

EVOLVING ROLE OF THE JUDGE ADVOCATE IN THE 21ST CENTURY: FROM OPERATIONAL LAW TO NATIONAL SECURITY LAW

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I. INTRODUCTION

The U.S. Army Judge Advocate’s Generals Corps (“JAG Corps”) saw a dramatic change in 1987. Although many may say (and when I say “many,” I mean me) it was because I entered the JAG Corps that year, the better answer is that in 1987, Operational Law (“OPLAW”) was formally introduced as a legal discipline. In July 1987, then Lieutenant Colonel David E. Graham heralded the advent of OPLAW and its effect on the JAG Corps.¹ He noted, “[l]est there be any doubt, OPLAW is a new concept. It is not simply a modified form of international law, as traditionally practiced by Army judge advocates, dressed up in a battle dress uniform and given a

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1. See generally David E. Graham, *Operational Law: A Concept Comes of Age*, in 27 THE ARMY LAWYER 9 (David R. Getz ed., 1987) (discussing the evolution of law related to the conduct of overseas military operations by the U.S.).

‘catchy’ name.”² Over the next thirty-three years, OPLAW grew in importance within the JAG Corps, the U.S. Army, other military services, and the Department of Defense, and is now regarded as a core discipline.³ OPLAW became such an integral part of the Army JAG Corps’ practice that there was considerable consternation when, in April 2018, the Judge Advocate General and Deputy Judge Advocate General announced that Operational Law would officially be renamed to National Security Law.⁴

With the adoption of OPLAW, the role of the judge advocate evolved from undertaking primarily traditional tasks, such as military justice, to being intimately involved in all aspects of legal issues in military operations.⁵ Judge advocates now realize that to be effective legal advisors, they must co-locate with their clients in operation centers and fully understand the weapons and missions their commanders and staff perform.⁶ Even though judge advocates spent the last thirty-three years developing and successfully integrating the core discipline of OPLAW, there still are those who question the wisdom of changing the name of Operational Law to National Security Law. What necessitated the recent name change? Similar to the questions propounded by scholars in 1987, commentators today inquire whether National Security Law is just a catchy new name for OPLAW or truly a different and innovative concept.

This article will first look at the history of how OPLAW evolved from the conflict in Vietnam through the current conflicts in Afghanistan, Iraq, Syria, and other locations around the world. Second, the article will explore why the Army JAG Corps decided to shift from the concept of Operational Law to National Security Law. Finally, the article will address the evolving role of judge advocates moving forward as the United States shifts from focusing on counter-terrorism (“CT”) and counter-insurgency (“COIN”) operations to preparing for near-peer and peer-to-peer conflicts against states such as Iran, China, and Russia.

2. *Id.*

3. GLOBAL SECURITY, OPLAW and Core Legal Disciplines Supporting Army Operations, <https://www.globalsecurity.org/military/library/policy/army/fm/27-100/chap3.htm#3.1> (last visited Mar. 18, 2020); see JOHN N. MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW, at xxxvii (2d ed. 2005).

4. TJAG and DJAG Special Announcement 40-04, *Announcement on Decisions on Strategic Initiatives* (Apr. 20, 2018), www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=0480354BA3ADF9388525820F0057CFDB (also on file with the author).

5. See Charles N. Pede, *Evolving with the Threat – The Changing Nature of Our Practice*, ARMY LAW., 2019, at 2.

6. *Id.*

II. OPERATIONAL LAW FROM VIETNAM TO TODAY

Judge advocates have provided legal advice to commanders since the inception of the JAG Corps. In 1775, William Tudor, an attorney, was selected to serve as the Judge Advocate of the Continental Army.⁷ Lieutenant Colonel Tudor joined General George Washington's staff and advised Washington on discipline and military justice matters.⁸ The responsibilities held by current judge advocates, including the task of understanding diverse legal disciplines at a high level of legal intensity, far exceed the services and advice expected of the late William Tudor.⁹ The evolved expectations of judge advocates is what validated OPLAW as a core legal discipline.¹⁰ Although judge advocates still advise commanders on military justice matters and a full range of other legal issues, there has been a clear and dramatic change in how judge advocates support military operations.¹¹

In 2001, Colonel Frederic L. Borch III¹² wrote *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*,¹³ which chronicled how the role of a judge advocate evolved from providing traditional legal services, including those involving military justice, claims, legal assistance, and administrative law, to today's practice of OPLAW, where judge advocates are directly involved in targeting and all relevant aspects of military law that affect the conduct of operations.

Borch noted that throughout most of the Army's history, the judge advocate's role during military operations centered on the practice of

7. U.S. DEP'T OF THE ARMY, *William Tudor Judge Advocate General (1775-1777)*, 22 MIL. L. REV. iii (1963).

8. U.S. DEP'T OF THE ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 8 (1975).

9. U.S. DEP'T OF THE ARMY, *FIELD MANUAL 1-04 (FM 1-04), LEGAL SUPPORT TO THE OPERATIONAL ARMY* ¶ 1-3 (Jan. 26, 2012) [hereinafter FM 1-04].

10. *Id.* at ¶ 1-5.

11. *Id.*

12. Frederic L. Borch is the Regimental Historian and Archivist for the Army Judge Advocate General's Corps. He served twenty-five years as an Army lawyer before retiring from active duty in 2005. The following year, he returned to the Army as a civilian and today, is the only full-time military legal historian in the U.S. government. Borch has history degrees from Davidson College and the University of Virginia, law degrees from the University of North Carolina, University of Brussels (Belgium), and The Judge Advocate General's School. He also has an M.A. from the Naval War College.

13. *See generally* FREDERIC L. BORCH III, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001) (providing an outstanding history of how judge advocates' roles of providing traditional legal services evolved to what is now regarded as the practice of operational law).

military justice.¹⁴ This was certainly true at the start of Vietnam, but the paradigm began to shift in 1964 when the senior legal advisor¹⁵ expanded the role of his judge advocates into OPLAW areas.¹⁶ For example, judge advocates aided the South Vietnamese on prisoner of war issues, including advice on determining the status of captured enemy personnel by setting out procedures using “Article 5 tribunals,”¹⁷ investigating and reporting of war crimes, and assisting the South Vietnamese with programs designed to help control government resources important to the enemy.¹⁸ As a result of the robust legal support provided by judge advocates, the South Vietnamese military recognized that the conflicts with the Viet Cong and North Vietnamese were no longer considered an internal disturbance, but rather, an international armed conflict. Accordingly, the South Vietnamese military agreed to apply the provisions of the 1949 Geneva Conventions on Prisoners of War to classify captured personnel. Although some judge advocates took on operational roles during this time, the concept of OPLAW did not exist, at least with respect to how OPLAW is institutionally recognized and adopted today.

14. *Id.* at vii.

15. The senior legal advisor is generally known in the U.S. Army as the Staff Judge Advocate (“SJA”). FM 1-04, *supra* note 9, at ¶¶ 4-21 to 4-22. “As TJAG’s assigned representatives, the SJA has the responsibility to deliver legal services within a particular unit or command. The SJA is also responsible for his or her office of legal cadre, or the Office of the Staff Judge Advocate. This officer is responsible for planning and resourcing legal support, as well as conducting training, assignments, and the professional development of JAGC personnel assigned to the command and its subordinate units. In accordance with Article 6 of the UCMJ, the SJA is authorized to communicate directly with his or her representative TJAG and other supervisory SJAs of superior or subordinate commands as necessary. The SJA serves as the primary legal advisor to the commander exercising General Court Martial Convening Authority (GCMCA) as prescribed by UCMJ and the *Manual for Courts-Martial*. The SJA is a member of the commander’s personal and special staff. In accordance with Article 6 of the UCMJ, at all times the commander and the SJA shall communicate directly on matters relating to the administration of military justice, including, but not limited to, all legal matters affecting the morale, good order, and discipline of the command. The SJA provides legal advice and support to the staff and coordinates actions with other staff sections to ensure the timely and accurate delivery of legal services throughout the command.” Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations: Counsel, Conscience, Advocate, Consigliere, or All of the Above?*, in U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 6 n.32 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015); BORCH, *supra* note 13, at ix, 20-21 (noting that MACV judge advocates, particularly Colonel Haughney and his staff, outlined the first procedural framework for categorizing combatant captives using “so-called” Article 5 tribunals).

16. BORCH, *supra* note 13, at 12-13.

17. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 75 U.N.T.S. 135.

18. BORCH, *supra* note 13, at ix, 20-21.

One of the most important aspects of the judge advocate's role in Vietnam was the adoption of the Department of Defense Law of War Program in 1974. The Program required judge advocates to communicate with commanders and staff, train personnel, and help ensure compliance of military operations with the law of war.¹⁹ The adoption of the Program was a formal first step in allowing judge advocates to begin immersing themselves in operational planning.

In 1983, judge advocates deployed to Grenada as part of military operations. Over the next two-month period, judge advocates engaged in a wide variety of legal issues which, up to that point, were not considered part of their normal duties.²⁰ These activities broadened and redefined the roles held by judge advocates because, unlike before, they went beyond the mere application of the law of war to military operations.²¹ Although judge advocates were responsible for assessing issues on the law of armed conflict ("LOAC") involving interpretations of the Hague Regulations and Geneva Conventions, particularly with respect to the detention and treatment of prisoners of war, judge advocates in Grenada were faced with different types of legal issues. For example, their duties involved drafting and reviewing Rules of Engagement ("ROE") and handling matters involved with payment of claims, contracting issues, treatment of private property, war trophies, and a wide range of civil affairs issues.²² One judge advocate noted, "[y]ou can only tell the [Commander] he can't shoot prisoners so many times. You reach a point at which, when the boss has run out of beans and bullets, has certain equipment requirements, and has the locals clamoring to be paid for property damage; you have to be prepared to provide the best possible legal advice concerning these issues as well."²³

After Grenada, the Army JAG Corps realized it was imperative to train and resource its judge advocates to provide advice on a broad range of legal issues surrounding military operations. Grenada was the catalyst for

19. *Id.* at 51.

20. *Id.* at 62-63 (detailing the expansion of "nontraditional" roles assumed by judge advocates during Operation Urgent Fury in 1983).

21. Graham, *supra* note 1, at 10 (defining Operational Law as domestic and international law dealing with military operations during times of peace and hostility, which "includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of force agreements, operations against hostile forces, and civil affairs operations").

22. *Id.* at 11.

23. *Id.* at 10; BORCH, *supra* note 13, at 81 (quoting Colonel Richardson in his After Action Report regarding the evolution of the role of judge advocates in that they could no longer act within traditional peacetime legal functions) (citation omitted).

development of the JAG Corps' newest discipline, OPLAW, which came to fruition in 1987.²⁴

The Judge Advocate General's School, U.S. Army ("TJAGSA") conducted a study in 1986 and made a series of recommendations for implementing an OPLAW program.²⁵ These recommendations included an agreed upon definition of Operational Law, development of the curriculum at TJAGSA, and the publication of an Operational Law Handbook.²⁶ There were five types of deployments initially identified for training, including: (1) U.S. forces stationed overseas (under a stationing agreement); (2) security assistance missions; (3) combat operations; (4) overseas exercises, and (5) deployment for COIN/CT missions.²⁷ The first proposed definition of Operational Law was the following:

Domestic and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of forces agreements, operations against hostile forces, and civil affairs operations.²⁸

The rationale for OPLAW training was to incorporate, in one legal regime, relevant substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law.²⁹ The goal of designating OPLAW as a core legal discipline was to provide a comprehensive and structured approach to the myriad of legal issues that may arise during a deployment to enable judge advocates to provide a wider range of legal advice to a commander and more effective contributions to mission success.

The new OPLAW concept was quickly tested with military operations in Panama in Operation Just Cause and in Iraq in Operation Desert Shield/Desert Storm in 1989 and 1990, respectively. In Panama, judge advocates prepared ROE and conducted predeployment training prior to operations.³⁰ In December 1989, Colonel Smith, a judge advocate, deployed

24. BORCH, *supra* note 13, at 81.

25. Graham, *supra* note 1, at 10.

26. *Id.*

27. Graham, *supra* note 1, at 10-11 (noting that the International Law Division developed a curriculum that focused on the diverse legal issues that arose with the various forms of overseas deployment).

28. *Id.*

29. *Id.*

30. *See* BORCH, *supra* note 13, at 106-07.

on the first plane to Panama with other members of the command team.³¹ He entered Panama carrying only a pistol, six meals ready to eat (“MREs”), a microfiche of the Manual for Courts-Martial, a condensed versions of the Army regulations on military justice, war trophies, various claims, and the Army Field Manual 27-10, *The Law of Land Warfare*.³² After the conflict between the American and Panamanian forces, judge advocates provided operational advice on targeting, detention and status of detainees, status and treatment of foreign diplomats, claims, and military justice.³³ Judge advocates were much better prepared to confront these issues than their colleagues in previous deployments because of the JAG Corps’ emphasis on the “newly developed practice of operational law.”³⁴ Judge advocates engaged in predeployment legal assistance programs, such as preparing wills and powers of attorney. In addition, they were more actively involved in operational planning and ROE.³⁵ Judge advocates became an integral component of a commander’s combat team.³⁶

Operation Desert Shield/Desert Storm quickly followed Panama. Colonel Ruppert, the staff judge advocate for U.S. Central Command (“CENTCOM”), stated Desert Storm was “the most legal war we’ve ever fought.”³⁷ Building upon the experiences in Panama, judge advocates were even more involved in both legal and nonlegal matters related to operational planning, training, and warfighting. The development of OPLAW and the expanded roles held by judge advocates made this possible.³⁸ Commanders no longer viewed their judge advocates as holding limited roles of merely providing traditional legal support for military justice, legal assistance, and administrative law.³⁹ Rather, as the JAG Corps recognized OPLAW as a core mission, commanders began actively seeking out legal advice at every opportunity with the expectation that judge advocates deliver advice on fiscal law issues, combat contracting,

31. Colonel Smith was the first judge advocate to deploy to Panama from the U.S. with combat forces. *Id.* at 99.

32. *Id.*

33. *Id.* at 103.

34. *Id.* at 117 (emphasizing that the judge advocates in Operation Just Cause were better prepared than those previously deployed in Vietnam and Grenada primarily because, though both groups engaged in a variety of operational law activities, the latter group approached the challenges in an “unstructured manner, and as individuals”).

35. BORCH, *supra* note 13, at 117.

36. *Id.*

37. *Id.* at 194; Steven Keeva, *Lawyers in a War Room*, 77 A.B.A.J. 52 (Dec. 1991).

38. BORCH, *supra* note 13, at 195.

39. *Id.*

intelligence law, and ROE, in addition to providing advice on traditional legal issues and the law of war.⁴⁰

Judge advocates continued this integration of OPLAW into operations after Desert Shield/Desert Storm. In the 1990s, legal support became an even more important aspect of military operations as the U.S. military engaged in various politically sensitive military operations, with judge advocates deployed to locations such as Somalia, Haiti, the Balkans, and Southwest Asia.⁴¹ The U.S. Army recognized the important and ever-expanding role of legal issues in operations. Judge advocates with OPLAW experience started working side-by-side with the operations staff as opposed to remaining sequestered in their legal office.⁴² Training events and training centers began to inject legal issues into practice as judge advocate observers/controllers were assigned to the Army's combat training centers. The first OPLAW observer/controller was assigned to the Joint Readiness Training Center in 1995.⁴³ By 1996, as judge advocates returned from Haiti, OPLAW, as a core competency of the JAG Corps, was fully in place. It became common for judge advocates to use every aspect of the law to provide OPLAW support to operations. To that note, Borch opined that in the 21st Century, "the most significant future developments in the role of the Army lawyer will occur at the strategic level."⁴⁴ Judge advocates would need to focus on interagency coordination and cooperation with operators from other government agencies.⁴⁵ As it turns out, Borch was exactly right.

Following the terrorist attacks of September 11, 2001, judge advocates assumed an even greater role in combat operations.⁴⁶ Judge advocates were deployed to combat operations in Afghanistan, Iraq, Africa, Syria, and elsewhere,⁴⁷ and were relied upon heavily due to the complex nature of high-intensity combat, counter-terrorism, and counter-insurgency operations. The practice of OPLAW is now an essential element of U.S. military operations,⁴⁸ resulting in the high demand for judge advocates.⁴⁹ With the U.S. Army adopting a modular force design, which primarily focused on brigade combat teams and support brigades, came the brigade legal section headed by a judge advocate major. These brigade legal

40. *Id.*

41. FM 1-04, *supra* note 9, at ¶ 1-2.

42. *See* BORCH, *supra* note 13, at 324.

43. FM 1-04, *supra* note 9, at ¶ 1-2.

44. BORCH, *supra* note 13, at 326.

45. *Id.*

46. Gade, *supra* note 15, at 6.

47. *Id.*

48. *Id.*

49. *Id.*

sections offer legal capabilities that were once found only at the division level or higher. Commanders can now turn to organic legal assets for real-time advice and expertise in all the core legal disciplines instead of having to look for legal support at higher levels.⁵⁰

The result is that from 1964 to the present, judge advocates have gone from focusing on tasks related to traditional legal disciplines, like military justice, to becoming intimately involved in all aspects of legal issues in military operations. Even with the development and successful integration of this core discipline of OPLAW in the last thirty years, many still question the wisdom of moving away from the term “Operational Law” to “National Security Law.” Just as David Graham asked in 1987 with regards to the development of OPLAW, many are asking whether National Security Law is “simply a modified form of [operational] law ... dressed up and given a “catchy” name?”⁵¹

III. MOVE FROM OPERATIONAL LAW TO NATIONAL SECURITY LAW

The Judge Advocate General of the Army established National Security Law as a legal function in April 2018 moving away from international and operational law. He stated:

National Security Law is being established as a legal function because International and Operational Law does not adequately capture the breath [sic] of actual work being done by Judge Advocates (JAs). National Security Law will comprise legal practice fields formerly identified under International and Operational Law plus cyber and intelligence law. This change is more consistent with interagency and academia, which refer to the body of law as NSL. The term “Operational Law” is understood by some to reflect practicing law in a deployed and/or wartime environment. However, the current operational environment stretches from peacetime garrison activities all the way to kinetic operations and encompasses everything in between. National Security Law better describes the practice area post 9/11. Practically, this change will be visible with the restructuring of OTJAG International and Operational Law Division and The Judge Advocate General’s Legal Center and School’s International and Operational Law Department to the National Security Law Division and the National Security Law Department, respectively.⁵²

There are three primary rationales for changing the name of Operational Law to National Security Law: (1) Operational Law no longer reflects the full scope of work that judge advocates are doing in this area of

50. FM 1-04, *supra* note 9, at ¶ 1-11.

51. Graham, *supra* note 1, at 9.

52. TJAG and DJAG Special Announcement 40-04, *supra* note 4.

law, (2) National Security Law more closely aligns with the term used in academia and other government agencies; and (3) Operational Law was primarily viewed through the lens of a deployed and/or wartime environment.

In looking at the first rationale, OPLAW is often viewed as focusing on *jus in bello*.⁵³ National security law reflects the broad expansion of the traditional “operational and international law” practice that has come to light over the past two decades. It more accurately describes the strategic nature of a judge advocate’s practice covering not just the traditional *jus in bello* concepts, but also the *jus ad bellum*⁵⁴ concepts, domestic operations, coalition interoperability, special operations, cyber and intelligence law both domestically and abroad, as well as the issues surrounding emerging technologies (e.g., artificial intelligence), changing doctrine (e.g., Multi-Domain Operations), and new threats (e.g., Counter-UAS).⁵⁵ Accordingly, the National Security Law discipline now incorporates cyber, intelligence, domestic operations, and information operations as foundational areas of practice for judge advocates. As noted by The Judge Advocate General, failure to implement these changes risk that they are continued to be viewed as areas of “niche practice.”⁵⁶ These areas can no longer be viewed this way but need to be seen as fundamental pieces of judge advocates work.⁵⁷

Second, the shift from Operational Law to National Security Law was also a way to align the practice in this area with others in the interagency as well as with academic partners by using a common language. For example, many law schools around the country have instituted national security law programs. As law school graduates consider careers in the JAG Corps, the name change helps with recruitment and talent management, which is critical to the future staffing of the JAG Corps. These graduates that have often studied national security law will enter the JAG Corps with a better understanding of the breadth of national security law challenges and therefore be better able to seamlessly transition into their roles. As noted by The Judge Advocate General, “building and sustaining expertise in a

53. *Jus in bello*, or “international humanitarian law” (IHL), is the law that governs conduct during warfare. IHL is sometimes regarded as independent from questions regarding the justifications for war or prevention of war. See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 11 (2011).

54. *Jus ad bellum*, or the “law of armed conflict” (LOAC), is often regarded as synonymous with the “law of war.” The terms LOAC and “armed conflict” are preferred over “law of war” in the legal military community. *Id.*

55. *Pede*, *supra* note 5, at 2.

56. *Id.*

57. *Id.*

manner that is persistent and deliberate” is critical to the JAG Corps’ future success.⁵⁸

Changing the name of Operational Law to National Security Law also “serves to create harmony with interagency and academic partners by using a common language.”⁵⁹ It is not simply a matter of mirroring academia or the interagency, but an acknowledgment that this area has grown beyond just OPLAW. Importantly, it is not a move away from OPLAW, but an attempt to capture the true nature of the work judge advocates undertake in the 21st century.

Third, OPLAW was originally developed and instituted with the goal of providing a comprehensive, structured approach to the myriad of legal issues that may arise during a deployment. Judge advocates, as a result, now provide a wider range of legal advice to a commander and make more effective contributions to mission success. This was the right approach in 1987, but the environment is very different today. Judge advocates in the national security realm must now be proficient, both in a deployed environment and in a domestic setting when engaging in their normal course of duties. A judge advocate must be broadly skilled in various areas of the law such as constitutional law, the law applicable to cyberspace, intelligence law, international law and operational law, and special operations. For example, a judge advocate must be able to answer fundamental questions about the authorities to use military force under domestic law, which involve questions of constitutional law, the application of the War Powers Act, and interpretations of the Authorization for the Use of Military Force (“AUMF”) passed by Congress.

Contrary to expectations in 1987, judge advocates are now being called upon to be proficient in a wider area of law. Within this broader aperture, national security law covers an incredibly comprehensive spectrum of fascinating and challenging legal issues. Importantly, under national security law, there are certain practice areas, such as cyberspace and electromagnetic operations, intelligence law, and special operations law, that are considered discrete legal tasks because these areas require specialized knowledge and practice that judge advocates will not experience when dealing with OPLAW.⁶⁰ Although these practice areas fall under national security law, they are not different legal disciplines, but rather a recognition that they involve different clients with different legal needs.

58. *Id.*

59. *Id.*

60. *Id.*; see also U.S. DEP’T OF THE ARMY, FIELD MANUAL 1-04 (FM 1-04), SUPPORT TO OPERATIONS (2020 Draft) (on file with the author).

IV. THE EVOLVING NATURE OF NATIONAL SECURITY LAW FOR JUDGE ADVOCATES

Cyberspace⁶¹ operations are the employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace. Cyberspace and Electromagnetic (“CEMA”) operations will likely grow increasingly congested and contested, and will be critical to successful military operations. There are rapid developments in this area that will challenge operators and legal advisors.⁶² There are three interrelated cyberspace missions: (1) Department of Defense Network operations (“DODIN”); (2) defensive cyberspace operations, and (3) offensive cyberspace operations (“OCO”).⁶³ Unlike cyber operations, cyberspace-enabled activities use cyberspace to enable other types of activities, which employ cyberspace capabilities to complete tasks, but are not undertaken as part of one of the three cyber operation missions.⁶⁴ Information Operations can be a category of cyberspace-enabled operations when it includes the integrated employment of electronic warfare, computer network operations, psychological operations, military deception, and operations security, in concert with specified supporting and related capabilities to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.⁶⁵

The law applicable to cyberspace generally is not a unique body of law but requires the legal advisor to apply other national security law disciplines to cyberspace operations and cyberspace-enabled activities. The complex nature of cyberspace operations, including the highly classified tools and capabilities involved and the potential for political implications, means that approval and oversight requirements for cyberspace operations often remain at the most senior leadership levels. Cyberspace operations will often raise unique and complex factual and legal issues that test the application of existing national security law. This is especially challenging since much of the guidance and regulations are classified and judge

61. Cyberspace is a global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the internet, telecommunication networks, computer systems, and embedded processors and controllers. JOINT PUBLICATION 3-12[R], CYBERSPACE OPERATIONS, (5 Feb. 2013) [hereinafter JP 3-12(R)]; ARMY FIELD MANUAL 3-12, CYBERSPACE AND ELECTRONIC WARFARE OPERATIONS, 1-10 (April 2017). Army Field Manual 3-12 replaces FM 3-38, which outlined initial guidance in 2014.

62. ARMY FIELD MANUAL 3-12, CYBERSPACE AND ELECTRONIC WARFARE OPERATIONS, 1-10 (April 2017) [hereinafter FM 3-12].

63. *Id.* at ¶ 1-5.

64. *See id.*

65. *Id.* at ¶ 2-3.

advocates will need to know where to find the appropriate laws and regulations. When analyzing legal issues raised by cyberspace operations, judge advocates will first need to determine whether the activity is a cyberspace operation or whether it is a cyberspace-enabled activity.⁶⁶ Once judge advocates determine whether the activity is cyber operations or a cyberspace-enabled activity, they must determine the relevant legal authorities governing the activity.⁶⁷ Judge advocates will also require a basic understanding of cyber technology and capabilities in addition to having knowledge of constitutional, domestic, international, operational, and intelligence law.⁶⁸

Judge advocates must advise the commander and staff with respect to cyberspace actions, particularly if cyberspace operations may affect civilians, and ensure they comply with applicable policies and laws.⁶⁹ Cyberspace operations will often raise challenging international law issues given the structure of the internet and the potential for a particular activity to affect third-party systems. Judge advocates must analyze whether the proposed operation would constitute a use of force versus a prohibited intervention into a State's domestic affairs.⁷⁰ Additionally, cyberspace operations often raise issues related to neutrality and sovereignty. While many cyberspace operations occur outside of armed conflict, the law of armed conflict will apply to those that occur in an armed conflict or rise to the level of an armed attack.⁷¹ There is no shortage of legal issues that judge advocates and their operators will face on a daily basis and they must be prepared to quickly provide the correct legal advice.

The practice of intelligence law has evolved since the 1980s. When many senior judge advocates entered the Army, they did not hear about intelligence law in either their basic or advance courses.⁷² By the mid-1990s, there may have been an hour or two of instruction, and as a result, many of the judge advocates that worked in this area had to learn on the

66. See generally *id.* at ¶ 3-31, Table 3-1 (outlining the tasks of the cyberspace electromagnetic working group).

67. *Id.*

68. *Id.*

69. See *What Limits Does the Law of War Impose on Cyber Attacks?*, ICRC (June 28, 2013), <https://www.icrc.org/en/doc/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm> (last visited Mar. 27, 2020).

70. *Id.*

71. *Id.*

72. Richard M. Whitaker, *Intelligence Law, in U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE* 509, 550 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015).

job, make mistakes, and then try to learn from them.⁷³ Thankfully, this is no longer the case since there is now a level of sophistication within the Army and other services. Still, it is important to ensure the next generation of judge advocates do not experience these same growing pains.

Intelligence activities are some of the most sensitive activities conducted by military forces. They are highly regulated and subject to intense scrutiny and oversight both within the Department of Defense, the interagency, as well as Congress.⁷⁴ This is particularly true when the intelligence pertains to U.S. persons.⁷⁵ Any information that is being collected, stored, disseminated, and analyzed on U.S. persons is fraught with legal issues. Judge advocates play a key role in the oversight of intelligence activities. Therefore, they not only require specialized training on the authority to conduct a particular intelligence activity, but also on any reporting requirements for questionable intelligence activities and significant or highly sensitive matters.

Judge advocates must intimately understand intelligence law because of the similarities between operational activities and intelligence activities. The means and methods employed for both are often similar, but authorities for operational activities versus intelligence activities are very different. This is particularly true with respect to using publicly available information and operational preparation of the environment, both of which are operational activities.⁷⁶ These activities are very closely related to open source intelligence and human intelligence activities, respectively. Although operational activities are conducted pursuant to different authority and with a different reporting and oversight process, they raise many of the same sensitive issues as the intelligence activities.⁷⁷ Judge advocates not assigned to intelligence units may not be familiar with these authorities or distinctions in the law, but judge advocates assigned to intelligence units must know the distinction to ensure that operational activities are not misidentified and misanalysed, but rather are approved and conducted pursuant to the appropriate authorities.⁷⁸ Judge advocates must understand

73. *Id.*

74. *See generally* Exec. Order No. 12,333, 3 C.F.R. § 1.1-3.6 (1981) (outlining the “activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents,” all of which are essential to U.S. national security).

75. A U.S. person is defined as a U.S. citizen, a permanent resident alien, a corporation incorporated in the United States, or an association substantially composed of U.S. citizens or permanent resident aliens. *See* Exec. Order No. 12,333, 3 C.F.R. § 1.1-3.6 (1981), *as amended by* Exec. Order No. 13,470, 3 C.F.R. § 3.5(k) (2008).

76. Whitaker, *supra* note 72, at 551.

77. *Id.*

78. *Id.*

the importance of finding the correct legal authorities and where those authorities originate in order to provide the correct legal advice.⁷⁹

Special operations are defined as “operations requiring unique modes of employment, tactical techniques, equipment and training often conducted in hostile, denied, or politically sensitive environments and characterized by one or more of the following: time sensitive, clandestine, low visibility, conducted with and/or through indigenous forces, requiring regional expertise, and/or a high degree of risk.”⁸⁰ In addition to special operations conducting different types of missions than conventional operations, many of the domestic and international legal issues raised by the conduct of special operations will be different.

Examining this definition and the various activities they carry out underscore the diverse legal issues that can arise. Operations in denied or politically sensitive environments will often involve issues of sovereignty and intervention if they are carried out without the knowledge or consent of the host nation.⁸¹ Operations by partners, in particular non-state armed groups, will raise questions regarding their legal status and targeting issues.⁸² Finally, clandestine missions will raise legal questions on the status of special operation forces (“SOF”).⁸³

Legal advisors in special operations units face many of the same challenges as any other legal advisor. They must have competence in all the core disciplines of their peers, but what distinguishes legal advisors in special operations units is that they must also have the character and discipline to work with an organization that has the capacity to move at a faster rate than conventional military units. In other words, the law does not change, but the pace of decision-making increases exponentially, which will place incredible pressure on all members of elite organizations to perform.

As discussed above, special operations units often have authority to conduct certain operations with conventional forces working in areas that require extreme care. Judge advocates must guide SOF operators through tactical decisions with strategic implications. The moral courage to say “no” or “not that way” brings profound meaning to codes of professional responsibility. These organizations are also often working with a host

79. *Id.*

80. Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, in U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 553, 555 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015).

81. *Id.* at 556.

82. *Id.*

83. *Id.*

nation, which means the legal advisor must at least be proficient in local laws, customs, and practices to avoid jeopardizing operations. Finally, these organizations, because of the sensitivity of many of their missions, operate at highly classified levels, which means that a legal advisor has fewer colleagues to consult with as those colleagues will not have the need to know.

V. CONCLUSION

In 1987, the development of OPLAW caused a significant shift in the roles held by judge advocates. Today, approximately thirty years later, judge advocates are experiencing another significant shift in the way they provide legal advice to commanders in operations. The move to national security law reflects the reality of a judge advocate's role in today's changing military. OPLAW is still a vital component of national security law as a judge advocate must not only be experts on the law, but also must understand how certain weapons are used, and advise on the legality of certain proposed targets or the status of civilians taking part in hostilities. They must know and understand the intent of the commander and, when necessary, propose alternative scenarios that comply with the law. The changing nature of warfare with the advent of new technologies, complex operating environments, and the increasing impact of the law on military operations, means that areas of the law, such as intelligence, CEMA, and special operations, are vital to the success of missions. The shift from operational law to national security law means that judge advocates will be ready for these challenges.