

CHAPTER 11

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

KEY REFERENCES:

- U.S. CONST. art. II, § 1–3 (Executive, Commander in Chief, and Execution of the Laws Clauses, respectively).
- U.S. CONST. amend. IV.
- U.S. CONST. amend. V.
- U.S. CONST. amend. VIII.
- 10 U.S.C. §§ 331–335 - The Insurrection Act.
- 10 U.S.C. § 12301.
- 18 U.S.C. § 242.
- 18 U.S.C. § 1385 - Posse Comitatus Act.
- 50 U.S.C. § 2301 *et seq.* - Defense Against Weapons of Mass Destruction Act.
- Pub. L. No. 105-277, Section 101(h), as amended by Pub. L. No. 106-58, Title VI, Section 623, Sept. 29, 1999.
- CJCSI 3121.01B - Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, June 13, 2005.
- AR 190-14, Carrying of Firearms and the Use of Force for Law Enforcement and Security Duties, March 12, 1993.
- U.S. Department of Justice, Office of Investigative Agency Policies, Resolution 14, Concerning the Use of Deadly Force, October 16, 1995.
- FORSCOM Augmentation Forces to Designated AMC and ATEC Sites,
- FORSCOM and USARC Force Protection OPORDs,
- QRF/RRF RUF,
- EXORD ISO Consequence Management Operations in New York City and Military District of Washington,
- CJCS CONPLAN 0500-98,

A. Introduction

The Standing Rules for the Use of Force (SRUF) provide the operational guidance and establish fundamental policies and procedures governing actions taken by DoD forces performing civil support missions (e.g., military assistance to civil authorities and military support for civilian law enforcement agencies) and routine Service functions (including AT/FP) within the United States and its territories. It also applies to land-based homeland defense missions occurring within the United States and its territories. The SRUF also apply to DoD forces, civilians, and contractors performing law enforcement and security duties at all DoD installations worldwide, unless otherwise directed by the Secretary of Defense. The SRUF supersede CJCSI 3121.02, RUF for DoD Personnel Providing Support to Law Enforcement Agencies Conducting CD Operations in the United States, the rules for the use of force in the DoD Civil Disturbance Plan (Garden Plot) and the use of force guidance contained in DoD Directive 5210.56, Enclosure 2.

The SRUF apply to Title 10 forces performing missions both for homeland defense and defense support to civil authorities. These rules do not apply to National Guard forces in either state active duty or Title 32 status. For information concerning National Guard rules for the use of force (RUF),

see Chapter 12, *infra*. Judge advocates should coordinate with their National Guard counterparts when operating in a joint environment to confirm the RUF the National Guard is using.

Before beginning any discussion on the use of force in an operational setting, service members need to understand the legal, policy, and practical limitations for the use of force. The use of force for domestic mission accomplishment is constrained or limited by federal law and the Standing Rules for the Use of Force.

While there are some very significant differences, the development, training, and application of the RUF and the ROE for overseas contingency operations can be similar.¹ The Standing Rules for the Use of Force provide the template for training RUF for domestic operations. Development of hypothetical scenarios will assist in posing the ultimate question of whether the service member may use force, up to and/or including deadly force. Often in training scenarios, the solution is not found in the applicable RUF but rather in the rules for when a service member can use force in self-defense and identifying either a hostile act or demonstration of hostile intent. It is imperative to ensure commanders, as well as the service members who execute the commander's plans, understand the potential limits on self-defense when operating as part of a unit. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless *otherwise directed* by the unit commander, service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense becomes a subset of unit self-defense and the unit commander may limit individual self-defense by members of the unit.²

Use of force practice is one of the few areas in which the legal competence of the judge advocates can potentially have life or death consequences for service members and civilians. Therefore, it is imperative that judge advocates understand and apply legal and practical considerations when practicing in this area. This chapter will discuss the role of judge advocates in use of force, the practical realities involved in use of force incidents that are often not included in legal references, the legal standard for federal use of force, the existing Army policies on use of force, the potential legal liability involved in use of force, as well as other issues. This chapter should provide the reader with an introduction to use of force and its key legal references.

B. The Judge Advocate's Role in the Use of Force

Judge advocates are called upon to practice domestic use of force law in routine legal duties as well as in domestic operations. The most common of these situations arises when judge advocates advise on force protection and installation law enforcement activities. Many judge advocates train service members on domestic operational RUF or use of force policies for law enforcement and security operations. Judge advocates advise units executing domestic operations, and will also advise or review investigations into incidents involving the use of force by a service members. Finally, judge advocates may be involved in civil or criminal proceedings for a use of force incident

¹ For a comprehensive discussion on the development, training, and application of the ROE that can be applied to the RUF, see CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES (2000).

² See CJCSI 3121.01B at Enclosure L (U) – Standing Rules for the Use of Force for U.S. Forces (13 June 2005) [hereinafter SRUF], para. 4.a.

as a trial counsel, trial defense counsel, Special Assistant U.S. Attorney, or as an attorney assisting in defensive federal litigation in his or her respective service.

In drafting or reviewing RUF, judge advocates have to understand both the substantive law that governs Rules for the Use of Force, as well as the procedures necessary to modify the SRUF. Efforts to either augment or restrict the current SRUF must follow precise staffing requirements, and, in the case of augmentation, require advanced planning and should be initiated as soon as the need is identified.³ In most cases, however, these RUF would already be staffed and implemented by judge advocates at higher echelons.

Judge advocates performing all of these duties must know the controlling law for domestic use of force. For operations in areas subject to U.S. jurisdiction, the appropriate constitutional law standards as interpreted by the courts and the executive branch control. In addition, the policies or RUF issued by higher headquarters further define the legal requirements for use of force. In order to properly apply those policies or RUF, judge advocates must understand the underlying legal standards.

RUF drafters involved in planning or executing a domestic operation should consider critical factors that are similar to those involved in Rules of Engagement. These factors include the following.

- What are your command's mission and your commander's concept of the operation?
- What type of unit is involved, what weapons and equipment, if any, will they deploy with, and what is the level of training for the domestic use of force with the assigned weapons?
- What threat could your command face?⁴
- What kind of interaction and exposure to the general public will your service members face?
- What training resources are available for pre-deployment RUF training?
- Does the training program properly address the issues involved with RUF or do training deficits set the conditions for misapplication of the rules with the potential for significant legal consequences for soldiers and the command?
- Does the mission being planned nest well with the SRUF or should the local commander initiate a process to seek augmentation of the SRUF by submitting a request for a mission specific RUF?⁵

³ See SRUF, *supra* note 2, para. 3.a.–3.b. and CJCSI 3121.01B at Enclosure P (U). The SRUF requires Combatant Commanders desiring to augment the SRUF to staff such actions through the CJCS to the Secretary of Defense for approval. Restrictions to the SRUF require notification although limited flexibility is provided for time critical situations. Enclosure P provides the template for requests for mission specific SRUF.

⁴ Judge advocates should base their draft SRUF and legal guidance on the worst feasible scenario. For example, a number of JAs have been assigned duties of advising on detention or migrant and refugee camp operations. In most cases, no one expected the detainees to violently riot. Unfortunately, rioting often occurs in extended detention operations. Structuring your SRUF assuming the detainees will passively comply will leave your security force without adequate guidance on how to respond to the emergency situation they will face in a riot.

⁵ If such a need is identified, staffing of the request should be initiated using Enclosure P to CJCSI 3121.01B as a template. As this must be staffed to the Combatant Commander for staffing through the CJCS to the Secretary of Defense for Approval, it is imperative that this action be initiated upon the identification of the need.

C. Practical Realities of Use of Force Situations

Judge advocates need to understand practical aspects of deadly force confrontations in order to be competent in use of force law. Understanding the law and policy of use of force is not enough. Judge advocates must recognize that the real world does not allow for dispassionate, reflective, and judicious decision making on whether to use force. Thus, judge advocates should consider a number of critical factors: what capabilities and limitations do service members bring to a potential deadly force confrontation; what should judge advocates know about potential attackers; and, what physical reactions will affect service members during and after use of force incidents?

1. Capabilities and Limitations

What capabilities and limitations do most service members bring to a life or death confrontation during a domestic operation? Let's consider the service member's equipment, training, and use of force knowledge.

a. Soldier Equipment

Compared to civilian law enforcement personnel, most service members are not as well-equipped for potential confrontations with belligerent and innocent civilians. When drafting RUF for a particular mission, commanders must decide if the mission requires service members to be issued firearms or other non-lethal weapons.⁶ Further, if non-lethal weapons or non-standard weapons or ammunition are authorized for the mission, it is critical that soldiers be well-trained in the proper employment of these systems.

b. Skill and Training for Confrontations

Most service members do not receive extensive training on the types of skills and situations that are involved in confrontations in domestic operations. Because service members receive little training on tactical marksmanship and close quarters confrontations, they may not understand how to shoot accurately under stress or how to employ lesser means of force competently. Moreover, units generally do not conduct training emphasizing firearms engagements at closer than 10 yards, or on how to defend oneself using bare hands. Finally, service members trained on unarmed combatives,⁷ must know which are deadly and which are non-deadly techniques.

c. Training on RUF Law and Policy

Many service members have not been trained on domestic law applicable to the use of force and, as a consequence, do not understand many of the policy requirements imposed by DoD and DA decisions.⁸ Additional key concepts such as hostile act and hostile intent are often misapplied or used interchangeably. As such, it is critical that judge advocates understand the terminology and are capable of training these concepts in a straightforward manner. In addition, very few service

⁶ The Army's use of force policy advocates arming Soldiers with non-lethal equipment such as military police batons, OC pepper spray, and military working dogs.

⁷ U.S. DEP'T OF ARMY, FIELD MANUAL FM 3-24.150, COMBATIVES (18 Dec. 2002).

⁸ Military police and special operations Soldiers are probably the only general population in the Army that routinely learn and understand these rules.

members receive training on the RUF or the legal and policy aspects of the investigations and litigation that may follow a use of force incident. This increases the challenge for judge advocates preparing units for domestic operations.

The judge advocate must also consider the nature of the threat that our service members might face. Service members have to try to differentiate between aggressors employing various levels of force threats, those who do not present a direct threat but against whom force is authorized, and innocent civilians.

An attacker will generally have the service member at a disadvantage. They will almost always have the initiative and sometimes they will have the element of surprise. One of the accepted principles of violent confrontations is that the attacker's "action" will defeat a "reaction" of comparable speed by the service member.⁹

2. Physical and Psychological Effects

It is also imperative to keep in mind that the physical and psychological effects on the service member during a life or death situation can be critical. The stress of a life or death encounter will often trigger the "fight, flight, or freeze" response. Accompanying this, the body and mind undergo a number of changes that can affect performance. Judge advocates should research these reactions and consider their effects when drafting the RUF. They, and investigating officers, should also consider them when judging a service member's reactions and statements in the aftermath of a shooting incident.

D. Legal Authority and Standard for U.S. Military Use of Force in Domestic Operations

The underlying legal authorities for use of force are grounded in the constitutional role of the Executive Branch, and tempered by the constitutionally protected civil rights as listed in the Bill of Rights. Against this backdrop, Congress has imposed a number of statutory provisions that help define and limit this authority.

The competent use of force practitioner must understand these underlying authorities.¹⁰ This is similar to the duty of the competent SROE practitioner to understand the underlying public international law and law of war authorities affecting use of force by armed forces of the nation-state. Finally, the use of force practitioner and SROE practitioner must understand the differences between these two bodies of law and resist the temptation to confuse and meld terms and concepts from one to the other.

All U.S. Army domestic use of force authority flows from the powers of the President as granted under the Constitution. The underlying authority of the President to order routine installation force

⁹ This concept is central to law enforcement use of force training theory. If an officer is faced with a deadly threat, the officer should not waste time considering whether other options will work. The immediate choice is whether the officer needs to use deadly force to save life or limb. This is why the Federal Bureau of Investigation and the Department of Justice emphasize that the use of force policy that applies during a confrontation is essentially a question of whether it is objectively reasonable to use deadly force. If it is not, then the agent is free to consider other lesser alternatives.

¹⁰ Since domestic operations have generated very few reported cases involving service members, we must look to law enforcement cases to help define the limits of military use of force.

protection and law enforcement could be justified under the President's executive powers.¹¹ The authority to order the military to defend the homeland against overt international aggression can be clearly justified under his authority as the Commander in Chief.¹² Finally, the President's authority to order the military to execute DSCA operations (Defense Support of Civil Authorities)¹³ to enforce federal law has been based on the President's duties to execute the laws.¹⁴ As officers of the Executive Branch, service members conduct operations and derive authority from the President's Constitutional authorities.¹⁵ Similarly, whenever the military uses force to execute the orders of the President and those he appoints, that use of force must be based on constitutional authority.

All Executive Branch uses of force are balanced against the civil rights of the public. While three primary provisions of the Bill of Rights limit federal use of force in domestic operations, the primary focus is on the Fourth Amendment.¹⁶ The constitutional standard is whether the use of force violated the Fourth Amendment prohibition against unreasonable seizures.¹⁷ The U.S. Supreme Court has described this standard as an objective measurement based on the facts and circumstances known to the service member at the time of the use of force.¹⁸ This rule is the very heart of the standard for governmental use of force.

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.*¹⁹

The courts have long recognized the authority to use force, including deadly force, in the performance of federal governmental duties.²⁰ Judge advocates must know the limits of the mission and how the commander intends to execute this mission to advise on the RUF that support the operation. This makes the mission analysis portion of the planning critical. The phrasing of

¹¹ U.S. CONST., art. II, § 1.

¹² *Id.* § 2.

¹³ U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVILIAN DISTURBANCES (4 Feb. 1994).

¹⁴ U.S. CONST., art. II, § 3.

¹⁵ *See e.g.*, *In Re Neagle*, 135 U.S. 1 (1890).

¹⁶ The Fifth Amendment Due Process Clause limits the ability of federal officers to use force after an arrest has occurred. The Eighth Amendment defines the rights of a prisoner when corrections personnel use force.

¹⁷ U.S. CONST., Amend. IV, provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated"

¹⁸ *Graham v. Connor*, 490 U.S. 386, 296 (1989).

¹⁹ *Id.* (emphasis added).

²⁰ *Neagle*, 135 U.S. at 1.

Operations Orders or other directives that define the mission and operation are critical to defining the limits of this authority.

There are a number of restrictions and decision points that the SRUF imposes on our service members or that are, in practical effect, introduced into RUF training. Judge advocates involved in drafting mission specific RUF should carefully consider where to balance the interests of force protection and the lives of service members against the important interest of not risking an excessive use of force incident involving the military. Further, judge advocates involved in the development of RUF training must be careful that the training does not introduce procedures that effectively restrict the SRUF or introduce tactically dangerous or unsound practices.

Such errors can occur because judge advocates are mistaken in their understanding of the law or uncomfortable with the application of the RUF. Specifically, judge advocates should never apply Law of War to the domestic law on the use of force.²¹ Likewise, judge advocates should not confuse the law of individual self-defense of a private individual with the authority of self-defense for government officials.²²

1. Minimum Force Necessary or Deadly Force as a Last Resort

The SRUF provides that, “Normally, force is to be used only as a last resort, and the force used should be the minimum necessary.”²³ The SRUF further states that, “Deadly force is to be used only when all lesser means have failed or cannot be reasonably employed.”²⁴ Lastly, the SRUF imposes a reasonableness requirement stating that the force used must be “reasonable in intensity, duration and magnitude” based on the totality of the circumstances to counter the threat.²⁵

Federal courts, however, do not require that service members employ “minimum force necessary” or that they employ deadly force as only a “last resort.” The courts have generally held that the issue is solely whether deadly force was reasonably necessary. They have declined to impose a requirement to use minimum force.²⁶ Nor do courts require the use of feasible lesser force alternatives to avoid the use of justified deadly force.²⁷ Judge advocates involved in planning domestic operations that carry a significant risk of potentially lethal encounters with armed or dangerous elements should evaluate whether the SRUF meets the task or whether mission specific

²¹ As discussed above, the underlying substantive law applicable to domestic governmental use of force is the Constitution, not the Law of War. A common example is use of language of “proportionality of response” by a Soldier defending against an attack.

²² While related, these legal standards are significantly different. A common example of this confusion is a requirement to retreat. Government officials using force in the performance of their duty have no duty to retreat and in some instances could be in breach of their duty if they do retreat. It is also possible to inadvertently lose the authority to use force under governmental authority by wording the RUF to invoke the law of individual right of self-defense of the state law or federal common law. For example, a provision that says, “Service members retain their right to use force in self-defense as defined by local and state law” reduces the service member’s right to use force in self-defense to the level of a private citizen under state law. This is a significant concession of otherwise lawful defensive authority.

²³ SRUF, *supra* note 2, para. 5.b.1.

²⁴ *Id.* para. 5.c.

²⁵ SRUF, *supra* note 2, para. 5.b.1.

²⁶ See *e.g.*, O’Neal v. DeKalb County, Ga., 850 F.2d 653, 666 (11th Cir. 1988).

²⁷ See *e.g.*, Deering v. Reich, 183 F.3d 645, 652–53 (7th Cir. 1999).

RUF that more closely resembles the standards of case law should be developed and staffed for approval by the Secretary of Defense.²⁸

2. Mandatory Verbal Warnings

Federal courts require service members to issue a verbal warning, where feasible, in the case of using deadly force against a fleeing criminal. This is clearly required in the seminal case of *Tennessee v. Garner*.²⁹ However, in defensive use of force there appears to be no such requirement in law. The SRUF does not require a verbal warning but does state that “[w]hen time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.”³⁰ Although the type of warning that should be given is not specifically established, it cannot take the form of a warning shot.³¹

3. Denial of Deadly Force in Self-Defense

Federal courts do not require that service members who are not armed in the course of their duties be denied the authority to use deadly force in their own defense. Some commanders and judge advocates believe that if there is no authority to arm service members, then there is no authority to use deadly force. This presumption is not imposed by federal law. In reference to self-defense, however, judge advocates must ensure that service members, acting as part of a unit, understand that the SRUF specifically provides that the individual right of self-defense may be restricted. This is rationalized by stating that when “individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, commanders may limit individual self-defense by members of their unit.”³² This is a controversial authority provided to commanders in the SRUF and would likely be challenged by a soldier being prosecuted either for violation of a lawful order or manslaughter.³³ The SRUF also limits the use of deadly force to situations where lesser means have failed or cannot reasonably be employed.

4. Operational Orders/Execution Orders

For those operations that have not been thoroughly anticipated, judge advocates may find that the RUF are disseminated through message traffic with an OPORD or EXORD. Often judge advocates will have to wait for RUF guidance from higher headquarters because the decision of whether to draft new RUF or adopt an existing template is yet to be announced.

²⁸ Staffing of the request should be initiated using Enclosure P to CJCSI 3121.01B as a template. As this must be staffed to the Combatant Commander for staffing through the CJCS to the Secretary of Defense for approval; it is imperative that this staffing process be initiated upon the identification of the need.

²⁹ *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985). *Garner* provides a three prong analysis under the Fourth Amendment for the evaluation of whether the use of deadly force is reasonable. These prongs include: whether there is probable cause to believe that the individual suspect is dangerous; whether the use of deadly force is necessary to prevent the suspect’s escape; and, whether, if feasible under the circumstances, a verbal warning was given.

³⁰ SRUF, *supra* note 2, para. 5.a.

³¹ SRUF, *supra* note 2, para. 5.b(3). There are some limited exceptions to this restriction, but these exceptions are unlikely to be encountered by most U.S. Army personnel.

³² SRUF, *supra* note 2, para. 4.a.

³³ For an excellent discussion of the historical development of the inherent right of self-defense and its modern interpretation by American courts, see DAVID G. BOLGIANO, *COMBAT SELF-DEFENSE* 32–39 (2007).

5. SRUF Authority to Use Deadly Force

In RUF, the authority to use deadly force exists for limited purposes. The SRUF provides uniform guidance on domestic use of force. It also provides a consistent training template to avoid the ad hoc approach previously used in domestic operations RUF practice.

a. Inherent Right of Self-defense

As discussed above, unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to hostile acts or demonstrated hostile intent. Unless otherwise directed by the unit commander, service members may use deadly force when it appears reasonably necessary against a hostile act or demonstrated hostile intent. Individual self-defense is a subset of unit self-defense and as such may be limited by the unit commander when an individual service member is acting as part of a unit. Unit self-defense includes the defense of other DoD forces in the vicinity.

b. Defense of Others

The use of deadly force extends to the use of force to defend other non-DoD persons in limited circumstances. Service members may use deadly force in defense of non-DoD persons who 1) are in the vicinity, and 2) when the use of force is directly related to the assigned mission.³⁴

c. Protection of Assets Vital to National Security

Service members may use deadly force when it appears reasonably necessary to prevent the actual theft or sabotage to assets vital to national security. The SRUF defines assets vital to national security as President-designated non-DoD and/or DoD property, the actual theft or sabotage of which the President determines would seriously jeopardize the fulfillment of a national defense mission and would create an imminent threat of death or serious bodily harm.³⁵ The SRUF provides a list of *potential* examples: nuclear assets, nuclear command and control facilities, other designated areas that contain sensitive codes or involve special access programs. Planners and commanders need to determine the existence of assets in their anticipated area of operations to apply the SRUF properly so as to safeguard these designated assets.

d. Protection of Inherently Dangerous Property

Service members may use deadly force when reasonably necessary to prevent the actual theft or sabotage of inherently dangerous property. The SRUF defines “inherently dangerous property” as property that, in the hands of an unauthorized individual, would create an imminent threat of death or serious bodily harm.³⁶ Examples include portable missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material. On-scene DoD commanders are authorized to classify property as inherently dangerous.³⁷ Command guidance in this area is critical. Without clear and proper guidance, the commander’s intent could easily be frustrated. For

³⁴ SRUF, *supra* note 2, para. 5.c.2.

³⁵ SRUF, *supra* note 2, para. 4.f.

³⁶ SRUF, *supra* note 2, para. 4.f.

³⁷ SRUF, *supra* note 2, para. 4.f.

example, a commander may not want to have lethal force deployed against looters who steal small arms ammunition. Failure to provide guidance on this could lead to an engagement that was proper under a strict reading of the SRUF but is inconsistent with the on-ground commander's intent. Likewise, a commander may consider all crew-served weapons as "inherently dangerous," but a failure to make such designations may lead to confusion over what is "inherently dangerous property" by Soldiers on the ground.

e. National Critical Infrastructure

Service members may use deadly force when reasonably necessary to prevent the sabotage of national critical infrastructure. National critical infrastructure for DoD purposes is President-designated public utilities, or similar critical infrastructure, vital to public health or safety, the damage to which the President determines would create an imminent threat of death or serious bodily injury. Commanders and planners need to identify the existence of such infrastructure when preparing for a domestic operation.

6. Other Mission-Related Circumstances for Use of Deadly Force

As with the circumstances described above, deadly force may be used, under limited circumstances, when directly related to the assigned mission. Further, such force may only be used "when all lesser means have failed or cannot reasonably be employed."³⁸ These additional circumstances, where such force may be used when directly related to the assigned mission, are discussed below.

a. Prevention of Serious Crime against Persons

Service members may use deadly force when it appears reasonably necessary to prevent a serious crime involving the threat of imminent death or serious bodily harm (hereinafter referred to in this chapter as "serious crime"). Examples of such crimes include murder, armed robbery, and aggravated assault. Further, attempting to set fire to an inhabited building or sniping would constitute offenses that involve the threat of imminent death. Serious crime is a critical term to the definition of a number of the following authorities to use deadly force.³⁹

b. Escape⁴⁰

Service members may use deadly force when it appears reasonably necessary to prevent the escape of a prisoner, provided there is probable cause to believe that the prisoner committed or attempted to commit a serious offense. Serious offense is defined as one that involves imminent threat of death or serious bodily harm or an offense that would pose an imminent threat of death or serious bodily harm to DoD forces or others in the vicinity.

³⁸ SRUF, *supra* note 2, paras. 5.c & 5.d.

³⁹ SRUF, *supra* note 2, para. 5.d.1.

⁴⁰ SRUF, *supra* note 2, para. 5.d.2.

c. Arrest/Apprehension of Persons Believed to have Committed a Serious Offense⁴¹

Service members may use deadly force when it appears reasonably necessary to arrest or apprehend a person who they have probable cause to believe has committed a serious offense as defined in paragraph b above.

7. Augmentation of the RUF

A unit commander that desires to augment the SRUF must staff the action to the appropriate Combatant Commander. The Combatant Commander must then staff the request through the CJCS to the Secretary of Defense for approval.⁴² Requests for augmentation must be prepared using the template provided at Enclosure P, RUF Messaging Process, to CJCSI 3121.01B. Unit commanders, however, may further restrict the SRUF without prior approval. However, if a restriction is implemented by a unit commander on a Secretary of Defense-approved RUF, the Secretary must be notified through the Joint Staff. When confronted with time critical situations, commanders can notify the CJCS and the Secretary of Defense concurrently, or if not possible, may notify the CJCS as soon as possible after the Secretary of Defense notification.⁴³

E. Liability for Service Members, Leaders, and RUF Drafters in Use of Force Situations

Service members, their leaders, and the planners who draft the RUF for domestic operations face potential personal liability for any unlawful use of force by a service member during a domestic operation. This includes federal and state civil and criminal proceedings after an incident. In addition, such incidents are often accompanied by a variety of investigations that can result in adverse administrative consequences. Therefore, it is important that judge advocates consider this liability as they draft RUF, disseminate the RUF, and participate in training for and the execution of domestic operations under RUF. Failing to do so could unnecessarily expose service members to the financial and emotional burdens of litigation, even if the case is ultimately dismissed.

1. Federal Civil Liability

A person injured by a service member's use of force could seek damages in a federal civil suit against the service member and others involved in the RUF. If the person is dead, the family members of the decedent could file the suit. This private cause of action for damages—caused by a service member's use of force—is based on deprivation of a constitutional right. In most cases, this will involve the Fourth Amendment standard of objective reasonableness. The seminal case that created this cause of action is *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.⁴⁴ In fact, one reported Supreme Court *Bivens* case involves an Army Soldier and use of force against a civilian.⁴⁵

⁴¹ SRUF, *supra* note 2, para. 5.d.3.

⁴² SRUF, *supra* note 2, para 3.a.

⁴³ SRUF, *supra* note 2, para. 3.b.

⁴⁴ *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴⁵ See *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier*, Katz attempted to unfurl a protest banner in close proximity to Vice President Gore's speaking stand on the Presidio of San Francisco. Katz brought a *Bivens* action against the

Litigation is also conceivable in situations where force was not used and an innocent civilian is killed or injured as a result. A soldier's decision not to use force, or a commander's decision to limit the use of deadly force would most likely be found to be within the discretionary function defense to claims made under the Federal Tort Claims Act (FTCA).⁴⁶ However, if the decision not to engage an otherwise lawful target was a result of a failure to train or the use of ill-conceived training materials, the U.S. Government could be found liable for negligence under the FTCA. While discretionary function is a closely guarded "silver bullet" defense, plaintiff's counsel could use faulty or inadequate training as a basis to seek to establish negligence on the part of the U.S. Government.

a. The Application of Qualified Immunity

Judge advocates serving as advisors, investigators or litigators should understand that qualified immunity is a critical dispositive measure to forestall unnecessary burdens on the government and its representatives, and it can serve as a bar to trial. Recent caselaw provides guidance on how courts apply qualified immunity.

Saucier v. Katz, a 2001 Supreme Court decision, is a noteworthy case in the context of military support to domestic operations. Saucier, a Military Police officer assigned to protect the Vice President, was accused by Katz of using excessive force. Pursuant to *Bivens*, Katz filed suit against Saucier on the grounds that Saucier had violated Katz' Fourth Amendment rights.

Pearson v. Callahan, a 2009 Supreme Court decision, is now the key case from which to analyze issues of qualified immunity.⁴⁷ (*Pearson* involved an accusation of a Fourth Amendment violation for a warrantless search and seizure conducted by Utah state law enforcement officers.)

For judge advocates vis-à-vis their roles as RUF practitioners, it is first necessary to understand the analysis handed down in *Saucier* as it may still be used by lower courts. In *Saucier*, the Court mandated a two-prong analysis to determine whether an official was entitled to qualified immunity. First, a court was required to decide: 1) "whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was 'clearly established' at the time of the defendant's alleged misconduct."⁴⁸ This analysis was to be strictly applied and provided an analytical paradigm that often served to direct early disposition of cases in favor of the official without the need for extensive and costly pretrial discovery and litigation.

In *Pearson* however, the Supreme Court effectively reversed its position in *Saucier* by holding that lower courts were no longer bound to the rigid two-prong analysis. The Court noted, however, that the *Saucier* case could still be used as an appropriate analytical paradigm by lower courts in their discretion, but that lower courts were no longer required to use the *Saucier* procedure.⁴⁹

military police that apprehended him. Katz alleged that the military police violated his Fourth Amendment rights by use of excessive force in forcibly removing him from the immediate vicinity of the podium and in placing him into a van.

⁴⁶ United States v. Gaubert, 499 U.S. 315 (1990).

⁴⁷ Pearson v. Callahan, 555 U.S. 223 (2009).

⁴⁸ Saucier, 533 U.S. at 194.

⁴⁹ Pearson, 555 U.S. at 223.

Accordingly, *Saucier* remains an important qualified immunity case. However, in light of *Pearson* and the difficulties lower courts have had with the *Saucier* analysis, it is uncertain how effective the analysis will be for those attempting to assert its procedure in establishing qualified immunity in the future.

b. State and local government use of force cases are usually based on a civil cause of action created by 42 U.S.C. § 1983

Section 1983 has evolved into an effective basis for citizens to seek damages for alleged violations of their rights by governmental organizations or their employees under the Fourteenth Amendment. Section 1983 liability has also been extended to apply to those who are involved in use of force policy and training decisions. These individuals have been found liable for civil damages if their decisions and work contributed to an improper use of force by an individual law enforcement or security person.⁵⁰ As the SRUF specifically directs that commanders at all levels must train their subordinates on the use of both deadly and non-deadly force,⁵¹ failure to do so may expose commanders, their Soldiers, their advisors, and the U.S. Government to a host of legal consequences as discussed below.

2. Federal Criminal Liability

Service members could be held criminally liable for unconstitutional or illegal use of force before a court-martial, a federal district court, and in some cases, a state court. A federal statute prohibits use of force under the color of law that deprives any person of their constitutional or legal rights. Accordingly, DOJ has, in the past, investigated use of force during a domestic military operation with a view toward seeking a Grand Jury indictment for violation of this statute.⁵²

⁵⁰ A supervisor who causes a constitutional violation by a “deliberate indifference” to constitutional standards in proper training for officers may be liable under a Section 1983 cause of action. *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989). While agencies can be found liable for a lack of proper training on deadly force, agency officials have also been found liable for a lack of training on non-deadly force (*Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir. 1991)) and for training conducted that was insufficient (*e.g.*, *Berry v. city of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994)). The judge advocate advising a commander on RUF for a domestic operation should compare the difference in effort and attention to law between military RUF practice and the comparable efforts of federal law enforcement agencies. While Section 1983 may provide plaintiffs with a compensable claim after a use of force encounter as a result of a failure to train, the FTCA could also provide a potential remedy when a training requirement existed and it was either not accomplished or it can be demonstrated that the training was inadequate or failed to apply the proper standards. Ironically, it is conceivable that a third party that could have been covered under “defense of others” could attempt to bring a claim under the FTCA if the individual could establish that the Government was negligent in its training of RUF and it contributed to the injury suffered.

⁵¹ SRUF, *supra* note 2, para. 1.b.

⁵² For an excellent overview of the liability nightmare resulting from a Marine shooting that was authorized and proper under the Rules of Engagement for JTF-Six, see Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1.

3. State Civil and Criminal Liability

Federal Supremacy Clause Immunity will not always prevent a service member from having to face trial in state civil or criminal proceedings. In fact, in the “Ruby Ridge” use of force incident, a federal officer was not granted immunity from a state criminal proceeding for the shooting of a civilian involved in an armed confrontation with the FBI.⁵³

F. Other Trial or Litigation Issues

Judge advocates involved in post-shooting procedures and litigation should consider a number of issues. First, be prepared to advise commanders on the many investigations that could occur. Second, be aware of the Army’s procedures on civilian litigation. Finally, know that service members have far less legal protection against use of force liability than a federal law enforcement agent.

Judge advocates should know that if a service member kills or injures a civilian during a domestic operation, a number of agencies could initiate investigations of the incident that would affect both the service member and the Army. Commanders will probably recognize the fact that the various commanders involved, their parent services, any joint command, and the National Guard Bureau or State National Guard authorities, could initiate an administrative investigation and Rules for Courts-Martial (RCM) 303 inquiries.⁵⁴ Commanders are often surprised to find that the following civilian investigations could occur.

- An investigation by DOJ or the U.S. Attorney for potential federal civil or criminal disposition;
- An investigation by state, county, or municipal law enforcement authorities for state criminal disposition; and
- An administrative investigation by the Inspector General or internal investigative element of a federal law enforcement agency if the command was providing support to that federal agency.

Judge advocates also need to know the procedures and considerations involved in potential civil litigation. Army Regulation 27-40, Litigation,⁵⁵ Air Force Instruction 51-301, Civil Litigation,⁵⁶ Navy Instruction 5800.7D, and Manual of the Judge Advocate General (JAGMAN)⁵⁷ outlines Service guidelines on issues such as whether a service member will be entitled to government-provided representation, investigation of potential litigation cases, whether the government will indemnify the service member for damages in civil cases, and the key points of contact when the Service may be involved in litigation. Further, Army Pamphlet 27-162, Claims Procedures,⁵⁸

⁵³ *State of Idaho v. Horiuchi*, 215 F.3d 986 (9th Cir. 2000). Interestingly, one of the critical factors in the Court’s analysis was the fact that a supervisor had published unlawful use of force guidance. This became an issue, even though Special Agent Horiuchi based his decision to shoot on the lawful pre-existing RUF, rather than the flawed rules published by his team commander.

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008).

⁵⁵ U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION (19 Sep. 1994).

⁵⁶ U.S. DEP’T OF AIR FORCE, INSTR. 51-301, CIVIL LITIGATION (1 Jul. 2002).

⁵⁷ U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), para. 6020 (14 Mar. 2004).

⁵⁸ U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (21 Mar. 2008).

provides guidance on the management of potential claims against the U.S. Government under a variety of theories and statutory authorities.⁵⁹

Finally, judge advocates need to recognize that service members and commanders involved in use of force incidents will probably have less legal and practical protection than their counterparts in federal law enforcement. Caselaw defining the role of service members using force during Homeland Security operations is extremely limited. Many of the cases interpreting governmental use of force have expressly or impliedly based their interpretations of the “reasonableness” of the force on the law enforcement status of the federal officers. These officers were qualified and credentialed law enforcement officers with clear statutory investigative jurisdiction and duties to uphold federal law and confront criminals. Service members performing non-traditional Homeland Security operations do not have the benefit of this well-defined caselaw. Judges could potentially decide cases of first impression involving service members less deferentially than they have for law enforcement officials. Finally, Congress does not extend immunity that is routinely applied to federal law enforcement to Army domestic operations.⁶⁰

G. Common Issues in Drafting and Training RUF

During domestic operations planning and execution, judge advocates may draft, interpret, or conduct training on the RUF on short notice. In this atmosphere of crisis planning, judge advocates must carefully balance the interests of protecting the rights of the public against the force protection concerns of service members in potentially dangerous situations. Accordingly, striking the appropriate balance requires that judge advocates: understand the law and policies that shape this area of practice, including key Supreme Court decisions; have a basic understanding of both tactical engagements applying RUF; and consider the psychological and physiological responses of citizens confronted with a use of force scenario.

1. Training of Judge Advocates

Although RUF is rarely at the forefront of training for judge advocates, leaders should seek opportunities for their judge advocates to obtain basic training in the deployment of weapons in tactical engagements.⁶¹ If available, training with police or special forces elements can provide

⁵⁹ Claims have been paid in recent history for shootings by U.S. military personnel engaged in the performance of their duties. For example, in 1997 U.S. Marines were sent to support the U.S. Border Patrol in Texas along the Mexican border during a period of escalating border violence and drug related activity. Although the facts are disputed, a U.S. person of Hispanic ancestry was under observation by U.S. Marines. The Marines claimed that the individual under surveillance fired at them with a .22 caliber rifle that he had in his possession. The Marine claimed that he returned fire when fired upon and he killed the individual with one shot from his M-16 rifle. There was immediate controversy that surrounded the incident and the Navy agreed to settle the claim for an amount reported to be \$1.3 million. *See U.S. Settles with Family in Fatal Border Shooting*, NY TIMES (August 12, 1998), <http://www.nytimes.com/1998/08/12/us/national-news-briefs-us-settles-with-family-in-fatal-border-shooting.html> (last visited Jul. 7, 2011).

⁶⁰ Congress, recognizing that the scope of duties for federal law enforcement officers does not extend to enforcing laws against simple assaults, homicides, and other types of violent crime, extended the scope of employment for federal officers having to use force to prevent such violent crimes. The language of this statute does not make it applicable to the majority of service members engaged in domestic operations. *See* Pub. L. 105-277, Section 101(h), *as amended* by Pub. L. No. 106-58, Title VI, sect. 623, Sept. 29, 1999, often referred to as the Federal Good Samaritan Statute.

⁶¹ Although the law that governs RUF is different than that which governs ROE, this training will assist judge advocates that are called to assist in the development or training of either RUF or ROE as an appreciation on the tactical

judge advocates with great insight into the challenges confronted by a soldier in a lethal force encounter.

Ideally the training should include the study of executive, congressional, and judicial authorities and constraints on the use of force by government and military personnel, and tactical skills training using both lethal and non-lethal measures. Although training such as this is resource intensive and time consuming, it is difficult for judge advocates that have not been exposed to tactical scenarios involving the use of weapons to provide comprehensive advice and support to training the force.

If resources or time do not permit “hands on” training, the development of scenario training packets can assist in developing a more nuanced appreciation for application of the RUF. Although scenario training that does not involve actual hands on experience cannot replicate the physiological and psychological responses associated with a tactical engagement, an analysis of likely scenarios done in conjunction with a robust discussion of controlling legal authority can help illuminate the challenges that will be faced by those who may be called to apply RUF. Further, these scenarios can be developed to highlight the challenges that often face RUF planners and drafters and thus improve upon their ability to draft, provide advice concerning, and train RUF.

2. SRUF and Areas of Confusion and Concern

Most RUF practitioners will be called to advise and train on either the SRUF or mission specific RUF crafted and approved by higher headquarters and the Secretary of Defense, respectively. RUF practitioners whether being asked to propose mission specific RUF, advise on existing RUF, or to train RUF need to be sensitive to several areas that often become the source of confusion or error.

The following are discussed in greater detail, *supra*, but care must be undertaken to understand the interface of the following concepts with the SRUF. These include the concept of use of “minimum force,” the general prohibition on the use of warning shots by land forces, the use of warnings to include verbal warnings, and the introduction of restrictions that go beyond that required by the SRUF that may have the inadvertent effect of depriving a Soldier of otherwise valid defenses available to federal officers acting in their official capacities. Such restrictions could come from the imposition of additional preconditions to the use of force beyond that of “reasonable belief,” imposing a duty to retreat by inappropriately relying on state law as it relates to the use of force by private citizens, or by attempting to further restrict the right of self-defense.

Another potential source of confusion can flow from an effort to reconcile portions of AR 190-14, *Carrying of Firearms and Use of Force for Law Enforcement and Security Duties*⁶² with the SRUF. The SRUF applies broadly both on and off installations and specifically provides that its provisions apply to “DoD forces, civilians and contractors performing law enforcement and security duties at all DoD Installations.”⁶³

use of small arms and other lethal and non-lethal weapons will improve a judge advocate’s ability to support the warfighter and the command significantly.

⁶² U.S. DEP’T OF ARMY, REG. 190-14, *CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES* (12 Mar. 1993).

⁶³ SRUF, *supra* note 2, para. 1.a.

However, AR 190-14, Chapter 3, was revised in 1993 to synchronize with the use of force guidance contained in DOD Directive 5210.56. Subsequently however, the use of force guidance contained in DoDD 5210.56 was specifically rescinded by the SRUF.⁶⁴ As such, judge advocates advising in a variety of areas related to law enforcement and security missions to include the development of contractual provisions for contract security forces need to be aware of this disconnect between AR 190-14 and the SRUF. When the provisions of the two cannot be reconciled, the SRUF would control as its provisions cannot be augmented without the approval of the Secretary of Defense and cannot be further restricted without providing notice to the same.

⁶⁴ SRUF, *supra* note 2, para. 1.b.