The 2013 Lieber Conference—From Gettysburg to Guantanamo: 150 Years of the Lieber Code and the Law of Armed Conflict—was hosted on November 21, 2013 at Columbia Law School by the Columbia Journal of Transnational Law, the Columbia Law School Human Rights Institute, the Roger Hertog Program on Law and National Security, and the Lieber Society of the American Society of International Law to mark the 150th anniversary of the Lieber Code.

The Lieber Code, which regulated the conduct of U.S. soldiers during the Civil War, was drafted by Columbia Professor Francis Lieber and signed by President Lincoln in 1863 as General Order No. 100. While the Code was mainly limited in application to Union forces, the rules were based on customary law, and strongly influenced subsequent international codification of the law of armed conflict. The Lieber Conference celebrated the 150th anniversary of the Lieber Code by exploring the origins and import of the Lieber Code in its Civil War context, its impact on the development of international humanitarian law, and its continued significance to modern challenges in armed conflict.

Remarks made at the Lieber Conference and essays reflecting on the issues discussed will be featured in Volume 53 of the Journal as part of the the “Lieber Series.” Additional content from the Lieber Conference will be published in the Journal’s online companion, the Bulletin. For more information, please visit jtl.columbia.edu/bulletin.
Lieber Conference Keynote Address

BRIGADIER GENERAL RICHARD C. GROSS*

Brigadier General Gross delivered the keynote address at the 2013 Lieber Conference, From Gettysburg to Guantánamo: 150 Years of the Lieber Code and the Law of Armed Conflict, hosted at Columbia Law School on November 21, 2013.

It is a tremendous honor to be asked to come here today. It is never hard to get me to come to New York City; this is a great town and I love coming here. Thank you, Professor Cleveland, for inviting me. This is the first time I have been here in uniform—I have never come in full dress uniform—and I get the sense that New Yorkers are not really used to seeing soldiers in uniform. When I was in the lobby of the hotel, I had several people hand me their bags or ask me to hail a cab. It has worked out fairly well so far; I made about $17 in tips, so I have that going for me.

For those of you who just came for lunch and the keynote remarks, thanks for being here because it has been a rough morning for this keynote speaker: we have had a series of people come in and debunk everything we thought we knew about the Lieber Code, and I was sitting in the back, cursing the entire time. But I am going to present to you the “orthodox view” of Lieber and the Lieber Code. I will leave it to the academics who, if they get another panel, can tell you what they think about the Lieber Code, or Lincoln’s Code, as one of our panelists was fond of calling it.

* Brigadier General Richard C. Gross is the Legal Counsel to the Chairman of the Joint Chiefs of Staff. He was born in Knoxville, Tennessee and achieved a B.S. in Computer Science from the U.S. Military Academy at West Point in 1985. He was commissioned as a second lieutenant in the U.S. Army and first served in the 82nd Airborne Division in Fort Bragg, North Carolina. In 1993, he graduated from the University of Virginia School of Law and entered the U.S. Army Judge Advocate General’s Corps. In 2009, he graduated from the U.S. Army War College with a Masters in Strategic Studies. Brigadier General Gross has multiple combat deployments to Iraq and Afghanistan. He has served as the principal legal adviser to the Joint Special Operations Command, the International Security Assistance Force in Afghanistan, and, most recently, as the Staff Judge Advocate for U.S. Central Command.

The views expressed are those of the speaker only and do not reflect the official policy or position of the U.S. government, the Department of Defense, or the Joint Staff.
This is a really important anniversary for this school. It is a very important deal for Columbia and, really, for the armed forces as well. I think it is amazing that you would celebrate this and it should be celebrated. I asked Professor Cleveland to show me the Lieber memorial at Columbia and we were not able to find it. There is no Lieber Hall, no statue of Lieber, no Lieber print, or anything here at the school. Hopefully, when we come back for the 200th anniversary, there will be.

I believe that the Lieber Code was one of the most influential pieces of work that has governed—at least, my life’s work and many of yours—what we call the “law of armed conflict” in the military and what others used to, and some still do, call the “law of war.” The Lieber Code was published on April 24, 1863. It was called the “General Order No. 100: Instructions for the Governance of Armies of the United States.” Why do we celebrate a general order from the Civil War, one hundred and fifty years later? Let me give you what we in the military call the “bottom line up front.” Let me tell you why we think the Lieber Code is so important. First of all, before Lieber wrote it, there was no single source documenting the law of armed conflict. Most of the law of armed conflict existed in various customs and usages; you would have found snippets of it in war strategy manuals in various languages in Europe, but there was no single source that a soldier or commander could go to in order to find out what the law of armed conflict was. So that was pretty important. Second, the Lieber Code went far beyond the Union Army. It was later adopted by the Confederacy and it grew to influence armies throughout Europe, South America, and other places across the globe. It also became the basis for some of the most important international humanitarian law treaties we have in the twentieth century, including the Hague Regulations and the Geneva Conventions. Finally, the Lieber Code actually went a long way towards helping establish racial equality in the period during and after the Civil War, because it required that black soldiers be treated the same as white soldiers when it came to combat. That was a major step in how the law of armed conflict developed.

This university has a unique link to the Lieber Code and Francis Lieber himself. So I thought it might be fun to talk about Francis Lieber, since everybody else has talked about the Code, because he was kind of an unusual character. You ought to be proud of him, but he was a little bit unusual. He was born either in 1798 or 1800; we are not sure because we think he lied about his age to enlist in the Prussian army. We think he did so because of a deep-seated hatred he had for Napoleon and what Napoleon was doing throughout Europe, so we think he lied about his age to get into the army. In
fact, as a child, he had hatched a plan to learn French and then disguise himself to try to assassinate Napoleon. That was one of his childhood fantasies. True statement! When he did enlist, he was wounded twice in the Battle of Waterloo; once in the neck and once in the chest, and actually was left for dead. Fortunately for us and for this conference, he survived.

He studied mathematics, received a Ph.D., and later studied topography. So he was a mathematician who knew how to make maps, who later wrote an influential piece of international law. He was never one to sit still very long; he actually ran off to fight in the Greek Revolution of 1821. I did not know there was a Greek Revolution of 1821, but there was and Lieber participated in it. He was briefly imprisoned twice for about four months as a political prisoner when he returned to Prussia, but was later pardoned. He wrote a book of poetry called Songs of Wine and Bliss, under a pen name. I will not be performing any of those poems, though tonight at the dinner we can if there is wine and bliss there! He immigrated to Boston in 1827.

What do you think his first job in Boston was? He was a mathematician with a Ph.D. and topography skills who had already started to write on policy, politics, democracy, and law. His first job: He managed a gymnasium in Boston where he met President John Quincy Adams, who used to swim there. So he started to gain influence in the United States. He next became an encyclopedia editor. He edited and created the Encyclopedia Americana, which was the second largest encyclopedia in the world. He actually helped Alexis de Tocqueville write his classic Democracy in America. In 1835, this gentleman from Europe, this soldier, this Yankee from Boston, moved south and spent twenty years at the University of South Carolina, where his writings on law, democracy, political theory, and ethics gained him a lot of attention. In fact, it gained him so much attention that the King of Prussia heard about his writings, pardoned him, and brought him back as a royal consultant for about a year. That is one of my dream retirement jobs, to be a royal consultant! When he returned to the University of South Carolina, he wrote—as most of the professors in this room hope to do—a textbook on American constitutional law, which was used for years throughout several U.S. universities and colleges.

Lieber never felt comfortable in the South. He was a strict abolitionist and an anti-secessionist who felt very strongly about these issues. Even though he lived there for twenty years, working at the University of South Carolina, he was very uncomfortable with it. In 1857, he took a professorship here in New York at what was then Columbia College. That is where our story starts to pick up with the
Lieber Code. He became, shortly after he arrived here, one of four professors who founded the law school at Columbia, which is, of course, in existence to this day. That series of events led up to the Civil War era.

It is important to know that Lieber had three sons. His oldest son, Oscar, fought for the Confederacy; his middle son, Hamilton, fought for the Union, was wounded at the Battle of Fort Donelson, and later lost an arm; and his youngest son, Guido, became an army lawyer for the Union Army and made a career out of the military. Talk about a family in conflict! Lieber was not only personally familiar with warfare from his own adventures, but he had sons who were serving in the Civil War, which brought it very close to home. When his son Hamilton was wounded at the Battle of Fort Donelson, he came into contact with General Henry Halleck. This encounter set into motion the events that eventually led to the Lieber Code. In those days, if you were wounded in a Civil War battle, you would have been sent to one of the nearby hospitals. Because there were so many wounded soldiers, hospitals started farming individuals out to whatever hospitals were in the area in order to get them the medical care they needed. These hospitals kept terrible records and often didn’t know where the wounded had been sent. It was not unusual for fathers of wounded sons to end up traveling long distances and searching for their wounded children in one of the area hospitals. In fact, Lieber went on a long journey to Tennessee to look for his son Hamilton, whom he had heard was wounded. During the course of his search, he met General Halleck who, at the time, was an engineer general. Lieber and General Halleck became friends. They had one thing in common: Halleck had written a book on international law as an engineer and, of course, Lieber had written on politics, democracy, and law himself. So they took up this friendship. Halleck would later become the General-in-Chief of the Union Army of the United States, the most powerful general in D.C. That gave him the ability to later reach out to Lieber.

The next major development was the Lieber lecture series. This was the next important phase for the Lieber Code, which is what we’re here to talk about today. He held this lecture series from October 1861 to March 1862. It was a series that every professor here would envy. There were even some reports saying that every single student at Columbia University, Columbia College at the time, attended these lectures. One hundred percent attendance, even from students who were not taking Lieber’s class! That is pretty amazing. I heard most professors would be lucky to get people in who are taking their class. Not only did all of the Columbia students attend these lectures, but outsiders came as well—again, something that
would be the envy of every professor in this room. *The New York Times* also printed every lecture that Lieber gave. These transcripts were then published by other newspapers as well; Lieber’s lectures got quite a bit of press attention throughout the country. Those lectures became the foundation of the Lieber Code.

The next evolutionary step in the journey of the Lieber Code came as General Halleck and others in the Union Army encountered the problem of the partisan rangers. The South was very fond of using guerrilla fighters, guerilla warriors, or guerilla men. These were fighters who were non-uniformed, who, during the day, would look like Union loyalists in a village, but at night would emerge to fight. They sound like the Taliban of today, for that matter. They would fight and then disappear back into the civilian population. There emerged a political-legal argument between the Union and Confederacy about the legitimacy of guerrilla warfare and of these individuals who were not known to be soldiers until they attacked. International law at that time held that, as long as the state commissioned you, you were a legitimate soldier and a legitimate combatant who could fight in the conflict. The Confederacy’s position was therefore to give a commission to the partisan rangers and allow them to fight in this manner. Halleck was very concerned and reached out to his friend, Professor Lieber, seeking his advice. Or, perhaps Lieber reached out to Halleck to provide his advice. Regardless of the sequence of events, Lieber wrote a very long and very difficult-to-read 6,000-word memorandum of law. But it contained the guts of a legal theory about when someone was a lawful combatant. This definition essentially contained the same elements that we use today under the Geneva Convention: a distinctive insignia or badge, to be identified; the fact of a legitimate chain of command as an agent of the government; and compliance with the laws of armed conflict. These are some of the same tests that we use today when dealing with combatants and determining whether or not an individual is a lawful combatant.

Halleck sought out Lieber again in December 1862 in light of several additional problems related to warfare and asked him to write a code of regulations. It became what we know today as the Lieber Code or, as Professor Witt has called it in his book, “Lincoln’s Code.” There is no evidence that Lincoln personally commissioned the Code or that he revised or edited it. We just do not have that information. But we do know that he approved it and that it was issued under his authority as the Commander-in-Chief, so whether called “the Lieber Code” or “Lincoln’s Code,” it was the official regulation for the Union Army. Later, the Confederates adopted it as well, after initially being quite derisive of it.
What makes the Lieber Code so groundbreaking? There are several reasons why I think it was a groundbreaking Code. First, it was written by what I call a “practitioner-scholar.” In the legal world, as in many fields, there is a continuum of individuals who write and consider the law in a particular area. On one side you have brilliant scholars who have devoted their lives to academia and do us a tremendous service because they think deeply about issues. They write about them and study them; their entire lives are built around scholarship, academia, and helping us think through problems. On the other side of the spectrum you have practitioners like me. In the middle, there are “practitioner-scholars,” who are a blend of both. Daniel Bethlehem is an example: he worked and served in government. Professor Cleveland has also worked and served in the U.S. Government and is a scholar. “Practitioner-scholars” serve a unique purpose by both theorizing about and operationalizing the law for practical, common-sense application to the real world. That combination cannot be beat. Lieber was such a “practitioner-scholar.” Consider that he personally participated in almost every situation imaginable under the law of armed conflict. He was a soldier, he was wounded, he was a prisoner, and, although not a prisoner of war, he spent time in a prison. He was familiar with the situation of being under the control of another state sovereign. He had sons who were also participants in warfare. This practical experience lent a great deal to his scholarship and to the Lieber Code; he knew the horrors of war.

While he knew what war was like, he also saw the balance, if you will, between humanitarian and justice concerns. We could have had a world where there were no rules when it came to warfare. This is an idea many in the eighteenth century supported. Total war would have ensued. Some, such as Clausewitz, made this argument: War should be brutal, hard, mean, and short. The idea was that the rougher and more brutal a war is, the shorter it will be and therefore the more humane it will be in the long run. On the other hand, there is the view that all war is bad and that humanitarian concerns override every possible action. This is essentially a pacifist view that asserts that virtually no force is allowed in warfare. The problem with both of those views is that they are extreme. In the middle somewhere lies a balance of humanitarian and justice considerations. Certainly, wars can be fought for just reasons. For example, an unlawful attack may be followed by a necessary response using force as a last resort in order to restore the peace.

Thus there are certainly justice concerns when it comes to warfare, but there are also humanitarian concerns. A total war takes us away from what we are: from our values as human beings and
from our values as a Western civilization. Lieber believed in the idea of a short and tough war, but his Code reflected the humanitarian concerns that we see today in the law of armed conflict. There are concerns about the treatment of prisoners, non-combatants, women and children, and other concepts of humanitarianism reflected throughout that Code. One of the most important provisions in Lieber’s code is the idea of military necessity: The idea that you do not take an action in warfare unless it is indispensable; unless it is necessary to meet the needs and aims of the war itself. Military necessity is a principle of war which exists to this day and prevents a state from doing just anything anywhere in a war. There has to be a reason for the action; it has to be justifiable as a means or a method of warfare.

Finally, the Lieber Code was an important step in recognizing racial equality. We still have a long way to go in this country, but, back then, the fact was that the Confederacy was treating black soldiers differently from white soldiers who were captured. Under the Lieber Code, that was unacceptable. Soldiers, irrespective of their race, were treated as combatants entitled to the same rights. That statement was an important step towards recognizing racial equality in this country.

In sum, war is an ugly business. There is no doubt about it. I have seen it myself. As a lawyer advising senior commanders on warfare, I have never personally aimed a weapon and shot it. That has never been my role. But I have seen the after-effects of war. Once, after an allied airstrike in Kunduz, in the northern part of Afghanistan, which caused a great number of civilian casualties, I traveled with General McChrystal to visit the victims. We visited the civilian victims of an air strike in a hospital the day after it took place. It was incredibly difficult to see the innocent civilian victims, who were going about their day-to-day routines, now badly burned and injured. That does not include the civilian casualties, as many were killed. We were faced with the living, the looks in their eyes, and the pain they were undergoing. I will tell you that it moved me and it moved General McChrystal. It influenced him to take further steps to protect civilians in Afghanistan. During the remainder of his term as commander, there were a number of different policies put in place to dial back and ensure the protection of civilian populations. Nothing will change your perspective on war like seeing somebody in a hospital bed, especially a child.

It is not just the civilians, but also the soldiers, who bear the horrors of war. I live in Fort Myer in Virginia, which is adjacent to Arlington National Cemetery. Just yesterday—and I see this a lot—as I was driving to catch the train to come here, I passed the chapel.
There was a little boy crying while his mom comforted him. I thought, “I wonder what is going on there?” Then farther down from the chapel, I saw an entire company of marines in full dress uniform and a horse-drawn caisson with a flag-draped coffin. I put it together and realized I had seen a child who would never talk to his dad again. That is very difficult; war is an ugly business. But let me tell you: Without things like the Lieber Code—without a code that requires us to follow basic humanitarian principles, fight wars the right way, and maintain our values as a civilization—war would be a lot worse. The last twelve years would have been a lot worse for a lot more people. That is the basis today for us to thank Francis Lieber for what he did. It is a code that merits further study and celebration. Thank you very much for giving me the opportunity to give these remarks today.