

## Shifting Guidelines Prompt Calls for ROE Reform

The Afghan man captured on a grainy surveillance video was a known insurgent. And there he was — again — digging a hole for a homemade mine beneath a well-traveled dirt road in Helmand province.

Several Marines in a nearby combat outpost watched the video feed closely, but a decision on what to do fell to 1st Lt. Josh Waddell, executive officer of India Company, who was running the command post on the afternoon of Nov. 1 for 3rd Battalion, 7th Marines.

Waddell, 25, sprang into action, calling his battalion headquarters to get authorization — what military lawyers call “positive identification” — to launch a strike. From there, he hurriedly issued orders to ground patrol units, sniper teams and aircraft hovering nearby, coordinating a complex operation to kill or capture the enemy.

The insurgent was surrounded by a village full of women and children, so Waddell’s decisions required the kind of nuanced judgment call that has become a hallmark requirement of today’s often murky counterinsurgency missions.

Waddell opted against calling in the helicopter gunships. Instead, he ordered a sniper team to home in on the insurgent. The first sniper shot was high and off-target, sending the man sprinting across a patch of farmland. But other shots struck his leg and stomach. The man dropped and rolled into a ditch for cover.

Waddell had a split second to decide on his next move. And the choice he made — to fight rather than stand down — put him in one of the thorniest dilemmas faced by leaders in today’s wars: the rules of engagement.

Drafted by lawyers and obsessively reviewed by senior commanders, the ROE govern when it’s OK to shoot — and when it’s not. But on the battlefield, confusion often reigns and leaders don’t have time to seek a second opinion before ordering their troops to use deadly force.

After-action reviews of commander decisions have led to courts-martial, career-killing bad evals and hours of second guessing.

Restrictive ROE in Afghanistan have led to congressional inquiries and a move to create a special panel to decide whether a service member’s actions were justified.

### An Order to Fire

When Waddell saw some civilians hoist the wounded insurgent onto a nearby tractor, the young Marine saw a tactical retreat. He ordered his snipers to fire at the tractor’s engine block, to disable it until a Marine foot patrol could arrive to detain the man.

What a lawyer later saw were civilians conducting a medical evacuation — and firing on them was a potential war crime.

Waddell ultimately ordered his snipers to cease fire after more civilians, including a child, gathered around the tractor.

In the end, the insurgent was found dead from his wounds. No civilians were injured.

Nevertheless, the incident made Waddell a target for months of investigations. His commander, Lt. Col. Seth Folsom, later said he acted “recklessly” and showed “poor judgment.” Although Waddell did not break any international laws of war, he violated the “tactical directive in effect at the time.”

The young officer was relieved from his job as company XO. Folsom later gave him a searing “unsatisfactory” on a fitness report, saying Waddell was “not recommended for promotion with his contemporaries.”

Folsom did not respond to a request of comment.

Waddell believes the adverse fitness report will end his career. But he has few options. He has hired a high-profile attorney, Jeffrey Addicott, a retired judge advocate for Army Special Forces who runs the Center for Terrorism Law at the St. Mary’s University School of Law in San Antonio.

Within the system, all he can do is appeal to the Board for Corrections of Naval Records, a tedious, time-consuming process.

“By the time the board meets and considers your case, it’s too late. You’re already hosed,” Addicott said in an interview. “They’ve already transferred you to your next job — and you didn’t get a good job and you’re not getting promoted.”

Senior military commanders say precise and appropriate rules of engagement are a crucial aspect of today’s counterinsurgency-style, asymmetrical wars, in which the enemy blends easily into the civilian population. Commanders issue “tactical directives” to help clarify the intent of the rules.

Yet for many of the ground-level troops pulling triggers and authorizing real-time strikes, understanding today’s nuanced and frequently shifting rules of engagement is a challenge — and a major career hurdle. At a time when the military is shrinking, one blemish in a personnel file can snuff out any chance of promotion.

These rules have evolved over the years. Seasoned troops with multiple deployments under their belt have seen a full range of ROE during the past decade.

Early in the Iraq War, troops were given broad discretion to use lethal force. But those aggressive ROE were later criticized for causing civilian casualties. Troops were told to use caution as counterinsurgency doctrines became popular among the American military leadership.

As winning hearts and minds of the local population became a central tenant of warfare, the pendulum swung and ROE tightened. The most restrictive in recent memory were imposed in Afghanistan under former Army Gen. Stanley McChrystal in 2009 and 2010.

Critics said those rules, which curtailed airstrikes, put the lives of U.S. troops at risk.

Nevertheless, those changes influenced military culture. Evidence suggests war fighters began to overcompensate — in some cases becoming exceptionally cautious.

For example, two Army officers were “severely reprimanded” in 2009 for repeatedly denying air and artillery support to a Marine company that was pinned down by more than 100 insurgents.

Not long after Army Gen. David Petraeus replaced McChrystal, Petraeus revised the ROE and issued arguably less restrictive rules for troops in Afghanistan.

Keeping up with those changing restrictions and interpreting the current commander's "tactical directive" can be a complex task. And some troops say it casts a shadow over the broader mission.

"You get the tail wagging the dog. It's no longer the mission that's critical; it's the ROE. Now guys think the ROE is the mission. Our mission is to not hurt anyone and make everyone happy," said retired Marine 1st Sgt. John Bernard, who faults the ROE for his Marine son's death in Afghanistan in 2009.

That often comes down to a choice between protecting their careers or their comrades in arms, he said — at moments when hesitation can lead to disaster.

Troops who run afoul of the ROE can face a range of reprimands, including nonjudicial punishment or even court-martial. But commanders are increasingly using more subtle administrative measures — fitness reports and performance evaluations — that can still adversely affect a career.

Greg Rinckey, a former Army JAG who specializes in military law in private practice, has handled many such cases in recent years. He said in some instances, troops may prefer a criminal charge to a bad fitness report.

"With a court-martial, you have the right to trial so you can prove your innocence," Rinckey said, but a fitness report is not as easy to respond to.

"Once it's in your file, your only option is to try to go to the board of [record] corrections, which can take at least 12 months."

By then, the lasting career damage may have already been done.

### Congress Gets Involved

More than a decade after the start of the war in Afghanistan, some lawmakers on Capitol Hill are talking about protecting rank-and-file troops from restrictive or confusing ROE.

In an unusual move, they want to create "rules of engagement review boards," which would give troops the option of appealing adverse administrative actions related to ROE violations, such as being relieved of command.

Such boards "would help ensure upper ranks have a valid reason for alleging violations of ROE, and lower ranks would have the assurance that political bias did not play a role in the allegation," said Rep. Trent Franks, R-Ariz., a member of the House Armed Services Committee.

The proposal was inspired in part by the case of Waddell, whose father, Mark Waddell, a retired Navy SEAL commander, has aggressively sought to overturn the damaging fitness report his son received in January.

The Waddells have enlisted the help of Addicott and others. In addition to representing 1st Lt. Waddell in his appeal to the Board for Corrections of Naval Records, Addicott is also advising Franks on proposed legislation.

In an April 2 report to Congress, Addicott says ROE can lead troops "to do nothing for fear of violating" the rules. That confusion, along with preferential treatment, means not all violators are treated the same, he said.

"It is painfully apparent that rules of engagement have proven to be a source of injustice to service members in the field of combat," he said, "particularly ... when the chain of command uses administrative punishment as a form of discipline, providing little recourse to the service

member.”

In an interview, Addicott said ROE review boards could be composed of three officers appointed by the theater commander. They would be outside a service member’s immediate chain of command, but nevertheless a component of the military leadership.

“It would give an independent set of eyes to look over what happened,” he said.

But some veterans advocates question the concept. “If you want to relieve someone of command in the U.S. military, you need to have a tremendous amount of evidence that there is some negligence,” said Jon Soltz, an Iraq veteran and chairman of VoteVets.org, a veterans advocacy group.

Soltz suggested the concept Addicott supports would “undermine commanders on the ground,” and added that he believes ROE are not a major concern among many veterans.

“We know what is right and wrong,” he said.

### Fighting for His Career

Waddell is aggressively fighting his commanders’ decision to fire him, a move he called a “soft kill” on his career.

In his formal response to the adverse fitness report, Waddell suggested the ROE are applied arbitrarily and inconsistently, and argued his understanding of his “commander’s intent” was swayed in part by an aggressive strike his battalion authorized in late October, when he said a helicopter gunship sprayed nonprecision weapons into an Afghan village near civilians.

“A few days prior to this event, my battalion cleared a non-precision strike delivered from aircraft into enemy casualty-evacuation personnel within meters of an occupied civilian compound with rounds impacting within [the] compound,” Waddell wrote.

That signaled to him the “level of risk the battalion was willing to assume,” he said.

Waddell’s father filed a formal complaint about that incident with U.S. Central Command.

A spokesman for Marine Corps Forces-Central Command said the matter was investigated and found to be “meritless.”

Waddell’s case was investigated for months and finally reviewed in January by Marine Brig. Gen. Lewis Craparotta, commander of 2nd Marine Division (Forward), based at Camp Leatherneck in Helmand province.

In the command investigation, Craparotta overturned a lower-level ruling that the insurgent on the tractor amounted to a “medical evacuation” and that the order to the sniper team violated the international laws of war. Still, Craparotta ruled that Waddell should have withheld fire based on risk to civilians in the area.

To be sure, Waddell faced a difficult task, the general said.

“First Lt. Waddell found himself in charge of a chaotic, complex and quickly developing situation. It began as a relatively simple engagement but evolved into a chaotic vehicle interdiction ...to prevent the escape of an insurgent. It was further complicated by comingling of civilians and insurgents raising nuanced civilian casualty considerations,” Craparotta wrote in the final endorsement of the command investigation.

In an addendum to Waddell’s fitness report, Craparotta also said he did not agree with the recommendation that Waddell should not be considered for promotion with his peers.

“Anyone who has had to make split-second decisions in combat must recognize that judgment

is not always perfect in those situations,” he wrote. “We must be careful when we evaluate decisions that are made in combat when individuals have only seconds to react.”

Nevertheless, Craparotta left untouched the decision by Waddell’s battalion commander to relieve the first lieutenant of his XO position.

“This is the commander’s prerogative,” he wrote.