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The Culture They Keep:
The Role of Legal Professionals in Restoring
Accountability and Legitimacy to SOF Culture

By Jason DeSon

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On the cover:

Left. An Army Ranger conducts a simulated raid during a capabilities exercise for local civilian leaders and active duty family members at Fort Bragg, N.C., on 13 June 2018. PHOTO BY U.S. AIR FORCE MASTER SERGEANT BARRY LOO

Center. A statue of Lycurgus, the Spartan lawgiver, is pictured from the vestibule of Justice Palace in Brussels. PHOTO BY RENATA SEDMAKOVA/SHUTTERSTOCK

Right. A U.S. Army soldier from the 7th Special Forces Group listens to instructions for simulated close air support training on 13 September 2018 at Kunsan Air Base, Republic of Korea. PHOTO BY U.S. AIR FORCE SENIOR AIRMAN STEFAN ALVAREZ

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THE CULTURE THEY KEEP: THE ROLE OF LEGAL PROFESSIONALS IN RESTORING ACCOUNTABILITY AND LEGITIMACY TO SOF CULTURE

When someone asked why [the Spartans] visited disgrace upon those among them who lost their shields, but did not do the same thing to those who lost their helmets or their breastplates, he said, ‘Because these they put on for their own sake, but the shield for the common good of the whole line.’¹

Introduction

After a string of high-profile incidents, the ethics and culture of U.S. Special Operations Forces (SOF) fell under the spotlight. In the Fiscal Year 2019 National Defense Authorization Act (FY19 NDAA), Congress called for a description and assessment of special operations “ethics and professionalism” programs.² A reading of the Congressional Research Service’s 2018 edition of *U.S. Special Operations Forces (SOF): Background and Issues for Congress*, released prior to the enactment of the FY19 NDAA, revealed that Congress may have been reacting in part to “reportedly non-sanctioned military combat operations in Africa, where U.S. SOF are said to have strayed from their train and assist mandate.”³ Indeed Congress seemed to be equally concerned with the overall use of SOF in over 17 years of sustained global conflict against terrorist organizations and how that may have impacted the culture of SOF overall.

In response to the Congressional tasking, then-commander of U.S. Special Operations Command (USSOCOM), General Raymond Thomas, directed a 90-day review on opportunities to address SOF core values in education and training programs. His intent was to gather observations and potential corrective action plans on the current SOF culture climate in order to address whether a “disordered value system”—where team and individual comes first—was the root cause of recent high-profile cases of SOF misconduct and ethical failure.⁴ General Thomas added that, “Correcting this trend will take committed leadership at all levels of our command and personal moral courage by all.”⁵

1. Plutarch, “Sayings of the Spartans,” accessed 27 February 19, http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Moralia/Sayings_of_Spartans*/main.html.

2. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law No. 115–232, 115th Congress (2017–2018), Section 1066.

3. Andrew Feickert, *U.S. Special Operations Forces (SOF): Background and Issues for Congress*, Congressional Research Service, RS21048, 29 October 2018, 9.

4. General Raymond A. Thomas, “Ethics and Our SOF Culture—A Call to Action,” email to author, 12 December 2018.

5. Thomas, “Ethics and Our SOF Culture.”

In March 2019, the Department of Defense (DOD) released its official response to the FY19 NDAA Congressional tasking. The seven-page report did not find a systematic problem with ethics or professionalism in the SOF community, but did note that, “DoD is pursuing several initiatives to improve individual and organizational ethics and professionalism in the SOF community.”⁶ A few months later, in July 2019, several high-profile incidents highlighted new misconduct in the Navy special operations community, including the relief of a SEAL team platoon for alcohol abuse while deployed and testimony during the trial of Special Warfare Operator Chief Edward “Eddie” Gallagher that highlighted an alleged “cowboy culture” during a 2017 deployment to Iraq.⁷ Another incident involved a separate SEAL Team that allegedly used cocaine and abused other banned substances while avoiding drug testing.⁸ Following these scandals, in August 2019 the new USSOCOM commander General Richard Clarke ordered a second review of ethics and culture.⁹ In his message to the force, General Clarke noted that both individuals and teams must uphold the highest standards of ethical conduct at home and abroad. These standards ensure that SOF maintain trust of the population both at home and abroad. The result of that comprehensive review was published in January 2020.¹⁰

If a disordered value system is truly the source of the current ethical and cultural shortcomings of SOF—where individual and team considerations come before ethical standards—then what role, if any, does the legal professionals of the Judge Advocate General’s (JAG) Corps supporting SOF have in enabling the commander to overcome those shortcomings and promote a culture of adherence to those high standards of ethical and professional conduct? This question has taken on increased significance, if not controversy, in the wake of the Gallagher trial, during which, prosecutorial misconduct came to light and, following Gallagher’s acquittal on all but one charge, the Chief of Naval Operations took action to stop two other cases against SOF personnel and order a review of Navy JAG Corps’ performance and leadership in August 2019.¹¹ The Navy published its comprehensive review of both the Navy and Marine Corps JAG Corps in January 2020.¹² While there does appear to have been gross mismanagement and inept lawyering in the prosecution of the Gallagher case, this should in no way distract against the critical role legal professionals across the

6. Luis Martinez, “Pentagon Review Calls for Changes in Special Operations Ethics Training,” *ABC News*, 7 March 2019, <https://abcnews.go.com/Politics/pentagon-review-calls-special-operations-ethics-training/story?id=61531219>.

7. Carl Prine, “SEAL Shenanigans in the Spotlight (Again),” *Navy Times*, 24 July 2019, <https://www.navytimes.com/news/your-navy/2019/07/25/seal-shenanigans-in-the-spotlight-again/>.

8. Prine, “SEAL Shenanigans.”

9. Meghann Myers, “SOCOM Boss Calls for Another Ethics Review,” *Military Times*, 12 August 2019, <https://www.militarytimes.com/news/your-military/2019/08/12/socom-boss-calls-for-another-ethics-review/>.

10. Jeff Schogol, “Special Operations Command Review Finds Deployment and Leadership Issues But No ‘Systematic Ethics Problem,’” *Task & Purpose*, 28 January 2020, <https://taskandpurpose.com/socom-no-ethics-problem>.

11. Carl Prine, “Navy Orders Probe into Actions of Judge Advocate General Corps Leaders,” *Navy Times*, 1 August 2019, <https://www.navytimes.com/news/your-navy/2019/08/02/navy-orders-probe-into-judge-advocate-general-corps-leaders/>.

12. Caitlin M. Kenney and Corey Dickstein, “Navy, Marine Corps JAGs Must Address Culture and Lack of Ethics, Review Finds,” *Stars and Stripes*, 10 January 2020, <https://www.stripes.com/news/us/navy-marine-corps-jags-must-address-culture-and-lack-of-ethics-review-finds-1.614315>.

SOF enterprise can and will play in the effort to restore legitimacy to SOF ethics and culture as discussed here.

Clarifying the SOF Culture Problem and Solution

Legal professionals are very good at spotting issues. Right or wrong, many SOF commanders turned to their legal advisors to tackle the 90-day review. At first glance, this seemed appropriate given that many of the symptoms were inherently “legal” in character (e.g., violations of the Uniform Code of Military Justice, Law of War, or government ethics laws and regulations). However, the long-term solution to Congressional concerns may require something more than the typical “legal” responses (e.g., punitive violations, reviewing command actions, providing more training, etc.). These are reactive accountability actions. This is not to suggest that there is no place for these actions. Quite the opposite. However, if the root cause of the current problem is truly a disordered value system, then the most effective solution is not just to correct violations, but also reinforce and *promote* the correct value system. Legal professionals should embrace this more proactive approach, and the opportunity to affect cultural change within SOF. Like accountability actions, SOF commanders must own this approach for it to succeed, but make no mistake—lawyers and paralegals will be critical to restoring legitimacy to SOF culture. That legitimacy will come only when the SOF community, through moral as well as physical courage, willingly integrates ethical and professional standards into its cultural identity. Instead of *getting after it* or *getting to yes*, SOF must embrace *getting ahead of it* and *getting to right*.

Step One: Identify the Sources of the SOF Culture Problem

Special operations are built on individuals and small units who apply special skills with adaptability, improvisation, and innovation.¹³

Before addressing how a legal team can contribute to restoring legitimacy, it is first necessary to understand the current SOF culture. To paint a complete picture, it is necessary to ascertain what the SOF (and non-SOF) community thinks it is, or should be. If one searches for the term *special operations culture* online, a number of websites appear, many with articles or blog entries written by current and former members of the SOF community, as well as articles and scholarly works written by non-SOF observers. Several of these online resources stand out for demonstrating the difficulty in trying to pinpoint the traits of the current SOF culture. They can be broken up into two broad categories: the outsider view and the insider view. Both viewpoints are essential to properly identify the SOF culture problem. A mere sample of these viewpoints are presented here.

To paint a complete picture, it is necessary to ascertain what the SOF (and non-SOF) community thinks it [SOF culture] is, or should be.

13. *Special Operations*, Joint Publication 3-05 (Washington, D.C.: Joint Chiefs of Staff, 2014), II-2.

In early 2019, the RAND Corporation analyzed the cultures of all the military Services to include USSOCOM and SOF. The report noted that while there is a different culture between USSOCOM as a headquarters and the SOF components that fall under it, there were also several commonalities.¹⁴ Critically, the authors of the report reached out to members of the SOF community to analyze how they define the SOF culture. Not surprisingly, many of the operators interviewed highlighted a forward-leaning, direct-action-oriented culture focused on individuals with a “direct-action mindset” where operators *want* “to go into the most difficult combat situations you can, to face death, and to win ... [t]o go into very risky, very personally risky situations, where it’s one on one, and go duke it out with the bad guy. That’s what SOF guys want.”¹⁵ This is their mandate.¹⁶ The report adds that “many are drawn to the SOF community for the potential to deploy more frequently and engage in the counterterrorism operations” that have become a dominate part of SOF operations.¹⁷ Innovation, adaptability, and flexibility are also prized and seen as an extension of the SOF focus on humans over hardware and quality over quantity.¹⁸ There are two potential inferences that can be made from these comments: 1) Congress may be mistaken if it believes that recent misconduct is the result of an overstretched SOF community taxed by 17 years of continuous combat; and 2) this cultural mandate may prove very difficult to influence and change. As one Navy SOF officer states in the report, USSOCOM is not as good at “transformational change,” as it is good at “incremental” change given its current focus on solving “near-term problem sets.”¹⁹ Some have labelled this overall SOF attitude as the *just get after it* mentality. There is peril in a mentality that simply seeks to rush into danger to get after a problem without comprehending the why or the consequences of those actions.

One noteworthy outsider view comes from a professor at the University of Sydney in Australia, who writes on the concern over the so-called “band of brothers” culture in special operations (and the broader military) and whether it is responsible for the increase in civilian casualties in recent conflicts and incidents involving U.S. conventional forces and Australian SOF. She defines this culture in familiar terms. She writes, “Combat and special forces units are also often characterised using the band of brothers e-trifecta: elite, essential and exceptional. They have historically been presented as ‘the tip of the spear,’ and the most essential and responsible units for protecting the

14. S. Rebecca Zimmerman et al., *Movement and Maneuver: Culture and the Competition for Influence Among the U.S. Military Services* (Santa Monica, CA: RAND Corporation, 2019).

15. Susan Lynn Marquis, *Unconventional Warfare: Rebuilding U.S. Special Operations Forces*, Washington, D.C.: Brookings Institution Press, 1997, 305.

16. According to one Army Officer, this “executing direct-action for over a decade of warfare necessarily results in changes to training, resourcing, recruiting, and organizational preferences. America’s Special Forces are now more likely to emphasize violent operations than they have before.” See Cole Livieratos, “A Cultural Failure: U.S. Special Operations in the Philippines and the Rise of the Islamic State,” *War on the Rocks*, 3 July 2017, <https://warontherocks.com/2017/07/a-cultural-failure-u-s-special-operations-in-the-philippines-and-the-rise-of-the-islamic-state/>.

17. Martinez, “Pentagon Review,” 132.

18. Martinez, “Pentagon Review,” 130.

19. Martinez, “Pentagon Review,” 131.

nation.”²⁰ Her argument is that, “Elitism and a mentality of exceptionalism perpetuates lack of accountability and an “above the rules of war” attitude in military units.”²¹ Obviously this argument does not have universal application. Not all warrior elites commit misconduct. Nonetheless, it is included here as a potential danger of unrestrained elitism in the SOF culture that could be nourished by the *just get after it* mentality and undermine the legitimacy of SOF culture itself.

Not all warrior elites commit misconduct.

Another researcher in Australia has been looking at this problem with a specific focus on the advise and assist mission of SOF. He writes, “One of the classic missions of special forces is to train, advise and equip irregular forces, often guerrilla, non-state forces.” From the ethical standpoint he adds, “There are all sorts of questions about what our ethical responsibilities are when they do things they’re not supposed to do. Can we bite the bullet on working with bad people in order to get good things done?”²² In an online article highlighting the research, it is noted that in interviews with both U.S. and Australian SOF personnel, there were “wildly divergent views on the ethics of special operations.”²³ The article notes that “despite its moral complexity, very little research has been done on the topic that could guide the actions of special operations units.”²⁴ Perhaps most critically, however, is the finding that “special operations forces themselves have struggled to define where they are in this space.”²⁵ In some ways, this article highlights the underlying problem that without reinforcing one set of standards, a diverging view has emerged on what *right* looks like.

Adding complexity to the SOF culture problem, a former special forces member noted that even within the SOF culture there may be multiple subcultures competing against each other.²⁶ For example, “Each unit has its own distinct culture, identity, and accoutrements such as insignia, berets, and badges, but also unofficial symbols and names which appear on team t-shirts, unofficial velcro patches, ballcaps, challenge coins, and the like.”²⁷ However, he adds, “Special Operations has a propensity towards forming cults, the natural extension of any closed group or sub-culture. Tribal mentalities help soldiers fight, and if need be die, together. However, when they become cults they result in a type of immaturity that is detrimental to the mission and to national security in general.”²⁸ As with the concern over unrestrained elitism, the problem here is the concept of

20. Meghan MacKenzie, “How a Special Forces Band of Brothers Cultures Leads to Civilian Deaths in War,” *The Conversation*, 13 July 2017, <https://theconversation.com/how-a-special-forces-band-of-brothers-culture-leads-to-civilian-deaths-in-war-80878>.

21. MacKenzie, “How a Special Forces Band of Brothers.” Professor MacKenzie also notes that the “band of brothers culture can fuel group mentality that is centered on adrenaline, competitiveness, violence and impunity.”

22. “Ethics of Special Operations: An Ethics for the ‘Grey Zone’ of Special Operations,” University of New South Wales (UNSW) Defence Research Institute, accessed 16 December 2019, https://dri.unsw.edu.au/groundbreaking_post/ethics-of-special-operations/. Dr. Deane-Peter Baker is quoted in article.

23. UNSW, “Ethics of Special Operations.”

24. UNSW, “Ethics of Special Operations.”

25. UNSW, “Ethics of Special Operations.”

26. Jack Murphy, “The Cults of Special Operations,” *NEWSREP*, 8 June 2014, accessed 28 February 19, <https://thenewsrep.com/35671/cults-special-operations/>.

27. Murphy, “The Cults of Special Operations.”

28. Murphy, “The Cults of Special Operations.”

unrestrained tribalism and whether a *just get after it* mentality tolerates the spread of these subcultures that erodes or worse—undermines—the legitimacy of the broader SOF culture. This in turn distorts what *right* looks like across all of SOF, leading to different ideas of what is right or wrong.

Step Two: Promote the Tools Necessary to Affect SOF Culture Change

In some ways, this step is relatively easy. In their 2018 joint guidance on ethics memorandum, the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD[SO&LIC]) and the USSOCOM Commander noted that SOF have been employed for 31 years conducting thousands of missions and, as a result, SOF already holds itself to high standards of ethical and professional conduct.²⁹ What are those standards? There is not one single definitive source. Much like their different cultures, all SOF components have their own creeds, ethos, and core values that they bring to the table.³⁰ Further, USSOCOM also has its own “SOF Truths”³¹ and “SOCOM Ethos.” Each of these sources are valuable tools for restoring the legitimacy of SOF culture. These, combined with existing laws and regulations governing the conduct of SOF personnel, are the tools that already exist with which to restore legitimacy to the SOF culture.

The first phase in restoring legitimacy to SOF culture and avoiding the dangers mentioned in the previous section is to begin by emphasizing these existing ethical and professional standards. This starts with accountability. “Accountability brings responsibility, and leaders who are made

Lawyers play a pivotal role in ensuring that standards are enforced through administrative and judicial actions.

accountable and hold others accountable for supporting the vision for an organization will help to ensure that stakeholders move toward goals for accomplishing that vision.”³² Lawyers play a pivotal role in ensuring that standards are enforced through administrative and judicial actions. This is a vital step. However, “reinvigoration of existing values, requires actions different from the status quo.”³³ Thus, it is not enough simply to keep reinforcing the same standards through existing accountability actions. The military, with few exceptions, is very good at holding itself accountable for its shortcomings. Even now, high profile cases of SOF misconduct are being

addressed by the military justice system. Lawyers are *getting after it* consistent with the current SOF culture. But, this is not enough. The real question is how lawyers and leaders in the SOF community can *get ahead of it*.

29. Murphy, “The Cults of Special Operations.”

30. Pete Nealan, “The Importance of Ethos in Special Operations,” *NEWSREP*, 3 August 2015, <https://thenewsrep.com/38266/the-importance-of-ethos-in-special-operations/>.

31. “The SOF Truths,” United States Special Operations Command, accessed 28 February 2019, <https://www.socom.mil/about/sof-truths>.

32. Nelson Lim, Abigail Haddad and Lindsay Daughtery, *Implementation of the DoD Diversity and Inclusion Strategic Plan: A Framework for Change through Accountability* (Santa Monica, CA: RAND Corporation, 2013); Pamela Babcock, “Diversity Accountability Requires More Than Numbers,” *Society for Human Resource Management*, 13 April 2009, <http://www.shrm.org/hrdisciplines/Diversity/Articles/Pages/MoreThanNumbers.aspx>.

33. Jennifer J. Li et al., *Enhancing Professionalism in the U.S. Air Force* (Santa Monica, CA: RAND Corporation, 2013), 72.

Step Three: Getting Ahead of It—A New Strategic Approach

The primary challenge in this step is one that can be borrowed from the strategic role lawyers play in U.S. Africa Command (USAFRICOM). At a recent gathering of lawyers in Stuttgart, Germany, it was argued by a senior member of the combatant command that lawyers need to be more strategic in their approach to the mission. Instead of focusing on making sure that U.S. forces are complying with the law, they should be focusing on ways to use the law to make the partner forces (and the governments they serve) the legitimate source of authority and justice such that the people will run to them instead of away from them to the enemy. Only then can the U.S. achieve its strategic objectives in Africa. By analogy, SOF lawyers now must consider whether they need to look beyond merely helping commanders enforce compliance with ethical and professional standards and start looking at how to enable their commanders to find ways to ensure the SOF community *runs* to ethical and professional standards as a legitimate part of their warrior ethos—this is ultimately what is meant by restoring legitimacy to SOF culture.

This will be a gargantuan task given the elite and tribal aspects of SOF culture discussed earlier. Again, the situation on the ground in Africa is a useful analogy. Professor Anna Simons, who wrote *The Company They Keep*—which provided a serious and authentic inside look at U.S. special forces—recently commented on the misunderstandings Americans have with tribalism and cited Africa as an example. She notes, “Most of Africa’s 54 countries are home to multiple tribes, in each one of which members remain duty-bound to preferentially look out for one another.”³⁴ She argues that this is problematic when it comes to democratic governance on the continent, as it is presumed that elected leaders who do not come from the same tribe will not be looking out for their interests—or provide for their security. Thus, she concludes “the challenges tribes raise are *moral*.”³⁵ This is because “every tribe comprises its own moral universe, [and] most of its rules (and its protections) apply to it and its members alone.”³⁶ This reinforces the importance in making the ethical and professional standards part of the SOF moral universe. While lawyers can assist in this effort, they cannot do it alone since they may be perceived as an outsider trying to impose outside morals on the SOF tribe. Military lawyers who have had experience in rule of law missions may understand some of this frustration and their experiences may provide a useful roadmap for this effort.³⁷

34. Anna Simons, “Getting Tribes: A Corrective,” *The American Interest*, 16 May 2018, <https://www.the-american-interest.com/2018/05/16/getting-tribal/>.

35. Simons, “Getting Tribes.”

36. Simons, “Getting Tribes.”

37. Judge Advocate General’s Legal Center and School, *Rule of Law Handbook: A Practitioner’s Guide For Judge Advocates* (Charlottesville, VA: U.S. Army, Center for Law and Military Operations, 2015.)

Step Four: Getting to Right—Implementing the New Approach

First, the rule of law should protect against anarchy and the Hobbesian war of all against all. Second, the rule of law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the rule of law should guarantee against at least some types of official arbitrariness.³⁸

So, how exactly can rule of law help reform SOF ethics and culture? The answer lies in how the military has implemented rule of law into its doctrine. The Army's Field Manual 3-07, *Stability*, states that "rule of law means that all persons, institutions, and entities—public and private, including the state itself—are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles."³⁹ To strengthen rule of law, Army units seek to improve the capability, capacity, and legitimacy of host-nation judicial and corrections systems.⁴⁰ Improving capability and capacity has long since been a classic SOF mission. It should not take much to look inward and focus on the legitimacy of the internal mechanisms of SOF for ensuring accountability for its own forces. The objectives are already out there.

Accountability and legitimacy go hand-in-hand. Accountability to law is the primary domain of the legal professional. Judge advocates have been involved in rule of law operations since the Spanish-American War.⁴¹ However, the relatively recent experience with rule of law in Africa may be the most instructive for the SOF cultural problem. From its onset, the rule of law initiative in Africa has faced the hurdle of the so-called "rule of personality," where "leaders use the military to concentrate wealth and power in themselves, interfere in civil governance, or simply grab power to overthrow a civilian-elected government."⁴² SOF culture seemingly faces a similar rule of personality. In this case, it is the rule of the tribal personality where the individual and team come first.

In Africa, the military was seen as the strongest government institution by which rule of law could be promoted.⁴³ Efforts were made by Judge Advocates to educate military commanders on the application of law of war and rule of law was added into every command engagement, exercise, and

38. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*; Richard H. Fallon Jr., "The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* vol. 97 issue 1, (January 1997): 7–8.

39. Department of the Army, *Stability*, Field Manual (FM) 3-07 (Washington, D.C.: Department of the Army, 2014), 1–2, https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm3_07.pdf.

40. Department of the Army, *Stability*.

41. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*, 155–156.

42. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*, 155–156; James Dapper, Benes Aldana and Jeremy Greenwood, "Rule of Law Development at the U.S. Africa Command: Moving from the Rule of Personality to the Rule of Law," *The Public Lawyer* (Summer 2013): 3.

43. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*, 155–156; Dapper, Aldana and Greenwood, "Rule of Law Development at the U.S. Africa Command."

training opportunity.⁴⁴ One of the key pillars of these efforts was reinforcing that the military has an appropriate military justice system that holds personnel accountable for their actions.⁴⁵ The end goal of this early effort was the elimination of outside enforcement by international tribunals. The effort continues to this day with the annual USAFRICOM Accountability Colloquium, where various rule of law topics are addressed with African commanders and their legal advisors.

So, what are the lessons from USAFRICOM's experiences for SOF ethics and culture? First, there must be a recognized

necessity to eliminate the need for outside review and oversight of SOF behavior. To accomplish this, commanders need to take the lead in showing that they can be trusted to ethically carry out their mission. In other words, they need to *get to right*. To do this, they have to know what right looks like and ensure those standards are publicly promulgated, equally enforced, independently adjudicated, and consistent with broader ethical principles and laws.

Legal professionals can assist in this effort by helping commanders develop programs for: 1) education on what those standards are; and 2) effective reinforcement of those standards. In the rule of law context, this was done through engagements, exercises, and other training opportunities. In the SOF context, reinforcement will require hard decisions on holding those who violate standards accountable for their actions. This is where the legal professionals supporting the command will play a pivotal role—they form the strongest institution for carrying out this aspect of the mission for the SOF commander.



Colonel Gabriel Udoh Akpan receives his Certificate of Participation from Mr. Mark D. "Max" Maxwell on the final day of the Accountability Colloquium VI in Lilongwe, Malawi, on 28 February 2019. The Accountability Colloquium is an annual event hosted by United States Africa Command's Office of Legal Counsel that seeks to create a collaborative forum for military commanders and their legal advisors to exchange information on topics related to African military operations. PHOTO BY U.S. ARMY SERGEANT EDWARD A. SALCEDO

In the SOF context, reinforcement will require hard decisions on holding those who violate standards accountable for their actions.

44. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*, 155–156; Dapper, Aldana and Greenwood, "Rule of Law Development at the U.S. Africa Command."

45. Judge Advocate General's Legal Center and School, *Rule of Law Handbook*, 155–156; Dapper, Aldana and Greenwood, "Rule of Law Development at the U.S. Africa Command." The other pillars established by Africa Command are: 1) Military is subordinate to civilian authority; 2) Military adheres to International Humanitarian Law; 3) Military and security forces observe, respect, and protect human rights; and 4) Preventing military corruption.

It must be made clear that ethical standards apply equally across the SOF formation, to operators and support personnel alike. Legal professionals can help ensure that the process is fair, independent, and consistent with law and broader ethical principles within the military departments, the DOD, and the federal government. They can also develop processes by which ethical dilemmas are tested as part of SOF exercises and training. A key element of SOF success is mission rehearsal—operators should not have their first encounter with an ethical dilemma on the battlefield—they should be prepared for it before it happens.

While making sure ethical standards are properly enforced through formal processes, legal professionals must also remember one hard-learned lesson from other rule of law operations—the

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role of the so-called “customary” or parallel justice systems.⁴⁶ In Afghanistan, the Taliban’s ability to provide timely, enforceable justice was credited as a major reason for their success.⁴⁷ It simply was not the type of justice Western nations would acknowledge as best for the people. In the U.S. military, discipline is governed primarily by the Uniform Code of Military Justice. This process can be slow and tedious, which may result in SOF commanders choosing alternative means to quash unethical behavior. These alternative means may not be entirely ineffective, but may not be what is expected in the conventional forces. For example, the U.S. Navy relieved an entire SEAL platoon in July 2019 due

to “perceived deterioration of good order and discipline within the team during non-operational periods.”⁴⁸ Nothing may be quite as devastating to a SOF operator as the removal from an operational deployment because of the actions of his teammates. Relief of the SEAL platoon quickly got national attention and was viewed as a disgrace for that unit. Actions such as these can have deterrent effects. However, a careful line must be drawn to ensure that this is not the only form of discipline taken. Commanders must ensure that customary and formal approaches work together in tandem to hold those responsible accountable and reinforce right behavior for the SOF formation.

Additional Considerations from the Comprehensive Reviews of USSOCOM and the Navy Legal Communities

In January 2020, both USSOCOM and the Department of the Navy released their “Comprehensive Review” reports addressing their respective high-profile issues in SOF and the uniformed legal

46. Judge Advocate General’s Legal Center and School, *Rule of Law Handbook*, 90.

47. Judge Advocate General’s Legal Center and School, *Rule of Law Handbook*, 46.

48. Jeff Schogol, “Booze. Coke. Hazing. Forced redeployment. What’s Wrong with the Navy SEALs?” *Task & Purpose*, 25 July 2019, <https://taskandpurpose.com/navy-seals-discipline-problem>.

communities of the Navy and Marine Corps.⁴⁹ Taken separately, these reports may not appear to have much in common, however, when read together, several themes begin to emerge. First, both organizations see a need to change their cultural focus. For the Navy, it is to emphasize the dual professions of law and arms that all uniformed lawyers are a part of.⁵⁰ For SOF, it is to reemphasize leadership, discipline, and accountability over SOF employment and mission accomplishment.⁵¹ Second, both reports call for a similar form of leadership development that demands what the USSOCOM report labels as *present and engaged* command teams that teach, train, mentor, and hold individuals and units accountable.⁵² The Navy similarly calls for commanders to be “more informed and demanding clients” as their scope of responsibility increases—particularly as it relates to the administration of good order and discipline.⁵³

To make commanders more informed and demanding clients, the Navy calls for more engagement with the legal community throughout that officer’s career. The USSOCOM report does not make the same recommendation as it relates to leadership, discipline, and accountability, but generally sees broader issues with SOF professional development and personal maturity—the result of a culture that has been overly focused on meeting current SOF requirements and mission accomplishment. This focus has pulled SOF leaders away from being present and engaged which in turn has eroded leadership, discipline, and accountability across the SOF enterprise.⁵⁴ While the report calls for broader leadership development, it stops short of directly recommending more engagement with the legal community to help develop the core tenets of leadership, discipline, and accountability. The one area for potential legal engagement in the report is the recommendation to publish “SOF enterprise-wide leadership and accountability lessons learned.”⁵⁵ However, limiting legal engagement to just this one aspect of leadership development would be a critical mistake.

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As the USSOCOM report is apt to note, “Leadership and leader development are critical to setting culture at the organizational and institutional levels that promote discipline and accountability—the type of culture that balances USSOCOM’s force employment with other areas of USSOCOM’s

49. U.S. Department of the Navy, Comprehensive Review of the Department of the Navy’s Uniformed Legal Communities, 9 December 2019, <https://www.navy.mil/strategic/Comprehensive%20Review%20DON%20Uniformed%20Legal%20Communities.pdf>; U.S. Special Operations Command, United States Special Operations Command Comprehensive Review, 23 January 2020.

50. U.S. Department of the Navy, Comprehensive Review.

51. USSOCOM, Comprehensive Review, 4.

52. USSOCOM, Comprehensive Review, 30.

53. U.S. Department of the Navy, Comprehensive Review, 121.

54. USSOCOM, Comprehensive Review, 31.

55. USSOCOM, Comprehensive Review, 37.

responsibilities.”⁵⁶ Discipline and accountability are the responsibility of commanders, not the legal community. However, the Navy report shows the danger of not making sure commanders and their legal advisors are not joined at the hip early and often when dealing with issues that end up eroding the institutional culture of both communities and leads to high-profile lapses in judgment. However, the overall responsibility for these failures remain with the commander. The drafters of the USSOCOM report can thus be forgiven for not including a direct reference to the role of the legal community in this effort. But why is it left out at all? The answer may lie in how the discipline and accountability are defined in the USSOCOM report.

The USSOCOM report notes that at the broader institutional level, the terms *discipline and accountability* have taken on broader meanings beyond the mere enforcement of military justice or ethical standards of conduct. Criminal or unethical misconduct are seen as symptoms of a broader issue with how SOF are employed to meet current requirements—more specifically a lack of discipline and accountability to make sure SOF are used correctly against validated requirements. Despite this, there is still a vital role that the legal community can play in enforcing discipline and accountability beyond the mere enforcement of laws, regulations, and ethical standards of conduct.

The Navy report reinforces the notion that members of the legal community are actually beholden to two professions—the profession of law and arms. Judge Advocates must be “supportive of Navy requirements, culture, and values.”⁵⁷ So too must Judge Advocates and paralegals supporting the SOF community. The USSOCOM legal community cannot narrow its focus on those areas where it has traditionally had the most input. Discipline and accountability must be expanded beyond the traditional concepts of military justice and standards of ethical conduct. Rather, the legal community must look at how it can assist in the effort to shift the culture away from its focus on force employment and mission accomplishment and that high operational tempo that “challenges unit integrity and leader development.”⁵⁸ The legal community as members of the profession of arms, should also be familiar with mission requirements and the proper use of validated SOF requirements.

This paper has posited the notion that *legitimacy* is also a key area of focus for the SOF legal community. In a sense, the USSOCOM Comprehensive Review confirms this notion in that a major factor leading to the erosion of leadership, discipline, and accountability has been the *illegitimate* use of SOF, which has distracted attention away from developing *present and engaged* leaders who create units that are “focused, credible, and capable.”⁵⁹ This results in SOF units that deploy “with leadership and tactical flaws that have the potential to manifest into individual and group misconduct and tragic incidents on the battlefield and in forward deployed locations.”⁶⁰ The proposed solution is to ensure “increased presence and engagement [of command teams] with their SOF formations and greater participation and influence in the FORGEN [Force Generation Report]

56. USSOCOM, Comprehensive Review, 33.

57. U.S. Department of the Navy, Comprehensive Review, 115.

58. USSOCOM, Comprehensive Review, 25.

59. USSOCOM, Comprehensive Review, 30.

60. USSOCOM, Comprehensive Review, 32.

process.”⁶¹ The “FORGEN process” refers to “the processes and structure that generate SOF that are ready to fulfill validated global requirements of SOF activities ... [t]hese processes and structure include training, education, exercises, and certification.”⁶² The SOF legal community must look at how it can influence this FORGEN process. However, as the Navy Comprehensive Review notes, “[t]he responsibility of the commander for his or her command is absolute and the authority of the commander is commensurate with his or her responsibility. Compliance with the rule of law is the commander’s responsibility.”⁶³ Thus, the legal community must ask how it can enable the commander to meet his or her responsibility in this regard.

One solution is to look at the legal functions established by the Air Force JAG Corps’ Flight Plan—*Inform, Engage, and Partner*. This calls for the Air Force legal community to, “Proactively engage those outside the JAG Corps to inform and train on the law and its implications and to partner with Air Force and external organization to achieve optimal results and improve the legal system.”⁶⁴ This function needs to be embraced by the larger SOF legal community to better enable the objectives sought by the USSOCOM Comprehensive Review. Further, USSOCOM should consider making it a recommended action as it prepares to form its Comprehensive Review Implementation Team.

Conclusion

Go tell the Spartans, stranger passing by, that here obedient to their laws we lie.⁶⁵

This paper began with a quote from ancient Sparta on the importance of the shield and value Spartans placed on selflessness. In his book, *The Warrior Ethos*, Steven Pressfield, author of *Gates of Fire* (the fictionalized account of the Battle of Thermopylae), notes that Sparta, unlike the United States, was a complete warrior culture.⁶⁶ To lose your life in battle was the ultimate glory and was understood by all—civilians and warriors alike—this was a legitimate death in the eyes of the Spartan. It is thus fitting that the epitaph to the 300 Spartans reads, *obedient to their laws we lie*. Many SOF warriors today see themselves as the modern incarnation of the Spartan warriors of old. Indeed, there is much to admire in the Spartan warrior ethos—particularly in their belief that you gave all on the battlefield with your brothers. But this was not the ultimate aim of their deaths. When a Spartan mother, whose five sons went off to battle, asked a messenger how the battle had gone and the messenger told her that her sons were lost, she replied, “I did not inquire about that ... how fares our country?” It was only after she was told that the battle was won that she replied that

61. USSOCOM, Comprehensive Review, 32.

62. USSOCOM, Comprehensive Review, 6.

63. U.S. Department of the Navy, Comprehensive Review, 121 (citation omitted).

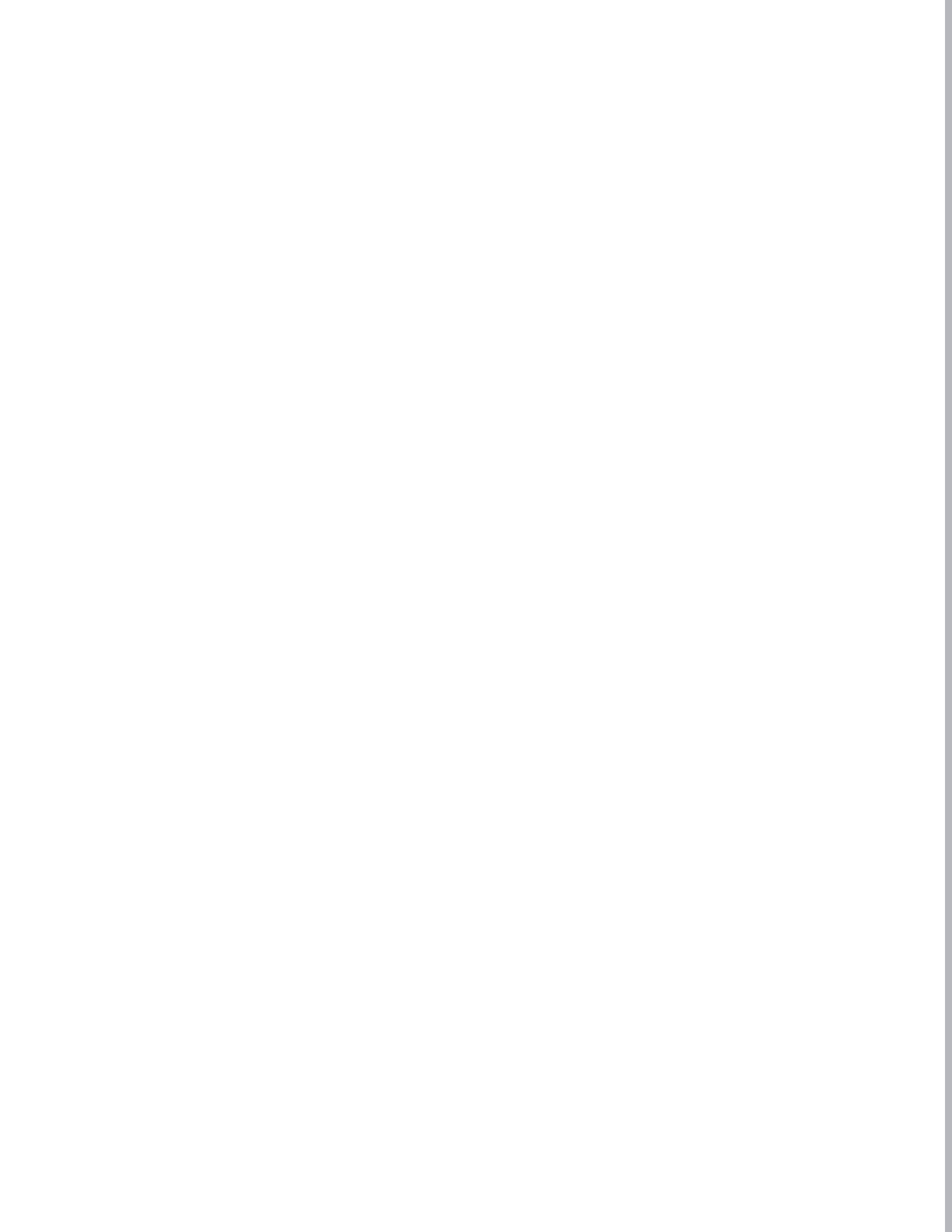
64. John J. Martinez, Jr., “The JAG Corps Flight Plan—Our Foundation, Our Future,” *The Reporter*, Volume 44, Number 1, p. 39.

65. Paul Cartledge, *After Thermopylae: The Oath of Plataea and the End of the Graeco-Persian Wars* (Oxford: Oxford University Press, 2013), 139–144.

66. Steven Pressfield, *The Warrior Ethos* (Brooklyn, NY: Black Irish Entertainment LLC, 2011).

she was content that they all met their deaths.⁶⁷ This is the key factor missing from today's warrior culture—it is not enough to accept risk on behalf of yourself and your team to *get after it*—whether that is meeting the enemy face-to-face or by, with, and through a partner force. Instead it is whether one's actions are legitimate in the eyes of our country. The modern Spartans must ask themselves: How will the country fare by their sacrifice? This is the ultimate test of legitimacy, both in the eyes of their teammates and the people they serve. Legal professionals have a pivotal part to play in this effort, but if they attempt to do it on their own, they will not succeed. Nor can they simply approach the problem from the outside in. They have to work from inside the formation through the commander to ensure the entire formation gets to *right*. Lawyers and paralegals can guide the process—even lead the process in some aspects—but success will only come when members of the tribe accept the ethical and professional standards expected of them as part of their own culture and start to get *ahead* of problems to get to *right*.

67. Plutarch, "Sayings of the Spartans."





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