



Transcript of Judge Advocates General: On the Frontline of National Security and the Rule of Law, October 8, 2025

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Carrie Cordero

Good morning and welcome to the Center for a New American Security I'm Carrie Cordero for those who are joining us virtually today, who may be new to our work here at the center, we are a national security, foreign policy and defense Think Tank tackling some of the thorniest issues in policy today and over the horizon. We are bipartisan in makeup and non partisan in the research and policy work that we do each day. So today, we plan to explore the critical role that military lawyers play in our national security framework, their responsibilities, ethical obligations, and how their advice shapes decision making under critical and sensitive circumstances. To begin our conversation, I'd like to welcome Admiral John Richardson, who serves on the CNAS board of directors. Admiral Richardson comes to us from a distinguished career of over 37 years in the Navy. Among his many leadership roles, he served on several submarines, was submarine commander of the USS Honolulu was commander of the US Navy Submarine Force and served as Chief of Naval Operations, which is the senior officer in the Navy. Admiral Richardson will open our program with some reflections on the role of military lawyers from a commander's perspective, welcome.

Admiral John Richardson, USN (Ret.)

Well, good morning everybody, and it's a real privilege to welcome you, along with Carrie, to today's panel to discuss the role of Judge Advocates General on the front line of national security and the rule of law. And as we consider these two ideas, the role of JAGs and the importance of the rule of law, it might help to for us to keep three things in mind. The first thing is that the idea of the law of armed conflict to govern the application of force goes back almost as far as conflict itself. I mean certainly organized conflict, conflict by warriors. That's the first point. Number two, the idea of restraint and discipline and proportionality in the use of force is intrinsically American. And have these have been part of every conflict we've in which we've

engaged all the way back to George Washington fighting for independence, 250 years ago, and three throughout Judge Advocates General have been and still are absolutely essential advisors to the operational commander. They too are woven into the fabric of the American warrior ethos. So let's just go a little bit deeper into each one of those three ideas, the idea that even war must have limits, as I said, is as old as war itself. Hammurabi's code, the Mahabharata, Augustine Aquinas Islamic teachings, they all reflect the conviction that force must be tempered by restraint. In medieval Europe, it became the chivalric code, urging warriors to spare civilians, honor truces, protect sacred places. As the modern state system developed, thinkers like Grotius gave these instincts some structure by the 19th century, these types of rules, these restraints, this discipline, was being codified in Lincoln's Lieber code, one of the very first times that these were codified by Abraham Lincoln. At the direction of Abraham Lincoln during our Civil War, the first Geneva Convention in 1864 The Hague Conventions at the turn of the century, and after the devastation of World War Two, the Geneva Conventions of 1949 became the backbone of today's law of armed conflict. And as I said, the United States has been committed to this principle since our very beginning. We're about ready to celebrate the 250th anniversary of the founding of the United States and during the Revolutionary War, George Washington talked about the importance of discipline and the use of force in his general order number one, and he appointed the first judge advocate just a few weeks after taking command of the Continental Army. And he wrote in that general order that an army without order, regularity and discipline, is no better than a commissioned mob. And from that moment forward, the judge advocates general Corps has been part of what distinguishes an American military force, disciplined, lawful and honorable, and this is the heart of the matter, right following the law of armed conflict is not a burden on warriors. It is the very expression of their warrior ethos and their honor. It's what separates professional soldiers, airmen and sailors, from criminals, mere thugs with weapons. It gives legitimacy to force and ensures that even in war, conscience and discipline prevail. Now my personal experience at command, with my Judge Advocate General, is rich and complex. I used to hold a morning stand up meeting every morning in command, it was. It was stand up, so it would be brief, and it would set the tone for the day. And we talk about those things we're occupying our schedule and our attention. And every single time, my JAG was there, right at every one of those meetings, when I was commanding the Submarine Force, we were really, at that time, focusing on the emerging threats that we're facing today. You know, back at that time, they were just getting started, this involves a consideration of the rules of engagement, which for submarines, has always been a complicated thing, right? And so, you know, this needed refreshing and reinvigorating, and the judge advocates general were central to that effort, and it's also important for me as a commander, and you know, commander of other commanders, to be very clear for myself and and my other commanders that the JAGS are advisors, right? It's the commander that retains the responsibility and accountability for the employment of force. And so in that regard, I always wanted to be to have a very professional and knowledgeable and capable JAG corps. They need to win their case for the service and advise commanders how to do their jobs. And there's a kernel of truth about becoming over cautious, but that caution is not necessarily the caution of the JAG corps, that caution is exercised by the commander, all right, and I wanted my jag to be thorough and detailed and giving me the very best advice so that then I could put my risk where I wanted it to be. All right. So in that regard, in fact, Admiral Crandall is here. We had a number of engagements between me personally and the JAG corps to make sure that we were operating at those standards. So with that said, I hope I've given you some context in terms of just how important I considered the JAGs and most operational commanders I knew. And with that, I'm going to hand the program over to back to Carrie, who introduced our guest speakers, who are two leaders who embody the best traditions of military legal practice, Judge James E. Baker and rear Admiral James McPherson, being unmatched in their experience from the bench

the fleet and the halls of government, and I know that their insights will help us reflect on how the law of armed conflict has evolved, how JAGs have shaped its practice, and how both must adapt in a world of rapid technological and strategic change. So Carrie, back over to you.

Carrie Cordero

Great, thank you so much. Admiral Richardson, appreciate your your comments today in opening our program, as well as your service on the CNAS board of directors. And I am joined today by two distinguished guests. Judge Jamie Baker began his military career as an infantry officer in the Marine Corps. He is currently Professor of Law and director of the Syracuse University Institute for security policy and law and Professor of Public Administration at the Maxwell School of Citizenship and Public Affairs. He also served as the chief judge of the US Court of Appeals for the armed service and legal counsel to the National Security Council, among other roles in government. Also very honored to have with us here today. We are Admiral Jim McPherson, who began his military career as an enlisted member of the Army as a lawyer. He worked his way up as an assistant Judge Advocate, all the way up to Judge Advocate of the Navy, and he also served as general counsel of the army and Under Secretary of the Army in the first Trump administration. So delighted to have you both with us today, and we're going to bring begin with some perspective on military lawyering generally, and how military lawyers fit into the operational and administrative chain of command, why their independence is vital, and later in the program, we will get to some of the current issues as well that that are relevant to military lawyering. I want to start out just at a very basic level, maybe for some members of our virtual audience who are not so familiar with military lawyering and and JAGs, Judge Baker, I'm going to start with you. There are over 5000 I think, military lawyers on active duty, for those who are less familiar with sort of what that means. Can you give us a little bit of an overview between the difference between judge advocates and the civilian lawyers who work on national security matters throughout the government.

Judge James E. Baker

Thank you, Carrie, so I will let Jim and Admiral McPherson cover most of the Judge Advocate routine. But before I respond to your question in this room of friends and experts, it's always awkward to call out any one person, but I would like to, on behalf of Jim and myself, acknowledge that we do have three former judge advocates general here. Del Crandall was already called out by Admiral Richardson. Stu Risch is here as well, and, of course, Joe Berger is here. Thank you, all of you for coming today and showing your support for military lawyers and military law. Now I've lost track of the question, but I'll tell you, sort of my favorite color was

Carrie Cordero

the role of military lawyers as commit as compared to some of the civilians

Judge James E. Baker

making fun of myself the So, so I was not a Judge Advocate, but I will. And so I'm going to let Jim talk about the overall core and so on, but I'll say a couple of things about that. When I was the NSC legal advisor, so I was the President's National Security lawyer, I always made sure I had a Judge Advocate on the team. And when I first called over, to be perfectly honest, I called over to the Marine Corps initially, as one would, and I said, Hey, would, can you please assign a Judge Advocate to NSC legal and the monitor, the person who assigns colonel said, we don't have that billet? I said, Yeah, I know you don't have that billet because I'm looking out in the office and there's no marine colonels here. But don't you want to have a Marine colonel advise the commander in chief on issues like Law of the Sea, law of armed conflict and so on? Well, I didn't get very far with the monitor, so I called the Council to the comment on the Marine Corps,

Peter Murphy, and he immediately said, Absolutely, who do you want and when do you want them? And some of you know what the rest of the story, which I'll share with you later, but the person reported for duty the next morning at 07 having been pulled from a far away location. Why did I want a Judge Advocate on the team at all times? First, unquestionable work ethic, I used to have to order my Judge Advocates to go home on Sundays, the day off in the afternoon. But one unquestionable work ethic and what happens when the law is not present, they move on without you, right? They don't wait. Oh, the lawyer's not here. Let's make sure they come in and let's feed them carefully and be nice to them. No, if the law is not in the room, the law is not in the room. So I never had to tell my Judge Advocates, please stay for the meeting. I always had to say, go home and see if your family is still there second they knew the law of armed conflict. I don't think I'm giving away a state secret to say most presidents and most attorneys general, et cetera, don't know the law of armed conflict. You know who does? Judge Advocates, and they're trained to do the targeting issues and that sort of thing. One thing I did have to articulate to the Judge Advocates is that the answer to the question is rarely yes or no. It's Yes, but or no, but, and we have to do legal policy here, and not just law. So sometimes Judge Advocates are used to because they're can do use of mission accomplishment, and so they're working toward getting to yes. And I would, and that's great, but I would always, always articulate the mission is to get the yes with honor, with the nation well taken care of in the Constitution intact, and that was the additional bit. And JAGs understood that once the mission was defined, off they went to accomplish the mission, and that they did, Jim your turn.

Rear Admiral James E. McPherson

Happy to thank you and thank you Carrie and to CNAS for hosting this, and to Admiral Richardson for your very kind remarks at the beginning. Appreciate that greatly. So each of the services have judge advocates assigned to them, to include the Coast Guard. They're pretty much the same in their organization, and what they do that is entry level judge advocates are junior officers, and they will be assigned to a large law office, and they will probably do military justice some legal assistance that is helping our sailors, our soldiers, our Airmen, Coast Guard and our Marines with basic questions they have with their landlord and that sort of stuff. They will also do administrative law, personnel law, that sort of thing. And some will do contracting law, and that's where we have a little bit of a divergence among the services. And I'll mention that in a second, as a Judge Advocate, will progress in their career. Obviously they will have greater responsibility roles, and typically, they will eventually find themselves on the staff of a flag or general officer, either in an office that has a number of JAGs assigned, or as the staff judge advocate to that command. And that's the first brush they will have with with, if you will, a general or flag officer. My own experience was, I was very fortunate during my career. In that the flag officers I worked for understood what JAGs were, understood what our role was, and appreciated us, and not because of me, but because of their own experience and their wisdom. Like Admiral Richardson said, I was always part of the inner circle of the decision making that that flag officer or general officer had a couple of the differences in the services is important. I'll talk about at the service level in a second. But Navy lawyers, Navy JAGs, we don't do contracting law. We don't touch that. Thank goodness. I wasn't good in my contracting law class, and so I was very happy to hear that when I came on active duty, but the army does, and the Air Force does, and as well, the Marine Corps does as well. Now there's a point of friction that you might perceive involved here, because in addition to the uniformed attorneys that are assigned to the services, there are also general counsel assigned to their services, and their boss is the general counsel with their respective service. I was fortunate enough that I was selected as a general counsel of the army. How did I go from Navy to army? I have no idea. You'll have to ask those people who thought I'd do a good job put me there. In any case, that friction point is always present, and in some instances, historically, it has been dysfunctional. I

was very fortunate when I became the Judge Advocate General the Navy in that my counterpart, the General Counsel, was a gentleman by the name of Alberto Mora. I know many of you know him. I don't know. I don't see Alberto here. He had, okay, the first meeting that we had, Mr. Mora said to me, Jim, I regard you and me as partners in the law firm of the Navy. And he not only said that, but he acted that he would include me in meetings that he held. He would include me in decisions that had to be made that spilled over into my area of responsibility, and that was very important to me. When I suddenly found myself inbound as the Army General Counsel, I wanted to do the same thing, and at the time, I was fortunate that General Pede and general Stu Risch were part of the leadership of the army JAG corps. I had that same conversation with them. And so I'd like to think Stu can not his head up or down or sideways. I'd like to think what we really never became adversaries at all. The advice that we were given, and sometimes we were giving the advice on the same issue to leadership of the army was always the same, and as a result, it carried much more weight. The other difference that in the services that is unique to the Marine Corps and the Coast Guard in that marine judge advocates and Coast Guard judge advocates are first line officers. That is, they will do a tour or two, an assignment or two as a judge advocate, and then they will go off and they'll be a line officer, Colonel Dave Jonas in the back of the room. Can nod his head. He did that as well. He is a good friend and colleague from those days on active duty, and that makes their perspective a little bit different than the perspective you're going to find in a staff Corps officer whose entire career is just with that staff corps.

Carrie Cordero

It's a great overview, and I want to stick with you for a minute and ask you as well, you have the unique vantage of having served as a lawyer and navy JAG, but then also as Undersecretary of the Army. So can you talk a little bit about, then, how being in that non legal leadership position, how that may be changed or evolved your view of working with military lawyers.

Rear Admiral James E. McPherson

I go back to the differences that exist for historical reasons. The Judge Advocate General of the Army and the Air Force is assigned to the army staff that is their boss is the Chief of Staff of the Army and the Air Force in the Navy, the Judge Advocate General is assigned to the Secretary's staff. In other words, my boss was Gordon England, Secretary of the Navy. That's that's a distinction that has repercussions throughout how you perform your duties and responsibilities. Yes, the CNO when I was the JAG, yes, the CNO would see me and ask me a question now and then. But the person I saw most often every day was the Secretary of the Navy. That's the very different experience that the Army has and the Air Force has, and that their boss is the Chief of Staff of the Army and the Air Force. It was my experience moving into the army staff that that really didn't make a whole lot of difference at the leadership level. It was either Stu or Chuck that attended the secretary meetings, as well as the chief of staff meetings, and often those meetings were both of those individuals too, and it seemed it was much more seamless than it would appear on the on an organization chart. So you're right. Carrie, I went from being the provider of legal services to being the recipient of legal services. I've always thought, and it was proven in my career that the most difficult client an attorney can have is another attorney. Yes, that's true. I was, I was very sensitive to that. And when I was the Under Secretary and I would reach out to either Stu or Chuck for an issue that involved the uniform side, I was very careful not to interject my own beliefs as an attorney. The other thing that was different too was I suddenly found myself in a policy position as a presidential appointee. Read politics capital P in the first Trump administration. We can get into that, perhaps in the question and answer later on. Let me just say that it was sometimes very difficult. One of the one of the issues we had to wrestle with early on is a tweet at two o'clock in the morning aimed at the Department of

Defense, is that in order for us to do something, or should we ignore it? Or what do we do now? If you're interested, I'll tell you how we resolve that in our own minds and successfully, I think.

Carrie Cordero

Great. So I do want to note for our audience, so a little bit later into the program, we will welcome questions. For those of you who are here in person, we'll have somebody with a mic, so if you want to start thinking of a question or two for our guests, also for those of you who are watching virtually, you can feel free to add a question into the chat function on the CNAS website, and those will make their way up to me here with the with the group, and we're happy to take questions there as well. So with that background and thank you, thank you both for it, I want to dive a little bit more into the nature of the type of advice that military lawyers provide, and sort of how that process works, and how the the tensions sometimes play out between the objective the military objective, but and then the lawyer's role in interpreting constitution, international law, law of armed conflict, as you described. You both co authored a paper, a white paper that is available publicly. You had two co authors on it, who I'll mention, Major General John Altenburg, who had served as Deputy Judge Advocate General of the Army, and Colonel David Graham, who had been the executive director, director of the army JAG Legal Center. That paper is available. It's on the role of military lawyers and JAGs, and it's available and was published by the ABA Standing Committee on law and national security, which I and many of our guests serve on that committee. And I want to highlight for you something that you wrote in that paper, and then ask for you to sort of reflect on it a little bit more. You all wrote, quote, adherence to the law of armed conflict is the key to a disciplined force in combat, and only a disciplined force is an effective force. Judge Baker, can I start with you to reflect? Can you unpack that a little bit for our audience?

Judge James E. Baker

Happy to and I'm always happy when a former CNO and Admiral can get up and recite the law of armed conflict, as you did. That's what we want. We expect Lance Corporals to know the law of armed conflict, Admiral should too, as should everybody in this room. One of the things I found in my practice of national security law and the operational chain of command was that on up to the commander in chief, lawyers sometimes fail to tell their clients, and I viewed my client as the Constitution, which was just so you know, but I wasn't speaking to the Constitution, but when I was speaking to the national security advisor or the chain of command, I'd always articulate why the law was not just what the law was, because sometimes In moments of stress, and if you're in the operational chain of command, you're usually dealing with moments of stress and oftentimes with strong personalities, their first instinct wasn't, let's see what the law is, and let's make sure we follow it. You had to articulate what the law was and why you should follow it, and why it leads to a better result. And so I always would encourage, and I encourage my students today, don't just tell the person what the law is. Tell them why the law is so. Why is the law of armed conflict essential to the combat effectiveness of the American military? Why is that the magic sauce? Everybody has AI, everybody has tanks. The difference between the Russian military, which is an army of war criminals, and the United States military and the Ukrainian military, is adherence to the law of armed conflict. One. So we quote George Washington. Always good place to go back to General, General's order one. And George Washington, right? He understood that the difference between an armed mob and a professional military was adherence to discipline and obedience to orders and the law. Why else would you follow the law? Why else is it important? First Alliance, right? If whatever your problem is, if your problem is. Or, let's say randomly, drug traffic from Latin America, you need Alliance. If your issue is protecting NATO, you need Alliance. And if you don't follow the law of armed conflict, you're going to lose Alliance. You're not going to get weapons, you're not going to get information. And

as Jim and I were talking beforehand with the information flow. You sometimes you won't know when you're not getting something. So if you want your allies to give you intelligence, follow the law of armed conflict or they're not going to share with you what you need to know. The list goes on. We actually have a 16 point handy handout on this very topic, why law matters, but here are some of the other reasons. Recruiting as fathers and mothers and uncles and aunts. Do we want our children to go to an into an armed force that isn't moral and is unethical, and have them run the risk of engaging in something that will stay in the remainder of their life? No one joins up to join a military that is going to go off to commit war crimes or violate the law. It's an essential recruiting component to adhere to the law of armed conflict. The it is who we are. It distinguishes us from Russia, China and other militaries. What would you like to add to that list?

Rear Admiral James E. McPherson

No, you're absolutely right. I adherence to the law of armed conflict also has a criminal component to it. Then, as Judge Baker pointed out in our paper, that that's the enforcement mechanism that we here in the United States have with regard to the law of armed conflict, is that there are actually 18 U.S. code sections, criminal code sections in our federal code that make it a crime to violate the law of war, the law of armed conflict.

Judge James E. Baker

So this is one of the things that we've gets lost in some of the media outlets. Is JAGs aren't there as they may love Grotius or not, love Grotius, but most of the law of armed conflict, virtually all of it, is embedded in us. Criminal Law 18, USC, 2441, the Uniform Code of Military Justice. JAGs are upholding the law, and it all starts with the oath to the Constitution, to support and defend the Constitution, not the select portions of the Constitution you like, all of the Constitution, that's the fundamental oath. Bit awkward. Sometimes when I visit a service academy or I'm in a room full of military officers, I ask, have you read the Constitution? And I expect every hand to go up, and oftentimes not every hand goes up. So if you're going to support and defend the Constitution, which is to say the law, you ought to know what you're supporting and defending and prepared to die for. I would read the Constitution when I was at the NSC, I'd read the Constitution every two weeks, cover to cover, to refresh my recollection, what an honor it was, what a responsibility it was, and what a joyful duty it was to get to support and defend the Constitution. And occasionally, what would happen is I'd be in a meeting and some weird issue would come up that I had never thought of like an Emoluments Clause issue, and I'd be able to quote the Emoluments Clause off the top of my head as if I'd studied it all my life. So it had the added bonus of preparing me for the job. Anyway, we can go on on this topic.

Carrie Cordero

No, but I do have, I do have a follow up, which is that, having served so I did not serve in the JAG corps. Served as a civilian national security lawyer in the Justice Department during sort of the post 9/11 era. And for all national security lawyers, there is oftentimes pressure to try to get to, yes, whatever is the outcome that leadership wants to get to. Because National Security Law in particular has a lot of gray space in it, and sometimes there are novel issues that come up, and so it requires a lot of lawyering, and sometimes very sort of novel and creative lawyering. I'm going to start with you, Admiral McPherson, can you talk a little bit in the in the military lawyer context, how JAGs deal with that tension between, perhaps, like their loyalty and their wanting to serve the commander, wanting to give good advice to their commander, but also wanting to stay in the room. As you mentioned earlier, you want to be a lawyer who gets invited to the meeting so that you know what's going on, and if you're the person who's always saying no, you might be not invited to those meetings, which are important to your effective functioning. So can you talk a little bit about how JAGs can navigate what can be? Sort of a little bit of

tension between their loyalty to the commander, how they want to be helpful, but their job is to interpret the Constitution and interpret the law.

Rear Admiral James E. McPherson

Thanks, Carrie. Back in the day, that means, when I was on active duty, back in the day, we had a course of instruction for anyone that was going to their first staff judge advocate job, that is, they were the legal advisors to Align command or to a staff. And part of that instruction was just that, how do you answer a question from your boss that you know the answer is, No, sir, I'm sorry. We can't do that. And what we would tell people, and what served me well, is I would always, I'd rephrase it, I'd say, boss Admiral, what is it you want to do? And oftentimes they would tell you what it is they want to do. And that was very different than the question they were giving you, that was only answerable yes or no, and that gave you the opportunity to say, Well, can we change the parameter just a little bit on what you want to do? And then let me show you a path to that. I found that pretty much always successful. However, there were always occasions when the boss would articulate, here's what I want to do. Jim and I would go back to my office and think about it a lot and research about a lot, and the answer always came back as a no, usually in the area of fiscal loss stuff, how do I spend money? And I would go back and have to tell the boss that. But the key to that was I had a great relationship with the boss to start with. You always hope that that's not the first question you get on day one when you're the CNO's counsel. You hope it's the question you get on day 100 as a CNO's Council, because by then you have gained their trust and confidence, and they were more willing to accept the no on the rare occasion that it was no, but I got to say back and re-emphasize this. Rarely was it No. It was usually okay, Admiral, I understand this is what we need to do. Let me, let me course a path to get there, and we were always able to do that.

Carrie Cordero

So we've talked about the adherence to the Constitution. We've talked about some of the tensions in being able to give this type of advice. I want to focus and judge. I'm going to come to you in a second. I want to focus on some of the ethical considerations and sort of how lawyers navigate again when there is sort of this gray space. I'd note, I know we have some law students who are here in the room, and we also have a question that was posed online in terms of, what type of advice would you give to maybe some junior JAGs who are watching this virtually, or our law students who are here who might be thinking about careers in this field for thinking through the ethical obligations that a military lawyer has. Judge. I'll start with you and then go to

Judge James E. Baker

Well, I'd start by saying, the predicate of the question shouldn't be directed at law students or junior lawyers. It should be directed at all lawyers at whatever grade and wherever they serve National Security Law, the practice of law, in my view, is substantively easy. The hard part is the values part. So law serves three purposes. It provides the authority to act and the limits on that action. It provides for central process, and it provides for values. And what we want is good process, not bad process. And we want to get to yes with honor, with the nation well taken care of in the Constitution intact. To me, the hardest challenges of practicing law, especially in the national security space, are the ethical challenges doing the right thing the right way, when everybody is yelling at you, and I'm with Jim, completely solve the problem, don't answer the question. Figure out what they're trying to do, and help them do that. And I would always say, which wasn't well received, but I'd always say, I can always get to yes with a constitutional amendment. It might take a while so, and by the way, a lawyer saying no is not necessarily. It tells me a couple things when, when you get the constant refrain that lawyers always say no, I'm

going to get ethics here in a second, which is, eventually you want to say no, because if you're dealing with a national security problem, and you never say no, or you never get to a point where it's no, but, it tells me a couple of things. One, you either have a lawyer as a yes person, and they're not doing their job, or perhaps the policy person isn't trying hard enough to solve the mission or to solve the problem, right? If your job is to prevent a terrorist attack in the United States or to find a spy counter. Have a counter intelligence issue at an intelligence agency, you should be trying to overreach, and that's where you need to be greeted by your lawyer, who will show you back to the edge of the law. So there's no shame in No It depends how you got there. So on the ethics side, which I think, is what it's all about. It's always so I have 14 things to say here. Let me try to limit it to three. So one know who you are and what you stand for. Usually, if you haven't sorted that out, the moment comes when you're put to the test and you miss the opportunity. So you need to go into the issue with that in mind. What is where? When will I resign? Why will I resign? What do I ultimately stand for? And that can be a creed. It can be living up to the ideals of a particular role model, but it all has to be sorted out ahead of time. Quick side note, when I attended my first principals committee meeting, and it was about a week into the job, I didn't even have a pass yet, so I had to talk my way past the Secret Service folks into the sit room. Actually, I talked my way past I went charging down the hall, and then I realized as I got down to the hall that I had no idea where the sit room was, so I had to go back to the Secret Service guys and ask them where it was. And they laughed at me and had a fun time with that. But I was in there, and not sort of 10 minutes into the thing, it was clear the only meeting, only reason they were meeting was to discuss a legal issue. And I looked around, and I was the only lawyer in the room, other than the Attorney General, and this was a topic for which the attorney general would not be expected to know, know the law. And not one second later, I was asked to brief the thing. Had no idea what the meeting was about, so I briefed the thing, and I say the question presented is on [unclear]. And on the one hand, blah blah blah, and the other hand, blah blah blah, a cabinet officer slams their hands on the table and says things I cannot say here, but they were essentially, you're the dumbest lawyer I've ever seen. Get the heck out of here who hired you and why you're here and never come back. And I was thinking, boy, is this what happens at principals meetings? Like no wonder the Balkans is out of control and the so I showed up with the law I had, right? It wasn't like, Excuse me, but can I go refresh my recollection and go to the library for five hours and come back? No, I showed up as I was what was I thinking about? By the way, there are two rounds of this. The Nationals I'll get the National Security Advisor turned me and said, Do you have a response to that? And my response was to say it all back. No. I said, perhaps I wasn't as clear as I should have been. What was I thinking about? Then? What was I thinking about? I was thinking about my role models. I wasn't thinking about, Gosh, I wish I'd paid more attention in that class. I was thinking about whose ideals would I seek to live up to? And I said to myself, I'll be darned if I'm going to give up my integrity the first time I attend a meeting at this place. And if they want to fire me, that is fine. They should fire me if I sell out, not if I stand to the law. I know I had to be right if I was wrong, they should fire me. And so know what you stand for and be prepared to take the fall last point, last point, because this is very important, and this is very important in today's context, I'm going

Carrie Cordero

to pause you one second. I also am going to ask our mic, can we give Admiral Richardson up here a mic, because I know he has a comment to weigh in on here.

Judge James E. Baker

All right, yeah, so some of you know this, but I went to law school because I worked for Senator Daniel Patrick Moynihan. He called me in one day and he said, You're apolitical, aren't you?

And I thought he was complimenting me, and he was not. He was making the point that don't you know where you work. And I was very proud that I was apolitical because I served the country and I served the law and he said, Well, you have to go to law school. I said, I don't want to go to law school. Who would want to be a lawyer? And he said, No, no, I don't want you to go to law school to be a lawyer. I want you to go to law school because you're going to work for the government all of your life, aren't you? And I said, Yes. And he said, I want you to go to law school so if anyone in the government ever asks you to do something immoral, unethical or unlawful, you can tell them to take a hike, and you will have a profession to fall back on to provide for your family. That's not his actual language. He used naval language. But the point is, we all as lawyers and JAGs. We all have that law degree already, so we have no excuse for not standing up for what is morally, ethically and legally correct.

Carrie Cordero

Admiral. Do you have anything to add?

Rear Admiral James E. McPherson

I do just briefly. So every judge advocate is a member of a state or territorial bar. And as you might know, every state or territorial bar has professional responsibility codes, and even though you may be wearing the uniform of your country and you're serving in the military, you are expected to adhere to those professional responsibility regulations of your state bar now, each of the services also embraces the ABA model, rules of professional responsibility, and you're expected to adhere to those as well. So there is a touchstone, there is a foundation of ethical. Responsibility that you have. Now, some of them are inapplicable to your practice in the military, but it's important, and we would remind all the new JAGs, remember, you have a state bar out there that's going to regulate what you do, and you must continue to adhere to that state bar's regulations.

Carrie Cordero

Admiral Richardson, do you have a comment you want to offer?

Admiral John Richardson, USN (Ret.)

I did want to just, just address this little topic of the relationship between the lawyer and the commander. Of course, that dialog where you said, Hey, what are the skilled ways that you can say no, you know, as the person who was getting that message like no. You know, of course, there's going to be a tremendous amount of frustration, right? But you know, for all of the folks who may be providing that advice or taking it, you know, I just had to train myself that that frustration was really an expression of that I hadn't thought it through, that there was a blind spot in the plan, and that, you know, we were sort of moving and very mature, ready to execute. But, you know, if I could kind of count to 10 get past that, and exactly as you said, Okay, why are you giving me this advice? And then we and it was really also a lesson that I hadn't brought my legal counsel in early enough in the planning, so that when this thing was sort of, you know, baked as far as it was, that it included all of the wisdom to make sure that the plan was not only effective, but also legal. So I just wanted to provide that perspective.

Judge James E. Baker

One of the things I've seen the JAG school do is bring commanders and their lawyers in front of the audience, and part of being prepared for the ethical challenge is anticipative guidance and thinking through what will the challenge be? It's never what you will anticipate it to be, but you can play out the scenario of, what will I do when? And so watching, so I'm going to bring the two

of you together and make you do this and go on a road show. But that's a great way to see. How do I tell a commander, no but, and don't just learn that from lawyers, but learn that from commanders. Sorry. Thank you.

Carrie Cordero

Thanks. So I want to invite you both to weigh in on a few things that I know are on the minds of both our virtual audience as well as our guests in the room, and again, if anyone here in the room, if you will, we can do the old fashioned way if you want to just raise your hand, catch my attention, if you'd attention. If you do have a question that you want to pose, we've got mics in the back so I can, I can work those questions in, but I want to start off with a question that has been posed online, and also that is on my mind. And Admiral McPherson, I'm going to come to you first, because it's on the issue of the National Guard and domestic deployment of the military. Obviously, we are in a environment this year where we are seeing a pretty aggressive use of domestic deployment of the military for law enforcement purposes from the administration, and I would note that it real life is mirroring some work that we did here at CNAS over the last couple years. So under our securing us democracy initiative, we ran an exercise in the spring of 2024 that actually teased out what would happen if governors and the president disagreed about the use of the National Guard, and how that would actually play out in purpose, play out in practice. And we have a report that's called stress testing state power that's published on our website that explains the analysis of how the group that we assembled, which was a group of academics and think tanks and former government officials, how those tensions would play out, and how the adjutants general might respond if they're getting one direction from their governor, who is the default commander of their National Guard, versus a different type of order from the president, who might be trying to federalize the guard, and how that might play out. So we've done a lot of work on these issues here at CNAS, but I know in your experience, you have some experience Admiral McPherson working with the National Guard command. So can you talk a little bit about and then I'm going to come to an audience, a question from the audience, so if we can hand a mic over there. But can you talk a little bit about how is this dynamic? How would this be analyzed by military lawyers who are today in the job of having to navigate these disputes between governors and the president and litigation that is governing on a day to day basis, what they can and cannot do and where they can and cannot go and what state they might be able to enter into. How would they be thinking about these issues?

Rear Admiral James E. McPherson

Thanks, Carrie and I apologize for touching on basics for just a moment in order to. To get us all on the same page, National Guard are in one of three categories. The first category is state active duty. That's typically what you see a National Guard soldier doing on the weekends. They're two weeks in the summer, that sort of thing. They're working for the state. Their boss is the governor, and they do state active duty things. Most commonly it would be disaster relief when hurricane season arrives, or fires take place in California, and the National Guard in California, the governor sends them into the fire lines, those sorts of things. Second possibility is called Title 32 status. That's a more of a fiscal thing, because title 32 means that the federal government is paying for the National Guard soldiers, their salaries, their equipment, all that, but the governor remains as their commander in chief. They remain under the command and control of the state governor. The third category is what we see currently, National Guard deployed in California, in Oregon and in Chicago, and that's called Title 10. Title 10 is the military title, and that results from the president putting them in title 10 status. They now answer to the president united states as their Commander in Chief in that operational chain of command, and they are paid for by the Pentagon, by your tax dollars to the federal government. A footnote, those guard

right now that you see on TV in our streets here, we just passed a couple on our way here this morning, but the ones that are in Oregon and in Chicago, they're in title 10 category, and they are not being paid. They're part of the shutdown. So not only had as a port guard soldier, left their civilian job, because they're always employed by some civilian job, whether it be a high level job or they're a clerk at Kmart, they've left that civilian job, they've donned the uniform, they've come to to Chicago, and they're not getting paid by the military either. Keep that in mind, especially the media folks in here. Keep that in mind when you're doing your stories, because that's a public interest part that that the public just is not aware of. Back to the question Carrie, and I'll get to it, and I apologize, so the president can order them into title 10 category for for a whole host of reasons, in California, where we'll start, they were ordered into federal status, title 10 to go to California and number one, protect federal buildings, and number two, protect federal personnel. Both authorized. Nothing wrong with that, whatsoever. The problem is, what are the facts that were articulated that required them to do that? Well, those facts were not supported by the evidence, ladies and gentlemen, it just simply was not and as a result, the facts that the administration articulated were facts they found on truth social facts they found in podcasts, facts they found not in evidence. On the ground, that's the first problem with the guard deployed to California. The other problem is Posse Comitatus. I know it's Latin. I hate Latin as much as you, but essentially it says that the military cannot be used for law enforcement purposes in the civilian sector. That's simply stated. So when they take title 10 status, they're now federal, Posse Comitatus applies to them if they're in state active duty or title 32 Posse Comitatus does not apply. But if they're in that category, the President couldn't order them to Los Angeles, so they came to Los Angeles. Posse Comitatus applied. A lawsuit was brought. The plaintiffs argued that they violated the Posse Comitatus, and so you need to restrain them federal district court judge from what they're doing, there was a hearing on that. Facts were brought out. In that hearing, facts from government officials that in fact, these soldiers were briefed to ignore certain portions of the restrictions of the Posse Comitatus Act. And as a result, the federal district court judge in Los Angeles issued a restraining order. It has since been put on hold by the Ninth Circuit still being litigated. That's that's one aspect. The judge in Oregon focused on a different aspect, and that was, why are they coming to Oregon out of California? Why are they entitled 10 status? And she held a factual hearing, and the facts that she was able to garner is that there was no need for them to protect federal buildings. There was no need for them to protect federal personnel. And so they're here on more of a ruse, if you will. That same issue is applied now in Chicago, which they came out of, Texas. National Guard in California, going to Los Angeles, was difficult, but I think the next step, the more dangerous step down this pathway, is when you send National Guard from California or Texas into Oregon or Illinois.

Carrie Cordero

Okay, I'm gonna pause, and I think we have a question in the back. Do you have a mic? Okay, I'm gonna ask for your question. Can you identify yourself? And then we'll take your question. Thank you.

Jonathan Cedarbaum

Sure, good morning. I'm Jonathan Cedarbaum. I teach as a professor of practice over at GW law school, and I was one of Jamie Baker's successors as the NSC legal advisor at the beginning of the Biden administration. My question is about the 2am tweet, can you tell us the resolution Admiral McPearson you mentioned before?

Carrie Cordero

So I had, I had heard, I had heard, I don't know if this so there was some question for those of us who were on the outside looking into the first Trump administration about, you know, maybe

a spreadsheet that existed, or some tracking mechanism that the Department of Defense really did have to keep track of public statements that were made. So I'll just call them public statements, right? Because it doesn't really matter the mechanism, whether it's a tweet or now a post on X or whatever it is, or on true social but a public statement and how that can be operationalized.

Rear Admiral James E. McPherson

The rule of thumb we came up with was this, if it's a tweet or it's a comment made during a speech or something like that, we would prepare to receive that, but we would not execute on that until we had received written orders down through the chain of command, that is from the White House to the Secretary of Defense coming to the Service Secretary. That's how we handled those. Curiously enough, I will say that very few of those were ever followed up by those written instructions.

Carrie Cordero

Okay, so I want to turn to an issue of that I know we've we've mentioned it a couple times in our conversation so far. It's also of keen interest to our online audience, and that is the recent targeting of the drug cartel running boats in the Caribbean and the military strikes that are taking place against them. The last report I saw, I saw one report that was from Reuters that actually introduced some question as to actually how many of these there have been. So I can't affirmatively say whether there's been three or four. I think there's been at least that many that have been publicly reported on, but this Reuters report that I read yesterday said there's actually some question about how many, as a matter of fact, there actually have been. So I'm going to maybe start with you. Judge Baker, obviously. Well, let me first start from my perspective, this represents a substantial change in the government's approach to drug cartels, drug trafficking generally, that came up a little bit yesterday in the hearing that took place in the Senate Judiciary Committee with the Attorney General, but not as much. I don't think that the senators keyed in on it quite enough to represent sort of the fundamental shift of treating drug trafficking as a national security matter that we actually are undergoing right now. And so I think it's important to place these targeted strikes that are taking place in the Caribbean in a broader context of what is the administration's completely new approach towards targeting these as a national security matter, as opposed to maybe the last 30 years, where they were treated as a criminal matter, but then drilling down more precisely on The issue of the strikes, how, as a matter of the lawyering, we have, obviously a policy objective by an administration. We have orders that are being given to conduct these strikes as a practical matter. So can you fill in for us a little bit what happens in between, in the military lawyering that needs to take place to make sure that the activities that are being taken, that are being implemented are lawful?

Judge James E. Baker

Well, first, let me describe the normative process, and then the audience can determine when we learn more facts, if we learn more facts, to what extent the normative process was followed or not followed. Remember, law is the authority to act and limits on that action, process and values, and all three come in play here. So how do you determine if you have the authority to act and what are the limits on that action? So the authority to act is the decision to resort to force in the first instance. The operational chain of command, as you all know, Goldwater-Nichols and constitutional framework, you have the Commander in Chief, the Secretary of Defense, then the combatant commander, and then on down to the implementing elements, air, ground, naval and so on. So who are the key lawyers there? The key lawyers there, if they participate, are the President's National Security lawyer, who might be the NSC legal advisor, might be the Counsel to the President, or perhaps no one. Then you have the general counsel

of the Department of Defense, and then the rest of the people who are going to make who normatively would review this matter would be judge advocates, the staff judge advocate to Southern Command, and down down the chain of command, so potentially two civilian lawyers and then military lawyers after that, the first question, the first question of authority to act is, what is the President's constitutional authority to resort to force in the first instance, as you all know, in this room, but perhaps some people online may not, is that that is normatively a question that is handled in Washington at the national level, because it raises questions of constitutional law, Article Two, authority and so on, and that would normatively be addressed in concert by the Attorney General Office of Legal Counsel, NSC, legal advisor and the White House Counsel, potentially with input from Chairman's legal but, but perhaps, perhaps not, it'd probably be developed organically through principals meetings or NSC meetings. The next question is, once the President has decided to resort to force, and is, are the means and methods of warfare used, the method of using to implement that force lawful? This is a disaggregate question, right? You may have a constitutional basis to use force, but you still need to use force that is lawful in its implementation. So what we have here is we have, does the President of the United States have the constitutional authority to order the military to interdict drugs coming into the United States? I sure hope so, because presidents have been authorizing that for a long time. And in my view, the President has broad authority, not just as Commander in Chief, but pursuant to his foreign affairs authority and as chief executive, to use the military to interdict drugs coming into the United States that is now not a novel, in my view, assertion of constitutional authority. So then we get into is this a means and methods issue? And there we're looking to the principles of the law of armed conflict. Are the, is the is the target being struck? So that a couple of bases on which you might it has to be a lawful combatant. It has to be a combatant. So if you're acting in anticipatory self defense, or in self defense, the theory is the person is posing, or the target is posing an imminent threat to the United States of armed attack. So sometimes the decision to resort to force is the same as are using proper force. You have a plot to do something there's an imminent threat to the United States. The President authorizes, pursuant to his constitutional authority as Commander in Chief, Foreign Affairs authority, take out the terrorist target. They pose an imminent threat to the United States. What I sense is going on is there's a certain game of labeling. The reason you can target a terrorist is not because you put the word terrorist on their head. It's because they pose an imminent threat of attack on the United States. It's a fact based assessment. So the other reason you might be able to target a combatant is because you're in an armed conflict. You're in an outstanding in an ongoing armed conflict. And then the question gets shifted too, and we've seen this right. The first war powers report went up and said, This is an act of self defense, in which case you'd have to make the argument that whatever the target was was posing an imminent threat to the United States. Now the reasoning seems to have been shifted to we're in an ongoing armed conflict, a non International, ongoing armed conflict, and therefore we don't need to make the determination that the person who we're targeting poses an imminent threat to the United States. They're a combatant. The problem here, this seems to be reverse engineering. It's not clear there's an armed conflict, which is another way of saying it's not clear at all that there's an armed conflict, right? There's no armed group and ongoing, consistent, violent hostilities. I'm not seeing it. So let me make two more points.

Carrie Cordero

So what we're missing is some of the factual justification for it.

Judge James E. Baker

So one should always if you believe in your legal argument and you believe the facts support your legal argument, you ought to be able to articulate it in public. And if there's a classified

reason, you may not want to articulate it in public, for example, you don't want to indicate to the adversary, where else this might apply, then have a classified annex. Classified annex. This also applies in these two other instances, but the legal analysis ought to be public and transparent if you believe in it. So judge Immergut in the Oregon case, she presented, this is the National Guard issue. She said, This presents a question of law and facts. So one of the issues before her is this a question of law, question of fact, a question of law, of facts. So she said it's both. And she said, in order to show deference, so she would show deference to the court, but this is what she said, there has to be a colorable assessment of the facts and law with a fair, fair application of honest judgment. So that's a, that's a that's a great, great way to sort of look at the issue of, are these facts a fair judgment or they is it a case of reverse engineering? We don't know. We don't know.

Carrie Cordero

So as we're winding down on our time,

Judge James E. Baker

I want to say one more thing, because this gets to the heart of what it means

Carrie Cordero

Stick with us virtual audience. We've got a minute.

Judge James E. Baker

I have seven more things to say. One of the things I fear might be happening here is that the judge advocates, in this instance, may be providing proper means and methods advice, but I sense that the administration has gone to the Department of Justice and asked the Office of Legal Counsel to override whatever advice is being given by the judge advocates. And it's hard for a judge advocate. If you get a memo from the Attorney General saying, I hereby pronounce this as lawful, it makes it harder, but not impossible, for the judge advocate to take issue with that. That's not normative. Where have we seen that before? We've seen that with enhanced interrogation and torture. And one of the problems there is that OLC memo may get withdrawn. It may get changed. It may be found to be unsound because none of us have seen it. And where does that leave the commander who authorized the use of the weapon system in question? Command responsibility, the commander still owns it. So if I were a judge advocate and I was having advice pushed down on top of my head that I disagreed with, I would make sure that I documented my view. I would continue to advise the commander as to what the law is and should be, and make sure the commander realizes this where, where the Admiral Richardson mentioned this. The military has this bit this lingo that commanders decide. Lawyers advise, well, if the JAG advised that it was unlawful, Commander owns it now. And if you're a commander in the military, and you don't have the guts to stand up to the military chain of command, you shouldn't be a commander in the military. So if you think there's something that is unlawful, you need to say so, and that's a point when you put your stars on the table.

Carrie Cordero

Appreciate those comments. Admiral McPherson, I'm going to give you the final word as we wind down our program here. Thank you. Thank you both for your comments, but I want to give you an opportunity to weigh in on how, especially having previously served as Navy JAG, they might be thinking about these cartel strikes

Rear Admiral James E. McPherson

in judicial terms, I concur, but won't leave it at that. No, I agree 100% with Judge Baker said I would, I would go a step further. If I was the JAG advising the individual who is the commander who is making these decisions on what what weapons to use and what targets to strike, if I felt that that he was being given advice that was not sound and not legal. I would document that myself, but I'd also say to my boss, boss, let me draft for you a document that you can hold and send to your boss regarding your objections of what's going on and that will protect you in the future. Some of this comes back to haunt you,

Carrie Cordero

and on that note, thank you very much to our guests today, Admiral Jim McPherson, Judge Jamie Baker, Admiral John Richardson, really appreciate all of you who have joined us virtually for this conversation, as well as those of you who are here in person. It's a critically important conversation and role that our military lawyers are playing and so thanks very much. Applause.