

LAWYERING FOR UNCLE SAM WHEN HE DRAWS HIS SWORD

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For two hundred and twenty-eight years uniformed lawyers have been providing legal advice to commanders. They have used their legal skill, their sense of social organization, and their understanding of military history and tradition to assist in the formulation of sound discipline, governance, and policy. The uniqueness of martial advice and its contribution to our country's dedication to the Rule of Law is a heritage worth celebrating. The purpose of this essay is to discuss this unique heritage so that one may appreciate the current state of the practice of martial military law. The theoretical conflict between law and armed force, the history of America's

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Rarely is one given the opportunity to reflect on the legal basics experienced in a thirty-year military career. Articulating the lessons learned from practice, study, and reflection is a privilege. As is true with any teacher, some of my most important insights were learned from my combat arms students.

unique military law contribution, the organization within the Defense Department for the rendering of legal advice, and a reflection on how this heritage should be taught in the classroom are included.¹

LAW AND ARMED FORCE

When speaking to the uninformed and the subject of Law of War arises, one usually hears words to the effect: “Law of War---How oxymoronic!” What follows is usually some statement that suggests war is without law, rules, or restraint. Often these comments come from those well versed in criminal procedure and civil liberties. The lessons learned

¹ Most legal articles are centered on in-depth analysis of a precise issue. My assignment for this essay is quite different. I have been asked to reflect on thirty years of practice and teaching with the purpose of educating, highlighting, and sharing broad ideas, observations, and themes. Documenting such an assignment is difficult. Since this is really an “executive summary” of thirty years of speaking and writing, the best documentation comes from past—more expansive—discussions. Three principal sources are available. The first article was written while I was a student at the Army War College and was my first written attempt to deal with the unresolved legal standard for command criminal responsibility. William G. Eckhardt, *Command Criminal Responsibility: A Plea For A Workable Standard*, 97 MIL L. REV. 1 (1982). Some years later, this article became a “workhorse” in my teaching and was read and discussed by hundreds of senior officers students. After retirement and after becoming a law professor, I was asked to deliver a lecture on the lessons of Nuremberg during the fifty-year anniversary. I decided to use Mr. Justice Jackson’s remark (“We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.”) to provide both a legal history lesson and an “update.” William G. Eckhardt, *Nuremberg—Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1 (1996). Some years later, our law review featured an issue devoted to famous trials. I was asked to contribute. It was time to say what needed to be said about My Lai in an historical context. William G. Eckhardt, *My Lai An American Tragedy*, 68 UMKC L. REV. 671 (2000).

In addition to writing, I have spoken five or six hundred times on professional conduct on the battlefield. Half of those have been devoted to preventing another My Lai.

Such a record of public dialogue for uniformed lawyers and teachers is not unusual. It parallels, yet differs from, a “pure” academic path. Writing usually comes when time is available (at educational “stops”) or when an issue rises to unusual importance—often the subject of a conference.

involving use of force by the police seem to be considered inapplicable.

What is inferred in such remarks is an absence of thinking about the continuum of law and armed force. Thoughtful consideration of that continuum places the law of armed conflict in perspective.

A comparison of law and armed force can best be seen by an examination of the differences, the contrasts, and the similarities of these two vital components of any ordered society.² To bring these components into sharp focus, they will be compared using extremes.

The differences are stark. Both compete for authority. The law glorifies “system” (means) while armed force prizes “results” (ends). Will we follow the inefficient, corrupt, unresponsive system or will we use effective, cleansing force? Each choice would eliminate certain acts and conduct of the other. Armed force would do away with the “system” because it obviously is not working. Law, on the other hand, seeks to do away with several “results” such as violence with its loss of life, its destruction of property, and its loss of freedom. Furthermore, law and armed force have limited tolerance and respect for the institutions and doctrine of the other.

² William C. Westmoreland & George S. Prugh, *Judges in Command Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POLICY 1, 1-2 (1980); William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 29-30 (1982).

Armed force fears that necessary measures will be outlawed. Law fears the loss of jurisdiction.

The contrasts are equally as stark. Law restricts power while armed force uses power. Law focuses on means (due process) while armed force demands mission accomplishment. Law seeks to eliminate violence; armed force employs violence. Law seeks to minimize disruption and instability while armed force creates disruption and instability in an attempt to bring peace by imposing the sovereign's will.

Yet both functions are similar. Both deal with matters vital to the state. Law seeks to civilize and organize people to function together while armed force provides protection when the system breaks down. Thus, both perform functions that are the hallmarks of an ordered society: stability, safety, and security. Law and armed force each seek the preservation of the state by very different methods and means. Could any worthwhile society exist in the absence of either function? Can one imagine any worthwhile society in which there would not be tensions between these two functions?³

³ Law and armed force compose a continuum. At least the possibility of both being present is a fact. Incorrect thinking is often in exclusive opposites: war or peace; law or armed force. Only when one realizes the reality of both being present can the "creative tension" between these two competitors for power focus attention on workable solutions.

AMERICA'S UNIQUE MILITARY LAW CONTRIBUTIONS

Uniformed lawyers have made three major contributions to the American legal system—two of which are particularly relevant to war fighting.⁴ First: the Lieber Code (General Order 100) formed the very foundation of the Law of War. Before dwelling on this contribution, it is worth noting the other two.

Second: since discipline is the essential ingredient in any professional armed force and since our Rule of Law is grounded in a civil liberty-oriented-society requiring justice, the Uniform Code of Military Justice⁵ has balanced, at least since 1950, the requirements of good order and discipline with the American concept of justice.⁶ The constitutionally mandated

⁴ The selection of these three contributions is my own. During the Bicentennial of our country, while stationed at the Presidio of San Francisco, my office facilitated the placement of a brass plaque commemorating the founding of The Judge Advocate General's Corps. These three contributions originated during that period.

⁵ Pub. L. No. 81-506, §1, 64 Stat. 108 (repealed 1956).

⁶ William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971). In this article, General Westmoreland, while Chief of Staff of the Army, articulated the basic framework for any military code of justice. His main points include:

1. The system must deter conduct, which is prejudicial to good order and discipline.
2. Military law must both motivate soldiers and prevent offenses.
3. Military law must aid in preserving the authority of military commanders.
4. The military justice system must protect discipline, loyalty and morale.
5. Protection must be provided against conduct which threatens the integrity of the military organization and which threatens the accomplishment of the mission.
6. The military justice system must provide for rehabilitation.

congressional function of establishing the rules utilized by the armed forces⁷ includes the enactment of the Military Justice Act of 1983⁸. This Act allows service personnel to file habeas corpus petitions in the United States Supreme Court in court-martial cases creating a leap from an Article I court (court martial) to an Article III court (the Supreme Court). Therefore, everyone joining the armed forces and submitting to military discipline can be assured that the Supreme Court is the ultimate arbiter of legal disputes in the administration of good order and discipline.

Third: the last major contribution is Legal Assistance—delivering legal services to those less privileged. Some eight million servicepeople in World War II rapidly mobilized from civilian life and thereby needed help in resolving the resulting legal problems of hasty departure and changed circumstances. Using its military attorneys, the United States for the first time established a system of Legal Assistance for servicepeople and their families. Labor unions and corporations seeking to assist their personnel in

7. The system must operate with reasonable promptness.

8. The system must be flexible.

9. The system must also protect against offenses to persons and to property.

10. The military justice system must provide a commander with the authority and with the means to maintain good order and discipline.

11. There should be no conflict between discipline and justice: The military justice system should be an instrument of justice and in the process it will promote discipline.

12. Our system of military justice should protect the rights of individuals.

⁷ “The congress shall have Power...To make rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 14.

⁸ Military Justice Act of 1983, Pub. L. No. 98-209, § 3(a), 97 Stat. 1393.

resolving basic legal matters soon followed this example. Great need often brings innovative, practical, and durable solutions.

America's Law of War trek began of necessity. The blood soaked battlefields, the chaos, and the suffering of our own Civil War prompted action. President Lincoln assigned General Hallack and Law Professor Francis Lieber the responsibility of producing necessary military regulations. Francis Lieber taught law at Columbia and at the University of South Carolina. As a young man he lived during, fought in, and observed the Napoleonic Wars. He was badly wounded and left to die on the battlefield in the Battle of Namur. Lieber's discipline, experience, and legal skills were essential to his leadership role in the formation of the Law of War in the United States.

Using his pen, Lieber did what we Americans seem to do best. Clearly understanding the humanitarian concerns which were necessary to avoid unnecessary suffering and loss of life and property and obviously possessing the legal skill to articulate clear, understandable, practical rules, he produced

“General Order 100.”⁹ These regulations were so “revolutionary”—a carefully chosen and appropriate word—that within some twenty years they led to the rewriting of the Law of War manuals of the Great European Powers. Decades later these same regulations became the basis of The Hague and The Geneva Conventions and a significant contributing foundation to modern Law of War.

Individual leadership as well as unique ideas and carefully crafted system ensures progress. Certainly this is true for the development of military law in the United States. Elihu Root—the turn of the century Secretary of War, Secretary of State, Senator, President of the American Bar Association and Winner of the Nobel Peace Prize—may well be the “Father of American National Security.” This extraordinary leadership came from a lawyer who, in his own words, “knew nothing about war.” His vision, political skills, and practical concepts of the Rule of Law produced necessary building blocks without which history might be very different.¹⁰

Root made “fungible” America’s two armies—the federal Regular Army and the state National Guard or Militia—when he was instrumental in

⁹ Gen. Orders No. 100, U.S. War Dep’t (24 Apr. 1863). *See generally* James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1 (1965).

¹⁰ *See generally* Richard W. Leopold, ELIHU ROOT AND THE CONSERVATIVE TRADITION (1954).

the passage of the Dick Act of 1908. He envisioned that both armies should have similar standards, training, uniforms, and equipment. In short, in times of crisis, these two armies with different commanders (one the President and the others a Governor) could become a “whole.” Winning World War I, World War II, and especially the long Cold War would have been impossible without this necessary fungibility.

Additionally, as a manager Root reformed the War Department to modernize it and to make it more efficient. He ended the bureau system that had been used to manage the Western frontier and replaced it with a democratic, legally regulated “German General Staff.” So encompassing was this reform, that his organization “carried” us through the change and complexity of World War II. Lastly, he founded the Army War College (“Not to Promote War but to Preserve Peace”) and the system of senior military education. He believed that war was sinful and evil but could not be “outlawed.” If it could not be abolished, he felt that it should be carefully studied so that war would not have to be fought in the first place. But if war was necessary, the least number of lives and the least amount of treasure would have to be expended. Rarely has one man made such major, long-

lasting contributions. Elihu Root clearly exemplifies the contributions that law and lawyers can provide to national security.

System, however, also has its place. Our national security system was largely built after World War II. At the beginning of that conflict the United States had the eighteenth largest army in the world and, because of the lack of equipment, was drilling with broomsticks in the sand of Fort Ord, California. Emerging some five years later as the mightiest nation in the world required us to “make permanent” what had been hastily created in an emergency. A series of Congressional Acts followed—all of which produced profound change.

The “lead” Act was the National Security Act of 1947.¹¹ This Act provided our permanent peacetime defense establishment, creating the Department of Defense with its Joint Staff System. The Act also established the Central Intelligence Agency, the National Security Council, and an independent Air Force. The importance, breadth, and scope of this Act takes one’s breathe away.

¹¹ The National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 10 and 50 U.S.C.).

Reform usually is needed in twenty-year intervals, and the intelligence function was next with the Church Commission in the 1970s.¹² Oversight and accountability in secret “black-book” operations is particularly important and difficult to rationalize in a democracy. This reform produced “parliament-like” congressional oversight. After carefully establishing layers of responsibility and by requiring the authorizing official to sign a “finding” for these secret operations, accountability was assured. Thus, flexibility was allowed but only with ultimate political accountability.

Military reform came ten years later with the Goldwater-Nichols Act of 1986.¹³ Prior to this Act, an intolerable strain on military governance existed. The “hoteling” function constantly competed with the “war-fighting” function. Unfortunately the daily demands of “hoteling” tasks-- by necessity-- took precedence over the more deliberative, time consuming, less immediately pressing war-fighting functions. “Hoteling” functions include procuring, recruiting, training, equipping, disciplining, and governing. “War-fighting” functions include deliberative war planning and ad hoc crisis action management. The Goldwater-Nichols Act separated these functions

¹² Foreign and Military Intelligence, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. REP. NO. 755, 94 Cong., 2d Sess.

¹³ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub.L. 99-433, 100 Stat. 992 (1986).

by establishing two different chains of command—the Service Secretaries performed the “hoteling” functions while the Unified Commands and the Joint Staff were primarily responsible for “war-fighting.” Thus, the positive aspects of both functions were accentuated and strengthened. In addition, the separation shortened, invigorated and made more responsive both chains of command. Especially important, the separation helped the United States speak with one voice on security matters overseas. It also required an administration to produce a national security strategy to insure public education and debate.

Three uniquely legal Congressional Acts have been passed since World War II and undergird in important ways the national security acts of greater scope. The 1950 Uniform Code of Military Justice¹⁴ civilianized, reformed, and made uniform the basic criminal code for the armed forces. In attempting to meet criticism of military justice engendered during the mass mobilization of World War II, the revised code clearly “tilted” toward a civilian model ignoring important elements of its unique martial character, particularly in the Law of War. It updated practice that had not been addressed since the reforms following World War I and it made uniform the

¹⁴ See *supra* note 5.

military law applied to the old Army and Navy and the new Air Force. A major “lawyerization” occurred in 1968.¹⁵ Recently “revolutionary” changes—usually after each major conflict—have given way to yearly “corrections” which insures a healthy, steady, predictable modernization.

Congress in the Military Justice Act of 1983¹⁶ added an essential final reform. To ensure uniformity between Article I courts-martial and Article III federal courts and to achieve Supreme Court Article III oversight, Congress allowed service personnel to petition the Supreme Court via writ of habeas corpus in court martial cases. The unique military justice system is thus now directly subject to constitutional supervision by the Supreme Court. Lastly, in the War Crimes Act of 1996,¹⁷ previously imperfectly implemented Nuremberg principles for war crimes were at least partially corrected when those not subject to trial by courts-martial could be tried in federal district court for war crimes. The prior jurisdictional defect prevented ninety percent of those subject to prosecution in the My Lai incident from facing possible charges.¹⁸

¹⁵ Military Justice Act of 1968, Pub. L. No. 90-632, § 866, 82 Stat. 1335.

¹⁶ Military Justice Act of 1983, Pub. L. No. 98-209, § 3(a), 97 Stat. 1393.

¹⁷ War Crimes Act of 1996, 18 U.S.C. § 1441 (West Supp. 1999).

¹⁸ See William G. Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 680-82 (2000).

Events, even institutional staining tragedies, can be the impetus for great change. Such was certainly the case for the Vietnam era My Lai Tragedy in which a company of soldiers lost their discipline, got out of control, and in the process murdered over five hundred Vietnamese civilians. National character can also be judged by how countries react to such tragedies. The reaction of the United States is well summarized by an introduction I received while making a presentation at the International Society for Military Law and the Law of War in Brussels, Belgium in 1991. After referring to My Lai, my Belgium host introduced me with the following words: “Only the United States of America would not cover it up, would prosecute it at the cost of losing a war, and would use it so forcefully to prevent future incidents.” For over thirty years “No More My Lais” has been a forceful motivating driving force in the development of professional conduct on the battlefield.

Most importantly, the Profession of Arms reclaimed the rules of its own profession. “Law of War” came out of the library and off lawyer’s desks and once again became the province of the practical Profession of Arms. Law of War programs were introduced and integrated into training. An institution found ways to talk about such subjects as disobeying illegal

orders.¹⁹ A recognized military law specialty, Operational Law,²⁰ was born. This increased attention to rules of war coupled with technology produced service-wide Rules of Engagement—the means by which force is controlled.²¹

Practical service personnel are not lawyers. Our heritage of the Rule of Law and the guidance of the laws of war must be practical and a part of everyday conduct and training. This practical integration of law and armed

¹⁹ When confronted with the challenge of teaching difficult negatives, it is often best to teach positives. This is certainly true in teaching professional conduct on the battlefield. The best example of this strategy can be found in The Nine Marine Corps Principles.

THE NINE MARINE CORPS PRINCIPLES

1. Marines fight only enemy combatants.
2. Marines do not harm enemy soldiers who surrender. Disarm them and turn them over to your superior.
3. Marines do not kill or torture prisoners.
4. Marines collect and care for the wounded, whether friend or foe.
5. Marines do not attack medical personnel, facilities or equipment.
6. Marines destroy no more than the mission requires.
7. Marines treat all civilians humanely.
8. Marines do not steal. Marines respect private property and possessions.
9. Marines should do their best to prevent violation of the law of war. Report all violations of the law of war to your superior. (Or Judge Advocate, Chaplain or Provost Marshal.)

The Marine Corps Principles were adopted as The Soldier's Rules by the Army in Army Regulation 350-41, Training in Units (19 March 1993) as minimum training and knowledge for all personnel.

²⁰ The Army developed a concept of "Operational Law." That term was defined as follows: "Operational Law (OPLAW) incorporates, in a single military legal discipline, substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law relevant to overseas deployment of US military forces. It is a comprehensive, yet structured, approach toward resolving legal issues evolving from deployment activities." CENTER FOR MILITARY LAW AND OPERATIONS AND INTERNATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK (2d ed.), Preface to Original OPLAW Handbook (1992). See Marc L. Warren, *Operational Law-A Concept Matures*, 152 MIL. L. REV. 33-73 (1996).

²¹ See generally *supra* note 18, at 695-98.

force is well expressed by emphasis on five basics.²² Professional training is key. Individual best must be combined to produce unit best. This, of course, is military training. Military personnel must know, understand, and enforce compliance with the Rules of Engagement—when to shoot: at what and whom: and under what circumstances. Because clear thinking is difficult when shots are being fired, there must be insistence on compliance with standard operating procedures. Yes, drill is important. Subordinates must be controlled through the issuance of clear and concise orders. Commissioned officers and non-commissioned officers must intervene at the first sign of ill discipline. Most importantly, there must be an insistence upon the truthful moral high road. In short, the “decision to pull the trigger” is ultimately an individual professional decision involving legality, morality, and common sense. Our civilian education, our military education, and our religious education attempt to prepare us for such moments. When the Law of War is thus integrated and made practical, professional conduct on the battlefield results. When service personnel follow these principles, they are fighting lawfully.

²² *Id.* at 694-95.

The political aftermath of the My Lai incident and the increasing use of the Law of War as a weapon against the United States by our enemies has produced a new method of communicating and a healthy democratic public accountability.²³ Although the United States is not likely to lose militarily on the battlefield, the United States is far more vulnerable in the world court of public opinion. Knowing that our society so respects the Rule of Law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the Law of War. This is our vulnerable “Clausewitzian Center of Gravity.”²⁴ To counter these “attacks” our government—and the military in particular—have developed a mechanism to justify, explain, and account for their actions. This change began with a British-like “White Paper” issued by President Ronald Regan when he bombed Libya in 1983.²⁵ The government subsequently has had the discipline to articulate the legal and moral justification for our military actions. For the military, this means that the war fighters (Commanders and the J-3s (Operations Officers)) must fight the war by day and explain their actions on “CNN” at night. The Secretary of

²³ *Id.* at 698-99.

²⁴ German Philosopher of War, Carl von Clausewitz is the principal war theoretician. CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds. & trans., Princeton University Press 1976).

²⁵ President’s Address to the Nation, United States Air Strike Against Libya, April 14, 1986, 22 WEEKLY COMP. OF PRES. DOC. 491-92 (April 21, 1986).

Defense and the Chairman, Joint Chief of Staff become as much public spokesmen as war managers.

In a democracy, however, nothing could be healthier. Our citizens need to know the costs—in lives and in treasure—of any military action. In our society, nothing is more ethically sensitive than the use of deadly force. The same is true with our domestic police. When our military personnel “kill people and break[s] things in the name of the state,”²⁶ we demand that use of force be done in accordance with the Rule of Law. Sound military policy can only be formulated with a dialogue between the military, the government, and the citizenry. The “justification” we see nightly on the evening news often has legal and moral overtones, and, thus, the concepts of Just War and Law of War form the basis for this dialogue. In reality, modern warfare has added a new requirement. Not only must the military train, plan, and execute a military operation; the military must now justify its operations as well.

²⁶ I frequently use this phrase to describe the function of the armed forces. It is brutal, graphic, and accurate. Many try to soften the reality of war—e.g. “Humanitarian Law” instead of “Law of War.” This phrase focuses attention on reality.

LAWYERS WITHIN THE DEPARTMENT OF DEFENSE

The Department of Defense uses three titles for lawyers. These titles are important because with each goes a very separate function. “General Counsel” are mostly civilians who work for the various Secretaries (Defense, Army, Navy, Air Force) or who work in specialized areas (typically not related directly to war fighting). General Counsel perform those more politically related tasks of policy formulation, policy coordination, and policy implementation that would be inappropriate for uniformed lawyers. “Staff Judge Advocates” are the traditional military lawyers who perform tasks involving administrative law, criminal law, legal assistance, claims, and procurement. Additionally, Staff Judge Advocates do perform international law functions and are responsible for Law of War teaching and training. Justifiably, the Staff Judge Advocates are proud of their Operational Law expertise and their practice of Law of War when training with or when deployed with their units. In short, Staff Judge Advocates perform the “hotel” functions²⁷ that are included within the responsibility of the Secretaries of the various armed services.

²⁷ See discussion *infra* America’s Unique Military Law Contributions; Goldwater-Nichols Act reforms.

Markedly different from their counterparts are the “Legal Advisors” to the Combatant Commanders (CINCS) who perform legal services within the Joint Chain of Command. The Goldwater-Nichols Act of 1986 markedly increased the authority and the responsibility of these “Legal Advisors.”²⁸

Additionally, Joint Legal Offices are small, specialized, and credentialed. Usually ten or less lawyers hold these positions who have practical experience in Operational Law and the Law of War and who have graduate legal degrees in International Law. These Joint Legal Officers concentrate on the legal aspects of war fighting. Their issues include: operational law, international agreement management, status and stationing agreements, host nation support, and internal command issues. Joint Legal Offices do not do base legal work—criminal justice, legal assistance, claims, etc.

Law office management is also unique. As international agreement manager, they are often responsible for keeping track of hundreds of international agreements. As such, the law library is a rare combination of domestic law and international law. International agreements are used just

²⁸ The ideas for this section were first articulated in an address before the Military Law Committee of the American Bar Association on August 9, 1991, in Atlanta, Georgia.

like cases are used in normal domestic practice. Operational law practice changes so rapidly that the librarian often must carefully collect legal conference materials and keep track of contact information for persons responsible for sensitive areas. Communication within such an office is complex. Classified information necessitates special precautions. Classified means for voice communication and document communication must exist within the unified command, with all of the various military services, and with key offices in certain embassies as well as with the Departments of Defense, State, and Justice in Washington, D.C. The Office Manager must be unusually flexible, vigilant, and technically sophisticated.

The role of the Legal Advisor is quite varied. The Legal advisor must be an international agreement manager, which is particularly important because Great Powers are consistent and Great Powers keep their word. A Legal Advisor must supervise the handling and reporting of all such agreements and must review such agreements for compliance with both domestic law and international law. In operational matters, a Legal Advisor must protect the honor of the United States. The Legal Advisor participates in the battle staff, reviews war plans, and helps develop strategy by insuring

that the legal underpinnings of such a strategy are understood.²⁹ As various parts of the government interact, the Legal Advisor helps insure that the United States speaks with one voice in national security matters. A Legal Advisor is an advocate-- nationally and internationally--for practical, enforceable, and understandable rules involving the use of force. Behaving much as a Law Professor would, the Legal Advisor attends conferences, attends lectures, and writes on the vital linkage between the law of armed conflict and the profession of arms. Uniquely, the Legal Advisor is a legal policy maker within his command's area of operations. This function often includes participation in international negotiations and in strategic policy formulation. The Legal Advisor becomes an actor and not a mere advisor. The "Legal Advisor" is thus quite different from a "General Counsel" or a "Staff Judge Advocate."

²⁹ From 1988 - 1991 I served as the Legal Advisor to the United States European Command. My principle task was "to bring the law into the battle staff" in an invigorated post Goldwater-Nichols Act Unified Command. Assisting me were Captain Thomas E. Randall, Colonel Keith Sefton, Colonel Werner Hellmer, and Lieutenant Colonel Richard A. B. Price who used their intellectual talents and creative energy to successfully bridge the high standards demanded by both the legal profession and the profession of arms. During this period, collectively, we became a full participant in the battle staff, we reviewed war plans and significantly upgraded their practical legal content, and we assisted in the articulation and implementation of strategy.

TEACHING: LESSONS THAT NEED TO BE TAUGHT

One trains for certainty but educates for uncertainty. It is the uncertainty that many of us have spent our lives addressing. Three case studies and a teaching addendum are essential for senior officers, yet the lessons learned from each are important at many different career stages.

The lesson of My Lai is that ill-discipline on the battlefield loses wars.³⁰ Discipline and the basics of the Profession of Arms are underscored in the study of My Lai. In this study, command criminal responsibility presents itself.³¹ Students are reminded that the function of the Profession of Arms is so basic and so important to society that military personnel can be punished for inaction. When military personnel reasonably know of improper activity and do nothing, they are subject to criminal prosecution. Whereas other professions are punished only when they criminally or negligently improperly act in the performance of their professional duties.

The necessity of continually modifying the Rules of Engagement to correspond with current political reality is the lesson learned from the

³⁰ See generally *supra* note 18, at 694-95.

³¹ See generally *supra* note 2, at 3-21.

Bombing of the Marine Headquarters in Lebanon and the Long Commission Report.³² In this instance, the Marines were sent to Lebanon as peacekeepers. When the political conditions changed, the Rules of Engagement were not altered—with tragic consequences. “Rules of Engagement” is both a process and a product. The product is the result of a continuous process of evaluating political conditions, the military mission, and current rules regarding the use of force. The process is the “first and constant” task of those involved in “managing” the use of force. The official discussion in the Long Commission Report regarding the court-martialing of the four-star NATO commander for failure to properly supervise the Rules of Engagement has been an example of what not to do for Unified Commanders, their Staffs, and their Legal Advisors. The first words spoken to me by my four-star combatant commander were: “Colonel, are you familiar with the Long Commission Report?” With that question my four-star combatant commander forcefully reminded me of my heavy new responsibilities.

³² United States Department of Defense Commission, *Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983, December 20, 1983*. Known as “The Long Commission Report.”

The Iran-Contra incident provides a third important case study. Both the Tower Commission Report³³ and the Joint Congressional Commission Report³⁴ underscore the dynamics that can develop between the Executive Branch and the Legislative Branch of the United States Government when important national security issues are at stake. Of particular significance is the theory articulated in the Tower Commission Report concerning the proper method for formulating national security policy at the National Security Council level. This incident also provides a practical vehicle for a discussion of the appropriate role for military officers in such situations.

One teaching addendum is necessary for a matter that transcends specific lessons learned from case studies. Indeed it permeates-- in important ways--the entire practice of martial military law. The Profession of Arms has two “carriers” – Law of War and Just War Tradition. Some argue that modern Law of War replaces and trumps the Just War Doctrine,³⁵ which

³³ John Tower, Edmund Muskie, and Brent Scowcroft, *Report of the President’s Special Review Board*, February 26, 1987. Known as “The Tower Commission Report.”

³⁴ *Report of the Congressional Committee Investigating the Iran-Contra Affair*, Washington, D.C.: Government Printing Office (1987). Known as “The Joint Congressional Committee Report.”

³⁵ The articulation of the Just War Doctrine is not uniform. The articulation I use is as follows:

JUST WAR CRITERIA

JUS AD BELLUM
(JUST RECOURSE TO WAR)

JUST CAUSE
LEGITIMATE AUTHORITY
JUST INTENTIONS (ATTITUDE AND GOALS)

should be avoided because it adds religious gasoline to sensitive secular discussions. Nothing could be further from the truth. It is true that the *Jus in Bello* (Just Conduct of War) has been supplanted by Law of War and Rules of Engagement but its basic concepts of discrimination, noncombatant immunity, and proportionality are the intellectual building blocks of professionalism and morality in the conduct of warfare. The criteria of *Jus Ad Bellum* (Just Recourse to War) are quite helpful in the public debate about “going to war.” As such, one is forced to use the language of Just War in discussing military use of force. Likewise, senior military leaders must understand these principles when they speak about and—importantly—when they formulate military policy.

Similarly, Just War Theory is alive and well in the United States. During the nuclear buildup of the 1980s, American churches became concerned that man might commit the ultimate sin—the destruction of God’s

PUBLIC DECLARATION (OF CAUSES AND INTENTS)
PROPORTIONALITY (MORE GOOD THAN EVIL RESULTS)
LAST RESORT
REASONABLE HOPE OF SUCCESS

JUS IN BELLO
(JUST CONDUCT IN WAR)

DISCRIMINATION (NONCOMBATANT IMMUNITY)
PROPORTIONALITY (AMOUNT AND TYPE OF FORCE USED)

Excerpted from THE UNITED METHODIST COUNCIL OF BISHOPS, IN DEFENSE OF CREATION: THE NUCLEAR CRISIS AND A JUST PEACE 33-34 (1986).

creation. Each church group in its own way—using its unique theology and polity—struggled with issues of war and peace. Each dealt in theological terms with the role of government in general, with the issue of “peace,” with the use of force, and with the use of weapons of mass destruction. These American church letters³⁶ will be used for years in both our theological and in our secular debates concerning the use of force. As any teacher of the Law of War recognizes, the “major premises” are often theological and must be understood to comprehensively teach.³⁷

CONCLUSION

Lawyering for Uncle Sam when he is preparing for or is actually drawing his sword is really not so unique. Lawyers performing such functions provide legal advice. They assist an institutional client with non-

³⁶ *E.g.*, Catholic: NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD’S PROMISE AND OUR RESPONSE. A PASTORAL LETTER ON WAR AND PEACE (May 3, 1983). Lutheran: THE LUTHERAN CHURCH IN AMERICA, PEACE AND POLITICS (1984). Methodist: THE UNITED METHODIST COUNCIL OF BISHOPS, IN DEFENSE OF CREATION: THE NUCLEAR CRISIS AND A JUST PEACE (1986). Presbyterian: THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, PEACEMAKING: THE BELIEVERS’ CALLING (1980). EVANGELICALS: NATIONAL ASSOCIATION OF EVANGELICALS, GUIDELINES: PEACE, FREEDOM, AND SECURITY STUDIES (1986).

³⁷ During my assignment on the Faculty of the Army War College and during my off-duty time, I and three other colleagues for three years taught “Contemporary Theology of War and Peace” to Catholic and Protestant War College students. The Commandant was a student during one of those years. We used these church letters, among others, and included differing version of liberation theology. This was the most difficult class I ever taught, yet it has helped me immensely in publicly speaking about war and peace and the Law of War.

legal or semi-legal process. They act as a reminder of the Rule of Law, as one who helps keep the conscious of the command, as a witness to important events, and as an unbiased “back up” to assist decision makers. Honor and not money is the “coin of the realm.” Unusually ethical practice and continuous education are professionally rewarding. Being part of a team doing something important is important. In sum, such practice provides an opportunity to “perform or influence the performance of great actions; [to] bring new growth and new challenge; and [to] have the capacity to leave a legacy of honor, hard work and respect for the law.”³⁸

³⁸ Department of the Army, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975*, 1 (1975). The full quotation has long been a favorite.

War has been said to be an impersonal thing, and in many respects it is. However, armies are necessarily composed of human beings—who perform or influence the performance of great actions; who bring new growth and new challenge; and who have the capacity to leave a legacy of honor, hard work and respect for the law.