



THE ARMY LAWYER

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Brigadier General Charles N. Pede

Deadly Advice: Judge Advocates and Joint Targeting
Major James A. Burkart, USMC

The Long, Hot Summer: Active Duty Support to Wildland Fire Fighting Operations
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Realizing a Dream: Expedited Paths to Citizenship for Servicemembers
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Lincoln's Code: The Laws of War in American History
Reviewed by *Lieutenant Andrea M. Logan, USN*

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Lore of the Corps

The First Manual for Courts-Martial

By Fred L. Borch

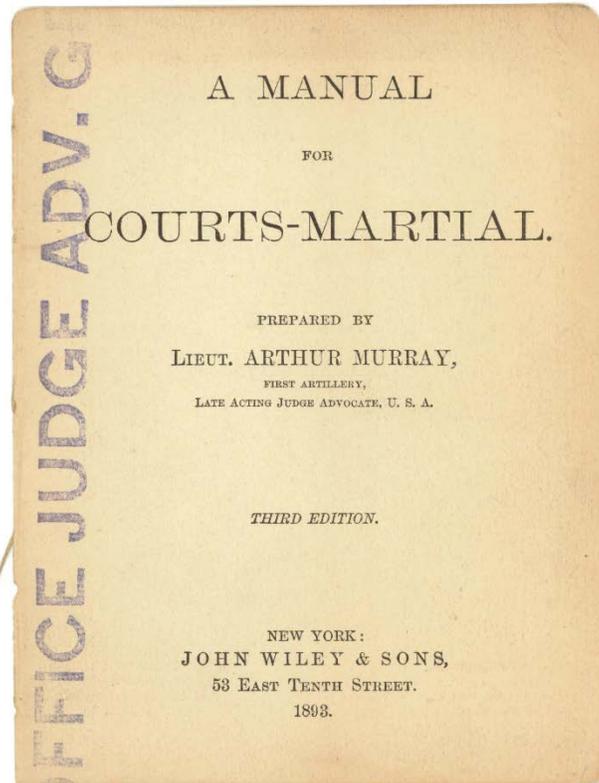
Regimental Historian & Archivist

While military legal practitioners today assume that there has always been a manual to guide those prosecuting, defending, and judging courts-martial, nothing could be further from the truth: It was not until 1895 that an official *Manual for Courts-Martial* was published by the Army. What follows is the history of that first *Manual*.

Although the Continental Congress adopted sixty-nine articles for the regulation of the Army during the Revolution, and the new U.S. Congress exercised its power under Article 1, Section 8 to enact the first American Articles of War in 1806, there was little in the way of written guidance or procedure that governed how a court-martial should operate. The 1863 Articles of War, for example, provided only that a general court-martial should consist of “any number of commissioned officers, from five to thirteen”¹ (with thirteen preferred) and that the judge advocate “shall prosecute in the name of the United States” but also “consider himself counsel” for the accused.² Persons giving evidence before the court were “to be examined on oath or affirmation,”³ and the judge advocate was required “to object to any leading questions” and to prevent the accused from answering questions “which might tend to criminate (sic) himself.”⁴ But there were no provisions in the Articles of War governing the admission of hearsay, or elements of proof in a substantive offense, much less any guidance on how to draft a charge sheet or court-martial convening orders.

It was not until 1886, when then Lieutenant Colonel William Winthrop published his two-volume *Military Law and Precedents*, that judge advocates in the field had any authoritative source. However, Winthrop’s treatise was mostly about military law; it provided no practical guidance for the line officer tasked with prosecuting a court-martial or serving as a member at a general, garrison or regimental court. To meet this need, First Lieutenant (1LT) Arthur Murray, a Field Artillery officer stationed at Fort Leavenworth, wrote “Instructions for Courts-Martial and Judge Advocates,” which was published as Circular No. 8, Headquarters, Department of Missouri, on July 11, 1889.⁵ Murray had previously served as the Acting Judge Advocate for the Department of Missouri in 1887 and consequently had considerable experience with courts-martial and the Articles of War.⁶

In 1890, Murray turned his ‘Instructions’ into a small four-inch by-five-inch “pamphlet.”⁷ He then had it commercially published by a New York firm as “A Manual for Courts-Martial.” After rearranging and enlarging his original work, Murray published a second edition in 1891 and a third edition in 1893.⁸ These were greatly improved versions of his original manual, as he had obtained input from members of the Judge Advocate General’s Department (JAGD), including Captain E. H. Crowder, Major George B. Davis, Colonel (COL) Thomas F. Barr, and COL G. Norman Lieber, the



A Manual for Courts-Martial, 1893

¹ U.S. WAR DEP’T, ARTICLES OF WAR ART. 64 (Stackpole Books 2005) (1863).

² *Id.* at Art. 69.

³ *Id.* at Art. 73.

⁴ U.S. WAR DEP’T, *supra* note 2.

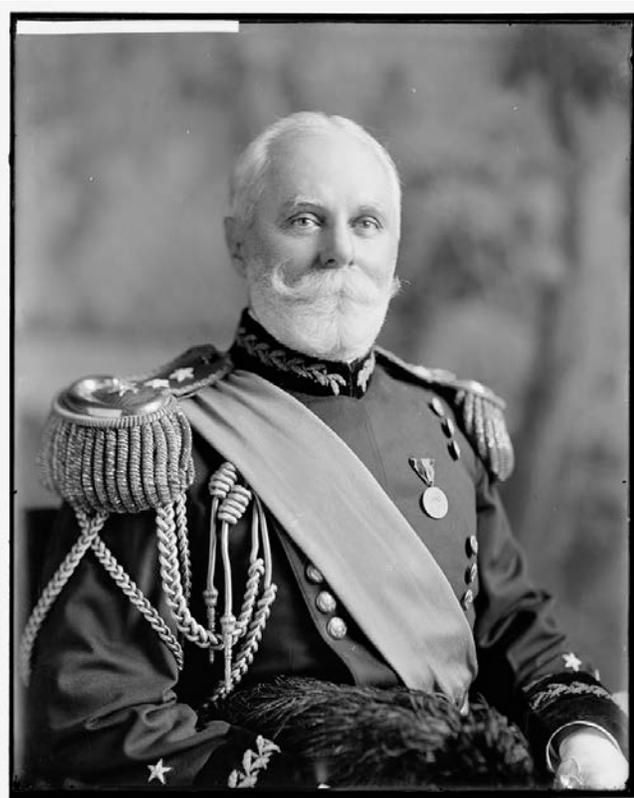
⁵ THE JUDGE ADVOCATE GEN.’S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975, at 95 (1975).

⁶ ARTHUR MURRAY, A MANUAL FOR COURTS-MARTIAL pt. IV (3d ed. 1893), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1893.pdf.

⁷ *Id.* pt. III.

⁸ *Id.*

Acting Judge Advocate General (JAG).⁹ Since Crowder, Davis, and Barr later served at the highest ranks of the JAGD, Murray's manual was reaching an important and influential audience.¹⁰



Major General Arthur Murray

First Lieutenant Murray's 185-page *Manual* did not promise anything more than being a "handy source of legal guidance."¹¹ Moreover, the book's premise was that military law was primarily about discipline. It was intolerant of "legal niceties" in that the *Manual* advised that "the judge advocate's opinion was rendered only when asked for" by the court.¹²

⁹ *Id.* pt. VI, VII.

¹⁰ For more on Barr, see Fred L. Borch, *TJAG for a Day and TJAG for Two Days: Brigadier Generals Thomas F. Barr and John W. Clous*, ARMY LAW., April 2010, at 1-3. For a biography on Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955); see also Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859-1932)*, ARMY LAW., May 2012, at 1-3. For more on Davis, see Fred L. Borch, *From Frontier Cavalryman to the World Stage: The Career of Army Judge Advocate General George B. Davis*, ARMY HISTORY, Winter 2010, 6-19.

¹¹ THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 5.

¹² *Id.*

¹³ Murray, *supra* note 6, at 64.

¹⁴ *Id.*

¹⁵ *Id.* at 61-62.

While there was no formal discussion of evidence, Murray did write that a court should always use the "best evidence obtainable" and he insisted that "hearsay evidence is inadmissible."¹³ He also advised that documentary evidence was "only admissible when its authenticity has been established by sworn testimony, or the seal of a court record, or when its authenticity is admitted by the accused."¹⁴ A *Manual for Courts-Martial* also had sections discussing credibility of witnesses,¹⁵ proof of intent,¹⁶ and findings¹⁷ and punishments.¹⁸ While there was no discussion of the elements of proof required for an offense, the "General Forms" at the back of the booklet provided sample specifications for common offenses such as larceny, desertion, fraudulent enlistment, drunk and disorderly, and conduct prejudicial to good order and military discipline.¹⁹ These sample specifications, like those in Part IV of today's *Manual for Courts-Martial* necessarily covered the elements that must be proved for a conviction.²⁰

Murray's *Manual* received high praise. Colonel Barr wrote that "its adoption and general distribution would be of great advantage to the service."²¹ As Acting JAG, Lieber explained, *A Manual for Courts-Martial* "had been carefully prepared, with the manifest object of giving in small compass and convenient form the established principles which are of common application in the administration of justice."²² Since Murray not only compiled "authoritative rules and decisions relating to courts-martial practice," but also included a "collection of forms for use in such practice," Lieber lauded the book as "a useful guide for courts-martial reviewing authorities, and officers of the army generally."²³

Perhaps 1LT Murray was a bit too successful in his writing of "The Murray Manual," because the War Department took his book and published it as *A Manual for Courts-Martial* in 1895, the first official manual for courts-martial.²⁴ While this first official version acknowledged Murray's role—it stated that the book was "prepared under the supervision of the Judge-Advocate General by First Lieutenant Arthur Murray, Field Artillery"²⁵—Murray's authorship was quickly forgotten. When the War Department

¹⁶ *Id.* at 62-63.

¹⁷ *Id.* at 65-68.

¹⁸ *Id.* at 69-87.

¹⁹ *Id.* at 125-34.

²⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV (2012).

²¹ Murray, *supra* note 6, at VII.

²² *Id.*

²³ *Id.*

²⁴ THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 5, at 94.

²⁵ *Id.* at 95.

published a second, revised edition in July 1898, it renamed the work *A Manual for Courts-Martial and of Procedure Under Military Law* and omitted any reference to an author.²⁶ What had started as a commercially printed guide for officers involved in courts-martial served as the model of every manual published by the War Department over the next fifteen years. The 1901, 1905, 1907, 1908, 1909, and 1910 editions were small, pocket-sized booklets similar to other manuals on infantry, drill and ceremonies, mess operations and other military subjects. Although the 1917 *Manual for Courts-Martial* was published in a larger format, it was not until 1921, after Congress had made significant revisions to the Articles of War, that wholesale changes were made to what 1LT Murray had originally assembled.²⁷

Unfortunately for Murray, the Army's adoption of his manual "effectively deprived him of any royalties"²⁸ he would have received from the sale of his book. But there was nothing he could do, as it was not until 1960 that an author could sue the United States for copyright infringement in the U.S. Court of Claims.²⁹

In the end, however, Arthur Murray did well as a career Army officer: He was promoted to brigadier general and appointed Chief of Artillery in 1906 and retired as a major general in 1915. Murray was recalled to active duty during World War I and served as the Commander, Western Department, until retiring a second time in 1918. Major General Murray died in Washington, D.C., in 1925, at the age of 74.³⁰

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
<https://www.jagcnet.army.mil/8525736A005BE1BE>

*Dedicated to the brave men and women who have served our
Corps with honor, dedication, and distinction.*

²⁶ WAR DEP'T, MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW (1898)
http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1898.pdf.

²⁷ THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 5, at 95-96.

²⁸ *Id.* at 95.

²⁹ *Id.*

³⁰ ASSOCIATION OF GRADUATES OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, ANNUAL REPORT 115-17 (1930).

Communication is the Key—Tips for the Judge Advocate, Staff Officer and Leader*

Brigadier General Charles N. Pede**

I. Introduction

Yogi Berra and Rudyard Kipling do not have much in common. They likely never imagined they might combine sentiments to influence the way Army lawyers practice law. In a surprisingly lucid ‘non’ non-sequitur, Berra observed “you don’t have to swing hard to hit a home run. If you got the timing, it’ll go.”¹ When we recall Rudyard Kipling’s timeless charge to “fill the unforgiving minute with sixty seconds worth of distance run . . .”² we find the perfect inspiration for our dual professions of the Law and Arms.

For me, Berra’s highly nuanced skill of hitting a ninety-five-mile-an-hour baseball combines perfectly with Kipling’s ethic of relentless diligence: Both are at the very core of skilled lawyering and rigorous staff work in the American Army at the dawn of the twenty-first century.

One trait Berra and Kipling obviously do share with peculiar polarity is artful *communication*. As powerful as their messages are, it is their *ability to communicate* the message that really matters.

And so it is no surprise that the unifying theme in the lessons I have learned over the years, is the importance of our ability to communicate—what we say, how we say it and with whom—in both our skilled legal advice and rigorous staff work. Although this may seem self-evident, the art of communication is sometimes overlooked and is, as well, so fundamental to our practice that it is worth periodically examining.

This article offers tips that spring from what I have learned from my nearly thirty years of success and failure as a staff officer and judge advocate in the Army. I offer in this article seven tips that may help you achieve both professional and personal success as judge advocates.

1. *Understand Intent*
2. *Anticipate, Anticipate, Anticipate*
3. *Who Else Needs to Know?*
4. *Communicate Directly*
5. *Writing—Even Email Is an Art*
6. *Rank Work, The Boss’s Work and Gut Checks*
7. *Find Your Inspiration—and Inspire Others*

1. Understand Intent

So obvious we sometimes forget it: You must always understand your boss’s intent. If you do not—ask. Most responsible supervisors will not mind you asking for clarity. Done properly, your query shows efficiency and “smarts” (and a certain amount of courage, as most staffs are inclined to not ask the boss until much later). Done too much, it suggests you do not listen well. The sweet spot is, of course, the art. If you cannot get the boss’s intent, fill the vacuum and then see if you were right.

If the staff is going down a path you do not think was intended, consider it your job to stop and ask the boss if this is what she wants. Most of the time, the boss did not want to go down that path and did not know the staff was on it, leading to an Abilene Paradox.³ Additionally, many times, your boss wants you to challenge her, wants you to check her own manner of thinking without tainting your view of an issue. Be honest and give your true assessment of the issue or situation; do not just tell the boss what you think she wants to hear. “If everybody is thinking alike, then somebody isn’t thinking.”⁴

Many times, your boss will simply ask the question and listen to the debate so she can hear the differing views. This is a productive technique—not a trick or a waste of time. It is a decision-making process. Embrace it.

When the time comes for an answer, be sure to answer the question the boss actually asked. We are exposed daily to, and sometimes enamored with, the artful non-answer. Our role, though, as both a lawyer and staff officer is to answer the

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* It is also inherently risky. Anyone who writes about what good “anything” is, especially staff work or lawyering, treads on the thinnest of ice. What makes my views any more important than another’s? Quite simply—nothing. However, I have been doing it for a long time. By analogy, even the best professional batters only get a hit about a third of the time, and fewer still hit home runs regularly. On the assumption that time on the field, regardless of how well you hit, grants perspective, not perfection, this note offers some timeworn, proven techniques to consider as each of us, every day, try to be better staff officers.

¹ Yogi Berra, *The Showman*, in *ESQUIRE THE MEANING OF LIFE* 145 (2004).

² Rudyard Kipling, *If*, in *REWARDS IN FAIRIES* (Doubleday, Page & Company 1910) (1895).

³ JERRY B. HARVEY, *ORGANIZATIONAL DYNAMICS, ABILENE PARADOX: THE MANAGEMENT OF AGREEMENT* 17-43 (Summer 1988), <http://www.rmastudies.org.nz/documents/AbileneParadoxJerryHarvey.pdf>. The Abilene Paradox is when “[o]rganizations frequently take actions in contradiction to what they really want to do and therefore defeat the very purposes they are trying to achieve.” *Id.* at 18.

⁴ *General George S. Patton, Jr. Quotations*, GENERAL PATTON, <http://www.generalpatton.com/quotes/> (last visited June 8, 2016).

question. Every time. Answer “yes” or “no” to questions that call for succinct answers—perhaps in a tactical operations center (TOC) or around the table at a staff meeting.

The boss is often interested *only in* ‘the time of day, not how to build a watch’ or even what time it was earlier. Provide depth, nuance, background, history, etc., when warranted or sought. As a fundamental principle, understand what your boss is asking for and *answer that question*.

2. Anticipate

The notion of anticipation is the beating heart of good staff work. We do this habitually in our legal practice: What questions must I prepare for? What objections must I respond to? What have I failed to consider? This same sort of red-teaming⁵ approach applies to staff work as well, and it should be repeating itself in your mind. It is a sort of role-playing. Spend time thinking like the boss and determine what questions you would ask. Then answer them. Be prepared to know what is coming before it arrives.

As Napoleon is reputed to have said, *anticipate, anticipate, anticipate*. Well, not exactly. Napoleon actually intoned the famous, “L’audace, l’audace, toujours, l’audace.”⁶ Anticipation is simply the staff officer’s corollary to Napoleon’s martial maxim for commanders.

3. Who Else Needs to Know?

Regularly ask yourself, “Who else needs to know?” This question must animate and consume you. It is on a Post-It on my computer screen, constantly reminding me of this foundational staff officer maxim. Communicating often and early, particularly on a staff, maximizes the probability that your legal and staff recommendations will influence decision-makers before problems arise. Communicate concerns, identify solutions, and provide options at the staff-officer level before anyone asks the commander to make a decision.

The corollary, of course, is to never pose a problem without a recommendation. Ever. And don’t make the boss always ask for a recommendation; because you begin to look reluctant when you omit the recommendation at the onset. Additionally, when you do not present a recommendation, you look like you are letting the boss do the hard work or, worse, waiting for an azimuth check before committing to your recommendation. Neither is good. Anticipate the issues,

communicate with anyone else who needs to know, and offer solutions.

4. Communicate Directly

General Martin Dempsey has remarked,

During the Revolution in Military Affairs of the late 1990s, the U.S. developed an almost unquestioning faith in technology. We came to believe that technology would allow us to achieve a “quality of firsts” the ability to see first, understand first, decide first, and act first. We became apostles of knowledge dominance and worshippers at the altar of stand-off and precision strike. But our imagination failed us. . . .⁷

Overreliance on technology creates the grave risk of losing meaningful contact with our clients. So many of our communication tools today attenuate human contact—create some measure of distance between people. The essence of the lawyer-client relationship is trust. Trust is built through rapport. Which impels my next unshakable principle of practice.

A lawyer’s advice is always best-delivered face-to-face. Anything short of face-to-face is a compromise. You have shaved some perceptible effect off of your advice and counsel when you do not deliver it face-to-face. As your stock in trade, your advice must be the focus. Why diminish its effectiveness? Only presence with a client ensures your nuanced delivery of advice, tailored to the real time reactions of your client. If you sense you are losing your client, you adjust content, language, modulation, pace, body position, intensity. Little of this is available over the phone or thru correspondence. A client can sense your commitment, can see it, can even *feel* it when you are there, with them, in the moment. There is no real substitute. *However, I recognize in our world today, and in our practice and in our Soldiering, face-to-face is not always practical or possible.*

When face-to-face is not an option, the next best solution to being there in person is picking up the phone. Why do we text or send email? Oftentimes, it is because we do not want to subject or expose ourselves to a lengthy conversation, waste time chatting about nonsense, face an awkward moment, or for countless other unfortunate reasons. You might rationalize that you can knock out five emails coordinating meetings in the time it takes you to have one

⁵ See U.S. DEP’T OF ARMY, UNIVERSITY OF FOREIGN MILITARY AND CULTURAL STUDIES, THE APPLIED CRITICAL THINKING HANDBOOK (Jan. 2015), http://usacac.army.mil/sites/default/files/documents/ufmcs/The_Applied_Critical_Thinking_Handbook_v7.0.pdf. “Red teaming is a function that provides commanders an independent capability to fully explore alternatives in plans, operations, concepts, organizations and capabilities in the context of the operational environment (OE) and from the perspectives of partners, adversaries and others.” *Id.* at 2.

⁶ See PAUL JOHNSON, NAPOLEON: A LIFE 22 (2006). The quotation translates to “audacity, audacity, and ever more [always] audacity.” This quote is also attributed to General George S. Patton. See, e.g., PATTON (20th Century Fox 1970).

⁷ General Martin Dempsey, *A Campaign of Learning*, 155 RUSI JOURNAL, no. 3, June/July 2010, at 7.

conversation. And, in moderation, this may be true and prudent.

Unfortunately, over time this approach retards the fundamental skills of communication. So when your evil twin suggests a call would “waste time” or present an awkward moment, push him off your shoulder and pick up the phone. Odds are, you should work through the awkward moment as a professional and get on with the business of the day building rapport and relationships.

Resist the various temptations that nag us all. Pick up the phone. Reconnect with your client and hone your fundamental communication skills as a lawyer.

5. Writing—Even Email Is an Art

Although regularly up to my neck in email, it is my least favorite way to communicate. It enables the most curious paradox to seep into our staff work. When you ask a colleague to “check on the status of the work order” or “see what time is best for Joan to hold the meeting” we immediately regress about one hundred years in communication and efficiency. While our technology permits neck-breaking speed, we adopt one of the slowest methods to accomplish the task—we email. Then we wait for a response, and wait, and wait. Finally, we forget what we are waiting for until someone asks about it again.

Further, there is no context, no tone, and no interaction. The stock in your trade is advice, which is best rendered, as discussed above, by presence and availability. The written word can be enormously effective in some contexts (like motions, for example). But it can also become victim to sloppiness and inattention to detail in others. The nuance of advice, the tone and tenor of advice, is lost in email. There is no body language; no perceived impact on the recipient.

It Is Art. Writing is an art. It is and should be an iterative process. That means as a staff attorney, you will get multiple edits, multiple times—not because your boss knows what it is supposed to look like at the beginning or that you are a terrible writer—but because it takes shape through the process of writing and rewriting. “There is no great writing, only great rewriting.”⁸ Editing makes you a better writer and, in turn, a better communicator. Look at the edits and learn from them. There is no room for pride in authorship.

The key to the “art” is knowing when to pull the trigger. That is, when to end the editing process and submit or send your work. You will know it when you see it, which is either

a nearly blown suspense or satisfaction in the results of your process.

Bottom Line Up Front. The hallmark of good Army writing is hitting the reader with the Bottom Line Up Front (BLUF).⁹ Any memorandum, any email, and any communication should contain a BLUF. Work it into your practice. Avoid the long list of reference citations that no one will read. Hit the boss or the client with the BLUF.

Specific to email, do not forward a string of emails without a BLUF. We do not forward emails to anyone senior to us with “FYI.” We need to put the BLUF at the top of the string of emails. Then, the boss knows the purpose of the email and has the information in the string if she has the time and inclination to read them. You must assume she does not have the time. Remember to screen the string of emails as well; are you sure you want the boss to see all of it? The BLUF is an essential element of an email, especially when the boss does not have the time to read the entire email.

Brevity. “If I’d had more time I would have written a shorter letter. . . .”¹⁰ Always practice brevity. However, your style will often depend on the audience. It is easy to write a five-page legal opinion. It is much harder to condense the five pages to one page without losing the tone, accuracy, or cogent recommendation. Remember the single page will likely be consumed, but the five-page opinion will be avoided.

Clarity. “Writing must be clear, concise, and effective” and easily read and understood in a single reading.¹¹ This can vary by degree, depending on the audience. Writing for another lawyer should not be the same as writing for a client, an investigating officer, or the court. Academic writing is altogether different from appellate writing or a note to a commander. An ethics opinion to a commander is necessarily different from a memorandum for record that supports the more easily understood commander’s note. Knowing your audience is imperative, but the axiom remains the same: easily understood in a single reading.

For Others. “Tear lines” and ghost writing emails are part of the job. Anytime your boss tells you to prepare an email for her, you must pause and remember you have just been told to do a tear line—a note the boss can cut and paste with minimal editing and send. Therefore, you must write in your boss’s style. Edit and re-edit. Any mistakes will be attributed to your boss. If done well, this is a practiced art. Your boss will know if you tried to mimic her style and see the level of effort you invested. And, of course, if you did not, she will notice that, too.

⁸ Justice Louis Brandeis, *Words of Wisdom*, BRANDEIS UNIVERSITY, <https://www.brandeis.edu/acserv/fellowships/essays.html> (last visited June 8, 2016).

⁹ U.S. DEP’T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE para. 1-36.b. (17 May 2013) [hereinafter AR 25-50].

¹⁰ Mark Twain, *Letter to James Redpath*, MARK TWAIN PROJECT (June 15, 1871), www.marktwainproject.org/xtf/view?docId=letters/UCCL00617.

xml;style=letter;brand=mtp. Although this quote may not be directly attributable to Mark Twain, Twain wrote regarding the length of his letter, “You’ll have to excuse my lengthiness—the reason I dread writing letters is because I am so apt to get to slinging wisdom & forget to let up. Thus much precious time is lost.” *Id.*

¹¹ AR 25-50, *supra* note 11, para. 1-10; *see also* Plain Writing Act of 2010, Pub. L. No. 111-274, § 3, 124 Stat. 2861, 2861 (2010).

Edits. Return edits to written work with previous edits. Do not make the boss ask for them. She will not remember all the edits she made and we should not expect her to. If you are proficient in track changes, ensure the boss knows how to use the function—accepting or rejecting your edits and comments. More importantly, if the boss’s edits do not work or make sense, then take the initiative and write it better. However, be sure to point it out and explain the changes so the boss does not think you ignored or missed the edit.

Errors. Proof and spell-check before sending. Errors can take away from the entire meaning of your communication.

Respond. Acknowledge email taskings with “acknowledged,” “got it,” “wilco,” etc. Do not fear cluttering the boss’s inbox; he wants to know you have the task. If you were standing face-to-face and received the task, would you turn and walk away without uttering a word or at least nodding acknowledgement?

Think Twice and Use Caution. Email after 2100 is usually fine to compose but a bad idea to send. Sleep on it, reread it, and send in the morning. Or do not.

Understand that every email you send to a commander or staff member, to include the staff judge advocate (SJA), may be viewed as a legal opinion. Email has many dangers, not least that it can be forwarded in pieces and parts. If you send an email, be prepared to see it again—anywhere. While email is a vital feature of our practice landscape, and life in general, exercise caution. Being mindful of its pitfalls and weaknesses, compensate through balance. And, when necessary, write and sign a memorandum instead of sending an email.

Along the same lines, watch the staff’s email traffic. We all know that email lives forever and while the tone and content can be informal, it should always be professional. If you see an email that skirts the line, discuss it with the sender.

General Dempsey’s admonition from above resonates for email as well. Understand our environment, use its tools, but do not let the tools become your master. You must think beyond the technology to understand how to use it best, and how to be ready for the next fight, whether it be the next deployment or the next deposition or cross-examination. Email is as much a blessing as it is a curse. Maximize the blessing and minimize the curse. Renew your relationship with Bell’s greatest invention. Better yet, have a face-to-face conversation.

6. Rank Work, the Boss’s Work and Gut Checks

Having answered the question, and communicated that to the boss, periodically consider whether you are actually doing

the work the Army is paying you to do. If you are a colonel, then do not do the work intended for majors and lieutenant colonels. The Army promoted you to do colonel’s work. The same is true for every grade. Even though you know you can¹² produce the slidedeck for the briefing, *that* may no longer be your job. Depending on your job, you may be the person who now *reviews* the deck, *reacts* to what was created, and *teaches* others how to properly create the slidedeck. The difference is critical, and you must be smart enough to know the difference. However, never be too above it all to get your hands dirty. Just understand the point of departure.

Work at Your Level. Field grade officers exist to “see above the fray.” They are there to view to the field and direct the interplay between larger formations; to digest data from broader input sources and make sense of it as part of a larger whole. You cannot direct the movements of battalions if you are standing in front of a company. This principle is so fundamental it should not need elaboration, but we constantly live to repeat the error. If you are not looking beyond the 50-meter target, you cannot anticipate what the 300-meter target looks like or where it will be.

You owe your boss operational or strategic vision. If you are doing all the legal reviews on investigations, who is looking for trends, training requirements, and resourcing to fix the trends? As a Deputy SJA, if you are reviewing every action that leaves the office, you paralyze the office. Also, you cannot evaluate the effectiveness of legal writing or a slidedeck if you created it. Teach others in your office how to fish, and then spot-check the fishing lines, the fishing hole selections, and the cooking of the fish. You will have to prioritize your work to ensure the office runs smoothly.

You will do it all, so embrace it. No drama, no whining. Just ensure the weight of the effort is in the right place, given your grade and duties.

Do the Boss’s Work First. Prioritize your efforts in the right way. A simple, age-old adage that is often ignored or simply not understood or appreciated. If in doubt how to prioritize, you must ask. “Got it Ma’am. I’m working an action for the Deputy right now on the fuel contracts; do you want me to pause on that action to work this?” Whatever prioritization you settle on, you own an action until it is back on your desk, signed and complete. If it is waiting on someone’s desk for review or signature, it is your job to keep it moving, which means you pester the Deputy. Keep pushing until the action is complete. If no one is asking for the action, then the boss is going to assume it is routine and can wait, or worse, that you do not care.

Gut Checks. Know that your boss trusts your judgment and you should trust your instincts. A good staff officer, like a good SJA or commander, will do a gut check prior to

¹² This is a common lament among senior officers. Candidly, it’s entirely possible I cannot produce the notional slidedeck—at least not as effectively as others in the office. This footnote should serve as a reminder to JA

leaders that believing you can produce slides as well as your subordinates may be founded on hubris rather than reality.

making a decision. Your “spidey sense” is invaluable in the practice of law and soldiering. If something does not feel right, it probably is not right. Note that the gut check is fundamentally different from guessing. Do not guess. However, make calculated decisions based on your expertise and experience. That is, after all, a large part of what the Army pays you to do. I have witnessed a superb trial attorney, during strategy sessions, do gut checks on different aspects of witness decisions—whom to call, what order, areas of focus, whether to even use the accused’s statement to the investigator, etc. I have emulated his practice ever since that moment. There is the law, there is the regulation that might allow you to do something, and then there is the gut check.

7. Find Your Inspiration—and Inspire Others

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.¹³

Exhilarating. On the order of the Saint Crispin Day speech¹⁴ or Churchill’s “Finest Hour,”¹⁵ Roosevelt’s *Man in the Arena* speech resonates in so many places in our practice—from gut checks prior to cross-examination to those dark moments as an SJA when you stand seemingly alone in the world with a piece of advice no one wants to hear. As we soldier, as we practice law, there will be many moments, if you are doing it correctly, where our faces will be “marred with dust and sweat and blood.”¹⁶

Your proudest moment will arrive when, having delivered your advice, you find that you and your team are the only ones who could deliver that advice, and you suddenly realize that your years of training brought you to that point. It arrives a second time, more forcefully in the hallway conversation with other officers, who say afterwards, “I am glad you said something because no one else was going to.”

Figuratively, every day in court, or in rigorous preparation for the next great case, should have each of us “daring greatly.”¹⁷ Every new venture improving the warrant process in some foreign land, or trying to bring the interagency together for its inevitably dysfunctional best effort, will push us to make the incremental, or, every so often monumental, difference. For that is where the real job satisfaction awaits you. That is where you finally realize you are in that moment in time when your training, skills, intellect—and the Army’s investment in you—have conjoined to allow you to achieve great things.

So, have something that inspires you. Whether it is Roosevelt, Churchill or Kipling’s famous poem, *If*, have *something*. Risk of failure is ever-present. Inspiration is the highly enriched fuel that overcomes the fear of taking risks—and will make you a better lawyer.

Interest in Others, and Being Interesting. Good lawyering means getting clients comfortable talking to you, anywhere, anytime, about anything.

This means you have to be interesting, which in most human interaction means you take an interest *in them* and *their interests*. So, while I do not like watching or reading about baseball, if my boss does, then I am going to learn about her favorite team and know how they did last night; so in our warm up conversation I can *participate*. If you find yourself saying, “I shouldn’t have to do that to do my job,” or “I hate football,” that is your evil twin talking again. Brush the evil twin off—this is not a waste of time.

Since all armies march on their stomach, it is no surprise that so much of our work gets done in the vicinity of food. Whether it’s the M&M jar or the dining facility, some of your best advice is conveyed in the mess hall or over coffee in your office. The identification of an investigating officer, a candid discussion with the intel officer or someone in the targeting cell, or talking the public affairs officer out of a magazine interview with the commanding general. Making people feel comfortable around you and learning about them only improves your ability to communicate with them.

II. Final Thoughts

The crossroads of our practice of law with our staff officer responsibilities is communication. If information is the coin of the realm then communication is our stock exchange. Figuring out who else needs to know—and artfully communicating with them—will pay immense and

¹³ Theodore Roosevelt, *Citizenship in a Republic, The Man in the Arena, Address in Paris, France* (Apr. 23, 1910).

¹⁴ WILLIAM SHAKESPEARE, *HENRY V*, act 4, sc. 3.

¹⁵ Winston Churchill, *Their Finest Hour, Address Before The House of Commons of the Parliament of the United Kingdom* (June 18, 1940).

¹⁶ Roosevelt, *supra* note 15.

¹⁷ *Id.*

immeasurable dividends. Moreover, artful communication is the lifeblood of good leadership.

Think about Berra's charge of competence to hit home runs and Kipling's immortal anthem to relentless diligence, self-improvement, and self-awareness setting each of us on a path to "meet with triumph and disaster and [to] treat those two imposters just the same"¹⁸

You are, and will always be, the "unfinished symphony." You are always under construction. Let this notion animate you every day and in so doing emulate the lawyer you admire, steal from the leader you respect, and operate in a way your mother or father would brag about.

¹⁸ Kipling, *supra* note 2.

Deadly Advice: Judge Advocates and Joint Targeting

Major James A. Burkart*

*You have got to know your business inside and out and you have got to think like an operator. Your job as a military lawyer is not to prevent me from doing my job, your job as a military lawyer is to make it possible for me to do my job without breaking the law, without blowing up things I should not blow up, without killing people I should not kill*¹

I. Introduction

“Bombs away.” A 500-pound bomb fell towards a house near Baqubah, Iraq, where insurgent leader Abu Musab al-Zarqawi was meeting with his spiritual advisor on June 7, 2006.² Prior to the air strike, as analysts vetted the intelligence and operators planned the mission, military lawyers reviewed the operation³: *Was Zarqawi, the leader of al-Qaeda in Iraq, a valid target? Were the means and method of the attack lawful? Were precautions employed to avoid or minimize collateral damage? Was the strike proportionate since women and children were likely to be in the house with Zarqawi? Were there any violations of Iraqi sovereignty?* Properly advised, the commander made an informed decision and the bomb dropped on its target.⁴

By providing legal advice to commanders, judge advocates “play a critically important role”⁵ during targeting situations. The in-depth integration of military lawyers into targeting decisions stems from the aftermath of the My Lai massacre when the Department of Defense ordered judge advocates to ensure that all U.S. military operations complied with the law of war.⁶ This directive heralded a shift in the duties of judge advocates, evolving from “that of special staff officer providing traditional legal support [military justice,

claims, legal assistance, administrative law] to the current role in which judge advocates are integrated into operations at all levels.”⁷

For example, judge advocates were often called upon to address the legality of attacking problematic targets throughout Operation Desert Storm, such as when Iraqi fighter jets were placed next to the ancient temple of Ur.⁸ In Kosovo, the allied air commander approvingly noted that “every target . . . bombed for seventy-eight days had been reviewed at some level by professional military lawyers and that is the way it has to be.”⁹ During recent operations in Iraq and Afghanistan, military lawyers have provided commanders with a legal analysis for all preplanned targets to ensure compliance with the law of armed conflict (LOAC).¹⁰

To effectively provide advice during the planning and execution of targeting operations, judge advocates must understand the procedural mechanics of the targeting cycle, the substantive laws governing targeting, and their own crucial role in ensuring the law is accurately applied to the process in a way that enhances the commander’s ability to accomplish the mission.¹¹ Indeed, joint doctrine specifically tasks judge advocates:

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¹ Lieutenant General Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, 78 INT’L L. STUD. 19, 26 (2002).

² MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *THE ENDGAME: THE INSIDE STORY OF THE STRUGGLE FOR IRAQ, FROM GEORGE W. BUSH TO BARACK OBAMA 206-08* (2012).

³ See Charles J. Dunlap, Jr., *Come the Revolution: A Legal Perspective on Air Operations in Iraq since 2003*, 86 INT’L L. STUD. 139, 142-45 (2010) (highlighting the integration of judge advocates in air operations centers and their legal review of all preplanned air strikes); see also Mark Benjamin, *Killing “Bubba” from the Skies*, SALON (Feb. 15, 2008), http://www.salon.com/2008/02/15/air_war/.

⁴ GORDON & TRAINOR, *supra* note 2, at 207.

⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 7-45 (18 Mar. 2013) [hereinafter FM 1-04].

⁶ FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI ix (2001). Current Department of Defense (DoD) policy requires that “all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.” U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5.11.8 (9 May 2006, current as of 22 Feb. 2011) [hereinafter DODD 2311.01E].

⁷ BORCH, *supra* note 6, at vii.

⁸ *Id.* at 167.

⁹ Short, *supra* note 1, at 26.

¹⁰ Lieutenant Colonel James K. Carberry & M. Scott Holcomb, *Target Selection at CFLCC: A Lawyer’s Perspective*, FIELD ARTILLERY 39, 41 (Mar.-June 2004). The law of war, often called the law of armed conflict, “encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” DODD 2311.01E, *supra* note 6, para. 3.1.

¹¹ FM 1-04, *supra* note 5, para. 7-46; see General Hal M. Hornburg, *The Importance of Legal Professionals in the Air Force* (June 27, 2001) (“Who do you think was standing right behind me [in the operations center]? It was my [judge advocate (JAG)]. That person needs to know the law and

Due to the complexity and extent of international law considerations involved in the joint targeting cycle, [judge advocates] must be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations. Early involvement by [judge advocates] will improve the targeting process and can prevent possible violations of international or domestic law.¹²

This article summarizes the phases of the targeting cycle, identifies the principles of the law of targeting, and then addresses the role of the judge advocate in the targeting process. Throughout the discussion, it should be remembered that “it is *always* the commander (not the lawyer) who makes the final decision to strike or not to strike a target”; judge advocates “play a *supporting* role to the commander during the targeting process.”¹³ To support the commander, judge advocates must first understand the targeting cycle.¹⁴

II. Targeting Process

Doctrinally, targeting is the process of “selecting and prioritizing targets and matching the appropriate response to them”¹⁵ to create desired effects that achieve the

commander’s objectives. Targeting is accomplished through the targeting cycle: an iterative, logical methodology for the development, planning, execution, and assessment of attacks against the enemy.¹⁶

In Phase 1 (End State and Commander’s Objectives), the commander sets overall campaign objectives that focus the development of general target sets.¹⁷ Understanding the commander’s objectives is the most important activity of joint targeting because this guidance drives all subsequent phases of the targeting cycle.¹⁸ For instance, during the 2003 invasion of Iraq, the campaign objective was to “rapidly defeat the enemy to deny his use of weapons of mass destruction while preserving critical infrastructure to facilitate the post-conflict rebuilding of Iraq.”¹⁹ Consequently, targeting guidance restricted strikes against Iraqi infrastructure, although such objects may have been lawful targets, because their destruction did not facilitate post-conflict reconstruction.²⁰

After establishing general targeting guidance, specific targets are developed in Phase 2 (Target Development and Prioritization).²¹ Target development seeks to “identify and characterize potential targets that, when successfully engaged, support the achievement of the commander’s objectives.”²² The underlying intelligence is first vetted to make sure the assessment is accurate; the target is then validated to confirm that it meets the targeting guidance and complies with the LOAC and rules of engagement (ROE).²³

rules of engagement, but he or she also needs to understand things bigger than just the law. They’ve got to understand combat.”), reprinted in Colonel Charles J. Dunlap, Jr., *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 A.F. L. REV. 293, 303 (2001).

¹² JOINT CHIEFS OF STAFF, PUB. 3-60, JOINT TARGETING I-1 (31 Jan. 2013) [hereinafter JP 3-60].

¹³ Carberry & Holcomb, *supra* note 10, at 39 (“The [JAG’s] role is to ensure the order is the result of a well informed decision, taking into account the relevant Law of War considerations of necessity, humanity, discrimination and proportionality. In doing so, [the JAG] facilitates the commander’s success.”).

¹⁴ See Dunlap, *supra* note 3, at 146 (noting that judge advocates must be familiar with their client’s business, including “a myriad of technical specifics related to weapons, platforms, strategies and other aspects of the military art”).

¹⁵ JP 3-60, *supra* note 12, at I-1. This article uses the joint targeting process as found in JP 3-60. The Army and Marine Corps use a similar cycle: Decide, Detect, Deliver, and Assess (D3A). The commander and staff first decide what enemy objects to attack. They then determine the best method to detect the target and the most appropriate weapon to be delivered against the target to achieve the desired effects. Finally, they select the most effective means to assess the results of the strike. See U.S. DEP’T OF ARMY, TECHNIQUES PUB. 3-60, TARGETING (May 2015) [hereinafter ATP 3-60]; U.S. MARINE CORPS, WARFIGHTING PUB. 3-43.3, MARINE AIR-GROUND TASK FORCE (MAGTF) FIRES (3 June 2011) [hereinafter MCWP 3-43.3].

¹⁶ JP 3-60, *supra* note 12, at I-10; see *infra* Appendix A; see also U.S. DEP’T OF DEF., DOCTRINE NETWORKED EDUCATION & TRAINING, <http://dtic.mil/doctrine/docnet/courses/operations/targt.htm> (last visited Jul. 6, 2016) (providing an online training course on joint targeting).

¹⁷ JP 3-60, *supra* note 12, at II-4. For example, general target sets in Desert Storm included: leadership command facilities; electricity production facilities; telecommunications and command, control, and communications nodes; strategic integrated air defense system; air forces and airfields; nuclear, biological and chemical weapons research, production, and storage facilities; scud missiles, launchers, and production and storage facilities; naval forces and port facilities; oil refining and distribution facilities; railroads and bridges; Iraqi army units including republican guard forces; and military storage and production sites. U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 95 (1992).

¹⁸ THE JUDGE ADVOCATE GEN.’S SCHOOL, U.S. AIR FORCE, AIR FORCE OPERATIONS & THE LAW 279 (2014) [hereinafter AF OPS & LAW].

¹⁹ Carberry & Holcomb, *supra* note 10, at 40.

²⁰ *Id.*; see also MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 239 (2007).

²¹ JP 3-60, *supra* note 12, at II-5; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 859 INT’L REV. RED CROSS 452 (Sept. 2005).

²² JP 3-60, *supra* note 12, at II-5.

²³ *Id.* at II-11. Rules of engagement (ROE) are “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” JOINT CHIEFS OF STAFF, PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 207 (8 Nov. 2010, as amended through 15 Jan. 2016) [hereinafter JP 1-02].

Prioritization is important because the purpose of targeting is to engage those targets that best secure the submission of the enemy as soon as possible.²⁴

In Phase 3 (Capabilities Analysis), after a potential target is identified, vetted, and validated, weaponeers select the most appropriate weapon to use against a particular target under the circumstances.²⁵ They also identify the risk of fratricide and collateral damage.²⁶ The goal is to apply enough force to create the desired first order effects on the target while minimizing second order collateral damage and reducing the expenditure of resources.²⁷

With target development and capabilities analysis complete, the target is presented in Phase 4 (Commander's Decision and Force Assignment) to the commander for decision.²⁸ Upon approval, the target is passed from theoretical planning to actual operations and an appropriate unit is tasked with the mission.²⁹ Engagements are prioritized and scheduled, whether simultaneous or sequential, to achieve the best operational effects.³⁰

A unit receives the tasking orders in Phase 5 (Mission Planning and Force Execution) and conducts detailed planning, such as determining flight routes, followed by execution of the mission.³¹ After the target is attacked, an assessment is conducted in Phase 6 (Assessment) to evaluate the specific actions on the target (measures of performance) and to determine whether the tactical actions generated the desired operational effects (measures of effectiveness).³² The

iterative cycle continues back into Phase 1 as the assessment informs the commander's campaign objectives and shapes future target development.³³ Once comfortable with the targeting process, judge advocates then focus on the law of targeting.³⁴

III. Law of Targeting

The law of targeting is a delicate "balance between the desire of states to retain the capability to effectively conduct military operations and the humanitarian mandate of both shielding those who are uninvolved in a conflict from its tragic consequences and protecting those who are involved, such as members of the armed forces, from unnecessary harm."³⁵ The law preserves this balance through the general principles of military necessity,³⁶ distinction,³⁷ means and

²⁴ MCWP 3-43.3, *supra* note 15, at 1-2 ("[F]iring units don't strike targets just because they can; rather, they attack relevant targets to create specific effects based on how those actions contribute to the larger mission.").

²⁵ JP 3-60, *supra* note 12, at II-13. The most appropriate weapon may be a less than lethal weapon system since "[t]argeting is much more nuanced than merely blowing things up and killing people; it involves influencing people to do things as well as not to do things." GEOFFREY CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 162 (2012).

²⁶ JP 3-60, *supra* note 12, at II-13.

²⁷ *Id.* at II-13 to II-15; GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 532 (2010).

²⁸ JP 3-60, *supra* note 12, at II-16. Targets approved by the commander are placed on the Joint Integrated Prioritized Target List (JIPTL), which is "a prioritized list of targets approved and maintained by the joint force commander." JP 1-02, *supra* note 23, at 126; JP 3-60, *supra* note 12, at I-8, II-12.

²⁹ JP 3-60, *supra* note 12, at II-16.

³⁰ *Id.*

³¹ *Id.* at II-20; SOLIS, *supra* note 27, at 532.

³² JP 3-60, *supra* note 12, at II-31. Measures of performance are "tied to measuring task accomplishment," whereas measures of effectiveness are "tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect." JP 1-02, *supra* note 23, at 149.

³³ JP 3-60, *supra* note 12, at II-31.

³⁴ Comfort with the process will include familiarity with targeting computer systems, such as the Joint Targeting Toolbox (JTT), Theater Battle Management Core System (TBMCS), Joint Automated Deep Operations

Coordination System (JADOCs), Advanced Field Artillery Tactical Data System (AFATDS), and Precision Strike Suite for Special Operations Forces (PSS-SOF), or attendance at a Joint Firepower or Weaponeering Course. See U.S. JOINT FORCES COMMAND, *JOINT FIRES AND TARGETING HANDBOOK* app. C (19 Oct. 2007), http://www.globalsecurity.org/military/library/policy/dod/joint/joint-fires-targeting_hb.pdf.

³⁵ Michael N. Schmitt & Eric W. Widmar, "On Target": *Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SECURITY L. & POL'Y 379 (2014); see also Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010); U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* para. 1.3.4 (June 2015) [hereinafter *LAW OF WAR MANUAL*].

³⁶ "Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war." *LAW OF WAR MANUAL*, *supra* note 35, para. 2.2.

³⁷ *Id.* para. 2.5. "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Although not a party to AP I, the United States considers many of the treaty's targeting provisions as reflective of customary international law. See, e.g., Rem. by Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) [hereinafter Matheson Remarks].

methods,³⁸ precautions,³⁹ proportionality,⁴⁰ and humanity.⁴¹ These principles provide the foundation for a basic law of targeting design in which combatants (1) identify a lawful military objective, as distinguished from civilians, civilian objects, and other protected categories, and (2) employ a lawful, discriminate weapon, (3) using a lawful method, that will result in desired effects on the target, while (4), through reasonable precautions, avoiding or minimizing collateral damage to the uninvolved civilian, at least not excessive, and also (5) respecting state sovereignty.⁴²

From the legal perspective, the first step of targeting is the characterization of the target as a military objective.⁴³ Military objectives include enemy combatants,⁴⁴ members of non-state armed groups,⁴⁵ civilians directly participating in hostilities,⁴⁶ and “those objects which by their nature,

location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, under circumstances ruling at that time, offers a definite military advantage.”⁴⁷ All persons, places, and objects are protected from attack, such as civilians,⁴⁸ combatants placed *hors de combat*,⁴⁹ medical and religious personnel,⁵⁰ medical facilities,⁵¹ and cultural or historical property.⁵² Only military objectives can be the target of an attack.⁵³

After identifying a valid military objective, the law of targeting next addresses the weapon being employed and the execution of the attack,⁵⁴ because “[t]he right of States engaged in armed conflict to adopt means and methods of warfare is not unlimited.”⁵⁵ For instance, it is forbidden to use inherently indiscriminate weapons⁵⁶ or “to employ arms,

³⁸ “In general, *method of warfare* has referred to how warfare is conducted, while *means of warfare* has referred to weapons or devices used to conduct warfare.” LAW OF WAR MANUAL, *supra* note 35, para. 5.1.1.

³⁹ “Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects.” *Id.* para. 5.11; *see also* AP I, *supra* note 37, art. 57; Geoffrey S. Corn, *Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War*, JUST SECURITY (July 8, 2015), <https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/>.

⁴⁰ “*Proportionality* may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.” LAW OF WAR MANUAL, *supra* note 35, para. 2.4. Specific to targeting, “this rule obliges persons to refrain from attacking where the expected harm incidental to such attacks would be excessive in relation to the military advantage anticipated to be gained.” *Id.* para. 2.4.1.2; *see also* AP I, *supra* note 37, art. 51(5)(b).

⁴¹ “*Humanity* may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.” LAW OF WAR MANUAL, *supra* note 35, para. 2.3.

⁴² *Id.* at 5.5.2; Schmitt & Widmar, *supra* note 35, at 379; *see also infra* Appendix B (providing law of targeting design diagram). “Design is the conception and articulation of a framework for solving a problem. . . . The purpose of design is to achieve a greater understanding of the environment and the nature of the problem in order to identify an appropriate conceptual solution.” U.S. MARINE CORPS, WARFIGHTING PUB. 5-1, MARINE CORPS PLANNING PROCESS 1-3 (24 Aug. 2010).

⁴³ Schmitt & Widmar, *supra* note 35, at 382. “Military objective” is a term of art within the law of targeting, indicating a lawful target. AP I, *supra* note 37, art. 52(2). It should not be confused with an objective in the general operational sense of “a clearly defined, decisive, and attainable goal toward which every operation is directed.” JP 1-02, *supra* note 23, at 171.

⁴⁴ “In general, combatants, whether privileged or unprivileged, may be made the object of attack, provided they have not been placed *hors de combat*.” LAW OF WAR MANUAL, *supra* note 35, para. 5.8.

⁴⁵ “Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.” *Id.* para. 5.8.3.

⁴⁶ “Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.” *Id.* para. 5.9; *see also* AP I, *supra* note 37, art. 51(3).

⁴⁷ LAW OF WAR MANUAL, *supra* note 35, para. 5.7.3; *see also* AP I, *supra* note 37, art. 52(2). For war-sustaining objects, a controversial area, *see* LAW OF WAR MANUAL, *supra* note 35, paras. 5.7.6.2, 5.7.8.5, and 5.17.2.3;

Ryan Goodman, *Targeting “War-Sustaining” Objects in Non-International Armed Conflict*, 110 AM. J. INT’L L. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783736.

⁴⁸ “Civilians may not be made the object of attack, unless they take direct part in hostilities.” LAW OF WAR MANUAL, *supra* note 35, para. 4.8.2; *see also* AP I, *supra* note 37, art. 51(3).

⁴⁹ “Persons, including combatants, placed *hors de combat* may not be made the object of attack.” LAW OF WAR MANUAL, *supra* note 35, para. 5.10; *see also* AP I, *supra* note 37, art. 41(2).

Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape: persons in the power of an adverse party; persons not yet in custody, who have surrendered; persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and persons parachuting from aircraft in distress.

LAW OF WAR MANUAL, *supra* note 35, para. 5.10.

⁵⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 24, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]. “Military medical and religious personnel may not be made the object of attack.” LAW OF WAR MANUAL, *supra* note 35, para. 4.10.1. However, “Military medical and religious personnel who take actions outside their role as military medical and religious personnel forfeit the corresponding protections of their special status and may be treated as combatants or auxiliary medical personal, as appropriate.” *Id.*

⁵¹ GC I, *supra* note 50, art. 19, 21; LAW OF WAR MANUAL, *supra* note 35, para. 5.14.3.1.

⁵² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. “Certain types of property receive additional protection as cultural property. Cultural property, the areas immediately surrounding it, and appliances in use for its protection should be safeguarded and respected.” LAW OF WAR MANUAL, *supra* note 35, para. 5.18.

⁵³ LAW OF WAR MANUAL, *supra* note 35, para. 5.6.1; *see also* AP I, *supra* note 37, art. 48.

⁵⁴ Schmitt & Widmar, *supra* note 35, at 397-404.

⁵⁵ LAW OF WAR MANUAL, *supra* note 35, para. 2.6.2.1; Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2295 [hereinafter Hague IV Reg.].

⁵⁶ LAW OF WAR MANUAL, *supra* note 35, para. 6.7; *see also* AP I, *supra* note 37, art. 51(4)(b).

projectiles, or material calculated to cause unnecessary suffering.”⁵⁷ Furthermore, treaty or customary international law may either specifically prohibit a particular weapon completely or regulate its method of employment, such as with chemical weapons,⁵⁸ mines and booby-traps,⁵⁹ or incendiary weapons.⁶⁰

In regards to the method of attack, it is especially forbidden to kill or wound the enemy in a treacherous or perfidious manner.⁶¹ Furthermore, those that plan, authorize, and execute attacks must take feasible precautions to minimize incidental damage to civilians and civilian objects, taking into account all circumstances at the time, including humanitarian and military considerations.⁶² Specific precautions may consist of adjusting the timing of an attack,⁶³ selecting a certain weapon,⁶⁴ or providing effective advance warnings to potentially affected civilians, unless circumstances do not permit.⁶⁵

Even when employing reasonable means and methods to attack a legitimate target, there may still be incidental injury to civilians and collateral damage to civilian objects.⁶⁶ While

unfortunate and tragic, military necessity justifies incidental damage, subject to the principle of proportionality that prohibits attacks when the anticipated harm to civilians and civilian objects is excessive in relation to the concrete and direct military advantage expected to be gained.⁶⁷ The legal focus is on a military commander making a reasonable decision based on the information readily available; the post-strike “fact that civilians are killed or injured, or civilian property is destroyed, as a result of an attack does not of itself necessarily render that attack unlawful.”⁶⁸

Finally, although not necessarily a *jus in bello* targeting issue, the location of the target can have legal implications in the *jus ad bellum* sense of impacting another state’s sovereignty.⁶⁹ In an international armed conflict between states, “attacks may be conducted against military objectives wherever located, outside neutral territory.”⁷⁰ The territory of a neutral state is inviolable, unless a neutral state fails to fulfill its obligation to prevent its territory from being misused.⁷¹ During a non-international armed conflict between a state and a non-state actor, attacks are permissible when conducted with the consent of the state where the military objective is

⁵⁷ Hague IV Reg., *supra* note 55, art. 23(e); LAW OF WAR MANUAL, *supra* note 35, para. 6.6.

⁵⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317; Law of War Manual, *supra* note 35, para. 6.8.3. For additional guidance on riot control agents, see Law of War Manual, *supra* note 35, para. 6.16. For poison, see Hague IV Reg., *supra* note 55, art. 23(a); Law of War Manual, *supra* note 35, para. 6.8. For asphyxiating gases, see Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65; Law of War Manual, *supra* note 35, para. 6.8.2. For biological weapons, see Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163; Law of War Manual, *supra* note 35, para. 6.9.

⁵⁹ Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as Amended on May 3, 1996, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, May 3, 1996, 2048 U.N.T.S. 93; Law of War Manual, *supra* note 35, para. 6.12. For policy guidance on landmines, see U.S. DEP’T OF STATE, BUREAU OF POL.-MIL. AFF., *Fact Sheet: Changes to U.S. Anti-Personnel Landmine Policy* (Sept. 23, 2014); *see also* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (Ottawa Convention) (United States not a party); *see* Law of War Manual, *supra* note 35, para. 6.13 (providing guidance on cluster munitions).

⁶⁰ Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; LAW OF WAR MANUAL, *supra* note 35, para. 6.14; *see id.* para. 6.14.2.1 (discussing specific guidance on white phosphorous).

⁶¹ Hague IV Reg., *supra* note 55, art. 23(b); LAW OF WAR MANUAL, *supra* note 35, para. 5.22. It is also forbidden to “declare that no quarter will be given” during an attack. Hague IV Reg., *supra* note 55, art. 23(d); LAW OF WAR MANUAL, *supra* note 35, para. 5.5.7.

⁶² LAW OF WAR MANUAL, *supra* note 35, para. 5.11; Matheson Remarks, *supra* note 37. “In the conduct of military operations, constant care shall be

taken to spare the civilian population, civilians and civilian objects.” AP I, *supra* note 37, art. 57(1). While this article specifically addresses precautions taken by the attacker, the party subject to attack also has a duty to take feasible precautions to reduce the risk of harm to civilians and other protected persons and objects. LAW OF WAR MANUAL, *supra* note 35, para. 5.14; AP I, *supra* note 37, art. 58. *See also* W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 150-68 (1990).

⁶³ LAW OF WAR MANUAL, *supra* note 35, para. 5.11.2.

⁶⁴ *Id.* para. 5.11.3.

⁶⁵ *Id.* para. 5.11.1; *see also* AP I, *supra* note 37, art. 57. But note, the United States specifically does not view article 57(3) as reflecting customary international law. LAW OF WAR MANUAL, *supra* note 35, para. 5.11.5.

⁶⁶ LAW OF WAR MANUAL, *supra* note 35, para. 2.4.1.2. “Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of war.” Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) (Lieber Code).

⁶⁷ LAW OF WAR MANUAL, *supra* note 35, para. 5.12; AP I, *supra* note 37, art. 51(5)(b).

⁶⁸ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 475 (2012); *see* INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN paras. 50-51, *reprinted in* 39 INT’L LEGAL MATERIALS 1257, 1272 (2000).

⁶⁹ Schmitt & Widmar, *supra* note 35, at 407-09. *Jus ad bellum* is the law concerning the resort to force; *jus in bello* is the law concerning conduct during war. LAW OF WAR MANUAL, *supra* note 35, para. 1.11.

⁷⁰ LAW OF WAR MANUAL, *supra* note 35, para. 5.5.5. This includes the land, sea, and air territory of a belligerent state and international waters and airspace. Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 5 (2014).

⁷¹ Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 5, Oct. 18, 1907, 36 Stat. 2310; LAW OF WAR MANUAL, *supra* note 35, para. 15.3; Schmitt, *supra* note 70, at 5.

located, when authorized by the United Nations Security Council, or when consistent with *jus ad bellum* self-defense because a state is unable or unwilling to address an imminent threat emanating from its territory.⁷² The penetration of a state's sovereignty is permissible when based on these justifications and exceptions.⁷³

Regardless of where it occurs, as noted above, an attack must always be directed at a valid military objective through lawful means and methods, taking feasible precautions to avoid or minimize incidental harm to civilians. The law of targeting requires a reasonable military commander to exercise good faith judgment in weighing numerous intangible considerations, with imperfect information in dynamic and chaotic situations.⁷⁴ It is not as simple and precise as "using a calculator to solve a mathematical equation."⁷⁵ With an understanding of the law of targeting, in addition to the mechanics of the targeting process, a judge advocate is now ready to provide legal advice to the commander and staff as they employ force to accomplish the mission.⁷⁶

IV. Role of the Judge Advocate in the Targeting Process

The judge advocate plays an essential role in ensuring that the law of targeting is integrated into the targeting process.⁷⁷ During the first two phases of the targeting cycle, the main emphasis is on identifying a valid military objective. In the third phase the concern shifts to the means and methods employed against the target and the feasible precautions taken to minimize collateral damage. The judge advocate then provides legal advice to inform the commander's decision in Phase 4 and monitors the planning and execution of the mission in Phase 5, to include delivering real-time advice as

the operation unfolds. Finally, in Phase 6 the judge advocate helps evaluate the post-strike assessment. The judge advocate is intimately involved in every phase of the targeting cycle, pointing out potential legal pitfalls and assisting the commander and staff with making reasonable targeting decisions.⁷⁸

A. Phase 1 (End State and Commander's Objectives)

During the first phase of the targeting cycle, judge advocates actively participate in the operational planning process, review all plans and orders for legal and policy compliance, and provide the commander and staff with legal estimates as they identify overall campaign objectives.⁷⁹ As members of the joint targeting coordination board (JTCB), judge advocates help translate the campaign objectives into general targeting guidance and target sets.⁸⁰ Judge advocates must ensure all proposed targeting guidance and target sets are consistent with all applicable law and policy.⁸¹

Of note, ROE and other operational directives often restrain targeting to a greater degree than that permitted by the LOAC because they account for political and military purposes in addition to the law.⁸² Judge advocates work with the commander and operations personnel to determine whether the current ROE are sufficient to accomplish the mission or whether supplemental ROE are needed to support the desired concept of targeting.⁸³ Early involvement by judge advocates helps ensure that the targeting guidance, target sets, and ROE are properly nested within the overall campaign objectives, which will set the legal conditions for all subsequent phases of the targeting cycle.⁸⁴

⁷² Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77-91 (2013). See also Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012).

⁷³ Schmitt, *supra* note 72, at 77-91.

⁷⁴ LAW OF WAR MANUAL, *supra* note 35, para. 2.2.3.3 (recognizing the "Rendulic Rule," in that decisions in combat are assessed based on information reasonably available to the commander at the time of the decision, not on information that subsequently comes to light). See also SOLIS, *supra* note 27, at 265, 286-90.

⁷⁵ Frederic L. Borch, *Targeting After Kosovo: Has the Law Changed for Strike Planners?*, LVI-2 NAVAL WAR C. REV. 75 (Spring 2003).

⁷⁶ CTR. FOR LAW & MIL. OPERATIONS (CLAMO), THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DEPLOYED MAGTF JUDGE ADVOCATE HANDBOOK 2-2 to 2-4 (2013) (noting that legal advice should be accurate, timely, relevant, complete, and useable).

⁷⁷ BOOTHBY, *supra* note 68, at 476, 484-85 ("Ready access to legal advisers at all appropriate levels is an important means of ensuring that legal constraints are properly understood and that they are factored into military decision-making, including in particular in relation to targeting decisions."). See Appendix C for matrix of law of war and targeting process integration.

⁷⁸ Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 467-68 (Mar. 2004).

⁷⁹ JOINT CHIEFS OF STAFF, PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS I-12 (17 Aug. 2011); see also Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW. 5, 22 (Sept. 2014).

⁸⁰ JP 1-04, *supra* note 79, at III-18 (noting the presence of a judge advocate on the joint targeting coordination board as essential to ensure proper analysis of whether strikes comply with the law of war).

⁸¹ AF OPS & LAW, *supra* note 18, at 280. For example, guidance to spread terror among the civilian population would obviously be prohibited. LAW OF WAR MANUAL, *supra* note 35, para. 5.3.2; AP I, *supra* note 37, art. 51(2).

⁸² INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 81-82 (2015) [hereinafter OPLAW HANDBOOK]; see also HEADQUARTERS, INT'L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE (6 July 2009), http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (unclassified version).

⁸³ JP 1-04, *supra* note 79, at II-12.

⁸⁴ AF OPS & LAW, *supra* note 18, at 279; JP 3-60, *supra* note 12, at II-4. An air commander in Kosovo advised, "The important thing is that the legal advisor has got to be integrated into the operational team. He can't be an

B. Phase 2 (Target Development and Prioritization)

During the second phase, judge advocates advise staff members within working groups, elements, and cells as they develop specific targets that meet the targeting guidance and fall within a target set.⁸⁵ A potential target is vetted and validated to verify its characterization as a legitimate military objective worth engaging as part of the concept of operations.⁸⁶ It is then prioritized among other potential targets because the intelligence resources necessary to develop targets, and the time to do so, are not unlimited.⁸⁷

1. Target Vetting

Target vetting is an assessment of the accuracy of the intelligence that supports the decision to classify a person or object as a military objective.⁸⁸ Current U.S. policy requires positive identification or “a reasonable certainty that the proposed target is a legitimate military target.”⁸⁹ Rules of engagement will set forth standards for the quantity, quality, timeliness, and duration of the intelligence necessary to establish positive identification.⁹⁰

To advise on target vetting, a judge advocate needs to understand the different sensors that are collecting intelligence, whether human sources, signals intelligence, or real-time video feeds from intelligence, surveillance, and reconnaissance (ISR) assets.⁹¹ Because means and methods of intelligence collection are often classified, the judge advocate must have the appropriate security clearance and be

afterthought. He has to be there when the plan is being made.” Randon H. Draper, *Interview with a JFACC: A Commander’s Perspective on the Legal Advisor’s Role*, THE JAG WARRIOR 21-22 (Autumn 2002).

⁸⁵ JP 1-04, *supra* note 79, at x.

⁸⁶ BOOTHBY, *supra* note 68, at 476.

⁸⁷ See JOINT CHIEFS OF STAFF, PUB. 2-0, JOINT INTELLIGENCE II-6 (22 Oct. 2013) [hereinafter JP 2-0] (noting that intelligence needs often exceed intelligence capabilities, requiring prioritization of collection).

⁸⁸ JP 3-60, *supra* note 12, at II-11.

⁸⁹ See Coalition Forces Land Component Command ROE Card, Iraq (2003), reprinted in OPLAW HANDBOOK, *supra* note 82, at 109; see also John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT’L L. 83 (2016), <http://ssrn.com/abstract=2597065> (arguing to replace positive identification with affirmative target identification as “an honest and reasonable belief, based on such affirmative evidence as is reasonably available at the time, that the object of attack is a lawful military target”).

⁹⁰ See JP 2-0, *supra* note 87, app. A (describing intelligence confidence levels: low, moderate, and high); see also U.S. MARINE CORPS, WARFIGHTING PUB. 2-3, MAGTF INTELLIGENCE PRODUCTION & ANALYSIS 3-12 to 3-13 (27 Sept. 2001) [hereinafter MCWP 2-3] (outlining the intelligence evaluation system with reliability and accuracy evaluation codes).

⁹¹ Rear Admiral Michael F. Lohr & Commander Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT’L L. 465, 471-72 (2003); see also JP 2-0, *supra* note 87, app. B (listing intelligence disciplines).

read on to relevant intelligence programs.⁹² Understanding the reliability of intelligence allows the judge advocate to independently evaluate the characterization of a person or object as a military objective.⁹³

2. Target Validation

Once the intelligence is deemed reliable, target validation determines whether a potential target fits within the commander’s targeting guidance and complies with the LOAC and ROE.⁹⁴ The judge advocate will review the target folder, either hard copy or electronic, and all the underlying intelligence, such as satellite imagery and intelligence summaries, to conduct a legal assessment and ensure that the potential target is a valid military objective.⁹⁵ The judge advocate’s active participation in target validation is essential because some operations personnel, without legal guidance, may be overly cautious and forego attacks that are legally permitted, or overly zealous and launch attacks that are legally questionable.⁹⁶

The primary legal question during vetting and validation is whether there is positive identification of a military objective because without a valid military objective there is nothing to target.⁹⁷ After being vetted and validated, potential targets can be placed on one of three different lists: the joint

⁹² U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 6.1.2.1 (July 2007) (noting that commanders should “ensure their judge advocates have appropriate clearances and access to information to enable them to carry out [their legal] responsibility”).

⁹³ When evaluating intelligence judge advocates should be aware of analytic pitfalls and cognitive biases that can influence the decision-making process. MCWP 2-3, *supra* note 90, at 4-9 to 4-14. See also Ashley S. Deeks, *Cognitive Biases and Proportionality Decisions: A First Look*, http://law.huji.ac.il/upload/6_AshleyDeeks_p.pdf (unpublished draft manuscript; cited with permission); Lieutenant Commander Luke Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT’L SECURITY J. 577 (2016).

⁹⁴ JP 3-60, *supra* note 12, at II-11. Of particular concern will be dual use targets. By having a military purpose, dual use targets are military objectives and subject to direct attack; however, their concurrent civilian function heightens collateral damage considerations. *Id.* at A-5; LAW OF WAR MANUAL, *supra* note 35, para. 5.7.1.4.

⁹⁵ AF OPS & LAW, *supra* note 18, at 280-81.

⁹⁶ *Id.* at 281. But see BING WEST, ONE MILLION STEPS: A MARINE PLATOON AT WAR 29 (2014) (arguing that legal advisors sap energy and optimism from the targeting process, causing hesitation to conduct even legally permissible attacks).

⁹⁷ See Short, *supra* note 1, at 19 (“Every target we intended to strike had passed an extraordinary series of tests, perhaps the most important one being whether it fit with our definition of military objective under the law of armed conflict.”).

target list,⁹⁸ the restricted target list,⁹⁹ or the no-strike list.¹⁰⁰ Although judge advocates must be familiar with these lists, they do not directly manage them; the lists are maintained and updated by intelligence and operations personnel.¹⁰¹

C. Phase 3 (Capabilities Analysis)

Once a valid military objective is identified, weaponeers make a recommendation on how to engage the target and analysts conduct a collateral damage estimation to identify possible collateral concerns.¹⁰² The judge advocate must be readily available to advise on the means, methods, and precautions of attack being considered.

1. Weaponeering

While the weaponeer matches the capabilities of an appropriate weapon with the vulnerabilities of a particular target to achieve the desired effects, the judge advocate reviews the proposed weaponeering solution for potential legal or policy restrictions.¹⁰³ Since all weapons in the U.S. inventory have previously received legal reviews during their acquisition, whether the weapon is inherently indiscriminate or specifically designed to cause unnecessary suffering is not a major concern at this stage.¹⁰⁴ However, the actual method of employment must still be examined for potential legal issues, like the use of a weapon regulated by specific treaty, the use of a weapon beyond its intended purpose, or the use of any otherwise lawful weapon with the specific intent to cause unnecessary suffering.¹⁰⁵ Beyond legal restrictions, the

primary ROE concern is whether the commander has release authority for a particular weapon or whether for operational reasons the use of that weapon is reserved at a higher headquarters.¹⁰⁶

2. Collateral Damage Estimation (CDE)

After deciding on a weaponeering solution that achieves the desired first order effects on the target, CDE examines the incidental second and higher order effects on the uninvolved civilian and civilian objects.¹⁰⁷ A CDE analyst uses the CDE methodology to identify the risk of collateral damage, often through computer modeling that predicts the likely effects of engaging a particular target with a particular munition.¹⁰⁸

The CDE analyst first geospatially locates the positively identified military objective and draws a ring around the target that represents the effects of most conventional weapons in the U.S. inventory (CDE Level 1).¹⁰⁹ If there are no collateral concerns within the effects ring, the target receives a rating of 'low' and a commander with authority to approve that level of collateral risk (CDE Level 1 Low) may authorize the strike after considering risk to the mission, friendly forces, and collateral concerns.¹¹⁰

However, if there are collateral concerns within the effects ring, the target proceeds to the next assessment tier where mitigation techniques are applied to modify the weapons effects with the intent that the collateral concerns will no longer be affected.¹¹¹ Mitigation techniques may

⁹⁸ A joint target list includes targets that have been vetted and validated, with no engagement restrictions; these targets will be nominated for inclusion on the joint force commander approved JIPTL which is prioritized according to the commander's objectives. JP 3-60, *supra* note 12, at II-12.

⁹⁹ A restricted target list contains vetted and validated targets that have operational restrictions on them; restricted targets have engagement prohibitions or limitations due to operational or political considerations, such as do not destroy a bridge, even if it is an otherwise valid military target, because the ground forces need it for their subsequent scheme of maneuver. *Id.* at II-12, II-13.

¹⁰⁰ A no-strike list contains all identified entities functionally characterized as civilian or non-combatant in nature and thus are protected under international law and cannot be the object of attack, unless their protection is lost due to improper use. *Id.* at II-12; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01B, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (11 Dec. 2015) [hereinafter CJCSI 3160.01B] (for official use only (FOUO)).

¹⁰¹ The DoD operates a modernized integrated database (MIDB) as an all-source repository for all target lists, no-strike lists, and data in electronic target folders. JP 3-60, *supra* note 12, at B-3; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3370.01A, TARGET DEVELOPMENT STANDARDS (17 Oct. 2014) (FOUO).

¹⁰² JP 3-60, *supra* note 12, at II-13.

¹⁰³ AF OPS & LAW, *supra* note 18, at 281.

¹⁰⁴ *See* U.S. DEP'T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (2003).

¹⁰⁵ *See* CORNET AL., *supra* note 25, at 191.

¹⁰⁶ U.S. AIR FORCE, DOCTRINE DOCUMENT 1-04, LEGAL SUPPORT TO OPERATIONS 95 (4 Mar. 2012).

¹⁰⁷ JP 3-60, *supra* note 12, at II-14, II-18; CJCSI 3160.01B, *supra* note 100, encl. E (unclassified). The five foundational questions of the collateral damage estimation (CDE) framework are: (1) Can I positively identify the person or object I want to attack as a legitimate military objective? (2) Are there collateral objects within the effects range of the weapon I would like to use? (3) Can I mitigate damage to those collateral concerns by attacking the target with a different weapon or method of engagement, yet still accomplish my mission? (4) If not, how many non-combatants do I think will be injured or killed by my attack? (5) Are the collateral effects of my attack excessive in relation to the expected military advantage to be gained and do I have authority to engage the target with the risk of collateral damage, or do I need to call higher headquarters? *Id.*

¹⁰⁸ CORNET AL., *supra* note 25, at 188; SOLIS, *supra* note 27, at 532. *See also* Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681, 740-53 (2014); Dwight A. Roblyer, *Beyond Precision: Issues of Morality and Decision Making in Minimizing Collateral Casualties* 18 (paper submitted to the Program in Arms Control, Disarmament and International Security, University of Illinois, Urbana-Champaign) (28 Apr. 2003), <http://www.dtic.mil/dtic/tr/fulltext/u2/a424627.pdf>.

¹⁰⁹ CJCSI 3160.01B, *supra* note 100, encl. E, app. A (unclassified).

¹¹⁰ *Id.* Collateral concerns are any people or objects not otherwise considered military objectives found within the weapons effects ring. *Id.*

¹¹¹ *Id.* encl. E, apps. B, C, D (unclassified). There is additional, specialized analysis if the target is a dual-use facility, or if human shields,

include using precision guidance technology, varying the explosive yield and the fusing arrangement (point detonating, proximity/variable time, or delay fuses), altering the angle of attack to minimize the fragmentation pattern, or adjusting the timing of an attack to account for civilian patterns of life.¹¹² Different mitigation techniques are employed at different assessment tiers (CDE Levels 2-4) and if mitigation techniques can completely separate the weapons effects from impacting the target while not likely affecting the collateral concerns, then a commander with corresponding approval authority (CDE Levels 2-4 Low) may authorize the strike on the target.¹¹³

If there are still collateral concerns within the modified effects rings after employing the available mitigation techniques, then a casualty estimate is performed to calculate the anticipated amount of non-combatant injury and death (CDE Level 5).¹¹⁴ The casualty estimate is compared to a non-combatant and civilian casualty cut-off value (NCV) to determine 'low' targets that may be approved by a corresponding commander (CDE Level 5 Low) or 'high' targets that are forwarded for higher, political level review and approval (CDE Level 5 High).¹¹⁵

Collateral damage estimation is a tool that helps commanders employ fires in accordance with the law of war.¹¹⁶ Importantly, CDE is not an exact science and does not guarantee a particular outcome; it merely detects collateral concerns, identifies potential mitigation techniques, and informs the commander's proportionality assessment, weighing collateral risk against military advantage, within the targeting process.¹¹⁷ The judge advocate does not conduct the actual CDE analysis, but still needs to understand the methodology to provide adequate legal advice in regards to the commander's assessment.¹¹⁸

environmental concerns, or chemical, biological, or radiological (CBR) hazards are present within the collateral hazard area. *Id.*

¹¹² BOOTHBY, *supra* note 68, at 478; *see also* AIR LAND SEA APPLICATION CTR., MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR THE JOINT APPLICATION OF FIREPOWER 125-28 (Nov. 2015) (FOUO).

¹¹³ CJCSI 3160.01B, *supra* note 100, enclosure E, apps. B, C, D (unclassified).

¹¹⁴ *Id.* encl. E, app. E (unclassified).

¹¹⁵ *Id.*; JP 3-60, *supra* note 12, at II-16. *See also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3122.06D, SENSITIVE TARGET APPROVAL AND REVIEW PROCESS (12 Nov. 2013) (classified).

¹¹⁶ JOINT TARGETING SCH., JOINT FIRES & TARGETING STUDENT GUIDE II-1, III-65 to III-67 (5 Mar. 2014), http://www.dtic.mil/doctrine/jfs/jts/jts_studentguide.pdf.

¹¹⁷ *Id.*

¹¹⁸ Dunlap, *supra* note 3, at 143 ("JAGs must also learn the applicable collateral damage estimation methodology."); *see* U.S. Army Central & 17th Field Artillery Brigade, Judge Advocates, Operation Inherent Resolve After Action Report 4 (July 2014 to Jan. 2015) [hereinafter USARCENT/17FAB AAR] (on file with CLAMO) (recalling that judge advocates worked closely with the CDE analysts and recommending

D. Phase 4 (Commander's Decision and Force Assignment)

After a vetted and validated target receives a weaponeering solution and a collateral damage estimate, it is presented to the commander for approval at the JTCB.¹¹⁹ The judge advocate attends the targeting board and provides advice to the commander.¹²⁰ However, this should not be the first time that lawyers see the target; by actively participating in the prior phases of the targeting process, including conducting a formal legal review of the entire target package, the judge advocate can identify and address legal issues prior to the target being briefed at the board.¹²¹ This will economize time and effort in developing targets and avoid raising legal objections for the first time during a formal staff meeting late in the process.¹²²

E. Phase 5 (Mission Planning and Force Execution)

When the unit receives a tasking order, a judge advocate should be readily available to provide legal advice during the unit's mission planning and during the real-time execution of the attack.¹²³ Many operational policies that are not legal in nature can have a significant impact on the mission, such as tactical directives, fire and airspace control measures, special instructions, and a concept of operations approval process.¹²⁴ Fratricide prevention is a key consideration during detailed planning and fire support coordinating measures help ensure that friendly forces are clear of the air and ground around the target.¹²⁵ If the attack may cause collateral damage, then the planners will consider ways to provide effective advance warnings to potentially impacted civilians, whether through radio broadcasts, leaflets, or possibly direct phone calls,

attendance at a CDE training course prior to deployment). Collateral damage estimation training courses are taught by the Joint Targeting School in Dam Neck, Virginia, or by mobile training teams. JOINT TARGETING SCH., JOINT ELECTRONIC LIBRARY, <http://www.dtic.mil/doctrine/jfs/jts.htm> (last visited Jul. 6, 2016) (providing contact information, course schedules, and reference materials).

¹¹⁹ JP 3-60, *supra* note 12, at II-16, III-3 to III-6.

¹²⁰ Carberry & Holcomb, *supra* note 10, at 39.

¹²¹ AF OPS & LAW, *supra* note 18, at 281. *See infra* Appendix D for notional targeting checklist.

¹²² Brigadier General Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 480 (Fall 2003) ("It is obviously counterproductive to raise legal issues after the fact, but it is almost as counterproductive to raise legal objections at the last moment. . . . Injecting legal friction late in the game only creates inefficiencies that can be lethal on the battlefield.")

¹²³ AF OPS & LAW, *supra* note 18, at 281-82.

¹²⁴ *Id.* at 274-75.

¹²⁵ JP 3-60, *supra* note 12, at III-1.

unless circumstances do not permit.¹²⁶ Furthermore, when targeting a specific individual, policy may go beyond the law and dictate an assessment of the feasibility of capture.¹²⁷

Coalition operations trigger additional multinational considerations, like national approval authorities and caveats.¹²⁸ Coalition partners will conduct an independent legal assessment of the operation to ensure that it is consistent with their own political concerns and legal perspectives, which may not align with U.S. positions.¹²⁹ Best practice has been the early and proactive engagement with coalition lawyers to identify, understand, and attempt to mitigate targeting differences among the coalition force.¹³⁰ Furthermore, geographic authorities and overflight permissions need to be obtained for the origin of the mission, the ingress and egress routes, and the location of the target.¹³¹ Operations taking place near international borders raise further concerns due to potential spillage of the conflict into neighboring states.¹³²

Combat operations are fluid, the operational environment changes, and even deliberately planned missions are dynamically executed.¹³³ Within execution of the mission, the target is found and sensors fixated to establish and,

especially if the target is moving, to maintain positive identification.¹³⁴ As the moment of the strike approaches, there is a reassessment of the area, including a scan for previously unidentified collateral concerns, to determine if the situation has sufficiently changed so as to merit the suspension or cancellation of an attack.¹³⁵ In identifying the target and any adjacent collateral concerns, an important consideration is any ROE requirement for observation of the target area (pattern of life) prior to and during the strike.¹³⁶ Finally, the target is engaged, followed by an assessment to consider immediate reattack if the initial strike is not effective.¹³⁷

F. Phase 6 (Assessment)

Although judge advocates may play a limited role in routine post-strike assessments, their involvement is crucial when issues arise with possible legal implications.¹³⁸ Judge advocates must monitor the assessment to identify required investigations of possible, suspected, or alleged LOAC

¹²⁶ LAW OF WAR MANUAL, *supra* note 35, para. 5.11.1; Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack Under International Law: Theory and Practice*, 87 INT'L L. STUD. 359 (2011).

¹²⁷ THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013) (stating a policy preference for capture during counterterrorism operations outside areas of active hostilities because of the benefits of gathering meaningful intelligence and disrupting terrorist plots). *But see* LAW OF WAR MANUAL, *supra* note 35, para. 2.2.3.1 (indicating that the law of armed conflict does not require a commander to capture or wound, if possible, rather than attack to kill).

¹²⁸ AF OPS & LAW, *supra* note 18, at 275; N. ATLANTIC TREATY ORG. (NATO), ALLIED JOINT PUB. 3-9, ALLIED JOINT DOCTRINE FOR JOINT TARGETING (May 2008). National approval authorities, commonly referred to as "red card holders," are coalition personnel that can approve missions assigned to their forces. National caveats are restrictions that coalition partners place on the use of their forces due to legal, operational, or political reasons. *See* 1st Infantry Division, Office of the Staff Judge Advocate, Operation Inherent Resolve After Action Report 7 (Oct. 2014 to July 2015) [hereinafter IID AAR] (on file with CLAMO).

¹²⁹ Squadron Leader Catherine Wallis, *Legitimate Targets of Attack: Considerations When Targeting in a Coalition*, ARMY LAW, 44 (Dec. 2004) (also highlighting that restrictions on the sharing of intelligence may impede a state from independently determining that a person or object is a military objective).

¹³⁰ *Id.* at 55-56.

¹³¹ W. Hays Parks, *Lessons from the 1986 Libya Airstrike*, 36-4 NEW ENG. L. REV. 755, 763 (2002) (commenting on legal issues that arose with regard to launching from, and overflight of, foreign nations during Operation El Dorado Canyon).

¹³² W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV. (Jan.-Feb. 1982); W. Hays Parks, *Linebacker and the Law of War*, AIR U. REV. (Jan.-Feb. 1983) (describing an operational buffer zone along the China-North Vietnam border to prevent U.S. aircraft entry into Chinese airspace).

¹³³ JP 3-60, *supra* note 12, at II-20 to II-30. This article focuses on deliberate targeting for attacking planned targets, either scheduled or on-call, that are known to exist in the operational environment and detected in sufficient time to list in an air tasking order; unplanned or unanticipated targets of opportunity that are identified too late, usually within 72 hours of the anticipated engagement, are addressed through dynamic targeting. *Id.* at II-1 to II-3. Dynamic targeting applies the same operational and legal principles identified herein, albeit under time compressed conditions, using the Find, Fix, Track, Target, Engage, and Assess (F2T2EA) cycle that facilitates the quick transition from the vetting and validation of a target, through the weaponeering solution and collateral damage estimation, to the actual attack. AF OPS & LAW, *supra* note 18, at 282-86; ATP 3-60, *supra* note 15, app. A. *See also* AIR LAND SEA APPLICATION CTR., MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR DYNAMIC TARGETING (Sept. 2015) (FOUO).

¹³⁴ It is vital that the aircraft identifies the actual target, known as combat identification, normally through an observer accurately passing the geospatial location of the target to the shooter. JP 3-60, *supra* note 12, at II-21, II-29. *See, e.g.,* Rod Nordlandnov, *U.S. General Says Kunduz Hospital Strike Was 'Avoidable'*, N.Y. TIMES (Nov. 25, 2015), <http://www.nytimes.com/2015/11/26/world/asia/afghanistan-kunduz-hospital-airstrike.html> (reporting how the aircraft misidentified the hospital as the target building).

¹³⁵ JP 3-60, *supra* note 12, at A-5; *see* ERIC BLEHM, THE ONLY THING WORTH DYING FOR 212 (2010) (describing a pilot shift the laser designator of a laser-guided bomb in flight to an abandoned field when it was discovered, after release of the bomb, that the targeted insurgents were surrounding an innocent taxi cab).

¹³⁶ Pattern of life has been used in two contexts: (1) to observe a potential target over time to confirm its characterization as a valid military objective, and (2) to observe civilian activity within an area over time as part of determining potential collateral concerns. McNeal, *supra* note 108, at 734.

¹³⁷ JP 3-60, *supra* note 12, at II-30; *see* IID AAR, *supra* note 128, at 2 (noting legal issues during reengagements, such as whether wounded insurgents were *hors de combat* or merely repositioning to continue fighting).

¹³⁸ AF OPS & LAW, *supra* note 18, at 282.

violations¹³⁹ or friendly fire incidents.¹⁴⁰ In an information environment filled with *lawfare*,¹⁴¹ military lawyers must also be ready to gather evidence to counter enemy propaganda alleging LOAC violations and civilian casualties.¹⁴² A post-strike assessment strategy, whether placing “boots on the ground” or using full motion video from the air, should be developed prior to a strike.¹⁴³ Finally, judge advocates capture legal lessons learned to improve their future performance and pass on their experiences to others.¹⁴⁴

V. Conclusions

A decade after the Zarqawi airstrike, judge advocates remain integrated in the targeting process.¹⁴⁵ Thus, in November 2015, when oil tanker trucks staged in the Syrian desert and prepared to smuggle their cargo to fund the Islamic State, judge advocates analyzed the situation¹⁴⁶: *Were the oil tankers and their cargo, integral links in the Islamic State’s war-sustaining revenue, valid targets? Were the means and method of the attack lawful? Were precautions, such as warnings, employed to avoid or minimize collateral damage? Was the strike proportionate if some drivers remained with their vehicles, or were the drivers directly participating in hostilities and thus excluded from the proportionality calculation? Were there any violations of Syrian sovereignty?* Judge advocates provided the commander with a recommendation, the commander made an informed decision, and the bombs destroyed their targets.¹⁴⁷

¹³⁹ DoDD 2311.01E, *supra* note 6, at para. 4.4; *see, e.g.*, Joseph Goldstein, *Doctors Without Borders Says Clues Point to ‘Illegal’ U.S. Strike on Afghan Hospital*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/world/asia/doctors-without-borders-seeks-explanation-for-kunduz-hospital-attack.html>.

¹⁴⁰ U.S. DEP’T OF ARMY, REG. 638-8, ARMY CASUALTY PROGRAM para. 2-14 (23 June 2015); *see, e.g.*, Azam Ahmed, *‘Friendly Fire’ Strike Kills 5 Special Operations Soldiers in Afghanistan*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/world/asia/friendly-fire-strike-kills-5-special-operations-soldiers-in-afghanistan.html>.

¹⁴¹ Dunlap, *supra* note 122, at 480 (“Lawfare is specifically the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective.”).

¹⁴² *See* JEWISH INST. FOR NAT’L SECURITY AFF., 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT (Mar. 2015); *see also* MICHAEL GOLEMBESKY & JOHN R. BRUNING, LEVEL ZERO HEROES 257-62 (2014) (recalling an Afghan family claiming an American airstrike killed their daughter and demanding compensation, despite medical evidence that she “had been executed at close range by a single 7.62mm gunshot to the side of the head”).

¹⁴³ *See* HEADQUARTERS, INT’L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE (30 Nov. 2011), [http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r.pdf](http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf) (unclassified version) (“Where engagements appear to have breached any aspect of this Directive, whether or not they resulted in civilian casualties, I expect commanders to investigate. We are in a better position tactically, operationally and strategically when we are first with the truth.”).

¹⁴⁴ JP 1-04, *supra* note 79, at III-19 to III-20. Judge advocates are encouraged to contact the Center for Law and Military Operations

Today more than ever, as conflicts continue across the globe under increased legal scrutiny, judge advocates must be “trained, operationally oriented, and readily accessible”¹⁴⁸ to assist commanders and their staffs with navigating the maze of applicable laws, policies, and orders that impact targeting operations.¹⁴⁹

The legal advisor’s role/responsibility . . . is to offer well-reasoned advice. . . . This requires knowing the law, awareness of other restrictions, understanding of the military and political objectives, familiarity with the methods of achieving those objectives and, finally, the ability to synthesize and make a recommendation on a target or set of targets. . . . Legal advisors provide recommendations on whether the proposed use of force abides by the law of war and do this by offering advice on both restraint and the right to use force. . . . However, the final decision will always be the commander’s. Legal advisors do not . . . approve or disapprove targets.¹⁵⁰

To provide effective legal advice that supports the decision-making process and mission accomplishment, judge advocates need a firm grasp of the targeting cycle, a fundamental knowledge of the law and policies governing targeting, and the wisdom to know how to apply the law to the process.¹⁵¹

(CLAMO) via email at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil to acquire recent after action reports prior to their deployment and to conduct an after action review upon redeployment. FM 1-04, *supra* note 5, para. 4-50.

¹⁴⁵ *See* USARCENT/17FAB AAR, *supra* note 118, at 4-5; IID AAR, *supra* note 128, at 2-3 (highlighting judge advocate integration in current Operation Inherent Resolve targeting process and strike cells).

¹⁴⁶ *See* Michael R. Gordon, *U.S. Warplanes Strike ISIS Oil Trucks in Syria*, N.Y. TIMES (Nov. 16, 2015), http://www.nytimes.com/2015/11/17/world/middleeast/us-strikes-syria-oil.html?_r=1; Beth Van Schaack, *Targeting Tankers Under the Law of War (Part 1)*, JUST SECURITY (Dec. 2, 2015), <https://www.justsecurity.org/28064/targeting-tankers-law-war-part-1/>; Beth Van Schaack, *Targeting Tankers Under the Law of War (Part 2)*, JUST SECURITY (Dec. 3, 2015), <https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2/>.

¹⁴⁷ *See* Gordon, *supra* note 146.

¹⁴⁸ U.S. AIR FORCE, ANNEX 3-60, TARGETING 96 (10 Jan. 2014).

¹⁴⁹ *See* Carberry & Holcomb, *supra* note 10, at 39; Dunlap, *supra* note 3, at 145 (emphasizing the strategic importance of adherence to the law of war in modern conflicts).

¹⁵⁰ Colonel Tony Montgomery, *Legal Perspectives from the EUCOM Targeting Cell*, 78 INT’L L. STUD. 189-90 (2002), *quoted in* SOLIS, *supra* note 27, at 531.

¹⁵¹ *But see* Arthur Rizer, *Lawyering Wars: Failing Leadership, Risk Aversion, and Lawyer Creep—Should We Expect More Lone Survivors?*, 90 IND. L. J. 935 (2015) (discussing the negative impacts of the contemporary legal environment on U.S. military operations).

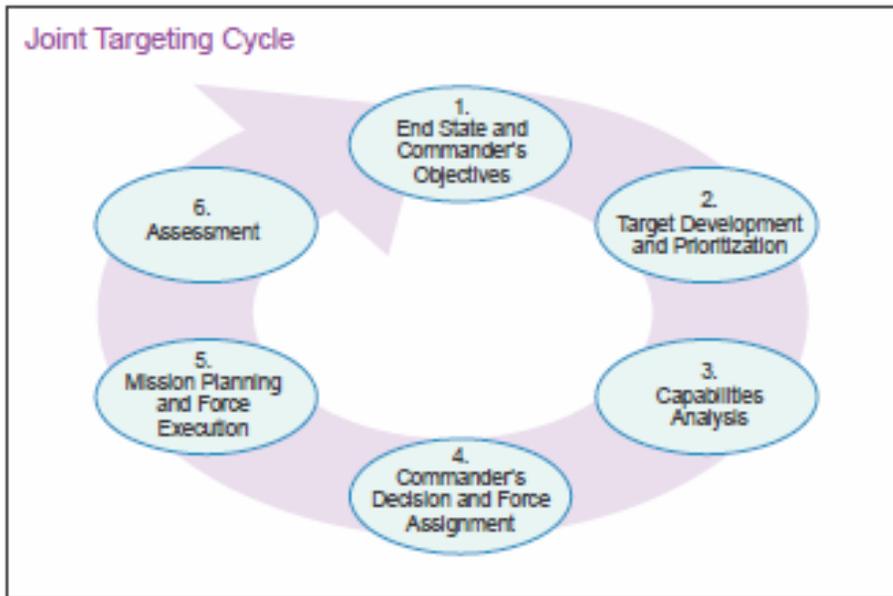


Figure II-2. Joint Targeting Cycle

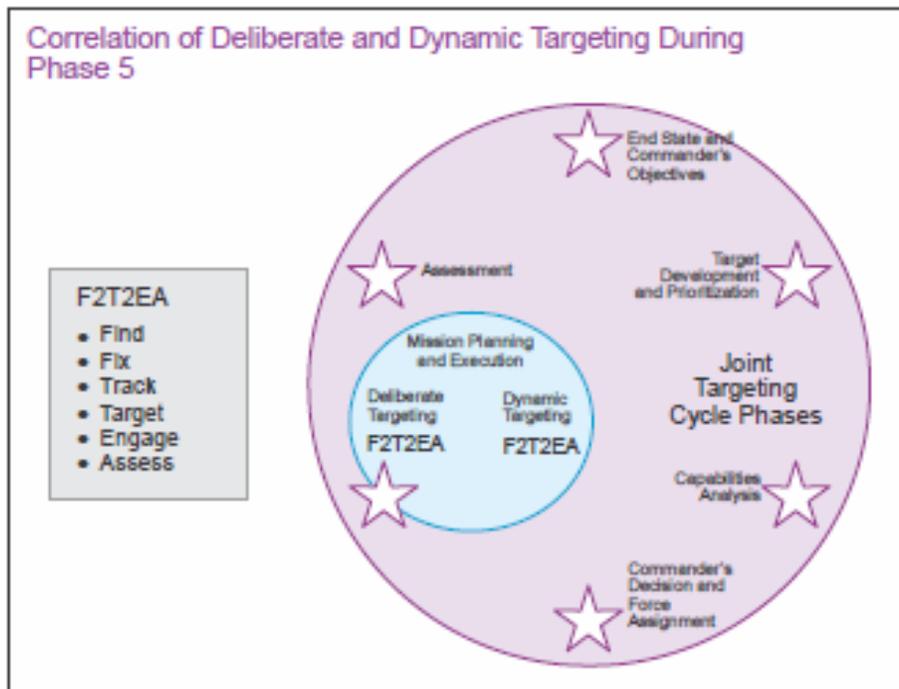
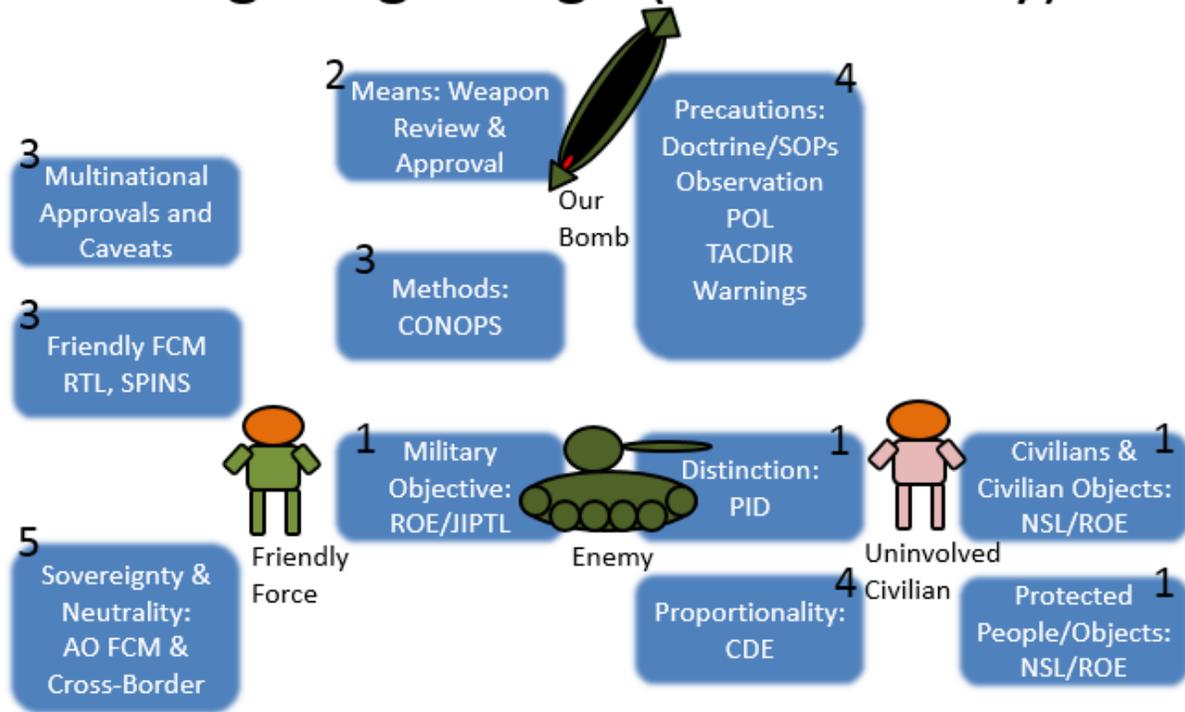


Figure II-9. Correlation of Deliberate and Dynamic Targeting During Phase 5

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¹⁵² JP 3-60, *supra* note 12, fig.II-2, II-9.

Targeting Design (Law & Policy)



At the most basic level, “in war the main idea is to get the bombs on the targets.”¹⁵³ The law of targeting governs the relationship between our bomb and the enemy target, while also balancing the interests of the uninvolved civilian and our friendly force, by requiring combatants to:

- (1) Gain positive identification of a valid military objective, as distinguished from civilians, civilian objects, and other protected categories.
- (2) Use a lawful weapon, with appropriate release authority.
- (3) Execute a lawful method, consistent with friendly force fire control measures and multinational considerations.
- (4) Employ feasible precautions to avoid or minimize (at least not excessive) incidental collateral damage to civilians, civilian objects, and other protected categories.
- (5) Respect the sovereignty and neutrality of states.

¹⁵³ General Curtis LeMay, Eighth Air Force Commanding General to Eighth Air Force Commanding General (Mar. 31, 1944), *quoted in* STEPHEN L. MCFARLAND, *AMERICA’S PURSUIT OF PRECISION BOMBING: 1910-1945*, at 7 (1995), *reprinted in* Canestaro, *supra* note 78, at 433.

Appendix C. Joint Targeting Cycle and Law of Targeting Integration Matrix

		Joint Targeting Cycle					
		Phase 1: End State & Commander's Objectives	Phase 2: Target Development & Prioritization	Phase 3: Capabilities Analysis	Phase 4: Commander's Decision & Force Assignment	Phase 5: Mission Planning & Force Execution	Phase 6: Assessment
Law of Targeting	Military Necessity - Distinction (1) Target	Attend Coordination Board Campaign Objectives Targeting Guidance Target Sets Military Objectives (LOAC) Rules of Engagement	Participate Working Groups Target Vetting Positive Identification (Quantity, Quality, Timeliness, Duration) (Pattern of Life) Target Validation Military Objective (LOAC) Rules of Engagement Restricted Target List Protected on No Strike List		Complete Legal Review Target Folder Attend Coordination Board Advise Commander	Confirm Not No-Strike List Not Restricted Target Combat Identification Immediate Reattack Criteria Squirters	Monitor Post-Strike Battle Damage Assessment (FMV, BOG) Potential Investigations First with Truth
	Means (2) Weapon			Advise Weaponeer Legal Review No Indiscriminate No Unnecessary Suffering Specific Treaty Regulation Weapons Release Authority		Confirm	
	Precautions - Methods (3) Concept of Operations					Assist Plan and Monitor No Perfidy Warning Observation Fire Control Measures Avoid Friendly Fire Special Instructions Multinational Concerns National Caveats Shift/Abort Criteria CONOP Approval	
	Proportionality (4) Collateral Damage Estimation			Advise CDE Analyst ID Collateral Concerns Collateral Scan (Pattern of Life) Mitigation Techniques CDE Call = Approval Authority Excessive		Confirm Collateral Scan (Pattern of Life)	
	Sovereignty (5) Location of Target	Geographic Considerations <i>Jus ad Bellum</i> Issues	Geographic Considerations <i>Jus ad Bellum</i> Issues			Geographic Considerations <i>Jus ad Bellum</i> Issues Origin, Ingress, Egress Near/Cross Border Guidance	

The columns are the phases of the joint targeting cycle, while the rows are the principles of the law of targeting, indicating the main legal issues at play during each phase of the targeting cycle. A judge advocate starts in the left column, phase 1, developing general target sets (target), before focusing in phase 2 on target vetting and validation (target) and addressing the weaponizing solution (means) and the collateral damage estimation (precautions and proportionality) in phase 3. After conducting a complete legal review in phase 4, the judge advocate assists with detailed mission planning (method and sovereignty), confirms all issues, and monitors the attack in phase 5, ready to assess the situation in phase 6, the right column. It is an iterative process, so the judge advocate continually provides advice across the spectrum of the planning, decision, execution, and assessment of attacks.

DELIBERATE TARGETING						
Military Necessity - Distinction - Proportionality – Humanity						
<i>Military Necessity</i>	(1) Target:	LOAC: Military Objective	Combatant Nature	NSAG Location	DPH Purpose	Use
<i>Distinction</i>		ROE				
<i>Means</i>	(2) Weapon:	Associates				
		TST				
<i>Methods</i>	(3) CONOPS:	NSL/Protected				
		RTL				
<i>Precautions</i>		Dual Use				
		Positive Identification	Quantity	Quality	Timeliness	
<i>Proportionality</i>	(4) CDE:	Pattern of Life	Duration			
<i>Sovereignty</i>	(5) Location:	Legal Review				
		Indiscriminate Weapon				
		Specific Treaty				
		Unnecessary Suffering				
		Weapons Release				
		Perfidy				
		Warning				
		Observation				
		Shift/Abort Criteria				
		Alternative COA				
		Capture				
		HHQ Intent/Guidance (Tactical Directive)				
		FCM/SPINS/SOPs				
		Reattack Criteria				
		Post-Strike BDA				
		Multinational Issues				
		National Caveats				
					NCV =	
		CDE Approval Authority (SAA/TEA/NAA)				
		Collateral Concerns				
		Mitigation Techniques				
		Pattern of Life - Collateral Scan				
		Excessive				
		Geographic AO				
		Origin/Ingress/Egress				
		Near/Cross Border				

Starting at the top, the checklist walks the judge advocate through the law of targeting, first considering the target, before moving on to the weapon, the concept of operation with its associated considerations, the collateral damage estimation, and, finally, the geographic location of the target. The checklist follows the analytical framework of the targeting design.

The Long, Hot Summer: Active Duty Support to Wildland Fire Fighting Operations

Captain Matt D. Montazzoli*

The U.S. military has been a key partner in wildland firefighting for decades and we greatly appreciate their willingness to provide us with Soldiers to serve as firefighters.¹

[W]e do have to know in what odd places to look for missing parts of a story about a wildfire and of course have to know a story and a wildfire when we see one.²

You are a newly minted operational law attorney assigned to Fort Wildland in the mountain west. You are ensconced behind your desk, enjoying a post-physical training (PT) cup of coffee in the early hours of a typical Monday. Your boss is on leave, the Deputy is on temporary duty, and the staff judge advocate (SJA) is on convalescent leave after a particularly brutal sports PT session the week prior. You sip your coffee and look out the window, noting the faint haze of smoke that hangs in the air. In fact, that morning you had to rummage around in your car trunk for your snow scraper to clear a thin layer of accumulated ash from your windshield before beginning your commute. Acknowledging that your day will cease to be yours once the rest of the office arrives for duty, you turn your attention to the pile of work your boss generously left on your desk and begin reviewing a fragmentary order when your phone rings. The local chief of police introduces himself and says in a hurried voice,

A lightning strike caused a fire on state forest land between town and the post. The fire department is on scene, and they're reporting a flame front that is wind driven, moving fast through dried scrub brush. Once it burns past Rocky Road, it will hit a grove of beetle-killed ponderosa pine, crown, and run all the way into town if we don't hook it. Our folks can't get it under control with the resources we have, but there is an engineer unit on your post that could scrape a dozer line between Rocky Road and the reservoir to stop the fire from getting to that beetle-kill. The Mayor asked me to call you. Can your commander help?

The goal of this article is to equip a Judge Advocate to perform on the staff of an active duty unit that has been assigned to support wildland fire fighting (WFF) operations. Wildland fire or wildfire is defined as any non-structure fire

that occurs in the wildland.³ Wildland is “[a]n area in which development is essentially non-existent, except for roads, railroads, powerlines, and similar transportation facilities. Structures, if any, are widely scattered.”⁴ The terms wildland fire and wildfire are used interchangeably throughout this article. Wildfire suppression or WFF is “[a]n appropriate management response to wildfire . . . that results in curtailment of fire spread and eliminates all identified threats from the particular fire.”⁵ The article will discuss the history of military involvement in wildland fire suppression, including deliberate mobilization of active duty troops for WFF and Immediate Response Authority (IRA); the landscape of modern wildfire suppression, including a very brief overview of tactics and civilian suppression resources; and a review of legal issues likely to arise during support of WFF operations. The legal issues surrounding WFF operations are not especially knotty or novel, but the context can be confusing. As with most situations, a judge advocate with a solid working knowledge of wildland fire terms, tactics, and capabilities will be in a position to provide a commander with well-reasoned, useful legal advice across a broad range of disciplines.

I. Historical Role of the Military in Wildfire Suppression

Wildfire has long been an important part of the ecology of the American west. Lightning-caused wildfires served as natural agents of renewal, clearing out deadfall and maintaining the health of forests. Native Americans and early settlers utilized fire as a resource management tool, executing controlled burns in the service of hunting and agriculture.⁶ For most of the nineteenth century, the federal government's interest in land management was limited to ensuring that natural resources were “wisely used for the benefit of the

* Judge Advocate, U.S. Army. Trial Counsel, 21st Theater Sustainment Command, Panzer Kaserne, Germany. J.D., 2014, University of Colorado School of Law. Member of the bar of Colorado. The author wishes to thank Mr. Robert Gonzales, U.S. Army North; Mr. Steven O'Brien, Defense Coordinating Element Region X; and CPT David Pigott, Colorado Army National Guard.

¹ Press Release, Aitor Bibaburu, U.S. Nat'l Interagency Fire Ctr., NIFC Mobilizes Active Duty Military Personnel to Help with Wildfire Suppression (Aug. 17, 2015) (on file with author) [hereinafter NIFC Mobilizes Active Duty].

² NORMAN MACLEAN, *YOUNG MEN AND FIRE* 37 (1992).

³ NAT'L WILDFIRE COORD. GRP., PMS 205: GLOSSARY OF WILDLAND FIRE TERMINOLOGY 182 (2008).

⁴ *Id.*

⁵ *Id.*

⁶ JOHN W. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 17 (2d ed. 1879) (“In the main these fires are set by Indians . . . they systematically set fire to forests for the purpose of driving the game.”).

home builder first of all.”⁷ The role of the United States Forest Service in wildland fire management was incidental, insofar as timber that was immolated would be unavailable for productive economic use.⁸ Unlike the majority of the Forest Service’s regulatory mission, WFF was universally popular with the residents of western states, to the extent that internal Forest Service publications asserted that “[p]robably the greatest single benefit derived by the community and the nation from forest reserves is insurance against the destruction of property, timber resources, and water supply by fire.”⁹

Acute federal interest in wildland fire suppression can be traced to the fire season of 1910. Known as the “Big Burn,” a series of contemporaneous wildfires consumed three million acres in Idaho, Montana, and Washington state, scorching frontier towns, and killing eighty-five people, many of them firefighters.¹⁰ This incident also represents an early example of active duty military support for WFF, as several companies of Buffalo Soldiers from the 25th Infantry Regiment were hastily dispatched by President Taft to battle the blazes.¹¹ In the aftermath of the big burn, the Chief of the Forest Service advocated for establishing military outposts in national forests during fire season, and federal cavalry routinely deployed to Yosemite National Park during the summer months for wildfire patrols.¹²

Throughout the twentieth century, federal policy demanded immediate suppression of all wildfires on public lands, regardless of cause.¹³ In the 1930s, crews from the Civilian Conservation Corps (CCC) were employed in wildfire suppression, greatly expanding the ability of federal officials to mass men and material to extinguish fires.¹⁴ The Army provided officers and non-commissioned officers as

cadre to CCC crews, and after World War II, the paramilitarization of the fire service took off in earnest. The smokejumpers, elite firefighters who arrive at wildfires via parachute drop, jumped from military surplus C-47 ‘flying boxcar’ aircraft of the type that had scattered paratroopers over Normandy, while surplus jeeps and ‘deuce and a half’ trucks were not an uncommon sight on the fire line.¹⁵ The modern incident command system (ICS), which mirrors a military staff, evolved to provide management of massive wildfire suppression operations in California in the 1970s and has become the standard framework for domestic emergency response.¹⁶

The military continues to play a key role in WFF, especially the reserve component. The National Guard and Air National Guard, acting in State Active Duty (SAD) status, are intimately involved in wildfire suppression in western states; some National Guard units undergo extensive wildland fire training and have capabilities and equipment that is on par with that of civilian wildland fire fighting agencies.¹⁷ National Guard resources can also directly support civilian responders; during Colorado’s 2012 High Park wildfire, an Army National Guard armory was converted into a base camp and incident command post for several hundred civilian firefighters.¹⁸ Individual state laws and authorities vary, but typically Guard forces on SAD status can be employed for WFF pursuant to the Governor’s declaration of a state of emergency for affected counties and his or her issuance of an executive order directing SAD forces to provide support of civil authorities.¹⁹ State Active Duty forces will typically organize as a joint task force (JTF).²⁰ Although SAD forces can be used to fight wildfires on the ground, they will primarily assist in traffic control, evacuation, and aerial fire suppression missions.²¹ Aerial fire suppression missions can

⁷ Letter from Gifford Pinchot, first Chief of the U.S. Forest Service, quoted in CHARLES F. WILKERSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 128 (1993).

⁸ POWELL, *supra* note 6, at 15-17.

The evidence that the growth of timber, if protected from fires, might be extended to the limits here given is abundant [I]f the fires are prevented, the renewal by annual growth will more than replace that taken by man [O]nce protected from fires, the forests will increase in extent and value.

Id.

⁹ U.S. DEP’T OF AGRIC., *THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS* 63 (1905).

¹⁰ See TIMOTHY EGAN, *THE BIG BURN TEDDY ROOSEVELT AND THE FIRE THAT SAVED AMERICA* (2009).

¹¹ STEPHEN J. PYNE, *FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE* 244 (1982).

¹² *Buffalo Soldiers*, U.S. NAT’L PARK SERV., <http://www.nps.gov/yose/learn/historyculture/buffalo-soldiers.htm> (last visited June 7, 2016).

¹³ Rebecca K. Smith, *War on Wildfire: The U.S. Forest Service’s Wildland Fire Suppression Policy and Its Legal, Scientific, and Political Context*, 15 U. BALT. J. ENVTL. L. 25, 25 (2007).

¹⁴ Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 306 (2006).

¹⁵ Ker Than, *The Military Roots of Fighting Modern Wildfires*, NATL. GEO., (Aug. 28, 2013), <http://news.nationalgeographic.com/news/2013/08/130828-military--wildfire-fighting-technologies-rim-fire-yosemite>.

¹⁶ U.S. FED. EMER. MGMT. AGENCY, INCIDENT COMMAND SYSTEM TRAINING (May 2008), <https://training.fema.gov/emiweb/is/icsresource/assets/reviewmaterials.pdf>.

¹⁷ Penny Horton, *North Dakota National Guard Members Complete Wildland Firefighting Training*, NATIONAL GUARD (May 9, 2012), <http://www.nationalguard.mil/News/ArticleView/tabid/5563/Article/575808/north-dakota-national-guard-members-complete-wildland-firefighting-training.aspx>.

¹⁸ HEADQUARTERS, COLO. ARMY NAT’L GUARD, FRAGMENTARY ORDER 12-13, HIGH PARK WILDFIRE, TO OPORD 11-03 FY12 COARNG SENTINEL para. 1 (Jun. 9, 2012) (on file with author).

¹⁹ Colorado National Guard, Joint Forces Headquarters Tabletop Exercise: Wildfire, at slide 12 (Jun. 6, 2009) (unpublished PowerPoint presentation) (on file with author) [hereinafter Wildfire TTX].

²⁰ *Id.* at slide 21.

²¹ Colorado National Guard, Wildfire Staff Mission Analysis, at slide 9 (Feb. 4, 2015) (unpublished PowerPoint presentation) (on file with author).

use National Guard lift aviation, and the Air National Guard also maintains the capability to convert C-130s to perform retardant drops using the Modular Airborne Fire Fighting Systems (MAFFS).²² Although the contributions of the reserve component are significant, employing National Guard forces on SAD or in Title 32 status does not present the same legal or logistical issues as the employment of active duty forces, and this article is primarily focused on the issues surrounding active duty support of WFF operations.

II. Modern Jurisdictional Framework

The responsibility for WFF rests with a diverse, diffuse, and often confusing confederacy of agencies. There is significant and continuing tension between wildland fire suppression agencies regarding wildfires that spread across jurisdictional boundaries.²³ The geographic location of a wildfire ignition typically determines which agency has initial responsibility for suppression.²⁴ A fire on private land is initially the responsibility of the landowner.²⁵ Although a private landowner's responsibility is usually limited to promptly reporting the blaze to authorities, some states require the landowner to "take all practicable means to suppress any fire on his property," lest he be financially liable for later government suppression efforts.²⁶

When a fire starts on public land that is not managed by the federal government, a patchwork of state laws control; if the ignition happens within the limits of a municipality, the local fire department has the authority (although not always the wildland-specific training or equipment) to extinguish the blaze.²⁷ Unincorporated areas implicate the jurisdiction of local, often volunteer, rural fire protection districts, while some states appoint the elected county sheriff as the official fire warden.²⁸ The state government will often step in when local or county forces are unable to bring a fire under control. Several western states have their own dedicated WFF agencies, but the majority assigns the function to departments

of forestry or natural resources management.²⁹ A fire that breaks out on federal public land is, in some ways, the cleanest possible scenario, as federal land management agencies will be the first responders and federal authorities will manage the incident response from start to finish.

At the federal level, the main players are the Department of Agriculture (USDA)'s United States Forest Service (USFS), the Department of the Interior (DOI)'s National Parks Service (NPS), and the DOI's Bureau of Land Management (BLM). The Forest Service is the oldest federal land management agency, and can trace its origins (and wildfire suppression mission) back to the Organic Act of 1897.³⁰ Although responsible for only thirty percent of federally owned lands, it has by far the largest role in wildland fire management, at least as measured by millions of dollars spent.³¹ The National Parks Service benefits from being charged with responsibility for the most beautiful and most high profile public lands in the country, including landmarks such as the Grand Canyon National Park, Gettysburg National Military Park, and Yellowstone National Park.³² Many Americans have spent time on USFS or NPS managed lands for recreation, and positive images of Smokey Bear and campaign hat clad rangers are fairly commonplace.³³ By contrast, BLM lands tend to be less visited and less well known.³⁴ The Bureau of Land Management manages over 260 million acres of public land, including one out of every five acres west of the Mississippi river.³⁵ The Bureau of Land Management's holdings are sometimes regarded as leftovers from the USFS and NPS reserves, causing a perception that BLM's wilderness holdings are composed of "land that only God and the BLM could love."³⁶

Although there is occasional infighting and jurisdictional squabbling between "green" (USDA) and "brown" (DOI) fire suppression agencies, in practice federal WFF displays an enviable degree of interagency cooperation. The National Interagency Fire Center (NIFC), the federal clearinghouse for all things wildland fire, includes representatives from the

²² *Modular Airborne Firefighting Systems (MAFFS)*, U.S. FOREST SERV., <http://www.fs.fed.us/fire/aviation/airplanes/maffs.HTML> (last visited June 7, 2016).

²³ DONALD K. ARTLEY, *WILDLAND FIRE PROTECTION AND RESPONSE IN THE UNITED STATES: THE RESPONSIBILITIES, AUTHORITIES, AND ROLES OF THE FEDERAL, STATE, LOCAL, AND TRIBAL GOVERNMENT* 6 (2009) [hereinafter *WILDLAND FIRE PROTECTION AND RESPONSE*].

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ W. VA. CODE § 20-3-11 (2015).

²⁷ *Wildland Fire Protection and Response*, *supra* note 23, at 23.

²⁸ Colo. Rev. Stat. § 30-10-512 (2014).

²⁹ *Wildland Fire Protection and Response*, *supra* note 23, at 19-20.

³⁰ Sundry Civil Appropriations Act of 1897 (Forest Service Organic Administration Act of 1897) 16 U.S.C. §§ 473-478, 479-482, 551 (amended 1905, 1911, 1925, 1962, 1964, 1968, 1976).

³¹ U.S. DEP'T OF AGRIC., FISCAL YEAR 2015 BUDGET OVERVIEW 33 (2015). Wildfire suppression costs have grown from 13% of USFS's budget in 2004 to consume 47% of the budget as of 2014. *Id.*

³² *About Us*, U.S. NAT'L PARK SERV., <http://www.nps.gov/aboutus/> (last visited June 7, 2016).

³³ The National Park system experienced 281.3 million visits in 2010. See THOMAS H. STEVENS, ET AL., *Declining National Park Visitation, An Economic Analysis*, 26 JOUR. LEISURE RES. (NO. 2) 153, 160 (2014).

³⁴ U.S. BUR. OF LAND MGMT., PUBLIC LAND STATISTICS 2013, 187 (July 2014), http://www.blm.gov/public_land_statistics/pls13/pls2013.pdf (estimated 68 million visitors to Bureau of Land Management (BLM) lands in 2013).

³⁵ *The Bureau of Land Management*, U.S. BUR. OF LAND MGMT., http://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/general_publications/general.Par.75750.File.dat/TextBLMbro.pdf (last visited June 7, 2016).

³⁶ Charles F. Wilkinson, Professor of Law, University of Colorado, Lecture during Foundations of Natural Resources Law and Policy (Fall 2013) (on file with author).

Forest Service, BLM, NPS, National Weather Service, Bureau of Indian Affairs, Fish and Wildlife Service, and the Federal Emergency Management Agency.³⁷ Unlike the military concept of unity of command, “[d]ecisions are made using the interagency cooperation concept because the NIFC has no single director or manager.”³⁸ Although the Department of Defense (DoD) is not a standing member of the NIFC, the DoD will send a liaison officer as necessary.³⁹ In recent years, the DoD assigns a mobilized reservist serving as an emergency liaison preparedness officer (ELPO) to serve as a full-time liaison to the NIFC during the fire season.⁴⁰

Wildland fire fighting operations can be broken into two stages: Initial attack (IA) and extended attack. Initial attack represents “actions taken by the first resources to arrive at a wildfire.”⁴¹ Initial attack forces can range from a single fire engine to several crews supported by aircraft, depending on the situation, and activities can include sizing up of the fire, patrolling, monitoring, holding actions, or suppression.⁴² Barring an exceptionally active fire season or a fire that starts on a military installation, active duty military units are unlikely to engage in IA.⁴³ The vast majority of wildfires are contained during initial attack, but those that require additional resources are referred to as extended attack incidents.

An extended attack incident represents all suppression efforts from the end of IA until a fire is officially extinguished.⁴⁴ The massive *megafires* that dominate cable news during the summer are typically extended attack incidents.⁴⁵ Extended attack incidents are analogous to a military campaign, with a sprawling, forward operating base-like fire camp springing up to provide a headquarters complete with sleeping tents, dining facilities, laundry, and logistical support.⁴⁶ Wildfire units that are available for nationwide dispatch by the NIFC are part of the National Ready Reserve, colloquially known as being on the board.⁴⁷

Units from local fire engines to federal Hot Shot crews can put themselves on the board if fire activity in their home district does not require their presence.⁴⁸ Military units are never on the board, but may be activated by the NIFC for deliberate support of WFF using specific procedures described later in this article.

III. Modern Wildfire Suppression Resources

Wildfire suppression units are referred to as resources. Resources can be broadly segregated into hand crews, engines, overhead, and aviation. Engines consist of the fire trucks of popular imagination; they are generally four wheel drive vehicles modified to transport and deploy water onto a fire. Engines are classified into seven different types based on the amount of water they can carry and the rate at which they can pump that water through their hoses.⁴⁹ Engines typically employed for wildfire suppression range from a Type VI (“six pack”) engine that resembles a pickup truck outfitted with a water tank and hoses that can pump thirty gallons per minute with a crew of two, all the way to a Type I engine, the main battle tanks of the wildfire suppression army with a crew of four and the ability to pump over a thousand gallons in a minute.⁵⁰ Wildland fire fighting agencies also employ water tenders, large tanker trucks that haul water from reservoirs to the fireline to replenish engine supplies.⁵¹ Additionally, wildland fire fighting organizations make use of bulldozers and tractor plows, capable of building firelines quickly and cheaply over certain terrain.⁵²

Within the WFF community, *overhead* is the term for supervisory and planning resources.⁵³ Most resources provide their own overhead in the form of a crew superintendent or an engine boss organic to that resource. Every fire, regardless of complexity, must have an incident commander (IC).⁵⁴ While the first qualified overhead to

³⁷ *Mission and History*, NAT’L INTERAGENCY FIRE CTR., http://www.nifc.gov/aboutNIFC/about_mission.html (last visited June 7, 2016).

³⁸ *Id.*

³⁹ *Military Support in Wildland Fire Suppression*, NAT’L INTERAGENCY FIRE CTR., http://www.nifc.gov/fireInfo/fireInfo_military.html (last visited June 7, 2016).

⁴⁰ E-mail from Mr. Robert Gonzales, U.S. Army North, to author, (Mar. 15, 2016) (on file with author).

⁴¹ NAT’L WILDFIRE COORD. GRP., PMS 210: WILDLAND FIRE INCIDENT MANAGEMENT FIELD GUIDE 17 (2013).

⁴² U.S. NAT’L INTERAGENCY FIRE CTR., 2016 NATIONAL INTERAGENCY STANDARDS FOR FIRE AND AVIATION OPERATIONS GUIDE 7 (2016) [hereinafter REDBOOK].

⁴³ NAT’L INTERAGENCY FIRE CTR., NFES 2175: MILITARY USE HANDBOOK ch. 30-1 (2006) [hereinafter MILITARY USE HANDBOOK] (“Initially the military will in most cases be assigned mop-up activities. Within a few shifts they may . . . be reassigned to hotline fire activities.”)

⁴⁴ REDBOOK, *supra* note 42, at 7.

⁴⁵ Kyle Dickman, *Age of the Megafire: We’re Making Wildfires Worse and We Don’t Know How to Fight Them*, SALON.COM (Jul. 12, 2015), http://www.salon.com/2015/07/12/age_of_the_megafire_were_making_wildfires_worse_and_we_dont_know_how_to_fight_them/.

⁴⁶ Jessica Garrison, *Los Angeles Fire Camp Like a Little City*, LOS ANGELES TIME (Sept. 5, 2009), <http://articles.latimes.com/2009/sep/05/local/me-fire-command5>.

⁴⁷ REDBOOK, *supra* note 42, at 342-43.

⁴⁸ NAT’L DISPATCH EFFICIENCY WORKING GRP., INTERAGENCY STANDARDS FOR THE ROSS OPERATIONS GUIDE 6 (2015).

⁴⁹ REDBOOK, *supra* note 42, at 271.

⁵⁰ See U.S. FOREST SERV., WILDLAND FIRE ENGINE GUIDE (2000).

⁵¹ REDBOOK, *supra* note 42, at 272.

⁵² *Id.* at 273.

⁵³ U.S. NAT’L INTERAGENCY FIRE CTR., 2015 NATIONAL INTERAGENCY MOBILIZATION GUIDE 54 (2015) [hereinafter MOBILIZATION GUIDE].

⁵⁴ REDBOOK, *supra* note 42, at 208.

arrive on an initial attack will initially act as the IC for that fire, more complex extended attack fires require additional mission command resources in the form of an incident management team (IMT).⁵⁵ Incident management teams are divided into types based on their level of training and the complexity of incidents that each team is capable of managing, from Type 5, a purely local ad-hoc team capable of managing very simple incidents, all the way to a Type 1 team that fulfills all of the functions associated with a military general staff, from logistics to public affairs, and is capable of managing a very complex incident or series of incidents.⁵⁶ Type 1 and Type 2 teams are certified by the federal government; there are currently sixteen Type 1 IMTs in the United States.⁵⁷

Aviation resources consist of fixed wing and rotary wing assets from private contractors and government agencies. Rotary wing resources can be used for anything from aerial reconnaissance to “bucket drops” of water onto fires.⁵⁸ Rotary wing lift resources are also utilized for logistics and to insert “helitack” crews: Rappel-capable teams of firefighters similar to Air Assault units in the Army.⁵⁹ Lift helicopters are regularly utilized for medical evacuation, and can be employed to evacuate civilians threatened by wildfire.⁶⁰ The most common fixed wing air assets consist of air tankers known as “slurry bombers,” specially modified airplanes that drop water or a flame-extinguishing chemical liquid called slurry onto or in the path of wildfires.⁶¹ A common example of military support to wildfire suppression efforts is the Modular Airborne Fire Fighting System (MAFFS), a

modification that converts C-130 Hercules cargo aircraft into massive slurry bombers.⁶²

The infantrymen in the war on wildfire are organized into hand crews. Hand crews are categorized as Type 1 crews, which are national-level resources, and Type 2 crews, which are local or regional resources with a lower level of training and readiness.⁶³ Type 1 crews include Smokejumpers, airborne firefighters with base throughout the western United States and Alaska.⁶⁴ “Hot Shot” crews, composed of experienced firefighters with extensive training, are also Type 1 assets.⁶⁵ A Type 1 crew is always available for deployment from one fire to another for the entire fire season.⁶⁶ Type 2 crews have varying levels of training and readiness; some Type 2 crews are dedicated to wildfire suppression, but many are primarily utilized for trail maintenance or fuel reduction crews that are cross-trained in firefighting.⁶⁷ Many states train and organize prisoners into Type 2 wildfire crews; these “con crews” are organized with the same personnel and equipment as a regular crew, with the addition of a pair of shotgun-toting correctional officers.⁶⁸ In some fire seasons, con crews make up nearly half of wildfire hand crews in California.⁶⁹

Typical hand crews are composed of eighteen to twenty people, broken up into three squads with a superintendent (supe) and foreman for overhead.⁷⁰ The supe and foreman (often called the crew boss) fill roles analogous to a lieutenant and a platoon sergeant, with the superintendent primarily responsible for tactics and communication with higher

⁵⁵ *Id.* at 209.

⁵⁶ *Id.* at 209-12.

⁵⁷ *Incident Management Team Professional Development and Training*, U.S. FIRE ADMIN., <https://www.usfa.fema.gov/training/imt/> (last visited June 7, 2016).

⁵⁸ Jennifer Hlad, *Pendleton Choppers Practice Fighting Wildfires Amid Drought*, STARS AND STRIPES (May 1, 2015), <http://www.stripes.com/news/us/pendleton-choppers-practice-fighting-wildfires-amid-drought-1.343552>. Judge Advocates should be aware that the purchase of wildland fire fighting (WFF) specific equipment, such as the ‘bambi buckets’ described in the article, for defense support of civil authorities (DCSA) with Operations and Maintenance, Army funds is not proper. See BLACK FOREST FIRE AAR, *infra* note 90, at 3. The items may be procured for a necessary expense, such as WFF on the installation, and then employed for DCSA, but should not be expressly acquired for DCSA purposes.

⁵⁹ Redbook, *supra* note 42, at 301.

⁶⁰ *Id.* at 304; BILL GABBERT, *Fire in Jasper National Park Requires Evacuation of Park Visitors by Helicopter*, WILDFIRE TODAY (Jul. 10, 2015), <http://wildfiretoday.com/2015/07/10/fire-in-jasper-national-park-requires-evacuation-of-park-visitors-by-helicopter>.

⁶¹ TOM BAUER, *Forest Service Unveils Strategy for Replacing Old Slurry Bombers*, THE MISSOULIAN (Feb. 11, 2012), http://missoulian.com/news/state-and-regional/forest-service-unveils-strategy-for-replacing-old-slurry-bombers/article_d17624c8-54b1-11e1-8215-0019bb2963f4.html; see also Anna Huckabee, *Slurry Bomber Lefthand Canyon Fire*, YOUTUBE (Mar. 11, 2011),

<https://www.youtube.com/watch?v=XQtPHOYtOIo> (video of slurry bomber in action).

⁶² *Modular Airborne Firefighting Systems (MAFFS)*, *supra* note 22.

⁶³ REDBOOK, *supra* note 42, at 51-53.

⁶⁴ Smokejumpers also provide U.S. Army Special Operations Command (USASOC) elements with training and technology development for rough terrain parachuting. See INTERAGENCY MEMORANDUM OF AGREEMENT BETWEEN USDA-FOREST SERVICE, USDOJ-BLM, AND USASOC (1992).

⁶⁵ REDBOOK, *supra* note 42, at 260.

⁶⁶ *Id.* at 261.

⁶⁷ See Jon Driessen, *Crew Cohesion, Wildland Fire Transition, and Fatalities*, U.S. FOREST SERVICE, <http://www.fs.fed.us/t-d/pubs/htmlpubs/htm02512809/page08.htm> (last visited Jan. 20, 2016).

⁶⁸ Alex Helmick, *Thousands of Inmates Serve Time Fighting the West’s Forest Fires*, NAT’L PUBLIC RADIO (Jul. 31, 2014), <http://www.npr.org/2014/07/31/336309329/thousands-of-inmates-serve-time-fighting-the-west-s-forest-fires>.

⁶⁹ David Schmalz, *Convicts on the Crew: Inmates in the California Conservation Camp Program Help Battle Wildfires*, COACHELLA VALLEY INDEP. (Dec. 30, 2013), <http://www.cvindependent.com/index.php/en-US/news/environment/item/950-convicts-on-the-crew-inmates-in-the-california-conservation-camp-program-help-battle-wildfires>.

⁷⁰ REDBOOK, *supra* note 42, at 262.

headquarters while the crew boss handles logistics and maximizes individual firefighter performance.

The non-overhead members of a hand crew carry various tools that they use to build a “fireline.” A fireline is essentially a shallow trench about two or three feet wide where the ground has been scraped down to mineral soil, creating a break in combustible materials that will contain the fire.⁷¹ A fireline is usually dug as close as safety permits to the flames to minimize the amount of unburned fuel between the fireline and the fire.⁷² Crews often build their fireline with “one foot in the black” because the fireline is so close to the actual fire that crew members can stand in the ashes of already burned material.⁷³ Often, a crew must hike for many miles with over twenty-five pounds of equipment before beginning work.⁷⁴

A crew that is engaged in building a fireline is said to be the “cutting line.”⁷⁵ The supe moves ahead of the crew, scouting and marking where the fire line will be cut based on terrain and fuels.⁷⁶ The remaining members of the crew follow in a line, each crew member about a tool’s length from the next, bent over digging for up to sixteen hours a day.⁷⁷ Most crews are organized with a pair of “saw teams,” consisting of a “sawyer” who operates a chainsaw to remove trees and dense brush and a “swamper” who clears away debris to keep the saw operating.⁷⁸ Behind the saw teams come firefighters swinging a double-sided combination of a mattock and an axe known as a Pulaski, used to chop roots and scrape away fuels.⁷⁹ Farther down the line, crew members employ shovels and McLeods, a sort of aggressive looking rake.⁸⁰ Each crew member takes a few swings with his or her tool and sidesteps; the effect is of a centipede chewing as it crawls, stripping away anything that could burn to produce the fireline.⁸¹ A fireline is measured in “chains” of sixty-six feet.⁸² A Type 1 crew working in brush typically

cut six chains of line per hour, while a Type 2 crew is expected to cut four.⁸³ Active duty Soldiers mobilized to support wildfire suppression are classified as Type 2 crews.

IV. Immediate Response Authority

Active duty support for wildland fire suppression falls under the rubric of Defense Support of Civil Authorities (DSCA). Defense Support of Civil Authorities is defined as “support provided by U.S. federal military forces . . . in response to a request for assistance (RFA) from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.”⁸⁴ Defense Support of Civil Authorities includes support to prepare, prevent, protect, respond, and recover from domestic incidents including major disasters, both natural and man-made.⁸⁵

The Robert T. Stafford Disaster and Emergency Relief Act (“Stafford Act”) is the preeminent federal legislation governing DSCA.⁸⁶ The Stafford Act provides expanded federal authority in support of local disaster response efforts by providing equipment, facilities, supplies, and personnel as directed by the President.⁸⁷ Military WFF operations can be authorized as either deliberate DSCA missions under the Stafford Act or authorized under immediate response authority (IRA).

Immediate response authority allows a federal military commander to temporarily deploy and employ resources under her control to save lives, prevent human suffering, or mitigate great property damage.⁸⁸ Immediate response authority requires a request from civil authorities under imminently serious conditions when time does not permit

⁷¹ *About Handcrews*, U.S. FOREST SERV., http://www.fs.fed.us/fire/people/handcrews/about_handcrews.html (last visited June 7, 2016) [hereinafter *About Handcrews*].

⁷² *Id.*

⁷³ *Wildland Fire: Fireline Construction*, U.S. NAT’L PARK SERV., <http://www.nps.gov/fire/wildland-fire/learning-center/fire-in-depth/fireline-construction.cfm> (last visited June 7, 2016).

⁷⁴ *About Handcrews*, *supra* note 71.

⁷⁵ Amanda Chicago Lewis, *The Prisoners Fighting California’s Wildfires*, BUZZFEED NEWS (Oct. 31, 2013), <http://www.buzzfeed.com/amandachicagolewis/the-prisoners-fighting-californias-wildfires#.fvVbR0kBR> [hereinafter *Fighting California’s Wildfires*].

⁷⁶ Kyle Dickman, *In the Line of Wildfire*, OUTSIDE (Jun. 13, 2013), <http://www.outsideonline.com/1920071/line-wildfire> [hereinafter *In the Line*].

⁷⁷ *About Handcrews*, *supra* note 71.

⁷⁸ *In the Line*, *supra* note 76.

⁷⁹ The Pulaski was named in honor of Forest Service Ranger Edward Pulaski, the hero of the 1910 ‘big burn.’ See *1910 Fires: Edward Pulaski*, U.S. FOREST SERV., <http://www.fs.usda.gov/detail/r1/learning/history->

[culture/?cid=stelprdb5122876](http://www.fs.usda.gov/detail/r1/learning/history-culture/?cid=stelprdb5122876) (last visited June 7, 2016). Pulaski saved the lives of his forty-five man hand crew by leading them to take shelter inside an abandoned mineshaft to escape the fire. *Id.* He is also said to have invented the tool that carries his name.

⁸⁰ *Fighting California’s Wildfires*, *supra* note 75.

⁸¹ *Id.*

⁸² U.S. NAT’L WILDFIRE COORD. GRP., PMS 210: WILDLAND FIRE INCIDENT MANAGEMENT FIELD GUIDE 110 (2013).

⁸³ *Id.*

⁸⁴ U.S. DEP’T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) 16 (29 Dec. 2010) (C1 21 Sept. 2012) [hereinafter DCSA].

⁸⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES I-2 (31 Jul. 2013).

⁸⁶ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C. § 5121 (1988) (amending the Disaster Relief Act of 1974, Pub. L. No. 93-288).

⁸⁷ 42 U.S.C. § 5170 (2015).

⁸⁸ DCSA, *supra* note 84, para. 4.g.

approval from higher authority.⁸⁹ Immediate response authority forces cannot perform law enforcement duties; the deployment must be terminated when civilian resources become available or the immediate threat has passed, usually within seventy-two hours.⁹⁰ All requests for support of civil authorities must be evaluated for legality, lethality, risk of harm to military forces, cost, appropriateness, and impact on military readiness.⁹¹ The decision to employ IRA, and any decision to extend immediate response beyond 72 hours, should be documented in writing and ought to undergo a legal review.⁹² Immediate response authority forces continue to answer to their chain of command, unlike forces deliberately mobilized for WFF operations.⁹³ Recent IRA mobilizations have included Soldiers, rotary wing aviation assets, wheeled vehicles, and bulldozers.⁹⁴

The use of IRA is not an isolated or unlikely event, particularly for installations in the western United States. For example, assume that a wildfire caused by a lightning strike ignites on state land near a rural military installation. A local engine crew deploys to the fire to size it up and determines that based on prevailing winds and available fuels, the fire is likely to “blow up” and burn into a populated area once it hits a dense thicket of scrub brush that is a few miles away. At the current rate of spread, the fire will reach the thicket within the next hour. An hour is not enough time to cut a fireline by hand between the fire and the thicket, but a bulldozer could easily cut a fireline in the time available. An active duty engineer company on the base happens to have bulldozers available. In response to a request from the local civil authorities and considering the factors discussed above, the Commander could authorize the use of the bulldozers under IRA.⁹⁵

Judge advocates advising commanders during IRA operations should remember that the Posse Comitatus Act (PCA) prohibits active duty Soldiers and Airmen from

engaging in law enforcement actions.⁹⁶ The standing rules for the use of force (SRUF) apply during a wildfire incident, however Soldiers are prohibited from carrying individual or issued weapons while “participating in a [wildfire suppression] operation.”⁹⁷ While most operations in support of wildland fire suppression are unlikely to trigger the PCA, it is important to watch for mission creep. For example, during the Waldo Canyon Fire in 2012, a civilian official attempted to employ Soldiers to perform duty at roadblocks to prevent members of the public from entering areas where wildfire suppression operations were being conducted.⁹⁸ While this makes intuitive sense, in that Soldiers are trained and equipped for such a mission, it runs afoul of the PCA and the request was denied.⁹⁹ A judge advocate should be nested with the task force command team and in close touch with the IMT during planning to make incident managers aware of the constraints on military resources.

During the Waldo Canyon Fire, Soldiers were employed to control traffic in support of an engineer company’s convoy of bulldozers from Fort Carson to the scene of the fire. The use of Soldiers to control civilian traffic off-installation represents a PCA violation, but because the Soldiers were conducting roadblocks to allow a military convoy to move unimpeded along civilian streets and highways, this activity falls under the military purpose doctrine (MPD) exception to the PCA.¹⁰⁰ The MPD allows federal troops to provide some law enforcement assistance if the primary purpose of the assistance is to further a military purpose under appropriate authority.¹⁰¹ In this case, the appropriate authority was IRA and the military purpose was to allow the military convoy to travel unimpeded from Fort Carson to the site of the fire.¹⁰² The use of military vehicles driven by Soldiers to voluntarily evacuate citizens from areas threatened by a wildfire would probably be permissible because it would not constitute actions to “execute the laws” under the PCA.¹⁰³ The use of

⁸⁹ *Id.*

⁹⁰ *Id.*; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 4TH INFANTRY DIVISION, FORT CARSON, CO AFTER ACTION REPORT BLACK FOREST FIRE RESPONSE 5 (Jan. 2014) [hereinafter BLACK FOREST FIRE AAR]. The 2013 human-caused Black Forest Fire caused \$420.5 million in damages and suppression costs, burned 489 homes in Colorado Springs, Colorado, and killed two people. *Id.*

⁹¹ DCSA, *supra* note 84, para. 4.e.

⁹² BLACK FOREST FIRE AAR, *supra* note 90, at 6.

⁹³ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORT CARSON OSJA/U.S. AIR FORCE ACADEMY/NORTHCOM COLORADO WILDFIRES AFTER ACTION REPORT 14-15 (Oct. 10-11, 2012) [hereinafter COLORADO WILDFIRES AAR].

⁹⁴ BLACK FOREST FIRE AAR, *supra* note 90, at 1.

⁹⁵ Telephone interview with CPT Conner Bidwell, Judge Advocate, U.S. Army (Aug. 27, 2015) [hereinafter Interview with CPT Conner Bidwell]. This scenario was inspired by CPT Bidwell’s experiences as Chief of Operational Law, 4th Infantry Division (Mechanized) at Fort Carson, Colorado, in the summer of 2012. Fort Carson utilized Immediate Response Authority (IRA) to provide a portion of an engineer battalion and

heavy equipment such as bulldozers to dig fireline in support of efforts to contain the Waldo Canyon Fire, a 2012 blaze that burned upwards of 18,000 acres, destroyed 347 homes in Colorado Springs, Colorado, and killed two people. *Id.*

⁹⁶ 18 U.S.C. § 1385.

⁹⁷ U.S. ARMY NORTH (ARNORTH), STANDARD OPERATING PROCEDURES, WILDLAND FIREFIGHTING, APPENDIX 35 TO ANNEX H (LEGAL) para. 4.G.7.B (repeating a prohibition imposed in JOINT CHIEFS OF STAFF, DEFENSE SUPPORT OF CIVIL AUTHORITIES EXECUTION ORDER para. 3.I.8 (7 JUN. 2013) [hereinafter ARNORTH Wildland Firefighting SOP].

⁹⁸ Interview with CPT Conner Bidwell, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ COLORADO WILDFIRES AAR, *supra* note 93, at 10.

¹⁰¹ U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 15 (27 Feb. 2013) [hereinafter DoDI 3025.21].

¹⁰² COLORADO WILDFIRES AAR, *supra* note 93, at 10.

¹⁰³ Posse Comitatus Act, 18 U.S.C. 1385 (2015).

the same Soldiers and vehicles to enforce a mandatory evacuation order, or to patrol the evacuated areas to prevent looting, would violate the PCA and DoD policy.¹⁰⁴ National Guard resources on state active duty or Title 32 Status, if available, may provide a similarly trained and equipped alternative resource for law enforcement type missions because the PCA does not apply to Guardsmen in either of those statuses.

V. Deliberate Mobilization of Active Duty Forces to Support Wildfire Suppression

The NIFC serves as the coordination center for WFF operations throughout the United States, and active duty military support can only be employed under either Immediate Response Authority or after a formal request by the NIFC.¹⁰⁵ The Economy Act is the animating federal legislation for the interagency agreement that governs the deliberate employment of active duty forces in support of wildland fire suppression.¹⁰⁶ Department of Defense attorneys have already ensured that the interagency agreement is in compliance with the Economy Act and the Stafford Act, so a judge advocate in the field needs to ensure deliberate WFF operations are executed in compliance with the agreement.

In the past, the NIFC was required to “[e]nsure that all available or suitable civilian resources have been committed, and the requested support is not in competition with private enterprise,” but that requirement was eliminated in 2006, and the NIFC is merely required to determine that civilian resources are not readily available.¹⁰⁷ United States Joint Forces Command (JFCOM) is officially listed as the DoD’s

Executive Agent for Wildfire Support in the most recent interagency agreement, but JFCOM was eliminated in 2011 and Northern Command (NORTHCOM) assumed responsibility for Defense Support of Civil Authorities (DSCA), including WFF.¹⁰⁸ Northern Command assigns a Defense Coordinating Element (DCE), essentially a robust liaison package headed by a post-brigade command O-6 level Defense Coordinating Officer (DCO) to each of the Department of Homeland Security/Federal Emergency Management Agency (DHS/FEMA)’s ten nationwide regions.¹⁰⁹ The DCO validates the DSCA’s requests and passes them through NORTHCOM for approval by the Secretary of Defense, and the DCO remains DoD’s primary point of contact between supporting military forces and the supported civilian authorities.¹¹⁰

The NIFC is authorized to request military resources in battalion strength, the equivalent of twenty-five hand crews.¹¹¹ Recent operational deployments have also consisted of an order for ten hand crews and a battalion command element, the equivalent of a reinforced company.¹¹² Northern Command has the authority to request forces for DCSA through a standing DCSA execution order (EXORD) or via a request for forces (RFF) through the Joint Staff.¹¹³ Prior to the annual fire season, Army Forces Command (FORSCOM) publishes a planning order that designates available Army battalions to support the WFF mission.¹¹⁴ If activated, available battalions will be placed under the operational control (OPCON) of NORTHCOM, which will OPCON them to the service component command, such as ARNORTH, and the service component command will OPCON the forces to the DCO for the FEMA region where the fire occurs.¹¹⁵ Operational control is defined as “the authority to perform those functions of command over

¹⁰⁴ See DoDI 3025.21, *supra* note 101.

¹⁰⁵ MOBILIZATION GUIDE, *supra* note 53, at 24.

¹⁰⁶ U.S. DEP’T OF AGRIC., U.S. DEP’T OF INTERIOR, & U.S. DEP’T OF DEF., INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WILDLAND FIREFIGHTING OPERATIONS AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF DEFENSE (2010) [hereinafter INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS].

¹⁰⁷ U.S. DEP’T OF AGRIC., U.S. DEP’T OF INTERIOR, & U.S. DEP’T OF DEF., MODIFICATION NO. 01 TO INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WILDLAND FIREFIGHTING OPERATIONS AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF DEFENSE (2006) (superseded by an identically named interagency agreement ratified in 2010, *see* INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS, *supra* note 106). The agreement was modified due to Congressional concern that the previous requirement to ensure all private resources were committed was more restrictive than the Economy Act required, particularly with regard to aircraft. *See* OFF. OF MGMT. & BUDGET, A REVIEW OF EXISTING AUTHORITIES AND PROCEDURES FOR USING MILITARY ASSETS IN FIGHTING WILDFIRES 10 (2004).

¹⁰⁸ HEADQUARTERS, U.S. DEP’T OF ARMY, DEFENSE SUPPORT OF CIVIL AUTHORITIES EXECUTION ORDER 191-13 para 3.C.4.O (Aug. 29, 2013) [hereinafter EXORD 191-13].

¹⁰⁹ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW 2013 HANDBOOK 21 (Oct. 2013).

¹¹⁰ U.S. ARMY NORTH, USARNORTH OPORD AN-OPORD-15-008-01 FOR 2015 SUPPORT TO THE NATIONAL INTERAGENCY FIRE CENTER AND USNORTHCOM WILDLAND FIRE FIGHTING EFFORTS, para. 3.A.1 (Jul. 1, 2015) at para 3.B.3 (DCO is the primary DoD coordinating official to support NIFC) (on file with author); *See also* E-mail to author from Mr. Steven O’Brien, Defense Coordinating Element Region X, dated Mar. 14, 2016 (on file with author) [hereinafter USARNORTH WFF OPORD];

¹¹¹ Military Use Handbook, *supra* note 43, at 5.

¹¹² E-mail from Steven O’Brien, Defense Coordinating Element Region X, to author (Mar. 14, 2016 (on file with author)).

¹¹³ *See* EXORD 191-13, *supra* note 108.

¹¹⁴ U.S. ARMY FORCES COMMAND, FORSCOM EXORD ISO DEFENSE SUPPORT TO CIVIL AUTHORITIES FY16/17 para. 3.D.7.A.1 (18 Nov. 2015) (on file with author). Two WFF battalions are geographically sourced annually with one on the west coast and one in the central United States. *Id.*

¹¹⁵ USARNORTH WFF OPORD, *supra* note 110, para. 5.A.4; *see also* E-mail from Robert Gonzales, U.S. Army North, to author (Mar. 12, 2016) (on file with author).

subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission.”¹¹⁶ Operational control does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training.¹¹⁷

Some sources, including the NIFC’s handbook for federal wildland fire agencies who receive military resources, suggest that tactical control (TACON) of the tasked battalion is passed to the civilian Incident Commander managing the wildfire.¹¹⁸ Tactical command consists of “authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.”¹¹⁹ Tactical control does not provide authority to change organizational structure or direct administrative and logistical support, although the NIFC always provides some wildfire-specific logistical support such as boots and firefighting tools.¹²⁰ In recent operational deployments the tasked battalion has been given the purpose of “rapidly and effectively support NORTHCOM and [the] NIFC to mitigate the effects of wildland fires, while maintaining public confidence and support for DoD support of civil authorities.”¹²¹ Operational and tactical control of the mobilized battalion was given to the DCO and the DCO was directed to provide mission command for the tasked battalion.¹²² The tasked battalion was authorized and encouraged to coordinate with the civilian IC, but no formal command relationship was specified.¹²³ The command relationship between the IC and the tasked battalion is generally understood as that of “direct support.”¹²⁴ Direct support is defined as “a mission requiring a force to support another specific force and authorizing it to answer directly to the supported force’s request for assistance.”¹²⁵ The IC is the supported force and must communicate his or her

requirements and intent through the DCO to the battalion command element for execution.¹²⁶

Once NORTHCOM identifies the specific battalion that will support NIFC’s request from available units identified by the service components, NIFC will dispatch an advance party to the supporting unit’s home station. The advance party will consist of a Battalion Military Liaison, an experienced wildfire supervisor who will integrate into the battalion staff as a subject matter expert and liaison with the IMT, as well as twenty-eight Military Crew Advisors who will provide overhead for the battalion’s hand crews.¹²⁷ These individuals will deploy and remain with the unit throughout the incident.¹²⁸ The NIFC advance party will also consist of appropriate cadre to train the battalion’s Soldiers in wildfire suppression techniques; the NIFC cadre will conduct a half-day of classroom training at home station and two days of field training at the incident site to certify the battalion’s Soldiers as wildland firefighters pursuant to applicable federal standards.¹²⁹ The NIFC is also expected to equip the battalion with personal protective equipment and tools, as well as diesel fuel and shower facilities.¹³⁰ The NIFC will also issue radios for communication between incident overhead and military crews because although military units will deploy with organic communications systems to facilitate internal mission command, military radios are not generally compatible with those used by civilian responders.¹³¹

Within five days of notification, a battalion can be trained, equipped, and ready to commence travel to an incident site.¹³² The battalion is expected to deploy with the Battalion Aid Station and organic transportation assets.¹³³ Recent active duty deployments in support of WFF have also included an aeromedical evacuation section with hoist capability.¹³⁴

“[A] Judge Advocate can be attached to a [Battalion] Headquarters” for a wildfire suppression deployment.¹³⁵ When appropriate, the mobilized battalion’s general court-

¹¹⁶ U.S. DEP’T OF ARMY, DOCTRINE PUB. 1-02, TERMS AND MILITARY SYMBOLS para. 1-63 (Feb. 2015) [hereinafter ADRP 1-02].

¹¹⁷ U.S. DEP’T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 2-17 (May 2012) [hereinafter ADRP 5-0].

¹¹⁸ MILITARY USE HANDBOOK, *supra* note 43, at v.

¹¹⁹ ADRP 1-02, *supra* note 116, para. 1-63.

¹²⁰ ADRP 5-0, *supra* note 117, para. 2-17.

¹²¹ U.S. ARMY NORTH, FRAGO 1 TO USARNORTH OPORD, AN-OPORD-15-008-01 FOR 2015 SUPPORT TO THE NATIONAL INTERAGENCY FIRE CENTER AND USNORTHCOM WILDLAND FIRE FIGHTING EFFORTS para. 3.A.1 (14 Aug. 2015).

¹²² *Id.* para. 3.C.3.C.

¹²³ *Id.* para 3.C.5.E.

¹²⁴ E-mail from Mr. Steven O’Brien, Defense Coordinating Element Region X, to author (Mar. 14, 2016) (on file with author).

¹²⁵ ADRP 1-02, *supra* note 116, para. 1-29.

¹²⁶ E-mail to author from Mr. Steven O’Brien, Defense Coordinating Element Region X, dated Mar. 14, 2016 (on file with author).

¹²⁷ MILITARY USE HANDBOOK, *supra* note 43, at 10-11.

¹²⁸ *Id.*

¹²⁹ *Id.* at 13.

¹³⁰ *Id.*

¹³¹ *Id.* at 52.

¹³² MILITARY USE HANDBOOK, *supra* note 43, at 1.

¹³³ *Id.* at v.

¹³⁴ Off. of the Judge Advocate Gen., U.S. Army, Int’l and Operational Law Division, U.S. Army Support to Firefighting Efforts in Western States (Aug. 18, 2015) (unpublished information paper) (on file with author).

¹³⁵ MILITARY USE HANDBOOK, *supra* note 43, at 21.

martial convening authority may designate a legal advisor to deploy with the unit and advise the commander and staff on legal issues affecting military plans and operations.¹³⁶ Although a battalion could certainly deploy with the parent brigade's brigade judge advocate or trial counsel, it is significantly more likely that the brigade combat team's operational law judge advocate would be attached to the battalion headquarters.¹³⁷ However, in a recent active duty WFF mobilization, only the battalion paralegal deployed with the headquarters to provide legal support.¹³⁸

Soldiers assigned to a wildfire incident remain subject to the Uniform Code of Military Justice, as well as state and local laws at the incident location. Although NIFC advises Incident Managers that "[t]he military quickly addresses disciplinary questions, rather than deferring resolution until redeployment to home bases," it is almost certain that the majority of military justice actions during a month-long fire deployment would be handled upon return to home station.¹³⁹ A report of any incident during a wildland fire suppression mobilization that might be the basis for court-martial charges must be forwarded to the ARNORTH Office of the Staff Judge Advocate.¹⁴⁰ Military justice actions will likely be minimal due to a high operational tempo and the fact that "officers and non-commissioned officers will enforce a no alcohol policy at all times and closed camp policies when necessary."¹⁴¹

VI. Fiscal and Administrative Law

The core tenants of fiscal law from the Judge Advocate Officer Basic Course (purpose, time, and amount) are applicable to active duty support for WFF operations, whether executed deliberately or under IRA. The Stafford Act provides express statutory authorization for federal disaster assistance to state or local governments "with or without reimbursement" to the agency.¹⁴² Department of Defense support to federal fire-fighting agencies is always on a

reimbursable basis utilizing the Economy Act.¹⁴³ The Economy Act provides general authority for a requesting federal agency to transfer funds to another servicing federal agency.¹⁴⁴ The Interagency Agreement that governs active duty support for wildland suppression requires the USDA to provide "reimbursement of DoD expenditures . . . for goods and services provided through the NIFC to the various firefighting agencies for response to wildland fire emergencies."¹⁴⁵ Interestingly, "all DoD incurred costs in support [of wildland fire suppression] will be reimbursed in accordance with . . . the Economy Act to include pay and allowances."¹⁴⁶ The DoD, DOI, and USDA are required to conduct a post-fire season reimbursement workshop not later than December of each year to "ensure all DoD support to NIFC has been fully reimbursed for the previous fire season."¹⁴⁷ Economy Act reimbursements for services rendered or supplies furnished may be credited to the appropriation or fund of the activity performing the reimbursable work, versus being deposited in the Treasury as miscellaneous receipts.¹⁴⁸ Operations and Maintenance, Army (OMA) funds are the appropriate source of funds for operations in support of wildfire suppression, subject to reimbursement.¹⁴⁹ An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. Within the DoD, Economy Act orders are typically executed using a DD Form 448, "Military Interdepartmental Purchase Request (MIPR)."¹⁵⁰

The DoD Financial Management Regulation provides that the bona fide needs determination for an Economy Act transaction is made by the requesting activity and not by the servicing activity.¹⁵¹ This means that NIFC, not the Army, would be responsible for the bona fide needs determination when active duty forces or equipment provide deliberate support to wildfire suppression operations. The ordering agency must certify that it has available funds for the supplies or service, as well as provide a "Certification of Availability as to Purpose" that certifies that funds are properly chargeable

¹³⁶ ARNORTH Wildland Firefighting SOP, *supra* note 97.

¹³⁷ Policy Memorandum 14-08, Off. of the Judge Advocate Gen., U.S. Army, subject: Location, Supervision, Evaluation and Assignment of Judge Advocates in Brigades (2014) (assigning a dual position administrative law and operational law judge advocate in the grade of captain to brigade combat teams).

¹³⁸ E-mail from Major Benjamin Perry, Brigade Judge Advocate, 17th Field Artillery Brigade, Joint Base Lewis-McCord, Washington, to author (Aug. 18, 2015) (on file with author).

¹³⁹ MILITARY USE HANDBOOK, *supra* note 43, at 21.

¹⁴⁰ ARNORTH Wildland Firefighting SOP, *supra* note 97, tab B to app. 35 of annex H (Legal) (providing a sample legal paragraph for a wildland fire suppression OPOD).

¹⁴¹ MILITARY USE HANDBOOK, *supra* note 43, at 21.

¹⁴² 42 U.S.C. § 5170a(1) (2015).

¹⁴³ 31 U.S.C. §§ 1535-1536 (2011).

¹⁴⁴ CONTRACT & FISCAL LAW DEPT., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK ch. 2-54 (2015) [hereinafter 2015 FISCAL LAW DESKBOOK].

¹⁴⁵ Interagency Agreement for the Provision of Temporary Support During WFF Operations, *supra* note 106, at II.

¹⁴⁶ U.S. Northern Command, FRAGO 172.000 to OPOD 01-13 DOD Ground Support to NIFC 2015, para. 4.B.1.B (Aug. 18, 2015).

¹⁴⁷ INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS, *supra* note 106, at IV.

¹⁴⁸ U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 11A, ch. 3, para. 030103 C [hereinafter DoD FMR].

¹⁴⁹ Policy Memorandum, Asst. Chief of Staff for Installation Mgmt., U.S. Army, subject: Army Wildland Fire Policy Guidance, para. 8.1 (Sept. 4, 2002) ("Funding for . . . wildland fire suppression . . . is an installation operations and maintenance responsibility.").

¹⁵⁰ DoD FMR, *supra* note 148, vol. 11A, ch. 3, para. 030101.

¹⁵¹ 2015 FISCAL LAW DESKBOOK, *supra* note 56, at 3-26.

for the purposes cited in the order.¹⁵² Economy Act transactions also generally require the requesting activity to prepare a Determinations and Findings (D&F) statement that the use of interagency support capabilities is in the best interest of the government and that the required goods or services cannot be obtained as conveniently or economically by contracting with a private source.¹⁵³ A judge advocate cannot be completely asleep at the switch, however, as a servicing agency should refuse to accept an Economy Act request if it is obvious that the request does not serve a need existing in the fiscal year for which the appropriation is available.¹⁵⁴ In general, NIFC should not request active duty support unless there is a bona fide need for that support due to exhaustion of available civilian resources.

Administrative law concerns center mostly around the use of military assets by civilians, including civilian firefighters. Military aviation transportation is authorized for “employees of other U.S. Government agencies . . . when traveling on official business for DoD.”¹⁵⁵ This authority would allow Army aircraft to transport civilian federal firefighters, especially the military crew advisors assigned to each military hand crew. Army aircraft can also be used to fly civic leaders and news media for public affairs purposes, so long as the passengers execute a hold harmless agreement and the responsible commander determines the flight is in the interest of the Army.¹⁵⁶ There is no authority for transporting other categories of passengers, such as federal civilian contractors, local firefighters or law enforcement officers, or non-profit employees, absent an exception for aero-medical evacuation when there is a threat to life, limb, or eyesight, and no other adequate evacuation means is available.¹⁵⁷ Judge advocates should be especially attuned to the fact that contractors are very common in wildland fire suppression operations, often wearing the same yellow and green nomex uniforms and performing the same functions as federal employees.¹⁵⁸ Service and DoD regulations apply even when forces are supporting civilian authorities under IRA. For example, a proposal to place civilian law enforcement officers on Army aircraft to act as air traffic controllers during the Black Forest Fire was disapproved because there was no

applicable exception to Army restrictions on civilians in aircraft.¹⁵⁹

Another potential areas of concern for judge advocates is claims stemming from wildland fire suppression operations. Claims for damage to property, personal injury, or death that arise out of the activities of a federal agency or employee responding to a disaster are barred by the Federal Tort Claims Act (FTCA) when such claims are “based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty.”¹⁶⁰ Government action in the suppression of wildland fires has repeatedly been held to be a discretionary function because “[a]s the protector of public lands the federal government and agents of the United States are entrusted with many discretionary decisions [related to fighting wildfires] and these actions should not be hampered by hindsight judgments by judges and juries.”¹⁶¹ Thus, any negligent or tortious acts by active duty forces supporting WFF are not compensable under the FTCA. That said, commanders must still investigate and document any damage caused by unit personnel or other incidents that might give rise to a claim, and incidents that occur on the way to or from the sight of a fire could still give rise to a colorable claim.

In cases where the military causes a fire, the claims process is utilized to compensate those who lose property or sustain injuries. A destructive wildfire caused by military operations could qualify as a disaster for the purpose of claims planning and processing.¹⁶² If a wildfire is considered a disaster, a special claims processing office will be established and the local claims officers “must be equipped with cash for immediate payment of claims.”¹⁶³ In 2007, a New Jersey Air National Guard F-16 ejected a flare during a training flight; the flare started a wildfire that burned to over 17,000 acres and destroyed forty structures.¹⁶⁴ The Air Force reimbursed local fire agencies for the \$230,000 cost of suppression, as well as settled over \$2,000,000 worth of private claims. An Army artillery-caused wildfire at the Yukon Training Area in Alaska scorched 87,000 acres and resulted in the evacuation of residents in 2013.¹⁶⁵ The rapid and fair adjudication of claims probably does as much to mitigate the negative fallout

¹⁵² For a thorough and useful primer on agency to agency Economy Act transactions, see Major John R. Longley, *Traditional Economy Act Transactions – A Hidden Opportunity for On-the-Job Training*, ARMY LAW. Mar. 2013, at 7, 10.

¹⁵³ DoD FMR, *supra* note 148, vol. 11A, ch. 3, para. 030102.

¹⁵⁴ *Id.* para. 030403.

¹⁵⁵ U.S. DEP’T OF ARMY, REG. 95-1, AVIATION FLIGHT REGULATIONS para. 3-7(a)(4) (2014) [hereinafter AVIATION FLIGHT REGULATIONS].

¹⁵⁶ U.S. DEP’T OF ARMY, Reg. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM 41 (2011).

¹⁵⁷ AVIATION FLIGHT REGULATIONS, *supra* note 155, para. 3-3n(3).

¹⁵⁸ See George Lavender, *Fighting Fires is Big Business for Private Companies*, EARTH ISLAND JOURNAL (Oct. 29, 2013), http://www.earthisland.org/journal/index.php/elist/eListRead/fighting_fires_is_big_business_for_private_companies.

¹⁵⁹ BLACK FOREST FIRE AAR, *supra* note 90, at 9.

¹⁶⁰ U.S. DEP’T OF ARMY, PAM. 27-162, LEGAL SERVICES CLAIMS PROCEDURES para. 2-42 (21 Mar. 2008) [hereinafter CLAIMS PROCEDURES]; 42 U.S.C. § 5148 (2015).

¹⁶¹ Thune v. United States, 872 F. Supp. 921, 924 (D. Wyo. 1995).

¹⁶² CLAIMS PROCEDURES, *supra* note 160, ch.1-21.

¹⁶³ *Id.*

¹⁶⁴ *Another Military Jet Starts a Fire*, WILDFIRE TODAY, <http://wildfiretoday.com/2008/05/16/another-military-jet-starts-a-fire> (last visited May 10, 2015).

¹⁶⁵ Emily Schwing, *Army Claims Responsibility for Stuart Creek 2 Wildfire*, KTOO PUBLIC MEDIA (Oct. 22, 2013), <http://www.ktoo.org/2013/10/22/army-claims-responsibility-for-stuart-creek-2-wildfire/>.

from a military-caused wildfire as any efforts, active duty or otherwise, towards actually putting out the fire.

VII. Conclusion

Active duty support for WFF is not a regular event, but it is a recurring one. As the Army returns from overseas contingency operations to settles into garrison during an era of constrained government resources and ever-longer fire seasons, active duty support for WFF is likely to become more common. Active duty forces from 18th Airborne Corps, 101st Airborne Division, 4th Infantry Division, 1st Cavalry Division, 2nd Infantry Division, 1st Infantry Division, 7th Infantry Division, and I Marine Expeditionary Force have all contributed ground troops to battle wildfires since 2000.¹⁶⁶ Numerous active duty aviation units have also been tasked to support wildfire suppression efforts.¹⁶⁷ A working knowledge of the mechanics behind active duty support to WFF operations will make judge advocates more broadly skilled practitioners, ready to respond when things heat up.¹⁶⁸

¹⁶⁶ Gary Sheftick, *Army Units Rotate in Fight Against Wildfires* ARMY NEWS SERV., Nov. 8, 2000; LeAnn Swieczkowski, *Clinton Visits Firefighting Troops in Idaho*, ARMY NEWS SERV., Aug. 13, 2000; C. Marie Smith, *1st Cavalry Division Soldiers Assisting with Wildfires in Montana*, TEMPLE DAILY TELEGRAPH (Aug. 31, 2003), http://www.tdtnews.com/archive/article_e704e292-67ca-5421-9edc-597dfe343f5f.html; Patti Bielling, *Firefighting Mission Ends for Army's Task Force Blaze*, AMERICAN FORCES PRESS SERV. (Sept. 3, 2006), <http://archive.defense.gov/news/newsarticle.aspx?id=680>; Jason Jacoby,

Monument Fire Heats Up, Grows, LA GRANDE OBSERVER, Jul. 17, 2002; *NIFC Mobilizes Active Duty*, *supra* note 1.

¹⁶⁷ Hlad, *supra* note 58.

¹⁶⁸ This is the only deliberate wildfire related pun in the article, despite ample opportunities to reference 'burning questions,' etc.

Realizing a Dream: Expedited Paths to Citizenship for Servicemembers

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*United States citizenship is a unique bond that unites people around civic ideals and a belief in the rights and freedoms guaranteed by the U.S. Constitution. The promise of citizenship is grounded in the fundamental value that all persons are created equal and serves as a unifying identity to allow persons of all backgrounds, whether native or foreign-born, to have an equal stake in the future of the United States.*¹

I. Introduction

The legal assistance office is packed with Soldiers seeking your office's legal assistance expertise on this fine, fall day in 2015. The client card you pick up indicates that the Soldier, Private First Class (PFC) Juan Mojica-Corrales, has questions about expedited paths to naturalization through military service. Panic sets in because the one takeaway you remember from your Judge Advocate Officer Basic Course is that immigration law is second only to tax law in its complexity.² However, you also know that providing legal assistance in the area of immigration is within the scope of your duties.³ You call PFC Mojica-Corrales back to your office where the two of you sit down. Private First Class Mojica-Corrales wants to know if he is eligible for expedited naturalization through his military service, the legal issues involved, any advantages or disadvantages of pursuing this type of naturalization, and what forms or documents are required.

Private First Class Mojica-Corrales tells you that he is twenty years-old. He has lived in the United States for the

past two years, and he is a lawful permanent resident (LPR)⁴ of the United States. He has never been in trouble with the law, civilian or military—not even a parking ticket, non-judicial punishment, or an administrative reprimand. He also tells you that his active duty, honorable service exceeds one year. Private First Class Mojica-Corrales asks if he may set up a follow-on meeting with you to wrap up his questions because he must meet with First Sergeant Hernandez in fifteen minutes. You agree because this will give you time to research the issue.

Qualifying members of the U.S. Armed Forces may be eligible for citizenship through the expedited naturalization provisions of sections 328 and 329 of the Immigration and Naturalization Act (INA).⁵ While there are commonalities to both sections, they differ in multiple respects. Understanding the differences and how they apply to servicemembers is critical to providing them with sound legal advice.

This article will discuss the expedited paths to citizenship under sections 328 and 329 of the INA, their commonalities, the unique requirements specific to each section, the key legal

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¹ USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part A – Citizenship and Naturalization Policies and Procedures, Chapter 1 – Purpose and Background, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartA-Chapter1.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. A, Ch. 1].

² Joshua Daley Paulin, *Immigration Law 101*, GPSOLO (Sept./Oct. 2013), http://www.americanbar.org/publications/gp_solo/2013/september_october/immigration_law_101.html.

³ U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6f (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-3].

⁴ *Tools and Resources, Glossary, Lawful Permanent Resident (LPR)*, U.S. CITIZENSHIP & IMMIGR. SERVS.,

https://www.uscis.gov/tools/glossary?topic_id=#alpha-listing (last visited May 19, 2016) [hereinafter *Lawful Permanent Resident*]. A lawful permanent resident (LPR), is any "person not a citizen of the United States who is residing in the United States under legally recognized and lawfully recorded permanent residence as an immigrant." *Id.* A LPR is also known as a "Permanent Resident Alien," a "Resident Alien Permit Holder," and a "Green Card Holder." *Id.*; see also INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2012) (defining what it means to be "lawfully admitted for permanent residence"). There are also "conditional permanent residents (CPR)." 8 C.F.R. § 216.1 (2015). A CPR receives a green card that is only valid for two years; the CPR must petition to remove the conditional status during the ninety days before the card expires. *Green Card, Conditional Permanent Residence*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence> (last visited May 19, 2016). Generally speaking, for purposes of enlisting in all branches of the military, conditional lawful permanent residents "are legally equivalent to other LPRs, with the exception that their status can be terminated if they fail to meet the conditions on their status or to obtain a waiver." MARGARET D. STOCK, *IMMIGRATION LAW & THE MILITARY* 14 (2d ed. 2015). See 8 C.F.R. § 216.1 (discussing CPR status).

⁵ INA § 328, 8 U.S.C. § 1439 (2012); INA § 329, 8 U.S.C. § 1440 (2012). Before the creation of the Immigration and Nationality Act (INA) in 1952, the statutes governing immigration law were not organized in one location. *Laws, Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/laws/immigration-and-nationality-act> (last visited May 19, 2016). Subsequent to the establishment of the INA, it was codified in the United States Code (U.S.C.) under Title 8, "Aliens and Nationality." *Id.* While it is common to see both the INA and U.S. Code referenced in citations, the INA citation is more commonly used. *Id.* For example section 328 of the INA is cited as INA § 328, 8 U.S.C. § 1439. This article will parallel cite to both.

issues a judge advocate must understand, and the forms and documents required to apply for expedited naturalization under these sections. Finally, this article will provide resources and guidance for those immigration issues falling beyond the scope of a legal assistance office.

This article is an issue-spotting guide meant to assist in identifying legal issues a client may face when applying for expedited naturalization pursuant to sections 328 and 329, rather than a research paper into the complexities of immigration law. Some clients will present very straightforward factual cases with no legal issues; others will require consultation with a senior attorney in your legal assistance office; and, still others will require referral of the client to a private attorney because the complexity of their case is beyond the expertise of your legal assistance office.⁶

II. Background of Expedited Naturalization Provisions for U.S. Servicemembers

Special naturalization provisions benefitting non-citizens serving in the U. S. Armed Forces date back to at least the Civil War.⁷ Since that time, during major conflicts, special enactments were made.⁸ Post-September 11, 2001 (9/11), was no exception.⁹ After 9/11, Congress and the President expressed a continued interest in legislation that expanded the citizenship benefits for non-U.S. citizens serving in the military.¹⁰

The foundation for the currently enacted versions of the

INA that provide expedited naturalization opportunities for servicemembers dates back to the Immigration and Nationality Act of 1952.¹¹ In 1952, Congress significantly broadened the class of persons eligible for naturalization through military service when it repealed the Nationality Act of 1940, as amended, and replaced it with the Immigration and Nationality Act (INA) of 1952.¹² The Act of 1952 replaced the provisions relating to the naturalization of alien veterans with the more encompassing sections 328 and 329.¹³ This expanded the naturalization options for military servicemembers.¹⁴ It also provided the underpinnings of the currently enacted versions of sections 328 and 329.¹⁵

III. Expedited Naturalization for Servicemembers under Sections 328 and 329

Under the currently enacted versions of sections 328 and 329, servicemembers may be eligible for expedited naturalization through their qualifying military service.¹⁶ In general, service in the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, and certain components of the National Guard and the Selected Reserve of the Ready Reserve is considered qualifying military service for eligibility purposes under sections 328 and 329.¹⁷

The first of the two expedited paths to citizenship that servicemembers may be eligible for is section 328. Section 328 deals with naturalization during periods of no declared hostilities.¹⁸ This section is often referred to as the “peacetime” statute.¹⁹ The other expedited naturalization

⁶ AR 27-3, *supra* note 3, para. 3-5a. “Attorneys providing legal assistance will not assist clients on matters outside the scope of the legal assistance program” *Id.* Whenever “legal assistance cannot be rendered, every effort will be made to refer clients (in accordance with para 3-7h) to attorneys who can assist them.” *Id.* para. 3-5c(2). A client should not be referred to an outside attorney “unless the referral is in the best interest of the client.” *Id.* para. 3-7h(2). One of the critical factors a legal assistance attorney should consider when making this determination is the attorney’s expertise in the area of immigration law. *Id.* para. 3-7h(3)(b).

⁷ Act of July 17, 1862, ch. 200, § 21, 12 Stat. 594, 597 (extending naturalization benefits to those who served with the armies of the United States); *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part I – Military Members and Their Families, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter1.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. I, Ch. 1].

⁸ MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RES. SERV., RL31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: CURRENT LAW, POL’Y, AND ISSUES 3 (2009). This includes the period up to, and including, the Vietnam War. *Id.* For a good discussion of the various military naturalization statutes and their legislative history, see Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 408-30 (2000).

⁹ *Policy Manual*, Vol. 12, Pt. I, Ch. 1, *supra* note 7.

¹⁰ *Id.* Legislation benefitting servicemembers and their families increased considerably since 2003. *Id.*

¹¹ Goring, *supra* note 8, at 423-24.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* From a practical standpoint, “naturalized immigrants gain important benefits, including the right to vote, security from deportation in most cases, access to certain public-sector jobs, and the ability to travel with a U.S. passport.” WILLIAM A. KANDEL, CONG. RES. SERV., R43366, U.S. NATURALIZATION POL’Y I (2014). An additional benefit of naturalization for servicemembers is the ability to obtain a security clearance. U.S. DEP’T OF ARMY, REG. 380-67, PERSONAL SECURITY PROGRAM para. 3-22a (24 Jan. 2014). While there are exceptions to this rule, absent a compelling reason justifying a security clearance for a non-citizen, one will not be granted. *Id.* Obtaining a security clearance opens up greater employment opportunities within the military for those servicemembers. See STOCK, *supra* note 4, at 37. For example, intelligence operations and special-forces require both U.S. citizenship and a security clearance. LEE & WASEM, *supra* note 8.

¹⁵ Goring, *supra* note 8, at 423-24.

¹⁶ INA §§ 328, 329, 8 U.S.C. §§ 1439, 1440 (2012); *Military, Citizenship for Military Members*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/military/citizenship-military-personnel-family-members/citizenship-military-members> (last visited May 19, 2016) [hereinafter *Citizenship for Military Members*].

¹⁷ *Citizenship for Military Members*, *supra* note 16.

¹⁸ INA § 328, 8 U.S.C. § 1439; *Citizenship for Military Members*, *supra* note 16.

¹⁹ *Citizenship for Military Members*, *supra* note 16.

avenue available for eligible servicemembers is section 329. This section covers naturalization during designated “periods of hostilities.”²⁰ Section 329 is often referred to as the “wartime” statute.²¹

Sections 328 and 329 are not mutually exclusive; a servicemember may be eligible for expedited naturalization under one or both sections.²² Accordingly, understanding the requirements and differences between sections 328 and 329 will help assist clients in identifying their eligibility to naturalize, potential legal issues, the benefits and drawbacks to naturalization under these sections, and the forms and documents required to apply.

A. Requirements Common to Sections 328 and 329 of The Immigration and Naturalization Act

Applicants seeking expedited naturalization through sections 328 and 329 must meet many of the same requirements applicable to all other naturalization

applicants.²³ Generally, there are four common requirements applicable to all naturalization applicants.²⁴ First, the servicemember must exhibit their understanding of the English language.²⁵ This includes the “ability to read, write, and speak words in ordinary usage in the English language.”²⁶ Next, the servicemember must demonstrate a knowledge and understanding of the fundamentals of U.S. history and government (i.e., civics).²⁷ A servicemember’s English language comprehension and civics knowledge is tested during the naturalization interview with a U.S. Citizenship and Immigration Services (USCIS) officer.²⁸ Third, the servicemember must be attached to the principles of the Constitution of the United States, and “be well disposed to the good order and happiness of the United States.”²⁹ The servicemember declares their attachment to the Constitution when they take an Oath of Allegiance during their naturalization ceremony.³⁰ Fourth, the servicemember must establish they were, and continue to be, a person of good moral character during the applicable statutory period.³¹

²⁰ INA § 329; 8 U.S.C. § 1440; *Citizenship for Military Members*, *supra* note 16.

²¹ STOCK, *supra* note 4, at 37. Wartime service refers to a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force. INA § 329(a), 8 U.S.C. § 1440(a). Section 329 of the Immigration and Nationality Act also deals with posthumous naturalization. That is beyond the scope of this article.

²² INA §§ 328, 329, 8 U.S.C. §§ 1439, 1440; *Citizenship for Military Members*, *supra* note 16. It is critical to note that sections 328 and 329 do not automatically grant citizenship to an applicant because they are serving in the military. See Millan-Garcia v. Immigration and Naturalization Service, 343 F.2d 825, 830 (9th Cir. 1965). Instead, what they do is extend eligibility to those servicemembers that meet their requirements. *Id.*

²³ STOCK, *supra* note 4, at 38.

²⁴ *Citizenship for Military Members*, *supra* note 16.

²⁵ INA § 312(a)(1); 8 U.S.C. § 1423(a)(1) (2012); 8 C.F.R. § 312.1(a) (2015); *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part E – English and Civics Testing and Exceptions, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartE-Chapter1.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. E, Ch. 1]. This is done during the naturalization exam. *Id.*

²⁶ INA § 312(a)(1); 8 U.S.C. § 1423(a)(1); 8 C.F.R. § 312.1(a); *Policy Manual*, Vol. 12, Pt. E, Ch. 1, *supra* note 25. “Ordinary usage means comprehensible and pertinent communication through simple vocabulary and grammar, which may include noticeable errors in pronouncing, constructing, spelling, and understanding completely certain words, phrases, and sentences.” *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part E – English and Civics Testing and Exceptions, Chapter 2 – English and Civics Testing*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartE-Chapter2.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. E, Ch. 2].

²⁷ INA § 312(a)(2), 8 U.S.C. § 1423(a)(2); 8 C.F.R. § 312.2(a); *Policy Manual*, Vol. 12, Pt. E, Ch. 2, *supra* note 26. This, too, is tested on the naturalization exam. *Policy Manual*, Vol. 12, Pt. E, Ch. 2, *supra* note 26.

²⁸ *Policy Manual*, Vol. 12, Pt. E, Ch. 2, *supra* note 26; *Thinking About Applying for Naturalization?*, U.S. CITIZENSHIP & IMMIGR. SERVS.,

<http://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/PDFs/G-1151.pdf> (last visited May 19, 2016) [hereafter *Thinking About Applying*]. The naturalization test is composed of two parts: 1) an English language proficiency component that tests the applicant’s ability to read, write, speak, and understand English; and, 2) knowledge of U.S. history and government, which is ascertained on a civics test. *Policy Manual*, Vol. 12, Pt. E, Ch. 2, *supra* note 26. An applicant has two chances to pass the English and civics tests. *Id.* The first chance is during the naturalization interview with the U.S. Citizenship and Immigration Services (USCIS) officer. *Id.* The second chance is during the re-examination interview. *Id.* One of the reasons applicants fail their naturalization test is because they cannot answer the interview questions in English. *Id.* Servicemembers interested in finding English or citizenship classes where they live can visit www.literacydirectory.org or they can contact their local community college or adult education program. *Id.*; see *infra* Part V for information on study materials and resources available to servicemembers.

²⁹ INA § 316(a)(3); 8 U.S.C. § 1427(a)(3) (2012); 8 C.F.R. § 316.11 (2015); *Policy Manual, Volume 12 – Citizenship & Naturalization, Part D – General Naturalization Requirements, Chapter 7 – Attachment to the Constitution*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter7.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. D, Ch. 1]. “Attachment implies a depth of conviction which would lead to active support of the Constitution.” 8 C.F.R. § 316.11(a). “Attachment includes both an understanding and a mental attitude including willingness to be attached to the principles of the Constitution.” *Policy Manual*, Vol. 12, Pt. D, Ch. 1.

³⁰ INA § 337(a)(1)-(4), 8 U.S.C. § 1448(a)(1)-(4) (2012); *Thinking About Applying*, *supra* note 28.

³¹ INA § 316(a)(3) & (d), 8 U.S.C. § 1427(a)(3) & (d); 8 C.F.R. § 316.2(a)(7) (2015); 8 C.F.R. § 316.10 (2015); *Citizenship for Military Members*, *supra* note 16. The naturalization provision under which the servicemember files for naturalization (e.g., INA section 328 or 329) will determine the statutory period during which the servicemember must demonstrate good moral character. *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part F – Good Moral Character, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter1.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. F, Ch. 1]. See *infra* Parts III B and C for the required statutory periods under section 328 and section 329 respectively. Whether an applicant meets the good moral character requirement is determined by a USCIS officer’s assessment of the applicant’s record, statements provided

Although not likely to be an issue with most servicemember-applicants, the good moral character analysis can be complex if the servicemember was ever in trouble with civil or military authorities.³² Military authorities include not only court-martial convictions, but also administrative and non-judicial punishment and discharges.³³ It is important to know that the USCIS is not limited to periods set forth in the statute when making a good moral character determination.³⁴ If the situation warrants, the USCIS may take into consideration conduct of the servicemember prior to the required statutory period.³⁵ This includes looking into the history of a servicemember prior to their qualifying military service.³⁶ Accordingly, if the servicemember-client was in trouble with the authorities, the good moral character determination should involve the assistance of a seasoned immigration attorney.³⁷ A checklist of questions to ask servicemember-clients regarding their military service is included in Appendix A.

In addition to the above, another advantage common to sections 328 and 329 is exemption from the continuous residence and physical presence requirement prior to applying for naturalization.³⁸ In order to satisfy the continuous residence and physical presence requirements, most LPRs are required to wait three to five years before applying for U.S. citizenship.³⁹ However, for qualifying servicemembers, the requirement for continuous residence and physical presence

in the United States is waived or reduced, as are the state residence requirements.⁴⁰

While sections 328 and 329 provide expedited paths to naturalization for qualified servicemembers, they also contain a significant disadvantage that applicants must be aware of. Specifically, servicemembers that naturalized pursuant to section 328 or 329 after November 24, 2003, may have their citizenship revoked.⁴¹ Sections 328 and 329 require servicemembers naturalized under their sections to serve honorably for a period or periods aggregating five years.⁴² If the servicemember is separated under other than honorable conditions before honorably serving for the requisite time, they may have their citizenship revoked.⁴³ Thus, servicemembers need to understand that post-naturalization misbehavior may negatively impact their citizenship.⁴⁴

Despite the common requirements of sections 328 and 329, there are significant differences that will impact under which section a servicemember is eligible to naturalize. Understanding these distinctions is necessary to providing sound legal advice to a servicemember-client.

B. Requirements of the Peacetime Statute, INA Section 328

The peacetime naturalization statute is available to

in the naturalization application, and oral testimony given during the interview. *Policy Manual*, Vol. 12, Pt. F, Ch. 1, *supra*. Good moral character is defined in the negative under the INA. INA § 101(f), 8 U.S.C. § 1101(f) (2012). Generally, good moral character means “character which measures up to the standards of average citizens of the community in which the applicant resides.” *Policy Manual*, Vol. 12, Pt. F, Ch. 1, *supra*; INA § 101(f) (providing a non-exhaustive list of criminal acts that constitute a statutory bar to showing good moral character); 8 U.S.C. § 1101(f). Examples of statutory bars to establishing good moral character include a conviction for murder or an aggravated felony. *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part F – Good Moral Character, Chapter 4 – Permanent Bars to GMC*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter4.html> (last visited May 19, 2016). Even if a servicemember is not statutorily barred from showing good moral character, they may still be denied naturalization if their conduct, in total, during the statutory period, shows a lack of good moral character. STOCK, *supra* note 4, at 42.

³² STOCK, *supra* note 4, at 42.

³³ *Id.* at 71.

³⁴ INA § 316(e), 8 U.S.C. § 1427; 8 C.F.R. § 316.10(a)(2); IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 1803, 1810 (14th ed. 2014); *Policy Manual*, Vol. 12, Pt. F, Ch. 1, *supra* note 31.

³⁵ INA § 316(e), 8 U.S.C. § 1427; 8 C.F.R. § 316.10(a)(2); *Policy Manual*, Vol. 12, Pt. F, Ch. 1, *supra* note 31.

³⁶ INA § 316(e), 8 U.S.C. § 1427; 8 C.F.R. § 316.10(a)(2); *Policy Manual*, Vol. 12, Pt. F, Ch. 1, *supra* note 31.

³⁷ STOCK, *supra* note 4, at 42.

³⁸ *News, Naturalization Through Military Service: Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/news/fact->

[sheets/naturalization-through-military-service-fact-sheet](#) (last visited May 19, 2016) [hereinafter *Military Service Naturalization Fact Sheet*].

³⁹ STOCK, *supra* note 4, at 37. Generally, a civilian LPR must establish that they have resided continuously in the United States for a period of at least five years before becoming eligible for naturalization. 8 C.F.R. § 316.2(a); *see also* 8 C.F.R. § 316.5 (providing detailed guidance on what constitutes “residence” for naturalization applicants).

⁴⁰ INA § 328, 8 U.S.C. § 1439 (2012); INA § 329, 8 U.S.C. § 1440 (2012); STOCK, *supra* note 4, at 40; *U.S. Citizenship, Continuous Residence and Physical Presence Requirements for Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/continuous-residence-and-physical-presence-requirements-naturalization> (last visited May 19, 2016); *Military Service Naturalization Fact Sheet*, *supra* note 38; *Citizenship for Military Members*, *supra* note 16.

⁴¹ STOCK, *supra* note 4, at 37.

⁴² INA § 328(f), 8 U.S.C. § 1439(f); INA § 329(c), 8 U.S.C. § 1440(c). According to the USCIS, both ‘Honorable’ and ‘General-Under Honorable Conditions’ “discharge types qualify as honorable service for immigration purposes. Other discharge types, such as ‘Other Than Honorable,’ do not qualify as honorable service.” *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part I – Military Members and Their Families, Chapter 2 – One Year of Military Service During Peacetime (INA 328)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter2.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. I, Ch. 2].

⁴³ INA §§ 328(f), 329(c), 8 U.S.C. §§ 1439(f), 1440(c).

⁴⁴ STOCK, *supra* note 4, at 38-39. For a good discussion of the immigration consequences of military adverse actions, *see* Major Takashi Kagawa, *The Judge Advocate’s Guide to Immigration Consequences for Military Adverse Action*, ARMY LAW., Oct. 2014, at 6 (discussing the adverse immigration consequences of military adverse action on servicemembers).

qualified servicemembers at all times;⁴⁵ it does not require an executive order to come into effect.⁴⁶ To be eligible to apply under this section, the servicemember must meet a number of requirements. First, the servicemember must have served honorably in the service for a period or periods aggregating one year.⁴⁷ Additionally, if the servicemember separated from the service, that separation must have been honorable.⁴⁸ For immigration purposes, both honorable and general, under honorable conditions, discharges qualify as honorable service.⁴⁹ An other than honorable discharge does not qualify as honorable service.⁵⁰

Second, the servicemember must be eighteen years old or older.⁵¹ Third, the servicemember must have LPR status at the time of the examination on the application with the USCIS officer.⁵² Fourth, the servicemember must show five years of good moral character.⁵³

The fifth requirement pertains to the continuous residence and physical presence element of the statute.⁵⁴ Normally, an applicant for naturalization must show they have continuously resided in the United States for at least five years preceding the date of filing their application.⁵⁵ They must also show that they were physically present in the United States for at least thirty months out of the five years immediately preceding the date of filing the application.⁵⁶ However, servicemember-applicants under the peacetime statute are exempt from the continuous residence and physical presence requirements if they do one of two things.⁵⁷ The servicemember must either file their application while still in the service, or do so within six months of separating from the

service with an honorable discharge.⁵⁸

Section 328 of the INA applies to active duty servicemembers, and any of the reserve components, to include the Individual Ready Reserve or the inactive National Guard.⁵⁹ However, the caveat for National Guard service is that service must be during a period of time when the National Guard unit is “federally recognized as a Reserve component unit.”⁶⁰

Looking through your notes from the meeting with PFC Mojica-Corrales, you see that he is eligible to file an application for expedited naturalization under section 328. He is an LPR and is over eighteen years old. His active duty time exceeds one year and he is still in the service. Good moral character does not appear to be an issue because he was never in trouble with the law. If he files his application while still on active duty, or does so within six months of separating from the service (assuming his service is characterized as honorable), he will be exempt from the continuous residence and physical presence requirements, too. Despite PFC Mojica-Corrales’ eligibility for expedited naturalization under the peacetime statute, you note that he may be eligible for naturalization through the wartime statute, too.

C. Requirements of the Wartime Statute, INA Section 329

Unlike the peacetime statute, the wartime statute is only available during specified statutory periods, or when a presidential executive order invokes section 329 of the INA.⁶¹

⁴⁵ INA § 328; 8 U.S.C. § 1439; STOCK, *supra* note 4, at 43.

⁴⁶ *Id.* “Executive Orders (EOs) are legally binding orders given by the President, acting as the head of the Executive Branch, to Federal Administrative Agencies.” *What is an Executive Order*, THIS NATION <http://www.thisnation.com/question/040.html> (last visited May 19, 2016). Generally, they are used to direct federal agencies and officials in their execution of congressionally established laws or policies. *Id.* An EO does not require Congressional approval to take effect, but they have the same legal weight as laws passed by Congress. *Id.* The President’s source of authority to issue EOs is found in Article II, Section 1 of the Constitution, which grants to the President the “executive Power.” *Id.*

⁴⁷ INA § 328, 8 U.S.C. § 1439.

⁴⁸ *Id.*

⁴⁹ *Policy Manual*, Vol. 12, Pt. I, Ch. 2, *supra* note 42.

⁵⁰ *Id.*

⁵¹ *Citizenship for Military Members*, *supra* note 16; STOCK, *supra* note 4, at 43; *see also* 8 U.S.C. § 328.2(e) (2015); 8 C.F.R. § 316.2(a)(1) (2015).

⁵² 8 C.F.R. § 328.2 (2015); *Citizenship for Military Members*, *supra* note 16; STOCK, *supra* note 4, at 43.

⁵³ 8 C.F.R. § 328.2(d); Specifically, the “applicant must demonstrate good moral character for five years prior to filing for naturalization, and during the period leading up to the administration of the Oath of Allegiance.” *USCIS Policy Manual: Volume 12 – Citizenship & Naturalization, Part D – General Naturalization Requirements, Chapter 1, Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS.,

<https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter1.html> (last visited May 19, 2016).

⁵⁴ INA § 328, 8 U.S.C. § 1439; *Citizenship for Military Members*, *supra* note 16.

⁵⁵ INA § 328, 8 U.S.C. § 1439; *Citizenship for Military Members*, *supra* note 16.

⁵⁶ *Citizenship for Military Members*, *supra* note 16.

⁵⁷ INA § 328, 8 U.S.C. § 1439; *Citizenship for Military Members*, *supra* note 16. The residence and physical presence requirements are waived for time spent abroad in the military service. KURZBAN, *supra* note 34, at 1797.

⁵⁸ INA § 328; 8 U.S.C. § 1439; *Citizenship for Military Members*, *supra* note 16; STOCK, *supra* note 4, at 43. As Stock notes in her treatise, a veteran may still apply for naturalization under INA section 328 after six months from being discharged from the service, but they will be subject to the continuous physical presence and residency requirements that were originally waived. *Id.* at 43 n.31. Accordingly, other than not paying the filing fee, there is little to be gained from filing under INA section 328 if the veteran was discharged more than six months prior. *Id.*

⁵⁹ *United States v. Rosner*, 249 F.2d 49 (1st Cir. 1957); STOCK, *supra* note 4, at 44.

⁶⁰ STOCK, *supra* note 4, at 44.

⁶¹ INA § 329; 8 U.S.C. § 1440 (2012); 8 C.F.R. § 329.2 (2015); *Citizenship for Military Members*, *supra* note 16; STOCK, *supra* note 4, at 44. Past designated periods of hostilities include: World War I (April 6, 1917, to November 11, 1918); September 1, 1939, to December 31, 1946; June 25, 1950, to July 1, 1955; February 28, 1961, to October 15, 1978;

On July 3, 2002, President George W. Bush issued an executive order invoking section 329 and designating the period beginning on September 11, 2001, as a “period of hostilities.”⁶² This period of hostilities remains in effect until terminated by a future executive order.⁶³ Because we are currently in a period of designated hostilities, qualified servicemembers may apply for expedited naturalization under the wartime statute.⁶⁴

In general, like the peacetime statute, a servicemember-applicant under the wartime statute must satisfy a number of specific requirements.⁶⁵ First, unlike the peacetime statute, a servicemember is eligible to apply for naturalization after serving only one day of honorable service.⁶⁶ As such, they do not have to wait one year before applying for naturalization under the wartime statute; they may apply immediately.⁶⁷ This also means that servicemember-applicants are exempt from the general conditional residence and physical presence requirements common to most civilian naturalization statutes.⁶⁸ Second, the wartime statute requires honorable service in an active-duty status, or in the Selected Reserve of the Ready Reserve, during a designated period of hostilities.⁶⁹ This is distinct from the peacetime statute, which does not require any specific type of service.⁷⁰ Additionally, if the servicemember was separated from the service, then they must have been separated under honorable conditions.⁷¹ As with the peacetime statute, for immigration purposes, both an honorable and general, under honorable conditions, discharge qualifies as honorable service.⁷² An other than honorable

discharge does not qualify as honorable service.⁷³

Third, a servicemember does not have to be a LPR to be eligible to apply for naturalization under this statute.⁷⁴ However, they must have been present in the United States or certain territories at the time of their enlistment or induction.⁷⁵ Fourth, there is no minimum age requirement for an applicant under the wartime statute.⁷⁶ Finally, as with the peacetime statute, the servicemember must establish good moral character.⁷⁷ The period of good moral character under the wartime statute is one year.⁷⁸

Referring back to your notes from the meeting with PFC Mojica-Corrales, you notice that he is eligible for naturalization under the wartime statute, too. Assuming that his current term of active duty service is honorable, he is eligible to file an application for naturalization immediately without having to wait a year. Moreover, under the wartime statute, he is exempt from the residence and physical presence requirements applicable to most other applicants for naturalization. Because he has never been in trouble with the law, it appears there would be no issues with his good moral character determination. His age is not an issue because age is not a factor under the wartime statute. Finally, although not required to apply under this statute, he is an LPR. Having determined that PFC Mojica-Corrales is eligible for naturalization under both the peacetime and wartime statutes, you turn to the forms and application requirements necessary to apply under both statutes.

and, August 2, 1990, to April 11, 1991. *Citizenship for Military Members*, *supra* note 16.

⁶² Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002); *Citizenship for Military Members*, *supra* note 16.

⁶³ Exec. Order No. 13269, 67 Fed. Reg. 45287.

⁶⁴ *Id.* Interestingly, while this executive order remains in effect, a LPR servicemember may be eligible for naturalization under both INA sections 328 and 329. STOCK, *supra* note 4, at 38. However, servicemembers who are not LPRs or U.S. nationals may only naturalize under INA section 329. *Id.*

⁶⁵ *Citizenship for Military Members*, *supra* note 16.

⁶⁶ INA § 329, 8 U.S.C. § 1440 (2012).

⁶⁷ *Military Service Naturalization Fact Sheet*, *supra* note 38; *Policy Manual, Volume 12 – Citizenship & Naturalization, Part I – Military Members and Their Families, Chapter 3 – Military Service During Hostilities (INA 329)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter3.html> (last visited May 19, 2016) [hereinafter *Policy Manual*, Vol. 12, Pt. I, Ch. 3].

⁶⁸ STOCK, *supra* note 4, at 40.

⁶⁹ INA § 329, 8 U.S.C. § 1440; *Citizenship for Military Members*, *supra* note 16. “Active duty” is defined as “full-time duty in the active military service of the United States.” 10 U.S.C. § 101(d) (2016). This includes “full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.” *Id.* However, the term does not include full-time National Guard duty. *Id.*

⁷⁰ STOCK, *supra* note 4, at 47.

⁷¹ INA § 329, 8 U.S.C. § 1440; 8 C.F.R. § 329.2 (2015).

⁷² *Policy Manual*, Vol. 12, Pt. I, Ch. 3, *supra* note 67.

⁷³ *Id.*

⁷⁴ INA § 329, 8 U.S.C. § 1440; 8 C.F.R. § 329.2; *Citizenship for Military Members*, *supra* note 16; STOCK, *supra* note 4, at 44. It is worth noting that under INA section 329 and 8 U.S.C. § 1440(a), “Where person honorably served in time of war or declared hostilities during a period designated by Presidential Executive Order, LPR status is *not* required and applicant may, therefore, be undocumented and obtain citizenship.” KURZBAN, *supra* note 34, at 1795.

⁷⁵ INA § 329, 8 U.S.C. § 1440; *Citizenship for Military Members*, *supra* note 16. Specifically, the servicemember must have been in the “United States, the Canal Zone, American Samoa, or Swain Island, or on board a public vessel owned or operated by the United States for noncommercial service.” INA § 329, 8 U.S.C. § 1440.

⁷⁶ Compare INA § 329(b)(1), 8 U.S.C. § 1440(b)(1), and 8 C.F.R. § 329.2(e) (an applicant may be naturalized regardless of age), with INA § 328, 8 U.S.C. § 1439 (2012), and 8 C.F.R. § 328.2(e), and 8 C.F.R. § 316.2(a)(1) (an applicant must be at least 18 years of age); *Citizenship for Military Members*, *supra* note 16.

⁷⁷ *Citizenship for Military Members*, *supra* note 16.

⁷⁸ STOCK, *supra* note 4, at 40. Although 8 C.F.R. § 329.2(d) sets out a one-year good moral character requirement, the “one-year good moral character requirement under INA § 329 is not statutory, but rests on a regulation and an agency interpretation that has been upheld by the courts.” *Id.* at 40 n.18; KURZBAN, *supra* note 34, at 1803.

IV. Forms, Fingerprints, and Fees

There are two USCIS forms required to complete an application packet for naturalization under sections 328 and 329 of the INA.⁷⁹ First, the servicemember will need to obtain USCIS Form N-400, Application for Naturalization.⁸⁰ This form, along with instructions on how to fill it out, is available on the USCIS webpage.⁸¹ On the form, servicemembers will need to indicate that they are applying based on their qualifying military service.⁸² For servicemembers applying for expedited naturalization under section 328, the earliest they are eligible to file is after they have obtained status as an LPR and after completing one year of honorable military service.⁸³ For those applying pursuant to section 329, the earliest they are eligible to file is after completing one day of honorable service on active duty, or in the Selected Reserve or Ready Reserve.⁸⁴

The second form required when applying for naturalization under sections 328 or 329 is USCIS Form N-426, Request for Certification of Military or Naval Service.⁸⁵ This form is critical because it establishes the periods of honorable service of your client.⁸⁶ The characterization of

service is determined by the servicemember's branch of service.⁸⁷ An honorable or general, under honorable conditions, characterization of service, or discharge type, qualifies as honorable service for immigration purposes.⁸⁸ For those servicemembers on active duty at the time of their naturalization application, the form must be certified by their commanding officer, or other individual authorized to certify the form (usually the S-1).⁸⁹ It is critical to note that recruiters are not authorized to certify Form N-426.⁹⁰ As with the N-400, the N-426 and instructions on how to fill it out are available for download on the USCIS webpage.⁹¹ Ensure your client uses the most current edition of each form; information regarding the proper edition of Forms N-400 and N-426 is available on that form's page within the USCIS webpage.⁹²

In addition to the forms required by the USCIS, servicemembers must also submit a copy of their fingerprints with their naturalization application.⁹³ Servicemembers have a number of options available to have their fingerprints taken depending on where they are located.⁹⁴ One option is for the servicemember to travel to a domestic USCIS application support center (ASC) for fingerprinting.⁹⁵ For those planning

⁷⁹ *Citizenship for Military Members*, *supra* note 16. The USCIS forms are provided free of charge through the USCIS web site. *Forms: Forms*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/forms> (last visited on May 19, 2016). Forms may also be ordered by mail, but require the applicant to fill out a web-based form on the USCIS web site. *Id.* Forms are also available by calling 1-800-870-3676. *Id.* All aspects of the naturalization process are available to military members overseas, too. 8 U.S.C. § 1443a (2012); *Military Service Naturalization Fact Sheet*, *supra* note 38. However, it is only available to those currently serving in the U.S. Military; veterans must naturalize within the United States even if they are eligible for naturalization pursuant to INA sections 328 or 329. STOCK, *supra* note 4, at 40 n.15. More information on overseas processing is available at *Citizenship for Military Members*, *supra* note 16. Although the processing requirements may have changed since 2005, for a general overview of the naturalization process for servicemembers in a deployed environment, see Major Marc Defreyn & First Lieutenant Darrell Baughn, *Immigration and Naturalization Issues in the Deployed Environment*, ARMY LAW., Oct. 2005, at 47.

⁸⁰ *Citizenship for Military Members*, *supra* note 16.

⁸¹ *Forms, N-400, Application for Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/n-400> (last visited May 19, 2016) [hereinafter *N-400, Application for Naturalization*].

⁸² *USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part I – Military Members and Their Families, Chapter 5 – Application and Filing for Service Members (INA 328 and 329)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter5.html> (last visited May 19, 2016) [hereinafter *Policy Manual, Vol. 12, Pt. I, Ch. 5*].

⁸³ STOCK, *supra* note 4, at 51.

⁸⁴ *Id.*

⁸⁵ *Citizenship for Military Members*, *supra* note 16.

⁸⁶ *Id.*; STOCK, *supra* note 4, at 51.

⁸⁷ STOCK, *supra* note 4, at 51.

⁸⁸ *Policy Manual, Vol. 12, Pt. I, Ch. 2*, *supra* note 42; *Policy Manual, Vol. 12, Pt. I, Ch. 3*, *supra* note 67.

⁸⁹ *Forms, N-426, Request for Certification of Military or Naval Service*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/n-426> (last visited May 19, 2016) [hereinafter *N-426, Request for Certification of Military or Naval Service*]; see STOCK, *supra* note 4, at 51 n.75. If the servicemember previously served in the military, then the Form N-426 need not be certified if it is accompanied by a DD 214 (Certificate of Release or Discharge from Active Duty) or NGB 22 (National Guard Report of Separation and Record of Service) that covers all applicable periods of service and lists the type of separation and character of service. *N-426, Request for Certification of Military or Naval Service*, *supra*; See STOCK, *supra* note 4, at 51 n.75.

⁹⁰ *N-426, Request for Certification of Military or Naval Service*, *supra* note 89.

⁹¹ *Id.*

⁹² See, e.g., *N-400, Application for Naturalization*, *supra* note 81. These form can be downloaded in Portable Document Format (.pdf) from the USCIS web page. See *id.*; *N-426, Request for Certification of Military or Naval Service*, *supra* note 89. In addition to the current "edition date" being listed on the USCIS forms' web page, each paper form, as well as the form's instructions, will also list its current edition date on the bottom of the page. *N-426, Request for Certification of Military or Naval Service*, *supra* note 89. At the time of this writing, the current edition date for the N-400 is March 26, 2016. *N-400, Application for Naturalization*, *supra* note 81. However, according to the USCIS web page, starting on August 9, 2016, the USCIS will only accept the March 26, 2016 edition. *Id.* Until that time, customers may file using the September 13, 2013 edition. *Id.* Similarly, at the time of this writing, the current edition date for the N-426 is August 4, 2015. *N-426, Request for Certification of Military or Naval Service*, *supra* note 89.

⁹³ *Citizenship for Military Members*, *supra* note 16.

⁹⁴ STOCK, *supra* note 4, at 61.

⁹⁵ *Id.* A servicemember may visit any domestic USCIS Application Support Center (ASC) to have this done, even if they have not filed their application for naturalization yet. *Id.* To be fingerprinted and avoid the fee,

on naturalizing during basic training, traveling to an ASC and having their fingerprints taken before reporting to basic training is also an option.⁹⁶ While servicemembers may be tempted to utilize their enlistment fingerprints to fulfill this requirement, the process of transferring them between the military (Department of Defense) and the U.S. Department of Homeland Security, which the USCIS falls under,⁹⁷ is often slow.⁹⁸ Being fingerprinted at an ASC is often more timely and efficient for purposes of the servicemember's application.⁹⁹ Another option available to servicemembers is to have their fingerprints taken by USCIS personnel at certain military installations in the United States via mobile fingerprinting equipment.¹⁰⁰ For servicemembers stationed overseas, they "may have their fingerprints taken manually at U.S. military installations or U.S. embassies and consulates using the FD-258 fingerprint card."¹⁰¹

By law, servicemembers are exempt from the application fee associated with filing Form N-400, Application for Naturalization, pursuant to sections 328 or 329.¹⁰² Similarly, the biometric fee associated with filing for naturalization under sections 328 or 329 is also waived for servicemembers.¹⁰³ For servicemembers, this amounts to a total cost savings of \$680 dollars.¹⁰⁴ There is no fee for filing Form N-426.¹⁰⁵

Based on your research, PFC Mojica-Corrales needs to fill out the N-400 and N-426 in order to apply for expedited naturalization under section 328 or 329. Additionally,

the servicemember will need to show their military identification or other proof of service. *Id.*

⁹⁶ *Id.* This is generally the more efficient avenue of approach for those seeking to naturalize during basic training. *Id.* For noncitizen enlistees planning on naturalizing upon graduation from basic training under the USCIS "Naturalization at Basic Training Initiative," the USCIS conducts the fingerprinting on that basic training installation. *Military Service Naturalization Fact Sheet*, *supra* note 38.

⁹⁷ U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov> (last visited May 19, 2016).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ STOCK, *supra* note 4, at 61. Stock lists a number of other options available to servicemembers, although one of the options may be less efficient than going to the ASC for a biometrics capture. *Id.* at 47.

¹⁰² INA § 328(b)(4), 8 U.S.C. § 1439(b)(4) (2012); INA § 329(b)(4), 8 U.S.C. § 1440(b)(4) (2012); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

¹⁰³ *Policy Manual*, Vol. 12, Pt. I, Ch. 5, *supra* note 82.

¹⁰⁴ *N-400, Application for Naturalization*, *supra* note 81. The fee associated with the N-400 is \$595, and the fee for the biometrics is \$85. *Id.*

¹⁰⁵ *N-426, Request for Certification of Military or Naval Service*, *supra* note 89.

¹⁰⁶ U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 97.

regarding fingerprints, you determined there are multiple options available to PFC Mojica-Corrales, some of which are more expedient than others. Finally, you nailed down the question of fees associated with applying for expedited naturalization under section 328 or 329. Prudently, you now turn your attention to researching additional resources available to legal assistance attorneys and servicemembers.

V. Resources Available to Legal Assistance Attorneys and Their Clients

There are multiple resources, both general and attorney-specific, available to legal assistance attorneys and their clients that provide information on expedited naturalization for servicemembers. One such resource is the USCIS website.¹⁰⁶ Within the USCIS website are webpages with information, both general and specific, pertaining to expedited naturalization under sections 328 and 329.¹⁰⁷ The USCIS provides information on the naturalization test, study materials for the civics and English portions of the naturalization examination, and a citizenship resource center.¹⁰⁸ This includes links to downloadable flash cards.¹⁰⁹ Another USCIS web-based resource is the availability of an email address specifically designed to assist servicemembers.¹¹⁰ The USCIS also maintains a toll-free military customer service hotline that servicemembers may utilize.¹¹¹

¹⁰⁷ See, e.g., *Naturalization Information for Military Personnel*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/files/form/m-599.pdf> (last visited May 19, 2016) (providing general naturalization information to military personnel); *Citizenship for Military Members*, *supra* note 16 (providing military-specific naturalization information); *Military Service Naturalization Fact Sheet*, *supra* note 38 (same); *USCIS Policy Manual: Volume 12 – Citizenship & Naturalization, Part I – Military Members and Their Families*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI.html> (last visited May 19, 2016) (providing detailed information on almost all aspects of military naturalization).

¹⁰⁸ *U.S. Citizenship: The Naturalization Test*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/us-citizenship/naturalization-test> (last visited May 19, 2016).

¹⁰⁹ *Id.*

¹¹⁰ *Military Service Naturalization Fact Sheet*, *supra* note 38. The email address available to servicemembers is: militaryinfo.nsc@dhs.gov. *Id.*

¹¹¹ *Military: Military Help Line*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/military/military-help-line> (last visited May 19, 2016). The toll-free military help line is 1-877-CIS-4MIL (1-877-247-4645). *Id.* Excluding federal holidays, the call center's hours of operation are Monday through Friday from 0800 until 1630 (CST). *Id.* Servicemembers stationed in the United States or overseas can access the toll-free number through their base telephone operator or by using the Defense Switched Network (DSN). *Id.* As noted by immigration attorney, Margaret D. Stock, a word of caution is in order regarding the advice received from these hotlines—due to the complex nature of U.S. immigration laws, unless the source of the information is an expert, the advice may not be accurate. Margaret D. Stock, *Hidden Immigration Benefits for Military Personnel*, GPSOLO (Sept./Oct. 2013), http://www.americanbar.org/publications/gp_solo/2013/september_october/hidden_immigration_benefits_military_personnel.html. Similarly,

In addition to the USCIS resources, there are pro bono legal services that work with legal assistance attorneys for the benefit of their servicemember-clients.¹¹² One immigration resource is the American Immigration Lawyers Association's (AILA) "Military Assistance Program" (MAP).¹¹³ The AILA's MAP is a collaborative effort between the attorneys of the AILA and the U.S. military services Legal Assistance Offices (LAO) of the Judge Advocate General's (JAG) Corps.¹¹⁴ The program provides resources and knowledgeable pro bono legal counsel on immigration issues when the needs of the client exceed the expertise of the legal assistance attorney.¹¹⁵ Another informational resource for servicemembers is the webpage maintained by The Adjutant General Directorate (TAGD) of the U.S. Army.¹¹⁶ Available on TAGD's webpage is the useful nuts and bolts guide entitled, "The Soldier's Guide to Citizenship Application."¹¹⁷

Having completed your research, you review your case notes from the meeting with PFC Mojica-Corrales one more time. You determine that you can now address each of his questions when he comes back to your office for the follow-up meeting. He is eligible for expedited naturalization under sections 328 and 329. Based on the information he provided, it does not appear that there will be any legal issues with his case. The advantages of expedited naturalization are that he can obtain his citizenship sooner than if he applied under a civilian statutes, and the filing fees for servicemembers are waived. The big disadvantage of naturalizing under sections 328 or 329 is that PFC Mojica-Corrales' citizenship can be revoked if he fails to honorably serve for the requisite five years. Finally, the forms and procedures associated with his application appear to be straight forward.

VI. Conclusion

Expedited naturalization under sections 328 and 329 of the INA is a complex area of immigration law that requires specialized knowledge to effectively assist servicemember-applicants.¹¹⁸ Understanding the commonalities of sections

328 and 329, their specific requirements and exemptions, the key legal issues associated with each, and the forms and documents necessary to apply for expedited naturalization is critical for a judge advocate when advising and assisting a client.

Immigration law is an area in which you are able to advise clients.¹¹⁹ This article provides you with a baseline knowledge of the legal issues and requirements associated with applications for expedited naturalization under sections 328 and 329 of the INA. With this information you should be able to competently advise and assist clients. Should a client's case prove to be beyond the scope of your legal assistance office, you are now armed with information to assist them in finding a specialist in immigration law.

information listed on websites and forms programs should only be relied on when their accuracy is confirmed by an expert. *Id.*

¹¹² See, e.g., Major Tricia LeRoux Birdsell, *A Few Minutes of Your Time Can Save Your Client's Dime: Obtaining Pro Bono Assistance for Legal Assistance Clients*, ARMY LAW., June 2015, at 14 (discussing multiple pro bono resources available to legal assistance attorneys, to include immigration-specific information about the American Immigration Lawyers Association (AILA) Military Assistance Program (MAP)).

¹¹³ *AILA Military Assistance Program*, AM. IMMIGR. LAW. ASS'N, <http://www.aila.org/practice/pro-bono/find-your-opportunity/military-assistance-program> (last visited May 19, 2016). For more information on AILA's Military Assistance Program, contact the AILA's Practice and Professionalism Center (PPC) department at ppc@aila.org. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Guide to Citizenship for Soldiers*, UNITED STATES ARMY HUMAN RESOURCES COMMAND, THE ADJUTANT GENERAL DIRECTORATE, <https://www.hrc.army.mil/tagd/guide%20to%20citizenship%20for%20soldiers> (last visited May 19, 2016).

¹¹⁷ *The Soldier's Guide to Citizenship Application*, UNITED STATES ARMY HUMAN RESOURCES COMMAND, <https://www.hrc.army.mil/site/ASSETS/PDF/SoldierGuideCit.pdf> (last visited May 19, 2016).

¹¹⁸ STOCK, *supra* note 4, at 42.

¹¹⁹ AR 27-3, *supra* note 3, para. 3-6f.

1. Have you complied with the Selective Service laws? If not, why not?
2. Have you ever served in the U.S. Armed Forces (Army, Navy, Air Force, Marines, Coast Guard, Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, Coast Guard Reserve, Army National Guard, or Air National Guard)?
3. If you have served in the U.S. Armed Forces, what were your dates of active duty and Selected Reserve service? What was the date when you were released from any and all military obligations, including inactive service in, for example, the Individual Ready Reserve?
4. Did you naturalize through military service (If yes, counsel should explore whether post-naturalization misconduct may lead to a denaturalization proceeding. See Chapter Seven of MARGARET D. STOCK, *IMMIGRATION LAW & THE MILITARY* (2d ed. 2015) for further discussion of this issue.)
5. Have you ever been the subject of a military investigation of any sort, or ever been “titled” in a military criminal investigation?
6. Have you ever received a Form DD-214 or a Form NGB-22 (National Guard only)? (If the answer is yes, the attorney should obtain a copy and review the dates of service, the characterization of service, and the reasons for discharge.)
7. If you were discharged, what was the characterization of your service when you were discharged?
8. If you were discharged, why were you discharged?
9. Have you ever claimed conscientious objector status?
10. Have you ever sought a discharge on the grounds that you were an alien (foreigner)? Even if you did not seek an alienage discharge on your own initiative, did the military discharge you on account of alienage?
11. Have you ever been the subject of any adverse administrative action while serving in the military (example: letter of reprimand, reduction in pay, reduction in rank, etc.)?
12. While you were in the military, did anyone ever “read you your rights” or investigate you for any reason?
13. Have you ever received an “Article 15” or “captain’s mast” or “mast” or “office hours” [these are all terms for non-judicial punishment under the Uniform Code of Military Justice (UCMJ)]? If so, what were the circumstances?
14. Have you ever appeared before a military administrative discharge board? If so, what was the reason for the board, and what was the result?
15. While serving in the U.S. Armed Forces, did you ever undergo any court-martial proceedings? If so, what was the level of the court-martial (summary, special, general)? What was the result of the court-martial? What was the result of any appeal?
16. Have you ever sought to have a military discharge upgraded?
17. Have you ever spoken to a judge advocate general (JAG) attorney or military legal assistance attorney about any matter?
18. Have you ever been apprehended by the military police for any reason?
19. Have you ever been confined in a military detention facility?
20. Have you ever been denied a security clearance, or had a security clearance revoked?

¹²⁰ STOCK, *supra* note 4, at 71.

Book Review

Dies Irae: Day of Wrath¹

Reviewed by Lieutenant Commander Aaron J. Casavant*

*Be Prepared.*²

I. Introduction

Over the past year, the Islamic State in Iraq and Syria (ISIS) has carved great swaths of territory out of those countries, shocking the world with its military sophistication, brutality, and callous disregard for human life.³ In that same time period, hundreds of thousands of undocumented migrants, including many unaccompanied minors, have crossed the southwest border into the United States.⁴ Politicians from both parties debate these problems, but no solutions have been forthcoming.

William R. Forstchen's most recent book, a novella, *Dies Irae: Day of Wrath*, weaves these familiar issues into a compelling narrative about our country's vulnerability to a determined enemy. Told from the perspectives of a middle school teacher and several ISIS operatives over the course of a single harrowing day, the *New York Times* best-selling author describes a nightmarish terror attack against the United States executed by a well-organized, suicidal force.

No stranger to cautionary tales,⁵ the author explicitly intended *Day of Wrath* to be a wake-up call to the country and our leaders.⁶ The effectiveness of that, as in any such novel, depends on how realistic the plot is crafted. Although the scenarios in *Day of Wrath* are entirely possible, at times the author glosses over certain important details that would affect the likelihood of their occurrence. Regardless, the book contains important warnings that we disregard at our peril.

II. A Gripping, Horrific Story

The story's protagonist, Bob Petersen, is a seemingly average teacher at the fictional Joshua Chamberlain Middle School in Portland, Maine. Bob's day starts out normally enough as he hurriedly grabs a cup of coffee from his wife,

Kathy, on the way out the door. His oldest daughter, Wendy, a student at the school, rushes him through the couple's goodbye kiss in her haste to meet friends, and the author closes the chapter with the ominous portent that this is the last time they would see each other alive.⁷ This introduction to Bob and his family is effective because it provides the reader with a personal reason to care about what happens to the country during the terror attack.

Unknown to his colleagues at school, Bob brings with him a Ruger .380 handgun, in defiance of state and federal law.⁸ Though illegal, Bob's decision is based on what he believes is a moral obligation to protect his students above all other considerations.⁹ The concealed carry plot element is clearly a reflection of the author's belief that ordinary Americans are responsible for their own safety,¹⁰ a fact highlighted by the impotence of first responders and law enforcement later in the novella.

The author next introduces the villains: members of one of the thirty ISIS death squads preparing to attack the middle school. Forstchen describes in detail the terrorists' voyage on a cargo ship from the Middle East to Mexico to bypass the heightened scrutiny of airplane passengers put in place after September 11, 2001 (9/11). The terrorists then use drug cartel mules to smuggle them across the U.S. border. The ISIS teams also maintain strict electronic silence to avoid detection. Once inside the United States, the teams link up with sleeper agents who have obtained assault weapons, ammunition, and combat gear through private sales in order to escape background checks. Only on the day of the attack do they finally activate their cell phones to receive the single tweet from their leader: "#diesirae631: Four hours, Sword One. Four Hours and a Half Hours, Sword Two. Allahu Akbar."¹¹

While the description of their journey is certainly

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¹ WILLIAM R. FORSTCHEN, *DIES IRAE: DAY OF WRATH* (2014).

² "Be Prepared" is the Boy Scout Motto. See BOY SCOUTS OF AMERICA HANDBOOK 25 (13th ed. 2015).

³ *ISIS Militants Target Random Cars and Run Them Off the Road*, THE DAILY MAIL, <http://www.dailymail.co.uk/video/news/video-1099735/ISIS-militants-target-random-cars-run-road.html> (last visited June 10, 2016).

⁴ *CBP Border Security Report*, CUSTOMS & BORDER PROTECTION 3 (2014), https://www.cbp.gov/sites/default/files/documents/FINAL%20Draft%20CBP%20FY14%20Report_20141218.pdf.

⁵ The author's bestselling novel, *One Second After*, chronicles the effects of a catastrophic electromagnetic pulse (EMP) attack against the United States.

See WILLIAM FORSTCHEN, *ONE SECOND AFTER* (2009).

⁶ See Forstchen, *supra* note 1, at iv ("I hope that [the book] will make enough of us think things through to ensure not only the safety of our children, but of our Republic as well.").

⁷ *Id.* at 9.

⁸ See, e.g., 18 U.S.C. § 922(q)(2)(A) (2011).

⁹ Forstchen, *supra* note 1, at 15 ("If ever the children in his charge were threatened, he believed that the first responsibility of a teacher, transcending all other responsibilities, was to protect.").

¹⁰ *Id.* at 14.

¹¹ *Id.* at 25.

thought-provoking, the author also implies that the highest levels of the U.S. Government were aware of at least the possibility of the Day of Wrath attack,¹² but, for political reasons, decide to exploit the situation to increase the government's powers.¹³ Given the author's stated intention to effectively communicate a warning,¹⁴ this statement was not helpful because it suggests that the U.S. Government was complicit in the slaughter. Perhaps the author figured that being provocative was a small price to pay for being heard, but the suggestion that the White House was in on the plot could be offensive to some readers.

After leaving the hotel, the five-man death squad piles into two vehicles, one bound for Joshua Chamberlain and one headed for the highway. The three Sword One terrorists then assault the school, slaying the security officer and killing the administrative staff. They take position at the front and back entrances, scattering fake improvised explosive devices (IEDs) in the other exits to keep the students and teachers penned inside and first responders out. Guided by architectural plans obtained on the Internet,¹⁵ the third gunman moves down the hallways, killing students and teachers in their classrooms.

In the staff lounge, Bob notes with horror that this is not the lone wolf-style attack like Columbine and Newtown that they had been trained for, but rather an assault similar to the Beslan school massacre of 2004.¹⁶ He manages to find his daughter and shoves her through a classroom window, allowing her to run to safety. When the gunman enters his classroom, Bob shoots him, forcing him to withdraw. He then helps the remaining students escape.

With attacks on four other schools underway, the media erroneously reports that schools across America are under siege, and frantic parents flood the highways trying to retrieve their children. As they crowd onto the interstate, the Sword Two teams move along the stretches of road, massacring drivers, passengers, and bystanders.¹⁷ Some of the terrorists exit their vehicles and proceed to walk through the resulting traffic jams, executing hundreds and videotaping the slaughter for uploading to ISIS servers and further broadcasting to the world.

¹² *Id.* at 112.

¹³ *Id.* at iii. "There is a subtext within these pages that transcends ISIS; I'll leave that for you to find. Recall the words of a politician who declared that any crisis presents political opportunity as well." *Id.*

¹⁴ *Id.* at iv.

¹⁵ This is easy to do on the Internet. See, e.g., *Floor Plans for The New Elementary School*, DOUGLAS PUBLIC SCHOOL DISTRICT, <http://www.douglas.k12.ma.us/Admin.cfm?subpage=1502632> (last visited June 10, 2015).

¹⁶ The attack occurred in Beslan in North Ossetia on Sept. 1, 2004. Kelley McEvers, *Beslan Timeline: How the School Siege Unfolded*, NPR (Aug. 31, 2006), <http://www.npr.org/templates/story/story.php?storyId=5740009>. In the attack, thirty-two Chechen militants stormed the town's School No. 1 and took 1,200 children, parents, grandparents, and teachers hostage. *Id.* Most of these individuals were herded into the school's gymnasium, which was rigged with explosives, where they were held for three days without

In the chaos, Bob's wife, Kathy, leaves their youngest daughter with a neighbor and tries to get to the school, only to be shunted into a nearby church to wait. Meanwhile, Bob re-engages one of the gunman outside the classroom and is shot several times. Though partially paralyzed, he kills the gunman and retrieves his assault rifle. What follows is one of the most horrifying moments of the book: a terrorist grabs a twelve-year old girl and brings her up to the roof of the school where, in full view of the news cameras, he rapes her and slits her throat. This act provokes the police and parents into storming the school, where many of them, including Kathy, are killed by the terrorists as they charge across the school yard. The rapist then sets out to kill Bob, only to be killed when Bob shoots him with the gunman's recovered rifle.

The remaining ISIS teams are stopped through the combined actions of ordinary citizens, police officers, and the National Guard. Bob is rescued and reunited with his daughter but sees Kathy's body as he is loaded into the ambulance. The book ends with the U.S. President declaring martial law and the ISIS leader proclaiming, "Allah be praised, we have won!"¹⁸

III. A Closer Look at Key Plot Elements

The story keeps the reader engaged, but the author makes some assumptions that require further analysis. The most important of these are the terrorists' journey to the United States; the selection of so-called *soft targets* to attack; and the use of mass media to induce panic.

A. The Terrorists' Journey to the United States

Because the terrorists' departure point is described only as a "middle Eastern port,"¹⁹ it is impossible to say what maritime security counter-measures were in place that country when the crew was embarking. Mexico, however, is a state party to the Safety of Life at Sea (SOLAS) Convention and the International Ship and Port Facility Security (ISPS)

food and water. *Id.* On the third day, two explosions rocked the gymnasium, leading Russian Special Forces to try to take back the school. *Id.* Over the three-day siege, over 330 hostages and soldiers were killed, along with 31 militants. *Id.*

¹⁷ Forstchen, *supra* note 1, at 65.

Simply get on the highway, swing alongside cars, preferably those with a number of passengers, and shoot the driver. Tractor trailers were sweet targets: drive up, send several shots through the door, then speed on, hoping the truck jackknives. Even better if it is carrying petrol or some hazardous material.

Id.

¹⁸ *Id.* at 168.

¹⁹ *Id.* at 17.

Code.²⁰ The ISPS Code, a 2004 amendment to SOLAS enacted in response to 9/11, provides a framework for governments to cooperate to detect and deter acts of maritime terrorism.²¹ Notably, the ISPS Code requires that vessels control the embarkation of “persons and their effects,”²² and one of its conditions of port entry is the provision of a crew list to the port state.²³ As a party to both SOLAS and the ISPS Code, Mexico would require a vessel calling at one of its ports, especially one from the Middle East, to provide the crew list for security screening. Unless the terrorists were hiding in a cargo container, a fact not mentioned by the author, their names would have been screened against the Mexican equivalent of a known or suspected terrorist (KST) list, increasing the likelihood of detection. Also, the author states that the chances of the container ship being checked were “less than five percent,”²⁴ but it is unclear to what this statistic refers. Is it the chance of law enforcement checking each cargo container? Is it the probability of screening the crew list against the KST list? In order to analyze the likelihood of the maritime portion of the voyage, additional details are required.

The second stage of the terrorists’ journey through Mexico is also controversial. Within the last year, several conservative websites have reported active collaboration between drug cartels and ISIS.²⁵ Predictably, these stories were criticized by left-leaning journalists.²⁶ While U.S. officials are more circumspect,²⁷ their assessments are based on the assumption that their agencies will be able to detect coordination between ISIS and the cartels, a factor the author tries to minimize by the terrorists’ radio silence. However, there are other forms of intelligence that could assist U.S. law enforcement agencies determine whether terrorists are infiltrating the country.²⁸ As such, while it is at least possible for ISIS to enter through the southern border, the likelihood of its doing so is very much open to debate.

²⁰ IMO Documentation, INT’L MARITIME ORG., <https://imo.amsa.gov.au/public/parties/solas74.html> (last visited June 10, 2016).

²¹ ISPS Code: International Ship and Port Facility Security Code and SOLAS Amendments iii, INTERNATIONAL MARITIME ORGANIZATION http://www.imo.org/blast/mainframe.asp?topic_id=897 (last visited June 10, 2016).

²² *Id.* at 11.

²³ *Id.* at 53.

²⁴ Forstchen, *supra* note 1, at 17-18.

²⁵ Edwin Mora, *Report: Border Patrol Agent Says Classified Intel Proves Terrorists Infiltrate U.S.*, BREITBART (Sept. 30, 2014), <http://www.breitbart.com/national-security/2014/09/30/report-border-patrol-agent-says-classified-intel-proves-terrorists-infiltrate-u-s/>.

²⁶ See Greg Sargent, *Tom Cotton: Terrorists Collaborating with Mexican Drug Cartels to Infiltrate Arkansas*, WASH. POST (Oct. 7, 2014), <https://www.washingtonpost.com/blogs/plum-line/wp/2014/10/07/tom-cotton-terrorists-collaborating-with-mexican-drug-cartels-to-infiltrate-arkansas/>.

²⁷ See Zeke Miller & Alex Rogers, *GOP Ad Claims ISIS Plot to Attack U.S. Via ‘Arizona’s Backyard’*, TIME (Oct. 7, 2014),

B. Selecting Soft Targets

The author’s next assumption is that the terrorists will attack so-called soft targets rather than a large-scale attack like 9/11. These types of targets, which include schools, malls, and restaurants, are an increasing cause for concern among national security experts.²⁹ The disturbing fact is that people are vulnerable when they go to the coffee shop, mall, or grocery store; most are simply not on the alert for a terror attack. As ISIS calls for sympathizers to kill civilians in the West,³⁰ terrorists unfortunately have an excellent chance of success against a soft target.

Moreover, this type of attack inevitably produces mass confusion as bystanders evacuate the area, emergency medical personnel attend to casualties, and law enforcement officers attempt to stop the threat.³¹ This is perhaps the most disturbing prediction in *Day of Wrath*. As the parents and law enforcement attempt to reach the school children, attention focused on arriving at school, they are even more likely to be caught unawares on the highways.

Additional strain is placed on law enforcement and emergency medical services as more people become victims, further reducing their effectiveness. A coordinated attack on multiple targets in a single geographic with hundreds of victims could easily overwhelm the emergency response systems of most cities and towns in the United States.

III. Exploiting the Media to Cause Panic

In the fourteen years since 9/11, personal computing and social media have expanded exponentially. Smartphones, tablets, and cameras are ubiquitous, giving us the ability to upload videos to the Internet within seconds of an event. Some of these go viral, garnering millions of page views and

<http://time.com/3478254/isis-nrcc-border-plot-gop-2014/>.

²⁸ Other types of intelligence, including human intelligence (HUMINT), were not addressed by the author and could potentially provide law enforcement agencies with additional means of tracking ISIS collaboration with drug cartels.

²⁹ Steven Edwards, *Terrorists’ ‘Soft Target’ Strategy Puts Anyone—and Everyone—in Danger*, FOX NEWS (Feb. 2, 2015), <http://www.foxnews.com/world/2015/02/02/terrorists-soft-target-strategy-puts-anyone-and-everyone-in-danger/>.

³⁰ Josh Yevs & Holly Yan, *Western Leaders Reject ISIS Leader’s Threats Against Their Civilians*, CNN (Sept. 22, 2014), <http://www.cnn.com/2014/09/22/world/meast/isis-threatens-west/>.

³¹ Forstchen, *supra* note 1, at 64.

The brilliance of the caliph’s plan was understanding the pattern of the infidels’ reaction, how they would respond collectively to a threat to their precious children . . . Though only a few out of the nearly one hundred thousand schools were now threatened, millions of parents would rush out of their homes and offices and flood onto the interstates.

Id.

Facebook likes. Against this technological backdrop, the author perceptively observes that information is a new battlefield in the fight against terror.³² This was on disturbing display in the professionally-produced ISIS propaganda videos recording the chaos it caused in the Middle East. Unfortunately, these images are profoundly compelling to tens of thousands of disaffected young men in countries around the world, young men who are even now streaming into ISIS-controlled territory to take part in the fight against the West. The footage of ISIS bringing the most powerful country on the planet to its knees in a two-pronged terror attack would be a powerful lure for those who want to kill Americans and deal the West a crippling blow in the information war.

IV. Conclusion

As a work of fiction, *Day of Wrath* contains no footnotes or citations, which hampers any objective evaluation of the likelihood of this type of attack occurring. However, by fleshing out a lurid hypothetical scenario with highly sympathetic characters, the author effectively seizes the reader's attention while also communicating his concerns about the country's vulnerabilities.

Despite this shortcoming, *Day of Wrath* is terrifying, and I now understand why the author said that it was a book he did not want to write.³³ What makes the novella effective is that none of the scenarios he creates in the plot are impossible. Some are, perhaps, less likely than others, but they are still plausible. These scenarios are certainly no more unlikely than hijackers commandeering four passenger aircraft and flying them into major U.S. landmarks. The good news is that the vulnerabilities the author identifies have not yet been exploited in the manner he describes.

Day of Wrath is the *cri d'coeur* of an intelligent, perceptive author intent on warning us that despite the billions of dollars spent on homeland security and the Global War on Terror, we remain vulnerable to a low-tech, suicidal attack. It is also a reminder to those of us who have dedicated our professional lives to the national security of the United States to think about how we can be even more prepared, both personally and professionally. For now, let us be thankful that *Day of Wrath* is a work of fiction.

³² *Id.* at 154.

³³ *Id.* at i.

Book Review

Lincoln's Code: The Laws of War in American History¹

Reviewed by Lieutenant Andrea M. Logan*

*The life of the law has not been logic; it has been experience The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*²

I. Introduction

John Fabian Witt's *Lincoln's Code* explores the law of war in American history. It is not just a historian's account of President Lincoln as the title suggests, although it is one of the more original books on the subject in recent years.³ Nor does Witt focus, as the majority of contemporary legal scholars do, on the highly debated American experience with the law of armed conflict after 9/11.⁴ Witt instead draws upon four centuries of historical experience to discover the evolving uses of the law of war⁵ in American history, from the founding fathers, through slavery and Emancipation, to World War I.⁶ Few historians write as well as Witt does in *Lincoln's Code*, nor do they unearth from America's battlegrounds as many useful insights. Structured around the drafting of the Lieber Code, which was approved by President Lincoln in 1863 during the Civil War to guide the conduct of the Union Army,⁷ *Lincoln's Code* is as much about the history of the law of war in America as it is about the moral struggles of America's military leaders. Witt portrays the stories of these leaders who fought America's wars, created its policies, argued its legal battles and who ultimately became important contributors to the laws of war as they exist in international law today.

In this context, no readership will benefit more from *Lincoln's Code* than the military professional and lawyer. This book is essential reading for military lawyers who are, or should be, trying to understand and employ the legal and military framework for the law of armed conflict in America's

present and future wars. Witt's discoveries about the usages of international law in America remind military and other government lawyers that they must obtain a deeper understanding of the historical origins of the law of war. Not only does American society expect it, the profession of arms increasingly requires it.

This review examines three insights from *Lincoln's Code* that are important and enduring realities for the military lawyer's practice. It bears repeating that history *is* the greatest teacher. In order to understand the law of armed conflict so that it can be *usefully applied* in future conflicts, a military lawyer should recognize how the rules were utilized in the past, as well as how they have evolved dynamically over time. Second, the law of war is as much about the process of ethical decision-making for military leaders and promoting a climate, ethos, and framework for principled action by Soldiers,⁸ as it is reciting rules to a military commander. Lastly, a criticism of the law of armed conflict embodied in treaties and conventions of the twenty-first century is that some areas of the law, such as the protections afforded to non-state actors, are too vague and non-specific.⁹ *Lincoln's Code* reminds us that for centuries military scholars and lawyers have attempted to apply humanitarian, principled-based approaches in evolving conflicts when aspects of their engagements did not fit neatly into established rules under

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¹ JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012) [hereinafter *LINCOLN'S CODE*].

² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

³ *Lincoln's Code* was a 2013 Bancroft Prize Winner, Am. Bar Ass'n Silver Gavel Award Winner, Pulitzer Prize Finalist, and a *New York Times* Notable Book of the Year for 2012. See also ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* (2010) (focusing on the evolution of Lincoln's ideas and policies about slavery through his career). *The Fiery Trial* won the 2011 Pulitzer Prize, the Bancroft Prize, and the Lincoln Prize; JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER-IN-CHIEF* (2008) (concentrating on a portrayal of Lincoln as a wartime president.) *Tried by War* won the 2009 Lincoln Prize.

⁴ See, e.g., Naz K. Modirazadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 225 (2014).

⁵ The law of war is also called "the law of armed conflict or international humanitarian law." For purposes of this review, the terms are used interchangeably. Witt uses the plural, the laws of war, in *Lincoln's Code*.

⁶ WITT, *supra* note 1.

⁷ WAR DEP'T, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (Wash., Gov't Printing Office 1898).

⁸ Geoffrey S. Corn, Guest Lecture on the Law of War, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia (Sept. 11, 2015).

⁹ This criticism is seen in some reviews of the Department of Defense (DoD) *Law of War Manual* released in June 2015. U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* (2015) [hereinafter *WAR MANUAL*]; see Chris Jenks, *A Missed Opportunity: DoD's Law of War Manual & Applying Law as a Matter of Policy*, JUST SECURITY (Aug. 7, 2015), <https://www.justsecurity.org/25287/dod-law-war-manual-applying-law-matter-policy-missed-opportunity/>; see also Eric Jensen, *The Law of War Manual, Information or Authoritative Guidance?*, JUST SECURITY (Jul. 1, 2015), <https://www.justsecurity.org/24332/law-war-manual-information-authoritative-guidance/> & cd=1 & hl=en & ct=clnk & gl=us.

customary international law.¹⁰ Accordingly, an essential part of a military lawyer's craft is to be comfortable in the grey, and, in the fog of war, to be capable of rendering sound, principled advice to a military commander.

II. The Life of the Law (of War) is Experience

Oliver Wendell Holmes wrote "the life of the law has not been logic . . . it has been experience."¹¹ Holmes was writing about the common law but the same is true about the law of armed conflict. John Fabian Witt illustrates in *Lincoln's Code* that the experience of the nation's history with war is the greatest teacher. In his prologue, Witt challenges the reader to go beyond the two competing, yet shallow, partisan positions heard most often today about the laws of war in America: That the actions of the United States after September 11, 2001, disrupted a long American tradition of respect for, and participation in, the international laws of war and that international law has taken on a more prominent role in American policymaking in the past few decades.¹²

Witt dispels as myths these two generalities about the law of war. Witt illustrates the enduring presence of the law of war in American thought and dialogue throughout its history. The author shows how America's leaders have struggled with all too familiar issues, such as the legal status and treatment of detainees, combatant immunity for Soldiers, military tribunals, and war crimes. He portrays George Washington's treatment of British soldiers as prisoners of war as an early example of the nation's adherence to international law and custom.¹³ Witt also describes—as departures from humanitarian law principles—Andrew Jackson's treatment of enemy combatants and civilian populations in the Indian wars;¹⁴ General Sherman's disregard for civilian property in Confederate States during the Civil War;¹⁵ and tactics used by American troops during the counterinsurgency in the Philippines.¹⁶

Witt argues that there are two competing ideals American leaders have struggled to reconcile throughout history: *humanitarianism and justice*.¹⁷ He explains that in pursuit of justice, Americans have at times put humanitarian ideals aside and departed from accepted principles of international law.¹⁸ Witt advances this thesis in his prologue and epilogue and

describes Lincoln's use of his war powers to justify Emancipation as his central example.¹⁹ Witt explains how Lincoln's use of the principle of military necessity to bring an end to slavery was an important departure from customary international law protecting civilian property rights in wartime.²⁰ He also describes how the law of armed conflict was applied to emancipated Soldiers who fought in the Civil War so that they were afforded the same protections as other Union Soldiers and subject to the same laws of war.²¹

Witt convincingly speaks the language of the military professional in *Lincoln's Code*. He not only describes the historical rationales for national command decisions, but also adeptly examines the realities of each conflict from an operational perspective. The author's account of Francis Lieber, the Prussian-American soldier and jurist who assisted the U.S. War Department in drafting General Order No. 100, demonstrates the importance of the drafters of the laws to have the military experience and perspective to understand the nature of war.

By describing the drafting of the Lieber Code, Witt reveals that the law of war has been employed by America's leaders for many purposes: national strategy interests, a military code of honor in combat, and, importantly, for humanitarian ideals.²² Some of America's positions on the law of war and its written policies, such as the Lieber Code, would later inform the Hague and Geneva traditions and become customary international law.²³ Through his original research and engaging anecdotes, Witt shows the reader that the American experience with the law of war is complex and cannot be reduced to generalities. Witt reminds us that history and experience provide the necessary context and allow the reader to understand the law of war comprehensively and intuitively.

III. The Law of War as a Forum for Moral Engagement

Lincoln's Code is more than a historical account of America's development of the law of armed conflict. Witt illustrates the moral struggles of America's military leaders during war. In a refreshingly honest and non-partisan way, Witt explores the nation's experience with war "in all its ugly complexities."²⁴ The author reveals that the law of war has

¹⁰ WITT, *supra* note 1.

¹¹ HOLMES, *supra* note 3; see WITT, *supra* note 1, at 369.

¹² WITT, *supra* note 1, at 5.

¹³ *Id.* at 15–27.

¹⁴ *Id.* at 93, 95–99.

¹⁵ *Id.* at 250–84.

¹⁶ *Id.* 353–62.

¹⁷ *Id.* at 5–8.

¹⁸ *Id.*

¹⁹ *Id.* at 1–10, 220–49, 366–74.

²⁰ *Id.* at 367–70.

²¹ *Id.* at 240–49.

²² *Id.* at 367–74; see *Lincoln's Code: The Laws of War*, LIBRARY OF CONGRESS (Apr. 9, 2013), http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=5904&loclr=ytb [hereinafter *Lincoln's Code Webcast*].

²³ WITT, *supra* note 1, at 51–59, 87, 367–74 (describing the U.S. prize courts' position on neutral shipping rights and Lincoln's use of a blockade as informing the law of neutrality).

²⁴ *Id.* at 6.

been applied throughout American history for many purposes, “sometimes for good and sometimes for ill,” and that the law of war was then, as it is today, an important forum for moral engagement.²⁵ *Lincoln’s Code* also helps remind military professionals and lawyers that the law of war serves as an important framework for principled action for their Soldiers during hostilities. This is the author’s point when he argues that “the laws of war have served as tools of practical moral judgement in moments of extreme pressure.”²⁶

There are several current terms in the U.S. law of war policy that reflect Witt’s point—one is good faith and another is honor.²⁷ A reviewer of the *Department of Defense (DoD) Law of War Manual* commented last July that the emphasis on principles, such as the term “honor” in U.S. law of war policy, may recalibrate the military’s understanding of principle-based rather than rules-based law-of-war concepts.²⁸ Notably, the *DoD Law of War Manual* states that when no specific rule applies, the principles of the law of war are to be used as a general guide for conduct during war.²⁹ This is a key take-away. Military lawyers may not feel comfortable advising their commanders without a rule of application or on a vague understanding of honor,³⁰ but that is exactly what the law of war policy requires. The military commander must understand the importance of promoting a principled climate and ethos for the warfighter.³¹ Teaching principles instead of rules in law of war training may be a step towards realizing Witt’s understanding of moral judgement in times of extreme pressure. The moral principles that underlie the law of war provide an important and enduring foundation for the military professional. *Lincoln’s Code* reminds military lawyers that they must obtain a deeper understanding of the law’s historical origins and be prepared to employ the law of armed conflict in our evolving present and future wars.

IV. Judge Advocates: The Timeless Interpreter of the Laws of War

This review of *Lincoln’s Code* comes after the release of the *DoD Law of War Manual*, which has received praise and criticism in the last year. One comment is that the *Manual* it is too broad and voluminous to usefully and specifically

inform DoD personnel responsible for executing military operations.³² In the context of this criticism, *Lincoln’s Code* reminds us of the gift Professor Francis Lieber gave to the world when he drafted the first rulebook for Soldiers in the field. The influence of Lieber’s Code can be seen in virtually every service manual in the twentieth century.³³ However, perhaps due to this field-manual tradition, or the operational value of the pocket-card, or perhaps simple convenience, an attitude has formed among military professionals and lawyers that the law of armed conflict can be reduced to a couple pages and separated from comprehensive command advice.³⁴

Unfortunately, the full body of the law, and principles governing armed conflict, cannot be captured on an index card. An important take-away from *Lincoln’s Code* is that military scholars and lawyers have been present over centuries to apply humanitarian, principled-based approaches in evolving conflicts when aspects of their engagements did not fit neatly into established rules under customary international law. Military lawyers play a vital role advising military commanders. Their command advice has reflected law of war principles and considered practical realities in conflict in order to accomplish national strategic ends. If state leaders wished to apply humanitarian limitations, they turned to military professionals, scholars, and lawyers for interpretations for a specific conflict, just as they do now.

Considering the fact that guidance available to Lieber was not translated into English as he furiously drafted his manual over Christmas in 1862,³⁵ the privilege of having 1,204 pages of law of war policy³⁶ to draw from to provide command advice does not seem that bad at all. What *Lincoln’s Code* illustrates, and the release of the *DoD Law of War Manual* reinforces, is the truth that the interpretation of the law of armed conflict—specialized knowledge and not laminated formulas—will continue to be the domain of the military lawyer.

V. Conclusion

John Fabian Witt’s *Lincoln’s Code* offers military professionals and judge advocates the benefit of

²⁵ *Id.* at 6, 368.

²⁶ *Id.* at 5–10.

²⁷ WAR MANUAL, *supra* note 9, § 2.6 at 93 (stating that honor, or *chivalry*, demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces). In U.S. law of war policy, *good faith* is used frequently. *See, e.g., id.* § 5.2.1, § 12.2 (asserting absolute *good faith* with the enemy must be observed as a rule of conduct in hostile and non-hostile relations); *see also id.* § 18.3.1 (affirming [e]ach member of the armed forces has a duty to comply with the law of war in *good faith*).

²⁸ Sean Watts, *The DoD Law of War Manual’s Return to Principles*, JUST SECURITY (June 30, 2015), <https://www.justsecurity.org/24270/dod-law-war-manuals-return-principles/>.

²⁹ WAR MANUAL § 2.1, *supra* note 9, at 77.

³⁰ Watts, *supra* note 1.

³¹ Corn, *supra* note 9; *see* WAR MANUAL, *supra* note 9, § 18.4 (stating [m]ilitary commanders also have a duty to implement and enforce the law of war and this duty extends to taking appropriate measures to control their forces and to prevent violations of the law of war).

³² Jensen, *supra* note 9; *see also* Jenks, *supra* note 9.

³³ The preface to the *DoD Law of War Manual* contains a descriptive and inclusive summary. *See* WAR MANUAL, *supra* note 9, at preface.

³⁴ This attitude is expressed in a commentary by David Glazier, *The DoD Law of War Manual: What is it Good For?*, JUST SECURITY (July 28, 2015), <https://www.justsecurity.org/24977/dod-law-war-manual-good-for/>.

³⁵ WITT, *supra* note 1, at 230–49.

³⁶ The *DoD Law of War Manual* is 1204 pages in length.

understanding America's historical experience with war. The author invites discussion about current conflicts but stops short of examining the armed conflicts of the twentieth and twenty-first centuries. Some could say this omission makes the author's work less relevant to the contemporary reader because he avoids taking a position on the law of war as interpreted in U.S. policy in the last century. But this criticism would misunderstand the author. Witt is a historian focused on revealing American history in a novel way to the reader. He does not advocate a particular doctrine or approach for the management of hostilities. But, it is clear that the author respects the leader, like Lincoln, who holds strong moral convictions but is also aware of his moral fallibility, in the Enlightenment model of warfare.³⁷ By examining history honestly, Witt hopes the law of war will survive as a forum for moral engagement in the twenty-first century.

³⁷ *Lincoln's Code Webcast*, *supra* note 22.

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