).
57. *Id.* (discussing the nature of the international law violation); O'REILLY & DUGARD, *supra* note 53, at 109–54 (canvassing the spectrum of activities that Mossad agents were engaged in within Argentina leading up to the capture of Eichmann). Nor have commentators characterized those activities as illegal under international law, even after widespread publication. *Id.*
58. See SHAW, *supra* note 52.
59. REISMAN & BAKER, *supra* note 36, at 72.
60. Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639, 1652–54 (2017) (authors of the *Tallinn Manuals* citing radiation harms as animating its sovereignty rule of trespass in cyberspace); Beatrice A. Walton, *Duties Owed: Low-Intensity Cyber Attacks and Liability for Transboundary Torts in International Law*, 126 YALE L.J. 1460, 1519 n.174 (2017) (observing the *Tallinn Manual's* linkage of its sovereignty rule to international pollution, radiation, and other environmental harm cases).
61. E.g., *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. Pleadings 249, ¶ 456 (Nov. 23) (transboundary radiation); TALLINN MANUAL 2.0, *supra* note 18, at 36–37 (citing Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1965 (Trail Smelter Arb. Trib. 1941) (transboundary sulfur dioxide pollution). See Joan Johnson-Freese, *China's Anti-Satellite Program: They're Learning*, CHINA-U.S. FOCUS (July 12, 2013), <https://www.chinausfocus.com/peace-security/chinas-anti-satellite-program-theyre-learning> (describing Chinese laser tests as creating indiscriminate harms out of space debris).
62. E.g., sources cited *supra* note 61.
63. CORN ET AL., *supra* note 24, at 152.
64. See REISMAN & BAKER, *supra* note 36, at 71–75.
65. *Id.* at 71–72, 75, 77.
66. *Id.*
67. E.g., sources cited *supra* note 48. See DoD LAW OF WAR MANUAL, *supra* note 48, § 6.7 (for example, the United States uses use-of-force concepts to describe the harms of indiscriminate weapons by describing indiscriminate weapons as those "weapons that are incapable of being used in accordance with the principles of distinction and proportionality . . . as well as weapons that, when used, would necessarily cause

- incidental harm that is excessive compared the military advantage expected to be gained from their use”). See also U.K. MINISTRY OF DEFENCE, JOINT SERV. PUB. 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT para. 6.4 (2004); GER. FED. MINISTRY OF DEFENCE, HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL paras. 401, 454–56 (Aug. 1992).
68. See REISMAN & BAKER, *supra* note 36, at 71.
69. KIM ZETTER, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD’S FIRST DIGITAL WEAPON 6 (2014).
70. BEN BUCHANAN, THE HACKER AND THE STATE: CYBER ATTACKS AND THE NEW NORMAL OF GEOPOLITICS 309 (2020).
71. ZETTER, *supra* note 69.
72. See NAT’L RSCH. COUNCIL, TECHNOLOGY, POLICY LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 1, 3 (William A. Owens et al. eds., 2009).
73. ZETTER, *supra* note 69, at 308–09 (distinguishing “shaping” operations in cyberspace from conventional military force “signaling,” which involves indirectly inducing changes in adversary behavior because of force visibility and an adversary’s ability to calculate the capabilities that a particular known military force could impose).
74. See, e.g., David E. Sanger & Nicole Perlroth, *U.S. Escalates Online Attacks on Russia’s Power Grid*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html> (describing U.S. actions in implanting potentially malicious, but currently benign malware into the Russian electric grid).
75. REISMAN & BAKER, *supra* note 36, at 66. See Michael Schmitt, *U.S. Cyber Command, Russia, and Critical Infrastructure: What Norms and Law Apply?*, JUST SEC. (June 18, 2019), <https://www.justsecurity.org/64614/u-s-cyber-command-russia-and-critical-infrastructure-what-norms-and-laws-apply/> (distinguishing benign malware implants from contact mines based on the former remaining subject to the supervisory control of U.S. cyber operators).
76. REISMAN & BAKER, *supra* note 36, at 71. While the *Rainbow Warrior* incident also involved an inadvertent death, New Zealand had disputed France’s nuclear tests for years and viewed the *Rainbow Warrior* as its “knight in shining armor.” *Id.* As such, New Zealand would likely have raised an international protest based on the ship sinking alone.
77. BUCHANAN, *supra* note 70, at 173–74 (describing the Sony attack in detail, which included millions of dollars in damage).
78. S.C. Res. 138, pmbl. (June 23, 1960).
79. Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED (Aug. 21, 2007, 12:00 PM), <https://www.wired.com/2007/08/ff-estonia/> (describing how Russia launched a Distributed Denial of Service operation against Estonia for its government’s removal of a Russian statue that symbolized oppression to the Estonian people, who had protested for its removal.).
80. See REISMAN & BAKER, *supra* note 36, at 71.
81. *Id.* at 75 (describing as improper similar efforts to outlaw all clandestine action in the physical domains).
82. *Id.*
83. Weiman, *supra* note 9, at 196, 200–02.
84. See Weiman, *supra* note 9.
85. *Id.* at 200–02.
86. *How Botnets Are Evolving: From IoT Botnets to Hive-nets*, *supra* note 3.
87. *Id.*; Nakashima, *supra* note 8.
88. Scott Ikeda, *Nation-State DDoS Attacks May Be the “New Normal”; Leaked Documents Reveal Russia’s FSB Is Seeking to Build a Massive IoT Botnet*, CPO MAG. (Apr. 3, 2020), <https://www.cpomagazine.com/cyber-security/nation-state-ddos-attacks-may-be-the-new-normal-leaked-documents-reveal-russias-fsb-is-seeking-to-build-a-massive-iot-botnet/>.
89. Matthews, *supra* note 2; Shannon Vavra, *Cyber Command, Microsoft Take Action Against TrickBot Botnet Before Election Day*, CYBERSCOOP (Oct. 12, 2020), <https://www.cyberscoop.com/trickbot-takedown-cyber-command-microsoft/> (describing the election context of the *Trickbot* operation).
90. E.g., Catalin Cimpanu, *TrickBot Gang Is Now a Malware Supplier for North Korean Hackers*, ZDNET (Dec. 11, 2019), <https://www.zdnet.com/article/trickbot-gang-is-now-a-malware-supplier-for-north-korean-hackers/>.
91. See BUCHANAN, *supra* note 70, at 309 (asserting that, once exposed, cyber operations are relatively easy to defend against).
92. For example, a territory-specific due diligence rule that “[s]tates should not knowingly allow their territory to be used for internationally wrongful acts [in cyberspace],” would be of little use against threats like *Trickbot*—since such threats aggregate malicious cross-border activity before achieving sufficient scale to become a threat. See U.N. Secretary-General, *Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶ 13(c), U.N. Doc. A/70/174, (July 22, 2015) (describing the due diligence principle). In the cyber domain, since the threat *status itself* can be borne through aggregating minor acts across various states, normative protection through a sovereignty-linked due diligence principle would remain unachievable because it would require 1) international consensus on a very low threat threshold, 2) common capacity to detect that threat, and 3) simultaneous, collective state action. Cf. *id.*; see also Matthews, *supra* note 2; U.N. Secretary-General, *Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶ 13(c), U.N. Doc. A/70/174, (July 22, 2015).
93. E.g., JULIA VOO ET AL., NATIONAL CYBER POWER INDEX 2020: METHODOLOGY AND ANALYTICAL CONSIDERATIONS (2020), [https://www.belfercenter.org/sites/default/files/2020-09/NCPL\\_2020.pdf](https://www.belfercenter.org/sites/default/files/2020-09/NCPL_2020.pdf) (listing the major state cyber powers that have asserted that sovereignty imposes a rule in cyberspace); FRENCH MINISTRY OF THE ARMIES, *supra* note 12, at 6–7 (French Ministry of the Army position on sovereignty in cyberspace); Letter from the Minister of Foreign Affairs, the Netherlands, to the President of the House of Representatives, the Netherlands, subject: The International Legal Order in Cyberspace the Netherlands to Parliament (5 July 2019) (Netherlands position on sovereignty in cyberspace); Michael Schmitt, *Germany’s Position on International Law in Cyberspace, Part I*, JUST SEC. (Mar. 9, 2021), <https://www.justsecurity.org/75242/germanys-positions-on-international-law-in-cyberspace/> (Germany’s position on sovereignty in cyberspace); Michael Schmitt, *Finland Sets Out Key Positions on International Cyber Law*, JUST SEC. (Oct. 27, 2020), <https://www.justsecurity.org/73061/finland-sets-out-key-positions-on-international-cyber-law/> (highlighting other European states who have provided legal opinions on sovereignty in cyberspace).
94. U.N. CHARTER arts. 42, 48, 51; TALLINN MANUAL 2.0, *supra* note 18, at 139.
95. The unwilling or unable defense theory has been invoked to justify use of force against terrorists operating in states unable or unwilling to suppress them. See, e.g., PHILIP BOBBITT, TERROR AND CONSENT: WARS FOR THE TWENTY-FIRST CENTURY 464–699 (2008) (discussing the legal rationale underlying sovereignty violations of states unable to suppress threats to third-party states); MICHAEL JOHN GARCIA & JENNIFER K. ELSEA, CONG. RSCH. SERV. R43720, U.S. MILITARY ACTION AGAINST THE ISLAMIC STATE: ANSWERS TO FREQUENTLY ASKED LEGAL QUESTIONS 19 (2014) (discussing the origins of the “unable or unwilling” anticipatory self-defense doctrine and U.S. reliance thereon to justify extraterritorial counterterrorism operations).
96. GARCIA & ELSEA, *supra* note 95, at 6 (citing Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L L. 483 (2012)).
97. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 218–19 (2003).
98. Ashley Deeks, *The Geography of Cyber Conflict: Through a Glass Darkly*, 89 INT’L L. STUD. 1, 2, 13 (2013).
99. See, e.g., Comments by Argentina to Initial “Pre-draft” of the Report of the United Nations Open Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security (Aug 27, 2020), <https://front.un-arm.org/wp-content/uploads/2020/04/oewg-ict-comments-argentina-3.pdf>.
100. TALLINN MANUAL 2.0, *supra* note at 18, at 138–39 (asserting that cybers that produce “loss of confidence in the longer term” in critical infrastructure “may be the factor that qualifies as a ‘grave and imminent peril’” even when the immediate effects of a hostile cyber operation do not present a significant threat in the short term).
101. E.g., Lucas Kello, *The Meaning of the Cyber Revolution: Perils to Theory and Statecraft*, INT’L SEC., Fall 2013, at 7 (describing the offense-favoring nature of cyberspace).
102. Tom Jowitt, *French Cyber Police Takedown Paris-based Botnet*, SILICON (Aug. 29, 2019, 10:41 AM), <https://www.silicon.co.uk/security/cyberwar/french-cyber-police-takedown-botnet-282533>. In addition to violating the French Ministry of Arms position on state sovereignty, the disinfecting action would also be a violation of state sovereignty under the *Tallinn Manual* approach. TALLINN MANUAL 2.0, *supra* note 18, at 68.
103. ASHLEY DEEKS, HOOVER INST., AEGIS SERIES PAPER NO. 2004, DEFEND FORWARD AND CYBER COUNTERMEASURES 11 (2020)
104. Andru E. Wall, *Demystifying the Title 10–Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT’L SEC. J. 85, 119–20 (2011) (discussing the difficulties of discerning intent from foreign code prior to it creating effects in a cyber ecosystem).
105. See, e.g., Corn & Taylor, *supra* note 14.
106. Weiman, *supra* note 9; Vavra, *supra* note 89.

# Closing Argument

## Allied Relationships Should Start with Humility and Commitment

By Lieutenant Colonel Jay S. Burns

### **Governments create alliances and partnerships, but people create the relationships that make those alliances and partnerships effective.**

Defender Europe 2021 was an exercise that involved twenty-six militaries operating in twelve countries, airport operations in sixteen countries, and port operations in five countries. To pull off such a massive undertaking, hundreds of different agreements and arrangements and thousands of hours of planning were required from the national down to the unit level. However, the legacy of Defender Europe 2021 and any similar undertaking is far more likely to manifest itself in the minds and the lives of the 28,000 people who played some role in the exercise. Because people—individuals—are ultimately the mechanism through which alliances and partnerships are built, nurtured, and put into action, we must pay particular attention to how we represent ourselves, our Army, and our Nation's people when engaging with allies and partners. The most important aspects of that representation are maintaining humility and demonstrating our commitment to our relationships.

Humility is absolutely essential at both the individual and collective levels. Not every nation wants to be the United States; but the patriotism and civic pride, concentrated further by the fact that we are all people who chose to serve in the U.S. military, can frequently cloud our awareness of the fact that our way is not the only way. The Army had to develop cultural awareness training for key leader engagements conducted in Iraq and Afghanistan

over the last two decades to overcome the inherent bias toward American values in how those key leader engagements were being conducted. Humility requires an awareness that ours is neither a perfect system nor the only viable system, and it also requires acknowledging our own shortcomings. Now, more than any time in recent memory, our affairs at home and abroad are receiving intense scrutiny—especially in how we treat one another and how disadvantaged groups of people have been mistreated throughout our history. Failing to acknowledge this risks making us hypocrites and undermining our credibility with our partners and allies; admitting failures, demonstrating a sincere desire to improve in those areas, and taking sincere and visible actions to improve ourselves can be a major part of demonstrating American values.

All our efforts are wasted if we fail to actually demonstrate our commitment when needs arise. Even now, a painful (yet important) example of how we demonstrate that commitment is going on as Service members and civilian teammates, along with assistance from many allies and partners in at least three geographic combatant command areas of responsibility, conduct continuous operations to bring tens of thousands of Afghans to safety. Two decades of U.S. involvement in Afghanistan did not yield the results many sought; but even as we withdrew the last troops under challenging circumstances, the United States demonstrated—and continues to demonstrate—its commitment to the Afghan allies who helped us in our

shared fight. Our ability to focus on the mission at hand when time is critical while applying lessons from previous missions, both completed and failed, is a key part of how we demonstrate that our commitment to our allies and partners endures in both good times and bad. For those of us in Europe, our Afghan evacuation operations in Germany, Spain, Italy, and Kosovo serve as a visible reminder to our European allies that the United States will stand by them too.

Strong relationships are especially important to the Soldiers, Sailors, Airmen, Marines, and Guardians in the U.S. European Command area of responsibility for another reason. Not only do we work alongside our allies and partners on a daily basis both in peacetime and across the full range of military operations, but we live with our families in the same villages, towns, and cities as our comrades in arms. We shop at the same stores, many of our children attend the same schools, and we rely on the emergency services and other support from our host nations. Our close and continuous connection to our host nations make us acutely aware of how local host nation sentiment toward the United States changes over time based on how we—Service members, our families, and our nation—conduct ourselves both at home and around the rest of the world. Every Soldier is an ambassador; let us fulfill that responsibility with humility and commitment. **TAL**

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*LTC Burns is the Chief, National Security Law, for U.S. Army Europe and Africa in Wiesbaden, Germany.*

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## AROUND THE CORPS

Sergeant Alex Saab, Paralegal NCO, 3d Brigade Combat Team, 82d Airborne Division, rigs a HMMWV to a hovering UH-60 following a Joint Force Exercise in Estonia. (Photo courtesy of MAJ Derek Carlson)





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