

2014 CONTINUING LEGAL EDUCATION AND TRAINING PROGRAM
U.S. Court of Appeals for the Armed Forces
May 21, 2014

**The Soldier and the State: The Meaning of “Profession” and “Legal Ethics” in the
Context of Judge Advocates**

Outline of Ethics presentation and discussion:

1. The Military Profession:

- How do you distinguish between ethics, morality, and law? (conventional, Platonic, other)
- What does it mean to be a profession? (of arms, of law).
- How are they similar? Different? At cross-purposes?

2. Learning Ethics:

- From where or what do we as people, or we as officers or members of the Armed Forces, learn ethical conduct?
- Are Codes important? If so, which Codes? Why?
- Are role models important? If so, who have been the most important role models in your career? Outstanding examples (both good and bad) re: moral courage?
- Do you have a reading list? A movie list? (e.g., What are the five most important books/articles a professional military officer should read? An ethical military lawyer?)

3. Ethics and the Military Today:

- What are the greatest ethical challenges facing the United States military today?
- Military lawyers?
- Are there particularized challenges, or just the ageless challenge of human emotion and conduct?
- When it comes to military ethics do we have a leadership gap? A “followership” gap? Or a general officer gap?
- How would you put today’s challenges in context, as compared to WWII, post-Vietnam, or any other comparative metric you wish to apply?

- Are there post-conflict-return-to-Garrison challenges we can expect (should always expect)? If so, how should we prepare?

4. Ethics and Role of Technology:

- What are the ethical challenges facing our military members regarding the use of technology?
- How do the norms in social media outside the military relate to the norms inside the military?
- Is this an example of the concept of human well-being (eudaimonia) central to Plato's virtue-based ethics?
- What flexibility is there in the context of the military for setting the standards?
- Are we doing enough to meet those challenges and educate our service-members regarding the ethical use of technology? If not why not?
- What more should we be doing?

5. Model Rules of Professional Responsibility:

- What do you think of the Model Rules as an ethical code?
- Is there a Golden Rule in the Model Rules - the one rule we can't live without or that defines what it means to be part of the legal profession as opposed to merely a lawyer?
- If you were to add one Rule, what would you add?

6. If time: Ethics and Cognitive Development

- We have new understanding in the past five years, about the cognitive development of the brain and in particular the development of the frontal cortex and its impact on reasoning, judgment, and ethical behavior. It turns out that for most people the frontal cortex does not fully develop until one is in their mid-twenties, which means an individual's capacity to reason and to regulate ethical behavior.
- What impact, if any, should that knowledge have on how we teach ethics to members of the armed forces? To our children?
- How do we hold people accountable for ethical and/or criminal trespasses?
- Does the military use anticipative guidance as an ethical methodology?

7. Mystery Question: TBA



Law and Ethics in Command Decision Making

A. Edward Major

MILITARY COMMANDERS OFTEN consult their staff judge advocates (SJAs), especially in the escalation of conflict. Seeking legal advice is increasing and has become prevalent, even in the battle space.¹ “It is also clear from the commanders . . . that legal advice is essential to effective combat operations in the current environment—legal advice is now part of the tooth not the tail.”² Here, the legal profession and the profession of arms meet, evolving as to how to most effectively work together. This article explores relying on the law in weighing issues in commanders’ decision making. Its objective is to offer direction in using the law, while cautioning against over-reliance on it.

What role does law play in society? WikiAnswers says: “Law decides what is right or wrong in the view of the public.”³ Yet, the law is sometimes upheld as the guardian of morality and a panacea to all problems. Witness the growing body of international law, domestic federal law, the growth of litigation, the growth of legal departments within governmental agencies and businesses, and societies’ increasing reliance on the law to solve disputes.⁴ Understanding that their actions will finally be judged by standards set by law, commanders logically seek legal direction to better assure themselves of legal compliance and avoid liability. In the U.S. military establishment, this means greater reliance on the legal opinions and advice of staff judge advocates and general counsel.

We should applaud the movement toward reliance on the law. It instills the occasion to dialogue and analyze a situation, and then recognizes that a lawyer has a significant professional perspective to offer, “to better ensure that [the commander] understands the non-kinetic parameters of an action prior to committing kinetic solutions.”⁵ With legal analysis, better decisions come out of discussions and consideration of alternatives, effects, and outcomes. In a general way, we honor this expansion of the rule of law. Better to be ruled by a common law than the whims of a dictator, as many people said most recently in the Arab Spring. The role of the SJA is a commendable component of our military efforts.

A. Edward Major, a civilian lawyer for 25 years, has a keen interest in the interplay between the law and national security issues and improving them, and has published pertaining to national security. He has been admitted to practice law in New York, New Jersey, and Florida as well as England and Wales. He has a son on active duty as an Army engineer officer.

PHOTO: U.S. Army LTC Michael Infanti (right), commander, 4th Battalion, 31st Infantry Regiment, briefs COL Michael Kershaw (left), commander, 2nd Brigade, 10th Mountain Division; LTG Ray Odierno, commander, Multi-National Corps-Iraq; and Iraqi Army LTC Iman Ibrahim Mansour, commander, 4th Battalion, 4th Brigade, 6th Iraqi Army Division, on the partnerships between the coalition forces and the Iraqi forces on 4 March 2007, at Forward Operating Base Yusufiyah, Salah ad Din Province, Iraq, during Operation Iraqi Freedom. (U.S. Army, SGT Curt Cashour)

Further investigation is necessary, however, to more fully consider the limitations of this legal infusion. Let us examine:

- Substitution of law for ethics.
- Limitations of the legal view.
- How the professional military ethic (PME) complements legal review.

Substitution of Law for Ethics

We hear the critical danger of substituting law for ethics in the refrain: “If it is legal, it must be okay!” For the civilian lawyer, the experience in dealing with clients is almost invariably that, if an act is legally permissible, it is all right, and the client will do it without hesitation, irrespective of moral conflict. Edmond Nathaniel Cahn claimed that the law itself is the embodiment of our moral values and that the courts are the proper fora for moral adjudication.⁶ But the refrain above exposes the incompleteness of the law. If not from a moral perspective, how else would we review the law?⁷ Without moral review from outside the law, we lose much of our ability to evolve and meet new challenges. Without an independent moral review, we lose much of our impetus to change law and correct imbalances. What is legal is not necessarily moral, and the law does not address many moral issues at all.

To illustrate the point, observe the great American pastime of avoiding taxes. The Code of Federal Regulations plainly prohibits professionals from basing opinions on the likelihood of audit (i.e., determining whether a client can “get away with it”). The Code states: “In evaluating the significant Federal tax issues addressed in the opinion, the practitioner must not take into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.”⁸ However, one would be hard-pressed to find such restraint in an advisor’s opinion.

Clients demand and routinely obtain probability of audit advice, even if the advisors neglect to write it into their opinions. As one prominent tax advisor put it, after being promised anonymity: “Every client needs two advisors, one to advise him what the law is, and the other to advise him what he wishes the law was—then the client can choose which advice to follow.”

Or consider how the law conflicted with ethics during the internment of Japanese-Americans during World War II. The internment was completed entirely under law, yet we would scarcely consider it to be moral. If our moral compass has evolved into simple legal consultation, the result will often be “a ‘deflection of responsibility’ in the substitution of detailed legal formulations for a . . . moral one.”⁹

Many question whether the special mission for Osama bin-Laden into Abbottabad, Pakistan, was legal under international law. Yet Americans largely agree it was morally right, whether or not it met the standards of international law.¹⁰ The law on the subject is conflicted, depending on whether one focuses on violations of sovereign territoriality or the significance of Osama bin-Laden and his finding sanctuary in Pakistan. From the standpoint of law, both arguments are compelling—but the majority of Americans, to put it simply, do not care; the morally right necessity of eliminating Bin-Laden trumped any esoteric question of legality. In the case of World War II internments, what was legal was not moral; in the case of Bin-Laden, what the United States did was seen to be moral, whether or not it was legal.¹¹

As further illustration of the law’s irresolution, transition policy in both Iraq and Afghanistan stresses varying roles of the law:

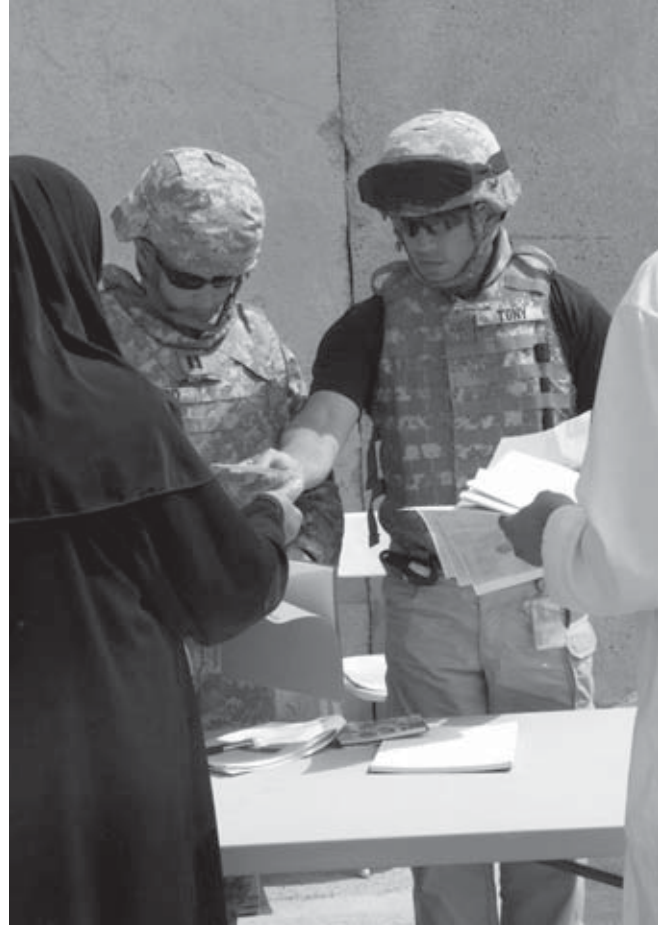
A significant difference exists between policing requirements [of a military force] in the [short-term] aftermath of intervention and policing requirements over the long-term. Stability policing places a high priority on preventing violent crime with less regard for prosecution under the rule of law. Community-based [long-term] policing places a much higher priority on embedding the police force within the community, professionalizing the force, and adhering strictly to the rule of law.¹²

These differences are borne out through evolving policy “trade-offs” of “security vs. human rights” and “peace vs. justice.”¹³ Therefore, the commander must understand when the transition takes place and recognize that the context of legal opinion varies (although not the law itself). There are many relevant considerations to the application of the law, partially influenced by the then applicable role of our military.

The world still grapples with another gnawing issue: Can the conventional criminal justice system deal effectively with terrorism? For example, in the United Kingdom in 2008, heated parliamentary and public debate took place on a government proposal to extend the time a suspect may be held in police custody, without formal charges. After its eventual passage in the House of Commons, the measure was promptly and heavily defeated in the House of Lords. The entire issue demonstrated the lack of consensus on how seriously to judge the extremist jihadist terrorism threat and what tools should be available to the security authorities to combat it. In September 2009, Parliament ordered an independent review of the working of their Control Order (involving electronic tagging and movement restrictions on suspects) following adverse judicial judgments. Disagreement arose between the branches of government, as well as among the public. Clearly, the law does not yet have an adequate answer to the threat of terrorism, and it may be some time before, or even if, consensus can be reached.

Other issues such as, for example, when the War Powers Act must be invoked, the legality of incarcerations and interrogations at Guantanamo, the rule of necessity or proportionality in the use of force, or whether the so-called “9/11 laws” are valid and under what circumstances continue to absorb time and require nuanced review to understand what they mean and how to use them as new events unfold.¹⁴

The above are not stray situations or the work of rogue actors. They are the natural result of substituting legal for moral review, and for this, we cannot claim surprise. It is a disassociation from our internal sense of right and wrong and desensitizes people from their values and actions.¹⁵ One of the foremost scholars of military ethics recently stated at a Fort Leavenworth ethics symposium: “Many senior officers I talk with feel as if ‘ethics’ is ‘law’—a view reinforced by the annual so-called ‘ethics brief’ by the JAGs [SJAs].”¹⁶ The comment demonstrates the subtlety of the confusion and tendency toward reliance on the law. Moving from decision making based on wisdom, experience, and ethics to an undue reliance on the law is all too expedient and common in society at large. Translated to a military setting, over-dependence on



(U.S. Army GT Johnathon Jobson, TF Marine Public Affairs)

CPT Todd Chard, the chief of Client Services for the 3rd Infantry Division Staff Judge Advocate office, and his interpreter prepare paperwork for an Iraqi couple, during a claims payout mission held at Joint Base Balad, 19 September 2010.

the law decentralizes authority from the commander to an expert aide, an SJA advisor, who does not possess expertise over the entire body of requisite considerations.

Even with the inability to come to consensus in dealing with the rules of engagement (ROE) and terrorism, the law increasingly guides the resolution of ethical issues here as well. This movement toward the law is a cultural laziness, which, instead of grappling directly with the issues in the fullness of an ethical analysis, hands them off to lawyers and the legal system for resolution. It is the collapse of the question, “What *should* we do?” into “What can we lawfully do?” The consideration of what may lawfully be done does not consider other relevancies of morality, diplomacy, politics, our own public opinion, and relations with the host population.¹⁷ Nor does it consider what is most important to mission accomplishment. It is merely a quicker way to deal with the situation, with the review delegated

to someone else, usually an SJA officer. Some may even incorrectly consider that reliance on the SJA's opinion absolves oneself of the consequences of a poor decision, even although the law specifically says otherwise.¹⁸

The law is an inadequate substitute for our value and individual judgment and was never intended to act as such. It partially reflects history and often incorporates a reaction to recently occurring events. Most times it is just, but sometimes it is unjust. Often it is incomplete, dealing only with those particular issues that have been written into the law, but not addressing others. Through this system, the law aspires to modify and guide future activity. Ideally applied, the law is a filter for unethical behavior. Figure 1 below is a visual way to show this. The law is important as a filter; it effectively screens out much unethical behavior, but it does not deal with *all* such behavior, nor does it go beyond that which it has considered, which may nonetheless be of ethical importance.

The law offers a concise and discreet insight into ethics through its own system, but its filter only screens out some unethical behavior. It does not convey the full panoply of issues offered by a full ethical review of the facts by commanders planning a mission. The law should not be permitted to sweep

aside other considerations and values we hold dear. "The core practice of any professional is the exercise of discretionary professional judgment."¹⁹ In merely relying on the opinion of an SJA, commanders relinquish their professional status, which is very different than just being advised. As a matter of policy, we do not wish to remove the authority of commanders to apply their own moral compasses. Commanders must guard themselves from this intellectual sleight of hand and growing social willingness to substitute a legal opinion for a thorough moral review, especially in the operational environment where responsibilities are sometimes overwhelming. While commanders almost always assert their freedom to challenge the opinion of the SJA, they should be vigilant to the growing social temptation of an untoward reliance on the law.

Limitations to Legal Review

"Given the constraints of our various criminal justice systems, we are often at a disadvantage in addressing global threats."²⁰ Our efforts face "legal, moral, and ethical constraints on its defensive actions that many of [our] adversaries do not."²¹ This caution of the director of the Federal Bureau of Investigation, a lawyer and outspoken believer in the rule of law, applies equally to the law of

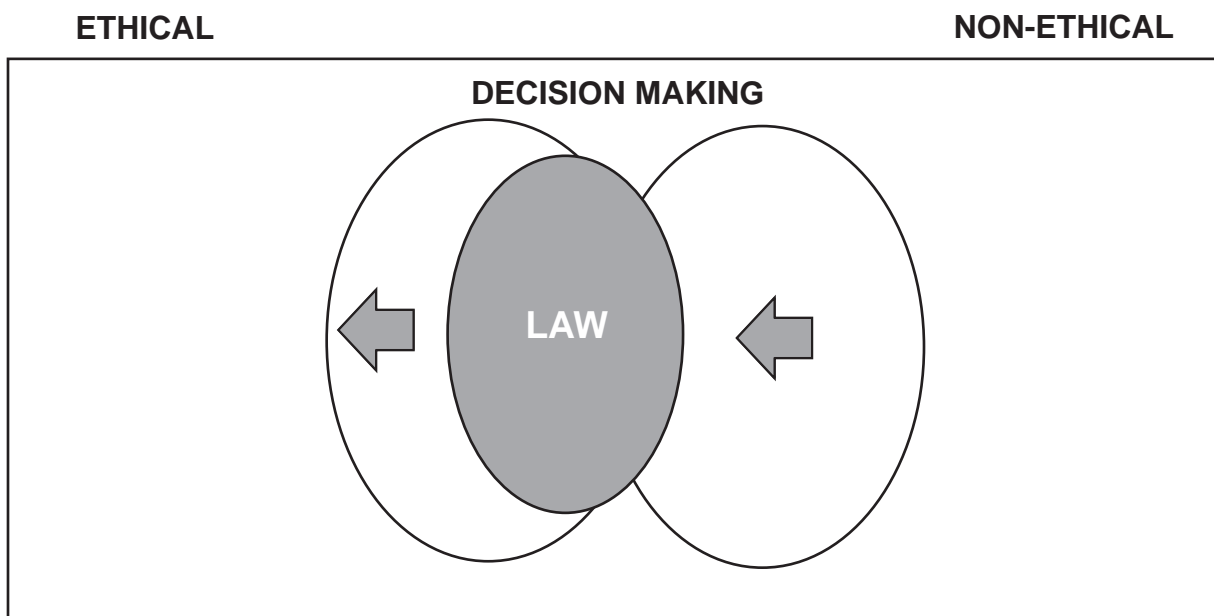


Figure 1
The law as a partial screen against unethical behavior.

armed conflict. Its caution is to the effects of a more formalized, codified decision-making process: one that may stiffen the response to a facile enemy unbound by such niceties. An overuse of the law formalizes thinking rather than equips our commanders to think creatively, broadly, and critically.²²

The sometimes-narrow focus of legal advice. When attending law school, many in my class joked about how we had gone to the university to expand our minds, but that studying law was like putting on blinders. The comment had a point: legal review is about focusing on facts as presented and relating them to applicable law. Few in law school discussed right and wrong in terms broader than what written law would dictate. *A well-trained lawyer culls the facts to only those which relate to the criteria set out in the law. Other facts are ignored. This focus is the peculiar insight and contribution provided by the legal profession.*

The law may be out of date. Although the law is broadly reflective of social values, it suffers a time lag before it can reflect current issues. Litigating some issues requires years before matters are finally settled. Some criticize the law for being out of touch with the realities of 21st-Century combat conditions and placing unjust burdens on our soldiers in the field and what may justly be required of them.²³ [The term “soldier” herein refers to all service personnel, not merely Army soldiers.] While the challenges of the battlefield change with great rapidity, the laws that govern war and our soldiers are “relatively unchanging national security laws. Most of our statutory framework was built after World War II or after the Vietnam War. It is very difficult for our Congress to legislate [change] anything, including the extension of our budget into next week. And, for the same reason, since it takes 67 votes to get a Treaty, it is very difficult for Congress to update our treaties.”²⁴

Legal focus can degenerate into “rule-following.” Society employs the constraint of law to keep actors above the line of acceptable behavior. This power of obligation, punishment, and enforcement of social norms is the force behind its power. Its effect sometimes reduces to “rule-following.”²⁵ The approach is ill-suited to guide our soldiers in the fast-moving, amorphous battle space of recent conflicts and undeclared wars. We must also consider that the human mind does not function optimally when tense and facing deadly threats, yet the body needs to act quickly and instinctively. Given that many of our soldiers operate independent of supervision in the current combat deployments, the threat of legal punishment offers little inducement.²⁶

The law is retrospective, not aspirational. Further, the application of the law is retrospective, not aspirational (as opposed to ethics, which is prospective and motivational, a guide to current and future behavior). To be authoritative, a legal review must consider an actual occurrence and injury. U.S. courts routinely refuse to accept jurisdiction of cases unless the controversy is “ripe,” that is, when a real injury has occurred.²⁷ Thus, advice offered by the SJA concerning a possible mission does not carry the authority of the law or constitute any more than an opinion, professional although it may be. It is only *after* the injury occurs that there is a ripe set of facts, which may then be reviewed, adjudged, and only thereby become authoritative. It is tempting to receive an opinion and, because it is that of a lawyer, give it more weight than it deserves.

Legal opinions may over-focus on “what-ifs.” Being trained to identify issues, one of the insights that a lawyer offers is a review of what can go wrong with a planned mission. Sometimes the commander may become tied up by all the legal “what-ifs” that a lawyer is trained to identify, thereby inhibiting the commander’s ability to make a decision and creating institutional inertia.²⁸ The commander must

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therefore be watchful not to overuse the advice of SJAs in directing missions and unduly rely upon their supposed authority.

Because an act may be legal, such as to return fire after being threatened and fired upon, does not make it ethical.²⁹ For example, there are numerous instances where soldiers took the initiative, disregarded their legal right to both individual and collective self-defense, and placed themselves in peril for the sake of not harming civilians.³⁰ In not exercising the basic human instinct of self-protection and their legal right to return fire, our magnificent American soldiers were showing the importance of their individual ethics and the American cultural mores which undergird those ethics.

Local practice and international law complicate legal analysis. The range of the SJA's required review sometimes includes "knowing the host country and its government's objectives, the U.S. national security objectives, and the individual mission's goal."³¹ International law may also be part of this complicated analysis. The European Court of Human Rights has articulated and frequently grants a "margin of appreciation" to determine local practice on such matters as states of emergency and military matters, even where alleged human rights violations are in question.³² With Rules of Engagement, there is the requirement that the "ROE . . . evolve with mission requirements and be tailored to mission realities. ROE should be a flexible instrument designed to best support the mission through various operational phases and should reflect changes in the threat."³³

Professional requirement for moral input. A little known requirement of many state bars and the American Bar Association Model Rules of Professional Conduct is for lawyers to render "candid advice," that is, to provide context to their reviews to clients. While candid advice does not require an ethical review, commentary to the Rule advises: "In rendering [such] advice, a lawyer *may* refer not only to law but to other considerations such as *moral*, economic, social, and political factors that may be relevant to the client's situation."³⁴ The bar advises lawyers to render more than a strict review of the law to clients and to put issues into their broader context.³⁵ Recognizing that narrow and technical rendering of advice may be

of little use or even misleading to a client, official commentary on this rule recognizes: "Moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."³⁶ Recognition of this cause-and-effect relationship should drive lawyers to speak out about their moral perception and cause them to call upon commanders to raise such moral issues as perceived from their perspective. If this is not happening, commanders should demand this input of their SJAs.

The importance of commander-SJA interaction. The demands on the deployed SJA to provide an authoritative and useful legal opinion on a proposed or completed action, especially in a combat environment, are indeed difficult to fulfill in such an environment of fluidity, required scholarship, and subtlety. In fast-moving and fluid situations including subtleties outside the bounds of normal civil law and without the time or resources for thorough research or collaboration, the SJA is more limited than he (or the commander) may care to acknowledge. Yet lawyers, being creatures of their training to rely and focus upon the law, sometimes neglect to fully grapple with and disclose these limitations. Few lawyers in private practice counsel clients to consult their own moral compasses when receiving legal advice, as is also sometimes the case when SJAs counsel field commanders. Such lawyers rely on the belief that the law already encompasses our moral considerations in an objective, more thorough, and evenly applied manner. Clients' moral considerations, on the other hand, are largely personal and subjective. Further, they say, a separate ethical review renders the law itself moot.³⁷

These are cohesive arguments, but why not disclose the difficulty of fully advising clients, especially commanders, and remind them to seek other ethical inputs? This view clearly demonstrates the need for commanders *to assemble the full package of advice from various staff members*, together with their own moral compasses, and apply the authority vested in their command. The commanders are competitively selected for their positions by performance and discretion demonstrated over many years of service dealing with these very issues.

Many SJAs enjoy close relationships with their commanders and, as a part of the commander's personal staff, are able to offer candid advice and context in their counsel.³⁸ They also have a role in the decision-making process: The chairman of the Joint Chiefs of Staff has directed that attorneys will review all operations plans and participate in targeting meetings of military staffs. In addition, the Hague and Geneva Conventions contain dissemination provisions that encourage the involvement of judge advocates [SJAs] in ROE matters. A provision of the 1977 Protocol I to the 1949 Geneva Conventions—which although not ratified by the United States is considered declarative of customary international law on this point—expressly mentions the role of “legal advisors.”³⁹ Even with these participatory requirements, the SJA serves dependent on the commander's needs and wants. Commanders may simply choose not to accept the counsel of the SJA. The mantra is: “SJAs advise, while commanders decide.”⁴⁰ SJAs, as do all other staff members, in practice influence only so

much as their advice is incorporated in the decision by the commander.⁴¹ The Goldwater-Nichols Act confirms this organizational structure.⁴² The lawyer-client relationship in private practice is no different. (While each service has its own rules, which are patterned on the ABA's Model Rules, the Army's rules for SJAs are utilized herein.)⁴³ The Services also commend the SJA to provide an “honest assessment, [un] deterred . . . by the prospect that the advice will be unpalatable to the client.”⁴⁴

Commanders also have a responsibility to their SJAs if they are to expect reliable advice from them. Of all soldiers in the field, only the commander has access to the full range of relevant facts. “Facts, if skewed or incomplete whether by neglect or, worse, willfully, can invalidate even the best legal analysis.”⁴⁵ Even the most willing commander may not understand what are the necessary facts, so as to convey them to his SJA and vice versa. Therefore to be effective, the staff SJA must enjoy the trust and confidence of the commander.⁴⁶ The commander must therefore ensure that the SJA has access to the information necessary for the SJA to offer complete legal counsel.⁴⁷ SJAs will be well served to understand the Laws of Armed Conflict, rules of engagement, and the challenges of the asymmetry of combat in gaining this trust. Poor advice, which may be rendered due to a poor understanding of which facts are legally relevant or by an SJA who is overly protective or conservative, may endanger the lives of our soldiers and/or prevent accomplishment of a valid mission. It may also subject the commander, soldiers, or even the SJA to criminal investigation and liability.⁴⁸

Limited time and resources for SJA research.

A further limitation to consider is that the complexity of some issues and knowledge of the individual SJA requires research and collaboration with other lawyers for an SJA to offer effective advice.⁴⁹ In many circumstances, this may not be possible. For example, although the United Nations Charter does not limit the inherent right of individual or collective self-defense, the International Court of Justice still waffles over whether the right of self-defense applies when engaging nonstate actors.⁵⁰ How does an SJA advise on such a critical issue to current conflicts in Iraq and Afghanistan, without access to adequate research materials and/or knowledgeable colleagues? Forward deployed SJAs, who may



(MSGT Buzz Farrell, USMC)

U.S. Marine Corps MAJ T.G. McCann, assigned to the Staff Judge Advocate's staff, 1st Marine Division, checks the identification of a former Iraqi detainee at the Abu Ghraib Prison in Iraq, 6 June 2009.



U.S. Navy LCDR Lorraine Luciano, a member of Multi-National Corps-Iraq Staff Judge Advocate office speaks with the on-site foreman about the construction of a new courthouse in the district of At Tannumah in Basra, Iraq, 21 August 2008.

possess better situational understanding than the vicarious understanding of other SJAs, have little realistic opportunity for such research and collaboration. Limitations due to operational tempo, location, or logistics are inescapable.⁵¹ SJAs stationed away from the battlefield have the opposite problem of lacking “field knowledge.” Therefore, the field commander must consider whether the SJA may offer appropriate advice, especially where there is exigency to the situation.⁵²

The press also has its own, separate effect, which may or may not be reflective of these general cultural norms, and cannot be predicted by the law. Many of the pieces in the press, their expressed opinions, norms, and systems conflict with one another, yet a commander must consider them and make decisions through this perplexity and ultimately shoulder the nondelegable responsibility for it.⁵³ This means that a commander relies entirely on the opinion of an SJA at his peril. While such reliance may be a mitigating factor, the commander

made the decision and remains personally liable, no matter how justifiable.⁵⁴

An historical example. Abraham Lincoln, the “patron saint” of many lawyers, understood that law is limited, when compared to our moral structure. In an 1854 speech on the subject of the newly passed Kansas-Nebraska Act, which allowed the expansion of slavery, he anticipated the importance of the slavery issue when he said: “These principles [expansion of slavery, and ethical concerns over slavery] are an eternal antagonism; and when brought into collision so fiercely as slavery extension brings them, shocks and throes and convulsions must ceaselessly follow. Repeal the Missouri Compromise, repeal all compromises, repeal the Declaration of Independence, repeal all past history; you still cannot repeal human nature. It still will be the abundance of man’s heart that slavery extension is wrong, and out of the abundance of his heart, his mouth will continue to speak.”⁵⁵ The Kansas-Nebraska Act was law and reflective of the

will of the majority of the people; yet, to Lincoln's perceptive eye, the law was unethical, and therefore he could not support it. It took the national tragedy of our Civil War to finally rectify the issue.

The movement toward legal regulation reigns even with commanders in the field, who may have matters that are more urgent on their minds, such as dealing with enemy engagements! Yet the law does not work particularly well under time constraints. A full analysis takes time. Consulting an SJA officer may cause a critical delay and restrict initiative in the chaos of combat or contingency operations. Sometimes, the requirements of the situation and the needs of the commander may preclude a complete consultation. This is another limitation that the commander must consider when reviewing legal advice.⁵⁶

The commander in the field must have the authority to make quick decisions and inflict lethal force, even under risk of mistakes. It is the nature of an inherently dangerous profession, fighting dangerous threats, in a dangerous world. As a nation, we go to great lengths and expense (including exposing our soldiers to harm) to minimize casualties and avoid unnecessary destruction to property, our soldiers, allies, and even enemies. Yet, we also wish to fully equip our commanders with full authority to complete their mission and protect our soldiers that we have placed in harm's way.

The often dizzying demands on a lawyer, exacerbated by the limitations placed on an SJA, sometimes render offering complete advice and opinions an impracticality. Commanders must recognize this, and SJAs must be careful to preface their advice with a warning that, although based on the "best information available," the advice falls short of the more thoroughly researched advice that the SJA would prefer to give. Nonetheless, the legal system will review the decisions of commanders, SJAs, and soldiers, even in wartime, with their subjection to liability as never before. This is the growing reality of social demands on our system, and the inherent risk the commander must accept as a reality of taking command.

Relying on the law unduly does not provide a clear answer, nor does it adequately address ethical issues. Rather, good leadership is a team sport, which emerges in effectiveness through understanding of the limitations of SJA advice, as well as mutual

trust, mutual respect, and interdependence with all staff officers and their collective views, together with the input of the commander's own judgment and ethics.

How the Professional Military Ethic Complements Legal Review

While law does not substitute for morality, ethical reviews offer a supplement that improves the thoroughness of the commander's review. How does the commander evolve to operate in an environment where mistakes and abuses in employing force have such grave consequences and are subject to legal review? Is there a way of taking a hybrid approach by operating under the law, but also improving the discourse with ethical reviews to make more informed combat decisions?

Simultaneously with the general social movement toward more reliance on the law, there is a growing commitment in the armed forces of the United States to the professional military ethic (PME).⁵⁷ The PME represents the ethics of the profession of arms. The program has been widely incentivized within the U.S. military and recently described as: "An exemplary Ethic is [a] necessity for any Profession of Arms given the lethality inherent in its practices. Militaries must establish and enforce an Ethic that governs the culture, and the actions of individual professionals to inspire exemplary performance in order to guard the integrity of the profession."⁵⁸ As a profession, the military has the dual obligations to uphold a high sense of duty and to guard and oversee its deadly resources and skills, in which the rest of society may not participate. It is a contracted relationship with society where the commander is authorized to exercise professional judgment.

The PME is defined as "a set of shared explicit and implicit moral values and principles intended to guide the conduct of military professionals in the performance of their duties."⁵⁹ Otherwise stated, "Our professional military ethic is the system of moral standards and principles that define our commitment to the nation and the way we conduct ourselves in its service."⁶⁰ The breadth of its review is broader than a legal review and focuses on inspiring us to encourage behavior, rather than to control behavior through sanctions.⁶¹ "Rather than constraining the conduct of military professionals, [the moral aspiration approach of the PME] seeks

to inspire the conduct of military professionals [and] appeals to the time-honored martial virtues internal to the military profession. These virtues when internalized become the social-psychological mechanisms that infuse the otherwise morally reprehensible phenomenon (killing and dying) with morally redeeming qualities.”⁶² These “individual and institutional values [inculcated through ethical training] are more important than legal constraints on moral behavior.”⁶³ They are more important in large part because of the complexity and tempo of combat and the commander’s role. The wise lawyer will acknowledge that there are no laws that can cover all contingencies in any issue, especially when in the chaos of battle.

The exemplary leader, through the PME, inspires and motivates through example and positive reinforcement and helps soldiers to attain their best and to be prepared to go “above and beyond the call of duty.” These actions are “the moral aspirations of the military, . . . the traditional martial virtue and honor.”⁶⁴ Yet, these aspirations must be present to motivate our soldiers to do the extraordinary: to kill and be killed, and do so without losing their moral compass, kept in alignment with our culture.⁶⁵ In addition, “forming partnerships and co-opting factions within the system are critical in setting the conditions for experimentation and risk-taking.”⁶⁶ Proficient commanders therefore integrate many skills when formulating their internal perception of ethics in decision making.

Ethics reviews are rarely easier than a well-fought boxing match. Shying away from them, like avoiding a well-placed punch, is natural. Yet, as they struggle and stumble through the process of decision making, most people still independently desire to act out of principle and respect. Our diverse society of many different cultural norms calls on us to rely upon our own sense of ethics, and make these decisions considering a wide array of factors.

Ethics, by definition, involve an internal, in-depth searching of one’s value system and soul, as well as an extensive review of cultural norms, political climate, the law, and the implications of one’s actions against those of the unit, those of the military, those of our country, those of our enemy, and those of world opinion. “Reflecting on [the PME] broadens the usual considerations and invites officers at every level to think through the systems they control and

work under and to explore the behavior they drive, allow, and reward.”⁶⁷

The PME educates the commander’s own sense of ethics and the subjective element to it and builds better leadership. Through the PME, the commander may capitalize on leadership skills and personal ethics to access facts about the command, such as morale, supply, weather, and fatigue, which are less well understood by an SJA, even if he is embedded with the unit.

It takes mental and spiritual toil to make ethical decisions, as well as much training. The higher the command, the greater is the responsibility to uphold the ethics of the group.⁶⁸ Among other responsibilities, “[the PME] must be reinforced in daily operations, leaders must mentor their subordinates and explain how the PME shapes their decisions and unit policies. Preserving the understanding and the meaning of the professional military ethic (PME) is the responsibility of leaders.”⁶⁹ Ethical decisions must issue from the commander’s internal workings, natural habits, and identity. Commanders who live their internal PME, demonstrate an aspirational moral sense and become “powerful instruments of social influence



U.S. Army LTC Robert Morschauser, commander, 2nd Battalion, 15th Artillery Regiment, 2nd Brigade Combat Team, 10th Mountain Division, goes over battle plans with BG Ali Jasim Mohammed (center left), commander, 4th Brigade, 6th Division Iraqi Army, during a combined mission, Lutiafiyah, Iraq, 16 April 2007. (U.S. Army, SSG Martin K. Newton)

by clarifying to [soldiers under their command] what their moral obligations are and what behaviors are held in esteem . . . , as well as behaviors that are unacceptable As military units normally have well-organized socialization processes, we expect these . . . influences to be especially powerful.”⁷⁰ Not only does the commander set a tone, but he “set[s] the conditions for group members to reinforce each others’ ethical behaviors.”⁷¹

The PME encompasses several categories of values and standards including Army Values, the Warrior Ethos, the Noncommissioned Officer’s Creed, the Soldier’s Creed, and the oaths of office. The PME combines these and other values embedded in the military culture into a cohesive whole. Collectively these values and standards provide principles that guide the decisions of military commanders, recognizing the lethal power wielded by our armed forces.⁷² These values and standards operate much like the ethics within the legal profession and are mutually complementary. The PME also sets standards for the profession of arms, which complement the law itself. The growing focus within the services on the PME and the general expansion of reliance on the law are occurring simultaneously, as if to complement one another. The exchange of these respective values, cultures, and expertise takes place every time the commander and SJA communicate in the decision-making process. A greater coherence can be found when they build upon each other’s knowledge. This interaction is particularly important in an age when the commander’s and SJA’s actions are more publically and rapidly scrutinized than ever. To operate under our systems of laws, authority structure, and free press, the commander must be encouraged to verify contemplated actions and aspirations against applicable law.

Conclusion

Notwithstanding the issues with the law presented in this article, there is no practical way to proceed in combat missions in the current environment without a good faith consultation of the law. This article does not condemn commanders who repeatedly consult their SJAs, but encourages them to concurrently and ultimately apply their own moral compass and situational knowledge in making decisions. We wish to fill the current developmental void, where

instruction over the use of SJAs is not offered, and encourage commanders to apply their own morals when many of their challenges are not foreseeable. That commanders possess the freedom to act in a manner consistent with their personal beliefs, as informed by the PME, is critical. This is necessary to effective leadership of those they command and is the only manner of empowering commanders to make rapid and discerning decisions. In a collaborative approach, the commander should weigh legal advice carefully, giving it the deference it is due with respect to other staff insights and the commander’s own PME, as well as the many other issues inherent in combat decisions, chief among them being risk to mission, risk to troops, and risk mitigation. The dialog is both complicated and necessary.

The opinion of an SJA best serves to validate the commander’s own, already thought out, ethical review. If his ethical opinion conforms to the legal opinion, and other staff officers’ opinions, the mission should proceed. But, if there is a difference, the commander must, if possible, delay and review the distinctions before giving a command. Finally, the law is complicated and requires time to parse through for both SJA and commander; the law is an inadequate and incomplete source for guidance when a situation calls for a split-second decision. To protect our and others’ liberties, the law must and will be employed to review major infractions and have an important place in the decision-making process. This article stands as a word of caution against *overreliance* on legal advice.

In practice, command decisions are, of course, not based on one-dimensional inputs. Neither is the advice of SJA officers made in the vacuum of the law, without the bright light of reality. Field commanders routinely allow many inputs to make their decisions: orders from superior officers, intelligence reports, character and condition of troops, field conditions, supply requirements, and a personal sense of ethics. Likewise, SJA officers are also not simply legal automatons, especially when attached in the field with the units they advise, and they possess an understanding of combat exigencies beyond the text of law books. They can be force multipliers in assisting commanders to think creatively by shaping strategic alliances, suggesting fresh ideas, and avoiding mistakes.⁷³ Lawyers, in recognition of the limitations of the law, can advise their commanders

with a professional rendering of applicable law that includes recognizing that the law may not satisfy moral standards. Such thoroughness complements the commander's application of the PME. This will aid in the success of our military operations and better protect the soldiers who risk their lives in performing them.

As one of my professors advised: "Because there are injustices and problems in our system, does not mean we dispatch the entire process. As lawyers, we have a duty always to do our best, learn from our inevitable mistakes, and improve the process. It is the very nature of the legal process and government in the common law world. Our laws can never hope to possess the infallibility of God's laws."⁷⁴ The law's nature is that it should be constantly selfcorrecting by its repetitive review of new facts and previous decisions, and the application of these decisions to issues currently before the court.

Let us therefore realize the contributions and fallibility of law and constantly confront its errors. If we believe in the rule of law, let us build up a corps of sophisticated and worldly SJAs who understand their role in advising commanders, viewing their counseling as part of the decision process, and not an overlay under which all others must labor, encouraging commanders to perform ethical reviews, while putting forward their own candid advice. Commanders should realize that

the SJA's counsel is merely an opinion, albeit a professional one, and one to be closely considered. The final authority remains in the commander, who possesses the broadest view of the situation and applicable facts, has the greatest access to outside advice, to include legal counsel, and retains ultimate responsibility for the decisions made.

The importance of the military commander's ethical acts has never been more critical. The first line in a front-page article of the Sunday Review section of *The New York Times* (21 August 2011), in an article by William Deresiewicz, entitled "An Empty Regard," reads: "No symbol is more sacred in American life right now than the military uniform." It goes on to state: "The military is can-do, the one institution—certainly the one public institution—that still appears to work. The schools, the highways, the post office; Amtrak, FEMA, NASA, and the T.S.A.—not to mention the banks, the newspapers, the health care system, and above all, Congress: nothing seems to function anymore, except the armed forces—the one remaining sign of American greatness."⁷⁵ There is a social duty in our times, like it or not, which is unabashedly the great motivator of those in military service. Recognizing the new responsibilities placed on the shoulders of our military, I trust the military may live up to this standard, even while the rest of us are still condemned to muddle through. **MR**

NOTES

1. U.S. Army, Field Manual (FM) 1-04, *Legal Support to the Operational Army* (Washington, DC: U.S. Government Printing Office [GPO] (2009), paras. 1-5 to 11; H.R. McMaster, "The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War," *The Army Lawyer* (May 2011): 35; David Luban, "Lawfare and Legal Ethics in Guantanamo," 60 *Stanford L. Rev.*, 1981, at 1999 (2008); Glen Sulmasy and John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 *UCLA L. Rev.*, 1815, at 1838-842 (2007).

2. National Defense Authorization Act, Independent Review Panel to Study the Relationship between Military Department General Counsels and Judge Advocates General, Section 574 (15 September 2005).

3. See answers.com, "What role does law play in society?" (2011).

4. Administrative Office of the United States Courts, *2010 Annual Report of the Director: Judicial Business of the United States Courts* (Washington, DC: GPO, 2011), 12-14 (increased case filings).

5. COL Clarence D. Turner, communication with author, 1 December 2011.

6. Edmond Nathaniel Cahn, *The Moral Decision: Right and Wrong in the Light of American Law* (Bloomington: Indiana University Press, 1981, originally published 1955).

7. Jeremy Bentham, *Of Laws in General*, ed. Hart, HLA (1970) and Jerome E. Bickenbach, "Law and Morality," in *Law and Philosophy*, vol. 8, no. 3 (1989): 291.

8. 31 CFR 10.35(c)(3)(iii) (2002).

9. Philip Zelikow, "Legal Policy for a Twilight War," Annual Lecture to the Houston Journal of International Law (2007). Matthew Moten, *The Army Officers' Professional Ethic, Fort Leavenworth Ethics Symposium: Exploring The Professional Military Ethic: Symposium Report*, 28 (November 2010).

10. Alastair Macdonald, "Analysis: Bin Laden again unites, then divides, U.S. and Europe," Reuters (5 May 2011) available at <http://www.reuters.com/article/2011/05/05/us-binladen-europe-usa-idUSTRE74406C20110505>.

11. Al Shine, conversation with author, 3 January 2012.

12. COL Arthur D. Simons, Center for the Study of Interagency Cooperation, *Interagency Handbook for Transitions* (2011), 11-13.

13. *Ibid.*, 24.

14. Primary among them being the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law 107-56 of October 26, 2001; 115 STAT. 272.

15. While the purpose of this article is not to define the causes for the growing reliance on SJAs, there are many hypotheses. An unwillingness of some leaders, military and political, to underwrite subordinates' mistakes and to look to assign blame may be one reason. Some say it is the press's involvement where the opinions of journalists are unpredictable and wield great sway over political opinion. Others claim excessive political involvement in military decisions—e.g., Vietnam and, more recently, GEN Clark's depiction of his command in Kosovo—where every targeting decision required approval of both President Clinton and NATO Secretary-General Javier Solana, as well as American and European lawyers. Wesley K. Clark, *Waging Modern War* (New York: Public Affairs, 2001). Other commanders may seek the security that a legal opinion supporting their action (or inaction) offers. Still others claim that coalition warfare necessitates legal involvement, as every participating nation's politicians wish to protect themselves from political repercussions. Just wading through each participating and host nations' law can be a major undertaking. The number of lawyers in the Army Judge Advocate Corps alone has grown to over 3,400, according to a check of the Army JAG Corps website on 7 December 2011.

16. Martin L. Cook, *Professional Ethics Across the Career Spectrum* (Fort Leavenworth Ethics Symposium: Exploring the Professional Military Ethic: Symposium Report, November 2010), 8.

17. Philip Zelikow, "Legal Policy for a Twilight War" (Annual Lecture to the Houston Journal of International Law, 2007).

18. Judge Advocate General's School, Charlottesville, VA, *Operational Law Handbook*, 35 (2010).

19. Sean T. Hannah, communication with author, 7 December 2011.

20. Robert S. Mueller, III, address before the National Symposium for United States Court of Appeals Judges, Washington, DC, 4 November 2011.

21. Alane Kochers, *No More Secrets: National Security Strategies for a Transparent World*, March 2011, 2.

22. Dan McCauley, "Design: Thinking, Not Process," *Small Wars Journal* (2011): 1-2, et seq.

23. See generally, Charles J. Dunlap, Jr., *Law and Military Interventions: Intervening Humanitarian Values in 21st Conflicts, Humanitarian Challenges in Military Intervention Conference*, Kennedy School of Government, Harvard University, Washington, DC, 29 November 2001.

24. Harold Koh, "International Lawyering for the U.S. Government in an Age of Smart Power," address to Annual Review Conference of The Standing Committee on Law and National Security of the American Bar Association, 1 December 2011.

25. Peter L. Jennings and Sean T. Hannah, "The Moralities of Obligation and Aspiration: Towards a Concept of Exemplary Military Ethics and Leadership," *Military Psychology* (2011): 23-1, 5; and see generally, A.C. MacIntyre, *After Virtue* (IN: University of Notre Dame Press, 2007).

26. *Ibid.*, 23-12.

27. *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969). Brian Imiola and Danny Cazier, "On the Road to Articulating Our Professional Ethic," *Military Review* (September 2010): 14-16. The rationale is that it is inappropriate for a court to expend time on a theoretical discussion before there is a real issue. Further, early adjudication deprives the courts of the opportunity to review a concrete set of facts in the current dispute before them.

28. LTG Bruce Fister, communication with author, 19 November 2011.

29. This is the inherent right of self-defense. Chairman of the Joint Chiefs of Staff Instruction 3121.01B (2005); United Nations Charter, Art 51.

30. Robert Caslen, communication with author, 13 November 2011. Judge Advocate General's School, Charlottesville, VA, *Operational Law Handbook*, Art 71 (2010). See also Donovan Campbell, *Joker One* (New York: Random House, 2009), 128. "Our decentralized small unit operations require life and death decisions to be made by our most junior soldiers, with front page of the *New York Times*' consequences. 'Strategic corporals' are what we call them. But what drives these decisions are the values they are brought up in: values that are part of our Army culture and part of our military ethic. And that are integrated into our training, and demonstrated by our leadership. But this ends up being the basis for the ethical behavior—or not."

31. Ann Castiglione-Cataldo, "The Judge Advocate's Dual Mission in a Low Intensity Conflict Environment; Case Study: Joint Task Force-Bravo, Where 'Can I Shoot the Prisoners?' Is Never the Question" (thesis presented to the Judge Advocate General's School, United States Army, 1991) and Cf. Celestino Perez, Jr., *The Army Ethic and the Indigenous Other: A Response to Colonel Matthew Moten's Proposal, Fort Leavenworth Ethics Symposium: Exploring the Professional Military Ethic: Symposium Report* (November 2010), 255-68. The SJAs advise must consider politics, yet be free of political bias. Joint Publication (JP) 3-07, 8.02.3, "Drafting Considerations; and Eric Talbot Jensen and Geoffrey Corn, "The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress," *44 Hous. L. Rev.*, 553, 571-76 (2007). An understanding of *jus cogens*, the principles of international law so fundamental that no nation may ignore them, would be an esoteric but also required part of the SJA's analysis.

32. See for example, *Case of Klass*, 28 Eur. Ct. H.R. (ser. A) (1978) (national security); *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) (1978) (state of emergency).

33. JP 3-07, 8.02.2, Purposes of ROE.

34. ABA Model Rules of Professional Conduct, Rules 1.1 and 2.1 (2004) (emphasis added).

35. Alternatively, "review of the law" is considered by some attorneys to include minimum ethical considerations. Under this interpretation, a "strict review of the law" satisfies the requirement to provide "candid advice." See also Cahn.

36. ABA Model Rules of Professional Conduct, Rule 2.1 (2004) (emphasis added). Recognizing the requirement to offer "candid advice," the depth of such advice varies greatly according to the type of lawyer. Some lawyers are effectively independent from and usually not party to internal issues and may have difficulty in connecting to the client's issues so as to effectively offer candid advice. SJAs are often a part of the decision-making process, offered broad access to information, and tasked with rendering ethical decisions. They often possess good access to information through their direct experience and confidential sources. This alignment of interests may provide the commander with a level of trust rarely available to a lawyer in private practice. James S. Hilboldt, Jr., Esq., Senior Counsel, International, Raytheon Company, communication with author, 16 August 2011.

37. COL David E. Graham, retired, Executive Director, The Judge Advocate General's Legal Center and School, U.S. Army, communication with author, 1 December 2011. See also Cahn.

38. See U.S. Army, Army Regulation 20-1, 27-1, 165-1, and 360-1 (Washington, DC: GPO). Joint Chiefs of Staff, *Doctrine for the Armed Forces of the United States*, V-15 (2007).

39. JP 3-07, 8.2.1, *Commander's Responsibilities*.

40. Graham.

41. National Defense University, Norfolk, VA, Joint Forces Staff College, *The Joint Staff Officer's Guide* (2000), 1-45. In this environment, the SJA is required to remain professionally independent from the commander—sometimes a difficult task.

42. *Goldwater-Nichols Department of Defense Reorganization Act of 1986*, 10 USC Sect 161 et seq. (2006), see National Defense University, Norfolk, VA, Joint Forces Staff College, *The Joint Staff Officer's Guide*, 1-31 (2000).

43. See also, regulations on government lawyers, 28 U.S.C. 530B and implementing regulation, 28 CFR 77.

44. U.S. Army Regulation 27-26, *Rule of Professional Conduct for Lawyers* (Washington, DC: GPO), r 2.1 Comment. See also r 8.5(f) (requirement that SJAs conform their conduct to their respective branch of service, as well as their state bar affiliation).

45. Kenneth F. Miller, Esq., communication with author, 20 November 2011.

46. James F. Garrett, *Necessity and Proportionality in the Operation Enduring Freedom VII Campaign* (U.S. Army War College, Carlisle Barracks, PA, 2008).

47. *Ibid.*

48. Under international law, precedents set in the Nuremberg tribunals expose SJAs to criminal liability. See Uniform Code of Military Justice [UCMJ] Art 92 (2002); Center for Professional Responsibility, American Bar Association, *ABA Model Rules of Professional Conduct*, Rules 1.1 and 2.1; and Cf. Milan Markovic, *Can Lawyers Be War Criminals?* 20 Geo. J. Legal Ethics, 347, 359 (2007) and Cf. *Three Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council, Law No. 10*, at 1083 (1951). Clients rarely request ethical advice of the private attorney. It is not generally their expectation to look to a lawyer for such counsel. Similarly, other than the written rule to provide "candid advice," the bar does not encourage offering ethical advice and the subject is rarely discussed. The several Judge Advocate General Schools of the U.S. Armed Forces actively stress the importance of providing ethical advice to field commanders. FM 27-100, *Legal Support to the Operational Army* (Washington, DC: GPO, 1 March 2000), 1-5. For example, an SJA would be liable where found to have helped a client perpetrate a crime or for dereliction of duty. UCMJ Article 92 (2002). This can occur where the SJA (1) has certain duties, (2) knows or reasonably should know of said duties, and (3) willfully or through neglect or culpable inefficiency is derelict in performance of those duties. Cf. Scott A. DiRocco, "Holding the Line: Understanding the Role of Independent Legal Counsel in Command Decision-Making," *Army Law*, 3, 19 (December 2010). Further, an SJA would be liable for failure to report a law of war violation and/or failure to initiate a proper investigation. *Ibid.*, 3, 18-20. See also The Department of Justice, Office of Professional Responsibility Final Report, "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," 29 July 2009. Whether Department of Justice attorneys in that case rendered effective advice or crossed the line into something else was reviewed. The two investigated attorneys were cleared of wrongdoing, but the fact that their advice was the subject of so much scrutiny and made public is interesting if not remarkable. Sometimes the ethical discussion subtly finds its way into legal counsel, even with lawyers in private practice, in a cost-benefit analysis. In a divorce matter, for example, a lawyer, even when loathe to become too preachy, may advise a client: "If you go the extra mile, surrender some legal right, then you may have bought less turmoil and a longer lasting peace. This action may, in turn, constitute a step toward keeping your children out of a protracted battle." Mills Rouse, Esq., a lawyer in private practice, communication with author, 3 August 2011.

49. Jeff A. Bovarnick, Foreword to *2010 Manual for Military Commissions, The Army Lawyer* (2010), 1.

50. See International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion), para. 139, 9 July 2004. International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, para. 36, (meeting the "necessity" standard before using force in self-defense), Paras. 51, 64, and 78 (Self-defense is only permitted when an "armed attack" or "aggression" is against a state, and not against indiscriminate acts of violence that may harm any number of States [such as the instant mines laid in international shipping lanes and missiles fired at ships of several different nationalities], and the self-defense from such acts must be against only another state actor) 6 November 2003. Indeed many U.S. scholars believe that the ICJ is rewarding aggressors and punishing those who engage in self-defense. John Morton Moore, Use of Force Decisions of the International Court of Justice: Triumph or Tragedy, 5 December 2011.

51. Scott DiRocco, *Holding the Line: Understanding the Role of Independent Legal Counsel in Command Decision-Making, The Army Lawyer* (December 2010), 2.

52. Practical advice to the SJA is offered by a retired SJA: "I've found that in the military setting (and I'm sure in private practice) the train is often moving fast. If I want my advice to be heard, I need to be on the train. In those situations I will give my best advice but inform the commander that advice is limited by the time I've had to research it." Michael Feighny, Esq., senior civilian attorney for the Corps of Engineers, Seoul, Korea, *Correspondence*, 26 November 2011.

53. Judge Advocate General's School, Charlottesville, VA, *Operational Law Handbook* (2010), 35.

54. Jennings and Hannah, 23-2. Something may be legal AND ethical, yet still unseemly in our culture. It may represent new thinking or change. A given culture may attack things new or unfamiliar using ethical or moral (or even legal) arguments when, in point of fact, the behavior is simply different. COL Thomas A. Kolditz, head, Behavioral Science and Leadership Department at West Point and director, West Point Leadership Center, communication with author, 27 July 2011. See also, *The Constitution of the International Military Tribunal art 1*, 8 August 1945.

55. Speech delivered at Peoria, IL, 16 October 1854.

56. Feighny, and DiRocco, 2.

57. Fort Leavenworth Ethics Symposium: Exploring the Professional Military Ethic: Symposium Report (November 2010) and Cf. George W. Casey, Jr., "Advancing the Army Professional Military Ethic," *Joint Force Quarterly*, 3d Quarter (2009): 14-15, and Cf. Robert L. Caslen, Jr., and Erik Anderson, "Reconnecting With Our Roots Reflections on the Army's Ethic," *Military Review* (September 2010): 114-15.

58. Hannah, Doty, and Jennings, *Building Moral Character for an Era of Persistent Conflict and Beyond*, Center for the Army Profession and Ethic, U.S. Military Academy (2011), 23.

59. Jennings and Hannah, 23-2.

60. Casey, 14.

61. Jennings and Hannah, 23-6.

62. *Ibid.*, 23-5. See also Don M. Snider, Paul Oh, and Kevin Toner, "The Army's Professional Military Ethic in an Era of Persistent Conflict," *Professional Military Ethics Monograph Series*, 1 (October 2009), 1-30.

63. McMaster, 37, 61.

64. Jennings and Hannah, 23-2.

65. *Ibid.*, 23-4.

66. John B. Richardson, IV, *Real Leadership and The U.S. Army: Overcoming A Failure of Imagination to Conduct Adaptive Work* (December 2011), 18.

67. Martin L. Cook, *Professional Ethics Across the Career Spectrum* (Fort Leavenworth Ethics Symposium: Exploring the Professional Military Ethic: Symposium Report, November 2010), 13.

68. *Ibid.*, 14; Cf., A. Edward Major; Lee Deremer and David G. Bolgiano, "Fixing the Rudder Post on a Rudderless Ship: The Need for Ethics Training of Strategic Leaders," awaiting publication, *Proceedings*.

69. Caslen and Anderson, 115; Diltrice M. Thomas, "Exploring the Professional Military Ethic," *Command and General Staff College Foundation News*, no. 10 (Spring 2011).

70. Jennings and Hannah, 23-13. See also G.R. Salanick and J. Pfeffer, "A Social Information Processing Approach to Job Attitudes and Task Design," *Administrative Science Quarterly*, 23 (1978): 224-53.

71. *Ibid.*

72. Casey, 14-15.

73. Bolgiano, 10

74. E. Adamson Hoebel, Esq., "Law and Anthropology" (lecture, University of Arizona, Tucson, Winter, 1974).

75. *New York Times*, 21 August 2011, Sunday Review Section, 1.



U.S. Army LTC James Zieba, a staff judge advocate with Task Force Cyclone, and Abdul Manan Atazada, the chief judge of the Kapisa Province of Afghanistan, discuss building plans for a jail in the Tagab Valley District center area of the province, 25 August 2009.

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