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The Judge Advocate as Strategist

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Dan Maurer

Creativity is a muscle. Use it.^[1]

Introduction

“Everything in war” Clausewitz wrote, “is simple, but the simplest thing is difficult.”^[2] The same is true of military criminal justice: prosecute the “bad guys,” protect the innocent and the victims, and move on to the next case, thereby remedying an injustice and helping commanders fight their battles more effectively and efficiently.^[3] These apparently simple-stated duties for those criminal justice practitioners are, of course, exceptionally hard. Consider, for instance, just the recent changes to military justice practice in the traditional two-party adversarial system under the ultimate authority of the commander: the introduction of special victim counsel, special victim prosecutors, special victim and witness liaisons, restrictions to the convening authority’s clemency power, and the effect of victims’ influence over sentencing.^[4] Or consider the changes proposed by the Department of Defense’s Military Justice Review Group that may still affect our practice: victim input into the disposition decision by the commander, changes to the court-martial panel process, reforming our sentencing structure with guidelines, and even rethinking the standard for appellate review of guilty pleas.^[5] Grasping, practicing, and advising under these complications—on top of what they must already attempt to master—is understandably overwhelming to Trial Counsel. Because they advise commanders who grew into their quasi-judicial role in an earlier era of military justice, and who have an operational experience during the Global War on Terror in which military justice was less prominent,^[6] the situation is a bit like leading a platoon that had been trained under a Cold War doctrine of firepower and maneuver, awkwardly and uncertainly placed in urban counterinsurgency for the first time. Trial Counsel, like combat platoon leaders, are stationed at the “forward edge of the battle area,”^[7] so-to-speak, and therefore face hard choices, clogged by these practical sources of courtroom and chain-of-command “friction”^[8] and complex conditions daily. Importantly, judge advocates do not make those hard choices alone, and are not the ultimate decider-in-chief.

Happily, this combination of demand for their expertise and the relationship they have with the chain-of-command presents an opportunity rather than a constraint. It is an opportunity to reconsider the Trial Counsel’s role and purpose. This article suggests that strategy is one function we perform continuously and tacitly, in part *because* military justice demonstrates Clausewitz’s timeless caveat about simple things being hard. Therefore, being a “strategist” is implicitly tied to the Trial Counsel’s conventional role as the objectively reasonable, analytical advisor and is another proper role to openly accept. This essay begins in Part II.A by briefly recounting our traditional and well-rehearsed roles as lawyers. Part B will describe

the judge advocate as the “Agent” and the commander as a “Principal,” by way of theoretically justifying the intellectually intense, time-consuming, and advisory function Trial Counsel perform within the military justice system. Part C defines “Strategy” before Parts D and E define *what* and *who* “Strategists” are. Part III concludes with the argument that Trial Counsel are *de facto* military justice strategists—a role that ought to be welcomed and well-understood by any young practitioner assigned to a case as well as the more-seasoned leaders mentoring them through the thicket of modern military justice.

Role-Play and Strategy

The Roles We Play

In the recently published *U.S. Military Operations: Law, Policy, and Practice*,^[9] a distinguished group of military lawyers banded together to publish a collection of essays describing the evolution and current role that uniformed attorneys play in the field. The volume’s particular emphasis is on the deployed judge advocate’s increasingly critical effect on the planning of combat and contingency operations. Operational law judge advocates, according to one of those authors, act along four lines of effort, asserted to varying degrees: the *advocate*, the *judge*, the *counselor*, and the *conscience*.^[10] These roles, according to the author, sometimes merge into a “consigliere model”—judge advocates who are “close, trusted colleagues, and serve as a confidant and senior statesman for the commander and organization . . . and dispense disinterested and sometimes tough advice for the advancement of the mission.”^[11] This model judge advocate, then, is premised on two unstated attributes. First, he or she is not merely a reflexive, reactionary, library of arcane technical knowledge. Second, he or she shoulders a responsibility to see, work within, and advance a larger—*strategic*—perspective. Yet, while the Judge Advocate General’s Corps welcomes the first premise, it has not yet paid much attention to the latter premise’s applicability to the young Trial Counsel.

Our Rules of Professional Conduct, for instance, affix certain labels to our practice: “officer of the legal system,” a “public citizen having special responsibility for the quality of justice,” and a “representative of clients.”^[12] This last label itself has at least five shades of meaning:

As *advisor*, a lawyer provides a client with informed understanding of the client’s rights and obligations and explains their practical implications. As *advocate*, a lawyer zealously asserts the position under the law and the ethical rules of the adversary. As *negotiator*, a lawyer seeks results advantageous to the client but consistent with requirements of honest dealing with others. As *intermediary* between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as *evaluator* by examining a client’s legal affairs and reporting about them to the client or to others.^[13]

Given that Trial Counsel exercise these functions daily as part of routine criminal law practice, these labels are accurate—except they are not the *only* functions we serve. Then-Major Mark S. Martins, in his seminal study of rules of engagement (ROE) in the mid-1990s, also proposed that a judge advocate is not limited to being the “conscience” of the command, or a zealous advocate of a client’s position or interests, or even the technical expert “judge” of what the legal rules and precedents demand.^[14] His argument, favoring a robust role for judge advocates in the design of valuable and realistic ROE training, was that judge advocates combine aspects of *all* of these functions by performing as “*counselor*” or “one who assists leaders in the decision-making process” by helping the commander see various ways of solving problems and assessing the menu of potential courses of action from which to choose.^[15]

At their core, Trial Counsel are not just technical experts in a narrow legal discipline that is only incidentally tied to winning our nation's wars. Rather than a niche or boutique military practice, we can and should reframe our self-definition, for Trial Counsel continually help commanders ascertain ways of solving problems, given an overarching leadership and disciplinary philosophy and end-state, and assess alternatives for their ability to satisfy that end-state. At our core, therefore, we are corps of strategists. This title may sound uncomfortably overindulgent, and outside our conventional comfort zone of providing expertise to the commander's "promotion of justice" and maintaining "good order and discipline" within our units and organizations.[16] That concern, however, would be misplaced. It is misplaced because judge advocates serve in as *agents* for the commanders (defined below), and it is the nature of this agency relationship, one that is implicitly infused with strategy-making, which turns us into strategists.

Trial Counsel as the Commander's Agent

It takes very little time in the job as a Trial Counsel, for instance, to realize that *time*, like lithium, is a resource of extreme value and limited availability. In the process of learning the Rules for Court-Martial, the Military Rules of Evidence, how to draft an accurate, compelling, but ultimately fair stipulation of fact, [17] the local circuit judiciary's preferences for courtroom procedure, the routine information requirements imposed by the Staff Judge Advocate and Chief of Military Justice, the capabilities of the installation's law enforcement investigators, the all-too-harried Trial Counsel's internal battery must still have enough juice to learn and live with the idiosyncratic personalities and leadership philosophies of the commanders they counsel daily. As part of that learning curve, the Trial Counsel comes to appreciate that time is even scarcer and more valuable to that commanding officer.[18]

This presents the underlying *causus belli* for the increasing stress and anxiety among nearly all Trial Counsel. At some point—and probably many points—in the judge advocate career, the admonition that “commanders, not lawyers, own the military justice system” is echoed.[19] Or, likewise, that the Uniform Code of Military Justice is a “*commander's tool*” to ensure good order and discipline within the ranks, and thereby “promote justice . . . [and] promote efficiency and effectiveness.”[20] Commanders do indeed have a “judicial function” that imposes on them duties that make them appear to act as prosecutors, judges, and investigators.[21] Of course, most commanders will explain that their primary mission is to serve as what Samuel Huntington called expert “managers of violence.”[22] They recognize and accept their judicial and prosecutorial responsibilities.[23] As then Army Chief of Staff, General Ray Odierno testified,

I want the commander fully involved in the decisions that have an impact on the morale and cohesion of the unit, to include punishment, to include UCMJ. That's their responsibility. It's not too much responsibility. In my mind, it sets the tone.

But commanders also rely heavily on the advice and expertise of their serving judge advocates whenever a case, controversy, or unwelcome fact seeps to the surface, smells like a rotting legal issue and begins to intrude into the commander's limited time and attention.[24] Even though that issue is intimately entwined with the commander's ability to execute his or her tactical mission, that commander simply lacks the time in which to personally and fully address it with the same zeal as they would a Gunnery Table. Their day job, so-to-speak, is still “an extraordinarily complex intellectual skill requiring comprehensive study and training” as Huntington put it more than half-a-century ago.[25]

As a consequence, “military justice is our Corps' statutory mission.”[26] In other words,

Congress—using its Article I powers to oversee and manage the affairs of the national security establishment[27]—specifically assigns judge advocates as the specialists in the practice of criminal law, as applied to the unique circumstances and demands of the military profession, its organizations, and its units—the “specialized society,” distinct, and “tightly knit military community” in the Supreme Court’s words.[28] These unique circumstances, of course, include combat and its implicit demand for discipline, obedience, cohesion, and mission focus.[29] This breeds the inevitable tension between the due process rights of the accused Soldier and the desire for swift, efficient justice meted out by a commander—not to mention the additional variable of the victim’s rights and the extent to which they shape our investigations and prosecutions.[30] In other words, we have an unambiguous charge for which we are expected to perform admirably, consistently, and without fail on behalf of the commander in unquestionably ambiguous circumstances.

Therefore, we are working as the commanders’ *agents*. Agency, at least in the legal sense and used in this essay, is defined as:

the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.[31]

Generically, a principal is “one who authorizes another to act on his her behalf” and is usually liable for conduct of the agent he or she employs.[32] The generic agent, therefore, is “one who is authorized to act for or in place of another; a representative.”[33] The bond that exists between these two participants is “fiduciary”—that is, a “relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.”[34] This mutual manifestation of assent is a “meeting of the minds” or agreement (would can be tacit) that the principal is always in the legitimate, superior decision-*making* or decision-*approving* position relative to the agent. The agent, in turn, engages in activities on behalf of the guiding interests and objectives of the principal.[35] This relationship is, therefore, concerned with augmenting or enhancing the natural capabilities of the principal.[36] In turn, the principal is knowingly dependent on the skill, judgment, and execution that the agent provides.[37] Along with the trustee-beneficiary relationship and the doctor-patient relationship, the attorney-client relationship has long been considered fiduciary in nature and fits the “principal-agent” mold.[38]

Our charge, then, working within an agent’s “scope of responsibility” delineated by the Uniform Code of Military Justice, the Manual for Courts-Martial, Department of Defense and Army regulations, and our commanders’ guidance, is to add resolution and clarity to these murky criminal fact-patterns with indeterminate consequences and high risk of harm to a number to competing interests. In that sense, our practice of law in the field of military justice is strikingly similar to that of a military strategist.

What is “Strategy?”

Contemporary U.S. military doctrine defines strategy as a “prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.”[39] Far easier to understand is the dictum, articulated by Lykke, that strategy equals “ends, ways, and means.”[40] The *ends* are the goals or objectives; the *ways* are methods used to get to that goal; and the *means* are the personnel, material, logistical, or financial resources used as part of that method. B.H. Liddell Hart simplified it further still when he wrote that strategy is the “art of distributing and applying military means to fulfill the ends of policy”—that strategy is concerned chiefly with choosing how best to create “effect.”[41] For Colin Gray, strategy is the “bridge that relates military

power to political purpose” or the “use that is made of force and the threat of force for the ends of policy.” [42] Even more generically, according to Rear Admiral J.C. Wylie, strategy can be thought of as a “plan of action designed in order to achieve some end; a purpose together with a system of measures for its accomplishment.” [43]

However, it may be more nuanced still. As historian of war and strategy, Lawrence Freedman, writes, “strategy comes into play where there is actual or potential conflict, when interests collide and forms of resolution are required. This is why strategy is much more than [just] a plan.” [44] Harvard Business School professor Michael Porter, in the context of competitive business practice, describes strategy as “choosing to perform activities differently or perform different activities than rivals.” [45] To Porter, business strategy is much more than simply reengineering one’s “operational effectiveness” or good management, much in the same way that Freedman distinguishes military strategy from operational planning. Strategy, Porter writes, is the “creation of a unique and valuable position, involving a different set of activities [than one’s rivals or competitors]” by identifying and choosing among various unwelcome “trade-offs” (where “more of one thing necessitates less of another”) that leaders would rather ignore. [46] Sometimes gripping these unwelcome facts means determining what *not to do at all*, rather than simply improve an existing function or continuously reaching out for the “best practice.” [47]

Ultimately, this management of trade-offs, choosing what to do or not to do, and establishing a unique and valuable position relative to rival competitors is simply suggesting that one’s strategy is a “formula for how a business is going to compete, what its goals should be, and what policies will be needed to carry out those goals.” [48] Porter himself suggests that what he would describe as business’s key operating policies could, essentially, be interpreted as tactics, or the “means” (or Wylie’s “system of measures”) while a business’s goals and objectives equate to “ends.” [49] If a successful military strategy effectively uses force or the threat of force to overcome the will, position, or strength of a rival to achieve a better peace according to its own terms and political ends, then it is compatible with Porter’s view of business strategy: “positioning a business to maximize the value of the capabilities that distinguish it from its competitors.” [50] The military and corporate definitions of strategy, despite contextual differences, are synonymous.

To give a brief example of how tactics serve strategy, and therefore are distinguished from it, consider the not-so-well-known story of Alexander the Great engaging in the relative mundane task of getting his army up a hill and attacking a rag-tag armed caravan of Balkan barbarians. [51] Alexander, starting out on his first military expedition designed to conquer—the campaign into Asia Minor and then on to Persia—was about twenty years-old and in command of his Macedonian and Greek troops for the first time as King. In order to preserve his own safety and security of his kingdom while far to the East, he realized he would have to subdue the restless tribes of the Balkans to the east of Macedonia along the Danube River. He marched his forces north and came upon a massive ridgeline crowned by Mount Haemus. Among this rocky and wooded alpine terrain, Alexander met the wild and fierce tribe of Triballi warriors literally standing in the way of his narrow defile pass and his advance on the Persian Empire. The Triballi had wisely arranged its many wooden carts along the defile path, so that if Alexander ordered his troops up the hill, they would be crushed by an avalanche of wood and bronze barreling down the slope. Alexander, knowing that he could not risk the time and logistical burden of marching west far around the ridge, and knowing that he could not retreat in the face of poorly-organized, if aggressive, mountain-men, decided to advance up the hill—but not without a caveat and clever tactical plan. He ordered his troops to immediately part their lines laterally, moving east and west, allowing the carts to rumble through the gaps; those who could not move laterally quick enough would immediately lay face down, with their heavy shields covering their heads and backs, acting as an interlaced blanket or ramp. When the carts came, they careened up over the low-angled shields and shattered on the trees and rocks below. Here, he literally

positioned his men to maximize the value of the fighting capabilities that distinguished the organized Greeks and Macedonians from his rival enemy.[52] Alexander's forces, having survived largely unscathed, got up, cheered, formed back on line, and attacked up the hill, scattering the Triballi at the crest of the ridge.

Alexander's tactical plan—arranging his troops and ordering them to react to an enemy decision in a certain manner—precisely served and effected the larger strategy of simultaneously intimidating his unruly northern neighbors and opening up his line of communication and supply from Macedonia and into Asia Minor. He traded the likely fear his dismounted infantry and archers felt at the onrushing carts (a specific *means* and *way*) for the *ends* he sought: the psychological effect it would create on his enemy and the direct access through this desirable mountain pass.[53]

What is a “Strategist?”

By implication, a strategist is one who participates in conceiving that “prudent idea or set of ideas,” or the one who studies how and why interests collide and how various ways and means might accomplish specified ends. In doing so, the strategist helps clarify or redefine what those ends might become. According to the Army's definition, the Strategist “Functional Area” is composed of officers that manages the “skillful formulation, coordination, and application of ends, ways, and means to promote and defend national interests” in order to “facilitate senior-leader decision-making.”[54]

The strategist participates in a cyclic argument or “dialogue” between what is *desired* (like Porter's “unique and valuable position”) and what is *possible* given various trade-offs—and what is or becomes possible will inevitably redefine what is desired.[55] “Proper strategic dialogue,” writes former British army officer and war theorist Emile Simpson, “involves the adjustment of policy in the light of practical reality in relation to various audiences.”[56] This dialogue, then, generates a “strategic narrative,” very much akin to Freedman's conception of strategy as a “story about power told in the future tense from the perspective of a leading character.”[57] It is the explanation of actions before, during, and after the policy goals have been implemented by continuous and accurate reference back to those policy goals.[58]

A necessary condition for a successful narrative, Simpson argues, is ensuring its overall consistency. Even though that narrative may be stated in different terms depending on the audience, the strategist is one who is capable of abstracting those narratives in just the right way so as to be necessarily included within the grander unifying narrative that explains the end state in the broadest of terms that remain analytically and persuasively sound.[59]

This effort to ensure consistency among many layers of “narrative” may sound complicated, but in more familiar terms we call this “nesting” or getting one echelon of command's mission *nested* within the higher headquarters' mission and intent. To Porter, this is defined as “fit” or ensuring consistency between the things we do and the overarching intent, making sure that those activities at various echelons of command and control, or function, are mutually reinforcing for a positive net gain. This, according to Porter's view on strategy, requires an “optimization of effort” or properly coordinating and communicating across multiple disciplines to avoid wasted effort or redundancy.[60] Accordingly, strategists are those that, first, recognize that need for continuous adjustment and, second, actually construct the manner in which that happens, to be approved by the decision-maker and implemented on the ground by the tactical or operational agent.

In General John Galvin's widely-discussed statement to the House Armed Services Committee, the NATO Supreme Allied Commander at the time spoke of the significance of well-educated and systematically-employed officer-strategists. “We need strategists . . . at all levels,” he testified, “and we need young officers who can provide solid military advice—options, details, the results of analysis—to the

[commanders].”[61] Perhaps he was critiquing the view of Cold War-era strategist and Professor Bernard Brodie, who wrote cynically: “soldiers usually are close students of tactics, but only rarely are they students of strategy and practically never of war!”[62] Major General William Rapp, now Commandant of the Army War College and former Chief of the Office of the Legislative Liaison, describes these strategic *options* as “a set of actions including resource commitments designed to lead to a specific [objective] or goal or a fundamentally different combinations of ways and means to achieve the same [objective] or goal.”[63] Rapp argues that strategists also conceive of and describe *courses of action* or “minor variations on a single option and provide differing levels of resources and ways to achieve the same” goals and objectives established by the commander.[64] The strategist “translates . . . policy into military plans and actions.”[65] The strategist observes various conditions and facts (both known and speculated) and then arranges their presentation or explanation to the commander in such a way as to frame a decision choice.[66]

Simpson analogizes writing the strategic narrative to the art of oratory or rhetoric—a purposeful effort to combine rational, emotional, and moral arguments in order to persuade.[67] Hence, in Simpson’s terms, a strategist is a master persuader. Persuasion, though, implies that the person persuaded (*i.e.*, commander or decision-maker) *trusts* the person persuading. Trust, according to one current Army strategist, is built from the ground up based on communication and “speaking truth to power even when it is unpopular.”[68]

Freedman, similarly, suggests strategy—future storytelling—is related to drama. Both the strategist and dramatist are concerned with plotlines, assigning meaning to events, ensuring consistency in a narrative, managing the pace of events, and—in a way—manipulating the attitudes opinions of various audiences.[69]

Crafting a narrative based on available facts, one that is both compelling and coherent, and persuading an audience (even if it is an audience of one) based on trust is what strategists *do*. Trial Counsel do the same for their commanders. In the most general sense, “[a]s advisor, a lawyer provides a client with informed understanding of the client’s rights and obligations and explains their practical implications.”[70] Trust, too, is of prime importance to the lawyer. “Trustworthiness” is discussed at least three times directly in our Rules of Professional Conduct.[71] Our Rules demand that that we are “competent, prompt, diligent, and honest.”[72] Our doctrine expects the same.[73] “Developing the trust of the staff and supported commanders facilitates the judge advocate’s role in supporting mission command.”[74] But more specifically, our rules of professional conduct envision a strategist model that is implicit in the attorney-client relationship:

Both lawyer and client have authority and responsibility in the *objectives and means* of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law, and the lawyer’s professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue *objectives or employ means* simply because a client may wish that the lawyer do so. *A clear distinction between objectives and means sometimes cannot be drawn*, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of *means*, the lawyer should assume responsibility for technical and legal tactical issues.[75]

As mentioned earlier, Brigadier General Martin’s labeling of the judge advocate as a “counselor” is fully consistent with this division of labor between those who articulate *objectives* and those who advise on the *means*

. In every action we manage and advise the command on—from an adverse separation to a preferral of charges—we expect of ourselves, and the commanders expect of us, to be the honest independent broker, unbiased by operational or personal connections to the soldier or subject matter. In that sense, Trial Counsel “speak truth to power” daily. When in the courtroom, the Trial Counsel is also disposed toward scripting the drama or strategic narrative each time they open their case, make a closing argument, introduce evidence, or signal the “theme” and “theory” of the case.[76]

Who is the Strategist?

But in order to juggle the ends, ways, and means, the strategist-lawyer must be of a certain type, or possess certain attributes that they are able to flex and exercise. The strategist, according to General Galvin, is “uniquely qualified by aptitude, experience, and education in the formulation and articulation” of strategy.[77] Those aptitudes include the ability to recognize constraints and limits on resources, “understands people and knows how to motivate them,” and is capable of “thoughtful analysis, creative ideas, and [blessed by] a sense of perspective.”[78] The Army demands its officer-strategists to be capable of flexing their “[c]ritical thinking skills and the ability to develop creative solutions to complex problems [and] [e]mploy interdisciplinary assessment, problem solving, and planning techniques that complement senior leader decision-making and appraisal.”[79]

In that sense, the strategist is an expert, but also an *agent*: he or she applies that expertise in the service of a principal, or decision-maker who otherwise lacks the time or expertise but possesses the authority and responsibility to decide.[80] As Gray observed (taken with a grain of salt, as he was writing from the perspective of having served as a strategist), a strategist is a person “who sees, even though he or she cannot possibly be expert in, all dimensions of the ‘big picture’ of the evolving conditions.”[81] That, in a nutshell, is who a strategist *is*.

So who *is* a Trial Counsel? A Trial Counsel is an expert in military criminal law in that he or she possess a working knowledge of the Uniform Code of Military Justice, the Rules of Court-Martial, the Military Rules of Evidence, relevant case law, relevant Department of Defense, Army, and installation policies and regulations that impose constraints and prohibitions on the conduct of Soldiers, and of course the U.S. Constitution. Trial Counsels develop working relationships with law enforcement investigators and shepherd various stages of the investigation as facts develop into theories of the crime; they respond to questions from commanders concerned about breaching the boundaries of their legal authorities, and offer proactive and reactive advice to commanders on a wide range of subjects linked to the good order and discipline of Soldiers in a given unit. In that sense, we might modify Liddell Hart’s definition of strategy slightly to reflect the actions of the Trial Counsel: *technical expert in the art of explaining, distributing and applying legal means to fulfill the ends of good order and discipline.*

The Military Justice Strategist

With that definition in mind, we can begin to anticipate the promise of what this essay calls the “military justice strategist.” For each case they undertake, the Trial Counsel wears the strategist hat just as they traditionally don those of the counselor, advisor, and zealous advocate. For each case, well before a detailed proof analysis and trial preparation start, the Trial Counsel, acting as an agent for the commander, inquiries into what the overarching objective or end-state of the commander might be. Is it deterrence? If so, what kind—specific or general? Incapacitation? Rehabilitation? Plain-old retributive punishment? [82] Or is the objective just to re-build broken or fractured unit cohesion?[83] They probe into thinking of the Commander: what facts or factors weigh strongly in favor of those end-states: extenuating circumstances? The degree of harm on the victim? The effect on the morale, safety, or welfare of the unit? Recommendations from subordinate leaders? A sense of fairness, or a sense of equity?[84] The

Trial Counsel must consider, and advise the Commander about, how this particular case fits within an overarching pattern—perhaps acted out by the accused’s peers or in other units on the installation—or relates to larger systemic trends within the Army. They objectively frame the case, or develop a “strategic narrative,” using a skill set that includes analytical rigor and cautionary sense of perspective, just as a military strategist assembles, sifts though, synthesizes, and draws conclusions from a dizzying array of tactical facts, trade-offs, and circumstances to help understand the larger strategic narrative—and to perhaps rewrite it.

When a crime warrants adjudication by trial, for instance, that judge advocate becomes the lead agent in directing, managing, and executing a highly-complex arrangement of procedural actions that places an accused Soldier in court to stand trial before a judge or panel. When an offense does not warrant that particular “way,” the judge advocate must adroitly understand and articulate the other available ways that a commander may achieve his or objective: non-judicial punishment, reprimands, transfers, or re-training. [85] Of course, the adequate description of these alternatives (if we are to apply the three skills of classical rhetoric) must include the cost—in time, dollars, manpower, public perception and opinion, on the career and dependents of the accused, the justice owed to the victim, the likelihood of success or the consequences of an appeal to a higher authority. In other words, the Trial Counsel is conversant in the *means* that construct or support the various *ways* (courses of action) open to a commander, and which may or may not be prudent given the ultimate *ends*, objective, or goal.

Having advocated for a particular *option*, like referring the case to a court-martial over an adverse administrative response, the Trial Counsel descends on the available *courses of action* like a hungry football player at a post-game all-you-can-eat buffet line. Recommending a general court-martial over a special court-martial requires the technical knowledge of the jurisdictional limits and sentence restrictions. Having recommended a general court-martial, the trial counsel must further decide what evidence is necessary to prove up the elements of the offense, what witnesses to call for testimony (and how they might be impeached), what sentence to ask for and why, and hundreds of other questions. This all requires a grasp of how those constraints and specific *means* might satisfy the ends envisioned by the commander of that accused Soldier in any given case, using this *way*, or that method. The same logic holds true for choices between nonjudicial punishment under Article 15 offered by a Company Grade officer or Field Grade officer, or a General Officer Memorandum of Reprimand (GOMOR) to be filed “locally” or in the subject’s official and permanent personnel file. Ultimately, like a strategist, the Trial Counsel seeks to *persuade*. Do we not, as Aristotle suggested, rely on an admixture of logic and reason, emotional pull, and moral position when we advocate?[86]

But, beyond these three rhetorical devices, what about the law’s emphasis on *precedent*? That mode of legal reasoning can, likewise, be reconciled with strategic reasoning. Simpson suggests that history is also a vital source of data from which to build those logical, emotional, and moral arguments:

The power of how people perceive history can be a powerful “force multiplier,” or can alternatively be a huge drain on resources where strategy tries to swim upstream against historical perception.[87]

Commanders use After Action Reviews to generate lessons-learned that will shape future conduct,[88] and often rely on historical study to inform their judgement about their current situation.[89] The institutional Army vigorously maintains its own “Center for Army Lessons Learned” to—at the operational and tactical level—“share knowledge and facilitate the Army’s and Unified Action Partners’

adaptation to win wars.”^[90] The Maneuver Center of Excellence at Fort Benning maintains an online self-study program that, among other things, stresses that history “provides a context that helps equip an agile mind to make informed decisions [and] provides context as maneuver leaders reflect on personal experience in training and combat.”^[91] Military history in particular serves to record the “complicated and disagreeable realities” of warfare, which—if properly reflected upon by *discerning and establishing differences rather than similarities* among events—guide combat practitioners in future conflict.^[92] Historian Michael Howard cautions us to always review military history in “depth,” “width,” and “in context”—that is, command of the nuanced *facts* of each historical case-study, augmented by broadly reviewing many such “like” and “unlike” campaigns and battles across a *long period of time*, and assessing these facts, trends or patterns through a reasonable and fair appreciation of the nature of the personalities, environments, and choices that shaped these historical events.^[93]

Trial counsel and other criminal law practitioners *also* rely on history—on *precedent*—in drawing legal conclusions and “making the case” to ensure our commanders make fully-informed strategic decisions. Certainly, courts interpret legal standards and rules in historical ways that very much mirror Howard’s caveats on the “use and abuse of military history.” As just one example, the Court of Appeals for the Armed Forces interpreted a complicated federal code provision in precisely the same way—in depth, in width, and in context. In *United States v. Schell*,^[94] the Court was faced with interpreting, for the first time, the meaning of “intent” under 18 U.S.C. § 2422(b) and applying it to a case in which a Soldier was convicted of engaging in sexually “graphic Internet chats” with a person he believed (erroneously) to be a fourteen-year-old girl.^[95] In overturning the Army Court of Criminal Appeals’ earlier decision, the government counsel argued—and the Court’s analysis included—the following: an assessment of the “plain meaning” of the words in the statute; the legislative history of the statute and the driving intentions of the lawmakers when they crafted this statute; analogous cases that this Court had decided in previous years that—when properly interpreted—refuted the lower court’s interpretation of this statute’s text; and, finally, a broad review of every other federal circuit court of appeals’ decisions that had already interpreted this statute and its “intent” element.^[96]

In *Schell*, the Court explained the meaning of the law as applied to this matter by looking *deeply* (into peculiar and unique facts of this particular episode in which a Soldier used the Internet to communicate with another person, and into the statute’s textual meaning), *widely* (by looking at the interpretations available under other federal circuits), and *in context* (by examining the motivations of this law’s drafters at the time they enacted it).

This same modus operandi is evident when Trial Counsel discuss cases and fact-patterns with their commanders before they make a disposition decision. As Rule for Court-Martial 306 explains:

Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances . . . the views of the victim . . . recommendations by subordinate commanders, the interests of justice, [and] military exigencies.^[97]

We advise our commanders that they must “remain neutral and detached from the circumstances [in order to] make the best decision for the unit, the Soldier, and the interests of justice . . . [so] [e]ach case must be individually considered in the context of a consistent disciplinary philosophy.”^[98] We counsel our commanders to look *deeply* into the facts of each case on its own individual merits; *widely* by looking at the both the effect of the crime (on the victim as well as on command’s morale, fighting effectiveness, and

good order and discipline) and how like cases have been handled in the past; and *in context* by addressing the extrinsic and environmental circumstances peculiar to each case that may mitigate or aggravate the crime or the Soldier's criminality, to include the history of the Soldier's own misconduct the offense's history within that command. Just as it does for military strategy-making, precedent or history clearly plays a mammoth role in how we advise our commanders to pursue military justice and in how we formulate our legal arguments.

Our own professional code relies on the "ends, ways, and means" description, and our mode of reasoning is both precedent and analogy-based. We can look to Anne-Marie Slaughter's famous advice about "thinking like a lawyer" to see the parallels: lawyers, as well as military strategists, think

with care and precision, reading and speaking with attention to nuance and detail . . . understanding that words can have myriad meanings and can often be manipulated . . . [and] paying attention to context and contingency . . . exercising judgement, distinguishing among those arguments, sifting good from bad [and] combining realism with idealism.[99]

Therefore, our profession already tacitly acknowledges our strategist function. Reality, too, demonstrates that trial counsel perform this function. In the courtroom, in the staff conference room, and sitting across the desk from the commander with the investigation and MCM in hand, Trial Counsel—without exception—think and perform as strategists from "Reveille" to "Retreat" (and, usually, well-passed "Taps"). If they do not, they risk far more than an acquittal or motion to dismiss. Liddell Hart famously wrote:

[t]he object in war is to attain a better peace . . . [but] [i]f you concentrate exclusively on victory, with no thought to the after-effect, you may be too exhausted to profit from the piece, while it is almost certain that the peace will be a bad one, containing the germs of another war. This is a lesson supported by abundant experience.[100]

Military Justice Strategists, as the American Bar Association standards for prosecutors reminds us, are officers that do not concentrate exclusively on the prosecution or crime, "with no thought to the after-effect." [101] Rather, they always strive to know—and advise their commanders on—what the "better peace" or "better justice" would look like, how it can be accomplished, and why it deserves the opportunity.[102]

Appendix

Figures 1 and 2, below, describe the "Command and Control (C2) Paradox" that can assist in visualizing the strategic role that Trial Counsel fill for the commanders in the field of military justice. In brief, this paradox suggests that the "more you command, the less you control." In hierarchical organizations, like government bureaucracies, large business divisions or military units, the *position* one sits in generally affects one's resources, knowledge, scope of responsibility, ability to orchestrate or coordinate among others, and opportunity or authority to act independently.[103] The executive, according to James Q. Wilson's famous study of bureaucratic organizations, is often concerned more with "external constituencies" and other similar-situated, sister, organizations than with internal organizational management.[104] The "operator," in contrast, is "the person that does the work that justifies the

organization.”[105] Therefore, it seems reasonable to suggest that a generic representation of information awareness and event control is *opposite* that of the standard line-and-block organizational tree—one with a singular head, director, or commander at the apex and branching out below with an ever-increasing number of subordinates as one descends layers of the hierarchy and chain-of-command. Figure 1, below, depicts this inversion.

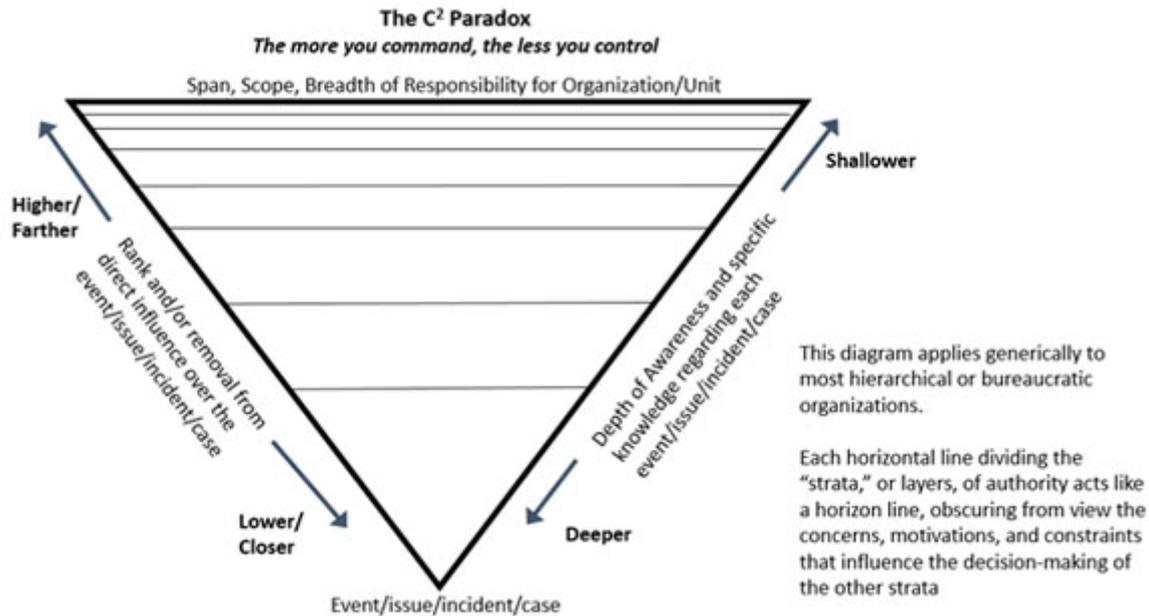


Figure 1: The Generic Organizational Command and Control Paradox

At the very bottom of the inverted triangle is the generic action officer—the representative of the unit or organization that most directly engages with a particular event, issue, incident or case (*i.e.*, Wilson’s “operator”). In a military unit in combat, imagine this person to be the Soldier directly engaged in a firefight with an enemy combatant. At this lowest level, the Soldier experiences and benefits from the deepest well of situational awareness about that *particular* engagement he or she experiences first-hand. The ability to control or influence that engagement by a single person is at a zenith. But, as one moves farther away from the engagement, either geographically or by rank, the situational awareness and opportunity to directly influence that particular engagement will, realistically, decrease: consider the squad leader that must remain cognizant of six other Soldiers and *their* engagements and how they mutually reinforce the other with intersecting fields of fire or over watch. Or consider the platoon leader, orchestrating *three* such squads and communicating in real-time back to the company command post and with air support buzzing overhead.

With both the squad and platoon leaders, their range of responsibility widens, but their depth of awareness and knowledge of that singular Soldier’s personal direct engagement becomes shallower. Moving higher up the chain-of-command to the battalion, brigade, or division headquarters, the breadth of command or responsibility naturally expands (represented by increasing horizontally), but their depth of awareness naturally shrinks in comparison to those below.[106] Only in rare exceptions would a battalion or brigade commander experience the same situational and contextual depth of understanding about that particular firefight that the original shooter on the ground experiences, and thereby directly influence or control the outcome (an exception that proves the general rule).

The horizontal lines stretching across the diagram in Figure 1 can be thought of as “horizon lines”

dividing the various echelons of command and control. Unless affirmative and overt steps are taken to communicate between and among these various “strata,” the information and situational awareness each layer experiences is largely inaccessible, hidden from the view of the others much like seeing beyond a horizon line is impossible if one remains static or still. Consequently, the action officer (operator) sitting at the lowest vertex would not observe (let alone grasp or influence) the concerns, motivations, and constraints that affect decision-making and judgment at each higher layer of command. This paradox, then, means that the person most able to directly affect the particular event, issue, incident, or case does so blindly—missing the larger forest for the trees directly ahead. Whether one stands at the “tip of the spear” closest to the action, or one stands at the apex of command overseeing entire subordinate organizations, each with their own action officers at the tip of the spear, the risk that each will make uninformed, biased, arbitrary, reactionary, or short-term-only decisions is high.

The position, duties, and expectations of a Trial Counsel, however, may modify this inversion. In Figure 2, below, imagine the Trial Counsel at the lowest vertex of the diagram—the action officer that *most directly* effects or influences military justice decisions as the agent for the commander.

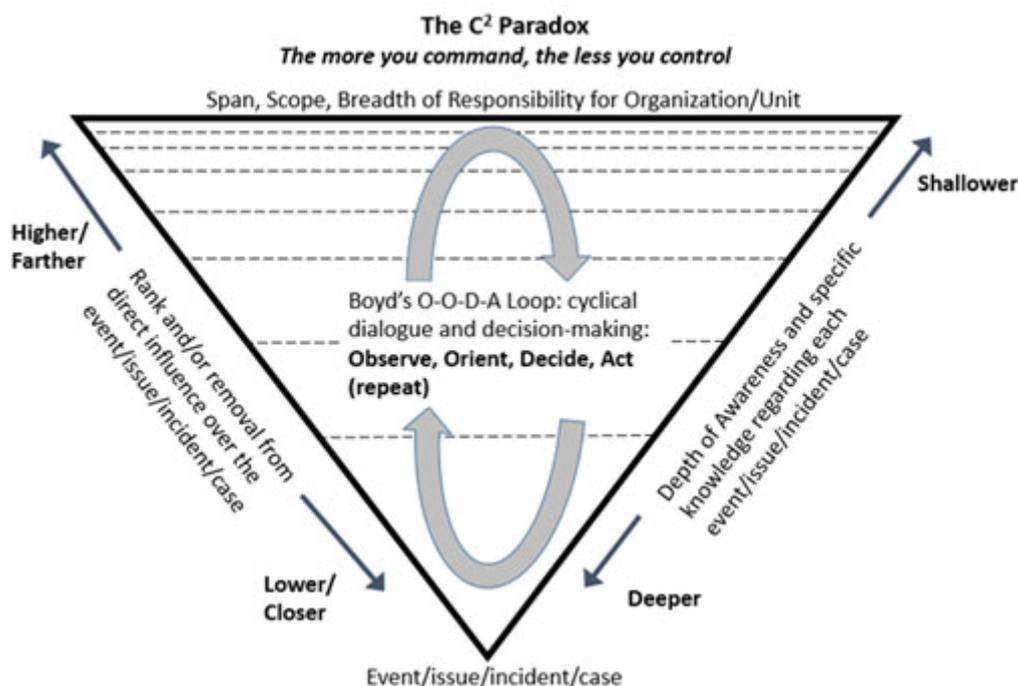


Figure 2: The C2 Paradox Mitigated by the Trial Counsel

As discussed in the main article above, Trial Counsel have privileged, insider, access to the chain-of-command’s leadership and disciplinary philosophy and how they apply contextual considerations to each case, as well as to facts (evidence) not widely known beyond the law enforcement community. Trial Counsel, moreover, have opportunity, serving on the special staff of the commander, to share their technical knowledge and provide advice to each strata or each layer of the chain-of-command (company, battalion, and brigade), thereby expanding the depth of each commander’s situational awareness. Finally, Trial Counsel are aware of other like cases happening in real-time across other jurisdictions and aware of precedent—both within their own jurisdictions and within the common law tradition that structures our appellate system of case law.

Whereas the generic bureaucracy would shield the generic action officer from the motivations, opportunities, constraints, and concerns influencing the judgment of those superior in the “chain-of-

command,” the judge advocate Trial Counsel effectively moves between and among the various strata—they are not blinded by the horizon lines. These lines, in essence, become transparent.

Unlike the static action officer of Figure 1, the Military Justice Strategist, the *technical expert in the art of explaining, distributing and applying legal means to fulfill the ends of good order and discipline*, is “free to move about the cabin.” As discussed earlier, the Trial Counsel works to continually fill the chain-of-command with as much relevant and material fact—as well as their recommendations—as possible, as new information becomes available about a specific case, controversy, or disciplinary concern. The Trial Counsel helps the commander articulate his or her end state or goal (if not already well-established) and generates various plausible courses of action and options within the technical, rule-based, bounds of the Manual for Courts-Martial, regulations, and policy. These *ways*, when approved, will trigger the Trial Counsel to begin applying the myriad *means* that constitute those ways (with an agent’s expert skill) to fulfill the ultimate *ends* of the commander’s management of good order and discipline (even if those ends may evolve over time). We can think of this continuous strategic narrative, in Emile Simpson’s terms, as a dialogue—between what is desired and what is possible—between the agent Trial Counsel and the principal Commander. John Boyd’s famous “O-O-D-A Loop” framework provides another tool for labeling this interaction.^[107] The Trial Counsel helps—indeed may be the only one—to *observe* the facts of a case; she then *orients* the chain-of-command in way that highlights relevant aspects of the case (e.g., R.C.M. 306 factors); she then advises the commander on available *decisions*, and then communicates that decision; finally, she manages with technical fluency the *act* of the commander—whether it is an administrative separation board, an Article 15 reading, or the preferral of charges and a court-martial.

In sum, Figure 2 illustrates that a Trial Counsel, as an *agent* (with duties of care, competence, diligence, communication, and candor) for a *principal* decision-maker, can help dissolve the horizons between layers through informed communication and expert counsel, within the Trial Counsel’s “scope of responsibility” established by the UCMJ, MCM, Regulations, and case law. In this sense, the Trial Counsel is far more than the technically-proficient operator of the military justice system’s bureaucracy: the Trial Counsel is the *technical expert in the art of explaining, distributing and applying legal means to fulfill the ends of good order and discipline*.

End Notes

[1] Presentation by staff at IDEO’s office in Boston, Massachusetts, to the Fellows of the CSA’s Strategic Studies Group (SSG), September 2013. IDEO is a “global design firm that takes a human-centered, design-based approach to helping organizations in the public and private sectors innovate and grow.” <https://www.ideo.com/about/>. The firm uses “design thinking” (akin to the Army Design Methodology doctrine) to advise and consult on the development of new products, services, or processes both in government and private business clients. The SSG is small, interdisciplinary, and Joint group of officers, civilians, and senior non-commissioned officers selected by the CSA, and chartered to conduct “**innovative, independent, and unconventional** research and analysis, unconstrained by conventional wisdom, employing the best data, analysis, and creative strategic thinking that can be assembled” to examine long-term challenges and opportunities facing the institutional and operational Army. http://csa-strategic-studies-group.hqda.pentagon.mil/SSG_Index.html. The Military and Civilian Fellows of SSG Cohort II (2013-14) met with key leaders at the IDEO Boston office in order to understand and experience first-hand that organization’s analytical and creative framework of “Inspiration, Ideation, and Implementation.” <https://www.ideo.com/about/>. The Cohort, on which this author served, identified several valuable approaches during this engagement with IDEO, including the merits of iterative innovation (starting small, then scaling up, without too much regard for the risk of

failure—“fail early, fail often”), that persuasion is ultimately a function of combining “empathy plus evidence” (which is similar to the classical approach to rhetoric, discussed in Part II.D., *infra*) and that a sound strategy is developed before the “design” and “testing and iteration”—that is, assumptions and hallowed premises underlying the strategy might deserve to be edited or discarded after implementation proves them unsound or irrelevant, leading back to reimagining one’s strategy. Author’s personal notes (September 2013).

[2] Carl von Clausewitz, *On War* 119 (Michael Howard and Peter Paret eds., trans., 1989) (1832).

[3] Manual for Courts-Martial, United States, Part I (Preamble) (2008) [hereinafter *MCM*].

[4] *See, e.g.*, National Defense Authorization Act for 2014, Section 1702(b) (amending Article 60(c), UCMJ); TJAG Policy Memorandum 14-06 (SVP) (22 January 2014), *available at*

[https://www.jagcnet2.army.mil/8525799500461E5B/0/6E6211CCFF14996585257C6A00619F1F/%24FILE/TJAG%2006%20\(Special%20Victim%20Prosecutors\).pdf](https://www.jagcnet2.army.mil/8525799500461E5B/0/6E6211CCFF14996585257C6A00619F1F/%24FILE/TJAG%2006%20(Special%20Victim%20Prosecutors).pdf); and TJAG Policy Memorandum 14-01 (SVC) (1 November 2013), *available at*

[https://www.jagcnet2.army.mil/8525799500461E5B/0/89C13A8FAC6DE91285257C6A0060BEDD/%24FILE/TJAG%201%20\(Special%20Victim%20Counsel\).pdf](https://www.jagcnet2.army.mil/8525799500461E5B/0/89C13A8FAC6DE91285257C6A0060BEDD/%24FILE/TJAG%201%20(Special%20Victim%20Counsel).pdf).

[5] *See generally*, Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Military Justice Review Group (22 December 2015), *available at*

http://www.dod.gov/dodgc/images/report_part1.pdf.

[6] One measure of this shift in attention from military justice to operational concerns is reflected in the number of general and special courts-martial (authorized to adjudge a bad conduct discharge) referred by a convening authority (both individually and aggregate) each year between 2000 and 2014, as well as the percentage of the active duty Army facing such courts-martial. In the year 2000, there were 482,170 Soldiers serving on Active Duty. 731 general courts-martial and 386 “BCD-Special” courts-martial were convened that year (1,117 total). That is, less than one quarter of one percent of the Active Army faced a court-martial, or a rate of one such court-martial for every 432 Soldiers. By 2011, the size of the Army had swelled to 565,463 serving on Active Duty, reflecting the demands of an Army at war, but only a total of 1,081 general or “BCD-Special” courts-martial were convened. That is, less than one-fifth of one percent of the Active Army faced a court-martial, or a rate of one trial for every 523 Soldiers. By 2014, there were only 979 such courts convened in the Army of approximately 510,000 Active Soldiers, or rate of one per every 521 Soldiers. *See* Court of Appeals for the Armed Forces, *Annual Reports* (1951-2014), http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm, and *see* Department of Defense, *DOD Manpower Requirements Report for Fiscal Year 2014*, Table 1-1, *available at* <http://prhome.defense.gov/Portals/52/Documents/RFM/TFPRQ/docs/F15%20DMRR.pdf>.

[7] Defined at U.S. Dep’t of Defense, Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms 95-96 (8 November 2010, as amended through 15 November 2015), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

[8] Clausewitz, *supra* note 2, at 119 (describing the accumulation of routine difficulties and “countless minor incidents” that may not be foreseeable as the friction that inevitably “combine to lower the general level of performance, so that one always falls short of the intended goal”), and at 121 (“[f]riction . . . is the

force that makes the apparently easy so difficult”).

[9] U.S. Military Operations: Law, Policy, and Practice (Geoffrey S. Corn, et al. eds., 2016).

[10] Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations*, in U.S. Military Operations: Law, Policy, and Practice 1, 21-23 (Geoffrey S. Corn, et al. eds., 2016).

[11] *Id.*, at 24.

[12] U.S. Dep’t of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (1 May 1992) [hereinafter *Army Lawyer Rules*], para. 6a; *see also* American Bar Association’s first four “functions” of a prosecutor: (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction; (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions; (c) The duty of the prosecutor is to seek justice, not merely to convict; [and] (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. American Bar Association Standard 3-1.2, *available at*

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html

[13] *Army Lawyer Rules*, at para. 6b. (emphasis added).

[14] Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, not Lawyering*, 143 Mil. L. Rev. 3, 9-10 (1994).

[15] *Id.*, at 10 and n. 21 (quoting Matthew E. Winter, “*Finding the Law*”—*The Values, Identity, and Function of the International Law Advisor*, 128 MIL. L. REV. 1, 29-30 (1990)).

[16] *MCM*, Part I (Preamble), *supra* note 3, at para. I-3.

[17] Consider Sun Tzu’s good advice: “when you surround an army [you could substitute “accused” here] leave an outlet free. Do not press a desperate foe too hard.” Sun Tzu, *The Art of War* (quoted in B.H. Liddell Hart, *Strategy* xii (2d. rev. ed., 1991)).

[18] Consider, for instance, all that the Army expects of a commander:

All commanding officers and others in authority in the Army are required (1) [t]o show in themselves a good example of virtue, honor, patriotism, and subordination; (2) [t]o be vigilant in inspecting the conduct of all persons who are placed under their command; (3) [t]o guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; (4) [t]o take all necessary and proper measures, under the laws, regulations, and customs of the Army; [and] (5) [t]o promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

U.S. Dep't of Army, Reg. 600-20, Army Command Policy, para. 1-5c.(4)(d), 10 U.S.C. § 3583.

[19] U.S. Army, The Judge Advocate Legal Center and School, Misc. Pub. 27-8, "2015 Commander's Legal Handbook" (2015), at 11.

[20] *MCM*, Part I (Preamble), *supra* note 3, at para. I-3 (emphasis added).

[21] A commander is responsible for executive, legislative, and judicial-like duties over a significant portion of his or her soldiers' behavior. *See MCM, supra* note 3, Rules for Court-Martial [hereinafter R.C.M.] 303, 306, 307; *see generally* Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968), *available at*

<https://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsweb.nsf/Main?OpenFrameset>; *see also* U.S. Army, The Judge Advocate Legal Center and School, Misc. Pub. 27-8, "2015 Commander's Legal Handbook" (2015), at 17, para. A.

[22] Samuel Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* 11, 15 (1957) [hereinafter *Soldier and the State*] (paraphrasing Harold D. Lasswell, *The Garrison State*, *American J. of Sociology*, 46:4, 455-68 (Jan. 1941), *available at* https://www.cyberwar.nl/d/1941-The_Garrison_State.pdf).

[23] Summarized transcript available at "Top Brass Reject Overhauling Military Justice System to Reduce Sexual Assault," PBS Newshour (4 June 2013), http://www.pbs.org/newshour/bb/military-jan-june13-sexualassaults_06-04/.

[24] *See, e.g.*, R.C.M. 105 ("Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice"); R.C.M. 406 ("Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice"); R.C.M. 1106 ("Before the convening authority take action . . . on a record of trial by general court-martial . . . that convening authority's staff judge advocate or legal officer shall . . . forward to the convening authority a recommendation"); *see also* doctrine relating to the role of the Trial Counsel in Dep't of Army, Field Manual 1-04, Legal Support to the Operational Army, para. 4-6, 4-13 (18 Mar. 2013).

[25] Huntington, *supra* note 22, at 13.

[26] Dep't of Army, JAGC Publication 1-1, Personnel Policies, Office of the Judge Advocate General (1 January 2014), A-14 (Appendix 7-1, "Military Justice Skill Identifiers Implementing Policy").

[27] U.S. CONST. art. I, § 8, cl. 14 ("[t]o make Rules for the Government and Regulation of the land and naval Forces").

[28] *Parker v. Levy*, 417 U.S. 733, 743, 749 (1974).

[29] *Parker v. Levy*, 417 U.S. at 743-44; *see also* David A. Schlueter, *Military Criminal Justice: Practice and Procedure* 78 (8th ed. 2012); Joseph W. Bishop, Jr., *The Case for Military Justice*, 62 Mil. L. Rev. 215, 216-21 (1973).

[30] See, e.g., the programs designed to assist purported victims of sexual offenses such as the Special Victim Counsel program (see 10 U.S.C. §§ 1044 and 1565b) and *TJAG Sends: A Message from The Judge Advocate General* (“Special Victim Advocate Program”) 39-02 (15 October 2013), available at <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?tag=TJAG+Sends>; and see Executive Order 13696, 2015 Amendments to the Manual for Courts-Martial (specifically: the amendments to Rule for Court-Martial [hereinafter R.C.M.] 405(i) regarding the participation and rights of a victim at a Preliminary Hearing before a case has been referred to a court-martial; R.C.M. 1001A, regarding a crime victim’s opportunity to be “reasonably heard” at a sentencing hearing; and R.C.M. 1107, regarding a victim’s opportunity to present matters to the Convening Authority after trial and before the Convening Authority takes action on the findings or sentence).

[31] Restatement (Third) of Agency § 1.01 (2006) [hereinafter Agency Restatement]. Agency theory also takes on economic and political meanings. See, e.g., Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (2003) (applying principles of macroeconomic agency theory to the dynamics between senior civilian political officials and senior military leaders).

[32] Black’s Law Dictionary 551 (2d Pocket ed. 2001) (definition of “principal”).

[33] *Id.*, at 26 (definition of “agent”).

[34] *Id.*, at 222 (definition of “fiduciary relationship”).

[35] See Deborah A. DeMott, *The Lawyer as Agent*, 67 *Fordham L. Rev.* 301, 302-03 (1998) (“the defining elements of the relationship are mutual manifestation of consent, the agent’s undertaking to act on behalf of the principal, and the principal’s right to control the agent . . . [where ‘control’ means] prescribing on an ongoing basis what the agent shall or shall not do”).

[36] *Id.*, at 303 (for instance, in a lawyer-client model of agency, “many clients lack the expertise to supervise the lawyer’s actions because the client will not understand their import”—hence the reason the lawyer was hired in the first place. “In many agency relationships, the principal’s expertise is inferior to that of the agent and the principal exercises control by selecting a particular agent, defining the scope and objectives of the agent’s retention”). *Id.*, at 304.

[37] Tamar Frankel, *Fiduciary Law*, 71 *Calif. L. Rev.* 795, 800 (1983).

[38] See Restatement (Third) of the Law Governing Lawyers § 26 cmt. b (2000) (“[l]egal representation saves the client’s time and effort and enables legal work to be delegated to an expert. Lawyers therefore are recognized as agents for their clients in litigation and other legal matters.”) See also James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 *Buff. L. Rev.* 349 (2000);

[39] Dep’t of Defense, Joint Publication 1-02 (Department of Defense Dictionary of Military and Associated Terms) (as amended through 15 November 2015), at 231.

[40] Arthur F. Lykke, Jr., *Toward an Understanding of Military Strategy*, in *U.S. Army War College Guide to Strategy* (eds. Joseph R. Cerami and James F. Holcomb, Jr.) (Feb. 2001), available at <https://www.au.af.mil/au/awc/awcgate/ssi/00354.pdf>.

[41] B.H. Liddell Hart, *Strategy* 321 (2d rev. ed. 1991).

[42] Colin S. Gray, *Modern Strategy* 17 (1999). Gray's definition of strategy includes *seventeen* inter-related "dimensions" that affect overall strategic performance: (1) people, (2) society, (3) culture, (4) politics, (5) ethics, (6) economics and logistics, (7) organization, (8) administration, (9) information and intelligence, (10) strategic theory and doctrine, (11) technology, (12) operations, (13) command, (14) geography, (15) friction, (16) the adversary, and (17) time. *Id.*, at 24-44.

[43] *Id.*, at 18 (quoting J.C. Wylie, *Military Strategy: A General Theory of Power Control* 14 (1989)).

[44] Lawrence Freedman, *Strategy: A History* xi (2013).

[45] Michael E. Porter, *What is Strategy?*, *Harv. Bus. Rev.* (November-December 1996), 61-78, at 64.

[46] *Id.*, at 68, 70.

[47] *Id.*

[48] Michael E. Porter, *Competitive Strategy: Techniques for Analyzing Industries and Competitors* xvi (1980) [hereinafter *Competitive Strategy*].

[49] *Id.*, at xvi-xvii.

[50] *Id.*, at 47.

[51] Why recount a story of military maneuvering from antiquity in an article about military justice strategy? This story is not found in Army Field Manuals or Army doctrine regarding leadership, tactics, or strategy; therefore, it is somewhat safe to assume that the majority of readers of this article will be unfamiliar with it—hence, its illustrative value in distinguishing tactical decision-making from strategic thinking.

[52] Paraphrasing Porter, *Competitive Strategy*, *supra* note 48, at 47.

[53] Arrian, *The Campaigns of Alexander* (trans. Aubrey de Selincourt) 42-44 (1958); *see also* Philip Freeman, *Alexander the Great* 49-51 (2011).

[54] Dep't of Army Pam. 600-3, para. 28-1a. and 28-1d.(1), *Commissioned Officer Professional Development and Career Management* (3 December 2014).

[55] Emile Simpson, *War From the Ground Up* 116-19 (2013).

[56] *Id.*, at 126.

[57] Freedman, *supra* note 44, at 608.

[58] Simpson, *supra* note 55, at 179-80.

[59] *Id.*, 181-83.

[60] Porter, *supra* note 45, at 70-73.

[61] General John R. Galvin, *What's the Matter with Being a Strategist?*, *Parameters* (Winter 2010-11 reprint), 82.

[62] Bernard Brodie, *War and Politics* 11 (1973).

[63] Major General William E. Rapp, *Civil-Military Relations: The Role of Military Leaders in Strategy Making*, *Parameters*, 45:3 (Autumn 2015), 14-26, at 21.

[64] *Id.*

[65] Galvin, *supra* note 61, at 84.

[66] The Nudge Blog, <http://nudges.org/> (John Balz ed.). To “nudge” in this context is to alter a person’s “behavior in a predictable way without forbidding any options or significantly changing” their incentives. See Richard H. Thaler & Cass R. Sunstein, *Nudge* 6 (2008).

[67] Simpson, *supra* note 55, at 188.

[68] Lieutenant Colonel Aaron Bazin, “Speaking Truth to Power: What Does the Army Strategist of 2025 and Beyond Look Like?,” *Modern War Institute* blog (9 May 2015), *available at* <http://modernwarinstitute.org/201559speaking-truth-to-power-what-does-the-army-strategit-of-2025-and-beyond-look-like/> (last viewed 9 January 2016).

[69] Freedman, *supra* note 44, at 622-28.

[70] U.S. Dep’t of Army, Reg. 27-26, *Legal Services: Rules of Professional Conduct for Lawyers* (1 May 1992), at 1.

[71] *Id.*, at 5 (Rule 1.3, Comment), 29 (Rule 8.3), and 30 (Rule 8.4).

[72] *Id.*, at 1 (Preamble, para. 6c.).

[73] Dep’t of Army, Field Manual 1-04, *Legal Support to the Operational Army*, para. 1-12 (18 Mar. 2013).

[74] *Id.*, at para. 2-14.

[75] U.S. Dep’t of Army, Reg. 27-26, *Legal Services: Rules of Professional Conduct for Lawyers* (1 May 1992), at 4 (Rule 1.2, Comment) (emphasis added).

[76] See, e.g., Larry S. Pozner & Roger J. Dodd, *Cross-Examination: Science and Techniques* 25 (2d. ed. 2009) (“[a] theory of the case is a cogent statement of an advocate’s position that justifies the verdict he or she is seeking” or a “unifying focal point” around which to logically arrange the facts the advocate presents or rebuts). In contrast, the “theme distills the essence of the theory of the case into a short refrain.” *Id.*, at 64.

[77] Galvin, *supra* note 61, at 83.

[78] *Id.*, at 83-84.

[79] Dep’t of Army Pam. 600-3, 28-2b.(3), *Commissioned Officer Professional Development and Career Management* (3 December 2014).

[80] Agency Restatement, at § 1.01, and See DeMott, *The Lawyer as Agent*, at 302-03 (“the defining elements of the relationship are mutual manifestation of consent, the agent’s undertaking to act on behalf of the principal, and the principal’s right to control the agent . . . [where ‘control’ means] prescribing on an ongoing basis what the agent shall or shall not do”).

[81] Gray, *supra* note 42, at 52.

[82] See, e.g., Lieutenant Colonel Charles L. Pritchard, Jr., “*Punished As a Court-Martial May Direct*”: *Making Meaningful Sentence Requests*, *Army Law*. (December 2015), at 33-34.

[83] *Id.*, at 35; see also Daniel Maurer, *Military Mediation as Military Justice? Conjectures on Repairing Unit Cohesion in the Wake of Relational Misconduct*, 28 *Ohio St. J. on Disp. Resol.* 419, 429-33 (2013). Military discipline is “manifested in individuals and units by cohesion, bonding, and a spirit of teamwork.” U.S. Dep’t of Army, Reg. 600-20, *Army Command Policy* (18 March 2008), para. 4-1b.

[84] R.C.M. 306(b), Discussion.

[85] See, e.g., *MCM*, Part V, para. 1c. and 1g.

[86] Simpson, *supra* note 55, at 188-89. The author acknowledges the irony of using a rhetorical question about the use of rhetoric—it was intentional.

[87] Simpson, *supra* note 55, at 214.

[88] U.S. Dep’t of Army, Training Circular 25-20, *A Leader’s Guide to After-Action Reviews* (30 September 1993), at 1.

[89] Lieutenant General H.R. McMaster, *Discussing the Continuities of War and the Future of Warfare: the Defense Entrepreneurs Forum*, *Small Wars J.* (13 October 2014) (“[t]he first step in thinking clearly about future war is to pay attention to continuities in the nature of war as well as changes in the character of armed conflict”), available at <http://smallwarsjournal.com/jrnl/art/discussing-the-continuities-of-war-and-the-future-of-warfare-the-defense-entrepreneurs-foru>.

[90] United States Army Combined Arms Center, Center for Army Lessons Learned, <http://usacac.army.mil/organizations/mccoe/call> (last visited 9 January 2016).

[91] United States Army Maneuver Center of Excellence, Maneuver Self-Study Program, *available at* <http://www.benning.army.mil/mssp/Military%20History/>.

[92] Michael Howard, *The Use and Abuse of Military History*, Parameters, Vol. XI, no. 1 (March 1981), at 10

[93] *Id.*, at 14; *see also* H.R. McMaster, *On War: Lessons to be Learned*, Survival, 50:1 (February-March 2008), at 28.

[94] 72 M.J. 339 (2013). In full disclosure, the author was the lead government appellate counsel in this case, argued on 15 April 2013 at the Court of Appeals for the Armed Forces.

[95] *Schell*, 72 M.J. at 340-41.

[96] *Schell*, 72 M.J. at 343-45

[97] R.C.M. 306(b), discussion.

[98] U.S. Army, The Judge Advocate Legal Center and School, Misc. Pub. 27-8, “2015 Commander’s Legal Handbook” (2015), at 11.

[99] Anne-Marie Slaughter, “On Thinking Like a Lawyer,” *Harvard Law Today* (May 2002), *available at* <https://www.princeton.edu/~slaughtr/Commentary/On%20Thinking%20Like%20a%20Lawyer.pdf>.

[100] B.H. Liddell Hart, *Strategy* 353 (2d. rev. ed. 1991).

[101] American Bar Association Standard 3-1.2, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html

[102] One way of visually depicting this relationship is offered in the appendix.

[103] James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 24 (2000).

[104] *Id.*, at 31-32.

[105] *Id.*, at 33-34.

[106] The size differences in these strata are relative, not absolute measures. In other words, the operator’s or action officer’s situational awareness may in fact be objectively quite shallow because the incident or event is just then beginning, but it remains—relatively—much deeper than that possessed by ascending levels of command and control above him.

[107] See, e.g., Gray, *supra* note 42, at 90-91; see also generally Robert Coram, Boyd: The Fighter Pilot Who Changed the Art of War (2004); and see Chet Richards, “Boyd’s OODA Loop (It’s Not What You Think),” at 10-11, available at http://www.jvminc.com/boydsrealooda_loop.pdf.

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The views expressed are those of the author and do not reflect the official position of the US Army, the Judge Advocate General’s Corps, or the Department of Defense.

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{6} http://www.dod.gov/dodgc/images/report_part1.pdf

{7} http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm

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