

Developing Client-Ready Practitioners: Learning How to Practice National Security Law at Military Law Schools

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I. INTRODUCTION

To lead an untrained people to war is to throw them away.-Confucius

“[W]ar is not an independent phenomenon, but the continuation of politics by a different means.”¹ Likewise, the body politic shapes law.² Reflecting the political realities over the past half a century, national security law and associated legal policy has expanded substantially in complexity, specificity, and volume. National security law is no longer limited to traditional state-versus-state armed conflict, and now includes a range of issues from terrorist and cyberattacks to pandemic influenza.³ The practice of uniformed lawyers, known as judge advocates (JAGs),⁴ has been increasingly integral to and effected by

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1. CARL VON CLAUSEWITZ, *ON WAR* 8 (Michael Howard & Peter Paret eds. & trans., 1984) (1832).

2. “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed” OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark D. Howe ed., 1963) (1881).

3. There is not a single legal academy, practitioner, or public definition of “national security law.” This article uses “national security law” to describe jurisprudence associated with “national security” as defined in 10 U.S.C. §801(16): “the national defense and foreign relations of the United States.” For this article, it also includes those areas for which the military is charged to provide support to civil authorities when tasked, such as Homeland security threats from natural or manmade disasters. This article applies this definition from strategic to tactical levels of practice. For a discussion on the definitions of national security, see Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573 (2012); see also JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 13-22 (2007); Peter Raven-Hansen, et. al, Remarks at “What is National Security Law?” panel, Am. Bar Ass’n Standing Comm. on L. and Nat’l Security (hereinafter SCOLANS); Georgetown Law Second Annual Seminar on Teaching National Security Law (Sep. 17, 2011); Ben Powell, Remarks at “Careers in National Security” Panel (Oct. 7, 2011).

4. A judge advocate general (JAG) is defined in 10 U.S.C. §801 (13) as “(A) an officer of the Judge Advocate General’s Corps of the Army or the Navy; (B) an officer of the Air Force or the Marine Corps

these changes.⁵

During this same time, the Army, Navy, and Air Force created military legal schools to supplement the legal education and training a lawyer gained in the civilian legal academy. Over the past three decades, these military legal schools have increasingly included formal instruction in various aspects of national security law. Some might argue that our current national priorities combined with national debt will lead to a contraction in national security law practice and should drive a corresponding reduction in associated legal education. This article would disagree with such an assessment in part. History proves that the demand for trained and educated national security lawyers, including those in the military, is not going to lessen.⁶ However, budgetary constraints will, and already have, affected military legal education and training. The problem or challenge is to meet the demand for these lawyers within shrinking resources. Therefore, the military law schools must be as focused and efficient as possible in delivery of legal education to train the right student, at the right time, in the right way. This article proposes an analytical process to address the problem.

In order to continue to meet the requirement⁷ for trained and educated national security military lawyers, the military Services (Army, Navy, Air Force, Marine Corps, and Coast Guard) must first identify national security legal training as a core or “mission essential” Service function. Second, the Services should integrate the Joint (and perhaps interagency) legal community into the existing process for identifying and deconflicting legal education requirements. Third, the new process should deliberately assess what legal knowledge, skills, and professional ethos judge advocates require to practice national security law at the tactical,⁸ operational,⁹ and strategic¹⁰ levels. Finally,

who is designated as a judge advocate; or (C) a commissioned officer of the Coast Guard designated for special duty (law).” See also JOINT PUBLICATION 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (2011), available at http://www.dtic.mil/doctrine/new_pubs/jp1_04.pdf.

5. See, e.g., Terry Carter, *Meet the Man Who Would Save Guantanamo*, ABA J. 35 (Mar. 2013).

6. For more information on other careers as a national security lawyer, see Laura K. Donohue, *National Security Law Pedagogy and the Role of Simulations*, 6 J. NAT’L SECURITY L. & POL’Y 489 (2013); *Careers in National Security Law*, NAT’L SECURITY L. REP. (Special Issue) (Aug. 2005); Am Bar Ass’n, Transcript of the Careers in National Security Brown Bag and Teleconference (Oct. 7, 2011) [hereinafter *Careers in Nat’l Security Brown Bag*] (on file with author).

7. This article will not enter the debate on the necessity or propriety of the involvement of military lawyers in national security matters except to provide the historic development of the demand for such lawyers, pointing out how the Armed Forces senior leadership has already made that decision by allocating manpower resources to legal corps and assigning them national security tasks. For one example of an article that discusses this topic, see Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877 (2007).

8. Tactical level of war is defined by the Department of Defense as “[t]he level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Nov. 2010) (as amended through Dec. 2012), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

9. Operational level of war is defined by the Department of Defense as “[t]he level of war at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas.” *Id.*

this process should identify which parts of the required knowledge, skills, and ethos lawyers can effectively and economically gain from civilian legal education, on-the-job-training, and the various forms of distance learning. The process should also identify those areas best delivered in traditional Service brick-and-mortar schoolhouses.

By way of introduction to this discussion, Section II of this article provides a broad overview of the legal structures associated with judge advocates. Since before the founding of the United States, there has been an identified need for legal skills and knowledge associated with the military. As a result, judge advocates have served our Nation since before the signing of the Declaration of Independence.¹¹ For the first two hundred years, their primary focus was on crimes allegedly committed by servicemembers (known as “military justice”), legal assistance to servicemembers, some contract law, and other laws unrelated to national security law.¹² Post-World War II, and particularly after the Vietnam conflict, a variety of factors significantly influenced the manner in which military lawyers were educated and organized, and how they practiced.

Section III introduces the military judge advocate legal schools (JAG schools). It describes those schools today with an emphasis on national security law courses. Prior to the Korean War, military legal training was primarily on-the-job training or self-education which supplemented any civilian legal education a judge advocate obtained. The military Services concluded that such informal education and training was ineffective and inefficient; thus, institutionalized and deliberate programs for judge advocate education and training were established.

In Section IV, the article discusses the ways JAG schools provide education and training by using a variety of teaching techniques, including experiential capstone events. Military courses have been and continue to be taught using a range of instructional styles and often address practice skills. The article provides in-depth descriptions of simulation training events held at each school.

Although Joint organizations do not operate, and are not responsible for, JAG schools, they do provide some legal training for the joint environment. Section V briefly discusses this training as part of the development of a national security

10. Strategic level of war is defined by the Department of Defense as “[t]he level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.” *Id.*

11. The position of judge advocate of the Army was created on Jul 29, 1775 and filled by William Tudor, a law pupil of John Adams and a Boston lawyer. J.W. CLOUS, JUDGE ADVOCATE GENERAL’S DEP’T, THE ARMY OF THE UNITED STATES: HISTORICAL SKETCHES OF STAFF AND LINE WITH PORTRAITS OF GENERALS-IN-CHIEF (Theophilus F. Rodenbough & William L. Haskin ed. 1896). On the other hand, the Navy did not have a Judge Advocate General until 1865.

12. That is not to say that military justice is never an issue of national security. Rather, there are any number of military justice cases of national security import, from the trial of Jefferson Davis to that of detainees under the military commissions and the court-martial of Bradley Manning. See David K. Watson, *The Trial of Jefferson Davis: An Interesting Constitutional Question*, 24 YALE L.J. 669 (1915); *Army Officer Orders Court-Martial for WikiLeaks Suspect*, ASSOCIATED PRESS, Feb. 4, 2012, available at <http://www.foxnews.com/us/2012/02/03/army-officer-orders-court-martial-for-wikileaks-suspect>.

lawyer. Section VI then provides cameo examples of ways that trained and fielded judge advocates are employed.

Section VII examines the evolution of the practice of military national security law and the accompanying increase in JAG school education to support a burgeoning practice area. The trained and developed judge advocates introduced in Section VI have a relatively new set of skills and core knowledge compared to judge advocates in the preceding centuries. Historically, few military lawyers have practiced national security law, although aspects of their practice had national security implications. For example, military lawyers have always supported the requirement for good order and discipline necessary for an effective uniformed force, but most individual military justice actions do not involve national security law. Judge advocates became increasingly involved at all levels of military operations only in the wake of the Vietnam conflict. Since the early 1980s, military national security law has consistently expanded in breadth and depth of practice. A historical evaluation clearly demonstrates that planners should not expect the trend to reverse. A historical review can also help guide planners in anticipating future requirements.

For training and education to be worth the resources they cost, they must link to requirements. Section VIII discusses some of the knowledge, skills, and professional ethos necessary for military national security practitioners. This section draws from the historical review of Section VII and builds on Joint doctrine because there is no single Department of Defense (DoD) or Joint mandate for national security legal knowledge or skills. There is also no formal process to obtain Joint input on the JAG school curricula.

The article concludes with a future focus. The problem that the Services must confront is budget reductions without a commensurate reduction in the requirement for trained judge advocates. The article asks questions of planners, suggests a refined requirements-based planning process, and identifies some available institutional courses of action to solve the problem. Even if the expected budgetary cuts do not occur, these efficiencies represent good stewardship of taxpayer dollars and lend themselves to adapting the delivery of information to the modern technology-savvy learner.

II. JUDGE ADVOCATES AND MILITARY LEGAL STRUCTURES

It is also clear from the commanders who testified that legal advice is essential to effective combat operations in the current environment—legal advice is now part of the tooth not the tail. ~ Independent Review Panel¹³

13. INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEP'T GEN. COUNSELS & JUDGE ADVOCATES GEN., LEGAL SERVICES IN THE DEPARTMENT OF DEFENSE: ADVANCING PRODUCTIVE RELATIONSHIPS 60 (2005) [hereinafter ADVANCING PRODUCTIVE RELATIONSHIPS], available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Preston_DODReport_0905.pdf.

Judge advocates have all volunteered to serve their Nation in uniform as military officers with a legal specialty. Military Services recruit, organize, and train them. They have all graduated from an American Bar Association (ABA) accredited civilian law school, passed at least one bar examination, and been admitted to practice in at least one state or federal jurisdiction. They undergo background checks so they can obtain and retain a security clearance. They are commissioned into one of the military Services and take an oath to support and defend the Constitution of the United States.¹⁴ Those in the Army National Guard and Air National Guard additionally take an oath to support and defend their State.¹⁵

The Services assign judge advocates to, and provide support for, a variety of DoD organizations (and a few interagency positions). They change assignments on an average of every two to three years. The majority of judge advocates are in the military grades of O-3 (captain/lieutenant) and O-4 (major/lieutenant commander).¹⁶ Only Marine Corps and Coast Guard judge advocates regularly move in and out of legal positions. The majority of judge advocates serve at the tactical and operational levels on a commander's staff or in a legal field support organization within their individual military Service. Some serve in Joint organizations at the Joint Staff¹⁷ or the Unified Commands¹⁸ (also known as Combatant Commands or COCOMs, such as United States Central Command).¹⁹ Judge advocates assigned to a COCOM serve as staff officers in support of the commander.

Many judge advocates are assigned as part of a commander's staff below the Service or COCOM level, such as a Major Command, a battalion or brigade, a

14. 5 U.S.C. §3331 (2006).

15. 32 U.S.C. §312 (2006).

16. The Services have a pyramid manpower structure with junior grades in the majority and senior grades increasingly a smaller percentage of the force. Military lawyers come in at the junior grades and promote up through the ranks. Judge advocates do not come into the military at mid-level or senior grades, although occasionally a mid-level officer will transfer from one Service to another. Fundamentally, it takes twenty years to grow a twenty-year colonel.

17. Joint Staff is "the staff under the Chairman of the Joint Chiefs of Staff as provided for in Title 10, United States Code, Section 155. The Joint Staff assists the Chairman of the Joint Chiefs of Staff and, subject to the authority, direction, and control of the Chairman of the Joint Chiefs of Staff and the other members of the Joint Chiefs of Staff in carrying out their responsibilities." *DICTIONARY OF MILITARY TERMS*, *supra* note 8.

18. Unified Command is a "command with a broad continuing mission under a single commander and composed of significant assigned components of two or more Military Departments that is established and so designated by the President, through the Secretary of Defense with the advice and assistance of the Chairman of the Joint Chiefs of Staff." *Id.*

19. Combatant Command is "a unified or specified command with a broad continuing mission under a single commander established and so designated by the President, through the Secretary of Defense and with the advice and assistance of the Chairman of the Joint Chiefs of Staff. Combatant Commands typically have geographic or functional responsibilities." The subset of a COCOM, specified command, is "a command that has a broad, continuing mission, normally functional, and is established and so designated by the President through the Secretary of Defense with the advice and assistance of the Chairman of the Joint Chiefs of Staff. It normally is composed of forces from a single Military Department." *Id.*

wing, or a Joint Task Force (JTF).²⁰ Other judge advocates are in concentrated legal staffs and headquarters elements such as the international law and/or “operations law” or “operational law”²¹ legal staffs in the Pentagon, Navy Legal Services Command, Air Force Legal Operations Agency, and the Coast Guard Legal Service Command. The legal commands typically include military criminal defense services, appellate offices, and those who perform complex civil litigation. Other judge advocates serve as faculty to the judge advocate schools and the military Service academies.

A handful of military lawyers are assigned at the DoD level, outside DoD (e.g., State Department), and other specialty positions (e.g., Congressional liaison). Others are assigned as students at various ten-month long schools (e.g., Masters of Law programs [LL.M.], and professional military education [PME]).²² Judge advocates apply legal knowledge and practice skills tailored to the requirements of the mission of the organization to which they are aligned.²³

Judge advocates currently practicing national security law range from strategic-

20. See JOINT PUBLICATION 1-04, *supra* note 4.

21. “Operational Law encompasses all relevant aspects of military law that affect the conduct of operations” and recognizes it as a core legal discipline. U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (2012) [hereinafter FM 1-04]. Similarly, the Marine Corps defines Operational Law as “that body of international, foreign (host nation), and United States domestic laws, regulations, and policies that directly affect United States military operations across the operational spectrum – from peacetime activities to combat operations.” U.S. MARINE CORPS, ORDER 3300.4, MARINE CORPS LAW OF WAR PROGRAM, Enc. 1, ¶2, at 1 (2003). The Sea Services (Navy, Marine Corps, and Coast Guard) jointly published a “Commander’s Handbook on the Law of Naval Operations and an Annotated Supplement” that “sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea [. . .] [and] is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict.” U.S. DEP’T OF NAVY, OFF. OF THE CHIEF OF NAVAL OPERATIONS, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 114M/MCWP 5-12.1/COMDTPUB P5800.7A, at 19 (2007) [hereinafter COMMANDER’S HANDBOOK]. LEGAL SUPPORT TO OPERATIONS, AIR FORCE DOCTRINE DOCUMENT 1-04 (2011), available at http://static.e-publishing.af.mil/production/1/af_cv/publication/afdd1-04/afdd1-04.pdf [hereinafter AFDD 1-04] provides details on legal support to operations but does not define operations law. Air Force policy defines “operational readiness” as “[The Judge Advocate General’s Corps or TJAGC] core competency that encompasses the ability to provide the warfighter with a complete set of legal capabilities at any time and place and provide the services necessary to enhance and sustain the readiness of the Total Force” and explains “TJAGC supports air and space operations by providing responsive legal capabilities configured to support home station and expeditionary operations.” TJAG POLICY MEMORANDUM: OPERATIONAL READINESS – 1 (2005). AIR FORCE JUDGE ADVOCATE GENERAL’S SCH., AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR, SPACE & CYBER FORCES (2009), available at <http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf> [hereinafter AIR FORCE OPERATIONS & THE LAW]. The first version in 2002 divided legal support to warfighters into three chapters: international matters, strategic matters, and operational matters. The second version in 2009 divided legal support into international law, operations law, and expeditionary law.

22. PME is also termed Developmental Education (DE) in the Air Force.

23. For example, the Office of the Staff Judge Advocate at U.S. Northern Command (USNORTHCOM) provides advice on the core judge advocate practice areas of military justice, fiscal and contract law, claims, legal assistance, administrative law, and employment and personnel law. They also provide national security law advice as tailored for the USNORTHCOM mission (e.g., international law primarily dealing with Canada, Mexico, and the northern pole region; homeland defense; homeland security; domestic law; other aspects of operations law; and law and policy on intelligence collection in the homeland). See generally Donna Miles, *Strict Law, Policies Frame Northcom, NORAD Operations*,

level senior lawyers in the grade of O-9 (lieutenant general/vice admiral) assigned to headquarters offices in Washington D.C., down to the most junior O-3 judge advocates deployed in the field or assigned to legal offices in support of tactical-level operations. At the strategic level, the most senior judge advocates in DoD, the Judge Advocates General²⁴ (commonly known in the Air Force and Army as TJAG and the JAG in the Navy), and Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC) (hereinafter collectively the TJAGs), are assigned to their respective Services. They are components of their Service's headquarters staff with specific statutory responsibilities for military justice. They have broad responsibility to assist their Service Secretary and Chief of Staff, Chief of Naval Operations, CMC, or Commandant of the Coast Guard (hereinafter collectively the Chiefs) in discharging their Service responsibilities. They also provide advice and support to the Chiefs in their roles as members of the Joint Chiefs of Staff.

The legal authority and influence held by the TJAGs is impacted by both the way DoD is organized and the authority of the Service Secretaries and Chiefs. For example, for the brief period of time after World War II when the Service Secretaries were also members of the then-new National Security Council (NSC), the TJAGs advised NSC principals.²⁵ As a more recent example, the Navy JAG is the DoD representative to the interagency and international community for Ocean Policy Affairs.

The TJAGs in the Army, Air Force, Navy, and Marine Corps have long-standing significant statutory and policy authority and responsibilities for the functional direction of judge advocates aligned within their Service.²⁶ For the Air Force and Army, this includes authority to "direct" the judge advocates in their Service "in the performance of their duties"²⁷ and specific statutory authority associated with assigning judge advocates to particular jobs.²⁸ The TJAGs' authority also includes establishment and enforcement of professional

AMER. FORCES PRESS SER., Jan 23, 2013, *available at* <http://www.defense.gov/news/newsarticle.aspx?id=119082>.

24. The term "Judge Advocate General" means, severally, the Judge Advocates General of the Army, Navy, and Air Force. Except when the Coast Guard is operating as a service in the Navy, it is also an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security. 10 U.S.C. §801 (2006).

25. This was long before the National Security Council had a legal counsel.

26. Army Judge Advocate General, Deputy Judge Advocate General, and general officers of the Judge Advocate General's Corps are established in 10 U.S.C. §3037 and the Judge Advocate General's Corps in 10 U.S.C. §3072; the Navy Judge Advocate General is established in 10 U.S.C. §5148 and the Navy Deputy Judge Advocate General, Assistant Judge Advocate General is at 10 U.S.C. §5149 and the Navy staff corps of Judge Advocate General's Corps at 10 U.S.C. §5150; the Air Force Judge Advocate General and Deputy Judge Advocate General at 10 U.S.C. §8037; Staff Judge Advocate to the Commandant of the Marine Corps at 10 U.S.C. §5046 and the Marine Corps judge advocates in 10 U.S.C. §5587a; and the Judge Advocate General for the Coast Guard is recognized in 10 U.S.C. §801.

27. 10 U.S.C. §8037(c)(2) (2006); 10 U.S.C. §3037(c) (2006).

28. 10 U.S.C. §806 (2006).

standards of practice.²⁹ These authorities and responsibilities translate into direct authority related to the recruiting, training, educating, and much of the employment of judge advocates, including those who practice national security law. Law established the Coast Guard TJAG position in 2003 and his authorities and responsibilities have grown since that time, to include a 2011 decision to include the Coast Guard TJAG in decisions on Coast Guard judge advocate assignment.³⁰

The TJAGs have small supporting staffs aligned at their level who practice national security law in the form of policy reviews, and who assist in guiding judge advocates assigned at subordinate levels (in the field/fleet). These specialists are typically in international and operations law branches of headquarters staff. For example, the Navy headquarters includes the following divisions: International and Operational Law (Code 10); Admiralty and Maritime Law (Code 11); Cyber, Information Operations, and Intelligence Law (Code 18); and National Security Litigation (Code 30).³¹ The Army, Navy, and Air Force TJAGs also oversee their Service JAG schools. Marine and Coast Guard judge advocates attend the Navy JAG school (called the Naval Justice School or NJS) for initial skills training. They attend NJS and the other JAG schools for additional training.

Although this article focuses on judge advocates, it is important to understand that there are a substantial number of civilian attorneys within DoD and the Services. Some are organizationally aligned under their TJAG or a senior judge advocate at a command level. Others, at the highest levels, are General Counsel (GC) and their staff.³² The Secretary of Defense and each Service Secretary are supported by a GC with a staff of civilian lawyers.³³ The Marine Corps, as part of the Department of Navy, also has a senior executive service civil servant Counsel for the CMC.³⁴ The DoD/GC is the senior DoD lawyer and Chief

29. Service Rules of Professional Conduct are based upon the American Bar Assoc'n Model Rules of Professional Conduct and include modifications necessitated by the requirements of military practice. TJAG Policy Memo.: TJAGC Standards - 2, Air Force Rules of Prof'l Conduct R. 3.6 (2005) [hereinafter Air Force Rules]; U.S. Dep't of Army, Army Regulation 27-26, Rules of Prof'l Conduct for Lawyers R. 3.6 (1992), available at http://www.army.mil/usapa/epubs/pdf/r27_26.pdf [hereinafter ARMY RULES]; U.S. Dep't of Navy, JAG Instruction 5803.1C, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General R. 3.6 (2004), available at http://www.jag.navy.mil/library/instructions/5803_1c.pdf [hereinafter Navy Rules].

30. *History of the Coast Guard Legal Program*, U.S. COAST GUARD, www.uscg.mil/legal/History.asp.

31. For discussion of the responsibilities associated with the various offices within the Office of the Judge Advocate General of the Navy, see Instruction 5400.1C, JAG/COMNAVLEGSVCCOM, STANDARD ORGANIZATION MANUAL (2012).

32. For information on the history of the GC positions and offices, see ADVANCING PRODUCTIVE RELATIONSHIPS, *supra* note 13.

33. The DoD GC position was established by DoD in 1953 and is codified in 10 U.S.C. §140 (2006). See also DoD Directive 5145.01, General Counsel of the Department of Defense (2001). The General Counsel of the Army is codified at 10 U.S.C. §3019(a) (2006), the Air Force at 10 U.S.C. §8019 (2006), and the Navy at 10 U.S.C. §5019 (2006).

34. *Counsel for the Commandant*, U.S. MARINES CORPS, <http://www.hqmc.marines.mil/Agencies/CounselfortheCommandant/Counsel.aspx>.

Legal Officer.³⁵

The GCs are civilian lawyers appointed by the President with the advice and consent of the Senate to perform duties their Secretary directs, including national security issues. Because their term in office is associated with a particular political administration, they bring a different perspective to legal policy than the career-service TJAGs. The lawyers on GC staffs are civilian employees. Most are long-term employees and some were formerly judge advocates or are currently Reserve or Guard judge advocates. Some of them practice national security law.

GCs also advise 15 DoD agencies and seven field activities which are under the authority, direction, and control of the Secretary of Defense (e.g., Defense Intelligence Agency, National Geospatial-Intelligence Agency, the National Security Agency, and the Defense Threat Reduction Agency). The TJAGs and Service GCs work together closely to support their principals, while the TJAGs retain functional statutory responsibility for their JAG organizations (hereinafter called JAG Corps even though all JAG organizations are not technically a Corps). There is no TJAG at the Department of Defense level.

Since 1949, the Chairman of the Joint Chiefs of Staff (CJCS) has had a full-time uniformed legal counsel assigned to the Joint Staff (now identified as Office of the Chairman of the Joint Chiefs of Staff, Legal Counsel [OCJCS/LC]).³⁶ The Legal Counsel has a small staff of senior judge advocates from all Services. The OCJCS/LC and his staff are full-time judge advocates assigned on duty tours to that office for typically two to three years in length and all practice national security law. The first nine OCJCS/LC were Navy captains, the Army, Marine Corps, and Air Force equivalent of colonel.³⁷ A Navy judge advocate was the first OCJCS senior legal counsel promoted to rear admiral (0-7) when the legal counsel position was statutorily created and appointed to a positional grade of no less than brigadier general or rear admiral (lower half).³⁸ The second and current LC is an Army judge advocate.

OCJCS/LC is responsible for providing counsel and advice to the CJCS and his staff on legal aspects of Joint³⁹ operations.⁴⁰ The OCJCS/LC represents the

35. 10 U.S.C. §140; JOINT PUBLICATION 1-04, *supra* note 4.

36. In 2001, then-Secretary of Defense Donald Rumsfeld briefly considered consolidating OCJCS/LC with Dep't of Defense General Counsel (GC) under GC. Then-CJCS General Henry H. Shelton wrote to Secretary Rumsfeld, objecting to such a consolidation and stating: "While you and I usually agree on issues, there may be times when my military advice, and that of the Joint Chiefs of Staff, may differ from your position. Likewise, the separation of functions and responsibilities of the officers that has heretofore existed allows the examination of issues from the military perspective independent of that of the OSD organizations. While their advice is frequently in accord, there are occasions when they diverge." Memorandum from Henry H. Shelton to Secretary of Defense, Subject: Consolidation of Offices (Aug. 22, 2001).

37. The 10th senior counsel was a Marine, followed by an Army judge advocate and then an Air Force judge advocate in 1975.

38. 10 U.S.C. §156 (2006).

39. The term "Joint" connotes activities, operations, organizations, etc., in which elements of two or more Military Departments participate. DICTIONARY OF MILITARY TERMS, *supra* note 8.

CJCS in the interagency process, in negotiations and discussions with nongovernmental organizations, and with foreign governments in coordination with geographic COCOMS' senior lawyer (most often called a staff judge advocate [SJA]).⁴¹

The OCJCS/LC does not have statutory functional authority over judge advocates. However, the Chairman's Legal Counsel is the principal judge advocate and advisor to the CJCS, and the primary judge advocate in a joint position who interacts with the DoD GC, and as such, he is in a unique position to advise and assist the COCOM SJAs. Depending upon the OCJCS/LC priorities and resources, OCJCS/LC hosts short continuing legal education (CLE) conferences on regular intervals with COCOM SJAs and a few other key DoD and Joint national security senior lawyers.

Bridging from the strategic level to operational level, the COCOMs are the Joint "warfighting" elements of DoD. Although it has not always been this way, today the Services recruit, organize, train, and equip a force and then transfer command of those forces to the appropriate COCOM for operational activities. A SJA and legal staff support each COCOM. Today, all COCOM SJAs are O-6s (colonels/captains). As with OCJCS/LC, they serve tours that typically last two or three years. The Service TJAGs nominate judge advocates to serve as COCOM SJAs. The COCOM commander selects his SJA from the nominees. TJAGs assign the other legal staff members to the SJAs' staffs.

COCOM SJAs work for their commanders and in conjunction with DoD, the Services, and LC. They also represent their commanders on interagency and international matters. Similarly to LC, they advise and assist subordinate command SJAs but do not recruit or organize other judge advocates.⁴² They do not supervise JAG schools, although most of them have annual CLE conferences in their specific area of practice for advanced practitioners. Interagency, coalition, or allied partners are sometimes included in the CLE events.

The subordinate unified (subunified) command level, Joint Task Force, Functional Component, and Service Component conduct operational and tactical level activities.⁴³ At each of these levels, the SJA and supporting legal staff advise the commander and other staff members. JTFs are the most common Joint force command established for a particular mission function or geographic area. Joint doctrine lists substantial aspects of a JTF SJA's duties and responsibilities.⁴⁴ To the degree desired by a Service, JAG schools can use this doctrine to

40. JOINT PUBLICATION 1-04, *supra* note 4.

41. Staff Judge Advocate (SJA) "means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate." MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS-MARTIAL 103(17) (2012). Joint doctrine provides an almost identical definition to Rule of Court-Martial 103(17) but also recognizes that a judge advocate who is the principal legal advisor to a Joint force command is an SJA. JOINT PUBLICATION 1-04, *supra* note 4.

42. JOINT PUBLICATION 1-04, *supra* note 4.

43. *Id.*

44. *Id.*

guide curriculum development.

III. JUDGE ADVOCATE SCHOOL EDUCATION AND TRAINING OVERVIEW

*The civilian bar has made a stunning discovery. The legal profession is the only profession in which you can get a license to practice without knowing how. Any staff judge advocate could have told the civilian bar that. ~ Brigadier General Dulaney L. O’Roark, Jr. (ret.)*⁴⁵

Because the military Services train and educate⁴⁶ forces as part of a Service responsibility to Organize, Train, and Educate (O,T &E), TJAGs are functionally responsible for their Services’ JAG schools. The schools, to varying degrees, also train the enlisted and support forces associated with their JAG Corps (e.g., paralegals, legal clerks, and court reporters). The Navy articulates the mandate this way: “All JAGC personnel will receive training, throughout their career, designed to prepare them for the future leadership, management, and legal challenges they will encounter.”⁴⁷ Accordingly, over a course of a career, military and civilian lawyers of all Services attend a wide range of JAG school courses at their Service school as well as courses offered by JAG schools of other Services.

45. Dulaney L. O’Roark, Jr., *The First Annual Hugh J. Clausen Leadership Lecture: Transformational Leadership Teaching the JAG Elephant to Dance*, 146 MIL. L. REV. 224 (1994).

46. Neither law nor policy consistently define or distinguish the terms “training” and “education.” Department of Defense and Service regulations often use the terms interchangeably. Congress has provided legislative authority, direction, and associated fiscal authorization and appropriations for a broad range of military learning, termed both “education” and “training.” For example, each Service has several accredited degree-granting schools whose statutory authority is under their respective Service Title 10 chapter entitled “Training Generally” or “Education and Training.” Some authorities, which primarily focus on funding, do provide definitions applicable to that section and distinguish between “training” and “education.” See, e.g., *Advanced Education Assistance: Active Duty Agreement; Reimbursement Requirements*, 10 U.S.C. §2005 (2006). Section (d)(1) states “The term ‘advanced education’ means education or training above the secondary school level but does not include technical training provided to a member of the armed forces to qualify such member to perform a specified military function, to workshops, or to short-term training programs.” See also Air Force Instruction 34-254, Services Education and Training, ¶3.1.2 (2007) (“Education and training at the tactical level includes training in a primary skill and education in the fundamentals of leadership. The following activities accomplish tactical education and training: fundamental education, specialty training, continuation training, and leadership education”); AFI 36-2639, EDUCATION WITH INDUSTRY PROGRAM, ¶1.1 (2009) (providing for “non-degree educational assignment” with industry); *Degree-granting authority for United States Army Command and General Staff College*, 10 U.S.C. §4314 (2006); *Training Generally*, 10 U.S.C. §401 (2006); *Degree-Granting Authority for United States Air Force Institute of Technology*, 10 U.S.C. §9314 (2006); *Degree-Granting Authority for Air University*, 10 U.S.C. §9317 (2006); *Training*, 10 U.S.C. §9301 et seq. (2006). “Professional Military Education Schools,” which are a portion of the degree-granting institutions, are also listed in other locations under that specific title. *Preparation of Budget Requests for Operation of Professional Military Education Schools*, 10 U.S.C. §2162; 10 U.S.C. §6901, et. seq. (2006) (Navy and Marine Corps “Education and Training”); *Degree-granting authority for Naval War College*, 10 U.S.C. §7101, et. seq. (2006); 10 U.S.C. §4301, et. seq. (2006) (Army).

47. U.S. Navy, JAG Instruction 1500.4A, JAG Corps Training Program 2 (2012).

Most state bars accept JAG school courses to satisfy state professional bar CLE requirements. Thus, the schools support both professional military development as well as legal licensure requirements. Use of JAG school courses to satisfy CLE requirements is beneficial to the institution because they develop lawyers who are trained for their area of practice. JAG school CLE is also beneficial to individuals in that they do not have to pay for the military CLE courses.

All JAG schools support a variety of other schools and programs with JAG school instructors (e.g., Air Force JAG school instructors regularly teach in the degree-granting programs at Air University). All JAG schools are “interservice” in that they have at least one member of another Service attached to the school. Some JAG school courses are also open to international and interagency lawyers.

The Army JAG school is located on the campus of the University of Virginia (UVA) in Charlottesville at The Judge Advocate General’s Legal Center and School (TJAGLCS) with advanced enlisted training courses also held at Fort Lee, Virginia. Only TJAGLCS is an ABA degree-granting institution and only for the LL.M. in Military Law. TJAGLCS trains more than 6,000 students a year in more than thirty-eight courses for some sixty offerings a year, which range from a few days to the ten-month LL.M. program.⁴⁸ TJAGLCS students may also take classes at UVA and UVA students may take certain courses at TJAGLCS.⁴⁹ Part of TJAGLCS is the Center for Law and Military Operations (CLAMO). CLAMO conducts significant research, produces advanced scholarship, and provides education on national security issues.⁵⁰ Specifically, CLAMO examines legal issues associated with “the preparation for, deployment to, and conduct of military operations.”⁵¹

The Naval Justice School at Newport, Rhode Island trains all Sea Service judge advocates (Navy, Marine Corps, and Coast Guard). NJS also has teaching detachments in San Diego, California; Norfolk, Virginia; and a three-person Branch at TJAGLCS. Typically, NJS instructs more than 28,000 students a year worldwide with more than 3,000 attending more than thirty-four resident courses with approximately 140 total offerings a year, which range from three days to eleven weeks in length.⁵²

48. ANNUAL BULLETIN, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL 4, 29-30 (2012-2013).

49. Rob Seal, *Unique Military Law School Marks 60 Years at U.Va.*, UVA TODAY, Aug. 1, 2011, available at <http://news.virginia.edu/content/unique-military-law-school-marks-60-years-uva>.

50. CLAMO is an interservice (as opposed to Joint) and multinational organization. Some CLAMO publications are available through the Library of Congress. *The Center for Law and Military Operations*, LIBR. OF CONG., http://www.loc.gov/frd/Military_Law/CLAMO.html.

51. JOHN O. MARSH, JR. CLAMO PROMULGATING LETTER (Dec. 21, 1988) (on file with author); David E. Graham, email information on CLAMO Mission (Mar. 17, 2012) (on file with author).

52. Telephone interview with NJS, Office of Academic Director (Feb. 19, 2013). The NJS mission is “To oversee formal training of naval judge advocates and legalmen to ensure their career-long professional development and readiness; to provide comprehensive formal training to all Sea Service

From 1992 until 2000, NJS also ran the Defense Institute of International Legal Studies (DIILS), after which Defense Security Cooperation Agency became the executive agent. DIILS is across the street from NJS and NJS still provides instructors to the program. DIILS is a highly successful program that provides professional legal education and training to international military and civilian students through worldwide mobile training teams, resident courses, and courses held at various U.S. locations. DIILS is jointly staffed and augmented by judge advocates from all the Services and the Coast Guard as well as experienced civilian lawyers who are experts in applicable fields. Courses cover a range of aspects of international and national security law, to include war crimes, human rights, rule of law, anti-corruption, civilian control of the military, aspects of combating terrorism, operations law, and military justice codes.⁵³

The Air Force Judge Advocate General's School (AFJAGS) is collocated with most of the other Air Force post-graduate level degree-granting programs on Maxwell Air Force base in Montgomery, Alabama, home to Air University (AU). AFJAGS also holds a few courses at other population centers.⁵⁴ AFJAGS instructors teach approximately 20,000 students a year with almost 2,900 of them at one or more of the twenty-eight resident legal courses with approximately forty-five offerings a year, which last from a couple of days to just over two months in length.⁵⁵ AFJAGS instructors also teach at AU. Since 1997, AFJAGS has also offered courses by distance learning (DL). In addition to DL paralegal training, AFJAGS hosts web-based courses for the newest judge advocates to take when assigned to a particular job for the first time at installation level.⁵⁶ These courses are currently PowerPoint presentations with a prerecorded lecture and include a multiple-choice final exam. AFJAGS also regularly delivers individual lectures on topics of JAG Corps relevance via DL in a format that permits students to input questions and the lecturer to respond

judge advocates and other legal personnel in order to promote justice and ensure the delivery of quality legal advice and other services to the commander; and to train commanders and senior officers in the practical aspects of military law to enable them to perform their command and staff duties, and train other personnel to assist in the sound administration of military justice." VICE ADMIRAL JAMES W. HOUCK, JAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCT. 1, 2012 TO SEPT. 30, 2011 (2011), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf>.

53. *See generally* DEF. INST. OF INT'L LEGAL STUD., <https://www.diils.org/organization/defense-institute-international-legal-studies>.

54. Specifically, courses are presented in or at the following locations; Washington, D.C., Nellis Air Force Base, Nevada, Lackland Air Force Base, Texas, Yokota Air Base, Japan, and Ramstein Air Base, Germany. JUDGE ADVOC. GEN.'S SCH., ANNUAL BULLETIN 2012-2013, at 6-8 (2012), *available at* <http://www.afjag.af.mil/shared/media/document/AFD-121017-034.pdf>.

55. THE AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL, FISCAL YEAR 2013 COURSE SCHEDULE (2013). In 2012, AFJAGS held 53 courses. LIEUTENANT GENERAL RICHARD C. HARDING, TJAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCT. 1, 2012 TO SEPT. 30, 2011 at 15-16 (2011), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf>.

56. For example, a ten-hour course for new chiefs of military justice and a 2.5-hour course for new chiefs of operations law is always available on-line from an AFJAGS hosted website behind a firewall.

orally to all attendees. Most of these courses qualify for CLE credit.

The Services should allocate and apply military training and education resources based upon requirements for judge advocates to have certain knowledge, skills, and a professional ethos. TJAGs, SJA to the CMC, the JAG school advisory boards, field judge advocates, judge advocates assigned to Joint commands, Service or Joint commanders, and others can identify the need for specific legal knowledge and skills. As mentioned, Joint doctrine identifies desired Joint Task Force SJA knowledge and skills,⁵⁷ but JAG schools are not required to link courses to this doctrine.

TJAGs, or their delegates, validate training requirements and determine training priority. Civilian GC or JAG Corps lawyers may also attend JAG school courses, although most attendees are uniformed lawyers. Neither DoD, nor OCJCS/LC, nor the COCOMs control or direct JAG school curriculums or set student prioritization. As such, to some degree, the schools' curriculums reflect the priorities of a TJAG leading his JAG Corps and his views of client requirements. If his focus is significantly influenced by the Joint community as the ultimate client, there will be a different set of priorities than if the focus is primarily on supporting a Service in garrison (at home station rather than in the deployed environment). For example, school curriculum and prioritization (along with assignment progression) will vary depending on whether the TJAG views the role of the JAG Corps as developing as many JAGs as possible to serve, as in garrison SJAs, or if he views the JAG Corps role to develop as many Joint force SJAs as possible, or something in between. The number of Joint versus Service SJA positions available to JAG Corps members may influence which approach the TJAG takes. However, the number of Joint positions available to judge advocates from a particular Service may result from the JAG Corps training and development objectives.

When a JAG Corps determines that law or policy has changed, or when skill or knowledge deficiencies arise, it can adjust curriculums or add courses. A JAG Corps can eliminate courses when a skill or knowledge set is no longer required or is not a high enough priority to compete for available resources. TJAGLCS must also comply with ABA requirements because their LL.M. program is ABA-accredited.

To limit curriculum overlap between schools, the JAG school leaders (commandants or deans) meet on a biannual basis at the Interservice Legal Education Review Committee (ISLERC), which was established in 1977. Its charter is to "facilitate all Services training and education with a goal of eliminating duplication, reducing cost, standardizing instruction, and increasing training and education efficiency, consistent with readiness."⁵⁸ The committee examines all curriculums and associated legal training and education requirements. They coordinate on educational policy, program quality, and "maximize cooperation"

57. JOINT PUBLICATION 1-04, *supra* note 4.

58. Thomas L. Strand, *The Commandant's Corner*, THE REP., Mar. 2004, at 3.

to permit interservice sharing of faculty, course materials, and publications.⁵⁹

Most JAG school courses focus on the tactical and operational levels, rather than the strategic policy-maker level. All of the schools have mandatory initial basic level courses. The courses vary in length but generally range from two to three months long. They introduce new judge advocates to military justice, legal assistance, basic operations law, and other topics as appropriate for each Service and prepare the lawyers for their first military assignment. The schools have a number of other postgraduate CLE courses that provide more in depth training on particular areas of military practice, including national security law. The CLE courses range in length from a day to a few weeks. Some of these are resident courses with an increasing number of them delivered as DL, either in whole or in part.

Both resident and adjunct legal faculty teach JAG school courses. Paralegals and other support personnel teach courses for paralegals and support staff, and selectively assist with attorney-level courses. The significant majority of instructors are uniformed members rather than civilian employees. The few civilian legal instructors are almost all former military members and have extensive practice experience in the area they are teaching. Many instructors have attended at least one course designed to enable them to be an effective academic educator. Most adjunct faculty are practitioner-specialists. Because practitioners teach the courses, there is a close tie between practice and learning. Instructors have inherent credibility with students who are eager to learn the law, clients, context, and the instructors' view of and tips on practical application. JAG school instructors use a variety of teaching techniques.

IV. JAG SCHOOL PEDAGOGY

[I]f wars of the coming century look more like Iraq and less like Korea, we're going to see an increased demand for legal services . . . We're going to need to provide the point man who is going to be less senior and less experienced than he used to be—[and] we're going to have to provide him with legal services. ~ General Michael Williams, USMC (ret.)⁶⁰

JAG schools liberally combine lectures, seminars, and experiential teaching techniques (most commonly known in the military as simulations or exercises).⁶¹ In the classroom, instructors usually use visual aids such as PowerPoint slides and/or application of “primacy and recency” techniques to remind stu-

59. As with all areas of study, the Service JAG schools each develop courses that focus on different aspects of the law and operations. For example, AFJAGS offers a classified cyber law course; the Army school teaches a course on intelligence law; and the Naval Justice School provides a course entitled Information Operations Law Training. This arrangement was done purposely to avoid redundancy between the schools and to provide judge advocates practicing in the cyber communities with the opportunity to attend all of these courses.

60. ADVANCING PRODUCTIVE RELATIONSHIPS, *supra* note 13, at 3.

61. See J. Jeremy Marsh, *Teaching a Law of War Class*, ARMY LAW., June 2010, at 50.

dents of the previous day's key points or summarize the current lesson's key points.⁶² The Socratic Method is not the primary teaching style and is rarely used in lecture halls. Case law reviews are not common and instructors often draw lessons from the headlines and from their experiences and those of other judge advocates. Seminars and simulations reinforce knowledge but primarily focus on developing application skills and reinforcing professional ethos. Outcome-based evaluations also include production of scholarship, such as required in the TJAGLCS LL.M. program and the Coast Guard/Homeland Security course.

Experiential events allow students to be creative in their reaction to various legal challenges and to experiment with different ways of addressing problems. They reinforce legal knowledge learned in a class by forcing the student to understand and apply that knowledge. They build professional ethos by testing moral courage and practicing teamwork and leadership. They prepare students to practice in a real-world environment by creating patterns of responses that will later contribute to a sense of familiarity and control when the graduated student confronts an actual stressful event.

Students encounter experiential learning in their first JAG school course and in many courses thereafter. The smaller exercises focus on a particular skill set. For example, the basic courses generally introduce a specific legal concept such as a rule of courts-martial procedure or evidence in a lecture format combined with reading assignment. Students then discuss the rule during a smaller seminar where they also perform a very short role-playing exercise. The seminar instructor and other students comment on the exercise. Capstone experiential events bring all training and education together. For example, in the basic courses and after several weeks of military justice education, the students participate in a moot court-martial.

National security law experiential events range from small classroom tabletop exercises to full-scale field exercises that simulate deployed environments. As with training in other areas of practice, classroom exercises typically focus on discrete skill sets while the capstone events bring together a range of skills. During a small exercise, students may perform a short role-playing scenario in a seminar about the Law of Armed Conflict (LOAC, also called the law of war) or the rules of engagement (ROE). Large simulations push participants and processes to identify seams and gaps – to “exercise to failure.” Post-training analysis then reduces or eliminates gaps and errors in the future.⁶³ Examples of capstone national security law events follow.

TJAGLCS Gauntlet: The TJAGLCS basic legal officer course has used a day long role-playing simulation as a capstone event since the mid 1990s. After eight days of operations law instruction, instructors evaluate students' perfor-

62. *Id.*

63. The military is able to exercise this way because they do not have political consequences to exercise failures or gaps like some civilians, such as a locally elected Sheriff or Mayor may have.

mance in the “Gauntlet.” These new military lawyers learn a general scenario and applicable rules and then confront a variety of issues including rule of law, hostile act, hostile intent, wounded and sick personnel, triage, and detention and interrogation scenarios. After the exercise, the faculty, role players, and other experienced lawyers conduct an after-action review with each student. Student evaluations examine legal knowledge and skills such as demonstrated ability to interact with, and provide advice to, their client.⁶⁴

NJS OPLAWEX: The NJS Law of Military Operations (LOMO) course has a classroom element, to include lectures, panels, and seminar discussions. The course then builds to an outcome-based table-top scenario (Operational Law Exercise or OPLAWEX) which presents students with an escalating fictional scenario and a range of associated legal issues. The students divide into groups and are assigned role-playing positions on the staff of a multi-national force (MNF) commander of a fictitious nation. The OPLAWEX is conducted in a seminar format and participants are required to respond rapidly to assigned legal questions and to draft various levels of rules for the use of force in support of the ever-escalating scenario. Students brief their solutions to the class and instructor. Issues include noncombatant evacuation operations, disputes on territorial seas, exclusive economic zones, drawing of baselines, maritime interdiction operations, hostage rescue associated with state-sponsored terrorist groups, legality and enforcement of no-fly zones, request for a non-United Nations commanded multinational force participation in an invasion, humanitarian and disaster assistance, stability operations, and more.⁶⁵

AFJAGS JAGWAR: The Air Force has a course entitled Gateway for mid-level career judge advocates.⁶⁶ Gateway focuses heavily on leadership, management, and communication skills, in addition to advanced instruction on law. Combining skills development with operational law, Gateway includes a realistic capstone exercise held in the Air Force Wargaming Center. The exercise is called “JAGWAR” and builds on the classic military wargaming construct. Students role-play through a scenario built on a five-phased campaign to suppress terrorist activities. Students confront issues that include status of forces, rules of engagement, cyber attacks, and hot pursuit.

AFJAGS JAG FLAG: The JAG Corps began the most robust JAG school national security law course with full-scale role-player field simulations in 1997 and called it “JAG FLAG.”⁶⁷ Field lawyers first identified the need for such a

64. David E. Graham & Richard P. DiMeglio, emails with author (Feb. 22, 2012) (on file with author).

65. LAW OF MILITARY OPERATIONS & INTERNATIONAL LAW OF MILITARY OPERATIONS, SCENARIO, SEMINARS, AND ROE EXERCISE (June 2011) (on file with author).

66. The Air Force JAG Corps suspended this course for 2013.

67. Air Force “FLAG” training exercises are designed to provide students training in an environment similar to ones that they will encounter in real-world missions. For example, “RED FLAG” is an aerial combat training exercise developed during the Vietnam Conflict. It was designed to provide fighter pilots with simulated combat experience prior to actual combat in order to increase combat

course.⁶⁸ For the first two years, the legal team in an Air Force Major Command, the Air Combat Command, envisioned, developed, and led the course. Thereafter, AFJAGS added it to the Operations Law Course.⁶⁹ JAG FLAG attendees have included lawyers from all military Services, as well as individuals from the international legal community.⁷⁰

JAG FLAG provides legal training in a simulated environment and measures effectiveness by combining a capstone performance with ongoing role-player and phased instructor feedback.⁷¹ Before the JAG FLAG portion of the course begins, students divide into teams of one lawyer and one paralegal so that they can build this relationship throughout the week. Upon arrival at the school, teams group with other students who have the same roles. Students attend the OLC classroom element prior to the JAG FLAG simulation. OLC instruction includes lectures, seminars, panels, and video teleconferences conducted by lawyers who are currently supporting military operations or have returned recently from such a deployment. Students also receive written materials.

Throughout the classroom week and in addition to substantive legal briefings and seminars, students watch mock TV news reports and receive scenario-based intelligence briefings that describe problems in the fictional country to which they will deploy. Students role-play positions on the staff of a military operational deployed commander. Either a judge advocate with extensive operational law experience or an officer who is not a lawyer plays the commander role. It is preferable to use a non-judge advocate officer as the simulation commander because of the real-world operational experience and perspective he brings to the simulation. Simulations that only include lawyers as role players both risks negative training by lawyers taking over roles outside their proper lane and misses the opportunity to provide learning through client interaction.

After OLC classroom instruction is completed, students and instructors “deploy” to the field. Each group of students has one instructor to act as their shepherd (marshal) and evaluator. As a group, the students travel to an austere environment, typically in a secluded wooded area. Although there is food, water, and basic hygiene facilities, there are no creature comforts. The students put their bag of gear – clothing, toiletries, and work material – in an assigned sleeping tent. The tents contain standard-issue military cots, a naked light bulb

effectiveness and reduce combat losses. See JAMES KITFIELD, *PRODIGAL SOLDIERS: HOW THE GENERATION OF OFFICERS BORN OF VIETNAM REVOLUTIONIZED THE AMERICAN STYLE OF WAR 165-174* (1997).

68. The field lawyer, William A. Moorman, who led this training, was the same lawyer who led the first major air-focused operations law activity (Operation JUST CAUSE). By this time, he was the Air Combat Command Staff Judge Advocate.

69. Patricia A. Kerns, *THE FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 175* (2004) [hereinafter *FIRST 50 YEARS*].

70. For example, in 1999, class attendees included students from Australia, Canada, Chile, the Dominican Republic, the Netherlands, and Venezuela. W. DARRELL PHILLIPS, *TALKING PAPER ON OPERATIONS LAW COURSE/JAG FLAG* (1999) (on file with author).

71. Because military lawyers attend other non-legal training focused on physical security and designed to reduce combat-related losses, these matters are only cursorily addressed in legal courses.

hanging from the tent ceiling, a few chairs, and nothing else. They live and sleep in that environment for the entire exercise. Students have meals provided by a contracted field food kitchen and/or MREs (meal, ready to eat).⁷²

Throughout the rest of the exercise, the student teams are presented with a number of written and role-player scenarios in order to challenge their legal knowledge and refine their ability to apply skills. Teams take turns as the senior advisor for their assigned commander, sometimes in the presence of their fellow students, who therefore are able to learn from their colleagues, and other times alone. Instructional days are long and stressful in order to create a realistic environment. Students have laptop computers and printers but are given limited time to create documents and even less time to conduct research. Instructor/commanders and marshals provide students with daily feedback. Students participate in end-of-course feedback. Instructors assess their legal knowledge and skills such as application of that knowledge to the fact situation and delivery of the information in the scenario environment.

Currently, the JAG FLAG scenario is a notional peacekeeping mission in the year 2020. Halfway through training, the mission shifts to offensive operations. Students confront a range of issues, including: self-defense and defense of others (nongovernmental actors as well as self and hostile act/intent); humanitarian and civic assistance to include transport of humanitarian aid; and issues which may or may not be governed by a notional status of forces agreement, such as importation of military weapons by the United States, taxation of the United States by the host nation, inspection of U.S. aircraft by the host nation, and foreign criminal jurisdiction. Other issues include discussion of international agreements and authority to bind the government; right to detain and use force; Geneva Convention Common Article Three, treatment and status of civilians, terrorists, and uniformed troops; interrogations; use of riot control agents in the context of coalition-partner concerns, rules for the use of force and chemical weapons convention; cross-cultural communication with local individuals about claims brought against the United States for military damage; protection of classified material at a helicopter crash site; military training of foreign forces; and security assistance activity. Students interact with a variety of role players, such as nongovernmental organization actors, coalition military, media, and local citizens. Although the number of role players may sound extensive, they are almost all volunteers who get professional satisfaction from helping the students learn.

V. JOINT LEGAL TRAINING

The support forces that deploy with an operational unit, to include judge advocates, are war-fighting assets and must be deployable, as survivable and

72. MREs are high-caloric prepackaged food that is heated by adding fluid to an individual chemical heating bag and then placing the bag next to the food package.

*as thoroughly trained as the operational forces they accompany. Otherwise, they are merely a logistical drain.*⁷³

In addition to JAG school training, some military lawyers receive a degree of training in the joint environment. Joint operational organizations, such as COCOMs, do not operate degree-granting programs, nor do they operate initial military or technical skills-training programs or legal schools. However, they are responsible for the readiness of forces assigned to their command and provide mission-specific training, including seminars and in-house courses.⁷⁴ They also rely heavily on both table-top and field scenario-based exercises and “war games,” or Rehearsal of Concept (ROC) drills. This type of training is not the primary emphasis of this article but will be addressed briefly because it is important to understand that military national security lawyers have organized and deliberate learning opportunities outside of the JAG schools which support their national security legal practice.

Joint legal doctrine recognizes Joint training as “the cornerstone to joint readiness [. . .] one of the most critical components to providing adequate legal support to the JTF.”⁷⁵ Joint training is comprised of two elements: individual and organizational training. Individual training has three elements: Joint, tactical, and legal. Individual Joint training is professional military education as provided by organizations such as Command and General Staff College; Air Command and Staff College; and the Naval, Army, Air, and National War Colleges. These and other programs qualify as Joint PME for service members, regardless of their job specialty. For the lawyer, PME is an important component of understanding the client and the context in which to apply law and legal policy. Individual tactical training is designed to enable a military member to physically operate and survive in a deployed Joint environment through weapons training, first aid training, and convoy operations. Individual legal training supplements Service JAG school training and education with more focused emphasis on Joint operational legal issues.⁷⁶

As of 2011, Joint doctrine specifically recommended that “before serving as the JTF SJA or a supervisory JA, senior JAs should attend the Joint Operational Law Course. This course provides advanced legal knowledge and Joint training focused on the Joint operational Environment.”⁷⁷ As of 2013, that course no longer exists. Today, and for the foreseeable future, the only Joint legal course is

73. Harry L. Heintzelman, IV & Edmund S. Bloom, *A Planning Primer: How to Provide Effective Legal Input Into the War Planning and Combat Execution Process*, 37 A.F.L. REV. 5, 6 (1994), available at <http://www.afjag.af.mil/shared/media/document/AFD-090108-035.pdf> [hereinafter *A Planning Primer*].

74. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MANUAL 3500.03C, JOINT TRAINING MANUAL FOR THE ARMED FORCES OF THE UNITED STATES (2011), available at http://www.dtic.mil/doctrine/training/cjcs3500_03.pdf [hereinafter JOINT TRAINING MANUAL].

75. JOINT PUBLICATION 1-04, *supra* note 4, at III-11. See also JOINT TRAINING MANUAL, *supra* note 74.

76. JOINT PUBLICATION 1-04, *supra* note 4, at III-12-13.

77. *Id.* at III-12.

run by U.S. Special Operations Command, Joint Special Operations University – the 4.5-day Joint Special Operations Legal Advisor’s Course.

Joint organizational training has two components: legal office staff training and training for the JTF commander and staff. Legal office training is in-house training designed to ensure all staff understand their particular unit’s mission, authorities, processes, superior and subordinate organizations, and their place in this process. This training builds on any Joint training plan the overall unit may have.⁷⁸ It includes legal office participation in the unit exercises and training drills, or mission rehearsals. These exercises have significant value, particularly when conducted across a coalition and/or interagency as they quickly identify gaps and seams that are not readily apparent otherwise. The training for JTF commanders and staffs is for the entire unit, of which there is a small legal part. In the JTF training, the legal team provides training on relevant topics such as LOAC, rules of engagement or rules for the use of force, applicable domestic or host-country law, fiscal law, detention operations, and any other mission-specific law and legal policy.⁷⁹

VI. A TRAINED NATIONAL SECURITY MILITARY LAWYER

“Bombs, firearms, and air support are usually the weapons of choice in military exercises. But sometimes the most effective soldiers in the field are those carrying laptop computers and attaches.” ~ Air Force Times⁸⁰

The education and training of a judge advocate produces a valuable military legal asset. This section of the article provides cameos of national security military lawyers in a variety of operational law settings. Because a COCOM SJA supports the most senior military operational commander, the paper will first describe in some detail a typical judge advocate assigned to a COCOM. It will then introduce judge advocates at a Navy-led installation in the Horn of Africa, a deployed-battalion command, a Combined Air Operations Center, a Combined Interagency Joint Task Force, and in rule of law operations. The next section of the article will provide more detailed examples of military national security lawyers in the context of history as their roles expanded.

Let’s first look at a lawyer assigned as part of the staff of the Office of the Staff Judge Advocate that supports both United States Northern Command (USNORTHCOM) and North American Aerospace Defense Command (NO-RAD). He will arrive at the COCOM with a law degree and having attended a number of JAG school courses. He received basic operations law, skills training, and an introduction to the JAG Corps ethos at his first JAG course about

78. *Id.* at III-11-15. For further detail on the development of the JTP, see JOINT TRAINING MANUAL, *supra* note 74.

79. JOINT PUBLICATION 1-04, *supra* note 4, at III-11-15.

80. David Castellon, *JAGs Train as Vital Force for Deployments*, AIR FORCE TIMES, June 4, 2001, at 24.

ten to fifteen years earlier. He would have probably attended two to four advanced JAG school courses, most of which are a week in length, such as the Army Domestic Operations Law course. He may have a LL.M. from TJAGLCS or the civilian legal academy with an emphasis on some aspect of national security law, such as Air and Space law or Cyber law. He will have had two to three levels of Joint PME. One or two of those may have been a resident ten-month long program that awarded him a Master of Science degree in either military operations or national security.

He will most likely have deployed outside the United States at least once and received training specific to that deployment in the Joint arena. He may have had one or two prior assignments to legal offices that addressed operations-law issues, such as at the Military Commissions or a headquarters element of a Service component of a COCOM (e.g., U.S. Army North, Air Forces North, Marine Forces North). He would have engaged in self-study over the years, reading various books and journal articles on military operations or national security and operations law. He has probably attended a few legal conferences that discussed various aspects of national security law, such as those hosted by the ABA's Standing Committee on Law and National Security or the annual Homeland Security Law Institute CLE conference. He may have even published on a national security legal topic.

During his ten to fifteen years of practice, he would have received significant on-the-job training and informal mentoring designed to develop his practice skills. He will know the overall DoD and Service processes, and have a strong network of colleagues and mentors he can go to for guidance and assistance. His moral courage has probably been tested on multiple occasions, and he may have had his physical courage tested.

Once at NORAD/USNORTHCOM, he will attend the USNORTHCOM-wide two-week orientation course on Homeland Defense and Defense Support of Civil Authorities. Judge advocates, along with everyone else new to USNORTHCOM, attend the course that includes instruction on a number of laws and legal policies (i.e., federalism, National Response Framework, Stafford Act, Posse Comitatus Act, and Executive Order 12333, United States Intelligence Activities). The judge advocate will then move into the legal office and start on-the-job training on the particular authorities that apply to both NORAD and USNORTHCOM missions.

He will study authorities of Department of Homeland Security, Department of Health and Human Services, Department of Justice, and others. He will learn laws, authorities, and processes that govern the Army and Air Guard when they are under the command of a Governor. He will study State laws as they impact USNORTHCOM missions, such as who has the authority to issue a mandatory evacuation notice and which States permit non-State licensed medical personnel to practice in that State during an emergency. In his NORAD role, he will learn laws, authorities, and processes that govern the bi-national defense cooperation agreement between Canada and the United States. This includes authorities in

support of the NORAD missions of Aerospace warning and control and Maritime warning. Depending upon the SJA, there may be regular in-house training sessions led by one of the legal experts more experienced in the subject matter. When resources permit, the legal office also hosts an interagency legal conference, which he will attend to hear from a range of experts.

He may attend or be part of a training session involving Canadian and/or Mexican lawyers. He will participate in tabletop exercise inside the legal office as they prepare for USNORTHCOM and National-level exercises (NLEs). He will then participate in the NLEs. All of this training, education, and experience will prepare him for the day every fiber of him hopes will never come, but which he fully expects will come and for which he must be ready – when the Armed Forces are called upon to support their fellow Americans suffering from a natural or manmade disaster, or to respond when the United States or Canada is attacked by air.

JAG school educated and trained judge advocates enable the full array of DoD activities. For example, the Navy operates the only U.S.-military installation in Africa at Camp Lemonnier under Combined Joint Task Force-Horn of Africa (CJTF-HOA), an organization under U.S. Africa Command.⁸¹ Since its formation in 2002, CJTF-HOA Navy judge advocates have advised on a wide range of national security issues, from engaging terror cells in East Africa to humanitarian missions, regional stability, and capacity building.⁸² They advise on matters related to the status of U.S. personnel and port and air operations under the *Agreement Between the Government of the United States and the Government of the Republic of Djibouti on Access to and Use of Facilities in the Republic of Djibouti*.⁸³ They support use of an Acquisition and Cross-Servicing Agreement with the Japanese Self-Defense Force related to counter-piracy operations, conduct legal reviews of multinational operations, and provide basic LOAC training.⁸⁴

As another example, Marine Corps judge advocates who deploy with a regimental or battalion command are primarily intended to provide counsel on national security law matters such as LOAC, targeting, ROE, detainee operations, and sensitive site exploitation.⁸⁵ As line officers, they can also fill non-legal roles, either full- or part-time.⁸⁶ Battalion-level Marine judge advocates in Iraq advised commanders on a range of issues including LOAC, ROE, targeting, detainee operations, military justice, as well as rule-of-law matters,

81. David Melson, *The Horn of Africa: Building the Future*, JAG MAG., Nov. 13, 2001, at 8.

82. *Id.*

83. *Agreement Between the Government of the United States and the Government of the Republic of Djibouti on Access to and Use of Facilities in the Republic of Djibouti*, U.S.-Djibouti, Feb. 19, 2003, T.I.A.S. 03-219.

84. Melson, *supra* note 81, at 9.

85. STAFF JUDGE ADVOCATE TO THE COMMANDANT, HEADQUARTERS, U.S. MARINE CORPS, MARINE CORPS LEGAL SERV. – STRATEGIC ACTION PLAN 2010-2015, 6 (2010), available at http://www.hqmc.marines.mil/Portals/135/Docs/JRS/Legal_Service_SAP.pdf.

86. *See id.* at 5-6.

such as advising and assisting the local political structures in their efforts to establish court systems and address military justice matters.⁸⁷

Air Force judge advocates assigned to the Combined Air and Space Operations Center (AOC, or CAOC given that it is Combined) at Al Udeid Air Base, Qatar are fully integrated into this combat weapons system. The U.S. forces at this CAOC are a component of U.S. Air Forces Central Command, a sub-command of U.S. Central Command. There are a number of other Combined and/or Joint AOCs. The judge advocate at Qatar is counsel for the Joint Air Force Component Commander (JFACC) and staff. Among other activities, he supports creation of the daily Air Tasking Order (ATO), which disseminates air assets and missions in furtherance of command objectives. Often by their commander's side, the attorneys ensure legal compliance on all deliberate (pre-planned) and dynamic (ad hoc) target prosecutions. In addition, they provide liaison and counsel to coalition headquarters, especially for partner countries with different LOAC standards and policy approaches. As importantly, these lawyers formulate legal policies in congruence with the commander's long-term planning, so that tactical and operational objectives can be achieved within the parameters of governing doctrine, norms, principals, and law.⁸⁸

Among other positions, Coast Guard judge advocates are assigned to the U.S. Southern Command subordinate command entitled Joint Interagency Task Force South (JIATF-South). These lawyers advise on issues that include wide-ranging intelligence-collection management authorities, illicit trafficking, counterterrorism (CT), support of civil authorities, law of the sea, ROE, Rules for the Use of Force, Posse Comitatus, laws of and agreements with multiple countries related to interdictions and arrests, counterintelligence operations, and asylum and refugee law and policy. For example, they address issues such as those that arise from a Law Enforcement Detachment embarked on a Coast Guard cutter, Navy vessel, or boat of an international partner intercepted, boarded, searched and seized as a suspected narco-trafficker.⁸⁹

Army (and other Service) judge advocates have served in Iraq and Afghanistan in a variety of organizations over the past decade, supporting Counterinsurgency Operations (COIN) through rule of law development, such as in the Iraqi Joint Area of Operations with the 25th Infantry Division deployment as part of Multi-National Division North or Special Operations Task Force – Central, or in

87. See, e.g., *Public Service Profiles, Siddhartha Velandy LL.M. '11, Captain, U.S. Marine Corps*, HARV. L. SCH., http://www.law.harvard.edu/news/spotlight/public-service/related/siddhartha-velandy_us-marine-corps.html.

88. Interview with Col. Adam Oler, Judge Advoc., U.S. Air Force (Apr. 15, 2013) (interviewee was also former CAOC legal counsel).

89. For a review of JIATF-South operations, see Evan Munsing & Christopher J. Lamb, *Joint Interagency Task Force-South: The Best Known, Least Understood Interagency Success*, INST. FOR NAT'L STRATEGIC STUD., STRATEGIC PERSPECTIVES 5, June 2011, available at http://www.ndu.edu/inss/downloaded/Strat%20Perspectives%205%20_%20Lamb-Munsing.pdf.

Afghanistan with the NATO Rule of Law Field Support Mission for Afghanistan/ Rule of Law Field Force-Afghanistan. These judge advocates address issues such as status of forces, ROE, LOAC, and CT operations. However, they focus on assisting the receiving state with rule-of-law development. For example, these missions have included helping to develop, organize, and train local police, judges, prosecutors, inspectors general, and build associated infrastructure.⁹⁰ They have mentored and trained the Afghan National Army on issues such as LOAC, including reporting and prosecuting war crimes, and they have worked to help the Afghans to create a military justice process, including a judge advocate program.⁹¹ They have also worked on human rights issues such as assisting with development of laws against violence against women and associated public educational campaigns efforts.⁹² Even when the programs in Afghanistan are reduced or eliminated, lawyers will continue to provide this support through other organizations such as DILLS and other military operations.

VII. HISTORICAL DEVELOPMENT OF JUDGE ADVOCATE PRACTICE OF AND EDUCATION ON NATIONAL SECURITY LAW

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect. ~ Sir Walter Scott

90. See generally, Ellen Klein, *Bridging the Potomac: How a Rule of Law Field Force Strikes Balance Between Security and Development Operations*, SMALL WARS J., Mar. 25, 2013, <http://smallwarsjournal.com/jrnl/art/bridging-the-potomac-how-a-rule-of-law-field-force-strikes-balance-between-security-and-dev>; Brig. Gen. Mark S. Martins, *ROLFSOs: One Individual Augmentation, Five Different Experiences*, THE OFFICIAL BLOG OF THE US NAVY JAG CORPS, Mar. 22, 2012, <http://usnavyjagcorps.wordpress.com/2012/03/22/rolfso-one-individual-augmentation-five-different-experiences/>; Lt. Nicolaus Gruelsen, *ROLFSOs: One Individual Augmentation, Five Different Experiences*, OFFICIAL BLOG OF THE US NAVY JAG CORPS, Mar. 27, 2012, <http://usnavyjagcorps.wordpress.com/2012/03/27/rolfso-one-individual-augmentation-five-different-experiences-2/>; Lt. Philip Rohlfling, *ROLFSOs: One Individual Augmentation, Five Different Experiences*, OFFICIAL BLOG OF THE US NAVY JAG CORPS, Apr. 3, 2012, <http://usnavyjagcorps.wordpress.com/2012/04/03/rolfsos-one-individual-augmentation-five-different-experiences/>; Lt. Chris Cook, *ROLFSOs: One Individual Augmentation, Five Different Experiences*, OFFICIAL BLOG OF THE US NAVY JAG CORPS, Apr. 12, 2012, <http://usnavyjagcorps.wordpress.com/2012/04/12/rolfsos-one-individual-augmentation-five-different-experiences-2/>; Rear Adm. James W. Crawford III, *ROLFSOs: One Individual Augmentation, Five Different Experiences*, THE OFFICIAL BLOG OF THE US NAVY JAG CORPS, Apr. 3, 2012, <http://usnavyjagcorps.wordpress.com/2012/04/17/982/>; Geoff Guska, *The Rule of Law at Dawn: A Judge Advocate's Perspective on Rule of Law Operations in Operation Iraqi Freedom from 2008 to 2010*, SMALL WARS J., Feb. 11, 2011, <http://smallwarsjournal.com/jrnl/art/the-rule-of-law-at-dawn>.

91. See Daniel J. Hill & Kevin Jones, *Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond*, ARMY LAW., Mar. 2007, at 12, 17, available at http://www.loc.gov/rr/frd/Military_Law/pdf/03-2007.pdf; see also DEP'T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN (2012), available at http://www.defense.gov/news/1230_Report_final.pdf.

92. Lt. Jennifer Myers, *ROLFSOs: One Individual Augmentation Five Different Experiences*, OFFICIAL BLOG OF THE US NAVY JAG CORPS (Apr. 17, 2012), available at <http://usnavyjagcorps.wordpress.com/2012/04/17/982/>.

The preceding part of this article described the education and training of judge advocates today and provided cameos of some of those fielded forces. Deliberate development of judge advocates for national security law practice has only existed for the past three decades. The JAG schools' national security law curriculum developed in response to emerging requirements. During that time, the JAG schools had sufficient resources to develop and offer courses on a liberal basis.

Today, increasingly constrained resources are affecting the schools. There is reason to anticipate the fiscal challenges will become more severe over the next several years. Deliberate prioritization of resources is critical during such times. In 2013, the schools canceled, delayed, or transitioned some courses to a DL format, including at least one national security law course. When a JAG school cancels a course, those seats are not easily recoverable and a group of judge advocates has lost a developmental opportunity. That means a loss of knowledge and skills in the force. It can also have a negative impact on morale and harm judge advocate retention rates if JAG Corps members do not believe their Service will invest in their professional development.

A. Major Historical Trends

At least three major themes emerge in a historical study of the development of national security law, practice, and education. An understanding of these themes can inform future difficult resource decisions. A historical study helps anticipate future trends and requirements for trained lawyers and associated legal education, including that offered at the JAG schools.

First, the development of national security law and practice are deeply and clearly interconnected. Together, they demonstrate the accuracy of Clausewitz's theory on war and Oliver Wendell Holmes's observations on law – law and war are aspects of politics.⁹³ As such, war is guided by law and law responds to war. Thus, it is not surprising that history demonstrates that as the array and numbers of U.S. military operations have grown in scope, scale, number, and complexity, so too have the corresponding laws and legal policy. Logically, increasing numbers of judge advocates have become involved in this practice area.

As an example, the nature and degree of the threat from international terrorism evolved from hijacking airplanes and street bombs on foreign shores in the 1960s and 1970s to mass murder in the 1990s to the growing existential threat of chemical, biological, radiological, or high-yield explosives. The increased complexity of this threat corresponded with increased global reach by bad actors. As this evolution occurred, so too the complexity and amount of law and policy grew.

As another example, the deployed use of the military instrument of power multiplied as U.S. global reach and power expanded while simultaneously

93. See VON CLAUSEWITZ, *supra* note 1; HOLMES, *supra* note 2.

globalization increased public awareness of atrocities and disasters worldwide. As the fear of nuclear war with the Soviets subsided, the American public decided that use of its powerful military could alleviate some of that human suffering. Humanitarian missions raised a new set of international, coalition, nongovernmental, and civilian (for example, internally displaced people) legal challenges. The sense that Americans could and should help others led to the integration of humanitarian relief efforts into nation-state versus nation-state combat operations. Each step of this expansion stretched and challenged laws, policies, and legal practice.

Likewise, U.S. counterinsurgency (COIN) operations of the Vietnam era were tentative and not highly regulated. As the United States found itself in “Phase 4” – post-conflict operation in Iraq and Afghanistan, COIN and associated rule-of-law development took on proportions and complexities previously unseen. Compared to the Cold War highly-structured environment of a force-on-force model, COIN demanded more nuanced and creative governance systems. Combined with CT efforts, COIN operations took on more urgency and demanded more political space. As these operations and laws developed and expanded, so too did the demand for judge advocates to practice in this area.

A similar historical review of other legal areas such as cyber operations and homeland security reveals the same pattern.

Second, major defense structural changes have affected legal practice due to associated shifts in authorities. Judge advocates advise senior leaders and commanders in matters relating to the leaders’ authorities. Milestone transitions include the creation of the National Military Establishment and passage of Goldwater-Nichols. More recent structural changes, such as the creation of the sub-unified command U.S. Cyber Command, continue to require lawyers to adapt so that they can learn and apply new process and policy.

Third, legal education has been largely reactive to the political forces of law, war, and economy. The development of military law schools followed the development of civilian law schools and both were associated with the professionalization of the practice of law. Military national security law education developed as a reaction to requirements for an increased number of educated judge advocates, and a requirement that they be educated in an ever-broadening array of legal complexities. Civilian national security law education developed much more recently, also in response to a need for educated lawyers, as well as other reasons. The expanding U.S. economy, from the time of the Great Depression until recently, enabled the employment of the military instrument of power and professionalization of these legal capabilities, including the JAG schools.

This article will now examine the history of military national security law, practice, and education chronologically. The article describes military national security issues and legal practice in each major era. The discussion of each era ends with a review of the military and civilian legal education as it existed during that period.

B. Pre-World War II

The presence of one of our regular civilian judge advocates in an army in the field would be a first-class nuisance. ~ General William T. Sherman, 1875⁹⁴

National security law as an aspect of military practice primarily began during the Civil War, when President Lincoln recognized the requirement for a written code to govern Army conduct in war. He commissioned a law professor, Francis Lieber, to draft what was to become the first written United States law of war.⁹⁵ This 1863 code was formally known as “General Order No. 100: Instructions for the Government of Armies of the United States in the Field” and informally called the “Lieber Code.”⁹⁶ During the late 1800s and early 1900s, lawyers and statesmen built on the Lieber Code, culminating in the Hague Conference of 1899 and 1907.⁹⁷ By the early 1900s, an Army Field Manual entitled “The Law of Land Warfare,” the revision of which is still in effect, replaced General Order No. 100.⁹⁸ However, by 1920, “[u]nlike Military Law Proper, the Law of War *in this country* [was] not a formal written code, but consist[ed] mainly of general rules derived from International Law, supplemented by acts and orders of the military power and a few legislative provisions.”⁹⁹

Starting in the early 1900s, a few senior judge advocates provided legal opinions on a limited range of national security issues, including “prisoners of war, the rights and duties of the forces abroad, the interpretation of treaties, and kindred subjects.”¹⁰⁰ Army judge advocates were also employed in “foreign intercourse,” as with Spain in the Philippines and with then-Governor William H. Taft on his mission as a special envoy to the Vatican in 1901.¹⁰¹ On the other hand, “[a]s late as World War I, ‘the Navy Judge Advocate General’s Office boasted that there was not a single lawyer on its staff.’”¹⁰² The first comprehensive U.S. treatise on military law, concerning both military justice and law of war, was written by an Army colonel judge advocate and published by the War Department in 1886. Colonel William Winthrop’s *Military Law and Precedents*

94. R. HEINL, *DICTIONARY OF MILITARY QUOTATIONS* 168 (1966).

95. Burtus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 213-214 (1998).

96. *Id.* at 213; *see also* U.S. WAR DEP’T, GEN. ORDERS NO. 100 (1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp.

97. *See* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 773 (2d ed. 1920); *see also* Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 194 (2000).

98. *See* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS: A PERSONAL MEMOIR* 10 (1992); DEP’T OF DEFENSE, U.S. ARMY FIELD MANUAL FM 27-10, *THE LAW OF LAND WARFARE* (1956) [hereinafter FM 27-10].

99. WINTHROP, *supra* note 97 (emphasis in original).

100. *E.g.*, E. H. CROWDER, *REPORT OF THE JUDGE ADVOCATE GENERAL U.S. ARMY TO THE SECRETARY OF WAR* 8 (1919).

101. Simeon E. Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 YALE L. J. 1, 2 (1902).

102. Frederick L. Borch, *Discipline in the Age of Sail*, THE JUDGE ADVOC., Nov. 2011, at 6, 7.

was a landmark text that expanded upon the author's digest of opinions of The Judge Advocate General.¹⁰³ Other judge advocates produced less notable but still useful publications.¹⁰⁴

During this period, military lawyers learned their practice through on-the-job training and self-study. The absence of institutionalized military legal training and education was consistent with the way civilian lawyers developed during this era. Through the 1800s, legal education slowly began to transform from a law office apprentice-model to institutional professional education.

Very early law school education was haphazard and primarily consisted of lectures. In the late 1800s, Harvard Law School Dean Christopher Columbus Langdell developed the case-study education technique. This pedagogy remains the preferred civilian legal academy method today, particularly in doctrine courses. The ABA, founded in 1878, and the Association of American Law Schools (AALS), founded in 1900, guided the institutionalization of case-study methods.¹⁰⁵

Recalling that judge advocates are initially civilian lawyers, a small number may have received education on national security law in their civilian education and training. The young civilian academy offered courses such as "Law of Nations" and "Admiralty and Maritime Law" as early as 1817.¹⁰⁶ Professor Francis Lieber taught law at the newly created Columbia Law School both before and after drafting the "Code for the Government of the Armies."¹⁰⁷ During WWI, some schools temporarily added courses on "Military Law" and "Issues of War."¹⁰⁸ The War Department, Committee on Education and Special Training the Student Army Training Corps (precursor to Reserve Officer Training Course [ROTC]), briefly prescribed specialized curriculum for a law school course entitled "Military Law and Wartime Legislation."¹⁰⁹ World War I (WWI) briefly affected the young civilian legal academy, forcing law schools to tempo-

103. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (1886).

104. Additional early materials on national security matters written by judge advocates include: Frederick Wiener, *Book Review: When Civil Law Fails*, 53 HARV. L. REV. 356 (1939); A. Robert Ginsburg, *Book Review: De Re Militari Et Bello Tractatus*, 50 HARV. L. REV. 1333 (1937); S.T. Ansell, *Status of State Militia Under the Hay Bill*, 30 HARV. L. REV. 712 (1917); S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471 (1917).

105. See BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* (2009) (providing a historical perspective on legal education in America); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994) (same); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (same).

106. ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION ON LAW*, CARNEGIE FOUNDATION REPORT 456 (1921).

107. See Carnahan, *supra* note 95, at 214; PAUL D. CARRINGTON, *LIEBER, FRANCIS (1798-1872), AUTHOR AND PROFESSOR* (1987) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2618&context=faculty_scholarship.

108. Comment, *The Law School*, 28 YALE L.J. 60, 61 (1918).

109. THE STUDENT ARMY TRAINING CORPS DESCRIPTIVE CIRCULAR 6 (1918), available at <http://libcucl.colorado.edu/wwi/pdf/i7375352x.pdf>.

rarily close or reduce education.¹¹⁰ A sourcebook was prepared, but not prescribed, and not implemented because it was printed at the conclusion of the “War to End all Wars.”¹¹¹ The George Washington University law department selected the judicial opinions for inclusion.¹¹² The Post-WWI era was notable for the dearth of publication on any military law topic.¹¹³

C. World War II, Korea, and Vietnam

During the WW II to mid-Vietnam decades, military national security practice was primarily limited to more senior judge advocates who had acquired much of their knowledge through on-the-job training and self-study rather than formalized education. Post-WW II, national security law practice included international meetings such as the 1958 United Nations Law of the Sea Conference, and the drafting of international agreements and treaties such as the United Nations Charter, Geneva Conventions and the 1948 Genocide Convention, United Nations Convention on the Law of the Sea, and inputs on United States legislation such as the War Powers Act of 1941, Second War Powers Act (1942), the National Security Act of 1947, the 1949 National Security Act, and the DoD Reorganization Act of 1958. The “Space Race” launched space law, a particular area of concern for a few senior Air Force lawyers in the late 1950s and thereafter.¹¹⁴ There were few Coast Guard positions for lawyers, severely limiting their practice despite major reorganizations and expanded authorities from the WW II era.¹¹⁵

A larger group of lawyers participated in prosecution of war crimes, “which was, in effect, an extension of one of their traditional core missions, the administration of military justice.”¹¹⁶ The Korean Conflict brought with it practice and study areas on issues such as those leading to the Steel Seizure case.¹¹⁷ Judge advocates produced Service regulations that explained LOAC but it appears that judge advocates did not deliver that training in the field, and if they did, it was on a very limited basis.¹¹⁸ Even during combat operations in

110. Comment, *supra* note 108.

111. U.S. WAR DEP’T COMM. ON EDUC. AND SPECIAL TRAINING, A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION III (J.H. Wigmore ed. 1919); T.W.S., *Book Review: A Source-Book of Military Law and War-Time Legislation, Prepared by the War Department Committee on Education and Special Training Book Review*, 28 YALE L. J. 847 (1919).

112. See U.S. WAR DEP’T, *supra* note 111.

113. See Austin W. Scott, *Book Review: The Army and the Law*, 32 HARV. L. REV. 187, 187 (1918).

114. FIRST 50 YEARS, *supra* note 69, at 42-43.

115. History of the Coast Guard Legal Program, *supra* note 30.

116. Michael F. Lohr, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT’L L. 465, 470 (2003).

117. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

118. See, e.g., FM 27-10, *supra* note 98 (explaining LOAC but not discussing how often, how much, or how to train on LOAC). In the Air Force, Basic Military Training – the training for new enlisted accessions – included very limited training content on LOAC and the Code of Conduct for Prisoners of War but there is no known evidence in the Air Force that judge advocates provided that training. Email from Air Education and Training Command Historian (Jan. 15, 2013) (on file with author).

Vietnam, judge advocates were involved in a few other areas of military operations on a very limited basis.¹¹⁹

As previously mentioned, judge advocate roles and responsibilities are associated with the authorities of their principals. As such, major military reorganizations affected the practice of judge advocates. Although the National Security Act of 1947 created the “National Military Establishment,”¹²⁰ it was weak, with limited powers and a small staff. The Joint Chiefs of Staff now had formal legal standing, each still supported by their TJAG, but there was no Chairman until the 1949 revision. Once there was a Chairman, his authorities were limited, so his legal staff’s authorities, practice, and influence was limited. At first, he did not even have a vote with the Joint Chiefs. Once he had a vote, each Joint Chief effectively had veto power over an issue even when the other Chiefs supported an issue. The 1958 revision was the last major change to defense organization until 1986.¹²¹

The DoD Reorganization Act of 1958 authorized the President, through the Secretary of Defense and with advice of the Joint Chiefs of Staff, to establish both specified and unified commands; it also clarified that the operational chain of command runs from the President and Secretary of Defense to the combatant forces rather than to the Services. Unified commands, such as U.S. Caribbean Command (which evolved into U.S. Southern Command), had supporting legal staffs. However, despite the law, “the military departments retained a de facto role in the operational chain of command and never complied with the provisions strengthening the unified commanders.”¹²² As such, the TJAGs retained primacy in operational legal advice – such as it was.

Although military national security practice was not yet expanding, the TJAGs were building JAG schools during this era. Between the 1940s into the end of the 1960s, at the same time the civilian law school education was becoming de-rigueur, the military Services developed formal curriculum to train new lawyers for service as judge advocates as well as to provide CLE and training in various specialized areas of practice. The Services institutionalized their legal training because it had become clear that lack of formal military

119. See, e.g., Terri M. Gent, *The Role of Judge Advocates in a Joint Air Operations Center: A Counterpoint of Doctrine, Strategy, and Law*, AIRPOWER J., Spring 1999, at 40, 43; DEP’T OF ARMY, THE ARMY LAWYER: A HISTORY OF THE JAGC, 1775-1975 (1975); GEORGE S. PRUH, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (1975), available at <http://www.history.army.mil/books/Vietnam/Law-War/law-fm.htm>; Ted B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19, 53-54 (1988); Lohr, *supra* note 116; FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 3-52 (2004) [hereinafter JUDGE ADVOCATES IN COMBAT].

120. National Security Act of 1947, Pub. L. No. 80-253. The National Military Establishment became the Department of Defense. See Act of Aug. 10, 1949, Pub. L. No. 81-216, 63 Stat. 578.

121. James R. Locher III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, NAVAL WAR COLL. REV., Autumn 2001, at 95, 99, available at <http://www.usnwc.edu/getattachment/744b0f7d-4a3f-4473-8a27-c5b444c2ea27>.

122. *Id.*

training hindered quality development of new lawyers.¹²³

NJS was established in 1946. The Army legal training that evolved into The Army Judge Advocate General's School (and is now TJAGLCS) began during World War II and was formally established in 1951 on the campus of the University of Virginia.¹²⁴ From 1950 through 1955, new Air Force lawyers received formal military legal training, but that program was dismantled in 1955 in favor of on-the-job training.¹²⁵ Training had become all the more important when the UCMJ went in effect in 1951. In the early 1960s, the Air Force began to send a few students to obtain a LL.M. in International Law.¹²⁶ In 1968, AFJAGS was formally re-established.¹²⁷ This was the same year of a major revision to the UCMJ and associated major expansion of the role of military lawyers.¹²⁸ In 1987, the Army's law school became a congressionally-authorized degree-granting institution and an ABA-accredited law school which awards a LL.M. in Military Law.¹²⁹

During this era, the practice of the majority of judge advocates focused on military justice, claims, legal assistance, some contracts, and administrative regulatory matters, rather than on national security law. JAG school curriculum reflected that practice. Military legal curriculum included limited discussion of LOAC.¹³⁰ A few Army JAG school students' theses examined emerging areas of the law and national security.¹³¹

The institutionalization of JAG school education reflected trends in civilian legal education. As in WW I, the civilian legal academy suffered from loss of students and instructors during World War II (WW II). Schools not accredited by ABA suffered most. Later, funding for veterans' education (G.I. Bill) resulted

123. See R. Scott Howard, *The Great Big School House*, THE REP., Special Anniversary Edition, 1999, at 79-80.

124. JOHN W. BURTSCHAELL, HISTORY OF THE JUDGE ADVOCATE GENERAL'S SCHOOL, COMMANDANT'S ANNUAL REPORT 1965-1966 1 (1966), available at http://www.loc.gov/rr/frd/Military_Law/pdf/CAR_1965-1966.pdf.

125. Howard, *supra* note 123, at 80.

126. Future Air Force TJAG Major General Walter Reed obtained his LL.M. in International Law in 1963 from McGill University. *Major General Walter D. Reed*, U.S. AIR FORCE, <http://www.af.mil/information/bios/bio.asp?bioID=6866>; see also FIRST 50 YEARS, *supra* note 69, at 54. The Air Force still sends judge advocates to this program for their emphasis in Air and Space law.

127. Howard, *supra* note 123, at 79.

128. Military Justice Act of 1968, Pub. L. No. 90-632, §2(27), 82 Stat. 1335 (1968).

129. 10 U.S.C. §4315 (2006). The course of instruction that evolved into the LL.M. began decades earlier and the 1960s versions included international law training. See also *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, 27-50-181 ARMY LAW. 3, 3-4 (1988).

130. BURTSCHAELL, *supra* note 124, at 15.

131. See, e.g., BENJAMIN B. FERRELL, LEGAL CONTROL OF RESOURCES IN A COUNTERINSURGENCY WAR: A THESIS PRESENTED TO THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY (1966), available at <http://www.archive.org/stream/legalcontrolofre00ferr#page/n11/mode/2up>; THOMAS E. DONAHUE, SELF-DEFENSE AND FREEDOM OF THE SEAS: A THESIS PRESENTED TO THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY (1964), available at <http://ia600800.us.archive.org/10/items/selfdefensefreed00dona/selfdefensefreed00dona.pdf>; KEITH D. LAWRENCE, MILITARY-LEGAL CONSIDERATIONS IN THE EXTENSION OF THE TERRITORIAL SEA: A THESIS PRESENTED TO THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY (1964), available at <http://www.archive.org/stream/militarylegalcon00lawr#page/n5/mode/2up>.

in an influx of students, primarily at accredited schools. By the 1950s, these influences, combined with state legislation restricting legal practice and imposing bar examinations, solidified law schools as the path to practice.¹³²

D. 1970s: Impact of Vietnam

*The responsibility to ensure compliance with the laws of war, more than any other responsibility, accounts for the emergence of the lawyer as an advisor on the conduct of military operations ~ Rear Admiral Michael Lohr, USN (ret.)*¹³³

That aspect of national security law now termed “operational law” or “operations law” by military lawyers grew out of the post-My Lai massacre 1970 “Peers Inquiry.” The Peers Inquiry found that the United States “in part fulfilled” its “obligation to instruct its military personnel concerning the conventional law of war[. . .]by [providing] formal military instructions and directives.”¹³⁴ It summarized the U.S. obligations under U.S. and international law to investigate alleged war crimes.¹³⁵ The Inquiry then found that contributory causes of the murders included inadequate law-of-war training and unclear directives prescribing the procedures for the reporting of war crimes.¹³⁶ As a result, the Army immediately mandated that judge advocates provide the law-of-war training, preferably in conjunction with experienced commanders.¹³⁷ Likewise, young Air Force judge advocates assigned at installations began to teach the law of war to new military accessions during Basic Military Training.¹³⁸ In 1974, DoD published DoD Directive 5100.77, *DoD Law of War Program*, which made the Army JAG Corps lead organization for implementation.¹³⁹ The DoD Directive mandated that judge advocates participate in the development and review of operational plans and troop training on the law of war.¹⁴⁰ In order to review operational plans, judge advocates were then required to obtain

132. See generally KIMBALL, *supra* note 105, LAPIANA, *supra* note 105, STEVENS *supra* note 105 (providing a historical perspective on legal education in America).

133. Lohr, *supra* note 116, at 471.

134. U.S. DEP’T OF THE ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 9-2 (1970), available at http://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf.

135. *Id.* at 9-3 to 9-5.

136. *Id.* at 4-7 to 4-8, 8-13, 12-7 to 12-8; see also David E. Graham, *My Lai and Beyond: The Evolution of Operational Law*, in JOHN NORTON MOORE & ROBERT F. TURNER, *THE REAL LESSONS OF THE VIETNAM WAR: REFLECTIONS TWENTY-FIVE YEARS AFTER THE FALL OF SAIGON* 363-379 (John Norton Moore & Robert F. Turner eds., 2002) [hereinafter *REAL LESSONS OF THE VIETNAM WAR*]; JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 30.

137. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 30.

138. Air Education and Training Command, Historian email (Jan. 7, 2013) (on file with author).

139. DoD Directive 5100.77, DoD Program for the Implementation of the Law of War (1974) [hereinafter DoD Dir. 5100.77]; see also JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 31.

140. DoD Dir. 5100.77, *supra* note 139.

necessary security clearances and be “in the command center.”¹⁴¹

The Peers Inquiry report would later become the identifiable point at which military national security law practice began to shift from the exclusive practice of a handful of strategic-level senior Service lawyers to an inclusive practice conducted by officers of all ranks and in broad range of assignments. The DoD Directive’s second-order effect was the development of judge advocates that had an awareness of, and familiarity with, national security issues and operational activities on a scale never before seen.¹⁴² Meanwhile, senior judge advocates in the Pentagon and some judge advocates assigned to legal offices overseas continued to perform a variety of international law and law-of-war functions, including matters associated with prisoners of war and law-of-war violations.¹⁴³

While ground forces were managing and adapting to events such as the My Lai massacre, air forces suffered from frustration over combat losses associated with highly complex air operation ROE; ROE was also closely associated with the White House. Then, in 1972, General John D. Lavelle was relieved of command and retired as a major general for having allegedly ordered attacks in violation of the ROE and then directing aircrew to report their actions falsely.¹⁴⁴ The Inspector General investigated; there was negative media attention and a Congressional hearing, but General Lavelle was not court-martialed. Decades later, the Air Force Board for Correction of Military Records concluded that the White House, DoD, and JCS “all possessed evidence which, if released, would have exonerated him. This evidence indicates that bombing missions into North Vietnam were authorized by then President Nixon.”¹⁴⁵ Throughout the Vietnam era, almost no judge advocates were involved in drafting, reviewing, or advising on air ROE. Post-Vietnam, the pilots who went on to lead the Air Force employed their lawyers in a manner that recognized the increasingly complex and high-risk legal and political environments.

Likewise, the Navy experienced deep frustration over the Vietnam-era ROE.

141. Lohr, *supra* note 116, at 471.

142. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 62; FIRST 50 YEARS, *supra* note 69, at 137.

143. The Air Force Judge Advocate General’s Corps “participates in and monitors all international negotiations affecting USAF interests, prepares opinions of various international legal matters, provides inputs to certain DoD reports, monitors all Foreign Criminal Jurisdiction (FCJ) cases, and is responsible for all matters involving the Law of Armed Conflict. Overseas bases monitor all cases being processed under FCJ and prepare reports for interested commanders. They also pursue local matters arising from treaties and Status of Forces Agreements.” GORDON A. GINSBURG, ET AL., THE JUDGE ADVOCATE GENERAL’S 1982 BLUE RIBBON PANEL ON DATA AUTOMATION 88 (1983) (on file with author).

144. Gent, *supra* note 119, at 44.

145. BOARD OF PROCEEDINGS, AIR FORCE BOARD OF CORRECTION OF MILITARY RECORDS, IN THE MATTER OF JOHN D. LAVELLE (DECEASED), DOCKET NUMBER BC-2008-03624, at 7 (2009) (on file with author). General Lavelle died in 1979. In 2010, upon Air Force and DoD recommendation, the White House nominated General Lavelle for retirement with his four stars. Larry Shaughnessy, *General dead for 31 years nominated for promotion to clear his record*, CNN, Aug. 4, 2010, <http://www.cnn.com/2010/US/08/04/general.posthumous.promotion/index.html>. The matter of General Lavelle remains unresolved and both military and civilian lawyers are involved in efforts or response to efforts to clear his name.

In 1979, then-CNO, Admiral Thomas B. Hayward, ordered a study to standardize the worldwide Maritime ROE.¹⁴⁶ That study contributed to significant ROE changes DoD-wide through the early and mid-1980s.¹⁴⁷ These changes had less impact on the Coast Guard, which was focused on its expanding role in fisheries laws and environmental protection due to various 1970s-era laws.¹⁴⁸

In the 1970s, the Army expanded national security law JAG school course offerings. For example, the Army created a one-week course on the study of the Law of War.¹⁴⁹ The Army JAG school also began to teach the “lessons” of Vietnam to Army lawyers, offering “[e]xtensive instruction [. . .] on how to teach the Law of War in the field” and encouraging military practitioners to produce scholarly articles on the topic.¹⁵⁰

The Services increasingly sent judge advocates to civilian law schools to obtain a LL.M. in various subjects, including International and Comparative Law.¹⁵¹ The first civilian national security law course was offered in the mid-1970s. That first University of Virginia course was taught by Professor John Norton Moore, who had studied the UCMJ at Duke Law School under a former Air Force judge advocate and judge, Professor Robinson O. Everett.¹⁵² By 1978, a casebook existed that addressed the military justice system, law of armed conflict, and powers and control of the Armed Forces, but no national security law texts yet existed.¹⁵³

E. 1980s: Military National Security Law Practice Comes of Age

Lest there be any doubt, OPLAW is a new concept. It is not simply a modified form of international law, as traditionally practiced by Army judge advocates, dressed in a battle dress uniform and given a ‘catchy’ new name. ~ Col David E. Graham, USA (ret.)¹⁵⁴

146. W. Hays Parks, *Righting the Rules of Engagement*, U.S. NAVAL INST. PROCEEDINGS, May 1989, at 84.

147. *Id.*

148. *See generally* History of the Coast Guard Legal Program, *supra* note 30.

149. *REAL LESSONS OF THE VIETNAM WAR*, *supra* note 136, at 365-366.

150. *Id.*

151. The Services continue to send some judge advocates to civilian institutions for LL.Ms today. All Army mid-level judge advocates obtain an LL.M. from either a civilian institution or TJAGLCS.

152. Chief Judge Everett served as an Air Force judge advocate during the Korean conflict. He later went on to serve on the United States Court of Military Appeals, now the Court of Appeals of the Armed Forces, from 1980-1990, retiring as the Chief Judge. He continued to promote the study of national security law and was one of the most respected authorities on military justice at the time of his death in 2009. Likewise, Professor Moore has continued to further the study, teaching, and practice of national security law, including co-authoring the first key text on the subject.

153. Stephen Dycus, *Teaching National Security Law, The Law Teacher as Peacemaker: National Security in the Classroom*, 55 J. LEGAL EDUC. 42, 43 n.3 (2005) (citing DONALD N. ZILLMAN ET AL., *THE MILITARY IN AMERICAN SOCIETY: CASES AND MATERIALS* (New York, 1978)).

154. David E. Graham, *Operational Law—A Concept Comes of Age*, *ARMY LAW.*, July 1987, at 9 (emphasis in original).

The seeds of the judge advocate legal training first sown in the 1970s bore fruit leading up to and during the 1983 invasion of Grenada in Operation URGENT FURY. Other judge advocates deployed to Grenada with combat troops and provided advice on a range of matters beyond military justice and claims. At the request of commanders, they advised on policy on war trophies, treatment of captives, status of forces agreements and more; they also liaised with the International Committee of the Red Cross.¹⁵⁵ Operation URGENT FURY further focused military attention on the requirement for improved organization, and for a need for increased amount and breadth of operational legal education and experience.¹⁵⁶ URGENT FURY legal support was a success, and in 1984, the Marine Corps published a doctrine document that defined how legal services should be employed to support the Fleet Marine Forces.¹⁵⁷ In 1988, a Joint Chiefs of Staff Memorandum reinforced and expanded upon the pre-Grenada requirement that commanders should have lawyers immediately available to them for a range of support, including employment and restraint of the armed force.¹⁵⁸

Concurrently, following the failed April 1980 rescue attempt of the U.S. hostages in Tehran, Iran, President Reagan transformed the Rapid Deployment Joint Task Force, which President Carter had established in March 1980 into U.S. Central Command (USCENTCOM). USCENTCOM was activated in January 1983 with supporting legal staff. Over the next three decades, USCENTCOM was to become a strategic linchpin in U.S. engagement in the Middle East and it commanded U.S. involvement in multiple hostilities. A significant number of lessons learned for employment of judge advocates in operations have arisen from the USCENTCOM Area of Responsibility (AOR). Many of DoD's most experienced national security lawyers were previously assigned to the USCENTCOM legal office or the office of one of its subordinate Joint commands.

The 1983 bombing of the United States Marine Corps barracks in Beirut, Lebanon marked the continued evolution of judge advocate practice into CT, a trend that would increase in the decades to come. The United States bombed Libya in Operation EL DORADO CANYON in April 1986, in response to the Libyan-sponsored terrorist bombing of a Berlin discotheque earlier that year, and to previous attacks in the Rome and Vienna airports. In 1988, state-sponsored terrorists downed Pan Am Flight 103 over Lockerbie, Scotland.

155. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 62.

156. JUDGE ADVOCATES IN COMBAT, *supra* note 119; FIRST 50 YEARS, *supra* note 69, at 137; REAL LESSONS OF THE VIETNAM WAR, *supra* note 136, at 370-373.

157. U.S. MARINE CORPS, OPERATIONAL HANDBOOK NUMBER 4-10, LEGAL SERVICES SUPPORT (1984), available at [https://www.fido.gov/facadatabase/docs_meetings/2010-73653-177332_USMC%20SAP%20Tab%205%20-%20USMC%20OH%204-10%20LSS%20\(1984\)_\(2010-08-17-11-21-49\).pdf](https://www.fido.gov/facadatabase/docs_meetings/2010-73653-177332_USMC%20SAP%20Tab%205%20-%20USMC%20OH%204-10%20LSS%20(1984)_(2010-08-17-11-21-49).pdf).

158. MEMORANDUM OF THE JOINT CHIEFS OF STAFF (MJCS) 0124-88, IMPLEMENTATION OF DoD LAW OF WAR PROGRAM (1988) followed MEMORANDUM OF THE JOINT CHIEFS OF STAFF 59-83. IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (1983).

Judge advocates published their thoughts on this subject as some of the earliest modern material on terrorism and law.¹⁵⁹ Samuel Huntington would not publish his first article positing “The Clash of Civilizations” for four more years.¹⁶⁰

Significantly, Congress passed the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Goldwater-Nichols).¹⁶¹ The CJCS now became the principal military advisor to the Secretary of Defense and the President of the United States. The Joint Staff became responsible exclusively to the Chairman. As such, the Joint Staff Legal Counsel became the Chairman’s Legal Counsel and took on more significant responsibility and influence. Goldwater-Nichols strengthened the COCOM¹⁶² force employment power over the military Services, expanding COCOM interaction with Congress and its voice in the DoD budget process. More operational authority brought with it more legal responsibility. Judge advocate knowledge and understanding of good process has always been important – it is even more so during times of major structural and authority changes. During such times, judge advocates often teach or remind non-lawyers about the distinctions in authority and function between the administrative and operational chains of command.

This shift to a Joint structure also extended to those units subordinate to COCOMs, many of which now required a staff, including judge advocates with operational and strategic knowledge and skills. The lawyers in each layer of the post-Goldwater-Nichols Joint organizations now primarily provided legal advice, and thus accountability for military operations, to a degree and scale that had not existed before Goldwater-Nichols. For example, the previously mentioned *DoD Law of War Program* requires COCOMs to have their legal counsel review all plans, policies, directives, and rules of engagements, and to supervise the administration of the law-of-war program dealing with enemy violations.¹⁶³

In addition to changing the organization structure, process, and authorities, Goldwater-Nichols linked future promotion eligibility to Joint operational experience and education.¹⁶⁴ This was not an insignificant part of the Act. It increased the incentive for those officers most competitive for senior military leadership positions to serve in the Joint commands. Before the Act, these high-performing officers did better from a career-progression perspective if their assignments were in their Service. As such, Goldwater-Nichols shifted the tide of quality officer assignments.

Congress permitted SecDef to waive certain military occupational professional specialties, including judge advocates, from satisfying the Joint experi-

159. See, e.g., RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM (1989), available at <http://www.au.af.mil/au/awc/awcgate/au/erickson.pdf>.

160. Samuel P. Huntington, *The Clash of Civilizations?*, FOR. AFFAIRS, Summer 1993, at 22.

161. Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. §619 (1986).

162. *Id.*

163. Dep’t of Def., Directive 2311.01E, DoD Law of War Program, ¶¶5.11.5, 5.11.8 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

164. Goldwater-Nichols Act, *supra* note 161.

ence and education requirement.¹⁶⁵ However, the recent congressionally commissioned *Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy* recommended a requirement for “formalizing judge advocate participation in the Joint officer management program and Joint Qualification system.”¹⁶⁶ Certainly, this recommendation is worth serious consideration by each of the JAG Corps. Concerns to overcome include the challenge to obtaining enough seats for high-performing judge advocates to attend resident joint PME. For example, the Air Force sends only four judge advocates to War College each year – two to Air War College and two to National Defense University. Additionally, there are only a certain number of qualifying joint assignments compared to the percentages of otherwise competitive individuals. At a minimum, DoD should phase in any elimination of the waiver over an extended time, just as it was phased in for those without the waiver.

Nonetheless, all JAG Corps strongly encourage appropriate-level PME because it increases the ability of judge advocates to provide quality legal services to the Services and Joint force.¹⁶⁷ Additionally, although judge advocates have not been formally processed and tracked as part of the Joint system that advances other officers, the requirement nonetheless stimulated increased national security operational-level practice.¹⁶⁸ Today, almost all general and flag officer judge advocates have both Joint experience and Joint education. Many have served at least once as a staff judge advocate for a COCOM, component thereof or as part of the OCJCS/LC.¹⁶⁹ Making one or more assignments in a

165. 10 U.S.C. §619A(b)(3)(C) (2006); Dep’t of Def., Instruction 1300.19, DoD Joint Officer Management Program, at Enc. 2, ¶2.23 (Oct. 31, 2007 incorp. Change 2, Feb. 16, 2010); Chairman of the Joint Chiefs of Staff, Instruction 1331.01D, Manpower and Personnel Actions Involving General and Flag Officers, at Enc. E, ¶6(b)(3) (2010).

166. INDEPENDENT REVIEW PANEL TO STUDY THE JUDGE ADVOCATES REQUIREMENTS OF THE DEP’T OF THE NAVY, FINAL REPORT 70 (2011) [hereinafter REVIEW PANEL REPORT ON NAVY], available at <https://sites.google.com/site/506panel/documents>.

167. See, e.g., JAG Instruction 1500.4A, *supra* note 47. Additionally, in some Services, failure to have appropriate-level professional military education substantially eliminates an individual from promotion to the next level. For example, between 1989-2013, of the hundreds of active-duty AF JAGs considered for promotion to colonel, only six individuals who had not completed grade-appropriate PME were selected for promotion. Only one of those six was selected for promotion after 1993. The Air Force Judge Advocate General’s Professional Development Directorate Central Selection Board historical statistics (on file with author).

168. Promotion board composition includes non-JAG members who are subject to the Joint duty requirements and education preferences. Most of these board members value operational experience and education. Promotion boards also receive instructions from Service Secretaries that include direction regarding needs of the Service, such as identifying leaders who have Joint, Coalition and Interagency experience. For more information on promotion board procedures and processes, see, e.g., 10 USC §619 et seq. (2006); 10 USC §14301 et seq. (2006); Dep’t of Def. Instruction 1320.12, Commissioned Officer Promotion Program (2005); Dep’t of Def. Instruction 1320.14, Commissioned Officer Promotion Program Procedures (1996).

169. All of the current and immediate past most-senior lawyers have Joint operational experience. For example, Lieutenant General Richard C. Harding, USAF, was the Staff Judge Advocate for U.S. Strategic Command; Lieutenant General Flora D. Darpino was the Staff Judge Advocate for U.S.

Joint operation a priority does lag in some pockets of the legal community, depending upon personalities and appreciation of the importance of Joint operations.

The November 1986 revelations to Congress over the transfer of weapons to Iran in exchange for their assistance in securing the release of U.S. hostages held in Lebanon, and transfer of associated proceeds of those weapon sales to the Nicaraguan Contras, commonly known as the “Iran-Contra affair,” also resulted in transformational national security changes. Congress and others scrutinized DoD (including its lawyers) for its part in the scandal.¹⁷⁰ Legislative, policy, and organizational changes at a number of levels and within a number of organizations were enacted. Among other organizational changes, in 1987, the position of legal counsel to the National Security Council was created and filled.¹⁷¹

The Services, and the Army in particular, reformed procedures and regulations identified by the investigations as areas of concern. Reflecting back on Iran-Contra in 1988, the Army General Counsel stated: “The Army has virtually escaped criticism in this area, because Army lawyers assumed the lead in identifying what needed to be done, and following through on the tough decisions that had to be made.”¹⁷² The practices of judge advocates at the strategic levels, such as the Service Judge Advocates General, OCJCS/LC, and those involved in intelligence and special operations, were particularly impacted by these changes. Field judge advocates were primarily impacted by the in-

Forces-Iraq in Baghdad; Lieutenant General Dana K. Chipman, USA (retired in September 2013), served as the Staff Judge Advocate for both U.S. Central Command and U.S. Special Operations Command; Vice Admiral Nanette M. DeRenzi, USN, was the staff judge advocate to U. S. Southern Command; Major General Steven J. Lepper, USAF, who has a LL.M. in International and Comparative Law, was Deputy Counsel in the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff and was Staff Judge Advocate for U.S. Forces Japan; Major General Clyde J. “Butch” Tate, USA, served at U.S. Special Operations Command and was one of the first judge advocates on the ground during Operation URGENT FURY in Grenada; and Rear Admiral James W. Crawford, III, USN, was the Legal Counsel to the Chairman of the Joint Chiefs of Staff, staff judge advocate U.S. Pacific Command, and commander, NATO Rule of Law Field Support Mission/Rule of Law Field Force-Afghanistan.

170. For example, Ms. Susan Crawford, General Counsel of the Army, was deposed in 1987 by the U.S. House of Representatives, Select Committee to Investigate Covert Arms Transactions with Iran. In her testimony, she described the standard legal review process for matters related to classified and special access programs primarily associated with transfer of equipment to the CIA. This description included comment on standard process legal reviews on matters of this nature by the Army Judge Advocate General and his staff. Transcript of Congressional Deposition, MARY FERRELL FOUND., at 3, 9, 10, 18, 19, 25, 30, 31, available at <https://www.maryferrell.org/mffweb/archive/viewer/showDoc.do?absPageId=1575963>.

171. National Security Decision Directive 266, Implementation of the Recommendations of the President’s Special Review Board 5 (Mar. 31, 1987) adopted the recommendation to appoint a legal counsel by the REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD, pt. V, at 1 (Feb. 26, 1987); Office of the Historian, *U.S. Department of State, History of the National Security Council: 1947-1997*, FAS, Aug. 1997, <http://www.fas.org/irp/offdocs/NSChistory.htm>.

172. Susan Crawford, *Opening Remarks for the General Counsel’s Conference: June 1988*, ARMY LAW., July 1988, at 13, 14.

creased fiscal law oversight on military operations.

In 1989, the President authorized the U.S. invasion of Panama in Operation JUST CAUSE.¹⁷³ While strategic level national security lawyers provided guidance to the highest levels, an Army judge advocate parachuted into Panama with Joint combat forces.¹⁷⁴ “Within an hour he received his first legal question,” not on military justice or legal assistance, but on the legality of seizure of Panama Defense Force helicopters.¹⁷⁵ “Legal issues loomed large in the deliberations, as U.S. officials had emphasized that none of the actions contemplated should violate the canal treaties or other applicable laws.”¹⁷⁶ As a result, the Task Force Atlantic commander “found himself (as did other commanders) relying as much or more on his staff judge advocate for advice as on his operations officer.”¹⁷⁷

At the Service Component levels, lawyers were heavily engaged in issues, including ROE. At US Army-South, the colonel SJA was deeply involved in intense discussions with USSOUTHCOM on ROE.¹⁷⁸ At Air Forces-South, Air Force judge advocates assigned to Joint operational units provided legal and legal policy planning and execution advice.¹⁷⁹ This legal activity was led by a judge advocate who would later become the Air Force TJAG,¹⁸⁰ and built upon judge advocate participation in air control center exercises, and in Joint and combined exercises that had begun in 1980.¹⁸¹ The USSOUTHCOM SJA was also involved in all manner of planning and execution, such as advocating to lawyers in OCJCS/LC for declassification of the ROE.¹⁸²

Throughout the 1980s, JAG schools responded to the increased requirement for trained national security lawyers at the operational and tactical levels. Because civilian national security law education remained almost non-existent through the 1970s and early 1980s, new judge advocates were not entering the military with this knowledge.¹⁸³ JAG schools modified their curriculums and added new courses to concentrate on field judge advocate issues as they were learning them from the above-described operations. New offerings included

173. President Bush authorized Operation JUST CAUSE on Dec. 17, 1989.

174. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 99-100.

175. *Id.* at 99.

176. LAWRENCE A. YATES, THE U.S. MILITARY INTERVENTION IN PANAMA: ORIGINS, PLANNING, AND CRISIS MANAGEMENT JUNE 1987-DECEMBER 1989, 202 (2008), available at http://www.history.army.mil/html/books/just_cause/CMH_55-1-1_Just_%20Cause_opt.pdf.

177. *Id.*

178. *Id.* at 212.

179. GINSBURG ET AL., *supra* note 143.

180. Then-Colonel William A. Moorman was the dual-hatted as the Twelfth Air Force and Air Forces-South Staff Judge Advocate during Operation JUST CAUSE. He continued to guide the Air Force forward in operations law training, education, and practice until his retirement as a major general.

181. GINSBURG ET AL., *supra* note 143, at 45.

182. YATES, *supra* note 176, at 119.

183. The first law school center dedicated to the study of law and national security was created in 1981 at the University of Virginia. By 1984, only seven law schools taught national security law courses. *Center on Law, Ethics and National Security*, DUKE LAW, <http://www.law.duke.edu/lens>; Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L SECURITY L. & POL'Y 166 (2005).

Law of the Sea, Air and Space Law, and an Advanced Law of War seminar.¹⁸⁴ The Goldwater-Nichols organizational impact and shift in authorities was part of the training. At the end of this period, the JAG school instruction on fiscal law in the context of operations quickly began to expand in the wake of Iran-Contra. Because of international terrorist activities, the Army created and then expanded a course entitled “Legal Aspect of Terrorism.”¹⁸⁵ With judge advocates now in AOCs, the Air Force began its first post-graduate course in this subject in 1986, entitled “International Operations Law.”¹⁸⁶ As in most of these areas, previously, the air operational judge advocates had relied on self-study and on-the-job training.¹⁸⁷ This course reflected the significant development in the operational practice of Air Force lawyers.

In 1987, then-Lieutenant Colonel and Army Chief, International Law Division, David E. Graham, published an article entitled, “Operational Law—A Concept Comes of Age,” which introduced operational law as a new area of practice.¹⁸⁸ The Army also developed and taught a formal operational law curriculum to the LL.M. students.¹⁸⁹ As the first national security law textbook was not published until 1987, military instructors created their own materials.¹⁹⁰ In 1987, the Army JAG school faculty published the first edition of the *Operational Law Handbook*, a book that quickly became a key legal resource.¹⁹¹ For the first time, their national security law courses employed in-classroom role-playing seminars in order to prepare students to apply theory to practical situations they would encounter in the field, and to improve their client interaction skills.¹⁹²

184. DAVID L. MINTON, THE JUDGE ADVOCATE GENERAL’S SCHOOL, ANNUAL BULLETIN 1980–1981, 6 (1981), available at http://www.loc.gov/tr/frd/Military_Law/pdf/AB_1980-1981.pdf; WILLIAM K. SUTER, ANNUAL BULLETIN 1983–1984, THE JUDGE ADVOCATE GENERAL’S SCHOOL 7 (1984), available at http://www.loc.gov/tr/frd/Military_Law/pdf/AB_1983-1984.pdf; ROBERT E. MURRAY, ANNUAL BULLETIN 1984–1985, THE JUDGE ADVOCATE GENERAL’S SCHOOL 7 (1985), available at http://www.loc.gov/tr/frd/Military_Law/pdf/AB_1984-1985.pdf; DULANEY L. O’ROARK, JR., 1985–1986 ANNUAL BULLETIN, THE JUDGE ADVOCATE GENERAL’S SCHOOL 6 (1986), available at http://www.loc.gov/tr/frd/Military_Law/pdf/AB_1985-1986.pdf.

185. SUTER, *supra* note 184; O’ROARK, *supra* note 184.

186. FIRST 50 YEARS, *supra* note 69, at 137.

187. “[T]hey relied on DOD Directive 5100.77, Air Force Pamphlet (AFP) 110-31, International Law—The Conduct of Armed Conflict and Air Operations (1976), Air Force Regulation (AFR) 110-32, Training and Reporting to Insure Compliance with the Law of Armed Conflict (1976), and AFP 110-34, COMMANDER’S HANDBOOK on the Law of Armed Conflict (25 July 1980).” GINSBURG, ET AL., *supra* note 143, at 46.

188. Graham, *supra* note 154.

189. REAL LESSONS OF THE VIETNAM WAR, *supra* note 136, at 371.

190. Stephen Dycus, *Teaching National Security Law, The Law Teacher as Peacemaker: National Security in the Classroom*, 55 J. LEGAL EDUC. 42, 43 n.4 (2005) (citing THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW [1987]).

191. The handbook was first published in 1987 and has been updated every year following. INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENT. & SCH., OPERATIONAL LAW HANDBOOK (2013), available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2013.pdf.

192. See MINTON, *supra* note 184.

F. 1990s: The New World Order

“[O]perational law is going to become as significant to a commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity.” ~ General Anthony C. Zinni, USMC (ret.)¹⁹³

The 1990s further advanced military national security law practice and education. Although the 1990s began with traditional nation-state set-piece war in Iraq, this decade was largely characterized by small-scale conflicts, humanitarian interventions, and terror attacks rather than large-scale nation-state v. nation-state conflict. Because the United Nations (U.N.) Security Council was now no longer constrained by Cold War politics, the U.N. exercised its authorities through various Security Council Resolutions which authorized member states to use means “as may be necessary to maintain or restore international peace and security” under Chapter VII of the U.N. Charter.¹⁹⁴ The rule of law also spread through vehicles such as the International Criminal Tribunal for former Yugoslavia and the Rome Statute of the International Criminal Court.

Operations DESERT SHIELD and DESERT STORM reflected the new normal: “lawyers were everywhere during the Gulf War” and they were not doing much traditional military justice.¹⁹⁵ Then-Chairman of the Joint Chiefs of Staff, General Colin Powell, later explained that “[d]ecisions were impacted by legal considerations at every level . . . lawyers proved invaluable in the decision making process.”¹⁹⁶ In the early to mid 1990s, when the post-Desert Storm manpower force reductions occurred, Service leaders reduced military lawyers to a lesser degree than many other specialties. In individual cases, commanders valued legal skills so highly that they traded combat specialty manpower positions for lawyer positions.¹⁹⁷

Experienced national security military lawyers were heavily engaged in preparing for, and using, the military instrument of power. At a tactical level, for example, an Army JAG who had been one of the first operational lawyers as a captain during Grenada in 1983, served as a senior judge advocate a decade later during the “Battle of Mogadishu” in Somalia. In Somalia, he advised his commander on more than just legal issues and was so close to his commander

193. Anthony C. Zinni, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 15, 17. See also Raymond E. Ruhlmann III, *Legal Services Support to Operational Commanders*, MARINE CORPS GAZETTE, Nov. 2006, at 79 (quoting then-Lieutenant General Anthony C. Zinni).

194. U.N. Charter art. 42.

195. Steven Keeva, *Lawyers in the War Room*, 77 A.B.A. J. 52 (1991); see also FIRST 50 YEARS, *supra* note 69, at 138-150; JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 121-197; GINSBURG, ET AL., *supra* note 143; W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393 (1992); *A Planning Primer*, *supra* note 73, at 6; Jane G. Dalton, *The Influence on Seapower in Desert Shield / Desert Storm*, 41 NAVAL L. REV. 27 (1993).

196. Keeva, *supra* note 195.

197. For example, on more than one occasion, Air Force commanders gave up other staff officer spaces, or even unfilled pilot slots, to gain lawyer spaces.

during combat that he administered first aid to his commander for a bullet wound sustained during the battle.¹⁹⁸ Likewise, in Haiti, Operation UPHOLD DEMOCRACY, judge advocates supported commanders by advising on everything from detainee interrogations and rules of engagement to preparing the Commanding General for politically significant meetings and statements.¹⁹⁹ Air Force, Navy, Marine, and Coast Guard lawyers were also equally and fully employed in these and other operations on issues including Law of the Sea, LOAC, international overflight rules, support to nongovernmental organizations, international access rules, failed state governance, and the status and protections (or lack thereof) of U.S. individuals captured during operations abroad.

By 1996, judge advocates were fully integrated into deliberate and crisis action planning, targeting reviews, and intelligence collection processes, among other processes, and they addressed use-of-force standards, sovereignty issues, international mandates, treatment of internally-displaced people and refugees, detainee treatment, maritime interception operations, freedom of navigation operation issues, no-fly zone issues, actual or suspected law-of-war violations, and more. As an example, lawyers were integral to the United States and North Atlantic Treaty Organization (NATO) military operations during the Kosovo War. The large-scale air campaign involving militaries from a number of countries was highly complex on a number of levels. NATO countries do not have identical treaty obligations or uniform views of customary international law and they have different political considerations for the use of force. Legal processing of target sets at all levels of command, including the Commander-in-Chief, was indispensable to ensure LOAC was properly applied for each allied partner. Given the air-focused operation, AOC lawyers and other air-minded judge advocates were deeply involved in this mission. The lawyers also served to provide political credibility to the use of force, and they helped clarify policy issues for decision makers all in the context of a fragile political NATO consensus.²⁰⁰

While troops were deployed overseas, the 1990s was also the first time in decades that the President had employed federalized troops in the Homeland. This era opened a front of national security law practice to a new and much larger generation of practitioners. In accordance with the Insurrection Act²⁰¹ and at the request of the California Governor, in April 1992, the President ordered the military to respond to riots in Los Angeles after the Rodney King trial verdict. Judge advocates at headquarters and in the field explained to

198. Lieutenant Colonel Gary Walsh (ret.), is now a senior operational lawyer at USNORTHCOM.

199. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 229-265.

200. See James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander In Chief*, 4 CHI. J. INT'L L. 407 (2003); James E. Baker, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, NAVAL WAR C. REV., Winter 2002, at 11, 18, available at <http://www.usnwc.edu/getattachment/8160cd34-f17e-4d91-838e-445d209ea35d>.

201. 10 U.S.C. §§331-335 (2006).

commanders and their troops the Insurrection Act and Posse Comitatus Act of 1878,²⁰² the Presidential “cease and desist” proclamation,²⁰³ and the associated executive order (EO).²⁰⁴ They also ensured ROE and arming orders were appropriate to Homeland activity, forces were in the appropriate status for employment, and equipment was loaned and used properly.²⁰⁵ Lawyers accompanied troops “into the streets, providing both training and legal support.”²⁰⁶ Lawyers both advised on the law and policy as well as on political issues associated with extremely sensitive use of the Armed Forces in the Homeland. Then, in August 1992, Hurricane Andrew decimated south Florida near Miami. Consequently, national security lawyers across federal agencies and among states worked together on the domestic disaster response that would lay the groundwork for later disaster responses such as for Hurricane Katrina.²⁰⁷ Legal support aided in authority clarification and proper flows of funding between federal departments and agencies, and state and local authorities.

Throughout the 1990s, military and intelligence operations continued largely unabated, but were not always reported in public settings. International terrorism reached the shores of the United States with the 1993 bombing of the World Trade Center. After the 1995 Tokyo subway Sarin gas attacks, national security experts increased planning for mass terrorist-delivered chemical, biological, radiological, nuclear, high-yield explosive attacks. By the mid 1990s, practitioners had become more deeply involved with creation of laws, presidential directives, and executive department and agency policies and regulations on terrorism. Even before the 1998 bombings of the U.S. embassies in both Tanzania and Kenya, national security lawyers at all levels were assessing the applicability of LOAC and other rules to the terrorist threat posed by Al-Qaeda.²⁰⁸ The final assessment was that Osama Bin Laden and Al Qaeda were legitimate military targets – a “significant shift in the U.S. legal posture.”²⁰⁹ Thereafter, U.S. efforts to kill Osama Bin Laden began, such as the August 1998 missile strikes on Afghanistan and Sudan.²¹⁰

The mid-to-late 1990s also ushered in a new era of military and civilian national security legal practice and study—Information Warfare (cyberwar or cyber security). The first notable cyber-based attack occurred in April 1994 at Rome Laboratories in New York. While public discussion was limited, the DoD

202. 18 U.S.C. §1385 (2006).

203. *Law and Order in the City and County of Los Angeles, and Other Districts of California*, Pres. Proc. No. 6427, 57 Fed. Reg. 19,359 (May 5, 1992).

204. Executive Order 19,361, 57 Fed. Reg. 19361 (May 5, 1992).

205. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 296-300; *see also* Christopher M. Schnaubelt, *The 1992 Los Angeles Riots: Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, at 88.

206. JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 297; *see also* Schnaubelt, *supra* note 205.

207. *See* JUDGE ADVOCATES IN COMBAT, *supra* note 119, at 300-304.

208. BAKER, *supra* note 3, at 64.

209. *Id.* at 64, 200-201.

210. *Id.* at 27, 64, 200-201.

enacted structural, regulatory, process, and doctrinal changes and developments in reaction to the attack. The first class of “infowar” officers trained at DoD’s National Defense University graduated in 1995.²¹¹ Organizations such as the Air Force Information Warfare Center and an Air Combat Command information warfare squadron were created and required legal counsel.²¹² Experts warned, “Cyberwar is not merely a new set of operational techniques. It is emerging . . . as a new mode of warfare that will call for new approaches to plans and strategies, and new forms of doctrine and organization.”²¹³ A SecDef-commissioned RAND Corporation series of exercises entitled “The Day After in Cyberspace” reinforced concerns. The increasing national security risk of cyber attacks was hammered home in 1998 when two U.S. teenagers aided by Israel gained access to hundreds of military computers in what became known as “Solar Sunrise.”²¹⁴ That year, the Presidential Decision Directive on Critical Information was issued and stated: “I intend that the United States will take all necessary measures to swiftly eliminate any significant vulnerability to both physical and cyber attacks on our critical infrastructures, including especially our cyber systems.”²¹⁵

The military schools continued to rapidly expand and evolve offerings, curriculums, and educational materials to support the growing breadth and depth of national security law practice at the operational and tactical levels. Civilian legal academy national security offerings and texts were still very limited.²¹⁶ By 1994, 83 law schools offered courses in this area of study,²¹⁷

211. Robert G. Hanseman, *The Realities and Legalities of Information Warfare*, 42 A.F.L. REV. 173 (1997).

212. *Id.*

213. John Arquilla and David Ronfeldt, *Cyberwar is Coming*, 12 COMP. STRATEGY 141, 154 (1993).

214. *See, e.g.*, Hanseman, *supra* note 211. *See also* Sean P. Kanuck, *Information Warfare: New Challenges for Public International Law*, 37 HARV. INT’L L.J. 272 (1996); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 7 COLUM. J. TRANSNAT’L L. 885, 885 (1998); James P. Terry, *The Lawfulness of Attacking Computer Networks in Armed Conflict and in Self-Defense in Periods Short of Armed Conflict: What Are the Targeting Constraints?*, 169 MIL. L. REV. 70, 84 (2001); Roger D. Scott, *Legal Aspects of Information Warfare: Military Disruption of Telecommunications*, 45 NAVAL L. REV. 57, 66-67 (1998); Charles Dunlap, *The Law of Cyberwar: A Case Study from the Future*, in *CYBERWAR 2.0: MYTHS, MYSTERIES AND REALITY* (Alan Campen & Douglas Dearth eds., 1998); LAWRENCE GREENBERG ET AL., *INFORMATION WARFARE AND INTERNATIONAL LAW* (1998); WALTER GARY SHARP, SR., *CYBERSPACE AND THE USE OF FORCE* 129-32 (1999); Walter Gary Sharp, Sr., *Balancing Our Civil Liberties with Our National Security Interests in Cyberspace*, 4 TEX. REV. L. & POL. 69, 70 (1999); Mark R. Shulman, *Discrimination in the Laws of Information Warfare*, 37 COLUM. J. TRANSNAT’L L. 939, 955-956 (1999); MARTIN C. LIBICKI, *DEFENDING CYBERSPACE AND OTHER METAPHORS* (2002); Richard Clarke, *Threats to U.S. National Security: Proposed Partnership Initiatives Towards Preventing Cyber Terrorist Attacks*, 12 DEPAUL BUS. L.J. 33, 36-39 (1999/2000); Richard W. Aldrich, *How Do You Know You Are at War in the Information Age?*, 22 HOUS. J. INT’L L. 223, 234 (2000); Jason Barkham, *Information Warfare and International Law on the Use of Force*, 34 N.Y.U. J. INT’L L. & POL’Y 57, 68 (2001).

215. White House, Presidential Decision Directive/NSC 63, Critical Infrastructure Protection (1998), available at www.fas.org/irp/offdocs/pdd/pdd-63.pdf.

216. In 1990, the second and third national security law textbooks were published: STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW* (5th ed. 2011)

some taught by current or former judge advocates.²¹⁸ The Army school hosted the first Joint operational law symposium.²¹⁹ The Air Force formally recognized the legal discipline of “operations law” and the Army published a capstone legal doctrine manual on legal support to military operations.²²⁰ The Army Field Manual contained several chapters on legal services in a range of the operational spectrum.²²¹ In 1992, the Air Force divided the International and Operations Law Course into two courses entitled “International Law Course” and “Operations Law Course.”²²² Because reserve and Guard judge advocates had been so integral to legal support during military operations, the JAG schools began to include them in training and the Air Force even designed a course specifically for them.²²³ DoD conducted the first interagency course on national security aspects of crime and intelligence.²²⁴ The Army began an annual Intelligence Law Course and the Air Force started the first annual cyber law course. The Services expanded operations law training in their initial courses for the newest judge advocates. NJS started a Legal Considerations for Peacekeeping and Military Operations in 1998 and invited international students. By 2000, the course was offered twice a year and students included representatives from forty-three nations.²²⁵

(first published in 1990); JOHN NORTON MOORE & ROBERT TURNER, NATIONAL SECURITY LAW (2nd ed. 2005) (first published in 1990). In 1993, Duke Law School opened the second center dedicated to the study of national security law, this one headed by a former Air Force judge advocate. See *Center on Law, Ethics, and National Security*, DUKE LAW, <http://www.law.duke.edu/lens/>; see also Silliman, *supra* note 183.

217. SCOLANS, STANDING COMMITTEE ON LAW AND NATIONAL SECURITY – 1962-2002: A BRIEF HISTORY 7 (2002), available at http://www.americanbar.org/content/dam/aba/migrated/natsecurity/publications/committee_history.authcheckdam.pdf.

218. For example, then-Lieutenant Colonel Walter G. Sharp was an adjunct professor of law at Georgetown University Law Center teaching a course on operational law issues, to include multilateral peace operations, while serving as a deputy counsel to the Chairman of the Joint Chiefs of Staff.

219. REAL LESSONS OF THE VIETNAM WAR, *supra* note 136, at 372.

220. MICHAEL A. NELSON, LT. GEN. & DAVID C. MOREHOUSE, MAJ. GEN., MEMORANDUM FROM USAF/XO AND USAF/JA, SUBJECT: OPERATIONS LAW, (Dec. 11, 1991), cited in Terri M. Gent, *Let's Demystify Operations Law*, I THE JAG WARRIOR (4), n.1 (Dec. 1998) (on file with author); HQ DEP'T OF ARMY, ARMY FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1991) [hereinafter FM 27-100] (now FM 1-04). Air Force doctrine on legal support to operations followed in 2003. AIR FORCE DOCTRINE DOC. 2-4.5, LEGAL SUPPORT (2003) (now AFDD 1-04), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFDD1-04.pdf>.

221. FM 27-100, *supra* note 220.

222. FIRST 50 YEARS, *supra* note 69, at 141.

223. The first-ever Deployed Air Reserve Component Operations and Law Course for Air Reserve Component lawyers and their commanders started in 1994. *Id.*, at 160.

224. The DoD held a four-day National Security Crime Symposium in February 1997. The four-day course brought together practitioners and investigators and included presentations by individuals such as M.E. (Spike) Bowman, then-Associate General Counsel (National Security Affairs), Federal Bureau of Investigation. MAJOR GENERAL WALTER B. HUFFMAN, TJAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCT. 1, 1996 TO SEPT. 30, 1997, at 7 (2011), available at <http://www.armfor.uscourts.gov/newcaaf/annual/fy97/FY97ArmyReport.pdf>.

225. REAR ADMIRAL DONALD J. GUTER, JAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCT. 1, 1999 TO SEPT. 30,

G. September 11, 2001 and Thereafter

In essence, we “threw” lawyers at very difficult problems and they produced solutions in virtually every case – often under very challenging circumstances and in an uncertain security environment. [. . .] I tried to get all the lawyers we could get our hands on – and then sought more. ~ General David H. Petraeus, USA, (ret.)²²⁶

As December 7, 1941 was the “date which will live in infamy,”²²⁷ September 11, 2001 (9/11) was a defining moment in U.S. history. In the minds of many civilians and military alike, 9/11 delineated a time between national security and insecurity. It removed the perception that the geography of the United States would protect her from national security threats. By 9/11, memories of the fears that the U.S.S.R. or Japan posed an existential threat had faded. Now, the clear and present danger was less definable, more fluid, and less able to be influenced. Response options raised issues about the fault line between security and liberty. New governance structures, laws, and policies were created. The world in which judge advocates operated became much more complex and demanded significantly more legal resources.

Since 2001, judge advocates have deployed to locations that include Iraq, Afghanistan, the Horn of Africa, Haiti, Cuba, Bosnia, Colombia, Thailand, Sri Lanka, Indonesia, Djibouti, Egypt, Honduras, Kuwait, Saudi Arabia, Qatar, and Bahrain.²²⁸ The percentage of the legal force deployed at any given time has varied. However, deployments alone do not reflect the full scale of legal support. For example, cyber operations have increased significantly and are generally conducted from the Homeland. Air operations are controlled from AOCs (to include Joint and/or Combined AOCs), some of which are in the United States, others at permanent stations in Europe and the Pacific. As discussed, one is in Qatar. Navy and Marine Corps judge advocates are assigned to permanently deploying forces and during the decade after 2001, “permanent operational law assignments for Navy judge advocates” increased by seventy five percent and by 135 percent for Marine judge advocates.²²⁹ The Coast Guard national security legal practice exploded in size post-9/11 and its operations are primarily in the Homeland. There are more Joint legal jobs now at the

2000, at 13 (2010), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/fy00/FY00NavyReport.pdf>

226. JOINT PUBLICATION 1-04, *supra* note 4, at 36.

227. A phrase used in the December 8, 1941 speech by then president Franklin D. Roosevelt addressing a joint session of Congress and the Nation via radio and only hours before he signed the declaration of war against Japan.

228. *See* TJAG and JAG ANNUAL REPORTS (1997–2012), U.S. CT. APP. FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm [hereinafter TJAG and JAG ANNUAL REPORTS]. These reports identify end strength numbers of the Army, Marine Corps, and Air Force JAG Corps and identify some of the deployments.

229. REVIEW PANEL REPORT ON NAVY, *supra* note 166, at 42.

OCJCS/LC and COCOM level. Those positions are primarily in the United States, and even the overseas COCOMs are not deployments. Likewise, strategic-level Service jobs, such as those in the Pentagon, are not deployments.

As an alternative to counting deployments, one might point to the size of a JAG Corps as reflecting the size of its national security legal practice.²³⁰ This is one factor, but not the only factor, and must be considered over time in relation to the Service end-strength, additionally recognizing that other factors impact JAG Corps size.²³¹ The danger of assuming JAG Corps size is a direct reflection of national security legal practice is that it is both inaccurate and sets up unrealistic expectations for JAG Corps reductions when the number or size of military operations reduce. Perhaps except for the Army, the total numbers of judge advocates has not increased over the past decade as much as existing resources have shifted when priorities changed to satisfy the substantial growth in national security legal practice. The assumption about cause and effect for deployments and JAG Corps size can also lead to a misperception about JAG Corps core legal functions in relation to the practice of the Service General Counsel.²³² As previously discussed, the scope of the GCs' practice is Service specific. JAG Corps have not given up practice areas to GCs as a direct result of the expansion of national security law practice.

For example, after 9/11, the Marine Corps expanded legal assignments to the Battalion-level. However, their size has remained relatively small. In 2000 and again in 2005, they had about 420 active-duty judge advocates.²³³ The Marine Corps had 450 judge advocates in 2004 and again in 2008, then dropped to 390 in 2009.²³⁴ In 2011, the Marine Corps grew to an all-time high of 530 active duty judge advocates and growth to 550 judge advocates was projected for

230. Donohue, *supra* note 6, at 495.

231. Congress allocates a certain manpower end-strength to the Armed Forces each year. Each Service has a manpower standard to determine how to allocate their share of the manpower (spaces). The Services then recruit and train certain types of people to fill the spaces with the right mix of skills. The Services provide the trained forces to the COCOMS as needed by the COCOMs and authorized at the Department of Defense or above through a variety of requirements and authorities. The forces not provided to the COCOMs generally continue to be assigned to their Service. The Services have flexibility in the mix of specialists that they recruit, train, and educate. For example, in a period without manpower growth, if a Service decides it needs more tank or submarine drivers or fighter pilots so that it can support actual or anticipated COCOM requirements, and the Service is willing to take that position out of another specialty, it will reduce the authorized manpower for other areas. Below the Service-level, military commanders have significant influence over, and at some levels control, what military specialist functions fill the manpower slots. For example, four-star major command commanders have a certain degree of flexibility to move their manpower "spaces" from one functional specialty to another specialty based upon their organizational requirement. The new slot will then be filled with an appropriate person, or "face," who possesses the right special skills. Although on a much lesser degree, lower level commanders, even to the colonel level, have some flexibility in the "spaces" equation. They can also ask that they be overmanned in a particular specialty area beyond the number of "spaces" earned from a manpower calculation. This faces-and-spaces equation reflects a prioritization of resources.

232. *See, e.g.*, Donohue, *supra* note 6, at 499.

233. *See* TJAG and JAG ANNUAL REPORTS, *supra* note 228.

234. *Id.*

Fiscal Year 2012. But, the 2011 and 2012 growth was a direct result of the need for more Marines to practice military justice rather than national security deployments.²³⁵

“Wherever there are Naval personnel, there are Navy judge advocates advising their commanders – from the Chairman’s Legal Counsel [. . .] to the Carrier and Expeditionary Strike groups, and with the Coalition Provisional Authority in Baghdad and the Joint Task Force in Guantanamo Bay, Cuba.”²³⁶ In 2004, when those words of now-retired Rear Admiral Jane Dalton, USN, JAGC, were published, the Navy inventory had dropped from 784 judge advocates in 2000 down to 769. Between 2004 and 2008, the numbers dropped to 648 and then rebounded to 767 judge advocates. From 2009 until 2012, the numbers have steadily increased until there were 826 Navy judge advocates in the inventory as of 20 September 2012.²³⁷ The increase during this period was due to a number of factors, including increased lawyer retention rates due to the economic downturn.²³⁸

As for the Air Force, although the national security practice has expanded, Air Force JAG Corps end-strength is currently lower than it was for any year between 1983 and 2004.²³⁹ The Air Force legal manpower standard is largely linked to installation (garrison) manpower size. As installations closed after the end of the Cold War, resources were lost or shifted elsewhere. More manpower cuts came with various Program Budget Decisions. Manpower gains have typically come in small numbers and from commanders who convert other positions or from senior Air Force leadership decisions to expand legal practice. National security practice, particularly deployments, have largely been absorbed by taking people out of installation offices and requiring the remaining staff to work to make up for the absence. The JAG Corps has tried to mitigate the recent manpower reductions in a variety of ways, including JAG Corps reorganizations and technological efficiencies.

The Army is the one JAG Corps which has seen consistent growth since 9/11. After 9/11, the Army began to assign lawyers down to the Brigade-level, which drove the need for more lawyers.²⁴⁰ In 1999, there were 1,426 active duty Army judge advocates. This number has steadily increased every year; it was 1,897 by

235. REVIEW PANEL REPORT ON NAVY, *supra* note 166; Vice Admiral James W. Houck, JAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, OCT. 1, 2010 TO SEPT. 30, 2011, at 21 (2011).

236. Jane G. Dalton, *Challenges and Opportunities in the Law*, 8 JONES L. REV 27, 32 (2004).

237. Emails from Military Personnel Division (Code 61) Office of the Navy Judge Advocate General, to author with attached PowerPoint chart (Feb. 14 and 15, 2013) (on file with author).

238. *Id.*

239. As a sampling, in 2010 there were 1,237 active duty AF JAGs; in 2009 – 1,203; in 2008 – 1,198, but in 2005 it was 1,283, in 2004 – 1,377; in 1999 – 1,330, in 1995 – 1,341, in 1993 – 1,375, and its all-time high in 1991 of 1,399. In 1983 it was 1,283; in 1981 – 1,208; in 1978 – 1,111, and in 1975 there were 1,258 active duty Air Force judge advocates. In 1972 there were 1,097; in 1971 – 1,296; and in 1965, there were 1,339. FIRST 50 YEARS, *supra* note 69, at Appx. 3; see also TJAG and JAG ANNUAL REPORTS, *supra* note 228.

240. See, e.g., ADVANCING PRODUCTIVE RELATIONSHIPS, *supra* note 13, at 2-3.

2011.²⁴¹ Although that is an increase, a 470-person increase in an organization the size of the U.S. Army is a fraction of a percentage of total Army manpower.

Deployments and new national security military jobs after 9/11 opened up new areas of practice and expanded on other areas. Most obvious were the legal issues in the wars in Iraq and Afghanistan.²⁴² Those issues ranged from the application of LOAC in traditional and nontraditional conflicts to post-conflict (re)construction with operations such as a Rule of Law Task Force and Provincial Reconstruction Teams. Even five years before those operations, lawyers would not have been able to envision the scope of knowledge and skills required for these operations. As Harvard Law graduate and Army judge advocate Brigadier General Mark Martins stated:

They must also be prepared, when called upon to foster cooperation between local national judges and police, to plan and supervise the security and renovation of courthouses, to support the training of judges and clerks on case docketing and tracking, to establish public defenders' offices, to set up anti-corruption commissions to mentor local political leaders and their staffs, to explain governmental happenings on local radio and television, to develop mechanisms for vehicle registration.²⁴³

CT and associated matters now includes legal practice on detainee operations, military commissions, intelligence collection, interagency covert operations, sovereignty issues, "targeted killing," the convergence of Title 50 and Title 10 law, renditions, wear of uniforms, and ongoing conflict issues associated with al Qaeda in a variety of locations, including in the Islamic Maghreb, and more. In the Homeland, terror issues require judge advocates to address the line between security and defense, and the legal and political complexities in Homeland intelligence collection.

In addition to CT-related issues, judge advocates continued to be involved in the areas of practice developed in prior decades such as (but not limited to), freedom of navigation operations and overflight rights, navigation in the polar regions, the right of self defense, the law of neutrality, and deception during

241. The numbers for each year are as follows: 1,426 for 1999; 1,427 for 2000; 1,462 for 2001; 1,474 for 2002; 1,506 for 2003; 1,547 for 2004; 1,603 for 2005; 1,638 for 2006; 1,643 for 2007; 1,647 for 2008; 1,730 for 2009; 1,858 for 2010; and 1,897 for 2011. TJAG and JAG ANNUAL REPORTS, *supra*, note 228.

242. For information on lawyering in Iraq and Afghanistan, see the CLAMO products available through The LIBR. OF CONG., *supra* note 50; see also Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 1; John A. Weil, *The Battle for Fallujah, One Soldier's Memoir*, ARIZ. ATT'Y, July-Aug. 2005, at 13; Paul E. Kantwill & Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons": How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681 (2005); M. Scott Holcomb, *View from the Legal Frontlines*, 4 CHI. J. INT'L L. 561 (2003).

243. Mark Martins, Remarks at Harvard Law School (Apr. 18, 2011), available at <http://www.lawfareblog.com/2011/04/mark-martins-speech-at-harvard/>.

armed conflict. They advise on rules related to weapons such as the law of targeting; rules on mines, cluster, and fragmentation weapons; directed energy weapons; and nuclear, chemical, and biological weapons. They are involved in repression of piracy issues; cyber law;²⁴⁴ law and policy related to civilians in the operational environment, such as asylum and temporary refuge; and issues that resulted from increased DoD and State Department use of contractors in the deployed environment. Today, legal issues are also associated with transnational threats such as narcotics trafficking and military operation in failed states and ungoverned spaces. Several COCOM legal offices and higher-level organizations address legal issues associated with North Korea and Iran. Judge advocates were consulted on issues that flowed out of the “Arab Spring,” the overthrow of Muammar Gaddafi in Libya, ongoing conflicts in Syria, and more.

Humanitarian operations continue to produce legal issues. DoD is substantially more involved now in Homeland civil support issues with USNORTHCOM as the DoD lead. Haiti earthquake relief efforts required many hours of judge advocate work from the tactical to strategic levels. Likewise, support to the Tsunami responses in Japan and Indonesia generated legal issues at all levels.

Whereas the Peers Inquiry was the turning point for DoD legal practice of national security law, September 11, 2001 was that point for Coast Guard judge advocates. Prior to 9/11, they largely focused on military justice, claims, legal assistance, and environmental protection, and addressed some law enforcement issues associated with the “War on Drugs.”²⁴⁵ In the 1980s, they had played an active part in reflagging vessels in the Persian Gulf. They were also involved with Maritime Interdiction Operations in the Middle East during Desert Shield/Storm and before the fall of Saddam Hussein.²⁴⁶ Since 9/11, judge advocates are involved daily with international and operational legal issues as well as intelligence law oversight and domestic law enforcement.²⁴⁷ Sea Service lawyers were involved in drafting and are now involved in enforcing multiple layers of new rules targeted at maritime and port security.²⁴⁸ Coast Guard legal practice significantly and permanently expanded because of the organizational changes created by the 2002 Intelligence Authorization Act.²⁴⁹ It amended the

244. For a partial list of cyber incidents between 2006 and March 2012, see *Significant Cyber Incidents Since 2006*, CENT. FOR STRATEGIC & INT’L STUD., http://csis.org/files/publication/120302_Significant_Cyber_Incidents_Since_2006_0.pdf.

245. History of the Coast Guard Legal Program, *supra* note 30.

246. Dalton, *supra* note 195.

247. See REAR ADMIRAL FREDERICK J. KENNEY, TJAG, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES COAST GUARD, PRESENTED TO THE AMER. BAR ASSOC’N (2011).

248. For example, Coast Guard lawyers were with the International Maritime Organization Resolution, Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships; Amendments to the International Convention for the Safety of Live at Sea; and the Maritime Transportation Security Act of 2002. *History of the Coast Guard Legal Program*, *supra* note 30.

249. *Id.*

National Security Act of 1947 so that Coast Guard intelligence elements moved within the Intelligence Community. “As the intelligence program would grow, so would the number and [legal] sophistication of military and civilian counsel supporting it.”²⁵⁰

The creation of the Department of Homeland Security (DHS) and associated legislation and regulations also altered Coast Guard legal practice and structures. In the early to mid 2000s, both the Coast Guard under Admiral Thad Allen, and the Coast Guard JAG Corps under its first TJAG, reexamined and reorganized the Coast Guard and its legal services.²⁵¹

The Coast Guard is a key interagency partner in natural and manmade disaster response. They were integral in responding to the 2005 Hurricanes Katrina and Rita and the 2012 Deepwater Horizon disasters, providing on-scene commanders. With their skills in disaster response, they deployed to Haiti and supported humanitarian efforts after the 2012 earthquake. Legal advice for disaster response includes interagency authorities, forcible evacuations, force protection, inland search and rescue operations, support to nongovernmental organizations, Stafford Act support, and more.²⁵²

Coast Guard judge advocates have also expanded their involvement with more traditional DoD missions. They have supported war crimes investigations and the military commissions process. They are engaged in world-wide counter-piracy efforts. They have and are deployed to Afghanistan. They serve on Joint Staff, COCOM staff, and one is currently a COCOM SJA.²⁵³

During this decade and through the present, JAG schools continued to fill the demand for trained national security military lawyers. They expanded the breadth, depth, and number of national security law courses and offerings. For example, in 2002, the Marine Corps began Basic Operational Legal Training (BOLT), a five-day course in international and operational law for new judge advocates. In 2006, BOLT was absorbed into the NJS Basic Lawyer Course curriculum so that now all new Navy, Marine, and Coast Guard judge advocates attend the training. The Marine Corps has inserted operational law issues and judge advocates into an existing Marine Corps field-exercise training program called Mojave Viper. The NJS LOMO course previously mentioned began in 1999. Held in conjunction with the International Law of Military Operations (ILOMO), sponsored by DIILS, these courses, which include students from American and foreign militaries, have a classroom element, including lectures, panels, and seminar discussions. Additionally, NJS offers a semi-annual, week-long course called the Law of Naval Operations that focuses on legal issues faced by forward-deployed maritime forces operating across the range of military operations. The Navy JAG Corps has hosted an annual Information Opera-

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* The first Coast Guard COCOM SJA is currently assigned to USNORTHCOM.

tions Law Training Course since 2009.

The Coast Guard sends their new judge advocates to NJS for initial skills training, including Coast Guard-specific training on basic operational law authorities. New attorneys also attend the annual DHS Homeland Security Conference where they gain an operational understanding of all of the DHS components. More senior judge advocates, civilian attorneys, as well as interagency counsel, attend the biannual Advanced Missions Law Course on the application of broad Coast Guard military, law enforcement, regulatory, and intelligence authorities to perform a broad spectrum of marine safety and security missions, including interagency response to domestic incidents. Since 2006, along with a civilian law school security institute, they hold an annual Coast Guard/Homeland Security course. Beginning in 2013, the Coast Guard began sending a judge advocate or civilian attorney to earn a LL.M. in National Security Law. Additionally, Coast Guard judge advocates attend other Service advanced courses.²⁵⁴

The Army conducts several operational law courses. Since the mid 1990s, the Army basic course has included a national security law simulation-based capstone evaluation event previously described. They have now merged the Law of War course, which began in 1972, with the Operational Law course, which began in 1990. The new course is entitled the Operational Law of War course. TJAGLCS also holds a Rule of Law course. Additionally, for more than a decade, the Army has conducted an annual weeklong domestic operations law course that includes students and presentations from and by other federal agency, state, and local-level partners.²⁵⁵

TJAGLCS incorporates a substantial amount of national security law into its ten-month LL.M. in Military Law curriculum, including public international law; use of force; Hague and Geneva Conventions; LOAC; occupation law; war crimes; human rights; air, space, and sea law; ROE; intelligence law; detention and interrogation operations; peace operations; information operations; homeland support; and combating terrorism. More in-depth electives are available on most of those topics and for History of Warfare and Comparative Law.²⁵⁶

Through the years, operations law instruction also significantly expanded in the Air Force basic legal course. Since shortly after 9/11, the Air Force conducted an annual Homeland Defense/Homeland Security course with an airspace flavor as the Air Force primarily performs the Homeland air defense role and has many installations inside the United States.²⁵⁷ Because the Air

254. Email from Commander Tom Emerick, Off. of Legal Pol’y and Program Dev., U.S.Coast Guard (Feb. 10, 2012) (on file with author); see also REAR ADMIRAL FREDERICK J. KENNEY, *supra* note 247.

255. For an example of the way TJAGLCS teaches the application of the 1949 Geneva Conventions, see Paul E. Kantwill & Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons;” How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 *FORDHAM INT’L L.J.* 681 (Feb. 2005).

256. ANNUAL BULLETIN, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL 22-23 (2012-2013), available at http://www.loc.gov/rr/frd/Military_Law/pdf/AB_2012-2013.pdf.

257. As of 2013, this course has been suspended.

Force heavily utilized reserve and Guard judge advocates on overseas deployments, there was an Air Reserve Component operations law course. The Air Force offered a cyberlaw course in the late 1990s until 2001. Since 2009, the Air Force has hosted an annual cyber law workshop in a Top Secret environment. In 2012, the Air Force instituted a two-day Cyber Law Basic Course.²⁵⁸ Other Air Force courses touch on aspects of national security law, such as the mid-level officer course and the course for new staff judge advocates.

Today, there are also more civilian legal academy educational opportunities. Current and prospective judge advocates can reach out to more schools for this education, either through military-funded programs or on their own through full-time, distance learning, or night and weekend courses. Now, approximately half of all ABA-accredited law schools offer one or more courses in some or multiple aspects of national security law.²⁵⁹ Since 9/11, additional casebooks have been published on more narrow aspects of the field.²⁶⁰ At the request of a member of the legal academy, the Association of American Law Schools now has a section on national security law, created in 2003.²⁶¹ In 2004, George Washington University Law School began to offer one of, if not the, first civilian LL.M. with “National Security” in the title and which judge advocates attend.²⁶² There are a number of national-security-law-focused clinics, classroom-based simulation exercises, and student-led organizations.²⁶³ As of early 2013, more than three dozen law schools employ former military officers as professors and/or senior administration officials.²⁶⁴ Many more practitioners are adjuncts.

258. As with all areas of study, the legal schools for the three Services develop courses that focus on different aspects of the law and operations.

259. Ed., *The War on Terror in Classrooms and Clinics: An Inventory*, 60 J. LEGAL EDUC. 480 (Symposium 2011); History of ABA SCOLANS, ABA, http://www.americanbar.org/groups/public_services/law_national_security/about_us.html; see, e.g., *National Security Law*, GEO. UNIV. L. CENT., http://apps.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=79.

260. See e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* (4th ed. 2011); NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* (3d ed. 2008); VICTORIA SUTTON, *LAW AND BIOTERRORISM* (2003); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WARD* (2010); HENRY J. STEINER, ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (3d ed. 2008).

261. Telephone interview with the author, National Security Law Section staff, Association of American Law Schools (Dec. 2011).

262. This was a subtle but important shift from other LL.Ms with titles such as “International and Comparative Law.” See generally ABA SCOLANS, ABA, *STANDING COMM. ON NAT. SEC., CAREERS IN NATIONAL SECURITY LAW* (Laura Bean ed., 2008), available at http://www.americanbar.org/content/dam/aba/migrated/nat_security/nsl_text.authcheckdam.pdf.

263. For a more complete discussion of the development of civilian academy instruction on and support for national security law, see Donohue, *supra* note 6.

264. According to school websites located through Google searches, law school educators with military law experience are currently at a number of law schools, including (in no particular order and including senior administration but not including adjunct faculty): University of New Hampshire School of Law; Texas Tech School of Law; Thomas M. Cooley Law School; Washburn University School of Law; South Texas College of Law; Northwestern California School of Law; Ave Maria School of Law; University of Virginia School of Law; John Marshall Law School; George Washington University Law School; University of Wisconsin Law School; McGeorge School of Law; Whittier Law

This development is obviously significant because of knowledge, skills, and ethos these practitioners bring to the legal academy. These schools also provide opportunities to formally partner with JAG schools.

VIII. REQUIRED KNOWLEDGE, SKILLS, AND ETHOS

*A senior military attorney is educated and trained to ask the right questions, rapidly assess and assimilate facts, consider their import, and articulate positions, with the expectations that non-legal concerns will be integrated into the analysis.*²⁶⁵

Building on the earlier parts of this article, this section considers what capabilities are now required to be a military national security lawyer. This section also briefly discusses the role of the JAG schools in creating those capabilities. Following this discussion, the article will culminate with recommendations to educate future military national security lawyers.

History teaches that there are many ways to describe the application of knowledge to national security practice.²⁶⁶ There are “three enduring duties of the national security lawyer: to uphold process, to educate, and to support and defend the Constitution.”²⁶⁷ One report stated that “[t]he art of operational law is to identify legal and related policy issues in these divergent areas, and rapidly synthesize them in order to give timely and coherent legal advice to senior civilians, commanders, staffs, and tactical forces.”²⁶⁸ Said another way, “[t]he role of legal support is to analyze and evaluate circumstances, identify options, assess risks, and then provide timely advice to commanders.”²⁶⁹ And again, “[t]he good lawyer must be able to identify risk, assess the true value of a dispute, and work collaboratively with others to negotiate a swift and comprehen-

School; Duke Law School; St. Mary's University School of Law; Stetson College of Law; Howard University School of Law; University of Minnesota Law School; Notre Dame Law School; Vanderbilt Law School; Temple Law School; Washington & Lee University School of Law; Campbell University School of Law; University of Missouri-Kansas City School of Law; Albany Law School; Northwestern California School of Law; New England Law School; University of Houston Law Center; Creighton Law School; Wayne State University Law School; Regent University School of Law; Southern Illinois University School of Law; Brigham Young University School of Law; University of Florida; Ohio Northern University Pettit College of Law; Rutgers-Camden; Villanova University School of Law; University of Washington School of Law. Not all professors with military experience teach national security law courses.

265. Wheaton, *supra* note 242, at 1.

266. For one perspective on the role of lawyers as delivered by someone outside the United States legal community see Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367 (2011).

267. James E. Baker, *United States Court of Appeals for the Armed Forces, National Security Process and a Lawyer's Duty: Remarks to the Senior Judge Advocate Symposium*, 173 MIL. L. REV. 124, 126-127 (2002).

268. REVIEW PANEL REPORT ON NAVY, *supra* note 166, at 44.

269. AFDD 1-04, *supra* note 21.

sive resolution.”²⁷⁰ The Services and Joint community also describe and organize the necessary knowledge, skills, and ethos required to practice national security law in a variety of ways and to different degrees.

This article uses the following construct: Knowledge, Skills, and Professional Ethos.²⁷¹ First, a lawyer needs substantive legal knowledge and to know the client and situational context. Second, the lawyer needs the skills to apply that knowledge effectively, and to insert the resulting legal analysis into the process in a relevant and timely way. And third, knowledge and skills must be grounded in a strong professional ethos. The JAG schools help develop judge advocates in each of these areas to varying degrees. This article does not presume to address all legal knowledge, skills, and aspects of ethos but to highlight some of those particularly applicable to military national security law practice.

A. Knowledge (Legal, Client, and Context)

1. Legal Knowledge

Research of Law and Legal Policy: First, in order to gain legal knowledge, students must know where the rules reside and understand the mechanisms and tools to obtain that knowledge. Today, lawyers come into the JAG Corps familiar with the Constitution, statutes, case law, some regulatory guidance, and international law. They know how to use civilian legal research tools such as Lexis or WestLaw. They quickly learn that the very nature of military practice is more than case law, statutory law, international common law, and international agreements. They learn that national security legal practice relies heavily on executive branch policy and practice tradition.²⁷²

270. Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 6 (1999).

271. This division bears some similarity to that set forth in the ABA study on law schools known as the Cramton Report, or more formally as the AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS ON THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979). The ABA study known as the MacCrate Report presents another construct. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). (Of interest to national security lawyers, the Robert MacCrate of this ABA study was the same Robert MacCrate who was special counsel to the Peers Inquiry.) A third review of the matter is at William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING: PREPARATION FOR THE PROFESSIONS (2007) (commonly known as the Carnegie Report). A fourth construct is proposed in Donohue, *supra* note 6.

272. Executive Orders, DoD, Joint, and Service instructions, regulations and manuals, operational direction in the form of executive orders, and even email document policy decisions and guidance. Policy preferences at the strategic levels are also often unwritten in order to create more political space in which to operate. Tactical-level practitioners usually seek written policy direction and often view it with as much weight as law so there is no ambiguity for the proverbial eighteen-year-old troop with a weapon. Tradition (or doctrine) is a habit of process practice, as in “we do things this way,” rather than “common law,” to be found in hornbooks. There are some doctrine documents, but, due to classification issues and operational sensitivities, much informal doctrine is passed by word-of-mouth or in clarified military after-action documents.

At the JAG schools, students learn to employ military and related web-based research systems to find guiding law, legal policy, doctrine, and practice samples. These systems are typically behind firewalls and only accessible to individuals who have the right authorities because of the sensitivities associated with “for official use only” and classified information. Judge advocates in the basic courses focus on written policy and some doctrine. More advanced courses teach more nuanced policy and focus on where to find and influence such policy and doctrine.

Students become familiar with JAG school-produced practitioner resources. All of the JAG schools have law journals in which they often discuss national security matters. National security practitioners, course directors, and instructors often reference CLAMO products and resources.²⁷³ The other JAG schools publish more frequently on other areas of military practice. AFJAGS also publishes the *Guide for Air, Space & Cyber Forces*.²⁷⁴

Students also learn about the various layers of legal offices responsible for law and policy so they can contact them for guidance and insight into the traditions-based aspects of the practice and policy perspectives. The network of colleagues they begin to build from their first day at the JAG schools serves them well throughout their careers.

Substantive Material: Second, to state the obvious, military national security lawyers learn relevant substantive law and legal policy at the JAG schools. As previously discussed, legal knowledge generally accepted by the JAG community as relevant and necessary to support military operations has changed significantly since the 1980s. The type and degree of legal knowledge is also dependent upon the stage of a judge advocate’s development. Lawyers at their first assignment and freshly out of the basic courses have limited use for detailed national security law because their practice tends to focus on military justice, legal assistance, and some civil law. They do need fundamental operations law knowledge because they will likely deploy to an operational unit within the first few years of their service. As such, the JAG schools’ basic courses introduce, but do not teach, national security law to the same degree as more advanced courses.

Conversely, mid-level officers typically need much more detailed knowledge of national security law. For example, Joint Publication 1-04, *Legal Support to Military Operations* (a doctrine document) states that required knowledge for JTF level practice includes information on irregular warfare, peace operations, rule of law, humanitarian assistance and disaster relief, post-conflict operations, civil-military operations, and noncombatants.²⁷⁵ Joint Doctrine also lists pages worth of JTF SJA duties and responsibilities, most of which presume knowl-

273. CLAMO’s website recently merged with a website behind an Army firewall but some publically-releasable materials are available through LIBR. OF CONG., *supra* note 50.

274. AIR FORCE OPERATIONS & THE LAW, *supra* note 21; Naval War College also publishes the Commander’s Handbook.

275. JOINT PUBLICATION 1-04, *supra* note 4, at III-6, III-12.

edge of the applicable law.²⁷⁶ A few Joint or deployed positions have established knowledge preferences or requirements, such as expertise in Law of the Sea or detainee operations. There is no Joint mandatory list of requirements levied upon the JAG Corps or JAG schools as a training requirement or standard. Rather, the Services rely on any existing processes from pre-Goldwater Nichols.²⁷⁷

Today, the range of substantive law taught at the JAG schools includes, but is not limited to, those areas listed in their Service doctrine²⁷⁸ and Joint Publication 1-04, plus law previously discussed such as international law; host-nation domestic law; LOAC; law of the sea, air, space, and cyber space; intelligence law; domestic support; homeland defense; CT; and detainee and interrogation operations. Each Service course emphasizes Joint practice from a Service focus.

No JAG school has a course designed primarily for the strategic-level practitioner.

2. Client and Context Knowledge

Know Who the Client is and the Lawyer's Role: As corporate lawyers must understand the client's business, judge advocates must know and understand the client and the context in which that client operates.²⁷⁹ The TJAGs publish rules of professional conduct, which identify the client as the organization.²⁸⁰ In the early stages of practice, client identification appears relatively simple – the military Service to which a judge advocate is assigned as represented by the lawyer's commander. Note that new judge advocates are taught that the commander as an individual (including the Commander-in-Chief) is not the lawyer's client unless the lawyer is serving as defense counsel or in a legal assistance role.

As the judge advocate becomes more senior, and depending upon the position that lawyer is holding, the client can be the Department of Defense, a Joint organization, or even an interagency department or agency.²⁸¹ At the most strategic levels, client identification can be less clear. Although not frequently an issue for even the most senior judge advocates, military lawyers must understand whom the political appointee lawyers above them view as the client. For example, the second General Counsel of the Office of the Director of National Intelligence said: "I have learned that a lawyer for the government in particular has obligations not only to his or her client agency but also to the

276. *Id.* at 1-3.

277. *See, e.g.*, Dep't of the Navy, Judge Advocate General Instruction 3300.1A, JAG Billets Requiring Special or Detailed Knowledge of the Law of Armed Conflict and Training Objectives for Navy Judge Advocates in Such Billets (1983, revised 2004) [hereinafter Navy Instruction 33300.1A].

278. FM 1-04, *supra* note 21; AFDD 1-04, *supra* note 21.

279. JOINT PUBLICATION 1-04, *supra* note 4, at III-6, III-12; *A Planning Primer*, *supra* note 73, at 6.

280. *See, e.g.*, Air Force Rules, *supra* note 29; Army Rules, *supra* note 29; Navy Rules, *supra* note 29.

281. *Id.*

public at large, and if the client's proposed action would not serve the public interests, the government lawyer should say so even if that action is legal."²⁸²

A lawyer must also understand the role he is fulfilling toward the client: counselor (to include educator), mediator, advocate, or judicial or quasi-judicial.²⁸³ The role will shape the style and nature of the legal product. Typically, the military national security law practitioner will be acting as a counselor in his role as SJA or in support of the SJA. As such, he advises on law, legal policy, and "other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."²⁸⁴ To do so, he will educate his client on various legal and legal policy matters. He will also serve as a process champion and provide balanced advice.

Commanders want to know when an intended course of conduct is legal, complies with policy, is within their level of authority, and the perspectives of others with equities in the matter. Most commanders also want the lawyer to help identify and assess options and risks, and to check the underlying facts associated with the courses of action they are considering. Such knowledge is necessary so that the commander can make informed decisions. Fundamentally, a commander wants to know if he has the authority to take certain action or to take no action, and he wants help in deciding if necessary.²⁸⁵ They do not need a proponent or "yes man" when making a decision.

In the often-secretive national security world, and within a strict military hierarchy, the legal advisor role is crucially important. Most military decisions are never reviewed publically but must be credible and appropriate if subjected to public scrutiny. Military decisions must be compliant with higher authorities, or the chain of command and civilian control of the military can be threatened. Additionally, some non-JAG staff officers often believe their job is to "get to yes" rather than to identify risks associated with an expressed or implied desired action or end-state. As such, most commanders view their legal counselors as the "honest broker" and the "red light on the commander's desk."²⁸⁶

For example, a lawyer assigned to USNORTHCOM or subordinate level of command would ensure, in his educator role and in advance of any identified need, that his commander is familiar with 18 U.S.C. § 831, *Prohibited Transactions Involving Nuclear Materials*, in that it provides that the Attorney General may request assistance of SecDef to use DoD personnel in the enforcement of

282. *Confirmation Hearing of Robert S. Litt to be General Counsel of the Office of the Director of National Intelligence Before the S. Comm. On Intelligence*, 111th Cong. 7 (2009) (statement of Robert S. Litt, nominee for Gen. Counsel of the Office of the Dir. of Nat'l Intelligence).

283. *See, e.g.*, Air Force Rules, *supra* note 29; Army Rules, *supra* note 29; Navy Rules, *supra* note 29.

284. Air Force Rules, *supra* note 29, at Rule 2.1 (advisor); *see also* Army Rules, *supra* note 29, at Rule 2.1 (Advisor); Navy Rules, *supra* note 29, at Rule 2.1 (Advisor).

285. *See generally* BAKER, *supra* note 3, at 310-325.

286. Marc L. Warren, *Operational Law – A Concept Matures*, 152 MIL. L. REV. 33, 40 (1996); UNPUBLISHED SURVEY OF COMMANDERS CONDUCTED BY AIR FORCE JUDGE ADVOCATE'S GENERAL CORPS (2005) (on file with author).

§ 831. This authorized assistance may include using DoD personnel in capacities that would otherwise violate the *Posse Comitatus Act* (18 U.S.C. § 1385). The lawyer would understand the process and know the participants who would be involved in invoking such authorities. In the event of an exercise or real-world action that involved proposed use of DoD personnel in this manner, the lawyer would take action to help ensure the right level of authority approved the actions before execution of the mission.

The lawyer needs to understand his client may require him to serve in other roles such as an advocate or mediator. The national security lawyer will need to know how to “assess the true value of a dispute, and work collaboratively with others to negotiate a swift and comprehensive resolution.”²⁸⁷ A few judge advocates serve as military judges and hear criminal national security cases. Sometimes, a senior judge advocate may serve in a quasi-judicial role on a legal policy issue. For example, a tactical-level lawyer might identify an issue and elevate it to an operational or strategic-level lawyer for appropriate level “ruling” on a legal interpretation for which there is no case law or on-point written policy. Likewise, the more senior lawyer will be in a position to ensure that tactical and operational-level individuals comply with policy or seek exceptions or variances.

Detailed client knowledge and appreciation of the context are substantially learned on-the-job, through PME, and self-study. Client understanding starts at the basic JAG school courses. Some JAG school courses also provide this information. For example, almost all military national security law course material includes at least one organizational chart. Some of the more advanced national security law courses include discussion of the application of rules of professional conduct to standard fact patterns. Case studies typically follow lectures.²⁸⁸

Know the Client's Business: Judge advocates must also know the business of the organization.²⁸⁹ They must understand the language and terms associated with military operations and national security law and legal policy. They need to understand the decision-making processes and execution procedures. This includes understanding the unit's “battle rhythm” – a schedule of briefings, meetings, and events designed to optimize communication. They must know the mission, organization, and authorities of the unit to which they are assigned, and for those units above and below in the chain of command. They should know

287. Reno, *supra* note 270, at 6.

288. The “Torture Memos” and detainee interrogation debates are among the more notable case studies. See, e.g., Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflection on Judge Gonzales's Apologia*, 42 TEX. TECH L. REV. 893 (2010). The warrantless surveillance issues, including the visit to Attorney General John Ashcroft while in the hospital, are rich classroom discussion fodder. Case studies on tactical-level ethical challenges also exist, such as the disputed use of the military in the Branch Davidian operation. See, e.g., LISA L. TURNER, BRANCH DAVIDIAN CASE STUDY, AIR FORCE JAG CORPS KEYSTONE LEADERSHIP CONFERENCE (2008) (unpublished) (on file with author).

289. *A Planning Primer*, *supra* note 73, at 6.

the mission, organization, and authorities of organizations (or nations) with which their unit has overlapping equities. They should know the goals and objectives (both stated and unstated) of these various levels of command and for key influencers. They need to understand the various stages of military planning, execution, transition, and redeployment, and their role at each stage of this process; they also need to know the weapons and weapon delivery platforms.²⁹⁰

For example, a judge advocate assigned to the Pentagon must understand the unique aspects of practice “inside the beltway.” A judge advocate who is advising on matters in a coalition environment must understand the political sensitivities associated with that coalition, the U.S. policy-maker view of the coalition and each partner, and the differing law and authorities each partner holds. A judge advocate assigned to detainee operations must understand how the mission both shapes and affects the strategic political level. A JTF SJA during the employment stage will need to know the processes associated with his role to “assist the [commander] in monitoring, assessing, planning, coordinating, direction and controlling operations through direct participation on JTF boards, centers, cells, and working groups.”²⁹¹

Know the Client’s Language and Mission: For the new judge advocate, military-speak can seem like a foreign language. JAG schools immerse new lawyers in the client’s language from the first day at the basic legal course. At each level of operational law instruction, JAGs learn new terms. Some of the JAG school publications even include a list of definitions and acronyms. Some courses touch on mission, organization, and unit authorities, although lawyers learn most of that knowledge elsewhere. The courses do not address unit goals and objectives. Higher-level courses teach aspects of strategic impacts and effects, typically by discussing historical development of law and policy along with lessons learned in their application. For example, the judge advocate learning about detainee operations will learn much about the history and political issues associated with that mission-set.

Know the Client’s Representatives’ Personal Preferences: Judge advocates are most effective if they know the personalities of the principal decision makers and influencers. This includes knowing the principal’s/influencer’s comfort with risk; decision-making style; priorities; degree of desire for speed, secrecy, and political maneuver space; and other things. Most principal decision-makers have to operate in subordination to a boss and are very aware of the personality, goals, and objectives of the boss. As such, a judge advocate with some knowledge of the “boss’s boss” will be more effective. For example, the law and written legal authorities may appear to indicate a commander has authority to take certain action. The judge advocate would do well to know if the senior commander or civilian authority expects advance notice of the exercise of such an authority with an opportunity to provide alternate direction,

290. JOINT PUBLICATION 1-04, *supra* note 4, at III-6, III-12; *A Planning Primer*, *supra* note 73, at 6.

291. JOINT PUBLICATION 1-04, *supra* note 4, at III-6, III-12

or even have a decision deferred to him.

JAG schools do not, and really cannot, teach students about the personalities of the individual principal decision makers or key influencers. However, the schools can discuss the importance of these factors on the development of legal advice. The instructors can identify various techniques for the student to learn the personality factors. They can also teach students how to deal with a range of common personalities in the context of law, policy, and the Service and JAG Corps culture. Teaching methods include providing students with examples of common challenges and the way other JAGs have resolved those conflicts, and by simulation role-playing. Finally, instructor-practitioners also serve as mentors to students. As such, when an instructor has worked for or knows about a particular commander or civilian leader, the instructor can privately pass on the personality information to the student.

B. Skills (Application and Delivery)

Judge advocates have been taught to “think like a lawyer” by the civilian legal academy. Most have some basic skills in a legal research and writing course or in a law school clinic. Once in the military they refine their ability to spot issues, synthesize information, and apply knowledge to a problem set. They also learn to insert their legal analysis into the process in a relevant and timely way. Because of the analytical and communication skill sets trained and experienced lawyers bring to the table, senior policymakers and commanders employ national security lawyers in nontraditional roles.²⁹² JAG Corps members pride themselves on the ability to be useful to decision makers as a “sounding board” in matters other than those involving law and legal policy.²⁹³ JAG school instructor-practitioners have significant credibility with students when teaching these skills.

1. Application

After a judge advocate has substantive legal, client, and context knowledge, he must apply it to a particular issue – no easy matter. It requires maturity, wisdom, judgment, and creativity – all of which lawyers most often gain or improve through experience. Historical study and simulation training can provide some of these skills and capabilities. The JAG schools teach some history. They provide several opportunities for simulation training, as previously discussed.

Find Solutions: National security lawyers must be solution-oriented. Clients do not just need a list of problems or impediments. Commanders must accom-

292. REVIEW PANEL REPORT ON NAVY, *supra* note 165, at 43. See, e.g., *Career History of Army Judge Advocate, Brigadier General Mark S. Martins*, JAGCNET, [https://www.jagenet.army.mil/8525799500461E5B/0/D0560B904E592F00852579CA005A410D/\\$FILE/Martins%20BG%20Bio%20%20Photo%20Updated.pdf](https://www.jagenet.army.mil/8525799500461E5B/0/D0560B904E592F00852579CA005A410D/$FILE/Martins%20BG%20Bio%20%20Photo%20Updated.pdf).

293. Warren, *supra* note 286, at 40; UNPUBLISHED SURVEY OF COMMANDERS, *supra* note 286.

plish an assigned mission, and wise counsel can assist on ways to “get from point A to point B.” The commander will have preferences on actions that support the overall unit mission in the context in which he finds himself. The lawyer is not the decision maker – the commander is. Therefore, the lawyer should default to finding legal and smart ways to get to the desired end-state. However, the lawyer must be ready to articulate the risks, provide alternatives, and make recommendations. For example, at the tactical level, a lawyer providing advice on use of certain funds for construction outside of the United States may have to tell the commander that the proposed course of action is prohibited by law, but that alternative solutions exist to reach the desired end-state, such as using a different DoD funding source, or obtaining host-nation or coalition-partner funding.

Be Flexible: National security law practitioners must be flexible, possess the ability to respond under pressure with less than certain information, and be mature enough to practice in a variety of areas flavored with national security issues.²⁹⁴ Through his career, the military lawyer will perform different types of jobs. Some of them may be focused on national security while others are not. Some may have uninterrupted time to focus on document reviews, carefully review on-the-shelf deliberate war plans, or methodically review international agreements. Other national security jobs are high-stress and demand rapid assessment of, and advice on, issues with less than perfect data, such as an AOC. Sometimes both extremes exist in one job. In either case, a national security military lawyer must be able to deal with change and stress in order to be effective counsel in a range of environments.

National security legal issues usually come up in an uncertain context. Information is incomplete and typically changing. As intelligence or the political context changes, the lawyer must adapt. Anyone longing to apply black-letter law carefully and deliberately to steady facts would be wise to avoid this practice. New judge advocates have to learn quickly to adapt, and if they are unable to adapt, to self-eliminate into other specialty areas, or leave military service.

On a personal level, the military lawyer is usually the subordinate officer who will move every few years and whose boss will move every couple of years. The military lawyer should anticipate adapting to a different boss every year. As the subordinate, he will also have to subordinate his own ego to the superior. As General Powell advised, “[a]void having your ego so close to your position that when your position falls, your ego goes with it.”²⁹⁵

294. See Remarks at Careers in National Security Panel hosted by the Amer. Bar Ass’n SCOLANS and Section of Administrative Law and Regulatory Practice (Oct. 7, 2011); see also *Careers in National Security Law*, NAT’L SECURITY L. REP. (Special Issue), Aug. 2005 [hereinafter Special Issue: *Careers in National Security Law*], available at http://insct.syr.edu/uploadedFiles/insct/uploadedfiles/PDFs/aug05_national_security_law_report.pdf; *Careers in Nat’l Security* Brown Bag, *supra* note 6; *Careers in National Security Law*, *supra* note 262.

295. COLIN POWELL & JOSEPH E. PERSICO, *MY AMERICAN JOURNEY* 616 (1995).

Again, these skills are difficult to teach in a classroom. The schools introduce the concepts and primarily leave learning for on-the-job.

2. Delivery

Once a judge advocate has applied knowledge to a matter for a client and in a particular context, he must effectively transmit the information to the client. Effective communication is critical to military success. This skill set is also introduced and practiced somewhat at the JAG schools but is primarily learned through on-the-job instruction by supervisors and commander feedback.

Proactive Counsel: First, to be effective the information must be actionable. That means it must be timely, not provided after the process has already obviated the lawyer's opportunity for input or after a decision. In the best case, the judge advocate uses his knowledge of law, history, client, and context to anticipate the issue and shape it in advance through informal networks, fellow staff members, and lawyers above and below him in the decision making process. Commanders and senior policy makers value the lawyer who can anticipate their needs as clients, or as they say, "see around corners."

Proactive lawyers shape solutions by educating their principal in advance of when the principal confronts an issue. Former Secretary of State and Chairman of the Joint Chiefs of Staff General Colin Powell described "our best lawyers today [as] activists, seeking to keep their principals informed and advised of legal considerations that may impact on their decisional authority."²⁹⁶ To be proactive, they do not just sit in their office waiting for a meeting invitation or for a legal opinion. They ensure they are on the invitation list for standard meetings, such as staff meetings, programming, and budget decisions, and they routinely check their commander's meeting schedule for pop-up meetings which may involve legal issues.²⁹⁷ They also educate their client on issues the client is expected to confront.

By way of example, if a lawyer anticipates that an issue related to a particular military operation might work its way up the command, he will shape the issue by coordinating with subordinate lawyers while they are advising clients at their levels. He will coordinate with senior lawyers to ensure they have shared opinions. This also allows him to consider his approach if his superior lawyers provide a different perspective on the issue. Before he is asked for his opinion, he has probably informally discussed the matter with other staffers who have equities on the subject. He may have prepared a background paper or started a legal memo "just in case." He may have informally discussed the law and legal policy with his commander. Then, if the issue becomes ripe, the legal advice can be quickly finalized and delivered. For those issues where there is no advance warning, the lawyer must do his best to deliver his best product on

296. Keeva, *supra* note 195 at 56.

297. In twenty-three years of legal practice, the author has invited herself to meetings and/or asked to be invited to many meetings but only been told her presence was not required twice.

time. Young lawyers are repeatedly instructed, “the eighty percent solution on time is better than the 100 percent solution too late.”

Relevant Counsel: Second, the information should be clearly relevant. Senior clients typically have a very broad scope of responsibility and do not have time to spend on only one focus area. They are accustomed to making significant decisions despite knowledge gaps and uncertainty, and in limited time. They tend to be more comfortable than their lawyers are with risk.²⁹⁸ Accordingly, many commanders prefer bottom-line and solution-focused counsel. This means they answer the question or issue directly with a succinct analysis. The lawyers should then provide details as they directly affect the decision-making process. The advice must clearly identify issues subject to law, those subject to inflexible policy, and those which can be waived or changed at the right level of authority, as well as clarifying which inputs are the result of the lawyer’s sense of the “right thing to do” and comfort (or lack thereof) with risk. Judge advocates who interact with strategic decision makers, such as those in Washington D.C., have to utilize a more nuanced approach to providing legal counsel and are often called upon to address theory and history behind the law and policy. Their advice must assist a client who can change policy and influence legal changes.

Clear and Appropriate Counsel: Third, the lawyer must clearly communicate the information in the right time and manner. The judge advocate should use the client’s language unless there is a very good reason not to, such as when he is writing a legal opinion that someone outside DoD may read. Attorney General Reno once implored law school professors to teach students to write “a memo that will prepare a client to make a decision, or one that will explain a legal position,” not a document that reads like a law review with dozens of footnotes.²⁹⁹ The communication needs to be properly formatted using templates that are standard for Service or Joint staff work. These skills are relatively easy to teach.

Perhaps most difficult in this skill area is to teach time and place for communication. For example, it is wisest to find a discrete way to tell a commander or senior policy maker that his intended actions are illegal or may be unwise. This can be a private email to the senior official or a meeting in a small trusted group. Depending upon the personality of the senior official and the lawyer’s relationship with him, the lawyer will use more or less direct communication techniques on challenging issues. For some matters, the senior leader does not want written legal advice but is willing to take oral inputs. Other leaders will want written information on right and left legal boundaries and their authorities and options, but will not want written recommendations because there is a sense that such recommendations can reduce decision space. Regard-

298. This disparity between DoD lawyers’ (uniformed and civilian) and commanders’ risk-tolerance is anecdotal but is consistent with the risk-tolerance disparity between corporate lawyers and their CEOs. See CONSTANCE E. BAGLEY, *LEGAL ASPECTS OF MANAGEMENT SERIES: WORKING EFFECTIVELY WITH COUNSEL* (2003).

299. Reno, *supra* note 270, at 9.

less of senior leaders' preference, "on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don't say."³⁰⁰ Instructors can teach some of these skills in a classroom. All are refined on the job.

Credible Counsel: Fourth, the counsel must himself be credible. The legal, client, and context knowledge discussed above are key components of credibility. Practice, experience, and military grade are other aspects. Professional reputation is quickly established and grows over years of practice. Commanders gaining a new lawyer or other staff member will often use the "bubba network" and call around asking about the reputation of the new staff officer. The professional way a lawyer interacts with a commander or senior decision maker is also a factor. He must look professional – sharp uniform, be physically fit, and use military customs and courtesies.

Basic courses introduce skills and advanced courses reinforce them. All basic courses require the new lawyers to prepare legal memos and interact with clients and courts in mock exercises. Several advanced courses have exercises that simulate time-constrained, high-pressure military operational environments.

C. Professional Ethos

The Services must inculcate new judge advocates into the military and JAG Corps culture. Culture has many aspects and includes Service core values, such as those articulated by the Air Force: Integrity First, Service before Self, and Excellence in All. Some of the JAG Corps articulate additional values, others do not. For example, the Coast Guard JAG Corps lists their core values as: Legal Knowledge, Ethics and Professional Responsibility, Responsiveness, Advocacy, Partnering, Leadership, Adaptability, Watch-Standing, Technology, and Diversity.³⁰¹ The Air Force has guiding principles of Wisdom, Valor, and Justice. DoD has no articulated DoD-wide or Joint core values.

Integrity: There are a variety of particularly important aspects of professional ethos for military national security law practice. Integrity is not optional. National security military practice must be completely grounded in the integrity of the individuals and the process. The military must have the trust of the American public and lawyers are one significant self-policing mechanism. For example, a lawyer might fail the integrity test if he learns of an allegation of a LOAC violation and takes no further action, for whatever reason. If only a couple of operators know of the allegation, there may never be a review of, or accountability for, the violation. In addition to violating international and domestic law and policy, this process failure places at risk both good order and

300. BAKER, *supra* note 3, at 66.

301. REAR ADMIRAL FREDERICK. J. KENNY, TJAG, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCT. 1, 2010 TO SEPT. 30, 2011, at 6 (2011).

discipline, and institutional credibility. Abu Ghraib and My Lai provide worst-case examples of such breakdowns (neither involved a lawyer's failure to report).

Service: Lawyers who practice national security law should be motivated public servants. This community of practitioners and academics has a strong sense of obligation to serve the greater good, demonstrated by their thoughtful consideration of the needs of the client and Constitutional democracy.³⁰² In addition to being bound by professional rules of responsibility, many have taken an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic, that [and] bear true faith and allegiance to the same [. . .]." At some times, this will mean they must protect a commander's prerogatives. At other times, it will mean they act to restrain the commander's acts. Because these roles sometimes compete with each other, they can only serve in these roles if they understand that their oath obligates them to a greater good. For example, if a commander decided to alter the way detainees are treated in his area of responsibility in a manner inconsistent with law or policy and without higher authority, the judge advocate would be duty-bound to elevate the matter if he could not persuade the commander to remain within the law or policy, or to elevate the matter on his own.

Civilian Control of the Military: Representative civilian leadership absolutely must control the military instrument of power. Strong civil-military relations are critical. The larger the civil-military gap, the higher the risk of breakdown in this relationship.³⁰³ This is particularly important for national security practitioners who help ensure democratic civilian control of the military.³⁰⁴ Military lawyers must respect civilian authority in order to operate in the military

302. For example, together, academics and practitioners have published guides to careers in national security law, sponsored national security law career fairs, and held seminars on teaching national security law. *See, e.g.,* Williams C. Banks & Harvey Rishikof, *Educating National Security Lawyers for the Twenty-first Century: The Intersection of National Security Law and International Affairs*, 6:1 J. NAT'L SECURITY L. & POL'Y 483 (2013); Bean, *supra* note 294; PACE UNIV. SCH. OF L., THE CENT. FOR CAREER DEV., GUIDE TO CAREERS IN NATIONAL AND HOMELAND SECURITY LAW (2012); Special Issue: Careers in National Security Law, *supra* note 294.

303. *See generally* RICHARD SWAIN, THE OBLIGATIONS OF MILITARY PROFESSIONALISM: SERVICE UNSULLIED BY PARTISANSHIP (2010), available at <http://www.ndu.edu/INSEL/docUploaded/obligations%20of%20military%20professionalism.pdf>.

304. Since September 11, 2001, there have been a number of publications that discussed the role of judge advocates in civil – military relations. *See, e.g.,* Glen Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 U.C.L.A. L. REV. 1815 (2007); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407 (June 2008); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617 (2009); Lisa L. Turner, *The Detainee Interrogation Debate and the Legal Policy Process*, 54 JOINT FORCE Q., 3d Quarter 2009, at 40, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada515187>; Dunlap, *supra* note 288; Diane H. Mazur, *The Constitutional Bond in Military Professionalism: A Reply to Professor Deborah N. Pearlstein*, 90 TEX. L. REV. 145 (2012); Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TX. L. REV. 797 (2012).

hierarchical system. This issue can arise at the strategic levels when civilian authorities make decisions inconsistent with military recommendations, but within their authorities. In the field, it can arise, for example, when a Chief of Mission makes such a decision. At the tactical level, it more often takes the form of teaching and reminding military members about Article 88 of the UCMJ, which prohibits contemptuous words against the President, and other governmental leaders.³⁰⁵ When that fails, the judge advocate assists his commander in holding the offender accountable.

Courage: National security legal practice and military legal service require moral courage.³⁰⁶ As the Legal Advisor to the U.S. State Department has stated, lawyers are counselors who “also serve as a conscience for the U.S. government with regard to international law.”³⁰⁷ This is because national security practice is typically shrouded in secrecy; decisions may be made without much vetting; and strategic-level policy preferences are often unwritten. There is often great pressure to give the senior leader the answer he appears to want, and the legal analysis is not typically subject to review. As discussed above, the lawyer may be the only staff member able and willing to express concerns to a commander or senior decision maker about a particular course of action. To do so requires focus on the greater good rather than on some lesser purpose such as career enhancement. By way of example, Service senior judge advocates, OCJCS/LC and the Navy General Counsel displayed moral courage when they provided written legal opinions contrary to those offered by senior administration lawyers on detainee treatment.³⁰⁸ Congress has attempted to undergird judge advocate moral courage by creating a structure that prohibits interference with the independence of their counsel.³⁰⁹ This legislation is important, but the JAG

305. Unif. Code of Military Justice, art. 88; 10 U.S.C. §888 (2006).

306. The second core value listed by the Coast Guard Judge Advocate is “ethics and professional responsibility.” KENNY, *supra* note 301, at 6. Navy policy has long been to train judge advocates and legalmen on ethics, in addition to substantive areas of the law. See OFF. OF THE JUDGE ADV. GEN., JAG/CNLSC INST. 1500.1A, PROFESSIONAL DEVELOPMENT PROGRAM (1985), available at http://www.jag.navy.mil/library/instructions/1500_1a.pdf. Air Force Doctrine identifies moral courage as one of the five bedrock principles of legal support staff. “The legal support staff may be required to advocate a difficult or unpopular course of action after a thorough analysis of alternatives. Commanders expect the legal support staff to prepare and deliver the appropriate legal advice without hesitation.” AFDD 1-04, *supra* note 21, at 2. See generally Harlan G. Wilder, *Independent Counsel by Design*, 12 WRIGHT STUFF (2007) (on file with author).

307. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

308. See Turner, *supra* note 304, at 42; Charles J. Dunlap, *The Ethical Dimensions of National Security Law* 50 S. TEX. L. REV. 789 (Summer 2009). As a former Legal Counsel for the Chairman of the Joint Chiefs of Staff during the detainee discussions stated, “I did my best to provide clear, unvarnished legal advice without fear or favor of how my advice would be received.” Statement of RDML Jane G. Dalton, JAGC, USN (Ret.) Before the Committee on Armed Services, U.S. Senate (Jun. 17 2008), available at https://www.fas.org/irp/congress/2008_hr/061708dalton.pdf.

309. 10 U.S.C. §8037(c)(2) (2006); 10 U.S.C. §3037(c) (2006); 10 U.S.C. §5149 (2006); 10 U.S.C. §5046 (2006); see generally John C. Johnson, *The Air Force Judge Advocate: An Independent Legal Advisor*, REPORTER, Summer 2007, at 18-24.

Corps culture tradition of speaking the truth to power is long-standing and reinforced by both instruction and leadership by example, such as that displayed during the detainee treatment discussions.³¹⁰

Discipline: Judge advocates must have physical and mental self-discipline. National security practice often requires surge work periods. For example, leading up to and during an operation, commanders and staff can work for 18 hours straight for weeks on end with few or no breaks. Work and deployments will take the lawyer away from family for extended periods. Families will be required to move every two to four years so that the lawyer can progress in various assignments. Military lawyers must be willing to pay the costs of this unique legal practice, including the ultimate sacrifice. Sadly, the Services have lost judge advocates and paralegals in military operations, and more were wounded.

Collaboration: Judge advocates do not practice national security law in isolation. Military lawyers must be able to work collaboratively within their Service, and in Joint, coalition, and interagency environments. They must also be able to work with individuals associated with non-governmental organizations, and civilians with no affiliation to government. They must be able to appreciate the perspectives of others and often find common ground. These statements may surprise some who believe that the nature of classified or official-use-only information restricts any collaborative work. While security classifications and “need to know” do provide some impediments to collaboration, personalities of decision makers and staff are more influential in the degree of collaboration. In the military, collaboration provides checks and balances to prevent an individual commander or unit from operating outside of their authorities and “going rouge.” The awesome power of the military makes such restraint critical.

JAG school lectures and seminar discussions introduce culture, but much more than a few classroom contact hours is required to inculcate individuals into a culture. When actions of the cultural group match their words, culture is ingrained and sustained. The JAG schools introduce professional ethos in lectures and reinforce them with examples of the ethos. Many of these skills are learned as inherent to military service. JAG schools build upon those lessons by weaving skills development throughout the curriculum. For example, TJAGLCS has senior adjunct practitioners provide students with vignettes of when they personally confronted ethical and moral issues. Many courses involve practice of teamwork and leadership, such as by grouping students and assigning a leader to a seminar or group. However, development of a professional ethos is primarily accomplished in the fleet/field.

310. See generally Wilder, *supra* note 306; Johnson, *supra* note 309.

IX. RECOMMENDATIONS AND CONCLUSION

*I believe that, just as we can't predict with precision the nature of the next fight, I think we can predict with certainty that it will be as complex as any fight we face today, and we need lawyers that have that agility and flexibility to meet that threat. ~ Vice Admiral Harry B. Harris, Jr., USN, (ret.)*³¹¹

A. *The Problem*

The Services will continue to plan for and operate within reduced budgets. Resource constraints force organizations to distinguish between those expenditures that are core, essential, and enhanced. Some number of uniformed legal counsel will be required, and among them will be those who must address national security law. Lawyers are obliged to meet professional standards in the manner in which they practice. Given the fiscal constraints ahead, DoD will have a challenge addressing the gap between demand for trained and educated judge advocates, and the resources available for that training. However, the gap challenge is not insurmountable. The solution is to address the challenge deliberately and on multiple levels.

B. *The Problem Demands a Plan*

When facing any problem, the first and most important step is to create the right plan. Above all, that means leaders and planners must ask the right questions. This, in turn, requires careful, deliberate analysis and understanding of the problem.³¹² As a point of departure for such analysis, this article suggests that the following questions could be useful: What are the requirements for trained and educated JAG Corps legal counsel for both the Joint end-user and for the Services in this post-Goldwater-Nichols era? What balance of the Forces should be trained for various aspects of legal practice, including national security law? Within national security legal practice, and in order to meet end-user requirements, what knowledge, skills, and ethos do lawyers require at the tactical, operational, and strategic levels? What is the order of priority and balance between those levels? What is the most effective and efficient way to obtain, develop, and sustain counsel to meet the requirements to be Joint- and Service-capable practitioners, now and into the uncertain future? What emphasis should the JAG recruiting process place on hiring law school graduates and lawyers with existing national security knowledge and skills? What role do job assignments play in a deliberate development process? What is the right mix of informal mentoring, directed on-the-job training, self-study, PME, joint training,

311. Dep't of Navy, NAVY JAG 2020.1 11 (2011) (Navy JAG Corps Strategic Plan), available at <http://www.jag.navy.mil/organization/documents/jag%20corps%202020.1.pdf>.

312. For a very brief summary of the eight steps in problem solving, see, e.g., STATE OF WASH., GOV'T MGMT. ACCOUNTABILITY AND PERFORMANCE, THE EIGHT STEPS FOR SUCCESSFUL PROBLEM SOLVING: BASED ON THE TOYOTA BUSINESS PROCESS (2010).

and formal legal education – both in the civilian legal academy and at the military JAG schools? What is the most effective and efficient way for the JAG schools to transmit the required knowledge, skills, and ethos? These questions, asked in the right forum, will generate other illuminating questions to enable problem-solving analysis.

C. Requirement for National Security Law Judge Advocates

Senior leaders and commanders will continue to require trained and educated legal counsel for both the Joint end-user and for the Services. Judge advocates have served in the American military continuously for the past 238 years, and the fundamental missions and associated legal issues will doubtless endure. Lawyers will continue to provide legal counsel and capabilities in the core areas of military justice and administrative law. The core area of legal assistance will continue, absent significant legislative changes. The legal landscape also requires specialized military attorneys skilled in highly regulated areas such as environmental, contracts, fiscal, and labor and employment law. For example, deployed fiscal and contract law is a robust practice for deployed judge advocates.

As shown, senior leaders and commanders have come to rely on judge advocates on a broad range of issues, including national security law. Twenty-two years ago, then-Chairman of the Joint Chiefs of Staff Colin Powell recognized the judge advocates' indispensable role in support of commanders.³¹³ Operational commanders, such as General Petraeus and Vice Admiral Harris, value lawyers for their critical thinking skills, as well as their professional technical expertise.³¹⁴ More recently, a congressionally commissioned panel concluded, "the demand for operational law support could approximately double over the next decade."³¹⁵ Clearly, Services and Joint commanders will continue to require some percentage of their trained and educated legal counsel to be uniformed and able to deploy immediately to permissive, non-permissive, and uncertain environments.

Some might postulate that because of the troop drawdown in Iraq and Afghanistan, legal issues will contract and there will be a correspondingly reduced requirement for national security military lawyers. This would be naïve, and reject the lessons of recent history. Armed conflict and humanitarian crises are fundamental aspects of the human condition; they are inevitable. Planners dare not expect a reversal in the unrelenting trend toward increased complexity, uncertainty, and legal intensity in the national security environment.³¹⁶ For instance, the relentless threat of Weapons of Mass Destruction

313. Keeva, *supra* note 195.

314. JOINT PUBLICATION 1-04, *supra* note 4, at 36.

315. REVIEW PANEL REPORT ON NAVY, *supra* note 166.

316. *Id.* at 70. See generally U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (Feb 2010); MICHAEL MULLEN, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2011: REDEFINING

engages a complex framework of domestic and international law. Increasingly complex – and highly politicized – legal issues related to international and domestic terrorism will persist. Cyber threats and associated risks to critical infrastructure will continue to challenge domestic and international law and structures. This is particularly so as those challenges straddle the fault line between security and liberty. Even climate change will create a new demand for national security lawyers prepared to address resultant issues like government stability, population sustainability, and weather-spurred humanitarian crises.

D. Required Knowledge, Skills, and Ethos of National Security Law Judge Advocates

This article also provides a starting place to answer the questions: “In order to meet end-user requirements, what knowledge, skills, and ethos do lawyers require at the tactical, operational, and strategic levels?” and “What is the order of priority and balance between the aspects of required knowledge, skills, and ethos at the various operational levels of practice?” For the national security legal education piece of the equation, the Services should collectively apply three phases to this process. This process will require an initial investment of effort, but will improve national security law education and should reduce costs.

First, all Services should recognize in words and in acts that national security legal practice is a core area of legal practice. Currently, all Services assert that national security law is a core practice area, and frequently act accordingly.

The fact that commanders and senior leaders view this area of practice as mission-essential often translates into both JAG Corps manpower allocations, and in judge advocate promotion results. However, other decisions suggest national security law is anything but core. In particular, not all JAG schools have placed a corresponding priority on resourcing national security courses.

Next, the Services should integrate the Joint (and perhaps interagency) legal community into the existing ISLRC process, or create an alternative interservice process for identifying and deconflicting legal education requirements. History proved the validity of Goldwater-Nichols. We will not return to the day when the Services ruled the operational world. Despite this, the JAG schools collectively do not have a formal process to accept Joint community-identified requirements. Creating such a process would be consistent with Chairman of the Joint Chiefs of Staff Manual on Joint Training, which states: “Service training includes basic, technical, operational, and interoperability training in response to operational requirements identified by the combatant commands to execute assigned missions.”³¹⁷ It would be consistent with the DoD charge to each Service Secretary to both train individuals to qualify for force structure billets,

AMERICA’S MILITARY LEADERSHIP (2011); LEON PANETTA, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE (2012); MARTIN E. DEMPSEY, CHAIRMAN’S STRATEGIC DIRECTION TO THE JOINT FORCE (2012).

317. JOINT TRAINING MANUAL, *supra* note 74.

and to “[e]stablish and conduct individual, collective, and staff training programs and, to the maximum extent possible, align training schedules, curricula, and syllabi to support Joint and integrated operations training.”³¹⁸ And, such a process would be consistent with the COCOM commanders’ responsibility to “[p]rovide lessons-learned feedback to Service component commanders on operational requirements and priorities to be addressed in Military Department training programs.”³¹⁹ Given the current TJAGs’ operational joint experience, each is ideally situated to the value Joint community input would have in identifying effects-based requirements.

Third, the new Joint and interservice legal education process should deliberately assess what legal knowledge, skills, and professional ethos judge advocates require when practicing national security law at the tactical, operational, and strategic levels, including their prioritization balance. Of course, Joint doctrine is the starting place but it is not a deliberate, final, effects-based requirements list.

E. The Future of JAG Schools

Once the process identifies requirements, including what parts of a requirement will be levied upon a formal legal educational system rather than upon on-the-job training, the JAG schools should collectively identify how to best provide that training and education. In other words, they must address the question: “What is the most effective and efficient way for the JAG schools to transmit the required knowledge, skills, and ethos to students so that they learn and apply that knowledge?” This analysis should determine what pieces could be effectively and economically provided outside of the brick-and-mortar schools, such as through DL, civilian legal education, or JAG school-guided deliberate on-the-job-training. The schools should then use the ISLERC process to deconflict which pieces of that knowledge each school delivers, thereby minimizing duplication of effort.

1. Consolidate the Schools

In this time of shrinking budgets, and with DoD suggesting another Defense Base Realignments and Closure (BRAC)³²⁰ round, some suggest consolidating the JAG schools.³²¹ Facility consolidation can appear to be a money-saving option. Once DoD initiates a project of this scope, there is almost no way to reverse course. Accordingly, deep critical analysis is vital to any discussion of

318. Dep’t of Def., Directive 1322.18, Military Training 7 (2009), available at <http://www.dtic.mil/whs/directives/corres/pdf/132218p.pdf>.

319. *Id.* at 9.

320. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (as amended 2005).

321. See, e.g., Dwight Sullivan, *TJAGLCS Cancels 2012 New Developments Course*, NAT’L INST. OF MIL. JUSTICE BLOG, May 25, 2012, <http://www.caaflog.com/2012/05/25/tjaglcs-cancels-2012-new-developments-course/>.

this option. Simply put, school consolidation is the most costly, complex, and time-consuming option. It is least likely to be effective of any option available to close the requirement-resource gap or save the DoD money, even if military legal education is reduced.

BRAC criteria include costs and savings associated with a proposed consolidation, where available existing infrastructure receives the mission and associated personnel.³²² In 2005, application of BRAC criteria resulted in regionalization of interservice medical training and establishment of a single interservice school for chaplains. However, the government has not realized the savings promised from these projects.³²³ For example, due to military construction costs necessary to create a facility large enough to support all required religious education, the chaplain school cost 1,394 percent more than projected.³²⁴ Akin to the medical and chaplain communities, it would take decades to realize any savings from JAG school consolidation. New military construction would be required because no JAG school has the facilities to significantly increase, much less double or triple, student throughput. Even long-term savings would be small. While consolidation would reduce school operational overhead, the primarily fiscal expenditure for any military school is in student temporary duty costs (for example, travel, per diem pay, and lodging), and those costs would not simply be lessened through consolidation.

Although cost is a significant BRAC criteria, the “military value criteria” is the priority consideration under the most recent implementing legislation.³²⁵ Applying selection criteria, as modeled on the medical and chaplain consolidations, the “military value” of an interservice legal training center would be to improve interservice legal interoperability and joint deployability.³²⁶ To support this option, each JAG school currently teaches students from other Services and employs full-time and/or adjunct instructors from other Services.

All JAG Corps identify their core legal functions to include military justice, legal assistance, and operations law. In these core areas, the foundational law is the same—the UCMJ, state and federal laws related to landlord-tenant issues, trusts and estates, tax law, consumer law, and the Law of Armed Conflict. Additionally, judge advocates practice in a Joint environment without diminution of legal services.

However, unlike the medical and religious communities, the substantial body of legal practice and associated structure springs from Service policies, which derive from differences in the missions of each branch. As a straightforward example, when an Airman is offered nonjudicial punishment (NJP) under

322. *Supra* note 320, at §2913 (Selection Criteria for 2005 Round).

323. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-709R, MILITARY BASE REALIGNMENTS AND CLOSURES (2012), available at <http://www.gao.gov/assets/600/592076.pdf>.

324. *Id.*

325. Defense Base Closure and Realignment Act of 1990, *supra* note 320, at §2913 (Selection Criteria for 2005 Round).

326. See GAO, *supra* note 323.

Article 15 of the Uniform Code of Military Justice, he has a right to a military defense counsel and may demand trial by court-martial rather than accept the NJP.³²⁷ By contrast, due to limits associated with being at sea for extended periods, sailors do not always have these rights and may be subject to forms of punishment not available in the Army or Air Force, such as confinement on bread and water or diminished rations.³²⁸ As another example, in national security law practice, Air Force judge advocates have greater depth of knowledge and practice in Air and Space law, sea service judge advocates in Law of the Sea, and so on.

Structural differences also affect legal practice. The JAG Corps also differ in what constitutes core practice areas. For example, at headquarters and in the field, the Navy primarily employs GC staff, rather than members of the JAG Corps, to provide labor, environmental, and systems contract law services. On the other hand, the Air Force JAG Corps primarily provides those services rather than the GC staff for several reasons, including to ensure deployable experts in these areas.

JAG Corps lawyers in Joint billets overcome these differences. However, it is important to recall that the significant majority of judge advocates are not serving in Joint billets at any given time.

Additionally, DoD typically structures Joint legal offices to have lawyers assigned from each Service that supports the command's mission. For example, United States Transportation Command (USTRANSCOM) supports global mobility. The USTRANSCOM legal office, currently led by an Army SJA, includes lawyers from the Air Force who have airlift legal knowledge and Navy lawyers who have sealift legal knowledge.

Consolidating the JAG schools involves additional risks. Moving TJAGLCS from Charlottesville would be challenging due to that institution's close, synergistic relationship with UVA's law school. The benefits gained from the ability to bring in strategic speakers from nearby Washington D.C., not to mention TJAGLCS's ABA accreditation, add to that JAG school's program immensely. Because the Navy and Air Force are co-located with their Service PME programs, and support those programs' curriculums, moving NJS and AFJAGS from their current locations would weaken both PME platforms. Furthermore, consolidation would require the Services to place additional resources at the PME schools when the JAG schools move, further reducing any BRAC savings. The Navy and Air Force JAG schools would also lose other benefits of co-location, such as the AFJAGS's use of AU personnel and facilities for classified wargaming.

327. Air Force, Instruction 51-202, Nonjudicial Punishment, incorporating through change 3 (2011), available at http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-202/afi51-202.pdf.

328. Dep't of Navy, JAG Instruction 5800.7F, Manual of The Judge Advocate General §0109 (2012), available at <http://www.jag.navy.mil/library/instructions/JAGMAN2012.pdf> (Advice to Accused Prior to Initiation of Article 15, UCMJ); *id.* at §0111 (Limitations on and Nature of Punishments).

2. Consolidate Aspects of Training

Consolidating certain aspects of training is another way to close the requirement-resource gap. Although this option has not been studied for national security law courses, in Fiscal Year 2003, Congress directed the Secretary of Defense (SecDef) to submit a report to the Congressional Armed Services Committees addressing the “desirability and feasibility of consolidating the separate Army, Navy, and Air Force courses of basic instruction for judge advocates into a single course to be conducted at a single location.”³²⁹ Both the combined JAG school 2003 *Report on Assessment of Consolidating JAG Basic Courses*³³⁰ and a 2013 master thesis on the same topic³³¹ concluded that consolidation was not feasible or desirable.³³² Similar to the BRAC discussion, these studies concluded that even long-term savings would be minimal, it would be expensive in the short term, and legal education would suffer. Removing one class or set of classes does not reduce or eliminate the overall expenses of operating three schools, nor does it remove the cost of sending students to a school on temporary duty.

Consolidation of all national security law education at one school would be neither feasible nor desirable. The fundamental differences in Service missions and school logistical limitations eliminate any legitimate possibility of fiscal austerity. Currently, ISLERC works to reduce or eliminate duplication. As will be discussed, the ISLERC process, combined with improved identification of national security law educational requirements, is the best avenue to reduce the requirements-resource gap.

3. Reduce, Change, or Eliminate Courses

If the Services choose not to apply a requirements-based process in whole or in part, they have other ways to reduce costs yet still meet demands. The simplest option is to make pro rata reductions in most programs. This is the easiest choice intellectually, but generally makes little sense because it fails to apply sufficient rigor to the requirements-side of the gap analysis.

Alternatively, or additionally, Services can reduce the number of times a school offers a particular course and increase remaining class sizes, if logistically feasible. JAG school classroom space and numbers of instructors often curtail this option. To mitigate such limitations, they can reduce class sizes by

329. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 16 Stat. 2458, §582, Report on Desirability and Feasibility of Consolidating Separate Courses of Basic Instruction for Judge Advocates (Dec. 2002).

330. JAG SCHOOL REPRESENTATIVES, MEMORANDUM FOR COMMITTEE TO STUDY THE DESIRABILITY AND FEASIBILITY OF CONSOLIDATING BASIC INSTRUCTION FOR JUDGE ADVOCATES (2003) (on file with author).

331. ANDREW D. FLOR, JOINT JUDGE ADVOCATE BASIC OFFICER COURSE TRAINING: A CURRICULUM AND TRAINING BASED ANALYSIS OF THE FEASIBILITY OF COMBINING JUDGE ADVOCATE INITIAL OFFICER TRAINING (2013) (unpublished thesis) (draft copy on file with author).

332. MEMORANDUM FOR COMMITTEE TO STUDY THE DESIRABILITY AND FEASIBILITY OF CONSOLIDATING BASIC INSTRUCTION FOR JUDGE ADVOCATES, *supra* note 330.

carefully selecting only those judge advocates who must have a certain course for a current or immediate next assignment. Again, this requires careful requirements-based analysis. As previously mentioned, the Navy has been identifying billets that require special or detailed national security law training since 1983.³³³

The Services can also shorten or eliminate courses. Even in an unconstrained fiscal environment, a course should only be as long as necessary to fulfill the educational requirement. The JAG schools should, and do, conduct periodic course curriculum reviews with this principle in mind. When eliminating a course, the Services should carefully assess associated risks and consider mitigation techniques.

For example, the Services are already eliminating courses, including the AFJAGS 2013 Homeland Security/Defense course. This means that when (not if) another Homeland disaster/attack occurs, unless they obtain training elsewhere, there will be fewer judge advocates trained on how to respond.³³⁴ Cancelling the training particularly limits the number of judge advocates who understand and are able to advise on Homeland air defense.

Additionally, one Service can attempt to shift training demands onto another JAG school by trying to expand the number of students who can attend the sister-Service's courses. For instance, Air Force judge advocates who no longer have a Homeland Security/Defense course available at AFJAGS might be able to attend the TJAGLCS Homeland course. However, all schools are facing the same budget limitations and have both classroom size and staff size limitations. This option is also a sub-optimal solution because the material taught at another school typically will not meet a particular Service's requirement. Given that ISLRC deconflicts course overlap to the greatest degree possible, and because the Services' schools present information from different Service perspectives, gaps in Service-specific needs are inevitable.

4. Change Instruction Delivery Methods

The Services are working to utilize more efficient educational delivery techniques and platforms, such as DL, blended learning, and learner-paced models. Civilian universities have utilized these techniques for years. JAG schools are increasingly using DL, but still deliver military national security courses at the schools with a single course schedule.

Distance and Blended Learning: DL is instruction provided in virtual environments, such as web-based interactive classrooms and web-based gaming environments. Blended learning combines brick-and-mortar based instruction with DL in one course or set of coursework. During the mid-1990s, the JAG schools

333. Navy Instruction 33300.1A, *supra* note 277.

334. The author was an SJA at McGuire Air Force Base, New Jersey – the closest Air Force base to New York City – on 9/11 and has seen the challenges associated with responding to Homeland disasters without any prior training or education on Homeland defense or military support of civil authorities.

began to experiment with remotely delivered legal education. It became a “hot topic” among the schools in the mid-2000s,³³⁵ and DL has continued to expand due to significantly improved technology. Younger students are particularly receptive to DL. Like their contemporaries, many young judge advocates took at least one civilian online DL course, in either high school or college. They tend to be visual learners and highly competent with and comfortable in the DL environment.

JAG schools can readily deliver national security law lectures through DL. However, DL is less effective for seminar-style discussions and experiential learning. Seminar-type interactions between instructors and students in chat-room format are possible. Some Service schools use Defense Connect Online to approximate classroom style conversations, but technological limitations inhibit the free flowing style of brick-and-mortar classrooms. Blended learning provides a way to deliver DL format lectures with brick-and-mortar training on those activities best conducted face to face. For example, Air Education and Training Command is moving increasingly to blended learning in training courses ranging from those for new squadron commanders and civilian supervisors, to first sergeants, and even PME. In a national security course, a JAG school could deliver much of the lecture content via DL and combine those lectures with assigned readings. The shortened time at a JAG school would then be used for seminars and exercises.

As technology develops, schools could deliver national security experiential events through DL. As a robust example, in the civilian gaming marketplace, massive, multi-player, on-line role-playing games (MMORPGs) are common and have been widely used for almost a decade. Many young judge advocates grew up playing these games, such as World of Warcraft®. Should the military be able to invest in adaptive, simulation, massive multi-player exercises in a gaming format, they could reach many more students than they currently do through in-person events. If DoD invests in a MMORPG that teaches an array of military specialties, judge advocates should be part of those initial development efforts and ought to build in legal issues for the players, themselves included. Of course, MMORPGs have significant limitations, including initial investment and sustainment costs, security issues, and no role for interpersonal skills development.

Another challenge of DL and blended learning is to ensure that while the student is at home station, supervisors respect the time necessary to attend the course. The temptation is to keep assigning a normal workload and pile the course on top of an already stressed workforce. Effective use of DL and blended learning requires a leadership-driven demonstrated awareness that all personnel need sufficient off-duty time and a sense that leadership respects that time. Blended learning also provides limited financial savings. Even though blended learning reduces time at the JAG schools, travel and some per diem costs

335. Strand, *supra* note 58.

remain.

Learner-Paced Education: Learner-paced classes are another educational efficiency. Traditionally, schools deliver coursework in a lock-step format at the pace of the slowest learner. Learner-paced work delivers coursework in much smaller pieces and delivers it at the pace of each individual student. As such, some students can learn the material in a much shorter period than others, thus saving resources. Learner-paced work is easiest when combined with DL and blended-learning formats, but it can also be done in brick-and-mortar classrooms if the learning objectives are clearly identified. The JAG schools should study this as an option for national security law courses.

5. Create Cooperative Relationships

The JAG Corps should examine the fiscal and educational value of increasing links between the JAG schools and the civilian legal academy. Civilian education opportunities are now available given that national security law courses offerings have significantly expanded post-9/11. Additionally, the basis for shared understanding and partnerships already exists through the many former judge advocates who law schools now employ. As discussed, judge advocates have long attended civilian law school LL.M. programs. TJAGLCS and UVA have an established association, but this concept would develop such relationships to a much greater degree.

Cooperative relationships could broaden the depth and widen the perspectives of national security law courses, particularly if attended by other federal department and agency lawyers. They could also spread the cost of some operational and strategic level courses among a number of organizations. For example, a civilian law school and JAG school combined course on homeland security and defense attended by DHS, DoD, FBI, DHHS, and some state and local lawyers would be much more effective than the current JAG school courses. After the main body of the instruction, short breakout sessions for a particular agency to teach their lawyers additional agency-specific lessons could follow. The same principle would be true, for example, for an intelligence law course, which could involve brick-and-mortar courses, DL, and/or blended learning and military participation in exercises. A civilian-JAG school partnership could also readily fill the existing gap of a strategic-level practitioner course. This course could share civilian and military instructors and, of particular value, address interagency issues. The schools could deliver it through blended learning, combining on-line lectures and discussions, culminating with a live experiential learning opportunity where the students receive feedback from senior, experienced national security law professors and practitioners.

Certainly, there are challenges with this concept. This type of cooperative relationship could not replace JAG school education as a whole, given the different mission sets. It would not be appropriate for basic-level instruction. The schools would have to establish a cooperative agreement upon a careful study of the educational requirements for national security lawyers, as discussed

above. Additionally, JAG schools' ability to create such links is dependent upon the associated costs of civilian law schools, their willingness to accept military input on educational learning objectives, and their amenability to including military adjunct instructors. Courses that involve other federal departments and agencies also require a great deal of coordination. Keeping in mind that other federal and state departments and agencies typically do not fund education and training to the same degree as DoD will add to this challenge. However, because lawyers must meet licensure CLE requirements, national security lawyers may be interested in these short courses, even if they have to pay to attend. This would seem particularly so if the courses are conducted through DL or blended learning.

This is the right time for such a discussion given the pressures that the changing nature of legal practice and the economy are placing on civilian law schools.

F. Conclusion

This increased emphasis on national security law in the United States rests in the context of the nation's broader efforts to bring process and order to multifaceted, high-threat national security challenges.³³⁶ The national security educational establishment will continue to produce prepared minds that will contribute to the governance of civic relations in the context of America's military instrument of power. The JAG schools are a vital component of that educational establishment. In order to meet current and future requirements for educated and trained national security lawyers, these institutions must focus their surviving resources on delivery of legal education to the right student, at the right time, in the right way. The Services must start the requisite analysis with the correct questions, and refine existing processes to answer those questions. Only then can they make informed decisions on how to shrink the gap between required legal force structure and limited resources. Even if further budgetary cuts do not occur, this problem-solving process represents good stewardship of taxpayer dollars and lends itself to more effective and efficient production of national security lawyers. Regardless, one thing is clear; the need for properly trained national security lawyers is going to increase, and it is the Service JAG Corps' obligation to ensure they are trained and educated properly.

336. See generally Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus Ad Bellum*, 176 MIL. L. REV. 364 (2003).