Lawyers as Leaders: A Civilian Perspective for Military Attorneys

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8 June 2010

Incredible demands weigh on America's military personnel who serve in zones of conflict such as Afghanistan, Iraq, Kosovo, Somalia, to name a few. Current practice often requires they put their lives in jeopardy before engaging the enemy. How may military lawyers advise compliance with laws protecting foreign, non-combatants and still best serve our own Service Personnel? (The terms "Soldiers" and "Troops", as used below, refer to all uniformed personnel deployed in combat). Breaching this towering wall has befuddled many. We attempt to sort out some of the compelling issues that the military lawyer must deal with under current conflicts, from our perspective as civilian attorneys.

Reporter Evan Wright was an embedded reporter with the 1st Reconnaissance Battalion of the United States Marine Corps during the 2003 invasion of Iraq. In *Generation Kill,* he witnessed First Recon's Bravo Company planning for taking a pivotal bridge over the Euphrates. The men struggle with a change in the Rules of Engagement (ROE). The officer tries to explain them:

> "[A]nyone with a weapon is declared hostile. If it's a woman walking away from you with a weapon on her back, shoot her. If there is an armed Iraqi out there, shoot him. I don't care if you hit them with a forty-millimeter grenade in the chest."[1]

A team leader, in turn, translates the ROE for his own team:

> "You see a m*****r through a window with an AK, cap his ass…[But] don't get buck fever. You cap an

[1] Evan Wright, *Generation Kill*, 2004, p. 84.

> old lady sweeping a porch, 'cause you think her broom is a weapon, it's on all of us."[2]

Wright continues:

> The First Recon Marines also had to deal with the difficult issue of putting the aggressive ROE within the context of their own moral qualms.
>
> The strangest, most unsettling spectacle Marines see… is that of armed men who dart across alleys, moving from building to building, clutching women in front of them for cover. The first time it happens, Marines shout, "Man with a weapon!"
>
> Despite the newly aggressive ROEs, Marines down the line shout, "I'm not shooting! There's a woman!"[3]

These are events from seven years ago, filtered through a reporter's eyes. But they cut to the heart of the issues we raise: should lawyers be leaders and, if so, how may they lead?

Many people do not see lawyers as leaders. They see them as well-educated technocrats, functionaries who are either "Yes Men" who find legal loopholes to justify and accomplish what the commander wants to do, or risk-averse "Nay-Sayers". Worse, they may act as dentists sitting in their offices, waiting for disaster to strike. [Telephone Interview with COL Gross, 22 May 2010].

We submit that there are three types of lawyers:

1) those who do anything the commander (or client) wishes to do;
2) those who say no to everything because they are risk averse; and
3) those who believe that a commander's every action must be legal, moral, and ethical.

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[2] Wright, 84-85.
[3] Wright, 93.

Lawyers predictably prefer to see themselves as category 3) types. Some of our actions, however, bespeak otherwise. Some military commanders look upon their JAG (Judge Advocate General) officers and other military lawyers as nothing more than "Yes Men," well-educated enablers, who are most useful to put the proper spin on a commander's actions. As advocates, we have a duty to represent the best interests of our clients, considered for this limited purpose, the commander. Nevertheless, if we take this role too far, we have neglected our coincident and equally important role as leaders and Officers of the Court. At other times, we make the reverse mistake and act as risk-adverse Nay-Sayers and fail in our role as advocates. To properly fulfill each duty, we must find that fine line between sometimes competing roles and serve as the conscience of the command.[4]

Professionals generally are independent thinkers and "motivated [more] intrinsically by their expert knowledge and dedicated to its application than they are to the extrinsic motivators offered by the institution in which they serve."[5] In a military setting, this motivation should draw the officer away from the mission of his Unit and into his role as an objective expert in the law. This tension requires that he serve as an overseer, applying his expertise to see a planned mission through a perspective different from any other Soldier. Because his role is critical to the planning, the military lawyer must make himself a part of the decision-making process.

Officers of the Court have a duty to society at large. Our oaths of office, to paraphrase that of the Florida Bar, for example, affirm that we will not counsel or condone actions which appear unjust to us, but will employ only means which are consistent with truth and honor. Many States' oaths conclude with "So help me God!"

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[4] Interviews of LTC David G Bolgiano, 7 and 15 June 2010.

[5] Leonard Wong and Don M. Snider, "Strategic Leadership of the Army Profession," *The Future of the Army Profession*, 2005, p. 603.

Our required oaths hold us up as leaders, whose responsibility is greater than being an enabler or contrarian to a commander. When we take the oath of admission, we accept a duty to society to uphold just and truthful principles. We are called to lead as the sole certified experts in our field. As the definition of "leadership" goes in the Army Manual: our job is "influencing people—by providing purpose, direction, and motivation". I submit we should take up our mantle and, in a paradigm shift, join the process as leaders.

The military lawyer's work is difficult and often conflicted. An important, if not the most important, responsibility lies with the Soldier on the battlefield.[6] The Soldier must also uphold the law, even when it dictates he must place his life at risk before engaging an enemy combatant. An effective military lawyer can help the Soldier make informed, life-and-death decisions. In this way, the military lawyer is a force-multiplier as both an educator and interpreter of the law.

In researching this article, we began looking into military lawyers and leadership with a predisposition to see them generally as technocrats who had not grasped their roles as leaders. We expected to find an Armed Services-wide inability to translate the requirements of the law into the current challenges of the Soldiers' environment. Through our research we gained a much more nuanced view of the stresses and complexities bearing on the military lawyer – and a great admiration for what many of them are doing. Nevertheless, our goal is to raise issues that offer insights from our civilian perspective.

Let us define what leadership as a military lawyer really means. The military Staff Judge Advocate is by definition a staff officer without operational lines of

[6] See Les Brownlee and Peter J. Schoomaker, "Serving a Nation at War: A Campaign Quality With Joint and Expeditionary Capabilities," *Parameters 34* (Summer 2004) 5-23, and Wong and Snider, 606.

authority. However, he exercises leadership in the performance of his or her duties in his advising the commander on the implications of applicable law to the operations and, particularly for this article, during active armed conflict. A definition of leadership is in the Army Leadership Manual:

> Leadership is influencing people—by providing purpose, direction, and motivation—while operating to accomplish the mission and improving the organization.

In this context, the JAG Officer's responsibility is to exercise leadership to influence his commander, other commanders down the line, and the Troops to conduct their combat missions within the constraints of applicable law.

If you conceptualize that lawyers must be leaders, the next question is: How?

Our thesis is threefold. Military lawyers lead:

1. By synthesizing the law and complexities of modern war for training leaders and Soldiers.
2. By employing concise, memorable, even inspiring language.
3. By being voices of wisdom in a polarized society.[7]

We divide our presentation below according to these three categories.

1. Lawyers lead by synthesizing the complexities of modern war for leaders and Soldiers

An accomplished attorney knows the law, absorbs as many of the facts that inform a situation where those laws apply, weighs options and makes recommendations that are in the interests of his client. The military lawyer knows that he has the job of helping win the war, keeping the "Warrior's Edge", and keeping the moral

[7] An example is a seminar offered at the ABA Annual Meeting 2010, entitled "Marshalling Lawyers to Prevent Mass Atrocities." The mere title suggests the profession's growing sense of leadership.

high ground in the face of an unscrupulous enemy.[8] This job is extraordinarily difficult: his goal is the effectiveness of the Soldiers he serves but also, ultimately, he serves the will of the American people and the civilians that the Soldier is defending.

War has always been complex. Even war between uniformed Troops raises hosts of difficult moral issues. Today's conflicts bring new and unforeseen complexities. Fighting an enemy on the city streets of Basra, in the Hindu Kush, or even the streets of New York, who is almost indistinguishable from non-combatants, surrounded by a local population that is often hostile to our Soldiers, whose goal is not to defeat us militarily, but to "bleed" our will to fight, raises issues of terrifying complexity.[9] Michael Walzer long ago pointed out one of the crucial questions of guerilla war: what are the rights of the people who support the guerillas?[10] Fighting in multi-national coalitions, aided by contractors from many nations, is difficult enough. But in a place like Iraq or Afghanistan, helping local leaders, military, and police secure the peace in a process for which "nation-building" may be the right term –this is three-dimensional speed chess played at gunpoint.

It is no wonder that lawyers often paper their trails with rule upon rule, directive upon directive and obscure language that works better than Ambien at putting fighting men to sleep.

The challenges of today's battlefield are no excuse to a lack of clarity. For the sake of our

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[8] See Warrior's Edge Memorandum, by LTG Raymond T. Odierno, at p. 19, Center for Army Lessons Learned, Escalation of Force Conference Packet, Carr Center for Human Rights Workshop, 26-27 March 2007.

[9] Our servicemen and women serve not just under the challenges of instantaneous news broadcasts but in a new world where they are frequently filmed by civilians and terrorists while on patrol and in battle. They serve in a world where our own laws are exploited to undermine their work, a form of warfare known as "lawfare".

[10] See Chap. 11, Guerilla War in Michael Walzer, *Just and Unjust Wars*, 1977. He argues that once the guerrillas in Vietnam had consolidated their political base in the villages, they had effectively ended the war -- and our right to fight it (p. 195). GEN McChrystal's emphasis on the conflict in Afghanistan as a contest for the will of the people seems to us the right one.

Troops, the American people, and peace-loving Afghans and Iraqis, we must fight this temptation. We see several areas where military lawyers and legislators are given to overly legalistic formulation.

Conflicts

First, conflicts abound in the laws, regulations, and directives. This is not always the fault of lawyers: it is the nature of our own law- and rule-making and those of coalitions of nations, working together in different theaters with different challenges and political objectives that make for a many-layered complexity that lawyers and commanders must navigate.

For example, what rules of engagement apply? In Afghanistan, some military personnel and contractors fall under the authority of the International Security Assistance Force (ISAF), a NATO-led coalition deployed under UN mandate. Some fall under Operation Enduring Freedom (OEF), a US-led coalition. The ROE differ for each force. What rules apply when individuals under both forces are together and come under fire or threat? Furthermore, the ROE themselves may have to be adjusted depending upon the tribal or cultural area within a country in which a force is operating. Poor or haphazard implementation of ROEs have strategic consequences, even by a few. [Bolgiano, 17. COL Turner, interview 15 June 2010]. Many JAG Officers fail to instruct their commanders and Troops on the laws of self-defense, in contravention of the Standard Rules of Engagement, which both provide the "Inherent Right of Self-Defense" at paragraph 3.a, and require that Troops are trained in and understand "when and how to use force in self-defense".[11]

Great tensions exist in the laws of war and lawyers must wrestle with them. Sometimes the results of that wrestling are not helpful to Troops. Take the principle of self-defense, the great Blackstonian and constitutional principle that comes into conflict with

[11] LTC David G. Bolgiano, *Combat Self-Defense*, 26.

the constraints imposed by the ROE. Whatever lawyers are writing or saying, we are still getting results on the field like the following:

> "They tell us in our convoy briefings that we have the right to self-defense, defense for civilians and other coalition forces," the Soldier said. "However, I do know that it is hard for Soldiers to distinguish when it is the proper time to use self-defense and when it is not. Soldiers are scared and they have a right to be. If a higher-up decides what you did was not in self-defense, you could get in major trouble and we feel that it's really not worth it."[12]

Yet, their ROE cannot be "duck and cover" to accomplish the mission. Issues even as minor as whether contractor vehicles are subject to the same "rules of the road" as military vehicles in a convoy can wreak havoc on military effectiveness and safety. What should a commander do when a civilian vehicle pulls into the middle of his convoy, knowing that it may be loaded with explosives?

Vague and Forgettable Language

Second, vagueness and mind-numbing forgettable language abounds in the laws and rules.

Donovan Campbell was a Marine platoon commander deployed to Ramadi, Iraq in 2004. In his book Joker One, he describes a JAG Officer (in "pristine cammies") who briefs Marines about to enter a combat zone. He gives complicated definitions of hostile acts and hostile intent. He fails to engage and even confuses his audience. Another Soldier, with in-theater experience, was called in by the Company commander to re-explain the rules in terms the Marines could grasp. Campbell boiled the latter presentation down to the Civilian Rule and the Pine Box Rule (the former: if it

[12] Bill Gertz, *Inside the Ring: Rules of Engagement,* WASH. TIMES, Feb. 16, 2007.

comes down to you or a civilian taking a bullet, you take it; the latter: if there's any question about whether it's you or the bad guy going home in a pine box, you make damn certain it's the bad guy).[13]

Were Campbell's rules themselves too simplistic to be helpful? Probably. But they were certainly memorable – and making it memorable for the heat of combat was the lawyer's job.

Many Soldiers and Marines say they barely remember their pre-deployment legal briefings. These briefings should be memorable, grave, and inspiring! They should resonate with the justice of our strategy and tactics and the admonition of their enforcement even in the face of a ruthless enemy. Our Troops are going out on the front lines with the firepower of the world's greatest military and represent the American people in the conflict that will define this generation. Their duty is tremendously complex: they must kill terrorists and at the same time "win hearts and minds". Lawyers can help them understand that difficult balance and the need for their judgment, the principles of justice that inform (and yes, constrain) their fight, and the justice that will arise from a well-fought fight.

A second example of vagueness is in the rule of proportionality and harm to noncombatants in response to attack. This is addressed in the Army Counterinsurgency Field Manual. In 2006, the Manual, redrafted under the guidance of GEN David Petraeus, offers some elaboration in Warfighting Verses Policing:

7-35. Discrimination requires combatants to differentiate between enemy combatants who represent a threat and noncombatants who do not. In conventional operations, this restriction means that combatants cannot intend to harm noncombatants, though proportionality permits them to act knowing some noncombatants may be harmed. In policing situations, combatants cannot act in any way in which they know

[13] Donovan Campbell, *Joker One*, Random House, 2009, p. 69-70.

bystanders may be harmed. FM 6-22. U.S. Army Leadership Manual, 12 October 2006, p. 1-2.

Although the Manual attempts to define when warfighting and when policing are appropriate, the line between the two is hardly clear. In theater, the continuum between the two is uninterrupted grey.

Another example of vagueness is how Soldiers on the battlefield distinguish combatants from civilians. This is, in our view, one of the great difficulties our Soldiers now face. The ROE often include Positive ID of targets as "a reasonable certainty that the individual is a military objective." It is generally sufficient that the individual "displays hostile intent." Is the hostile intent standard amenable to clarification or is that the best we can do in today's conflicts? This is a life-and-death issue for everyone on the battlefield.

Have lawyers pushed far enough to define terms or is this simply a standard not amenable to further specificity? We grant that this huge issue may NOT be susceptible to "bright line" clarity. It is so central to today's conflicts and killing non-combatants is so harmful to our efforts that lawyers need to bring all their energy and intelligence to bear on making a broad standard like this <u>as clear and intuitive as possible for the Soldier in the heat of combat</u>. The Soldier should be able to take his learning of the law and act almost automatically upon it. His life depends upon it.

<u>Complexity</u>

Over-complexity is a formula for paralysis. Trust is an essential ingredient in the effective operation of law. Too much regulation can take away from a Soldier's instincts and intelligence. Studies show that if people feel self-conscious about the decisions they make, they exercise poor judgment. It becomes a self-fulfilling prophecy! Complex rules force us into the careful exercise of logic, which is suitable for many situations. Battle is not one of them.

We all turn to instinct when under severe stress. In the first moments of a firefight, a Soldier will default to those instincts that are informed not only by who he is, but also by his training. If the rules that are part of his training are too complex, the natural result will be hesitation. This is not to call for hastiness, but hesitation can be fatal. To the extent it is possible, a military lawyer owes the men in that firefight *simplicity and clarity.*

An open issue is whether ROE and EOF cards give Troops helpful clarity or are largely useless and often dangerous. Do they ignore the fact that deadly force situations are complex and not conducive to "if-then" solutions? If so, should training be judgment-based rather than rule-based?[14]

Another issue is filing reports. From a Washington Times article in 2007:

> In one case, a Soldier fired two 5.56 rounds and as a result "had to sit in an office for two days straight and tell his story over and over and fill out a ton of paperwork for doing what he felt was right."
>
> The Soldier said after the experience that "he would never fire his weapon again because he felt the aftermath wasn't worth it, and that's just not right."[15]

Requiring Soldiers to file a report on all EOF incidents or on every round fired is in effect saying, in this situation, do not fire. Would that not be simpler? Is the reporting adding unnecessary complexity and taking precious time away from the mission, or is there an easier way to control needless

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[14] See LTC David G. Bolgiano, "Training America's Strategic Corporals", USAWC Strategy Research Project, at http://www.hsdl.org/?view&doc=117815&coll=public.

[15] Bill Gertz, *Inside the Ring: Rules of Engagement,* WASH. TIMES, Feb. 16, 2007.

violence and unprovoked shooting? At the very least, we need to be asking these questions.

Legal Review Before Action

A lawyer's understanding of the law can help establish the clarity needed to wage the battles we are in justly and with appropriate restraint. But we need to be zealous about time: are we slowing down missions unduly? How many enemies have escaped because Troops needed to consult a JAG before conducting a raid or firing a weapon?

We also recognize the tension that some JAGs feel. They are put in the position where sometimes the right thing to do is indeed to say "NO" to the commander – and yet the commander greatly influences his evaluation (OER)! Further, the JAG is a staff Officer who works more closely with his superior Officers than line Officers, which might mitigate an intractable decision in the eyes of his commander. To lead, therefore, may mean sometimes running the risk of angering commanders who just want to get the immediate job done. The edict: "Get me to yes!" may compromise a career, the commander's and/or the JAG's, no matter which way the JAG Officer turns. That, however, is the kind of stress that leaders are called to bear.

Frequency of changes in the ROE

We acknowledge that ROE need to change for different theaters and in response to events, particularly bad events. A clear example is shootings at traffic control points. Escalation of force rules must adapt – and have adapted -- to reduce harm to innocent drivers. But one thing lawyers are good at is understanding the value of predictability in the law--if you will, a *stare decisis* for Troops. Lawyers can lead by resisting changes that are merely knee-jerk responses to media outcry and ask, are changes to the ROE too frequent? (One captain described to us having to explain *four* sets of ROE's to his men during a 7-month deployment in Iraq). Can attorneys lead by resisting hasty, over-reactive change?

Training and time in the field

We recognize the difficulties in adapting the laws of war to today's battlefields for the American Soldier.[16] And our best efforts show through Troops' training.

One way for lawyers to lead is to spend more time in the field.[17] In fact, it is imperative for them to spend time in the field with Troops and experience their hardships and dangers if they are ever going to gain the credibility to be able to truly influence them or their commander with respect to understanding and compliance with the ROE. Spend more time talking to Troops, learning the obstacles and risks they face, and knowing the terrain within which they operate. Otherwise, you are like that dentist sitting in his office, waiting for the toothache to walk in. A leader gets out there and throws himself seamlessly into the decision-making process *from the beginning.* Many problems can thus be averted before they even arise.[18]

From our discussions with military leaders and lawyers, one of the most effective areas for lawyers to lead and for Soldiers to fight effectively AND lawfully is in training. FM 27-100, the OPLAW JA training manual, states that "ROE must be disseminated throughout the force and reinforced by training and rehearsal" (JCSI 2004).

From our viewpoint, great work has been done with training and yet large gaps remain.

On the one hand, the training Soldiers go through before deployment is an area where military lawyers have done tremendous work. The National Training Center (NTC) in the Mojave Desert in California has thirteen towns and villages spread across 1,100 square

[16] An excellent discussion of the difficulties of adapting ROE to the laws of armed conflict can be found in "A Brush With the New Reality: The Law of Armed Conflict and Rules of Engagement in the Theatre of the New War," Sherry Barrett-Mignon, *Critique*, Fall 2005.
[17] See COL Jeff O'Leary, *The Centurion Principles: Battlefield Lessons for Frontline Leaders*, 2004.
[18] Telephone interview, COL Richard Gross, senior legal advisor to GEN McChrystal, 23 May 2010.

miles. 1,600 role players populate them during two-week training events. Soldiers face high-stress events designed to exceed the difficulties of combat. In-theater experience is constantly worked into the training.

At the NTC, the rules of engagement and escalation of force are put to the test in convoys, checkpoints, urban, mountain and cave firefights, IED explosions, and intelligence, detainment and close air-support operations. Their training aims to take the rules and make them part of the muscle memory of combat. To some extent, this training can address the ever-changing ROE, Escalation Of Force (EOF), and other directives.

On the other hand, reports that legal briefings are not helpful crop up in source after source, including our own original interviews. One Lieutenant reports that his class received perhaps two hours of exposure to ROE over four years at West Point. He described a JAG officer briefing before deployment in each theater as "clear but theoretical", devoid of real-world combat examples. None of his Troops asked questions and they wanted "class to be over."[19]

We recognize the daunting task faced by military lawyers. No matter how much foresight you show as you draft mission-specific ROE, no matter how thorough the training, the enemy will often stay one step ahead.

And we must train to meet the demands of an ever-changing battlefield. This is particularly true as weaponry constantly advances.[20] Nevertheless, history teaches that superiority of arms is hardly an indicator of success on the battlefield (Agincourt, 1415; Chancellorsville, 1862). An over-reliance on military might is a particular danger now, when stability

[19] Interview with deployed Soldier, USA, 2010.

[20] At Fleet Week in New York in May 2010 the Joint Non-lethal Weapons Program showcased the Active Denial System (ADS). The ADS is a truck-mounted dish that projects an invisible 95 GHz beam up to 1000 meters. This beam penetrates clothing and the first 1/64th inch of skin. It creates an intolerable heat sensation – without causing injury. The Program aims to deploy it to turn back adversaries without resorting to lethal force. The ex-Marine we interviewed said one of the ADS goals is to test whether this is helpful in distinguishing combatants from non-combatants.

operations bring us into close proximity with adversaries. We are vulnerable to low-tech weaponry and "hit and run" tactics. These often provoke us into responses that sow hatred and distrust in the local civilian population – the opposite of "winning hearts and minds."

As lawyers help to shape training, they may take leadership by showing that the "we die or they do" mentality may often be a false dichotomy. Domestic SWAT teams regularly protect bystanders and come back without casualty.[21]

Finally, lawyers are helping to train LOCAL lawyers, police and Soldiers how to administer a country under the rule of law. They are all doing this by example. We are not aware of the extent that military lawyers are engaged in direct training of Iraqis, Afghans and other nationalities in regions of conflict. But while it is difficult, is this not as important as helping to rebuild roads, hospitals and water systems?[22]

2. Lawyers lead by using concise, memorable, even inspiring language

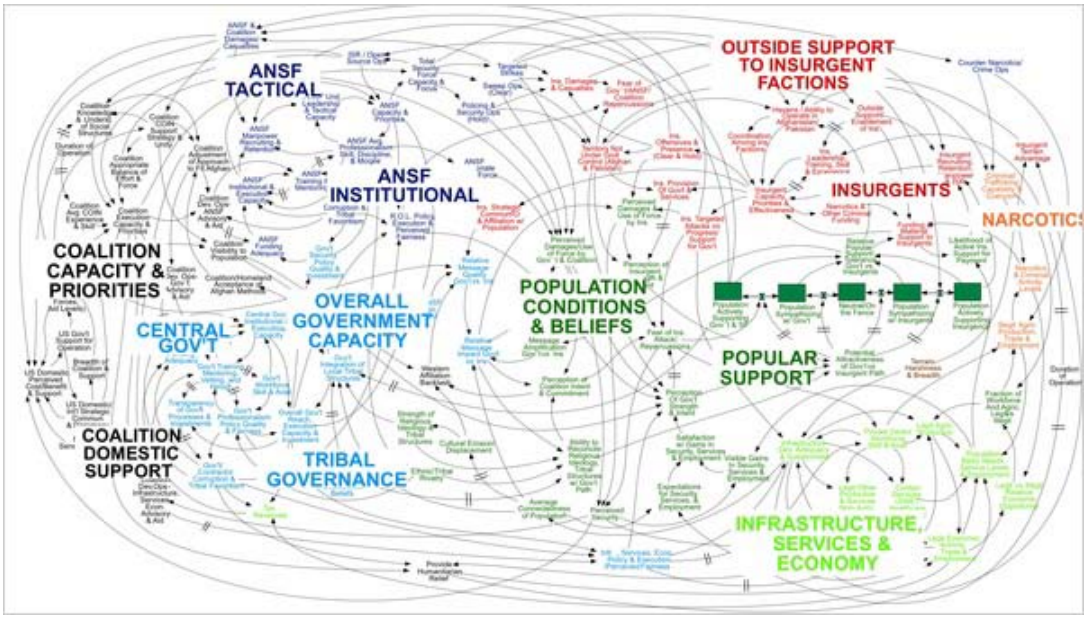
To get his job done, a carpenter in Colorado uses his hammer, a stud, and a twelve-penny nail. To get his job done, a Soldier in Kabul uses a night-vision goggle and his rifle. To get her job done, a lawyer in Kuwait uses words.

Fred Rodell, former Dean of Yale Law School once said: "There are two things wrong with most legal writing. One is its style. The other is its content." Unfortunately, as lawyers we are susceptible to the temptations of dense, eye-glazing legalese. Why? Because crafting words for our audience is difficult. To be concise, clear, and memorable takes time.

[21] Interview with LTC Bolgiano, 15 June 2010.

[22] Email interview with LTG Robert L. Caslen, US Army. Caslen believes that good military lawyers are not only interpreters of the law, but shoulder the huge and often unapplauded task of training indigenous lawyers and police.

Here is an example of a military advisor who gave in to the twin temptations of word inflation and clever complexity:



Source: “We Have Met the Enemy and He Is PowerPoint”, by Elisabeth Bumiller, New York Times, April 27, 2010

Be memorable

Troops need rules that are intuitive and instinctive. For this to happen, they need to be memorable.

One way that lawyers make the rules forgettable is by failing to use life examples in their briefings. We acknowledge that you cannot cover every eventuality and the danger of past examples is they may not inform a different scenario in the future. But in general, we do not remember rules like we remember stories. Whenever possible, why not have officers who have seen combat give real-world combat examples? Why not set aside time for team leaders to discuss with JAG officers, away from their men, the tougher scenarios? [23]

Evidence of a positive trend is GEN McChrystal's November 2009 memorandum on Counterinsurgency Training Guidance. [24] It is peppered with sidebars that illustrate good and bad incidents that illustrate the guidance (including a pen flare incident, how cutting down fruit trees increased IEDs, how school supplies stopped rocket attacks, and how holding fire during a village *shura* resulted in village elders punishing militants).

Be clear

Go back to Strunk & White. Use verbs like hammers and nouns like anvils. Cut the fat. Take Judge Learned Hand's lead: "The language of law must not be foreign to the ears of those who are to obey it."

An excellent example of clear writing is again GEN McChrystal's 2009 COIN memo, which summarizes for commanders and sergeants what the mission is all about:

[23] Interview with 1LT M. Noel, USA, 24 May 2010.
[24] See McChrystal COIN memo at http://usacac.army.mil/cac2/coin/repository/COMISAF_COIN_Training_Guidance.pdf.

> Protecting the Afghan people is the mission. The Afghan people will decide who wins this fight, and we…are in a struggle for their support. The effort to gain and maintain that support must inform every action we take. Essentially, we and the insurgents are presenting an argument for the future to the people of Afghanistan: they will decide which argument is the most attractive, most convincing, and the argument that has the greatest chance of success. [25]

He then refers commanders to tactical directives on driving, EOF and close air support and gives specific guidance on building relationships with local leaders. But first he (and his JAG advisors!) laid out in clear language what they are there for.

The ROE, or any other legal direction in war, have to fit the commanders' intent and vice versa. Without knowing all the details of a plan, Soldiers can operate and succeed if they know what the commander is trying to achieve. For example, the airborne forces dropped behind German lines just prior to D-day were totally unorganized because of bad drops. But the Soldiers knew what had to be done and they made it happen. If the ROE is mutually supportive with a commander's intent, and not just a list of "do's and don'ts", then a Soldier knowing this intent will have far fewer disconnects when it comes to complying with the ROE.[26]

An example of lack of clarity is the hostile intent standard. LTC David Bolgiano, USAF, now Assistant Director of National Security Legal Studies at the U.S. Army War College, believes that this is one area where lawyers must check their instinct at good, preventative lawyering, "taking a step to the rear and a step to the left." That makes sense when advising a commander on the Armed Export Control Act. For a Soldier confronted with an immanent threat of death or

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[25] McChrystal memo, page 5.

[26] Bruce Fister, LTG, USAF (Ret.), former Commander, US Special Operations Command, describes the commander's intent as "going after the center of gravity." In *On War*, Carl Von Clausewitz points out that every enemy has a center of gravity that if eliminated or controlled, will result in achieving the desired military and political ends.

bodily injury, "deadly force should probably not be your last resort. It should be your first resort."[27]

Bolgiano suggests a simple three-step test. If intent, ability and opportunity to inflict death or grievous bodily injury are shown, you have hostile intent. A prisoner at Guantánamo may have intent and ability, but no opportunity. A man brandishing a knife faces you and your sidearm--you have hostile intent. If a chain-link fence separates you, you may not.

Bolgiano goes further: he believes the Standing Rules of Engagement (SROE) were drafted with a carrier battle group commander in mind: someone who has great experience, judgment and above all time to react to an approaching threat.

The end-user of the SROE today is more likely a 19-year old Marine with little experience and milliseconds to react. Bolgiano believes the appropriate field to draw on more heavily for both rules and training is law enforcement.[28] He also suggests that putting attorneys through combat simulation training will help them draft rules that are simpler and more realistic.[29]

Inspire

Read Churchill. Read Lincoln. Read Chief Justice Marshall again. It may just be a memo on traffic control points you are writing. But your words can encourage and motivate both leaders and Troops in ways you hardly realize. David Wall, Dean of Northeastern School of Law put it this way: "We cannot overestimate

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[27] See LTC David Bolgiano's testimony at http://warchronicle.com/TheyAreNotKillers/LCplSharratt/Testimony/LtColDavidBolgiano.htm.

[28] *Ibid.* Bolgiano gives a compelling and extensive exploration of how both psychology and ballistics work against our Soldiers in a split-second, reactive environment. That is, under threat the rules must FREE them to use deadly force more than the current interpretations do. Bolgiano argues that some military lawyers incorrectly infuse the ROE with the Law of Armed Conflict's concept of proportionality. Yes, you do not drop a 2000-pound bomb on an insurgent in a crowded marketplace. Nevertheless, this does not mean that in a small-arms confrontation fire must be equally matched.

[29] David G. Bolgiano, *Combat Self-Defense*, p. 110.

the power of our words and the power of our wisdom on the spirit of people with whom we interact."[30]

A 2007 memo from LTG Raymond T. Odierno to the Multi-national Corps in Iraq is an excellent example of inspiring writing. One excerpt reads:

> Warriors know that the undisciplined use of force reduces our effectiveness and greatly undercuts the justness of our cause. Our respect for non-combatants is not incompatible with the offensive mindset…To that end, trust your training, battle drills, other operational procedures and judgment…Do not be reluctant to root out the enemy and engage him in accord with the ROE whenever and wherever found.
>
> Keep in mind, however, that EOF practices DO NOT replace the exercise of reasonable discretion and judgment. The split-second decision on when and how to eliminate a threat is a matter of sound judgment left to individual troopers, leaders, and commanders. In conclusion, Iraq is a complex battlefield where we are engaged in counter insurgency operations against a devious and despicable enemy. To win we must take full advantage of our Warrior's Edge, seize and maintain the offensive, and remain vigilant, honorable, and professional in every action.[31]

3. Lawyers can lead by being voices of wisdom in a polarized society

Finally, we submit that military lawyers can lead by speaking up in a society increasingly divided by shrill and simplistic shouting from both ends of the spectrum.

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[30] David Wall, *The Spiritual Revitalization of the Legal Profession*, p. 181.

[31] *Center for Army Lessons Learned (CALL) Escalation of Force (EOF) Conference Packet*, Carr Center for Human Rights and PKSOI Workshop, at the John F. Kennedy School of Government, Harvard University, 19-20 (26–27 Mar. 2007).

From the hawkish perspective, many claim, "lawyers are running the war" or "lawyers are tying our Soldiers' hands."[32] The current flap over giving medals for "courageous restraint" is a case in point.[33] This narrative claims that if the liberals were not such crybabies, we could free our Soldiers to fire at will and wipe the bad guys off the map.

Doves, on the other hand, often fit battlefield news into a narrative that says that all American military action and motives are suspect, that the rules are too loose, and the military is a mere killing machine that needs to be hobbled.

Though each contains its sliver of truth, both of these narratives are naïve. The complexities of the rules of engagement and the harrowing issues that lawyers must face are stunning. The more one learns, the more respect one gains for the task of resolving the tensions between taking the fight to the enemy and protecting civilians and securing the goodwill of the people. This, however, is a story poorly told. Military lawyers can lead by telling this fuller, more complete story in all forms of media.

The lengths to which the US military goes now to be more precise in fighting adversaries and protecting civilians and the depth of effort down to the lowest ranks to engage the local population in rebuilding the peace are not well-enough understood by civilians. This is so for three reasons: the shrillness we describe in the media, historical illiteracy and the military's failure to tell the story well. In some ways, it appears to us that the American Soldier is fighting more thoughtfully than in Vietnam – why not tell how? The bad news will always get the front page, but if we are improving, shout it from the rooftops!

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[32] See http://townhall.com/columnists/DianaWest/2007/08/17/death_by_rules_of_engagement.

[33] Ridicule of military consideration of awarding medals for restraint permeates the hawkish blogosphere at present (See e.g., http://www.breitbart.tv/courageous-restraint-military-considers-awarding-medal-for-not-killing-civilians/).

Perhaps those lengths are sometimes a bridge too far. If so, lawyer leaders will speak up. How much of the public understands that every time there is a shooting, an Army Soldier is investigated by the Army's Criminal Investigation Division (CID)? Or that every Soldier must account for every bullet issued to him and explain the circumstances of each round fired?

This leads us to the great issue around which the ROE debates turn: What is the duty we owe to protect civilians in armed conflicts outside the US? Do we apply the same standard to a policeman in a shootout in an American city where the people involved are our own neighbors? Should that matter? What if an entire village or neighborhood is hostile, giving aid and support to insurgents who are planting IEDs or shooting coalition forces? We do not pretend to answer these enormous issues here. We do assert that instead of waiting for "what are my options" emails, military lawyers can take the lead by actively and continually thinking through these questions, taking positions based on law and what they perceive to be just, and advising their commanders and instructing Troops in accordance with those positions.

Further, take the forceful distinctions that Michael Walzer draws[34] between combatants, terrorists, and criminals. They are persuasive, helpful, and have informed military doctrine: can lawyers help present them to the public in a way the layman can grasp?[35] Could lawyers lead by initiating more press conferences, writing more articles for the general press, getting their commanders to tell their stories to the public on YouTube and Facebook, bypassing the simplistic boxed-in narratives on the extreme ends of the spectrum that so dominate our discourse?

Or take a brutal case in point: our enemies use of women and children as shields. How do you show that

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[34] Walzer, Ch. 12. Note that much of Walzer's power lies in his use of on-point historical examples.

[35] See also COL David Wallace, Battling Terrorism under the Law of War, Military Review, Sep.-Oct. 2007. COL Wallace notes the ambiguity in public officials' responses to terror between the law-enforcement and the war-fighting paradigms. He argues that the war-fighting paradigm is appropriate for this conflict.

we are aiming at, and often achieving, a higher standard for our fighting men? Simple assertion will not do. In *Joker One*, Campbell shows one effective option: tell a powerful, true story. At one point his point men had gotten two attackers in their sights for over twenty seconds. But they had not fired.

> I was furious. "What the hell is wrong with you? We're Marines – we kill people who attack us. Why on earth would you not shoot?"
>
> "Uh, sir, we didn't fire back because the guys were surrounded by a crowd of little kids, sir. Maybe twenty, they were all around. The guys, they were just holding up their AK's in the middle of the kids and firing them wildly our way. Without a scope, sir, I was worried that if I fired, I would hit the little kids." He looked down at his feet. "I thought that was what you wanted, sir."
>
> My heart swelled with pride in my Marines at exactly the same time I kicked myself for yelling at them before I had all the facts. Dotson and Cabrera had done exactly what we had trained them to do – stop, think and put themselves at greater risk if they believed there was any danger to innocent civilians from their reactions.[36]

More recently in the news is the idea enshrined in the 2006 Army Counterinsurgency (COIN) Field Manual. One phrase in that manual currently drives military strategy in Afghanistan: "Ultimate success in COIN is gained by protecting the populace, not the COIN force."[37] This idea is neither simple nor without controversy. But it is merely the most recent version of something deep in the bedrock of Western civilization, embodied in the Spartan's last stand at Thermopylae: "My life for yours."

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[36] Campbell, p. 128.
[37] See http://www.fas.org/irp/doddir/army/fm3-24fd.pdf at p. 31.

So, to our legal brethren in the military we say, “Go to the American public and make your case.” Hearts and minds need to be won not just “over there.” The military lawyer’s key role in America’s efforts to fight justly puts them in a powerful position to explain how those efforts are going. “Yes Men” do not look for creative ways to do so. Leaders do.

Conclusion

Simple, clear guidance is exceedingly difficult on today’s battlefield, but remains urgently necessary. Laws of armed conflict are under extreme stress through incomplete or misguided presentation of the law, political considerations, media exploitation (positive or negative), and a cunning enemy who seeks to manipulate our own laws against us (“Lawfare”). Nevertheless, lawyers owe our Troops and our country a relentless drive for synthesis and clarity, use of language that is concise, memorable and powerful, directed training for Troops, and a more articulate voice of wisdom and moderation in a polarized society. As our lawyers take this harder, less-traveled road, they will influence commanders and Troops, their actions on the battlefield, and the American public itself. That kind of initiative *is* leadership.

Special thanks for their talents in directing and editing your authors are offered to COL Richard C Gross, USA, LEGAD to COMISAF; LTC David G. Bolgiano, USAF, USAWC; LTG Robert L. Caslen, USA; LTG Bruce L. Fister, USAF (Ret.); COL Clarence D Turner, USA; Dr Don M Snider, USAWC; CPT Andrew Dausman, USMC; CPT Edward Major, USA; and CPT Michael Noel, USA.