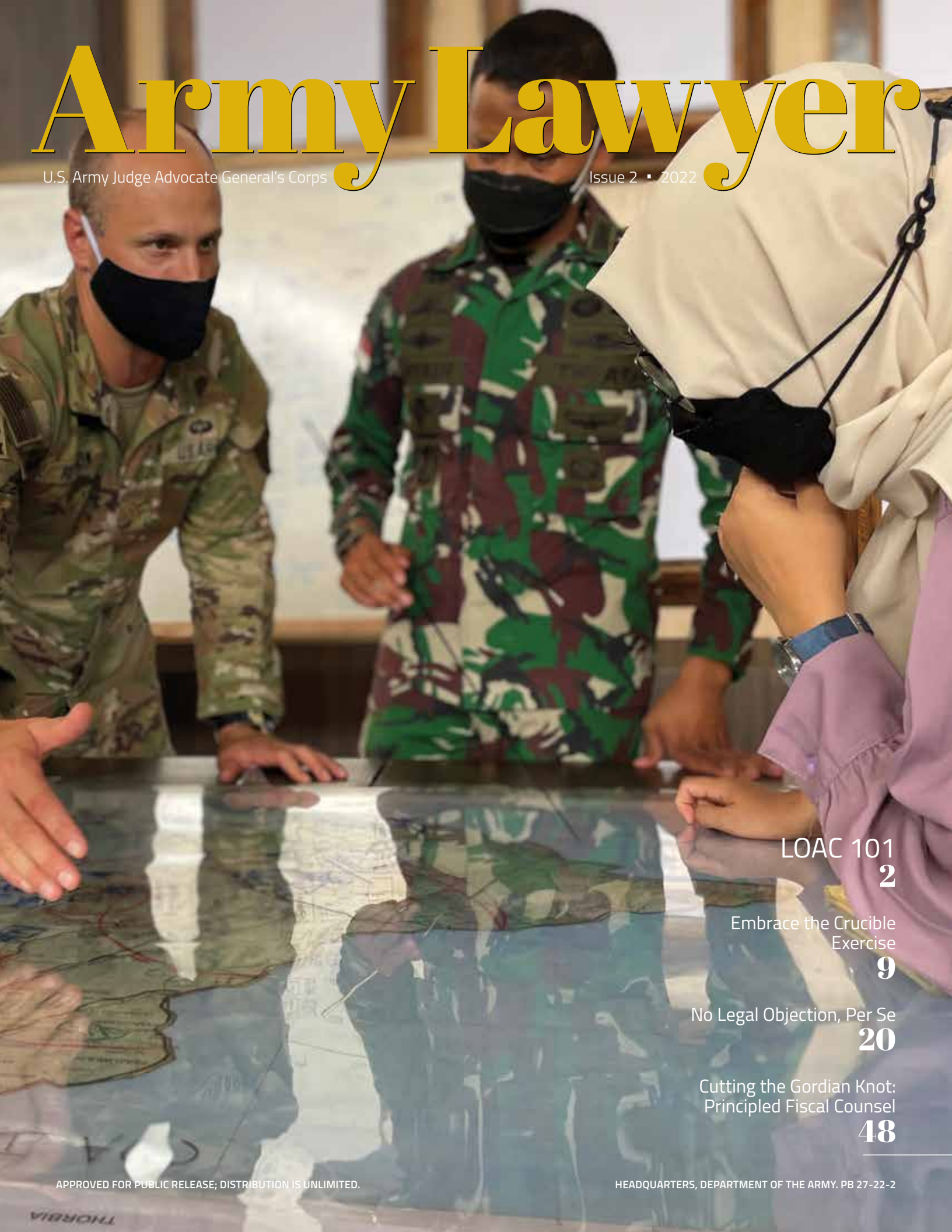
# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 2 ▪ 2022





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# AROUND THE CORPS

On 7 January 2022, Colonel Travis Rogers of the U.S. Army Trial Judiciary had the pleasure of jumping out of a perfectly good airplane with his son, CPT Nicholas Rogers of the 1st Special Warfare Training Group. Judge Rogers has been able to maintain jump status while serving as a circuit judge at Fort Bragg, North Carolina. No word on if his robe and gavel were part of his basic load.

# Army Lawyer

**Editorial Board**

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By Order of the Secretary of the Army

**JAMES C. MCCONVILLE**
*General, United States Army*
*Chief of Staff*

Official:

**MARK F. AVERILL**
*Administrative Assistant*
*to the Secretary of the Army*
2211002

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On the cover: Major William Rothstein provides training and familiarity with the military decision making process to Indonesian Army staff.

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## Features

In 2021, prior to the current conflict in Ukraine, Armed Forces of Ukraine soldiers assault an OPFOR-controlled mock village during training at Rapid Trident 2021. Rapid Trident 2021 involved approximately 6,200 personnel from 12 nations at the International Peacekeeping Security Centre near Yavoriv, Ukraine. Rapid Trident is an annual, multinational exercise that supports joint combined interoperability among the partner militaries of Ukraine and the United States, as well as Partnership for Peace nations and NATO allies. (Credit: SSG David Carnahan)

# Court is Assembled

## LOAC 101 in New Operational Environments

*By Colonel Kristy L. Radio, Lieutenant Colonel Michael E. Schauss, Lieutenant Colonel Matthew B. (Blake) Williams, & Walter J. (Joey) Sepulvado*

### Staff Judge Advocates Must Prepare for New Operational Environments

The U.S. Army faces advanced operational environments (OEs) in 2030, and legal advisors must adapt accordingly in order to defend the legitimacy of American combat power. Getting ready for these new OEs is the special responsibility of staff judge advocates (SJAs) who deliver advice to force generating commanders and training organizations. As in the counterinsurgency (COIN) environment of the past, the law will remain the foundation of legitimacy for U.S. policy and action. However, SJAs cannot simply apply the systems developed in the past to these emerging OEs. The new OEs are complex and raise strategic issues of neutrality, standardization, resource sharing, care of detainees, and treatment of civilians, which brigade level validation exercises do not always cover. To reduce friction, SJAs should systematically build legal compliance into the operational design. SJAs advising commanders at the operational level of war[1] must recognize and close gaps in judge advocate (JA) training and knowledge by renewing their focus on national security law (NSL) and the Law of Armed Conflict (LOAC). Those who invest in developing NSL expertise today will stand ready to advise tomorrow at the pace of war and defend the legitimacy of American combat power.

### The Nature of the Change in OEs

Since the fall of Kabul in August 2021, the United States has shifted its focus from COIN operations to the threat of long-term strategic competition and International Armed Conflict (IAC) with Russia and China. On 24 February 2022, Russia launched an invasion of Ukraine, starkly reminding the world modern warfare is anything but restrained and policy-inhibited, and that LOAC must play a critical role. Russia's actions initially seemed to achieve a level of complexity not seen since the opening stages of Operation Iraqi Freedom, with multiple lines of advance and the employment of air, sea, and land power. However, it became clear that Russia was failing to effectively integrate joint and combined arms maneuver, sequence logistics, and synchronize effects. The enduring conflict in Ukraine and the subsequent allegations of Russian war crimes[2] provide a unique and timely insight into the role that LOAC will play in our Nation's ability to fight and win future conflicts. However, it is imperative that we remember an IAC in the Pacific would be immeasurably more challenging on all fronts. Conflict in Ukraine is largely land based and fought primarily with technology developed in the 20th Century.

Conflict in the Pacific would be multi-domain and likely involve below the threshold actions using 21st Century weapons.[3] Accordingly, the Department of Defense is expending tremendous effort to increase readiness and speed modernization to meet—and counter—existing and emerging near peer competition below the level of armed conflict.

### The COIN Legacy

The length and scale of recent U.S. COIN operations drove the Army to build intricate rule sets and systems around the use of force. Unlike large scale combat operations (LSCOs), COIN operations minimize the application of deadly force by managing the tactical level of war. These COIN systems rely on pre-deployment training on restraint, Collateral Damage Estimations (CDEs) focused on the tactical level reviews of individual, tactical level engagements by JAs and commanders, generous intelligence collections relative to target sets, detailed battle damage assessments (BDAs), and investigations into unintended deaths. In LSCO the center of gravity is unlikely to be the goodwill of a civilian population and more likely to be an enemy force. LOAC, under the rule of proportionality, recognizes and permits incidental harm to civilians and damage to civilian objects, which may be greater than policy during the recent COIN centric conflicts has allowed. Mission commanders must feel empowered to engage in attacks that cause foreseeable civilian harm that is not excessive in light of the anticipated concrete and direct military advantage. They also must be ready to make these decisions without the guardrails of CDE built upon extensive intelligence and freedom of action. There will be more pressure on the legal staff to get it right because reduced constraints will place the commander closer to the legal line.

### It's Hard to Overprepare for LSCO

As military leaders across the operational Army seek to apply lessons learned in Ukraine to the Pacific theater, their efforts will touch on synchronization, protection of command and control nodes and logistics, offensive cyber, the impact of unmanned systems at scale, and managing high volume open source intelligence. Furthermore, the rapid destruction of command posts in Ukraine indicates that COIN battle management systems of the last two decades may be unmanageable impediments to the operational tempo of LSCO.[4] This has immediate implications for both commanders and SJAs.

Like commanders, JAs must assess the likely OEs and legal implications. Gaps in preparation may reduce compliance with the law and undermine strategic legitimacy. As The Judge Advocate General noted, these new and complex OEs require "… getting back to basics…[5]" of the LOAC. In addition, legal advisors in multi-domain conflicts need technical expertise to apply the law to emerging technology and familiarity with other international law and norms applicable in IAC. Staff judge advocates must be ready to manage the support of operational headquarters through the thoughtful assignment of talent to staff planning cells, functional groups, and command posts. Commanders at the operational level are free to modify staff procedures and command post distribution as needed to meet mission requirements. In such dynamic circumstances, SJAs must exercise their professional judgment to maximize the effectiveness of their legal teams. Managing talent requires staff coordination, accurately assessing the OE's legal complexity, and not only understanding the talents but also limitations of your team.

Finally, providing principled counsel in a dynamic OE requires knowledge of authorities and permissions that extend beyond the rules of engagement and enable interoperability. Interoperability requires thoughtful joint, inter-agency, and multinational coordination prior to operations. Judge advocates and their teams should ask themselves the following: How does the staff communicate needs with the joint force command and staff? Who are the legal points of contact? What authorities exist to share equipment, supply, and intelligence with other nations? Where are these agreements managed? What host nation laws impact the use of force? What special international law, such as regional human rights law, applies to the operations? What are the variances in legal obligations amongst allies? What policies will be implemented to close these gaps?

### Identifying and Reducing Friction at Every Level of Command.

As an Army Service Component Command (ASCC) sets a theater for potential future LSCOs, its legal advisors must engage the staff regarding treaty obligations in the region. For instance, ASCCs normally have special responsibilities for managing Acquisition and Cross Servicing Agreements (ACSA) and should be prepared to incorporate subordinate units into the ACSA execution processes. The ASCC Office of the Staff Judge Advocate (OSJA) sits in the best position to understand the legal aspects of the theater OE. Covering gaps for inbound commands, the ASCC OSJA can ensure organizational tools like the Regionally Aligned Force repository contain updated international agreements and DoD policies. The ASCC can also manage the permission matrices which directly impact Army force posture.

A corps may be responsible for acting as a multinational land force headquarters. Judge advocates may face issues regarding prisoners of war, multinational medical services, refugees, or munitions, amongst others. Following legal judgments in the European Court of Human Rights, many nations retain a strong political aversion to detention.[6] A corps staff may have to work out not only the difficult logistics of mass detention operations but also the legal and political issues of allied participation. Russia's failure to properly conduct detention operations energized Ukrainians and solidified resistance to Russia throughout the international community.[7]

In addition, ceasefire failures and safe corridor violations have devastated Russian legitimacy and endangered civilian lives. While agreements with the stateless enemy in a COIN environment are nearly impossible, they are foreseeable in an IAC where the LOAC encourages, and may even require such arrangements.[8] However, even our most experienced JAs may not have examined the authorities to sign ceasefire arrangements and establish humanitarian corridors. Commanders will turn to their legal advisors to resolve these complex issues in preparing for and executing LSCOs.

Finally, a corps staff will also need to manage the U.S. distribution and use of weapons that allies may have either banned

or regulated through treaty obligations. Here, the legal nature of the ban and the policy of the nation are both critically important. For instance, the Ottawa Convention only bans anti-personnel landmines,[9] and the treaty on cluster munitions allows additional room for interoperability that nations may choose to exercise.[10] Learning the nuances of each nation's domestic policies and attitudes and applying the knowledge to realistic training is key to ensuring smooth legal operational planning.

Staff judge advocates at the division and corps level bear special responsibility for addressing the legal aspects of the operational environment. The Army closes gaps through education, training, and planning. In addition to self-study, there are numerous courses and formal training sessions available to the field. Training applies knowledge and identifies deficiencies in systems and individuals. Staff judge advocates must heighten their investment in validation exercises to identify friction and gaps. Only after conducting checks on learning and on the systems they intend to employ will SJAs be able to plan for operations in the new OEs. With a combination of education, training, and planning, OSJAs will "be prepared to provide the legal support required to support Army formations executing large-scale combat operations."[11] Regardless of the OE, coalition operations bring a great deal of potential friction to operational planning and its legal analysis. Successfully navigating these issues through legal mission analysis can reduce friction, enhance the commander's effectiveness, and maintain U.S. legitimacy.

## The Law Remains the Foundation of Legitimacy

The LOAC will be more prominent in future OEs, not less. Respect for the law is the foundation of U.S. operational legitimacy. An SJA must be prepared to apply the law in a complex, fast-paced OE outside of COIN. Furthermore, they must prepare their officers to do the same. The intricate system of legal compliance developed during the era of COIN was designed to serve a mix of legal, policy, public affairs, and operational aims to fit that environment. The ready legal advisor must understand the difference. In renovations, a contractor who cannot identify a load bearing wall will inevitably create disaster trying to please their customer. Likewise, JAs who fail to understand the complexities of international law can adversely impact the legitimacy and effectiveness of strategic operations. Legal success at the operational level of war requires more than professional military education. Judge advocates should seek out LSCO training environments for their officers and pay special attention to qualifications during assignments. Using the quill to save lives is fundamental to the mission of the JAG Corps, and a lack of readiness can cost lives and risk operational legitimacy. **TAL**

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*COL Radio is the chief of the National Security Law Division in the Office of the Judge Advocate General.*

*LTC Schauss is the deputy chief of the National Security Law Division in the Office of the Judge Advocate General.*

*LTC Williams is the chief of International Law in the National Security Law Division in the Office of the Judge Advocate General.*

*MAJ Sepulvado is an attorney in the National Security Law Division in the Office of the Judge Advocate General.*

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## Notes

1. Joints Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States (12 July 2017).

2. *See, e.g., Ukraine: Deadly Mariupol Theatre Strike 'A Clear War Crime' by Russian Forces,* Amnesty Int'l (June 30, 2022), http://www.amnesty.org/en/latest/news/2022/06/ukraine-deadly-mariupol-theatre-strike-a-clear-war-crime-by-russian-forces-new-investigation/.

3. *See, e.g.,* Denny Roy, *On Taiwan, China meets its 'gray-zone' warfare match* Asia Times (Aug. 10, 2022), https://asiatimes.com/2022/08/on-taiwan-china-meets-its-gray-zone-warfare-match/ (explaining that "'gray-zone' refers to hostile activities below the threshold that would normally trigger military retaliation from the targeted country."). *See also* Bonny Lin et al., *A New Framework for Understanding and Countering Cina's Gray Zone Tactics* Rand Corp. (Mar 30 2022), https://www.rand.org/pubs/research_briefs/RBA594-1.html (discussing the breadth of Chinese gray-zone activities and possible U.S. countermeasures).

4. David Axe, *The Ukrainians Keep Blowing Up Russian Command Posts and Killing Generals*, Forbes (Apr. 23, 2022, 6:13 PM), https://www.forbes.com/sites/davidaxe/2022/04/23/the-ukrainians-keep-blowing-up-russian-command-posts-and-killing-generals/?sh=7d7cb284a350.

5. Strategic Initiatives Off., Off. of The Judge Advoc. Gen., SIO Sends: JAG Corps Strategic Messaging (Apr. 2022) (The Judge Advocate General's Communication Priority and Intent). "Following almost two decades of sustained counterinsurgency and combat, the now years-long COVID-19 pandemic, and a constantly changing operational environment, our Regiment must get back to the basics . . . "

6. *See generally,* Jochen Katze & Maral Kashgar, *Legal Challenges in Multinational Military Operations: The Role of National Caveats, in* The "Legal Pluriverse" Surrounding Multinational Military Operations 393 (Robin Geiß & Heike Krieger eds., 2019)(discussing the challenges varying legal cultures and constitutional norms amongst member states pose to NATO operations).

7. *See, e.g.,* Jim Reed, *Ukraine war: WHO says attacks on health facilities are rising daily*, BBC (Mar. 26, 2022), https://www.bbc.com/news/health-60866669; *Ukraine: Russian soldiers filmed viciously attacking Ukrainian POW must face justice*, Amnesty Int'l (July 29, 2022), https://www.amnesty.org/en/latest/news/2022/07/ukraine-russian-soldiers-filmed-viciously-attacking-ukrainian-pow-must-face-justice/; Emma Farge & Brenna Hughes Neghaiwi, *Red Cross convoy to Mariupol turns back, to renew attempts Saturday*, Reuters (Apr. 1, 2022, 1:47 PM), https://www.reuters.com/world/europe/red-cross-teams-way-mariupol-without-aid-2022-04-01/.

8. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art 17, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (requiring parties to a conflict to endeavor to reach agreements to remove "wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment" from areas under siege).

9. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

10. *See, e.g.,* Int'l Comm. of the Red Cross, Convention on Cluster Munitions: Interoperability and National Legislation: The View of the International Committee of the Red Cross (2012), https://www.icrc.org/eng/assets/files/2012/cluster-munitions-interoperability-icrc-2012-09-12.pdf.

11. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 2-1 (8 June 2020).

# News & Notes

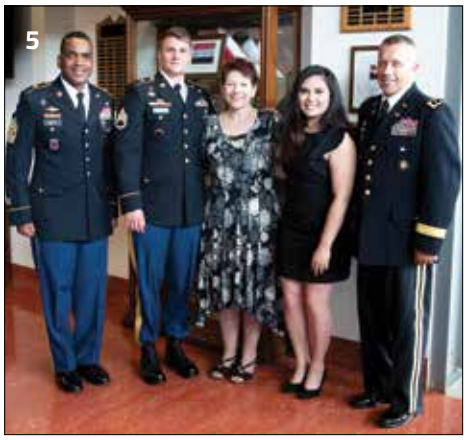


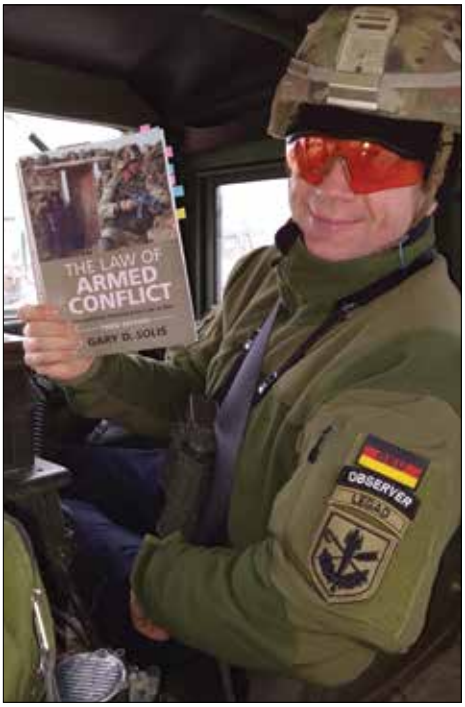
**Photo 1**
The Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff recently hosted the 2022 Combatant Command SJA Conference at the Pentagon, bringing together the 11 Combatant Command SJAs and legal representatives from the Department of Defense Office of General Counsel and the National Security Staff to discuss a variety of current and future national security issues affecting the Department and the United States Government. The Army JAGC is well-represented in these premier war-fighting commands!

**Photo 2**
Members of the 174th Legal Operations Detachment converged for a MUTA 8 battle assembly April 7-10 at Headquarters, Miami. Day one consisted of a site visit to the Miami Coast Guard base organized by newly promoted CPT Robert Klock, a former Coastguardsman himself. Soldiers from all teams: Puerto Rico, Orlando, Saint Petersburg and Miami converged and had the unique opportunity to learn about these vessels from the experts themselves and gain a newfound respect for what the Coast Guard does every day. The tour culminated with lunch at the dining facility and a meet and greet with the newly promoted Commander.

**Photo 3**
The V Corps OSJA (currently deployed to Germany) and members of the Ansbach Law Center visit the regional court (Landesgericht) in Ansbach on 8 April 2022 as part of their LPD program. Es wird gemacht! Victory!

**Photo 4**
Combined Joint Task Force - OPERATION INHERENT RESOLVE Union III Legal Team take a break and visit the swords in downtown Baghdad with the CENTCOM Historian (FWD) COL Leduc. From left to right, LT Gabriel Soto (USN), CPT Juan Mejia, COL Patrick Leduc, SGT David Lange, Squadron Leader Conor Donohue (New Zealand Air Force), and MAJ Marina Sacristan (Spanish Army).

**Photo 5**
Staff Sergeant Jake Rotluff (second from left) received the 2022 Sergeant Eric L. Coggins Award of Excellence. Janice Waugh (center), Sergeant Coggins' mother, presented Staff Sergeant Rotluff an Army Commendation Medal. The Judge Advocate General, Lieutenant General Stuart W. Risch (first on right), and the Regimental Command Sergeant Major, Michael J. Bostic (first on left), presided over the award ceremony. Staff Sergeant Rotluff was joined at the award ceremony by his wife, Ashley (second from right).




Dr. Jan Ganschow utilized Mr. Gary Solis's *The Law of Armed Conflict (Third Edition)* during Allied Spirit XIII, a Large-Scale Operations Exercise with 6,300 troops in Hohenfels, Germany. (Photo courtesy of author)

# Book Review

## The Law of Armed Conflict

### International Humanitarian Law in War (Third Edition)

*Reviewed by Dr. Jan Ganschow*

**One requirement of being a German military *Rechtsberater*** (legal advisor, LEGAD) or a judge advocate (JA) with the U.S. Army Judge Advocate General's Corps remains constant: in order to effectively and efficiently advise battlefield commanders on how to achieve lawful mission accomplishment, a military legal professional must have the right skills, knowledge, and experience. This simple truth is valid for every level of command. When it comes to the most challenging fields of legal expertise, i.e., operational law with the law of armed conflict (LOAC) as its supreme discipline, the stakes are particularly high. But there is a silver bullet that, over a decade of personal experience, has steadily enabled the LEGAD or JA to get a jump-start: Gary D. Solis's book *The Law of Armed Conflict: International Humanitarian Law in War*.[1]

The title holds true but is too modest. The work is not only a primer on LOAC but also an outline of operational law framework rendering it the one book that I would put into my rucksack (besides a copy of the *Operational Law Handbook*[2] with its *LOAC Documentary Supplement*[3]) to prevail on the legal battlefield. Of course, the LEGAD or JA also needs to know the law, national regulations, commander's directives, and the doctrinal/political framework, etc. But without an explanatory framework and a reliable source for quick cross-checks, these sources stand apart from each other, sometimes even seemingly detached from the case at hand.

Here, *The Law of Armed Conflict* can be seen as a toolbox (e.g., the Rules of Engagement (ROE) are explained in their own chapter, like formulating mission-specific ROE etc.) to support required skills development with its didactical-methodological approach. Solis provides unbiased and thoroughly referenced, in-depth knowledge of *de lege lata*, the law that is,[4] as well as *de lege ferenda*, the law that is to come,[5] which, in the time between the first and third edition, have often proven prophetic. More than once, Solis's own experience as a combat veteran and JA assisted me in my practice.

Since a legal practitioner is always short on time, I was happy to find Solis's elaborations addressing the time constraints and needs of the military LEGAD or JA. The book is well-indexed, divided into topical chapters with subchapters, rendering it user-friendly for the concrete knowledge-seeker and time-pressured producers of legally-charged texts. Every chapter includes a summary of the most important facts and findings. Quite a few times, despite my years of experience the field, I consulted it for a quick reference on a specific topic, only to discover that the LOAC issue at hand was much more complex than I anticipated. Solis competently guides the reader through the maze that LOAC sometimes can be, with all its politically-, ethically-, and culturally-charged sub-layers, and does so in a manner that is interesting and engaging. I was often surprised by what I got as "knowledge bycatch" when I consulted *The Law of Armed Conflict* (ever heard of the "Rendulic rule"[6] or the "Commander's Seven Routes to Trial"[7]?).

Because of Solis's credibility as a Vietnam War veteran, a former lawyer with the U.S. Marine Corps, and an acknowledged academic, and the selectively-compiled cases and materials, *The Law of Armed Conflict* also makes for a fascinating read. Solis empowers his readers by offering not only an understanding of the content of LOAC but also of its structure, the historical and political background. He delineates the most important tools for the operational lawyer and thereby allows the reader to put these ideas straight into practice. Accompanying me from one mission area to another since the first edition, *The Law of Armed Conflict* proved its value many times—and continues to do so with this third edition.[8]

Personally, I very much enjoy Solis's explanations on the historical and political backgrounds of relevant LOAC structures and norms.[9] Solis's elaborations are captivating to read and show what a monumental achievement it has been to develop this body of law through the ages in bloody fits and starts. They also help to put today's LOAC into a societal context. Only with these backgrounds can one fully comprehend the stage of development and interconnectedness of the different legal instruments and norms of this legal field, enabling sound, holistic legal advice.

Solis leads the readers through LOAC's rich complexity, which, as he shows, partly stems from its history,[10] how it was created and applied through the ages, its purposes, and effects. And while we tend to think that the operational surrounding of the military LEGAD or JA becomes extraordinarily complex given the doctrinal shift from counterinsurgency to artificial intelligence-,

drones-, and cyber-driven Joint All-Domain Warfare, the historical explanations in *The Law of Armed Conflict* give the reader the sense that militaries in earlier decades probably felt likewise. And still, at least to my knowledge, the legal services of most of the NATO members' militaries did not implement highly specialized career tracks within their personnel development system but kept to the generalist LEGAD or JA rewarding a wide range of different assignments.

So even while *The Law of Armed Conflict* necessarily contains a vast amount of legal-technical facts in order to illustrate LOAC exactly, it never becomes a dry read. The reader is invited on a worldwide LOAC journey that begins at the first international war crime prosecution.[11] This occurred in 1474 via the beginning of the codification of modern LOAC by my personal hero, Francis Lieber,[12] who fought in the Napoleonic Wars before he migrated to the United States from his native Germany. From there, it continues over the mind-boggling legal aspects of the internet as battlefield[13] to hybrid warfare,[14] lethal autonomous weapon systems,[15] and artificial intelligence.[16]

Solis also gives room to the human dimension and makes a certain personal involvement by the reader possible. Solis catches more than the reader's professional attention when he frequently cites fascinating primary sources (like a "Top Secret" CIA memo[17] or a rare infantryman's poem[18] about LOAC) and accounts of LOAC application in combat, giving his subject matter a human voice. In nearly forty sidebars, Solis makes topical excursions that let the readers experience real life instances and gripping anecdotal reports to exemplify and illustrate the respective chapters. Maybe this, I think, is key to the book's success and makes it so much more than a student's textbook.

In a combat zone, mere juridical advice might not always be enough. Solis knows this from personal experience both as a platoon leader and company commander tasked with fighting and winning battles and as a JA tasked with enabling lawful mission achievement and upholding the law. *The Law of Armed Conflict* reflects this. Be it counterterrorism operations or Joint All-Domain Warfare with Large Scale Combat Operations, the use of military force is legally multilayered and complex. New technologies and artificial intelligence bring along new tactics, techniques, and procedures that add to the complexity of the battlefield. Solis finds that, since publication of the second edition in 2016,[19] armed conflicts have changed substantially; combat operations are more technically oriented, more "wired," more lethal.[20]

I rank this book high among my most-consulted public sources[21] for my work in the field of LOAC because its author, having proven many times to possess the right skills, knowledge, and experience as a military officer and a JA himself, acts like an enabler to the LEGAD or JA. This book served as a metaphorical parachute when I needed backup. This was especially true while I was deployed to an area of active hostilities and tasked to deliver advice on LOAC in an austere work environment.

*The Law of Armed Conflict* does not include the specifics of the law of war at sea or law of aerial warfare. However, it helped me understand the full dimension of the law not only of land warfare but of warfare generally since the basic norms and structures usually apply in each operational domain. Two controversial and politically-sensitive operational law topics stand out to me: security detention[22] and targeting.[23] Here, and on some other topic areas, Solis also outlines the U.S. and other legal-political views, always explaining where to locate this in the legal framework. In preparation for various legal presentations on these topics, I turned to *The Law of Armed Conflict* for guidance and often found not only what I needed but also material to prepare for follow-on discussions, particularly with members of non-governmental organizations.

I remember a large LEGAD conference on LOAC that I had to convene in a mission area on very short notice. The conference was a success because my fellow international LEGADs agreed to use selected contents of my tattered copy of *The Law of Armed Conflict* as our agenda. Every session was built upon the content of one of the selected chapters, so every session was helpful to the audience. On another occasion, I was tasked to give an ad hoc briefing to a multinational staff (equivalent to a division) in theater about the concept of direct participation in hostilities and its specific impact on the conduct of certain operations. Without much time to prepare and no possibility to reach back to colleagues at higher command, I was relieved to find the topic in my copy of *The Law of Armed Conflict.* This was certainly better than having to rely solely on my own critical understanding of the known Interpretative Guidance on the Notion of Direct Participation in Hostilities from the International Committee of the Red Cross.[24] Given this personal experience, I think it is no wonder that the 40th Judge Advocate General of the United States Army, Lieutenant General Charles N. Pede, recommends Solis's book in his foreword to the third edition not only to students but to uniformed JAs as well.

When given short notice to deliver a product that explains the legal aspects of an actual situation in a mission area, I noticed the impulse in my colleagues and myself to consult legal blogs online to get a first idea of the problem. That is dangerous. I frequently found dubious legal opinions that claimed to accurately reflect the law but, in truth, followed an ideological agenda. I, therefore, agree with Michael Schmitt and Sean Watts when they deplore the fact that many scholars lack the appropriate education or experiential background but, nevertheless, claim LOAC expert status, misstating basic principles and rules with distressing frequency.[25] Not so with Solis. Turn to his book first and then begin exploring and cross-checking when operational law and/or LOAC plays a role. You will probably find every relevant aspect covered, at least in a way that allows for further explorations. Solis takes care to produce reliable legal findings and to clearly mark areas of controversy.

The reader can tell Solis's work has stood the test in his discussions and debates on LOAC with Soldiers and Marines fresh from combat in Iraq, Afghanistan, and Africa and that these discussion have honed the viewpoints in the book. This feeling of following a candid author and the already-mentioned fine writing style made Solis's book a quick reference for legal products and an excellent guide in further developing my professional capacity in LOAC and my understanding of the U.S. perspective. That understanding is something a German or European LEGAD should strive to develop unless they want

to run into the serious legal interoperability trouble that comes with not fully understanding where NATO's most-powerful member state is heading.

Even while the text is heavily weighted towards the U.S. perspective, it is, as Solis explains, more than a statement of American positions since it incorporates lessons from British, Dutch, Israeli, and other combatant forces while also addressing positions of non-governmental organizations. Solis also includes legal opinions from Germany and other jurisdictions. This reflects the current Western military reality of ever more multinational coalitions and should be helpful to also legally synchronize the common efforts.

For my part, I found it very enlightening to also learn about the U.S. practice when it comes to military justice[26] in connection with LOAC. However, to put Solis's elaborations on U.S. legal practice, policy,[27] and doctrine into perspective, I recommend that any non-U.S. reader keep in mind the positions of their respective country and the legal positions of the European Court for Human Rights, should their country be a state party to the European Convention on Human Rights.[28]

My motivation to write this rather personal review about Solis's *The Law of Armed Conflict* stems from a certain sentiment of gratefulness to an author who helped me with his work and thereby indirectly shaped the legal domain in military exercises, combat zones, and areas of active hostilities. Turning to Solis's book always added value to my operational legal products and played no small part in finding the right solutions for legal challenges in theater.

Solis's book has never disappointed me. To me, who, as a military LEGAD or desk officer, had to deliver timely work results on the tactical, operational, and strategic level, it is nothing short of a masterpiece. I am not aware of a similar work in the United States or in Europe. I hope that it will help other operational lawyers fulfill their tasks as it helped me. **TAL**

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*Dr. Ganschow is the action officer for multinational operations and interoperability with the Center for Law and Military Operations at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (3d ed. 2021).

2. Nat'l Sec. L. Dep't. The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Operational Law Handbook (2022).

3. Nat'l Sec. L. Dep't. The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Law of Armed Conflict Documentary Supplement (2022).

4. *De lege lata*, Oxford Reference, https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-519 (last visited Mar. 21, 2022).

5. *De lege ferenda*, Oxford Reference, https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-518 (last visited Mar. 21, 2022).

6. Solis, *supra* note 1, at 222, 240–243 ff.

7. Solis, *supra* note 1 at 324–329.

8. Whereas the first and second edition of *The Law of Armed Conflict* had 660 and 864 pages respectively, the completely updated and revised third edition finds the balance with 743 pages (and 2,732 meaningful footnotes (I counted!)). The third edition of *The Law of Armed Conflict* starts with tables of treaties and cases, followed by twenty-two chapters on LOAC. I deem it is worth it to name them here in order to illustrate this review:

1. Rules of War, Laws of War;

2. Codes, Conventions, Declarations, and Regulations;

3. Two World Wars and Their Law of Armed Conflict Results;

4. Protocols and Politics;

5. Conflict Status;

6. Individual Battlefield Status;

7. Law of Armed Conflict's Core Principles;

8. What Is a "War Crime"?;

9. Obedience to Orders, the First Defense;

10. Command Responsibility;

11. Ruses and Perfidy;

12. Rules of Engagement;

13. Targeting Objects;

14. Targeting Combatants and Others;

15. Artificial Intelligence, Autonomous Weapons, Drones, and Targeted Killing;

16. Torture;

17. Cyber in the Law of Armed Conflict;

18. Attacks on Cultural Property;

19. The 1980 Certain Conventional Weapons Convention;

20. Gas, Biological, Chemical, and Nuclear Weapons;

21. Military Commissions;

22. Security Detention.

A bibliography and an index are at the end of the book.

9. I consider it a lucky circumstance that the U.S. Army JAG Corps's historian and archivist, Fred Borch, is mentioned in the preface of the book, acting as a quasi-guarantor of Solis's findings.

10. *See* Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War 2–4, 34–66, 67–105 (3d ed. 2021).

11. *Id.* at 4, 26–28.

12. *See id.* at 35–41.

13. *Id.* at 533–535.

14. *Id.* at 142–152.

15. *Id.* at 464–497.

16. *Id.* at 464–497.

17. *Id.* at 527–531.

18. *Id.* at 280.

19. Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (2d ed. 2016).

20. Solis, *supra* note 1, at XXI.

21. Other sources I often consult include: The Judge Advoc. Gen.'s Legal Ctr. & Sch., Nat'l Sec. L. Dep't, Operational Law Handbook (2022); Max Planck Encyclopedia of Public International Law (Anne Peters ed., Oxford Univ. Press 2008–2020), https://opil.ouplaw.com/home/mpil (accessible online to subscribers); The Handbook of the Law of Visiting Forces (Dieter Fleck ed., 2d ed. 2018); The Handbook of the International Law of Military Operations (Terry D. Gill & Dieter Fleck eds., 2d ed. 2016); The Handbook of International Humanitarian Law (Dieter Fleck ed., 4th ed. 2021); Leuven Manual on the International Law Applicable to Peace Operations (Terry D. Gill et al. eds., 2017); *Legal Advisors Worktop Functional Area System*, NATO, https://lawfas.hq.nato.int (last visited Dec. 29, 2022); *Treaties and Customary Law*, Internat'l Comm. of the Red Cross, https://www.icrc.org/en/war-and-law/treaties-customary-law (last visited Dec. 29, 2022).

22. Solis, *supra* note 1, at 672-695.

23. Solis, *supra* note 1, at 397-424 for targeting objects, 425-463 for targeting combatants and others.

24. Nils Melzer, Legal Adviser, Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009).

25. *See* Michael N. Schmitt & Sean Watts, *State* Opinio Juris *and International Humanitarian Law Pluralism*, 91 Int'l L. Stud. 171, 175 (2015).

26. *See, e.g.*, Solis, *supra* note 1, at 79–84.

27. *See, e.g.*, Solis, *supra* note 1, at 274–275, 593–594, 603–604.

28. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 (subsequently amended by Protocols 11, 14, 15, and supplemented by Protocol Nos. 1, 4, 6, 7, 12, 13, 16).

CPT Alexa Andaya (left, leaning on table), National Security Law Judge Advocate for the 173d Infantry Brigade Combat Team (Airborne), discusses the principle of proportionality with brigade commander, COL Michael Kloepper (right, seated at table), during Saber Junction 22, a multinational exercise held at the Joint Multinational Readiness Center in Hohenfels, Germany. (Credit: MAJ Michael Myers)

# Azimuth Check

## Embrace the Crucible Exercise

### An Intentional Approach to Training Opportunities

*By Colonel Andrew M. McKee & Lieutenant Colonel Jason M. Elbert*

**The ongoing conflict in Ukraine keenly illustrates** the likelihood that future warfare will challenge the usefulness of our counterinsurgency experience in Afghanistan and Iraq. National security law practitioners should practice for future warfare in anticipation of a need for mobility in sustained operations, force reconstitution, and the ability to operate in degraded environments.[1] Technological advances in artificial intelligence, information dominance, and the use of drones will test our assumptions, create friction, and impede our ability to maneuver.[2] These elements of the battlefield will also serve as command decision tools and force multipliers.

The fifth Major General John Fugh Symposium, hosted by Lieutenant General Stuart Risch, The Judge Advocate General, highlighted the importance of the laws of armed conflict (LOAC) fundamentals to an audience of prominent academics, Army and Department of Defense senior leaders, and senior judge advocates (JAs) from partner nations.[3] Despite the symposium's future focused exploration of "Multi-Domain Operations and the Rule of Law in an Era of Evolving Warfare," the value of LOAC principles served as a common thread throughout the events three academic panels.[4] There was overwhelming agreement amongst the participants that the current LOAC is sufficient to govern future conflict.[5] Similarly, the panel experts often referenced the importance of factual analysis and circumstances in LOAC application.[6] The message resonated—JAs must be confident in LOAC fundamentals, train on them, and practice their application.

Arguably, we must take our practice further to ensure all special staff come away from interactions with JAs with a shared understanding of LOAC. It is the only method of providing "multi-functional legal support simultaneously at multiple command posts while anticipating minimal access to digital communication and information" at the speed of relevance.[7] In combat, the pace of battle will move too quickly for on-the-spot legal advice. Success will require LOAC considerations during planning, a deep understanding of the commander's targeting philosophy, and iterative war game discussions that involve legal considerations. Adequate preparation for large scale combat operations (LSCO) requires the JAG Corps's commitment to LOAC fundamentals and large-scale exercises. This commitment should include educational training and assignment opportunities within the JAG Corps's National Security Law Expertise Objective,[8] inclusion of LOAC fundamentals and national security law topics within local leadership development programs, and staff presence throughout the unit's road to war planning and preparatory command post exercises. This model allows JAs to strengthen and practice LOAC principles, expand into specialized areas, and adequately integrate into the staffing process.[9] On a tactical level, it prioritizes JA warfighting preparation and encourages the development, testing, and refinement of analog products.[10]

Accordingly, the JAG Corps's priorities and training plans must *prepare* judge

| Table 1: SJA Initial Assessment Questions |
|---|
| 1. How will I organize to support the fight? |
| 2. Who will serve as NSL Chief (likely a Division SJA consideration only)? |
| 3. How many attorneys do I want to commit to the exercise? Rank? Experience? |
| 4. How many paralegals do I want to commit to the exercise? Rank? Experience? |
| 5. How will I facilitate teamwork? |
| 6. What training can I take advantage of for my team? |
| 7. What is the end state for the OSJA at exercise completion? |
| 8. How do I define that end state (i.e., training objectives)? |
| 9. How will I measure success? |
| 10. What products do I think we need to fight? Options include annexes, briefing slides, authorities matrix, battle drills, running estimate, seven-minute drills for meetings, and a reporting matrix. |
| 11. How will I prioritize training objectives and related tasks? |

advocates with a thorough foundational understanding of LOAC. To achieve this, leaders within the JAG Corps must approach training requirements such as Combat Training Center (CTC) rotations and Warfighter Exercises (WfX) with intentionality, devoting serious thought and their own time into ensuring every member of the team gets the most they can out of these opportunities.

## The Opportunities

The Army designed the Combat Training Centers (CTCs) to test, train, and build combat-ready leaders, Soldiers, and formations by immersing units in a highly realistic, decisive, action crucible experience.[11] The CTCs replicate combat by "stressing every warfighting function with operations against tough, freethinking, realistic, hybrid threats under the most difficult conditions possible."[12] The Warfighter Exercise (WfX) is a distributed, simulation supported, multi-echelon, tactical command post exercise fought competitively against a live-thinking regional adversary.[13] The WfX scenario environment is complex in order to prepare Corps and Division Headquarters for future Decisive Action missions.[14] Directed by the Chief of Staff of the Army and scheduled by the Commander, U.S. Army Forces Command (FORSCOM), a WfX is major multi-echelon training event focused on developing Corps and Division level staffs for future large-scale combat operations.[15]

Combat deployments are diminishing, and candid reflection persuades national security law practitioners that counterinsurgency experience can hinder analysis during LSCO. Because of this, the exercise learning environment is essential to building expertise within the JAG Corps national security law core legal competency.[16]

## Preparation

JAG Corps doctrine requires readiness to provide legal support "in austere conditions, to rapidly maneuvering and mobile unit headquarters, in a contested digital environment."[17] In order to provide principled counsel in support of a "ready, globally responsive, and regionally engaged Army," JAs must have LOAC fluency and challenge their understanding in realistic environments.[18] The stress and friction found during exercises test knowledge, presence, and leadership. If JAG Corps leadership emphasizes well-thought training objectives, participation in command post exercises, and post rotation learning, there is no better preparation environment.

Judge Advocates Legal Services (JALS) personnel will not get the most out of these exercises unless their leadership is deliberate about maximizing the learning potential of the events. During these exercises, unit commanders and staff will practice Mission Command, the Army's approach to command and control.[19] Training audiences will also hone the operations process, the Army's framework for putting command and control into action.[20] The operations process consists of four activities performed iteratively: planning, preparing, executing, and continuously assessing.[21] This process facilitates the organization, integration, and synchronization of complex activities in combat.[22] As JAs, our own preparation and planning efforts should mirror this process.

Staff Judge Advocate (SJA) preparation for these events should start well in advance of execution. To guide planning and preparation activities, SJAs should develop questions they will use to assess their team and their efforts. Table 1 is an example of some questions an SJA might ask as exercise planning and preparation begin.

In the months leading up to a WfX or CTC rotation, units will engage in several planning events punctuated by a series of increasingly complex preparatory, smaller-scale exercises.[23] These events provide built-in gates to assess progress towards readiness for the exercise and the SJA's desired end state and to modify the plan as necessary. As the large-scale exercise nears and the JALS personnel assigned to the exercise gain experience, preparation should become more granular. Table 2 is an example of what questions an SJA might ask and what tasks exercise personnel might take up after the initial preparatory exercise.

Presence during these preparatory events is critical and must be a point that leadership emphasizes. The presence of JALS personnel provides space to build trust, integrate, and hone staff LOAC understanding. It also helps the JA to improve competencies outside of legal advice that are critical to the practice in an austere environment. Presence may build fitness; develop systems understanding; help JAs appreciate the primary, alternate, contingency, emergency (PACE) communications precedence; guarantee a seat within the operations center; or open opportunities to learn about combat capabilities. Moreover, encouraging legal participation in all phases of exercise preparation creates space to test systems and analog redundancy.[24] It also cultivates a trust with the command that will enable LOAC specific discussion, flesh out targeting philosophies, and create informal training opportunities. For example, adequate presence in the run-up to an

**Table 2: Post Exercise 1 Assessment and Preparation Tasks**

| SJA Assessment Questions | NSL Team Preparation Tasks |
|---|---|
| 1. What are the relative strengths and weaknesses of the core NSL team? | 1. Review organization's Tactical Standing Operating Procedure (TACSOP) and the NSL shared drive for predecessor work product; |
| 2. What training/knowledge gaps does the NSL team have? | 2. Review CLAMO and CALL websites for current trends; |
| 3. How does the unit conduct exercise planning? Does the OSJA have sufficient presence? Does the SJA need to open any doors? | 3. Initiate communication with higher/lower echelon NSL team to seek/give guidance and begin relationship building; |
| 4. How useful are the products and processes we created for me as the SJA? Identify any additional products? | 4. Integrate with key staff sections including G5 and Fires (i.e., "go make friends."); |
| 5. How realistic is the initial manning plan given the unit's battle rhythm, seats available, workstations available and personnel available? | 5. Prioritize work; |
| | 6. Develop roles and responsibilities for specific tasks based on prioritized work; |
| | 7. Develop a training plan for regular, deliberate training on legal doctrine, operational doctrine, and capabilities (to include training on mission command systems and the Operational Law Kit – Expeditionary (OLK-E) and budget time for NSL team members to attend NSL courses, particularly in developing areas of expertise such as Cyber Law; |
| | 8. Seek resources and build relationships with those personnel who control critical resources (e.g., workstations and life support). |

exercise may allow a JA the access necessary to run a hypothetical driven targeting discussion with the command and members of the staff with fires decision authority.

## Conclusion

The JAG Corps mission remains constant, to "provide principled counsel and premier legal services, as committed members and caring leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army."[25] Readiness for high-intensity conflict and near-peer adversaries remains critical to future success."[26] This no-fail strategic requirement necessitates the study of LOAC, the assessment of varying LOAC applications during planning, and the practical application of LOAC in challenging environments like the CTCs and WfXs. **TAL**

*COL Mckee is the senior legal observer coach trainer at the Mission Command Training Program at Fort Leavenworth, Kansas.*

*LTC Elbert is the director of the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

## Notes

1. *See, e.g.,* Army Mad Scientist, *How Russia Fights 2.0 with Brigadier General (Retired) Peter B. Zwack, Brigadier General (Ret.) Peter L. Jones, Ian Sullivan, Dr. Mica Hall, Samuel Bendett, and Katerina Dedova*, The Convergence (July 21, 2022), https://podcasts.apple.com/us/podcast/the-convergence-an-army-mad-scientist-podcast/id1495100075.

2. *Id. See generally* MG John Fugh Symposium, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, June 15, 2022 [hereinafter MG Fugh Symposium].

3. MG Fugh Symposium.

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 3-41 (8 June 2020) [hereinafter FM 1-04].

8. U.S. Dep't of Army Judge Advoc. Legal Serv. Pub. 1-1, Personnel Policies fig.7-3 (Feb. 2022) [hereinafter JALS Pub. 1-1].

9. FM 1-04, *supra* note 7, at para. 2-14. (requiring Judge Advocate Legal Services personnel to be "integrated into the staff and operations process during all phases of decisive action").

10. Colonel (Retired) Gail A. Curley, *Leading Lawyers and Advising Senior Leaders During Crisis: Reflections on the Army's January 2021 Civil Disturbance Operations Response*, Army Law., no. 5, 2021 at 18, 20 (emphasizing the importance of preparing an analog Smartbook).

11. U.S. Dep't of Army, Reg. 350-50, Combat Training Center Program para. 1-5 (2 May 2018).

12. *Id.*

13. MCTP, *Warfighter Exercise Overview WFX 101,* MCTP, https://cacmdc.army.mil/cact/MCTP/PLEX/WFX%20101%20Internal/Forms/AllItems.aspx (last visited Aug. 30, 2022).

14. *Id.*

15. *Id.*

16. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 1-6 (8 June 2020).

17. *Id.* at para. 3-41.

18. *Id.* at para. 1-1 (articulating the Judge Advocate General's Corps mission).

19. U.S. Dep't of Army, Army Doctrinal Publication 5-0, The Operations Process para. 1-12 (July 2019) [hereinafter ADP 5-0].

20. *Id.* para. 1-15.

21. *Id.*

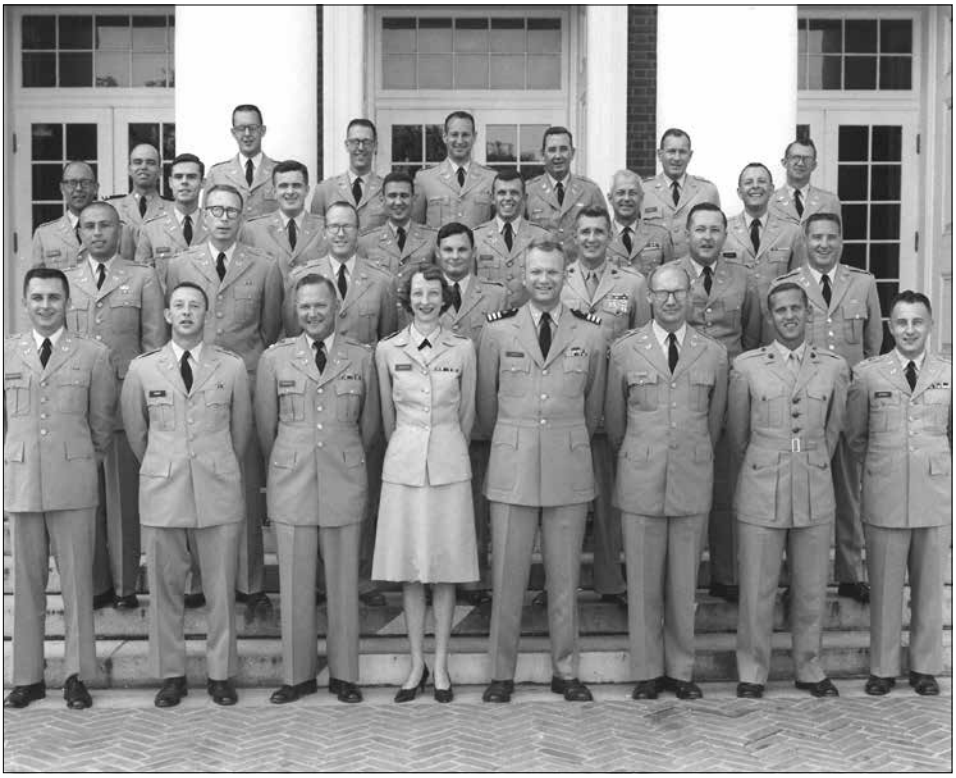
22. *Id.* para 1-16.

23. This assertion is based on Colonel Mckee's recent professional experiences as the senior legal observer coach trainer for the Mission Command Training Program from 9 June 2021 until present.

24. FM 1-04, *supra* note 7, at para. 3-44 (requiring JAG Corps leaders to prepare to deliver legal support through analog means, execute off-network document production, and have hardcopy or off-network reference materials on-hand).

25. FM 1-04, *supra* note 7, para. 1-1.

26. *See generally The Army's Vision and Strategy*, U.S. Army (Sept. 6, 2022) https://www.army.mil/about/.



Major Elizabeth Smith (1st row, 4th from left) in the 13th Career Class at The Judge Advocate General's School, U.S. Army, 1964–1965. (Photo courtesy of author)

# Lore of the Corps

## The First Female to Wear Eagles in Our Corps: Elizabeth Smith Jr.

*By Fred L. Borch III*

**Since the Army was gender-segregated in the 1940s, 1950s, and 1960s, the opportunities for women to soldier were limited because of their decidedly second-class status.** Additionally, not only were most women in a separate organization—the Women's Army Corps (WAC)—but also Congress prohibited women from serving in combat units, commanding men, and being promoted to general officer.[1] Additionally, until the 1970s, commanders had the authority to involuntarily discharge female Soldiers due to pregnancy, childbirth, or becoming parents through adoption.[2] Despite these restrictions, there were 9,000 women in the WAC by 1960 and 12,500 by 1970.[3] However, since there were a total of 1.32 million Soldiers in the Army in 1970, this meant that less than 1 percent of the Army was female.[4] Despite these low numbers, there were a handful of female lawyers in The Judge Advocate General's (JAG) Corps, including Elizabeth R. Smith Jr. This is her story.

"Liz" Smith was the *first* female attorney to attain the rank of colonel.[5] She also was the *first* female judge advocate (JA) to graduate first in the Judge Advocate Basic Course. Colonel Smith also holds the record in the Corps for having been a command judge advocate (CJA) to a commanding general for twelve consecutive years.

Born in Ravenna, Kentucky, on December 27, 1926, she was the only child of R.W. and Elizabeth Ratliff Smith. Colonel Smith really was a "Junior" because she was named after her mother.[6]

Smith grew up in Irvine, Kentucky, and entered the University of Kentucky in 1944 in a six-year, combined Bachelor of Arts and Bachelor of Laws degree program. After graduating in 1950, motivated by patriotism during the Korean War, adventure, and a desire to get away from the small Kentucky town in which she had grown up, Smith applied to join the WAC. She was accepted, commissioned as a second lieutenant, and completed the WAC basic course at Fort Lee, Virginia.[7] Although she was a lawyer, Smith did not request to be assigned to an Army legal office, much less ask to do legal work. As she put it:

> Now I had no promises of being a lawyer in the Army, but it just did not make sense to me that the Army, being a somewhat sensible organization, would not at some point use my talents, my ability, my training, my education. So, I figured I would just take the chance in coming in and doing whatever I had to do and eventually working my way into the law.[8]

Smith served first at Fort Eustis, Virginia, before volunteering to serve overseas and being reassigned to Heidelberg, Germany, in March 1954. The plan was for now First Lieutenant (1LT) Smith to work as a supply officer in a quartermaster unit in U.S. Army, Europe, but when the senior WAC officer in Europe learned that Smith was an attorney, this officer decided that

it was not appropriate for Smith to be a supply officer.

The Northern Area Command, located in Frankfurt, Germany, was "desperate for a lawyer" and so, instead of serving as a supply officer, Liz Smith was assigned to the Northern Area Command legal office.[9] She spent three years in Germany. While Smith worked chiefly as a legal assistance officer, she did have the opportunity to do administrative law, and she served as a trial and defense counsel at special courts-martial. One of her JA colleagues was 1LT John J. O'Connor, the spouse of the future Supreme Court Associate Justice Sandra Day O'Connor.[10] But while Smith was serving as a lawyer in the staff judge advocate's (SJA's) office, she was not formally assigned or even detailed to the JAG Corps; Smith remained a full-fledged member of the Army WAC.[11]

It was a very different Army for women in the mid-1950s. As Smith remembers, "at that time, we had two full colonel women in the [entire] Army" and "about 13 lieutenant colonel women. Frankly, lieutenant colonels were like gods. When you talk about a full colonel, that's even beyond god."[12]

In 1957, 1LT Smith applied to attend the 25th Special Class (the forerunner of today's Judge Advocate Basic Course). She was accepted and completed the course, graduating first in in her class.[13] A letter to Smith from Major General George Hickman, Jr., then-serving as The Judge Advocate General, congratulated 1LT Smith for finishing number one in the Special Class. Hickman also wrote that this "award has added significance when it is realized that you [Smith] were competing with 54 other officer lawyers who graduated from *better law schools.*"[14] One has to wonder what Liz Smith thought of this backhanded compliment.

First Lieutenant Smith then was assigned to Fort McClellan, Alabama, where she was an instructor in the General Military Subjects Division, WAC Training Battalion. She taught military justice to the WAC basic trainees. Smith tried "to use physical demonstrations of [criminal] offenses and do it in sort of a dramatic fashion so that it wasn't so boring."[15] When talking about attempted arson, for example, she would hold up a box of matches and then strike matches in front of the trainees to get their attention.[16]

Promoted to captain in 1958, Smith then served a one-year tour as the commanding officer of Company B, WAC Training Battalion, "an opportunity she thoroughly enjoyed."[17]

> I loved it. I think, other than being a JAG officer in the Army, being a Commander is the next best job because you are responsible for everything. You are responsible for all your troops, all your cadre, your training, your sergeant and your second and your first lieutenants, as well being responsible for the training of the WAC basic trainees. It was a daunting, frightening job because, of course, I had never been a commander.[18]

Captain (CPT) Smith next served at Fort Leavenworth, Kansas, where she was the only female JA in the SJA's office. She still had her WAC status but was now *temporarily* detailed to the JAG Corps for a period of three years.[19]

In 1961, at the urging of Major General Charles L. "Ted" Decker, the Army formally allowed qualified WAC officers to be *permanently* detailed to the JAG Corps. Smith applied for the new status, which was approved. This permanent status with the Corps meant that, while she remained in the WAC, CPT Smith's career was now managed by the JAG Corps rather than by the WAC Career Management Branch. It also meant that CPT Smith was authorized to wear JAG Corps brass on her uniform collar.[20]

Captain Smith's next assignment was to The Judge Advocate General's School, U.S. Army (TJAGSA), where she worked as the Deputy Director of the Academic Department. The only female lawyer on the staff, Smith "managed the school's academic schedule, guest speakers, coordinated support to the academic departments, and otherwise assisted in the administration of the academic program."[21] It was not easy to be the lone woman at TJAGSA, especially as not every male soldier was convinced that women should be in Army uniforms. Despite this, during her time there, she promoted to the field grade ranks. Certainly, Major (MAJ) Smith's supervisors were aware that some Soldiers held those views, as reflected in this senior rater comment from Colonel John F. T. Murray, the TJAGSA Commandant: "For anyone with a built-in prejudice against women lawyers, I suggest a tour with [MAJ] Smith. She will overcome the prejudice and demonstrate why she is an outstanding officer."[22]

After her promotion, Smith completed the 13th Career Course (today's Graduate Course) in 1965, finishing in the top third of the class. She was the only female in her class of twenty-five to thirty JAs. After graduating, Major Smith joined the Military Affairs Division, Administrative Law Division, Office of The Judge Advocate General. In her opinion, "it was one of the best assignments you could have."[23] As she put it in her oral history:

> It was far better than the Military Law Division, International Law, or anything else because a commander's "meat and potatoes" is running his post, camp, or station, and he is going to be in the area of administrative law far more than the courts-martial. Anybody can do courts-martial. I think it takes real talent to do Administrative Law.[24]

In December 1966, then-Lieutenant Colonel (LTC) Smith left the Pentagon for an assignment as the first legal advisor for the U.S. Army Recruiting Command (USAREC), then-located in Hampton, Virginia. Her job as the command's first CJA was challenging as the Vietnam War was in full swing. The increasing unpopularity of the draft meant that Smith and her staff wrestled with a variety of issues, including sometimes-violent anti-war demonstrations at Armed Forces Examining and Entrance Stations (AFEES) and handling responses to private habeas corpus actions used to impede the induction of men who had been drafted. Lieutenant Colonel Smith "had a booming telephonic legal business, all day long, all over the country,"[25] as she and her staff were providing advice and counsel to forty-seven recruiting main stations and seventy-three AFEES stations—almost all of which were not on military installations.[26]

When USAREC moved from Virginia to Fort Sheridan, Illinois, LTC Smith went with it. On 10 July 1972, while still serving


Major Elizabeth Smith at The Judge Advocate General's School, U.S. Army, circa 1965. (Photo courtesy of author)

as the CJA at USAREC, Smith made history as the first female JA to reach the rank of colonel (COL). This was a remarkable achievement, as there were only thirteen female colonels in the entire Army—of nearly 811,000 Soldiers.[27]

The following year, after the draft and inductions ended, COL Smith helped USAREC transform itself so it could better focus on recruiting for an all-volunteer Army. She was particularly interested in institutional changes at USAREC that would create more opportunities for women in the Army. In any event, COL Smith was so valued by the command at USAREC that she stayed on as its top JA until she retired—with more than twenty-six years of service—on 31 May 1978, the last twelve years having been exclusively at USAREC.[28]

When asked to reflect whether she thought of herself as "forging a new road for women" as the "first and only colonel" in the Corps in the 1970s, COL Smith replied:

> Only in the sense that I did not ever want to do badly. I wanted to do well because I knew that I had a unique position . . . but my main concern was never letting down women . . . because if I did badly, it would perhaps hold back other women, in some way, in the eyes of men who would question whether a woman could do the job.[29]

In retirement, COL Liz Smith played golf (she described herself as "fair" at the game) and collected opera records. Opera, in fact, was her passion; the last month of her tour of duty in Germany, she went "to the opera every week."[30] Colonel Smith died at her home in Newport News, Virginia, on 8 July 2007. She was 81 years old. She never married and left no survivors. **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. This Lore of the Corps draws from a previous Lore of the Corps in The Army Lawyer, issue 1, 2020.* See *Fred L. Borch,* Women in the Corps: A Short History of Female Judge Advocates*, army kaw., no. 1, 2020, at 13, 14–15.*

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## Notes

1. Bettie J. Morden, *Women's Army Corps, in* Historical Dictionary of the U.S. Army 519 (Jerold E. Brown ed., 2001). The first woman to be promoted to general or flag rank in any service was Anna Mae Hays. An Army nurse, she pinned one star on her collar in June 1970. Harrison Smith, *Anna Mae Hays, Nurse Who Became U.S. Military's First Female General, Dies at 97*, Wash. Post, Jan. 8, 2018, at B6.

2. Exec. Order No. 10,240, 16 Fed. Reg. 3,689 (Apr. 27, 1951) permitted commanders to involuntarily discharge any female in uniform if she became pregnant, gave birth to a child, or became a parent by adoption or as a stepparent.

3. For more on the WAC, see Bettie J. Morden, The Women's Army Corps, 1945-1978 (1990), https://history.army.mil/html/books/030/30-14-1/cmh-Pub_30-14.pdf.

4. David Coleman, *U.S. Military Personnel, 1954–2014*, Hist. in Pieces, https://historyinpieces.com/research/us-military-personnel-1954-2014 (last visited Jan. 31, 2022).

5. For a comprehensive look at Smith's career, see Major George R. Smawley, *The First Female Colonel of the U.S. Army Judge Advocate General's Corps: A Summary and Analysis of the "Oral History of Colonel Elizabeth R. Smith, Jr. (USA Retired) (1951–1978)*, 179 Mil. L. Rev. 171 (2004). Smawley's article is based chiefly on the oral history of Smith completed in January 1989, which is located in The Judge Advocate General's Legal Center and School library and available at www.jagcnet.army.mil/history.nsf.

6. Smawley, *supra* note 5.

7. Smawley, *supra* note 5, at 183.

8. Oral history, Elizabeth R. Smith, Jr., Jan. 13–14, 1989, at 5 [hereinafter Oral History]; www.jagcnet.army.mil/sites/history.nsf (last visited 2 Feb. 2022).

9. *Id.* at 15.

10. *Id.* at 19. After leaving active duty, John Jay O'Connor practiced law in Arizona and Washington, D.C. He died in 2009. His wife, Associate Justice Sandra Day O'Connor, served as the first female Associate Justice of the U.S. Supreme Court from 1981 to 2009. *Sandra Day O'Connor: First Woman on the Supreme Court*, Sup. Ct. of the U.S., www.supremecourt.gov/visiting/sandradayoconnor.aspx (last visited Feb. 2, 2022).

11. Smawley, *supra* note 5, at 184.

12. Oral history, *supra* note 8, at 14.

13. *High Court Admits WAC to Practice*, Sunday Star, Jan. 17, 1962.

14. Letter from Major General George Hickman to First Lieutenant Elizabeth Smith, WAC, Women's Army Corps School, June 10, 1957 (emphasis added).

15. Oral history, *supra* note 8, at 31.

16. Oral history, *supra* note 8, at 31

17. Smawley, *supra* note 5, at 187.

18. Oral history, *supra* note 8, at 31.

19. Oral history, *supra* note 8, at 42–45.

20. Smawley, *supra* note 5, at 187.

21. Smawley, *supra* note 5, at 190. Smith was the first female lawyer on The Judge Advocate General's School, U.S. Army's (TJAGSA) staff; the first female lawyer on TJAGSA's faculty was Major Captain Nancy Hunter. For more on Hunter, see Fred L. Borch III, *Lieutenant Colonel Nancy A. Hunter's Career of "Firsts,"* Army Law., no. 5, 2021, at 21.

22. U.S. Dep't of Army, Form 67-5, Officer Efficiency Report, Elizabeth R. Smith, Jr., 1 June 1962 to 31 March 1963, Block 16.

23. Smawley, *supra* note 5, at 191.

24. Smawley, *supra* note 5, at 191.

25. Oral history, *supra* note 8, at 65–66.

26. Recruiters and personnel manning Armed Forces Examining and Entrance Stations (AFEES) faced demonstrators who threw real and artificial blood on them and their files, and one AFEES was bombed. Smawley, *supra* note 5, at 193.

27. Oral history, *supra* note 8, at 79; Coleman, *supra* note 4.

28. Oral history, *supra* note 8, at 94–101.

29. Oral history, *supra* note 8, at 119.

30. Oral history, *supra* note 8, at 120.

A Romanian Special Forces Soldier fires an AT4 rocket launcher simulator at enemy tanks while a U.S. Air Force JTAC calls in their location during Combined Resolve 15 at Hohenfels training area on February 26, 2021. Joint Terminal Attack Controllers (JTAC) play a key role in providing a link between air assets and personnel on the ground. (U.S Army photo by Sgt Patrik Orcutt)

## Practice Notes

# Building National Security Law Readiness Through Combat Training Center Rotations

*By Major Timothy A. Davis & Major Jason D. Young*

*In no profession are the penalties for employing untrained personnel so appalling or irrevocable as in the military.*[1]

Readiness is what makes the Army a credible deterrent to war and a capable force to fight war.[2] To fight and win, the Army must conduct tough, realistic training for the truly unknown: the time, place, and adversary in the next fight. Constant attention, effort, and dedication to readiness are all required to consistently improve. One critical part of the Army's preparation to win in a complex world is the crucible of collective training events at the combat training centers (CTCs).[3] For judge advocates (JAs) and paralegals in peacetime, there is no better way to build and maintain national security law readiness and proficiency in the austere

Observer-Coach/Trainers HMMWVs stage before heading into the Fort Irwin training area during a decisive action training rotation. (Credit: Operations Group, National Training Center, U.S. Army)

practice of law than a CTC rotation. This article provides an overview of the mission and composition of the Army's CTCs, how the CTCs contribute to the Judge Advocate General's (JAG) Corps mission, and how a brigade legal section (BLS) and offices of the staff judge advocate (OSJA) prepare to ensure they gain maximum training value from a rotation.

## The CTCs: Mission and Composition

The Army charges CTCs with providing "realistic joint and combined arms training, according to Army and joint doctrine, approximating actual combat."[4] There are four CTCs: the Mission Command Training Program (MCTP) at Fort Leavenworth, Kansas; the Joint Multinational Readiness Center (JMRC) at Hohenfels, Germany; the Joint Readiness Training Center (JRTC) at Fort Polk, Louisiana; and the National Training Center (NTC) at Fort Irwin, California.[5] This article focuses on JMRC, JRTC, and NTC, collectively known as the maneuver combat training centers.[6]

The JMRC is forward deployed in Germany and focuses primarily on U.S. Army Europe and Africa brigade combat teams (BCTs), while also providing events for North Atlantic Treaty Organization response forces, regionally-aligned forces, and other rotational forces.[7] The JRTC and NTC primarily focus on achieving decisive action proficiency for the Army's BCTs.[8] Typically, JRTC receives airborne and light infantry BCTs, while the NTC receives primarily armored BCTs and Stryker BCTs.

Training at JRTC and NTC focuses on force-on-force and live-fire training for the Army's BCTs with a professional opposition force (OPFOR) and experienced operations group observer coach/trainers (OC/Ts) to provide unbiased observations and feedback.[9] Each training center can resource up to ten rotations a year.[10] Training is tough, realistic, and combat-like across a wide range of tactical operations to help a BCT achieve decisive action proficiency.[11] In addition to the seven organic battalions of a BCT, there is always a combat sustainment support battalion and a combat aviation battalion, with occasional involvement from chemical battalions, multiple launch rocket system (MLRS) battalions, and other battalions. Also, JRTC and NTC execute rotations focused on BCT preparation for global force management allocation plan, with rotations geared specifically towards a geographic combatant commander's needs. At times, the training centers travel to distributed locations to observe, coach, and train in a particular area of operations.[12] Additionally, security force assistance brigades, special operations forces (SOF), and other unique organizations conduct rotations tailored to their missions.[13] Frequently, multinational forces participate in rotations, providing an excellent opportunity to build interoperability with partners.[14] In support of the rotation, legal OC/Ts provide detached observation, candid feedback, and necessary coaching and training to the BLS, with an ability for easy, candid discussion between peers that can be more difficult in a rater/senior rater/rated Soldier relationship.

For the Army, the CTCs remain "the cornerstone of an integrated strategy that builds trained and proficient, combat-ready units and leaders to conduct operations as part of the joint force-ready to *win* in a complex world."[15] In short, the CTCs prepare BCTs for large-scale combat operations (LSCO) and for any regionally-aligned missions needed by geographic combatant commanders. The CTCs provide a "crucible experience for units and leaders training in a complex and highly realistic decisive action training environment (DATE) designed to replicate combat by stressing every warfighting function with operations against tough, freethinking, realistic, hybrid threats under the most difficult conditions possible."[16]

The CTCs focus on increasing the pace of the Army's transition to unified land operations by challenging units and leaders to adapt to battlefield conditions, and by enhancing lethality and our ability to operate with our unified action partners and SOF across the range of military operations.[17] Centrally, the CTCs focus on LSCO, at the right edge of the range of military operations.[18] The CTCs prepare JAs and paralegals, as part of a BLS and BCT, to deploy worldwide, fight with confidence, and win against any adversary, anytime, under any conditions.

## How the CTCs Advance the JAG Corps Mission

The CTCs advance the JAG Corps mission by providing tough, realistic, doctrinally-based training to build national security law readiness, help the JAG Corps and the Army learn what role Judge Advocate Legal Services (JALS) personnel play in LSCO, and allow JAs and paralegals to learn how to practice law in an austere environment.

As the Army shifts from twenty years of counterinsurgency (COIN) back to a focus on LSCO, the CTCs provide JALS personnel the opportunity to build and sustain national security law readiness for a type of conflict not seen in years. With deployment opportunities dwindling, there are fewer opportunities for building national security law readiness. Moreover, while valuable, these recent deployments do not necessarily build national security law readiness for LSCO or for multi-domain operations (MDO).[19] Combat training center rotations mimic a near-peer threat, with a living, thinking OPFOR and an array of capabilities the Army has not faced in years. For example, the OPFOR contests air and frequently jams mission command systems, cyberattacks systems, and employs long-range precision fires and chemical weapons, presenting a real threat to command posts requiring frequent survivability moves and more robust protection planning.

In addition to building NSL readiness, the CTCs provide a testing ground for the JAG Corps to re-learn how it provides legal services during LSCO. While the Army most certainly provided legal services in LSCO during the Cold War and prior to recent COIN operations, the battlefield has significantly changed in the intervening years, as adversaries such as China have rapidly advanced their capabilities.[20] And while there are lessons to learn from how the JAG Corps provided legal services in LSCO in the past, the shift to LSCO will require practitioners to continuously build and maintain competence in key areas.[21] There are attempts, such as the recent and upcoming Defender exercises,[22] to rebuild this capability, because there are few current practitioners in the JAG Corps who experienced an old REFORGER exercise.[23] A DATE rotation at a training center provides tough, realistic training, which allows JAs and paralegals with critical repetitions with the pace, tempo, and stressors to mimic combat. Additionally, CTC rotations provide the most realistic repetition of defending MDO that Soldiers will receive, with active cyber and electromagnetic activities, long-range precision fires, chemical weapons attacks, contested air, and the enemy combining arms in a way that only a peer or near-peer threat can muster. Additionally, multinational partners with a BCT provide an opportunity for multinational attorneys to integrate into a BLS, providing U.S. JAs and paralegals an opportunity to practice interoperability prior to working together in combat.

Likewise, most commanders and staff have no experience fighting in anything but COIN.[24] Their perspective of the JAG Corps is shaped entirely around the garrison legal mission and legal services provided in COIN, with prescriptive tactical directives and rules of engagement (ROE) and little strategic appetite for civilian casualties.[25] Not all, but some commanders and staff question what role JAs play in LSCO, arising out of a misguided view that JAs are only necessary in COIN for a recitation of prescriptive tactical directives and ROE. Their view of LSCO is that the "gloves are off" and that JAs will be less necessary than before.[26] By our presence and contributions at CTC rotations, the JAG Corps can help teach and train our commanders and staff about the vital role of JAs in LSCO in preparing tactical formations to have a level of decision-making responsibility often held at the general officer level in COIN. Tactical commanders' ability to assess risk and create a risk-mitigation structure with fires at the BCT level has atrophied due to COIN ROE and prescriptive tactical directives.[27] While commanders routinely assess and either accept or reject risk, they have extraordinarily little experience in doing so with a LSCO ROE.[28] To fully educate them and get repetitions, a BLS needs to come fully staffed, with support from a home-station OSJA if required.

Failing to fully staff a CTC rotation with legal personnel sends an implicit message that providing legal services in LSCO is not as important as our home-station mission, undercutting an effort to show the importance of legal personnel regardless of the type of conflict. In addition to preparing JAs and paralegals for advising in LSCO, CTC rotations afford the JAG Corps an opportunity to be robustly involved in CTC rotations to help educate commanders and their staff about the significant role JAs play in LSCO. It is difficult for the JAG Corps to argue it plays a key role in LSCO if OSJAs do not send a full complement of JAs and paralegals to the key training requirement for LSCO.[29] Presence is the single biggest indicator that a staff section or warfighting function plays a significant role. Routinely, sections that do not send a full complement of personnel are marginalized during rotations to the training center.[30]

The CTCs also provide a unique opportunity for JAs and paralegals to learn and refine how to practice law and leadership in an austere environment. An austere environment and tough, realistic training provide a crucible experience where leaders can experience how they and their subordinates react when sleep-deprived, hungry, hot, or cold, and mentally and physical exhausted in a way that is impossible to replicate at home station. A CTC rotation also provides infrequently experienced challenges that arise from a peer adversary, such as unreliable communications, a crushing pace of battle, and a capable enemy with long-range fires requiring frequent command post survivability moves. The rotation also presents an opportunity to conduct legal operations in a distributed manner, with paralegals supporting battalions and even companies at times, much like those that may be necessary in LSCO.[31]

Additionally, JALS personnel are accustomed to constant digital connectivity with technical chains and ready access to the internet.[32] In a degraded information environment due to jamming, lack of power, cyberattack, or other enemy means, JALS personnel will learn the importance of planning for such situations. They learn to manage network erosion through robust Primary, Alternate, Contingency, and Emergency (PACE) communication plans, built-in redundancy, and clear mission command with subordinate personnel.[33] Further, the importance of analog fighting products to build shared understanding across the BLS becomes critical with digital communications and survivability issues. CTC rotations also offer a rare opportunity to attempt a distributed legal section, with the majority of BLS running a consolidated legal office at home station. Only by experiencing these challenges can JAs and paralegals learn how to mitigate risk, provide legal services in a degraded environment, and adapt and overcome a variety of challenges.

## Preparing for a CTC Rotation

CTCs offer a realistic and austere training environment for BLS to prepare and practice for the rigors of combat. Even practice requires preparation. Unfortunately, the BLS is normally all-consumed with higher priority command discipline issues and, as a result, they delay preparation for the CTC until the last moments before departure. The difference between BLS offices that prepare and those that do not is obvious, but BLS and OSJAs can do a couple of things to posture for success: 1) set the dial on risk tolerance and LOAC compliance in the targeting process; 2) advocate for physical space and staffing; and 3) develop training objectives aligned with the BLS state of readiness, OSJA guidance, and any follow-on mission with redundant and analog fighting products to ensure readiness for an austere environment.

### *Targeting Process*

The brigade judge advocate (BJA) should help the commander dial in the right amount of risk in the targeting process while ensuring compliance with the LOAC. In general, the fires warfighting function is accustomed to formulaic ROE with clearly delineated target engagement authorities (TEAs) based on collateral damage estimates (CDE). In LSCO, and at the CTCs, this formulaic process is not effective in a dynamic, high-intensity fight. Based on this, the CTC legal OC/Ts discourage using CDE as a control measure to delineate TEAs. Instead, the OC/Ts coach the rotational training unit to use CDE as a tool that "informs the commander's application of the law of war principle of proportionality to assess the risk to mission and strategic risk due to collateral damage."[34] Without the luxury of time and a formulaic targeting ROE, brigades struggle to implement a process that identifies targets and employs fires dynamically when civilian casualties are anticipated.

After twenty years of COIN, the targeting officer (TARGO), the field artillery intelligence officer (FAIO), the fire support officer (FSO), the fire support coordinator (FSCOORD), and the brigade commander all have experiences conducting the targeting process, but those experiences formed in different operations with more time, more sensor fidelity, and more precise munitions. Due to the formulaic process and experiences, a BJA is likely to encounter misunderstandings on the law, risk-aversion, and an imbalance towards sacrificing combat power to protect civilians. This imbalance may lead to an inability to accomplish the mission.

A way to restore balance to the force is for the BJA to host, or actively participate in, a pre-rotation fires conference or round-table discussion. The BJA must provide more than a basic understanding of identification and proportionality to the team. In other words, one cannot simply define the terms and consider the team trained. The BJA must walk through scenarios on sensor fidelity, cross-cueing assets, and target value relative to anticipated civilian casualties. Consider the following questions: What level of fidelity do ground moving target indicators (GMTI) provide? What is a lob, a cut, or a fix for target identification? How can we use counterfire radar and GMTI together? How will we value the assets on the high payoff target list relative to the anticipated civilian loss? How does the evaluation change from the defense to the offense? How and when should we conduct preparatory fires into a populated area to ensure our maneuver battalions preserve combat power for follow-on operations? These questions discussed openly in a large forum with the brigade commander's input will help the staff understand the brigade commander's risk tolerance in targeting and allow those with delegated engagement approval authority to understand and implement the commander's targeting philosophy. Moreover, this gives the BJA an opportunity to lawfully shift the targeting dial from COIN to LSCO before arrival at a CTC.

### *Manning and Physical Space*

The BJA and the noncommissioned officer in charge (NCOIC) should sit down at least 180 days prior to the start of their rotation to discuss staffing for the CTC. They need to identify who will participate and who will remain in the rear to keep the wheels of justice grinding. Once needs are identified, the BJA and NCOIC should request additional legal personnel from the division or from outside organizations. When a unit shows up to a CTC rotation with less than the authorized number of legal personnel, an OSJA leaves a valuable training slot vacant and opportunity to build the bench of proficient national security law practitioners and paralegals.

The physical location of JAs and paralegals is equally important. First, the most successful units conduct decentralized operations with paralegals serving in their battalion operations centers as radio or joint battle command-platform (JBC-P) operators.[35] The goal is to make the paralegal value-added to operations, so they have access to information and an ability to identify issues for the BJA, who remains physically near the commander. This may require networking with the battalion operations sergeant major and a willingness to support paralegal's participation in unit home-station training exercises to develop those skills.

In addition to the paralegals, the BJA should articulate their role in operations to avoid fighting from the administration and logistics center (ALOC).[36] The most successful units networked with the operations noncommissioned officers to ensure the standard operating procedures physically located JAs and paralegals in the best locations to maintain situational awareness and influence decisions. These locations span physical space in the main command post (MCP), the tactical command post (TAC), and the ALOC. A seat in the MCP is especially critical as an opportunity to ensure proportionality and distinction are appropriately understood in a LSCO context.

### *Training Objectives and Fighting Products*

To properly focus during a CTC rotation, a BLS, in conjunction with the parent OSJA, must develop training objectives towards which to strive. Meeting these training objectives should support a measure of building—organizational readiness. The JAG Corps training objectives support multiple legal functions and multiple warfighting functions, so it is critical that mission-essential task list (METL) tasks are carefully examined to properly refine a BLS's focus.[37] Each BLS will primarily derive training objectives from their home-station training plan and the METL, as listed in Field Manual 1-04.[38] Necessarily, these METL tasks

must nest with the parent OSJA's training plan and METL. Ideally, a BLS incorporated training objectives into home station collective training events conducted prior to the CTC rotation to familiarize themselves with and refine the objectives. Further, OSJA training plans should contemplate BLS training objectives to build readiness in support of collective training objectives.[39]

Achieving properly focused training objectives presents a challenge even in ideal conditions. In an austere environment, meeting training objectives proves even more challenging due to difficulty in tracking progress and building shared understanding in a degraded environment. To properly focus on, track, and achieve training objectives in an austere environment, a BLS must develop and test redundant analogue fighting products (e.g., a legal running estimate, authorities matrix, investigations tracker) that can survive degraded communications, frequent survivability moves, and legal personnel at multiple nodes (e.g., an MCP or mobile command group (MCG)). Testing such systems for the first time at a CTC rotation will likely fail. Failing to have such systems at all creates little to no shared understanding across legal nodes, an inability to track organization progress and readiness, and makes it difficult or impossible to achieve objectives across legal and warfighting functions. Properly developing and testing such products is a predicate to success in an austere environment.

## Conclusion

A CTC rotation offers a BLS and the JAG Corps a peerless opportunity for tough, realistic training. As the JAG Corps and Army re-orient towards LSCO, the rotation provides a valuable testing ground for building national security law proficiency and readiness under significant stress, demonstrating to the rest of the Army the vital role that the JAG Corps plays in LSCO. It also hones the skill of practicing law under austere conditions to stress the BLS's ability to provide legal services without the luxury of a static base, significant continuity, and continuous communications. Yet, a BLS and OSJA will reap only a benefit commensurate with the amount of emphasis, preparation, and staffing invested. This article provides a starting point for the planning and analysis necessary for BLS and OSJAs to appropriately prepare, with necessary bottom-up refinement to come for the distinct missions of each team. **TAL**

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*MAJ Davis is the senior judge advocate observer coach/trainer (OC/T) at the National Training Center at Fort Irwin, California.*

*MAJ Young is the senior judge advocate OC/T at the Joint Multinational Readiness Center in Hohenfels, Germany.*

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## Notes

1. Jim Greer, *Training: The Foundation for Success in Combat*, Heritage Found. (Oct. 4, 2018), https://www.heritage.org/military-strength-topical-essays/2019-essays/training-the-foundation-success-combat (quoting Douglas MacArthur).

2. U.S. Dep't of Army, Doctrine Pub. 1, The Army para. 1-1 (31 July 2019).

3. U.S. Dep't of Army, Reg. 350-50, Combat Training Center Program para. 1-5a (2 May 2018) [hereinafter AR 350-50].

4. *Id.* para. 1-5c.

5. *Id.* para. 1-5e.

6. The Mission Command Training Program (MCTP) at Fort Leavenworth, Kansas is the primary combat training center for command training, with a focus on sustainment process, mission preparation progression, and other Army requirements. It trains divisions, corps, and other units such as Army service component commands.

7. AR 350-50, *supra* note 3, para. 1-5e.

8. AR 350-50, *supra* note 3, para. 1-5e.

9. This candid feedback has been provided consistently since the first judge advocate OC/T was assigned to the NTC. *See CLAMO Report: The Shifting Sands at NTC*, Army Law., Mar. 1998, at 46.

10. AR 350-50, *supra* note 3, para. 1-5c.

11. AR 350-50, *supra* note 3, para. 1-5c.

12. In 2021, the Joint Readiness Training Center (JRTC) traveled to Hawaii to do a decisive action rotation with a brigade combat team (BCT) from 25th Infantry Division.

13. AR 350-50, *supra* note 3, para. 1-5j. In February 2022, the 3d Security Force Assistance Brigade (SFAB) and 2d Brigade Combat Team, 1st Infantry Division (2/1 ID) both came to the National Training Center (NTC), with 2/1 ID replicating an Atropian BCT and 3d SFAB charged with advising and assisting a "partner force."

14. In the last year, NTC and JRTC have had multinational forces from a multitude of countries from every geographic combatant command's area of responsibility.

15. AR 350-50, *supra* note 3, para. 1-5a.

16. AR 350-50, *supra* note 3, para. 1-5a.

17. AR 350-50, *supra* note 3, para. 1-5.

18. *See* Joint Chiefs of Staff, Joint Pub. 3-0, Joint Operations, at V-4 (17 Jan. 2017) (C1, 22 Oct. 2018). The range of military operations extends from military engagement, security cooperation, and deterrence on the left edge; crisis response and limited contingency operations in the middle; and large-scale combat operations on the right edge of operations.

19. Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* Mil. L. Rev., Apr-May 2021, at 6, 17.

20. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 2-1 (8 June 2020) [hereinafter FM 1-04].

21. *Id.* para. 2-2.

22. *DEFENDER-EUROPE 20*, Supreme Headquarters Allied Powers Eur., https://shape.nato.int/defender-europe (last visited Mar. 25, 2022).

23. Andrew Feickert & Kathleen J. McInnis, Cong. Rsch. Serv., IF11407, Defender Europe 20 Military Exercise, Historical (REFORGER) Exercises, and U.S. Posture in Europe (2020). The REFORGER exercises brought two full brigades to Europe each year to augment a forward-deployed brigade. The two U.S.-based brigades would travel to Europe, link up with the forward-deployed brigade, draw prepositioned stock, and conduct a field training exercise. This exercise intended to maintain a U.S. capability to rapidly deploy combat power to Europe and to deter the Soviet Union.

24. Pede & Hayden, *supra* note 18, at 17.

25. Pede & Hayden, *supra* note 18, at 16.

26. This assertion is based on MAJ Davis's recent professional experiences as the Senior Observer-Coach/Trainer at the National Training Center from 1 July 2021 to 1-August 2022 and MAJ Young's recent professional experiences as the Senior Observer Coach/Trainer at the Joint Multinational Readiness Center from 1 July 2021 to 1 August 2022 [hereinafter Professional Experiences].

27. Pede & Hayden, *supra* note 18, at 17.

28. Pede & Hayden, *supra* note 18, at 17.

29. Professional Experiences, *supra* note 26.

30. Professional Experiences, *supra* note 26.

31. FM 1-04, *supra* note 20, para. 3-43.

32. FM 1-04, *supra* note 20, para. 3-41.

33. FM 1-04, *supra* note 20, para. 3-41.

34. Joint Chiefs of Staff, Joint Pub. 3-60, Joint Targeting, at II-20 (28 Sept. 2018).

35. *See* Major William A. Obringer, *The Distributed Brigade Legal Section: A Concept of Legal Support for a Brigade Combat Team in High Intensity Conflict*, Operational L.Q., Apr. 11, 2019, at 5.

36. *See* Lieutenant Colonel Christopher M. Ford, *Operational Law in Practice: Observations from the Mission Command Training Program*, Army Law., Dec. 2016, at 5, 8.

37. FM 1-04, *supra* note 20, app. C-2.

38. FM 1-04, *supra* note 20, app. C-2.

39. FM 1-04, *supra* note 20, app. C-2.

(Credit: aapsky – stock.adobe.com)

## Practice Notes

# No Legal Objection, Per Se

*By Eric M. Liddick*

The commander turns to me. "Any issues, Eric?"

I am the legal advisor to a special operations task force conducting counter-terrorism operations. Our mission: locate and capture—or kill—terrorists.

My "morning," like so many others, began a few hours earlier, but that means little when day blurs into night, night into day. I had removed my boots and lain down in my uniform on my well-worn twin-sized mattress shortly before the last of our teams began their return to base at about 3 a.m.

The pager, habitually positioned on a ledge near my head, buzzed obnoxiously around 5 a.m., jolting me awake, spiking my heart rate. I reached for it, desperate to reclaim the silence, before swinging my legs off the bed and exhaling an audible groan.

Sleepwalking and squinting, I made my way down the hall to the joint operations center to answer the page. A flurry of activity had replaced the normal quiet found in the few hours between an operation and sunrise. As the commander and operations officer intently focused on an unfolding situation, I walked over to the chief of operations. With a quiet and solemn voice, he broke the news: We just lost one of our men.

With a start, the fog lifted. My brain revved from zero to 60, rifling through battle drills and searching for potential legal issues.

Knowing this tragedy could beget more, I sent a runner to wake my deputy and paralegal. When they arrived, I explained the situation and assigned tasks, reminding them that, though we all justifiably felt anger, we needed to be the ones who remained unemotional. I tried to exude confidence and certainty, but my face, I fear, betrayed insecurity and anxiety.

Now, roughly four hours after that obnoxious buzz, I find myself staring at an oversized screen. On it, I observe three congregating individuals, two on bicycles, one who appears young—perhaps a boy, but I can't be sure—and I, as the legal advisor, am being asked by the commander whether he may legally kill these three humans. I am the judge—he the jury and executioner.

This is a story about how a lawyer's professional responsibilities, when tossed into the pressure cooker of combat, can produce unpalatable consequences; a story about the reaches of war and post-traumatic stress and moral injury on its less obvious participants; and how the hidden costs of war may be more expansive than we realize.

The reports began surfacing almost a decade into the "Global War on Terror": drone pilots operating from within the safety of the United States were beginning to show signs of post-traumatic stress.

I remember balking, laughing even. How could a drone pilot who worked in an air-conditioned box in Nevada or wherever, a pilot who worked eight or ten or twelve hours before returning home for dinner, a pilot who faced no real physical danger suffer from post-traumatic stress or moral injury? *Absurd*, I thought.

Now, almost two decades into that same war and confronting my own grief, I ask: How could I be so scornful, so wrong, so quick to judge?

Much has been written about the invisible wounds of combat, injuries suffered by, among others, infantry soldiers,[1] medics,[2] drone pilots,[3] interrogators,[4] special operations forces,[5] and even journalists.[6] Their wounds seem easy to comprehend, with their proximity to the action or direct causal link between the push of a button and manufactured death. But no one speaks about the potential for these wounds to affect others,[7] like judge advocates, who find themselves far removed from the physical danger or the direct causal link. Yet, I feel these wounds[8] within me.

Sure, I was geographically closer to the action, but, psychologically, I remained nearer to Nevada and those drone pilots. I faced little danger beyond sporadic, and ineffective, mortar attacks. I didn't receive or return fire, didn't experience "friendly fire," didn't fear improvised explosive devices, and, most importantly, didn't order the strikes or pull the trigger that took another human life. Instead, I was a mere cog in the machinery of death, advising in relative comfort away from the action, fueled by a steady supply of caffeine, snacks, and adrenaline, providing a cloak of legality to the decision-maker's choice to approve a strike, to pull a trigger—to kill.

Even so, every cog contains some *thing*. And this something has changed since I returned home. I am different, and the difference is the weight of the guilt I feel. But it is not only the moral weight of how even legal advice kills, but also the burden of feeling guilty for feeling guilty. Post-traumatic stress and moral injury are reserved for those warriors who have stared down the barrel at another human and pulled the trigger, not some lawyer chasing frosted blueberry Pop-Tarts with hot coffee. Their suffering seems somehow legitimate, whereas mine does not.

But post-traumatic stress and moral injury—"the damage done to one's conscience or moral compass when that person perpetrates, witnesses, or fails to prevent acts that transgress one's own moral beliefs, values, or ethical codes of conduct"[9]—don't work that way. No one possesses a monopoly on suffering. Death is a universal truth without a universal response. Trauma knows no geographic limits, affects each of us uniquely, and chooses its victim at random. This is why the *Diagnostic and Statistical Manual of Mental Disorders* recognizes not only "directly experiencing" actual or threatened death or serious injury, but also "repeated or extreme exposure to details surrounding" those events, including through "electronic media" so long as the "exposure is work related," as a basis for diagnosis.[10] None of us—not even lawyers—are immune.

**Instead, I was a mere cog in the machinery of death, advising in relative comfort away from the action, fueled by a steady supply of caffeine, snacks, and adrenaline, providing a cloak of legality to the decision-maker's choice to approve a strike, to pull a trigger—to kill.**

My job was to provide legal advice to the task force on the application of international law to military operations in furtherance of our mission. I had a room off the operations center and carried a pager with a limited range everywhere. Not because of any outsized importance, but because every decision the task force made moved us linearly toward a singular end: the defeat—often synonymous with death—of those who terrorized civilians and who also wished us harm. And in this carefully orchestrated dance with death, my role was to ensure the task force operated within legal constraints every step along the way.

Every member of the team experienced the hardships associated with a special operations task force deployment. In this regard, my job was hardly unique. But it was uniquely hard. As the legal advisor, I often felt alone, isolated on what seemed like an island in shark-infested waters. While each member, including the legal advisor, contributed in some way toward accomplishing the mission, some viewed the lawyer—rightly or wrongly—with skepticism or scorn, as an obstructionist outsider. As such, my effectiveness depended on working hard to ingratiate myself, to be seen by teammates as something other than a naysayer, to identify solutions and not just problems. The organization, like all special operations task forces, was an unstoppable train, and the pressure to gain

acceptance by bowing unquestionably to its lethal mission and intense human passions could be overwhelming. No one wanted to hear "no." They wanted—demanded—that I find a way to say "yes." And so, I had to decide whether to stand on the tracks or hastily jump aboard.

At the same time, I possessed obligations to something larger. The mission of the Judge Advocate General's Corps[11] is to provide "principled counsel," defined as "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."[12] Although a part of *this* team, I owed a greater duty to protect the Army—and not any one person—by upholding my solemn oath as an officer and attorney to the Constitution and rule of law in the relentless fight against consequentialism. This required a certain amount of neutrality, dispassion, and detachment that only isolated me further.

A brilliant officer once cautioned me to provide only legal advice. In the military, we refer to this as "staying in your lane." His caution concerned less professional protectionism of discrete tasks and more the weight accorded words spilling from a lawyer's mouth. Other teammates could express concern about a particular action and the commander would feel free to disregard those concerns. But those words, when expressed by a lawyer, would suddenly become imbued with some mysterious legal aura that might cause the commander to hesitate, to not follow his intuition.

One can certainly adopt this narrow view, that a judge advocate's job is to advise on the law—nothing more, nothing less. And one would be correct, and not. Because this seemingly limited duty is, in reality, quite expansive.

Baked into "principled counsel" are the Rules of Professional Conduct for Lawyers outlined in Army Regulation 27-26.[13] These rules require resolving issues "through the exercise of sensitive professional and moral judgment" and permit advice encompassing moral considerations "relevant to the client's situation."[14]

But "principled counsel" goes further, folding back on itself to make the permissive prescriptive. The reference to "the Army Ethic" incorporates the Army Values[15]—values like honor and integrity. Honor represents a core principle in the law of armed conflict, providing a safe harbor of legitimacy to our actions in the nation's defense.

No body of law, however, can comprehensively codify all that honor demands. A lawful action represents a necessary, but not sufficient, stop on that unpaved road. So, integrity fills the potholes. It requires us to act legally *and* honorably under all circumstances, and underpins the mandate to exercise moral courage, to choose the hard right over the easy wrong without concern for personal or professional consequences.

Legal advice, then, represents more than the prescriptive rules[16] outlining right from wrong, lawful from unlawful. It also represents and embodies our nation's collective values,[17] a notion found in the murky distinction between the permissive "may" and the normative "should." "Any legal objections, Eric?" asks both. Can I take this strike, and should I take this strike? Can I kill, and should I kill? The legal advisor needs the integrity to answer both questions fully and candidly. Because the law is not devoid of morality, even when the lawyer is.

It's these unrelenting pressures—accomplishing the mission; protecting our teammates; advancing the nation's interests; providing quick and accurate legal advice; ensuring compliance with the law and respect for the rule of law; finding a legal, ethical, and moral way to utter "yes"; being seen as a team player; and exercising moral courage—influenced by innumerable variables—atmospherics, optics, personalities, and differences in rank between me and those I advised—that generated the weight seated squarely upon my, and so many other legal advisors', shoulders.

I felt these pressures greatest during strikes targeting the enemy and its objects. These strikes[18] represented the bulk of my day-to-day responsibilities. In many instances, they were dynamic, arising spontaneously and providing no real moment for deliberation or second opinions, instead requiring a rapid assessment of the known facts and a split-second application of myriad international legal principles, rules of engagement, and theater-level directives and policies.

While every decision demanded precision, few carried the opportunity for error presented by dynamic strikes. Yet, because they ultimately coalesced around life or death, these strikes offered no real margin for error. The pressure to provide advice quickly, and accurately was indescribable—the consequences grave, and irreversible. Wait too long, and teammates die. Wait too little, and a life may be taken unjustly.[19] Though my answers took seconds, the questions forever remain.

Sometimes, when the night terrors relent, I wonder whether distance from mortal danger adds gravity to one's moral responsibility. Perhaps when you are not on the ground facing existential danger, your role in taking another human life feels more attenuated. Had I been receiving fire, the decision to kill would have been, in some ways, simpler—no easier and no less serious, but simpler: kill or be killed. But stripped of that human instinct for survival, my role assumed an air of profoundly unjust omnipotence, particularly where my decisions traced forward to the unfortunate, unintended taking of innocent lives. And that—the meaningless, unnecessary loss of innocent lives—is why living still feels like purgatory.

Many reassure me. "The decisions rested with the commander," they say. "He—not the staff officers, not the machinery, and least of all, not the judge advocate—determined when and where life would be extinguished." If the air of omnipotence surrounded anyone, it surrounded him.

Rationally, I know this to be factually accurate. But factual accuracy is not the mark of moral solvency. Because we fought as a team. The commander's decisions represented the sum of all parts, the accumulation of every effort, every insight, every decision, every analysis, every action up and down the chain. We all partook in that accumulation, and its cumulative effect. We all shared in the victories, and the mistakes. And any postmortem that attempts to pin an action and its consequences on the commander alone represents little more than a self-serving slippery slope, a foolish sentiment intended to assuage the conscience

and avoid individual responsibility. I cannot wash my hands so easily.

Sure, mistakes happen—whether through oversight or impatience or recklessness. The proverbial fog of war, we're told. Yet, rationality cannot erase the truth that, sometimes, innocent lives are lost. So, I find no comfort in knowing I did my best with the information available at the time. That fiction concerns itself with legal, not moral, responsibility and, as such, cannot offer moral absolution. An action may be legal, yet unjust—a decision right, yet wrong. And no hollow platitude or legal doctrine or empty "accidents happen" can so easily console or delude the moribund soul of one who participated in an ultimately unjust act.

The pressure builds as all eyes turn toward me. We've located three individuals who we believe participated in the firefight that claimed one of our own—or were, at the very least, sympathetic to the cause—and now the entire operations center waits, wanting and willing to exact justice, to destroy the enemy. I am the sole remaining impediment to a sentence of death.

The pressure generated by the morass of seething anger, hostility, and vengeance and by the demand for quick judgment mixes with the pressure generated by the very gravity of the question being asked. And, as this volatile mixture swirls, time collapses, making the seconds feel like hours as 40 eyes glare. I'm running on autopilot, the result of too little sleep, too much caffeine. My heart races, my eyes expand ever wider, screens lining the wall flash, the air fills with an underwater cacophony of ringing phones and static punctuated by intermittent radio chatter and the murmur of disembodied voices and the click of a pocket knife repeatedly, and unnervingly, flicked open and closed, open and closed, open and closed. I can hardly think over the silent din and pounding in my ears.

I turn to the commander. I'm leery. I have no legal objections, per se. But this isn't clean-cut. And I'm uncomfortable. My intuition demands caution, patience, but no one cares about my intuition. They only want the law.

"Any issues, Eric?"

"No legal objection," I decree.

I will never know with absolute certainty whether those three congregating individuals deserved to die.[20] But I will also never unsee,[21] in forever echoing minute detail, the child who sprinted into view from an adjacent courtyard or the crowded marketplace full of children or the slender man as he cradled a child's limp and lifeless body or the frightened family as it sought cover or the woman as she lamented God's indifference. I will never know whether I could have altered fate or prevented the loss of innocent lives had I only done more, had I only spoken up, had I only insisted on something—anything—different.

This is the punishment for my crimes—an agonizing purgatory of eternal remorse and what-ifs. Befitting the job, it's a lonely place indeed. **TAL**

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*Eric Liddick is a judge advocate assigned to The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. He hopes this article reminds those suffering from trauma, whatever the source, that they are not alone, and that it encourages them to seek help from others.*

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No Legal Objection, Per Se *is a reprint of Eric Liddick's article that was published on* War on the Rocks *on 21 April 2021. It has been reprinted with permission by* War on the Rocks.

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Staff Sergeant Matthew Franks, a combat engineer assigned to 3-364th Brigade Engineer Battalion, 189th Infantry Division, prepares to disassemble a weapon during the 2022 First Army Division West Best Warrior Competition at Joint Base Lewis-McChord, Washington March 15, 2022. (Credit: Staff Sergeant Scott Evans)

## Practice Notes

# The Global Operating Model

## A Judge Advocate's Role in the Surge of War-Winning Forces

*By Lieutenant Colonel Timothy D. Litka*

*Prior to his untimely death, one of Lieutenant Colonel Litka's most recent accomplishments was the selection of the following article for publication in* The Army Lawyer (TAL). *Special condolences to the Litka family from TAL staff. He was a joy to work with, wishing only to pass his wealth of knowledge on to the next generation.*

When I received the news from the Personnel, Plans, and Training Office that I was going to First Army, Division West to be their staff judge advocate (SJA), my first thoughts were: what is First Army, and what does Division West do? I know now. Each year, Division West pushes a corps' worth of troops to commanders all over the globe, and the assigned judge advocates (JAs) have to factor in complexities not found in a typical legal office.

### A Brief Overview of First Army

First Army is America's "longest-serving numbered field army."[1] In April 1917, the standing Army numbered 133,000 troops.[2] Following

the United States' declaration of war against Germany, 400,000 members of the National Guard were ordered into federal service.[3] As a result, General John J. Pershing was appointed to lead the American Expeditionary Force (AEF) to France, and he went overseas to build it.[4] When "American troops arrived, Pershing insisted they be trained to exacting standards, by battle-seasoned Soldiers, before they could be sent to the front."[5]

Simultaneously, Brigadier General E.A. Kreger assumed duties as a JA for the AEF.[6] In May 1918, "he was assisted by one officer and two battalion sergeants major."[7] In August 1918, First Army was established.[8] By September 1918, the legal workload had increased at a steady pace and First Army's legal office "consisted of six officers and a clerical force of eight men."[9] The work continued to increase, and it became apparent that the force "on duty" was not large enough to meet the need.[10] During this time, several JAs from various divisions assisted First Army's legal efforts.[11]

After World War I, First Army was deactivated.[12] In 1933, it was reactivated at Fort Jay, New York[13]: "First Army's new mission was to command and train regular Army, Army Reserve and Army National Guard units within its assigned area . . . ."[14] It also "commanded Soldiers from the Army's three components (Active, Guard and Reserve) until the eve of [World War II], when the unit resumed a combat role."[15] In 1973, First Army's mission became one of "improving the readiness of the Reserve Components (RC), as it had between World Wars I and II."[16] Ultimately, by 1995, First Army became the "largest of the Continental Armies in terms of personnel and second-largest geographically."[17] Finally, in 2006, "First Army gained the entire continental United States in its mission of training, mobilization, deployment and demobilization of all Army National Guard and Reserve Soldiers."[18]

In 2013, First Army was designated U.S. Army Forces Command's (USFORSCOM) Coordinating Authority for the Army's Total Force Policy Implementation.[19] As of 2019, First Army (often referred to as "Task Force Deed," based on its historical motto "First in Deed") remains "a multicomponent-sourced organization of more than 8,000 active- and RC Soldiers and Department of the Army civilians," providing training support to Reserve and National Guard units.[20] It is notable that "[w]ith more than 60 percent of the Army's combat support residing in the RC, the Army Reserve and Army National Guard are vital to accomplishing the Army's multifaceted global mission."[21] The Global Operating Model of the National Defense Strategy is comprised of four layers: "contact, blunt, surge, and homeland."[22] The "surge" is the mobilization of Guard and Reserve forces to win the war. Currently, First Army, through Division West, is the third layer of the Global Operating Model, training and validating Guard and Reserve Soldiers for the "surge."

## First Army, Division West

In accordance with the Army Sustainment Readiness model, "Division West supports pre-mobilization training for reserve component forces . . . ; assesses and reports pre-mobilization readiness for reserve component forces . . . ; [and] conducts mobilization and demobilization operations . . . ."[23] Moreover, continuing in the tradition of General Pershing's demand of the AEF, "Division West conducts battle focused, tough, realistic training to provide equipped and ready Soldiers, units, and leaders for the combatant commanders."[24] This training can include training in "counter-improvised explosive device, counter insurgency, and escalation of force . . . ."[25]

Division West partners with U.S. Army Reserve and Army National Guard Leadership "to better prepare them for deployment; ensure no degradation to the unit's wartime contingency capability and fully maximize the time for RC units in theater."[26] Division West accomplishes this mission through its headquarters at Fort Hood, Texas, and its five brigades at four locations throughout the western United States: 120th Infantry Brigade and 166th Aviation Brigade at Fort Hood, Texas; 181st Infantry Brigade at Fort McCoy, Wisconsin; 189th Infantry Brigade at Joint Base Lewis-McChord, Washington; and 5th Armored Brigade at Fort Bliss, Texas.

## Unique Jurisdictional Authority for Division West

Division West gains, loses, and gains jurisdiction again over Soldiers as it validates a corps' worth of Service members each year. In Division West, members may be either on Title 10 orders; drilling in a troop program unit (TPU) status; mobilizing (moving from Title 32 to Title 10 status); or de-mobilizing (moving from Title 10 to Title 32 status). Title 10 Soldiers at First Army, Division West, are active duty Soldiers or Reserve and National Guard Soldiers under the jurisdiction of the Federal Government.[27] When the Soldier is on Title 10 orders, jurisdiction belongs to the Division's general court-martial convening authority (GCMCA) and their brigade's special court-martial convening authority (SPCMCA); for mobilizing Soldiers, this begins at their mobilization (M) date, continues up until they deploy, and then picks up again when they redeploy.[28] This is a unique aspect of jurisdiction, since most active duty brigade judge advocates deal with issues of active duty Soldiers who are in the unit until they PCS or go to confinement. Another unique aspect of jurisdiction is that the Division West JA may need to consider the possibility of concurrent jurisdiction if a brigade-sized element mobilizes. Using continuous communication with their RC counterparts, issues such as investigating misconduct, recommending GOMORs, or demobilizing Soldiers, can be worked through without causing any friction between the Active element and the Reserve or Guard unit. When Soldiers return from deployment to demobilize, jurisdiction returns to Division West until the end of their transition leave.[29] At this point, the Service members go back to either state control under Title 32, or to their reserve unit.

## Providing Support to Approximately 60,000 Soldiers

"Mobilization actions begin with the unit notification of sourcing (NOS) and continues until forces board transportation to the theater of operations."[30] First Army is responsible for USFORSCOM's rotational mobilization, training, and deployment of RC forces.[31] Occurring approximately twelve-to-eighteen months before mobilization, the Multi-Component Joint Assessment (MCJA)[32] is an assessment that "enables First Army to work with the RC to develop their unit training plans so [First Army] can do both pre- and post-mobilization and get [all

partner units] to theatre with what they need to succeed."[33] The Office of the Staff Judge Advocate (OSJA) for Division West provides a video presentation to develop the RC units that attend the MCJA. It goes over the unique aspects of jurisdiction, investigations, and the common legal issues potentially facing Guard and Reserve units. These include lessons learned by the OSJA from the previous twelve months. From 2019 to 2021, these issues were inappropriate senior-subordinate relationships, allegations of toxic work environment, and Sexual Harassment/Assault Response and Prevention Program issues.

Approximately two-to-four months prior to arriving to the Division West footprint, the brigade legal office reaches out with a checklist of possible training briefings. Once that is returned, the attorneys and paralegals work with the unit to be ready to present the training requested, in addition to the training reviewed in the MCJA video. The 120th Infantry Brigade and the 5th Armored Brigade oversee Mobilization Force Generation Installations, which[34] "are the Army installations designated to provide premobilization training and support, combat preparation, post mobilization training, and sustainment capabilities to both AC and RC units."[35] The 120th Infantry Brigade mobilizes/validates approximately 20,000 Soldiers per year, and the 5th Armored Brigade mobilizes/validates approximately 30,000 Soldiers per year.[36] As such, the brigade judge advocates (BJAs) (at these two brigades) have five-to-ten times more Service members coming through their jurisdiction than a "typical brigade."[37] The 181st Infantry Brigade works closely with the 86th Training Division to provide observer/coach trainer (OC/T) support to multiple Combat Support Training Exercises on an annual basis.[38] The 181st Infantry Brigade is tasked to support up to four Combat Support Training Exercises over approximately a four-month period during the summer, directly contributing to the training and readiness of approximately 50,000 RC Soldiers.[39] Moreover, the 189th Infantry Brigade currently partners with approximately thirty RC brigades and six units at echelons above brigade.[40] In terms of deployments, in fiscal year 2019, the 189th Combined Arms Training Brigade (CATB) assisted with 31 deployed units, totaling over 1,200 personnel from 11 states.[41] Finally, the 166th Aviation BJA assists in validating roughly 33 percent of current, combined AC and RC deploying aviation forces.[42] The Division West brigade legal offices not only provides the training mentioned above but also has the dual role of observer/coach trainer for the legal teams, validating them so that they may go forward to their area of operations.

## Extra Layers of Complexity

***Title 10 Orders***

In my time at Division West, a majority of the misconduct we advised on was generated by Guard or Reserve Service members on active duty orders. As such, for every possible investigation or court-martial, a JA at Division West first needed to find out how much time was left on the active-duty orders to make sure jurisdiction was not lost. Additionally, the alleged misconduct needed to be examined for potential jurisdictional issues, to see if any of it occurred in a Reserve or Guard status. Lastly, coordination needed to be done with the reserve unit so they were aware that their Soldier was being investigated.

***Investigations and Courts-Martial***

The typical U.S. Army division has a robust bench of lieutenant colonels and colonels on hand who, if needed, could be called upon to investigate senior officers. Division West does not have that luxury in its immediate footprint. When an organic battalion or brigade needs an investigating officer for alleged senior leader misconduct, or a mobilizing/demobilizing unit has an allegation of senior leader misconduct, Division West may need to rely on the senior active duty army advisor (typically a Division West lieutenant colonel or colonel) detailed to a state Army National Guard Joint Force Headquarters Office to come on temporary duty orders to conduct the investigation.[43] Regarding courts-martial, most divisions have a full complement of military justice practitioners supervising, advising and prosecuting cases as general crimes or sex crimes. Division West does not. Division West will field the initial allegation and conduct an investigation or coordinate with the Criminal Investigation Division. When this is complete, similar to assisting the American Expeditionary Force, today, members of various garrison offices assist Division West with our legal efforts. By permanent order, I Corps, Joint Base Lewis-McChord; Fort Leavenworth; 1st Armored Division, Fort Bliss; and III Corps, Fort Hood, assist Division West with courts-martial.[44] Therefore, the investigation and decisions begin with Division West legal personnel coordinating legal advice and staffing through our SPCMCA and GCMCA and then, if needed, the issue is worked with the respective garrison GCMCA to completion at court.

***Reserve Battalions and Supporting the Total Force Readiness Exercises***

Apart from the 166th Aviation Brigade, all other First Army brigades are organized and designated as either a Multi-Function Training Brigade (MFTB) or a Combined Arms Training Brigade(CATB).[45] MFTBs and CATBs are "multicomponent-sourced, modular and scalable organizations that provide observer coach/trainer (OC/T) support for RC pre- and post-mobilization training."[46] They also "have the capability to support combat training centers, major training exercises, and enhanced annual training."[47] These brigades increase First Army's ability to train Reserve and Guard formations which is "a necessity, since more than 76 percent of the combat support/combat service support of the Total Force resides in the reserve component."[48] But this, too, adds to the legal office's potential duties—occasionally, the BJA will have to advise on a matter that comes up from a reserve support battalion that is not on Title10 status. When this occurs, we coordinate with the appropriate reserve legal support command. Last, First Army JAs assist the U.S. Army Reserve Legal Command by providing attorneys and paralegals to assist with their Total Force Readiness Exercises (TFRX) as OC/T support or supporting as a member of the Higher, Adjacent, Lower, Supporting, Supported response cell.

## Conclusion

First Army and Division West continue the tradition of the AEF, implementing the Total Force Policy. As General Milley stated:

> We cannot conduct sustained land warfare without the Guard and the Re-

> serve . . . It is impossible for the United States of America to go to war today without bringing Main Street—without bringing Tennessee and Massachusetts and Colorado and California. We just can't do it . . . It is one Army, and we're not small—we're big. We're very capable. And we're very capable because of the reserves, we're capable because of the National Guard.[49]

Above and beyond understanding and being able to work issues in national security law, administrative law, labor law, contract and fiscal law, military justice, and ethics, the JA's role in assisting the surge of war-winning forces has nuances that most JAs do not have to factor in their planning. With each and every issue that comes up, the JA must check the Service member's orders and see how much time is left on active duty, understand if we need to bring an investigating officer on temporary duty orders, know if they are Guard or Reserve members in order to figure out who their parent unit and legal office is for coordination of actions, go through the evidence to see if the alleged misconduct occurred on Title 10 status, understand if the action should be processed with the reserve or active regulations, and know these issues well enough to also provide O/CT validation through injects for the deploying units or helping with the U.S. Army Reserve Legal Command's TFRX. All of this may seem straight forward, until you arrive to Division West and realize that the assigned manning of the OSJA is composed of ten people: the SJA, the Division noncommissioned officer-in-charge, five BJAs, and three paralegals. **TAL**

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*LTC Litka served as the staff judge advocate for First Army, Division West from 2019 to 2021. He most recently served as a senior instructor at The Command and General Staff College in Fort Leavenworth, Kansas.*

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14. *Id.*

15. *Id. See also* First Army, First in Deed, https://www.first.army.mil/History/ (last visited Aug. 22, 2022) ("First Army established an impressive record of "firsts" in World War II: **FIRST** on the beaches of Normandy; **FIRST** out of the Normandy beachhead; **FIRST** into Paris; **FIRST** to break the Siegfried Line; **FIRST** to cross the Rhine River; and **FIRST** to link up with our Soviet allies at the Elbe River.").

16. *History*, First U.S. Army (Apr. 20, 2021), https://web.archive.org/web/20210420135301/https://www.first.army.mil/content.aspx?ContentID=200 (last visited Oct. 20, 2019).

17. *Id.*

18. *Id.*

19. Headquarters, First Army, G-7/Training Newcomers Orientation, at slide 7 (Feb. 20, 2018) (unpublished PowerPoint presentation) (on file with author).

20. *Units/Tenants*, U.S. Army Garrison Rock Island Arsenal, https://home.army.mil/ria/index.php/units-tenants (last visited Apr. 5, 2022) (scroll down to section, First U.S. Army).

21. *Id.*

22. U.S. Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America 7 (2018).

23. *Mission*, First Army Div. W. (Oct. 19, 2016), https://web.archive.org/web/20161019222105/http://www.first.army.mil/divwest/content.aspx?ContentID=103.

24. *Id.*

25. *Id.*

26. *First Army Division West Mobilization & Demobilization*, First Army Div. W. (Oct. 15, 2017), https://web.archive.org/web/20171015181035/http://www.first.army.mil/divwest/content.aspx?ContentID=109.

27. 10 U.S.C. § 101(d)(1).

28. *UCMJ, in* Headquarters, U.S. Dep't of Army, Execution Order 140–17, Annex A, Mobilization Command and Support Relationships and Requirements-Based Demobilization Process appendix 2 (3 Jan. 2018) [hereinafter HQDA EXORD 140-17].

29. *Id.*

30. *Reserve Component Mobilization Operations,* U.S. Army (Mar. 25, 2014), https://www.army.mil/standto/archive_2014-03-25.

31. *Id.*

32. W. Wayne Marlow, *First Army Focuses on Helping Reserve Component Units Succeed*, U.S. Army (May 17, 2016), https://www.army.mil/article/168022/first_army_focuses_on_helping_reserve_component_units_succeed.

33. *Id.*

34. Michael E. Linick et al., A Throughput-Based Analysis of Army Active Component/Reserve Component Mix for Major Contingency Surge Operations 16–17 n.9 (2019).

35. *Id.* at 17 n.9.

36. This assertion is based on the author's recent professional experiences as the staff judge advocate for First Army, Division West from 2019 to 2021.

37. *See generally Army*, U.S. Dep't of Def., https://www.defense.gov/Experience/Military-Units/Army/#army (last visited Apr. 5, 2022).

38. *See* Off. of Chief of Army Rsrv., *Combat Support Training Exercise*, U.S. Army (Mar. 19, 2018), https://www.army.mil/standto/archive/2018/03/19/ [hereinafter *Training Exercise*]; *Fort McCoy, Wisconsin*, U.S. Army Rsrv., https://www.usar.army.mil/Commands/US-Army-Reserve-Command/Fort-McCoy-Main/#:~:text=Each%20year%2C%20Fort%20McCoy%20provides,Red%20Dragon%20and%20Global%20Medic (last visited Apr. 5, 2022) [hereinafter *Fort McCoy*].

39. *See Training Exercise, supra* note 38; *Fort McCoy, supra* note 38.

40. *189th Combine Arms Training Brigade (CATB)*, First Army Div. W. (Oct. 11, 2020), https://web.archive.org/web/20201011204153/https://www.first.army.mil/divwest/content.aspx?ContentID=189.

41. *Id.*

42. Interview by Major Galen Flannery with Colonel Ron Ells, Commander, 166th Aviation Brigade, in Fort Hood, Tex. (Nov. 7, 2019).

43. National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315 (as modified by the National Defense Authorization Acts for Fiscal Years 1994, 1996, and 2005). *ATFP and Senior Army Advisor, Army National Guard (SRAAG) Duties and Certification*, U.S. Army (Dec. 3, 2014), https://www.army.mil/standto/archive_2014-12-03.

44. HQDA EXORD 140-17, *supra* note 28.

45. *Combined Arms and Multifunctional Training Brigades*, U.S. Army (Apr. 14, 2015), https://www.army.mil/standto/2015-04-14.

46. *Id.*

47. *Id.*

48. *Id.*

49. Ellen M. Pint et al., Review of Army Total Force Policy Implementation 9 (2017) (quoting General Mark Milley in Sergeant First Class Jim Greenhill, *General Milley: "There Is Only One Army,"* U.S. Army (Sept. 22, 2015), https://www.army.mil/article/155850/general_milley_there_is_only_one_army).

# In Memoriam

## Timothy D. Litka (1971-2022)

*By Fred L. Borch*

**Lieutenant Colonel Timothy David Litka died on 19 November 2022.** He was fifty-one years old and, at the time of his death, was serving as the legal advisor to the director and senior legal instructor, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas.

Born in Ohio on 4 January 1971, Tim Litka attended the University of Akron, from which he earned a degree in psychology in 1994. Four years later, he earned his juris doctor from the University of Toledo College of Law.

Immediately after passing the Ohio bar examination, Tim served as a public defender in Stark County, Ohio. Deciding that he wanted to use his law degree for a different kind of public service, Litka applied for a commission in the JAG Corps. He was directly commissioned as a first lieutenant in 2000. After completing the Judge Advocate Officer Basic Course, Tim served at Fort Hood as a legal assistance officer with the 4th Infantry Division before joining the Trial Defense Service at Fort Hood in 2001.

In 2003, then-Captain Litka received an assignment to the Washington, D.C. area, where he had tours at the U.S. Army Legal Services Agency with the Government Appellate Division and the Office of the Judge Advocate General, Criminal Law Division.

In 2006, Tim Litka left active duty, was admitted to the District of Columbia bar, and started his own law firm—Office of Timothy Litka, LLC—in Washington, D.C. He continued his service as an Army reserve lawyer, including tours at the Defense Appellate Division and Defense Counsel Assistance Program. In 2010, he decided to return to active duty and was reassessed into the Active Component.

In 2011, then-Major Litka deployed to Iraq for six months as a brigade judge advocate, 4th Infantry Brigade Combat Team, 3d Infantry Division, before being assigned to Fort Gordon, Georgia, with duty as the command judge advocate, 7th Signal Command. After completing the Judge Advocate Graduate Course in 2012, Major Litka received an assignment to U.S. Army, Japan. He served as the deputy staff judge advocate at Camp Zama until 2014, when he left to be the legal advisor, Marshall Center, Garmisch, Germany.

After a second deployment to Iraq as the legal advisor to the chief, Office of Security Cooperation-Iraq, Lieutenant Colonel Litka became the staff judge advocate, First U.S. Army, Division West, located at Fort Hood, Texas. He left that position in 2021 for Fort Leavenworth, Kansas.

Lieutenant Colonel Litka was extraordinarily proud of his years as a judge advocate in the Active and Reserve Components. He relished his time with his family, his friends, and his community. During his twenty-two years of selfless service, Tim always took time to plan adventures so that his family had unforgettable memories.

Tim Litka's military awards reflect his exemplary service. They include: the Defense Meritorious Service medal with two oak leaf clusters, the Meritorious Service Medal with five oak leaf clusters, the Army Commendation Medal with two oak leaf clusters, and the Army Achievement Medal.Tim Litka is survived by his wife of fifteen years, Amy Fernandez Litka, and his daughter, Ava Litka. His mother, Eleanor Ruth Litka, two sisters, and one brother also survive him, along with ten nieces and nephews.

Lieutenant Colonel Litka was interred in the Fort Leavenworth National Cemetery on 26 November 2022.[1] **TAL**

*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.*

### Notes

1. *Notice of Passing—Lieutenant Colonel Timothy David Litka*, JAGCNet (Nov. 23, 2022), https://www.jagcnet.army.mil/Sites/JAGC.nsf/homeContent.xsp?open&doctype=event&documentId=6BF5D84E7D5F47AD8525890300682FEE; Officer Record Brief for Lieutenant Colonel Timothy D. Litka (Nov. 28, 2022) (on file with author).

U.S. Army Southern European Task Force, Africa's operational law attorney Captain Alexa M. Andaya stands with Navy judge advocates during the Navy's Large Scale Exercise in the Mediterranean Sea. (Credit: Major Cain Claxton)

## Practice Notes

# Judge Advocates and Joint Work

## The Importance of Being "Joint"

*By Captain Alexa M. Andaya*

"Jointness" is a priority for the highest levels of U.S. political and military leadership. "Joint Force" appears twenty-nine times in the *Summary of the 2018 National Defense Strategy*—a document that never even names the separate services.[1] Senior leaders rightly focus on the integration of efforts across the Department of Defense (DoD) and beyond. They need to consider the full range of the Nation's political and security needs, and they need the full range of the Government's tools.

Generally, at the Soldier level, judge advocates (JAs) focus far less on jointness than do their top leaders. Yet, by working on jointness, JAs support their leadership's vision of integrating efforts across DoD components and improve at their own specific tasks. As Soldiers and as lawyers, JAs need to understand how "to operate successfully together," collaborating with other components and agencies as one "joint team."[2]

### Preparation, Preparation, Preparation

Jointness was far from my mind when I entered the Army Judge Advocate General's Corps. As a direct commissionee with no prior military experience, I busied myself trying to stumble through a single branch of service. One week after completing the Officer Basic Course (OBC) in May 2021, I moved to Vicenza, Italy, to start work as an operational law attorney for U.S. Army Southern European Task Force, Africa (SETAF-AF). In the midst of deciphering numbers (33 for Current Operations; 35 for Future Operations) and more acronyms (OPT, WG, IPR: various terms for "meeting," it seemed), I received an eyebrow-raising assignment from my staff judge advocate (SJA): participate in the Navy's Large Scale Exercise 2021 (LSE 21) as part of a JA team aboard the USS *Mount Whitney*.[3]

The LSE 21 scenario centered on fictional tensions rising in the Atlantic and Pacific Oceans, culminating in simultaneous crises

and forcing the United States to coordinate a response to threats across the globe. The exercise tested, among other objectives, the Navy's concept of Distributed Maritime Operations (DMO): an evolving fleet-level approach that relies on fleet commanders' abilities to assess the "big picture" across different campaigns.[4] In response to increased mission requirements without a corresponding increase in resources, DMO prioritizes "the precise delivering of only the exact right force to the exact right place at the exact right time,"[5] allowing individual assets to move as needed rather than adhering rigidly to the Navy's traditional Carrier Strike Group (CSG) structure. Thus, LSE 21 emphasized seamless communication and integration of efforts up the chain of command as well as across commands to assess the vulnerability posed by existing vertical and horizontal gaps.

staff, including key exercise players such as the Maritime Operations Center Director (MOC-D), and I began to familiarize myself with another service's idiosyncrasies. I learned the various ways in which the Navy JAG Corps differs markedly from the Army JAG Corps—for example, in organizational structure, career progression, and the "staff judge advocate" position, which, in the Navy, refers to an O-3 legal advisor assigned to a command rather than an O-6 leader of a legal office.

Every moment of this pre-exercise preparation was key because suddenly, two months after OBC, I was aboard the USS *Mount Whitney* working with five Navy JAs. I was the only Soldier on the ship and a source of great confusion to everyone, including myself; I had also just pinned captain, which means something very different to Navy personnel.

**I was aboard the USS Mount Whitney working with five Navy JAs. I was the only Soldier on the ship and a source of great confusion to everyone, including myself; I had also just pinned captain, which means something very different to Navy personnel.**

The preparation assigned for LSE 21's JAs included plenty of advance reading material, including *The Commander's Handbook on the Law of Naval Operations* as well as excerpts from *Joint Publication 1: Doctrine for the Armed Forces of the United States* and *Joint Publication 3-32: Joint Maritime Operations*.[6] In addition to those foundational documents were materials specific to LSE 21: the Road to Crisis, a description of the exercise scenario; and the exercise's operations order, including the rules of engagement (ROE) under which participants would initially operate.

Of course, as a new Army lawyer joining a massive Navy exercise, I needed extra orientation. About a week before the USS *Mount Whitney*'s departure for LSE 21, at my SJA's suggestion, I traveled to U.S. Sixth Fleet headquarters in Naples. There, I met the Navy JAs and other Sixth Fleet

**Exercising Operational Law: Substance, Practice, and Principles**

During the exercise, JAs worked closely with the operational staff, mainly to advise on rules of engagement. The legal team—three senior JAs and three first-term JAs—distilled the ROE into easily usable matrices so that the staff could understand their authorities at a glance. The legal team helped craft supplemental ROE requests and utilized theoretical interagency channels to get the staff what they needed to accomplish the mission. Importantly, we made ourselves visible and available by attending the same meetings and working in the same space as everyone else.

People began coming to the JAs of their own volition, asking for legal perspectives early in their planning or in response to some event. As the senior JAs told me and the other junior officers, being known, trusted, and sought out meant that we were doing our job right.

I certainly needed to hear that, as any time anyone asked me anything substantive, I felt like a fraud: I was new to the law, I was new to the Army, and I was definitely new to the Navy. I felt that I had no business advising on whether we could lawfully engage a certain type of submarine preparing to conduct a specified activity. Soon, though, I realized that that was exactly my business, and I realized that to do operational law, a JA has to just start doing operational law—like so much else, you can never fully understand it beforehand.

Alongside the other junior JAs, then, I did what Service members and lawyers do: I figured it out. As I analyzed dynamic situations and worked more closely with Fires, Intel, and everyone else, the processes started to click. Finally, amazingly, the meetings and roles at my home station—previously disjointed and abstract—made some sort of sense.

Operational law is not only substantive legal knowledge or even working across different shops. It is also working with the other branches of service. Because operations are so often joint, training that "muscle" is just as key for an operational law attorney as knowing the standing rules of engagement (SROE). During a real-world operation, prior exposure to joint work provides a necessary foundation.

That foundation includes both the "small" and "big" things that come, for example, with working with the Navy aboard a ship. "Small" things include the ship doors, ranks, and variety of uniforms. "Big" things include the legal ramifications of a ship's warning shot or the potential combatant status of a surveillance vessel. I had never thought about such matters, but my Navy counterparts viewed them with familiarity. When I analogized to what I did know—instead of a surveillance vessel, a spotter for a sniper—the sudden recognition of our different essential assumptions produced fascinating insights.

I did not think I had been in the Army long enough to form assumptions about warfighting or military priorities. Yet, when I was forced to explain something I took for granted or ask about something the Navy JAs took for granted, I saw our trained dif-

USS Mount Whitney at its homeport in Gaeta, Italy. (Photo courtesy of author)

ferences. This drill, repeated over the course of three weeks aboard the ship, illuminated the work of both services for me.

Of course, there are also constants across the services. Principled counsel, servant leadership, stewardship, and mastery of the law[7] are manifest priorities in both the Army and Navy JAG Corps, even if not discussed explicitly or with the same terms. The weight of these four constants is clearer than ever during an exercise or operation. Against the nearly tangible tension of a fluid crisis and a person with multiple stars and multiple questions, a JA—Army, Navy, or otherwise—needs to be quick, sure, and morally courageous.

Even though principled counsel and substantive mastery of the law are most prominent in such urgent moments, servant leadership and stewardship also feature—particularly during an exercise. In LSE 21, the three senior JAs flawlessly modeled the latter two attributes. They regularly pulled the junior JAs aside, collectively and individually, to ensure that we understood everything that was happening. They talked us through legal and political concepts and conundrums, both in general and as applied to the exercise. They gave us the context that we needed to comprehend how LSE 21 fit into our professional experiences and goals. Crucially, they listened to and empowered us: whether drafting orders or interpreting rules or figuring out presentations, the senior and junior JAs constituted a genuine team. This type of learning and mentorship is not service-specific, of course. Given the opportunity, a JA must be prepared to absorb such lessons as well as pass them on.

In fact, given the opportunity, a JA must be prepared in several respects so as to perform well in such an environment. For an exercise, pre-start familiarity with the Road to Crisis scenario and any available orders is critical. In general, staying up to date with the laws and topics that form the background of operations is absolutely imperative. There will be enough occasions when a JA will have to answer, "I'll get back to you on that, ma'am/sir," without also having to stumble on something fundamental like the SROE. Among the best preparatory steps is to learn what you already know you will have to know. Doing so will—again—minimize the number of things to throw a JA off, of which there will always be enough.

### Jointness in the Day-to-Day

After LSE 21, I returned to Vicenza with a far better understanding of my job as an operational law attorney and the confidence to implement that understanding. Although my normal day-to-day as a SETAF-AF operational law attorney did not involve advising on ROE or targeting, I wove the overarching lessons from LSE 21 into my daily work. Now, I thoroughly appreciate the need to know which shop to call for a particular topic. I appreciate the need to be known and trusted as a lawyer, and I appreciate the importance of considering a variety of perspectives.

Notably, the LSE 21 experience is particularly valuable for an assignment to SETAF-AF, the entity that serves as U.S. Africa Command's Joint Task Force—Headquarters (JTF-HQ)[8] for contingency operations. Should the need for a contingency response arise in Africa, SETAF-AF—as the

JTF-HQ—provides command and control of the joint operations.[9]

To ensure its ability to serve as the JTF-HQ, SETAF-AF leads two major annual exercises in Africa that involve the various DoD components, government agencies, and multinational partners. For 2022, I helped plan and execute the Justified Accord exercise in Kenya and participated in the African Lion exercise in Morocco.[10] The preparation for these exercises included a JTF academics week to familiarize participants with joint doctrine and related topics. Among the JTF presentations was a brief on Sixth Fleet, highlighting its structure, capabilities, role, and flagship: the USS *Mount Whitney*. The LSE 21 experience continues to be relevant.

Generally, exposure to the perspectives, limitations, and capabilities of a sister service enables better readiness for a joint exercise or operation. The opportunity to work across services, while key for any operational law attorney, was especially important preparation for my role at SETAF-AF. Now, as the national security and administrative law attorney for the 173d Infantry Brigade Combat Team (Airborne), lessons from those first joint exercises of my career still inform my understanding of my latest role as I work under SETAF-AF on brigade-level operations and exercises.

An Army exercise would have clarified my understanding of my role, too. But an Army-only or Army-centric exercise would not have forced me to recognize my assumptions about the law and the workings of the world—assumptions that formed in just a few short months in the Army. That is the major reason to emphasize joint training, especially for JAs. Through joint training, JAs get better at their job, and they get better at the Army's job: fighting and winning the Nation's wars, which will always be a joint endeavor.

## Toward a Joint JAG Corps

Joint education should begin at junior levels. As unnerving as it may be to enter an unfamiliar environment when a JA scarcely understands their own service, there are distinct learning benefits to a new JA at this early stage. While perhaps counterintuitive, a new officer may be best positioned to incorporate the lessons from a joint experience into their own work. They may not have the expertise of a senior officer, but they also have not had much time to lock in their thinking. They might be more willing to ask questions that are "basic," yet crucial.

I ended up at LSE 21 only through the sheer good fortune of working for an SJA who prized unconventional, away-from-the-office opportunities. That SJA met a Navy JA at African Lion 21, and upon hearing about LSE 21, the SJA asked if our office could send someone. He then offered me the chance to be that person.

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Yet, for all our pre-departure talk of the importance of "joint work," the words were nearly meaningless to me until the LSE itself. From outside the actual experience, explaining its powerful impact on me as a new Army JA is difficult. Looking back, I am amazed that my office was willing to assist through the logistics of sending an Army lawyer onto a Navy ship, lose that lawyer for a month, *and* pay the bill.

I cannot overstate the experience's value for me as a JA or my surprise at that value, as I frankly did not expect my participation to be significant—just a unique story of how I earned more sea time than most of the Army. In reality, LSE 21 helped me start to figure out what exactly a lawyer does in the military. Part of the job, too, is knowing whom to call. Now, my network of JA contacts (and JA friends) extends beyond the Army.

The JAG Corps must seek more opportunities for joint work, especially for its new officers. Where possible, it should institutionalize those opportunities and relationships, so that Army JA participation in LSE 31 does not need to depend on a particular SJA. Many of our actual operations are joint, but so often, our training and our thinking are not. A future JAG Corps, like the rest of the force, should be ready to operate as part of one joint team. **TAL**

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*CPT Andaya is the national security and administrative law attorney for the 173d Infantry Brigade Combat Team (Airborne) at Caserma Del Din, Vicenza, Italy.*

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## Notes

1. U.S. Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America (2018).

2. "The joint team is composed of the members of each Service, Department of Defense agencies, as well as associated civilians supporting governmental and private sector workforces." Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States, at ii (25 Mar. 2013) (C1, 12 July 2017) [hereinafter JP 1].

3. *See generally, e.g.*, U.S. Naval Forces Eur.-Afr. & U.S. Sixth Fleet Pub. Affs., *Mount Whitney and Sixth Fleet Underway for Large Scale Exercise* (July 27, 2021), https://www.navy.mil/Press-Office/News-Stories/Article/2708954/mount-whitney-and-sixth-fleet-underway-for-lse/.

4. *See, e.g.*, Kevin Eyer & Steve McJessy, *Operationalizing Distributed Maritime Operations*, CIMSEC (Mar. 5, 2019), https://cimsec.org/operationalizing-distributed-maritime-operations/. *See also* Chief of Naval Operations, U.S. Navy, A Design for Maintaining Maritime Superiority 8, 10 (version 2.0, Dec. 2018), https://media.defense.gov/2020/May/18/2002301999/-1/-1/1/DESIGN_2.0.PDF.

5. Eyer & McJessy, *supra* note 4.

6. *See* U.S. Dep't of Navy, Naval Warfare Pub. 1-14M, The Commander's Handbook on the Law of Naval Operations (Mar. 2022); JP 1, *supra* note 2; Joint Chiefs of Staff, Joint Pub. 3-32, Joint Maritime Operations (8 June 2018) (C1, 20 Sept. 2021).

7. The Judge Advoc. Gen.'s Corps, U.S. Dep't of Army, Four Constants, at slide 2 (2021), https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf.

8. *See generally* Joint Chiefs of Staff, Joint Pub. 3-33: Joint Task Force Headquarters (31 Jan. 2018).

9. *Mission*, U.S. Army S. Eur. Task Force, Afr, https://www.setaf-africa.army.mil/about/mission (last visited May 4, 2022).

10. *See generally Justified Accord*, U.S. Afr. Command, https://www.africom.mil/what-we-do/exercises/justified-accord (last visited May 4, 2022); *African Lion*, U.S. Afr. Command, https://www.africom.mil/what-we-do/exercises/african-lion (last visited May 4, 2022).

(Credit: alexanderuhrin – stock.adobe.com)

## Practice Notes

# SCOTUS Cranks Up the Lawn Mower

*By Major Daniel W. Hancock*

Practicing environmental law often feels like watching grass grow. Cases stemming from the Comprehensive Environmental Response, Compensation, and Liability Act[1] (CERCLA or "Superfund"), the comprehensive federal law governing the cleanup of contaminated lands, take years—occasionally decades—to reach resolution. Rarely is there an opportunity to witness a change to the landscape. One such rare occasion arose in spring 2021 when the Supreme Court decided *Guam v. United States*,[2] a case involving the Army and Navy, and resulting in an opinion that figuratively mowed down a decade's worth of incremental growth in the CERCLA landscape.

*Guam* required the Supreme Court to consider whether a Clean Water Act[3] (CWA) consent decree could trigger the statute of limitations for a contribution action[4] under CERCLA. The Supreme Court had never previously ruled on what non-CERCLA environmental settlements were sufficient to trigger CERCLA's statute of limitations. The apparent trend across the circuits distinctly favored the United States' position that non-CERCLA settlements can trigger the statute of limitations. Indeed, since 2010, an array of settlements had been held sufficient to trigger CERCLA's statute of limitations when the plaintiff had previously resolved some portion of its liability at the site in question under some other settlement provision of state or federal environmental law. Unfortunately, a ruling for the United States' position did not come to pass.

A ruling from the Supreme Court that built on the circuits' existing framework would have acted as a powerful fertilizer to advance CERCLA's purpose of streamlining environmental litigation[5] and established uniform precedent favorable to the Federal

Government at many clean-up sites with prior environmental settlements. However, instead of sedately pushing the fertilizer spreader across the CERCLA landscape, Justice Clarence Thomas and his colleagues elected to crank up the lawn mower.

This article provides a history and overview of CERCLA. It then moves into an analysis of a key line of cases from the last two decades, considering *Guam* in detail, and then reassesses the CERCLA landscape in the aftermath of *Guam*.

## CERCLA History and Overview

Congress created CERCLA to be the comprehensive federal law governing the clean-up of contaminated lands.[6] Enacted in 1980, CERCLA seeks to encourage quick cleanup of contaminated sites by those responsible for the hazardous waste contamination rather than forcing taxpayers to bear the costs of cleanup.[7] Persons that can be held liable for cleanup costs incurred by the government or another person are called "potentially responsible parties" (PRPs),[8] and, in some circumstances, a single PRP can be held liable for all the costs of cleanup at a site.[9] In its original form, CERCLA allowed only PRPs who themselves had incurred response costs—a term of art in CERCLA[10]—to bring actions to recoup their costs. This loophole left PRPs that had paid for response costs without actually performing the work themselves, including payment via settlement with the government, with no avenue of recovery against other PRPs.[11] Conceptually, it imposed joint and several liability without the accompanying common law remedy of contribution.[12]

As a result, in 1986, Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA).[13] The SARA created a contribution right for a PRP to sue other PRPs for their equitable shares of the response costs paid by the plaintiff once it had resolved its liability for response actions at the site in question with the Federal Government or a state government.[14] By offering PRPs the prospect of a contribution suit following resolution with state and federal regulators, SARA appeared to bolster not only CERCLA's goal of speedy clean-up litigation but also the broad cooperative federalism principles that allow states to enforce certain federal environmental provisions.[15] After SARA's enactment, PRPs pondering litigation generally had two options available: a suit to recover their own directly-incurred response costs under Section 107 ("cost recovery") and/or a suit to recover their indirect costs under Section 113 ("contribution") from other PRPs.[16]

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Plaintiffs' attorneys love options and flexibility, and Section 107 cost recovery actions appear more advantageous when compared with Section 113 contribution actions. Section 107 bars equitable defenses,[17] and it has the potential for a six-year statute of limitations for cost recovery actions as compared with a uniform three-year statute of limitations under Section 113 for a contribution action.[18] Contrary to plaintiffs' attorneys' preference for options, courts value the efficiency and simplicity of obligation and invariability. Although the Supreme Court has not directly addressed the issue,[19] eight circuit courts of appeals have considered whether a plaintiff may bring either a cost recovery action under Section 107 or a Section 113 contribution action, if both are available, and all eight circuit courts have restricted the plaintiff to a Section 113 contribution action.[20]

While our landscape may still appear foggy, we have established that a plaintiff that has previously resolved its liability for response costs through a settlement with the Federal Government or a state government that then wishes to recoup response costs from other PRPs must almost certainly seek contribution under Section 113 with its more limited three-year statute of limitations. With that background in mind, we may consider the case law leading up to *Guam* that attempted to define what exactly constitutes a PRP resolving its liability to the Federal or a state government for response costs through a settlement agreement—that is, what exactly was believed to make the CERCLA Section 113 clock start ticking.

## Case Law

That a settlement with the federal government or a state government pursuant to CERCLA would be sufficient to trigger a CERCLA Section 113(f)(3)(B)[21] action is a redundancy. But what about settlements pursuant to other environmental laws? Although there was not a definite answer to that question prior to *Guam*, the circuits were beginning to formulate a broad answer that favored the Federal Government as a frequent CERCLA defendant.

In 2005, the Second Circuit in *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*[22] became the first circuit court of appeals to consider whether resolution of non-CERCLA claims could trigger a contribution action under Section 113(f)(3)(B). The plaintiff, Consolidated Edison, contended that its settlement with the state of New York's Department of Environmental Compliance (NYDEC) pursuant to New York state environmental laws was sufficient for it to sue defendant, UGI, for contribution.[23] However, the Second Circuit panel disagreed and held that Section 113(f)(3)(B) does not permit contribution actions based on the resolution of state law claims apart from CERCLA.[24] The court identified two key foundations underlying its holding. The first was a settlement term whereby NYDEC reserved its rights to bring a future action against the plaintiff, which arguably meant that the settlement was not a full

resolution of the matter.[25] The second was a House of Representatives committee report in SARA's legislative history that the court characterized as requiring prior resolution "*under* CERCLA to seek contribution."[26]

Five years later, a different panel of the Second Circuit held that resolution of state environmental liability *and* CERCLA liability with the state of New York were sufficient to trigger a contribution action.[27] The *Niagara Mohawk* panel noted the obvious distinction that Niagara Mohawk's consent decree had resolved its CERCLA liability and relied on the statutory text of Section 113(f)(3)(B) to conclude that the absence of the United States as a party to the consent decree posed no problem.[28] The panel rested its conclusion in part on an EPA amicus brief stating that *Consolidated Edison* "was not correctly decided."[29] The panel's EPA-endorsed conclusion that resolution of CERCLA liability with a state was sufficient to trigger CERCLA's statute of limitations rendered *Consolidated Edison* meaningless to other circuits considering the issue in the years ahead.

In 2013, the Third Circuit in *Trinity Industries v. Chicago Bridge and Iron Co.* answered the same question posed by *Consolidated Edison* regarding whether a state environmental law settlement can trigger a contribution action in exactly the opposite manner.[30] Why the court did so is key: one of the *Consolidated Edison* panel's two foundational pillars was built upon sand. That sand immediately gave way when the panel noted that the House committee report language built upon by the Second Circuit panel referred to Section 113(f)(1), not Section 113(f)(3)(B).[31] The court also stated that, in its view, nothing in the text of Section 113(f)(3)(B) requires resolution of CERCLA liability in particular and found further support for its holding in the overlap between CERCLA and the relevant state environmental law.[32]

Knowing that it would break a tie in an ongoing circuit split,[33] the Ninth Circuit issued a comprehensive opinion[34] for its 2017 decision in *Asarco LLC v. Atlantic Richfield Co.*[35] The court sided with the Third Circuit to hold that a settlement under a non-CERCLA federal authority could give rise to a CERCLA contribution action.[36] Cognizant of debate regarding the House committee report's reference to CERCLA Section 113(f)(1) as opposed to (f)(3)(B), the *Asarco* court echoed the Third Circuit's conclusion regarding the House SARA report[37] and contrasted subsection (f)(1)'s specific language requiring a CERCLA predicate with subsection (f)(3)(B)'s lack of any such specificity.[38] The court took confidence that the EPA concurred with its interpretation and further noted that SARA's "broad remedial purpose [was]. . . to get parties to the negotiating table early to allocate responsibility . . . ."[39]

In 2019, the Seventh Circuit heard a case in which the plaintiff, Refined Metals Corporation, sought to escape Section 113's three-year statute of limitations.[40] In 1998, Refined had entered a settlement with the Federal Government and the state of Indiana resolving liability pursuant to the federal Clean Air Act,[41] the Resource Conservation and Recovery Act,[42] and state law. Since the settlement was silent regarding the resolution of CERCLA liability, Refined argued that its right to seek contribution had not been triggered.[43] The Seventh Circuit disagreed, holding that "a settlement need not resolve CERCLA-specific liability in order to start the clock on a contribution action."[44] Echoing *Asarco*, the Seventh Circuit carefully compared CERCLA Sections 113(f)(1) and (f)(3)(B), stating that the fact that subsection (f)(3)(B) contemplates resolution under state law "makes it even more unlikely that Congress was concerned only with liability under the federal CERCLA statute."[45]

To recap, prior to *Guam*, our CERCLA landscape had taken on a distinct shape with courts holding the following types of settlements sufficient to trigger a CERCLA contribution action: a CERCLA settlement with a state government (*Niagara Mohawk*)[46], a non-CERCLA state environmental law settlement with a state government (*Trinity Industries*)[47], and non-CERCLA federal environmental law settlements with the Federal Government (*Asarco* and *Refined Metals*).[48] However, faint yet discernible CERCLA shadows remained in all three of the latter cases.[49] Could a federal environmental law settlement that did not cite CERCLA trigger a CERCLA contribution action's statute of limitations? Enter now Guam, the Navy, and our Army.

### *Guam v. United States*

The roots of Guam's 2017 case against the United States ultimately lead back to the 1940s when the Navy allegedly first began to use the Ordot Dump[50] and the Army stationed dozens of Pacific Theater support units on Guam.[51] While the military bases had their own landfills, the Ordot Dump was the operational landfill for the remainder of the island. Under Guam's ownership and management since 1950, the Ordot Dump eventually became a 280-foot-tall mountain of trash. Nevertheless, the Ordot Dump lacked the basic environmental safeguards of a bottom liner and an upper cap. Both surface water runoff and rain percolating through the dump's contents picked up hazardous wastes and carried them into the nearby Lonfit River which ultimately flows into the Pacific Ocean.[52]

Unsurprisingly, the Ordot Dump caught the EPA's attention. In 1986, the EPA began a series of attempts to force Guam to clean up the Ordot Dump.[53] The culmination of these attempts was a 2002 CWA lawsuit resulting in a 2004 consent decree.[54] The consent decree required Guam to pay a civil penalty and close the Ordot Dump.[55] Guam officially closed the Ordot Dump in 2011.[56] In 2017, Guam sued the U.S. Department of Defense under CERCLA Section 107(a) for cost recovery and, alternatively, Section 113(f)(3)(B) for contribution to recoup some of the $160 million it estimated were required to close and remediate the Ordot Dump.[57]

The United States immediately moved to dismiss, arguing that Section 113 contribution was the only valid option of the two stated causes of action and that the 2004 consent decree had triggered Section 113's three-year statute of limitations, which had then elapsed. The district court denied the motion, and the United States sought an interlocutory appeal in the D.C. Circuit.[58] The D.C. Circuit panel first assessed and concurred with the logic of its sister circuits in concluding that Sections 107 and 113 are mutually exclusive and that Section 113 is the only remedy for plaintiffs who incur costs pursuant to a government settlement.[59] The question then became whether Guam's 2004 CWA consent decree with the Federal Government was sufficient to trigger Guam's right to seek CERCLA

contribution which would mean that the statute of limitations had run. In language echoing the prior case law, the D.C. Circuit panel highlighted the absence of CERCLA-specific language in Section 113(f)(3)(B) as compared with Section 113(f)(1) to conclude that a non-CERCLA settlement can trigger Section 113(f)(3)(B) contribution rights when it resolves the plaintiff's liability for a prior response action.[60] With Guam limited to a Section 113 suit and the 2004 consent decree triggering Guam's Section 113 rights, the statute of limitations had run a full decade before Guam filed suit. Guam requested a rehearing *en banc* and, being denied, appealed to the Supreme Court.[61]

The Supreme Court heard oral argument in April 2021, and in May, unanimously reversed and decided the case in Guam's favor. The question presented was whether a non-CERCLA settlement can trigger a contribution claim under Section 113(f)(3)(B) which would begin the statute of limitations.[62] As discussed previously, the previous four of five total circuit court opinions held that a non-CERCLA settlement could trigger contribution claims under certain conditions with a distinct trend toward broadening which types of settlement were sufficient. However, in language clearer than a remediated stream[63] the Supreme Court "h[e]ld that CERCLA contribution requires resolution of a CERCLA-specific liability."[64]

Justice Thomas's opinion, joined by all his colleagues, focused exclusively on the text of Section 113(f). Operating from an initial premise diametrically opposed to that of the circuit court panels deciding *Asarco, Refined Metals*, and *Guam*, the Supreme Court viewed Section 113(f)(1) as an "anchor provision"[65] that moored the entirety of Section 113(f). Specifically, the relevant subsection of Section 113(f)(3)(B) refers explicitly to (f)(2), and (f)(2) itself mirrors (f)(1), the "anchor provision."[66] Read as a whole, Section 113(f), thus, presupposes only resolution of a CERCLA-specific liability as the predicate liability for contribution under Section 113.[67] The Court stated that the United States' argument (and by extension the circuit court opinions underlying it) of functional equivalence between liabilities resolved under CERCLA and other environmental statutes stretched CERCLA beyond its statutory language.[68]

**Going into Guam, perennial CERCLA defendants had held out hope the Supreme Court would establish that the functional equivalent of CERCLA resolution at least three years prior to the instant suit was sufficient to trigger CERCLA's statute of limitations.**

## Conclusion

A glimpse across the CERCLA landscape now, just a short while after *Guam*, reveals a different scene than the one that had slowly grown up beginning with *Niagara Mohawk* in 2010. Of the four cases discussed, only *Niagara Mohawk* included resolution of the CERCLA-specific liability analysis required by *Guam. Trinity Industries* and *Refined Metals* respectively involved state statutory and consent decree references to be deemed resolution of liability. After *Guam*, the logic and results of those opinions should not be expected to reappear on the CERCLA landscape. Going into *Guam*, perennial CERCLA defendants had held out hope the Supreme Court would establish that the functional equivalent of CERCLA resolution at least three years prior to the instant suit was sufficient to trigger CERCLA's statute of limitations. However, the bud that the defendants hoped would blossom into a bright line rule was cut down, root and branch, as the SCOTUS lawn mower passed.

One thing apparent to everyone, regardless of familiarity with the technicalities of environmental law, is that a cut field inevitably grows back. How it changes over time as it grows back can be difficult, if not impossible, to forecast with certainty. Perhaps the only certainty in the immediate aftermath of *Guam* is that ongoing CERCLA Section 113 litigation involving a settlement more than three years prior to the complaint will endure. It's become time to watch the grass grow yet again—and beware of the sound of a lawn mower cranking up. **TAL**

*MAJ Hancock previously served as a litigation attorney in the Environmental Law Division, United States Army Legal Services Agency, at Fort Belvoir, Virginia. He is currently a brigade judge advocate at Fort Benning, Georgia.*

## Notes

1. 42 U.S.C. §§ 9601–9675. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) practitioners and courts alike generally refer to sections of the statute, as amended, rather than to the U.S. Code. This article adopts that practice in its main text but uses the U.S. Code citation in these endnotes for ease of reference for those readers seeking to look up relevant provisions. To convert a U.S. Code section number in these endnotes back to a CERCLA section number, simply focus on the final two digits of the Code section number.

2. Guam v. United States, 141 S. Ct. 1608 (2021).

3. Clean Water Act of 1977, 33 U.S.C. §§ 1251–1388.

4. *See* 42 U.S.C. § 9613(g)(3).

5. Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 248 (2018).

6. Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005).

7. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 689 (7th Cir. 2014).

8. Refined Metals Corp. v. NL Indus., 937 F.3d 928, 930 (7th Cir. 2019).

9. *See* Gov't of Guam v. United States, 950 F.3d 104, 107–08 (D.C. Cir. 2020).

10. *See* 42 U.S.C. § 9601.

11. *Id.*

12. *Asarco v. Atlantic Richfield Co.*, 866 F.3d 1108, 1116 (9th Cir. 2017).

13. SARA of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

14. *See Asarco*, 866 F.3d at 1116.

15. *See, e.g.*, Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 124–26 (2d Cir. 2010).

16. *See* 42 U.S.C. §§ 9607, 9613.

17. Refined Metals Corp. v. NL Indus., 937 F.3d 928, 930 (7th Cir. 2019).

18. 42 U.S.C. § 9613(g).

19. United States v. Atl. Rsch. Corp., 551 U.S. 128 (2007).

20. Gov't of Guam v. United States, 950 F.3d 104, 111 (D.C. Cir. 2020). *See also* Whittaker Corp. v. United States, 825 F.3d 1002, 1007 n.5 (9th Cir. 2016) (collecting cases).

21. Because the discussion at this point begins to focus heavily on CERCLA § 113(f), the entire subsection is provided here:

> (f) Contribution
>
> (1) Contribution[.] Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [section 107(a)] of this title, during or following any civil action under section 9606 [section 106] of this title or under section 9607(a) [section 107(a)] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [section 106] of this title or section 9607 [section 107] of this title.
>
> (2) Settlement[.] A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
>
> (3) Persons not party to settlement[.]
>
> (A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.
>
> (B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).
>
> (C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

42 U.S.C. § 9613(f).

22. Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005).

23. *Id.* at 95.

24. *Id.* at 96.

25. *Id.* at 96–97.

26. *Id.* at 96. "The report of the House Committee on Energy and Commerce accompanying SARA states that section 113 'clarifies and confirms the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially responsible parties.' H.R. Rep. No. 99-253(l), at 79 (1985) (emphasis added)." *Id.*

27. *Niagara Mohawk Power Corp.*, 596 F.3d 112.

28. *Id.* at 125–27.

29. *See id.* at 126, 126 n.15.

30. *Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013).

31. *Id.* at 135–36. "[A]s the United States points out, this passage refers to contribution claims under § 113(f)(1), not § 113(f)(3)(B), as it is only through a civil action under section 9607(a), [CERCLA § 113(f)(1)], that a PRP may be held jointly and severally liable for response costs under CERCLA." *Id.* at 136 (internal quotations removed).

32. *Id.* at 136–37.

33. *See Asarco*, 866 F.3d at 1119.

34. Unlike the aforementioned decisions that treated this series of questions almost exclusively as abstract questions of law, the *Asarco* court spilled a considerable amount of ink instructing its district courts how to spot a sufficient non-CERCLA settlement underlying a contribution action. The court held that the phrase "resolved its liability" requires that a potentially responsible party's compliance obligations be determined with "certainty and finality . . . for at least some of its response actions or costs set forth in the agreement." *Id.* at 1125. Neither a covenant not to sue nor a reservation of rights in and of itself prevents such a settlement from triggering a Section 113(f)(3)(B) contribution action. *Id.* at 1128–29. The second point was significant because it represented a rejection by a sister circuit of the Second Circuit's other foundational pillar in *Consolidated Edison. See* Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2005).

35. *Asarco LLC*, 866 F.3d 1108.

36. *Id.* at 1118–29. The *Asarco* court analyzed two federal settlements: a 1998 Resource Conservation and Recovery Act (RCRA) settlement and a 2009 CERCLA settlement. The court initially considered the RCRA settlement to hold that a non-CERCLA federal consent decree could trigger CERCLA contribution rights. However, the court determined that the RCRA decree did not resolve Asarco's liability for a response action but that the later CERCLA decree did do so. *Id.*

37. *Id.* at 1120.

38. *Id.* at 1118–19.

39. *Id.* at 1119.

40. Refined Metals Corp. vs. NL Indus., 937 F.3d 928, 929 (7th Cir. 2019).

41. Clean Air Act, 42 U.S.C. §§ 7401–7671q.

42. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k.

43. *Refined Metals Corp.*, 937 F.3d at 929.

44. *Id.* at 932; *cf. id.* at 931.

45. *Id.* at 933.

46. *Niagara Mohawk Power Corp.*, 596 F.3d 112 (2d Cir. 2010).

47. *Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013).

48. *Asarco v. Atlantic Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017); *Refined Metals Corp. vs. NL Indus.*, 937 F.3d 928 (7th Cir. 2019).

49. The Pennsylvania statute underlying *Trinity Industries* included a provision stating that remediation conducted pursuant to its provisions satisfied CERCLA. *Trinity Indus.* at 137. As discussed in detail in note 36, a CERCLA settlement played a role in *Asarco.* Refined Metals' federal settlement included a reservation clause indicating that CERCLA clean-up had been specifically implicated. *Refined Metals*, 937 F.3d at 933.

50. *See* Gov't of Guam v. United States, 950 F.3d 104, 108 (D.C. Cir. 2020).

51. *See, e.g.*, John B. Flick et al., *Chapter XI, Pacific Ocean Areas, in* 2 Med. Dep't, U.S. Army, Surgery in World War II: Activities of Surgical Consultants (John B. Coates, Jr. ed., 1964).

52. *Gov't of Guam*, 950 F.3d at 108-09.

53. *Id.* at 109.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 109–10.

58. *Id.* at 110.

59. *Id.* at 110–11.

60. *Id.* at 113–14.

61. Gov't of Guam v. United States, 2020 U.S. App. LEXIS 15472 (D.C. Cir. May 13, 2020) (per curiam), *cert. granted*, Guam v. United States, 141 S. Ct. 976 (2021).

62. Guam v. United States, 141 S. Ct. 1608 (2021).

63. *See Refined Metals Corp.*,937 F.3d at 931, citing *Refined Metals Corp. v. NL Indus.*, 2018 U.S. Dist. LEXIS 163988 at *15 (S.D. In. 2018).

64. *Guam*, 141 S. Ct. at 1611.

65. *Id.* at 1612.

66. *Id.* at 1611-13.

67. *Id.* at 1611-12.

68. *Id.*


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No. 1

# Command Responsibility for Subordinates' War Crimes

## A Twenty-First Century Primer

*By Major Michael D. Winn*

[T]*he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.*[1]

Legal advisor, take heed—when an enlisted member or officer of your unit commits a war crime in an armed conflict, your commander may be held responsible.[2] Recent updates to the *Department of Defense Law of War Manual, The Commander's Handbook on the Law of Land Warfare*, and *Army Command Policy* confirm President Roosevelt's declaration that commanders are ultimately responsible to keep their subordinates' actions in check.[3]

Following World War II, German and Japanese commanders were tried for war crimes in international tribunals at Nuremberg and Tokyo.[4] Some of these commanders were tried for war crimes they ordered their troops to commit, but other commanders were tried for war crimes they merely failed to prevent.[5] In the seventy-five years following those prosecutions, commanders have been aware that they may be held liable for not doing enough to prevent, halt, or punish war crimes committed by their subordinates.[6]

The Vietnam War and the Global War on Terror have provided various examples of commanders running afoul of the requirements of the law of war. From the My Lai massacre to the abuses at Abu Ghraib prison to the murder of detainees during Operation Iron Triangle in Iraq, U.S. military forces have not always lived their righteous values—and leaders have been called to account.[7] Now, as the U.S. military shifts its focus toward large-scale combat operations (LSCO) against peer and near-peer competitors, we must be ready to apply the law of war to a higher-speed, higher-intensity operating environment.[8] Commanders—and by extension, their legal advisors—must prepare now for the legal and leadership challenges that LSCO will entail.[9]

This article first considers the breadth of command responsibility for war crimes and summarizes the current standards in customary international law (CIL). It then explains how the international standard, first articulated by the United States in the tribunals following World War II, has made its way back into U.S. regulation and policy. Finally, the article considers commanders' affirmative duties under the 2020 update to *Army Command Policy*, highlighting both good and bad examples from recent U.S. history and offering practice tips for command legal advisors.

### Definition of War Crimes

In July 2020, the Army updated Army Regulation (AR) 600-20, *Army Command Policy*.[10] The new version of the regulation added

paragraph 4-24, "Command responsibility under the law of war."[11] The paragraph provides:

> Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control. These measures include requirements to train their Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated.[12]

This new provision on command responsibility for war crimes does not define the term "war crimes."[13] What then, are war crimes? Synthesizing the relevant sources, a war crime is an act or omission that is 1) a violation of the law of armed conflict (LOAC), 2) serious, 3) committed intentionally, 4) and pursuant to an armed conflict, as considered below.[14]

First, all war crimes are violations of the LOAC, also referred to as the law of war.[15] In determining whether a LOAC violation exists for any act or omission, consider whether there has been a violation of the Geneva Conventions, the Hague Convention of 1907, or another treaty that is ratified by the United States or that reflects CIL.[16] In the absence of any specific rule, look to the five LOAC principles derived from CIL: military necessity, distinction, proportionality, humanity, and honor.[17] A failure to comply with these principles may indicate a LOAC violation.[18]

Second, not all LOAC violations are war crimes.[19] A LOAC violation must be *serious* to be a war crime.[20] An example of a non-serious LOAC violation is that of a combatant who steals bread from a civilian's home in occupied territory to feed himself, in violation of the Hague Convention.[21] In contrast, serious violations of the LOAC may be considered war crimes.[22] For example, the U.S. War Crimes Act of 1996 criminalizes "grave breaches" of the Geneva Conventions and portions of other key international treaties.[23]

Third, the actor must have acted intentionally or at least with culpable negligence—there is no such thing as a purely "accidental" war crime.[24] A contemporary example is the attack by a U.S. AC-130U gunship on a hospital in Kunduz, Afghanistan, in 2015.[25] Although at least thirty occupants of the hospital were killed, the incident was not a war crime, since the U.S. Service members involved did not know they were firing on a medical facility.[26]

Fourth, a war crime can occur only incident to an armed conflict.[27] A war crime may arise during an international armed conflict,[28] or it may occur during a non-international armed conflict, as shown at the International Criminal Tribunal for Rwanda.[29] With "war crimes" defined, the next section considers what it means to have command responsibility for them.

**The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.[40]**

## Historical Development

Command responsibility goes beyond those in a command billet and implicates all military leaders, including platoon leaders and noncommissioned officers (NCOs), tasked with leading troops.[30] Any commander or other leader who ordered or encouraged a subordinate to commit a war crime would be criminally liable as a principal for the act or omission of that subordinate.[31] For example, during Operation Iron Triangle near Samarra, Iraq, in 2006, Staff Sergeant Ray Girouard of the 101st Airborne Division encouraged, or perhaps ordered, his squad members to kill three Iraqi detainees.[32] At his court-martial, Girouard was tried as a principal for premeditated murder.[33]

Command responsibility applies not only to those leaders who order or encourage their subordinates' war crimes, but also to those leaders who fail to take appropriate action to counter such abuses.[34] The cases explored below demonstrate the genesis of that duty.

### *Genesis of the "Knew or Should Have Known" Standard*

From the 1474 trial of Peter von Hagenbach by the Archduke of Austria to U.S. courts-martial during the Philippine insurgency at the turn of the twentieth century, commanders have been held criminally liable for acts committed by their subordinates.[35] Nonetheless, it was not until three U.S. prosecutions following World War II that the international standard for command responsibility crystallized.[36]

In the first trial, General Tomoyuki Yamashita, commander of Japanese forces in the Philippines, was convicted by a U.S. military commission for "permitting" widespread atrocities by those forces.[37] Although the prosecution introduced little direct evidence that Yamashita actually knew of his troops' actions, the panel found him liable for "crimes . . . so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[38] In other words, Yamashita was convicted because he "must have known" of the crimes yet failed to stop them.[39] The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.[40]

The *Yamashita* standard for command responsibility was soon refined by two cases from Nuremberg.[41] In the *Hostage Case*, a panel of U.S. judges convicted Field Marshal Wilhelm List and other German generals under a theory of command responsibility for their subordinates' murders of civilian hostages in occupied territory.[42] Later, in the *High Command Case*, Field Marshal Wilhelm von Leeb and other German officers were tried under a similar theory of command responsibility for subordinates' war crimes on the Eastern Front.[43] In both cases, the judges considered whether the accused knew or *should have* known that their subordinates were engaging in war crimes and that they failed to prevent or stop the crimes.[44]

***The "Knew or Should Have Known" Standard and Customary International Law***

The "knew or should have known" standard for command responsibility for war crimes took root in international jurisprudence.[45] In 1977, the standard was incorporated into Additional Protocol I to the Geneva Conventions in its provision for holding commanders liable for war crimes committed by subordinates.[46] Later, in the 1990s, the "knew or should have known" standard was employed by the International Criminal Tribunal for Yugoslavia (ICTY).[47] That same decade, the United States and over 150 countries negotiated the Rome Statute, which established the International Criminal Court (ICC)[48] and incorporated the concept of "knew or . . . should have known" as the standard for command responsibility for war crimes.[49] The ICC prosecutor applied it recently against a commander whose men had murdered, raped, and pillaged during an operation in Central Africa.[50]

Although the United States has not ratified AP I or the Rome Statute, it accepts the command-responsibility provision in AP I as reflective of CIL.[51] Customary international law is consistent practice that states follow out of "a sense of legal obligation."[52] According to CIL, then, commanders may be responsible for failing to prevent war crimes which they knew or had reason to know their subordinates would commit.[53]

A panel of American judges convicted Field Marshal Wilhelm List for war crimes on a theory of command responsibility. (Credit: German Federal Archive)

## Current U.S. Policy on Command Responsibility for War Crimes

The Uniform Code of Military Justice (UCMJ) does not expressly incorporate the international standard of "knew or should have known."[54] Nevertheless, a U.S. commander should still be mindful of it, for the standard is both germane to multinational operations and fully incorporated into U.S. military policy, as explained below.

To start, the standard constitutes CIL[55] and is the rule by which many of our allies and partners judge their commanders' actions.[56] A U.S. commander in a coalition operation will want to keep in mind that partner-nation commanders may be judged

"The Americans are back in Courtroom 600." Waltraut Bayerlein, the Vice President of the Higher Regional Court of Nuremberg, noted the historic nature of the return of American Service members to the courtroom that hosted the Nuremberg Trials. Lieutenant Colonel Jeremy Steward, Staff Judge Advocate for 7th Army Training Command, presides as judge for the mock-court martial held in the storied room as part of an outreach to the local German community. (Credit: Staff Sergeant Ashley Low)

based on what they "should have known."[57] Furthermore, although not common, a foreign nation may attempt to exert criminal jurisdiction over a U.S. commander.[58] For example, during the 2003 invasion of Baghdad, Iraq, a U.S. armored tank crew, believing it was under attack from enemy inside a hotel, opened fire and damaged the building.[59] A Spanish journalist at the hotel was killed.[60] Although a U.S. military investigation determined that the tank crew's actions were justified, Spanish authorities charged two U.S. officers and an NCO with murder and issued arrest warrants.[61] Spain did not drop the charges until 2008.[62] The international "knew or should have known" standard would likely come into play in any foreign prosecution against a U.S. commander.[63]

More importantly for American commanders, however, U.S. regulation and policy have fully embraced the "knew or should have known" standard for command responsibility for subordinates' war crimes.[64] In its section on command responsibility for subordinates' war crimes, the 2015 *Department of Defense Law of War Manual* cites to the statute defining the liability of principals under military commissions.[65] That statute includes as a principal a commander who "knew, had reason to know, or should have known" of subordinates' punishable acts.[66] Likewise, paragraph 4-24 of the 2020 version of AR 600-20 provides, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish."[67] The "knew or should have known" standard is also found in Field Manual (FM) 6-27, *The Commander's Handbook on the Law of Land Warfare*, published in 2019.[68]

While all three of these recently released policies require a commander to take steps to prevent war crimes by subordinates, they differ in how they word the commander's duty.[69] The *DoD Law of War Manual* imposes on commanders a duty to "take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[70] The term, "necessary and reasonable measures," was adapted from language in the 1956 Army publication, FM 27-10, *Law of Land Warfare*, and was carried over to its 2019 successor, FM 6-27.[71] Army Regulation 600-20 employs a seemingly stricter standard for Army commanders, requiring them to take "all feasible measures within their power to prevent and suppress" LOAC violations on the part of their troops.[72] Regardless, there is little practical difference between "all feasible measures," from AR 600-20, and "necessary and reasonable measures," from FM 6-27.[73]

These policies instruct that commanders may be held accountable for not taking adequate measures to "prevent or repress" violations of the law of war.[74] Command-

ers are expected to act on what they *should have* known as they take these measures.[75] Commanders who fail to comply with their obligations with regard to the LOAC are at risk of an administrative reprimand or elimination.[76] Worse, failure to comply could serve as the basis for a court-martial for dereliction of duty.[77]

### The Commander's Affirmative Duties and the Legal Advisor's Role

Given that commanders may be held accountable for their omissions, a responsible commander must lead proactively.[78] In regard to subordinates' war crimes, AR 600-20 reminds commanders of their three *affirmative* obligations: prevent, stop, and punish.[79] These cornerstone duties are described in turn.

#### *Prevent*

As noted earlier, AR 600-20 requires commanders "to take all feasible measures within their power to prevent or repress breaches of the law of war . . . ."[80] The regulation states that preventive measures "include requirements to train . . . Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated."[81] The components of prevention, i.e., to train, report, investigate, and take corrective action, are explored below.

*Train*

The DoD Law of War Program demands that all military units be trained periodically on the law of war.[82] The Army has reinforced this directive in AR 350-1, *Army Training & Leader Development*, by imposing annual training requirements on units organized under a military table of organization and equipment (MTOE)—in other words, deployable, combat-ready units.[83] In addition to annual training, MTOE units must also be trained in the law of war prior to deployment.[84] The commander is responsible to ensure troops receive the training, but the instruction itself may be conducted only by a judge advocate (JA) or a paralegal NCO certified by a JA.[85] Additionally, the training must be specific to the unit's designated missions or contingency plans and should be woven into field exercises.[86]

Time to train is always in short supply, especially leading up to a deployment.[87] The command legal advisor must work diligently with the staff to ensure LOAC training be nested within the unit's annual or pre-deployment training plan.[88] The command legal advisor or NCO should deliver the training personally,[89] but the commander must continually reinforce LOAC precepts by emphasizing respect for noncombatants.[90]

A cautionary example of a commander who failed to train his subordinates adequately is Colonel (COL) Thomas Pappas, who in 2003–04 commanded the 205th Military Intelligence Brigade, with responsibility over the Soldiers who engaged in atrocities at Abu Ghraib prison in Iraq.[91] Soldiers in the brigade abused Iraqi prisoners, in violation of common Article 3 of the Geneva Conventions.[92] Colonel Pappas received general-officer non-judicial punishment, in part because of his failure to train subordinates adequately in how to interrogate prisoners the correct way.[93] Commanders must learn from COL Pappas's example—it is easy to deprioritize LOAC training requirements when the operational tempo is high, but the consequences may be dire for failing to train.[94]

*Report and Investigate*

Of course, when U.S. commanders learn of a suspected war crime, they have the duty to report up the chain of command or to an appropriate investigative body, such as the U.S. Army Criminal Investigation Division (CID).[95] What may surprise some commanders, however, is that they have a duty to report *any* alleged violation of the LOAC, not just allegations of serious violations, up the chain of command to the appropriate Combatant Commander (CCDR).[96] The duty to report does not depend on the status of the alleged violators; they could be American, coalition, enemy, or neutral.[97] Furthermore, the standard for determining whether an incident must be reported is *credible information*—although a commander must report the allegation even should it fail to clear that low bar.[98]

**Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.[109]**

A legal advisor may want to advise the commander to err on the side of overreporting. Failure to report an alleged LOAC violation for fear of the boss's disapproval could lead to far worse results.[99] For example, immediately after the My Lai massacre during the Vietnam War, the division commander and his assistant received information that a couple dozen noncombatants had been killed under suspicious circumstances.[100] Nonetheless, the officers chose not to investigate the killings thoroughly, and they violated theater policy by failing to relay the information to higher headquarters.[101] Their failure to properly investigate and report the My Lai killings, which claimed far more than a couple dozen victims, has contributed to an enduring stain on the Army's reputation.[102]

When commanders learn of a reportable incident, they must direct an investigation into the incident, unless already begun by higher headquarters or an investigative agency such as CID.[103] As with the duty to report, the duty to investigate should be complied with strictly.[104] Commanders should err on the side of investigating too much rather than too little.[105]

*Take Corrective Action*

Commanders who learn that their troops have become undisciplined—e.g., dehumanizing the enemy or disregarding LOAC training—have a duty to correct that issue.[106] Commanders in this situation must reinforce subordinates' understanding of

the law of war, reeducate them on how to apply it, and employ sufficient checks on the troops' conduct.[107] The focus in corrective action is on preventing future LOAC violations.[108]

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.[109] When subordinates have a history of violence, substance abuse, or other misconduct, it should put a commander on guard about their propensity for LOAC violations, giving rise to a legal duty to take corrective action.[110]

The war in Afghanistan provides an example of when a commander *should have known* conditions were ripe for war crimes.[111] A squad leader in the 2d Infantry Division, serving in Kandahar, told his men that all Afghans were "savages."[112] Soldiers in the platoon began to fantasize openly about ways to kill Afghan children and other civilians, and they reveled in "trophy" photos with their kills.[113] The Soldiers' behavior remained uncorrected by platoon and company leadership, even when the Soldiers shot an unarmed Afghan teenager in an open field.[114] The platoon conducted at least four unjustified shootings of Afghans before it was reined in.[115] An engaged commander, immediately correcting lower-level misconduct, might have prevented most or all of these war crimes.[116] Instead, the Soldiers' actions, left unchecked, caused inestimable damage to the war effort in the minds of U.S. allies.[117]

In contrast, engaged commanders promote a climate of respect for the law of war.[118] General Barry McCaffrey, who commanded the 24th Infantry Division in Operation Desert Storm, refused to allow Soldiers to speak of Iraqis disrespectfully, such as by disparaging their ethnicity or religion.[119] He knew that talking of the enemy as subhuman would lead to treating the enemy as subhuman.[120] General McCaffrey ordered that any Soldier suspected of a war crime immediately be placed in handcuffs and sent to the rear.[121] General McCaffrey's respect for Iraqi soldiers contributed to their willingness to surrender rather than fight.[122]

Correcting loose talk and wrongheaded attitudes requires engaged, involved leadership by commanders.[123] Commanders must promote open dialogue with Soldiers, allowing them a safe place to discuss their emotions, to keep unchecked fear from leading to indiscriminate killing as was experienced at My Lai.[124] Furthermore, commanders must cultivate a culture in which subordinates are open to asking for clarification on orders and are not afraid to give the boss bad news.[125] Commanders must constantly keep their finger on the pulse of the unit and mentor their subordinate officers and NCOs to do the same.[126]

### *Stop*

The classic example of a U.S. Service member who stopped a war crime, at least in part, is Warrant Officer (WO1) Hugh Thompson, the Army aviator who intervened to save at least ten unarmed Vietnamese civilians during the My Lai massacre.[127] Although he was not a commander, Thompson displayed the behavior prescribed by *The Commander's Handbook on the Law of Land Warfare*—he investigated when he suspected a war crime was being committed, he questioned superiors as necessary, and he acted to protect the innocent.[128] Flying low over the hamlet in a light observation helicopter, Thompson, his door gunner, and crew chief saw up to one hundred bodies stacked in a ditch. Some were still alive.[129] Thompson landed and asked a platoon leader if he was going to aid the wounded, but a tense exchange followed in which the platoon leader told Thompson to mind his own business.[130] Thompson lifted off but soon saw ten civilians in a makeshift bunker, with U.S. troops closing in.[131] Thompson landed again, placing his helicopter between the Soldiers and the civilians.[132] With his gunner training his weapon toward the Soldiers, Thompson coaxed the villagers from the shelter and escorted them onto two larger helicopters which had landed nearby.[133] He stopped again at the ditch and rescued a living child from the stack of bodies.[134]

Commanders are expected to have the courage to stop LOAC violations as soon as they learn they may be occurring.[135] Even if it means placing oneself in harm's way, as WO1 Thompson did at My Lai, a commander's duty is to protect both noncombatants and the overarching strategic mission by leading from the front and intervening to stop war crimes.[136]

### *Punish*

A commander's responsibility with regard to subordinates' war crimes does not terminate once prevention of a war crime is no longer possible.[137] Commanders have a duty to punish war crimes once they learn of them, with the goal of deterring future war crimes.[138]

The duty to punish means taking appropriate steps to bring a perpetrator to justice, such as by preferring or forwarding court-martial charges as appropriate.[139] The inclusion of the duty to punish in AR 600-20 should not be interpreted to mean that commanders no longer have independent discretion to dispose of misconduct in their ranks, for that would constitute unlawful command influence.[140] Similarly, commanders will not violate AR 600-20 should the prosecution of an accused fail for matters beyond their control or should they deem non-judicial punishment or administrative action more appropriate.[141]

## Conclusion

Meeting our Nation's obligations under the law of war does not come automatically—it requires leadership.[142] In this era of increased focus on command responsibility for war crimes, legal advisors have an important role to play in helping their commanders prevent, stop, and punish such offenses.[143] Accordingly, legal advisors keep their commanders on the high road of command responsibility, where they can focus on their mission—to prepare Soldiers for combat and lead them in defense of our Nation.[144] **TAL**

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*MAJ Winn is the chief of administrative law at U.S. Army Combined Arms Support Command and Fort Lee, Fort Lee, Virginia.*

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## Notes

1. *See* Major William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 9 (1973) (quoting U.S. President Theodore Roosevelt).

2. *See* Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual § 18.23.3 (12

June 2015) (C2, 13 Dec. 2016) [hereinafter DoD LoW Manual].

3. *Id.*; U.S. Dep't of Army, Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare paras. 8-29 to -31 (7 Aug. 2019) (C1, 20 Sept. 2019) [hereinafter FM 6-27]; U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-24 (24 July 2020) [hereinafter AR 600-20].

4. John Alan Appleman, Military Tribunals and International Crimes 139–264 (1954).

5. *See, e.g., id.* at 259 (discussing the Far East Military Tribunal); Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al. (Feb. 1948), *reprinted in* The Law of War 1303–43 (Leon Friedman, ed., 1972).

6. *See* Parks, *supra* note 1, at 20.

7. Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility Under International Humanitarian Law*, 18 Chi. J. Int'l L. 553, 574–75, 587–88 (2018); Raffi Khatchadourian, *The Kill Company*, New Yorker (June 29, 2009), https://www.newyorker.com/magazine/2009/07/06/the-kill-company.

8. *See* Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, Army Law., Sept.–Oct. 2018, at 23, 27; Christopher M. Rein, *Weaving the Tangled Web: Military Deception in Large-Scale Combat Operations*, Mil. L. Rev., Sept.–Oct. 2018, at 10, 14.

9. *See* Allan A. Ryan, Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability 334–41 (2012) (discussing recent historical changes to the practice of the law of war).

10. *See* U.S. Dep't of Army, Reg. 600-20, Army Command Policy (24 July 2020).

11. *See id.* para. 4-24.

12. *Id.*

13. *See id.* Working for the Union Army, Francis Lieber coined the term "war crime" in 1865 while examining the archives of the Confederacy in search of material implicating rebel leaders in such a crime. He did not find evidence to support a prosecution. Jessica Laird & John Fabian Witt, *Inventing the War Crime: An Internal Theory*, 60 Va. J. Int'l L. 53, 89–90 (2019).

14. *See* War Crimes Act, 18 U.S.C. § 2441; DoD LoW Manual, *supra* note 2, § 18.9.5; Gary D. Solis, The Law of Armed Conflict 329, 335–37 (2d ed. 2016). U.S. Army Field Manual 27-10, published in 1956 and now inactive, considered *any* violation of the law of war to be a war crime. U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare para. 499 (July 1956) [hereinafter FM 27-10]. In defining "war crime," the *Department of Defense Law of War Manual* gives three options: the all-encompassing definition from Field Manual 27-10, the definition of "war crime" as a *serious* violation of the law of armed conflict (LOAC), and a third definition of "war crime" as a serious violation of domestic law applicable during armed conflict. This article uses the second definition of "war crime" as a serious LOAC violation, as it is the interpretation favored by the directive framing the DoD Law of War Program and is the generally accepted approach in the twenty-first century. *See* U.S. Dep't of Def., Dir. 2311.01, DoD Law of War Program para. G.2 (2 July 2020) [hereinafter DoDD 2311.01]; Oona A. Hathaway et al., *What is a War Crime?* 44 Yale J. Int'l L. 53, 55 (2019). The *Department of Defense Law of War Manual* recognizes the third definition as antiquated, yet states it may be helpful to categorize acts such as espionage and treason, which do not fit neatly into other formalizations of war crimes. DoD LoW Manual, *supra* note 2, § 18.9.5.

15. *See* DoD LoW Manual, *supra* note 2, § 18.9.5. This article uses the terms "law of war" and "LOAC" interchangeably.

16. *See* 18 U.S.C. § 2441(c); Hathaway et al., *supra* note 14, at 68. The War Crimes Act specifically includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as a source of war-crimes law. 18 U.S.C. § 2441(c)(4).

17. Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual § 2.1 (12 June 2015) (C2, 13 Dec. 2016).

18. *Id.* § 2.1.2. *See, e.g.,* the conviction at the Tokyo International Military Tribunal of Japanese service members for cannibalism, which international law had never prohibited explicitly. Solis, *supra* note 14, at 332.

19. *See id.* § 18.9.5.2.

20. *Id.* For example, the London Charter, which established the Nuremberg International Military Tribunal, defined war crimes as "violations of the law or customs of war. Such violations shall include, but not be limited to, murder . . . deportation to slave labour . . . killing of hostages, plunder of public or private property, wanton destruction of cities . . . or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1547, 82 U.N.T.S. 280.

21. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Hathaway et al., *supra* note 14, at 88. Another example is a medic wearing a red-cross armband on the right arm rather than the left. DoD LoW Manual, *supra* note 2, § 18.9.5.2.

22. Solis, *supra* note 14, at 329–30.

23. War Crimes Act, 18 U.S.C. § 2441.

24. *See id.* § 2441(d)(1), (3) (establishing liability for intentional acts yet not for causing collateral or incidental damage). "Individual acts may constitute war crimes, and intent is not indispensable to prosecution. . . . Reckless, as well as intent, is a sufficient prosecutorial basis." Solis, *supra* note 14, at 330.

25. U.S. Cent. Command, Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015: Investigation and Follow-on Actions 3 (n.d), https://www3.centcom.mil/FOIALibrary/cases/16-0061/00.%20CENTCOM%20Summary%20Memo.pdf.

26. *Id.* "The label 'war crimes' is typically reserved for *intentional* acts—*intentionally* targeting civilians or *intentionally* targeting protected objects." *See also* McCarthy, *supra* note 7, at 579.

27. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Solis, *supra* note 14, at 329, 335–37. The Pictet factors and *Tadić* factors provide a guide to determine when violence rises to the level of armed conflict. *See* 1 Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 49–50 (Jean S. Pictet ed., 1952), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf; *Tadić*, Case No. IT-94-1-T, ¶¶ 561–62. Not every crime committed during an armed conflict is a war crime; however, it must have a nexus to the battlefield. "If, for instance, a civilian merely takes advantage of the general atmosphere of lawlessness created by the armed conflict to kill a hated neighbor or to steal his property without his acts being otherwise closely connected to the armed conflict, such conduct would not generally constitute a war crime." Guénaël Mettraux, International Crimes and the Ad Hoc Tribunals 42 (2005).

28. *See, e.g.,* Appleman, *supra* note 4, at 139–264 (describing the tribunals following World War II).

29. *See* S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing a UN-sanctioned international tribunal to prosecute "genocide and other serious violations of international humanitarian law" in Rwanda).

30. *See* Claude Pilloud et al., Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 para. 3553 (Yves Sandoz eds., 1987) [hereinafter ICRC Commentary].

31. DoD LoW Manual, *supra* note 2, § 18.23.1–.2. *See* 10 U.S.C. § 877.

32. Raffi Khatchadourian, *The Kill Company*, New Yorker (June 29, 2009), https://www.newyorker.com/magazine/2009/07/06/the-kill-company.

33. *Id.*; United States v. Girouard, 70 M.J. 5, 8 (C.A.A.F. 2011). The panel was instructed on negligent homicide as a lesser included offense of premeditated murder, and Girouard was convicted of three specifications of negligent homicide. *Girouard*, 70 M.J. at 6, 8. On appeal, the conviction was reversed for negligent homicide not being a lesser included offense of premeditated murder under the elements test. *Id.* at 9–12.

34. DoD LoW Manual, *supra* note 2, § 18.23.3. Moreover, as the 2020 update to AR 600-20 states, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish." AR 600-20, *supra* note 3, para. 4-24.

35. Captain Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 112–17 (1972).

36. *See* Solis, *supra* note 14, at 423; Ryan, *supra* note 9, at 340; Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law 203–04 (2002).

37. *In re* Yamashita, 327 U.S. 1, 5, 13–14 (1946).

38. Decision of the United States Military Commission at Manila (Dec. 7, 1945), *reprinted in* The Law of War, *supra* note 5, at 1596–98. Yamashita's conviction was upheld by the U.S. Supreme Court, which confirmed that a commander is responsible under the law of war to control his subordinates. *Yamashita*, 327 U.S. at 15.

39. Solis, *supra* note 14, at 423.

40. Parks, *supra* note 1, at 22, 37–38.

41. Solis, *supra* note 14, at 423.

42. Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al. (Feb. 1948), *reprinted in* The Law of War, *supra* note 5, at 1303–43; 8 United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals 88–89 (1949); Ryan, *supra* note 9, at 304–07.

43. Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs.

Wilhelm von Leeb et al. (Oct. 1948), *reprinted in* The Law of War, *supra* note 5, at 1421–1470; 12 United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals 111–12 (1949); Ryan, *supra* note 9, at 308.

44. The "knew or should have known" standard is widely known as the *Yamashita* standard in international jurisprudence. *See, e.g.*, Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 200 (2000). However, the standard took form at the subsequent Nuremberg trials. Ryan, *supra* note 9, at 302–08; Parks, *supra* note 1, at 87–89. One expert refers to the "knew or should have known" standard as the von Leeb–List standard. *See* Solis, *supra* note 14, at 425.

45. Parks, *supra* note 1, at 88; Solis, *supra* note 14, at 423.

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

47. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

48. *The US-ICC Relationship*, Int'l Crim. Ct. Project, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Dec. 14, 2021). Although the United States has signed the Rome Statute, the U.S. Senate has not ratified it.

49. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

50. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, ¶¶ 29–30, 51–57 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF. Jean-Pierre Bemba Gombo, the leader of the Movement for the Liberation of the Congo and its military branch, was convicted of murder, rape, and pillaging committed by his subordinates from 2002 to 2003 in the Central African Republic. *Id.* ¶¶ 1–2, 752. The International Criminal Court Appeals Chamber held that the Trial Chamber had incorrectly determined that Bemba had failed to take "necessary and reasonable measures" while acting as a remote commander with a non-linear command structure. Prosecutor v. Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute," ¶¶ 171, 173, 191–92 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. The Appeals Chamber overturned the conviction. *Id.*, Judgment.

51. Michael Matheson, Deputy Legal Advisor to U.S. Department of State, 6th 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, reported in 2 Am. Univ. Int'l L. Rev. 419, 428 (1987), reprinted in Nat'l Sec. L. Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Law of Armed Conflict Documentary Supplement 249–50 (2020).

52. Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 3 (1989).

53. "The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War II." John W. Vessey Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 app. at 85 (May 3, 1985), *noted in* Brian Finucane, *U.S. Recognition of a Commander's Duty to Punish War Crimes*, 97 Int'l L. Stud. 995, 1006 (2021). *See also* Smidt, *supra* note 44, at 200, 213–15.

54. *See* Smidt, *supra* note 44, at 215-19; Major Trenton W. Powell, *Command Responsibility: How the International Criminal Court's Jean-Pierre Bemba Gombo Conviction Exposes the Uniform Code of Military Justice,* 225 Mil. L. Rev. 837, 871–79 (2017); *Instructions from the Military Judge to the Court Members in* United States vs. Captain Ernest Medina, *reprinted in* The Law of War, *supra* note 5, at 1732.

55. Matheson, *supra* note 51.

56. *See* AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a). Most North Atlantic Treaty Organization members, for example, have ratified AP I and the Rome Statute. Int'l Comm. of the Red Cross, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=47 (last visited Jan. 13, 2022); *The States Parties to the Rome Statute*, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 13, 2022).

57. *See* AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a).

58. *Spain Drops US Army Murder Case*, BBC News (May 13, 2008, 5:05 PM), http://news.bbc.co.uk/2/hi/europe/7398973.stm.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. Smidt, *supra* note 44, at 215. The American Servicemembers' Protection Act prohibits transferring or extraditing U.S. persons for prosecution by the International Criminal Court, but it does not and cannot foreclose prosecution by a court of a foreign nation. *See* 22 U.S.C. § 7423. *See also* Solis, *supra* note 14, at 330 (discussing a 2008 Italian criminal case against a U.S. Soldier stemming from a fatal shooting of an Italian officer at a checkpoint in Iraq).

64. *See* DoD LoW Manual, *supra* note 2, § 18.23.3.2 n.340; AR 600-20, *supra* note 3, para. 4-24.

65. DoD LoW Manual, *supra* note 2, § 18.23.3.2 n.340 (citing Military Commissions Act § 8, 10 U.S.C. § 950q (2009)).

66. 10 U.S.C. § 950q.

67. AR 600-20, *supra* note 3, para. 4-24.

68. FM 6-27, *supra* note 3, para. 8-31.

69. *See* DoD LoW Manual, *supra* note 2, § 18.23.3; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31.

70. DoD LoW Manual, *supra* note 2, § 18.23.3. For liability to attach, there must be "personal neglect amounting to a wanton, immoral disregard of the action of [the commander's] subordinates amounting to acquiescence in the crimes." *Id.* § 18.23.3.2.

71. *See* FM 27-10, *supra* note 14, para. 501 (requiring "necessary and reasonable steps"); FM 6-27, *supra* note 3, para 8-31. The term is also reflected in the Rome Statute for the International Criminal Court. Rome Statute, *supra* note 49, art. 28(a)(ii).

72. AR 600-20, *supra* note 3, para. 4-24.

73. *See* sources cited *supra* note 69. The *Department of Defense Law of War Manual* uses "feasible" and "reasonable" without distinction. DoD LoW Manual, *supra* note 2, § 5.2.3.1. *But see* James E. Baker, The Centaur's Dilemma 245 (2021) (holding "all feasible measures within their power," from AP I, to be a higher standard than "reasonable measures," as found in the Rome Statute).

74. Sources cited *supra* note 69. The standards expressed by these sources may be higher than those found in the UCMJ. *See* DoD LoW Manual, *supra* note 2, § 18.7.

75. DoD LoW Manual, *supra* note 2, § 18.23.3.2; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31. The duty to "prevent or repress" violations under the "knew or should have known" standard carries with it a duty to investigate. *See* DoD LoW Manual, *supra* note 2, § 18.4.3.

76. *See* AR 600-20, *supra* note 3, para. 4-6a; U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-2 (8 February 2020). For example, Colonel (COL) Michael Steele, commander of 3d Brigade, 101st Airborne Division (Air Assault), received an administrative reprimand for his response to the war crimes in Operation Iron Triangle. Paul von Zielbauer, *Army Says Improper Orders by Colonel Led to 4 Deaths*, N.Y. Times (Jan. 21, 2007), https://www.nytimes.com/2007/01/21/world/middleeast/21abuse.html. Colonel Steele reportedly received the reprimand for failure to report Iraqi deaths and "other details of the raid."

77. DoD LoW Manual, *supra* note 2, § 18.23.3.1. "A duty may be imposed by treaty, statute, regulation, lawful order . . . ." Manual for Courts-Martial, United States pt. IV, ¶ 18c(3)(a) (2019) [hereinafter MCM]. *See* Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 Gonz. L. Rev. 335, 401–13 (2006–2007) (advocating for a new article to the Uniform Code of Military Justice to address command responsibility for war crimes).

78. *See* Smidt, *supra* note 44, at 197. "Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control." FM 6-27, *supra* note 3, para. 8-29.

79. AR 600-20, *supra* note 3, para. 4-24 (codifying the three-part duty to prevent, stop, and punish war crimes helps the United States comply with its obligations under customary international law). *See* AP I, *supra* note 46, art. 87; Matheson, *supra* note 51.

80. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-24 (24 July 2020).

81. *Id.*

82. DoDD 2311.01, *supra* note 14, para. 2.7.b. All training must be consistent with the *Department of Defense Law of War Manual. Id.* para. 2.7.b.(2).

83. U.S. Dep't of Army, Reg. 350-1, Army Training and Leader Development tbl.F-2 (10 Dec. 2017) [hereinafter AR 350-1]. *See History of Tables of Distribution and Allowances (TDA) Units*, U.S. Army Ctr. of Mil. Hist. (May 30, 1995), https://history.army.mil/html/forcestruc/tda-ip.html.

84. U.S. Dep't of Army, Reg. 350-1, Army Training and Leader Development tbl.F-2 (10 Dec. 2017) (Law of War/Detainee Operations Training).

85. *Id.*

86. *Id.*

87. *See* U.S. Dep't of Def., Instr. 1322.32, Pre-Deployment Training and Theater-Entry Requirements para. 4.1.a (10 June 2020) (C1, 25 Aug. 2021).

88. *See* U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations paras. 3-24, 4-42, 4-47 (8 June 2020) [hereinafter FM 1-04].

89. *Id.*; AR 350-1, *supra* note 83, tbl.F-2 (Law of War/Detainee Operations Training).

90. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, Mil. L. Rev., May–June 2009, at 17, 19.

91. *Abu Ghraib US Colonel Reprimanded*, BBC News (May 12, 2005, 4:59 AM), http://news.bbc.co.uk/2/hi/americas/4539033.stm.

92. *Id. See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

93. *Abu Ghraib US Colonel Reprimanded*, BBC News (May 12, 2005, 4:59 AM), http://news.bbc.co.uk/2/hi/americas/4539033.stm.

94. *See id.*; Rielly, *supra* note 90, at 19.

95. U.S. Dep't of Def., Dir. 2311.01, DoD Law of War Program para. 4.2 (2 July 2020).

96. *Id.* paras. 4.2, G.2. (defining "reportable incident").

97. *Id.* para. 4.2.b.

98. *Id.* para. 4.2.c.

99. *See* Seymour M. Hersh, Cover-Up 256, 265–68 (1972) (discussing the consequences faced by the division and brigade commanders for covering up the My Lai massacre).

100. 1 Lieutenant General William R. Peers, U.S. Army, Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident 10-5, 10-12 to 10-16, 10-40 to 10-41, 11-12 (1974) [hereinafter peers inquiry].

101. *Id.*; Hersh, *supra* note 99, at 206–11.

102. *See* W.R. Peers, The My Lai Inquiry, at xi–xii (1979); Michael Bilton & Kevin Sim, Four Hours in My Lai 23, 185 (1992). The death toll comprised at least 347 noncombatants—mostly women, children, and old men. *Id.* at 92–93.

103. DoDD 2311.01, *supra* note 14, para. 4.2.a.

104. *See* DoD LoW Manual, *supra* note 2, § 18.4.3. Thorough investigation allows a commander to fulfill duties imposed by the "knew or should have known" standard of command responsibility. *See* Parks, *supra* note 1, at 90.

105. *See* MCM, *supra* note 77, R.C.M. 303 ("[T]he immediate commander shall make . . . a preliminary inquiry . . . .").

106. AR 600-20, *supra* note 3, para. 4-24; Rielly, *supra* note 90, at 19–20.

107. *See* DoD LoW Manual, *supra* note 2, § 18.4.2, 18.4.4.

108. Rielly, *supra* note 90, at 23.

109. *See* McCarthy, *supra* note 7, at 556. "An Army leader operates with clear expectations regarding conduct so that indiscipline does not jeopardize mission success." U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 1-94 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

110. *See* McCarthy, *supra* note 7, at 564, 586–87 (citing Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

111. *See* Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, Rolling Stone (Mar. 28, 2011, 2:00 AM), https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* McCarthy, *supra* note 7, at 556; ADP 6-22, *supra* note 109, para 1-94.

117. *See* Jim Frederick, *Anatomy of a War Crime: Behind the Enabling of the "Kill Team,"* Time (Mar. 29, 2011), https://world.time.com/2011/03/29/anatomy-of-a-war-crime-behind-the-enabling-of-the-kill-team/ (discussing "outrage" in Europe over the "Kill Team" story despite a lack of interest in it in the United States).

118. Barry R. McCaffrey, *Human Rights and the Commander*, Joint Forces Q., Autumn 1995, at 10, 10–11.

119. *See id.* at 12. "[I]f we train a unit to hate insurgents and kill them in combat, and the unit finds it increasingly difficult to distinguish the insurgents from the population, in the minds of the Soldiers, the population may soon become the hated enemy and thus victims of unlawful conduct." Rielly, *supra* note 90, at 20.

120. Barry R. McCaffrey, *Human Rights and the Commander*, Joint Forces Q., Autumn 1995, at 10, 12.

121. *Id.*

122. *Id.*

123. *Id.* at 12–13. Leaders at all levels must also police their own speech. Even offhand remarks in jest, such as, "The only good prisoner is a dead one," may be overheard and misinterpreted by Soldiers, leading to a climate of disregard for the Law of Armed Conflict. *See* Parks, *supra* note 1, at 78–80.

124. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, Mil. L. Rev., May–June 2009, at 17, 21.

125. *Id.* at 22. These problems contributed to the My Lai massacre and the failure of investigation afterward.

126. *Id.* at 22–23. "[A] moral, ethical command climate . . . is the single most important factor in preventing civilian casualties . . . . No substitute exists for ethical leadership manifested by the provision of training in garrison and throughout deployments." Def. Legal Pol'y Bd., U.S. Dep't of Def., Report of the Subcommittee on Military Justice in Combat Zones 60 (2013).

127. Bilton & Sim, *supra* note 102, at 138–40.

128. *See* FM 6-27, *supra* note 3, paras. 8-2, -4, -7.

129. Peers Inquiry, *supra* note 100, at 10-9 to -10.

130. Michael Bilton & Kevin Sim, Four Hours in My Lai 23, 138 (1992).

131. *Id.*

132. *Id.* at 138–39.

133. *Id.* at 139.

134. *Id.* at 139–40.

135. Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 Mil. L. Rev. 1, 14 (1982); *see* ADP 6-22, *supra* note 109, para. 8-4 (Leaders and Courage).

136. *See* Peers Inquiry, *supra* note 100, at 10-8 to -11; DoD LoW Manual, *supra* note 2, § 18.2 (discussing the practical reasons for enforcing compliance with the Law of Armed Conflict).

137. *See* AR 600-20, *supra* note 3, para. 4-24 (listing the duty to "prevent" as just one of a commander's duties with regard to war crimes).

138. Deterrence is a key goal of punishment. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 16, 2001).

139. MCM, *supra* note 77, R.C.M. 306 (initial disposition); Parks, *supra* note 1, at 80–81.

140. *See* MCM, *supra* note 77, R.C.M. 306(a); 10 U.S.C. § 37(a) (command influence). International law imposes no duty to punish certain offenses a particular way. FM 6-27, *supra* note 3, para. 8-5.

141. *See* MCM, *supra* note 77, R.C.M. 306. If a commander took unreasonably light action against an alleged war criminal, that could constitute a violation of the commander's duty to punish. Parks, *supra* note 1, at 80–81.

142. U.S. Dep't of Army, Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare paras. 8-1 (7 Aug. 2019) (C1, 20 Sept. 2019).

143. *Id.* para. 8-7. *See* AR 600-20, *supra* note 3, para. 4-24 (added to AR 600-20 in 2020).

144. *See* Chief of Staff, U.S. Army, & Sec'y of Army, The Army Vision (n.d.), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf. Enforcing compliance with the law of war enables mission accomplishment by enhancing troop discipline, setting an example for reciprocal compliance by opposing forces, and establishing a framework for perceived legitimacy by host-nation, allied, and U.S. populations. DoD LoW Manual, *supra* note 2, § 18.2.

(Credit: Andy Dean – stock.adobe.com)

No. 2

# Cutting the Gordian Knot

## Delivering Principled Fiscal Counsel in Support of Operations

*By Lieutenant Colonel Ryan Howard & Major Katherine F. Mitroka*

*It does not do to leave a live dragon out of your calculations, if you live near one.*[1]

As the United States has pursued her national interests over the last two decades, the importance of alliances has become ever more apparent. The recent interim national security strategic guidance calls for a renewed commitment to our partnerships around the world "because our strength is multiplied when we combine efforts to address common challenges, share costs, and widen the circle of cooperation."[2] In furtherance of this strategy, national security leaders have increasingly adopted a "by, with, and through" (BWT) operational approach in support of military campaigns.[3] Under this approach our "operations are led *by* our partners, state or non-state, *with* enabling support from the United States or U.S.-led coalitions, and *through* U.S. authorities and partner agreements."[4] Significantly, BWT requires legal authorities that allow the U.S. military to build partner capacity and provide support to partner forces abroad.[5] Consequently, the role of fiscal law at operational headquarters[6] is now prominent.

For both national security law (NSL) and fiscal law (KFL) attorneys, the challenge is clear: provide planners with a clear understanding of funding authorities so commanders can leverage funds appropriated by the legislative branch[7] to achieve the national security objectives of the executive branch.[8] Against this separation of powers backdrop, Army organizational structure and doctrinal planning processes layer added complexity to this practice area. Fiscal law issues arise throughout the operations process[9] and permeate each of the legal functions[10] and each of the warfighting functions.[11] Taken together, counsel of all ranks and backgrounds often confront a Gordian knot[12] of appropriations and legal authorities entangled with doctrinal processes and procedures.

Do not be overwhelmed! Judge advocates (JAs) can *cut* the knot by understanding the operations process, integrating with the staff, mastering the law, offering legal counsel that enables planning, and providing legal reviews grounded in principled counsel. Using this approach, NSL/KFL counsel have a unique opportunity to create and preserve options for commanders. To that end, this article offers practical advice to JAs providing fiscal law counsel to commanders and staffs in support of operations. After an orientation to relevant legal authorities and doctrine, the article offers observations, best practices, and examples based on the authors' experiences in the U.S. Central Command (USCENTCOM) and U.S. Europe Command (USEUCOM) areas of responsibility.

## The Authorities Context: The Operations Process and Appropriated Funds

As dual professionals, JAs must master both the law and the profession of arms.[13] These two bodies of knowledge converge when providing legal counsel at an operational headquarters. This is particularly true when practicing fiscal law, where the absence of funding authority can form hard limitations[14] that constrain the commander's options and undermine the feasibility of a course of action.[15] A *successful* NSL/KFL attorney, therefore, cultivates knowledge and skill as a professional staff officer *and* develops expertise in fiscal law. Therefore, let us first address the fundamentals of the Army's processes.

### *Operations Process*

Army commanders use the operations process to plan, prepare, execute, and assess assigned missions.[16] Within this cycle, the commander visualizes, describes, directs, and leads, while the staff promotes shared understanding, enables decision-making, controls operations, and assesses progress.[17] To drive the operations process, commanders cross-functionally organize their staffs into functional and integrating cells[18] dedicated to understanding challenges and developing proposed solutions.[19] Commanders leverage six warfighting functions to serve as *functional* cells, which enable and inform planning from a subject matter-specific perspective.[20] Additionally, commanders establish *integrating* cells comprised of subject-matter representatives to develop comprehensive plans tied to specific time horizons.[21] In this context sits the JA, who provides legal advice to the commander and staff.[22]

#### *Judge Advocate Engagement in the Operations Process*

How then should JAs engage in the operations process? The role of the JA is wide-ranging. Judge advocates are "counselors, advocates, and trusted advisors to commanders [and] staffs . . . who practice law [across] six legal functions."[23] With regard to the operations process, JAs must integrate with the staff to effectively provide legal advice to each of the warfighting functions.[24] From a planning perspective, JAs are expected to engage throughout the Military Decision Making Process (MDMP)[25] and contribute to numerous planning products.[26] Such support is required because legal issues, from any of the six legal functions, may arise within any planning cell or warfighting function.[27] Therefore, JAs must be postured to identify and resolve legal issues—irrespective of legal function—across all planning horizons (integrating cells) and throughout the battle rhythm (functional cells).

### *Fiscal Law*

Legal issues pertaining to funding authorities present considerable risk to commanders and their staffs as they develop plans in support of national security objectives. Why? Fiscal law issues have the unique potential to constrain operations in a way that cannot be resolved within the executive branch. The Constitution vested the *legislative* branch with the authority to fund the Federal Government.[28] Significantly, that authority is expressed in the *negative*—"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[29] Consequently, all Federal Government activities, including those of the executive branch (e.g., military operations), are dependent on the legislative branch appropriating funds.[30] Therefore, each activity contemplated by an operation must enjoy *positive* fiscal authority. When an operation includes activities that do not fall within the parameters of an appropriation, funds may not be obligated in support of those activities. Moreover, the executive branch cannot unilaterally adjust constraints rooted in appropriated funds; to create or modify funding authority, the legislative branch must act. In this way, fiscal law uniquely constrains operational planning efforts.

Effective legal support to planners requires NSL/KFL counsel to engage early and often. Failure to do so could mean the staff will discover they lack positive fiscal authority too late, which wastes precious time, or the staff will not discover the error at all, thereby allowing the commander to *unknowingly* accept risk of violating federal law (e.g., the Anti-Deficiency Act).[31] To avoid these outcomes, NSL counsel must develop a strong understanding of relevant funding authorities and constraints; while KFL counsel must attain fluency with ongoing operations to provide meaningful counsel on time.

## Operational Funding in Action

Given the need for effective fiscal law counsel throughout the operations process, how can JAs best advise leaders and planners? KFL/NSL practitioners should leverage a series of best practices, outlined below, throughout five phases of legal support: 1) staff integration, 2) staff education, 3) mastery of the law, 4) legal advice to planners, and 5) legal reviews. This article outlines relevant authorities and doctrine, offers practitioner insights, and shares real world examples for each phase, enabling NSL/KFL counsel to provide principled fiscal counsel at the speed of relevancy to create or preserve options for commanders.

### *Staff Integration: Staff Officership, Relationships, and Posturing Legal Personnel*

Long before opining on a funding challenge, NSL/KFL counsel must integrate with the staff and develop strong relationships with lead planners, warfighting functions, and the chief of staff (COS) or executive officer (XO). According to doctrine, commanders make the best decisions when they are supported by a staff that collaborates, engages in frank dialogue, and enjoys shared understanding.[32] This teamwork "produces the *staff integration* essential to synchronized operations."[33] To achieve staff integration, the staff meets in integrating cells,[34] operational planning teams,[35] and working groups,[36] organized into a battle rhythm[37] to drive the operations process. While planners may not realize it, they require legal support—particularly fiscal law counsel—early in the planning process.[38] Judge advocates must fully integrate with each warfighting function and planning cell to describe funding authorities and identify potential shortfalls.[39] To achieve successful staff integration, JAs must first develop proficient staff officer skills, build strong relationships, and effectively posture their legal personnel.

#### *Staff Officership*

To effectively operationalize legal counsel, JAs must first become outstand-

ing staff officers by communicating their knowledge, insights, and analysis to the commander and staff.[40] This requires staff officers, including JAs, to be "experts in doctrine and the processes and procedures associated with the operations process . . . ."[41] "Doctrine" is the *lingua franca* for integrating with the staff—this is the language planners use to define problems and develop solutions.[42] Therefore, JAs must develop a fluency with doctrinal processes in order to translate their legal expertise into staff understanding. Judge advocates who cannot speak the language will not effectively communicate their legal advice. To that end, counsel must first master the operations process. Second, NSL/KFL attorneys must engage in the operations process—in garrison, during field training exercises, and in support of real-world operations. By participating in doctrinal processes, JAs will grow in their ability to anticipate challenges, communicate their advice, and coordinate solutions. Strengthening one's knowledge of doctrinal processes is the first step to effective staff integration.

*Relationships*

Judge advocates must also develop strong relationships with the staff. As the adage goes: "relationships are a pacing item"[43]—they are critically necessary to achieve the mission.[44] Nowhere is this more true than for the JA, where relationships form the context of the practice of law. JAs are in the relationship business every day—by building strong relationships with the commander and staff, JAs gain access to the meetings and information they need to provide counsel that strengthens and refines planning. Without effective relationships, JAs are often out of position to deliver value—allowing planning to occur without the support of legal counsel who could help inform the development of feasible options.

How then should a JA develop relationships with the staff? *Build Trust.* High performing teams require mutual trust built through a shared understanding that is grounded in knowing one another. Prior to any legal crisis, JAs must build trust with the commander and staff through a blend of presence, intellect, and character.[45] To be *on* the team, JAs must be *with* the team—in garrison and in the field.[46] Moreover, JAs can bolster trust by leveraging their expertise and displaying character to help their team solve problems and win.

*Posturing Legal Personnel*

Finally, JAs must be postured throughout the headquarters in a way that promotes staff integration. After developing sound relationships, the demand for legal counsel will exceed the supply of available personnel. This is particularly true for fiscal law counsel. Accordingly, JA leaders must determine how to best posture their limited legal personnel to ensure effective operational funding (opfunding) support to planning efforts. The challenge is to provide *efficient* support to the operations process by leveraging the *correct* attorney at the *right* place and at the *right* time.[47] The NSL/KFL counsel can neither afford to miss a meeting regarding the use of appropriated funds, nor routinely attend meetings that are not ripe for opfunding advice.

Senior JAs should develop a legal support plan in coordination with the COS or XO to establish *which* events legal personnel will attend.[48] JAs should first meet with each planning cell and working group lead to better understand the purpose, frequency, composition, inputs, outputs, and agenda for each planning cell meeting and battle rhythm event.[49] While most meetings will involve some activity subject to legal authority, JAs should consider attending meetings where 1) legal issues are likely to arise, 2) planners are unlikely to identify the issue, and 3) failure to identify the issue will result in wasted staff time or allow the commander to unknowingly accept risk.[50] When legal support is appropriate, JA leaders should analyze which attorney is best suited to support each engagement.[51]

Judge advocates must also be intentional about *when* to provide legal support. Identifying the correct moment for engagement in the planning cycle is more art than science. When counsel engage too soon, the factual predicate is too vague to render legal advice. However, when counsel engage too late, plans may already be fully developed or executed. To strike this balance, JAs should ask: (1) am I engaging early enough to enable planning? and (2) am I engaging late enough such that planners have developed a sufficient factual predicate on which I can offer meaningful legal insight? In sum, JAs, leveraging their skill as staff officers and relationships with planners, should develop a legal support plan, in coordination with the COS/XO, that addresses when and where to posture limited legal resources to add value to the planning process.

***Practice Note: The Counter-ISIS Train and Equip Working Group.***
At Combatant Commands (CCMD), where staff sections are large and operations are numerous, staff integration is of paramount importance. At U.S. Central Command (USCENTCOM), the Counter-ISIS Train and Equip Fund working group (CTEF-WG) required considerable effort to achieve staff integration. Each week, attendees from forward task forces, USCENTCOM, and representatives from the Office of the Secretary of Defense – Comptroller (OSD-C), Defense Security Cooperation Agency (DSCA), and the State Department (DoS), would discuss various categories of partner force assistance (e.g., training, equipment, etc.). Initially, the working group participates limited their interaction to the meeting itself and attempted to resolve complex funding challenges in open forum. This approach produced friction as planners from various headquarters and various agencies debated the parameters of funding authorities. Over time, however, NSL/KFL attorneys were able to integrate with key stakeholders and gain access to key information before the meeting. This allowed counsel to identify potential legal issues, conduct legal research, and develop solutions *prior* to the working group. In sum, the CTEF-WG improved because working group members developed mutual trust and increased communication throughout the team.[52]

Staff integration is the foundation of effective legal counsel. When JAs successfully integrate with planners, they enjoy a better understanding of the plan earlier in the planning process. Consequently, they can provide better counsel faster. To enjoy

this desired level of staff integration, JAs must become effective staff officers who enjoy strong relationships with planners and posture their legal personnel in time and space to deliver value early in the planning process.

***The Fiscal Law Context: Separation of Powers***

After successfully integrating with the staff, NSL/KFL attorneys should educate key leaders and planners on the foundational principles of, and unique challenges presented by, fiscal law. Within the context of an operation, fiscal law concerns can seem bizarre if not comedic. From the planner's perspective, they are developing courses of action based on guidance they received from their higher headquarters, who received an order from a combatant commander (CCDR), who received an order from the Secretary of Defense (SecDef).[53] Given that posture, planners are often shocked when a plan draws a fiscal law *non-concur*: "Hey Judge—we appreciate your support, but senior leaders at the highest levels tasked us to do this . . .so what is your legal concern?" To promote more efficient coordination, JAs are wise to meet with planners, explain need for positive fiscal authority, and discuss the nuance that mission authority does not convey fiscal authority.

*Positive Authority*

Our Constitutional framework requires that NSL/KFL counsel work closely with planners to ensure each activity of the operation enjoys positive fiscal authority. Counsel should focus their education efforts on several foundational fiscal law principles. First, counsel should start with the Constitution—address the appropriations clause and emphasize its negative phrasing.[54] Address the fact that all executive activity (including operations) relies on appropriations by Congress: planners need *positive* funding authority for *each* activity contemplated by the operation.[55] Describe the challenges and lengthy timelines associated with creating or modifying appropriations. And, depending on the audience, conclude by sharing how attorneys analyze funding authorities in terms of purpose,[56] time,[57] and amount.[58]

*Mission Authority Is Not Fiscal Authority*

Counsel should also address the challenging interface between fiscal law and the operations process. The central issue for JAs is the frequent conflation of mission and fiscal authorities. To expend appropriated funds in support of any mission, commanders must enjoy *both* mission authority[59] *and* fiscal authority.[60] While commanders and planners understand the general need for funding, they are often surprised to find they need any authority beyond the mission authority that flows from the President. Because funding authority flows from Congress alone, mission authority from the executive branch does not convey funding authority. Therefore, NSL/KFL counsel should ensure leaders and planners understand the need for *both* authorities prior to approving any activities that require the obligation of appropriated funds.

***Practice Note: Partner Force Assistance Activities in Orders***

Under a BWT operational approach, orders often call for providing logistics support, supplies, and services (LSSS) to partner forces in support of operational objectives. However, these orders rarely include the authority required to fund the provision of LSSS. This dynamic, mission authority without funding authority, can create friction between planners and attorneys. From the planner's perspective, they believe the Joint Staff Execute Order (EXORD)—on its own—conveys all authority required to provide the LSSS. This misperception requires opfunding counsel to educate planners on the need for positive fiscal authority, flowing from Congress outside of executive branch orders. After building shared understanding on the need for positive fiscal authority, counsel and planners can work together to identify available appropriations. Oftentimes, this requires counsel, in coordination with planners, to seek approval for funds available at higher echelons, develop legislative proposals, or modify the plan to access existing funding authorities.[61]

Given the unique challenges presented by fiscal law, counsel must exploit opportunities to educate leaders and planners on the relationship between funding authorities and operations. Judge advocates should help planners understand the broader separation of powers context: planners are developing courses of action to enable Department of Defense (DoD) activities in support of executive branch objectives by using funds appropriated by the legislative branch. In this context, planners are more likely to appreciate the need for positive fiscal authority and the distinction between funding and mission authorities. When JAs have this discussion *prior* to planning, planners are better equipped to identify and resolve fiscal issues *during* planning; they are also more likely to understand fiscal advice and be able to resolve fiscal issues at the action officer level. However, educating planners on fiscal law principles is not enough—counsel must themselves master funding authorities and actively participate in planning to create and preserve options.

***Mastery—Legal Research and Technical Chain Discussions***

Parallel to staff integration and education initiatives, JAs must also develop mastery of the legal authorities specific to the current planning effort. Whether creating new plans or modifying existing plans, commanders are looking for attorneys to provide clarity on how various legal authorities will enable or constrain their options. This is particularly true for fiscal law: Which activities enjoy positive authority? Which activities are prohibited or unfunded? Are there other available funding sources? Where is the authority unclear? This requires mastery of the funding authorities applicable to the specific operation.

*Planning Context*

Within the planning context, developing mastery should commence upon "Receipt of the Mission" during step one of the MDMP.[62] By developing mastery prior to "Mission Analysis," NSL/KFL counsel are better postured to advise the staff *during* planning.[63] Judge advocates can accelerate their learning by reviewing all existing planning products, including their higher headquarters' operations order,[64] the

| Overseas Contingency Operations | | | | |
|---|---|---|---|---|
| **Title** | **Authority** | **Purpose** | **Funding Source** | **Approval/Notice** |
| **CTEF - Iraq**<br><br>**Expires 31 DEC 2020** | § 1209 FY15 NDAA, as amended most recently by §1222 FY20 NDAA<br><br>*Read CTEF Approp in concert w/NDAA<br><br>**See Also**<br><br>- CC Memo, Mgmt of CTEF [AUG 19]<br><br>- OSD Memo, Mgmt of CTEF [17 APR 19]<br><br>- OSD Memo, Use of DoD Operating Funds ISO Foreign Security Forces [13 JUL 18]<br><br>- OSD Memo, Syria T&E Budgetary Guidance [9 FEB 15]<br><br>- § 9016 FY20 CAA (Cross-Level Syria to Iraq) | 1. Assistance: training; equipment; supplies; stipends; repair/renovation; construction for facility fortification & humane treatment; and sustainment.<br>2. In the form of "Direct Support" [17 APR 19 SECDEF]<br>3. To vetted members of the Syrian opposition<br>4. Who are "participating or preparing to participate" in activities [CTEF Appropriation]<br>5. That Counter ISIS forces ["kinetic defeat" – combat, combat support, combat service support]<br>6. In a country designated by SECDEF (Iraq, Syria, Turkey, Jordan, or Lebanon) [8 JUN 17 OSD Memo]<br><br>CTEF may also be used to fund border security of adjacent nations (Jordan, Lebanon, Egypt, Tunisia).<br><br>Limit weapons divestitures to "small arms and light weapons" unless SECDEF approves (Congress notice).<br><br>CTEF may be used for both repair/renovation AND construction for facility fortification and humane treatment – construction/repair projects may not exceed $4M/project or $20M total [§1222 FY20 NDAA]. Any project exceeding $1M requires CDR USCENTCOM approval [§1223 FY18 NDAA] | FY19 C-ISIL Train & Equip Fund (CTEF): $1.35B available until 30 SEP 20.<br><br>FY20 CTEF: $1.195B available until 30 SEP 21.<br><br>CJTF validates requirements – CENTCOM (CCJ5) endorses MOR prior to obligation<br><br>Requires 15 day Congressional Notification prior to obligation (FAP)<br><br>*Significant oversight with input from OSD(C), OSD(P), DoS, DSCA, DTRA, and USCENTCOM.* | Approval: SECDEF approval w/ SECSTATE coordination. SECCDEF delegated through OSD(C) to Combatant Commanders<br><br>Contributions: SECDEF may accept contributions from foreign Gov'ts. SECDEF delegated to CENTCOM authority to accept non-monetary contributions. [8 SEP 17, USD Memo, Norquist]<br><br>Treat as Stocks: With written congressional notification from SECDEF, DoD may treat CTEF purchased equipment as DoD Stocks when that equipment is returned or not yet transferred (and no longer required) [22 JUN 18, DEP SECDEF Memo]<br><br>CTEF may NOT be used for DoD enabler costs; rule of law; governance; humanitarian assistance; civil infrastructure; jobs; or education.<br><br>FY20 CAA 9016 Cross Level S-TEF |

CCMD's campaign and contingency plans,[65] and SecDef Execute Orders.[66] By starting with these planning products, NSL/KFL counsel can leverage their understanding of the operating environment and the commander's desired end-state to focus their legal research.

*Research*

There are two common methodologies for fiscal law research: authorities-oriented and activities-oriented. First, the authorities-oriented approach: counsel should review the higher headquarters' planning documents and note any specific reference to a funding authority, including law, policy, and regulation.[67] Effective legal research includes both positive fiscal authority *and prohibitions* outlined in U.S. Code, National Defense Authorization Acts, and DoD Appropriations Acts. Legal research must also include any germane policy guidance from the Office of Management and Budget (OMB), DoD, military departments, and other federal agencies.[68] Finally, legal research should include all applicable regulatory guidance including, the DoD *Financial Management Regulation*[69] and military department regulations, directives, and instructions.[70]

Second, counsel should conduct *activities-oriented* legal research by examining planning products for each *activity* that implicates the use of appropriated funds. Counsel should review their higher headquarters' order for tasks and activities that contemplate procurement of goods and services, construction, security cooperation, or humanitarian assistance. While reviewing the order, counsel are likely to identify activities that will require the expenditure of appropriated funds, but the order will not reference the required funding authority.[71] Therefore, to complete the activities-oriented legal research, counsel must meet with the responsible planning cell and each warfighting function to understand the activities contemplated by planners. With a clearer understanding of the plan, counsel should research those authorities available to fund each anticipated activity and organize that research into a document library. Through *authorities*- and *activities*-oriented research, counsel will both identify and master the funding authorities implicated by the operation.

*Funding Authority Matrix*

Having established a funding authorities library, counsel should organize their legal research into an "authority matrix."[72] While this product can take many forms, the substance should synthesize all relevant authority (i.e., law, policy, and regulation) for each category of expense. Consider categories such as: security cooperation,[73] burden sharing,[74] acquisition and cross servicing agreements,[75] humanitarian assistance,[76] construction,[77] partner force assistance,[78] and extraordinary enabling authorities.[79] When summarizing the potential authorities, counsel should describe the fund's purpose, limitations, and approval authorities; note related limitations and prohibitions; and reference applicable law, policy, and regulation.[80]

*Technical Chain 1.0*

Legal research is not complete, and mastery cannot be achieved, until NSL/KFL counsel are able to refine their understanding of fiscal authorities with senior counsel. Building on their foundational legal research, NSL/KFL counsel should secure approval from their SJA to engage the legal

technical chain (tech-chain), including their higher headquarters, service component, and CCMD; the Joint Staff; and potentially the DoD Office of General Counsel (OGC). By engaging senior counsel, NSL/KFL attorneys will dramatically strengthen their understanding of funding authorities, evolving policy guidance, and OGC legal positions. One way to organize this engagement is through socialization of the "authority matrix." By sharing this product with senior counsel, NSL/KFL attorneys will refine their knowledge of evolving authorities, while building confidence in their mastery of well-settled funding authorities. In sum, effective fiscal law counsel requires inclusive frequent discussions between forward counsel (those closest to the facts) and senior counsel (those closest to law and policy). Therefore, OSJA leaders should allow *and* encourage their NSL/KFL counsel to directly engage the fiscal law tech-chain.

***Practice Note: Developing Mastery of 10 USC § 333***

At CCMDs, planners in the J5 and forward headquarters frequently desire to build the capacity of partner nations. The key authority for this effort is 10 USC § 333, "Foreign Security Forces: authority to build capacity," which authorizes the use of funds to provide training and equipment. Consequently, NSL/KFL counsel required mastery of this funding authority. First, counsel reviewed the statute in detail, noting (1) categories of permissible operations and support; (2) that the Defense Security Cooperation Agency (DSCA) is the sole source of funding; and (3) coordination with the Secretary of State is required. Second, counsel reviewed applicable constraints, including limitations on construction and the applicability of the Leahy Amendment. Counsel then reviewed DSCA's Security Assistance Management Manual (SAMM) and various "333" policy memoranda. After developing a composite view of the funding authority, counsel engaged attorneys at DoD OGC and DSCA to refine their understanding prior to engaging J5 planners.[81]

Prior to mission analysis (MA), NSL/KFL counsel must aggressively pursue mastery of all relevant funding authorities. Counsel should review the planning products of the higher headquarters to kick start their legal research focused on the authorities implicated by the operation. Effective legal research includes, at a minimum, applicable law (funding authorities *and* prohibitions), policy guidance, and regulations. After developing a solid understanding of these authorities, NSL/KFL attorneys should engage senior counsel to understand established JS or DoD OGC legal positions. Following this tech-chain engagement, NSL/KFL counsel will be postured to support the SJA and enable planners to develop feasible courses of action. Developing this level of mastery is *the key* to practicing fiscal law at the speed of relevancy.

***Legal Support to Planning***

After developing strong staff relationships, briefing key leaders on fiscal law foundations, and developing mastery of relevant funding authorities, NSL/KFL attorneys are now postured to provide legal support to planners.[82] Judge advocates can deliver tremendous value to the commander and staff by engaging early in the planning process. Regarding fiscal law, it is essential for this engagement to occur as early as possible to enable planning and maximize lead time to resolve funding challenges. Counsel can best support planning by engaging in mission analysis, developing an authorities-activities crosswalk, providing a legal running estimate, and meeting with planners to promote shared understanding of available funding sources and limitations.

*Mission Analysis*

As the staff commences MA, legal support to planners increases in relevance and importance.[83] During this step of the MDMP, the staff assesses the situation and "gather[s], analyze[s], and synthesize[s] information" about the operating environment to "better understand the situation and problem."[84] This assessment enables the staff to understand "*what* the command must accomplish, *when* and *where* it must be done, and most importantly *why*—the purpose of the operation."[85] The staff ascertains key tasks;[86] develops facts and assumptions;[87] determines constraints, including resource limitations;[88] and reviews available assets—including the identification of resource shortfalls.[89] Throughout this assessment, the commander and staff rely on legal counsel to identify and understand the impact of legal authorities and limitations.[90] As the staff works to understand the operating environment, frame the problem, and develop options for the commander, well-versed NSL/KFL counsel can deliver value by articulating funding parameters and anticipating shortfalls.

*Activities-Authorities Crosswalk*

As part of the planning effort, NSL/KFL counsel must find ways to translate their mastery of the law into useful "staff inputs" that strengthen the staff's understanding of funding authorities and limitations. One best practice is to develop an "activities-authorities crosswalk." This product, often taking the form of a chart, depicts likely activities and the corresponding potential funding authorities.[91] The crosswalk will serve as a useful graphic for counsel to visualize which activities enjoy positive fiscal authority, which activities lack funding authority, which activities are prohibited, and those areas where the authority is unclear. This legal planning product is a pragmatic way to anticipate questions from leaders, while equipping counsel with analysis that delivers value.

*Legal Running Estimate*

NSL/KFL counsel should now provide input to the SJA's legal running estimate (LRE). "A running estimate is the continuous assessment of the current situation used to determine . . . if planned future operations are supportable . . . ."[92] Running estimates are maintained throughout the planning process to inform course of action development and assessment.[93] Doctrine acknowledges that running estimates will be unique, which is certainly true for SJAs.[94] Using the crosswalk methodology, counsel may develop recommended input for the SJA's LRE and brief the SJA on the parameters of funding sources for each major operational activity—noting where the command enjoys positive fiscal authority, where prohibitions limit activities, and where funding shortfalls may occur. This discussion will strengthen the SJA's understanding of funding sources.[95]

*Legal Advice and Shared Understanding*

Equipped with a funding authority matrix, an activities-authorities crosswalk, and an updated running estimate, NSL/KFL counsel are now postured to provide legal support to planning. Too often, however, this is the moment where staff integration breaks down. While each staff section knows *their* assessment, planners often fail to translate their knowledge into *shared* understanding throughout the entire staff.[96] This is of critical importance for NSL/KFL counsel, who must communicate their understanding of funding authorities to planners with sufficient clarity to enable course of action development.[97] Therefore, NSL/KFL counsel should aggressively engage planners, while maintaining ongoing inclusive discussions with the tech-chain.[98]

As the MDMP continues, NSL/KFL counsel can deliver value by advising planners on funding authorities from course of action (COA) development (COADEV) through approval.[99] By providing legal advice *during* planning, planners are empowered to help ensure COAs conform to the law from inception. As the staff transitions from MA to COADEV, counsel will observe the factual predicate sharpen with detail. During this shift, legal counsel should evolve from a description of the law to advice on specific activities in light of the law. Counsel should highlight where activities enjoy positive fiscal authority and where activities are constrained by prohibitions or funding shortfalls. Where appropriate, counsel should address policy and regulatory constraints, with recommendations to seek exceptions to policy.[100]

Regarding limitations or shortfalls, NSL/KFL counsel have a unique opportunity to create options for their command. Depending on the nature of the limitation and the urgency of the requirement, counsel can work to modify *or* eliminate limitations in a way that the rest of the staff cannot. When the plan hits a limitation, counsel should first describe the nature and source of the limitation.[101] If the limitation is inflexible, counsel should work to identify different funding authorities or work with planners to change the plan to fall within the parameters of available funding authorities.[102] If the staff cannot adjust the plan and no authorities are available within the command, counsel should look for broader enabling authorities available at higher echelons or consider developing a legislative proposal.[103]

As NSL/KFL counsel advise planners, they should also reengage the legal tech-chain and build on the foundational dialogue initiated during their legal research. Equipped with additional facts, counsel at operational headquarters are uniquely postured to strengthen legal support at echelon. Through sharing updated planning efforts and draft legal positions with counsel at higher headquarters, senior counsel will gain a better understanding of the operating environment and potential legal issues. In turn, the NSL/KFL counsel at the operational headquarters will receive guidance from senior counsel that will strengthen their understanding and legal reasoning. Counsel at the operational level can, in turn, push this refined legal perspective to forward counsel and themselves remain up to date on the operating environment. In this way, vertical dialogue strengthens the entire legal community.

***Practice Note: Advice to Planners on Afghan Reconciliation***

When the time came for a political settlement between the Government of Afghanistan and the Taliban, USCENTCOM and USFOR-A planners, in coordination with legal counsel, worked to develop options. Following exhaustive legal research, counsel conducted inclusive discussions throughout the legal tech-chain. This engagement validated counsel's opfunding analysis and the legal community developed a single position—no funding source was available for this purpose. Recognizing the desired activity could not be modified, counsel worked with planners to develop a way ahead: seek approval for emergency and extraordinary expense (EEE) funding authority, while simultaneously developing a legislative proposal for the next fiscal year. This approach enabled planning, while developing a more fulsome authority for use in the future. That proposal ultimately became § 1218 of the FY20 NDAA, "Support for Reconciliation Activities Led by the Government of Afghanistan."[104]

Providing legal advice in support of planning requires aggressive preparation for and engagement in MA and COADEV.[105] Commanders and planners cannot afford for NSL/KFL counsel to limit their support to a legal review of the operations order at the end of MDMP. At that point, the plan, relying on an incomplete or inaccurate understanding of fiscal authorities presents considerable risk to mission (i.e., we cannot fund this activity) or to the commander (i.e., an Anti-Deficiency Act Violation). Instead, NSL/KFL attorneys must offer insights into relevant legal authorities *during* planning. Judge advocates can best deliver value by developing an activities-authorities crosswalk; drafting inputs to the running estimate; and briefing planners on funding authorities that support, fail to support, or prohibit each activity contemplated by the operation. Counsel must encourage planners to not abandon key activities when confronted with a perceived funding challenge. Instead, planners and attorneys must fight through friction to create options. *Fiscal solutions almost always exist.* Counsel who engage early in the planning process deliver tremendous value by enabling planners to develop legally sufficient COAs.

***Legal Reviews of Operations Orders and Expenditure of Funds***

When a course of action is approved by the commander, the staff transitions to orders production[106] which necessitates formal legal review by NSL/KFL counsel.[107] During this phase of planning, NSL/KFL counsel review the operations order for legal sufficiency and they review ancillary actions that seek to obligate appropriated funds in support of activities envisioned by the operation.[108] In both contexts, NSL/KFL attorneys must validate that the activity or object of procurement enjoys positive fiscal authority. This first requires a clearly defined factual predicate.

*Factual Predicate*

Counsel must understand the salient facts of both the operation and the attendant activities *prior* to developing a legal position and drafting a legal review. To that end, counsel must work closely with the staff to ensure the operative facts are clear, accurate, and stable. If plans and related

actions are opaque, NSL/KFL counsel cannot effectively determine if positive fiscal authority exists for a particular activity or procurement. Instead, counsel require a *clear* recitation of facts reduced to writing and endorsed by a senior leader.[109] Additionally, the factual predicate must be *accurate*. When the legal review relies on facts that differ from what is *actually* going to happen, the legal review is nullified. Finally, the factual predicate must be *stable*. When facts evolve and differ materially from those originally presented to counsel, the legal review is, again, void. It is incumbent upon counsel to educate planners and approval authorities that legal reviews rest on a foundation of facts and when those facts are wrong or evolve, the legal conclusions fracture and the legal recommendation can no longer stand.[110] When the staff fails to advise of changing facts or counsel fail to emphasize the fact-sensitive nature of the legal review, they allow the approval authority to *unknowingly* accept risk of violating the anti-deficiency act. For these reasons, the NSL/KFL counsel must ensure the factual predicate is clear, accurate, and stable before providing a legal review of the operations order or ancillary actions concerning the obligation of appropriated funds.

*Legal Review of the Operations Order*

The first category of legal review concerns the order itself. During the "orders reconciliation process," the staff reviews the operations order to ensure it "is internally consistent and is nested with the higher commander's intent."[111] As part of this process, JAs for each legal function complete their legal analysis in support of the SJA's single legal review of the operations order.[112] This review is both broad and deep, including the base operations order and each annex containing legally-significant matters.[113] Counsel should leverage their activities-authorities crosswalk to review the fiscal law aspects of the operations order.[114] Specifically, counsel should examine the order for each activity that will require the use of appropriated funds and ensure there is an available funding source.[115] A legal review of this scope and detail will require considerable time. Therefore, NSL/KFL counsel should coordinate with the SJA for guidance to provide the best possible legal review *on time*.

When the reviewing NSL/KFL counsel is satisfied that the activities contemplated by the order enjoy positive fiscal authority, counsel will recommend the SJA concur in the final legal review. If, however, a review of the order reveals activities that lack funding or violate prohibitions, counsel should immediately brief the SJA.[116] Additionally, NSL/KFL counsel should meet with planners, clearly describe the constraint, and offer a way ahead.[117] When this occurs, counsel should walk planners through the following options: 1) modify the plan to fall within the parameters of the funding authority, 2) coordinate for broader funding authorities[118] or an exception to policy, or 3) develop a legislative proposal to create a new funding authority. When the plan is inflexible and there is insufficient time to fully resolve the fiscal law issue, an established best practice is to insert a clause in the order stating that the activity is "subject to the identification of positive fiscal authority."[119] This approach enables orders production to continue; flags the issue for the forward headquarters; and allows planners, resource managers, and attorneys to pursue viable funding options in parallel with the orders process.

***Practice Note: Humanitarian Assistance***

Within any operation, humanitarian crises often arise prompting planners to add humanitarian assistance (HA) activities to existing orders. When this occurred at USCENTCOM, counsel worked through the aforementioned process. First validate the factual predicate is clear and stable—what exactly is the unit going to provide to whom, when, where, and why? Let us assume the activities include 1) purchasing relief commodities for internally displaced persons, 2) providing transportation, security, and logistical support to personnel from the U.S. Agency for International Development (USAID), and 3) construction of prison facilities. Equipped with clear and stable facts, counsel can transition to the law: review legal research materials and consult the authority matrix to identify potential funding authorities. Next counsel should synthesize the facts and the law through an activities-authorities crosswalk. For each activity, counsel should identify the most specific funding authority available for this purpose. In this case, counsel should conclude that the CCMD may expend Overseas Humanitarian, Disaster Assistance, and Civic Aid (OHDACA) funds under 10 U.S.C. § 2561 authority for both the support to IDPs and USAID. However, no positive authority exists to fund the construction of a prison. At this point, counsel should engage the SJA and advise planners accordingly.[120]

*Legal Reviews of Ancillary Actions Related to Operations*

The second category of legal review concerns actions ancillary to the order that are required to enable the operation. These actions arise in any number of ways. For example, guidance from the commander, engagement by an individual staff section, an output from a working group, or by implication from the order itself. Operational headquarters coordinate such actions using a variety of formal and informal processes.[121] The combination of operational timelines, variant staffing processes, and fiscal law creates unique challenges for NSL/KFL attorneys. Counsel must work closely with the staff to provide legal advice that creates and preserves options for the commander. To this end, fiscal law legal reviews should be integrated across the legal team, coordinated throughout the legal tech-chain, delivered in a manner that promotes speed, and organized in a way that is easily understood by approval authorities.

First, legal reviews should be integrated within the legal team into a single legal position—the SJA speaking with one voice. Many actions in the operational setting implicate multiple legal functions. When this occurs, the legal team must avoid communicating inconsistent legal positions.[122] The deputy SJA is usually the protagonist for this integration—ensuring analysis from each relevant legal function, including fiscal law, is included in developing the legal position. This internal integration will ensure each legal subsection understands

the analysis and concerns of every other legal function. Moreover, this synchronization will ensure the SJA is empowered to advise the commander and staff with a complete analysis from all relevant legal functions. The result will be a more helpful single pronouncement of legal sufficiency or insufficiency.

Second, fiscal law legal reviews should be coordinated with the legal tech-chain when appropriate.[123] With the support of their SJA, NSL/KFL counsel may decide to socialize their legal positions and draft legal reviews with senior and forward counsel. As discussed more fully above, vertical coordination is important to ensure counsel enjoy a current understanding of law, policy, and regulation.[124] Similarly, coordination with forward counsel will ensure the legal review reflects a current understanding of the operating environment and plan. The virtue of this vertical coordination is two-fold: it ensures consistent legal counsel from the entire legal community and, when limitations are discovered, it accelerates any required coordination for alternate funding authorities or exceptions to policy.

Third, JAs should communicate their legal position in a way that maximizes speed, while mitigating risk to the command. Too often, fiscal counsel default to lengthy formal legal reviews. Instead, counsel should intentionally determine how to best provide their counsel for each situation.[125] There are times when verbal fiscal law advice is appropriate. While it carries risk, this approach offers speed and should be considered for well-settled legal matters, with stable authorities, clear facts, and tight planning timelines.[126] Second, counsel may decide to communicate their advice by email. This method "flattens communications"—allowing counsel to quickly build shared understanding with leaders, planning teams, and attorneys throughout multiple headquarters. However, counsel should take steps to ensure their legal advice does not "get ahead" of the SJA, the approval authority's decision on funding, or the commander's decision for the activity.[127] Finally, counsel may communicate their legal opine through a formal legal review. This approach builds a record of the facts known at the time, captures the attorney's understanding of the law, and documents the recommendation made to the approval authority. As NSL/KFL counsel are preparing to opine on the use of appropriated funds, they should intentionally select the means of providing that advice that best supports the operational timeline, in light of the risk presented.

The legal review itself should consist of counsel's opine on the law, read on policy, business advice on risk, and overall recommendation.[128] Moreover, fiscal law legal reviews should be easily understood in a rapid single reading. After opening with a clear conclusion, counsel should succinctly summarize key facts and efficiently communicate their purpose-time-amount analysis. To the maximum extent possible, counsel should limit caveats.[129] Counsel should then identify funding constraints and limitations, with specific references to the source authority (i.e., law, policy, or regulation), and describe the impact. Counsel should identify the risk and then articulate ways to mitigate or eliminate that risk. Finally, legal reviews should end with a clear conclusion and recommendation.[130]

*A Word on Advocacy*

A JA builds trust by developing a reputation as a credible problem solver—an attorney who uses their staff officer acumen and mastery of the law to create and preserve options for planners and commanders. In seeking to deliver value, however, counsel must not compromise their reputation in an effort to "get to yes." As NSL/KFL counsel advise commanders on using appropriated funds to achieve executive branch objectives, they must dispassionately analyze the availability of funding authorities.[131] In doing so, NSL/KFL counsel must not advocate—counsel must not bend the parameters of a fund around the facts of the operation.[132] When advocacy permeates fiscal law reviews, counsel enable approving authorities to *unknowingly* accept risk. The approval authority will see a clean legal review that "concurs." Based on their trust and confidence in their JA, the approval authority will then obligate funds . . . *not* knowing that counsel accepted risk on their behalf by bending the law around the facts of the plan. Effective fiscal law advice requires dispassionate analysis—never advocacy.

***Practice Note: MILAIR***

Military air (MILAIR) is a common action that directly relates to operations but flows outside of the orders process. Typically, the order itself will vaguely contemplate the support, but not provide sufficient detail. When the recipient of the support is from another agency (e.g., DoS) or a foreign partner (e.g., foreign Chief of Defense), opfunding counsel is directly implicated. Let us assume the support concerns MILAIR transportation of a U.S. Ambassador from Kuwait to Country X to visit with a Disaster Assistance Response Team. The genesis of the action should be DoS leveraging the Executive Secretary ("EXECSEC") process seeking reimbursable or nonreimbursable support from the DoD. Often, however, the request flows from a forward DoD senior leader seeking CCMD approval of the movement. In this circumstance, counsel will have three questions: 1) has DoS requested the support; 2) does this support concern space available noninterference travel; and 3) if this is not Space-A, will this support be on a reimbursable or nonreimbursable basis? Let us assume this is not "Space-A" and that DoS submitted a request for support on a nonreimbursable basis. NSL/KFL counsel will conclude that SecDef is the approval authority for this travel and, separate from SecDef's approval, the command must identify a funding source. With the support of the SJA, counsel should engage Chairman's Legal and, potentially, DoD OGC to validate their legal position and preheat the action seeking SecDef approval of MILAIR and EEE to fund the transportation on a nonreimbursable basis.[133]

As the staff completes the orders reconciliation process, NSL/KFL counsel conduct legal reviews of both the operations order and ancillary actions related to the order. Before developing a legal position on either of these matters, counsel should first ensure they have a ripe factual predicate—a set of operative facts that are clear, accurate, and stable. Equipped with a vivid picture of the plan, counsel should review the order using a cross-walk approach to validate each activity

Brig. Gen. Shezard Nanaki, head of the Committee for the Delivery of New Aide from the International Coalition, and U.S. Army 1st Lt. Raphael Valles, reporting officer with the Counter-ISIS Train and Equip Fund (CTEF) program, reviews forms at Erbil Air Base, Iraq, on 8 March 2022. The Combined Joint Task Force - Operation Inherent Resolve's CTEF program has divested more than $500 million of equipment, vehicles, weapons and ammunition to advise, assist, and enable partner forces in the enduring defeat of Daesh. (U.S. Army photo by Cpl. Tommy L. Spitzer)

enjoys positive fiscal authority, noting those activities that will require separate actions to access or create funding authority. Running parallel to the orders process is an entirely separate ecosystem of actions that seek the obligation of appropriated funds. In this context, NSL/KFL counsel identify actions arising throughout the headquarters, develop integrated legal positions, and, where appropriate, coordinate those positions with the legal tech-chain. When translating that legal position into legal advice, counsel will intentionally decide how to best communicate that advice to promote speed while mitigating risk. Counsel's best military legal advice will include their opine on the law, read on policy, business advice on risk, and overall recommendation. This advice will be grounded in a dispassionate application of law to facts, without advocacy.

## Conclusion

The practice of opfunding law is both challenging and rewarding. The task is easily articulated—advise planners how to use funds appropriated by the legislative branch to enable the commander to achieve the national security objectives of the executive branch. The path to successfully meeting this challenge, however, is complex. To effectively practice in this cross-discipline area, counsel must be exceptionally strong staff officers, who are fluent in both planning processes and command post organization. Moreover, counsel must master two separate legal disciplines: national security law and fiscal law. Beyond the complexity, NSL/KFL counsel must navigate significant friction when the demands of the operation conflict with the limitations of funding authorities. How then should JAs understand the practice of "opfunding?" *Principled counsel.*

In 2017, Lieutenant General (Retired) Charles N. Pede, the former Judge Advocate General, introduced the concept of "principled counsel," as one of the Corps's four constants that shape and inform our practice.[134] Principled counsel acknowledges the challenges outlined above, while illuminating the path forward for the opfunding attorney: "Our Corps's doctrine defines 'principled counsel' as '*professional advice* on law and policy, *grounded in the Army Ethic* and enduring respect for the Rule of Law, *effectively communicated* with appropriate *candor* and *moral courage*, that influences informed decisions.'"[135]

The best practices offered in this article trace their roots to this understanding of principled counsel. Effective NSL/KFL counsel provide *professional advice* by developing fluency in doctrinal processes and mastery of relevant funding authorities, identifying positive fiscal authority for each activity contemplated by the operation, and coordinating integrated legal positions throughout the legal team and tech-chain. Their legal advice is *grounded in the Army Ethic* by building trust through staff integration; adopting a paradigm of "getting to *right*, not to yes;"[136] and zealously guarding against the inclusion of advocacy in legal reviews. Their counsel is *effectively communicated with candor and moral courage* by engaging early in planning processes,

by clearly and firmly articulating resource limitations, and by providing legal advice in a manner than promotes speed and clarity, while mitigating risk.

James Madison once described the separation of powers as a defect supplied to the interior of government to ensure the proper partition of power.[137] *A defect.* By making executive branch action dependent on legislative appropriations, the founders deliberately engineered friction into our system of government. Sitting at the fault line between these two powers is the NSL/KFL counsel who must navigate, and ultimately embrace, this friction so that their headquarters can fight and win by leveraging positive fiscal authority for each aspect of the operation. **TAL**

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*LTC Howard is the deputy staff judge advocate of III Corps and Fort Hood; he previously served as chair of the Contract and Fiscal Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

*MAJ Mitroka is the brigade judge advocate for the 2d Stryker Brigade Combat Team, 4th Infantry Division, at Fort Carson, Colorado.*

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## Notes

1. J.R.R. Tolkien, The Hobbit 217 (Del Rey Books 2020) (1937).

2. Joseph R. Biden, Jr., U.S. President, Interim National Security Strategic Guidance 10 (2021).

3. Joseph L. Votel & Eero R. Keravuori, *The By-With-Through Operational Approach*, 89 Joint Force Q., 2d quarter, 2018, at 40 (quoting Secretary James Mattis: "Our approach is by, with, and through our Allies, so that they own these spaces and the U.S. does not.").

4. *Id.* at 40.

5. *Id.* at 46.

6. Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States, at I-8 (25 Mar. 2013) (C1, 12 July 2017).

7. U.S. Const. art. I, § 9, cl. 7 (the "appropriations clause" also known as the "power of the purse").

8. U.S. Const. art. II, § 2, cl. 1.

9. U.S. Dep't of Army, Doctrine Pub. 5-0, The Army Operations Process para. 1-15 (31 July 2019) [hereinafter ADP 5-0].

10. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations paras. 1-6, 1-7, fig.1-2 (8 June 2020) [hereinafter FM 1-04]. The six legal functions are Administrative and Civil Law; Contract and Fiscal Law; Military Justice, National Security Law; Soldier and Family Legal Services and Trial Defense Service.

11. U.S. Dep't of Army, Doctrine Pub. 3-0, Operations paras. 5-9, 5-11, 5-13, 5-15, 5-17, 5-19, 5-25, fig.5-2 (31 July 2019) [hereinafter ADP 3-0] ("A warfighting function is a group of tasks and systems united by a common purpose that commanders use to accomplish missions and training objectives.") The six warfighting functions are command and control, movement and maneuver, intelligence, fires, sustainment, and protection.

12. *See* Ernest A. Fredricksmeyer, *Alexander, Midas, and the Oracle at Gordium*, 56 Classical Philology 160 (1961) (A "Gordian knot" means a complex or unsolvable problem. The expression traces back to classical antiquity. As the myth goes, King Gordius tied his ox-cart to a post using such an intricate knot that no one could untie it. It remained in place until Alexander the Great arrived. After analyzing how to untie the knot, he elected to simply cut the knot, which released the wagon.).

13. U.S. Dep't of Army, Doctrine Pub. 1-01, Doctrine Primer, at iii (31 July 2019) [hereinafter ADP 1-01] (describing doctrine as the "entire body of professional knowledge and beliefs that shape the art and science of [the] profession.").

14. Joint Chiefs of Staff, Joint Pub. 5-0, Joint Planning, at GL-10 (1 Dec. 2020) [hereinafter JP 5-0] (defining a "limitation" as "[a]n action required or prohibited by higher authority, such as a constraint or a restraint, and *other restrictions* that limit the commander's freedom of action . . . .").

15. *Id.* at GL-8 (defining "feasibility" as a "plan review criterion for assessing whether the assigned mission can be accomplished using *available resources* within the time contemplated by the plan." (emphasis added)).

16. U.S. Dep't of Army, Doctrine Pub. 5-0, The Army Operations Process para. 1-15, fig.1-1 (31 July 2019).

17. *Id.* para. 1-18, fig.1-1.

18. Joint Staff J7, Joint Headquarters Organization, Staff Integration, and Battle Rhythm 5 (3d ed. Sept. 2019) [hereinafter J7 Staff Integration Focus Paper] ("The use of cross-functional staff integration elements (frequently referred to as Boards, Bureaus, Centers, Cells, and Working Groups [B2C2WGs] and OPTs), coupled with solid Knowledge Management (KM) processes, [drives] staff coordination . . . .").

19. U.S. Dep't of Army, Field Manual 6-0, Command and Staff Organization and Operations para. 8-12, fig.8-1 (16 May 2022) [hereinafter FM 6-0].

20. ADP 3-0, *supra* note 11, para. 5-9, fig.5-2.

21. U.S. Dep't of Army, Field Manual 6-0, Command and Staff Organization and Operations paras. 8-22 to 8-28, fig.8-2 (16 May 2022).

22. *Id.* paras. 2-143–144.

23. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 1-8 (8 June 2020).

24. *Id.* para. 3-48, fig.2-10.

25. This article assumes basic knowledge of the Military Decision Making Process (MDMP). A good resource for readers with limited familiarity is U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production (16 May 2022) [hereinafter FM 5-0].

26. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations paras. 3-49, 3-50, 3-53, tbl.3-1 (8 June 2020).

27. To better understand how issues from each of the legal functions arise within each of the warfighting functions, see *id.* tbl.C-1 and tbl.3-2 depicting the legal support required for common battle rhythm events. Practice Note: Within the MDMP, a NSL attorney may be asked to determine if appropriated funds are available to provide logistics support to a partner force. A sustainment working group might ask an administrative law attorney if they may transfer excess property to a host nation in support of retrograde operations. During a combat update brief, the commander may ask the SJA if the military can fly a State Department official to a forward operating base. Each of these legal issues implicate fiscal law and may arise from any of the warfighting functions. This assertion is based on the author's professional experiences as the Chief, Contract and Fiscal Law for U.S. Central Command from 1 July 2019 to 30 June 2020 [hereinafter Professional Experience].

28. *See* U.S. CONST. art. I, § 9, cl. 7.

29. *Id.*

30. Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1350 (1988) ("The Constitution's appropriations requirement is . . . a condition *precedent* to executive branch action . . . . For the executive branch to act to achieve the ends of government *identified by Congress*, Congress must affirmatively authorize the funds to do the job.").

31. 31 U.S.C. § 1519.

32. U.S. Dep't of Army, Field Manual 6-0, Command and Staff Organization and Operations para. 2-32 (16 May 2022).

33. *Id.* para. 2-33 (emphasis added).

34. *Id.* para. 8-22, fig.8-2.

35. Joint Staff J7, Joint Headquarters Organization, Staff Integration, and Battle Rhythm 5 (3d ed. Sept. 2019) (defining an operational planning team as a cross-functional group of experts "established to solve a single problem related to a specific task or requirement on a single event horizon.").

36. *Id.* at 6 (defining a working group as a fairly "permanent cross-functional organization formed to develop, maintain, and leverage expertise from within and external to the [headquarters] in order to provide analysis and recommendations on more enduring challenges across all three event horizons").

37. ADP 5-0, *supra* note 9, para. 1-82. Commanders establish a battle rhythm to "integrate and synchronize . . . activities, meetings, and reports within their headquarters, and with higher, subordinate, supporting, and adjacent units as part of the operations process." *Id.* paras. 1-16, 1-82.

38. For example, various legal issues arise when a plans team (an integrating cell) conducts MDMP to integrate a partner force into the next phase of the operation, while the sustainment warfighting function (a functional cell) develops options to provide that partner force with logistics support. Professional Experience.

39. FM 1-04, *supra* note 10, para. 2-48.

40. U.S. Dep't of Army, Field Manual 6-0, Command and Staff Organization and Operations para. 2-8 (16 May 2022).

41. *Id.* para. 2-31.

42. Luke O'Brien, *The Doctrine of Military Change: How the US Army Evolves*, War on the Rocks (25 July 2016), https://warontherocks.com/2016/07/the-doctrine-of-military-change-how-the-us-army-evolves/.

43. Major General Chris Field (AU), *Seven Ideas for Leadership Beyond Covid-19*, The Cove (6 March 2020), https://cove.army.gov.au/article/seven-ideas-leadership-beyond-covid-19.

44. U.S. Dep't of Army, Reg. 220-1, Army Unit Status Reporting and Force Registration—Consolidated Policies 100 (16 Aug. 2022) (defining "pacing item" as "equipment central to an organization's ability to perform its designated mission).

45. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and The Profession para. 5-45 (31 July 2019) (C1, 25 Nov. 2019). While these attributes promote trust in the leadership context, they also promote trust in legal counsel.

46. Judge advocates should participate in training exercises—from academics to field problems, combat training center rotations to division warfighters—each repetition will strengthen a counsel's skills while building strong relationships and trust with the staff.

47. Developing an effective legal support plan is challenging. While some desire for JAs to attend every planning meeting, others pool legal resources and ask planners to identify legal issues. Both approaches are suboptimal. When JAs attend *every* planning meeting, time is wasted and competing legal requirements go unsupported. In the alternative, when JAs do not attend planning meetings, they allow planners to develop infeasible options that fail to account for legal limitations.

48. U.S. Dep't of Army, Techniques Pub. 6-0.5, Command Post Organization and Operations para. A-21 (1 Mar. 2017) (describing how the chief of staff or executive officer should analyze battle rhythm attendance requirements).

49. FM 6-0, *supra* note 19, para. 4-24.

50. Judge advocate leaders should leverage their relationships to gain access to agendas and anticipated talking points to assess whether contract and fiscal law (KFL) counsel should attend.

51. Cross-communication within the Office of the SJA is key. NSL action attorneys can often provide KFL-focused attorneys with key insight into operations and planning efforts, while KFL counsel can equip NSL counsel with knowledge of relevant funding authorities.

52. Professional Experience.

53. A JA must know where their headquarters fits within the broader national security structure, understand how their missions get assigned, and appreciate to what extent their headquarters can influence joint planning.

54. U.S. Const. art. I, § 9, cl. 7.

55. *See* United States v. MacCollom, 426 U.S. 317 (1976). The Court held that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *Id.* at 321.

56. Counsel should address the "Purpose Statute." 31 U.S.C. § 1301(a) (stating that agencies may only apply appropriations "to the objects for which the appropriations were made"). Counsel should also outline the Government Accountability Office's "Necessary Expense Doctrine." U.S. Gov't Accountability Off., GAO-17-797SP, Principles of Federal Appropriations Law, Chapter 3: Availability of Appropriations: Purpose at 3-16 ("The expenditure must bear a logical relationship to the appropriation[;] must not be prohibited by law[; and] must not be otherwise provided for . . . .").

57. Counsel should address the "Bona Fide Needs" rule. 31 U.S.C. § 1502(a) (appropriations are available only for the bona fide need of an appropriation's period of availability).

58. Counsel should discuss the Antideficiency Act, 31 U.S.C. §§ 1341–1342, 1511–1519, to ensure leaders and planners understand the consequence of knowingly obligating funds for impermissible purposes.

59. "Mission Authority" (authority to direct troops and materiel in support of a specified end state) flows from the President or the Secretary of Defense through the Combatant Command to the Joint Task Force (JTF) or Service Component under the U.S. Constitution and federal statute. *See* U.S. Const. art II, § 2, cl. 1–2; 10 U.S.C. § 113; 10 U.S.C. § 153; 10 U.S.C. § 164.

60. "Funding Authority" (authority to obligate appropriated funds) flows from the U.S. Const. art. I, § 9, cl. 7, as described by 31 U.S.C. § 1301(a) and U.S. v. MacCollom, 426 U.S. 317 (1976).

61. Professional Experience.

62. U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production para. 5-14 (16 May 2022).

63. *Id.* para. 5-29; FM 1-04, *supra* note 10, para. 3-50.

64. Joint Chiefs of Staff, Joint Pub. 5-0, Joint Planning, at I-18 (1 Dec. 2020).

65. *Id.* at I-8 to I-10. Campaign Plans "establish objectives, conditions, and tasks under which the CCMD and Service components build operations, activities, and investments to achieve objectives (set conditions) in support of national policy." *Id.* at I-8. Contingency Plans are "branches of [campaign plans] that are planned for designated threats, catastrophic events, and contingent missions without a crisis at-hand, pursuant to the strategic guidance in the *Unified Command Plan* (UCP), [the Contingency Planning Guidance (CPG)], and [Joint Strategic Campaign Plan] and guidance given by the CCDR." *Id.* at I-10.

66. *Id.* at I-18.

67. For example, when counsel's review of the CCMD order references a funding authority (e.g., REF//N/ 10 U.S.C. § 2561 "Humanitarian Assistance") opfunding counsel should add this authority in their legal research.

68. *See, e.g.*, Off. of Mgmt. & Budget, Exec. Off. of The President, OMB Cir. A-11, Preparation, Submission, and Execution of the Budget (2022).

69. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation (Dec. 2021).

70. *See, e.g.*, U.S. Dep't of Def. Dir., 2010.09, Acquisition and Cross Servicing Agreements (28 Apr. 2003) (C2, 31 Aug. 2018). *See also,* U.S. Dep't of Def. Inst., 2205.02, Humanitarian and Civic Assistance Activities (May. 2017).

71. Headquarters often include tasks and activities without reference to corresponding funding authorities. Why? Mission Command. Under this approach to command and control, higher headquarters use mission orders that convey results and effects without providing details regarding *how* to complete the task. By using mission orders, higher headquarters enable subordinate decision-making and decentralized execution. *See,* U.S. Dep't of Army, Doctrine Pub. 6-0, Mission Command: Command and Control of Army Forces paras. 1-14 to 1-21; 1-53 (31 July 2019) [hereinafter ADP 6-0]. For the opfunding attorney, this means the higher headquarters' order, because it is not addressing "how," will often not include specific funding authorities or the facts required to identify a funding authority. Those details will come from the planners within counsel's headquarters.

72. The authority matrix is a document intended only for legal counsel and should not be distributed to the staff as a substitute for legal advice.

73. *See, e.g.*, Foreign Security Forces: Authority to Build Partner Capacity, 10 U.S.C. § 333.

74. *See, e.g.*, Burden Sharing Contributions by Designated Countries and Regional Organizations, 10 U.S.C. § 2350J.

75. *See, e.g.*, Authority to Acquire Logistic Support, Supplies, and Services for Elements of the Armed Forces Deployed Outside the United States, 10 U.S.C. § 2341.

76. *See, e.g.*, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, 10 U.S.C. § 401.

77. *See, e.g.*, Contingency Construction, 10 U.S.C. § 2804.

78. *See, e.g.*, Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Authority to Provide Assistance to Counter the Islamic State in Iraq and the Levant, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).

79. *See, e.g.*, Emergency and Extraordinary Expenses, 10 U.S.C. § 127.

80. *See* Figure 1, Sample Authorities Matrix.

81. Professional Experience.

82. The authors view legal support to planning as distinct from legal reviews of orders and legal reviews of ancillary actions that seek to obligate appropriated funds. Why? The factual predicates in these two contexts differ dramatically. When providing legal support to planning, legal advisors are often limited to describing the parameters of funding authorities because the facts are too vague or rapidly evolving. It is only after the facts are clear and stable that counsel can conduct a legal review, *drawing a conclusion* as to the availability of funds for *these* specific purposes.

83. FM 1-04, *supra* note 10, para. 3-50, tbl.3-3.

84. U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production para. 5-29 (16 May 2022).

85. *Id.*

86. *See id.* paras. 5-40, 5-41, 5-43 (addressing specified, implied, and essential tasks).

87. *See id.* paras. 5-47, 5-48 (addressing facts and assumptions).

88. *See id.* para. 5-45 (addressing constraints and limitations).

89. *Id.* para. 5-44.

90. *Id.* para. 5-46.

91. This legal planning product does not constitute legal advice.

92. FM 6-0, *supra* note 19, para. 7-11.

93. FM 5-0, *supra* note 25, app. C. Running estimates generally include facts, assumptions, a summary of the current situation, conclusions, and recommendations.

94. FM 1-04, *supra* note 10, para. 3-55, fig.E-1. The SJA's running estimate will differ from other staff sections because the SJA's focus is distinct (legal authorities, constraints, and shortfalls).

95. Follow-on activities may include engaging senior counsel to better understand a specific authority, meeting with planners to clarify the nature of activities, or enabling SJA advice to the commander.

96. This assertion is based on the author's professional experiences as the Senior Operational Law Observer, Coach, and Trainer at The Joint Readiness Training Center from 1 July 2016 to 30 June 2018.

97. FM 5-0, *supra* note 25, para. 5-91, fig.5-1.

98. *See* discussion *supra* "Mastery—Legal Research and Technical Chain Discussions."

99. FM 5-0, *supra* note 25, paras. 5-91, 5-137, 5-191, 5-199, fig.5-1.

100. *See* discussion *supra* note 82.

101. Commanders and planners will want to know if the limitation is something they can change. For example, if the limitation is found in policy, counsel should help the staff pursue an exception to policy where appropriate.

102. In good faith, these adjustments to the plan must be real changes that reflect a true shift in understanding and operational approach (not merely an adjustment in wording). To chart the right path, consider: What is the commander's intent? What other options do we have to create this effect without offending fiscal authority?

103. *See, e.g.*, Emergency and Extraordinary Expenses, 10 U.S.C. § 127; Combatant commands: funding through the Chairman of Joint Chiefs of Staff, 10 U.S.C. § 166a.

104. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1218, 133 Stat. 1198, 1633–1635 (2019); Professional Experience.

105. U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production paras. 5-14, 5-29, 5-91, 5-137, 5-191, 5-199, fig.5-1 (16 May 2022).

106. *Id.* para. 5-203 (the process of "turning the selected [course of action] into a clear, concise concept of operations (with) the required supporting information").

107. Building on the discussion at *supra* note 82, as the planning process added clarity to the planned activities, counsel transition from articulating legal parameters of funding authorities to drawing legal conclusions: "it is legally permissible to expend appropriated funds on *this*."

108. FM 1-04, *supra* note 10, para. 3-54 (directing JAs review the base order and annexes).

109. The factual predicate must address who is funding what, for whom, why, when, and where in order to inform counsel's analysis of "purpose, time, and amount." When appropriate, counsel should ask these questions of planners to sharpen the facts.

110. Counsel should include a recitation of facts in their legal review and then caveat the review: "based on the facts presented." This practice puts approval authorities on notice that counsel's legal conclusion is based on *these* facts—if the facts presented are not accurate or if they evolve, a new legal review is required.

111. U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production paras. 5-203 to 5-207, app. D (16 May 2022).

112. *Id.* para. 5-46 (explaining that the commander and staff should coordinate with the SJA for a legal review of constraints or limitations in the plan).

113. FM 1-04, *supra* note 10, para. 3-54. Counsel must understand who has the authority to "chop" (i.e., to concur or nonconcur) on the operations order. Sometimes this authority resides at the action officer level (e.g., chief, NSL/KFL) and sometimes the authority is withheld to the general officer/flag officer level, meaning the staff-lead or director must sign. Within the legal team, this means the SJA. The SJA's legal "chop" should always come last in the staff action process so other directorates' modifications do not change the underlying facts after the SJA's final legal review.

114. Identifying funding limitations and shortfalls in operations orders is challenging. It is not uncommon for counsel to discover new activities within the order that were not discussed during the planning process. Moreover, many fiscal issues are hidden within activities and lack any reference to funding.

115. Counsel should examine each activity within the order and ask "how" is this going to be funded? For example, as counsel review the order, they may see a task to "provide logistics support" to a partner force, a directive to transport interagency partners on MILAIR, or a line of effort to train partner forces. For each activity counsel should ask "how is this being funded?"

116. Throughout the process, NSL/KFL counsel must ensure the SJA is aware of any fiscal concerns. This will avoid surprises and enable timely legal advice from the SJA to the commander and staff primaries.

117. When counsel anticipate they will "non-concur" to the order for fiscal law reasons, they should, communicate their position immediately to the SJA and, subject to SJA guidance, to planners.

118. *See, e.g.*, Emergency and Extraordinary Expenses, 10 U.S.C. § 127; Combatant commands: funding through the Chairman of Joint Chiefs of Staff, 10 U.S.C. § 166a, etc.

119. When this clause is used, NSL/KFL counsel should engage the forward counsel to ensure they understand the order includes a task or activity and at the time of orders production no funding authority was identified. Professional Experience.

120. Def. Sec. Coop. Agency, Manual 5105.38-M, Security Assistance Management Manual para. C12.3.4.1 (30 Apr. 2012), https://samm.dsca.mil/chapter/chapter-12#C12.3, Professional Experience.

121. For example, software, email, working groups, and office discussions.

122. For example, NSL counsel may "concur" on an operation from their NSL legal function's perspective, but the order may also include fiscal law issues that subsequently draw a "nonconcur" from KFL counsel. This promotes confusion on the staff, wastes precious time, and undermines the credibility of the legal team.

123. Before engaging the technical chain, counsel should first fully develop their legal position based on all known facts and legal authority—do not senior counsel "is this legal?" Second, counsel should assess risk in close coordination with the SJA. When the funding concerns well-settled matters with a strong track record of precedent, those actions often do not require engaging senior counsel. However, when there is lack of clarity on the law, the use of these funds for this purpose is unprecedented, or counsel know their position differs from senior counsel, engaging the technical chain is appropriate.

124. Given the breadth of authorities governing fiscal law and the rate at which law and policy shift, it is not uncommon for counsel to be made aware of new authority (or changes to authority) during these engagements.

125. Counsel should consider 1) are law and policy well-settled or is there debate amongst senior counsel, 2) is there any precedent for expending these funds on this purpose, and 3) does this planner have a track record of candor and accuracy or is there a history of evolving facts and "misunderstandings"? These variables should inform how counsel decides to provide their legal advice and legal review.

126. Verbal legal advice, particularly after working groups, can dramatically improve processing times.

127. Emailed legal advice should clearly state the legal position is "developing" or "draft," if the SJA has yet to opine. Moreover, counsel should caveat that their position is based on "the facts presented," to avoid application of the advice to materially different fact patterns (i.e., forwarding the emailed advice to third parties).

128. Rear Admiral Christopher C. French, Joint Officer Legal Training (Oct. 30, 2018) (unpublished PowerPoint presentation) (on file with author) [hereinafter Rear Admiral French].

129. Fiscal counsel understandably use caveats because it allows counsel to opine and move the action forward, while simultaneously noting what the planners have to do to bring the activity within the parameters of the appropriated fund (i.e., it is legally permissible to obligate *X* funds on *Y* purpose *provided A*, *B*, and *C*). However, such conditions often go unnoticed, or they promote confusion: "Judge—I've read your review . . . is this legal or not?" Counsel should work to resolve all caveats and eliminate all conditions prior providing a final legal review.

130. For example, "I recommend approval"; "I recommend modifying the plan"; "I recommend pursuing a different fund"; or "I recommend seeking an exception to policy."

131. Oath of Office, 5 U.S.C. § 3331.

132. Counsel should ask themselves: "Am I wordsmithing definitions to justify this activity falls within a funding authority" or "Am I working with planners to modify the plan so it falls within the parameters of the fund?"

133. U.S. Dep't of Def., Instr. 4515.13, Air Transportation Eligibility tbl.4 (22 Jan. 2016) (C6, 2 Mar. 2022); Professional Experience.

134. *See* The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

135. Lieutenant General Charles N. Pede, *Putting Principled Counsel into Action,* Army Law., no. 4, 2020 at 2, 3 (emphasis added) (quoting The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020)).

136. Rear Admiral French, *supra* note 128.

137. The Federalist No. 51 (James Madison).


Members of SOCKOR and the Republic of Korea Special Warfare Command attending the 2021 International Symposium on Security and Military Law, in Seoul, Korea From left: Petty Officer First Class Neil Eller, Major Mijeong Lee, Mr. Justin Malzac. (Photo courtesy of the author)

# Closing Argument

## The National Security Law Paralegal

*By Justin Malzac*

**If the law were black and white, there would be no need for lawyers.** It is in those grey areas, between the seams, where national security law (NSL) professionals find their value. What I have found as an NSL paralegal is that those things I enjoy doing most—researching, compiling references, drafting legal arguments—are the exact things my attorneys need from me. I have no desire to litigate the issue in front of the command. My drive is always toward finding the answers.

I have served both as a uniformed member and Army civilian, and I find both positions to have many of the same duties and expectations. To perform well in the field of NSL, a legal professional must be comfortable with the Military Decision-Making Process (MDMP), able to receive and interpret their commander's intent, and familiar with the applicable law and how to find it. Unfortunately, you are not going to get the latter from the Noncommissioned

Officer Professional Development System or Civilian Education System, which focus primarily on Army doctrine, culture, and general leadership.

National security law paralegals can support attorneys by equipping them with the information they need to render accurate and relevant legal opinions. National security law offices are often small compared to other legal sections. This means every member carries more weight, and, as a result, more responsibility. By conducting research and offering possible approaches to a legal question, paralegals can give much needed time back to attorneys they can use to fine tune and present their legal opinions. And it is always an advantage to have additional well-informed voices involved in office discussions.

However, being a meaningful part of that discussion requires having a strong foundation in an ever-expanding field of law. If the recent conflict in Ukraine has shown us anything, it is that conventional wars are not an artifact of some lost and bygone era. The Hague Regulations are just as relevant today as they were 100 years ago.[1] At the same time, the modern world continually presents novel and complex issues of law. Today, these include cyber and information operations, artificial intelligence, and autonomous weapons. As many eminent experts of the field have noted,[2] NSL professionals cannot fully support their operations staff without a general knowledge of technical matters. For example, in order to apply the law to cyber operations, you will first need a basic understanding of how computers and networks operate. There is no room for Luddites in this field.

Paralegals must take it upon themselves to study the wide range of issues comprising NSL, from the Law of Armed Conflict to international law, maritime law, intelligence law, or operations law. They must also develop their legal research skills largely on their own. There are courses available to take and books to read, but it is also important for NSL attorneys to mentor and support this self-development.

When I started as a paralegal, I knew I had a lot to learn, especially for my rather peculiar duty position. I listened to the *National Security Law Podcast*[3] during my morning commute, read articles on *Lawfare*[4] during downtime in the office, and found other ways to expand my understanding of the law. At first, I focused on the topics most relevant to my unit's mission. Once I became comfortable with the basics of NSL, I expanded my studies to the topics that interested me personally—such as the overlap of information operations and international law.[5] I also completed a certificate program in legal researching and writing. All of this self-development has made me a better asset to my attorneys.

There are many NSL positions available to active duty Army paralegals across the globe. Many of these are in the special operations community, or at the three- or four-star command level. Thus, most of these positions are billeted for mid to senior NCOs, but that doesn't mean junior Soldiers cannot begin taking steps towards a future goal of becoming a senior NSL NCO. To this end, the JAG Corps has created the NSL Personnel Development Skill Identifier (PDSI) to provide a career track of sorts for NSL paralegals. For the reserve paralegal, many of the most significant NSL positions fall under the IMA (Individual Mobilized Augmentee) program.

In order to succeed in these positions—especially as an IMA—a paralegal must be self-reliant, eager to learn, and resilient. They also need to be creative thinkers, able to "cope" with situations where guidance may be ambiguous or lacking.[6] These are not necessarily skills that can be learned, but nascent ones can be further developed. Again, proper mentorship is key.

The advantage of working in NSL is that you find yourself dealing with the most novel and interesting legal questions. What are the rules for maritime intelligence collection? Who has the authority to deploy counterterrorism forces on a potentially lethal raid? What changes if it is only an "advise and assist" mission? You also have a greater effect on regional—and sometimes even national—strategy and policy. But sometimes it's just fun to be able to say that you're friends with a bunch of SEALs. **TAL**

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*Mr. Malzac is the senior paralegal for a DOD joint component command.*

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## Notes

1. *See generally* Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277. This is especially true when considering the United States has not ratified Additional Protocol I to the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

2. *See, e.g.*, James E. Baker, The Centaur's Dilemma: National Security Law for the Coming AI Revolution (2020).

3. Nat'l Sec. L. Podcast, https://www.nationalsecuritylawpodcast.com/ (last visited Apr. 29, 2022).

4. Lawfare, https://www.lawfareblog.com/ (last visited Apr. 29, 2022).

5. *See, e.g*, Justin Malzac, *Expanding Lawful Influence Operations*, Harv. Nat'l Sec. J. Online (April 12, 2022), https://harvardnsj.org/wp-content/uploads/sites/13/2022/04/Malzac-Influence-Operations.pdf (last visited Aug. 25, 2022).

6. James E. Baker, *Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most*, 27 Geo. J. Legal Ethics 163, 179–180 (2014).

# AROUND THE CORPS

Soldiers participating in the Paralegal Warrior Training Course (PWTC) conduct an assault objective mission as part of the field training exercise portion of the PWTC at Fort McCoy, Wis. The PWTC aims to train and challenge paralegals to conduct peace and wartime missions in accordance with current law, policy and doctrinal guidance. (U.S. Army photo by Staff Sgt. Ryan Rayno)

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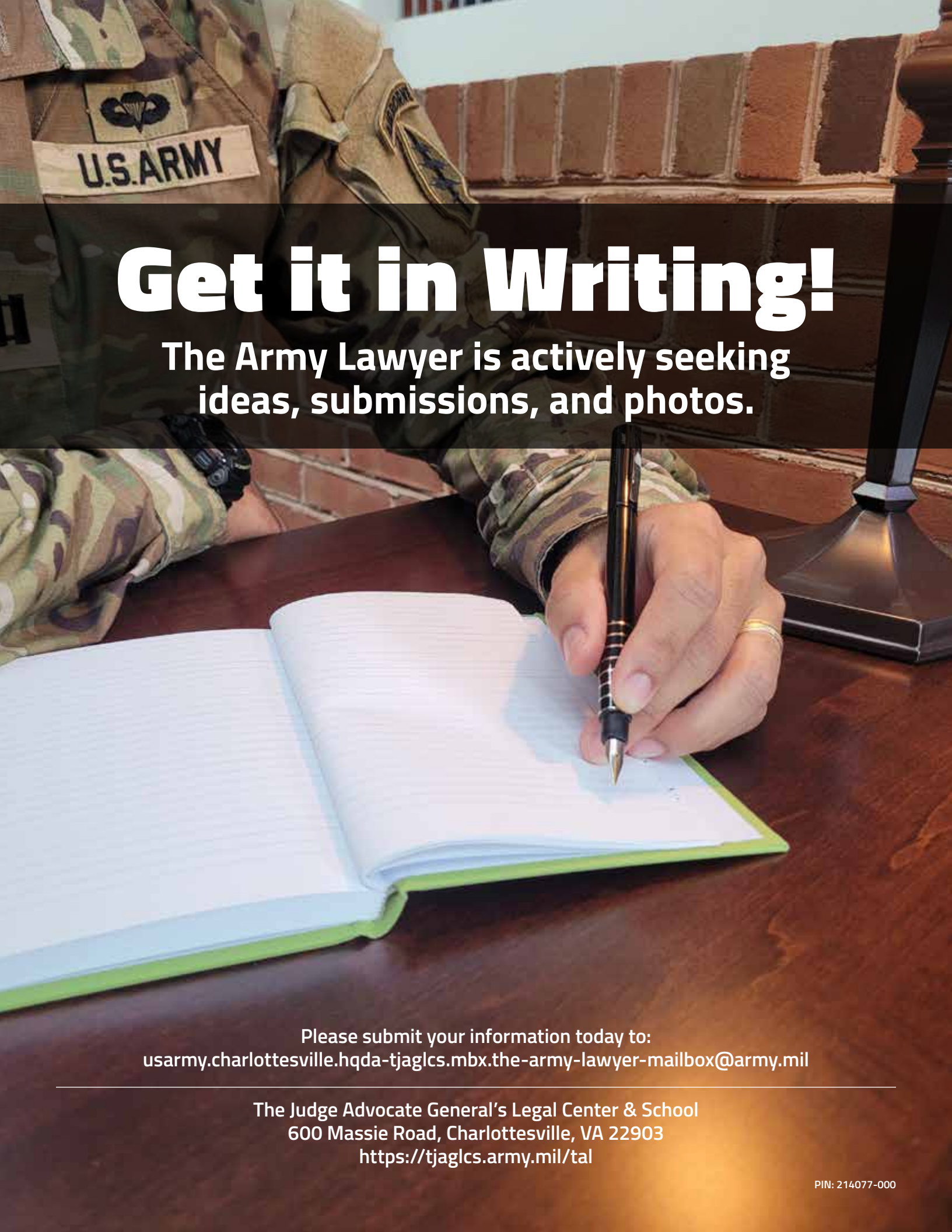


# Get it in Writing!

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https://tjaglcs.army.mil/tal

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