

Developing Warrior Lawyers: Why It's Time to Create a Joint Services Law of War Academy

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SINCE THE ABUSES at Abu Ghraib in Iraq came to public attention, a group of critics, pundits, and other purported experts have offered a surfeit of theories on the “real” lessons of that incident.¹ Unfortunately, many of these theories rely on the questionable inference that a causal connection existed between detainee abuse and Coalition interrogation efforts.² Contrary to the critics’ assertions, the lesson of Abu Ghraib was not the long-understood truism that detainees must be shielded from cruel, inhumane, and degrading treatment during interrogation. Instead, the “real” lesson of Abu Ghraib is much subtler than this and is reflected not in the fact that the incident occurred, but in the fact that the events at Abu Ghraib represent an exception to the overall outstanding record of compliance with the Law of Armed Conflict (LOAC) by U.S. Armed Forces.

In the 4 plus years since the initiation of military operations associated with the Global War on Terrorism (GWOT), U.S. Soldiers have confronted threats from both conventional and unconventional enemies, including regular armed forces, militia groups, militant groups, and members of transnational terrorist organizations equipped to conduct military-type operations. U.S. forces have engaged in belligerent occupation, counterinsurgency operations, and stability and support operations. A common thread running through this multitude of operations is the complexity and great necessity of understanding and complying with the LOAC. If there is one unanimously agreed-upon lesson from the debacle at Abu Ghraib, it is that effective resolution of LOAC issues is of profound significance when planning and executing credible U.S. military operations. The challenges associated with identifying the scope and applicability of the LOAC in relation to the military component of the GWOT are aspects of every military operation at every level of command. Indeed, the now notorious “torture memos” generated at the highest levels of our government, along with President George W. Bush’s written determinations regarding applicability of the LOAC to members of Al-Qaeda, demonstrate that this challenge has reached the highest level of national security policy development.

In response to the detainee abuse revelations, scrutiny is being cast on the doctrine, training, execution, and leadership aspects of detention and interrogation procedures. This scrutiny has led to reassessment of the quality and effectiveness of existing policies, doctrine, and training in ensuring compliance with the LOAC. Ironically, however, little assessment has been done regarding a key component in this compliance process: developing genuine LOAC expertise among members of the military legal profession. While there is no question that the tireless efforts of dedicated judge advocates have made a

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tremendous contribution to the planning and execution of GWOT operations, there is no justification for failing to include a critique of the effectiveness of the current techniques used to prepare judge advocates general (JAGs) for the future within this broader reassessment effort.

Such a critique would reveal an unacceptable reality: The Department of Defense (DOD) lacks a joint center of excellence devoted to LOAC Professional Military Legal Education (PMLE). The expertise to build such a center exists, but it is scattered throughout DOD. Providing a venue where such expertise could be consolidated and leveraged would offer JAGs, commanders, and other constituents a great opportunity to develop the expertise in the LOAC that the contemporary operational environment demands. This article proposes the creation of such a venue: a Joint Service Law of War Academy (JSLOWA).

There is certainly truth to the perception that JAG officers throughout the services have fought a valiant battle to ensure LOAC compliance in an environment marked by sometimes confusing guidance from policymakers. Unfortunately, this perception has served as a subtle shield against a genuine critique of the effectiveness of the existing PMLE used to prepare uniformed attorneys for the intense demands of serving as legal advisers during armed conflict and other military operations. Such a critique is long overdue; in fact, it is essential to ensuring that military attorneys who advise future combat leaders are as effectively prepared for the challenges of the contemporary operational environment as the forces they support.

A critique of the PMLE reveals a compelling need for the development of a truly joint approach to LOAC PMLE: creation of a JSLOWA. Such an academy could serve as a true center of excellence for developing expertise among military legal advisers, for providing a genuine opportunity to integrate advisers into joint warfare training and simulations, and for serving as a venue for exploring and advancing ideas about the legal regulation of military operations.

The proposal to develop a JSLOWA is the result of two propositions. First, the only discipline of law currently taught at service-specific JAG schools that will never be practiced in a service-specific context is the LOAC. Contemporary military operations are

not now, nor will they ever again be, “service-specific”; they are joint. And second, in spite of their best efforts, service-specific JAG schools do not have the resources to develop widespread genuine LOAC expertise—a result of the prohibitive confluence of the complexity of contemporary military operations and the limited time available for PMLE. DOD needs another solution, one that would produce military lawyers steeped in the LOAC. These LOAC experts would reduce the risk inherent in lesser trained lawyers, would provide better support to the combat commands, and, ultimately, would better safeguard the strategic interests of the United States.

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Signs Pointing to a JSLOWA

While anyone paying attention to the news would have quickly associated Abu Ghraib with a failure by U.S. forces to comply with the LOAC, there is a less sensational, more valuable lesson to be learned: The misconduct that took place at that detention facility became notorious precisely because it was an aberration in a much more widespread record of legal compliance. Former Secretary of Defense James Schlesinger emphasized this point when he explained the results of his investigation into the abuse incident: “[W]e must continuously bear in mind that the overall performance of those armed forces has been commendable. *[O]ur troops have performed well.* Bear in mind that we have had some 50 thousand detainees—and that over 300 thousand of our troops have served in Iraq. To be sure, any abuses are too many. But, to date, we have identified some 300 cases of possible abuse of which fewer than 100 have been confirmed. One-third of those abuses have been at the point of capture.”³

If, in fact, Abu Ghraib represents the exception to general compliance with the LOAC, it is worth asking why the U.S. record of compliance has been so positive. The answer is no doubt multifaceted, ranging from the quality of training and discipline

among the armed forces to the nation's core commitment to fundamental humanitarian values. Less abstractly, however, the answer would have to acknowledge that highly qualified military legal advisers contributed extensively to this overall record of compliance.

How then does this support a thesis suggesting that the current method of PMLE is insufficient? The answer rests with an examination of the background of the senior military legal advisers who served in critical positions during the planning for and execution of Operation Iraqi Freedom (OIF). Army legal advisers in key positions with the major units involved in ground combat operations in Iraq shared extensive—and among their peers relatively unusual—backgrounds in international and operational law.⁴ In fact, almost all of these officers had previously served as professors of international and operational law at the Army JAG School or had worked in the international and operational law division of the Office of the Judge Advocate General. All but one had served as a legal adviser during combat or in another contingency operation.

What was unusual about this all-star team was that it represented a tremendously fortuitous aligning of the stars into a constellation of expertise unusually competent to deal with the myriad complex, critical LOAC issues associated with the war. However, this expertise was not developed primarily through on-the-job training. Instead, it was developed through applying in the operational context the extensive knowledge derived from opportunities to engage in extensive study of the LOAC—in short, effective PMLE. While it is difficult to prove the negative, it seems reasonable to presume that this collective expertise proved instrumental in ensuring that the debacle at Abu Ghraib did, in fact, reflect the exception to the rule.

This all-star lineup was unusual precisely because the opportunities afforded these JAG officers during their careers were exceptional. Indeed, had the random alignment of key legal advisers occurred at some other point in the history of these units, the level of LOAC expertise might have been dramatically different. Unlike these officers, the vast majority of judge advocates have been required to learn on the fly, the result of the limited opportunities available for them to develop a foundation of knowledge through comprehensive LOAC-oriented PMLE.

Current PMLE and the LOAC

All judge advocates should have the opportunity to develop a comprehensive understanding of the LOAC, a discipline that, as recent events have once again demonstrated, is at the core of the practice of military law. This opportunity should be equal in scope and depth to the opportunity given the all-star lineup. Unfortunately, such opportunities are rare and generally insufficient. In fact, the career development of a hypothetical judge advocate is almost devoid of in-depth study of the LOAC.⁵

Typical judge advocates begin their military careers following graduation from law school. The years of legal study leading to their Juris Doctor degree include extensive immersion in criminal law, administrative law, contract law, and other areas of civilian specialization. However, it would be unusual if a student's law school experience included extensive study of the LOAC. Thus, when the typical new military lawyer begins the Judge Advocate Officer Basic Course (JAOBC), he or she has virtually no foundation in the LOAC. Unfortunately, the amount of time devoted to this discipline in JAOBC is minimal.⁶

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After completing JAOBC, new JAG officers report to their first assignments. While it is not uncommon for them to have some limited exposure to LOAC issues as a secondary or tertiary aspect of their duties, it is the norm that their primary garrison duties focus on legal assistance, claims, administrative law, and criminal law.

During their initial tours, they might have the opportunity to attend a course devoted to the LOAC or operational law at one of the service JAG schools. The odds of them attending such a course are low, however, unless they are deploying, and if they do attend the course, they will attend it normally only once. Even if they attend, the time allocated to such courses (normally 5 to 10 days), when compared to the time these officers have spent studying the other core disciplines of law, is not sufficient to meet their needs.

Nor is the usual method of instruction particularly well suited to build the type of expertise normally associated with a member of the legal profession. Officers in such courses are not asked to read or digest any cases, law review articles, or other significant sources of this law. Instead, they receive an outline of the law, PowerPoint® slides, lectures, and several small-group problems. The course, which is not graded, is normally offered only during an ongoing assignment. Thus, it is a pragmatic reality that officers will not devote much out-of-class time to studying.

A student's next opportunity to study the LOAC might come during a Masters of Law program, which will occur either at the Army JAG School or a civilian law school. This normally occurs around the 5th to 7th year of service.⁷ Students who attend such programs will have the opportunity to study the LOAC in greater depth. However, for most officers, instruction is limited to core offerings virtually identical to the previous limited instruction received earlier in their careers. Only officers with an interest in the subject will choose the several electives offering a more comprehensive treatment of this subject. Even the few who attend civilian institutions will have limited opportunity to immerse themselves in this discipline.

After graduating from the Masters of Law program as a relatively new field-grade officer, the military lawyer has essentially run out of PMLE opportunities to study the LOAC. Thus, just when their responsibility to be expert in this discipline has evolved to the point where they will be responsible for providing LOAC advice to senior commanders in the joint environment, they have exhausted virtually all opportunities to study this discipline.

Unlike the officers in the OIF all-star lineup, typical future legal advisers will not be properly prepared for the challenges they will confront. Each will no doubt be armed with a superior work ethic, intellect, and legal judgment, all of which will be crucial as they deal with the issues they confront as principal legal advisers during combat operations. But they will have been provided an unnecessarily limited opportunity to develop the foundation of expertise necessary to satisfy their ethical obligation of competence as attorneys. Consider this one simple fact: By the time our hypothetical officers assume SJA responsibilities for a division, the likelihood that they will have even read a reported case related to the LOAC (such as *In re Yamashita*, *Ex*

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parte Quirin, or *The High Command Case*) is close to nil. This is simply unacceptable.

Equally troubling is that the limited professional-development opportunities offered to these JAG officers will have all been service-specific. Although JAG schools include a faculty member from sister services, the PMLE is simply not joint, and officers will not have had the opportunity to integrate with the joint operators they will be called upon to support in the future. Thus, two undeniable aspects of the practice of the LOAC discipline (aspects that distinguish this discipline of law from every other discipline taught at JAG schools) are generally absent in the PMLE process: operational integration and joint context. For an armed force moving decisively in the joint and expeditionary direction, this won't work. If our armed forces are to rely on certainty rather than the random alignment of stars reflected in the OIF experience, this development process must be radically reformed.

The Solution: JSLOWA

The judge advocate PMLE process is no longer sufficient to meet the requirements of a force called on to operate in the legally intense environment in which our forces are now—and will continue to be—involved. What is the solution? One obvious option would be to increase emphasis on LOAC education at existing service schools. While this option would be a step in the right direction, it is ultimately deficient. The integration of LOAC PMLE into the broader curricula has led to a competition for time and resources and has inhibited any genuine commitment to treating the LOAC differently from other legal disciplines—a commitment absolutely justified by the nature of the demands imposed upon JAG officers in the operational environment.

By retaining service-specific venues for the PMLE process, the services are perpetuating a disconnect between the way JAGs are trained and

the way they will fight. Of greatest significance, however, is that the service-specific PMLE deprives DOD of the opportunity to consolidate the considerable expertise scattered throughout the services into one center of excellence. If such a place existed, JAGs and the line officers they support could periodically come together to devote themselves to intensive study of this critical practice area.

The strategic context of current military operations supports the need to develop a synergistic center of excellence. Perhaps at no time in the history of warfare have issues related to understanding, applying, and complying with the LOAC been more prominent. Entities outside the military (nongovernmental organizations [NGO], think tanks), journalists, commentators, pundits, academics, politicians, and average citizens have appointed themselves experts in this area. Indeed, the cottage industry of experts that emerged in the wake of Abu Ghraib provides a compelling reason to ensure that JAG officers who advise U.S. commanders, particularly senior commanders, have had the opportunity to study the LOAC in depth.

The onset of investigations and inquiries triggered by suspected LOAC violations offers the DOD military legal community a unique opportunity to adopt a forward-looking approach to providing LOAC PMLE: consolidation of LOAC expertise into a Joint Services Law of War Academy. In the opinion of this author, the ideal venue for such a center of excellence would be collocation with the Joint Forces Staff College or the National War College. However, what is more important than location are three structural factors that must be taken into account to maximize the benefits of a JSLOWA: faculty composition, curriculum development, and benefits for existing organizations.

The military could model the basic structure of the faculty on any number of current law departments embedded within such schools as the military academies, command and staff colleges, and war colleges. These departments share certain structural characteristics: They have a senior expert officer serving as department chair, they rotate subordinate faculty members, and they are integrated into a broader Professional Military Education (PME) curriculum. Another possible aspect several of these departments share that could contribute to the effectiveness of a JSLOWA is the inclusion on the

faculty of civilian professors possessing national and, in many cases, international, expertise in this discipline of law.

Also particularly well suited to a JSLOWA would be the inclusion of one or several international faculty members. Many of our JAGs have noticed the impressive LOAC expertise of many of our international legal counterparts; a conclusion reflected in the fact that the Naval War College has invited several distinguished international experts to hold its Stockton Chair of International Law—perhaps the most distinguished LOAC faculty position within DOD. Inclusion of such officers on the proposed JSLOWA faculty would substantially benefit faculty and students by offering a more international perspective.

Such a center of excellence might also include other experts on the faculty. For example, inter-agency experts might serve as temporary faculty members or guest lecturers. Because many LOAC issues arising at the tactical level have the potential to rapidly escalate to strategic importance, other PMLE participants could include judges, prosecutors, and defense lawyers from international tribunals adjudicating alleged war crimes; NGO law-of-war experts; and representatives of the International Committee of the Red Cross.

Curriculum development for such a center of excellence will present a number of challenges. The first, and perhaps most significant, would be identifying the appropriate relationship with preexisting PMLE courses. Developing a complementary curriculum could be embraced. Doing so would let the service JAG schools rely on the JSLOWA to satisfy the LOAC component of their broader programs.⁸

Perhaps the most advantageous aspect of a JSLOWA is that it would open LOAC PMLE opportunities to career JAGs of other services unable to attend the Army's (or a civilian) Master of Law program. To illustrate, the JSLOWA could host a periodic 4-week intensive LOAC PMLE course. Students in the Master's program at the Army JAG

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School specializing in international law could enroll in the course to satisfy curriculum requirements. They would be joined by career JAGs who, for whatever reason, will not participate in a Master's program. Thus, a shared foundation of expertise will be provided to a wider constituency.

The JSLOWA's resources could also be used to benefit the regular (non-legal) PME program at the joint level. Both faculty members and students from the JSLOWA could be integrated into instruction and simulations to ensure line officers are exposed to the type of complex LOAC problems they will inevitably encounter. Student integration would result in the added benefit of exposing future leaders to the benefit of integrating legal advice into the planning and execution process.

Another benefit to creating such a joint center of excellence would be the role it could play as a think tank for LOAC issues. Faculty members would not only be encouraged but required to produce practical and scholarly work related to the LOAC. Currently, there is no joint LOAC journal; if such a journal were developed in connection with the JSLOWA, it would reflect a more joint and integrated perspective on these critical issues.

The JSLOWA could also benefit from existing organizations. For example, a formal relationship could be established between the JSLOWA and DOD's Law of War Working Group with the former performing comprehensive research on behalf of the latter.⁹ The Working Group's function has varied over the years, but since the beginning of the GWOT it has been responsible for addressing a multitude of issues related to the war. It has also been tasked to look over the horizon to identify potential future issues and possible legal strategies for dealing with such issues. Because the Working Group has no dedicated research and analysis component, most issues are addressed on an ad hoc basis with the Group relying on volunteers to conduct the necessary research and analysis. A formal relationship with the JSLOWA would allow the Group to submit issues to faculty members for research, analysis, and proposed courses of action. Such integration is essential to developing a comprehensive, consistent understanding of the relationship of the LOAC to ongoing and future operations.

The time is ripe for a bold new approach to developing genuine LOAC experts throughout the

services—experts who will ensure that future all-star lineups are not the product of random luck but of a coherent PMLE process. Ironically, at a time when virtually every other aspect of LOAC training and compliance has come under intense scrutiny, the discipline's PMLE has not been addressed. To create a coherent PMLE process, DOD must acknowledge that the LOAC is distinct from other disciplines of law, ensure that military attorneys develop the same level of expertise in this discipline as they do in other disciplines, and establish a joint center of excellence—a JSLOWA—for the teaching, studying, and researching of LOAC issues.

Building for the Future

When it is not just possible, but highly probable, that a senior JAG serving as a principal legal adviser to a commander of thousands of troops in combat has never been exposed to more than a cursory education in the LOAC, something is wrong. Even if this risk is overstated, there is no question that the knowledge and sophistication of critics, pundits, and nonmilitary experts in this area will continue to grow. Our JAGs deserve the opportunity to keep pace. **MR**

NOTES

1. For perhaps the most noted example of such a work, see Seymour Hersh, "How the Department of Defense Mishandled the Disaster at Abu Ghraib," *New Yorker Magazine*, 17 May 2004, and *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004). For another example see March Strauss, "The Lessons of Abu Ghraib," originally posted on the Social Science Research Network Electronic Library website, on-line at <<http://ssrn.com/abstract=597061>>, accessed 11 April 2006.

2. Despite the extensive access granted to attorneys defending soldiers accused of abuse, no military defendant prosecuted for misconduct at Abu Ghraib has offered any credible evidence to support the "just following orders" theory as a defense or as mitigation and extenuation for sentencing purposes.

3. James Schlesinger, statement before the Senate Committee on Armed Services, Washington, D.C., 9 September 2004.

4. These included staff judge advocates assigned to the Central Command staff, V Corps, the 1st Armored Division, and the 101st Airborne (Air Assault) Division.

5. I use the example of an Army judge advocate because among service judge advocate general (JAG) schools, it is generally accepted that the Army offers the most comprehensive opportunity to study international law. The Army JAG School is the only service JAG school accredited by the American Bar Association to award a Masters of Law degree (following a 9-month midcareer course of instruction). Furthermore, JAG officers from other services and other nations routinely attend both the Masters of Law program and law-of-war-oriented courses conducted by the Army JAG School.

6. The instruction will encompass approximately 4 days in the classroom.

7. If, however, officers are in the Army Reserve or National Guard, they will most likely never receive this opportunity. Instead, they will be offered a 2-week course during which approximately 1 day will be devoted to law-of-war instruction.

8. For example, students attending their basic courses would spend several weeks at the Joint Services Law of War Academy (JSLOWA) studying this subject. As for the Army Masters of Law program (currently the only service advanced course for JAGs), faculty members from the JSLOWA could provide instruction at the Army JAG School to satisfy the core component of that course. Graduate students electing to earn a specialty in this subject could subsequently attend an intensive course offered at the JSLOWA to satisfy that aspect of their curriculum. Moreover, a course could be developed specifically to provide intensive preparation for JAGs selected to serve as staff judge advocates (a concept not unlike the pre-command programs currently in use).

9. Established pursuant to a Department of Defense (DOD) directive, the Law of War Working Group is the primary clearinghouse/think tank within the DOD legal community for addressing LOAC issues.