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THE LAW OF  
ARMED CONFLICT  
*An Operational Approach*



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ARMED CONFLICT:  
AN OPERATIONAL  
APPROACH

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# FOREWORD

The law of armed conflict is inseparable from its military context. It sets a legal standard that nobly strives to regulate hostilities and protect innocents amid the ambiguity and brutality of combat. Legal advisors who serve with the operating forces routinely offer advice on matters that will put themselves at risk and directly lead to the death of other human beings.

Some aspects of the law of armed conflict are clear, but others are not. No moral soldier would countenance the torture, abuse, or execution of prisoners, or the deliberate attack on innocent civilians, or the pillage of civilian property. The deliberate targeting of innocent civilians would bring condemnation, but what level of acceptable collateral damage to innocent civilians is justified under the law of armed conflict? When is a civilian taking part in hostilities so that he is a lawful target? Identifying and understanding these and other hard issues requires an appreciation not only of the standards, but also of the operational perspective of the law of armed conflict.

Few areas of the law are cited with greater ignorance or, worse, deliberate distortion, than the law of armed conflict. Stables of pseudo-experts appear in the media to offer analysis that is frequently tainted by political bias. Even well-intended commentators often speak of it only in the abstract since they have no practical experience with its application.

Regrettably, academic courses on the law of armed conflict are few and their content is uneven. The absence of meaningful courses of study is disappointing since the High Contracting Parties to the Geneva Conventions are bound to disseminate the text of the Conventions as widely as possible in their respective countries and to include the study of the Conventions in military and, if possible, civil instruction. The clear intent of the drafters and signatories of the Geneva Conventions was that the principles of the Conventions would become known not only to the armed forces, but to the entire population.

*The Law of Armed Conflict: An Operational Approach* affords a means to satisfy the requirements of the Geneva Conventions, and to move to an even higher level of understanding of the broader law of armed conflict. Through a



scenario-based approach, the text provides readers not only the means to gain familiarity with the law regulating hostilities, but also the opportunity to appreciate how it is applied in the chaos of combat. Operation Just Cause is the perfect vehicle for case studies because it covers — in a short time period — most of the thorny legal issues that have become nearly standard in military operations from Grenada in 1983 to Iraq and Afghanistan today. These include targeting, detention, rules of engagement, reestablishment of security and order, and other nuanced topics that conflate law, policy, and the military mission.

Hopefully, readers will appreciate that the legal advisors providing immediate advice on the law of armed conflict are also part of the operational context. They share the dangers and privations of other soldiers, and practice law amid the chaos and confusion of combat. Their advice is not always perfect, but their presence demonstrates the commitment of their nation to the law of armed conflict.

This book strives to educate those who want to learn this law and how it is applied. It is a means to become familiar with the theory and the practice. The reader can become as knowledgeable as possible about the law of armed conflict without having actually served as a legal advisor in combat. It is thus an important book, not only for students of the law of armed conflict, but also for all who want to comprehend the difficulties — and criticality — of its practical application.

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Legal Advisor for the Multi-National  
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We also collectively thank our families, whose support through our professional careers has been a true “force multiplier.” Special acknowledgment is owed to Colonel Ed Haughney (Chris Jenks’ Grandfather), U.S. Army (1917-2012). Soldier, Judge Advocate, Professor, Colonel Haughney was a consummate operational law attorney—before there were operational law attorneys—and an icon of legal education whose impact on generations of law students we can only hope to emulate. We also acknowledge Major James A. Schoettler, M.D. (1931-2012), who served in the U.S. Air Force Medical Service from 1958 to 1968, before entering a long and successful career in private medical practice, and Colonel Robert L. Corn, M.D., who served in the U.S. Army Medical Corps from 1956-1958, and again from 1987-1993 with his active service divided by an equally devoted career in private medical practice, both of whom throughout their lives exemplified the humanitarian ideals of all the military and civilian medical personnel who serve our country in various capacities during peacetime and in war.



Finally, we devote this book to Cadet Owen R. Corn, United States Air Force Academy, Cadet Ryan Hansen, U.S. Army ROTC, and all their fellow young patriots who choose to accept the challenge and responsibility of serving as leaders in our armed forces and for whom the principles in this text will not only be learned, but lived.

Geoffey S. Corn  
Victor Hansen  
Richard B. Jackson  
Chris Jenks  
Eric Talbot Jensen  
James A. Schoettler, Jr.

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# INTRODUCTION

The law of armed conflict or LOAC — the contemporary successor of what for ages was called the law of war or the *jus belli* and often referred to today as international humanitarian law — is central to the planning, execution, and critique of military operations. Accordingly, a comprehensive understanding of this law has never been more significant to U.S. national security than today. It is therefore unsurprising that the LOAC has become a growth area in legal and political science education.

The significance of this law is, however, nothing new for military commanders and the lawyers who advise them. Battle command is the art of leveraging all available resources and power to achieve a defined objective, or “end state.” The general principles that guide commanders and their subordinate staff experts who plan and execute military operations are called the principles of war, and include not only principles related to the effective application of combat power (such as mass and economy of force), but also the principle of legitimacy, which confirms that law and effective military operations are inextricably intertwined:

Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian populations in the operational area, and nations and organizations around the world.<sup>1</sup>

The principles of war are at the core of U.S. joint operational doctrine, as explained in the U.S. Joint Chiefs of Staff’s publication on “Joint Operations,” which provides:

This keystone publication forms the core of joint warfighting doctrine and establishes the framework for our forces’ ability to fight as a joint team. Often called the “linchpin” of the joint doctrine publication hierarchy, the overarching constructs and principles contained in this publication provide a common perspective from which to plan and execute joint operations

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1. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, (AUGUST 11, 2011) at A-4.



independently or in cooperation with our multinational partners, other U.S. Government departments and agencies, and intergovernmental and nongovernmental organizations.<sup>2</sup>

The inclusion of the principle of legitimacy among these core principles is profoundly significant, for it reflects the reasoned judgment of our highest level military commanders and most insightful strategists that compliance with law in the execution of military operations is as important as massing the effects of combat power at the decisive place and time on the battlefield. Law, and the LOAC more specifically, frame the legitimacy of all U.S. military operations. Brigadier General Mark J. Martins, the Commanding General of the Rule of Law Field Force-Afghanistan, Joint Task Force 435, eloquently emphasized this imperative when he accepted the honor of receiving the Harvard Law School Medal of Freedom. Martins, a JAG officer, served as the first Commander of this unit, and at the time of the speech had been selected by President Obama (his former Harvard Law School classmate) as the Chief Prosecutor for the Military Commissions. Martins noted:

The question [rule of law in Iraq and Afghanistan] urges inquiry into how law has constrained, enabled, and informed our own military operations since September 11th, 2001, even as it also causes us to mull whether and how an abstract concept we all approach with a multitude of assumptions arising from our own experiences can possibly help oppose ruthless and diverse insurgent groups halfway across the globe. The case I will briefly sketch here today is this: your armed forces heed and will continue to heed the law, take it seriously, *and in fact respect it for the legitimacy it bestows* upon their often violent and lethal — necessarily violent and lethal — actions in the field.<sup>3</sup>

As both U.S. joint war-fighting doctrine and Brigadier General Martins emphasize, legitimacy is central to accomplishment of all military missions. It should therefore come as no surprise that ensuring military operations are planned and executed in accordance with applicable domestic and international legal obligations is now, has been, and will always be a core function of military lawyers, known as JAGs (a reference to the term Judge Advocate General, the title of the senior military lawyer for each branch of the armed forces, which has come to be used to denote all military lawyers). JAGs must not only study the LOAC, they must be prepared to put the law into practice, often in extremely demanding situations.

The study of any law loses value without an understanding of the context of its application. For the LOAC, this loss of value is exponential, for it is the context of application that has always influenced the development of the law. That context is war, or what military lawyers call armed conflict (you will understand the significance of this term in short order). Military lawyers are advisors, and military commanders are the decision-makers they advise. The LOAC provides the international legal framework for the conduct of the military operations these commanders are tasked with executing. It is a

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2. *Id.*, Preface (letter from Admiral M.G. Mallen).

3. Speech by Brigadier General Mark J. Martins, Harvard Law School, July 5, 2011 (emphasis added), available at <http://www.youtube.com/watch?v=g6zBLMpU6Ew>.



body of law with roots deep in the history of war and international law, constantly evolving to meet the challenges of the contemporary battlefield, and reflected in a variety of sources. The application of the LOAC is sometimes straightforward, more often complex, but today more than ever absolutely central to the credibility of the forces engaged in these operations and the causes for which they fight.

Interest in the LOAC increased when the United States initiated the military response to the terrorist attacks of September 11, 2001 and characterized the conflict against terrorism as a “war.” Literally overnight the authority granted and the limitations imposed by the LOAC became central to the debate over the nature and extent of the U.S. response to the terrorist threat. Justifications for the use of military force, the long-term military detention of captives and the treatment, interrogation and prosecution of those captives, the use of combat power to attack terrorists alleged to be enemy belligerents targetable anywhere in the world, the risk of collateral damage to civilians as result of this transnational war, the inter-operability of U.S. legal theories with other countries whose view of the LOAC differed from that of the United States, and obligations under the LOAC that followed from the intervention of U.S. and coalition forces in countries where operations were being conducted provide just a sampling of LOAC-related issues at the core of debates about a new and aggressive U.S. policy grounded on a “war” paradigm. The rules that were at the core of the debate over that policy are the subject of this book and will be explored in depth in the chapters that follow.

While debate related to these and other issues assumed increasing visibility in the public domain, and especially in academia, military lawyers continued to provide advice to their commanders according to long-standing military understanding of U.S. obligations under the LOAC. Unlike their academic counterparts, the role of these lawyers was not debate and contemplation, but ultimately contribution to decisive action where lives were in the balance. These lawyers understand intuitively that the context of LOAC practice is fundamentally different than that of mere study. Expertise in the law is essential to that practice, and the increasing academic interest in this field has contributed to important insights into the complexities of the law. Indeed, like all international law, the works of distinguished scholars have and will continue to significantly influence the evolution of the LOAC. Ultimately, however, it is the ability to apply the law to the problems presented during military operations that defines success, and an appreciation of the complexity of this intersection of law and operations will contribute to positive developments in the law.

This text is designed to offer you the opportunity to gain a better appreciation of this context in the classroom environment. While the authors recognize that it is impossible to replicate the challenge confronted by operational legal advisors, and perhaps even more so the commanders they advise, we believe that providing operational context will substantially enhance your understanding of the law. Accordingly, we have designed our text around an



operational scenario. Your journey will begin in each chapter with an overview of a military operation, providing enough background to allow you to consider how the law you will learn is contextually relevant to “the fight.” Each chapter will then provide an overview of a distinct LOAC topical area, followed by study questions linking you back to the military operation. You will then have the opportunity to apply the law to the type of operational problems JAGs confront on a routine basis, not only from the perspective of a military lawyer, but also from that of civilians within and outside of government.

We have chosen as our contextual vehicle Operation Just Cause, the 1989 U.S. invasion of Panama, and Operation Promote Liberty, the 1990 operation that followed Just Cause to facilitate the restoration of a civilian-led democracy in Panama. Many aspects of the scenario and many of the study questions are drawn from the actual facts of Just Cause and Promote Liberty. However, for purposes of improving its value in a classroom environment, we have adopted certain embellishments and fictional modifications. This is necessary to produce the range of issues we believe provide a comprehensive journey through the military operational legal landscape. We will highlight for you those aspects of the scenario and problems that deviate from the actual history. We will also ask you to consider how the issues related to Operations Just Cause and Promote Liberty might be presented and resolved in the context of more contemporary military operations, such as those in Iraq and Afghanistan.

You may be wondering why we would reach back in history when operations in Iraq and Afghanistan provide such a rich landscape of operational context? The answer is simple: we want you to focus on the law, and not current debates related to the legitimacy of these more recent wars. Operation Just Cause, although brief in duration, involved a remarkably wide array of LOAC issues, and is therefore ideal as our battlefield scenario, while Promote Liberty, which was undertaken in collaboration with Panamanian authorities, is a more common post-conflict scenario than the occupation of Iraq. Furthermore, our treatment of the LOAC is primarily focused on U.S. practice, a focus that will be facilitated by considering issues from a conflict involving only the United States and Panama. We will, however, inject a small fictional multinational element into the scenario and problems. This is necessary to expose you to the reality that not all nations, and sometimes not even our closest allies, interpret and apply the law as does the United States. Understanding the challenge of LOAC compliance in a multi-national coalition context is therefore essential to understanding how U.S. practitioners operating in a coalition command will apply this law.

We cannot take you to a tactical operations center on a battlefield or sit you around a table in the Pentagon to wrestle with LOAC issues. What we can do is offer for you the type of problems we collectively confronted in our own practice in order to illuminate for you not only the black letter LOAC, but the challenge of applying that law to resolve complex issues during actual military operations. We hope you enjoy the journey.

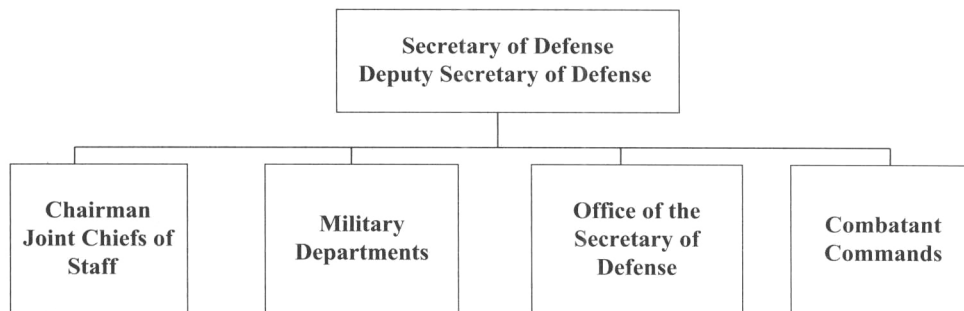


## Where You Fit in Our Operation

To navigate through our operational journey, you must have a sense of who you are and where you fit into this equation. We want you to learn this law through the lens of a junior JAG officer participating in the operation. In most problems, you will be in that role — advising your commander or his or her staff on legal issues related to the planning and execution of a wide array of combat and post-combat operations. The following very cursory overview of U.S. military structure is provided to facilitate your understanding of this pedagogical context.

## National Defense Organization

**Department of Defense:** The President is the Commander-in Chief of all military forces. The three military branches are the Army, Air Force, and Navy; the Marine Corps falls under the Department of the Navy.<sup>4</sup> All of these forces are managed by the Department of Defense (DoD). The DoD is responsible for providing the military forces needed to deter war, and protect the security of the United States. The Secretary of Defense exercises authority, direction, and control over the Department which includes the Chairman of the Joint Chiefs of Staff, the three Military Departments, and the Unified Combatant Commands.



The Chairman of the Joint Chiefs of Staff is the senior ranking military member of the Armed Forces and is the principal military advisor to the President. He is not, however, in command of U.S. military operations, nor are the Service Chiefs. When the United States conducts actual military operations, they will always fall under the command of a Combatant Commander. These are four star generals or admirals in command of operational organizations

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4. The U.S. Coast Guard is a separate uniformed service with both law enforcement and military missions that during peacetime is part of the U.S. Department of Homeland Security and in wartime can be integrated into the DoD.



that bring together forces from all the services to execute specific operational missions. These “joint” operational commands were created to mitigate interoperability problems between forces from the different services and maximize the efficiency and effectiveness of U.S. operations. When allied forces are added to the mix, the term “combined” is added to “joint.”

One way to understand this is to imagine Combatant Commands as war-fighting headquarters with very few forces assigned when they are not conducting operations. When, however, an operation is ordered, the different Services provide forces to execute the operation.<sup>5</sup> These forces are essentially “plugged into” the Combatant Command based on existing or ad hoc plans, and execute the operation under the chain of command established by the Combatant Commander. Thus, the Military Service Chiefs of each Service are not in the operational chain of command. The Military Service Chiefs perform two primary functions. First, as the Chief of their respective Service they are responsible for the training and management of that Service and to provide forces for use by the combatant commanders. Second, the Service Chiefs all serve as their Service’s representative on the Joint Chiefs of Staff. As members of the Joint Chiefs of Staff, they offer advice to the President, Secretary of Defense and the NSC on military matters.

## Operational Chain of Command

When the President, through the Secretary of Defense, orders the execution of an actual military operation, the mission is conducted under the authority of the operational chain of command. The operational chain of command in the United States military proceeds from the President to the Secretary of Defense to one of the six Combatant Commanders. There are six regional combatant commands that divide the world into six geographic regions. The six combatant commands are: United States Northern Command (USNORTHCOM) which includes Mexico and North America; United States Southern Command (USSOUTHCOM) which includes Central and South America; United States Pacific Command (USPACOM) which includes China, India, Southeast Asia, and Australia; United States European Command (USEUCOM) which includes Europe and Russia; United States Central Command (USCENTCOM) which includes the Middle East and Egypt; and United States Africa Command (USAFRICOM) which includes all of the African continent other than Egypt. In addition, there are three commands that have functional rather than regional responsibilities. They are the Special Operations Command, Strategic Command, and Transportation Command.

Each combatant command is a joint military command that is composed of forces from two or more of the military services. The combatant commands have a broad and continuing mission within their respective areas of operation.

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5. These forces can include active duty (i.e., full-time) and reserve (i.e., part-time) units and personnel, as well as the National Guard, which constitutes the organized militia of each State of the United States and is under both State and Federal government control.



The mission of the combatant command is to provide effective command and control of all U.S. forces operating in their area of responsibility. To do so, they normally form subordinate joint and/or combined task forces to conduct and execute the missions they have been tasked to accomplish.

## Joint Task Force

At the point of actual mission execution, it is the task force that will command and execute operations. The task force concept allows military units to be task organized on an ad hoc basis to accomplish a specific military objective or function. This task force structure allows for greater operational flexibility and ensures that all of the necessary capabilities are included within the force package and all units fall under a clear chain of command.

A Joint Task Force (JTF) executes most major military operations. A JTF is a force composed of assigned and attached elements of the Army, Navy, Marine Corps, and the Air Force, or two or more of these Services. A JTF is typically established by order of the Secretary of Defense or by the Commander of a Unified Command. A JTF often contains a ground force, an air component, and a naval commander. In addition to Joint Task Forces, there are also Combined Joint Task Forces (CJTF). A CJTF is a task force that is comprised of elements of more than one service and more than one nation.

The operational chain of command flows from the President to the Secretary of Defense, to the Combatant Commander, and then to the Commander of the task force. Some task forces are relatively permanent such as Joint Task Force North (formally, JTF-Six), which provides military support to state, and federal counterdrug operations. Other task forces are of short duration and are disbanded once the specific operation is completed.

A JTF or CJTF conducting ground operations will almost always include Army and Marine Corps assets. Since our scenario involves sustained ground operations, many of the problems you analyze will be in response to questions presented by Army or Marine Corps commanders. Remember, however, that while these commanders may be in command of primarily Army or Marine Corps personnel, they are part of a broader JTF or CJTF. Nonetheless, both the Army and the Marine Corps organize their forces to maximize their effectiveness when “plugged into” a Combatant Command. For the Army, this is reflected in the Brigade Combat Team (BCT) structure. For the Marine Corps, this is reflected in the Marine Air Ground Task Force (MAGTF) structure. Both of these are what are called “combined arms” units, in that they include within the organic command structure all elements of ground combat power (infantry, artillery, engineers, support), as well as air support (combat helicopters, and for the MAGTF combat fixed wing aircraft). A colonel normally considered among the top 10 percent of his professional peer group commands each. One, and oftentimes more than one, dedicated JAG officer will support each of these commanders.

The following summary of each military service completes this overview.



## Army

*Army Mission:* The Army's mission is to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of Combat Commanders.

*Force Structure:* The major war fighting elements of the Army are the Corps, Division and Brigade Combat Teams (BCT). These are all modular units and are task organized to make the most effective use of the functional skills and specialized equipment that each unit brings to the fight. The Army also maintains a number of Special Operations Units (Special Forces Groups, Ranger Regiments).

There are currently four modular corps headquarters in the Army. A 3-star General (Lieutenant General) normally commands a Corps. There are currently 18 modular divisions in the Army (10 Active and 8 National Guard). A 2-star General (Major General) normally commands a Division. The primary fighting unit in the Army is the Brigade Combat Team (BCT). A Colonel normally commands the BCT. BCTs are task organized to be self contained, highly deployable units. A BCT will include infantry, armor, artillery, engineer, and combat support units. The maneuver BCTs will either be infantry, armor, or Stryker brigades.

A brigade contains approximately 3,000-4,000 soldiers. Within the brigade there are several battalions of approximately 500-1,000 soldiers. Within each battalion there are a number of companies of approximately 100-200 soldiers. Within each company there are a number of platoons of approximately 30-40 soldiers.

## Marine Corps

*Marine Corps Mission:* The Marine Corps' primary mission is to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign.

*Force Structure:* The Marine Corps is organized into four categories: Headquarters, Operating Forces, Reserves, and the Supporting Establishment. The Marine Corps is part of the Department of the Navy and includes three combat divisions, three air wings, and other land combat, aviation, and air services as may be organic therein.

The Marine forces are organized into mission-oriented Marine Air-Ground Task Forces (MAGTF). The MAGTF is the principal organization for the conduct of all missions. The MAGTF may be of varying sizes and composition, depending on the mission. In each case, there will be a command element and ground combat element, an aviation combat element, and a combat service support element.



A Marine Expeditionary Force (MEF) is a “standing MAGTF” and exists in both peace and war. It can range in size from 20,000-90,000 Marines and sailors. The MEF is normally commanded by a Lieutenant General (3-star). A Marine Expeditionary Brigade (MEB) is an intermediate-sized MAGTF and ranges in size from 3,000-9,000 Marines and sailors. A Brigadier General (1-star) normally commands the MEB. An MEB can operate independently or as part of an MEF. It is normally composed of an infantry regiment, a Marine Air Group and a Brigade Service Support Group.

A forward deployed Marine Expeditionary Unit (MEU) can provide a quick reaction response to crises. The MEU is typically embarked aboard amphibious shipping within a naval expeditionary strike group. An MEU includes approximately 2,000 Marines and sailor and is commanded by a colonel. The overriding requirement for any of these MAGTFs is the ability to rapidly plan and execute contingency operations.

## **Air Force**

*Air Force Mission:* The mission of the U.S. Air Force is to defend the United States and protect its interests through air and space power.

*Force Structure:* The Air Force organizes, trains, and equips air forces through its Major Commands (MAJCOM). MAJCOMs are subdivided into Numbered Air Forces, wings, groups, and squadrons. MAJCOMs are commanded by a general. Numbered Air Forces (NAF) are the senior war-fighting echelon of the Air Force. The NAF conducts combat operations with assigned and attached forces. When participating in joint operations, the NAF serves as the Joint Forces Commander’s Aerospace Expeditionary Task Force. The NAF is commanded by a lieutenant general or a major general.

A wing is the next element and it contains all of the assets required to accomplish the organizational function. There are four main groups within a typical wing: the operations group; the maintenance group; the mission support group; and the medical group. A wing is normally commanded by a colonel. The squadron is the basic fighting group. They are not designed to conduct independent operations. They interact with other squadrons to provide effective air and space operations. Squadrons are normally commanded by a lieutenant colonel.

## **Navy**

*Navy Mission:* The mission of the Navy is to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas.

*Force Structure:* There are three primary types of Naval power projection. They are the Carrier Strike Group (CSG), and the Expeditionary Strike Group (ESG).