



The Reporter

2018 Archive

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Leadership

Leadership – Our mission readiness and success depend on leadership development across all domains, including knowledge management, professional development, training, planning and resourcing, and inspections.

PRESIDENT ABRAHAM LINCOLN: EMBODIMENT OF TRANSFORMATIONAL LEADERSHIP

Posted: 10 October 2018

By Major Michael A. Schrama

Excerpt: Lincoln's deft leadership spanned the course of eight different lead generals and four years of conflict that ultimately led to the preservation of the Union. Lincoln's leadership resulted in a legacy of innovation and change that still permeates our society today.



Military Justice and Discipline – The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen national security.

THE COURT-MARTIAL OF PRIVATE VASILY SHABUNIN: AN OBSCURE TRIAL AND ITS LASTING IMPACT ON NOVELIST LEO TOLSTOY

Posted: 24 October 2018

By Major R. Scott Adams

Excerpt: By the summer of 1866, Leo Tolstoy had been working on his titanic novel, War and Peace, for three years. During that midpoint of his work, Tolstoy's masterpiece was briefly distracted by two men who visited his family estate and asked for his assistance. The men were junior officers from the 65th Moscow ...

FIGHTER FEEDBACK: UTILIZING F-15 DEBRIEF TECHNIQUES TO IMPROVE COURTROOM PERFORMANCE

Posted: 28 November 2018

By Major Benjamin F. Martin and Major Mark C. Perry

Excerpt: Pilots use the post-sortie debrief as an immediate opportunity to draw out errors that occurred during the sortie ... and internalize the lessons to prevent future reoccurrence. JAGs should adopt the post-sortie debrief methodology following courts-martial to improve trial litigation skills.



Operations and International Law – Operations and International law capabilities enhance command situational awareness, maximize decision space, and promote optimal conditions for the projection of ready forces to defend the Nation and our allies.

ENHANCING MULTI-DOMAIN COMMAND AND CONTROL: ATTORNEYS AND PARALEGALS JOIN THE FIGHT IN EXERCISE BLUE FLAGS

Posted: 18 September 2018

By Colonel Michael A. Lewis, Major Rodney B. Glassman, Major Trenton M. White, and Captain John W. Kalis

Excerpt: While we dominate the air, space and cyber domains today, our adversaries have invested heavily in technologies to deny us the superiority we have come to rely upon We will need to integrate real-time information from

NEW OPERATIONS LAW TRAINING FOR A NEW CHAPTER IN COLOMBIAN HISTORY

Posted: 7 November 2018

By Lieutenant Colonel Steven G. Loertscher and Lieutenant Colonel Jennifer M. Sanchez

Excerpt: On 27 June 2017, the Revolutionary Armed Forces of Colombia (the FARC) officially disbanded, handing over the last of 7,132 weapons, and giving the United Nations coordinates to more than 900 weapons caches spread around the country

ARE WE THERE YET? APPLYING THE LEGAL FRAMEWORK OF ANTICIPATORY SELF-DEFENSE TO THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

Posted: 13 December 2018

By Major Megan C. Mallone and Captain Christine E. Seibert

Excerpt: Anticipatory self-defense has been recognized by the international community after it was first articulated in 1837 in the Caroline case. There are two types of anticipatory attacks in self-defense: pre-emptive and preventive. The distinction is nuanced and often misunderstood

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ENHANCING MULTI-DOMAIN COMMAND AND CONTROL:

Attorneys and Paralegals Join the Fight in Exercise BLUE FLAG 17-1

BY COLONEL MICHAEL LEWIS, MAJOR RODNEY GLASSMAN, MAJOR TRENTON WHITE, AND CAPTAIN JOHN KALIS

The Chief of Staff of the Air Force (CSAF), General David [Goldfein](#), recently wrote:

“While we dominate the air, space and cyber domains today, our adversaries have invested heavily in technologies to deny us the superiority we have come to rely upon.... We will need to integrate real-time information from a variety of sources—some non-traditional—and evaluate that information as fast as systems can process it. If an enemy blocks actions in one domain, we quickly ‘call an audible’ to change the plan and attack or defend from another. Future multi-domain operations will be high velocity, agile, and joint by their very nature.”^[1]

There is no place where General Goldfein’s words ring truer than in the Air Force’s Air and Space Operation Centers (AOCs). Placed in strategic locations around the world, from Al Udeid Air Base, to Joint Base Elmendorf-Richardson in Alaska, AOCs put into practice the multi-domain integration and communication called for by the CSAF, all day, every day. AOCs are in constant need of skilled operational legal advisors for missions as various as homeland defense, nation state partnership, and fighting terrorism. In the words of [Lieutenant General Mark D. Kelly](#), “An ops-savvy JAG is worth their weight in gold.”^[2]

**An ops-savvy JAG is worth
their weight in gold.**

In 2017, [Air Combat Command](#) (ACC), under the leadership of its Staff Judge Advocate, then Colonel, now Brigadier General Sharon [Shaffer](#), embarked on the development and implementation of its inaugural Advanced Air Operations Law Course (AAOLC). This course, hosted by the [505th Command and Control Wing](#) (505 CCW), Hurlburt Field, Florida, brought together over 45 Air Force JAG Corps attorneys and paralegals. It is the second step of a four-step



Download Document: [Enhancing Multi-domain Command and Control... Tying It All Together, \[https://www.af.mil/Portals/1/documents/csaf/letter3/Enhancing_Multi-domain_CommandControl.pdf\]\(https://www.af.mil/Portals/1/documents/csaf/letter3/Enhancing_Multi-domain_CommandControl.pdf\)](https://www.af.mil/Portals/1/documents/csaf/letter3/Enhancing_Multi-domain_CommandControl.pdf)

training pipeline envisioned by ACC to cultivate skilled operations law attorneys and paralegals. The first step of the pipeline is an introductory operations law course. These types of courses are offered by [The Air Force Judge Advocate General's School](#), [Naval Justice School](#), and [The Army Judge Advocate General's Legal Center and School](#). Once a judge advocate (JAG) has completed a basic level course, they then can attend the AAOLC. The third step in the pipeline is participating in Air Force exercises before the final step of taking on a subject matter expert role in subsequent exercises. Several of this year's AAOLC participants were selected to participate in the two-week BLUE FLAG 17-1 exercise at Davis-Monthan Air Force Base (DMAFB), Arizona. Multiple organizations at DMAFB were involved, including the [612th Air Operation Center](#) (612 AOC) as well as [12th Air Force](#) (12 AF/AFSOUTH). The 12 AF/AFSOUTH organization complimented AOC operations by focusing on Air Force Forces (AFFOR) challenges in the exercise, such as care and feeding of Airmen, supplies, and military justice issues.

The scenario integrates active duty, guard, and reserve components of the Army, Navy, and Air Force in order to **simulate major combat operations.**

For BLUE FLAG exercises, a scenario is developed over a 24-month period in advance of the exercise. The scenario integrates active duty, guard, and reserve components of the Army, Navy, and Air Force in order to simulate major combat operations. It is up to the people in the AOC to make use of their command and control assets and resources to overcome enemy movements and aid our allies. The exercise scenario was designed by the 505 CCW, with input from the commander of 12 AF/AFSOUTH, as well as the Navy's 4th Fleet (NAVSOUTH), and utilized fictitious nation states and military organizations as part of the scenario. The 505 CCW develops exercise scenarios that provide realistic replication of forces, plans, procedures, intelligence capabilities, and threats for the planned theater of operations.

Fifteen attorneys and paralegals from across the total force participated in BLUE FLAG 17-1 at DMAFB, supporting the AFFOR and AOC staff, and demonstrating a substantial commitment from the JAG Corps to training in the operational Air Force. Seven other JAGs and paralegals supported from Barksdale Air Force Base, Louisiana; Hurlburt Field, Florida; and a naval ship off the coast of Jacksonville, Florida. Expanding on knowledge acquired from the AAOLC, attorney and paralegal academics for BLUE FLAG 17-1 contextualized operational employment principles, with the overall vision of providing comprehensive legal support. The exercise also illustrated the benefits of extensive legal support to planning and operations. By embedding legal support into every division and team of the AOC and AFFOR, a multitude of potentially problematic issues were identified early and seamlessly addressed in a manner that enhanced the decision-making of the Combined Force Air Component Commander (CFACC)/Commander of Air Force Forces (COMAFFOR). Furthermore, this network of legal support contributed to the formulation of creative solutions to challenging problems as all AOC and AFFOR personnel could understand legal authorities and limits of action. Finally, the comprehensive legal team fostered an environment of collaborative learning among attorneys and paralegals. This collaborative environment was particularly evident with the integration of paralegals into daily JAG functions, such as drafting rules of engagement (ROE) and crafting special instructions (SPINS) updates, to respond to a fluid battlefield. Paralegals also worked on drafting a comprehensive general order for deployed U.S. forces in a fictitious host nation and managing an exercise-simulated downrange homicide to help the COMAFFOR maintain good order and discipline.

The recent BLUE FLAG exercise provided an opportunity for JAG Corps attorneys and paralegals to develop a deep understanding of AOC operations and to apply that knowledge to a broad array of challenging problems in a 24-hour operations tempo. Additionally, BLUE FLAG provided AFFOR personnel the opportunity to grapple with crucial issues like basing, personnel and equipment deployment, sustainment, and host nation integration. Unlike other types of "flag" exercises (e.g., RED FLAG, GREEN FLAG, SILVER FLAG), BLUE FLAG focuses

on the organizational planning, command, and control functions of an AOC. The primary purpose of BLUE FLAG is to test and train battlefield command and control (C2) capabilities by simulating realistic operations. BLUE FLAG exercises are ACC's foremost large scale, computer-assisted, C2 exercise. This focus makes BLUE FLAG a well-suited venue in which to train toward CSAF's goal of multi-domain command and control.

AIR OPERATIONS CENTER

In order to better understand the value of exercises like BLUE FLAG, it is important to understand the purpose and function of an AOC. While every AOC is unique, every AOC follows a similar doctrinal structure. The AOC is comprised of hundreds of Airmen that are distributed throughout five divisions: Combat Operations (COD); Combat Plans (CPD); Strategy (SRD); Air Mobility (AMD); and Intelligence, Surveillance, and Reconnaissance (ISR). Each division brings something unique to the fight and, when working together, integrates air, space, and cyberspace power into a lethal weapon against America's adversaries. Attorneys and paralegals play a vital role to the success of the AOC and comprise a specialized team in the AOC. Attorneys and paralegals are integrated into the different divisions to provide advice and guidance to commanders and division chiefs at a moment's notice. Constant communication with other attorneys and paralegals throughout the AOC makes the legal team an invaluable asset to commanders and their communications.

Looking more closely at the various AOC divisions, attorneys in SRD serve an advisory role for the conceptualizing of overall strategy and commander's vision. The JAGs will be present for meetings with key leaders to understand their optics and make sure the concept of operations ultimately developed adheres to that plan. The JAGs also work with strategy teams to make sure that implementation of the CFACC's plan does not violate any treaties, rules of war, or international laws. Lieutenant Colonel Eric Farquar, 612 AOC Operations Assessment Team Chief, said,

"The guidance and strategy team are responsible for analyzing the cradle to grave actions of the AOC in support of the CFACC's efforts for achieving campaign objectives. JAGs deliver value by helping establish and refine rules of engagement that allow tactical action to meet operational objectives for the Joint Force Commander. To deliver the most value for commanders, Air Force JAGs need to have an operational level of awareness and knowledge to understand what operators require to do their job."^[3]

Mr. Daniel "Sal" Salgado, 612 AOC Strategy Chief, also understood the importance of a JAG in SRD noting,

"The strategy division leads the Joint Operation Planning Process for the Air Component (JOPP-A) for the CFACC, which means we do crisis action planning for situations that come up. We develop and recommend courses of action (COAs), write the Joint Air Operations Plan (JAOP), the daily guidance (Air Operations Directive) then do operational assessments based on the execution of that guidance. JAGs review high-level documents and advise on developing the plan to ensure what we want to do is in compliance with international treaties and agreements."^[4]

For BLUE FLAG 17-1, with its focus on multi-domain command and control, two cyber JAGs were brought in for the crisis action planning event to assist in drafting ROE, COAs, and the JAOP. As those plans are implemented, attorneys review and advise at the appropriate level required for decision making and provide guidance that feeds into targeting.

After leaving SRD, the plan is passed to CPD where targets start to be developed. This is where the Air Tasking Order (ATO) cycle begins. This cycle takes a target and gets it weaponized and packaged for prosecution within 72 hours. Every day COD is executing an ATO. Which means that

every day, CPD is in various stages of preparing the next two days of an ATO. In this process, we embed JAGs and paralegals with the Master Air Attack Plan (MAAP) team and the Targeting Effects Team (TET). These legal professionals will review potential deliberate (pre-planned) targets to make sure they are not on a No-Strike List/Restricted Target List (NSL/RTL), they are not an otherwise protected structure, the collateral damage estimate (CDE) will minimize harm to non-military structures or non-combatants, and that the targets fall within Combatant Commander (CCDR) or CFACC guidance. This guidance is found by reviewing published ROE, SPINS, the Air Operations Directive, and any other published targeting guidance. It is the JAG's job to advise the operators of the confines of the law while incorporating the CCDR's and CFACC's guidance. Major Michael "Caveman" Cavanaugh, 612 AOC TET Chief, highlights the legal role in the targeting process, noting,

"The role of TET is to develop CFACC's targeting scheme and maneuver by prioritizing targets based on commander's guidance. JA is integral to that process by ensuring compliance with ROE, Law of Armed Conflict (LOAC), and commander's guidance. By having a JAG embedded within our targeting cell we were able to have discussions, as a team, allowing the opportunity for me to receive recommendations from the JAG as to how best to analyze commander's guidance."^[5]

Developing that prioritized list into a detailed set of weaponized targets falls to the MAAP team. As in TET, the role of the legal advisor in MAAP is crucial. According to Lieutenant Colonel Peter "TIMBr" Johncour, 612 AOC MAAP Team Chief,

"MAAP builds the schedule (Air Tasking Order) for the air battle plan requirements (strikes and collections that need to take place) and pairs them with an asset that can meet the requirements... we work with the JAGs to make sure all effects we are planning are in accordance with ROE updates and LOAC."^[6]

This sentiment is echoed by the 612 AOC CPD Division Chief, Lieutenant Colonel Kevin "Kato" Allred, who connects the legal advisor's role directly to the air crew who ultimately implements the ATO:

"By working with the JAG we can get a target through all the wickets whether it's reviewing CDE, Sensitive Target Approval and Review (STAR) Packages (packages requiring SECDEF or higher review), and making sure we are interpreting ROE guidance into the instructions the air crew will need."^[7]

It is also during this stage that JAGs working with ISR and specialized teams provide inputs for non-kinetic targets related to cyberspace, space, electronic warfare, or information operations. In the AOC, these JAGs are read-in on top secret, sensitive compartmentalized information, and applicable special access programs. These JAGs review sensitive targets and targets that are going to be attacked using non-kinetic effects. Advising in this area requires specialized training to understand how the Air Force employs non-kinetic effects and how those effects fit into the guidance and ROEs put forth by the CCDR or CFACC. Those specialized targets are then prioritized with the other targets from the TET and, once the targets are validated, are placed on the ATO and sent to COD for execution. Discussing how legal professional integrate with the ISR domain, Major Sue "Snow" White, 612 AOC ISR Deputy Chief, stated:

"Our big three functions for the AOC are analysis, ISR operations, and targeting. Typically targeting is where ISR works with the JAG by looking at the restricted target list and no strike list and collaborating on collateral damage estimates to make sure we are not violating LOAC or ROE. We cross check with JAG to make sure we are not going to potentially cause a second or third order effect we are not anticipating. A lot of people, when talking targets, are thinking about kinetics, but having the resource of a JAG is even more important when working to analyze second and third order impact of non-kinetic effects."^[8]

Mr. Salgado predicts that “more and more JAGs with non-kinetic specialties will be necessary in the future.”^[9] Mr. Salgado’s prediction about the increasing importance of non-kinetic operational and legal specialists takes on even more significance as the Department of Defense’s (DoD) cyber forces continue to mature. In 2013, after several years of service-specific force development, the DoD was faced with the challenge of how best to use all of the cyber assets being developed by the service components and focus cyber forces in several areas of specialization for critical missions related to a particular combatant commander or country of operations. The DoD’s answer to that challenge was the Cyber Mission Force (CMF),^[10] as described in the April 2015 “DoD Cyber Strategy.”^[11]

Within the AOC and the ATO process, fully leveraging personnel and technical resources available via the CMF is at the heart of multi-domain C2 in cyber. For AOC planners, utilizing cyber as part of a multi-domain ATO comes with the added complexity of differing preparatory timetables and logistical support requirements for cyber operations versus traditional kinetic operations. Fortunately, this challenge is not insurmountable. In many ways, the challenges of leveraging the CMF for cyber operations are similar to challenges of leveraging space assets within the ATO planning process. The Air Force overcame those challenges via a specialized team within the AOC called the Director of Space Forces (DIRSPACEFOR or DS4) team. Under the DS4, space capabilities have a history of successful integration into the ATO to meet CFACC’s objectives. This DS4 concept was recently applied to cyber via a new specialized AOC team called the Director of Cyber Forces (DIRCYBERFOR or DC4).

At BLUE FLAG 17-1, the exercise paid special attention to the multi-domain integration of kinetic and non-kinetic effects. Consistent with CSAF’s goal of fully integrating all domains of warfighting, BLUE FLAG 17-1 sought to fully integrate cyber and other non-kinetic effects into the daily ATO cycle. BLUE FLAG 17-1 successfully implemented the DC4 concept to present CMF forces as part of a multi-domain solution to address CFACC objectives. The same two cyber JAGs who attended the crisis action planning event

also participated in BLUE FLAG 17-1, with one JAG at Hurlburt Field, FL, with the 505 CCW exercise controllers, and one JAG embedded with the DC4 team at the 612 AOC and advising on the full scope of non-kinetic capabilities for the CFACC. Collectively, these efforts provided a useful model for multi-domain practice integration that the Air Force can apply to other AOCs.

Once the ATO is ready for execution through COD, **the JAG is responsible** for some of the fastest moving pieces of major combat operations: dynamic targets (DT) and time-sensitive targets (TST).

Once the ATO is ready for execution through COD, the JAG is responsible for some of the fastest moving pieces of major combat operations: dynamic targets (DT) and time-sensitive targets (TST). While the JAG on the COD floor is the first line of defense for issues that come up in the execution of the ATO, normally that is not a concern due to the fact that targets on the ATO have already been vetted. DT/TSTs are targets of opportunity that present themselves without the time to be placed on the normal 72-hour ATO cycle. The targets can be high-value individuals or they can be previously unknown troop movements. These targets are placed into a computer application that requires inputs from a variety of players as to how this target will be prosecuted; it is essentially cramming the ATO cycle into hours or minutes.

The JAG plays a huge role in advising whether or not the targets are valid military targets, whether there is positive identification of the target, whether ROE are met, and if the CDE is acceptable. The JAG also addresses the crucial issue of authority delegation. If so delegated, the Chief of Combat Operations (CCO) may have the authority to engage targets. However, if engagement authority has not been delegated, the JAG must be able to immediately tell the CCO at what level engagement authority rests—be it CFACC, JFC, SECDEF, or POTUS. Sometimes the lines

are black and white, such as a mobile surface-to-air site that is targeting U.S. aircraft. Other times these points of analysis can be gray, such as the enemy storing munitions at a local hospital or launching aircraft from a civilian airfield. The COD JAG is constantly checking and referencing the SPINS, ROE, targeting guidance, NSL/RTLs, and LOAC principles. Sometimes this analysis and decision-making can span hours, other times, only a few minutes. When a battle is heated and time is of the utmost importance, it is imperative that the JAG keeps her or his cool and is not afraid to give candid advice in order to preserve the commander's intent and integrity of battle.

The CCO runs the show on the COD floor and is responsible for the execution of airpower, in whatever form, based upon the CFACC's guidance. The 183d has a long-standing relationship with 12 AF and the 612 AOC, providing critical personnel augmentation with subject matter expertise during both exercises and real-world operations. The CCO for BLUE FLAG 17-1, Colonel Daniel "Disco" McSeveney is part of the 183d Fighter Wing, Illinois Air National Guard. He spoke to the critical importance of having an attorney on the COD floor:

"[The] Chief of the Combat Operations [CCO]... runs today's Air War. Entrusted with executing the plan and flexing when the enemy or mother-nature changes our plan. There's a reason that the JA is next to me. My right hand is my offensive and defensive air operators; and my left hand is my combat JAG, assisting in understanding rules of engagement, legality, and proportionality in all of the domains in which we operate.... JAGs are integral to any operation."^[12]

The AOC is not just an Air Force function. There are also liaisons for the Army Battlefield Coordination Detachment, Naval and Amphibious Liaison Element, Marine Liaison Element, and Special Forces Liaison Element working in the AOC who work with Air Force operators to get the right package on the right target. Working with operators is an invaluable experience for JAGs and paralegals by allowing us to get outside of our "bubbles" and see how the tip of the

spear operates. Colonel McSeveney agrees: "As a commander, I urge JAGs to share their desire to be a part of operational fight with their leadership so that they can see what other members are doing at the operational level of war."^[13] The JAGs and paralegals at BLUE FLAG 17-1 certainly were able to experience that by working alongside over 1200 other players from three different services and almost 170 different units.

Many times operations involve aid and relief efforts.

It should be noted that while BLUE FLAG 17-1 was a major combat operations exercise, there were injects and scenarios that did not involve offensive or defensive operations. This was done because AOCs are force enablers in many ways beyond the scope of kinetic engagements. For AOCs with a designated geographic area of responsibility (AOR) or area of cooperation, many times operations involve aid and relief efforts. For the 612 AOC, its area of cooperation is U.S. Southern Command (USSOUTHCOM), comprising essentially everything in the Americas south of Mexico and in the Caribbean Sea. In times of crisis and global need, AOCs like the 612 AOC at DMAFB are called upon to assist in humanitarian assistance and disaster relief missions. For example, in 2016, when Hurricane Matthew swept through the eastern Caribbean, it left a wake of destruction over countries such as Haiti, Cuba, Jamaica, and several others. By having knowledge of the pending storm, the 612 AOC was able to spring into action to begin coordinating relief efforts, organizing the airspace, and prioritizing traffic in and out of the region. In fact, an entire joint task force was stood up to better enable U.S. forces to respond to this disaster in support of the U.S. Embassy, State Department, and Office of Foreign Disaster Assistance. Because Haiti was still recovering from a devastating earthquake in 2010, significant preparation went into ensuring relief and aid efforts would be in place as soon as possible. Relief efforts were also focused on other countries with guidance from the AOC through the joint task force. In situations like this, AMD takes the lead for the AOC and works with a Director of Mobility

Forces (DIRMOBFOR) to move cargo and crews in and out of theatre. Colonel William “Percy” Percival, former 612 AOC AMD Chief, stated, “JAGs help you keep from speeding by processing legal reviews from [the combatant commander]...with the legal team in the background they help us navigate what we can do. The JAGs leverage their knowledge of SOFA, customs and norms, national-to-nation agreements, diplomatic clearances, and international law.”^[14] By working with the AOC in preparation for Hurricane Matthew, the AOC concept brought coordination to chaos and direction to devastation. Without the direction of the AOC, the massive relief effort that followed could have been a burden to the people of the affected countries rather than a benefit.

By having knowledge of the pending storm, the 612 AOC was able to spring into action to begin **coordinating relief efforts, organizing the airspace, and prioritizing traffic** in and out of the region.

The BLUE FLAG 17-1 exercise presented a comprehensive picture of multi-domain C2. More than 2000 missions were planned, eight ATOs were developed, almost 900 missions flown, and more than 700 targets were struck to include almost 20 dynamic targets and 70 non-kinetic targets. Additionally, thousands of notional troops were moved around in a notional foreign country; millions of pounds of supplies were brought in; thousands of notional American citizens were evacuated from a hostile country; air superiority was established; contested land was returned to UN-recognized borders; and battlefield control was realized thanks to the total force effort and management of the AOC. As JAGs and paralegals, we can take pride in knowing that we had a hand in planning and executing this exercise and ensuring that it went smoothly. The exercise also underscored the integral part played by JAG Corps

professionals in supporting command decision-making and how an integrated JAG or paralegal can be a force-multiplier and enhance multi-domain C2 from whatever level they are involved in. Colonel Daymen Tiffany, 612 AOC COD Chief, highlighted the importance of a JAG’s role in command decision-making: “Every commander I’ve had at the CFACC and Commander-level makes sure the JAG is right beside them to make sure that the right decisions are being made.”^[15] This is exactly the type of multi-domain enhancement that the CSAF had in mind.

The exercise also underscored the **integral part played by JAG Corps professionals...**

How can JAGs best prepare for these new challenges? According to [Brigadier General Bryan P. Radliff](#), Mobilization Assistant to the Commander, 12th Air Force, Air Combat Command, and Commander, Air Forces Southern, USSOUTHCOM, the key is to “exercise, exercise, exercise...there is ample opportunity to build experience prior to assuming combat responsibilities.”^[16] It cannot be overstated that BLUE FLAG 17-1 was an invaluable training experience for all career fields involved, especially JAG Corps professionals. All participants received significant exposure to the AOC and its vast capabilities. In keeping with CSAF’s vision on multi-domain C2, JAGs and paralegals should endeavor to find opportunities to gain incredible operations law expertise by working in an AOC.

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EXPAND YOUR KNOWLEDGE:

External Links to Additional Resources

- **AirForceTV Video: Multi-Domain Command & Control**, https://www.youtube.com/watch?v=WWnozSe2DU4&feature=emb_title
- **Air Force Magazine: Understanding Multi-Domain Command and Control (Jan 9, 2018)**, <https://www.airforcemag.com/Understanding-Multi-Domain-Command-and-Control/>
- **BreakingDefense: 2018 Forecast: Air Force, Space Force Or Multi-Domain Force? (Jan 5, 2018)**, <https://breakingdefense.com/2018/01/2018-forecast-air-force-space-force-or-multi-domain-force/>
- **C2/Comms: Air Force looks to transform command and control enterprise (Sept 17, 2017)**, <https://www.c4isrnet.com/digital-show-dailies/air-force-association/2017/09/18/air-force-looks-to-transform-command-and-control-enterprise/>
- **DVIDS Video: Blue Flag**, <https://www.dvidshub.net/video/524979/blue-flag-17-1>
- **DefenseNews: How industry's helping the US Air Force with multi-domain command and control**, <https://www.defensenews.com/c2-comms/2017/09/25/industry-pitches-in-to-help-air-force-with-multi-domain-command-and-control/>
- **DoD News: Air Force, Army Developing Multi-domain Doctrine (Jan 25, 2018)**, <https://www.defense.gov/Explore/News/Article/Article/1424263/air-force-army-developing-multidomain-doctrine/>

ENDNOTES

- [1] Letter from General David L. Goldfein, Chief of Staff of the Air Force, to Airmen (Mar. 10, 2017), <http://www.af.mil/News/Article-Display/Article/1108931/csaf-letter-to-airmen/>.
- [2] Electronic mail interview with Lieutenant General Mark D. Kelly, Commander, 12th Air Force, Air Combat Command and Commander, Air Forces Southern, U.S. Southern Command, Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [3] Interview with Lieutenant Colonel Eric Farquar, Operations and Assessment Team Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [4] Interview with Daniel Salgado, Strategy Guidance Team Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [5] Interview with Major Mike Cavanaugh, Targeting and Effects Team Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [6] Interview with Lieutenant Colonel Peter Johncour, Master Air Attack Plan Team Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [7] Interview with Lieutenant Colonel Kevin Allred, Combat Plans Division Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [8] Interview with Major Sue White, Intelligence, Surveillance, and Reconnaissance Division Deputy Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [9] Interview with Daniel Salgado, *supra*, at note 5.
- [10] The CMF is composed of teams of operators from across the military service components. The CMF is divided into four major missions: (1) cyber protection teams that defend DoD networks, (2) national mission teams that address national critical infrastructure (i.e., electric grids and other utilities), (3) combat mission teams that are aligned with combatant commanders and support missions in aligned areas of responsibility, (4) and additional support teams that augment the national mission teams and combat mission teams as needed.
- [11] U.S. Dep't of Def., *The DoD Cyber Strategy* (2015), https://archive.defense.gov/home/features/2015/0415_cyber-strategy/Final_2015_DoD_CYBER_STRATEGY_for_web.pdf.
- [12] Interview with Colonel Daniel McSeveney, Commander, 183d Air Operations Squadron at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
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- [14] Interview with Colonel William Percival, Air Mobility Division Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [15] Interview with Colonel Daymen Tiffany, Combat Operations Division Chief, 612th Air Operations Center at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).
- [16] Interview with Brigadier General Bryan Radliff, Mobilization Assistant to Commander, 12th Air Force, Air Combat Command and Commander, Air Forces Southern, U.S. Southern Command at Davis-Monthan Air Force Base, Ariz. (Apr. 29, 2017).

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President Abraham Lincoln: Embodiment of Transformational Leadership

BY MAJOR MICHAEL A. SCHRAMA

Abraham Lincoln was an attorney, ferryman, postmaster, storekeeper, and politician. He was a common man who accomplished uncommon feats. Lincoln had no administrative experience before becoming President and had no meaningful military experience. Yet, he became an avid strategist, able to direct field leaders and issue precise orders.[1] Lincoln's deft leadership spanned the course of eight different lead generals and four years of conflict that ultimately led to the preservation of the Union. Lincoln's leadership resulted in a legacy of innovation and change that still permeates our society today.

Lincoln's leadership is best viewed through the lens of transformational leadership. Transformational leadership is a process in which a leader increases their associates' awareness of what is right and important, raises motivational maturity, and moves individuals beyond their own self-interests for the good of the group, the organization, and society.[2] "The goal of transformational leadership is to 'transform' people and organizations in a literal sense—to change them in mind and heart; enlarge vision, insight, and understanding; clarify purposes; make behavior congruent with beliefs, principles, or values; and bring about changes that are permanent, self-perpetuating, and momentum building." [3] In today's climate, The Judge Advocate General's Corps must display dynamic leadership in order to create disciplined and legally enabled Airmen and Air Force organizations that advance

the mission. Lincoln provides a historical blue print to grow our leadership principles.

INSPIRATIONAL MOTIVATION

Lincoln's challenge during the Civil War was great. The Confederates were compelled to fight for their freedom and to protect their homes, but Lincoln's task was to continuously motivate northern soldiers to fight for something that was much less understood and appreciated—the preservation of the Union.[4] This became more difficult as years passed and casualties mounted. Lincoln navigated these impediments by articulating a clear vision to his followers and convincing them to buy-in.

**The ability to inspire,
the first element of
Transformational leadership.**

Through four years of conflict, Lincoln employed eight different generals to lead the Army of the Potomac: [Irvin McDowell](#), [George McClellan](#) (twice), [John Pope](#), [Ambrose Burnside](#), [Joseph Hooker](#), [George Meade](#), and [Ulysses S. Grant](#). [5] The first seven suffered from poor tactics, the inability to effectively pursue Robert E. Lee's army, and the lack of understanding of how to properly utilize a vastly

superior Army. Interactions with two generals—McClellan and Grant, demonstrate examples of Lincoln’s ability to inspire, the first element of Transformational leadership.

Lincoln became frustrated at McClellan’s reluctance to move his force during the Peninsula Campaign. Lincoln attempted to change McClellan’s behavior and bring his actions into conformity with Union battle strategy. It would have been easy for Lincoln to order his subordinate to move the forces, but Lincoln did not want to create an acrimonious situation and realized he had to cultivate this important relationship. McClellan had a delicate tolerance for criticism and was immensely popular with his troops. Instead, Lincoln sent forty-five messages over a four month period. These messages were clearly reasoned, incredibly patient, and persistent arguments encouraging McClellan to act.[6] Lincoln attempted to use reason and information to push his subordinate and inspire action.

Lincoln displayed discretion in knowing **when to order** specific action and **when to encourage** his generals to come to the decision he wanted them to make.

For example, Lincoln wrote:

You know I desired, but did not order, you to cross the Potomac below, instead of above the Shenandoah and Blue Ridge. My idea was that this would at once menace the enemies’ communications, which I would seize if he would permit. If he should move Northward I would follow him closely, holding his communications. If he should prevent our seizing his communications, and move towards Richmond, I would press closely to him, fight him if a favorable opportunity should present, and, at least, try to beat him to Richmond on the inside track. I say “try”; if we never try, we shall never succeed.[7]

Lincoln displayed discretion in knowing when to order specific action and when to encourage his generals to come to the decision he wanted them to make. Transformational leaders have a clear vision they are able to articulate to followers and help followers experience the same passion and motivation to fulfill the goals of the enterprise.[8] In another example, Lee served McClellan a decisive loss at the Battle of Gaines’ Mill, and McClellan publicly disparaged the President.[9] In response, Lincoln calmly responded by trying to help McClellan to see the overall objective of the war and articulated a compelling vision of the future of the engagement.[10] He did so by allowing McClellan to save face, instead of trying to make an example out of him. The massaging of the relationship sent a message to the Army of the Potomac that the Executive office and military were united in the cause. These acts exemplify Lincoln’s ability to take the “high road” as a transformational leader for the greater good.

Transformational leaders allow their subordinates the room to make mistakes and then **learn from those mistakes.**

In another example of inspirational motivation, Lincoln gave Grant great latitude in his decision making. Lincoln had approved Grant’s decision to move his army south in three different directions upon taking control of the army in the east.[11] During the battle of Cold Harbor, Grant admitted he had made a mistake in engaging Lee, where no advantage was gained to offset the heavy loss of men.[12] Despite heavy losses, Lincoln supported Grant and urged him on with a telegram stating to maintain his overall vision and exhorting him with, “You will succeed.”[13] Lincoln expressed confidence that Grant could achieve his goals, showing support for his general and his decisions. Transformational leaders allow their subordinates the room to make mistakes and then learn from those mistakes. This allows a subordinate to grow, cultivating the next generation of leaders.

A transformational leader puts the mission ahead of personal ambition.

IDEALIZED INFLUENCE

Lincoln showed another component of transformational leadership—idealized influence—as Grant was laying [siege to Petersburg](#) and needed more troops. Grant requested Lincoln raise 300,000 additional troops via a draft. The draft, which would be unpopular, would take place prior to the heavily contested 1864 presidential election, and many advised Lincoln to hold off so as not to negatively impact his re-election run.[14] However, Lincoln pressed forward, stating “what is the presidency to me if I have no country.”[15] Lincoln showed enthusiasm about what needed to be accomplished, even though his decision could have a profound personal impact on his career. He understood what it would take to accomplish the mission, setting aside his personal ambitions and potentially losing the presidency. A transformational leader puts the mission ahead of personal ambition. This cultivates an environment that encourages buy-in. Ultimately, accountability in a work environment begins by demonstrating the behavior you want to see modeled by others.

Transformational leaders keep lines of communication open...

INDIVIDUALIZED CONSIDERATION

Lincoln offered support and encouragement to his subordinates. Transformational leaders keep lines of communication open so subordinates feel free to share ideas and concerns, displaying the third component—individualized consideration. Lincoln maintained a close relationship with Northern soldiers and understood the “hearts and minds of the men in his ranks.”[16] When visiting the battlefields, he made it a point to have small, meaningful conversations with soldiers. He also hosted numerous soldiers at the White House. Lincoln always treated the men with respect and courtesy,

regardless of rank.[17] Lincoln patiently received soldiers in the White House, listening to every request and attempting to solve each problem, no matter how insignificant it was.”[18] When he visited soldiers in the hospital, he showed genuine concern for their injuries.[19] Lincoln treated others as individuals, rather than just as members of a group. He understood that individuals have different needs, abilities, and aspirations.[20]

Transformational leaders attempt to engage in the emotional support of their followers and effectively transcend change.

Lincoln’s common touch and absolute absence of affectation won the affection and loyalty of the men.[21] Lincoln’s motivation of his troops is evidenced in a letter from a soldier regarding his reenlistment: “I have made up my mind that a country that is worth living in time of peace is worth fighting for in time of war so I am yet willing to put up with the hardships of a soldiers life.”[22] Robert E. Lee’s plan was not to strike a decisive blow that would win the war outright, but rather, drag out the war with small victories until the North lost the will to carry on.[23] Lincoln’s leadership guided the North and its soldiers through four grueling years of battle, ultimately outlasting the manpower and supplies of the South. His transformational leadership fostered the relationships necessary to see the mission completed. Ideally, a leader wants to create an environment in which everyone in the enterprise has a different role, but everyone’s status is the same.

Transformational leaders not only challenge the status quo, they ferment creativity and encourage subordinates to explore new opportunities to learn and grow.

INTELLECTUAL STIMULATION

The final tenant of transformational leadership is intellectual stimulation. Transformational leaders attempt to engage in the emotional support of their followers and effectively transcend change.[24] In order to be a leader as an agent of change, Lincoln had to adjust his leadership style. At the outset of the war, Lincoln delegated to military leaders the military strategy and operations in each conflict.[25] However, after the disaster at Bull Run, Lincoln altered his approach. At first, Lincoln began to question the assumptions of his military leaders. However, ultimately, Lincoln realized that to be an agent of change, he needed to turn his full attention to learning military strategy and developing his own ideas that would carry out his national policy.[26] This allowed Lincoln to speak on the same level with commanders. At first, many generals resented a “civilian” telling them how to do their job. But over time, literature suggests the generals came to believe in Lincoln and his strategy. Had Lincoln not diligently studied military strategy and re-defined the role of commander-in-chief, he would not have become the agent of change that ultimately navigated the Union to victory. Transformational leaders not only challenge the status quo, they ferment creativity and encourage subordinates to explore new opportunities to learn and grow.[27]

Lincoln’s greatest legacy as President is how he invoked change and innovation. Lincoln demonstrated this trait on the moral issue of slavery when he penned the [Emancipation Proclamation](#), as an executive order, that changed the legal status of [enslaved people](#). [28] Many advisors were hesitant for Lincoln to explicitly intertwine the war and the issue of slavery, as it might lose support for the war in the North and invoke passions in the South.[29] Lincoln was well aware of this potential problem. Five months prior to the Emancipation Proclamation, Lincoln wrote an editorial to Horace Greely in the New York Tribune.[30] In the editorial, Lincoln expressed that his “paramount objective in this struggle [was] to save the Union” and not the issue of slavery.[31] But, then Lincoln extorted that the only way to save the Union was to abolish slavery. Lincoln linked the controversial act of slavery with the incontrovertible idea of saving the Union.[32] By doing so, he laid the groundwork

to draw criticism away from slavery and focus attention on the objective of preserving the Union.[33]

One year after writing his editorial, and after the [Battle of Gettysburg](#), Lincoln addressed the nation in what is now known as the Gettysburg Address, stating: “that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.”[34] Letters suggest that some Northern soldiers still disapproved of freeing the slaves, but for every expression of disapproval for the Emancipation Proclamation “there were ten in support of the act.”[35] Lincoln combined intellectual stimulation and idealized attributes to transform the war from a singular purpose (preserving Union), to a dual purpose (preserving the Union and ending slavery). He did so by first transforming how people think about the issue of slavery, and once doing so, invoking the moral consequences of it.

This final element of leadership turned out to be crucial. Lincoln realized that to win the war, the North would have to relentlessly pursue Lee and his Confederate Army of Northern Virginia. The North maintained an advantage of manpower and resources. Lincoln determined the North had to utilize its resources to engage Lee and the South in a war of attrition. However, Lincoln did not employ generals who either understood, or shared this philosophy (with the notable exception of Grant and Sherman). By learning military strategy, Lincoln learned how to speak on the same level with military commanders, and placed himself in a position as a true Commander in Chief. For example, Lincoln started the practice of issuing General Orders. Lincoln utilized General Orders to facilitate the movement of forces, to execute proposed plans of attack on supply lines, and command the Union forces to engage the enemy.

Further, Lincoln demonstrated intellectual stimulation by issuing the first code of conduct. Lincoln supported Generals Grant and Sherman by urging them to attack and acquiescing to the severity of harm they enacted upon the South.

However, Lincoln also disavowed malice toward the enemy or any desire for revenge.[36] To deal with the moral question of cruelty, Lincoln issued General Order 100, known as [Lieber's Code](#), which provided a written, official, and widely circulated condemnation of many kinds of misconduct and atrocities.[37] Lincoln again combined intellectual stimulation and idealized attributes. Lieber's Code asked soldiers to consider their own values and beliefs, and consider the moral and ethical consequences of their decisions. The Code was a nontraditional way to re-think ideas that had never formally been questioned. The Emancipation Proclamation and Lieber's Code established legal precedent, well ahead of its time, that continue to permeate the modern battlespace today. Intellectual stimulation encourages open mindedness and flexibility. A good leader will use intellectual stimulation to advance a vision that provides focus and purpose to obtain objectives and meet goals.

**Transformational leadership can
be a guide for our Airmen as we
pursue our mission with excellence
and integrity to become leaders,
innovators, and warriors.**

Abraham Lincoln embodied the attributes of a transformational leader. Through his leadership, Lincoln constructed a vision not only for the preservation of the Union, but opened a pathway to a reconstructed union without malice or desire for revenge. Through his actions, Lincoln encouraged his soldiers to meet goals, while maintaining moral integrity—and commanded an entire nation to do the same. Lincoln's presidency is a case study in how to effectively employ a transformational leadership style. When used appropriately, transformational leadership can be a highly effective managerial style. The mission of the United States Air Force is to fly, fight, and win in air, space, and cyberspace. Transformational leadership can be a guide for our Airmen as we pursue our mission with excellence and integrity to become leaders, innovators, and warriors.

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- **Forbes:** [Transformational Leaders: The Top Trait That Separates Them From The Rest](https://www.forbes.com/sites/kathycaprino/2018/02/03/transformational-leaders-the-top-trait-that-separates-them-from-the-rest/#3ff2bd2b52cc) (Feb 3, 2018), <https://www.forbes.com/sites/kathycaprino/2018/02/03/transformational-leaders-the-top-trait-that-separates-them-from-the-rest/#3ff2bd2b52cc>
- **HistoryNet:** [Abraham Lincoln](https://www.historynet.com/abraham-lincoln), <https://www.historynet.com/abraham-lincoln>
- **Leadership Freak:** [A Single Transformational Question](https://leadershipfreak.blog/2016/10/25/a-single-transformational-question/) (Oct 25, 2016), <https://leadershipfreak.blog/2016/10/25/a-single-transformational-question/>
- **National Geographic / History Channel Documentary:** [Abraham Lincoln: American Mastermind](https://www.youtube.com/watch?v=Uj-C2a8qXJs&feature=youtu.be) (1:03:00), <https://www.youtube.com/watch?v=Uj-C2a8qXJs&feature=youtu.be>
- **Smithsonian:** [Lincoln as Commander in Chief](https://www.smithsonianmag.com/history/lincoln-as-commander-in-chief-131322819/) (Jan 2009), <https://www.smithsonianmag.com/history/lincoln-as-commander-in-chief-131322819/>
- **VeryWellMind:** [What Is Transformational Leadership?](https://www.verywellmind.com/what-is-transformational-leadership-2795313) A Closer Look at the Effects of Transformational Leadership (May 23, 2018), <https://www.verywellmind.com/what-is-transformational-leadership-2795313>

ENDNOTES

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- [15] *Id.* at 373.
- [16] LEIDNER, *supra* note 4.
- [17] *Id.*
- [18] *Id.*
- [19] *Id.*

- [20] BOLDEN, GOSLING, MARTURANO, & DENNISON, *supra* note 2, at 5.
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- [23] RON C. CHERNOW, GRANT 355-56 (2017).
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- [29] KEARNS, *supra* note 11, at 478.
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- [31] *Id.*
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The Court-Martial of Private Vasily Shabunin: An Obscure Trial and its Lasting Impact on Novelist Leo Tolstoy

BY MAJOR R. SCOTT ADAMS

By the summer of 1866, Leo Tolstoy had been working on his titanic novel, *War and Peace*, for three years.^[1] Its completion would come three years later, near Tolstoy's fortieth birthday.^[2] During that midpoint of his work, Tolstoy's masterpiece was briefly distracted by two men who visited his family estate and asked for his assistance.^[3] The men were junior officers from the 65th Moscow Infantry Regiment, temporarily stationed nearby.^[4] One was Alexander Stasyulevich, an ensign and old friend of Tolstoy from his time in the army.^[5] The other was Grigori Kolokoltsov, a first lieutenant and close friend to Tolstoy's brother-in-law. The men explained that a young soldier in their regiment was accused of assaulting an officer.^[6] This private was facing possible death by firing squad.^[7] The men asked Tolstoy to serve as defense counsel at the court-martial.^[8] With little more than sympathy on his side, Tolstoy accepted the task.^[9] After Tolstoy's bumbling attempt at a defense, Private Vasily Shabunin was convicted and sentenced to death. Within two weeks soldiers from the regiment brought the pitiful looking young man to a post where he was shot to the sound of drums.^[10]

After Tolstoy's bumbling attempt at a defense, Private Vasily Shabunin was convicted and sentenced to death.

Tolstoy stayed at his estate throughout the rest of that year, writing feverishly through the winter, and creating what is often considered the greatest novel of all time.^[11] Scholars have debated the court-martial's effect on Tolstoy's writing and life.^[12] The debate persists in obscure academic corners largely because Tolstoy rarely discussed the experience.^[13] He frequently told strangers of his experience watching a man lose his head to the guillotine in France.^[14] But Tolstoy almost never described his client's execution; a curious and rare silence. In 1908, after Tolstoy's dedicated biographer, Pavel Biryukov, had already completed the first and second volumes of Tolstoy's life, he first learned of the Shabunin trial when he stumbled across an old file. The discovery agitated Biryukov, who had worked closely with Tolstoy for the past

24 years. Biryukov confronted Tolstoy and demanded an account.[15] Reluctantly, Tolstoy agreed to provide a narrative.[16] In May, 42 years after the court-martial, Tolstoy wept as he described his failure as defense counsel, a story that began with him saying the court-martial “had much more influence [on me]...than all the seemingly more important events of life; the loss of or recovery of wealth, successes or failures in literature, even the loss of people close to me.”[17]

42 years after the court-martial, Tolstoy wept as he described his failure as defense counsel...

This article will not provide information of immediate tactical value; rather, it seeks to bring to light an obscure court-martial of profound historical and literary significance. It operates under an assumption that there is truth, wisdom, and intangible value in literature. The article also operates under the hope that understanding courts of the past will draw a common emotional experience with today’s military justice practitioners.

THE COURT-MARTIAL

Private Vasily Shabunin was a 24-year-old alcoholic with a red face and red hair.[18] He was overweight and literate, both unusual characteristics for a young enlisted soldier in the Russian army.[19] He also volunteered to enlist at a time when enlisted men suffered in a culture of hardship, made harder by their often cruel and demanding officers.[20] Shabunin spent most of his free time alone, drinking a local brandy and muttering psalms he had memorized.[21] The 65th Moscow Regiment was his second assignment, where he served as a clerk to his company commander, Captain Yasevich, a graduate of Russia’s General Staff Academy and a man of Polish descent.[22] Shabunin promoted to sergeant early in his military career, but soon after his transfer to the 65th Moscow Regiment he began to experience discipline problems. Captain Yasevich was not impressed by the literate Sergeant Shabunin, and soon had him stripped of his

sergeant rank after Shabunin stole a uniform item from a fellow soldier. Apparently Shabunin intended to sell the item so he could buy vodka. Shabunin was scheduled to have the morning off on Monday, 6 June 1866. He went to the local liquor store and bought over a quart of vodka. He spent the rest of that morning drinking, and reported for duty at 1200.[23] Captain Yasevich asked Shabunin to copy a report for the battalion commander. Shabunin accomplished the task, but took his time and drank more vodka while doing it. Upon completion, Shabunin believed it was done well and provided it to Yasevich at 1700. Yasevich crumpled up the paper and, without explanation, threw it in Shabunin’s face.[24] Whether it was the alcohol or accumulated anger bursting out, Shabunin snapped. He insulted Captain Yasevich, though the exact words are not recorded.[25] Captain Yasevich then said to his sergeant major, “He is drunk again. Lock him up, and when the day’s work is done, get the birch rods ready.”[26] Yasevich then slowly began to pull on his white suede gloves and walk away.[27] But Shabunin followed and shouted, “Why do you torment me?”[28] Captain Yasevich looked calmly at Shabunin but did not speak. Shabunin then screamed, “Silence! You’ll beat me with birch rods?”[29] He then clenched his fist and struck Yasevich in the face while shouting, “Take that in your ugly Polish mug!”[30] Captain Yasevich was knocked down and blood dripped from his nose.[31] Shabunin was promptly locked in a guarded hut and a report of the incident was prepared for Colonel Yunosha, the commander of the regiment. Colonel Yunosha ordered an investigation that lasted all of one day and included a full signed confession by Shabunin. The investigation was sent to the adjutant general. A few weeks later orders returned stating Shabunin was to be charged with violating Article 604 of the draconian Russian code of military regulations, which read “Raising a hand or weapon against a superior is to be punished by death.”[32]

Article 604 of the draconian Russian code of military regulations: Raising a hand or weapon against a superior is to be punished by death.

Within a few days Tolstoy accepted the task of serving as defense counsel and set out from his home to meet with the young Shabunin a few miles down the road.[33] When Tolstoy entered the small brick hut, Shabunin stood at attention.[34] Tolstoy later noted, however, that Shabunin had a plain face, was dull and unresponsive, and seemed bored and uninterested in the entire process.[35] Whether Shabunin's attitude reflected defeat or indifference is unclear, but he would not speak, except to complain that Captain Yasevich "leaned on me." [36] Tolstoy had no experience and no qualifications. Instead he had a client who was obviously guilty of the charged offense, who had already confessed and was not willing to participate in his own defense. Tolstoy was also outmatched by the special prosecutor sent from Moscow.[37] Nonetheless, the trial continued a few short days later, on 16 July.[38] The court's officers were Colonel Yunosha, Ensign Alexander Stasyulevich, and Lieutenant Grigori Kolokoltsov.[39] A conviction merely required a majority vote of the officers.[40] Contrary to the claims of some Tolstoy enthusiasts, his argument before the court was not impressive. [41] The argument reveals a defense counsel that was both inexperienced and in a difficult position. "There he stands before you with downcast eyes. His countenance is indifferent, composed, and dull. He expects the death penalty, yet not a muscle of his face trembles," he argued.[42] The principal point of Tolstoy's repetitive and disorganized argument was that Shabunin must be suicidal, and therefore insane, because no sane person would sign a confession of such a crime.[43] Tolstoy awkwardly tried to place this argument primarily within the frame of Article 116, which provided an acquittal on a showing of insanity, and secondarily within Article 109, which allowed for a mitigated punishment where the soldier had a dull, or slow mind.[44] It is unclear if Tolstoy understood that Article 109 did not apply where the accused acted out of anger, as Shabunin had admitted.[45] Further, Article 116 only applied where a physician diagnosed the accused with insanity, and the army had already accomplished an examination that concluded Shabunin was sane.[46]

Tolstoy had no experience and no qualifications. Instead he had a client who was obviously guilty of the charged offense, who had already confessed and was not willing to participate in his own defense.

During Tolstoy's strained argument, the pragmatically minded officers were surely thinking the obvious; that Shabunin signed the confession not because he was suicidal, but because it was true and because he was stupid. Shabunin was, therefore, promptly convicted and sentenced to death by firing squad.[47] Yet Tolstoy's argument was not a complete failure. Tolstoy's close friend Stasyulevich voted against his regiment commander for acquittal.[48]

The lack of unanimity, owing to Stasyulevich, permitted an appeal of the court's decision.[49] Consequently, Tolstoy submitted a request for pardon to St. Petersburg.[50] Unfamiliar with the appeal process, he simply sent the case to his cousin, Alexandra Tolstoy, who was a tutor to the Tsar's children.[51] Alexandra took the appeal to General Dmitri Milyutin, the minister of war, who stated he could not act on the case because Shabunin's regiment number was omitted from the request.[52]

Less than one month following the trial, Captain Yasevich had his men place a black stake in the ground near the regiment camp, and dig a pit behind the stake.[53] The soldiers of Yasevich's company formed a square around Shabunin and shaved his red hair off half of his head as a mark of shame following the conviction. On this day the half-shaved Shabunin was led inside the square along with a black clad priest. Shabunin kissed a cross extended to him by the priest.[54] The soldiers then dressed Shabunin in a shroud, blindfolded him, and tied him to the stake with his hands behind his back.[55] Yasevich then voiced a command and 12 sharp shooters took their place fifteen paces from Shabunin and fired.

Two bullets penetrated Shabunin's head and four struck his heart.[56] A local doctor inspected Shabunin to ensure the sagging body was dead.[57] Shabunin was then released from the stake and his limp body thrown into the pit. Several men shoveled dirt onto the body. When all was done the band played and the regiment marched past the grave. The men of the 65th had seen military justice in action. Tolstoy stood and watched.[58] At the time, he could not know how profoundly the experience would affect his life's greatest work, *War and Peace*. [59]

TOLSTOY:

Tolstoy was not a lawyer. He had studied law in his youth at the University of Kazan, but fell just short of a degree.[60] Additionally, a decade before writing *War and Peace*, and long before becoming an eccentric, uncompromising pacifist, he fought for Russia in Crimea against Turkish, French, and British forces.[61] Indeed, Tolstoy commanded a light battery of an artillery brigade through some of the most intense fighting the world had witnessed since Waterloo.[62] His journal and his superior officers described his performance in a way that reminds not of glory seeking Prince Andrey, from *War and Peace*, but of the novel's bumbling Pierre Bezukhov, who wanders his way to Borodino and watches as a fascinated and horrified tourist.[63] He was also a prolific author, publishing several works that dealt with broad subjects such as the nature of courage and the morality of war.[64] A frequent theme of his work was that war reveals the best and worst of men.[65]

After Russia surrendered in 1855, Tolstoy immediately went to St. Petersburg to begin his full-time writing career.[66] He took up the pen in 1863 to write *War and Peace*. [67]

WAR AND PEACE

War and Peace is difficult to summarize. The novel is perhaps best known for its size. An unabridged audiobook of *War and Peace* runs over 61 hours, causing many readers to feel as the great American novelist Henry James did when he described it as a "baggy monster." [68] But despite the length and complexity that keeps most of us away, we know that *War and Peace* is a literary achievement. A story that is quintessentially Russian and yet compelling to people all over the world today.[69]

War and Peace contains broad lessons that remain relevant today: the triumph of patience over brute force; the strength of national solidarity; the supreme importance of domestic love. One main character provides a cautionary tale of chivalry through mutual respect.[70] Another shows a man to whom the highest virtue is simply to do his duty.[71] Tolstoy's masterpiece is often considered the greatest of all time because, as [one contemporary scholar stated](#), it "is surely the greatest attempt in the history of the genre to represent and embody the branching infinity of human relations." [72] Admirers of *War and Peace* often say it feels more like real life than their own lives.[73] Aside from Tolstoy's gift to describe human experience, his work is largely admired because it is autobiographical.[74]

Generally, the work covers the lives of several wealthy Russian families from 1805 until 1812.[75] This necessarily acquaints the reader with the lives and relationships of Russian aristocrats. The story also discusses Russian conflict with France, especially at the battles of Austerlitz and Borodino, the latter being the deadliest day of all Napoleonic Wars.[76] The book later describes the French occupation and subsequent retreat from Moscow.

During the French occupation of Moscow, the eccentric protagonist Pierre Bezukhov forms a ridiculous plan to assassinate Napoleon.[77] Pierre, the awkward civilian, is wandering the streets when he is arrested by the French for arson, though he was not guilty of that charge.[78] Pierre's subsequent court-martial and punishment are given three full chapters in the book.[79] These chapters are critical to the book and transparently reflect Tolstoy's personal experience with Shabunin.

The officer organizing Pierre's court looks on him and his fellow prisoners with indifference and indolence.[80] Though Pierre is confused by the process, he notes the officers act with "unhesitating assurance," leading him to conclude he was "an insignificant chip fallen among the wheels of a machine whose action he did not understand but which was working well." [81] At length, Pierre is brought before a French general officer.[82] At first the general does not look up, but after Pierre stands in silence, the general looks at him intently and says "I know that man." [83] Pierre responds,

“You cannot know me, general, I have never seen you.”[84] The general interrupts, “he is a Russian spy.”[85]

Through Pierre, Tolstoy honors the ordinary soldier—men like Private Shabunin.

Pierre pleads for his life, pitifully calling the general “Mousier,” but is taken away to a field.[86] Pierre is sixth in a line of prisoners who are executed by firing squad, two at a time.[87] After Pierre watches in horror as the first four are killed, the soldiers then take just the fifth prisoner and not Pierre.[88] The fifth prisoner is a young man and Tolstoy describes his execution with such detail that many believe it is not the narrative of an execution in the abstract, but of Private Shabunin.[89] The helpless Pierre watches as the French soldiers awkwardly drag the body away.[90] Pierre is then taken as prisoner with the retreating French and rescued much later.[91] The court-martial and firing squad introduce Pierre to a journey of suffering that becomes a major theme of the book.

Pierre is an intellectual. A clumsy, self-contradicting intellectual, but one that nonetheless seeks answers to life’s highest questions. Pierre is one of the wealthiest men in Russia, but finds himself without purpose. Before the Battle of Borodino, he travels to the battlefield to watch as a spectator.[92] On seeing the Russian infantry, Pierre finds himself envying the enlisted soldiers—young men like Private Shabunin. As he fell asleep Pierre thought to himself, “To be a soldier, just a soldier!... [t]o enter communal life so completely, to be imbued by what makes them what they are.”[93] These men have purpose. They are men of action who know what it means to live. Pierre envies the enlisted soldiers for casting “off all the superfluous.”[94] Thus, Pierre shows reverence for the honor of military service, not out of a sense of hyper-machismo or a heightened sense of patriotism born of fear or hatred of the enemy, but rather from what we feel at the tomb of an unknown soldier. The anonymity of sacrifice; the absorption of the individual into a com-

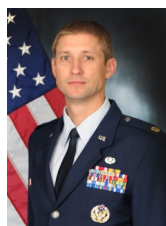
munal whole. Pierre’s thoughts remind of George Eliot’s hero Dorothea, who acknowledged she is the beneficiary of countless unhistorical acts and individuals “who lived faithfully a hidden life, and rest in unvisited tombs.”[95] Through Pierre, Tolstoy honors the ordinary soldier—men like Private Shabunin.

CONCLUSION

Throughout the 1890s Tolstoy wrote one of his last novels, *Resurrection*. [96] The story concerns Dimitri Nekhlyudov, a gentleman serving as a juror in a criminal case.[97] Nekhlyudov recognized the accused, Katusha, as a woman he seduced many years earlier, but Nekhlyudov is too ashamed to tell the judge of his personal connection and the woman is convicted and sentenced to penal servitude.[98] After the trial Nekhlyudov experiences a moral awakening and, unlike Tolstoy’s lacking performance for Shabunin, Nekhlyudov becomes relentless in his attempts to release Katusha. Nekhlyudov confronts the judge to urge delay of the sentence.[99] He hires an experienced lawyer to assist in an appeal for clemency; he personally takes the case to St. Petersburg to present an appeal to the courts, to the senate, to influential bureaucrats, and to the tsar himself.[100] Each is an example of what Tolstoy perhaps should have done for Shabunin, but did not. Nekhlyudov’s attempts end in failure, but he presses on. He is an undeterred man of action. Finally, Nekhlyudov follows Katusha to Siberia where he learns by letter that one of his petitions succeeded and Katusha’s sentence has been commuted.[101]

As the title implies, *Resurrection* is a story of redemption. Like Van Gogh painting himself as Lazarus while confined in an insane asylum, Tolstoy paints himself as Nekhlyudov. This vicarious expiation, attempted 30 years after the fact, astonishes us today just as Tolstoy’s weeping over the case to his biographer 40 years later. While we do not have the moral energy for Tolstoy’s profound sorrow, Tolstoy was cut from a different cloth and this difference is why we admire him. His work is so profound because he felt so deeply, and no experience in his long and extraordinary life was more influential than his brief time as counsel before a court-martial. [102]

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EXPAND YOUR KNOWLEDGE: EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Biography:** [Leo Tolstoy](https://www.biography.com/scholar/leo-tolstoy), <https://www.biography.com/scholar/leo-tolstoy>
- **History:** [5 Things You May Not Know About Leo Tolstoy](https://www.history.com/news/5-things-you-may-not-know-about-leo-tolstoy), <https://www.history.com/news/5-things-you-may-not-know-about-leo-tolstoy>
- **TED Ed Video:** [Why should you read Tolstoy's "War and Peace"](https://youtu.be/4dn7TEjnbPY) – Brendan Pelsue, <https://youtu.be/4dn7TEjnbPY>
- **Washington Post:** [Tolstoy's Turning Point: The Death of Vasili Shabunin](https://www.washingtonpost.com/archive/entertainment/books/1982/11/07/tolstoy-turning-point-the-death-of-vasili-shabunin/fc9f89ca-82a1-4189-8cc4-f3b1604ae06c/) (Nov 7, 1982), <https://www.washingtonpost.com/archive/entertainment/books/1982/11/07/tolstoy-turning-point-the-death-of-vasili-shabunin/fc9f89ca-82a1-4189-8cc4-f3b1604ae06c/>

ENDNOTES

- [1] See HENRI TROYAT, *TOLSTOY* 272-73 (Nancy Amphoux trans., Grove Press 1st ed. 1968) (1965).
- [2] *Id.*
- [3] WALTER KERR, *THE SHABUNIN AFFAIR* 23 (1982).
- [4] *Id.*
- [5] *Id.* The two men would have known Tolstoy had some training in the law and experience in the Army, but more importantly, they knew Tolstoy to be man of deep compassion.
- [6] A.N. WILSON, *TOLSTOY* 241 (1988).
- [7] *Id.* at 242.
- [8] WILSON, *supra* note 6, at 241-42.
- [9] See KERR, *supra* note 3, at 25-26. See also WILSON, *supra* note 6, at 242 (A.N. Wilson suggests in his novel that Tolstoy was, at least partially, motivated to accept the case by a desire to reacquaint himself with the “breed” of soldiers while deep in writing *War and Peace*).
- [10] WILSON, *supra* note 6, at 243.
- [11] See, e.g., VIRGINIA WOOLF, *THE COMMON READER* 253 (Harcourt ed., 1st ed. 1948).

- [12] Compare WILSON, *supra* note 6, at 243-44 (A.N. Wilson dismissed any idea of the court-martial having a lasting effect on Tolstoy), with TROYAT, *supra* note 1, at 305 (Henri Troyat argued that Tolstoy was “thoroughly demoralized” by the event).
- [13] KERR, *supra* note 3, at 76.
- [14] *Id.*
- [15] *Id.* at 166.
- [16] *See id.* at 166-67.
- [17] 2 PAVEL BIRYUKOV, LEV NIKOLAYEVICH TOLSTOI 93 (1911); KERR, *supra* note 3, at 168. *See also* KERR, *supra* note 3, at 12, 166 (While the aged Tolstoy was prone to exaggeration, many scholars, including Walter Kerr, opined that the Shabunin case was the primary cause of Tolstoy’s regrettable transformation from Tolstoy the artist to Tolstoy the preacher).
- [18] WILSON, *supra* note 6, at 242.
- [19] KERR, *supra* note 3, at 27, 74.
- [20] *Id.* at 27-28.
- [21] WILSON, *supra* note 6, at 242.
- [22] KERR, *supra* note 3, at 28.
- [23] *Id.* at 29.
- [24] WILSON, *supra* note 6, at 242.
- [25] KERR, *supra* note 3, at 29.
- [26] *Id.*
- [27] KERR, *supra* note 3, at 30.
- [28] *Id.*
- [29] *Id.*
- [30] WILSON, *supra* note 6, at 242.
- [31] KERR, *supra* note 3, at 30.
- [32] WILSON, *supra* note 6, at 242.
- [33] *See* KERR, *supra* note 3, at 31-34.
- [34] 2 BIRYUKOV, *supra* note 17, at 96.
- [35] *Id.* at 96-97.
- [36] *Id.*
- [37] KERR, *supra* note 3, at 45.
- [38] *See id.* at 39.
- [39] *Id.* at 46. It is worth noting here that the court-martial panel consisted of the same men who sought Tolstoy’s appointment as defense counsel. The historical sources provide little explanation for this, except that the panel was appointed by the regiment commander among officers in the regiment. *See generally* Wikipedia, *Judicial Reform of Alexander II*, https://en.wikipedia.org/wiki/Judicial_reform_of_Alexander_II (as of Apr. 3, 2018). It has been suggested that Tolstoy felt confident about his case, in part, because he was friends with two of the three officers on the panel. It has been further suggested that Kolokoltsov voted together with his commander to further his career. *See* KERR, *supra* note 3, at 57. However, the historical record is too thin to provide satisfactory explanation of these details.
- [40] *See* KERR, *supra* note 3, at 57.
- [41] *See* James Lieber, *Tolstoy’s Turning Point: The Death of Vasili Shabunin*, THE WASHINGTON POST, (Nov. 7, 1982), https://www.washingtonpost.com/archive/entertainment/books/1982/11/07/tolstoys-turning-point-the-death-of-vasili-shabunin/fc9f89ca-82a1-4189-8cc4-f3b1604ae06c/?utm_term=.d5bdfcf1b1a8.
- [42] KERR, *supra* note 3, at 49.
- [43] Although Tolstoy’s defense was weak, it is worth noting that some scholars have bolstered Tolstoy’s claim of insanity. Specifically, the 1911 Encyclopaedia Britannica entry on Tolstoy states that Shabunin likely sought death to escape his miserable life, noting that he was “persuaded that death was better than the living agony of exile.” XXVI THE ENCYCLOPAEDIA BRITANNICA 1056 (11th ed. 1911).
- [44] KERR, *supra* note 3, at 48-49.
- [45] *Id.* at 48.
- [46] *See* WILSON, *supra* note 6, at 242-43. Article 604 of the code had only one permissible punishment: death.

- [47] KERR, *supra* note 3, at 56.
- [48] *Id.* at 57. There is no surviving record to explain the decision of Kolokoltsov in voting to convict, after seeking Tolstoy's assistance. Similarly, Stasyulevich did not record his reason to vote for acquittal. It seems likely that both men desired procedural fairness, and that there may have been substantial pressure to vote together with the regiment commander. Just one year after the Shabunin trial, Stasyulevich committed suicide by drowning himself. One evening he put on a thick fur coat and walked into a deep river, never to be seen again. It is not known whether his involvement in the Shabunin trial is related to his later suicide. *Id.* at 87.
- [49] *Id.* at 87.
- [50] See WILSON, *supra* note 6, at 243.
- [51] KERR, *supra* note 3, at 58.
- [52] *Id.* at 69. Some scholars, including Walter Kerr, argue that a systematic conspiracy was in place to ensure poor Shabunin's death and Tolstoy's defeat. The argument is unconvincing. Kerr primarily points to minor errors in the case file and infers nefarious intent from these simple mistakes. No doubt the military justice system of 1866 in Russia was imperfect, but the argument for conspiracy is strained. The process ran its course and it was unlikely Tolstoy could have done anything to change the outcome.
- [53] KERR, *supra* note 3, at 72.
- [54] *Id.*
- [55] A shroud is a formal white shirt.
- [56] 2 BIRYUKOV, *supra* note 17, at 93.
- [57] KERR, *supra* note 3, at 73.
- [58] There is some scholarly debate about whether Tolstoy was actually present to watch the execution. See KERR, *supra* note 3, at 73. Very little evidence exists either way, but Tolstoy's friend and biographer, Pavel Biryukov, expressly states in the first authoritative biography of Tolstoy that Tolstoy was present. See 2 BIRYUKOV, *supra* note 17, at 93.
- [59] LEO TOLSTOY, WAR AND PEACE (Louise and Aylmer Maude trans., Oxford University Press, 1932) (1867) [hereinafter WAR AND PEACE].
- [60] See WILSON, *supra* note 6, at 48.
- [61] *Id.*
- [62] See *id.* at 104, 117
- [63] *Id.* at 117.
- [64] *Id.* at 81.
- [65] Tolstoy's diary from the Crimean War also reveals a fascination with military discipline. He wrote lengthy descriptions of punishments he witnessed: running the gauntlet, thrashing with an iron ramrod and other physical violence. WILSON, *supra* note 6, at 111-12.
- [66] *Id.* at 125.
- [67] *Id.* at 217-18.
- [68] HENRY JAMES, THE TRAGIC MUSE 93 (1921).
- [69] A.N. Wilson explains that War and Peace is such a significant part of the Russians' "emotional fabric" that even Stalin would not suppress it. WILSON, *supra* note 6, at 234. Russians mysteriously continued to read and celebrate War and Peace while all other literary works, including Dostoyevsky's, were ignored or suppressed by Bolsheviks. *Id.* Wilson further suggests that "for everyone who has enjoyed the experience of being completely lost in the world of War and Peace, [the] scenes are real life. Putting down the novel and returning to the everyday concerns of 'real life' is, in the experience of almost all readers of the book, a turning to something paler, less true than Tolstoy's art itself." *Id.* at 209. When it was published, Tolstoy knew, just as Dante and Shakespeare knew in their own time, that he had created a masterpiece. *Id.* at 208.
- [70] The fictionalized Napoleon admires Prince Andrey's courageous behavior in battle at Austerlitz. After watching Andrey fall during an aggressive charge, Napoleon later finds Andrey and orders the highest medical care. Once Andrey is recovered, Napoleon releases him in a demonstration of chivalry. Chivalry is a fundamental principle of the law of war, but chivalry is based on a mutual respect among combatants. Napoleon respects Andrey, but Andrey does not respect the French. Indeed, Andrey challenges the very idea of chivalry when, just before the Battle of Borodino and seven years after his wound, he argues that Russians should not take any French prisoners. He mocks chivalry by saying it turns war into a game. By this time Andrey has lost his father and his estate to the French advance. His anger causes him to forget he was rescued by the French, and blinds him to any sense of reciprocal humanitarian treatment.

- [71] Through Nikolay's experiences, *War and Peace* contains several examples of military discipline, including Nikolay's friend and commander, Major Denisov. While at a ruined German village, Denisov's men are dying of disease and hunger, so Denisov steals food from another regiment. Denisov is threatened with court-martial and then admits himself to the infirmary. In pitiful circumstances, Denisov composes a request for pardon and asks Nikolay to present his request to Tsar Alexander. After significant trouble, Nicolay reaches the tsar, but Tsar Alexander says he cannot grant the request because "the law is mightier than I." Nikolay accepts the tsar's decision and admires him for it.
- [72] James Wood, *War and Peace: Many Stories, Many Lives*, THE GUARDIAN (Aug. 1, 2014, 12:00 PM), <https://www.theguardian.com/books/2014/aug/01/war-and-peace-stories-lives-leo-tolstoy-james-wood>.
- [73] WILSON, *supra* note 6, at 209. A.N. Wilson describes the writing of Tolstoy by saying: "We all know that there is such a thing as life, that we are alive, that the world is there, full of sights and sounds. But, when we read Tolstoy for the first time, it is as if, until that moment, we had been looking at the world through a dusty window. He flings open the shutters, and we see everything sharp and clear for the first time." *Id.* at 19.
- [74] Nowhere is the relation between Tolstoy's life and his fiction more transparent than it is in *War and Peace*. Prince Andrey's cold feelings toward his wife, Nikolay's foolish gambling, Pierre's inconsistent principles; these are not fictional characters, they are Tolstoy himself.
- [75] See WILSON, *supra* note 6, at 244.
- [76] *Id.* at 21. Napoleon himself described Borodino as the "most terrible of all his battles." *Id.*
- [77] See 3 WAR AND PEACE, *supra* note 59, at 138.
- [78] *Id.* at 148.
- [79] See generally *id.* at 185-96.
- [80] *Id.* at 188.
- [81] *Id.* at 189.
- [82] *Id.* at 190.
- [83] *Id.*
- [84] *Id.*
- [85] *Id.*
- [86] *Id.* at 190, 192.
- [87] *Id.* at 192-93.
- [88] *Id.* at 193-94.
- [89] See WILSON, *supra* note 6, at 243.
- [90] The narrator explains that Pierre is saved by the general because while speaking with the general the two men then looked at each other's eyes, not as an indifferent prosecutor and defiant prisoner, but as humans.
- [91] See WAR AND PEACE, *supra* note 59, at 196.
- [92] *Id.*
- [93] *Id.*
- [94] *Id.*
- [95] 4 GEORGE ELIOT, MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE 371 (Harper & Brothers 1873) (1871).
- [96] KERR, *supra* note 3, at 116-118.
- [97] LEO TOLSTOY, RESURRECTION Book 1, Chapter V (Louise Maude, trans. 1999) (1899).
- [98] *Id.* at Book 1, Chapter IX. The similarities between the Shabunin trial and Resurrection are unmistakable. Among other similarities, the woman accused is in the same social status as Shabunin and is a heavy drinker. Further, there are three judges at the court, and one of them is gloomy, just as Stasyulevich. These and other similarities caused Walter Kerr to conclude the connection was unmistakable. KERR, *supra* note 3, at 118.
- [99] RESURRECTION, *supra* note 116, at Book 1, Chapter XXIV.
- [100] *Id.* at Book 1, Chapter XXV.
- [101] *Id.* at Book 3, Chapter XXIII.
- [102] Tolstoy's deep feeling may, in part, be explained by the suffering he experienced in life. Tolstoy had no memory of the face of his mother. She died while Tolstoy was an infant, without a photograph or painting. Tolstoy also lost children, fought in bloody combat, and was constantly absorbed in anxiety over his own sinful nature.

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New Operations Law Training for a New Chapter in Colombian History

BY LIEUTENANT COLONEL STEVEN G. LOERTSCHER AND LIEUTENANT COLONEL JENNIFER M. SANCHEZ

In a landmark ceremony on 27 June 2017, the Revolutionary Armed Forces of Colombia (the FARC) [officially disbanded](#), handing over the last of 7132 weapons, and giving the United Nations coordinates to more than 900 weapons caches spread around the country.[1] “Now we are just one people, just one nation,” said [Colombian President Juan Manuel Santos](#). “Long live peace.”[2]

The ceremony, the culmination of Colombia’s historic peace agreement reached with the FARC in late 2016, creates a remarkable opportunity to bring more than 50 years of internal conflict to a peaceful resolution. The situation in Colombia remains precarious, however, given the presence of other armed insurgent groups, criminal organizations, and drug traffickers that remain at large.

The Colombian military will continue to play a critical role in addressing these remaining challenges, which will present significant legal implications to Colombian commanders and their legal advisors. Attorneys from the [Defense Institute for International Legal Studies](#) (DIILS), Naval Station Newport, Rhode Island, and the office of the Staff Judge Advocate, [12th Air Force](#) (Air Forces Southern) have played a significant role in helping to prepare the Colombian military for these challenges by developing a new operations law course to help the Colombian military successfully navigate this complex legal and operational environment.

THE COLOMBIAN CONFLICT

The [conflict in Colombia](#) originated in the 1950s and 1960s in response to government oppression of popular progressive movements.[3] The [FARC](#) was largely inspired by the 1959 Cuban Revolution and was a self-proclaimed Marxist-Leninist organization committed to overthrowing the Colombian government and the redistribution of wealth.[4] The FARC began as a small group of peasants but grew to be a formidable military power in the 1980s when it began to use the drug trade to finance its activities.[5]

Peace talks between the FARC and the Colombian government first began in 1985 and resumed in 1999, but were unsuccessful because of the FARC’s territorial and financial gains.[6] The FARC continued to increase the scale of their operations over this time period, particularly in drug trade and kidnappings.[7] By 2008, the government had begun to make headway in its campaign against the FARC and renewed peace negotiations became a real possibility.[8] President Santos initiated peace talks again in 2010, and in 2016 an agreement was finally reached.[9] When the Colombian people were given the opportunity to ratify the accord by a plebiscite vote on 2 October 2016, the accord was narrowly defeated by 50.2 percent, sending the parties back to the negotiation table.[10] On [30 November 2016](#), Colombia’s Congress ratified a new version of the agreement, bypassing the voters the second time around.[11]

A COMPLEX OPERATIONAL AND LEGAL ENVIRONMENT

For many years, the Colombian military struggled with the legal complexity of fighting a war within its own borders. For the most part, Colombian commanders operated without the benefit of embedded operational law support. In 2004, in an effort to address concerns within Colombia and the international community, the Colombian Air Force began to assign some operations-related responsibilities to designated *Aseores Jurídicos Operacionales* (Operational Legal Advisors—AJOPes).[12] In 2006, another policy was issued further delineating the functions of these attorneys and the prerequisites for service in these positions.[13]

The other branches of the Colombian military shortly followed suit, with the Navy establishing its operational law program in 2007, and the Army in 2008.[14] By 2013, the Air Force had established 18 billets for operations law attorneys at the Aerial Combat Commands, the Aerial Groups, Air Transport Command, and the Military Aviation School. In 2013, the Navy had 11 operations law attorneys assigned at the headquarters, coast guard commands, brigade commands, and the marine infantry battalions. That same year, the Army had dedicated 140 legal advisors to operations law, assigning them to both operational and tactical units.[15]

Providing operations law legal advisors to commanders throughout the chain of command was a giant step forward....

Providing operations law legal advisors to commanders throughout the chain of command was a giant step forward, but it quickly became apparent that this nascent cadre of operational lawyers would require additional resources in order to achieve the desired effect on operations. Most of these AJOPes were new attorneys and newer officers, receiving little operational law training before assuming duties as legal advisors to commanders on the front lines. In 2015, with the potential of peace on the horizon, the Colombian military asked DIILS to create a new course

that would prepare the AJOPes to more effectively advise their commanders in the emerging operational environment.

THE ASSESSMENT

In April 2015, Mr. John McLoughlin, DIILS' director for activities in Central and South America, traveled to Bogotá, Colombia, to gather information that would help develop a new course for the Colombian Ministry of Defense (MOD). To help with the assessment, Mr. McLoughlin invited Lieutenant Colonel Steve Loertscher, then the Chief of Operations Law at 12th Air Force. Lt Col Loertscher had deployed to Colombia in 2011 as the legal liaison officer for the Staff Judge Advocate of United States Southern Command (USSOUTHCOM), where he worked closely with the MOD to strengthen its military justice, operations law, and human rights programs.

Most of the AJOPES were first-assignment attorneys who struggled to adapt to military service....

During the trip, Mr. McLoughlin and Lt Col Loertscher met with the MOD Human Rights Directorate (the Directorate), several AJOPes, senior military attorneys, and general officers to identify current challenges to providing operational law advice. The team quickly identified several difficulties. Most of the AJOPes were first-assignment attorneys who struggled to adapt to military service, understand the operational environment, and practice a specialized area of law they had never studied during their legal education. To complicate things further, these young lieutenants were often intimidated by having to instantly advise their commanders, often general officers, on issues arising in the heat of combat. AJOPes were often excluded from the early stages of operational planning, putting them in the unenviable position of advising against a course of action only after many hours had been invested in its planning. Some commanders perceived their AJOPes as obstacles rather than valued members of their staff.

Aware of these problems, the Directorate identified their desired outcomes for the course. First and foremost, they wanted the course to strengthen the relationships between commanders and their AJOPES. Second, they wanted the course to help the AJOPES apply legal principals to situations they would likely encounter in the field. Finally, they wanted the course to pave the way for missions the Colombian military might conduct after their internal conflict was resolved, which would include fighting remaining guerilla groups such as the National Liberation Army (Ejército de Liberación Nacional or ELN) and supporting law-enforcement efforts against well-funded and well-armed criminal and drug trafficking networks.

Preparing AJOPES to grapple with the legal implications of this operational transition would be critical. One of the principal duties of AJOPES during operational planning has been to advise commanders on which legal framework should apply to the operation. Since the war in Colombia is recognized as a Non-International Armed Conflict (NIAC), both the Law of Armed Conflict (LOAC) and International Human Rights Law govern Colombia's military operations against the insurgents.

For aerial operations, the legal analysis is often fairly straightforward: an offensive strike is permitted as long as the intelligence supports the conclusion that the standard LOAC principles of distinction, military necessity, proportionality, and humanity are satisfied. Since the operations are happening within Colombia's own borders, proportionality is often the biggest challenge. Under proportionality, AJOPES must be prepared to help commanders determine whether the anticipated military advantage from the strike is worth the risk of potential Colombian citizen casualties.

For land operations, AJOPES face an even greater challenge, because they must help combat units be prepared for sudden changes in the field. For example, soldiers supporting national police counter-drug units during a raid on a drug lab may suddenly find themselves in a full-on firefight with FARC or ELN fighters. This could require switching instantly from a use of force model centered on self-defense principles

to a more permissive situation during which pursuit and offensive operations could be appropriate. AJOPES would need to advise operators during planning, train soldiers on complex rules of engagement (ROE), and then be on hand to advise commanders during execution.

To be successful, the course would need to help AJOPES and commanders accomplish all of those things: no small feat for a one-week course!

BUILDING THE COURSE

As Mr. McLoughlin and Lt Col Loertscher prepared to depart Colombia, they presented their proposed concept for the new course to the Directorate. Commanders would be invited to attend the course with the AJOPE from their staff. The course would consist of a one-day substantive overview of International Humanitarian Law and International Human Rights Law. This review would be followed by a practical exercise based on a factual scenario modeled after Colombia's current operational environment.

Mission execution scenarios were largely based on reports of real-life incidents collected by the Colombian Army Human Rights School....

During the exercise, the commanders and AJOPES would work together to use the Colombian version of the Joint Operational Planning Process (JOPP)[16] to develop an operational plan, which they would brief to an officer playing the role of a joint force commander. The teams would then be presented with specific situations that could arise during the execution of the plan, and would discuss their proposed legal and operational solutions. These mission execution scenarios were largely based on reports of real-life incidents collected by the Colombian Army Human Rights School, which shared them with DIILS for inclusion in the course. The next phase of the course would be a second exercise, this time based on the likely environment in Colombia after a peace deal with the FARC was in place.

The Directorate loved the concept, and asked DIILS to present the first iteration in August 2015, less than four months later. While DIILS has many off-the-shelf presentations and reference materials for teaching operations law subjects in a traditional classroom setting, much of the envisioned course would need to be built from scratch.

Mr. McLoughlin and Lieutenant Brigham Fugal, a U.S. Navy Judge Advocate (JAG) and International Operations Officer at DIILS, led the effort to build and prepare course materials. Mr. McLoughlin wrote a detailed exercise scenario about a fictionalized country modeled after Colombia's history and likely post-conflict situation. In addition to substantive presentations on the Law of Armed Conflict and International Human Rights Law, the finished product included a brief history of the fictional conflict, maps, intelligence briefings, and mission execution scenarios that would give participants an opportunity to apply legal concepts to battlefield situations. All participants in the course would receive a bound copy of the course materials to use as a reference once they returned to their units.

The team would need attorneys with significant operational experience who could discuss legal concepts and share lessons learned from advising commanders.

ASSEMBLING THE TEAM AND EXECUTING THE COURSE

In addition to creating brand new course materials, DIILS would need to assemble a different kind of team to make the course a reality. The Colombians would be investing heavily in the course, taking not only lawyers but commanders away from their units to participate. The team would need attorneys with significant operational experience who could discuss legal concepts and share lessons learned from advising commanders. The team would need to be joint to match the anticipated audience. Finally, even though simultaneous translation would be available, Spanish-speakers with experience in Latin America would contribute cultural literacy to the effort.

DIILS executed the first course in August 2015. The team included seven U.S. JAGs: three from the U.S. Marine Corps, two from the Army, and one each from the Air Force and Navy.^[17] As the Air Force member of the team, Lt Col Loertscher had a chance to watch the course he helped create become a reality. It was immediately apparent that the Colombian military intended to take full advantage of the training opportunity for its AJOPes and commanders. More than 20 commanders attended, including three general officers, each bringing their operations law advisor.

Spending several days together helped commanders appreciate how much their young legal advisors knew about operational law, and gave the AJOPes a chance to practice their craft in a low-threat environment. The end result: AJOPes were better prepared to confidently advise their commanders, and commanders were more ready to listen to their AJOPes. At the end of the course, one commander said, "I used to think that my lawyer was an obstacle I had to overcome in order to accomplish the mission. The course has helped me understand better how they can help me do my job better."

At the close of DIILS' first offering of the course, the senior Colombian Army (COLAR) participant, a two-star general, took advantage of the opportunity to give all of the COLAR AJOPes a pep talk. He praised them for their diligence and expertise, told them how important their work was, encouraged them to network with each other, and asked them to keep up the good work. By the end, he had all of the AJOPes pumped up and shouting "¡Fe en la causa!" ("Faith in the cause!"—the Colombian military's slogan at the time). It was a good sign that the course was off to a great start.

DIILS executed the course twice in 2016 and once in 2017, with Lt Col Jennifer Sanchez serving as an instructor. DIILS incorporated feedback from students to make improvements to the course during each iteration. For example, DIILS built a concept of operations briefing template to make preparing and delivering the briefings more efficient. DIILS took advantage of the extra time gained by this efficiency, creating additional space to discuss scenarios during the execution phase of the exercises. Finally, DIILS augmented the intelligence reports for the planning exercise by adding

additional potential targets and giving participants more opportunities to analyze the legal and operational possibilities of the operation.

More than 100 Colombian commanders and legal advisors from the Colombian Army, Air Force, and Navy have attended the course.

So far, more than 100 Colombian commanders and legal advisors from the Colombian Army, Air Force, and Navy have attended the course. Among the graduates was a Colombian Air Force captain who was recognized as a superior performer when he participated with 12 AF (AFSOUTH)/JA in USSOUTHCOM's PANAMAX[18] exercise just four months after he attended the course. In 2018, Colombia will not be the only country to have benefited from the training. This year, DIILS plans to offer the course again in Colombia and in Trinidad and Tobago, giving the project transregional significance.

OPERATIONS LAW IN A NEW COLOMBIAN ERA

Subsequent developments in Colombia indicate that the course was delivered right on time. Between the first and second offering of the course, the Colombian government made a dramatic policy shift. In November 2015, the Colombian Government demonstrated a willingness to use military force against a group that had previously been treated solely as a drug trafficking organization. The target: the Urabeños (aka "Clan Usuga"), a criminal group consisting largely of former members of a guerilla group who left their politically-gearred organization to focus on money-making criminal enterprises.[19]

The director of the Colombian National Police said the [bombing](#) targeted an Urabeños camp that "could have hosted an 'amalgam' of forces from the Urabeños and rebel group the National Liberation Army (ELN)."[20]

The policy became more defined in May 2016, when Luis Carlos Villegas, the Colombian Minister of Defense, announced that Clan Usuga and two other criminal organizations would now be classified as "organized armed groups," a status that would allow authorities to use "[all of the state's force](#), without exception" to bring the groups under control.[21] This new framework for placing groups in this status was outlined in the Ministry of Defense's "Permanent Directive No. 15," which was released on 22 April 2016.[22]

In a nutshell, the Directive states the use of military force is justified against groups that: (1) engage in violence against Colombian police and military forces; (2) have a capacity to inflict a level of armed violence in excess of public disturbances and internal tension; (3) have an organized chain of command; and (4) and exert control over areas of national territory.[23] These factors were derived from a decision handed down in the International Criminal Tribunal for the Former Yugoslavia in the [case against Dusko Tadić](#), who was convicted of war crimes committed during the Bosnian conflict.[24] The directive also sets forth the process for identifying which groups qualify for this special treatment, which includes ratification of the designated groups by the Colombian National Security Council.[25]



Download PDF Documents:

- [Dirección de Derechos Humanos](#), Ministerio de Defensa Nacional, 2 Boletín Correo de la ODA 5 (2003), https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos_de_Interes/Derechos_Humanos/correo_oda/correo_oda02.pdf
- [Colombian Ministry of National Defense](#), Permanent Directive No. 15, https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf

The move foreshadowed Colombia's approach to dealing with one of its principal worries about the probable post-conflict situation: the very real possibility that criminal groups could recruit former guerilla fighters and move to fill the power vacuum that would appear after the FARC began to demobilize.

Those concerns appear to have been justified. Shortly after the peace accord was reached, both Colombian President Santos and Mr. Todd Howland, the Colombian representative for the United Nations High Commissioner for Human Rights, reported that criminal groups were already moving to [fill in spaces the FARC was leaving behind](#).^[26] On 25 January 2017, Colombian Attorney General Néstor Humberto Martínez announced that the Urabeños were offering FARC dissidents \$1.8 million pesos (about \$600) to [join their ranks](#) and help them take over the FARC's abandoned drug trafficking and illegal mining operations.^[27]

For Colombia's AJOPES, the policy shift will require an even more nuanced legal analysis as they advise military commanders called upon to execute operations against organized armed groups. Fortunately for AJOPES and commanders alike, the exercise scenarios created by DIILS

contemplated this possibility, and provided an opportunity to consider the legal implications of the policy. In the third offering of the course, one participant marveled at the prescience of the exercise scenario. "This is exactly the situation we find ourselves in now," he said. "This is exactly what we need."

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EXPAND YOUR KNOWLEDGE:

[EXTERNAL LINKS TO ADDITIONAL RESOURCES](#)

- **BBC:** [Colombia Profile – Timeline](#) (June 2018), <https://www.bbc.com/news/world-latin-america-19390164>
- **National Geographic:** [After Five Decades of Civil War, Colombia's Healing Begins](#) (Jan 2018), <https://www.nationalgeographic.com/magazine/article/colombia-civil-war-farc-guerillas-peace>
- **PBS:** [FARC Drops Its Weapons, but Colombia's Deadly Conflict Goes On](#) (Mar 2018, Video 9:22), <https://www.pbs.org/newshour/show/farc-drops-its-weapons-but-colombias-deadly-conflict-goes-on>
- **Time: Violentology:** [A Manual of the Colombian Conflict](#) (Oct 2012, Video 4:07), <https://time.com/3792184/violentology-stephen-ferry-documents-the-colombian-conflict/>

ENDNOTES

- [1] Chris Kraul, *Half a Century of Conflict in Colombia Comes to a Close as FARC Rebels Disarm*, L.A. TIMES, 27 June 2017, <http://beta.latimes.com/world/mexico-americas/la-fg-colombia-disarmament-20170627-story.html>.
- [2] *Id.*
- [3] *The Colombian Peace Process Explained*, <http://www.telesurtv.net/english/telesuragenda/The-Colombian-Peace-Process-Explained-20141121-0047.html>.
- [4] Amy Zalman, *A Profile of the Colombia FARC Guerrilla Group* (26 April 2016), <http://terrorism.about.com/od/groupsleader1/p/FARC.htm>.
- [5] THE GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, *THE FARC PEACE PROCESS: USHERING IN A NEW CHAPTER IN COLOMBIA'S HISTORY OF CRIME AND VIOLENCE?* (1 September 2016), <http://globalinitiative.net/wp-content/uploads/2016/09/meeting-summary-farc-peace-agreement-1-september-2016.pdf>.
- [6] *Id.* at 2.
- [7] *Id.*
- [8] *Id.*
- [9] *Id.*
- [10] Nicholas Casey, *Colombia's Congress Approves Peace Accord with FARC*, N.Y. TIMES, 30 November 2016, <https://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html>.
- [11] *Id.*
- [12] DIRECCIÓN DE DERECHOS HUMANOS, MINISTERIO DE DEFENSA NACIONAL, 2 BOLETÍN CORREO DE LA ODA 5 (2003), https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos_de_Interes/Derechos_Humanos/correo_oda/correo_oda02.pdf. In typical military fashion, each service has its own acronym for these operational law attorneys. “AJOPE” is used by the Colombian Army, while the Air Force uses “ASEJO” and the Navy uses “AJUROR.” For simplicity’s sake, “AJOPE” will be used here.
- [13] *Id.*
- [14] *Id.*
- [15] *Id.*
- [16] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING (11 August 2011). JOPP is a seven-step planning methodology that begins upon the receipt of a warning order (WARNORD), planning order (PLANORD) or alert order (ALERTORD), and results in an Operational Plan (OPLAN) or Operational Order (OPORD). The seven JOPP steps are: (1) Initiation, (2) Mission Analysis, (3) Course of Action (COA) Development, (4) COA Analysis/Wargaming, (5) COA Comparison, (6) COA Approval, and (7) Plan or Order Development.
- [17] The members of the first DIILS team were: Col Ian Brasure, USMC; Lt Col Patrick Knight, USMC; Lt Col Steve Loertscher, USAF; MAJ Melissa Van Buhler, US Army; MAJ Carlos Calderon, US Army; Maj Carina Cuellar, USMC; and LT Brigham Fugal, USN. Capt Ravi Kambhampaty, US Army, also participated as USSCOUTHCOM/JA’s liaison officer to the US Embassy in Bogotá.
- [18] PANAMAX is an annual exercise sponsored by U.S. Southern Command that increases the ability of nations to work together and test their responsiveness in combined operations.
- [19] The guerilla group was known as the Autodefensores Unidos de Colombia (United Self Defense Forces of Colombia), which competed against the FARC for influence in the late 1990s. *See* Los Urabeños, <http://www.insightcrime.org/colombia-organized-crime-news/urabenos-profile>.
- [20] David Gagne, *Aerial Bombing Possible Game Changer for Colombia BACRIM* (5 November 2015), <http://www.insightcrime.org/news-analysis/aerial-bombing-possible-gamechanger-for-colombia-bacrim>.
- [21] The other groups so designated were “Los Rastrojos” and “Los Puntillos.” *See* Sam Tabory, *Colombia Government Reclassifies BACRIM, Paves Way for Airstrikes* (9 May 2016), <http://www.insightcrime.org/news-briefs/colombia-government-reclassifies-bacrim-airstrikes>.
- [22] COLOMBIAN MINISTRY OF NATIONAL DEFENSE, DIRECTIVA PERMANENTE 15, SETTING FORTH THE GUIDELINES OF THE NATIONAL MINISTRY OF DEFENSE FOR CHARACTERIZING AND ENGAGING ORGANIZED ARMED GROUPS (22 April 2016), https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf.
- [23] *Id.*

- [24] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia 2 October 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. The factors were also adopted by the Colombian Constitutional Court in a 2007 case arising from the Colombian conflict. See C.C., 25 April 2007, Sentencia C-291/07 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2007/c-291-07.htm>.
- [25] *Id.*
- [26] Mimi Yagoub, *Santos Recognizes Criminal Groups Are Moving into FARC Areas* (3 November 2016), <http://www.insightcrime.org/news-analysis/santos-recognizes-criminal-groups-are-moving-into-farc-areas>.
- [27] Tristan Clavel, *Colombia's Urabeños Recruiting Dissidents from FARC Peace Process* (26 January 2017), <http://www.insightcrime.org/news-briefs/colombia-urabenos-recruiting-dissidents-farc-peace-process>.

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Fighter Feedback:

Utilizing F-15 Debrief Techniques to Improve Courtroom Performance

BY MAJOR BENJAMIN F. MARTIN AND MAJOR MARK C. PERRY

The fighter flying community reinforces lessons learned in the air through an immediate, rigorous, peer-led tactical debriefing process.

While our perspectives differ, fighter pilots and prosecutors actually have quite a bit in common. Certainly, the view from the cockpit of an F-15C Eagle differs from the vantage offered by the first chair in a general court-martial, but each individual requires a high level of preparation to perform and benefits from a healthy dose of confidence. Each community grows these self-assured individuals through a mixture of schoolhouse education, focused training, and real-world experience. The fighter flying community, however, reinforces lessons learned in the air through an immediate, rigorous, peer-led tactical debriefing process. Fighter pilots understand that the post-sortie debrief is the greatest opportunity to draw out errors that occurred during the sortie, craft precise solutions to the errors, and internalize the lessons to prevent future reoccurrence. Conversely, following a Judge Advocate (JAG) courtroom engagement, tactical deep dives are secondary to a strategically-focused post-trial hot wash with JAG and investigative leadership. While a JAG strategic hot wash may have its place, the JAG Corps should learn from our fighter pilot brethren and adopt the post-sortie debrief methodology

following courts-martial to improve trial litigation skills. This article will explore the debrief process utilized by fighter pilots, compare the process to the JAG approach of “lessons learned” after courts-martial, and offer a path forward for the JAG Corps to adopt these debriefing techniques.

FIGHTER FEEDBACK

Lesser known among the celebrated aspects of the fighter culture is the art of the debrief. Aerial dogfighting is a dynamic, adrenaline-pumping affair, and young pilots often land without a clear understanding of what just happened to them in the air. This fog is familiar to young JAGs, as the dynamism of courts-martial offers its own opportunity for disorientation and confusion. In order to allow pilots to grow in their understanding of these chaotic events, junior personnel learn how to lead a post-sortie debrief. These skills are valuable throughout their career as flyers progress through the spectrum of engagement from one-on-one dogfighting, known as basic fighter maneuvers (BFM), to large force employments. Junior pilots learn to debrief approximately a year into their first assignment in an operational squadron,

usually during their two-ship flight lead upgrade. Initially, Airmen face tempered expectations, and are expected to identify a handful of valid errors, show the ability to hone in on the root cause of a particular error, and learn from the process. At the other end of the spectrum, experienced weapons officers conduct probing debriefs and are trained to identify the exact split-second decisions that represent the difference between victory and death. The fighter community knows that no pilot is ever “too good” to benefit from a thorough debrief.

The frequency of these reviews reinforces their important role in a pilot’s development. Debriefings occur after every sortie, with only limited exceptions. Notably, the length of the sortie bears no relation to the decision to debrief. In fact, shorter sorties often afford an opportunity for a more thorough debrief. For example, BFM might consist of a 50 minute sortie with about 6-10 minutes of actual fighting. These BFM sets move quickly and burn a lot of gas. However, a debrief of this quick sortie could take upwards of four hours, as each segment of the engagement receives 30 to 45 minutes of review and consideration. These briefings can make for an extremely long duty day. Nonetheless, debriefs are only pushed to the following day if a pilot has something extremely important he or she cannot miss. This exception typically only applies to commanders and more senior pilots, and only in rare circumstances. No post-sortie responsibility is more important to a junior pilot than the debriefing. The team reconvenes an hour after the sortie to allow the pilots to review their tapes and flight data in order to have the best understanding of what occurred during the sortie going into the debrief.

FIVE KEY RULES

When the participants enter the debrief room, they follow five key rules of engagement.

- **FIRST**, no one comes and goes once the doors close. The debriefing is sacred, and disruptions are highly frowned upon. Also, it’s just impolite. Breaks are allowed but everyone must return promptly to continue the debriefing.

- **SECOND**, rank doesn’t influence the debriefing. The flight lead might be a Lieutenant debriefing a Colonel. Everyone is learning, and lessons can come from anyone.
- **THIRD**, and in a similar vein, hurt feelings are not allowed. Direct criticism is not fun to receive, especially from more junior personnel. However, debriefing participants know that the purpose of the debriefing is to help keep each other alive on their wingman’s worst day in the air. Nothing in the debriefing is personal, and frankly, bruised egos are better than losing a wingman.
- **FOURTH**, superfluous attendees are discouraged. Many pilots simply do not learn well when they are surrounded by their buddies or know that their commander is watching the process. The debrief is a sacred time to learn and any impairment to an individual being receptive to instruction is avoided. Typically, attendees are limited to only those on the sortie. However, debriefings are almost always open to others and younger pilots are encouraged to sit in on debriefings as much as they can. Practically speaking, the room could have only four or five participants, or grow exponentially for multi-layered engagements.
- **FIFTH**, the debriefing is an opportunity to find and fix a problem and finish with the right solution. It’s not an opportunity to exchange pats on the back or administer ego boosts. Pat folks on the back at the base Club later.

The flight lead begins the debrief with a brief reconstruction of events, and then directs the team to an overarching objective.

With these rules in the back of their minds, the flight lead directs the debriefing by following a time-tested methodology. The flight lead begins the debrief with a brief reconstruction of events, and then directs the team to an overarching objective. The debrief objective varies by the type and size of the engagement, and could focus more narrowly on tactical

failure or take an expanded focus to review the strategy employed during the fight. The flight lead then proposes a series of debrief focal points (DFPs) for further review and consideration. It's unnecessary and overwhelming to debrief every error. A DFP represents a suspected error that either negatively impacted the result of the engagement, or could have negatively impacted the engagement if the opponent fully capitalized on the situation. Essentially, these focal points represent areas where the "train came off the tracks" and the fight never fully recovered. However, the process is meant to be flexible, and the flight lead can adjust their DFPs as information develops during the debriefing. For example, let's suppose that an objective during an engagement was for the offensive pilot to maintain a position of advantage during a dogfight. The flight lead proposes as a DFP for further review of the first "jink," the maneuver the defensive pilot executed to avoid being shot. In this scenario, the offensive pilot would need to respond in turn to maneuver his aircraft to retain a position of advantage. If that didn't happen, that's an error appropriate for continued analysis.

The flight lead utilizes a five-step process to review each suspected error in chronological order. When an error is discovered, the flight lead first "declares the error" to establish the suspected erroneous action or inaction. Second, the flight lead confirms that the wingman understands the error, and determines if the wingman concurs that the conduct was in error. Third, the flight lead probes their wingman to determine the root cause of the error by asking non-leading questions. The lead seeks to determine the wingman's perception of events as they unfolded. Fourth, armed with insight gathered from their wingman's perception of events, the flight lead "names" the suspected root cause of the error. Fifth, the team prepares an instructional fix that hits directly at the identified root cause of the error. After this process is complete, the lead then turns the spotlight on themselves and debriefs their own decision-making, albeit in a more expeditious fashion. The debriefing concludes with a summation of the objective, DFPs, and "lessons learned," and pilots leave the room with individualized items to work on for the next sortie.

REVIEW PROCESS



5-Step Review Process

One additional note is relevant here. Many engagements involve extensive coordination with mission partners such as planners, intelligence analysts, or other airframes serving in a support function or pursuing interrelated, but separate objectives. The flight lead must consider whether full participation in the debrief adds value to the mission partners, or if it's a better use of their time to allow them to conduct their own analysis after sitting through the overall reconstruction and establishment of DFPs. If, for example, an error was made before the sortie by an intelligence analyst, the flight lead names the error as a DFP, asks the partner to separately look into the matter, and offers the partner an opportunity to share any information that they believed would benefit the group at that juncture. Thereafter, the mission partner and team would then meet separately to

discuss the error and explore the root cause, but would be expected to provide the flight lead with a back brief on the result of the completed analysis.

THE JAG MODEL

Let's contrast the fighter pilot model above with the way the AFI requires JAGs to hot-wash a trial. The requirement to conduct "lessons learned" arises in AFI 51-201, paragraph 13.38:

"Within thirty calendar days of the conclusion of trial, the legal office trying the case and the [AFOSI] detachment responsible for the investigation of the case conduct a hot wash. The hot wash should include the Staff Judge Advocate or Deputy Staff Judge Advocate, Chief of Military Justice, and trial team from the legal office, as well as the detachment commander or lead criminal investigations agent, and the case agent(s) from the Air Force Office of Special Investigations detachment. Other legal office and Air Force Office of Special Investigations personnel may attend. Lessons learned may be captured in an after action report, but an after action report is not required.[1]

Three key differences appear the clearly demonstrate that the JAG hot wash is not intended to operate as a tactical debrief. The first difference arises in the opening stanza of the paragraph, with the acknowledgement that trial debriefs can occur up to a month after the conclusion of trial. Fighter pilots focus on immediate correction in a same-day debrief, and rely upon fresh memories to explore errors while they seek to understand their teammates' perception of events. Conversely, a trial counsel that walks into a trial hot-wash several weeks after the conclusion of trial operates from faded memories clouded by their current workload. Accurate reconstruction of trial events becomes impossible as memories from long days in the courtroom fuse, fragment, and fade. The hot wash runs the not-insignificant risk of marginally informing JAG and AFOSI leaders with the faded recollections of their subordinates. In the absence of an immediate, formal debrief, the hours and days following the completion of trial generally unfold in one of two ways. If

the prosecutor achieved a finding of guilt accompanied by a "good" sentence, trial counsel will receive hardy congratulations for their assuredly masterful litigation tactics. If the trial counsel lost, they are consoled by friends and counseled by office leadership that, "you never know what court members will do." In either scenario, focused analysis of the tactics employed during the engagement will not occur for several weeks, if at all.

The second key difference between the trial and post-sortie debriefs involves the participants. The previous rendition of AFI 51-201 mandated Staff Judge Advocate (SJA) attendance, and did not contemplate the Deputy SJA as a stand-in. The updated instruction offers a beneficial expansion of permissible leadership attendees, as task-saturated SJAs typically lack flexible schedules. Nonetheless, by mandating a JAG leadership attendee, the instruction still establishes the hot wash as a strategic leadership oversight mechanism to gain understanding of what happened in the courtroom in order to, perhaps, better explain poor metrics, a weak investigation, or unexpected results. In contrast, the fighter debrief requires no leadership representative, and the "value" created by the exercise exists for the actual participants on the sortie. As a practical matter, and at the risk of getting ahead of ourselves, it may be appropriate for a more senior JAG to sit in on a tactical trial debrief. As discussed above, however, timeliness is the prime consideration, and delays to accommodate the bustling schedules of JAG leadership should be avoided.

Finally, the third key difference is the frequency of the debrief. As discussed above, fighter pilots almost always debrief. It's not mandated in an instruction; it's just part of their culture. Conversely, JAG "lessons learned" are only required when AFOSI serves as the lead investigative agent, and are not required for a significant number of courts-martial that never reach AFOSI's limited investigative purview. The AFI requirement makes sense as a JAG strategic process to examine a wing's biggest cases. However, without a requirement to debrief smaller cases, many wings choose not to add additional burden to their workload, and these courts-martial are *never* formally mined for tactical lessons. In combination, these three differences result in

a hot-wash that is simply not structured as a tool to train tacticians; the debrief is not primarily intended to foster learning amongst trial participants, and does not foster a sense of interdependence between a counsel, paralegal, and investigator. At the end of the day, while both communities benefit from thorough debriefs, one community relies on an established culture to transmit lessons learned, while the other fails to fully capitalize on a prime opportunity to grow young litigators and paralegals.

Before going any further, it's important to note JAGs are doing a lot right, and that the Air Force JAG Corps spends considerable time and treasure to build world-class counsel. The Air Force Judge Advocate General's School offers an array of valuable litigation courses. Skilled reservists travel the country to provide in-house mock trial training. Senior Trial Counsel linger at bases after the conclusion of trial to offer litigation training. These offerings frequently focus on errors that arose during the trial or address common litigation mistakes. On top of all this, legal offices hold their own litigation training, and the background of the SJA or Deputy SJA can be mined to great effect. Most notably, pre-trial "murder boards" conjure up the inquisitive spirit of the fighter debrief, and legal offices sharply critique draft findings and sentencing arguments in the hope that their pre-trial understanding of facts mirrors the evidence that will be admitted at trial. Again, JAGs are doing a lot right. However, our robust education and training programs are not a substitute to the inherent value of a debrief after a hard-won, courtroom experience. Those lessons must occur at the wing, in real-time.

A FUTURE JAG DEBRIEF

A beneficial tactical post-trial debrief is easy to imagine using fighter pilot techniques as a guide. The duty day after a court-martial, in each and *every* court-martial, the trial team gathers to debrief. Likely, the SJA or Deputy SJA attends, but the SJAs' foremost concern is immediate review and correction in order to mine the most value for trial participants. The trial team can take a day of leave to recharge later on that week. The attendees consist of the case paralegal, trial counsel, and lead AFOSI or Security Forces investigator. The investigative agency plans to sit in on the

full debrief, but, as outlined above in the process for mission partners, breaks from the main group when discussions delve into trial tactics and litigation decisions. The Senior Trial Counsel (STC) remains in the local area, eschewing delivery of a broad-strokes training brief to instead lead the debrief. Other junior counsel and case paralegals quietly observe the process. The trial lead prepares for the debriefing by considering the overall objective for the trial and identifying DFPs for further review. Meanwhile, other members of the trial and investigative team review their own notes to fully contribute to the review process. Once in the room, the trial lead names the objective, establishes DFPs, and then directs the process utilizing the five steps outlined above.

As a hypothetical, let's suppose that the trial lead specifically wants to dissect the assistant trial counsel's cross-examination of a key defense witness. The witness effectively evaded the counsel's questions and, in the middle of the cross-examination, the defense counsel objected as the assistant trial counsel attempted to establish one of the cross-examination's major objectives. Instead of responding to the objection, the assistant trial counsel told the military judge that they would "move on" and conceded the defense counsel's objection without attempting to rebut the argument. This is a common courtroom occurrence for junior counsel that rely upon heavily scripted examinations. Objections, even facially specious ones, disrupt the junior counsel's rhythm and inject doubt into their carefully-honed plan.

In the briefing room, the trial lead establishes this cross-examination as a critical turning point in the trial, and proposes it as a DFP for further review. After chronologically considering earlier DFPs, trial lead approaches this cross-examination, and begins with the most essential step, "declare the error." In the debriefing, the senior counsel simply offers, "I think your cross-examination was going well, but you 'moved on' too quickly after the defense counsel objected to your questions." The error declaration is purposefully plain-spoken and understandable so that the trial lead and co-counsel begin the process on the same page. During this step, the "error" is the only thing that the trial lead should declare. Nothing is being fixed yet. The lead may already believe that they know what caused the error and

how to fix it, but the process must be followed so that the co-counsel will learn from the error and internalize the fix that is produced.

The next critical step requires trial lead to identify and declare the error and determine if their wingman agrees with the error. This too is straight-forward. For example, “did you think you ‘moved on’ prematurely?” Consensus is key. If consensus is reached and the co-counsel agrees that an error was made, the trial lead proceeds to the additional steps. If co-counsel disagrees that a mistake was made, the trial lead faces the prospect that their teammate rejects further participation in the process. Accordingly, the trial lead makes the error declaration fully prepared to explain their assertion with facts, case law, Military Rules of Evidence, or even with reference to the relevant portion of the transcript if the situation dictates.

The third step of the process requires the team to work together to determine the cause of the error. The trial lead places the team back in the moment, and works to get in his or her teammate’s head by asking open-ended questions to determine his or her perception of the circumstances under which the error was made. Trial lead should exercise a light hand when probing for understanding during this stage, as judgements in the heat of the moment may lack the benefit of clear right and wrong approaches, and individuals may remain defensive of the course of action they took. Typically, errors from the cockpit are either a result of faulty perceptions, bad decision-making, or poor execution. In our hypothetical, let’s suppose that the assistant trial counsel reveals that she or he perceived that the examination was going poorly and used the defense’s objection as a break to change tactics and move on to a potentially more successful line of attack. The counsel believed that the panel of members would look upon them more favorably for pulling off on an unsuccessful approach rather than being shot down. In this scenario, trial lead identifies the mistake as an error in perception. Conversely, the assistant trial counsel may admit that they neglected to sufficiently familiarize themselves with the potential defense objection, or were unable to decipher the defense counsel’s objection to manage a response. Execution is the culprit.

After the root cause of the error is established, the fourth step of the debrief process is to clearly name the error as a mistake of perception, decision, or execution. If the error remains ill-defined and formless, it will complicate the team’s attempt to craft a precise solution to the problem. This leaves open the possibility that trial lead develops a solution to the wrong problem.

Finally, the fifth step of the process requires the trial lead to provide an instructional fix for the specific root cause of the error. If the error arose from faulty perception, the trial lead may address the fix for the issue by working back through the direct examination, and working through the questions to determine how the assistant trial counsel developed the belief that that the examination was not going all that well. If poor execution led to the error, trial lead can instead dissect the legal argument posed by defense counsel, work to develop a specific response to employ if the same objection is presented in the future, and arm counsel with a generic set of tactics when faced with future objections that leave counsel unsure of their legal footing.

If an instructional fix is not identified, trial counsel will leave the brief supremely confident that they screwed-up, but without reassurance that they know how to handle the situation in the future.

Unfortunately, the tendency in the final step will be to regurgitate the previous steps of the brief, without identifying a focused fix for the specific error. If an instructional fix is not identified, trial counsel will leave the brief supremely confident that they screwed-up, but without reassurance that they know how to handle the situation in the future. Accordingly, trial lead must move deliberately through the process from error, to root cause, to solution. The trial lead then concludes the debriefing with a brief review of the DFPs and provides each counsel with individualized areas for further study and development. While this hypothetical scenario considered the

THE ART OF THE DEBRIEF

JAG MODEL	PROPOSED JAG MODEL	FIGHTER MODEL
←	TIMELINESS	→
Up to a month after trial	Next duty day	Same day
←	PARTICIPANTS	→
Mandated leadership representation	Mixed, but leadership rep. not mandated	Leadership representation not required
←	FREQUENCY	→
Seldom to never	Always	Often, almost always

Comparison of Debrief Models: JAG Court-Martial and Fighter Pilot Sortie

five steps for an in-trial error, the same steps can be used to review investigative errors, and address inadequacies during the investigation or during pretrial.

THE WAY FORWARD

The first steps to implement this debriefing process can begin immediately at the wing level. Wing legal offices should schedule debriefs for every court-martial and discharge board in accordance with the scheduling guidance offered above. If you're in a Fighter Wing, look to your operations group for up-and-coming fighter pilots familiar with the debriefing process, especially weapons officers that can advise legal and investigative personnel on an approach to debriefing.

These men and women are future commanders, and will themselves benefit from an introduction to the legal team and the Uniform Code of Military Justice. This skillset is also present in many Training Wings or on higher headquarters staff. The collaborative nature of this debrief can benefit both JAGs and pilots alike.

Additionally, the long-range target must involve implementation of this skillset into STC training. There is no better "lead" for a tactical trial debrief than a talented STC that battled alongside the assistant trial counsel. Their example will guide junior JAGs and paralegals to confidently embark on their own tactical debriefs in cases without an assigned

STC. Once the process is firmly established, the ability to lead a trial debrief, and in turn identify error, root cause, and fix, could then serve as the culminating competence in a trial counsel's pursuit of independent trial certification.

As a final note, and in recognition of the current service-wide publications reduction initiative, this revised tactical debrief procedure is not appropriate for inclusion in an expanded paragraph 13.38 of AFI 51-201. Inclusion of the practice in an Air Force instruction takes the debriefing from a culturally-driven opportunity to hone litigation skills and transforms it into a necessary evil required to demonstrate compliance and pass an inspection. Our JAG culture will shift to embrace this process when trial counsel begin to experience the benefits of a thorough debrief and experience an increased sense of confidence upon their next foray into the courtroom.

The Air Force JAG Corps spends considerable time, money, and effort to build the best litigators in the Department of Defense. However, the next step in our development as litigators points us towards the traditions and heritage of our service. The fighter pilot debrief offers JAGs a proven review process that will transform hard-won courtroom experience into future courtroom successes.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Forbes:** 5 Ways to Turn Your Mistake Into a Valuable Life Lesson
<https://www.forbes.com/sites/amymorin/2017/07/17/5-ways-to-turn-your-mistake-into-a-valuable-life-lesson/#4442bc951c01>
- **TEDTalks:** Got a Wicked Problem? First, Tell Me How You Make Toast (7:59),
https://www.ted.com/talks/tom_wujec_got_a_wicked_problem_first_tell_me_how_you_make_toast
- **TEDxDayton:** The Culture of a Fighter Squadron (11:19),
<https://www.youtube.com/watch?v=YErkPyPP8M&feature=youtu.be>
- **YouTube Video:** Dogfight F-15 vs F-16 recorded by an IMAX High Def. camera during a Red Flag training exercise,
<https://youtu.be/INb-421E-mo>

ENDNOTE

- [1] U.S. DEPT OF THE AIR FORCE, AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, para. 13.38 (8 December 2017).

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Are We There Yet?

Applying the Legal Framework of Anticipatory Self-Defense to the Democratic People's Republic of Korea

BY MAJOR MEGAN C. MALLONE AND CAPTAIN CHRISTINE E. SEIBERT

Anticipatory self-defense has been recognized by the international community after it was first articulated in 1837 in the *Caroline* case.

Though infrequently relied upon in modern history to justify military action, anticipatory self-defense is not a new concept.[1] The United States declared the deterrence of the Democratic People's Republic of Korea (DPRK) nuclear program a top priority in the [Summary of the 2018 National Defense Strategy](#) of The United States of America.[2] As tensions rise, fall, and potentially rise again on the Korean peninsula, anticipatory self-defense, and the defense of the homeland against the DPRK's nuclear program, will remain a crucial topic of discussion. Anticipatory self-defense has been recognized by the international community after it was first articulated in 1837 in the *Caroline* case. It is often referred to as the *Caroline* doctrine.[3] There are two types of anticipatory attacks in self-defense: pre-emptive and preventive.[4] The distinction is nuanced and often misunderstood, but is integral to the analysis of whether the U.S. is able to lawfully use military force against another nation.

There are two types of anticipatory attacks in self-defense: pre-emptive and preventive.

In the past few years, the DPRK has ramped up its nuclear weapons development and missile testing program by successfully launching missiles of varying sizes and testing nuclear weapons.[5] This nuclear weapons development is a threat to surrounding nations and the U.S., and causes instability in the region. The recent spate of DPRK tests culminated in the successful launch of an intercontinental ballistic missile (ICBM) on 28 November 2017.[6] Despite the recent launches, the DPRK remains a member of the U.N., but has been repeatedly subject to ongoing suffocating sanctions established by the U.N.[7] Furthermore, despite

acceding to the nuclear Non-Proliferation Treaty (NPT) in 1985, the DPRK eventually announced their intent to withdraw in 2003 and declared they are no longer subject to the NPT framework. The recent events have caused many nations, including the U.S., to discuss the use of anticipatory self-defense as justification for use of force against the DPRK. This discussion will continue, despite recent peace talks, if the DPRK fails to completely denuclearize or if negotiations fail. This article explores the historical and legal basis for anticipatory self-defense, applies it to current events on the Korean Peninsula, and offers a useful continuum framework for legal professionals advising political and military leaders.

THE CAROLINE DOCTRINE

In order to fully understand anticipatory self-defense, it is necessary to review the origin of the *Caroline* legal doctrine. The doctrine arose in 1837 after a tense diplomatic incident between Britain and the U.S. during the Canadian Independence Movement.[8] The *Caroline* was a U.S. flagged steamer vessel owned and operated in the U.S. which regularly entered U.S. ports for extended periods of time. The Canadian Independence Movement had been fighting the British for increased democratic processes and a reduction in corruption. Canadian troops had been using the *Caroline* to move resources and personnel. Following a battle, the Canadians used the *Caroline* to retreat to Navy Island, outside of what is now Ontario. After dropping off the Canadian forces, the *Caroline* travelled back to Schlosser Port in New York and remained there overnight. British forces identified the ship as assisting the Canadian troops and planned an attack on the night of 29 December 1837, while it was in the New York port.[9] It is unclear whether the British knew that 23 U.S. citizens had boarded the vessel to stay the night.[10] On 29 December 1837, British troops, on order by their superiors, attacked the *Caroline*, set it on fire, and sent the vessel over Niagara Falls.[11]

The U.S. immediately condemned the attack, claiming neutrality in the battle between the Canadian Independence Movement and Britain.[12] Further, the U.S. demanded prosecution of the perpetrators and reparations for the destruction of the vessel.[13] In response, Britain claimed any U.S. citizens or property used to support the Canadian

Independence Movement are no longer neutral.[14] Additionally, even though the *Caroline* was on U.S. sovereign territory, Britain asserted what is now known as anticipatory self-defense.[15] The U.S. claimed that in order to be entitled to use self-defense, there must be an “instant and overwhelming” need to defend, leaving no other means to defend oneself, and no moment for deliberation.[16] Additionally the U.S. claimed the actions must be proportional and avoid unreasonable or excessive actions.[17] Britain ultimately asserted that the *Caroline* was an immediate and overwhelming threat due to its assistance to the Canadian Independence Movement and the only option was to destroy the vessel while it was in a U.S. port.[18] While the question of whether Britain truly faced an instant and overwhelming threat remained unresolved between Britain and the U.S. for many years, the *Caroline* doctrine and the rule of anticipatory self-defense became prevailing legal doctrine in the international community. Today, just as in 1837, the elements of anticipatory self-defense require an imminent threat that is instant and overwhelming, leaving no moment for deliberation, and requiring a necessary and proportional response.[19]

The *Caroline* doctrine and the rule of anticipatory self-defense became prevailing legal doctrine in the international community.

U.N. CHARTER CODIFIES SELF-DEFENSE

Today, the U.N. forms the backbone of the international community and rule of law. The U.N. was created in 1945 following World War II by the U.S., France, U.S.S.R. (now Russian Federation), Republic of China (now the People’s Republic of China), and the United Kingdom.[20] The U.N.’s mission is to safeguard global peace and prosperity, regulate conflict, and prevent future world wars.[21] The U.N. Security Council can be thought of as the U.N.’s executive branch which issues decisions and recommendations on issues brought before the Council. The Security Council can authorize international peacekeeping forces, diplomatic or economic sanctions, and even authorize military action.[22]

The five original—and only permanent—members can veto any action before the Security Council.[23] This point is important when discussing whether the Security Council would be willing to intervene in a situation related to the DPRK, given that China has a close relationship with the DPRK and Russia is generally not allied to the U.S. Often forgotten, the U.N. led a coalition of 17 nations during the Korean War against the DPRK and China, tapping the U.S. to lead the forces on behalf of the U.N.[24] This has caused the U.N. to be heavily involved in actions involving the DPRK and the Republic of Korea. Additionally, the U.S. has remained the leader of U.N. Command in charge of maintaining the armistice on the Korean Peninsula today.

United Nations Charter Article 2(4) states “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This principle of non-intervention is a cornerstone of international law and stands for the proposition that States must respect each other’s sovereignty.[25] While this provision places restrictions on Nations taking armed action against other Nations, [Article 51 of the Charter](#) allows for self-defense.[26]

...the right to self-defense, including the right to act in anticipatory self-defense.

Article 51 states “Nothing...shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” It goes on to explain that measures taken by Members in the exercise of this right to self-defense do not impact the authority and responsibility of the Security Council.[27] The U.S. believes the right to self-defense, including the right to act in anticipatory self-defense, is an inherent right of a sovereign nation and cannot be negotiated away.[28] Taking the Charter as a whole, it is clear the right to self-defense may be executed without the

consent of the U.N. Security Council, so long as the threat is so imminent that there is not time to notify or consult the Council. However, at the first opportunity, the Council must be notified by the acting State of what action was taken and what justified that action.[29]

PRE-EMPTIVE ATTACK V. PREVENTIVE ATTACK

It is a well-settled principle that a necessary and proportional response is authorized in response to a hostile act or demonstration of hostile intent. However, self-defense has multiple forms, including individual, unit, and national self-defense. When analyzing the right of self-defense each form should be considered separately. In the case of anticipatory self-defense, the focus is on national self-defense in response to indicators of hostile intent. However, an adversary could potentially commit several acts demonstrating hostile intent without triggering National Authorities to declare anticipatory self-defense and attack. The key to analyzing the problem is a balance between the risk the adversary is posing against the cost (i.e. money, personnel, materiel) to take action in response to the demonstrated hostile intent.

Pre-emptive attack or preventive attack are often used interchangeably; however, the two have substantial differences that make them distinct concepts from one another.

When considering whether or not anticipatory self-defense is lawful, the analysis starts with recognizing there are two left and right limits on the spectrum of responses a Nation can undertake: a pre-emptive attack or preventive attack. The terms are often used interchangeably; however, the two have substantial differences that make them distinct concepts from one another. Pre-emptive attacks are predicated on an immediate and known threat, leaving no time for inaction.[30] Meanwhile, preventive attacks occur without immediate threat and are illegal under international law unless the international community believes it was justi-

fed.[31] The international community will be the ultimate judge and jury of whether an attack was justified; therefore, providing justification and reasoning to the U.N. Security Council is imperative. It is important for political and military leaders at all levels to understand the differences between the two and use the terms appropriately, in order to clearly communicate State intentions.[32]

As noted, pre-emptive attacks refer to the use of force to avert an instant and imminent threat, and is a demonstration of national self-defense.[33] A pre-emptive attack is the response that occurs when National Authorities decide they are not willing to accept additional risk and therefore react to the hostile intent indicators. For example, let's assume State Alpha and State Bravo share a geographic military fortified border and have experienced periods of increased hostility throughout history. Recently, State Bravo made direct threats against State Alpha's sovereignty, including vocalizing plans to take territory from State Alpha, has started amassing significant military troops and equipment close to the border of State Alpha, and some border skirmishes have broken out, with fatalities of a few military members from each State. In this case, State Alpha could decide they are unwilling to accept the risk of State Bravo's threats and, in turn, undergo a pre-emptive attack against State Bravo.

On the other hand, a preventive attack refers to the use of force to avoid an emerging—but not instant and overwhelming—state of affairs in which a threat would be more likely or increasingly dire.[34] This form of attack usually takes place when a threat is still developing, but is not at a point where an attack is imminent.[35] One example is a non-nuclear weapons State beginning to developing nuclear weapons. During the research, development, and testing phase of any nuclear weapons program there is usually a large lead time before the State becomes nuclear weapons capable. Arguably, a State's nuclear program does not genuinely threaten any other state during the infancy of their program. Exercising national self-defense and attacking a state at the infancy of their nuclear weapons program is an example of a preventive attack. Again, such preventive attacks are generally illegal under international law, unless the international community determines the attack was justified.

ANTICIPATORY SELF-DEFENSE IN MODERN HISTORY

Historically, anticipatory self-defense was used a handful of times and met with mixed results. Two of the most renowned examples were attacks initiated by Israel called “Operation Opera” and “Operation Outside the Box.”[36]

In 1981, Israel struck Iraq on their sovereign soil in Operation Opera.[37] At the time, Iraq was developing the Osirak nuclear reactor and was publicly claiming the development of nuclear capability.[38] Israel did not notify the U.N. Security Council or provide any public justification for its actions before or immediately after this attack.[39] The international community spoke out against Israel's actions because they did not provide any justification prior to the attack.[40] Ultimately, no action was taken against Israel for their actions.[41] Nonetheless, this attack is an example of a preventive attack.

Operation Outside the Box took place over twenty five years later.[42] In 2007, Syria publicly claimed they were on the precipice of developing a nuclear reactor and that the reactor was going to “go hot” very soon.[43] Appearing to learn from Operation Opera, Israel notified the U.N. Security Council of the attack. Israel claimed Syria was an imminent threat to the Israeli people.[44] Israel provided intelligence indicating the reactor was close to completion and they timed their attack to avoid casualties.[45] Due to the advance notification and credible justification, the outcry from the international community was minimal.[46] This attack was an example of a pre-emptive attack that complied with U.N. reporting requirements.

The U.S. relied on anticipatory self-defense when pre-emptively ordering troops into Iraq in 2003 as a response to intelligence indicating Iraq continued to pursue a robust weapons of mass destruction program.[47] Different than Israel's two attacks, the U.S. received U.N. Security Council support and authorization from Congress to act pre-emptively in response to the possibility that Iraq would attack the U.S. or its armed forces, or conspire with terrorists to do the same.[48]

These historic examples demonstrate the complicated determination of whether a State is justified in the actions it decides to take against another State when threatened. Ultimately, there is no clear answer on what facts must exist to ensure anticipatory self-defense is lawful. The international community will assess a State's actions after the fact and collectively decide if those actions were justified, or not. This assessment is impacted by the extent of the threats, the condition of international relations between States, and whether the State exercising anticipatory self-defense provided justification for its actions. U.N. engagement prior to the attack is integral to providing justification to the international community for the use of anticipatory self-defense.

NUCLEAR NON-PROLIFERATION TREATY

In 1968, the nuclear Non-Proliferation Treaty (NPT) was opened for signature and went into effect in 1970. The continuing goal of the NPT is to eliminate nuclear weapons. Currently, [191 countries have signed on to the NPT](#) including the five permanent party members of the U.N. Security Council.[\[49\]](#) Four U.N. member states have failed to sign or ratify the NPT – India, Pakistan, the DPRK, and Israel. India, Pakistan, and the DPRK have all publicly announced and declared that they currently possess nuclear weapons.

The NPT includes important responsibilities and restrictions on nuclear proliferation for nuclear weapon states and non-nuclear weapon states. The nuclear weapon states include China, France, Russia, the United Kingdom and the U.S., because at the time of the treaty they had manufactured and detonated a nuclear weapon. All other states are considered non-nuclear weapons states. While the treaty allows any nation to research, produce, and use nuclear energy for peaceful purposes, it prohibits the efforts to acquire nuclear weapons.

While the DPRK is not currently a signatory to the NPT, it has come close to joining several times.[\[50\]](#) In 1985, the DPRK acceded to the NPT and were subject to its requirements, but did not complete the required safeguards in accordance with the NPT.[\[51\]](#) In 1993, the DPRK announced its intent to withdraw from the NPT.[\[52\]](#) The

U.S. intervened and negotiated with the DPRK to remain in the NPT.[\[53\]](#) However, those negotiations failed in 2003 when the DPRK announced its withdrawal from the NPT and its intention to no longer subject itself to the treaty.[\[54\]](#)

The Korean Peninsula is a unique environment, which offers unique challenges.

THE U.S.–ROK ALLIANCE

The Korean Peninsula is a unique environment, which offers unique challenges. Since 1953, the peninsula has not been in a state of peace nor in a state of war.[\[55\]](#) Rather, an armistice—or a cessation of hostilities—has persisted. The U.S. has led the U.N. Command attempting to maintain the armistice, document armistice violations, and deescalate hostilities. The Republic of Korea (ROK), also referred to as South Korea, is currently the only location where U.S. forces serve in support of an ongoing international armed conflict or State on State conflict, rather than a non-international armed conflict, where the U.S. fights non-state enemy actors.

For the past several decades, the mission of the U.S.–ROK alliance has been to maintain the armistice and prevent a return to the Korean War, while remaining ready to fight if necessary.[\[56\]](#) In 1953, immediately after the Korean War, the U.S. and ROK entered into a Mutual Defense Treaty which serves as the foundation of the close alliance that continues today.[\[57\]](#) Currently, the alliance includes the bilaterally-run Combined Forces Command, which reflects the mutual commitment of the ROK and the U.S. to maintain peace and security, and the willingness and capability to take that commitment into battle, if the need arises.[\[58\]](#) If war breaks out in Korea again, it will be led by the Commander, Combined Forces Command and U.N. Command, a joint and combined command.

A CONTINUUM

Ultimately, anticipatory self-defense resides on a continuum of actions. In the case of a non-nuclear weapons state pursuing a credible nuclear weapons program, actions on the pre-

ventive side of the continuum can include benign tasks like lawfully building nuclear power plants, educating scientists to support the nuclear power program, or purchasing stockpiles of raw materials. On the other end of the continuum are actions taken to directly threaten other nations, like launching missiles, increasing military forces, threatening other nations, and intelligence indicators signaling a direct attack is imminent. The point at which an attack would be preventive would come earlier on the continuum and would most likely not be in line with international law because the threat is not imminent. The point at which an attack would be pre-emptive would be closer to the far right of the continuum and legally justifiable under international law because there is an imminent threat and no other recourse to quell the threat is available. The decision space between the right and left limits captures the risk a State is willing to accept when hostile intent is present.

How much risk do we expect States to take when faced with a credible threat of nuclear attack?

Given this, the challenge for nations reside in the middle, where States must account for technological advancements, such as nuclear-tipped missiles that are able to reach their shores in minutes or a cyber-attack that threatens critical national infrastructure. These concepts did not exist in 1837 during the time of the *Caroline* and therefore the framework was not contemplated. There is no doubt that each case must be evaluated independently and at some point on the continuum of actions the use of anticipatory self-defense is legal. However, at what point does preventive anticipatory self-defense—which requires a State to engage the U.N. Security Council—gain legitimacy? What threats could render the need for consultation no longer practicable? How much risk do we expect States to take when faced with a credible threat of nuclear attack? To put it more grimly, would the U.S. be willing to accept the loss of Los Angeles or Chicago in order to consult the U.N. Security Council? If not, how can we expect other nations to do the same?

THE DPRK ADVANCES ON THE CONTINUUM

While the DPRK nuclear weapons program dates back to at least the early 1980's, the world has recently witnessed its significant acceleration. Each weapons production milestone or threat means the DPRK moves forward on the continuum of state actions, getting closer and closer to the type of hostile intent that triggers anticipatory self-defense.

In 2003, the DPRK announced its withdrawal from the NPT, removing any treaty obligation to refrain from developing nuclear weapons. In 2005, the DPRK admitted to having nuclear weapons. In 2006, an underground nuclear explosion occurred near the village of P'unggye, DPRK. Despite the [Six-Party Talks](#)^[59] to deescalate the situation, and agreements by the DPRK to stop development in the 2000s, in 2009 the DPRK launched a satellite, continued to pursue nuclear power production, and conducted another underground explosion. From 2010-2015, the DPRK continued to develop and test weapons of mass destruction and it became clear that the program was advancing successfully.

In July 2016 and in anticipation of the ongoing threat, the U.S. decided to deploy a Terminal High-Altitude Area Defense (THAAD) battery to South Korea.^[60] This defensive system was set up in preparation for the need to intercept short and middle range ballistic missiles.^[61] In September 2016, DPRK conducted its fifth nuclear test and conducted ICBM tests.^[62] In March 2017, the THAAD system began operating in South Korea.^[63] Following continued ICBM tests throughout the summer, in August 2017, the Security Council passed a resolution again expanding the sanctions against DPRK and restricted additional imports attempting to starve the DPRK of resources.^[64] In September 2017, DPRK conducted its sixth nuclear test, declaring it a success.^[65] Based on seismic activity during this time, it appears there was an explosion of a larger magnitude than any previous DPRK test. Immediately following the sixth nuclear test, DPRK tested an ICBM which overflowed Japan. This test resulted in the U.S. imposing additional sanctions and restrictions on business dealings with DPRK. Further, the [U.S. began flying B-1 Bombers off the coast of South Korea](#) and north of the Northern Limit Line (NLL), an

unofficial boundary created in 1953 by the U.N. to reduce tensions during armistice. It was the first time the U.S. had flown above the NLL in the 21st Century.[66]

At what point is anticipatory self-defense triggered, if at all?

In December 2017, the Security Council again imposed economic sanctions, as well as mandatory expulsion and return of DPRK citizens from other countries.[67] During this time, the U.S. announced that it would initiate a “pressure campaign” on all fronts.[68] The U.S. continued its economic chokehold on the DPRK, while also ensuring peak military readiness.[69] Finally, in 2018 the leader of the DPRK, Kim Jong Un, announced the DPRK is now prepared to thwart any threat.[70]

Given the DPRK’s march towards a successful nuclear weapons program described above, at what point is anticipatory self-defense triggered, if at all? Moreover, when on the continuum of DPRK actions does a response move from preventive self-defense to pre-emptive self-defense? There is no question the DPRK’s actions throughout the past five years are moving to the right of the continuum and getting closer to allowing Nations threatened to lawfully use anticipatory self-defense against the DPRK. Legal professionals at all levels must understand the concept of anticipatory self-defense and its continuum in order to properly advise.

Anticipatory self-defense will remain a topic of discussion.

CONCLUSION

The strategic environment in South Korea continues to change rapidly. After a volatile few years where the 2017 [doomsday clock](#)[71] ticked as close as it’s ever been to midnight since its inception, the tone has recently swung back towards peace. However, this is not the first time

events have trended towards a peaceful resolution. Despite recent events like the Panmunjom Declaration and a U.S.–DPRK agreement promising a “lasting peace” and “complete denuclearization,” anticipatory self-defense will remain a topic of discussion for those who care about the defense of the U.S. homeland,[72] because of the potential for negotiations to spiral out of control. Until significant demonstrated steps towards denuclearization occur, the DPRK remains very close, if not already able, to strike the U.S. with a nuclear-enabled ICBM. As peace talks continue, all nations with a stake in Indo-Pacific affairs will monitor the situation closely. If past dealings with the DPRK are any indicator, the circumstances could change at any time and may warrant further legal review of anticipatory self-defense.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Arms Control Association:** Chronology of U.S.-North Korean Nuclear and Missile Diplomacy (Nov, 2018), <https://www.armscontrol.org/factsheets/dprkchron>
- **Bulletin of the Atomic Scientists:** THE DOOMSDAY CLOCK: A Timeline of Conflict, Culture, and Change, <https://thebulletin.org/doomsday-clock/past-statements/>
- **History Channel:** 1837- Caroline Affair, <https://www.historycentral.com/Ant/caroline.html>
- **The Aviationist:** 36 Years Ago today, "Operation Opera": The Israeli Air Strike on an Iraqi Nuclear Reactor. (June 7, 2017), <https://theaviationist.com/2017/06/07/36-years-ago-today-operation-opera-the-israeli-air-strike-on-an-iraqi-nuclear-reactor/>
- **LAWFARE Blog:** Al-Kibar Strike: What a Difference 26 Years Make (April 2, 2018), <https://www.lawfareblog.com/al-kibar-strike-what-difference-26-years-make>

ENDNOTES

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- [7] The United Nations Security Council have passed the following resolutions between 2015 and 2018: U.N. Res. 2207 ([http://undocs.org/S/RES/2207%20\(2015\)](http://undocs.org/S/RES/2207%20(2015))), U.N. Res. 2276 ([http://undocs.org/S/RES/2276\(2016\)](http://undocs.org/S/RES/2276(2016))), U.N. Res. 2270 ([http://undocs.org/S/RES/2270\(2016\)](http://undocs.org/S/RES/2270(2016))), U.N. Res. 2321 ([http://undocs.org/S/RES/2321\(2016\)](http://undocs.org/S/RES/2321(2016))), U.N. Res. 2371 ([http://undocs.org/S/RES/2371\(2017\)](http://undocs.org/S/RES/2371(2017))), U.N. Res. 2397 ([http://undocs.org/S/RES/2397\(2017\)](http://undocs.org/S/RES/2397(2017))), U.N. Res. 2375 ([http://undocs.org/S/RES/2375\(2017\)](http://undocs.org/S/RES/2375(2017))), U.N. Res. 2345 ([http://undocs.org/S/RES/2345\(2017\)](http://undocs.org/S/RES/2345(2017))), U.N. Res. 2356 ([http://undocs.org/S/RES/2356\(2017\)](http://undocs.org/S/RES/2356(2017))), U.N. Res. 2407 ([http://undocs.org/S/RES/2407\(2018\)](http://undocs.org/S/RES/2407(2018))).
- [8] MUELLER ET AL., *supra* note 4, at 87.
- [9] *Id.*
- [10] *Id.*
- [11] *Id.*
- [12] *Id.*
- [13] *Id.*
- [14] *Id.*
- [15] *Id.*
- [16] Michael Byers, *Jumping the Gun*, in *London Review of Books*, Vol 24, No. 14, pgs. 3-5 (2002).
- [17] MUELLER ET AL., *supra* note 4, at 87.
- [18] *Id.*

- [19] DAVIES ET AL., *supra* note 3.
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- [22] United Nations Charter, Chapter VII, Art. 39, <http://www.un.org/en/sections/un-charter/chapter-vii/index.html> (last visited Sept. 28, 2018).
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- [28] ARMY OPERATIONAL LAW HANDBOOK, *supra* note 23, at 10.
- [29] United Nations Charter, Chapter VII, Art. 51, <http://www.un.org/en/sections/un-charter/chapter-vii/index.html> (last visited Sept. 28, 2018).
- [30] MUELLER ET AL., *supra* note 4, at 44.
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- [38] *Id.*
- [39] *Id.*
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- [41] *Id.*
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- [43] *Id.*
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- [67] *Chronology of U.S.-North Korea Nuclear and Missile Diplomacy*, *supra* note 47.
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