

PROFESSIONAL CONDUCT ON THE BATTLEFIELD

It is an honor and a pleasure to be here and to participate in this important program sponsored by the United States Court of Appeals for the Armed Forces.

I come before you today wearing a very different hat. It has been my privilege to serve this Honorable Court as the Chief of the Army's Defense Appellate Division in troubled times and to serve on this Court's Rules Advisory Committee. I have served The Judge Advocate General's Corps in its Litigation Division and litigated constitutional soldier matters in the Federal Courts. When the Military Justice Act of 1983 authorized service members to Petition the Supreme Court, via Writ of Certiorari, it was my honor to file the first brief on behalf of a soldier under that Act. As you can see, I am a technical litigator at heart.

BUT – and this is a big but – as a military uniformed legal officer, I proudly served two professions: The Legal Profession AND the Profession of Arms. As is true with any “corporate counsel,” we military lawyers are expected to represent our client's interests. In a nation that so reveres the Rule of Law nothing could be more worthy than to assist our

client in articulating, practicing and upholding the proud tradition of the Profession of Arms.

As you know, the Uniformed Lawyer in the Department of Defense can wear three different hats. The traditional “JAG Lawyer” is the backbone of the military justice system. But there are “Legal Advisers” who serve Combatant Commands in operational matters—especially when “Uncle Sam Draws his Sword.” In other words, they serve the warfighters. There can also be service as a “General Counsel”—a more political “hands on” adviser often interacting with other governmental departments.

Professional conduct on the battlefield plays an important role in all three legal hats. My intensity in this professional area comes from very practical life lessons. Within three months of graduating from the University Of Virginia School Of Law, I found myself in Vietnam—by choice—performing the normal JAG officer functions. Historically, the largest General Court Martial Jurisdiction had been 50,000 in World War II. My jurisdiction in Vietnam was 150,000 and eight of us—serving as either Trial Counsel or Defense Counsel—tried all of the cases. I tried a capital case by myself with the 1st Cavalry Division in the Central

Highlands some seven months out of law school. In Vietnam I traveled around the country and lived with the different units I served. Incidentally, I decided to remain in the Army because of the professionalism I witnessed in Vietnam.

Litigation in the Federal Courts exemplifies the general counsel function since it involves interaction with the Department of Justice, the Office of the Solicitor General, and various United States Attorneys. Not only must a uniformed lawyer be a technical litigator but that lawyer becomes an advocate and spokesman for the Profession of Arms. After all the courts continually—and brilliantly I might add—articulate the Profession of Arm’s contract with the society.

And, of course, Legal Advisers assist commanders in their “war fighting role.” Operational planning and execution are key. When to shoot: Who to shoot: and How to shoot are fundamental questions. Nothing has more moral or ethical consequences than “killing people and breaking things” in the name of the state. Doing so professionally is the essence of the Profession of Arms.

This leads me to the core of my remarks. How do we military lawyers help our client articulate their proud professional heritage? To

facilitate doing that, I want to share with you my remarks which I gave at the 2014 Ethics Symposium sponsored by the Command and General Staff College and the Command and General Staff College Foundation.

In preparing these remarks, I attempted to articulate the WHOLE of the ethic of the American Profession of Arms. That was my original theme. However, another theme quickly emerged as I listened to Brigadier General Hughes' Opening Conference Remarks concerning the need for a leader to mentor his military subordinates. One phrase rang in my ear—"unless you tell them why." We as members of the Profession of Arms ourselves—and our subordinates must understand WHY we are a proud profession. We ARE different and have a right—indeed an obligation—to be different. We should be proud of that difference.

Please allow me to share and thus to reiterate the remarks I made to future military commanders. In doing so I am suggesting ways to underscore the unique and historic pride of the Profession of Arms which is a key pillar in upholding our Democracy and the Rule of Law. Note the important role of the Legal Profession in these remarks.

The Profession of Arms can be justifiably proud of its legacy of chivalry, adherence to an ordered discipline, and defense of life and liberty. We are members of a profession that takes its cues from the likes of Sun Tzu, Joshua, and Clausewitz—but whose uniquely American development has been shaped by freeing a country from colonial rule, by defending and expanding frontiers across a vast continent, by preserving the nation during a great Civil War, and by providing protection, government, and often infrastructure for much of the United States as our population moved West.

The Military Profession in America was thrust on the World Stage with the Spanish American War, World Wars I and II, Korea, Vietnam, and the Cold War. We are further shaped by being—as some would say—the military arm of the indispensable World Super Power. Indeed, our world further shifted with the on-set of the Age of Terror and with the conflicts in Afghanistan and Iraq. Our Military Profession has always faced serious unique challenges with each passing generation. Yet what is the key to military professionalism so necessary for world stability? What can be learned from the past—to use in the present—and to confidently bequeath to the future?

Our profession—like other great professions—has a core of values, beliefs and practices that make us distinct. Collectively these values, beliefs, and practices are the ethics of our profession. These practices and beliefs are so essential that they are considered the foundation of the Profession of Arms. Stated differently, if one deviates from these norms, one would be subject to censure, discipline, or expulsion. In this regard, we are like every other profession.

Before examining these norms, let us look at the role of the Profession of Arms in American society. I suggest that one would start with the basics expressed in our Oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and to “bear true faith and allegiance to the same.” Note the uniqueness in world history of defending an idea. We are to support and defend the Constitution. Usually oaths require defense of king, country, land, religion, or tribe. Yes, our Oath impliedly contains the usual defense of country but our Oath is much more sophisticated. We are to “defend” and that means that use of force is contemplated. In order to emphasize our primary function—professional battlefield conduct—some insist on labeling that function as “killing people and breaking things in the name

of the state". No sugar coating our essential function. But our essential function transcends "killing people and breaking things."

The function of our Oath is to defend the state in a society that rightfully reveres the Rule of Law. From a secular legal perspective, this would seem to present a conflict between Law and Armed Force. Such conflict need not exist. Both Law and Armed Force compete for authority. The Law glorifies system or means while Armed Force glorifies results. Indeed, there are stunning contrasts in these two approaches. Law restricts power while Armed Force uses power. Law emphasizes due process while Armed Force prizes mission accomplishment. Law seeks to eliminate violence while minimizing disruption and instability. Conversely, Armed Force employs violence and creates disruption and instability in order to impose the sovereign's will. Furthermore, the Law civilizes and organizes while Armed Force provides protection when the system breaks down whether because of war, civil unrest, or natural disaster. But note—and this is the point—that by very different means both Law and Armed Force seek the preservation of the state each in its own way by guarding the hallmarks of an ordered society—stability, safety, and security.

But we are to be more than guardians of stability, safety and security. We are to be peacekeepers. In the religious rendition of our contract with society, the Catholic Pastoral Letter on War and Peace (The Challenge of Peace: God's Promise and our Response) articulates the military and society's mutual contractual obligations. That societal contract states that a soldier "is the custodian of the security and freedom of his country and is a peacekeeper." The soldier must behave professionally – especially toward innocent civilians. Senior military leaders "stand admonished":

--To exhaust peaceful alternatives

--To be surgical in the use of force

--To remember the obligation to train and educate soldiers

--To treat soldiers with dignity and respect

--To avoid dehumanization of the adversary.

Society, also, assumes certain responsibilities. Citizens must think about the effects of war upon soldiers. They must provide an appropriate place for soldiers in society including:

--Living and working conditions

--Adequate financial recompense

--Opportunity for spiritual growth – and a

--Dignified mode of life.

I would add another contractual duty for society. Since all citizens are an accountable part of the process that issues through their elected representatives to members of the armed force the warrant to wage war, all our citizens must be responsible participants in the political process. To me, the important concepts of the societal contract for soldiers are that they are Peacekeepers and Guardians of our country's freedom and security.

Another way to explore the Armed Forces role would be to examine the American military's place in society as brilliantly articulated in a series of Supreme Court cases arising from the Vietnam War. The vital role of the Armed Forces in our society was best articulated in 1974 by the United States Supreme Court in the infamous case of Doctor (Captain) Howard Levy who was charged with conduct unbecoming an officer for urging Black enlisted men to refuse to obey orders to go to Vietnam. In upholding his conviction, the Supreme Court said:

"This court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We

have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.” (Levy v. Parker, 417 U.S. 733, 743 (1974)).

The Court continued:

“For the reasons which differentiate military society from civilian society, we think congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which military society shall be governed than it is when prescribing rules for civilian society.” (Levy v. Parker, 417, U.S. 733, 756 (1974)).

In short, the Armed Forces are different and have the right – indeed the obligation – to have and uphold a higher and a different standard.

How do members of the Armed Forces prepare themselves for their unique societal role? I suggest three ways: displaying personal physical and moral fitness, insuring professional conduct on the battlefield and

gathering, learning, using, and sharing the extensive knowledge of matters relevant to the profession of arms.

In any organization, the fundamental building block is the individual. The Army says it best: "Be all that you can be." That statement implies moral, physical, and intellectual preparedness. Even a key portion of the well-known Boy Scout Oath: "To keep myself physically strong, mentally awake and morally straight." reflects the importance of the individual in any organization. The military profession expects those who join its ranks to maintain and to be held to a higher standard and to a different standard. In the military, lives depend upon competence, trust and bonding. Trust is the operative word. Trust is founded on a just cause (mission) espoused by a leader who insures that the mission is accomplished in a legal, moral, and professional manner. In our profession that is done with a competent, well trained, cohesive unit following trusted leadership.

The Supreme Court says the military is a "specialized society" and indeed it is. The military demonstrates that specialization in two ways. As we have just discussed, the military sets and upholds higher standards of personal behavior. But it does so in another way. While members of

the military are performing their core combat mission, individuals are not only expected to perform their duties according to their standard operating procedures and professionally accepted rules, but if they have knowledge that their subordinates are breaching those rules and they have the ability to do something about that breach and do not intervene, they will be held criminally responsible for their inaction. This is Command Criminal Responsibility and is the key to responsible command. Criminal law normally requires a combination of an act (actus reas) and intent (mens rea). In the military, the act can be the act of subordinates for whom the accused is responsible. The uniqueness and importance of the military's role in society make the military the only profession held criminally responsible for inaction.

A side note before moving on. The uniqueness of the Profession of Arms is in our Constitution itself which gives to the Congress the power to make rules for the land and naval forces – a unique power underscored by the Supreme Court—as we heard a few minutes ago. For example, Congress protects a higher ethical standard in our more authoritarian military culture where service personnel are expected to speak up and where silence may be a “lie.” It did so with the protection against self-

incrimination provision in Article 31 of the Uniform Code of Military Justice some sixteen years before the Supreme Court's Miranda Warning was constitutionally required. In other words, it takes a formal warning to alter our higher and different standard of expecting a truthful answer when silence is not an option.

Professional conduct on the battlefield is the activity which focuses our ethics. We are warriors and proud of it. The goal or standard influencing our conduct is driven by two components – the law of war and the just war theory. Of course, the military is not a courtroom nor is it a debating society. The law of war and just war theory become usefully practical in training, in standard operating procedures, in rules of engagement and – importantly – in discussing our unique role with the citizens we serve. The phrase “law” in “law of war” is not fully understood. The “rules” hence “law” are derived from a complication of past military practices. It is the “common law”, if you will, of military practice that becomes – because of tradition and practice – the rule of law. These common practices were first codified for Americans in President Lincoln's Lieber Code which influenced the later Hague and Geneva Conventions.

Just War is important because it is the language that has been used for centuries to discuss the use of force. Each component of just war has its own theory and historical development. Just War is used in public debate about the use of force and in government policy papers where use of force is at issue.

One of the most important uses of Just War language and Law of War is the necessity for the Profession of Arms to articulate how and why it has acted and thus to be accountable for the expenditure of lives, treasure, and sacred honor. Increasingly, this task falls upon the spokesperson warfighter who must fight during the day and then articulate later to the American people – often almost simultaneously on television – what has occurred during a military operation.

Articulating professional conduct on the battlefield may be as important to the outcome of hostilities as the battle itself. Allow me to share with you what I learned from my Green Beret Army War College students. The great German War theoretician Karl von Clausewitz discussed the “center of gravity” for any nation – where a nation was most vulnerable and thus where force should be applied. History teaches – especially since Vietnam – that America’s Center of Gravity may not

necessarily be on the battlefield. In a democracy such as ours where the rule of law is so respected, the war-fighting strategic difficulty is in maintaining the hard won political consensus to go to war in the first place. That difficult go-to-war consensus is attacked by allegations that the war itself is illegal and unjust and that it is being fought illegally. Of course, the counters to such allegations are disciplined professional behavior on the battlefield and the ability to articulate the appropriate expenditure of lives and treasure. This phenomenon is now known as “lawfare.” Increasingly, lawfare necessitates the existence of another military “front” which must be maintained with care.

But knowledge of Just War and Law of War—the ethical language of the Profession of Arms—is important for another reason. Carl von Clausewitz also taught that sound military policy depended upon a dialogue between the military, the government and the people. Thus, sound national security policy depends on a constant ability of the military to articulate—in the most practical of terms and in context with the topic under discussion—what is required to defend our country.

Having discussed the first pillar of military professionals—personal fitness and morality—and the second pillar—insuring professional

conduct on the battlefield, let's turn to the third pillar—gathering, learning and using extensive knowledge relevant to the profession of arms. One immediately thinks of history, political science, economics, technology, and current events. All—of course—are important at different times. It is the sort of knowledge that allows one to focus and appropriately use—with personal moral authority—the wisdom of our profession. For example, senior lawyers in Kansas City arrive at their offices about seven thirty in the morning having read the *New York Times*, the *Wall Street Journal* and the *Kansas City Star*. How could one ever give appropriate legal advice in the absence of current information infused with knowledge gained from a lifetime of professional study? The same is true when military officers are giving advice. They must exercise their professional judgment using current knowledge while displaying their best people skills. Stated succinctly, a military officer needs to be one of the most informed people in the room and should display exceptional “political skills.” Note, I did not avoid the word political. A military officer in such a setting should be the best politician in the room—BUT he should be fired if he is partisan.

Military personnel should always train themselves for what may come next. They must be physically and morally fit, have an inquiring mind, and have the ability to listen and be attuned to surrounding events. They must be able to articulate the basic tenants of their profession which is focused on professional conduct on the battlefield. Commanders work with and through others. Given a mission, they articulate the ways and means for its accomplishment. One needs to be prepared at every step of a career. Promotion means more responsibility and the requirements for greater knowledge and skill. We all want to be prepared – and we train, practice and think for a lifetime. Membership in the proud Profession of Arms demands no less.

As I concluded in my remarks to those military commanders:

- 1. Be physically fit. We are a physical profession. Even those who are not currently doing physical tasks must have disciplined stamina.**
- 2. Be morally fit. Take the high road. Set the example. Do not let the uniform become tarnished.**

3. Be an activist on the battlefield. Use every means available to insure that the personnel under your control are executing the mission in a professional manner.
4. Never cease to study and learn the lore of the Profession of Arms whether it be history, strategy, tactics, logistics, or geo-politics. Be mentally ready when the time comes.

That was my message to future military commanders. I used it today as a “laboratory example” of one attempt to engage in a dialogue with the Profession of Arms highlighting matters legal. This attempt underscores my second theme – General Hugh’s remarks – “unless you tell them why.” We lawyers have much to contribute and are very much a part of that process.

Telling our citizens “why” is what all of us do. Judge Advocates in the very understanding of their role and in the value judgments they make. The General Counsel in articulating the special needs of the Defense Department. But the real requirement for explaining “why” falls in the lap of those who are lawyering when “Uncle Sam Draws His Sword.” Perhaps I can best articulate this fact by discussing my experience as Legal Adviser.

On my first day as the Legal Adviser to the European Command, I was ushered into the Office of my Four Star Commander. The first words out of his mouth were: "Colonel Eckhardt, have you ever heard of the Long Commission Report?" I replied: "Yes, sir, I am familiar with it." Then with a gruff growl he said with unforgettable emphasis: "Don't you ever forget it."

The Long Commission was the official inquiry into the tragedy surrounding the loss of 241 Marines in the Beirut Marine Barracks Bombing in 1983. The inquiry centered on the Rules of Engagement which were much stricter for the nearby Ambassador's Residence than they were for the natural military target of the Marine Barracks. The Rules of Engagement had not been appropriately overseen and there actually was discussion of court-martialing the NATO Commander, General Bernard Rogers.

What my Commander told me—emphatically—was that it was my job to always see that the Rules of Engagement—and other operational matters—were correctly handled. In other words, the Commander himself, his Deputy, his Operations Officer, perhaps his Intelligence Officer and certainly his Legal Adviser had their "necks in a noose" and

would be responsible professionally and criminally for inaction. Taking national political goals and translating them into important guidance regarding who to shoot, when to shoot, and how to shoot is no easy task. One does not just sit behind a desk and write erudite memoranda.

But the task of a Legal Adviser is even more complicated. Although their legal work does not include the training, provisioning, and disciplining matters normally handled by Judge Advocates, all sorts of legal problems arise. Some of these problems have normal legal answers – many do not. The first function of a Legal Adviser is to assist Staff Officers in understanding the governmental structure and method for resolution. Next, a Legal Adviser participates and helps shape, frame, and resolve these issues as they are handled by the senior members of the Staff. Lastly, a Legal Adviser sits “in council” when the decisions are made. I was fortunate in the treatment I received. I was there to represent the Commander and indeed to be a “witness” to the process. After the matters had been discussed by all – and before the Commander issued a decision – he would look at me. Most of the time – over 95% of the time – I would shake my head in the negative indicating I had nothing to say. He

would then decide. However, at important times, I did speak, usually not to “take sides” but to insure that the process was appropriate.

Every time we put on the Uniform we are expected to exemplify the values of the Profession of Arms. When we lawyers practice our profession, we are expected to do so at our ethical best. What a privilege to be able to serve simultaneously two such honorable and proud professions!