Rule of Law(yers):
Legal Expertise in the United States Military and the Prosecution of Modern Warfare

Tracey P Blasenheim

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Adviser: Ronald R. Krebs

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Chapter One: Introduction

During an exercise, the 2nd Brigade Combat Team of the 82nd Army Airborne Division practices a nighttime drop into a firefight, with 800 trainers playing the role of non-uniformed combatants—inspired by the Islamic State of Iraq and Syria (ISIS)—who have taken control of a small desert town.[1] Parachuting into this war zone with the rest of the 82nd's command staff is Major Megan Wakefield, a military lawyer (JAG[2]) with the 82nd who specializes in the provision of legal advice on the battlefield. Throughout the mock battle, she is a key node in the brigade's Tactical Operations Center, answering questions, offering suggestions, and posing concerns about the legality and wisdom of various decisions. A reporter, embedded with the unit to observe the action, emphasizes the unmistakable influence that Major Wakefield wields over every decision, noting that "[w]hen Maj. Wakefield clears her throat, heads swivel."

For the armed forces of the United States, lawyers like Major Wakefield have become as much a part of warfare as armed drones, satellite imagery, and precision-guided munitions. Today, battlefield lawyers perform key functions in everything from assessing collateral damage estimates to reviewing the legality of cyber operations and determining when a civilian becomes a legitimate target. Whether monitoring drone feeds

[1] "ISIS, the Laws of War, and Combat Lawyers" http://www.huffingtonpost.com/david-wood/isis-the-laws-of-war-and-_b_5966718.html

[2] Note on terminology: unless otherwise stated, I use the terms "JAG," "judge advocate," and "military lawyer" interchangeably to refer to U.S. military lawyers from any of the five service branches (Army, Navy, Air Force, Marines, and Coast Guard). For the sake of analytical clarity and consistency, I do not adopt the more colloquial operational nickname of "judge" and do not refer to a military lawyer in the two service branches that fall under the authority of the Judge Advocate of the Navy—the Coast Guard and Marines—as a "JA" rather than a "JAG". Additionally, I adopt a number of other phrases, such as "operational attorney" or "battlefield lawyer" to refer to the primary subjects of this dissertation: military lawyers with significant operational duties.

or parachuting into combat zones with special forces units, JAGs now play an essential role in the conduct of modern warfare. The importance of these soldier-lawyers—who compose the bulk of the 10,000 attorneys currently serving in the Department of Defense—was summarized at the end of the capstone session of a mandatory legal training course for newly promoted battalion and brigade commanders that I attended in the spring of 2018. The departing trainees—all colonels and one-star generals with approximately 15-20 years of experience in the military—were handed sheets of paper with bullet points summarizing the course's core pearls of wisdom, the first of which read: "Involve your [JAG] legal adviser in almost everything"[3].

However, just thirty to forty years ago, the involvement of lawyers in operational decision-making would have been unthinkable. While JAGs have existed since 1775 to conduct courts-martial, the battlefield and command tent were off-limits to US military lawyers until the 1970s. Through the U.S.-Vietnam War (1964-1975)[4], JAG activities were almost exclusively limited to administering military justice and providing legal assistance to individual soldiers on areas such as tax law, the preparation of wills and power of attorney documents, and immigration issues. Over the forty-five years since the JAG Corps first began providing legal support to combat operations, military lawyers have become influential, highly trusted participants in military decision-making. This

[3] Fieldwork notes: Senior Officer Legal Orientation Course (03.16.18). Charlottesville, VA.
[4] Given this dissertation's focus on the United States, I refer to this conflict—which was actually just one half of a decades long civil war and struggle against multiple forms of colonial rule in Vietnam—through its more U.S.-centric colloquial name 'the Vietnam War'.

dissertation explains and unpacks the consequences of the proliferation and empowerment of these 'warrior lawyers'[5]—a process I term military 'lawyerization'.

In this chapter, I first define military 'lawyerization', provide context for my focus on the United States, and offer an overview of how the role of the JAG has changed since the 1970s. In this, I identify several perplexing elements regarding both the causes and effects of this transformation and outline the dissertation's core research questions. In the next section, I evaluate how the relevant scholarly literature on military legal advisers has addressed the 'lawyerization' of the armed forces (in the U.S. and beyond) as well as the conceptual resources provided by other relevant literatures on international law and legal expertise. I argue that the existing scholarship on this subject cannot offer a full account of the causes and effects of the rise of U.S. JAGs because it treats military 'lawyerization' as being epiphenomenal of macro-level changes in warfare and the intrinsic character of international law. While some of this scholarship begins with the assumption that the law constrains war and others argue that war-making is enabled by the international legal system, both approaches share an unstated presumption of military 'lawyerization' as an outcome, expression, or mechanism of these larger forces. In contrast, my argument—which I outline in the subsequent section—takes JAGs as agents who respond to openings created by structural transformations and, as such, have re-produced themselves as 'risk managers' in the prosecution of warfare. This position as

[5] I borrow this term from Jack Goldsmith's (2012) account of JAGs in the War on Terror, who he references as the 'warrior lawyers' of the U.S. military. Charles Dunlap (2001, 12), the JAG who coined the term 'lawfare', has also invoked this term to describe the newer generations of the JAG Corps. Commanders have frequently invoked related terminology such as "carnivore JAGs" or "attorney warfighters" (McChrystal 2016, xii) that indicate not only a change in function and responsibility within the military but also a shift in identity from the pre-Vietnam War era.

'risk managers', I argue, leads military lawyers to combine the constraining and enabling aspects of the law—emphasizing different combinations of these aspects based on their perception of legal and legitimacy risk. In the chapter's penultimate section, I provide a synopsis of my research methods, followed by a brief final section in which I offer an overview of the subsequent chapters of the dissertation.

Military 'Lawyerization' and Research Questions

Operational legal advising has been encouraged by humanitarian advocates for militaries around the world since at least the late 1970s when an article requiring the inclusion of such advisers was included—without significant controversy—in the 1977 First Additional Protocols to the Geneva Conventions of 1949. However, this article provided little more than normative encouragement towards 'lawyerization', as its text leaves the number, form, and positioning of legal advisers entirely up to state parties and presents no mechanism for enforcement[6]. As such, with the exception of a small handful of advanced industrial states with close military ties to the U.S., operational legal advisers were still relatively rare around the world at the close of the 20th century. In contrast, I estimate that today *at least* forty states currently field operational legal advisers with their forces, with those numbers having grown year by year over the 2000s and 2010s[7].

[6] The gradual delegation of operational duties to legal experts by militaries coincided with the inclusion of Article 82 of Additional Protocol I (1977) to the Geneva Conventions, which stipulates that all signatory states and parties to any armed conflict "shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level." 174 states are party to AP I, and Article 82 is widely viewed as having attained the status of customary international law.

[7] While there is virtually no global data on military 'lawyerization', I have collected information on the scale of this phenomenon through open-source research and interviews and fieldwork conversations at international military legal conferences and training centers. In the conclusion, I provide a rough overview of this growing database and further discuss these global trends.

I define military 'lawyerization' as increases in the deployment and influence of legal advisers in the conduct of military operations. I break down this category into two axes of evaluation: the 'extensiveness' and 'intensiveness' of operational lawyering. The 'extensiveness' of legal advising refers to both the size of the legal adviser corps and the positions in the military hierarchy where legal advisers are deployed. I refer to militaries with larger numbers of legal advisers (relative to the overall size of the armed forces), as well as militaries that attach legal advisers to units and decision-making chains at the tactical or operational level of command, as being more 'extensively' deployed than in militaries where only the top brass has access to operational legal advisers.

'Intensiveness' refers to the degree to which military lawyers are involved in operational activities—rather than just administrative or military justice duties—as well as the degree of access and influence they wield in operations. Having legal advisers around does not necessarily mean that they are effectual or involved in operational decision-making. As such, I argue that militaries that require key operational activities—such as targeting or detention—to involve the input of a lawyer, or where levels of trust between military officers and their lawyers are high, to be more 'intensively' lawyerized than those that do not demonstrate such traits. Increases in 'lawyerization' across either axis can be evidenced by formal measures—such as laws, military regulations, or formal orders specifying the deployment of legal advisers at a particular level or requiring their involvement in battlefield activities—as well as informal ones—such as the *de facto* involvement of legal advisers in various activities or levels of command, or the degree of trust that exists between advisers and commanders.

I take these two axes as heuristics that enhance the conceptualization and operationalization of 'lawyerization' and its constituent parts. The majority of states that have embarked on some program of military 'lawyerization' would be best described as featuring low levels of both intensiveness and extensiveness. As an example of high extensiveness but low intensiveness, the Chinese military fields tens of thousands of military lawyers; however, there is little evidence that these legal advisers are involved in key operational decisions or that strong relationships exist between commanders and military legal advisers. Conversely, as an example of low extensiveness but high intensiveness, the Israeli Defense Forces employ a relatively small number of operational attorneys who are only attached to higher headquarters; however, these operational attorneys have considerable influence over decision-making at the levels of command where they are present, including formal veto power over the use of force in certain circumstances. There are only two states that have featured high degrees of military 'lawyerization' across axes of both intensiveness and extensiveness for at least the last decade[8]: the United Kingdom (U.K.) and the United States.

This dissertation focuses almost entirely on the United States for three reasons. First, as the most materially powerful, extensively deployed, and active military in the world, this study provides insight into military legal advising in a large number of conflicts around the world. While the U.K. has also been party to many of these deployments, it has engaged in few military actions in the 21st century that have not been led by the U.S. Second, the U.S. Department of Defense not only boasts more operational

[8] The militaries of both France and Denmark also seem to have reached high degrees of intensiveness and extensiveness, but only since the start of this study in 2015.

attorneys than any other state, but the U.S. was also the first military to extensively deploy legal advisers on the battlefield. Focusing on the first adopter is important for this study since country cases of military 'lawyerization' are highly interconnected. The U.S. alone had no prior practical 'model' on which to base its deployment of operational legal advisers and thus primarily integrated military lawyers based on its own institutional and operational conditions. The same cannot be said for other states. As such, studying the initial factors and processes that made this novel phenomenon possible offers unique insights. Third, and following the prior point, U.S. 'lawyerization' has had a significant impact on the proliferation and form of military legal advising around the world. In this, the practices of U.S. JAGs have diffused to other states, both as a general model and, more directly, through the North Atlantic Treaty Organization (NATO), U.S. military assistance programs, and the occupations of Afghanistan and Iraq. Focusing on the U.S. model therefore potentially offers much broader analytical leverage about military legal advising.

Military 'lawyerization' in the U.S. has unfolded since the 1970s. In terms of 'extensiveness,' the relative size of the military's legal community has roughly quadrupled during that time. At the height of the Vietnam War buildup, the ratio of Judge Advocates in the U.S. Army to total active-duty personnel was roughly 1/1050. The ratio of Army JAGs to total personnel in 1980 roughly doubled to 1/525 and then doubled again to 1/270 by 2010[9]. Furthermore, during that time operational lawyering has

[9] These figures actually understate the expansion of operational lawyering in the JAG Corps during these years. First, military justice issues across the service branches dropped dramatically during this time period with the institution of the all-volunteer force. Second, many of the administrative duties that previously occupied the time of military lawyers have been since passed on to uniformed paralegals—whose ranks

migrated down the chain of command. In Vietnam, JAGs were almost exclusively found in rear-deployed command centers, attached to armies (50,000+ soldiers), corps (20,000-45,000 soldiers), and divisions (10,000-15,000 soldiers). Today, JAGs are also integrated into the staffs of far smaller, tactical units. By 2010, the Army and Marines were both assigning two JAG officers—one dedicated specifically to operational issues—along with a team of paralegals to each brigade (2,000-5,000 soldiers), and in practice, these brigade lawyers also provide advice to battalion commanders (100-1,000 soldiers). Special operations units—which by 2010 had taken over a significant portion of combat duties—feature even higher lawyer-to-troop-strength ratios, with military lawyers consistently deployed to battalions and frequently advising decisions made at the company level (60-200 soldiers).

Changes in JAG 'intensiveness' during this time have been no less dramatic. In 1970 neither formal authority nor precedent gave JAGs any place in battlefield decision-making. Most JAGs in the Vietnam War didn't even possess the necessary clearance to attend operational planning meetings, let alone to ask questions in dynamic combat situations. In the 1970s JAGs were formally tasked with ensuring that U.S. operations complied with international law; however, the first generation of operational attorneys reported significant resistance and opposition to the involvement of lawyers in wartime decision-making, specifically around combat decisions. Over the course of the 1980s and 1990s, these sentiments among military officers steadily waned, and military regulations, doctrine, and training have since strengthened the integration of legal advising into

have also swelled—as well as civilian attorneys with the Department of Defense. Not only are there currently more JAGs, but more of their time is devoted to operational issues.

standard warfighting practices such as targeting. Today, military lawyers are expected to provide input on even the most sensitive areas of military decision-making.

Furthermore, military legal advice has become highly influential in operational decision-making, despite the fact that JAGs hold no formal authority to do so. “I think a commander who takes an action over the legal objection of his legal advisor, does so with peril,” a recently retired JAG explained to me. “It's really hard for a commander to take an action that his lawyers inform him isn't lawful” (Interview 01.02.05). This observation was echoed by almost all of my interviewees and in written statements retrieved from archives—on the part of JAGs as well as commanders and staff officers. The strong influence of JAGs in combat has also been highlighted by prior scholarship on the activities of military lawyers. For example, in her 2015 study of the role of international law in targeting, Janina Dill remarks “[t]he entrenchment of professional [JAG] legal argument in military decision-making is arguably the most important pathway of [international law] into decision-making in contemporary US wars” (Dill 2015a, 146–47). Similarly, Jack Goldsmith has described “the marriage of the military and the law, and the attendant rise of warrior-lawyers who are deeply integrated into military operations” as “one of the most important but underappreciated developments in modern warfare” (Goldsmith 2012, 124).

Additionally, not only is JAG advice often heeded, but commanders also actively seek out the counsel of their lawyers, rather than feeling obligated to obtain legal review or begrudgingly accepting their assessments. For example, General David Petraeus told a DoD investigative panel in 2005 that “[m]ilitary lawyers were true combat multipliers in

Iraq…I tried to get all the lawyers we could get our hands on—and then sought more"[10]. This demand for lawyers is widely expressed by commanders and pertains to not only thorny legal issues but also decisions involving legitimacy and strategy. Emphasizing this point, a Marine lieutenant general explained: "I probably had more conversations with my attorneys about things that weren't really specifically about the law, just, you know, what do you think about this?... I don't know any commander that has not done this"[11]. Succinctly summarizing these trends, a Navy vice admiral similarly remarked: "I wanted my lawyers, my *military* lawyers, to be with me all the time"[12].

This close relationship between commanders and their JAGs is counterintuitive, given that official statements on the function of JAGs in operations has framed them as mechanisms of oversight. The initial set of DoD reforms in the 1970s that eventually ascribed operational duties to military lawyers were explicitly designed to "[e]nsure that the law of war and the obligations of the United States Government under that law are observed and enforced by the Armed Forces of the United States" through training and monitoring programs[13]. This portrayal has been continued by top officials in the Department of Defense in more recent years, who have publicly highlighted the work of the thousands of JAG lawyers in the US military as a welcome symbol of commitment to legal and humanitarian values amidst the scourge of war. In a widely covered 2016 speech on US targeting practices at NYU Law School, the General Counsel to the

[10] Quoted in *Joint Publication 1-04: Operations,* II-6.
[11] "Meeting of the Independent Panel" *Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy* (10.13.10) 69. On file with author. Hereafter 'Navy Panel'.
[12] "Testimony to Advisory Panel" *Legal Services in the Department of Defense: Advancing Productive Relationships* (06.02.2005) 29, *emphasis mine.* On file with author. Hereafter 'DoD Panel'.
[13] "Subject: DoD Program for the Implementation of the Law of War (Short Title: DoD Law of War Program)"

Department of Defense devoted a third of her talk to describing the influence military lawyers have in US operations, asserting that the involvement of JAGs "[helps] the United States serve as a beacon of liberty, security and the rule of law" (O'Connor 2016). Detractors of 'lawyerization' have articulated a similar assessment of the function of military lawyers, albeit framed in a negative light. For example, former Secretary Defense Donald Rumsfeld expressed his frustration with what he saw as the limitations imposed by the proliferation of lawyers, describing the 'lawyerization' of the DoD in the following way:

> One of the notable changes I had observed from my service in the Pentagon in the 1970s was the prevalence of lawyers—in almost every office and in nearly every meeting. By the time I returned as secretary in 2001, there were a breathtaking ten thousand lawyers, military and civilian, involved in nearly every level of the chain of command across the globe (Rumsfeld 2011, 553).

Similar critiques of military 'lawyerization' have continued in piecemeal fashion—primarily by American conservatives—in particular around instances where the prosecution of U.S. service members for violations of LOAC has garnered front-page attention[14].

Whether presented as manifestations of the rule of law in war or as irresponsible interlopers in the decisions of the command, the discourse of U.S. public officials has framed JAGs primarily as a form of constraint on the U.S.'s use of force on the battlefield. Not only is it surprising that the U.S. would integrate so many lawyers into its

[14] See, for example, the trials of Mathew Goldstein and Eddie Gallagher, in which public officials—including then-President Donald Trump—directed particular ire towards JAGs for enacting and enforcing compliance with rules that detractors believe to be harmful to the U.S.'s war efforts and unfair to soldiers on the ground.

operations, but it's also unclear, given that JAGs have no formal authority over decision-making, why the word of those lawyers—if they were indeed placed in operations to monitor for compliance—would come to hold so much weight in a command center and why commanders would turn to them for advice on both legal and extra-legal matters. To address these issues, my dissertation poses two core research questions: *Why has the U.S. military become so extensively and intensively 'lawyerized' since the 1970s, with military lawyers obtaining positions of not only influence but broad trust on the command staff? As a result of 'lawyerization,' how do military lawyers use their expertise to influence decision-making and shape the U.S.'s deployment of military power?*

Existing Literature on Military 'Lawyerization'

A small number of scholarly texts have offered direct or indirect narratives of the 'lawyerization' of the U.S. military (Jones 2020; Borch 2001; Goldsmith 2012; Dickinson 2010; Hodges 2018; Dill 2015; McConnell 2016; Betts 2001) and/or those of other states (Jones 2015; Craig 2013; Cohen 2011; Weizman 2010; 2011; Erakat 2019). A broader literature that details various aspects of the causes and effects of 'lawyerization' also exists within the JAG community[15]. At the forefront of this modest, but growing, literature is Craig Jones' *The War Lawyers* (2020)—which offers a rich, detailed account of how and to what effect military lawyers in the U.S. and Israel have

[15] The literature by judge advocates covering various aspects of the subject is vast. Each branch of the JAG Corps has between one to three of its own military legal journals and JAGs—both active-duty and retired—have increasingly been publishing in scholarly law journals. In addition, JAGs have authored a number of online publications, conference proceedings, textbooks, and full-length manuscripts covering various aspects of the practice of law in war. Many of these materials are cited here, with researching into a great many more having been conducted for the preparation of this dissertation.

come to shape the conduct of warfare. Despite the many achievements of Jones' groundbreaking text, I argue that *The War Lawyers,* as well as the broader scholarship on military lawyers, provide only partial answers to my research questions because they conceptualize military lawyers as functional extensions of the Laws of Armed Conflict (LOAC)[16], mediated through different schools of macro-level thinking on power and international law. Approaches that treat international law as a limitation on the power of the state frame JAGs as mechanisms of compliance. Conversely, theoretical accounts of international law as either an ineffectual constraint on state power or a form of power itself become reified in the figure of the military lawyer who functions to permit and legitimate violence. In other words, these accounts locate the answers to the core questions of war *lawyers* in the workings of the *laws* of war.

In making this argument, I do not dismiss the importance of these macro-theoretical insights and their relevance for understanding 'lawyerization'. Each contains elements of truth and reveals something about the way law and war are brought together in the 21st century. Rather, my account combines elements of these theories on the structural workings of international law with an emphasis on military lawyers as *agents* rather than *outcomes* of particular conceptualizations of law in global affairs. In doing so, I demonstrate how a more balanced attention to both legal structures and JAG agency can provide answers to my research questions that are not only more empirically

[16] Note on terminology: throughout this text I refer to the body of international law that is elsewhere called the *jus in bello* laws of war, international humanitarian law, or the *jus in bello* laws of armed conflict through a shortened version of the of the most politically 'neutral' of the three, the laws of armed conflict (LOAC).

comprehensive but also provide a novel framework for understanding contemporary patterns of war, law, and expertise in world politics.

The most commonly referenced explanatory factor for 'lawyerization' in this literature frames JAGs as solutions to broader problems of legal 'complexity' in modern warfare (Jones 2020; Borch 2001; Goldsmith 2012; Hodges 2018; Dill 2015). This largely functionalist account explains that militaries have turned to lawyers to help them navigate an increasingly confusing web of authorities and restrictions. Specifically, this account highlights two core factors: there are both more rules and more nuanced rules for soldiers to follow, and the 'irregular' nature of late modern warfare, as well as the increased precision of weaponry, make these rules even more challenging to apply. This explanation contains a number of similarities to a long-standing functionalist explanation for compliance with international law, which argues that noncompliance is often the result of a surfeit of capacity rather than motivation (Chayes and Chayes 1993; 1995). These accounts further explain that the challenges of prosecuting military campaigns that do not resemble battles between the uniformed soldiers of states have made it nearly impossible for commanders and operators, on their own, to comply with the rules of war.

On the one hand, this account is widely espoused in JAG writings and was frequently invoked in my interviews with military lawyers, most of whom believe that their positions are the result of the increased complexity of the law in war. However, there are a couple of issues with this explanation. First, LOAC has *always* been messy and reliant on unruly categories and blurred boundaries (Kinsella 2011; Megret 2006; Anghie 2005; Kinsella and Mantilla 2020). Arguments premised on the unprecedented

nature of modern law and war often overstate the novelty of these changes. Second, this account begs the question of *why* the U.S. military would be motivated to go to these lengths to comply with the law in the first place. The literature on capacity and compliance explicitly starts with the analytical wager that states generally wish to be in compliance (Chayes and Chayes 1993); however, this assumption cannot serve as a solid basis for explaining discreet phenomena. Third, these accounts tend to portray the U.S. military as having become, in recent decades, ensnared in a thick web of new rules and modes of application. Yet, the increased 'complexity' of LOAC has not simply happened *to* the U.S. military—and military lawyers in particular. Such processes have often occurred with the assent if not heavy activity of the United States, most notably (since the 1970s) through the creation of countless 'soft law' documents and handbooks outlining the byzantine application of LOAC in counterinsurgency campaigns, cyber warfare, drone attacks, and outer space[17].

To supplement this account of increasing 'complexity', some of the literature on 'lawyerization' further argues that the U.S. has applied this web of rules because it has come to recognize the benefits of engaging in practices of 'strategic restraint' in modern warfare (Jones 2020; Goldsmith 2012; Betts 2001). This argument reflects broader theories of international law which argue that states agree to be bound by the law when they have sufficient incentives to do so (Keohane 1997; 1984; Krasner 1982; Gilpin

[17] For example, the DoD's *Law of War Manual* (2016) is hundreds of pages long and outlines, in detail, the U.S.'s view on the application of LOAC in these areas and more. It was the culmination of years of work to consolidate what was already a sprawling set of U.S. handbooks and publications on the application of LOAC. Furthermore, active duty and retired U.S. military officers—most JAGs—have further added to the current complexity

1981; Ikenberry 2011; Guzman 2008; Goldstein et al. 2000; Martin 2011). In regard to military innovation and behavior, James Morrow (2014) provides precisely such an account of the creation of legal training and monitoring practices by state militaries in response to incentives of reciprocity engendered by developments in LOAC. Instead of reciprocity, accounts of military 'lawyerization' emphasize how asymmetric warfare, the prominence of human rights discourse, and the capacity of third parties to monitor battlefield conduct have created significantly heightened incentives for the U.S. military in the second half of the 20th century to demonstrate the legal legitimacy of its actions and mitigate civilian casualties. As such, JAGs emerge in operations as a result of the enactment of these broader world-historical transformations in the conduct of warfare, in which war is forced to become more "judicial" (Jones 2020).

This account provides an important first step in understanding 'lawyerization'—one which I adopt, in part, in my own analysis. However, I also argue that it cannot provide a complete picture. As Morrow describes, states face significant, costly hurdles in effectively corralling their own soldiers—who chafe at these top-down impositions on their wartime conduct—to go along with programs of 'strategic restraint'. First, it's not clear—if 'lawyerization' were driven primarily by programs of 'strategic restraint'—why JAG advice has remained informal, with commanders retaining the authority to disregard the assessments of their lawyers. Second, while the U.S.'s 'War on Terror'[18] offers ample

[18] I use this term to refer to all U.S. military deployments around the world since September 11, 2001 that the U.S. government has claimed fall under the umbrella category of the 'Global War on Terrorism'.

evidence of U.S. soldiers becoming frustrated with legal restrictions[19], the fact that commanders have come to not only heed legal advice but embrace their lawyers, and even demand greater legal expertise on their staff, is not easily accounted for by these arguments and points to the presence of other factors and processes.

One such potential explanation for this positive attitude towards JAGs in operations comes from accounts of military lawyerization based on processes of 'legal diffusion' (Dickinson 2010; Dill 2015a; Hodges 2018). These accounts point to similar transformations in the valuation of law and attentiveness to civilian casualties in modern warfare but view these values as having become largely internalized within the military itself. Such explanations follow the insights of broader theoretical arguments about how states acquiesce to the requirements of the law because they come to adopt the norms and preferences expressed in those rules (Chinkin 1989; Price 1995; Finnemore and Sikkink 1998; Finnemore 2003; Slaughter 1995; Simmons 2000); become socialized into treating the law as a shared expectation of appropriateness (Goodman and Jinks 2003; 2004; 2005; Johnstone 2011); or value the form of international law as an expression of legitimacy (Franck 1990; 1995; Brunnée and Toope 2010). As such, these accounts frame 'lawyerization' as an expression of the U.S. military's institutional and social commitment to LOAC (Dickinson 2010), as a reflection of the norms and practical guidance offered by LOAC (Dill 2015a), or as an outcome of internalized legalism within the military (Hodges 2018). As such, these various mechanisms of 'legal diffusion' offer

[19] See, for example, "Screwed by the rules of engagement" http://outsidethewire.armytimes.com/2012/04/16/this-week-in-army-times-print-edition-screwed-by-rules-of-engagement-rough-jumpers-list-of-new-commanders/

one set of conceptually plausible accounts for why JAG advice is largely heeded in combat—albeit by framing 'lawyerization' as epiphenomenal of broader transformations.

A different potential explanation for the favorable attitude of commanders towards their lawyers emphasizes dynamics of 'legal indeterminacy', in which the structural ambiguity of international law allows the military to exploit the legal system (Jones 2015; 2020; Craig 2013). These accounts reflect theories of the structure of international law (Koskenniemi 1989), the international system (Morgenthau 1940; 1978), and the capacity of powerful states to take advantage of international legal indeterminacy (Hurd 2017), which argue that actors utilize the law to fit their interests. As such, 'lawyerization' can be explained as a shrewd response by the U.S. in which its disproportionate power is used to "put the laws of war to work for the U.S. military" (Jones 2020, 90). Therefore, commanders have become attached to their lawyers because JAGs actually enhance their capacity in warfare. While this explanation is also conceptually plausible, it too presents JAGs as epiphenomenal of the structural conditions of international law, albeit with a conflicting set of theoretical assumptions as 'normative diffusion'.

I argue that this epiphenomenal emphasis in the literature on military lawyers—which takes JAGs as vessels of macro-level features of the international legal system—has trapped the existing scholarship into relatively one-sided conclusions about the role of JAGs in operations and the implications of 'lawyerization'. One-half of the literature—drawing on theories of 'strategic restraint' (Goldsmith 2012, 131) and/or 'legal diffusion' (Hodges 2018; Dill 2015a)—comes to the conclusion that U.S. military

lawyers function to *constrain* the U.S. military. This portrayal broadly coheres with the predominant portrayal of international lawyers as 'watchdogs' who aim to bring state behavior in line with international law through their roles as activists (Alter 2014; Keck and Sikkink 1998), government officials (Slaughter 2004), judges (Alter 2014), and bureaucrats in international organizations (Barnett and Finnemore 2004; Brunnée and Toope 2010). Through this lens, JAGs "seek to operationalize…respect for human rights and the imposition of limits on the use of force" and thus function as "a group of lawyers with a clear mission to enforce adherence to [the law of war]" (Dickinson 2010, 3, 11). This perspective is also articulated by accounts that view 'lawyerization' as a worrying development for the United States that has tied the hands of the nation's warriors (Betts 2001).

The other half of this literature—employing theories of 'legal indeterminacy'—portrays JAGs as *enabling* the exercise of military power. This framing of 'lawyerization' draws on either realist scholarship on the inability of international law to bind states or critical accounts of how international law acts as a form of power to establish hegemony[20]. It also echoes recent works on the conduct of government lawyers that emphasize how international legal experts can serve as 'apologists' who enhance state power (Brooks and Wohlforth 2008; Kennedy 2006; Lorca 2014; Jochnick and Normand

[20] This scholarship diverges sharply over the relationship of law to power. Realist scholarship largely frames the permissive application of the law as an expression of the failure of law to tame power in the international system. Critical scholarship, however, frames permissiveness as a sign of the power of the law—rather than as a sign of the law's impotence—specifically the power of certain states to establish and maintain hegemony. This distinction leads each camp to a fundamentally different understanding of how the law, and lawyers, can 'enable' the use of military power and the use of force. However, for the sake of simplicity, these two camps are merged in the current discussion.

1994). For example, Jones concludes that "live legal input [from JAGs] [enhances] operational activities and it does so by channeling especially rapid and ostensibly arbitrary forms of violence through legal process…towards more legitimate or legally sanctioned outcomes" (Jones 2020, 177). In this, he argues that "violence…is *enabled, legitimized, and extended* by" the work of military lawyers (Ibid., xxxii, emphasis in original) because they are uniquely equipped to "enable military operations [to use force] without jeopardizing their legality and legitimacy" (Ibid., 136). As such, Jones explains, JAGs deploy their legal expertise to not only permit the use of force but also to engage in practices of "law-making", in which the legally guided 'transgressions' of the armed forces serve as the groundwork for the gradual revision of the law itself, to the benefit of the military. This body of scholarship on U.S. JAGs is reinforced by similar findings of scholarship on the effects of military lawyering in the Israeli Defense Forces, which describe the practices of legal advisers as largely permissive (Craig 2013; Jones 2015; Erakat 2019) and/or engaged in law-making activities as well (Weizman 2010; Cohen 2011).

As such, this literature emphasizes either the *constraining* or *enabling* aspects of military 'lawyerization' but cannot account for both. Jones (2020) comes the closest to contesting this binary. He repeats on a few occasions that "the laws of war both enable and constrain violence" (8) and begins his text by remarking that "[t]his book does not claim that militaries employ war lawyers only as apologists for military violence" (xxx). However, over the course of his text, Jones' almost exclusive focus on the enabling capacity of the law runs contrary to these declarations. Ultimately, Jones concludes that

"[t]he malleability of targeting law means that its constraining function often loses out to its enabling function" (242) and that the near-exclusive function of military lawyers is to use the indeterminacy and complexity of LOAC "for [the military's] own tactical and strategic purposes" (283). While Jones correctly identifies important aspects of military 'lawyerization', he has not captured the full picture of what JAGs do.

There is good reason to question this binary approach to law and war. First, recent research on international legal expertise indicates that lawyers don't either constrain or enable the state but engage in complex practices that enact both sets of effects (Nuñez-Mietz 2016; Sanders 2018; Aalberts and Gammeltoft-Hansen 2018; Rajkovic, Aalberts, and Gammeltoft-Hansen 2018). Second, this portrayal does not hold up to empirical scrutiny. Throughout my interviews, archival research, and fieldwork in JAG training courses I consistently encountered mobilizations of legal expertise that oscillated between and blended practices of constraint and enabling, albeit with a skewed *overall* balance that leans towards enhancing the U.S. military's capacity to conduct warfare. Third, I argue that breaking apart this binary—and starting from the analytical position of viewing JAGs as agents in their own right, rather than as outcomes, reflections, or mechanisms of the international legal system—offers the most comprehensive account of how JAGs have established themselves as trusted members of the command whose value extends *beyond* the law.

Military 'Lawyerization' As 'Risk Management'

I argue that a closer look at the core techniques, relationships, and self-understandings of these military lawyers is necessary for explaining the causes and consequences of military lawyerization. Regarding the causes of 'lawyerization', I begin my argument in a similar fashion as accounts that emphasize how the U.S. engaged in a project of 'strategic restraint.' The heightened importance given by U.S. leaders to law and *jus in bello* legitimacy in the post-Vietnam era—driven by concerns over the strategic liabilities posed by enhanced sensitivity to civilian casualties and war crimes—created an opening for different groups within the DoD to establish themselves as experts who could spearhead and enact these reforms. This nodal position, I argue, was claimed by the JAGs who framed themselves as possessing the right combination of legal and martial skills and commitments.

This occurred through three contingent processes. First, the DoD's initial raft of 'strategic restraint' reforms neither highlighted the work of JAGs nor revised their role in operations. Instead, a handful of JAG leaders presented military lawyers as demonstrating the right balance of commitments for the 'post-My Lai' moment and successfully lobbied the DoD to allow military lawyers to take the lead in the long-term implementation of these reforms. These implementation processes resulted in the initial authorization of the JAGs to take a modest advising role in operations[21]. Second, JAGs initially enacted this

[21] In this regard, my argument runs the closest to Jones (2020), who similarly identifies the post-Vietnam War military's growing concern with war crimes and civilian casualties as the trigger for 'lawyerization' and then frames the development of 'Operational Law' as a 'militarization' of the practice of law that further integrated JAGs into the front lines. However, Jones' account frames this process as one in which the latent structural permissiveness of the law is exploited through the technical expertise of the JAGs and then integrated into operations. His account never answers why, if the capacity for this exploitation was

new role through their prior identities as lawyers. This nearly led to the failure of this project in the face of widespread opposition by commanders. In response, a new generation of JAGs re-produced their organization as one inhabited by "warrior lawyers" who assisted, rather than handcuffed, the command. During the late 1980s and early 1990s, this change in identity drastically reduced the initial opposition of commanders. Third, years of counterinsurgency operations in the War on Terror resulted in a renewed focus on 'strategic restraint', which hit its peak in the wake of the revelation of the U.S.'s systematic torture and abuse of detainees. This ushered in a renewed focus on law and legitimacy within the DoD, at the forefront of which the JAGs once again positioned themselves. This time, the JAG Corps highlighted the opposition of senior JAGs to the 'Torture Memos'[22] in order to frame military lawyers as key figures for enacting a new, more legally compliant version of the War on Terror.

This history matters, I argue, because these processes—of structural change and contingent self-re-production—have led JAGs to adopt the mode of a 'risk manager' in operations. To obtain their position of prominence, especially in the War on Terror, JAGs leveraged their dual identity, as members of both the professions of law and arms, who could identify *both* liabilities *and* opportunities in regard to the legal and legitimate prosecution of warfare. However, I posit that the reproduction of the JAG Corps around these claims to dual expertise—the key to their success in operations—has also created deep tensions that also threaten their authority and 'ontological security' (Giddens 1991)

latent in the legal system, JAGs or other civilian lawyers—who had worked in the Department of Defense for decades—had not previously put the law to work for themselves.

[22] The 'Torture Memos' were a series of legal white papers issued by civilian lawyers and cabinet members early in the administration of U.S. President George W. Bush that authorized the abuse of certain classes of detainees by denying the applicability of international legal protections for those prisoners.

when they have to make tough decisions in the war room. Too readily enabling the deployment of military power and being unwilling to say 'no' to commanders erodes the credibility of JAGs as lawyers. Conversely, enacting too *many* constraints undermines their identity as effective soldiers. As such, the very conditions by which the JAG Corps claimed its position in the war room have also enmeshed military lawyers in a delicate balancing act that can undermine that position.

I argue that JAGs have come to behave as 'risk managers' in operations to better navigate and mediate these irresolvable tensions between their two expert identities. First, the lexicon of 'risk' is germane to both the modern staff officer and the modern corporate lawyer (which many early operational lawyers took as professional models). This shared language has enabled JAGs to artfully present their advice in a manner that gestures to both sides of their dual identity. Additionally, by framing their advice as assessments of risk—rather than determinations of what should be done—military lawyers mask their role in decision-making and avoid some of the tension between seeming too enabling or constraining. Lastly, as a *manager* (not minimizer) of risk, JAGs influence decision-making by intervening both when they believe their fellow soldiers are being too risk-tolerant *or* too risk-averse in regard to legal legitimacy. In the latter case, JAGs identify areas where soldiers under-estimate their authorities—which enhances their martial standing. In the former, they enact techniques for mitigating the risks of deploying military power—which maintains their legal identity.

Adopting the model of a 'risk manager' in operations—in order to navigate the tensions in the JAG Corps' dual identity—shapes how they apply the law in war. I argue

that these techniques of risk management reveal how and under which conditions military lawyers enable and/or constrain the U.S.'s use of military power. In this, I posit that JAGs on the battlefield deploy their legal expertise in different ways depending on the degree of risk they perceive—which I divide into two conceptual categories: 'legal risk' and 'legitimacy risk'. When that perceived risk is high, JAGs will tend towards a constraining approach that is more in line with the findings highlighted by Dickinson and others that view international legal experts as forces of *restraint* in operations. Therefore, when advising on issues where JAGs expect a significant likelihood of both legal sanction and media scrutiny—such as the treatment of detainees and use of force around specially protected cultural and medical sites—I find the military lawyers, for the most part, act as strong proponents of not only legal compliance but limitations on the use of force that go beyond what the law requires.

However, under the majority of circumstances, JAGs may only perceive a moderate degree of risk and, as a result, deploy the law in a cautious yet ultimately permissive manner. In these instances, JAGs deploy the law in a way that more closely resembles some of Jones' findings—where military lawyers seek to enable the use of force by rendering it less objectionable. When JAGs perceive a low degree of legal *or* legitimacy risk, they shift to deploying their expertise to *permit* the use of force by mitigating risk without constraining military power. Such efforts may indeed lead to a reduction in lives lost and laws violated, but they largely serve the purpose of ensuring the continued ability of the U.S. to wage war. I posit that when JAGs perceive high legal risk but low legitimacy risk—for example, when navigating operational restrictions

involving the use of funds, providing support to allies, and the rules of engagement—military lawyers use their legal expertise to eliminate or diminish these roadblocks, thus making it easier for commanders deploy the options at their disposal without running afoul of the law. Since there is little expectation of negative media coverage in these circumstances, JAGs are emboldened to enact creative strategies for helping their fellow officers reach their targets without stepping over the line. Conversely, I argue that when the legal risk of deploying military power is low but the legitimacy risk is high—for example, during the evaluation of expected civilian casualties—JAGs adopt the function of a policy adviser who helps enable the strike by pushing for mitigation techniques that may reduce media blowback. While the techniques differ across these two conditions, I claim they both reflect the use of legal expertise as a form of *permission* for the use of military power—albeit with some reductions in harm. The function of the JAG is not to counsel *restraint*, but rather to help devise ways of using force that are, respectively, more legally defensible or conducive to retaining legitimacy.

Lastly, under circumstances where the perceived risk of using force is low, I argue that JAGs further enable the military by not only deploying their expertise to permit such actions but also by engaging in the 'law-making' practices identified by Jones, Weizman, and others. Here, JAGs use their expertise on and off the battlefield to carefully expand particular categories in LOAC and thus further enhance the U.S.'s ability to deploy military power. Under these circumstances, I propose that JAGs are engaging in 'law-making' activities to *expand* the U.S.'s capacity to wage war under the law. In this, I show how JAGs have been instrumental figures in the *expansion* of key

LOAC concepts in the legal definition of a 'legitimate target', applied to both objects as well as persons. This, I show, has been undertaken by military lawyers through the creation and defense of novel arguments in handbooks, scholarly articles, and at conferences and training courses around the world. These *expanded* legal claims on the part of JAGs, I show, have constituted a key part of the U.S.'s offensive legal strategies during the War on Terror.

All told, this dissertation argues that JAGs' agentic self-production as 'risk managers' helps explain the causes and effects of U.S. military 'lawyerization'. These insights, I posit, identify important points of interdependence between the constraining and enabling 'faces' of the law in the U.S.'s prosecution of warfare. In the dissertation's concluding chapter, I reflect on how reversing the mode of analysis in regard to military lawyers—using military 'lawyerization' to reveal facets about international law, modern war, and the U.S.'s unique position in the 'permissive' development of LOAC, rather than the other way around—holds important stakes for the study of these two areas of world politics.

Research Methods

Given the nature of my research questions and argument—which focus closely on historical processes of change and the meanings attached to the identity and practices of being an operational attorney—a multi-method, qualitative research design was most appropriate for understanding and explaining military 'lawyerization' in the United States. This approach is also well-suited for the data required to assess my argument, particularly in regard to the effects of 'lawyerization'. The majority of the events relevant

to my study—decisions regarding the use of force or other exercises of military power involving a U.S. military lawyer—remain classified by the U.S. government. Furthermore, even unclassified reports on the actions of military lawyers in recent decades are difficult to access and were not publicly accessible prior to the start of my research.

The aims of this research program fell into three general categories. The first was to process trace[23] the recent history of 'lawyerization' in the U.S. by identifying the mechanisms by which JAGs not only spread throughout the armed forces but became highly trusted and sought-after advisers on not only law but questions of ethics and policy. The second was to understand the *role* and *identity* of JAGs in combat today, primarily through the military lawyers' own self-understanding of these categories, but additionally from the perspective of the commanders and staff officers who engage most directly with JAGs in operations centers. The third was to identify the different ways that JAGs deploy their legal expertise to constrain or enable the use of force and to explain the conditions that lead JAGs to adopt these different practices. I conducted most of this research between March 2017 and October 2018, with select follow-up research pursued at various points between 2018-2021[24].

[23] I take George and Bennett's (2005) understanding of process-tracing, which they define as "attempts to identify the intervening causal process—the causal chain and causal mechanism—between an independent variable (or variables) and the outcome of the dependent variable" (206).

[24] In order to further understand legal advising 'in-action' I had intended to conduct a fieldwork visit to the Army's National Training Center (NTC) in spring-summer 2020 as a guest attached to the JAG 'observer controller' who injects legal issues into the training scenarios. Unfortunately, the COVID-19 pandemic made this fieldwork no longer possible.

To identify the core mechanisms entailed in 'lawyerization' I conducted primary source research at three archives[25], which resulted in the discovery of memoranda and correspondences between military officers, training manuals, unpublished reports, commanders' logs, and pamphlets. In these archives, I also uncovered unpublished oral histories of influential JAG officers; testimony, internal deliberations, and committee reports pertaining to three different studies conducted by offices within the Department of Defense of the activities of the JAG Corps; and over one-hundred unclassified interviews conducted by and with JAG and non-JAG members of the armed forces during the 2000s. I supplemented the documents uncovered from these archives with a series of Freedom of Information Access requests to track down missing materials, publications authored by the JAG Corps and individual judge advocates, and secondary source resources on the history of the JAG Corps and application of LOAC in the armed forces. Furthermore, I analyzed these documents alongside broader accounts of 'lawyerization' through fifteen open-ended interviews I conducted with retired JAGs, hailing from across the four combat service branches, all of whom played a part in the transformation of the JAG Corps into an operational force. These interviews also provided tremendous insight into the links between the mechanisms driving 'lawyerization' and the re-production of the role and identity of JAGs today.

To understand the contemporary role and identity of JAGs in operations, I conducted an additional twenty open-ended interviews with active-duty U.S. judge

[25] The United States National Archives (College Park, MA); the archives of the Judge Advocate General's Legal Center and School (Charlottesville, VA); and the archives of the Center for Army Lessons Learned at Fort Leavenworth (Leavenworth, KS).

advocates from across the four combat service branches—all of whom had deployed in an operational advising role during the War on Terror. I then supplemented these interviews with fieldwork conversations with more than a dozen currently deployed JAGs at operational bases housing U.S. Africa Command and U.S. European Command in Stuttgart, Germany. Through these interviews and conversations, I was able to identify patterns in how JAGs understand themselves and their function in operations. Additionally, through questions on the cultivation of trust and credibility with commanders and fellow officers, I was able to obtain insight into how JAGs cultivate and maintain their own authority in an operational setting, as well as the consequences of failing to retain this influence. I then supplemented these JAG interviews with five additional interviews with commanders, staff officers, and pilots on the topic of their relationships with operational legal advisers.

Since roughly half of these active-duty interviewees were serving in instructional roles at JAG training schools and international training programs at the time of our interviews, I was further able to inquire into the methods employed by the JAG Corps for reproducing this sense of identity and role, as well as other techniques for enabling the next generation of JAGs to maintain their operational influence. I also enhanced my understanding of the reproduction of this role and identity through participant observation at five training courses for legal advisers at the U.S. Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia; the Naval Justice School in Newport, Rhode Island; and the International Institute of Humanitarian Law in San Remo, Italy. By playing the role of a legal adviser in mock exercises at these courses, I

was able to compare my experiences with the accounts provided by my interviewees and obtain firsthand experience of training techniques employed to mold JAGs into operational attorneys. Lastly, I supplemented my interviews and fieldwork research with analysis of handbooks and doctrinal publications by the military as well as articles by individual JAGs elaborating on the expected roles, duties, and competencies of today's military lawyers.

To assess how JAGs deploy the law to constrain and enable operations, I relied on a combination of all the methods listed so far. My primary resources were a series of unclassified, but previously unreleased, after-action reports (AARs) authored by JAGs upon the conclusion of operational deployments between 2011-2017. I supplemented these AARs with publicly available summaries of 'lessons learned'—based on a much larger trove of AARs from 2001-2008—compiled by the Army JAG Corps' Center for Law and Military Operations (CLAMO). Together, these documents provided important information on how JAGs advised commanders under different circumstances regarding the use of force and military power, as well as perceptions of the legal and legitimacy risks attached by JAGs to different issues and courses of action. However, AARs involving JAG advice on the most complex and controversial instances of using force remain classified and thus could not be addressed through this approach. To get at these events, I provided my active-duty interviewees with hypothetical scenarios that replicated sensitive decision-making around the use of force and engaged in extended conversations on their perceptions of risk in those instances as well as how they would advise their commander when faced with such challenges. These scenarios were all generated by

trainers at the legal adviser training courses that I attended to reflect real-world scenarios faced by JAGs in the field. I further supplemented the use of these hypothetical scenarios in my interviews with fieldwork notes from the running of these scenarios, as well as others, from my attendance in these courses.

Additionally, I conducted fieldwork on 'lawyerization' in the United Kingdom, Israel, and France. The core of this comparative research entailed four weeks of international training courses at the International Institute of Humanitarian Law (IIHL) in San Remo, Italy with military legal advisers from over thirty countries. First, these courses provided comparative analytical leverage on the similarities and differences between how legal advisers to the militaries of the U.S., U.K., France, and Israel approach the same issues and scenarios. Second, it offered insights into the broader differences between legal advisers to states with more 'lawyerized' militaries and those in which legal advisers are either relatively new and/or have not obtained influential positions. Additionally, I supplemented these training courses with nearly twenty interviews with legal advisers to other states, primarily focusing on the U.K., France, and Israel. A brief discussion of these findings is provided in the concluding chapter of this dissertation.

Chapter Overview

The rest of the dissertation proceeds as follows. In the second chapter, I outline my arguments regarding the causes and effects of 'lawyerization'. I argue that JAGs' *identity*—as 'warrior lawyers' who must retain credibility as lawyers and as soldiers—and *role*—as 'risk managers' who assess liabilities and opportunities in modern

operations—reveal why and how military lawyers influence the conduct of war. Using these insights, I present a theory of the conditions under which JAGs constrain and/or enable the U.S.'s capacity to use military power.

The next three chapters present my empirical evidence regarding the causes of 'lawyerization' and the self-production of JAGs as 'risk managers'. In Chapter Three, I evaluate the recent history of military lawyers in combat and argue that, alongside certain structural incentives, 'lawyerization' occurred because JAGs re-produced themselves as 'warrior lawyers' who claimed expertise in both law and war. The chapter ends by demonstrating how, during the War on Terror, this 'warrior lawyer' approach became institutionalized as the 'risk manager' model of legal advising. In chapters four and five I show how the institutionalization of the 'risk manager' enables JAGs to obtain ontological security in their dual identity as both soldiers and lawyers as well as cultivate authority on the command staff. In Chapter Four, I demonstrate how maintaining this dual expert identity both requires JAGs to engage in a variety of performances—which serve to establish their legal and martial credibility—and leads to irresolvable tensions between these components of their identity. Chapter Five focuses on how JAGs navigate these tensions through the mode of a 'risk manager' by adopting the language of risk, masking their influence in decision-making through the posture of 'assessing' risk (rather than deciding outcomes), and intervening when their fellow soldiers are either too risk-tolerant or too risk-averse.

In chapters six, seven, and eight, I lay out my evidence for how operational legal advising, in the model of a 'risk manager', functions to both constrain and enable U.S.

war-making. Chapter Six presents my arguments for how and when JAGs act as forces of *restraint*. Chapter Seven focuses on how JAGs deploy the law as a source of *permission* for the use of military power. Chapter Eight then turns to JAG practices of *expansion*, where military lawyers not only apply the law but alter it as well. The dissertation then concludes, in Chapter Nine, with a summary of my argument, a brief discussion of the empirical stakes of this work for understanding global trends of 'lawyerization' and the offensive legal positions of the United States in recent decades, and reflections on the theoretical implications of my findings for the study of law, war, and power in International Relations.

Chapter Two: Theory

Introduction

In the prior chapter, I argued that the existing literature has treated military 'lawyerization' as an outcome, extension, or reflection of macro-level depictions of international law and transformations in the nature of warfare. As such, these texts do not provide sufficient answers to this dissertation's two core research questions: *Why has the U.S. military become so extensively and intensively 'lawyerized' since the 1970s, with military lawyers obtaining positions of not only influence but broad trust on the command staff? As a result of 'lawyerization,' how do military lawyers use their expertise to influence decision-making and shape the U.S.'s deployment of military power?* My argument in this dissertation reverses the direction of this analysis and explores the rise of U.S. military lawyers—understood as agentic actors in this process—to both unpack military 'lawyerization' and contribute to our understanding of modern law in war. The central process in my account is how the JAG Corps first re-produced its collective *identity* into that of an institution of 'warrior lawyers'—and leveraged that hybrid identity to claim expertise over strategic legitimacy in 21st-century warfare—and refined their *role* on the battlefield into that of a 'risk manager' who identifies legal liabilities as well as opportunities for the deployment of military power.

In this chapter, I lay out my argument across the following sections. The next section identifies three potential identities that could be attributed to JAGs in operations:

the lawyer, the soldier, and a hybrid of the two. I argue that JAGs have become deeply defined by a hybrid identity as 'warrior lawyers', which I argue provides a powerful claim to authority by navigating and linking the worlds of law and war. In the following section, I put this conceptualization of JAGs as 'warrior lawyers' to work to explain the causes of 'lawyerization.' I argue that the prominent battlefield position of today's JAGs was gradually and fitfully carved out by the JAG Corps, which re-produced itself as 'warrior lawyers' to claim prominent nodal positions in wide-reaching military reforms to institutionalize 'strategic restraint', most acutely after the Vietnam War and during the first decade of the War on Terror. The next two sections turn to the role that JAGs have come to play in these influential positions and the practices of legality in operations that this role entails. In this, I argue that JAGs neither adopt the role of a 'watchdog' nor that of an 'apologist', but rather that of a 'risk manager'. Both the 'watchdog' and 'apologist' roles entail practices of legality that inflame tensions at the heart of JAGs' dual identity as soldiers and lawyers. While providing legal advice as a form of 'risk management' does not resolve these tensions, it does offer an array of techniques for navigating them and maintaining the authority and 'ontological security' of JAGs in operations. Lastly, I argue that understanding JAG legal advice as a form of 'risk management' enables explanations for why and under which conditions JAGs constrain and/or enable the U.S.'s capacity to use military force. In the chapter's final section, I offer a theory of these dynamics, arguing that perceptions of 'legal risk' and 'legitimacy risk' explain why military lawyers shift between modes of *restraining*, *permitting*, and *expanding* the use of military power.

Identity: JAGs as 'Warrior Lawyers'

Most of the existing literature on international lawyers tends to define the *identity*[26] of international legal experts through their membership in an "epistemic community" (Haas 1992) or "community of practice" (Adler and Pouliot 2011) sometimes referred to as the "invisible college of international lawyers" (Schachter 1977). As such, this majority view takes international lawyers primarily as experts whose values and practices are defined by their commitment to the rule of law[27]. However, a small number of more recent texts emphasize how international lawyers can also become 'captured' by the values and interests of the actors who employ them. In these accounts, a

[26] My assessment of JAG identity is through the lens of professional identification. While it is beyond the scope of the current study to consider the other forms of identity that may shape JAGs' self-understandings, three trends that emerged from my fieldwork are worth noting. First, in terms of *political identification*, many of my interviewees either stated or implied identification with the American center-left. My fieldwork and interviews all took place during the administration of Donald Trump, about whom a number of interviewees expressed negative opinions. One interviewee explicitly described the JAG Corps as a "liberal corner of a conservative institution [the military]". Second, *gender* dynamics arose on a number of occasions. The JAG Corps in each service branch frequently boasts of having some of the highest rates of women in officer positions of anywhere in the armed forces. The first woman to achieve the rank of general in the Army was a JAG, a fact that was presented to me on a number of occasions. In the last decade, as the issue of sexual assault in the military has become a salient political issue, the JAG Corps has worked to recruit more women (with the intention of staffing special sexual assault survivor advocacy positions). However, JAG trainers and leading figures on the subject of operational legal advising continue to be overwhelmingly men, as was the case with all but two of my formal interviewees and the majority of the JAGs I spoke with in training courses. Third, while *racial and ethnic* identities were only rarely mentioned by my interviewees, the JAG Corps is overwhelmingly white. This trend was only noted once, by a Black JAG at a training course, who mentioned offhand that the JAGs remained one of the least diverse areas of the military's officer corps (I have not seen figures on these comparative rates of representation). Since these aspects of identity were not the focus of my research design, this study offers few reflections on the implications of these trends for military 'lawyerization'. However, it may be that the current *political*, *gender*, and *racial* makeup of the JAG Corps reflects a combination of those of its two constituent professional identities: the law and the military. In other words, it attracts a cross-section of the U.S. population that falls somewhere in between those groups that tend to become lawyers and soldiers. The legal profession in the U.S., on the whole, leans liberal; male, but with gender parity in some current law school cohorts; and white, but slowly diversifying. The military leans conservative; male, but slowly growing in representation by women; and white, but diversifying at a moderate pace.

[27] For example, Brunnee and Toope (2010) present international legal experts as communities of practitioners who, under certain conditions, can be activated to invoke the law in everyday settings and take the final step towards lasting compliance. A similar portrayal is offered by Alter (2014), who argues that lawyers and other legal professionals hold similar ideological commitments to the rule of law, thereby allowing the legal profession to mobilize against violations of international law and push domestic institutions to uphold the rulings of international tribunals.

lawyer's commitments to the rule of law become corrupted by institutional cultures of emergency and *realpolitik* (Sanders 2018), weakened by a lack of oversight from other lawyers (Nuñez-Mietz 2016), or simply pushed out by the ability of great powers to replace obstinate lawyers with more favorable ones (Brooks and Wohlforth 2008). This more modest literature emphasizes how international lawyers may actually identify primarily with the interests and values of their client, rather than those of the legal system. A reverse side of the same coin would be to not view JAGs as international lawyers at all, arguing instead how martial culture—particularly within the professional U.S. military—might be so strong that it tends to overwhelm other forms of identity (Huntington 1981; Feaver 2005; R. Brooks 2020).

In contrast, my argument builds off scholarship that emphasizes and takes seriously the hybridity of international lawyers. These texts emphasize that international lawyers are indeed united by certain common features—such as the structure of legal argumentation (Koskenniemi 1989), the status of the legal profession in world society (Kennedy 2018), the shared values instilled in law school (Finnemore 2003), or common practices of legal reasoning (Kratochwil 1989). However, they also view the international legal profession as being 'fragmented' across an array of inherently non-legal claims to truth and value (Koskenniemi 2011) and characterized by 'struggle' rather than unity (Kennedy 2006; 2018) [28]. Thus—in addition to being defined by their commitments to the

[28] Martti Koskenniemi's approach focuses on dynamics of epistemological 'fragmentation' (Koskenniemi 2011), which challenge the degree to which international lawyers should be conceptualized as being united by "a shared set of normative and principled beliefs" as well as "shared causal beliefs" and "shared notions of validity" (Haas 1992, 3). David Kennedy' account portrays jurists of all stripes as vying for power and influence across contested, and ever-shifting fields of expertise, which challenges the relatively static portrayal of the 'invisible college of international lawyers' (Kennedy 2018; 2006).

law or their commitments to their clients—international lawyers could also be defined by their attempts to navigate these dual sets of commitments.

I take all three of these camps to offer conceptually plausible ideal-typical *identities* for JAGs in operations. Military lawyers are commissioned officers who receive staff officer training and could identify overwhelmingly with the aims of their client, the armed forces, and the values of the 'brotherhood of arms.' However, I argue that—although the JAG Corps has worked intentionally to enhance its martial identity since the 1970s, such that many JAGs today identify themselves slightly more as soldiers than lawyers—there is scant evidence of the JAG Corps as a whole being 'captured' by an overwhelming identification with the armed forces or associating with the military to such a degree that their legal identity plays second fiddle. On the other hand, military lawyers must obtain a post-graduate law degree from an accredited law school, pass the bar exam in at least one U.S. state, and retain that bar certification through continuing education credits throughout their career. Thus, it is conceivable that JAGs would identify overwhelmingly with the bar and bench rather than the sword. I demonstrate that although this conceptualization of identity by and large captures the institutional commitments and self-perceptions of JAGs *prior* to the 'lawyerization' of the military—when the definitive function of the JAG Corps was staffing the military justice system—this identity was explicitly rejected in subsequent decades. Instead, I argue that the *identity* of the JAG Corps has been re-produced, by the JAGs themselves, from that of an organization that defined itself primarily as lawyers committed to the rule of law—who happen to be practicing law in the context of the military—to a fundamentally hybrid

identity defined by self-understandings as full members of both the profession of arms and the profession of law.

Furthermore, I posit that this process of identity transformation is a crucial component of military 'lawyerization', as it provides the currency upon which JAGs' informal authority is based. While hybrid identities are difficult to maintain—as I explain in the chapter's fourth section—they can also serve as powerful positions from which to influence global affairs. IR scholarship has demonstrated how actors step into nodal positions to function as 'brokers' across 'structural holes' in networks (Goddard 2009; Hafner-Burton, Kahler, and Montgomery 2009; Carpenter 2007). In these accounts, 'brokers' wield influence by virtue of their position in between—and simultaneous relationships with—two or more chains of actors. Seen through this lens the hybrid identity of the JAG Corps enables military lawyers to position themselves as novel linkages between the worlds of law and arms. Other studies of 'hybrid' experts who straddle multiple fields provide further insight into the techniques enacted to forge these linkages. 'Democratization' experts in the late 20th century (Guilhot 2005) functioned as key nodes between government officials, academics, and activists by adjusting their multifaceted identity depending on the circumstance, for example by emphasizing the language of good governance when in the presence of state leaders and embracing the lexicon of mass mobilization when engaging with activists. Think tanks in the U.S. (Medvetz 2012) have similarly carved out influential positions between the worlds of academia and policy-making by capitalizing on not only their similarities with these two worlds but also their differences. Defining themselves as both more principled and

rigorous than policy-makers but more pragmatic and influential than the ivory towers of academia, think tanks weave together an 'insider/outsider' image to claim an important position that links these fields.

Building off these insights, I argue that JAGs' dual expert identity has enabled them to increasingly entrench themselves as key nodes in the translation of law into U.S. military operations and, as I show in the dissertation's penultimate chapter on JAGs' law-making activities, from operations back into the law[29]. In a room full of soldiers, JAGs are the unquestioned subject matter experts on the law and, during the War on Terror, have become influential voices in 'law adjacent' deliberations of ethics and legitimacy. Conversely, at an international law conference, JAGs can present themselves as the experts on military practice, the experience of combat, and how 'the rubber meets the road' for LOAC.

'Lawyerization' Through Hybrid Identity

My account of military 'lawyerization' begins with the consequences of world-historical changes during the 20th century in the valuation of civilian lives in war (Downes 2011; Kahl 2006; 2007; Valentino, Huth, and Croco 2006), the increased visibility of warfare through changes in media and public scrutiny (Thussu and Freedman 2003; Hoskins and O'Loughlin 2010; Gilboa 2005), and the global institutionalization of LOAC as a system for guiding behavior (Dill 2015a; Morrow 2014) and communicating

[29] My claim is not that law and war are distinct entities that have been bridged by LOAC and military 'lawyerization'. These spheres have a long history of interconnection and co-constitution (Jones 2016; Irani 2018; Kinsella and Mantilla 2020). Rather, my claim is that, especially in moments of institutional or structural change, new forms of linkage can emerge that reconstitute aspects of this relationship.

legitimacy in combat (Kennedy 2006). It is beyond the scope of this dissertation to unpack or debate the causes and broader impacts of these changes in global affairs and war. Rather, I argue that a combination of these macro-level forces triggered a wide-ranging set of reforms with the U.S. Department of Defense (DoD) at the end of the Vietnam War that intended to interject principles of 'strategic restraint' throughout the armed forces[30]. As explained in the prior chapter, 'strategic restraint' involves the primarily instrumental institutionalization of LOAC in the armed forces in response to the rising costs of legal noncompliance. As such, concerned leaders institute mechanisms of training and oversight (Morrow 2014). I argue that over the course of the Vietnam War, the U.S. civilian and military leadership came to increasingly see reports of civilian casualties and war crimes committed by U.S. forces as major strategic liabilities. These concerns among the chain of command reached a critical mass in the revelation of the murder of upwards of 500 civilians by U.S. forces in the village of My Lai (hereafter 'The My Lai Massacre'), leading the DoD to issue a variety of reforms.

However, unlike the existing literature on military lawyers[31], I do not portray these 'strategic restraint' reforms as having directly or inevitably led to the placement of JAGs in operational positions. These initial reforms make no mention of repositioning JAGs as battlefield advisers or even broadening their authority to review

[30] As covered in the first chapter, this assessment of 'strategic restraint' shares much in common with a significant strand of the literature on U.S. military lawyers (Jones 2020; Borch 2001; Hodges 2018; Goldsmith 2012; Graham 2002)

[31] Borch (2001), Hodges (2018), Goldsmith (2012), and Graham (2002), all frame the movement of JAGs into the war room as a direct and largely inevitable outcome of the release of the Law of War Program in 1974. Jones's account is more nuanced but nonetheless portrays a direct causal relationship between post-Vietnam reforms and 'lawyerization', arguing that "the Law of War Program in the 1970s gave birth to the new legal regime of operational law…a crucial ingredient in the subsequent integration of military lawyers" (2020, 91).

operational plans. The only mentions of judge advocates in these documents are in reference to LOAC training programs. Instead, I argue that 'strategic restraint' in the 1970s provided an *opening* for the JAG Corps to expand its position in the military. While the 'strategic restraint' reforms did not move JAGs into the war room, they did articulate the need for a more direct and substantial link between international law and military operations than had previously existed.

I argue that the JAG Corps worked its way to the fore of these reforms by presenting itself as more than agents of military justice but also as key nodes in this new way of war-making. In this, senior JAGs successfully lobbied the DoD to create—and, more importantly, let the JAGs implement—a centralized 'Law of War Program' which, between the mid-1970s and mid-1980s, resulted in an array of instructions and orders that tasked JAGs with reviewing operational plans and providing informal operational advice. While there is sparse evidence of the motivations of the JAGs who enacted this initial wave of role expansion, this behavior is not surprising given the institutional pressures military departments face to innovate, broaden their purview, and justify their slice of annual military budgets, especially during periods of de-mobilization such as the decade after the Vietnam War (Rosen 1988; Murray and Millett 1998; Grissom 2006). In this, a handful of JAG leaders—all of whom had experimented with informal, 'proto-operational' activities during the Vietnam War—framed the JAG Corps to military and civilian officials as figures capable of strengthening the military *through* law. As such, JAGs positioned themselves as the ideal figures to spearhead the military's new emphasis on bringing international law into the day-to-day operations of the U.S. military.

Furthermore, I argue that the adoption of this nodal position was far from smooth or predetermined. Rather, the JAG Corps initially failed in their new position as the military's primary linkage between law and war. U.S. commanders in the 1970s and 1980s were frequently opposed to allowing JAGs to review operational plans and participate in decision-making. As such, the first generation of legal advisers found themselves routinely excluded from decisions and ignored when they did offer legal opinions. I argue that this resistance was due to the widespread perception within the JAG Corps—contrary to the narrative presented by some of the JAG leadership—that they were primarily *lawyers* rather than *soldiers*. However, within a few years, a newer generation of military lawyers began rising through the ranks—many of whom had been enlisted soldiers or non-JAG officers in the Vietnam War. These newer JAGs, who often sought out operational advising posts over military justice activities, enacted a gradual re-production of the JAG Corps as 'warrior lawyers' who identified equally, if not *slightly* more, as soldiers than as legal professionals. This transformation primarily took place through the invention and institutionalization of a new "field" of legal practice called 'Operational Law' (OpLaw) from the mid-1980s through the 1990s.

OpLaw does not so much refer to specific bodies of law—like international law or torts—but rather to a more offensive, authorities-focused approach to the practice of law in operations that facilitated the transformation of legalistic JAGs into 'warrior lawyers.' Following Aalberts and Leander (2013), I take legal expertise to be co-constitutive of the object of that expertise. OpLaw revised the function of the JAG on the battlefield to emphasize the enhancement of operations through law rather than the review of operations by law. In so doing, these JAGs re-fashioned the JAG Corps as dual experts in

the professions of law and arms by highlighting how LOAC and other legal bodies can enable military power. I argue that during the late 1980s and throughout the 1990s, these co-constitutive practices of transformation through OpLaw achieved the institutional re-production of JAGs as 'warrior lawyers' and significantly reduced the opposition JAGs faced in operations.

Lastly, I argue that, in the War on Terror, 'lawyerization' was again driven by JAG agency—this time facilitated, rather than hindered, by their identity—in response to another series of changes ushered in by a return to 'strategic restraint' as a guiding principle of war-making. By the mid-2000s, counterinsurgency doctrine—which emphasized legitimacy and minimizing the use of force to win the battle for 'hearts and minds'—was rising in the military and global headlines were filled with graphic evidence of the torture and abuse inflicted by U.S. forces on detainees. Much like the post-Vietnam years, the military responded by enacting both formal reforms and shifts in institutional culture to emphasize restraint and legal compliance. However, unlike after the Vietnam War, JAGs were already ensconced as the military's key nodes in the translation of legal concerns into operational guidance. This position was further cemented when JAGs mobilized their hybrid identity as 'warrior lawyers' to promote themselves as the antidote to the mindset that had led to the Torture Memos and the abuse at Abu Ghraib. Most notably, senior JAGs framed themselves as being able to chart a middle ground between the rule of law—evidenced by their strong opposition to the Torture Memos—and the necessities of war—demonstrated by their simultaneous backing of the use of international law to indefinitely detain 'terrorists'. As a result, two decades of sustained military operations since 2001 have led both doctrinal changes and strengthened

relationships that have greatly expanded the reach of 'lawyerization'. JAG officers have been granted steadily more access and authority by commanders who have come to view their legal advisers as not only accepted but highly trusted advisers on not only law but strategic legitimacy.

Role and Tensions of the 'Warrior Lawyer'

However, tracing the rise of JAGs into trusted positions on the command staff doesn't explain their *role* in operations. I argue that understanding the role JAGs perform in operations—beyond the formal description of their function as legal advisers to the command—matters for unpacking the effects of 'lawyerization'. As noted previously, much of the work on international legal expertise has treated international lawyers as fundamentally alike units. I argue that—in addition to the different *identities* international lawyers might have—actors within the 'invisible college of international lawyers' are also differentiated by the *roles* they hold in political processes. In this, legal experts who approach the same question or body of law through different roles will enact different practices of legality (Koskenniemi 2011, 271–91).

As explored in Chapter One, the existing literature on military lawyers and international legal experts tends to emphasize the inclination and capacity of these figures to use the law to either constrain (Dickinson 2010; Hodges 2018; Goldsmith 2012; Dill 2015a) or enable (Jones 2020; Weizman 2011; Cohen 2011; Craig 2013; Erakat 2019) the state. Broadly speaking, these two predominant strands of the relevant literature each provide an ideal-typical depiction of the *role* of the military lawyer in operations, which I term the 'watchdog' and 'apologist' models of legal advising. In both ideal types, lawyers

seek to address discontinuities between the requirements of the law and military practice. However, whereas the 'watchdog' pushes the military to make its behavior match the law, the 'apologist' exploits the law to make it fit the military's interests[32].

Understood as 'watchdogs,' international lawyers function as agents of compliance. I argue that JAGs functioning in such a role would practice the law in a manner that resembles the approach of a judge who assesses compliance (Koskenniemi 2011, 284–87). Therefore, a JAG 'watchdog' would enact legal practices of monitoring for violations, evaluating courses of action for legal sufficiency, and intervening to oppose illegal conduct. As such, we should see JAGs interact primarily functioning in decision-making as mechanisms of oversight and warning when soldiers may be veering into illegal territory. Understood as 'apologists', international lawyers function as agents of state power. As such, I argue that JAGs in the role of 'apologists' would enact practices of legality that would most closely resemble that of an advocate who uses the law as best they can in service of their client (Koskenniemi 2011, 289–91). Therefore, JAGs as 'apologists' should enact legal practices of authoring legal justifications for their client's interests and instructing soldiers on how they can exploit gray areas and loopholes in the law. As such, we should see such JAGs having a primarily perfunctory role in decision-making—since they would aim to put the law to work for the command,

[32] Some of these accounts are closer to these ideal types than others. As I note in the prior chapter, Jones (2020) explicitly denies that JAGs function as either agents of compliance or as "apologists". His argument is that JAGs are not 'apologists' because they enable military operations through the law, rather than by sanctioning violations of the law. However, this puts a great deal of analytical weight on an extremely subjective category—whether or not JAGs have 'crossed the line' and legitimated *illegal* actions. Instead, I argue that the role of an 'apologist' is better defined by their approach to legality, in which the law is exploited to enhance the military's interests. This definition remains generally agnostic as to whether or not the advice given is legally defensible. Taking this definition of an 'apologist', I assess that Jones' portrayal falls into this camp.

rather than the other way around. While 'apologist' JAGs would intervene to suggest more advantageous uses of the law, their role would primarily focus on affirming what their fellow soldiers intend to do and crafting justification strategies.

I argue that the role of JAGs in operations reflects, on the one hand, both of these ideal types and, on the other, entails practices of legality explained by neither of them. As such, the watchdog/apologist binary, as an analytical starting place, both does too much and too little for understanding the effects of military 'lawyerization'. *Some* of the techniques identified by these ideal types—such as warning soldiers when they are veering into illegal territory as well as instructing them on how to exploit grey areas and loopholes—are evidenced in the operational behavior of JAGs. However, I argue that JAGs work hard to *avoid* being seen as mechanisms of oversight or approval in decision-making, which is precisely the type of perception a 'watchdog' or 'apologist', respectively, would strive to create. Furthermore, as I argue late in this section, JAGs have come to frame their advice as a form of 'risk analysis', which also has little grounding in either of these ideal types. As such, I argue not only that JAGs are not 'apologists' or 'watchdogs', but also that their role is not *just* a combination of or oscillation between the two. As such, I develop an alternative conceptualization of the role of the operational attorney. In this, I turn both deductively—to accounts of the practices of international legal advisers to non-military clients—and inductively—to common themes from my interviews and fieldwork with judge advocates. I argue that together these reveal both the distinct role adopted by military lawyers in operations—as

managers of legal and legitimacy risk—and why 'warrior lawyers' have, over time, come to adopt this model.

A common thread of tension runs through portrayals of the role of international legal advisers to foreign ministries, international organizations, and corporations[33]. In reflecting on their experiences, these legal advisers highlight how—when the demands of the law and their client's interests clash—the advisers can quickly find themselves, no matter what decision they reach, in conflict with one or another set of actors with whom they have close professional relationships. As such, a consistent theme in these accounts—especially those of legal advisers to foreign ministries—is that legal advisers can very easily become 'the bad guy' for one set of actors or another in a decision-making chain. As such, many of these texts emphasized that when legal issues emerge during moments of crisis, the art of navigating key relationships is what distinguishes an effective legal adviser. This tension is explored in greater analytical depth by Wouter Werner (2014), who argues that the authority of a legal adviser is conditioned upon their capacity to manage the irresolvable "paradox" of their expertise, which rests on claims to both utility and objectivity. On the one hand, legal expertise relies on the capacity to be seen as a relatively 'apolitical' actor who carries out the law. On the other hand, such experts are only useful to international actors to the extent that they help those actors achieve their political ends by masking interests in the 'de-politicized' language of legality. As such, this forms a paradoxical form of authority, in which the requirements of

[33] See, for example, Zidar and Gauci 2016; Scharf and Williams 2010; Allott 2005; Leigh et al. 1992; "Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law" 1999; Koh 2011; Lammers 2009; Williamson 1990; Sacriste and Vauchez 2007; Petty 2011; Merillat 1964; Cassese 1992.

upholding one's legal expertise can hamstring an adviser's utility, and the performance of beneficial functions can quickly erode the very legal expertise that makes advisers useful.

I argue that the 'warrior lawyer' identity—which enabled JAGs to claim a position of authority in operations—also subjects them to a particularly intense version of Werner's paradox. As I previously argued, JAG influence is premised on their dual claims to expertise in the professions of law and arms. In Chapter Five, I demonstrate how much individual and institutional effort goes into maintaining those dual professional claims. Given that the primary audience for these operational performances is other soldiers, JAGs have a somewhat easier time affirming their credibility as legal experts. Nonetheless, they bolster their institutional credentials as bar-certified lawyers with symbols and displays of their legal knowledge and training as well as participating in professional activities among lawyers, such as authoring law journals or attending conferences. The more challenging performance, in the context of the war room, is typically the demonstration of their martial competence. To gain acceptance as soldiers, I find that JAGs engage in a number of activities that highlight their experience on the battlefield, their skills with arms and other military operations, their physical fitness, and their knowledge of U.S. military culture.

However, these two identities come into tension with one another when legally contentious battlefield decisions arise. As with other legal advisers, this could force them into a position of either affirming the legality of the measure—and potentially damaging their 'objectivity' in regard to the law—or labeling the intended action illegal and potentially harming their perceived 'utility' for the staff. However, I argue that this

tension is particularly acute for JAGs on the battlefield because saying 'no' also calls into question their identity as soldiers. Furthermore, JAGs cannot easily avoid this danger by simply approving legally questionable decisions because—in addition to eroding the credibility of their legal advice with the command—JAGs exist in a military hierarchy in which their behavior is constantly scrutinized by higher-ranking military lawyers who share an institutional motivation to uphold the JAG Corp's standing as lawyers. As such, I argue that when JAGs push the law too far, they are at serious risk of undermining their legal credibility. However, if they are too cautious with their legal advice, and appear to be getting in the way of military necessity, their claim to membership in the 'brotherhood of arms' can deteriorate even faster.

This tension, I argue, explains the relative dearth of evidence I uncovered of JAGs adopting the role of a 'watchdog' or an 'apologist'. Both lead to the collapse of a JAG's authority and ontological security as a 'warrior lawyer'. Practicing law on the battlefield through the role of an 'apologist' inflames this tension to the detriment of a JAG's credibility as a lawyer, and the result is even more deleterious to a JAG's martial identity if they adopt the role of a 'watchdog'.

JAGs as 'Risk Managers'

My interviews, fieldwork, and archival research all revealed patterns of practice among JAGs of assessing, mitigating, and capitalizing on the liabilities and opportunities of law in war. This evidence spans both the application of these techniques in warfare as well as the invocation, by the JAGs themselves, of 'risk management' as a language for describing their vocation. In the words of an Army JAG, military lawyers "provide [an

assessment of] legal risks, mitigation strategies, possible solutions, and courses of action" that take into account not only the question of "is [the plan] legal?" but also "is it advisable?" (Gade 2016, 35). The components of these risk assessments are detailed in the next section of this chapter, but they range from the threat of investigation and prosecution for war crimes to the risk of 'the CNN effect' by triggering negative media coverage. I argue that military lawyers adopt the role of a 'risk manager' as a way of navigating the fundamental tension that arises between JAGs' legal and martial identities during operational advising.

First, the language of 'risk' serves as a point of lexical overlap between the profession of the modern lawyer and staff officer. As a concept that has become more germane in these professions, risk' offers a conceptualization of the practice of law in war that affirms the JAG's competence and membership in both fields. In particular, corporate lawyers—a field of practice explicitly emulated by many judge advocates—often communicate their assessments through statements of 'risk' that predict the consequences of different potential decisions undertaken by their clients. Yet risk assessment is also a core function of the modern military staff officer. Planning processes in each branch of the military are conducted through various estimations of risks articulated by specialists in logistics, intelligence, and weapons deployment. As such, I argue that JAGs have adopted the *language* of 'risk'—rather than a more legalistic mode of speaking or one of mimicking the mannerisms of a front-line operator—because it enables them to deliver their advice in a way that reflects both their legal and martial commitments.

Second, delivering legal advice as 'risk assessments' enables JAGs to influence decisions without appearing to actually determine the outcome. Techniques of 'risk management', I argue, enable JAGs to *appear* as a detached specialist who merely maps the legal terrain for the commander, rather than putting their thumb on the scales. This way of advising covers the tracks of the lawyer's involvement in operations, offering a subtle touch in sensitive decision-making. For example, a Marine lawyer explained that he would always aim to provide the commander with at least three courses of action: "a very risk-averse plan;" a plan that was "all out, who cares what's on the end of the pointy stick;" and then "the plan you actually want him to choose" (Interview 01.01.04). By suggesting alternative courses of action and using subtle techniques for steering officers towards their preferred plan JAGs nonetheless use risk assessment to influence decision-making. In this way, JAGs attempt to sidestep—as much as possible—the fundamental tension between their legal and martial identities. To avoid being in the position of a legal expert who is appearing to approve or reject military decisions—which, I argue in Chapter Five, is not always easy, given some officers' inclinations to offload responsibilities onto their JAGs—military lawyers have settled into patterns of using risk assessment. In this manner, they can often, but not always, avoid getting put in the bind of undermining their identity and authority

Third, I argue that JAGs not only assess but also *manage* the legal and legitimacy risk of operations. When commanders and staff officers set their sights on plans that their military lawyers perceive to be high-risk—and cannot be nudged towards alternatives—the JAGs will first attempt to mitigate the risk of the plan by suggesting revisions in both

the procedure and the method by which military power is used. As a trainer at the Army JAG school explained, all military lawyers—before they determine whether something "is a clear no"—should ask themselves "Is there a legal way to do what you want?...Is [the problem] a risk thing?...Is there maybe something you could do to alleviate that risk?" (Interview 01.01.03). For example, keeping records of decision-making may improve the chances that a plan would survive an investigation if something were to go wrong. Alternatively, altering certain details of the plan—such as the time an attack is launched or the munitions used to reduce the expected number of civilian casualties—may serve to mitigate these risks. If all of these techniques have been applied and the JAG still perceives high levels of risk, most military lawyers will attempt to use their authority to directly lobby against the plan—accepting the harm that such a position will likely have on their standing with the command. For example, a retired Army JAG told me that "[as] a good legal adviser…you should be saying 'sir, that's illegal', but only if it good and truly is. If it's just shades of gray like everything is in combat, then you should be saying 'sir…here's a better target [providing alternatives] or another way to do it [mitigating risk]" (Interview 01.02.05). Thus, since the role of a 'risk manager' makes such an intervention an option of last resort, effective JAGs can render such situations relatively uncommon and avoid undermining their martial credibility.

Fourth, to both demonstrate their identity as soldiers and help compensate for the tension at the heart of the 'warrior lawyer', JAGs manage risk by identifying not only liabilities but also opportunities in the law. "If I can use the law in my benefit," an Army JAG explained, "I can…provide maximum flexibility to the boss. These are things an

effective [JAG] knows how to do" (Interview 01.01.10). Using the law to enable military operations in this fashion, I argue, reinforces a JAG's identity as a soldier and enhances their standing with the command. This, I argue, helps JAGs build up a reserve of 'credibility,' so to speak, that can be dipped into when they feel they have to directly oppose a decision. These enabling activities can take many forms—some of which I explore in the following section. However, one of the most common and effective ways that JAGs "provide maximum flexibility" to their commanders is by intervening when they believe their fellow soldiers have *under*estimated their legal authorities. As such, JAGs intercede in decision-making when they believe other soldiers are being either too risk-*tolerant* or too risk-*averse* with respect to the law.

Effects of Military 'Lawyerization'

I argue that both JAGs' *identity*—as 'warrior lawyers'—and their *role* in operations—as 'risk managers'—allows us to unpack the effects of military 'lawyerization'. In terms of their identity, JAGs' training in the professions of law and arms sets them up to both constrain and enable the prosecution of warfare. In addition to being instilled—through staff officer training—with a soldier's inclination to accomplish the mission, JAGs *enable* military power because their authority and ontological security are heavily dependent on their capacity to demonstrate their martial credibility. On the other hand, JAGs' legal identity motivates them to act as forces of *constraint*. In addition to the fact that their legal training and professionalization instills a commitment to the rule of law and a sense of legal fidelity, JAGs' authority and ontological security are also contingent on maintaining their credibility as lawyers. However, given that the audience

for these operational performances are almost exclusively soldiers, JAGs face both steeper challenges in gaining martial credibility and a faster erosion of that credibility when they oppose a course of action. Therefore, I argue that this balance is somewhat slanted—with JAGs enabling more than they constrain when they face roughly equivalent pressures to do both.

However, knowing that JAGs possess both sets of motivations doesn't help us explain the conditions under which one or both of these effects will be relevant. Understanding JAGs' role as that of a 'risk manager' addresses this gap. Risk management involves the translation of the uncertain or unknowable into a calculable expression of probabilities and costs (Leander 2011; 2010). I find that, in this role, JAGs translate the consequences of various operational decisions into the language of calculable degrees of risk that allow precise guidance for commanders. "You've gotta know the law, and from that, you find where you can 'operate in the grey'…where there's that fine line between right and wrong, legal or illegal," an Army JAG explained. "If I know where the [commander] wants to go and I know how to 'operate in the grey', I can see the extent we can flex the law" (Interview 01.01.10). I argue that identifying how JAGs make these 'calculations' reveals the conditions under which military 'lawyerization' constrains and/or enables U.S. military power.

Operating as 'risk managers,' I argue that JAGs are, on the one hand, operating within certain limits. High estimations of risk can and do leave JAGs believing—even after attempting to provide alternatives and mitigate consequences—that they have no choice but to deploy their authority to *restrain* the use of military power. However, as

this assessment of risk falls away, JAGs perceive more avenues for turning the rules to their benefit and thus increasingly use their expertise to enable. Furthermore, as mentioned previously, given the added pressure JAGs face to demonstrate their marital credibility in a room full of soldiers, I expect that under instances of moderate perceived risk, military lawyers will both constrain and enable but edge towards the latter. Therefore, I argue that JAGs' predominant effect on decision-making is to *permit* the application of military power, albeit with steps taken to mitigate consequences. Furthermore, certain circumstances arise when JAGs will go beyond *permitting* the decisions of their fellow soldiers and will actively *expand* their legal authorities to use force by using their dual expertise to engage in 'law-making' activities. Each of these behaviors, I argue, is explained by the pressures JAGs face to maintain their ontological security and their authority in operations, mediated through the 'risk management' techniques that JAGs have devised for navigating these pressures.

As 'risk managers', I consistently found that JAGs dealt with and distinguished between two types of risk in their legal advice: the potential for formal investigation and sanction—which I term 'legal risk'—and the loss of legitimacy with key audiences—which I term 'legitimacy risk'. For example, the Army's leading doctrinal publication for its JAGs states that: "[operational attorneys] owe commanders and staff their assessment of legal [and legitimacy] risks and mitigation in accordance with the risk management process"[34]. The same document defines these risks as:

> those concerned with mission degradation resulting from consequences of unlawful, or the perception of unlawful, conduct by the unit.

[34] *Field Manual 1-04: Legal Support to Operations* (2020, 3-12)

> Consequences for the conduct do not typically result in operational failure, but reduce the effectiveness of leaders and units if not adequately considered prior to execution[35].

Similarly, I encountered these two components of 'risk analysis' in almost every interview I conducted. "You [the JAG] have to let [the commander] know what the risks are," a retired, high-ranking JAG with years of deployments during the War on Terror remarked. That means, he explained, informing the commander "how strong the legal argument is or how weak it is [and] which courses of action are more lawful and which ones have more legitimacy" (Interview 01.02.05).

Most of the JAGs I spoke with associated 'legal risk' with being accused, investigated, or sanctioned—through career penalties, a discharge, or a court-martial—for illegality resulting from a plan, decision, or failure to exert command responsibility. As such, I use the term 'legal risk' to refer to the perceived likelihood and severity of formal punishment if an international law, domestic law, or other rule in the military justice code is deemed to have been violated. While JAGs used different terms to refer to what I call 'legitimacy risk'—with some prioritizing the language of 'legitimacy', 'conscience,' or 'policy'—they overwhelmingly referred to the capacity of JAGs to assess the risk to the military's legitimacy posed by negative media coverage. Only one interviewee expressed mild trepidation about going 'beyond the law' and advising on issues of legitimacy, although every interviewee was emphatic about the importance of distinguishing between these two sources of risk. I similarly differentiate between these two in my analysis, both

[35] Ibid.

to remain attentive to this key aspect of military legal practice and to enhance the conceptual clarity of my argument[36].

I operationalize this perceived 'legal risk' to refer to the degree to which relevant international legal bodies have been translated into binding, precise, and reliably enforceable domestic U.S. statutes and/or codes or policies guiding military conduct. For example, a retired Army JAG broke down his assessment of legal risk in the following way, which is worth quoting at length:

> I think the most successful JAGs make sure that their commanders understand the risks involved with any task. It's rare when there's a simple yes or no answer to a legal question in operations. One of the [analogies] I used to use is if the speed limit is 25 miles per hour, and a commander asks me if he can go 28, I'll say 'sir, no'. Your actions are unlawful because your actions are three miles per hour over the speed limit. I can still tell him the odds he'll get caught and what the consequences are, but I can pretty clearly tell you what you're doing is not lawful. Now, it's another thing if the law says 'you must drive at a reasonable speed based on the conditions of the road'. That's hard because…it's about what people have said is reasonable in the past: this is the weather, here's how they consider the time of day. And so, if you wanna go 30 miles per hour, and it's the middle of the day, and nobody's on the road, and it's dry, that's probably reasonable but somebody may disagree…[M]ost of the law we're dealing with…the law of armed conflict, etc., is more like the second example—you have to be reasonable (Interview 01.02.05).

As such, I argue that JAGs perceive greater 'legal risk' when the law in question is more precise and enforceable. When international treaties and norms have become binding on U.S. military personnel with a high degree of precision, JAGs are likely to perceive higher levels of 'legal risk' involved in pushing the boundaries of the law. This makes

[36] However, it should be noted that, in practice, these two forms of risk are not entirely independent. For example, part of how international law is enforced is through 'reputation costs' among mass audiences that can resemble my definition of legitimacy risk. On the other hand, assessments of legitimacy are primed by arguments regarding the legality or illegality of an action. I try to operationalize these two forms of risk to render them as distinct as possible in my analysis, however a certain degree of interconnectivity remains.

JAGs invoke the law as a set of firm rules, rather than as areas for debate and interpretation. Thus, when providing legal advice JAGs are likely to be cautious about demonstrating compliance with the letter of the law and will push back on suggestions by fellow officers to fall short of that compliance. Alternatively, when such treaties and norms lack precision and/or reliable enforcement, JAGs perceive far less 'legal risk' in expanding legal categories to enable the use of force. In these cases, JAGs are more likely to advise in a manner that presents the law as a muddled 'grey area' or a set of flexible principles that are open to interpretation and debate.

On the other hand, 'legitimacy risk' refers to the degree to which the situation at hand can lead to public relations blowback. I narrow this category by operationalizing it, for the purpose of this study, as *media salience*—further divided as visibility and public interest. Most every JAG I spoke with used media coverage as a partial shorthand for legitimacy, often referring to assessments of 'legitimacy risk' as thinking through "the CNN effect" of a particular course of action. For example, another retired Army JAG remarked that:

> With social media and twenty-four-hour networks, what you do in a combat environment has the potential to be on the news the next day…Every commander has to face that now. That's something about which he or she needs to be painfully aware. The JA's job is making sure that those kinds of ramifications are well considered by the commander (Interview 01.02.02).

I argue, first, that conditions presenting high degrees of 'legitimacy risk' are potentially visible to broad, non-military audiences. As such, procedures and standards that are classified or highly obscure will be unlikely to catch media attention. Second, issues that have a demonstrable record of being in the 'public interest'—indicated by prior instances

where an issue resulted in significant attention—will be perceived by JAGs as presenting higher degrees of 'legitimacy risk'. When they perceive high degrees of 'legitimacy risk', JAGs tend to adopt a more conservative approach to deploying military power and may recommend courses of action that are more constraining than what they believe the law strictly requires. However, when they perceive low degrees of 'legitimacy risk', JAGs adopt a more aggressive approach involving adherence to the bare minimum of legality as well as the creative use of loopholes, exceptions, and grey areas to broaden a commander's options.

To unpack how JAGs 'manage' these two types of risk, I divide each, for the sake of analytical clarity, into a high/low binary. This layout is illustrated in Figure 1, below, which provides a visual overview of this theory of JAGs as risk managers. When JAGs perceive both of these types of risk to be high, I argue that they generally constrain the deployment of military power, either by recommending significant changes through alternative plans or, if that does not sway a commander, simply opposing a course of action. However, if one *or* the other type of risk is perceived to be low, JAGs instead focus on mitigating the risk of deploying military power by recommending adjustments to a plan and taking advantage of other authorities under the law that ultimately enable the command to achieve their goal. Lastly, if the perceived risk is low, JAGs not only focus on enabling and mitigating, they also work—both on and off the battlefield—to expand the U.S.'s capacity to use force legally. Taken together, I argue that JAG advising practices fall into three ideal-typical versions of 'legality' that are practiced by JAGs under different conditions: *restraint, permission,* and *expansion*, with *permission* taking

on somewhat different qualities depending on whether the perceived legitimacy or legal risk is low.

Figure A-1: Operational Impact of JAGs as Risk Managers

	High Legitimacy Risk	**Low Legitimacy Risk**
High Legal Risk	*Legal Advice as Restraint*	*Legal Advice as Permission*
Low Legal Risk	*Legal Advice as Permission*	*Legal Advice as Expansion*

Taking each quadrant in turn, I start with the conditions that lead JAGs to apply a version of legality that positions themselves and their advice as forces of *restraint*. Under these conditions, I expect JAGs to impact operations more or less in the way envisioned by Dickinson (2010) and various government and humanitarian officials who have framed 'lawyerization' as evidence of a commitment to being bound by the rule of law. I argue that when both the legal and legitimacy risks of a particular course of action are high, JAGs apply the law as a restriction on the use of military power. In Chapter Six, I argue that JAGs tend to perceive this high degree of risk when dealing with longstanding and relatively precise components of both the Geneva and Hague strands of LOAC. The

examples I provide are of the laws pertaining to the treatment of enemy combatants and of those regarding specially protected cultural and medical objects. When faced with high levels of legal risk, I expect JAGs to apply the law as a set of hard and fast rules that soldiers cannot push beyond their limits. Furthermore, when faced with a high level of legitimacy risk, JAGs adopt an even more conservative stance, at times requiring standards of behavior that go beyond the letter of the law. As such, JAGs in these conditions will act as agents of *restraint*, keeping a keen eye out for violations and taking a firm stance against controversial plans and decisions. Furthermore, JAGs in these conditions are unlikely to intervene to tell soldiers or commanders if they are using less than their full authority under the law.

However, when the perceived legal risk of a course of action is high but the legitimacy risk of that action is relatively low, JAGs employ legal advising as a form of *permission*—in which clever navigation of the legal system allows for the adjustment of plans such that it becomes far less restrictive. This behavior falls more in line with the portrayal of military lawyers offered by Jones (2020), Normand and Jochnick (1994), and Craig (2013). In Chapter Seven, I argue that these conditions are most commonly found when JAGs advise on the more bureaucratic, yet nonetheless consequential, rules of modern warfare that are typically derived from U.S. domestic statute and policy documents rather than major LOAC treaties. The examples I provide are of the application of the rules of engagement, domestic statutes covering the use of funds in a war zone, and rules governing how the U.S. military cooperates with its coalition and non-state actor allies. Under these conditions, I argue that JAGs apply the law in a

manner approximating a tax attorney or a corporate lawyer facing a set of robust regulations that have little visibility beyond the scrutiny of external accountants. Faced with high levels of perceived legal risk, JAGs still frame the law as a set of firm rules. However, with low levels of legitimacy risk, there is little reason for compliance with the 'spirit' of the law or for restricting behavior beyond what the bare minimum requires. This makes possible a variety of inventive legal techniques for circumventing the limitations of the law without technically crossing any red lines. While violating the letter of the law can result in serious punishment, creative solutions to these barriers—such as finding loopholes or working with regulating authorities to relax these standards—are very much on the table. Furthermore, when plans or decisions are proposed that fall well short of a legal violation, JAGs often intervene to assist their fellow soldiers in taking full advantage of their authorities.

When the situation is reversed and the legitimacy risk is high, but the legal risk is low, JAGs again employ the law as a form of *permission*, albeit through different techniques. On the one hand, concerns over optics mobilize JAGs to remain cautious about the deployment of military power. On the other hand, the absence of legal precision and/or enforcement means that JAGs tend to exploit the ambiguity of the law to support the legal sufficiency of most operational plans with only minor revision. As such, JAGs use their authority under these conditions to propose mitigation strategies for reducing legitimacy costs to the greatest extent possible before pulling the trigger, rather than offering hard limits on operational decision-making (as with *restraint*). I argue that these conditions most likely occur in regard to principles of LOAC that generate significant

headlines but are covered by vague rules. The primary example I provide is of JAG advising around the issue of expected civilian casualties. When their fellow soldiers propose plans or decisions that demonstrate high levels of legitimacy risk but low levels of legal risk, JAGs will work with other staff officers to 'tinker' with these plans in order to alter the means by which force is deployed without opposing the plan as a whole. These revisions may include adjustments to the details of an attack to reduce expected civilian casualties, suggesting that staff officers review plans to double-check the identity of targets, or having a commander write out their decision-making in order to demonstrate the effort expended to reduce harm.

Lastly, in areas where there is low perceived legal risk and low legitimacy risk, JAGs enact the law as a source of *expansion* for the military's authority to prosecute warfare. Under these conditions, I expect to see JAGs deploy their legal expertise to not only *permit* military power but also engage in practices of law-making, some of which have been articulated by Jones (2020) and Weizman (2010). In this, JAGs tend to deploy their legal expertise to push the limits of the law, such as by laying out expanded definitions of legal concepts, removing existing safeguards or standards, or applying more expansive legal bodies to permit the use of force. In this, not only do JAGs interpret the law to enhance the immediate authority of their commanders but they also push the boundaries of the law itself. In their efforts to *expand* the U.S.'s capacity to make war through law, JAGs combine efforts on and off the battlefield to build up momentum behind their legal claims. As such, to examine dynamics of *expansion* I turn to JAG writings and arguments in international legal forums, as well as operational advice to

commanders. Furthermore, I argue that the ends of these strategies are, at minimum, what Sanders (2018) has termed "plausible legality," in which states offer international legal claims that may or may not be adopted by other states, but which strive for attaining a baseline recognition of these claims as reasonable, good-faith arguments rather than unacceptable acts of illegality.

Conclusion

This chapter has provided an overview of the dissertation's core concepts and arguments regarding the causes and effects of military 'lawyerization'. I claim that 'lawyerization' has occurred because the pressures of 'strategic restraint' provided an opening for JAGs to re-invent themselves as the military's primary figures for bridging the world of law and the world of arms. In this, military lawyers have come to adopt a hybrid *identity*—as professionals who straddle the fields of international law and the armed forces—and operational *role*—as experts in managing the legal and legitimacy risks of modern warfare—that condition both their authority and how they constrain and enable U.S. military power. These contingent and unsteady developments, I argue, have nonetheless enabled JAGs to stake out an influential position in the prosecution of warfare today.

This argument foregrounds the interconnected and mutually constitutive relationship between limitations on the power to kill in modern warfare and the conditions of possibility for such legitimate destruction—a theme I return to in the conclusion. Without understanding how JAGs provide some meaningful limitations on U.S. military power, we cannot fully appreciate how they also obtain the credibility to

enable the conduct of war. Therefore, this dissertation builds—from the ground up—an account of how JAGs re-produced themselves as experts who link the fields of law-making and war-making; the challenges of performing and maintaining credibility in both fields; and how U.S. military lawyers have turned to practices of 'risk management' to hold these forces and commitments together. This bottom-up analysis begins, in the next chapter, with an account of the rise of the operational attorney since the 1960s.

Chapter Three: Lawyers in the War Room?[37] The 'Lawyerization' of the U.S. Military

Introduction

In this chapter, I trace and explain the dramatic change in the prevalence and prominence of U.S. military lawyers since the Vietnam War. In Chapter One I described how, during this time, military lawyers have gone from having virtually no place in 'the war room' to being not only influential but highly trusted and sought-after advisers on law and legitimacy in operations. As outlined in the second chapter, I argue that this process has been driven by the JAGs' re-production of their own *identity*—as 'warrior lawyers' belonging to the professions of law and arms—and invention of a novel *role* for themselves in operations—as 'managers' of legal and legitimacy risk. Through the re-production of their identity, military lawyers have been able to take advantage of openings in which the military has been restructured around principles of 'strategic restraint'—most acutely during periods of fallout after the My Lai Massacre (early 1970s) and revelations of systematic torture and abuse of detainees by U.S. forces in the War on Terror (mid-2000s). In this, JAGs have leveraged their dual identity as 'warrior lawyers'—held together, as I show in chapters five and six, by their evolving role as 'risk managers'—to present themselves as critical components of these reforms. Through these activities, they have claimed influential nodal positions as brokers between the worlds of

[37] This title is derived from a profile of JAGs who deployed in the First Gulf War titled "Lawyers in the War Room" (Keeva and Cates 1991)

international law and war who can translate legal liabilities and opportunities—and, ultimately. those pertaining to 'legitimacy' as well—into the heart of operational decision-making[38].

To present my evidence for this argument, I divide this chapter into two chronological parts. The first covers the initial 'lawyerization' and self-production of the JAG Corps as 'warrior lawyers' between roughly 1964-2001. The second analyzes the further 'lawyerization' and institutionalization of the 'risk manager' role during the War on Terror (2001-present). I then offer a brief conclusion, in which I affirm that these processes—while largely successful for the JAG Corps—were neither pre-determined nor entirely stable. These points are further demonstrated in the subsequent two chapters on the performances and tensions of the 'warrior lawyer' (Chapter Four) and attempts by JAGs to mitigate these tensions through the role of the 'risk manager' (Chapter Five). Together, these three chapters unpack the interconnected dynamics by which the JAG Corps has transformed itself—gradually and contingently—into the operational force it is today.

The Rise of the 'Warrior Lawyer' (1964-2001)

Throughout the U.S.-Vietnam War, JAG activities were typically limited to conducting military justice (courts-martial) and, secondarily, providing private legal services to soldiers and their families[39]. In contrast to later conflicts, the hundreds of

[38] In Chapter Eight, I turn to the reverse trajectory of this brokerage, in which JAGs translate U.S. military interests and operational experiences back into the law.
[39] Directive 27-6 (1968) of the Military Assistance Command Vietnam (MACV)—the top JAG office in the country—confirms that the services of JAGs pertained to military justice, navigating the South Vietnamese legal system, claims provision, and tax assistance.

JAGs who accompanied combat troops to Southeast Asia had negligible roles in operational decision-making[40] (Borch 2001, 21-35; Solis 1997, 42). While a handful of JAGs handled questions on the Law of Armed Conflict (LOAC) when requested by high-ranking officers, such requests were both *ad hoc* and rare. For example, the U.S.'s bombing campaigns against North Vietnam included extensive deliberations among civilian and military leaders but featured no input from military lawyers (Parks 1990; Dill 2015, 255; Jones 2020, 51) The non-combat role of JAGs in Vietnam was so robust that most JAGs did not even possess sufficient security clearance to set foot in an operations center (Borch 2001, 19).

With only a few exceptions—as I cover in the next section—the provision of military justice was the defining *role* of the JAGs in doctrine and practice[41] during the Vietnam War. In this primary role, JAGs would evaluate charges recommended by commanders and then preside over the conduct of justice. In terms of their *identity*, JAGs both saw themselves and were seen primarily as lawyers, not soldiers. Not only were JAGs in Vietnam "simply not consulted on operational matters," there was "[little] indication that even those in the legal field believed they should be" (Kerns 2003, 61). In

[40] This role cohered with the historical function of the JAG Corps in armed conflict. As Jack Goldsmith argued: "In World War II, generals ordered fire bombings in the European and Japanese cities without consulting lawyers or considering legal implications. President Truman received a great deal of advice about whether and how to drop the atomic bombs on Hiroshima and Nagasaki, but it did not come from lawyers advising him about the laws of war. The same was true of Presidents Johnson and Nixon, and their generals, in the Vietnam War. These military leaders had a sense that they should minimize civilian casualties when consistent with the military mission, but they were not advised by lawyers on the legality of their actions. Military planning and military operations were based on military strategy and tactics, diplomatic and political considerations, and morality. Lawyers played practically no role" (Goldsmith 2012, 125).

[41] "Military justice issues were so commonplace that they accounted for the vast majority—and sometimes all—JAG work in Vietnam" (Jones 2020, 79).

the eyes of most commanders, JAGs were administrative officials rather than warfighters. As explained by one U.S. commander in Vietnam:

> [The] impression of JAG officers [by commanders in Vietnam] was not necessarily favorable and the expectation wasn't that they were going to find people who were soldiers in the JAG ranks. They were going to be lawyers, that's what they do[42].

Even those few JAGs who did make it to the front lines were compared to "the Old West's fabled circuit-riding judges" who would "[take] the legal office to the troops" rather than as a participant in the fight[43].

Throughout the Vietnam War, the main pathways by which law entered into U.S. combat decisions was through high-level targeting and policy decisions—made primarily by the civilian leadership (Cuddy 2016, 212; cited in Jones 2020, 52)—and annual (for soldiers) or semi-annual (for officers) lectures on the basics of LOAC provided to large auditoriums (Lewy 1980, 366–67). Both systems would later be criticized by judge advocates—the latter for its ineffectiveness at internalizing constraints[44], the former for its *overly* constrictive application of the law (Parks 1990). For the time, these were the primary vehicles by which military operations incorporated legal considerations. However, this system underwent an extensive transformation during the early 1970s—as the U.S. military was limping towards defeat in Vietnam—the DoD released an array of directives and other reforms aimed at reshaping the military's approach to LOAC[45].

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[42] "Oral History of General Michael Nardotti". On file with author.
[43] "Travelin' Judge" quoted in Jones (2020, 57).
[44] "Interview with Gary Solis". On file with author.
[45] The first of these changes was a sudden increase in and alteration to the LOAC training provided by the U.S. Army to each deployed servicemember in October 1970. [Army Subject Schedule No. 27-1 "The Geneva Conventions of 1949 and Hague Convention No. IV of 1907," (October 8, 1970)] In 1972 Congress established the Defense Investigative Services, which consolidated under the Secretary of Defense all fact-finding missions in the wake of war crimes to enhance their independence from command

These reports, orders, and doctrinal changes established the importance of international law, enhanced the LOAC training provided to all soldiers, and improved procedures for reporting war crimes.

These reforms were the direct result of concerns among civilian and military leaders that credible allegations of mass civilian casualties and war crimes against U.S. forces had done significant damage to the American war effort. Top U.S. commanders displayed acute sensitivity to the stakes of widespread domestic and international perceptions of U.S. forces as war criminals[46], and high-ranking civilian officials became increasingly frustrated by news reports of violent misconduct, many of which included testimonies from American veterans (Lewy 1980, 311–24). This concern hit its peak in 1969 with the revelation of the My Lai Massacre and its subsequent coverup. The media coverage surrounding the My Lai Massacre pushed the Army to conduct an aggressive investigation into the factors that contributed to this atrocity. The resulting 'Peers Report' detailed perverse institutional deficiencies around LOAC training, compliance, and reporting, and it recommended a series of broad-scale reforms[47]. The My Lai Massacre and Peers Report had the effect of further linking the U.S. military's failures in Vietnam

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influence. These were followed by directives from the highest offices of the DoD that significantly enhanced oversight in areas such as prisoners of war and detainees [Department of Defense Directive 5100.69, "DoD Program for Prisoners of War and Other Detainees," (December 27, 1972)] and legal reviews of weaponry. [Department of Defense Instruction 5500.15, "Review of Legality of Weapons Under International Law," (October 16, 1974)]

[46] After the war General Westmoreland, the high commander of U.S. forces in Southeast Asia, was frank about the impact that these accusations had on the war effort, arguing that the "propaganda…was so well orchestrated that we were the enemy—we were the ones that were killing women and children. We were the ones committing the atrocities. We were in effect the aggressors." "General Westmoreland Oral History" Vol 2, 57–58, on file with author

[47] *Peers Inquiry: Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident* (1970), 12-8

to insufficient attention to the strategic costs of legal violations. As a Marine commander later put it:

> Perhaps the most significant outcome of My Lai was that the law of war and its prohibitions against killing noncombatants became a constant consideration in the minds of commanders. Few were likely to disregard breaches of that law and ignore the moral and legal responsibilities they now understood themselves to carry. And, cynics might add, neither would they disregard the career-ending damage a cover-up, once discovered, would wreak (Solis 1997, 59).

In response to the Peers Report, the Army enhanced its LOAC training programs. Additionally, exercises highlighting "the 'lessons' of Vietnam" were immediately "incorporated into the instruction provided to all military attorneys" (Graham 2002, 365). The calls for reform eventually reached the halls of Congress, which ultimately prompted this cascade of LOAC reforms (Lewy 1980, 373; Oliver 2006, 243–45; Gill and Fleck 2011, 25–28). In sum, there is widespread evidence and scholarly agreement that the military's various reforms in the 1970s around LOAC were "a direct result of My Lai" as well as broader coverage of civilian casualties and war crimes accusations (Borch 2001, 319).

While these reforms elevated the status of JAGs by virtue of their function in the military justice system and position as LOAC trainers, they did not expand the role of the JAGs to involve operational advising. Even more tellingly, very few JAGs at the time perceived that these reforms represented a significant change to how they did business (Borch 2001, 51). It wasn't until the mid-1970s and early 1980s—with the DoD's release of the "Program for the Implementation of the Law of War," or "Law of War Program"

(LoWP) in 1974[48] and the array of implementation documents that followed in the decade after—that JAGs received the authorization to begin reviewing operational plans. However, these changes, I demonstrate in the next section, were not automatic. Instead, a handful of JAG leaders lobbied the DoD to first create the LoWP and then task the JAG Corps with its implementation.

The Invention of 'Operational Law'

The initial, modest expansion of JAGs into operations to review plans came about as the result of the efforts of a small number of judge advocate leaders. These military lawyers—which included the Judge Advocate General of the Army from 1971-1974, General George Prugh—shared common experiences of having been exceptions to the rule in the Vietnam War, in that they all had "developed new strategies for using the law to support the war effort in Vietnam" that went beyond the provision of military justice (Borch 2001, 30–31) Some of these examples included lobbying for the broadening of use of force policies in Southeast Asia[49], recommending changes to detainee policies, recording and reporting war crimes committed both by and against U.S. forces, and initiating a novel program of 'condolence payments' to a small number of the families of Vietnamese civilians killed by U.S. forces in order to enhance legitimacy (Borch 2001, 10–13). These examples, while very few in number and quite modest in impact, indicated motivations[50] on the part of a small portion of the JAG Corps to push beyond their

[48] Department of Defense Directive 5100.77, "DoD Program for the Implementation of the Law of War (Short
Title: DoD Law of War Program)," (November 5, 1974)
[49] "Oral History of Jack Grunewald". On file with author.
[50] As noted in Chapter Two, my study is agnostic towards the precise motivations JAGs have for expanding the purview of the military lawyer. In this, I accept a number of instrumental and normative explanations

traditional roles. Furthermore, some of these JAGs attained leadership positions in the 1970s and would use these activities as ‘evidence’ of the martial capabilities and inclinations of the JAG Corps.

The DoD’s rapid emphasis on ‘strategic restraint’ provided the opportunity for these judge advocates to mobilize this ‘evidence’ of JAGs behaving as not only lawyers but soldiers. These experiences were leveraged by JAG leaders to lobby their respective service branches for the JAG Corps to take the primary role in the operational integration of ‘strategic restraint’. For example, the suggestion for creating a unified ‘Law of War Program’ to centralize the implementation of these reforms and state the U.S.’s commitment to complying with LOAC in all operations came from General Prugh’s office (Borch 2001, 30–31; Graham 2002, 366). Similarly, this same group of military lawyers later lobbied Army leaders to designate the position of spearheading the implementation of ‘strategic restraint’ to the JAG Corps (Borch 2001, ix, 319; Graham 2002, 367). It’s unclear how much resistance and/or competition these JAGs faced with these petitions. However, accounts of these events do indicate how the JAGs staked their claim to this nodal position. An Army JAG who was serving in General Prugh’s office in

for these actions. For example, discourses of ‘innovation’ and pressures to expand a department’s area of control are well-established components of the U.S. military as an institution, which is explicitly designed to foster ‘competition’ between the service components. These pressures are particularly acute during times of budget reductions, such as after the Vietnam War. Furthermore, the JAG Corps’ traditional area of military justice has been dramatically diminished since the change of the military into an all-volunteer, professional force. For example, while JAGs conducted roughly 69,000 courts-martial in 1967, only approximately 680 were convened in 2017 (Interview 01.02.20). Historians of the JAG Corps have reflected that the rapid growth of ‘Operational Law’ in the 1980s and 1990s saved the JAG Corps from being on the receiving end of major budget cuts during that time (Kerns 2003). These concerns with institutional preservation were most likely bolstered by the self-identity of particular JAGs, and eventually the Corps as a whole, as soldiers who wished to contribute the military and enhance the U.S.’s effectiveness in warfare. As such, these interests and identities may not precede—in a causal sense—the transformation of the JAG Corps, but are more precisely seen as having been co-constituted with ‘lawyerization’.

the 1970s explained that in these petitions to the top brass, military lawyers highlighted both their institutional commitment to the law—evidenced by the novel programs JAG had established for recording and reporting war crimes in Vietnam—as well as their capacity to think strategically—as shown through their attempts to enhance the U.S. war effort in this conflict *through* law and legitimacy (Interview 01.02.01). This assessment is shared by others as well, including one JAG historian who concludes that "there was a direct link between the institutional change caused by the [LoWP] and the individual initiatives [taken by innovative JAGs] in the Vietnam era" (Borch 2001, 319).

These efforts were largely successful, with "the Judge Advocate General's Corps [being made] the lead organization in [the LoWP's] implementation" (Graham 2002, 365). Through the release of various instructions and doctrinal changes in the late 1970s and early 1980s, JAG leaders used the implementation of the LoWP—and the broader opening provided by the ascendency of 'strategic restraint'—to establish a modest foothold in operations as reviewers of plans. Whereas the DoD's initial reforms had focused on enhancing the training, monitoring, and reporting provided to soldiers, the JAGs implementing the LoWP argued that ensuring the legality of operations also required the involvement of JAGs in the planning process. These implementing documents determined that "successful implementation of the DOD Law of War Program would now require that [JAGs] begin to communicate directly with commanders and their staff principals throughout the course of planning for an operation—identifying and resolving issues that arose during the planning process" (Graham 2002, 367). Furthermore, in addition to the Army TJAG's office, which had been informally

delegated with the lead in these efforts, a few of the Navy[51] and Marine Corps JAGs (Interview 01.02.02) who had performed *ad hoc* semi-operational duties in the Vietnam War leveraged those claims to martial credibility to lobby for a seat at the table in the creation of new operational protocols that had a legal component. In effect, this implementation plan formally enacted a shift in the pathways by which law impacted operations[52]—with JAG legal reviews established as a conduit alongside training and monitoring programs.

The rollout of these changes was piecemeal and occurred over the better part of a decade across the various service branches. Not surprisingly, the Army moved first when it issued a regulation instructing its JAG officers to be ready to assist commanders with carrying out the LoWP in 1975, including through the review of plans and instructions[53]. The following year the Air Force increased the responsibilities of its Judge Advocate General to include "[providing] comprehensive advice on requirements and content on the law of armed conflict"[54]. In 1980, the Navy—which also sets policy for the Marines and Coast Guard—issued fleet-wide instructions bringing JAGs into operational planning by tasking them with "reviewing for [top Navy officers]….plans, policies, directives, publications, training materials, and rules of engagement for conformity with United

[51] "Oral History of Jack Grunewald". On file with author.
[52] This vision of the JAG as a 'legal adviser' in combat was likely influenced by the concurrent development of a new treaty requirement for all militaries to field "legal advisers"—of unspecified number, placement, and military/civilian status—in the 1977 First Additional Protocol to the Geneva Conventions (AP I Art. 82). While there is no direct evidence of a link between these treaty deliberations and the implementation of the LoWP, the two occurred simultaneously in the mid-1970s with the same Army JAG who had first proposed the LoWP, Waldemar Solf, serving as one of the lead U.S. negotiators.
[53] Army Chief of Staff Regulation 11-2 "Implementation of DOD Law of War Program" (May 7, 1975)
[54] Air Force Regulation 110-32 "Training and Reporting to Insure [sic] Compliance with the Law of Armed Conflict" (August 2, 1976)

States domestic and international law including the law of armed conflict"[55]. This change in role did not receive inter-service backing until 1983, in the form of a memorandum from the Joint Chiefs of Staff which declared that JAGs "should attend planning conferences for joint and combined operations and exercises when ROE and related topics will be discussed" and that "Legal Advisors…be immediately available to provide [LOAC advice] during joint and combined operations"[56].

However, although the implementation of the LoWP provided *formal* authorization for JAGs to review battle plans, these initial steps towards 'lawyerization' did not, by and large, translate into influence on the ground. For example, JAGs tasked to the Army units involved in the invasion of Grenada in late 1983 were neither informed of the impending operation in advance nor given a place in the initial assault (Borch 2001, 60–82; Graham 2002)[57]. Similarly, military lawyers did not accompany the Marine units sent to Lebanon in 1983 and were largely absent from Army special forces deployments to El Salvador and Honduras in the first half of the decade (Barnes 1984). Nor were military lawyers significantly integrated into the planning of U.S. airstrikes in Libya in 1986 (Interview 01.02.02). It wasn't until the U.S. invasion of Panama (1989)—a full decade and a half after the release of the Law of War Program in 1974—that JAGs across the service branches were given broad access to war rooms to review plans, interpret and

[55] SECNAVINST 3300.1A "Subj: Law of Armed Conflict (Law of War) Program to insure [sic] compliance by the naval establishment." (May 2, 1980)
[56] MJCS 59-83, "Title: Memorandum from the Joint Chiefs of Staff" June 1, 1983, quoted from the 1994 edition of the U.S. Army's *Operational Law Handbook*, on file with author
[57] "Oral History of Raymond Ruppert". On file with author.

supervise the distribution of ROE, and, in a novel development, take a limited role in targeting decisions (Borch 2001, 95; Kerns 1999, 138; Graham 2002).

This gap between JAGs *de jure* role in operations and their *de facto* exclusion from the command center was caused by the fact that a majority of the JAG Corps' continued to see themselves, and present to commanders, as *lawyers*, not *soldiers*. As such, many of the JAGs who first began conducting legal reviews of plans approached this task with an almost sole commitment to the law and their legal standing. For example, a retired Navy JAG described the approach of military lawyers in the 1970s and early 1980s in the following way:

> Certainly when I came into the Navy legal community, lawyers were looked at as naysayers…[That's because] the lawyers were protecting their 6's [safeguarding their standing in the 'legal community'] more than anything else. If they didn't have the answer, 'no' was the safe answer. We [the JAG Corps] weren't giving them the tools to say 'yes' (Interview 01.02.09).

Across the service branches, JAGs were widely perceived by their fellow soldiers as legalistic roadblocks who cared about the rules more than accomplishing the mission. "JAGs were viewed more as obstructionists," noted a former Army JAG and infantry commander. "[T]hey [were] the people that will tell you 'you can't do that'…[into] the '80s"[58]. In addition to rejecting plans, this first wave of military lawyers in operations largely failed to demonstrate their value. For example, an Army JAG Colonel similarly noted that "coming out of Vietnam, there was some mistrust of JAGs" because

[58] "Oral History of Mike Nardotti".

commanders did not see much "utility" in the JAG Corps "other than in a very [administrative] way"[59].

As such, most JAGs faced serious hurdles in carrying out their role as operational advisers—a consistent theme from all of my interviewees with operational experience at the time. For example, an Army JAG summarized his operational experiences in the 1980s as follows: "I encountered skepticism [of my involvement in operations]. There [were plenty of officers] who thought that lawyers were just there to gum up the works" (Interview 01.02.06). Similarly, a high-ranking Air Force JAG later wrote that early attempts to integrate military legal advisers were "met with apathy—or worse…because [other officers] could not easily accept being told how to do their jobs by lawyers" (Bridge 1994, 2). Another Army JAG recounted a more vivid depiction of the antagonism expressed towards lawyers in the war room. He recalled being stymied in his attempts to review plans by a commander who intentionally avoided informing him of meetings. When the JAG eventually found ways of keeping abreast of the commander's schedule, he discovered that his seat in the operations center, a metal folding chair, would be habitually removed in advance of important staff consultations (Interview 01.02.19).

This state of affairs was eventually flagged by top military officials, after complaints by judge advocates regarding the barriers they faced to fulfilling their new duties. For example, in 1985 the Navy sent out a fleet-wide memo stating:

> We are not making the best use of [JAGs] if they are excluded from the day-to-day command decision-making process. [This exclusion] results from a mindset developed after years of associating JAG officers with

[59] "Oral History of Marc Warren". On file with author.

> military justice matters, claims, and investigations [rather than operations][60].

However, it was neither instructions from the top brass nor forces of 'strategic restraint' during the 1980s—a period of relatively low operational tempo and concerns over war crimes and legal legitimacy for the U.S. military[61]—that broke through the resistance of officers to their lawyers. Rather, it was the efforts of the JAGs to remodel their profession as that of a 'warrior lawyer' that pulled this experiment back from the brink of failure.

The re-production of JAGs as 'warrior lawyers' was driven by the invention—undertaken by JAGs on the front lines and disseminated by the leadership—of 'Operational Law' (OpLaw) as the new model for advising the command. OpLaw was created as a pragmatic and permissive approach to legal practice that encouraged JAGs to consider a wide range of legal bodies and apply them in support of their commanders' mission. In this regard, OpLaw was not a distinct field of practice, like criminal or environmental law, but rather a change in identity for JAGs in operations and rebranding of what the JAG Corps had to offer. As one of the Navy's OpLaw pioneers remarked, "[using] the law to maximize mission accomplishment," as OpLaw emphasized, "presupposes that whomever [sic] is providing this instruction understands the operational side of the equation"[62]. This perspective developed gradually and was cross-

[60] CNO Message 111021Z, "Subj: Using Judge Advocates" (October 1985)
[61] The most widely-covered use of force by American soldiers to receive accusations of war crimes during the 1980s was the destruction of an Iranian commercial airliner by the USS *Vincennes* in 1988—after which the Navy sent harsh warnings to commanders on adherence to the ROE, which, according to deployed JAGs at the time, pushed certain commanders at sea to incorporate legal advice (Interview 01.02.09; "Oral History of Jack Grunewald").
[62] "Oral History of Jack Grunewald"

fertilized across the service branches, with multiple JAGs coordinating to revise their image as 'Operational Law Attorneys'. One of the Army's leading figures in the creation of OpLaw explained this shift in identity in the following way:

> Judge Advocates [needed to] not simply [be] lawyers, but [be] soldiers. [This required] understanding the operational environment, understanding the impact that their advice is going to have from an operational standpoint…This was a completely different approach in terms of how a lawyer would relate to a commander and his staff (Interview 01.02.01).

Most succinctly, one of the inventors of OpLaw in the Marines remarked to me that OpLaw, more than anything else, was about turning JAGs into "*soldiers* who happen to be lawyers, not *lawyers* who happen to be soldiers" (Interview 01.02.02).

The implications of this change in identity—for both JAG authority on the battlefield and how military lawyers deploy the law—are unpacked in detail in chapters four and five. Most importantly for this discussion, this focus—on being a consummate soldier—emphasized the creative use of the law as a means for not only constraining but also enabling the use of force. An Army JAG involved in the creation of OpLaw explained this change in the following way:

> We had to train our lawyers to not just say no. Probably up until [the mid-1980s], lawyers had done a very good job with saying that it's unlawful and you can't do it, and that's what operators have heard. What they're hearing [after the creation of OpLaw] is…not that the law is simply there to prohibit you from doing things, but that you can still operate within…the law and still accomplish your mission…We tried to tell our young Judge Advocates, you're not there to say no, you're there to find a way to do it. (Ibid.)

Similarly, a JAG who helped establish OpLaw in the Navy argued that successful operational attorneys must be: "in the business of helping the commander execute his mission, not simply providing him with a litany of rules; that just doesn't hack it"[63].

This process of turning operational JAGs into 'warrior lawyers' occurred by highlighting the battlefield efforts of a handful of JAGs who had prior experience, mostly in the Vietnam War, as enlisted soldiers or non-JAG officers. During the 1980s and early 1990s, these accounts were transmitted through after-action reports, memos, and articles[64] in JAG journals, which in turn became integrated into JAG training programs (Borch 2001, x). An Army JAG later recalled that "the corps devoted a lot of time to capturing the lessons learned [in the 1980s and 1990s] and trying to develop doctrine and to institutionalize, memorialize that experience; all in a positive way"[65]. In 1981 the Army JAG School first integrated operational reports from deployed JAGs into its international law instruction[66]. In 1982, the Army JAG School hosted its first annual "Military Operations and Law Symposium" that brought top commanders to speak with JAGs about the operational challenges they faced (Parks 1992, 399). In the wake of the Grenada operations—in which JAGs were excluded from operational planning activities—the same school organized a special advanced seminar on "operationalizing" LOAC knowledge, which was formalized as an annual course offering two years later[67]. And in 1986 the term "Operational Law" appeared for the first time as a formal area of

[63] "Oral History of Jack Grunewald".
[64] See, for example, Burger 1978; Draper 1978; Roach 1983; Barnes 1984; Graham 1987; Coleman 1988; Walsh 1989; Winter 1990
[65] "Oral History of Marc Warren".
[66] TJAGS Annual Bulletin, 1980-1981
[67] TJAGS Annual Bulletin, 1983-1984; 1985-1986

JAG training[68]. By the end of the 1980s, aspects of OpLaw had also trickled, at a modest pace, into broader military doctrine. For example, in 1988 the Joint Chiefs of Staff tweaked the language of its authorization of the operational involvement of the JAGs. Whereas the 1983 version of this document had focused on legal advising as a restraint on military power, the updated version stipulated that "[a]dvice on law of war compliance…will address not only legal restraints on operations but also legal rights to employ force"[69].

Deploying the 'Warrior Lawyers'

In 1989, the JAGs first enacted their charge to formally review operations in a combat deployment. This deployment was treated as a watershed moment by JAG leaders, who quickly integrated the lessons learned by these 'Oplaw attorneys' into changes to training and other internal reforms (Borch 2001, 320–22). Throughout the 1990s, U.S. combat and peacekeeping deployments around the world—most notably in Operations Desert Shield and Desert Storm, otherwise known in the U.S. as the 'First Gulf War' (1990-1991)—served as similar 'testing grounds' for the JAG Corps in operations. While the operational tempo and scale of these deployments were generally far below those of the War on Terror, these conflicts furthered the co-constitutive development of OpLaw and the re-production of JAGs as 'warrior lawyers.' In operations, especially combat deployments, JAGs leveraged their increased credibility as soldiers to justify expanded roles on the command staff, most importantly in the area of

[68] TJAGS Annual Bulletin, 1986-1987, 11
[69] MJCS 0124-88, "Title: Memorandum from the Joint Chiefs of Staff" (August 4, 1988)

targeting. Out of operations, the JAG Corps highlighted these war-fighting activities to bolster their martial identity—both in their own training programs and in their engagements with commanders on the home front.

In total, around 350 JAGs deployed during Operation Desert Storm (1991)[70] and, according to the DoD's final report to Congress, "military judge advocates and civilian attorneys with international law expertise provided advice on the law of war and other legal issues at every level of command in all phases of [operations]"[71]. The Staff Judge Advocate for US Central Command (CENTCOM) remarked that "Desert Storm was the most legalistic war we've ever fought" (Keeva and Cates 1991, 52). Not only were JAGs consistently reviewing operational plans and instructions, a few military lawyers also authored the 'rules of engagement'[72] and took a leading role in designing procedures for POWs and other detainees (Borch 2001, 178-180). Most notably, a handful of experienced JAGs provided counsel to commanders on tactical decisions involving the use of force[73]. While JAG involvement in targeting appears to have been both limited and

[70] The First Gulf War involved the largest JAG deployment to date, with Army combat divisions receiving 13-20 JAGs—whereas similar units in Vietnam had featured around four lawyers and those of WWII just one or two (Keeva and Cates 1991, 54; Myrow 1996, 136).
[71] "DoD Final Report to Congress on the Conduct of the Persian Gulf War" 1992, 607.
[72] "[I]t was pretty clear to me [U.S. high commander Schwarzkopf] was looking to me—the lawyer—to write the rules of engagement which was not doctrine. But that's what was done" ("Oral History of Raymond Ruppert"). The increased reliance on JAGs during this conflict to collaborate with operators on writing the rules of engagement is repeatedly mentioned in other accounts of these operations (Borch 2001, 132–33).
[73] Numerous observers described JAGs as taking part in targeting decisions to some degree (Lewis 2003; Heintzelman and Bloom 1994; Keeva and Cates 1991; Borch 2001; Parks 1991; DeSaussure 1994) For example, General Schwarzkopf's lawyer stated: "As the SJA at the theater level, I made the decisions of whether or not a target is a legitimate target under the Law of War by looking at an aerial photograph" (Oral History 01.02.13).

largely *ad hoc* in this conflict[74], this modest degree of lawyerly involvement was nonetheless unprecedented (Dill 2015, 148-152).

JAGs in the First Gulf War attributed much of their successful integration into operations to their capacity to demonstrate their credibility as soldiers, specifically through the lens of OpLaw. For example, an article in the *American Bar Association Journal* on JAGs in Desert Storm explained the successful integration of JAGs in the following way: "[JAGs] have come to realize that, as in the relationship of corporate counsel to CEO, the JAG's role is not to create obstacles, but to find legal ways to achieve his client's goals-even when those goals are to blow things up and kill people" (Keeva and Cates 1991, 59). Similarly, the lead JAG at the U.S.'s main air operations center during Desert Storm remarked:

> The purpose of judge advocates in combat operations or contingencies is not to create roadblocks by inappropriately injecting themselves into matters of strategy…This causes operators or support personnel to go to great lengths to avoid the "lawyer"…A combat JAG's advice focuses as much on the "do's" of how to vigorously employ lawful force as the "don'ts" of imposing legal restraints in combat activities (Heintzelman and Bloom 1994, 7).

Another prominent JAG—who was assigned to the Pentagon during Desert Storm to review plans, orders, and press releases and answer questions for JAGs in the field—recalled that "[t]he idea was to support CENTCOM in its execution of its mission, anticipating the legal issues that might arise, rather than wondering whether a particular option was 'legal' or 'illegal'" (Parks 1991, 405). Furthermore, military lawyers signaled

[74]For example, a 2003 study of Desert Storm concluded that "operational law advisers influenced the selection of targets. Once the war commenced, however, tactical operators were concerned with successfully performing their duties and had to rely on the ROE and their training for compliance with the law of war" (Myrow 1996, 142).

their martial competence through tactics that ranged from spending time with targeting specialists in order to "[develop] an appreciation of what an aircraft and its munitions can accomplish" (Bridge 1994, 17) to "[sleeping] in the sand alongside troops in the field" (Keeva and Cates 1991, 52).

Furthermore, the accounts of commanders during Desert Storm indicate that this approach enhanced the JAGs' standing with their fellow officers. Statements from top Pentagon officials, as well as the DoD's official report to Congress, broadly praised the work of JAGs in the conflict. For example, Colin Powell, Chairman of the Joint Chiefs of Staff, remarked that "[d]ecisions were impacted by legal considerations at every level" and that "lawyers proved invaluable in the decision-making process" (quoted in Keeva and Cates 1991, 52). In certain cases, records indicate that JAGs' performances in Desert Storm shifted their commanders' perceptions of them between the beginning and end of hostilities. For example, CENTCOM's top lawyer, Raymond Ruppert, recalled that at the start of Desert Storm the U.S. high commander, General Norman Schwarzkopf, viewed his lawyers as little more than "a necessary evil." Furthermore, he recalled that the CENTCOM chief of staff "did not understand the role of the lawyer on the general staff," which meant that Ruppert "had to fight to get into the briefing in the evening for [General Schwarzkopf]"[75]. His account then depicts how he gave his advice as "a soldier that happened to be a lawyer" throughout the First Gulf War and that, by the end of the conflict, he had altered the perceptions of both officers and gained the trust of the general.

[75] "Oral History of Raymond Ruppert".

These positive reports from commanders encouraged military leaders to promote Operational Law more actively. For example, immediately after the First Gulf War, the Air Force Judge Advocate General and Air Force Chief of Staff released a joint statement stating they were "committed to forging closer ties between law and operations" (Quoted in Myrow 2003, 153). Furthermore, this joint initiative asserted that:

> [the military] cannot afford to wait for war to bring judge advocates into the operations and planning environment. We need to work together all the time so that we all understand how and why the Law of Armed Conflict (LOAC) must be an essential element of our mission (Quoted in Dunlap 2003, 481).

Around the same time, the Judge Advocate General of the Army convened an inter-service conference on OpLaw and its essential role in the future of military lawyering (Interview 01.02.02). Furthermore, during the 1990s, each of the JAG Corps changed the name of their 'Departments of International Law' to 'Departments of International and Operational Law'[76]. Similarly, the various JAG schools increased their curricular focus on OpLaw, and each of the branches debuted handbooks devoted to enhancing the application of law in their domain[77]. The profile of OpLaw was further bolstered by a cascade of articles and special issues devoted to the subject in law journals throughout the 1990s[78]. The impacts of these reforms were noted by my interviewees, many of whom began their careers in the 1990s and commented on the seemingly meteoric rise of the concept and practice of Operational Law at this time. Operational advice became such an

[76] In the Army this was accomplished by the former legal adviser to General Schwarzkopf, who later noted that the change in nomenclature was more than symbolic: "[t]he focus of that office shifted a bit to more operational matters" ("Oral History of Ray Ruppert").
[77] For example, the Army had been publishing versions of their handbook since 1988 (Interview 01.02.01) but put greater effort into this publication after Desert Storm ("Oral History of Marc Warren")
[78] See, for example, Parks 1991; Myrow 1996; DeSaussure 1994; Warren 1996; Bridge 1994; Heintzelman and Bloom 1994; Coe and Schmitt 1997.

important part of the JAG Corps at the time that one prominent Army lawyer concluded that, going forward, "[e]very judge advocate must be an operational lawyer" (Warren 1996, 37).

The success of JAGs' continued re-production of their identity as 'warrior lawyers' through OpLaw was reflected in two trends that became apparent by the end of the 20th century and would grow during the War on Terror. First, the involvement of military lawyers in operations had expanded well beyond their formal authorities as reviewers of plans[79]. Second, despite having no formal role in decision-making, JAGs had become influential voices in even the most sensitive of deliberations. Both these trends were most evident in the JAGs' increasingly important role in the 'targeting cycle'. Nowhere did the military's rules at the time establish that lawyers had to have a seat at the table on the 'targeting boards' that nominated and approved all pre-planned airstrikes and missile attacks. However, the position of the JAG in targeting was nonetheless carved out in practice, at first in a piecemeal way during Operation Desert Storm and eventually in a more systematic fashion during the late 1990s and early 2000s (Lohr and Gallotta 2003; Jones 2020, 197–234). Furthermore, multiple studies have concluded that the JAGs who sat on these boards were often able to influence target selection, especially in the War on Terror. During the 1999 NATO intervention in Kosovo and Serbia (Betts 2001; Lohr and Gallotta 2003) and the 2003 invasion of Iraq, JAGs occasionally 'sent back' target selections that they felt did not hold up to legal scrutiny (Kahl 2007)—

[79] In a trend that would continue into the early 2000s, JAGs across the service branches noted the reach of military lawyers in operations had expanded well beyond their formal authorities and lobbied for new doctrine to capture this growth (Warren 1996, 72; Sharp 1996, 19; Dunlap 2001b, 7).

suggesting that JAGs had achieved sufficient influence to effectively 'veto' targeting decisions if they felt it necessary[80] (Dill 2015, 150). Reflecting on this trend, one such observer remarked, with a degree of hyperbole born out of concern, that when it came to targeting "NATO's lawyers…had become its commanders" (Betts 2001).

This expansion in the scope and influence of legal advising reflected the significantly expanded degree of trust commanders had come to place in their JAGs. Among my interviewees who deployed overseas between 1990-2001, there was a strong consensus that many commanders had accepted military lawyers "as part of the pointy end of the spear" (Interview 01.02.19). This account is also affirmed in the writings and reflections of commanders during this period. For example, an Air Force general stated: "I was in the CAOC during [Operation] Desert Fox. Who do you think was standing right behind me? It was my JAG" (quoted in Dunlap 2001, 11). These statements indicated broader recognition among much of the officer corps that JAGs had achieved substantial martial credibility to not only participate in operations but occupy a place of privilege on the command staff. In the words of a Marine general:

> The senior [Staff Judge Advocates] may be as close to the commander as his operations officer or his chief of staff**...**They will be the right hand of the commander, and he will come to them for advice (Zinni 1996, 17).

Furthermore, this 'right hand' place of the lawyer—carved out through the JAGs re-production of their own identity as 'warrior lawyers'—was on the precipice of an ever-greater period of expansion over the next two decades.

[80] In the following two chapters I explain why, despite often possessing an 'informal veto' in the war room, JAGs cannot use this authority with any frequency without undermining their own position.

In sum, between the Vietnam War and the War on Terror, the JAG Corps carved out an influential nodal position in operations and re-produced themselves as 'warrior lawyers' in a co-constitutive process. JAGs in the 1960s-1980s largely saw themselves—and were identified by commanders—as *lawyers* rather than *soldiers*. However, this identity was transformed into one that defined JAGs by their dual claims to membership in the professions of law and arms. This occurred first through the JAG's largely successful efforts to adopt positions as 'brokers' between law and operations at the forefront of the military's 'strategic restraint' reforms following the Vietnam War. Then, following strong backlash from commanders, this identity was more intentionally and substantially changed through the invention and institutionalization of 'Operational Law' in the 1980s and 1990s. This transformation—which unfurled unevenly and with a near-failure at the start—had significantly 'lawyerized' the U.S. military by the eve of the War on Terror, with JAGs involved in even the most sensitive of kinetic activities and commanders demonstrating a growing degree of trust in their operational attorneys.

The Institutionalization of the JAG as 'Risk Manager' (2001-2021)

The War on Terror ushered in the largest and most sustained operational deployment of JAGs in history. For example, by one tabulation, "2,200 JAGs, 350 civilian DoD attorneys, and 1,400 uniformed paralegals" were involved in 'Operation Iraqi Freedom' in 2003, as compared to around 350 JAGs in Desert Storm, even though troop levels in these two conflicts were relatively similar (Dill 2015, 149). In terms of placement, lawyers in the War on Terror began being deployed in smaller units across the armed services. Since the 1970s, JAGs in land units had typically been assigned to the

headquarters of a division, which consists of approximately 10,000-15,000 soldiers. This policy was drastically revised for the first time in 2005-2006 when the Army and Marines changed their deployment and personnel policies to attach a Brigade Operational Law Team (BOLT)—consisting of two JAGs and a handful of paralegal assistants—to every brigade (approximately 1,500-3,000 soldiers). Furthermore, special operations units, which took on an increasingly larger proportion of combat duties during the War on Terror, had a far higher proportion of legal advisers to total personnel[81]. Additionally, by at least 2010 all U.S. combined air operations centers were required to have at least two JAG officers on-call 24/7, whereas in Desert Storm this policy had only been in place at CENTCOM headquarters (Dill 2015, 151). Lastly, even though the nature of these conflicts least impacted the Navy, a 2011 report on naval JAG deployment revealed increases in not only the size of the force but the proportion of JAG billets dedicated solely to 'Operational Law' since 2001[82].

The JAG Corps was not alone in lobbying for these deployment changes. During the War on Terror, commanders in large numbers began not only accepting JAGs onto their staff but demanding them from higher headquarters. For example, the previously mentioned Navy report on JAGs found that commanders frequently requested additional operational attorneys. That report also highlighted the following quote from a high-ranking Navy commander: "I consult with [judge advocates] on any and every significant

[81] One special operations JAG who served in Iraq estimated there were about 5-6 operational attorneys assigned to each 'Special Forces Group' in the Army. ("Interview with LTC Oren McKnelly," quoted in Hodges 2018, 292)

[82] "Final Report" *Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy* (February 22, 2011), 47 (Hereafter Navy Panel).

issue that I face. . . Every operational commander I know wants all the judge advocates he or she can get"[83] This demand was affirmed in a Marine Corps study of its battalion commanders' perceptions of judge advocates from 2005-2006, which included the following testimony:

> I went without [a JAG] after he was wounded…nearly one month…it was an absolute immediate impact on operations…Assigning a Judge Advocate to an infantry battalion, especially for deployed combat…was one of the very best things that I have seen in 24 years of service in the Marine Corps.

Furthermore, this study found that when given a choice between gaining an additional general staff officer (Captain or Major), an additional civil affairs officer, or an additional JAG to their staff, 74% of the surveyed commanders preferred having another lawyer.

The high demand for lawyers among the command reflected the extent to which the JAG Corps had been re-produced, in the eyes of military officers, as 'warrior lawyers.' For example, an investigatory DoD panel concluded in their final report that "[d]eployed judge advocates have proven indispensable to commanders on today's battlefields. Deployed commanders consider their judge advocates as essential members of the command team"[84]. The testimony of commanders to this investigative panel reveals not only the degree of trust they placed in military lawyers by the mid-2000s, but also how this trust was linked to their increased martial credibility. In the words of one Air Force general:

[83] Ibid., 52.
[84] DoD Panel 11.15.05.

> We had a JAG Corps as I was coming up in the Air Force [in the late 1970s], that tended to be very much [of the mindset of] 'we're lawyers, we don't play'…[N]ow, we wouldn't go anywhere without our JAGs.[85]

Similarly, a second general testified that he would always heed the advice of "[JAGs] who I trust, who I have grown up with, who wear the same uniform, who have been to the same [Professional Military Education] schools that I've been to, who understand what is in the head of an operational commander"[86]. Furthermore, the desirability of these traits was being communicated back to the JAG Corps. For example, at a summit of judge advocates in 2005, the gathered JAGs were encouraged by the Chief of Staff of the Air Force to follow the example set by the recent generation of 'warrior lawyers', who had demonstrated that JAGs were "an indispensable partner in executing [a] warfighting mission". "Carnivore JAGs," the general concluded, "don't go to war without 'em!"[87]

'Restoring Law to the Battlefield': JAGs and the 'new' War on Terror

The trigger for the military's rapid 'lawyerization' during the War on Terror was the re-organization of the armed forces towards 'strategic restraint' during the 2000s and the successful efforts by JAGs to position themselves at the center of those reforms. As the wars in Iraq and Afghanistan quickly turned into occupations and counterinsurgency struggles, civilian and military leaders became increasingly preoccupied with winning 'hearts and minds' and viewed credible accusations of war crimes and other illegal conduct by U.S. forces as anathema to this strategy. However, this emphasis on 'strategic

[85] DoD Panel 06.02.05
[86] Ibid.
[87] The remarks were written by General Teed Michael "Buzz" Moseley and read by Maj. Gen. (ret.) Ronald Sega, the Under Secretary of the Air Force at the time, on October 3, 2005. These remarks, and others, were later published in the Air Force JAG Journal *The JAG Reporter* as part of a "Special Keystone Edition" in 2005.

restraint' was kicked into overdrive by the revelation of torture and abuse at the Abu Ghraib prison facility in 2004 and subsequent leaking of the Torture Memos later that year. As with the post-My Lai years, the DoD conducted investigations and issued reports on the 'root causes of Abu Ghraib' and then instituted a range of reforms intended to address these causes throughout the 2000s.

As a result of these operational conditions and events, 'strategic restraint' became firmly ingrained in DoD doctrine. For example, the Joint Chiefs of Staff added both "legitimacy" and "restraint" to their nine existing 'principles of war' in the 2008 update to their authoritative publication on 'operations'—placing the importance of these principles for winning modern wars just below concepts such as "offense", "maneuver", and "economy of force"[88]. "Restraint" and "legitimacy" were then further upgraded to holding equivalent status with these war-making principles in the 2011 update to the same document[89]. Furthermore, JAGs were directly identified as key actors in this move into 'strategic restraint.' For example, whereas the 2001 version of the Joint Chiefs' 'operations' publication made no mention of JAGs, the 2008 update included a section on legal support and role of the judge advocate in modern warfare, noting that "[n]early every decision and action has potential legal considerations and implications"[90].

Other documents from the time made even more direct links between the involvement of legal advisers and the strategic use of restraint and legitimacy to effectively combat insurgencies and 'terrorism.' The Army and Marine Corp's

[88] *Joint Pubication 3-0: Operations* (2008)
[89] *Joint Pubication 3-0: Operations* (2011)
[90] *Joint Pubication 3-0: Operations* (2008, III-35)

'Counterinsurgency Manual' (2006) repeatedly emphasized the legal components of legitimacy. This document devoted one of its five appendices entirely to "Legal Considerations" (Appendix D) and identified "consultation with the unit's supporting staff judge advocate" as an 'irreplaceable' component of an effective counterterrorism strategy in the 21st century[91]. Similarly, the Navy's 2011 report on JAGs concluded, after numerous interviews with commanders, that waging the War on Terror required a mode of operations that was "increasingly complex and legally intensive" and that, in addition, "experienced operational judge advocates can be successfully applied to non-legal tasks—particularly counterinsurgency operations"[92]. For both these reasons, the panel predicted that "the demand signal for judge advocates with expertise in operational law will continue to grow at least at the same rate as it has since September 11, 2001" and recommended that the Department of the Navy enlarge the size of both the Navy and Marine JAG Corps[93].

In addition to the military, the U.S. Congress undertook its own investigation, report, and sets of statutory reforms of the DoD to enhance 'strategic restraint' in the wake of Abu Ghraib and the Torture Memos. Congressional reforms repeatedly identified 'independent JAG advice' as a key part of preventing 'future Abu Ghraibs'. In this, Congress approved a series of items pertaining to judge advocates in the fiscal year 2006 National Defense Authorization Act (NDAA), which provided the highest authorization to date for the involvement of JAGs in operations. This addition to the NDAA—which

[91] *Field Manual 3-24/Marine Corps Warfighting Publication 3-33.5* (2006), D-1.
[92] Navy Panel, "Report" (2011), 43.
[93] Ibid., 213.

holds the status of U.S. law and has been included every year since 2006—formally prohibits any "officer or employee of the Department of Defense [from interfering] with the ability of the Judge Advocate General [or field-deployed JAGs] to give independent legal advice"[94]. Furthermore, the 2006 NDAA raised the ranks of the top JAGs of the Army, Navy, and Air Force, making them privy to a wider range of activities and decisions. "With these few words," a top-level JAG remarked after the passage of this act, "Congress signified the importance it gives to judge advocates' independent legal advice. Congress trusts judge advocates and it wants senior leaders and commanders to have the benefit of their independent advice" (Savage 2007, 37).

The identification and empowerment of JAGs as key actors in the institutionalization of 'strategic restraint' during the 2000s resulted from efforts by the JAG Corps to frame itself as representing a new approach to the War on Terror—one in which the rule of law and military efficacy in the fight against terrorism need not be sacrificed for one another. This vision—that the U.S. could both vigorously prosecute the War on Terror *and* uphold its legal and moral commitments—would become a major campaign promise and theme of the administration of Barack Obama, during which time the JAG Corps continued to thrive (Savage 2017; Goldsmith 2012). In emphasizing the depth and value of their legal commitments, the JAGs were aided by their strong public opposition to the 'Torture Memos' and an unsuccessful attempt by the Bush

[94] H.R.1815 - 109th Congress (2005-2006): National Defense Authorization Act for Fiscal Year 2006.

Administration to disempower the JAG Corps in policy-making as a result of this opposition[95].

These battles between Bush Administration lawyers and the JAGs started behind closed doors, with civilian leaders ultimately blocking military lawyers from participating in legal policy-making[96] (Turner 2009). However, the revelation of the abuse at Abu Ghraib and, shortly after, the existence of the Torture Memos and DoD policies of 'enhanced interrogation' as well as major supreme court cases on that U.S. authority to hold military tribunals pushed this clash into the halls of Congress. During widely covered hearings between 2005 and 2009, the Judge Advocates General of each service branch provided repeat testimony on the reasons for their opposition to the Torture Memos and matters regarding law in the War on Terror. On the one hand, top JAGs strongly criticized Bush Administration lawyers and called for the immediate overhaul of U.S. policy regarding detainee treatment. These arguments framed LOAC—and, as the military's foremost LOAC experts on LOAC, the JAG Corps by association—as being essential for the United States to regain the moral high ground in the wake of Abu Ghraib[97]. For example, a former Judge Advocate General of the Navy remarked that even if the "coerced testimony" of detainees at Guantanamo Bay were effective, it would still

[95] "Bush seeks to limit military lawyers' independence" https://www.nytimes.com/2007/12/15/world/americas/15iht-jag.1.8759385.html

[96] I cover these efforts by the JAGs to first block and then revoke the Torture Memos in my discussion in Chapter Six of JAGs functioning as forces of restraint.

[97] Other JAGs routinely made similar arguments during this time. See, for example Jackson's (2005; 2008) articles "Stick to the High Ground" and "Restoring the Law to the Battlefield: The Morality and Ethics of the Global War on Terror".

be "unbecoming of the United States to use it. There is no point to 'winning' the war if we lose our heart and soul in the process"[98].

Yet the JAGs were also careful to craft their arguments as a *combination* of fidelity to the rule of law and commitment to 'winning the War on Terror'. In response to Bush Administration officials who testified that international legal compliance in this conflict was foolish and naïve, the JAGs both emphasized the martial credentials and draped their arguments in the language of 'strategic restraint'. For example, the Deputy Judge Advocate General of the Air Force explained that adherence to the Geneva Conventions "is not only the right thing to do; it also serves the pragmatic military purpose of helping us win the Global War on Terrorism"[99]. Furthermore, when asked by a senator about whether the U.S. could "win the war and still live within Common Article 3 [of the Geneva Conventions]", all six testifying JAGs answered in the emphatic affirmative, with one remarking "I don't think we can win the war *unless* we live within Common Article 3"[100]. In addition to emphasizing that law and legitimacy were crucial for winning hearts and minds overseas, these JAGs also emphasized a more 'offensive' understanding of LOAC and military lawyers. While opposing the abusive treatment of detainees in U.S. custody, the military lawyers frequently affirmed the JAG Corps' strong support for using LOAC authorities to try 'unlawful combatants' in military tribunals[101]

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[98] *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld. Hearing of the U.S. Senate Committee on Armed Services (07.13.06).
[99] *Statement of Major General Charles J. Dunlap Jr. Before the House Armed Services Committee United States House of Representatives Concerning the Supreme Court's Decision in* Hamdan v. Rumsfeld (11.07.06).
[100] *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld. Hearing of the U.S. Senate Committee on Armed Services (07.13.06).
[101] For example, during debate Senator John McCain read two letters from high-ranking JAGs defending the use of military tribunals. In one of the letters, the Judge Advocate General of the Navy, Bruce

and detain them for as long as the U.S. chose to conduct the War on Terror[102]. For example, the Judge Advocate General of the Navy remarked during testimony that "the world is the battlefield in some respects…I believe that the United States can capture terrorists and [under LOAC] warehouse them"[103].

These public performances of the JAG Corps' identity as both soldiers *and* lawyers were picked up by military and civilian leaders as the key ingredients of a renewed focus on legality and legitimacy in the War on Terror. Congressional critics of the Bush Administration's conduct—led by Senator John McCain (and including then-Senator Barack Obama)—identified the JAGs as the perfect experts to determine whether the U.S. could fight the War on Terror within the confines of LOAC. For example, during testimony, Senator Lindsey Graham (himself a reservist in the Air Force JAG Corps) paused his line of questioning to "reinforce to the committee members" that the testifying JAGs were "unique" because they brought a combination of "military expertise and legal knowledge not possessed by many"[104]. Graham later framed this dual expertise as being strategically advantageous for preventing costly violations. "If [the Bush administration

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MacDonald, remarked "I recommend that the jurisdiction of military commissions be expanded to permit prosecution of all unlawful enemy combatants who engage in or attempt to engage in hostilities against the United States." In the other, the top JAG of the Marine Corps, Bruce Walker, remarked: "I submit that the jurisdiction of the military commissions should be broad enough to facilitate the prosecution of all unlawful enemy combatants, and not merely members of al Qaida, the Taliban, and associated organizations" *Congressional Record: Senate*—S10412 (11.28.06).

[102] "*[Navy Judge Advocate General] Admiral McPherson*: I think we [should] continue to hold [individuals who the U.S. doesn't have enough evidence to prosecute] until the cessation of hostilities, in accordance with the Geneva Convention. *Senator Dayton*: That, 'the cessation of those hostilities,' being what we define as the war against terrorism? *Admiral McPherson*: That's correct. Yes, sir". *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld. Hearing of the U.S. Senate Committee on Armed Services (07.13.06).

[103] *Standard of Military Commissions and Tribunals: Hearing Before the Committee on Armed Services, House of Representatives* (07.12.06)

[104] *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld. Hearing of the U.S. Senate Committee on Armed Services (07.13.06).

and military] had listened to [the JAGs] from the outset," he declared in another hearing, "we wouldn't have a lot of the problems we've dealt with in the past [few years]"[105]. These arguments were further echoed in letters to both houses of Congress that were signed by dozens of retired military commanders, all of whom vouched for the JAGs and their efficacy in the War on Terror[106]. Citing the support for military lawyers among the command, Congresswoman Susan Davis declared, just prior to a final vote on the floor of the House of Representatives, that the JAGs' "compelling" testimony had "[showed] the world that American can be tough on terrorism while staying true to the values we hold so dear"[107].

This portrayal of the JAGs—as figures who consistently saw 'the big picture' in the fight against terrorism and safeguarded the U.S.'s core ideals—proved immensely effective, earning praise for the JAGs in media[108], as well as from future officials in the Obama administration (Turner 2009, 42). More immediately, it led to the operational empowerment of the JAG Corps by the DoD and Congress, as described earlier. Summing up the effects of these various factors on the trajectory of 'lawyerization', the DoD investigative panel formed in the wake of Abu Ghraib concluded in its final report that "[it is] clear from the commanders who testified that legal advice is essential to

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[105] *Review of the Department of Defense Detention and Interrogation Policy and Operations in the Global War on Terrorism*: *Hearings Before the Committee on Armed Services Subcommittee on Personnel* (07.14.05)
[106] See, for example, "Letter to Chairman John Warner and Ranking Member Carl Levin from General John Shalikashvili U.S. Army (Ret.) et al." *Hearing of the Senate Armed Services Committee* (September 28, 2006)
[107] *Congressional Record: House*—H7944 (11.29.06)
[108] See, for example: "Military's Opposition to Harsh Interrogation Is Outlined" https://www.nytimes.com/2005/07/28/politics/militarys-opposition-to-harsh-interrogation-is-outlined.html; "Military Lawyers Prepare to Speak on Guantánamo" https://www.nytimes.com/2006/07/11/washington/11jags.html

effective combat operations in the current environment—legal advice is now part of the tooth not the tail"[109].

Legal and Legitimacy Risk Managers

'Lawyerization' during the War on Terror not only increased the reach and influence of military lawyers in operations, but it also framed issues of legitimacy and the broader 'risks' of modern operations as falling under the purview of the JAG. Many of these practices had been developing, from the ground up, since the 1970s. However, in the crucible of the War on Terror, JAG operational advising more clearly took shape as expertise on the legal and legitimacy-related issues of modern operations.

Whereas JAGs were formally tasked with providing *legal* advice in operations, commanders were increasingly not only accepting JAG input on non-legal issues of *legitimacy*, but in many cases were seeking out this counsel. While most of my JAG interviewees described their role as involving, from time to time, advising on extra-legal matters, the more recent judge advocates I spoke with—all of whom entered the JAG Corps in the 2000s or 2010s—described an obligation to provide 'policy advice' (the most common JAG phrase for legitimacy assessments) in their *role* as a JAG. "I've not met a lawyer who doesn't give policy guidance," an Army JAG explained, "because the legal decision may also have second and third-order policy implications" (Interview 01.01.10). Furthermore, these judge advocates generally remarked that they felt not only comfortable but typically expected by the commander to provide this counsel, as long as

[109] DoD Panel (06.02.05)

they clearly distinguished assessments of legitimacy from those of legality. “I’d say,” an Air Force JAG explained to me, “there are very few [commanders] who want you to 100% just stick to the law” (Interview 01.01.07). This perspective has been partially ingrained in commanders through the training they receive. For example, one of the core themes of a training course for new commanders that I attended was that their JAG adviser isn’t just there to provide *legal* advice. “When your legal advisor is telling you that something may be legal, but not wise,” a summary of course take-home points exclaimed, “listen to them”[110].

Both commanders and JAGs described military lawyers as uniquely positioned to advise the command on matters of operational legitimacy because they combined the strategic focus of a soldier with the analytical rigor and ethical commitments of a member of the legal profession. The combination of these talents and commitments—often summarized as a capacity to provide strategic objectivity in sensitive environments—was a common theme raised by my interviewees. JAGs who had deployed in the War on Terror explained that because of their martial-legal identity commanders used them to help the staff “see the bigger picture” in the War on Terror (Interview 01.01.19), “ask the tough questions” of potentially “unwise” courses of action (Interview 01.02.17), and “see the issue from all sides”—especially those of the media and key strategic audiences—when considering a plan (Interview 01.02.05). Others remarked that being the expert on *international* law was often seen as having insights into issues of legitimacy while engaged in overseas operations. For example, an Army JAG explained that “a lot of [the]

[110] Fieldwork notes: Senior Officer Legal Orientation Course (03.16.18). Charlottesville, Va.

risks" that he focuses on in his unit "aren't a part of my legal expertise as far as interpreting what LOAC is for my commander, but they're associated with it" (Interview 01.01.17).

Commanders similarly invoked this justification for the JAG's role in non-legal, legitimacy-related issues. For example, a Marine general explained that he frequently used his JAGs when considering "if [an action] is going to appear on the front page of some Washington Post article"[111]. The same commander later remarked that JAGs helped Marines keep in mind the "strategic implications" and understand "the legal and ethical implications of their actions" while "[taking] the fight to the enemy"[112]. In this, he argued that decision-making in counterinsurgencies required having officers "that you trust and have maybe a clearer [pause]. You're looking for that objectivity, I guess I'm saying. You'll never get better objectivity than from an attorney, whether it's a Marine attorney or a Navy attorney"[113]. Similar themes about a JAG's capacity for strategic objectivity, ethics, and critical thinking were highlighted by General (ret.) David Petraeus and his former JAG in Iraq, General Mark Martins during a public talk held by the two of them at the law school of George Washington University School in March 2018[114]. Throughout this discussion, Petraeus repeatedly explained that he and other commanders came to rely heavily on their military lawyers during the occupation of Iraq—providing examples that ranged from targeting to financial matters and governance decisions—for their advice in

[111] DoD Panel 06.01.05.
[112] Navy Panel 10.13.10
[113] Ibid.
[114] "Guest Speakers Gen. David Petraeus and BG Mark Martins: Leadership, Lawyers, and Judgment" https://www.law.gwu.edu/gen-david-petraeus-and-bg-mark-martins-leadership-lawyers-and-judgment

non-legal decision-making. He attributed this reliance to the capacity of JAG lawyers to be the perfect "sounding board" for plans under a mindset of 'strategic restraint' because they combined the instincts of a warfighter with the analytical capabilities and ethical commitments of a lawyer.

Furthermore, much of the institutionalization of JAGs as advisers on law *and* legitimacy directly followed—and even referenced—the framing efforts of JAGs in the wake of the Torture Memos and Abu Ghraib. This link was most evident in a 2009 report issued by the DoD's National Defense University on the opposition of the JAG Corps to the Torture Memos. This report cited widespread perception among senior commanders that JAGs were *expected* "to discuss nonlegal factors along with technical legal advice" because JAGs were seen as "honest brokers[s]" who had demonstrated their worth as the "conscience of the Services" during these events (Turner 2009, 42). As such, the report offers the following conclusion:

> Better policy is developed when a [JAG] serves as a balanced advisor…[who answers] four questions on any proposed action: Is it legal? Is it advisable? If it is not legal or if it is ill-advised, what are the alternatives? What is the recommended course of action? (Turner 2009, 42)

This recognition of command expectations for JAGs to go beyond the law was also articulated in doctrinal changes issued as part of the DoD's post-Abu Ghraib reforms. For example, in 2007 the Joint Chiefs of Staff released their first all-service publication outlining the role of the modern JAG. The formal role of the JAG in prior decades had—through instructions, memorandums, and service-specific handbooks—tasked JAGs with providing advice on the *law*. In contrast, this document stated that, in planning, military

lawyers were to "[a]ssist the commander…and staff in evaluating each [course of action] to ensure it is *acceptable* (i.e., worth the risks and within legal parameters)"[115].

During the War on Terror, this language of risk assessment and mitigation has become even more common. The core facets of what I have termed the 'risk manager' model of legal advising—which I unpack in detail in Chapter Five—were evident throughout my interviews. In this, the JAGs with extensive operational experience in the War on Terror were more likely to formally adopt the language of risk. For example, a Navy JAG trainer explained to me that "[operational lawyering] is about helping to clarify the legal terrain and what the risks are for the [commander]" (Interview 01.01.16). A more detailed description of this practice was summarized by a Marine lawyer who had recently returned from the U.S. campaign against the Islamic State of Iraq and Syria (ISIS):

> You've got a commander, you've got all these different guys on staff. You've got the intel guys, the targeteers, the fires guys, this that and the other. And they may not know how far [they] can go. 'If I do X, what risks am I exposed to, if any?' [And so, the lawyer is there to say:] 'We can go up to this extent, we can go past that but you're at great legal risk here…[The rules are] a gray area…and I'm gonna help you operate within that area' (Interview 01.01.09).

Summarizing these various changes in both practice and doctrine, an Army JAG's assessment of the role of the modern military lawyer asserts that "Judge Advocates provide legal risk [assessments], mitigation strategies, possible solutions, and courses of

[115] *JP 1-04 Legal Support to Operations* (2007); emphasis added.

action…Once legal risk is identified, prudent counsel must recommend steps to mitigate that risk, and recommend other possible courses of action" (Gade 2016, 35-36).

The language of risk—referring to both law and legitimacy—also now pervades formal doctrine. Prior to the 2000s, JAG publications rarely used the language of risk management. In contrast, the DoD's 2016 update to its joint document on 'legal support to operations'—which outlined the expanded roles and responsibilities of JAGs after the scandals of the mid-2000s—tasks operational lawyers with identifying "authorities, restraints, and constraints" in decision-making by "[considering] the second- and third-order effects of each recommendation and provide a risk assessment of each [course of action]"[116]. The 2020 update to the Army's leading doctrinal publication for JAGs is even more illustrative. It now devotes an entire sub-section to the concept of 'legal risk'[117]—a term that does not appear once in the two prior versions of the document (1991, 2000)—and focuses extensively on integrating JAGs into the development of courses of action in order to mitigate that risk. The same document also affirms the role of military lawyers as "counselors" and "trusted advisors to commanders" who possess crucial "critical thinking skills" that they utilize in the identification and "mitigation of legal risks and issues" that may arise in an operation[118]. In a subsequent analysis of these changes, two JAGs wrote this new language boiled down to every operational lawyer asking themselves a core question: "What does the commander need to know to appreciate, mitigate, or understand

[116] *Joint Publication 1-04: Legal Support to Operations* (2016, II-7–II-8)
[117] The definition of 'legal risk' in this document is slightly broader than my own and includes aspects of what I term 'legitimacy risk', such as "perceptions" of military behavior that can "reduce the effectiveness of leaders and units if not properly considered" *Field Manual 1-04: Legal Support to Operations* (2020, 3-12).
[118] *Field Manual 1-04: Legal Support to Operations* (2020, 1-3; 3-9; 3-10).

[the] legal risk or opportunities [of the mission]?[119]" Furthermore, commanders have been 'trained' to expect this role from their JAGs. "A good [JAG] will tell you: here are your left and right limits"[1], a JAG trainer remarked during a legal course for over one hundred commanders. "A *great* [JAG] will tell you, here are your risk areas and your authorities, and here's how you can work through those problems"[120].

In sum, the War on Terror proved to be another transformative event for U.S. JAGs in operations. First, the increased operational tempo of these conflicts deployed JAGs in record numbers and in smaller, more tactical units due in no small part to commanders' increased demand for military lawyers. These requests were directly attributed to the JAGs' perceived dual capabilities as 'warrior lawyers'. Second, scandals over the military's wartime conduct and the return of counterinsurgency doctrine as the dominant mode of warfighting caused the DoD to institute wide-ranging programs to instill 'strategic restraint'. This provided another major opening for JAGs to reinforce and expand their role as key nodes for the conduit of not only law but also now legitimacy in operations. In this, JAGs leveraged their dual commitments to the rule of law *and* the waging of war to frame themselves as the ideal figures for prosecuting the War on Terror in a way that was, on the one hand, legally defensible yet capable of putting LOAC authorities to work for the military and, on the other hand, more attentive to legitimacy issues without binding the hands of soldiers. This mobilization of their identity as 'warrior lawyers' identified unique combinations of their dual expert talents and

[119] MAJ Ryan Howard and CPT Keoni Medici, "The Running Estimate" *The Operational Law Quarterly*, Vol. 17-3 (June 2017), 10. On file with author.
[120] Fieldwork Notes. "Senior Officer's Legal Orientation Course" (03.14.18)

commitments, expressed perceptions of JAGs as being able to "see the big picture" in the War on Terror and not sacrifice strategic objectives for tactical expediency. Furthermore, in more recent years, the role of the JAGs in identifying legal and legitimacy issues has been increasingly expressed as a practice of risk management in which liabilities and opportunities in operations are assessed, exploited, and mitigated.

Conclusion

In this chapter, I have provided evidence supporting my claim that the JAG Corps' re-production of their *identity* as 'warrior lawyers' and institutionalization of their *role* as 'risk managers'—made possible by major 'strategic restraint' reforms—has driven the 'lawyerization' of the U.S. military. In this, I have shown how the JAG Corps leveraged claims to a dual expert identity, as both lawyers and soldiers, to ensconce themselves as key brokers between international law and operations during moments of deep concern among U.S. leaders over the strategic liabilities of legal violations and other threats to military legitimacy. Between the Vietnam War and the start of the War on Terror, JAG leaders transformed the JAG Corps into a cadre of 'warrior lawyers', primarily through the invention and institutionalization of 'Operational Law'. Since 2001, the JAG Corps deployed this claim to membership in the professions of law and war to drastically increase the number of military lawyers in operations, cultivate demand for JAGs amongst the command, and expand this role into that of a manager of the liabilities and opportunities of both law and legitimacy in modern warfare.

However, in providing this historical account, my argument is not that these issues were either perfectly navigated by the JAGs or have been permanently resolved. At

multiple moments the trajectory of 'lawyerization' could have stagnated—for example, if JAG leaders had abandoned their legal credibility and gone along with the Torture Memos—or collapsed altogether—for example, if the JAG Corps had insisted on remaining predominantly lawyers while trying to implement the Law of War Program. The following two chapters expand this focus on the ongoing instability of the JAG Corps' *identity* as 'warrior lawyers', which, I argue has been the key catalyst for the institutionalization of JAGs' *role* as risk managers for the command.

Chapter Four: Performing the 'Warrior Lawyer'

Introduction

In the prior chapter, I explained how the JAG Corps transformed its institutional *identity* around the model of the 'warrior lawyer': a specialized expert who can demonstrate membership and credibility in the professions of both arms and law. While that chapter provided a historical analysis of the 'lawyerization' of the military through this transformation since the Vietnam War, this chapter focus on the conditions of that identity. Although the production of JAGs as 'warrior lawyers' has been essential for them to carve out a place in operations, I argue that this transformation has brought with it significant challenges and irresolvable tensions. First, I posit that the 'warrior lawyer' identity is produced through individual performances and institutional accreditation processes that both affirm a JAG's sense of self and enable military lawyers to cultivate (informal) authority with their fellow soldiers. Second, I argue that the conditions of this cultivation also create strong tensions between a JAG's credibility as a soldier and their standing as a lawyer, which can quickly erode that ontological security and authority when they advise on contentious issues. Third, I claim that this tension explains why JAGs have not adopted the *role* of either a 'watchdog' or an 'apologist'—which I outlined and contradistinguished from the 'risk manager' in the second chapter.

I lay out this argument over the following five sections. In the first section, I take a closer look at how the 'warrior lawyer'—which, I argue, includes both legal and martial components but slightly favors a JAG's soldierly commitments—enables military

lawyers to cultivate both their own ontological security as specialized hybrid experts and their authority with commanders. The second section then provides evidence of the various performances JAGs undertake to demonstrate the martial side of that dual identity—which range from their command of military doctrine to their knowledge of military culture and shows of athleticism or skill at arms. In the chapter's third section, I show how a combination of institutional accreditation processes and individual performances of intelligence and ethical decision-making allow JAGs to maintain their legal credibility—which, I argue, is typically presumed by other non-lawyer soldiers unless 'proven' otherwise. The fourth section, then, turns to the tensions that arise between these two identities. I demonstrate how saying 'yes' to contentious plans damages a JAG's legal credibility, yet saying 'no' can erode their standing as soldiers. As such, the very currency of a JAG's authority also, paradoxically, undermines that authority when it is wielded to directly influence operations. In the fifth section, I unpack an initial set of implications of this paradox by arguing that JAGs who adopt the role of either an 'apologist' or a 'watchdog' become effectively irrelevant; thus, the JAG Corps has effectively rejected both of these ideal-typical roles.

'Solder First, Lawyer Always'

JAGs continue to define what it means to be a 'true JAG' in terms of their hybrid identity as experts in both the law and warfare. This deep association with, and admiration for both sides of this dual identity was a frequent theme across my research. For example, one of the leading Army JAGs in the War on Terror, Colonel Marc Warren, explained in his oral history: "The idea of being a part of, in my view, the world's two

noblest professions—the profession of arms and the profession of law—is just a perfect thing"[121]. Appropriately, JAG symbols emphasize the fusion of these two elements—the reconciliation of law and warfare through a figure who is trained in the skills and fluent in the languages of both. For example, the official symbol of the Army JAG Corps—adorning uniforms, stationery, publications, facilities, and equipment belonging to the JAG Corps, as well as sweatshirts, bumper stickers, and other paraphernalia displayed by JAGs—shows a crossed quill and sword, representing not only the dual professional commitments of military lawyers but the union of these commitments in the figure of the JAG (Figure 1).

Figure A-1: The Symbol of the Army JAG Corps

Verbal expressions of this union are also common among military lawyers. For example, the motto of the Army JAG Corps is "soldier first, lawyer always", and this phrase was often repeated by my interviewees. As with the symbol of the crossed sword

[121] "Oral History of Marc Warren".

and arrow, this slogan indicates a reconciliation between the soldierly and legal aspects of a JAG's identity. This dual claim is also conveyed to new generations of judge advocates in JAG schools and training centers through posters and other representations of the JAG Corps that emphasize not only courtroom vignettes, but also military lawyers firing rifles and crawling under barbed wire.

However, the balance struck between these two professional commitments is not entirely equivalent. A slight emphasis on a JAG's soldierly qualities was repeatedly conveyed through language, mannerisms, and symbols. This favoring of the martial component of a JAG's identity is also expressed in the descriptions provided of exemplary JAGs from generations past. For example, Colonel Marc Warren, in the same oral history as was previously referenced in this section, described how he strove to follow in the footsteps of military lawyers such as "[former Army TJAG] Mike Nardotti [who] could say [I'm a *soldier* who happens to be a lawyer] and mean it, having served as an infantryman in Vietnam, gravely wounded, Silver Star recipient"[122]. The image of the 'warrior lawyer'—as possessing a martial and legal component to their identity, but slightly favoring the former—has become deeply embedded in JAG institutional culture.

Maintaining this balance between their identities as lawyers and soldiers is also a key component of cultivating authority with the command. As explained previously, JAGs possess neither the formal authority to shape decision-making nor other mechanisms for ensuring that their advice is heeded. Instead, JAGs must cultivate an 'informal authority' with the command in order to have their recommendations followed.

[122] "Oral History of Colonel Marc Warren".

This authority, as shown in broad strokes in the prior chapter, is grounded in the credibility of a JAG's claims to be a 'warrior lawyer'. Similar patterns emerged from my interviews with military lawyers. For example, when I asked a highly experienced Army JAG about the qualities of an effective judge advocate, he replied: "The combination of the military training *and* the legal training…that's what really helps lawyers be useful to commanders" (Interview 01.02.07). Commanders have also articulated that they place their 'trust' in JAGs' who demonstrate they are both soldiers and lawyers. For example, General David Petraeus defined the effectiveness of his JAGs in the following way:

> So what qualities do commanders look for? Well before anything else, we look for soldiers who are lawyers…Neither having a soldier alone, nor being a lawyer alone, is ever adequate. But being both makes one indispensable on the battlefield[123].

Similar expressions of the currency of this 'trust' were common in commanders' statements about their lawyers, especially during the War on Terror.

However, as with JAGs' articulations of their own sense of self, commanders' descriptions of which JAGs earned their trust tended to emphasize martial qualities. For example, a vice-admiral remarked that he sought out and rewarded those JAGs who truly possessed "a military perspective…[those] that are well trained, experienced in the joint and in the Naval environment, who understand and have lived experiences within operations"[124]. A second vice-admiral stressed that he relied on lawyers who "go through pre-deployment workups, who are trained and qualified to stand operational watches,

[123] "The Judge Advocate in Recent Operations" Speech by LTG David Petraeus (10.06.05). Submitted to Navy Panel.
[124] Navy Panel (10.13.10)

[and] who understand the language of operations at sea"[125]. Similarly, a Marine general, reflecting on the "the credibility of our judge advocates" in the War on Terror, remarked that:

> Having judge advocates that spoke the same language and shared our culture proved essential to success during all phases of our operations…I wouldn't want someone who might be a great lawyer but a substandard Marine[126].

These remarks were all delivered to the same Navy panel investigating the effectiveness of the JAG Corps. Reflecting these sentiments, the panel's final report recommended that the JAG Corps continue to enhance the martial (staff officer) training it provides[127].

The JAGs I interviewed consistently emphasized that failing to establish this martial credibility led to isolation and irrelevance on the staff. "You could be the best lawyer in the world" a Navy JAG trainer explained, "but, if you don't have the credibility [as a soldier] to advise the commander, then you're not gonna be able to do your job" (Interview 01.01.14). Similarly, a Marine JAG trainer emphasized that he could quickly tell which new military lawyers were going to make it as operational advisers, and which were not:

> Your self-image has a lot to do with how effective you are. If you understand that you're a Marine or a Navy officer first, you understand that you're there to support the mission…[But] when [a new JAG insists], like, 'listen I'm a lawyer first and a military officer second', I can already tell they're not gonna get that buy-in (Interview 01.01.06).

Another JAG described this erosion of authority in the following way: "When you're in there talking to one of the operators, [you] need [them] to say 'oh yeah, I didn't think of

[125] Ibid.
[126] Ibid.
[127] "Final Report" Navy Panel (2011, 59)

that,' not 'that's just the dumbass lawyer, I don't have to pay attention to that' (Interview 01.01.01).

However, my interviewees also remarked that when the commander developed serious doubts about the legal sufficiency of the advice given, that JAG would also quickly lose their standing. "In the realm of law, I think commanders are going to listen to the lawyer almost every time," a special forces JAG explained to me, before adding "unless they're given a reason not to trust the quality of that advice" (Interview 01.01.10). Similarly, a lead trainer at the Army JAG School emphasized that:

> You have to be competent [as a lawyer]. The commander expects you to know the law. And if you are competent, I think that builds trust because they'll know you're speaking with authority and expertise (Interview 01.01.03).

In the same vein, a retired Army JAG responded to a question about the advice he would give to a young military lawyer with the following answer:

> You've got to give solid, good legal advice every time…It's got to be timely, and it's got to be right on the mark. You can't just shoot from the hip on this stuff because no one is going to trust you (Interview 01.02.03).

This point was also affirmed by commanders, albeit with less emphasis than their remarks about martial capabilities. Summarizing the testimony of a number of commanders, a panel of DoD officials in 2005 concluded that commanders had no interest in "Judge Advocates [who] were unable to give professional, candid legal advice"[128].

[128] DoD Panel ("Panelist Deliberations")

Performing Martial Identity

To demonstrate their all-important credibility as warfighters, JAGs engage in a variety of performances that seek to achieve recognition from their fellow soldiers. While this credibility can nonetheless be squandered through 'obstructionist' legal advising practices, a JAG must first communicate their membership in the brotherhood of arms to the other officers in their unit through a range of activities—many of which have little to do with their core responsibilities as legal advisers. These performances of martial identity are taught to newer judge advocates through a combination of formal instruction and informal socialization.

JAG doctrine and training have increasingly emphasized the instruction of military lawyers on how to be effective officers. A retired Army JAG recalled how in the 1990s an early proponent of 'Operational Law' who had been an ordinance officer in Vietnam before becoming a lawyer, instituted changes at the Army JAG School to "start teaching [JAG cadets] how to do the military planning method, the staff officers' planning guide, teaching [these things] at the basic JAG course …[as] part of socializing the lawyers with their military" (Interview 01.02.12). These changes included the addition of simulation exercises in which cadets would "practice encountering things on the battlefield, like their fellow soldiers will" (Ibid.). Since then, the Army, Navy, Air Force, and Joint Service publications outlining the roles and responsibilities of judge advocates have been revised to increase the martial responsibilities expected of military lawyers. For example, the Army's manual *FM 1-04: Legal Support to the Operational Army*—which outlines the roles, responsibilities, and expectations of lawyers—was first

published in 1991, with subsequent versions being released in 2000 and 2020. Whereas the 1991 edition devotes only a couple of dispersed pages to expectations regarding JAGs' mastery of staff officer skills—such as strategy, weapon systems, and decision-making processes—this topic was extended to half of a chapter in the 2000 edition of the publication. The 2020 edition devotes its entire second chapter ("Fundamental Concepts of Army Doctrine") and sixth chapter ("Planning") to this topic. The most notable example of the emphasis on martial skills in JAG training programs is in the Marines and Coast Guard, where all lawyers must graduate from the service's year-long officer candidate school. One Marine JAG explained to me that this training:

> creates a common language for everybody going forward. And it gets you that buy-in of 'oh they've done that same crappy training, they've sat in the same crappy foxhole in the rain, that I have. And I think it really gives you a lot of credibility (01.01.06).

Interviews with trainers at multiple JAG schools indicated that all the services have begun devoting larger chunks of training time for their new JAGs on cultivating essential skills for officers, such as learning the language of decision-making and planning processes and becoming conversant in doctrine and weapons systems (Interviews 01.01.03; 01.01.06; 01.01.14).

Similarly, the JAG Corps focuses its recruitment to attract law school students who want to be 'soldiers first'. Videos and pamphlets advertising a career in the JAG Corps typically foreground an attorney reviewing a battle plan or staring at a drone feed, prior to images of JAGs arguing cases at a court-martial. While such changes may have been designed to simply boost the JAG Corps' overall applications—although none of the branches have had trouble meeting recruitment targets since 2001—this strategy has the

added effect of attracting certain types of prospective lawyers. One JAG recruiter explained that "I always have to tell people when they're interested in [the] JAG [Corps] that…you're not a lawyer then a Soldier; the Soldier part is always first. You're Soldiers that also happen to be lawyers"[129]. A number of interviewees also emphasized the importance of selecting the right types of people as new military lawyers. "One of the biggest problems of the JAG Corps are [the] lawyers who come in because they go to a good law school, but are horrible fucking officers," one JAG explained (Interview 01.01.13).

Other JAG practices of cultivating martial identity were less formal. In training courses and dozens of meeting rooms and personal offices, I saw JAGs employ a variety of techniques to demonstrate their shared understanding of military language and culture. JAG offices and training centers are filled with images and items conveying the comfort and capability of military lawyers in using force. Knives, replica skulls, swords, souvenirs from war zones, unit mascots, and gavels shaped like war hammers were just a few of the items that adorned the spaces I visited which communicated the JAG's membership in the brotherhood of arms. The Army JAG School in Charlottesville, VA—where I attended two training courses—offers particularly evocative examples of this curated imagery. Each hallway is lined with glass cases displaying relics of war, such as bayonets, gifts from allied forces, and flags flown in major conflicts.

[129] "Soldiers Who 'Happen to Be Lawyers'" https://www.army.mil/article/181726/soldiers_who_happen_to_be_lawyers

Other martial symbols are displayed on JAG uniforms, specifically the patches and insignia affixed to a military lawyer's fatigues. For those with combat deployments prior to their JAG service, these patches tell a JAG's story of combat prowess. For example, one retired Army JAG explained how these symbols helped him gain the trust of his fellow officers:

> I encountered skepticism. There was a colonel who thought that lawyers were just there to gum up the works. But it was to my benefit that I had a ranger tab on my shoulder, which gave me some credibility. And I knew the lingo (Interview 01.02.06).

These patches also signal proficiency with certain weaponry and tactics obtained through additional training, such as 'drop school' for parachute mastery—a course that a number of my interviewees either had attended or expressed interest in attending. Those who had these 'tabs' on their shoulder expressed not only pride in this achievement but also an awareness that such badges made them, if not "operators" themselves, certainly more adjacent to the servicemembers who pull the trigger (Interview 01.01.20). Today, all the service branch JAG Corps allot funds for their attorneys to attend these trainings during their career, even though most JAGs are unlikely to use these skills during deployment.

Similarly, language and word choice are crucial components of these martial performances. My interviews with JAGs were drenched in the acronyms, jargon, and colloquialisms required of a front-line operator[130]. This discourse was also noted by Jones (2020) in his interviews with military lawyers:

> The JAGs that I interviewed all spoke about military operations with fluency and ease…So internalized and normalized have military

[130] However, as I discuss in the next chapter, this jargon dropped off noticeably during the provision of legal advising.

> operations become for JAGs the even specialists might mistake them for actual military operators (105–106).

This emphasis on being able to not only 'walk the walk' but also 'talk the talk' was frequently invoked by JAGs with combat deployments. "You need to know the language of your customer," a special forces Army JAG explained. "You need to know the language of how our troops fight" (Interview 01.01.10). Even those with a strong understanding of the battlefield might face skepticism if they could not adequately present that knowledge in the vernacular of not only the staff officers but the operators around them. "You've gotta learn the weapons systems, to talk aviation, and logistics talk" another lawyer remarked, while explaining the advice he gives to a new judge advocate (Interview 01.01.13). Similarly, an Air Force lawyer repeatedly emphasized the importance for new operational lawyers of "keeping up on the lingo and lore" of the military, as well as mastering doctrine (Interview 01.01.12). He recalled spending evenings during one deployment cramming information about aircraft, weapon systems, and targeting doctrine in order to win the trust of the pilots in his unit, some of whom would test him and the other lawyers on their knowledge of air warfare (Ibid.).

Other JAGs explained that they learned how to perform their martial competence through displays of athleticism and marksmanship. As one retired Army JAG explained, "develop[ing] the relationship with the commander [entails]…Not just being a lawyer, but a soldier as well. You're out there doing [physical training], you're just part of the team like everybody else." (Interview 01.02.01) Another pioneer of OpLaw similarly explained that to win over the command staff, JAGs needed to:

> be out there in the rain, in the mud, doing all that [training] stuff. You are part of the team. That is going to help you establish a rapport. [You'll show you aren't just] some guy who wears Class A's all the time and goes to court[131].

This aspect of competence was echoed by commanders as well as lawyers. For example, during his testimony to the Navy panel on JAG training, General Petraeus further explained that his "definition of a soldier also includes a degree of emphasis on physical fitness…judge advocates just have to be fit, not Olympic athletes—although the Mark Martins and the Lacys [two high-ranking JAG officials] of the JAG world have certainly gotten 'plus' points for being iron rock sons"[132].

Furthermore, I found that many JAGs learned how to cultivate this marital identity through socialization with more senior lawyers. Many of the younger JAGs I spoke with explained that their mentors within the JAG Corps had encouraged them to at least be present, if not excel, at some form of physical activity. One judge advocate explained that he was taught that a good Marine lawyer "could run, talk the talk, and shoot as well, if not better than they could" (Interview 01.02.08). An experienced Army OpLaw attorney remarked that, upon arriving for his first deployment in Iraq, he noticed that his immediate JAG superior "made sure everybody [on the legal team had]…all those soldier skills you needed." He further explained:

> The [JAG] officer in charge of the operational law team had done a lot of extensive training with his individual [JAG and paralegal] soldiers. Everyone was combat life saver qualified and went to all the ranges as

[131] "Oral History of Marc Warren".
[132] "The Judge Advocate in Recent Operations" Speech by LTG David Petraeus (10.06.05). Submitted to Navy Panel.

> often as they could to qualify on their weapons and [had] a really good relationship with the commanders in the brigade[133].

Similarly, an Army Major remarked that the senior military lawyer at his first command in Iraq told him that "[the other officers would] see me as more than just a lawyer if they [saw] me out running and doing [physical training] in the morning" (Interview 01.01.13).

Lastly, a number of JAGs shared stories of earning trust by going out of their way to participate in activities from which many of the common experiences of decision-makers and warfighters were forged. Some of these stories involved volunteering for tasks such as guard duty or 'ride-alongs' with patrol units. One special forces Army JAG emphasized the importance of going on a handful of missions with his soldiers:

> I participated in every type of operation our brigade conducted. An aerial recon. An IED route clearance operation. A patrol through populated area…How do you advise when you don't know what it's like to walk on the ground and observe the illumination rounds going over your head and going through buildings? (Interview 01.01.10)

This technique has been encouraged by other influential military lawyers. For example, in a book chapter on the role of 21st century military lawyers, a retired Army JAG recommends that because "[s]ome commanders and some on the staff may challenge the JA's legal opinions" JAGs must become immersed in the unit's culture through activities such as "[g]etting out on a foot patrol, becoming familiar with the communication devices, and sitting with the analyst" (Gade 2016, 29).

All told, these documents and interviews consistently emphasize the demonstration of a JAG's martial identity as crucial to establishing trust and wielding

[133] "Interview with MAJ Eric Magnell". On file with author.

authority in decision-making. JAGs who did not demonstrate a sufficient understanding of doctrine and military culture—and thus failed to convey their identity as 'true soldiers'—were far more likely to be dismissed as idealistic, out of touch, overly legalistic, or generally obstructionist. However, as shown in the following section, the importance placed on demonstrating a combatant's understanding of warfare was not seen as eliminating a JAG's fidelity to the law. Even though the JAG motto referenced in this chapter prioritizes the martial side of the JAG's identity—being a 'soldier first'—the authority of military lawyers in combat also hinges on the expectation that JAGs will act as defenders of the military's commitment to not only legality but moral action on the battlefield.

Maintaining Legal Identity

As the legal experts in an institution of soldiers, JAGs' lawyerly identity, unlike their martial credibility, is typically presumed by commanders unless proven otherwise. As such, their legal identity relies primarily on their institutional credentials and their recognition by other JAGs as competent lawyers. However, recognition by non-JAG lawyers also plays a key, albeit indirect, part in establishing this identity. First, JAGs are required to obtain a *juris doctor* (JD) degree from an American Bar Association (ABA) accredited law school. JAGs are then required to become bar-certified in at least one state and maintain that certification throughout their career through the completion of Continuing Legal Education (CLE) credits—often in the form of taking small courses and attending events during their free time. Most JAGs also pursue a Masters of Law (LLM), frequently from the Army JAG School in Charlottesville, Virginia, which has obtained

ABA accreditation for the awarding of such degrees. These various degrees and qualifications possessed by each JAG are prominently displayed in frames in their offices, included in their files when reporting to new commands, and—sparingly—referenced when speaking to their fellow soldiers. "So we have all our degrees on the wall," an Army JAG explained, "so [the commander] will be like 'oh you went here for undergrad, oh you went to Michigan for law school" (01.01.13).

Maintaining this system of professional accreditation opens the JAG Corps up to a certain degree of scrutiny and control from the ABA and other professional legal communities. First, as an organization, the Offices of the Judge Advocate General of the Army, Navy, and Air Force must each submit an annual report to the ABA on its training standards, activities, and other details relevant to maintaining their status as organizations with the profession of law. These reports are reviewed each year to assess whether, for example, the various JAG Schools can continue awarding LLMs and offering CLE credits to JAGs to maintain their bar status. The importance of this accreditation process was flagged by the 2005 DoD panel investigating the provision of military legal services. The panel's final report listed the accredited services provided by each branch of the JAG Corps as evidence of the quality of legal advising that civilian leaders could expect from JAGs, concluding in its findings that "[t]he ability of the Judge Advocates General and judge advocates in the field to give independent, professional legal advice is adequately provided for"[134].

[134] DoD Panel, "Final Report" 66; 104-111.

Perhaps even more impactfully, these accreditation processes require the JAG Corps to integrate the ABA's rules and standards of professional ethics into its doctrine and expectations for attorneys. For example, the Army JAG Corp's guide for professional ethics[135] is taken largely from the ABA's standards and is reviewed, periodically, by the ABA for compliance with its rules. These requirements are affirmed and restated in the Army JAG Corp's authoritative doctrinal publications:

> [The Judge Advocate General of the Army] has the unique requirement to meet professional legal responsibilities under AR 27-26. Furthermore, all judge advocates are attorneys subject to civilian rules of professional conduct, continuing education requirements, and professional discipline from their licensing organization, which requires enhanced technical supervision along [JAG Corps] channels[136].

This same official publication further affirms that "[j]udge advocates are subject to professional discipline from their bar licensing organizations for violating any applicable rule, even in an area of operations"[137]. Furthermore, my interviewees took their sense of conduct with these professional standards seriously. For example, one Army JAG mentioned the potential threat of de-certification explicitly:

> If the commander is breaking the law, I would have to tell my [JAG superior officer] and write memos and stuff. I'm going to protect my bar license and my job (Interview 01.01.19).

However, figures on the number of JAGs who have lost their licenses are not publicly available from either the ABA or the JAG Corps.

Beyond degrees and formal accreditation, this legal credibility is also conveyed through recognition by the commander and other soldiers. Both lawyers and commanders

[135] *Army Regulations 27-26: Rules of Professional Conduct for Lawyers* (1992)
[136] *Field Manual 1-04: Legal Support to Operations* (2020, 3-6).
[137] Ibid., 4-1.

alike highlighted the expectation of accurate and timely legal advice as a foundational expectation for cultivating trust in the unit's JAG. When either of these elements is lacking, commanders begin to lose faith in their lawyers. First, JAGs will lose standing with their commanders if any consequences ensue as a result of errors in their legal advising. Additionally, the military creates other mechanisms by which to monitor for lapses in the provision of legal services. For example, JAGs report not only to their commanders but also to their immediate superior officer in what is called the technical chain of command ("tech chain") and have a fellow JAG who sits on boards that determine promotions in every service branch except the Marines. Thus, in addition to instances where shoddy legal advice leads to consequences for a commander, JAGs are periodically assessed and monitored by their own in order to enhance confidence in the quality of the advice provided. These systems also provide informal means for commanders to "double-check" the work of their lawyers. A few JAGs remarked that because commanders of similar ranks socialize in the same networks, they will often ask their peers how their lawyers advise on particular questions (Interviews 01.01.13, 01.01.06, 01.01.15)

These legal advising duties are often supplemented by competence in the area of military justice, especially the convening of courts-martial. These are the issues where law books on the shelf are most likely to be opened for a commander, where statutes are referenced, and where JAGs are not only accepted but expected to act like lawyers. Despite the dramatic rise in prominence of OpLaw during the War on Terror, my interviewees perceived an important link between military justice and operational law

issues through the credibility JAGs can earn when they handle violations of the Uniform Code of Military Justice accurately and efficiently. “You want to build up on the little things so [the commander and staff officers] listen to you on the big things” a highly experienced Army JAG remarked. “Because if you do enough of the little stuff…where you demonstrate your competence in the law, that goes a long way” (Interview 01.02.16).

However, often performances of legal expertise for commanders have less to do with the veracity of advice—which most other soldiers are unable to judge—and more to do with general signals of intelligence, sharp oral and written communication skills, and other traits associated with the profession of law. “Very quickly you'll have credibility because you can read and write and speak,” a JAG Colonel with multiple combat deployments in special operations units told me, “[because] that's our job, and what we spend three years [in law school] doing” (Interview 01.01.01). A number of JAGs described this perception as an expectation to be the “smartest person in the room” (Interview 01.01.13). For example, an Army JAG recalled how in his unit’s initial preparation for deployment to Iraq in 2003 the logistics officer had initially assigned the legal staff to the second and third waves of transport. Upon seeing this allotment, the division commander openly criticized the logistics team at the next staff meeting, reportedly saying:

> ‘Do you really think I'm going to leave the smartest officer on my staff back in Clarkesville while I'm in Iraq, dealing with the most sophisticated problems that anybody in this room can imagine? Why would I do that?’ (Interview 01.02.12).

As noted in the previous chapter, perceptions of lawyers as possessing intelligence, analytical skills, and critical thinking were linked to the JAG Corps’ involvement in

decisions around operational legitimacy. However, this has also come with increased expectations and further demands on the performances of individual military lawyers.

Similarly, many of my interviewees described expectations by commanders that JAGs possess a strong ethical character. The majority of military lawyers I spoke with reported that—due to their legal training, knowledge of the law of armed conflict, and role in the military justice system—the successful cultivation of one's legal identity entailed a moral component. The most common phrase invoked to describe this phenomenon was the notion that the JAG must act as the "conscience of command" and reinforce the moral bent of the United States as a fighting force. "By their very existence, judge advocates represent the rule of law," a prominent Army JAG and OpLaw pioneer wrote "and their continued presence in the field demonstrates the commitment of the nation—and the Army—to discipline and humanity in battle" (Warren 1996, 73). Commanders have also invoked expectations of military lawyers as ethical actors. "A staff judge advocate plays a critical role in…occasionally serving as the commander's conscience," an Army general remarked in his testimony to a Navy panel, "to ensure…that we never become a lawless mob"[138]. Similarly, a Marine commander explained that "[h]aving a Marine judge advocate on the ground…can greatly assist Marines of all ranks in understanding the legal and ethical implications of their actions while…[taking] the fight to the enemy"[139].

[138] "The Judge Advocate in Recent Operations" Speech by LTG David Petraeus (10.06.05). Submitted to Navy Panel.
[139] Navy Panel 10.13.10

A number of JAGs recalled instances where they were expected by their fellow soldiers to be able to deliver compelling ethical reflections on the legitimate conduct of war. For example, an Army JAG who relayed having been asked by his commander to deliver speeches on the principles of the Law of Armed Conflict to each unit before the invasion of Iraq explained that expectation in the following way:

> It's almost like being a preacher, it's almost like being a pastor. You're the holder of the sacred rules. And they're looking for validation of the rules. They're about to go and maybe kill people and they want to hear you say it's valid, it's sanctioned, it's not murder (Interview 01.02.12).

However, other JAGs have speculated that while upper-level officers and those that regularly interface with military lawyers may view them as moral authorities, this perception may not extend down to more junior officers and enlisted soldiers, some of whom associate JAGs with bureaucratic or unfair restrictions on the conduct of soldiers.

Tensions of the 'Warrior Lawyer'

Yet even the most capable and experienced 'warrior lawyers' must struggle with tensions that arise between these two sides of a JAG's dual expert identity. Seeming too lawyerly can undermine one's martial standing. Conversely, coming across too much like a soldier can lead to doubts over a JAG's commitment to the law. As such, these performances of martial and legal identity are not only linked, but excessive emphasis of one credibility can undermine the other. While this balance is easier to maintain in informal activities—for example, by running each morning and crafting intelligent-sounding emails—the tension between these identities is most acute during a JAG's core operational duty: the provision of legal advice.

While JAGs cannot formally veto commanders' plans, their assessments of situations—even those involving non-legal issues—can have an outsized impact on decision-making if JAGs have competently performed their roles as soldiers and lawyers. An Army JAG with special forces deployments described this authority, properly cultivated, in the following manner:

> Other teammates could express concern about a particular action and the commander would feel free to disregard those concerns. But those words, when expressed by a lawyer, would suddenly become imbued with some mysterious legal aura that might cause the commander to hesitate, to not follow his intuition[140].

Furthermore, commanders are well aware that JAGs are required to record and report any illegal activities to their superiors in the hierarchy of military lawyers—referred to as the 'technical chain of command'. As a result the military lawyers I spoke with overwhelmingly stated that very few commanders today would continue with a course of action if the JAG told them it was illegal. Some JAGs refer to this wholesale mobilization of authority to nix a decision as playing 'the red card'—which can stop a planning session or even an operation in its tracks.

Repeatedly playing 'the red card', however, can undermine a JAG's longer-term standing with the commander and staff. JAGs who do not use their 'red cards' judiciously—making sure to save such strong opposition for important but infrequent interventions in the decision-making process—are deemed obstructionists who lack commitment to mission accomplishment. Because "[n]o one wanted to hear 'no'", a special forces Army JAG reports in a recent article, repeatedly shutting down ideas made

[140] "No Legal Objection, Per Se" https://warontherocks.com/2021/04/no-legal-objection-per-se/

him feel "as an obstructionist outsider" who was "isolated on what seemed like an island in shark-infested waters" vis-à-vis the rest of the command staff[141]. Regardless of how well a JAG performs their martial identity—through combat experience, knowledge of doctrine, and demonstrating a shared culture with their fellow soldiers—their credibility as a soldier can rapidly deteriorate if they are perceived to be preventing the unit from achieving its goals. "[If you just] had 'no' as an answer [and left it at that]," a highly experienced Army JAG explained, "you didn't survive as a staff officer, because if you're just 'the Abominable No-Man,' you get no respect, and you're not very useful for the command" (Interview 01.02.07). Becoming seen as 'the Abominable No-Man'—more commonly referred to as 'Dr. No'—by the staff or command would doom an operational attorney to irrelevance. "Don't be a 'no man'," a Marine JAG trainer remarked, explaining a key part of his advice for the new JAGs in his courses, "because they'll do everything they can at certain points just to…not use you" (Interview 01.01.04). Similarly, an Army JAG explained, "you don't want to be the guy that says 'no' all the time…[because] everyone will look at the lawyer like an impediment…that's a perception you definitely try to overcome early" (Interview 01.02.16).

Furthermore, my interviewees' insistence on avoiding the label of 'Dr. No' was more than just instrumental. Given how hard JAGs work to produce themselves as *soldiers*, constantly 'playing the red card' and shooting down ideas on the staff undermines their self-understanding as meaningful contributors to the mission. For example, a retired Army JAG explained that the early proponents of OpLaw trained

[141] "No Legal Objection, Per Se"

newer JAGs to think of themselves as "combat multiplier[s]" and "not simply lawyers, but soldiers", and thus they needed: "to tell our young judge advocates 'you're not there to say no; you're there to find a way to do it'" (Interview 01.02.01). Today, one of the first lessons young judge advocates learn—through both formal training and informal socialization—is not to be an obstructionist. "When I teach young lawyers," a high-ranking active-duty Navy JAG trainer explained, "[I emphasize to them that] our job is not to say 'no'" (Interview 01.01.19).

However, to avoid the pitfalls of saying 'no' JAGs cannot simply swing the other direction and begin approving all plans. Failing to affirm the rule of law and letting legally objectionable or indefensible actions proceed can undermine a JAG's credibility and identity as a lawyer. JAGs referred to their fellow lawyers who too readily approved their commanders' ideas as becoming "yes men" or having "gone native". Given the institutional efforts that go into cultivating that legal credibility—and its importance for distinguishing the unique skillset that a JAG brings to a command staff—military lawyers monitor one another for signs of having 'gone native'. As mentioned earlier, JAGs report not only to their command but also to a technical chain of command ("tech chain"). This provides many services to JAGs—including informal mentoring and socialization functions, informational 'reachback' services where JAGs can seek help on thorny questions, and a soft check on the authority of their commander through a protected channel of communication to the lawyer at a higher headquarters. However, it also exists to prevent JAGs from undermining the legal reputation of the Corps by becoming 'yes men' (Interview 01.02.07). For example, a Navy JAG trainer explained that the tech

chain can "help provide some guidance and oversight for you, to prevent you from 'going native'" (Interview 01.01.16). Similarly, an Army JAG remarked "young judge advocates [can] 'go native', and that's why you have a…legal tech chain, to monitor you" (Interview 01.02.17).

While warnings and nudges in the right direction may be the first step in this oversight program, these measures can quickly escalate to career-ending punishments if JAGs are too eager to say 'yes'. For example, a special forces Army JAG recounted an experience where he was the 'tech chain' superior to a "brilliant" young JAG who nonetheless started "drinking the Kool-Aid" and "[went] native" during a sensitive combat deployment (Interview 01.01.10). "They were breaking the law," he remarked with frustration, "flat out breaking the law [and all because]…the response of the lawyer was 'we're not gonna let some paperwork get in the way of an operation'" (Interview 01.01.10). In recounting the perils of becoming a 'yes man', this JAG conveyed concern with both the instrumental impacts of this approach—the legal risk to the commander and the mission—as well as a deeper sense that such actions violated the integrity of the JAG Corps and his duties as a lawyer. "That's a bridge too far," he exclaimed. Then, insinuating that serious punishments were eventually handed down, he explained that, as the superior lawyer in the 'tech chain', he had to intervene: "I can't let you do it, [so] someone's gonna pay the price" (Ibid.).

Warnings against abandoning the values and commitments of the legal profession abound in JAG publications, schools, and training materials. For example, the Army JAG Corps' statement of professional ethics—which is a required component of their

accreditation with the ABA—directly states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"[142]. Another widely circulated text on JAG roles and behavior emphasizes that "Judge Advocates who council leaders to push…the envelope on operational issues risk being labeled an accomplice" and thus erode their own credibility (Gade 2016, 26). As such, the author argues, "the lawyer cannot be so close to the client or the problem that she loses the objectivity and independence so essential to the exercise of sound legal judgment" (Ibid.). This point was emphasized in the JAG training courses I attended, especially in conversation with trainers. For example, one of the lead trainers at the Army JAG's Schools OPLOAC course remarked to me:

> The commander knows it's our job to say no when we have to…A JAG who is unwilling to say something is illegal [according to LOAC] has no place in that [operational] room…We train our folks better than to do that (Interview 01.01.03)

While the emphasis of this course was overwhelmingly on how JAGs can 'get to yes' through LOAC—a technique of the 'risk manager' model that I explore in the next chapter—the JAG trainers leading our exercises were also careful to sprinkle in warnings about the dangers of 'going native'. These warnings were most noticeable when discussing the treatment of detainees and the use of force around medical and cultural sites, as I demonstrate in Chapter Six.

In addition to losing legal credibility in the eyes of their fellow military lawyers, JAGs can also undermine their credentials as lawyers among the command staff when

[142] *Army Regulations 27-26: Rules of Professional Conduct for Lawyers* (1992, 4)

they fall into patterns of saying 'yes' too readily. If a JAG 'green lights' a plan that results in legal consequences for the commander or unit, this credibility is quickly undermined. "If the JAG is afraid to say no, or doesn't say no when they need to," an Army JAG trainer explained, "then it does seem like more things tend to go wrong, and commanders really don't like it when plans blow up in their face" (Interview 01.01.03). Similarly, a Marine JAG remarked:

> You can't be a yes man…[just] because you don't want to stand in the way. You're not doing your commander any service [in that case], …[because] they don't want to set themselves up for failure (Interview 01.01.04).

As shown earlier in the chapter, commanders tend to presume they are getting good legal advice as long as their lawyer shows the right credentials and appears intelligent and capable of sound ethical judgment. However, that trust can quickly collapse if they get reason to believe that their JAG's advice won't hold up to external scrutiny. For example, a former Judge Advocate General of the Army remarked, upon reflecting on his experiences advising commanders in the field, that "most of our Commanders…don't want a yes-man, and they don't what somebody that tells them what they want to hear. They want somebody that tells them what they need to hear"[143]. Yet, as previously established, JAGs can quickly lose standing with their fellow officers when they deliver these 'hard truths'. This creates an extremely challenging test of a JAG's authority, as many commanders want lawyers who have the *capacity* –in terms of both technical legal

[143] DoD Panel 05.19.05

knowledge and moral courage—to tell them when they've gone too far but also then punish their JAGs when they *employ* that capacity and tell them 'no'.

As such, the production of JAGs as 'warrior lawyers' has created a fundamental tension in how they deliver their operational advice, which threatens their ontological security as soldier-lawyers and can undermine their authority. When JAGs find themselves in the position of being forced to effectively 'green light' or 'red card' an important decision, they have been caught in a trap from which there is no solution without consequence. Saying 'yes' risks their legal credulity and saying 'no' costs them standing as a soldier.

To sum up this chapter's argument so far, while commanders today overwhelmingly praise and trust their JAGs, this trust is conditional. First, military lawyers must communicate their talents and commitments as both soldiers and lawyers throughout a deployment. Additionally, when offering legal advice, they cannot adopt the position of either 'Dr. No'—which undermines their hard-won martial credibility—or a 'yes man', which could result in consequences for the unit. This full set of challenges was summed up in an Air Force general's statement of expectations for a new team of JAGs at an operations center:

> You have got to know your business [the law] inside and out and you have got to think like an operator. Your job as a military lawyer is not to prevent me from doing my job, your job as a military lawyer is to make it possible for me to do my job without breaking the law, without blowing up things I should not blow up, without killing people I should not kill (quoted in Miller 2017, 3)

These pressures from the command are supplemented by the institutional identity of the JAG Corps as a whole, which takes significant pride in its recognition as both members

of both professions. Individual JAGs are motivated by their self-perceptions as both 'warriors' and 'lawyers'—with a slight but important emphasis on the former—and the JAG Corps as an institution instills these values through training, symbols, documents, and internal monitoring systems. Therefore, despite carving out and ensconcing themselves as key brokers between modern law and military operations, the position of the JAG Corps is nonetheless marked by tension and latent instability, on both an institutional and individual level.

Watchdog and Apologist

This irresolvable tension at the heart of the 'warrior lawyer' *identity* also reveals why JAGs cannot adopt certain *roles*—as I explain here—and why the JAG Corps gradually institutionalized itself around the role of the 'risk manager'—which I turn to in the following chapter. In Chapter Two, I outlined two ideal-typical roles for the practice of legal expertise in operations—the 'watchdog' and the 'apologist'—and I argued that the existing literature on military lawyers has largely imported this binary from broader scholarship on international law and lawyers. This chapter demonstrates why the majority of U.S. military lawyers do not adopt either of these roles. We have not seen 'lawyerization' take the form of institutionalizing 'watchdogs' or 'apologists' up and down the chain of command because JAGs cannot adopt either of these roles for long without undermining their own deeply held identity and hard-won authority.

Advising in the mode of a 'watchdog'—where legal expertise is deployed to monitor behavior and the adviser's predominant commitment is to the prevention of illegal activities—would chafe against JAGs' identification as 'warriors' and training as

staff officers who prioritize mission accomplishment. Furthermore, behaving as a 'watchdog' makes the cultivation of authority on the command staff extremely challenging, as it leads to repeated patterns of saying 'no' in critical moments. As such, JAGs adopting this posture would quickly become 'watchdogs' with no teeth, serving as operational advisers in name only. Conversely, JAGs are unlikely to behave as 'apologists' who deploy their legal expertise predominantly as a way to exploit the authorities and indeterminacies of the law as this mode clashes with their identity as principled attorneys who embody the rule of law in warfare. Furthermore, this mode of advising can easily undermine a JAG's legal credibility not only with their fellow military lawyers in the technical chain of command but also among non-JAG officers, who begin to doubt whether their advice can be trusted to hold up to scrutiny. Therefore, JAGs adopting this role most often find that their *apologias* come to lack a receptive audience, as the devaluation of their legal expertise collapses the currency of their authority. In either case, the outcome is irrelevance in decision-making, if not also significant career penalties.

An intuitive solution to this problem might be simply to *combine* these approaches. If JAGs just pick their battles and balance out every 'no' with a few 'yeses', they could counteract the erosion of one side of their identity in a particular moment by emphasizing that side in another. However, this assessment is only partially correct. Moderation is indeed one facet of how effective JAGs navigate this tension. When multiple JAG interviewees used versions of the phrase "you can't be a 'yes man', and

you can't be 'Dr. No'", they were, in part, describing an approach that "[strikes] the balance between going native and not slowing things down" (Interview 01.01.16).

However, as I describe in the next chapter, the *role* of the 'risk manager'—adopted by those operational attorneys deemed 'successful' and 'effective' and institutionalized by the JAG Corps in more recent years—is not the result of blending a part-time 'apologist' with a semi- 'watchdog'. When JAGs simply try to *balance* the equation of their identity and authority, the sum total comes out in the negative, at least over the long run. The loss of credibility taken by playing 'the red card' in one instance is not fully compensated for by giving 'the green light' in a few others. Nor can legal credibility be regained by becoming 'Dr. No' after a JAG's advice led to legal consequences for the command or triggered intervention through the 'tech chain'. Simply oscillating between the position of the 'apologist' and the 'watchdog' would erode both sides of the JAGs' credibility rather than having one cancel out the other. Instead, as I show in the next chapter, JAGs have developed techniques of 'risk management' to help moderate this tension.

Conclusion

In this chapter, I have demonstrated how the conditions that made 'lawyerization' possible in the U.S. military have also induced serious complications for upholding the JAG Corps' sense of identity and enacting their authority in operations. Both JAGs and commanders hold assessments of the "success" and "effectiveness" of a military lawyer that revolve around demonstrating one's capabilities and inclinations as a warfighter while maintaining credibility as a knowledgeable, principled lawyer. Generating this

credibility as both soldiers and lawyers requires a JAG to perform martial and legal capabilities and commitments through a wide range of individual and institutional signaling techniques—many of which are far afield of their formal duties as legal advisers. Furthermore, the 'burden of proof' for demonstrating these two competencies differs. Whereas JAGs must *convince* their fellow soldiers of their martial credentials, the legal accreditation requirements of the JAG Corps—supported by demonstrations of intelligence and ethical character—establish a baseline degree of trust in the presumed legal competence of the JAGs, at least in military circles.

I then showed how either side of this dual expert identity can be rapidly undermined by a JAG's legal advising practices. Adopting 'yes' as the default answer to questions regarding the mobilization of military power leads to an erosion of legal credibility, through 'tech chain' monitoring and when such decisions result in legal blowback on the command. Conversely, saying 'no' with any frequency results in commanders and staff officers viewing JAGs as obstructionists rather than true soldiers. This tension between the constituent components of a JAG's dual identity renders the *role* of either a 'watchdog' or 'apologist'—the two depictions of military lawyers offered by the existing literature—ultimately untenable for both maintaining ontological security and cultivating authority. As such, although individual JAGs may sometimes fall into such roles, the JAG Corps by and large has rejected these modes of legal advising. In the next chapter, I further explore the implications of this irreconcilable tension at the heart of the 'warrior lawyer'. I demonstrate how these conditions for cultivating authority and

maintaining ontological security are navigated by JAGs today through the *role* of the 'risk manager'.

Chapter Five: JAGs as 'Risk Managers'

Introduction

In the prior chapter, I demonstrated how JAGs' dual *identity* as 'warrior lawyers' both allows them to cultivate authority with the command and results in deep tensions between their legal and martial commitments—which can, paradoxically, undermine that authority during the provision of legal advice. In this chapter, I argue that attempts to mediate these tensions explain why the *role* of the JAG in operations has become institutionalized as that of a 'risk manager.' By deploying techniques of 'risk management,' JAGs ameliorate, but cannot resolve, the tensions between their identity as both lawyers and soldiers.

I present this argument over the following five sections. Section two shows how JAGs use the language of 'risk' to communicate their advice in a form that gestures to both their legal and martial commitments. In section three, I explain how framing their duties in terms of risk assessment allows JAGs to avoid being seen as decision-makers who approve or deny the use of military power. Section four builds on this argument to demonstrate how JAGs nonetheless influence operational decision-making through a "delicate dance" (Interview 01.01.14) in which they respond to overly risk-tolerant commanders by suggesting less risky alternatives for achieving the same ends. In section five, I show how—once a course of action has been determined—JAGs enact risk mitigation strategies for it by suggesting changes that will better enable the plan to

withstand investigative or media scrutiny. Taken together, these techniques help JAGS avoid playing 'the red card' as much as possible without having to undermine their legal credibility. However, there are moments when JAGs—after employing all of these techniques—still have to say 'no'. As both a technique of demonstrating their martial identity and compensating for these inevitable, but hopefully rare, moments when they need to play 'the red card', JAGs intervene when they feel their fellow soldiers are being too risk-*averse* in their assessment of their legal authorities and disabuse their compatriots of these 'overly restrictive' interpretations[144].

Law and War as 'Risk Management'

Experienced military lawyers provide their legal advice in a tone, tenor, and lexicon that communicates and combines their legal and their martial commitments. On the one hand, multiple JAGs explained that advice that over-emphasizes the law and legal terminology is ineffective. As a retired Army JAG explained, speaking in a legalistic manner would get an operational attorney ignored. "I can guarantee you [that] the [commander]," he remarked emphatically, "is not listening to your recitation of the articles of the Geneva Conventions" (Interview 01.02.16). This point was made most prominently by JAG trainers. For example, an instructor at the Naval Justice School

[144] As with JAGs' assessment of 'risk', these statements on the authorities of the military under the law not only reflect but work to establish permissive claims about LOAC itself, which I discuss in Chapter Eight. I then return to this theme—of the U.S.'s position vis-à-vis LOAC and the JAGs' role in that position—in the conclusion. For the purpose of simplicity, I am treating these statements of restrictions and authorities as they are understood by the JAGs themselves, rather than as an assessment of the validity of these arguments.

explained that "translating" the law into operational terms was one of the most critical skills a JAG can develop:

> How do you make [the law] something [commanders, staff officers, and operators] care about? If you start throwing Latin around [like *jus ad bellum* and *jus in bello*], you've lost them. They do not care (Interview 01.01.14).

Yet the same JAG added that military lawyers have to be careful about swinging too far into the other direction and diminishing the rule of law by excluding it entirely from their vocabulary:

> There's also a risk in briefing too little [about the law]. Because there's a fine balance between knowing what you're talking about and trivializing what you're talking about…It's up to us as a Navy JAG Corps to continue to hone that (Ibid.).

As described in the prior chapter, JAGs deploy the jargon of warfare to communicate their identity as soldiers. However, I noticed that this use of jargon was the lightest during their formal responsibilities to provide legal advice on operations—as shown in training courses and when JAGs in interviews provided mock advice to me as if they were addressing a commander.

The majority of experienced JAGs I encountered delivered their advice in a way that blended the legal concerns of a lawyer with the operational focus of a soldier. A retired JAG described this to me as the provision of "advice that is absolutely grounded in the law and can support the accomplishment of the mission" (Interview 01.02.03). Noting the limits imposed by the tensions between the JAG's dual identities, an Army JAG explained that he always told the lawyers under his command to make sure, when giving advice, that they're "not sounding like a cowboy and not acting like a

conscientious objector" (Interview 01.01.10). While subtle, this careful use of language in providing advice helps JAGs craft guidance that simultaneously conveys respect for the law as well as 'mission accomplishment' and mitigates some of the tension that arises between their professional commitments.

To help navigate this complex linguistic terrain, JAGs have gradually adopted the language of 'risk' for the provision of their operational legal advice. As explained in Chapter Three, the explicit vocabulary of risk assessment and management was much more common among my JAG interviewees who had deployed in the War on Terror, and only in the last decade has this terminology become commonly found in JAG doctrine. Settling on the language of risk—as a middle ground for conveying the concerns of both law and war—is not surprising. 'Risk assessment' is a core component of modern military decision-making and signals an individual's command of staff officer decision-making processes[145]. On the other hand, 'risk management' is a long-standing lens from which to understand the role of a legal adviser—especially in the realm of corporate law—who provides assessments of "legal risk" to their client[146]. More recently, the

[145] For example, one widely cited publication for lawyers offers the following definition of 'legal risk': "[Legal risk] refers to the risk of financial or reputational loss that can result from lack of awareness or misunderstanding of, ambiguity in, or reckless indifference to the way law and regulation apply to your business, its relationships, processes, products and services". "Legal Risk 2.0: Show you're in control"; accessed at http://www.ey.com/Publication/vwLUAssets/ey-legal-risk-2-show-you-are-in-control/$FILE/ey-legal-risk-2-show-you-are-in-control.pdf. For other texts on risk assessment and management in the legal field, see Molot 2009; Davis 2008; Osbeck 2018.

[146] For example, the U.S. military's authoritative doctrine on operations includes an entire section on the "risk management process" undertaken by operational planners, complete with an illustrated model of this process. This document explains that "[r]isk management is the process to identify, assess, and control hazards arising from operational factors and make decisions that balance risk cost with mission benefits. It assists organizations and individuals in making informed decisions to reduce or offset risk, thereby increasing operational effectiveness and the probability of mission success". *Joint Publication 3-0: Operations* (2017, III-19).

language of "legal risk mitigation" has been used by other observers to describe a particular approach to the use of LOAC by the United States[147].

The migration of 'risk management' into JAG doctrine and the invocation of the language of 'risk' by my interviewees reflects these dual origins. The roots of this progression go back to the development of 'Operational Law' (OpLaw). Although the pioneers of OpLaw in the JAG Corps during the 1980s and 1990s rarely used the language of risk, they took as their inspiration for OpLaw not only military staff officer practices but those of legal advisers to corporations (Keeva and Cates 1991; Warren 1996; Graham 1987; Gade 2016). These dual origins were reflected in JAG doctrine that explicitly uses the language of 'risk management' in the 2010s. For example, the Army's 2020 update to its "Legal Support to Operations"[148] document—which constitutes the most substantial use of the language of 'risk management' in JAG doctrine to date—builds on both the legal and martial applications of this language. First, the manual establishes "risk management" as a method by which "all staff sections account for hazards within their functional areas" and directs JAGs towards general military publications outlining risk assessment practices in the armed forces[149]. Next, the document identifies JAG-specific versions of "risk management" by outlining the term "legal risk", coined in corporate law, and explaining how that concept can be used to provide commanders with assessments of the consequences of conduct that could be

[147] See, for example, "Targeted Killing Under Trump: Law, Policy, and Legal Risk" https://www.justsecurity.org/37636/targeted-killing-trump-law-policy-legal-risk/
[148] *Field Manual 1-04: Legal Support to Operations (2020)*
[149] *Field Manual 6-0: Commander and Staff Organization and Operations* (2014); *Army Techniques Publication 5-19: Risk Management* (2014)

illegal—or perceived to be illegal—under LOAC and other relevant legal bodies[150]. Furthermore, when discussing JAG standards of conduct in these deliberations, this publication directs JAGs toward another document on professional ethics that requires JAGs to be aware of the "risks and benefits" of factors impacting operations and establishes their responsibility to "discuss the legal and moral consequences of any proposed course of conduct" with their commander[151].

My JAG interviewees used the language of 'risk' as a unified term for assessing the consequences of law and legitimacy in operations. "I think that's what we do…risk analysis," an Army special forces JAG remarked, explaining he would ask himself and his fellow officers the following questions during planning: "When it goes wrong, what does that cost [the commander]? Personally, professionally in blood and treasure. Then operationally and strategically [in regard to legitimacy]" (Interview 01.01.10). This, he explained, allowed him to provide the commander with a single assessment during decision-making. For example, if he viewed these consequences to be rather high relative to the benefits, he would remark: "Here's the risk. I don't recommend you do it, but if you need to do it, here's what it's going to cost you" (Interview 01.01.10). Through this language, my active duty (or recently retired) interviewees conveyed their awareness of and commitment towards the purview of both a soldier and a lawyer, integrated together into a single assessment[152].

[150] *Field Manual 1-04: Legal Support to Operations* (2020, 3-12)
[151] *Army Regulations 27-26: Rules of Professional Conduct for Lawyers* (2018, 13)
[152] While providing this unified assessment, JAGs nonetheless take care to distinguish which risks are derived from the law and which pertain to legitimacy.

The use of the language of risk to help achieve this dual signaling was demonstrated during the Army JAG School's Operational Laws of Armed Conflict (OPLOAC) Course—which I attended as a participant-observer. Since the course was primarily intended for JAGs who were likely about to receive their first deployment as operational attorneys, only a handful of the 95 early career JAGs in attendance had prior experience providing advice to commanders[153]. During the two-week course, I took part in numerous hypothetical exercises that instructed JAG trainees on both the content of LOAC and the translation of law into operational guidance. Through these exercises, JAG trainers modeled approaches and provided feedback that steered trainees towards the delivery of advice in a manner that blended the lexicons of law and arms. Often, but not always, this involved the explicit use of the language of risk.

For example, in conducting a legal review of an airstrike, instructors encouraged a mixture of international legal and military terminology in the delivery of advice through reactions, feedback, and critique. Figure 1, below, offers a reproduction of one such exercise—in which participants were instructed to evaluate a hypothetical 'targeting packet' and provide an oral legal assessment of the proposed plan to strike a facility in Syria that was said to host meetings of insurgent leaders. The facility was also identified as a site for providing training on the construction of improvised explosive devices (IEDs) and for the production of these devices[154]. Despite assessing that all individuals entering the site would be considered combatants—a topic I return to in Chapter Eight on the 'law-making' capacities of judge advocates—intelligence reports suggested that the

[153] Further details of the makeup of this course and its aims are outlined in Chapter One.
[154] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.14.18). Charlottesville, VA.

road nearby was frequently used by civilians. As such, civilian casualty estimation tools placed the number of expected civilian casualties as somewhere between 0-25, with a "best guess" of around 10. Different students took turns playing the mock role of the JAG adviser receiving this targeting packet in their operations center and providing advice to the commander.

Figure A-1: Targeting Exercise for Military Lawyers

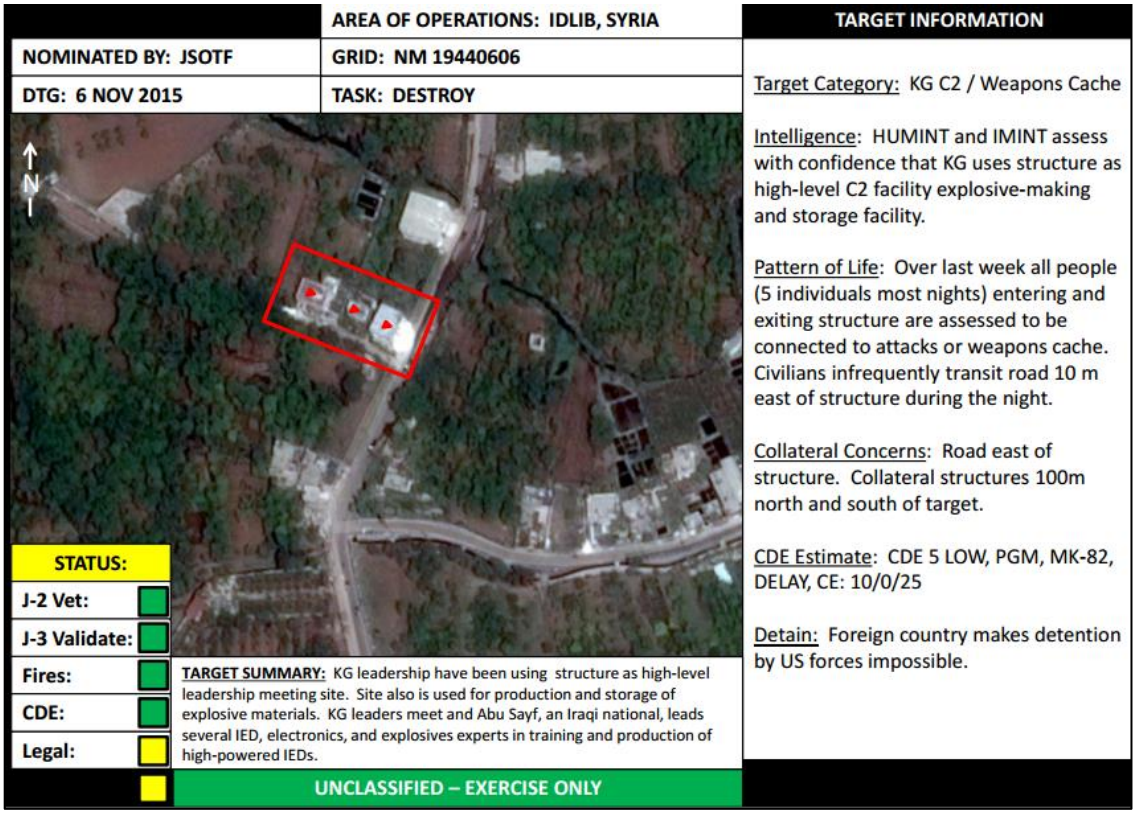

Figure 2 provides a reproduction of three responses given by trainees playing the role of the operational legal adviser in this exercise[155]. All three reviews reached the

[155] Chatham House Rules were in effect during this course, preventing personal attribution and audio recording of these events. Therefore, these remarks are recalled from memory and hand notes taken during

conclusion that the facility was a legally justifiable target. However, each JAG differed in how they presented their advice and the considerations the commander should take into account. Participant C—who was one of only a handful of trainees in the course with prior experience as an operational legal adviser[156]—settled on a tone, tempo, and vocabulary that blended the rigor of a lawyers' eye for detail with the pragmatism and conviction of a soldier and explicitly expressed his answer in the language of risk assessment. Based on instructor reactions and feedback, participants A and B, both of whom lacked experience as operational legal advisers, provided less competent practices of legal review. Participant A's tone and language communicated his status as a soldier but not as a lawyer, with the reverse being true for Participant B.

the session. These are not exact quotes, but approximations of responses given during exercises that provide representative examples of the main styles of advising witnessed during legal adviser training courses.

[156] Through chance, I ended up conversing with Participant C's JAG superior at a different fieldwork site. When I remarked that I had met Participant C at the Army's OPLOAC course, this superior replied that Participant C was an 'expert' in operational law already and should never have been approved to attend this training course.

Figure A-2: Legal Review of Exercise from Figure 5-1

Participant	Legal Review
Participant A	It looks good to me, sir. Our intel and CDE [collateral damage estimate] guys say there's no CIVCAS [civilian casualties] problem. Just watch the road to the east and attack during the day, using the MK-82 [delayed fuse munition]. Intel says if they're comin' and goin' from the house, they're a bad guy. No need for PID [positive identification]. When you drop just make sure not to blow up the neighbors, but other than that it's a green light from me. Take em out.
Participant B	Sir, this plan is in full compliance with the Laws of Armed Conflict. The principle of distinction is fulfilled according to our intelligence. The use and purpose of the site render it a military objective and the individuals inside are combatants given their command function in the enemy armed forces. Even if the IED makers aren't full combatants, they are civilians directly participating in hostilities who have lost their protections. The elimination of these targets will provide us with a definite military advantage in our campaign, fulfilling the military necessity test. As long as we avoid incidental civilian casualties by attacking during the day and with a precision-guided, delayed fuse munition, there is no need for an evaluation of proportionality.
Participant C	Sir, there isn't much risk on the legal side of things. Given our intel, both the facility and the individuals using it can be safely classified as legitimate targets. No legal issue there. The only area of potential risk is with the structures to the north and south, and with the possibility of civilians passing by on the eastern road. By attacking during the day, and with the munitions and trajectory proposed in the plan, we've taken all reasonable precautions to avoid collateral damage. We should keep an eye on that road regardless, if possible. But that goes above and beyond our legal obligations.

The responses of trainers to these different forms of advising communicated that Participant C's advice would be the most effective. On the one hand, Participant A's advice—which eschewed the language of the law and civilian protection—elicited critical

follow-up questions from trainers, playing the role of the 'commander'. These questions indicated confusion on what the actual limits of the *law* were and suggested that Participant A's tone was too relaxed in his treatment of civilian casualties. On the other hand, Participant B's reply was met with frustration regarding its length and emphasis on legal detail. For example, one trainer responded by asking "So, what's the bottom line? Are we good to go, or is there more we need to consider?" Not only did the emphasis on soldierly and lawyerly attitudes by Participants A and B, respectively, receive less positive feedback from trainers, the structure of their follow-up questions also demonstrated how these approaches can put the JAG in the position of having to say 'yes' or 'no'. In particular, the follow-up questions given to Participant B pushed him into either 'green-lighting' the operation or throwing up the 'red card'. In contrast, Participant C's advice deployed the language of 'risk' to "clarify the legal terrain" (Interview 01.01.16) for the commander. In this, Participant C emphasized the plan's potential liabilities—delineating between law and legitimacy issues—while avoiding any language that would put him in the position of a decision-maker who is either approving or rejecting the proposed plan. I turn now to this aspect of risk management—and its function in mitigating the tensions of the 'warrior lawyer'—in the next section.

'Risk Assessment' Not 'Decision-Making'

The role of a risk manager also enables JAGs to influence planning processes without having to say 'yes' or 'no'. As demonstrated in the prior chapter, when JAGs use their authority to 'green light' operations or throw up 'red cards' they can quickly undermine their identity as 'warrior lawyers.' By claiming the role of a 'risk analyst',

JAGs can shape courses of action and artfully steer their fellow officers towards certain conclusions while avoiding becoming—or being seen as—a decision-maker. This allows JAGs to retain their legal credibility as someone who will honestly assess legality and hold firm to their convictions by keeping that credibility in reserve.

Nearly all of my JAG interviewees emphasized the importance of using language that did not make it seem like the law and lawyers were providing answers. For example, an Army JAG instructor at a training course explained that it was imperative to frame limitations as "not the JAG's rules. One thing I always hit on [in courses] is that bad lawyers make themselves seem like they're saying 'no'" (Interview 01.01.12). Similarly, another Army lawyer explained how careful a JAG needed to be when delivering negative assessments of a plan. "If you don't use that word [no], you may be OK," he remarked, explaining that he instead adopted phrases with the "same effect, different packaging" (Interview 01.01.10).

In this, many of my recently deployed JAG interviewees turned to the language of risk. "I don't make decisions," a Navy JAG firmly stated. "We assist with risk assessment" (Interview 01.01.14). Similarly, a high-ranking Navy JAG at a training school explained:

> We're not 'no' people…But I am going to point out to the deciders that there is this statute or a DoD regulation or a Law of War issue, and that what we're doing creates—I sometimes use the term 'legal risk.' What you're doing is creating some 'legal risk' for yourself or the command or the Navy or the country (Interview 01.01.19).

In the presentation of these risk assessments, military lawyers help staff officers determine alternative courses of action that present lower-risk ways of getting to a similar

objective—which I turn to in more detail in the next section. “There's an art to how you present it,” a recently retired Army JAG remarked. Instead of saying ‘no,’ he explained he would try to tell his commander “there would be a lot of risk here. Instead, here are some alternatives, here's how you could get to what I think you want to get to” (Interview 01.02.03). An active-duty Army JAG stationed at a training center similarly observed that:

> Commanders…[and] line officer operators…get very angry when a JAG says ‘you can’t do that’…And so I always tell my [JAG subordinates]: you will not go into an operational environment and say ‘you can’t do that.’ If you think that needs to be said, you can come back and see me. But you *will* tell them, ‘hey here’s your risk if you do that. You might go to prison or this might happen. But don’t say ‘you can’t do that.’…We try to keep that vocabulary out (Interview 01.01.18).

As exemplified in these remarks, JAGs use risk assessment to nonetheless influence decision-making by laying out the precise expected consequences of these courses of action. For example, a Marine JAG explained:

> If you just say ‘sir, that’s a very risky option’ a lot of people will be like ‘ok, I don’t care. I’m willing to take the risk.’ Until you give them something very concrete…‘Sir, this leads to you [imprisoned] in [Fort] Leavenworth’. ‘Ok, I’m not gonna do that’” (Interview 01.01.06).

Through these assessments of risk—which covered not only direct legal implications but also ‘policy’ consequences involving legitimacy—my interviewees put their thumb on the scales of decision-making while intentionally minimizing their own influence.

Explicitly disavowing one’s role as a decision-maker is essential and challenging, my interviewees explained, because other officers will often put JAGs in such positions. Formally, military lawyers are not a part of the operational chain of command (except for under exceptional circumstances) and therefore cannot assume command responsibility.

Nonetheless, there are many reasons why a JAG can find themselves in the position of either effectively 'greenlighting' a course of action or playing the 'red card'. Many commanders and staff officers may simply expect law and lawyers to provide such firm answers—either out of fondness or dislike for the legal profession. However, some commanders and staff officers demonstrate patterns of pulling JAGs into the *de facto* role of the decision-maker in order to offload responsibility. For example, Dill finds interview evidence that military lawyers have become seen by operators as bearing significant moral responsibility for the use of force (Dill 2015a, 205). Many of my interviewees and fieldwork participants noted trends in which commanders or staff officers—to avoid having to approve or deny a plan themselves—will informally, and perhaps even subconsciously, attempt to effectively pass that authority on to the JAG—which can then undermine that JAG's credibility in the long run.

Some of my interviewees explained that they were pulled into *de facto* decision-making roles by commanders and staff officers who are seeking to partially offload the responsibility of approving a difficult decision onto an external authority, such as the law or a legal expert. "They all want that 'top cover' of 'the lawyer said yes,'" an Army JAG explained (Interview 01.01.18). However, the cause of this dynamic—colloquially referred to as the 'warm blanket effect'—appears to lie as much with the JAGs as it does with commanders. A number of early articles on OpLaw argued that legal advisers can enable the military by assuaging the legal and moral doubt that can come from killing (Pitzul 2001; Dunlap 2001b). This point was also emphasized by a number of my interviewees. For example, a retired Army JAG explained: "[the soldiers] are looking for

validation of the rules. They're about to go and maybe kill people and they want to hear you say it's valid, it's sanctioned, it's not murder. It's authorized and legal killing" (Interview 01.02.12). However, interviewees—especially those who were on active duty or had deployed extensively during the War on Terror—expressed unease with any implication that their advice provided 'approval' for decision-making. "Lawyers advise, commanders decide" was a slogan repeated by many when this subject was broached.

Other interviewees remarked that they would get pulled into decision-making roles for the *opposite* reason. Commanders and staff officers sometimes like to use the authority of the law and lawyer to shoot down proposals that they don't like. "Sometimes the [commander] *wants* you to be the 'No' guy" a Navy JAG explained, because then the lawyer "take[s] that blame [for a course of action not to be chosen]" (Interview 01.01.14). A group of JAGs termed this dynamic the 'wet blanket effect' and described, in frustration, how staff officers would pull them into the position of a decision-maker in order to talk commanders out of decisions they didn't like. "That way they can take your opinion to the commander," an Army major remarked, "and say 'look *I* think the plan's great, but the lawyer said no'"[157].

Experienced students in the training course I attended modeled 'parrying' away attempts to pull the JAG into a decision-making role. After a trainer, in the role of the 'commander' repeatedly asked a student whether or not they could take a particular action, the student refused to directly answer that question, and instead repeated their

[157] This conversation was held with six JAGs at the operational headquarters of U.S. European Command (EUCOM) in Stuttgart, Germany. As I was not permitted to record this conversation, the quote provided here is an approximation based on fieldwork notes (September 11, 2018).

assessment of the potential consequences of the plan and then asking: "what kind of risk do you want to assume here?"[158]. The same training school, through a different training course, also instilled expectations in commanders that their lawyers were there to provide assessments of risk, not make decisions. For example, the highest-ranking JAG at the training school summarized the appropriate role of the JAG in operational decision-making to a large group of commanders in the following way:

> Asking the [JAG] 'but is it legal?' is a bad use of your lawyer…The answer is rarely going to be 'yes' or 'no'. Instead, it's going to be 'if we go this way, we'll be assuming X amount of legal risk; if we go that way, we'll be assuming Y amount of legal risk'[159].

Through this course, and others like it, more experienced JAGs worked to ingrain the language of 'risk' as the dominant lexicon of operational advising and carve out a role for the JAG that also avoided (outward) decision-making.

In sum, risk management provides a useful way for JAGs to avoid the identity erosion—as either lawyers or soldiers—that can occur when they are perceived to be making decisions. Carving out this role has been particularly important for avoiding being pulled into *de facto* decision-making positions by certain commanders and officers who wish to offload part of this authority onto their JAGs. In the next section, I go into further detail on how the role of the risk manager enables JAGs to disavow this decision-making authority while nonetheless remaining influential in shaping operations.

[158] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.
[159] Fieldwork Notes. "Senior Officer's Legal Orientation Course" (03.16.18). Charlottesville, VA.

‘Getting to Yes’

As ‘risk managers’, JAGs don’t just assess liabilities and opportunities, they also subtly guide commanders towards less risky pathways for reaching their objectives. In this manner, military lawyers can move the needle in decision-making without having to actually ‘greenlight’ a controversial plan or play ‘the red card’. JAGs refer to this practice as ‘getting to yes’—a revision of a popular term in the world of business negotiations that has long been used by corporate lawyers and scholars in the legal field (Fisher, Ury, and Patton 2011).

All of my JAG interviewees described a version of these techniques. For example, a special forces Army lawyer laid this practice out for me in the following way:

> Good lawyers don't just look at the rules and say, ‘you can't do this you can't do that.’ They look at what the commander wants to accomplish and what possibilities exist for reaching that conclusion…A good lawyer is able to come up with another way (Interview 01.01.01).

Going even further, another highly experienced, retired Army JAG described his methodology in the following way:

> What I always tell commanders is that if you wanna get to point A from point B, don't tell me the route. Let me figure out a legal way for you to get there. If I can't, I'll tell you I can't. But that’s rare (Interview 01.02.05).

Furthermore, this technique of influencing decision-making through alternative options was directly linked by my interviewees to the tensions of the ‘warrior lawyer.’ “There are not a lot of legally unsupported courses of action,” a retired Marine JAG explained, noting that if you just ‘say no’ instead of trying to find a way to yes, “you could alienate yourself and get yourself relieved, and then you're on the outside. Then you won't be on

the inside when we need your legal expertise the most. So you need to learn these ways of navigating it" (Interview 01.02.08). Similarly, an Army JAG—writing about the pressure military lawyers face when legal issues arise—gave the following assessment: "my effectiveness depended on working hard to ingratiate myself, to be seen by teammates as something other than a naysayer, to identify solutions and not just problems"[160].

While most real-world examples of these techniques are classified, I got to see this approach 'in action' through hypothetical scenarios that were either offered in training courses or provided by me to active-duty interviewees. For example, in response to a situation where a commander wanted to pay the inhabitants of an occupied area to conduct guard duty, a JAG determined that the commander could be found in violation of fiscal laws if they followed the proposed plan. However, rather than play 'the red card', the JAG proposed that the unit use stores of cash recovered from enemy insurgents—which could be categorized as discretionary resources for the command under LOAC—to pay these guards[161]. Another scenario—which I took from a training course and provided to my interviewees—dealt with a commander who wanted to target a television and radio broadcasting station. The responses I received all involved attempts to 'get to yes' on this airstrike through a variety of means. A number suggested that the intelligence desk investigate whether 'command and control' activities were being undertaken through this station, which would enable it to be classified as a legitimate military target. One suggested similar research into the station's employees to determine if they might

[160] "No Legal Objection, Per Se"
[161] I provide more details on the JAG advising around fiscal issues as practices of *permission* in Chapter Seven.

actually be classified as having ‘directly participated in hostilities’ through other activities. Most also recommended using more precise weaponry in order to target only parts of the station and/or its employees—the ones potentially involved in military activities—and mitigate the remaining risk of using force—a technique I focus on in the following section.

Regardless of the subject, the core theme of these answers was the strong possibility—but not guarantee—of being able to identify methods by which commanders could deploy military power with less risk. “There’s usually a way,” a Marine JAG explained with confidence, “to accomplish the mission, to get to the desired end state of the commander, that isn’t legally objectionable” (Interview 01.01.04). Elements of these conversations also revealed that these practices of ‘getting to yes’ were focused on convincing commanders and staff officers of the potential for using force inherent in the law. “I suspect there’s a way to destroy that without running afoul of the rules,” a special forces lawyer explained to me, mimicking the way he engages with a commander. “There almost always is. It just takes imagination” (Interview 01.01.10). Similarly, another JAG unpacked his methods in the following way:

> For commanders, it’s important to make them understand that…‘listen, we can get there, there are ways we can get there. I’m here to get you other options, but just don’t go with that [highly risky] one’” (Interview 01.01.06).

As such, JAGs avoid saying ‘no’ or ‘yes’ by trying to present the commander with options and then steering them towards the option that presents less risk.

Most JAGs learn these techniques through 'socialization' with more experienced military lawyers. A retired JAG who helped transform the JAG Corps in the 1980s and 1990s explained that he made a conscious effort to:

> tell our young Judge Advocates, you're not there to say no, you're there to find a way to do it. If there's no lawful way to do it, you can't do it. But your job is to find a way within the parameters of the law and enable that commander to accomplish his mission (Interview 01.02.01).

The impact of this change can be seen directly in skills imparted through formal training programs. For example, the former Judge Advocate General of the Army told DoD investigators in 2005: "We train our folks…to find a way to accomplish the missions, because, often, you can say no, when there may be another alternative"[162]. These practices have also become more formalized over time. For example, the most recent (2016) version of the guiding doctrinal guide for JAG conduct across the armed forces instructs that:

> If a [course of action] is legally objectionable the joint force [JAG] should seek clarification or amendment of the [course of action]…[and identity alternative] legal authorities or requirements necessary to achieve objectives at each phase of the operation[163].

I saw the teaching of these techniques firsthand in the Army training course I attended. JAG trainers, playing the role of commanders in hypothetical targeting scenarios, would respond to trainees who effectively said 'no' to an idea with: "That's not enough. Tell me what I need to get there".

This technique of the 'risk manager'—in which JAGs attach risk assessments to different options and help generate less risky alternatives—provides a key mechanism for

[162] DoD Panel (05.19.05)
[163] *Joint Publication 1-04: Operations* (2016, II-8, II-9)

subtly influencing operations without eroding one's 'warrior lawyer' identity. The rest of this chapter identifies two other such discreet mechanisms of authority. The next section describes how, once a commander has selected a course of action, JAGs further mitigate the risk of using military power by recommending adjustments to the plan as well as procedural changes that will make the decision better able to withstand scrutiny. In the last section, I demonstrate how JAGs enhance their standing with the command by providing recommendations for how commanders can enhance their capabilities through the law.

Mitigating Risk

After a decision has been made, JAGs continue to manage the risk of deploying military power by proposing mitigation strategies. These entail various techniques for reducing expected civilian casualties, gathering more intelligence that enhances confidence in the identity and activities of the target, and assigning different forces in an international coalition to enact different parts of the mission[164]. To identify opportunities for risk mitigation, JAGs think through how their commander's plan could look to a potential investigator or public audience if it 'went wrong'. One of my interviewees referred to this as "thinking from the 15-6 [the code for a military investigation] backwards" (Interview 01.01.19). These processes of using the law to reduce the risk of a mission were framed by a number of my interviewees as enacting a perfect combination of legal and martial skills. For example, a recently retired JAG explained to me that: "your job [as a JAG] is to get to the commander's end state [objective]…There are almost

[164] Some of these tactics of mitigation are further detailed in my discussion of legal advising as *permission* in Chapter Seven.

always ways to get that commander to their end state…by changing a few things that make it much more legally supportable" (Interview 01.02.16). He then added: "when people see that you're trying to do that [achieve the commander's end state through the law], they'll know that you're doing your job. That you're a very good officer and a very good lawyer too" (Interview 01.02.16).

These various mitigation strategies—derived from working backward from how an operation might look to an investigation and/or reporter—shared a common theme of demonstrating the 'reasonableness' and 'good faith' of U.S. military decision-making. Standards of 'reasonableness' and 'good faith' appear frequently in LOAC treaties as well as U.S. rules of engagement and formal distinctions between 'unfortunate errors' on the battlefield and criminal negligibility. As such, JAGs focus on enacting changes that demonstrate that their fellow soldiers took sufficient effort to spare lives and made the decision to pull the trigger through reasoned assessment rather than emotion. A special forces lawyer unpacked for me why communicating such factors is so important:

> The analysis has got to be there…What is your reasoning for coming to the conclusion you came to?... At the end of the day, the question is 'was this a reasonable decision done in good faith'? It's gotta boil down to [being] reasonable and not emotional…[When those are both demonstrated], short of a clear war crime, you're probably gonna be ok" (Interview 01.01.10).

Similarly, an Army JAG trainer explained why, during the training scenarios we ran, he focused so intently on asking the commander to talk through their decisions. "By asking those questions back [to the commander], that means that they've actually thought about this stuff," he explained. "What I'm looking for is [whether I can demonstrate] that your decision is reasonable" (Interview 01.01.17).

These standards of reasonableness and good faith are reflected in JAG doctrine. For example, a 2017 document issued by the Judge Advocate General of the Army outlines how JAGs should assess the legality of targeting decisions made by U.S. forces. In many areas of targeting, the document argues, a decision that amounts to a legal violation rather than a mere "error in judgment" requires a test of 'reasonableness' and a test of 'good faith.' The test of reasonableness that must be conducted entails asking whether:

> a reasonable person might have committed [the same determination] under the same circumstances…As such, 'if officers of reasonable competence could disagree on the issue, (justification [of the decision]) should be recognized'[165].

In terms of 'good faith'—which the document defines as "the absence of malice" and "honesty of intention"—it argues that "if an accused 'could honestly conclude' his actions were justified, he has committed 'no criminal act'"[166]. As such, JAGs engaging in mitigation strategies adopt—as their standard for assessing whether a plan could hold up to an investigation—whether the activities of the staff and commander in planning the mission could demonstrate these values.

Oftentimes, demonstrating these values involves the creation of a 'paper trail' documenting the reasoning behind the decisions made as well as the procedures undertaken to reduce harm. As a high-ranking JAG explained to a room full of commanders, "doing the proper procedure and creating a paper trail of decision-making isn't a liability. It actually helps a lot with [reducing] risk [especially when it comes to

[165] *Targeting and the Law of War: Administrative Investigations & Criminal Law Supplement*. The Office of the Judge Advocate General of the Army (05.30.2017), 5.
[166] Ibid., 6.

LOAC]"[167]. Such practices were reported by many of the recently deployed JAGs I interviewed. In the words of a Marine JAG trainer:

> At the end of the day, if something goes wrong you [the commander] need to be able to articulate on the back end what you were thinking while throwing out the key phrases. Yes, I went through this particular analysis. I asked these questions. And I had this as part of my thought process (Interview 01.01.04).

While navigating hypothetical scenarios, this JAG demonstrated the role military lawyers play in these processes. Speaking to me as his hypothetical commander, he asked me questions about my reasons for making the attack and the steps we'd already taken to reduce harm, such as by verifying information and using lighter munitions. He then explained that he would either record those answers himself or, if time permitted, have the commander mark them down.

In this way, operational JAGs serve as both a prompt to complete and document these procedures *and* as part of that evidence trail. A Navy JAG trainer stressed the value of these practices in the following way:

> Pilots bring jets and missiles to the fight and surface warfare officers bring ships and missiles to the fight. I bring a memo. But a lot of times the memo might be more powerful than that weapons system they're engaging in (Interview 01.01.14).

He explained this point in the following way:

> I write you a memo, so that five weeks, five years from now or more both my principal and I can hold up a memo that says we did some sort of a legal analysis of this. We at least put the thought power into making an informed decision, whether it's the right decision or not, and that [in part] legitimizes what they did (Interview 01.01.14).

[167] Fieldwork Notes. "Senior Officer's Legal Orientation Course" (03.16.18)

The emphasis this JAG placed on practices such as record-keeping and 'training' commanders on how to 'answer the tough questions after' for reducing the risk of investigations was shared by many of my interviewees. "How you [the commander] articulate your response will matter," a special forces JAG explained. "[If you can articulate] here's the way I interpreted it. Here's my analysis…[higher headquarters] might determine you were wrong, but they will see how you did that and will generally support you" (Interview 01.01.10).

Other accounts of these practices involved an emphasis on broader issues of legitimacy, rather than investigations, as the core concern behind leaving a record of one's activities. As described in Chapter Three, during the War on Terror JAGs framed their combination of martial commitments and critical thinking/analytical skills (from their legal training) as providing a potent combination for today's combat environment. In particular, JAGs have argued that being able to communicate the steps taken by the military to reduce civilian casualties can help mitigate—to at least a certain extent—the "lawfare"[168] tactics employed against U.S. forces. For example, the coiner of the phrase 'lawfare'—an Air Force JAG—remarked that JAGs should always help their commanders "make some sort of contemporaneous record of the thinking that led to their decisions" in order to better defend their actions in the media (Dunlap 2001b, 7). More recently, JAGs have argued for a more offensive approach to these issues—calling for the JAG Corps to take a leading role in broader efforts to 'educate the public' on the

[168] Given the ambiguity, politicization, and colonial legacies of this term (Irani 2018; Jones 2016; Kittrie 2010), I have opted to largely exclude it from my analysis in this dissertation. However, many of my interviewees described their efforts to manage the legitimacy risks of operations as a response to the rise of 'lawfare' tactics by opponents.

authorities contained in LOAC and the steps taken by U.S. forces to reduce civilian casualties[169].

These mitigation strategies vis-à-vis the media have been a common part of recent JAG deployments. "There is significant legal risk [as well as political and public affairs risk] in failing to record [targeting] advice," a recent JAG after-action report observes, before describing how the JAG office in one joint operations center created a system for recording all legal advice provided[170]. In a more detailed example, a Marine JAG explained how, when he was deployed in Afghanistan, his office began requiring greater documentation of any kinetic operation deemed to potentially lead to civilian casualties:

> We made everybody do those…That way two or three years later when CNN's doing some big tour of Afghanistan and someone says 'they killed my brother' and you can track down the three guys involved in the firefight [and demonstrate that the deceased was an insurgent] (Interview 01.01.06).

Furthermore, he remarked that these documents revealed how much the U.S. strives to uphold the law in warfare—unlike its opponents. Through these procedures and paper trail, he argued:

> The U.S. can say 'we hold the moral high ground,' because a lawyer reviewed this at the time…If someone says 'this doesn't seem legitimate' you say 'we had the lawyers review it and we did X, Y, and Z to reduce casualties' (Ibid).

[169] "The perception being created by the news media and various NGOs is that any civilian casualty equates to a war crime," remarked two JAGs in recent JAG publication. "However, this perception is simply not true and reflects a misunderstanding of several LOAC principles which needs to be corrected" (MAJ Jon Stevens and LCDR Tim Cronin, "Understanding and Responding to Civilian Casualties" *The Operational Law Quarterly*. Vol. 18-1 (Dec. 2017) 25; on file with author)

[170] After Action Report. CJTF-OIR (Sept 2016-Sept 2017) Camp Arifjan, Kuwait. On file with author.

Similarly, the Navy JAG trainer quoted previously in this section remarked that being able to "[point] to the guy or the gal that has a law degree…provides [commanders] that legitimacy to their decision-making" (Interview 01.01.14). In that way, he argued, JAGs don't "decide" outcomes, but they do "mitigate risk" and therefore function as "legitimacy enablers" (Interview 01.01.14). Other interviewees focused on a less instrumental understanding of risk mitigation—emphasizing instead how these practices reinforced the identity of the JAG and the military as a law-abiding force. "Well, what you're doing [by asking these questions of the commander] is you're making sure that the decision that you made has gone through a process," a recently retired JAG explained. "And that's what makes us different from, let's say, the Russians. The Russians don't have a process" (Interview 01.02.17).

Taken together, the techniques outlined so far in this chapter have explained how JAGs use risk management to provide legal advice without undermining their identities as lawyers or soldiers. The language of risk and practices of risk assessment, 'getting to yes', and risk mitigation together offer a procedure for influencing operations while avoiding the tensions inherent in their identity as 'warrior lawyers'. However, even for the most effective 'risk manager' JAG, this tension can only be moderated, not eliminated. In some instances, my interviewees explained, JAGs have no other choice but to say 'no'[171]. "If [the answer] really is no," a retired JAG explained, "then you need to

[171] I provide examples of these instances in the following chapter, on JAG legal advising as a form of *restraint*. Most of my interviewees explained that they would, under rare but possible circumstances, specifically use words like 'no' to a commander, even though they could not formally reject a decision. However, a couple of my interviewees explained that even under such conditions—where explicit war crimes were being discussed—they would still frame their dissent in terms of risk assessment. For example, one interviewee remarked that even when she believed the law provided a straightforward 'yes' or 'no' answer she would still—in the case of a hard 'no'—"have to tell the commander" that "the risk would be

be able to hold firm" (Interview 01.02.16). The key, he explained, was that you "don't want to be the guy that says no all the time". However, rather than simply striking a middle ground between the 'watchdog' and 'apologist'—and balancing out a 'no' with a certain amount of 'yeses'—providing operational legal advice as a 'risk manager' involves minimizing as much as possible the frequency with which a JAG is in the position of saying 'yes' or 'no'. Once they assess a high degree of legal risk, JAGs first steer their fellow officers towards less risky alternatives. Then, they employ the mitigation strategies described in this section. It's only *if* these techniques cannot dissuade a commander from taking a very risky course of action that my JAG interviewees explained they would play 'the red card' and accept the consequences. As such, 'risk management' allows JAGs to retain their *potential* to say 'no'—and maintain their commitment to the law—without undermining their martial integrity by having to play the part of the obstructionist.

Identifying Legal Opportunities

Given that the role of the 'risk manager' can only moderate the tensions of the 'warrior lawyer'—not resolve them—JAGs seek out *opportunities*, in addition to *liabilities*, where their legal expertise can enable military power. By building up sufficient standing with the command through these enabling techniques, JAGs can better weather the moments where they have little choice but to say 'no'. My research revealed a wide range of examples in the War on Terror of how JAGs used their expertise to

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very high" because "what you are doing is breaking the law and you may go to prison". She then explained that "I'm still saying 'no', but I'm laying out a scenario that they don't want to go down. But I'm doing it in such a way that…is more palatable to the, because I'm giving the power to make a really bad decision back to them" (Interview 01.01.18).

enhance the U.S.'s capacity to deploy military power. For example, JAGs in Iraq and Afghanistan designed procedures for U.S. forces that blended warfighting and law-enforcement activities—such as mixing assault tactics with evidence collection techniques—to increase the chance that suspected insurgents could be 'taken off the battlefield' through at least pre-trial detentions, if not prison sentences[172]. I detail other illustrations of these enabling efforts in Chapter Seven and, most prominently, in Chapter Eight, which considers how JAGs not only use the law to the military's advantage but also to alter the law itself.

The most direct example of this dynamic—in which JAGs demonstrate their martial identity and reinforce their authority using the law to enhance the command's ability to deploy military power—is when JAGs intervene to explain that their fellow soldiers, in fact, possess *more* authority under the law than they had realized. This technique of the 'risk manager' model is not novel to the War on Terror. As explained in Chapter Three, JAGs in the First Gulf War emphasized their martial credentials as experts in 'OpLaw' to enhance their standing with the command. In a number of instances, this enhanced standing was achieved, in part, by informing U.S. soldiers that they were underestimating their authorities to wage war, thus demonstrating their capacity to be more than 'just lawyers'. For example, Air Force JAGs reported that "in many cases [they] actually found themselves to be more aggressive than the aircrew

[172] A commander in Iraq described these 'evidence-based operations' (EvBOs) in the following way: "We'd take the packets to the JAG and say, 'Does this meet the burden of proof?' They'd say, 'Yes that's enough for an Iraqi court,' or not…If it wasn't, they'd say, 'You're weak here, here, and here,' and we'd go back and collect more on those things before we went and did it that way it was relatively iron clad ("Interview with Colin Brooks").

flying the mission" (Lewis 2003, 500). For example, when some commanders balked at the use of high-altitude bombing runs, their lawyers:

> correctly advised their clients at the various levels that...[i]f Saddam Hussein persisted in placing military equipment in densely populated areas…he assumed responsibility for collateral civilian casualties...This is a classic example of the lawyer advising his client as to his rights. While collateral civilian losses always are regrettable, the law of war is not a suicide pact (Parks 1992, 416).

Likewise, CENTCOM's top Army lawyer recalled noticing that U.S. pilots were "pulling off legitimate targets" due to the conclusion that "they could not engage [Iraqi forces] because they were in civilian neighborhoods"[173]. Similar dynamics also occurred in the ground war. For example, Army JAGs offered legal advice to reassure uneasy commanders that certain tactics—such as using bulldozers to bury Iraqi soldiers in their defensive trenches—were indeed legal (Borch 2001, 170, 181-182).

In my interviews and fieldwork conversations with JAGs, all but a handful provided similar examples from the War on Terror. The most common of these illustrations were around weapon selection and the application of the concept of 'self-defense' (Interviews 01.01.02, 01.02.03, 01.02.08, 01.02.05). Regarding the latter, a number of JAGs described how years of conduct in theaters with relatively strict rules of engagement had led soldiers to believe that LOAC required them to wait to use force until they were fired upon. "They think the law is more restrictive than it is," a Marine JAG remarked. Therefore, as the JAG:

> you've gotta remind your marines and sailors that you never lose your right to self-defense. It doesn't matter who's pointing a rifle at you, if you

[173] Interview with Colonel Raymond Ruppert, cited in Borch 2001, 167

> think they're gonna pull the trigger and you're at risk of death or bodily harm, you have a right to use force in self-defense (Interview 01.01.06).

Others remarked that officers, including commanders, sometimes bore these same perceptions about the limitations of the law. "I do trainings all the time [for officers commanding ships]," a JAG at the Naval Justice School explained, "and what I often hear is a gross misrepresentation of what their authorities are. 'I have to take the first hit'. I hear that *all* the time" (Interview 01.01.14). To counteract these perceptions, this JAG explained that in pre-deployment training and exercises, when his fellow officers hesitated to use force in this manner, he would start shouting "Why aren't you killing them? They've done X, Y, and Z. That's all you need. Why aren't you killing them?" (Interview 01.01.14). Similarly, an Army JAG explained that attack helicopter pilots often believed they had to call back to higher headquarters before opening fire. He explained, "I tell them, if a guy is reaching for his gun or even [if] he's [just] going to get away…that is hostile intent, don't be afraid to pull the trigger" (Interview 01.01.13).

My interviewees described these interventions—when they believed soldiers were being too risk-*averse*—as enhancing their standing with the command. For example, one JAG noted to me that: "there are times where [the law is] less permissive, so you love to help [the commander] out [and say] 'no, no, that's actually good, sir'" (Interview 01.02.08). Similarly, the Navy JAG quoted in the prior paragraph explained that "when the lawyer is screaming for blood, it has a certain effect…on how they would take my advice in these types of situations [in the future]" (Interview 01.01.14). Reports from staff officers and commanders also suggest that such techniques make an impact. For example, an Army commander testifying before a 2005 DoD panel remarked that JAGs

were important parts of the U.S.'s efforts in the War on Terror, providing the following illustration: "Frequently combatants would put more restrictions on themselves than actually existed in the Law of War, and the lawyers were actually the ones who were able to give them more flexibility than they thought they had"[174].

JAGs have become more conscious of reminding soldiers of their authorities in recent years as U.S. forces have begun transitioning from a counterinsurgency mindset to one increasingly concerned with higher-intensity operations against other states. Many of my interviewees noted this as a key area for the JAG Corps to contribute to future operations. Furthermore, this perspective was instilled through the OPLOAC training course I attended. For example, an experienced trainer with multiple operational deployments explained that U.S. forces had "become too cautious" when using force after nearly two decades of low-intensity warfare and that JAGs in particular needed to help "tentative" commanders and officers become comfortable "taking off the gloves" and "[being] more aggressive" once again[175].

After-action reports from recent deployments also show growing JAG emphasis on intervening when they believe officers are not aware of their full LOAC authorities. For example, one JAG reflected that, in an era where deployments may entail "fluid, multi-phased large-scale joint operations" involving periods of both low and high intensity, JAGs will be crucial for ensuring that assessments of authorities are neither overly permissive *nor* overly restrictive[176]. Another JAG flagged issues in Afghanistan

[174] DoD Panel 05.19.05
[175] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18)
[176] LTC David Drake, "The Army's New Field Manual 3-0" *The Operational Law Quarterly*. Vol. 18-1 (Dec. 2017) 4; on file with author.

where U.S. officers, in their assessment, had internalized NATO restrictions on the use of force. As such, the JAG reported intervening to remind these officers that U.S. interpretations of the rules were significantly more permissive[177]. More recently, a JAG assigned to a major training center reported numerous instances where, in their assessment, authorities were being underestimated. "The experience of restrictive [rules] is so ingrained in Air Force operators," the JAG wrote, "that [prior to JAG involvement] they refused to engage multiple targets for fear of violating the ROE or the laws of armed conflict (LOAC)"[178]. As such, the JAG argued that "commanders and operators need a mindset change to become comfortable with the concept of using force when they do not possess perfect information about the target"[179]. Furthermore, they argued that "Judge Advocates obviously play an important role in helping these commanders [enact this mindset change]"[180].

According to an AAR from Operation Inherent Resolve (OIR)—the ongoing campaign against the Islamic State of Iraq and Syria (ISIS) since 2014—JAG efforts to enact this "mindset change" are already underway. After advising on operations that were of a higher intensity than most U.S. soldiers had experienced in nearly a decade, this JAG reported back that "prior deployment experiences [in COIN environments] may color a staff officer's perspective on [legal authorities in] current operations" and, as such,

[177] After action report, USFOR-A. Special Operations Joint Task Force. (Apr 2015-Jan 2016), 8-10. On file with author.
[178] After action report, National Training Center, Observer Controller (Mar 2017-Dec 2017), 2.
[179] Ibid.
[180] Ibid., 4.

certain officers were "[b]ringing an [Operation Iraqi Freedom] mindset to OIR"[181]. In terms of aerial bombardment, the JAG provided an example in which their unit had considered "targeting a bridge in enemy-held territory"—which the other officers perceived to be an illegal target until the JAG assured them otherwise[182]. The JAG continued that because "OIR presented a force-on-force conflict rather than a counterinsurgency," some of the officers were hesitant to open fire on 'identified' militants. They recall informing their fellow soldiers that because "there were declared hostile forces [such as ISIS]…waiting to strike in self-defense was not always required"[183]. Noting areas for further improvement, the JAG concluded that other military lawyers should "[b]e prepared to educate the staff on the difference between current and historical [authorities for using force]"[184]. As such, the switch to near-peer conflict 'operational readiness' may increasingly involve JAGs not only instituting broad definitions of 'self-defense' but also emphasizing the availability of more preemptive forms of authority for using force. These efforts provide both institutional and individual demonstrations of a JAG's continued capacities as a warfighter, not just a lawyer, and serve to bolster their standing with the command in a variety of operational contexts.

Conclusion

In this chapter, I have demonstrated how the tensions at the heart of the 'warrior lawyer' *identity* have led to the gradual institutionalization of the *role* of the JAG in

[181] *Operation Inherent Resolve (OIR) After Action Report* (26-27 August 2015) Office of the Staff Judge Advocate (OSJA), 1st Infantry Division. Deployed October 2014-2015. Iraq and Kuwait. 3. On file with author.
[182] Ibid.
[183] Ibid.
[184] Ibid.

military operations as that of a 'risk manager'. Looking back at the prior two chapters, this concludes my broader argument on the causes of military 'lawyerization' in the United States. In Chapter Three, I demonstrated how the re-production of JAGs as 'warrior lawyers' has enabled them to entrench themselves as key brokers in reforms of 'strategic restraint.' Chapter Four took a closer look at this dual *identity* and showed how the authority cultivated by JAGs over recent decades not only requires them to continuously perform their martial and legal commitments but also results in deep tensions between these commitments during the provision of operational advice. Therefore, not only are JAGs unable to sustain this identity and authority if they adopt the role of a 'watchdog' or 'apologist', this tension has been highly productive of a new way of practicing law in military operations.

In the following three chapters, I explore the ramifications of the integration of these 'risk managers' throughout the U.S. military. I show how the various techniques illustrated in this chapter are put to work to both constrain and enable the U.S.'s capacity to deploy military power. As outlined in Chapter Two, the approach JAGs bring to operational decision-making varies based on the degree of risk they perceive. The next chapter focuses on examples where JAGs perceive a high amount of risk—both in terms of the law and legitimacy. In these conditions, the role of the risk manager involves suggesting less risky alternative courses of action that usually will not get commanders all the way to their desired objective and then, if their suggestions are not heeded, playing the 'red card'. Thus, JAGs function generally as forces of *restraint* under these conditions. Chapter Seven turns to issues where JAGs perceive high degrees of either

'legal risk' or 'legitimacy risk', but not both. Under these circumstances, 'risk management' involves a combination of suggesting less risky alternatives to the current plan—but ones that typically can reach the same objective—employing mitigation strategies to diminish the risk of using military power, and—at times—broadening their commanders' perceived authorities. All told, I posit that JAGs generally affect operations under these conditions as a source of *permission*—albeit one that functions to reduce harm. In Chapter Eight, I focus on conditions where JAGs perceive low degrees of legal and legitimacy risk. In these areas, JAGs as 'risk managers' frequently see opportunities for the military to broaden its legal authorities, to the extent that JAGs not only permit the use of military power in operations but proactively seek to alter the law itself through articles, conferences, and other forms of legal argumentation. Under these circumstances, I argue that 'lawyerization' contributes to the U.S.'s capacity to *expand* its military authorities under LOAC.

Chapter Six: Legal Advising as *Restraint*

Introduction

This chapter unpacks the operational influence of JAGs as forces of *restraint* in the U.S. military. In Chapter Two, I argued that JAGs advising as 'risk managers' produces different outcomes based on the perceived degree of 'legal risk'—which I operationalize as the precision and enforcement of relevant legal bodies—and 'legitimacy risk'—understood as visibility and prior media salience. When JAGs assess high levels of both legal risk and legitimacy risk, they deploy their authority on the staff as a form of *restraint,* in which the rules are generally taken as firm limits on behavior rather than as sources of *permission* or opportunities for *expansion*. This, I argued, is evidenced by assertive attempts to steer commanders towards a less risky alternative or, if that fails, by playing 'the red card' and employing all available measures—including using the 'technical chain of command' to communicate with the commander's superior officer—to preempt that course of action, regardless of the impact this can have on a JAG's standing and identity. In this, JAGs may lobby for practices that exceed the restrictions of the law due to issues of legitimacy[185].

I offer two examples of JAG *restraint* in action. First, when advising on the targeting and treatment of medical facilities, medical personnel, and 'cultural property'—all of which have special protections under LOAC, are highly 'visible' targets, and are

[185] As with other parts of this study, I am referring to the JAGs' own understandings of what constitutes 'exceeding' the requirements of LOAC.

linked to the U.S. military's identity—JAGs enact the law as a force of *restraint* in decision-making, due to the combination of relatively precise definitions regarding these categories, norms regarding the protection of medical facilities, and negative publicity over the destruction of cultural heritage. JAG restrictions on the use of force around these objects and persons present the more straightforward of my two examples, since *most* civilian and military leaders have supported these measures. In the first half of the chapter, I lay out my expectations for JAG advising under these conditions and offer evidence of JAGs using operational advice as a form of *restraint* when these issues arise. I then show that this approach to advising is driven by concerns with both legal and legitimacy risk. I follow this with a brief discussion of how JAGs have institutionalized broader forms of *restraint* in the military in regard to specially protected sites and persons.

In the second half of the chapter, I show how JAG advising has predominantly, but not entirely, enacted *restraint* in regard to the treatment of detainees. This represents a harder case, as JAGs faced not only the pressures of maintaining their standing in the military, as described in the prior two chapters, but also, during the first years of the War on Terror, from civilian leaders to lend their legal expertise to the legitimation of torture. After establishing my expectations—which vary in terms of legitimacy risk before and after the Abu Ghraib prison scandal—I turn first to the JAGs at the senior level who directly faced this pressure from civilian leaders. Then, I focus on the advising practices and motivations of JAGs further down the chain of command prior to Abu Ghraib, demonstrating that, although most JAGs adopted positions of *restraint* when advising on

detainee treatment during these years, a few took a more *permissive* approach. I then show how, since Abu Ghraib, a heightened perception of legitimacy risk in this area has resulted in more consistent patterns of *restraint*.

Specially Protected Sites and Persons in Targeting

JAGs demonstrate advising patterns of *restraint* in regard to the targeting of medical facilities and individuals, such as medics, and classes of sites that might fall under the heading of 'cultural property.' I would expect JAGs to similarly approach both with a high degree of perceived legal risk because these persons and objects receive special, additional protections against the use of force under international treaties signed by the United States that have been rather robustly localized in U.S. domestic statute and military manuals. The special protections given to medical sites and professionals are long-standing components of both the 'Geneva law[186]' and 'Hague law[187]' strands of LOAC, including the Geneva Conventions of 1949[188]—the only piece of treaty law with universal ratification. The U.S. has also explicitly stated that it views the further protections for medical personnel and objects provided in the 1977 Additional Protocols to be a part of customary international law[189]. These international legal obligations have been translated into requirements for all U.S. service members, as outlined in military

[186] Protections for medical providers are some of the oldest components of modern LOAC. See, for example, 1864 Geneva Convention, Article 2; 1906 Geneva Convention, Articles 9–10; 1929 Geneva Convention, Articles 9–10.
[187] Some of the earliest treaty protections for "hospitals and places where the sick and wounded are collected" can be found in the 1899 and 1907 Hague Regulations, Article 27.
[188] The main articles offering these protections for medical activities are found in the First Geneva Convention, Articles 19–26, and 35; Second Geneva Convention, Article 36; Fourth Geneva Convention, Articles 14, 18, and 20-21.
[189] "In 1987, the Deputy Legal Adviser of the US Department of State affirmed that 'we support the principle that medical and religious personnel must be respected and protected" as provided in Article 15 of the 1977 Additional Protocol I.'" https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule25

manuals[190] and eventually U.S. statute as well[191]. These requirements are relatively precise, elaborating non-exhaustive lists of official military or civilian roles[192], professions[193], and/or "spontaneous' activities[194] that might render a person or location *specially* protected under international law. This combination of specific lists and broad protections—including the crucial phrase "[n]o one may ever be molested or convicted for having nursed the wounded or sick," found in the Fourth Geneva Convention of 1949—outlines a set of empirically verifiable activities (attacking medical providers and sites) that could be used to credibly accuse and prosecute U.S. servicemembers. Furthermore, due to the fact that most medical providers and facilities are affixed with symbols and professional designations, there is relatively little scholarly debate over the application of these terms.

Cultural sites also have long-standing protections in LOAC treaties ratified by the United States[195], offering special protections during war for a range of religious, scientific, artistic, and historical sites—with 'world heritage' sites holding further

[190] For example, the 1956 *US Field Manual*—still in force at the start of the War on Terror—states that "[t]he respect and protection accorded personnel by Articles 19, 24, and 25 [of the 1949 Geneva Convention I] mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions" (para. 225-226).
[191] See the US Military Commissions Act (2009), para. 950p(a)(2).
[192] See *API* Article 12, which affirms that all military medical units are offered these protections, as well as civilian medical units that are under the effective control of a party to the conflict
[193] See, for example, the *1987 Commentary* on *APII* Article 10 (para 4686) "This rule refers not only to doctors, but also to any other persons professionally carrying out medical activities, such as nurses, midwives, pharmacists and medical students who have not yet qualified."
[194] This has been a long-standing component of Geneva law, starting with the Convention of 1894 (Article 13). See also the First Geneva Convention of 1949, Article 18: "The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality"
[195] 1907 Hague Regulations, Articles 27, 56

protections under a separate treaty[196]. This includes provisions in the Lieber Code[197], a U.S. military innovation in LOAC that has been highly influential in the history of U.S. legal policy. Furthermore, these treaty obligations have been internalized through military manuals[198] and domestic legislation[199] put in place well before the start of the War on Terror. Legislation adopted since 2001 has further reinforced these prohibitions[200]. As with the law concerning the protection of military personnel and objects, these rules are some of the most precise in LOAC and strengthen the protections for most sites beyond the immunity provided to 'regular' civilian objects. First—unlike how the term 'civilian' is negatively defined as being anyone who is *not* a combatant—many of the most common cultural objects, such as houses of worship, museums, and historic monuments, are specifically listed in these documents, making it more difficult to diminish the scope of these protections. These special protections have been institutionalized through universal symbols—similar to the use of the red cross and red crescent—designating cultural property[201]. Second, there is no debate over the applicability of these terms for a key issue facing U.S. forces during the War on Terror: the use of force in the vicinity of mosques and religious sites. While certain terms, such as 'historical monuments,' allow

[196] Hague Convention for the Protection of Cultural Property of 1956, Articles 4, 6, and 16; First Protocol (1956); Second Protocol (1999)
[197] See Lieber Code Articles 34-37
[198] For example, Article 27 of the 1907 Hague Regulations was restated, word for word, in the *1956 US Field Manual* (para 45)
[199] The 1996 US War Crimes Act declared any violation of Article 27 of the 1907 Hague Regulations to be a war crime [Section 2441(c)(2)]
[200] The US Military Commissions Act of 2009 defines as a 'protected property' "any property specifically protected by the law of war, including buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments" [para 950p(a)(3)].
[201] For example, the 1956 Hague Convention for the Protection of Cultural Property initiated the use of a blue and white shield as a universal symbol for 'world heritage' sites. This symbol is taught, alongside the Red Cross and Red Crescent, in LOAC training courses.

for greater degrees of interpretive flexibility, the majority of these terms identify classes of objects whose destruction could lead to widely agreed-upon accusations by legal experts.

The area of greatest ambiguity in the special protections for both medical and cultural sites comes with the conditions under which they can be targeted if used for military purposes, given the capacity for militaries to stretch these conditions. However, even here these sites and personnel retain greater protections than most other civilian objects. Certain treaty provisions require an attacker to provide warnings, require high-level authorization for attacks, and only permit an attack on a specially protected site if no other feasible option remains for accomplishing a military objective[202]. None of these additional safeguards and requirements apply to the loss of protections for the general class of civilians and civilian objects, which can legally be targeted as if they were military objectives once they have been used for a military purpose.

However, even under circumstances where military necessity might enable states to target medical or cultural personnel and sites, despite these added protections, I would not expect JAGs to advise that commanders utilize these authorities given the high degree of legitimacy risk involved in attacking such targets. With regard to visibility, JAGs had plenty of information that damage to medical and cultural facilities would receive outsized, negative attention due to prior experiences in the Vietnam War[203], the First Gulf

[202] For example, the Second Protocol to the Hague Convention for the Protection of Cultural Property (1999) stipulates that even when a protected object becomes a military objective, it cannot be attacked unless: a) no other feasible alternative exists to using force; b) a high level officer orders the attack; c) sufficient warnings are given to discourage the use of the site as an objective.

[203] For example, during Operation Linebacker, the Bach Mai Hospital in Hanoi was largely destroyed by U.S. munitions, leading to a storm of negative coverage. See “Report of Damage to Hanoi Hospital

War[204], the U.S. intervention in Somalia[205], and the NATO intervention in Syria and Kosovo[206]. Similarly, accusations of cultural heritage destruction by U.S. forces in Iraq received significant attention, as did instances of such destruction as well as the direct targeting of medical personnel[207] by other governments prior to September 2001[208]. Furthermore, I would expect these pre-War on Terror perceptions of high legitimacy risk to have been reinforced by events involving damage to medical facilities[209] and cultural sites[210] over the following two decades.

Confirmed by U.S." in the *New York Times* (https://www.nytimes.com/1973/01/03/archives/report-of-damage-to-hanoi-hospital-confirmed-by-us-pentagon-says.html, accessed 04.19.21)

[204] Various experts on antiquities, cultural heritage, and archeology accused U.S. forces of having intentionally or wantonly damaged a number of ancient sites in Iraq during the First Gulf War (Forsyth 2004). These accusations led the DoD to devote sections of its report to Congress to refuting these claims (Report to Congress).

[205] For example, one incident where U.S. forces killed a pregnant woman at a hospital garnered significant attention not only in the U.S. media but from coalition allies. See "U.S. Says Troops Did Duty Despite Woman's Killing" Reuters News Service, 12 January 1994 and "Pakistani, U.S. Officers Clash Over Somali Peacekeeping Mission," Associated Press, 13 January 1994. This even, and others like it, made an impact on JAGs at the time. For example, one JAG later reflected on lessons of the Somalia intervention by recalling this incident, saying: "the other bad thing that happened was right in the middle of this ROE with the snipers we killed a woman on top of a rooftop, so the -- CNN did a story on it and, of course, it was she was pregnant, she was praying, and she was on the top of a hospital when one of the Marine snipers killed her" (*Richard Gordon Oral History*).

[206] For example, even relatively small amounts of damage to hospitals by NATO forces received mainstream media coverage. For example, "NATO bomb reportedly damages hospital, ambassadors' homes" http://edition.cnn.com/WORLD/europe/9905/20/kosovo.03/. These incidents were highlighted in reports by Human Rights Watch and other NGO watchdogs. https://www.hrw.org/reports/2000/nato/Natbm200-02.htm

[207] "In 1996, the US Department of State qualified the killing of six ICRC medical aid workers in Chechnya as a 'barbaric act' and condemned it 'in the strongest possible terms'" https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule25

[208] For example, the Taliban's destruction of the Bamiyan Buddha's drew strong criticism from around the world just months prior to the U.S. invasion. https://www.nytimes.com/2001/03/04/world/over-world-protests-taliban-are-destroying-ancient-buddhas.html

[209] For example, a U.S. airstrike in Kunduz, Afghanistan destroyed a hospital run by the group Doctors Without Borders, leading to a wave of condemnation (See https://www.nytimes.com/2015/10/04/world/asia/afghanistan-bombing-hospital-doctors-without-borders-kunduz.html). Many JAGs I spoke with described the Kunduz strike as one of the worst public relations disasters of the war in Afghanistan. This focus on preserving and enhancing medical facilities is also a common theme of the 2006 Counterinsurgency Manual: https://fas.org/irp/doddir/army/fm3-24fd.pdf

[210] For example, during the Battle for Falluja in 2004, U.S. forces repeatedly fired into mosques that insurgents were said to be using for military purposes (See

JAG Advising as *Restraint*

When dealing with medical facilities and personnel as well as cultural sites, I found strong indications of JAGs using their influence to promote *restraint*. Interviews and after-action reports from JAGs who deployed during the War on Terror all indicate this attitude. For example, when asked about the limitations that JAGs helped enforce in Iraq, one military lawyer immediately identified mosques as a top concern:

> *Interviewer:* "Were there any structures that were always off limits?"
>
> *Susan Arnold:* "Mosques, as cultural and religious property, are further up on the hierarchy…All the mosques were [no-fire areas]"[211].

Another JAG explained how his office viewed such targets as clear red lines, which presented challenges for targeting:

> We had a real issue with a lot of our targeting…We [would] want to drop a bomb on some place but it would end up being too close to a mosque or something. The problem was there were mosques all over the place[212].

This approach was applied even when attacking targets that could provide the military with a tactical advantage. For example, a special forces Army JAG deployed to Iraq in 2003 explained:

> We were finding ambulances being used to transport military hardware. We'd go into a town [and]…the mosques had become ammo dumps, the hospitals had become ammo dumps, because they knew we would follow the laws of war and not bomb those places[213].

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https://www.pbs.org/newshour/nation/middleeast-jan-june04-iraq04-07 and https://www.cnn.com/2004/WORLD/meast/04/07/fallujah.strike/). In other cases, prominent newspapers captured the use of an ancient mosque minaret by U.S. forces as sniper towers, leading to a sharp backlash (Corn 2005). Such tactics were largely discontinued by subsequent U.S. commanders who saw these attacks as harmful to a counterinsurgency strategy (R. B. Jackson 2005).

[211] "Interview with Susan Arnold". On file with author.

[212] "Interview with Eric Magnell". On file with author.

[213] "Interview with Mark Holzer". On file with author.

All three of these JAGs, reflecting wider trends, recalled advising commanders against the use of force in these circumstances.

JAGs don't often have to argue with their commanders to dissuade them from using force in such circumstances. However, when commanders have wanted to push forward with this form of targeting, their lawyers have displayed techniques of either suggesting significant revisions to these plans—which avoid the use of force around medical and cultural objects/persons—or, if that does not work, playing 'the red card'. For example, during the First Gulf War[214], U.S. operators approved a plan to target the Victory Arch, a large statue of two crossed swords being held in Saddam Hussein's hands. Several JAGs ultimately weighed in to argue, in the words of one legal adviser, that such a strike could be "against the 1954 [Cultural Property] convention and language in the 1907 Hague law about the protection of cultural monuments" (Jones 2020, 144). The high commander of U.S. forces, General Schwarzkopf, was intent on striking the monument and could not be swayed from this course of action—reportedly telling his operational planners to "save me one bomb for the Saddam Hussein statue. I intend to make a personal request to the President" (Ibid.). To strengthen their case, the lawyers involved went up their 'tech chain' to the Chairman of the Joint Chiefs of Staff, Colin Powell, arguing that "the media and much of the world will certainly challenge us as to whether these are cultural monuments which should be protected. We don't need this kind of a sideshow, so let's not do it" (Ibid., 145). The legal adviser to Colin Powell then met with him, armed with "a copy of the Hague Regulations in my hand and also the

[214] Another example from the First Gulf War involved JAGs proposing alternatives to attacking Iraqi aircraft parked next to a cultural heritage site (the Ziggurat of Ur).

Geneva Cultural Conventions" to argue that "we don't need the media hassle we'll get for blowing away these so-called cultural objects" (Ibid.). Colin Powell then reportedly phoned civilian leaders who intercepted General Schwarzkopf's request to target the arch.

I witnessed this *restraint* during hypothetical targeting exercises I presented to a few of my interviewees—with me playing the role of the commander and the interviewee modeling how they would provide advice. One such exercise (Figure A-4) involved a 'decapitation strike' aimed at key political leaders in the chain of command of a state with whom our 'nation' was at war. The strike had *potentially* war-ending implications—with the enemy state losing most of its leadership in a single attack. However, the expected 'collateral damage' of the strike included upwards of one hundred civilians killed—most of them "civil servants and government inner circle personnel"—and the potential destruction of a cathedral and a museum. All of the JAGs I ran this scenario with expressed strong reservations about adopting the proposed plan, instead saying they would work with planners to see if they could attack the same targets in another fashion. Furthermore, the main reason for this *restraint* was the damage to the cathedral and museum, not the civilian casualties[215]. "Aw geez," a Marine JAG remarked while reading the scenario, "as soon as you see cathedral and museum, you're like…ugh" (Interview 01.01.04). An Air Force JAG, explicitly emphasizing the special legal protections of these objects, immediately flagged the same issue, remarking: "We've got a museum and a church, so we've got potentially protected cultural objects we've got to consider" (Interview 01.01.07). Much of the subsequent advice of these interviewees hinged on

[215] I return to this point in the following chapter's discussion of how JAGs advise on civilian casualties.

whether or not the strike could be conducted without damaging those structures or if an entirely new plan could be drawn up. The previously mentioned Marine explained that, while the civilian casualties still entailed an assumption of risk, the strike would be *significantly* less risky "if you can avoid rubbling the museum and the cathedral" (Interview 01.01.04). Similarly, the Air Force JAG explained that his assessment of the situation would hinge on talking to the unit's "weaponeers about what is the anticipated effect on the cultural objects" (Interview 01.01.07). While none of these interviewees ultimately played 'the red card' in this scenario—although some insinuated they would if they could not obtain better intelligence on the degree to which the enemy's military capabilities would be downgraded by the strike—they all framed the scenario as entailing a high degree of risk, primarily due to the cultural objects involved, and they all steered 'the commander' towards alternative pathways for attacking the hypothetical cabinet members.

Legal and Legitimacy Risk

JAGs adopt this *restrictive* position out of a combination of concerns regarding legal and legitimacy risk. Throughout the OPLOAC training course I attended, JAG instructors not only signaled the need for a 'conservative' approach to such targets, but they also framed such an approach as necessary due to both LOAC and the potential effects of bad optics. For example, whereas other protected persons and objects, such as general classes of civilians and non-military structures, were discussed in lectures primarily in terms of the conditions under which those protections might be *lost*, the discussion of special protections for medical facilities and personnel was accompanied

with large font warnings and bold letters at multiple points to reiterate that medical staff (along with chaplains) are 'noncombatants' who 'must be respected and protected in all circumstances.' "Do not knowingly attack [these] personnel!" the final slide in this lecture read. The reasoning given for this strong prohibition was, on the one hand, clearly linked to legal risk derived from the precise ban on targeting such individuals in the Geneva Conventions. "The Geneva Conventions allow you to kill anyone on the other team, except the medic" the instructor noted, adding "that's one of the oldest war crimes in the book"[216]. This lecture did describe how medics—as well as hospitals and cultural objects—can lose their special protections but also highlighted the additional precautions legally required of a commander, summarized in the prior section, before undertaking such an attack. After-action reports indicate that JAGs often communicate these rules in their advice. For example, one JAG recounted how a raid on an occupied hospital was halted until officers "announced over loudspeakers that the raid was about to begin and that medical personnel should come out," in order to comply with these procedures[217].

The course also focused on the legitimacy risk of targeting medical personnel. In one lecture, the class was asked about a situation where a sniper was requesting authorization to target a soldier who was providing medical assistance but not wearing a distinguishing emblem, such as the red cross, which is a requirement for claiming these special protections. In the ensuing discussion, the instructor encouraged JAGs to affirm the legality of such an attack while lobbying their commander to avoid using force due to legitimacy concerns. "This is one of those situations where 'the should' and 'the law' are

[216] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.07.18). Charlottesville, VA.
[217] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 72)

two different things," he explained, "and it is your job to advise on that," highlighting specifically the potential negative media coverage of targeting a soldier providing medical assistance[218]. Similar advice was given about targeting medical facilities that were used for military purposes. JAG trainers argued that while *technically* the law allowed U.S. forces to do so, it would look very bad if a narrative developed that U.S. forces were targeting hospitals. To reinforce this point, the next slide featured a picture of the destruction of the Dar al-Shifa hospital in Aleppo by Syrian government forces on November 21, 2012. Here, the trainer noted that Syrian forces claimed the hospital had been used to store and distribute weapons, but that even if they were right and the strike was technically legal, the widely shared optics of the strike had done more damage to the regime than any tactical advantage gained from attacking the facility.

JAGs communicate similar rationales in operations. For example, although JAGs described that the use of force *could* be authorized against a mosque under LOAC, they both limited such authorities to cases of immediate self-defense and discouraged U.S. forces from doing so even when they possessed the legal authority:

> As an example, in Najaf the tomb of Mohammad's nephew – the tomb of Ali – if we had fired a round in there, it would have been so bad. But as a matter of law, if you're taking fire from there and you need to use self-defense, yes, I can make a very strong legal argument that that is proper. But whether that's a good idea is a whole different thing[219].

A similar mindset is reflected in the answer a JAG provided to an interviewer on how the U.S. military dealt with situations where an enemy "conduct[ed] operations from… a mosque, or a hospital, or a school." While affirming that sites used for military purposes

[218] Ibid.
[219] "Interview with Susan Arnold".

could not retain their full protections, the JAG explained that they had been exceedingly cautious about the use of force under such circumstances:

> *Interviewer:* …how did you deal with that sort of situation?
>
> *Mark Holzer*: Very conservatively…
>
> *Interviewer*: So even in the higher-intensity phases, you still went to great lengths?
>
> *Mark Holzer*: Oh, yeah.[220]

In sum, JAG advising as *restraint* reflects a combination of concerns with legal risk and legitimacy risk, each of which differently limits the use of force. JAGs are trained to emphasize that commanders have a LOAC obligation to refrain from attacking such objects and persons in almost all circumstances and that even under such exceptions special precautions must be taken when using force. Additionally, JAGs counsel *restraint* that often goes beyond the law out of legitimacy concerns. In this, JAGs see it as part of their role to lobby that commanders refrain from targeting such persons and objects under almost all conditions, despite potentially having the legal authority to do so.

Institutionalizing *Restraint*

This approach is not only visible in JAG advising, but also in operational restrictions that JAGs have had a hand in creating. As I discussed in Chapter Three, the JAG Corps has successfully positioned itself during the War on Terror as a key broker for enacting 'strategic restraint.' A primary example of this has come through the institutionalizing by JAGs of such practices around the use of force and cultural or

[220] "Interview with Mark Holzer"

medical objects/persons. Most importantly, JAGs have helped military and civilian leaders institutionalize rules for soldiers that withhold the authority to use force around such persons and objects to the highest echelons of the command. In this, JAGs have woven their concerns with both legal and legitimacy risk into the fabric of operational conduct. These efforts reflected both the increased precautions required by international law and concerns with legitimacy even if those additional legal issues are satisfied.

One facet of this institutionalizing has been through the increased use of 'no-strike lists' (NSLs)[221] (Kahl 2007, 16). For example, a number of after-action reports describe how JAGs have been important drivers in creating these NSLs—which typically included "schools, mosques, bridges, hospitals and water treatment facilities"—as well as procedures that restrict the use of force against these sites, even if deemed permissible by LOAC—to the highest levels of command[222]. Furthermore, when an object on an NSL would arise, JAG advice would tend to emphasize "the risk posed by 'outliers' (a weapon that for mechanical or other reasons might not strike its intended target)" in order to further dissuade commanders from taking a strike (Lohr and Gallota 476).

Another set of JAG-led changes have been through the training and rules for operators regarding the use of force. These rules and trainings require soldiers to provide "due warning" before using force against medical objectives, unless they are acting in

[221] While NSLs were commonly used prior to the War on Terror, they became further institutionalized as a part of the operational tempo as a strong limitation on the use of force for targets such as "cultural and religious sites, embassies belonging to noncombatant countries, hospitals, [and] schools" This is reflected in changes between 1997 and 2003 versions of Joint Targeting. From 2003 onward the Joint Targeting guidelines specifically referenced that "No-strike entities are protected from the effects of military operations under international law and/or the ROE. Attacking these may violate the laws of war…or interfere with friendly relations with other nations, indigenous populations, or governments" (II-12).
[222] "Legal Lessons", 106.

self-defense. Furthermore, these rules state that failure to do so could be grounds for criminal investigation. For example, ROE cards handed out to U.S. forces in Iraq in the early 2000s said "Do not target or strike any of the following except in self-defense…hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites"[223]. Similarly, a de-classified training vignette used throughout the first decade of the War on Terror reads:

> You are moving with your unit near the outskirts of an Afghan city. You see a hospital that is flying the red crescent and notice that it is being used as an observation post (OP). When you get in better position to observe, you notice the occupants have binoculars, radios, AK-47s, and RPGs. They do not appear to observe your unit at this time…What do you do? (Vignette #11)

Whereas other vignettes involving the use of a civilian object, such as a house, for military purposes affirms the right of soldiers to preemptively attack these targets, this vignette instructs a much higher degree of caution. The instructor's answer to this question reads: "Notify higher headquarters immediately. Do not fire! Hospitals are protected places and thus are not to be attacked except in self-defense." It further adds that the hospital only "[loses] its protected status after it is warned and given a reasonable time to comply" and that a higher headquarters—with access to a JAG—must confirm that "the hospital has been warned and that reasonable time for compliance has passed."

Third, JAGs demonstrated a willingness to recommend sanctions against soldiers who used force against such targets. For example, during an incident in Afghanistan an officer ordered one of his soldiers to fire on a group of Afghans who had used a tractor to

[223] Reprinted in Ford 2004, 23

provide transport to a man who had been wounded after U.S. troops fired on him for laying an unspecified object near the side of the road. Upon investigation of the incident, a JAG recommended prosecution of the officer on the grounds that the tractor had been used in a way equivalent to an ambulance and that sufficient evidence existed at the time showing that the group was intending to provide medical assistance rather than conduct hostilities[224]. The willingness by JAGs to prosecute in this instance reflects broader concerns about the risk of targeting medical and cultural objects and persons. In this, not only do JAGs enact *restraint* through their advising, but they also translate this concern with risk into requirements that further constrain the capacity of soldiers to use force in these instances.

Torture and Treatment of Detainees

I also would expect JAGs to perceive high levels of legal risk around the treatment of detainees. Relevant prohibitions on torture and abuse can be found in LOAC[225], International Human Rights Law[226], U.S. domestic law[227], and the Uniform

[224] "Screwed by the rules of engagement" (2012) http://outsidethewire.armytimes.com/2012/04/16/this-week-in-army-times-print-edition-screwed-by-rules-of-engagement-rough-jumpers-list-of-new-commanders/.

[225] Under IHL "torture is prohibited by Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75 (2 a & e) of Additional Protocol I and Article 4 (2 a & h) of Additional Protocol II. In international armed conflict, torture constitutes a grave breach under Articles 50, 51, 130 and 147 respectively of these Conventions." https://www.icrc.org/en/doc/resources/documents/faq/torture-law-2011-06-24.htm

[226] *Convention Against Torture* (Pt. 1 Art 1: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.")

[227] Section 2340A of Title 18 "prohibits torture committed by public officials under color of law against persons within the public official's custody or control. Torture is defined to include acts specifically intended to inflict severe physical or mental pain or suffering."

Code of Military Justice[228]. Furthermore, these legal bodies specify—to a degree exceeding most of the restrictions on the use of force in both LOAC and much of human rights law—relatively concrete descriptions or examples of actions that would be considered torture, thus enabling a critical mass of legal experts to accuse the U.S. of illegality when this definition is pushed too far. Furthermore, given that potential violations of these laws would typically occur against individuals already in U.S. custody—rather than in the heat of combat—responsibility for these abuses is more difficult to deny than with, for example, civilians killed as 'collateral damage.' These risks are further heightened by the fact that the International Committee of the Red Cross (ICRC) possesses the legal authority to visit all detention facilities for prisoners of war as well as an informal, but frequently accepted, mandate to tour facilities holding detainees that do not qualify for Prisoner of War status[229]. Additionally, since the Abu Ghraib prison scandal, U.S. domestic statute and DoD policy have been expanded to add further restrictions and mechanisms for encouraging enforcement[230]. As such, the overwhelming majority of investigations of U.S. troops for criminal acts during the early 2000s involved the treatment of detainees[231].

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[228] See articles 93 and 92 of the UCMJ, which prohibit, respectively, cruelty and maltreatment and the failure to report abuse conducted by fellow soldiers, as well as article 134, which prohibits service members from committing acts that would violate U.S. domestic statute, including prohibitions on torture.
[229] This authority of the ICRC was also affirmed in specific U.S. doctrine at the time, such as FM 27-10, C1, 15 July 1976 ("The special position of the International Committee of the Red Cross in this [relief] field shall be recognized and respected at all times.") and AR 190-8 para. 1-5(e) 1 Oct. 1997
[230] "Executive Order 13440: Ensuring Lawful Interrogations" (2009) https://obamawhitehouse.archives.gov/realitycheck/the-press-office/ensuring-lawful-interrogations; "McCain-Feinstein Anti-Torture Amendment" *National Defense Authorization Act for Fiscal Year 2016*, section 1045, available at https://www.congress.gov/bill/114th-congress/house-bill/1735/text#tocH75DFAC1D0A7148B4A454E532D7E864A6.
[231] As of mid-2006, the Pentagon claimed to have initiated over 6oo investigations in Iraq and Afghanistan in response to allegations of misconduct, most of them relating to the abuse of detainees. (Kahl 2006, 99) JAG AARs and 'lessons learned' documents confirmed this indication of the heightened legal risk of such

I also expect JAGs to perceive a high degree of legitimacy risk in this area since the Abu Ghraib prison scandal and subsequent unraveling of the DoD's 'enhanced interrogation program' in mid-2004. As covered in the third chapter, the scope and intensity of the media coverage of these events were felt immediately by the military. As such, I would expect JAGs *since* roughly 2005 to be highly sensitive to the potential public relations consequences of such abuse. For operational attorneys *prior* to that time, my expectations are more mixed. In terms of visibility, the treatment of detainees occurs largely behind closed doors, with numerous examples available of programs of systematic torture being kept largely 'in the dark' for years (Khalili 2012). However, in *most* cases involving the U.S. military[232], holding detainees also leaves a paper trail that can implicate perpetrators in the long run, if not also the short term (McCoy 2007). With regard to media salience, the record available to JAGs is also mixed. In the Vietnam War, media coverage of torture and mistreatment of suspected insurgents was eventually deemed a strategic liability, with a handful of JAGs taking on their first pseudo-operational roles to enhance detainee procedures and support the counterinsurgency campaign. These JAGs later took the lead in the implementation of the Law of War Program which also enhanced detainee protections (Borch 2001, 11–12). As such, many JAGs—especially higher-ranking military lawyers with a better sense of this history—would have been aware of the liabilities for U.S. legitimacy of torture and detainee abuse.

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actions. For example "Recent Operation Iraqi Freedom (OIF) AARs indicate most allegations of LOW violations involved detainee abuse and concerned actions occurring at the point of capture." *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 99)

[232] A partial exception to this was the use of 'black sites' run by the U.S.'s Central Intelligence Agency (CIA) to attempt to both subvert legal protections and avoid such paper trails. See, for example, "US Torture: Voices from the Black Sites" https://www.nybooks.com/articles/2009/04/09/us-torture-voices-from-the-black-sites/.

On the other hand, these events were thirty years old at the start of the War on Terror, and the U.S.'s deployments since Vietnam had not featured many front-page scandals involving detainees[233]. Therefore, salient warnings about the risks of detainee abuse would not have been at the fore of some JAGs' minds. However, the Abu Ghraib scandal put this issue back in the headlines and diminished the acceptability of torture in U.S. public opinion (Gronke et al. 2010), suggesting that JAGs' perceptions of legitimacy risk in this area would increase after this point.

Restraint by Senior JAG Leadership

Prior to those scandals, the majority of operational JAG behavior reflected patterns of *restraint*, especially among senior JAGs. As noted in Chapter Three, high-ranking JAGs clashed with Bush Administration officials over the invocation of the Geneva Conventions and the creation of the Torture Memos starting in 2001. JAGs' opposition to these processes indicated patterns of 'playing the red card', to the extent that they were eventually excluded from decision-making[234] and later targeted by Bush Administration officials, who sought to diminish their independence from civilian control[235]. As concerned JAGs at lower levels reported to their superiors on the techniques employed at Guantanamo in 2002[236] details of the DoD's legitimation of

[233] For example, in the first Gulf War the vast majority of U.S. and global media coverage of detainee treatment was on the conditions of a handful of captured U.S. pilots and civilians by Iraqi officials. See, for example, "6 Americans, Including Woman, Among 10 Released by Baghdad" https://www.nytimes.com/1991/03/05/world/after-the-war-pow-s-6-americans-including-woman-among-10-released-by-baghdad.html.

[234] "Don't bring the TJAGs into the process," one top Bush Administration official reportedly instructed another. "They aren't reliable" (Mayer 2009, 88).

[235] "Bush seeks to limit military lawyers' independence" https://www.nytimes.com/2007/12/15/world/americas/15iht-jag.1.8759385.html

[236] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, 70).

'enhanced interrogation techniques' were revealed to the service branch JAGs, each of whom issued a memo evaluating the legality of these policies. Overwhelmingly, each of the top JAGs found fault with these policies. The Air Force JAG review found "serious concerns regarding the legality of many of the proposed techniques," noting that "some of these techniques could be construed as 'torture'"[237] The Navy cited legal issues with the proposed techniques and recommended that "a more detailed interagency legal and policy review be conducted"[238]. The assessment by the country's top Marine lawyer "disagree[d] with the position that the proposed plan is legally sufficient" and concluded that "several of the…techniques arguably violate federal law, and would expose our service members to possible prosecution"[239]. The Army's review similarly "interpose[d] significant legal, policy, and practical concerns regarding most of the…techniques proposed," claiming that certain methods "appear[ed] to be clear violations of the federal torture statute" and others "cross[ed] the line of 'humane' treatment." These reports were then collected by the Legal Counsel to the Chairman of the Joint Chiefs of Staff, who concurred that the legal justifications for the 'aggressive interrogation techniques' proposed were "woefully inadequate" and that some of the techniques left her with "significant, significant concerns"[240].

[237] "Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the Global War on Terrorism" Memorandum from Major General Jack Rives to Mary Walker (5 February 2003)
[238] "Comments on the 6 March Detainee Interrogation Working Group Report" Memorandum from Rear Admiral Michael Lohr to Mary Walker (13 March 2003)
[239] "Working Group Recommendations on Detainee Interrogations" Memorandum from Brigadier General Kevin Sandkhuler to Mary Walker (27 February 2003)
[240] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, 85).

After failing to have their concerns addressed by the DoD, the top JAGs soon after issued verbal, email, and eventually formal written protests to the DoD General Counsel and the Service Chiefs of their respective branches. The Senate's final report on these events concluded that the JAGs and their allies "tried, without success, to have their concerns about the legality of aggressive techniques reflected in [new DoD recommendations for interrogations]. [However,] their arguments were rejected in favor of a legal opinion from the Department of Justice's Office of Legal Counsel's (OLC) John Yoo"[241].

The objections expressed in the memos written by senior JAGs grounded their concerns primarily in the illegality of the Bush Administration's policies. In their arguments, the JAGs warned these policies invited legal sanctions upon U.S. soldiers. In addition to warning of domestic consequences and the possibility of prosecution within the military justice system, these memos argued that the DoD's 'enhanced interrogation' techniques ran "the risk of subjecting uniformed personnel to criminal prosecution in foreign or international tribunals" (Nuñez-Mietz 2016, 230). To make this argument, the JAGs specifically identified the U.S.'s LOAC and human rights treaty commitments, such as the Geneva Conventions and the Convention Against Torture, and argued that the U.S. would be widely viewed as grossly breaching those commitments by the international legal community. In addition, JAG opposition highlighted the public relations consequences of these decisions, with some arguing that these legitimacy concerns were enough to warrant the cessation of 'enhanced interrogation techniques'

[241] "Inquiry into the Treatment of Detainees in U.S. Custody" 2008, xxi

even if they *were* perceived to be legally compliant. Specifically, JAG arguments referenced the damage to "the United States' international reputation," the "impact on the public's support for the war," and "the culture and self-image of the US Armed Forces" (Ibid.). Referencing both legal and legitimacy risks, one JAG, who had been working in the Pentagon in the early 2000s and helped write the Army's memo against these policies, explained the situation in the following way:

> From really the get-go, we kept on saying that it was patently unlawful. You can't do these kinds of things. 'But that's what the Secretary wants to do'. Well, your job is to go in and tell the Secretary we can't do those for any number of different reasons. Unlawful, policy reasons, blowback on our own people. You name it (Interview 01.02.01).

Overall, the combination of both negative optics and the possibility of inviting prosecution and credible accusations of legal violations became a strong motivating force for senior JAGs to use the various formal and informal levers of power at their disposal to oppose the policies of the Bush administration. In this opposition, the JAGs showed clear signs of being willing to 'play the red card' over this issue, such as by going around officials to try to get decisions reversed and lobbying military leaders to oppose their civilian counterparts on this issue.

Restraint **by Operational JAGs: Pre-2005**

The majority of JAG operational advising closer to the ground has also emphasized patterns of *restraint*. Prior to the War on Terror, most instances of JAGs advising on the treatment of detainees demonstrated a willingness to use their authority to enact significant limitations on the use of military force. For example, during Operation Desert Storm an Army JAG managed to stop plans to release captured Iraqi soldiers in

the desert—whose mass surrender was slowing the forward progress of an armored division—"over the protest of some of the corps' commanders" (Borch 2001, 182). This pattern continued during the initial invasions of Afghanistan and Iraq as well. For example, a collection of after-action reports from these combat operations—released *before* the Abu Ghraib scandal—concluded that "[d]etainee operations occupied JAs in [Afghanistan] and [Iraq] more than any other [international law] issue" and that "issues concerning detainee interrogation proved among the most sensitive and difficult questions [JAGs] faced"[242].

In this, JAGs intervened on a number of occasions when they believed that existing policy was in violation of the law—demonstrating their willingness, in these cases, to potentially be seen as 'obstructionists'. Various after-action reports note that JAGs intervened or offered policy guidance in Iraq and Afghanistan during instances where detainee practices did not meet international legal standards for nutrition (Ibid., Appendix A-6), labor and pay (Ibid.), autopsies and funerary rites (Ibid.), mail (Ibid., 48), the detention of minors (Ibid., 77-79), and the transport of detainees through combat zones (Ibid., 50). However, JAGs most frequently either proposed significant changes to operational plans or played 'the red card' in the area of interrogation methods. One JAG after-action report provided the following warning to military lawyers back home:

> Detainees are a potential source of valuable information, and the motivation to extract that information through interrogation may sometimes create strong temptations to test the limits of the LOAC. Questions [JAGs posed of detainee policy] often concerned the legality of specific proposed interrogation techniques (55).

[242] *Legal Lessons Learned from Afghanistan and Iraq: Volume I* (2004, 40, 55).

For example, in one high-profile incident, a Marine colonel was court-martialed and forced to resign over abusive interrogation tactics after a lower-level soldier notified the unit's JAG of these actions[243]. In another, a JAG stationed at the Baghdad International Airport intervened to address practices regarding the use of handcuffs in interviews and the use of detainees to conduct degrading labor[244].

In this, JAGs grounded their advice in the U.S.'s obligations under LOAC—despite the fact that civilian officials provided little guidance on this subject for JAGs during the invasion of Afghanistan[245] and later declared that LOAC protections did not apply to certain detainees. At times going against the grain of this guidance, after-action reports indicate that JAGs during these conflicts—for the most part—"advised [commanders] to treat detainees in a manner consistent with the Third Geneva Convention (GPW) and Fourth Geneva Convention (GP)"[246]. Specifically, military and congressional investigations into the Abu Ghraib scandal and the dissemination of the DoD's 'enhanced interrogation techniques' provided numerous instances where JAGs—contrary to these policies—argued that policies could not be approved and practices needed to be altered because they conflicted with the U.S.'s LOAC obligations. The military's investigation into Abu Ghraib revealed that a JAG who transferred to that prison just a couple of weeks before the leaking of graphic photos of abuse wrote a report that detailed alarming disciplinary issues and rumors of guard mistreatment[247]. The report

[243] "Failure of Command: the case of Lt. Col. Allen B. West" https://www.nationalreview.com/2003/12/failure-command/'
[244] *Church Report*. Preparatory Files. 09.25.04
[245] *Legal Lessons Learned from Afghanistan and Iraq: Volume I* (2004, 34).
[246] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 30)
[247] Identity redacted, see declassified statement by JAG on events from March 2003-February 2004, ACLU-RDI 884 p.1-8

describes interventions and investigations around the stripping of detainees and accusations of sexual assault, recalling a call made to higher headquarters where they told another officer that "if the ICRC came by and saw this they would have a problem because of our responsibilities under the Geneva Conventions"[248]. Similarly, Congressional investigators found that the only sustained challenges to the rollout of the 'enhanced interrogation program' came from the JAGs, who argued these policies violated the Geneva Conventions. "Only when JFCOM's Staff Judge Advocate became aware of and raised concerns about…offensive interrogation operations in late September 2003" the report concludes "did JFCOM leadership begin to take steps to curtail [these] 'offensive' activities"[249]. Similarly, the report found that JAGs at U.S. Central Command balked at the approval of interrogation techniques in September 2003, with "the CENTCOM [JAG] '[raising] concerns to us that the policy was objectionable in that aspects of the approved approaches were impermissibly coercive"[250]. The report then quotes this JAG as having, in objection to these policies, stated that "[m]any of the techniques appear to violate [Geneva Convention] III and IV and should not be used on [enemy prisoners of war] or [civilian internees]" given that the [Geneva Conventions] prohibits all coercive interrogation techniques"[251].

Additionally, operational JAGs during the War on Terror at times recommended courses of action that went *beyond* the requirements of LOAC. For example, JAGs intervened prior to an intelligence screening by U.S. interrogators of prisoners held by the

[248] Ibid., 5.
[249] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, xxv).
[250] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, 203).
[251] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, 203).

Northern Alliance out of concern that the U.S. military—despite not having legal control and responsibility for these prisoners—could be viewed on the home front as condoning the abuse of prisoners. In her after-action report, the JAG involved did not conclude that the U.S. possessed a legal obligation to demand the alteration of the Northern Alliance's prison conditions. Rather, she referenced the potential fallout if it became known that U.S. forces interrogated prisoners in these conditions and did nothing about it:

> These were not prisons that Americans are familiar with. Instead, picture mud cells with no sanitation, no electricity, no climate control, no creature comfort of any kind, packed with men and spread out over an area the size of about ten football fields[252].

Her commander heeded the JAG's recommendations in this case, and all interrogations were halted until the U.S. provided the Northern Alliance forces running the camp with detention resources and military police, all supervised by a JAG "to ensure the Geneva Conventions principles were followed *as a matter of U.S. policy* [rather than obligation], and to [liaise] with the International Committee of the Red Cross and the media"[253].

In this, most military lawyers refused to consider potential loopholes or exceptions in the legal code, instead adopting a cautionary approach to the issue of detainees out of a general concern with legitimacy. For example, a JAG who flagged issues with the proliferation of the DoD's 'enhanced interrogation techniques' later remarked to Army investigators that:

> As lawyers we're talking about adherence to the rule of law being important, and
> that's what we're trying to tell everybody as we travel around the world to these

[252] *Legal Lessons Learned from Afghanistan and Iraq: Volume I* (2004, 51).
[253] Ibid., 52. Emphasis added.

> other countries. That's paramount to democracy. And so suddenly we look like
> we're brushing this aside or we're twisting the law[254].

Referencing the additional steps taken by JAGs to ensure detainee treatment—such as recommending the enhancement of prison facilities beyond the requirements of the Geneva Conventions to demonstrate the U.S.'s commitment to humane treatment—one special forces Army JAG deployed to Iraq in 2003 explained:

> My unit, specifically, didn't have detainees, but others that we were associated with did. So, we were constantly talking. 'Okay, here's the list of things you can and cannot do'…[O]ur JAGs in that community were rather conservative about the approach and were more conservative than what came down from higher headquarters[255].

Similarly, an after-action report argued that strict adherence to detainee policy was required because lax standards "encourage negligent, if not criminal behavior from the detaining soldiers" and because every such violation "undermines the locals' trust in US forces"[256].

Permission **by Operational JAGs: Pre-2005**

However, operational JAGs on a few occasions during the 2000s deployed their expertise as a form of *permission* rather than *restraint*. These military lawyers sought out loopholes and exceptions for their commanders that enabled them to seemingly sidestep their LOAC obligations. In one instance, the Deputy Staff Judge Advocate for U.S. forces in Afghanistan approved legal guidance for interrogators that included 'enhanced

[254] *Inquiry into the Treatment of Detainees in U.S. Custody* (2008, 67).
[255] "Interview with Mark Holzer".
[256] Brigade Legal Section After Action Report. 1st BCT, 1st Cavalry Division. 4 March, 2015. Deployed 15 Sep – 31 Dec 14. On file with author.

interrogation techniques,' even after such techniques had been withdrawn by the Secretary of Defense. In an interview with a different military lawyer about why these authorities had been left standing, this JAG remarked:

> the methodologies approved for GTMO... would appear to me to be legal interrogation processes. [The Secretary of Defense] had approved them. The General Counsel had approved them... I believe it is fair to say the procedures approved for Guantanamo were legal for Afghanistan. (*Senate Report* 156)

In this, the JAG resolved legal concerns by looking for the maximum potential authority that could be found within the existing system of law and policy to extend military power.

However, the most telling example of this *permission* occurred in the Guantanamo Bay prison facility. A small number of JAGs at Guantanamo used clever legal arguments in an attempt to exploit relevant law. For example, in meetings and memorandums from October 2002, the top-ranked JAG at Guantanamo concluded that certain techniques—such as sleep deprivation, the use of a wet towel to simulate drowning, fear-based practices, and low-level physical assaults—could all be legally applied, as long as care was made to obtain certain authorities and to document the "good faith" "strategic" rationale behind these practices in advance[257].

Furthermore, these deliberations and arguments reveal that these JAGs were wary of legal sanction—although they ultimately believed they could defend their actions through careful argumentation and preparation. "We will need documentation [of

[257] "Counter Resistance Strategy Meeting Minutes" (10.02.02); "SUBJ: Legal Review of Aggressive Interrogation Techniques" (10.11.02)

authorities from the executive branch obtained, of medical personnel present, and of safeguards taken that demonstrate the lack of intent to cause serious harm]," the lead JAG remarked, "to protect us [from running afoul of the Torture Convention, the UCMJ, and the Eighth Amendment of the U.S. Constitution]"[258]. As such, there was a significant degree of *legal* risk perceived in these activities. These JAGs did not believe their actions would be hidden from legal oversight. Congress's investigation concluded that the Staff Judge Advocate at Guantanamo filed her opinion with the correct channels, believing that these arguments were provisional and would get vetted by other JAGs and lawyers at the DoD[259].

However, the JAGs at Guantanamo, along with other officials stationed there, perceived very low legitimacy risk because they believed they could conduct these activities away from the eyes of the press. While the lead JAG at the base was concerned about the consequences of these techniques being revealed to the public—specifically that, in the words of another meeting participant, "totally legal techniques will look 'ugly'"—the JAG and the rest of the staff believed that, by virtue of the media blackout at the Guantanamo Bay prison facility, interrogation procedures could be kept a secret as long as they did not lead to deaths. Beyond the media, JAGs noted the legitimacy threat posed by the ICRC "scrutinizing our operations", which could "draw a lot of negative

[258] "SUBJ: Legal Review of Aggressive Interrogation Techniques" (10.11.02)
[259] Instead, this legal review was, for a period, hidden from much of the rest of the JAG Corps and used by the Secretary of Defense as evidence of the legal sufficiency of its 'enhanced interrogation techniques'. When this opinion was sent to U.S. Southern Command, it was intercepted and steered out of the JAG 'tech chain' and into the hands of the Secretary of Defense. Eventually, the JAG legal adviser to the Chairman of the Joint Chiefs of Staff obtained the legal review from a civilian DoD official. She then flagged it as potentially insufficient and lobbied the Chairman, successfully, that the top JAGs from each service branch be allowed to review it as well.

attention"[260]. However, the staff believed (correctly) they could avoid this scrutiny by shuffling detainees between DoD custody and that of the Central Intelligence Agency (CIA)—the latter of which, the U.S. argued, did not have to accept ICRC visits. In sum, these activities resemble the use of legal expertise as a form of *permission*—which I expect when JAGs perceive relatively high degrees of legal risk but low legitimacy risk. As I show in the next chapter, JAGs under those circumstances are concerned about sanctions but use the absence of public scrutiny to seek out clever exceptions and loopholes in the legal system, much as the JAGs at Guantanamo did.

***Restraint*: post-2005**

Since the Abu Ghraib scandal broke, JAGs have consistently perceived high degrees of legitimacy risk in regard to the treatment of detainees and, as a result, have overwhelmingly adopted positions of *restraint*. As illustrated in Chapter Three, senior JAGs offered numerous rounds of Congressional testimony critical of the Bush Administration's approach. On the ground in Afghanistan and Iraq, JAGs referenced the 'lessons of Abu Ghraib' in calling for more stringent detainee protection policies. For example, a summary of 'lessons learned' from the first eight years of the War on Terror concluded that military lawyers needed to remain particularly vigilant in this area: "Detention operations will not only occupy an inordinate amount of a legal office's time but also represent a potential public relations landmine as was demonstrated at Abu Ghraib"[261]. In one such instance, a JAG in Iraq described how his unit assessed detainee facilities with a careful eye towards reports that might be filed by the ICRC:

[260] "Counter Resistance Strategy Meeting Minutes" (10.02.02);
[261] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 36)

> [The facilities set up for detained Iraqis] were adequate; they met the bare requirements of a place to keep them but I know we went and told the brigade commander, "Hey, look. We need to spend some money to fix these things up because if the Red Cross comes down we want to make sure we have a detention facility we can show them and that we can say, 'Look, we're meeting all of the things we're supposed to be doing.'" We put a lot of effort and money into fixing those up and made them into something that was really good. Every night we would review the packets of every single person that was detained within our brigade when they arrived at our brigade detention facility[262].

In another case, a JAG deployed with a brigade combat team in 2015 notes having to intervene strongly when a training exercise revealed that officers under the brigade command were skipping over key procedures and falling short of the rights afforded to 'enemy prisoners of war' [EPWs]. "This is a critical area," the JAG wrote, "because of the importance of proper handling of EPWs and the potential repercussions of mishandling EPWs"[263]. This shift in concern has been visible in JAG doctrine as well. For example, the Army's 2020 update to its leading JAG doctrine now includes an entire section on "detainee operations" which directly posits not only the legal but the legitimacy risks[264] of pushing the envelope on this issue.

The importance placed on detainee practices—in comparison with other areas of the law—was evident from the OPLOAC training course I attended. The 'lessons of Abu Ghraib' was a constant theme from this training course, as well as from my JAG interviewees. Rather than emphasizing authorities and the importance of 'getting to

[262] "Interview with Eric Magnell". On file with author.
[263] Brigade Legal Section After Action Report. 1st BCT, 1st Cavalry Division. 4 March, 2015. Deployed 15 Sep – 31 Dec 14. 2.
[264] "When detainees are abused or mistreated, it does significant damage to U.S. credibility…[M]istreatment of detainees by U.S. or host nation personnel substantially undermines the legitimacy of U.S. forces and, if it occurs in the context of stability operations, the host-nation government" *Field Manual 1-04: Legal Support to the Operational Army* (2020, 8-1).

yes'—which, as I show in the next two chapters was a strong theme of this course—these techniques were rarely mentioned during lectures and scenarios that pertained to the treatment of detainees. Instead, an aura of caution surrounded these discussions. "We're trying to fight morally and righteously" one instructor reminded the class, when discussing the detainee protections found in the Geneva Conventions, adding "the goal here is *not* to deny [protected] status to detainees"[265]. Similarly, during exercises trainers only intervened to notify trainees when they had been insufficiently restrictive. At one point, a JAG trainer unequivocally recommended that in areas regarding detention where military lawyers were unclear on law and policy they should "err on the side of caution, go with [prisoner of war] or equivalent treatment"[266].

To further reinforce this *restraining* approach, the OPLOAC course has, since approximately the late 2000s (Interview 01.01.02), invited ICRC officials to conduct some of the exercises on detainee treatment. In no other instance were non-JAGs, let alone officials from a humanitarian organization, tasked with running JAG training exercises and establishing expectations and models of operational advising[267]. These exercises simulated a visit by the ICRC to a U.S. facility, with the visiting humanitarian officials grilling trainees on the requirements of the law and the steps they would take to respond to various hypothetical issues in the 'camp'[268]. Instead of 'getting to yes' for the commander or seeking to mitigate risk by tweaking procedures, these exercises practiced

[265] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.06.18). Charlottesville, VA.
[266] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.
[267] As I explain in Chapter Eight, such an invite would never be extended to the ICRC on, for example, the identification of legitimate objectives in targeting—an area in which JAGs adopt advising practices of *expansion.*
[268] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.

the identification of constraints and the translation of these into significant reforms—including the firm recommendation that the command cancel certain practices[269]. After the ICRC team left, no criticism of this restrictive mentality was offered by the course trainers[270]—in contrast to these trainers' portrayals of ICRC position on the identification of 'legitimate targets', a dynamic I discuss in Chapter Eight on JAG practices of legal *expansion*.

Conclusion

When JAGs perceive high levels of both legal and legitimacy risk, they leverage their legal expertise as a *restraint* on the U.S.'s capacity to use military power. In these moments, JAGs not only warn commanders of the risks of using their power but are willing to 'play the red card'—risking the partial erosion of their authority with the command—in order to halt highly risky courses of action. JAGs adopt these strong positions out of concern that such actions will be widely viewed as illegal *and* will generate serious public relations issues for the U.S. military. In this regard, military lawyers will not only seek to enforce the law in operations but, in some cases, counsel commanders to take precautions that exceed the law.

JAGs consistently adopt such a position in regard to the targeting of specially protected persons and objects, such as hospitals, medics, and religious sites. These positions are adopted out of both concern with the added protections provided by LOAC, beyond those of most civilian objects, and assessments of the damage such acts can do to

[269] These issues ranged from concerns about access to medical treatment, protection from sexual violence, access to the outside world, tracking detainee belongings, and other conditions of detention, such as access to media, Internet, and television. Ibid.
[270] Ibid.

the U.S.'s legitimacy. Therefore, even under circumstances where LOAC *does* allow the military to target medical and cultural objects/persons, JAGs tend to argue against such decisions out of concern over optics. Furthermore, this approach has been institutionalized, in part through the JAGs, to shape how the U.S. military more broadly approaches the use of force around such targets. The history of JAG advising on the treatment of detainees is more mixed, with JAGs since 2005 consistently using legal advising in operations as a form of *restraint* and the majority of military lawyers prior to the Abu Ghraib prison scandal doing the same. Senior JAGs as well as those lower down the chain of command have, by and large, perceived high degrees of both legal and legitimacy risk in these issues and opposed civilian and military officials who have been in favor of pushing the envelope on the treatment of detainees. However, during the first years of the War on Terror, a few JAGs, including the legal advisers to the Guantanamo Bay prison facility, approached the treatment of detainees with a far lower assessment of the legitimacy risks based on their belief in the ability of the U.S. to keep the use of torture against 'high value' detainees a secret from the public eye. In these cases, operational advising was deployed as a form of *permission* for the abuse of detainees. This dynamic demonstrates how assessments of legal and legitimacy risk can change, shifting the effects of 'lawyerization' as well—a topic I explore again at the end of the next chapter on JAG practices of *permission*.

Chapter Seven: Legal Advising as *Permission*

Introduction

Using the typology of legal advising modes outlined in Chapter Two, this chapter unpacks dynamics in which JAGs deploy their legal advice as forms of *permission.* I argue that when one or the other of the conditions driving legal advising as *restraint*—high perceptions of either legal or legitimacy risk—are not present, JAGs deploy their expertise primarily to enable their commanders while mitigating some of the risks of using military power. While the precise tactics involved differ across these two sets of conditions, the overall approach emphasizes similar aspects of the 'risk manager' model. JAGs seek opportunities to enable the command while preferring to use mitigation strategies to handle risk, rather than imparting firm constraints. As such, when the optics of a decision are relatively low and JAGs are concerned with only the letter of the law, JAG risk managers seek out exceptions and creative workarounds to diminish the restrictiveness of the law and maximize commanders' authority. Conversely, when insufficient precision and enforcement exist to make legal sanctions credible—but concern with legitimacy risk is generally high—JAG advising tends to impart very low legal standards into operational decision-making, tempered by suggestions for measures that go beyond the law.

The first half of this chapter looks at conditions of *permission* where JAGs perceive high degrees of legal risk and low degrees of legitimacy risk. I argue that, under

these conditions, JAGs tend to invoke the law as a set of hard rules that can nonetheless be circumvented, in many instances, through creative lawyering. As such, the law's potential to constrain is simultaneously enacted and undermined by the presence of legal advisers, leaving ample room for permissive and enabling uses of legal rules. In this, I offer three examples of areas where I would expect such behavior: JAG advising around the operational use of funds, proving support to proxy forces, and the rules of engagement (ROEs)—the last of which, I show, can also result in legal advising practices of *restraint* under some conditions. In the second half of the chapter, I argue that when JAGs provide advice on the 'incidental' civilian casualties of attacks[271]—colloquially known as "collateral damage"—they *mostly* perceive high levels of legitimacy risk but low levels of legal risk. As a result, JAGs deploy their legal expertise to invoke the law as a permissive set of legal precepts that require largely procedural demonstrations of 'reasonableness' as well as 'good faith' attempts to reduce civilian casualties, rather than firm limits. This near-exclusive focus on enabling the use of force through the law is tempered by concerns over the legitimacy costs of civilian casualties, expressed as recommendations for the command rather than *de facto* imperatives (as with *restraint*). Lastly, I discuss how JAG advising on civilian casualties presents a challenging yet illuminating case for my theory. On the one hand, prior DoD rules that limited civilian casualties increased the legal risk that JAGs perceived, which—when/where those policies were in place—resulted in advising practices that vacillated between *restraint* and *permission*. On the other hand, a return to high-intensity interstate conflict could

[271] I adopt the term 'civilian casualties' in this section to refer only to the unintentional—yet frequently anticipated—killing of civilians rather than the intentional targeting of civilians and determination of who is a civilian, which I discuss in the next chapter.

drastically reduce JAGs' perceptions of the legitimacy risk of civilian casualties, which would shift their advising practices toward *expanding* the U.S.'s capacity to use force.

Permission I: High Legal Risk and Low Legitimacy Risk

When issues arise where JAGs perceive high legal risk and low legitimacy risk, military lawyers invoke legality as a type of regulatory regime that must be taken seriously but can, potentially, be minimized or even sidestepped. Therefore, I argue that this leads JAGs to work through such issues somewhat akin to how a tax lawyer might tackle the legal code or a corporate lawyer might navigate a set of government regulations. While they take seriously the potential costs of being found in violation of the law, JAGs also seek clever strategies for navigating those codes to reduce the limits on their commanders—as shown in the prior chapter by the legal advisers at the Guantanamo Bay prison facility. As such, I argue that JAGs approach such rules purely in terms of the letter of the law. In order to enable their commander while reducing risk, they seek creative, practical solutions to the barriers imposed by legal regulations rather than counseling a conservative approach. In this highly pragmatic form of advising, JAGs seek out exceptions to these rules, alternative sources of authority that permit a plan to proceed, and ways for restricting the framing of a plan to re-classify an action as falling under a different legal code. JAGs will also suggest changes to operational plans. However, unlike with practices of *restraint*, these revisions are not aimed at encouraging the commander to accept limitations, but rather at finding alternative pathways for reaching the same goal and adopting risk mitigation strategies—such as by altering the facts on the ground slightly to facilitate a more *permissive* legal assessment.

The first section in this half of the chapter focuses on the most consistent example of this form of *permission*: JAG advising on the use of funds in operations. The next section, which covers the provision of support to proxy forces, also demonstrates JAG practices of *permission*, although I also note analytical reasons to expect a minority of JAG practices in this area to resemble *restraint*. In the third section, I turn to how JAGs advise on the rules of engagement (ROEs), for which—because ROEs can cover many different areas of operations—my theory offers a more complicated set of expectations. I show how JAGs primarily function as forces of *permission* for their commanders, but also demonstrate how operational advising can shift to more closely resemble *restraint* under some conditions.

Fiscal Advising: Paying the Bills in Operations

During the occupations of Iraq and Afghanistan, U.S. laws[272] and LOAC treaties[273] that govern how commanders can spend money and confiscate resources frequently had direct operational implications. With the U.S. military formally or informally providing the functions of a government at different points in time during the War on Terror—as well as purchasing weaponry and other forms of material support for proxy forces in other moments (a point of overlap with my next section)—the practice of 'operational fiscal law' has taken on an outsized, and often under-appreciated, role in the prosecution of the War on Terror. "Fiscal law is a huge one", an Air Force JAG

[272] The U.S. statutes that govern the use of funds in operations are numerous. These have largely been collected into a handful of military publications that JAGs use to reference these laws. See *General Service Administration, Federal Acquisition Regulation* (May 2016); *Defense Federal Acquisition Regulation Supplement* (May 2016); and *Department of Defense Instruction 3020.41: Operational Contract Support* (2011)

[273] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (1907). Articles 51-56.

remarked, when describing the ways that JAGs could serve as 'force multipliers' in modern operations. Similarly, an Army JAG provided the following example: "If we don't have the funds to lease the land for an airfield, then we don't have somewhere to land all that nice aircraft and we can't supply the stuff [our forces need] in time for our planned operation" (Interview 01.01.10). Despite this importance, this subject garners hardly any media attention. The only examples I could find of media coverage of this area pertained to violations of federal ethics laws, in which a high-ranking military leader was accused of using public funds for personal enrichment[274]. However, these constitute a very narrow subset of all instances where fiscal issues arose. Not only did most of these instances involve low-level commanders—who would not make the headlines even if they were charged with ethics violations—this section focuses on JAG legal assessments of decisions that were unquestionably for the purpose of securing a *military* advantage rather than a *private* one.

JAG advice provided to commanders on the legal use of wartime discretionary funds—such as funds to pay local residents for services and funds to construct, purchase, or repair facilities—reflect perceptions of high legal risk. The JAGs I spoke with consistently described such decisions as having significant legal stakes, due to the relatively precise requirements of these laws. For example, an Army lawyer remarked that a significant portion of his job in operations came down to "money issues" that were governed by "hard law". As a result, he explained:

[274] Such coverage has been limited to only the highest levels of the chain of command, and often only when the infraction involves riveting or salacious details. See, for example, "The Petraeus Scandal Widens" (2012) https://www.nytimes.com/video/us/politics/100000001901378/timescast-politics-nov-13-2012.html?searchResultPosition=1.

> I can say without any reservation that the fiscal lawyer has the most important [legal] job in a forward-deployed headquarters. Because if they break that law, that's where the commander's gonna have a bad day. Most of the time you can kill the wrong person, but you can't spend the wrong money. That's a bizarro kind of thing to say, but the facts bear that out (Interview 01.01.10).

Other interviewees echoed that these laws were routinely enforced, through professional penalties and even the threat of jail time. "I've seen more careers end over fiscal mistakes," one JAG remarked, "than targeting or any other Law of War issue" (Interview 01.02.19). As such, JAGs are trained to steer their commanders away from decisions that seem likely to violate these laws. For example, JAG after-action reports from the 2000s recommended that "[JAGs] advising on fiscal law matters be strong-willed individuals given that this, at times, requires counseling 'no' to a commander's proposed course of action"[275]. Conversely, discussions of how JAGs advised on these fiscal matters—unlike those pertaining to civilian casualties, as I show in the second half of the chapter—stuck strictly to the law. No mention was made in these areas of issues of legitimacy risk ('policy issues') that further mitigated decision-making. For example, during a series of exercises on fiscal advising during the Army's OPLOAC course, JAG trainers described this area as "full of potential pitfalls" that required JAGs to carefully "gather the proper facts, analyze the issue, and assess risk. What could go wrong here?"[276]. However, these risks were only expressed in terms of the risks of *legal* sanctions. "You've gotta know the statutes inside and out" one JAG trainer explained. "That's where a [JAG functioning as a] fiscal attorney earns their pay grade"[277].

[275] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 207)
[276] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.14.18). Charlottesville, VA.
[277] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.14.18). Charlottesville, VA.

JAG approaches to fiscal advising contrasted with the approach taken in the prior chapter on *restraint*—where military lawyers tend to dissuade commanders from deploying military power. Despite the credible threat of sanctions around fiscal issues, JAGs approach them with the intent of enabling their commanders to take their desired actions by identifying alternative legal pathways and means for mitigating risk. In this, JAGs explicitly presented fiscal law as an area where military legal experts should exercise creativity to overcome legal obstacles, rather than encourage the commander to accept limitations. For example, the JAG after-action report mentioned in the prior paragraph, after remarking that certain fiscal lines could not be crossed, *also* instructed that JAGs needed "to find creative ways to support their commanders within the bounds of fiscal law"[278]. These creative solutions ranged from locating different pots of money to restructuring commanders' requests and fact patterns in order to devise a more compelling legal case for why a particular expenditure could be permitted. As such, the previously quoted Army lawyer, who explained that money issues often presented more legal risk than killing, explained that the role of the JAG was not just to counsel restraint. The JAGs "doing the hardest work," he remarked, were often the ones "doing the fiscal issues" because a good JAG could help a commander navigate those restrictions with minimal impact on their ability to deploy military power (Interview 01.01.10).

To avoid being in the position of having to say 'no' to a commander's request, the approach taken by JAGs in these situations heavily emphasized 'getting to yes' through clever adjustments to a combination of the facts on the ground and/or the terminology

[278] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 210)

employed to get around these restrictions and enable the commander's mission. In a number of instances, JAGs used examples of operational fiscal advising to illustrate these broader techniques of 'getting to yes':

> So part of the whole process as we train lawyers was saying, yeah, you have to stand up do a commander and say, 'sir, that's simply unlawful, but I know what you're attempting to do, let me tell you how you can do it.'…You can't do it that way, because it violates in the case of contracting and fiscal law, it violates the economy act. But here's what you can do, you can spend this money, but you can't spend that money (Interview 01.02.01).

For example, in an after-action report from Afghanistan in 2002, a commander wanted to combine raids with the distribution of goods to local villagers to facilitate intelligence collection. However, fiscal laws dividing DoD expenditures from humanitarian assistance provided by the Department of State got in the way of this proposal. The JAG attached to this unit responded by altering the framing of the proposal to claim that "any humanitarian benefit was merely incidental" and thus the funds should be classified as a combat expense subject to different fiscal rules[279].

Similar creative dynamics emerged in other after-action reports, such as by authoring temporary land claims in order to begin the construction of bases on Syrian soil[280] and classifying the distribution of gasoline to motorists or the purchase of soccer balls as 'operational expenses' through claims that cleared roadways, enhanced goodwill, and "[kept] athletic Iraqi males off the streets"[281]. Additionally, some fiscal rules

[279] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 210)
[280] "Using this language [provided by ARCENT JAGs], units began using Operational Control Memos as a temporary measure to memorialize their control over a given piece of land so that they could at last begin construction." After action report, National Training Center, Observer Controller (Mar 2017-Dec 2017), 2.
[281] *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 214-215)

originated from policy or the discretion of higher headquarters. Thus, effective lawyers could get rules relaxed or suspended in order to alter the situation. As a special forces JAG explained to me: "So maybe a commander at a certain level can only spend X amount of money. That actually comes from higher, not in the execution of the order, probably in DoD instruction or something like that. Again, if the commander is willing to put enough time and effort in it, then you [the JAG can enable them] to work a proposal up the chain of command" (Interview 01.01.01).

Furthermore, fiscal rules were one area of operations where U.S. forces often faced more constraints than their coalition counterparts. As a technique for 'getting to yes', JAGs would coordinate with the U.S.'s coalition partners to shuffle or trade responsibilities and evade these restrictions. This is a relatively common practice among legal advisers in coalitions—beyond the issue of fiscal advising[282]. For example, in an after-action report for Afghanistan[283], the outgoing JAG reported how legal advisers had developed a system in which targeting cells navigated the different rules that coalition partners have for their forces. "If a caveat prevents one nation from conducting a certain operation," the JAG reported, "it is tasked to one that can. Nationality, rather than ability, obliges this in the authorization process"[284]. To sidestep U.S. fiscal restrictions, JAGs

[282] Numerous other AARs flagged inconsistent ROEs as a major problem that JAGs were required to help coordinate and navigate. AAR3: "Ignorance of national caveats could prove devastating in a combat environment, as one of our commanders might give an order that our partners, under the law of their country, may be legally bound to disobey." (3) [ALSO: 2016 RIMPAC AAR-October 2016
[283] After Action Report. Resolute Support (RS)/U.S. Forces – Afghanistan (USFOR-A). 07 December 2016. Jul 2015 – Jul 2016. 3. On file with author.
[284] As a whole, legal advisers to coalitions adopt techniques of *permission* for getting around national caveats and restrictions. On the one hand, legal advisers take these rules seriously. "Ignorance of national caveats could prove devastating in a combat environment," a JAG wrote in an AAR, "as one of our commanders might give an order that our partners, under the law of their country, may be legally bound to disobey" (Brigade Legal Section After Action Report. 1st BCT, 1st Cavalry Division. 4 March, 2015.

would facilitate the shuffling of duties involving minor (but legally risky) expenses to the U.S.'s partner states in exchange for taking on missions involving the use of force, on which U.S. rules are typically laxer. "We would work with our U.K. counterparts [military lawyers]," one Army JAG explained, "and we would say, look we can't do this because…my fiscal rules won't let me do [it]" (Interview 01.02.03). Then, he explained, the two lawyers would work out a way to swap duties. "If you can do this for us, then we'll do this for you" (Ibid.). These techniques allowed the JAG to go back to his commander and say: "we can't do that…*but* I [contacted] the Brits…I think we can work out a deal with them" (Ibid.).

In other circumstances, JAGs intervened to inform their commanders they possessed more authority than they realized, such as by revealing that certain pots of money could be used in a highly flexible manner. The most common example of this came through the use of LOAC rules pertaining to the responsibilities and authorities of militaries occupying the territory of another state. Most soldiers, my interviewees explained, were not aware that these bodies authorized them to assume a variety of powers (as well as limitations) when occupying foreign soil in regard to not only the

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Deployed 15 Sep – 31 Dec 14. 3). To get around these restrictions, they create 'legal interoperability strategies' for assigning duties.

I experienced a version of this process during an international training exercise, where a team of participants from different states roleplayed a legal advising team. When a particular target was deemed to be a violation of our state's interpretation of LOAC, I followed this technique (as illustrated in prior interviews with U.S. JAGs) and suggested we pass the target along to coalition member with a "less restrictive understanding of the law". Three legal advisers to the Danish and British armed forces, including a course trainer, remarked that this solution was frequently employed amongst legal advisers in their experience—primarily with tasks or information passed along to U.S. forces. Fieldwork Notes. "Advanced Law of Armed Conflict Course". (05.09.18). San Remo, Italy.

defeat of an enemy force but also the safety and well-being of the occupied population[285]. One such area, they explained, pertained to the appropriation of certain funds and other resources to enable these activities. For example, a retired Army JAG explained that when U.S. forces were sent to Haiti between 1994-1996, they encountered a number of issues pertaining to "riots and a bunch of thugs who worked for the previous ruler" as well as "feeding and caring in an emergency situation for the local populace" (Interview 01.02.07). When operational planners laid out potential solutions to those problems, they ran into the issue of not having been allocated funds for such measures by military leaders, who apparently had not planned for such an occupation. "So, I said, well, you could look to occupation law," the JAG recalled, "[which] requires you under Article 43 of the Hague Convention to take care of providing for the safety and well-being of the civilian population" (Interview 01.02.07). This suggestion, he explained, played a key part in how the command, for a time, used a combination of the unit's combat-related resources and Haitian public funds to not only pay local law enforcement but "fill the oil tanks in the harbor at Port-au-Prince" and "run the electrical system" (Ibid.). Similarly, during the invasion of Iraq, lawyers devised systems—premised on these same LOAC authorities—to spend "captured Iraqi currency" on reconstruction and security assistance projects where regular sources of funding would not allow for these expenses[286]. This solution, an Army JAG noted, also required the creative navigation of DoD rules. JAGs, he explained, devised the novel argument that these confiscated funds could be

[285] As previously noted, I am referencing the JAGs' assessment of the law in regard to its authorities and restrictions.

[286] "During the initial stages of OIF, units relied heavily on funds - in total, more than $1,000,000,000 in U.S. and Iraqi currency - captured by Army and Marine Corps units." *Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2008* (2008, 221)

transferred to a particularly flexible pot of money for use by commanders[287]. This, he explained, was critical to devising strategies in Iraq referred to as "MAAWS, money as a weapons system. Win the hearts and minds through dollars. [The core idea was that] paying them off is better than killing them off" (Interview 01.01.10).

Training, Support, and Assistance to Proxy Forces

Whether the U.S. can conduct operations with proxy forces depends, in no small part, on an array of DoD regulations and federal statutes—which I expect JAGs to view as presenting high degrees of legal risk. For example, foreign military units and individuals with a track record of human rights violations can be barred from receiving any "training, equipment, or other assistance" under U.S. federal "Leahy Laws" and DoD regulations prohibiting such assistance to units with a verifiable history of LOAC violations[288]. These rules tend to be relatively precise and enforceable. Leahy Laws bar such assistance to a "unit of a foreign security force" if the DoD has "credible information that the unit has committed a gross violation of human rights" and lists a range of potential activities that could fall under this category[289]. These laws require the DoD to submit reports on such partners to the U.S. Department of State, who have the ultimate decision over whether individuals or units wind up on these internal blacklists. Furthermore, JAGs have good reason to take these rules seriously given the number of

[287] This more flexible pool is called the Commander's Emergency Response Program (CERP), and had traditionally been designated as a discretionary fund for making small purchases while deployed. As such, while it was not a well-funded account, it came with far fewer strings attached than other fiscal sources.
[288] These restrictions are found in two congruent sets of rules established in the 1990s—one as an amendment to the Foreign Assistance Act of 1961 and the other as an annual component of the National Defense Authorization Act.
[289] "Human Rights Issues: Security Forces Vetting ("Leahy Laws"). *Congressional Research Service*. (01.03.17). IF10574.

recorded instances in which military cooperation has been denied or suspended due to these laws[290].

On the other hand, I would expect the 'legitimacy risk' of providing support, training, and assistance to proxy forces—in the majority of situations—to be perceived by JAGs to be relatively low. One of the reasons states have increasingly come to employ proxy forces is because they add a degree of separation, or at least perceived separation, between states and the conduct of forces on the ground (Groh 2019; Berman and Lake 2019; Hughes 2012). Additionally, the visibility of actions of non-state actor proxy forces is often lower than that of the U.S. military, as the former operate further out of the reach of conventional media (Mumford 2013). In this, arrangements in which the U.S. provides 'training, assistance, and support'—and tries to minimize its operational footprint—have been promoted by U.S. national security strategists (Richardson and Bolton 2018) and U.S. commanders (Barnes 2013). Similarly, the media salience of the U.S.'s 'training, assistance, and support' missions tends to be low, allowing many proxy conflicts to be found 'in the shadows'[291]. In regard to human rights vetting, top military leaders have not been shy about arguing, publicly, that the U.S.'s requirements are too strict—a sign that

[290] Although details on individual vetting decisions are largely classified, some data has been released. Between 2011-2013 there were nearly 2,000 cases each year, spanning nearly 50 countries, of units and individuals having denied assistance under these laws. These denials ranged from regional partnerships in the Western hemisphere (Jamaica and Guatemala) to strategic U.S. allies around the world (Pakistan and Indonesia) and partners is key struggles, such Nigerian forces in the fight against Al Qaeda in western Africa "Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission" (2013) https://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html.

[291] "Shadow Wars: Cold War Foreign Policy in Africa" (2019) https://retrospectjournal.com/2019/10/20/africas-shadow-wars/

they aren't terribly concerned about the legitimacy costs of these associations[292]. However, critical media attention given in recent years to the U.S.'s training, advising, and support activities to Saudi Arabia in its wars in Yemen[293] indicate that in certain large-scale, egregious cases of violations U.S. actions can lead to negative coverage.

JAGs tend to take the requirements of "Leahy vetting" seriously and will not hesitate to inform a commander that federal law requires them to issue these assessments. For example, when a U.S. commander on an advising mission with Ukrainian forces decided to offer a new training course for these partner forces, the commander's JAG insisted that they institute policies for checking IDs for trainees in order "to ensure that no trainees have committed any human rights violations"[294]. Similarly, my JAG interviewees explained that it was the job of the military lawyers to think about "our legal obligations" in "train[ing], advis[ing], and assist[ing] missions" and to make sure the staff was considering whether "we [can] provide this type of assistance to [this] non-state armed group" (Interview 01.02.08). Furthermore, this insistence was directly tied to the legal risks of approving support operations without conducting this vetting. "There is a reporting requirement, it's extensive, and [it presents]…significant domestic legal issues that will *directly* impact operations [when]…we're advising, assisting, and sometimes

[292] "Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission" (2013) https://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html.
[293] "U.S. Rationale for Military Aid to Saudis in Yemen War Is Fraying" https://www.nytimes.com/2020/09/23/us/politics/yemen-us-weapons-saudi-arabia.html
[294] After Action Report. Joint Multinational Training Group-Ukraine (JMTG-U). JUNE 2017. February 2016-June 2017. Yavoriv, Ukraine. 6. On file with author.

accompanying," remarked a special forces lawyer who had recently dealt with these issues in the campaign against ISIS (Interview 01.01.10).

However, JAGs also tend to approach these vetting procedures as obstacles that lawyers can help commanders overcome, rather than as limitations on the command. In this, JAGs may recommend changes to the facts on the ground to alter whether U.S. activities meet the threshold of 'training' and 'support' when vetting requirements can't be met. For example, in the campaign against the Islamic State, when commanders expressed the strong operational need for cooperating with factions who either couldn't be vetted for human rights concerns (due to a lack of information) or who might fail such vetting processes, JAGs were keen to help their commanders avoid these restrictions. "Although support to these groups [with human rights abuses on their record] may be limited by various vetting requirements," one JAG wrote in an after-action report, "the [Office of the Staff Judge Advocate] is in a position to help the commander find a legal way to provide the particular support required"[295]. This JAG explained how creatively distributing resources from different pots of money could enable commanders—many of whom believed that groups blacklisted by certain laws could not be partnered with at all—to still operate in tandem with such forces. The JAG explained that proactive Judge Advocates in Syria informed their commanders on how to partner with Shia militias accused of human rights violations through collective self-defense justifications, as long as no training or equipment was directly transferred[296]. Similarly, JAGs in Syria during the battle of Mosul devised a way for "the coalition…to provide [material support] under

[295] After Action Report. CJTF-OIR (Sept 2016-Sept 2017) Camp Arifjan, Kuwait. 29.
[296] Ibid.

a training exception [regarding interoperability]" to units within the Iraqi military and police forces that had been accused of gross human rights violations and would not have been eligible for training and support under other pieces of domestic statute[297].

In interviews and training courses, the JAGs I interacted with framed the legal adviser as having an obligation to find 'a way to yes', as much as possible, with regard to vetting. "If I can't validate, verify, and vet the forces that [the commander wants] to have those weapons," remarked the Army special forces JAG mentioned earlier, "I'm done" (Interview 01.01.10). Similarly, during a training exercise I participated in, a group of JAG trainees were presented with a scenario where a commander asked if funds from a particular pot could be allocated to provide English as a second language training to allied forces who were helping U.S. troops staff a control tower on a shared airbase. The group's response, which was received positively by the trainers running the exercise, at first explained to the commander that he would be violating certain restrictions if he went ahead with this plan: "you're taking on a lot of risk if you go this way, sir" one of the trainees warned. Instead, the trainee group recommended that the same ESL education be labeled an 'interoperability' or 'safety' activity in order to free up a different pool of resources as well as avoiding human rights vetting that would have to be conducted if the activity were referred to as "training"[298].

[297] Ibid.
[298] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.14.18). Charlottesville, VA.

The Rules of Engagement

Rules of engagement (ROEs) are operationalized rules instituted up and down the chain of command—from the president on down to a tactical unit commander—that place restrictions on military activities. On the one hand, I expect ROEs, by and large, to be viewed by JAGs as carrying significant 'legal risk' because they exist precisely to address the ambiguity and lack of enforceability of much of LOAC (Dill 2015a; Morrow 2014). This presentation is widely agreed upon within U.S. military doctrine. For example, the military's authoritative joint publication on operations lists ROEs as a key tool for achieving the warfighting principle of restraint, encouraging the creation of "detailed ROE that the commander tailors to the specific circumstances of the operation"[299]. The U.S.'s *Law of War Manual* further defines ROEs as being both more context-specific and precise than LOAC in order to "delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement"[300]. Furthermore, as stipulated in the Uniform Code of Military Justice, failure to adhere to a legitimately issued ROE constitutes a willful violation of an order by a superior officer and can be punished through both a commander's disciplinary mechanisms and formal courts-martial[301]. Violation of the ROE is one of the most

[299] *Joint Publication 3-0*: *Operations* (2017, A-4).
[300] *United States Law of War Manual* (2016, 1.6.5, p, 26).
[301] For example, in a widely cited study from 1994, an Army JAG recounts how a Marine in Somalia received inadequate training on the ROEs, which ultimately led him to fire warnings shots in the air to stop a fleeing civilian when such procedures were prohibited in his ROE. This lack of training, the document recounts, ultimately landed the soldier in front of a court-martial (Martins 1994, 17–18).

commonly punished offenses in the military justice system, often used to dismiss soldiers when more hefty charges do not stick[302].

My expectations for the legitimacy risk perceived by JAGs are less straightforward than the prior two examples in this section. On the one hand, almost all ROEs are not only classified but vary between theaters of war and different operations (Martins 1994). Because the media does not have access to these rules and cannot keep track of ROE changes, I would expect JAGs to view ROE violations as being less likely to receive coverage than, for example, accusations of war crimes and acts of noncompliance with the Geneva Conventions. On the other hand, the rules of engagement cover a wide range of topics, some of which *would* be expected to generate media buzz[303]. For example, rules pertaining to the targeting of medical facilities, which I covered in the prior chapter, would likely be linked to expectations of high legitimacy risk by JAGs. However, most ROEs are not likely to entail this degree of scrutiny. For example, rules that establish procedures for determining 'positive identification' (PID) pertain to the definition of a legitimate military target which—as I discuss in the next chapter—I expect JAGs to view as entailing lower legitimacy risk. Other rules have less to do with legitimacy than principles such as 'economy of force' and establishing

[302] "Screwed by the rules of engagement" (2012) http://outsidethewire.armytimes.com/2012/04/16/this-week-in-army-times-print-edition-screwed-by-rules-of-engagement-rough-jumpers-list-of-new-commanders/.

[303] For example, many news outlets reported on changes in the rules of engagement under the Trump Administration because—based on their sources in the military—the relaxation of these rules were suspected as having caused an uptick in civilian casualties during the campaign against the Islamic State. See, for example, "Trump Eases Combat Rules in Somalia Intended to Protect Civilians" https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html; and "Trump Gives Military New Freedom. But With That Comes Danger" https://www.nytimes.com/2017/04/05/us/politics/rules-of-engagement-military-force-mattis.html.

effective 'command and control' mechanisms—such as those restricting the use of certain expensive vehicles and equipment to higher levels of command. "The Law of War is the *law*," one JAG explained to me, "but the commander *owns* the ROE. Those are *his* rules" (Interview 01.01.11). ROEs, therefore, present a more complicated set of cases for my theory, with primarily low perceived legitimacy risk in general, but some cases—such as the use of sensitive weaponry such as landmines, which I provide as an exceptional case in this section—being seen as higher legitimacy risk. As such, I would expect JAGs to mostly adopt positions of *permission*, with some instances more closely resembling *restraint*.

JAG advising on ROEs generally reflected a concern with the direct, legal consequences of taking a course of action that violated one of these rules (high legal risk). Multiple JAG accounts discussed the importance of ensuring that soldiers were correctly trained in the ROE and knew how to adhere to them—otherwise, they could wind up in legal trouble (Martins 1994; Prescott and Dunlap 2000). Others recalled informing staff officers and commanders that a plan, in its present form, would violate their current ROEs and expose them to potential investigation or prosecution. For example, in one instance, a staff officer recalled joining forces with the unit's JAG to intervene strongly against the decision of a commander that they both felt had violated the ROE. The staff officer recalled saying: "Sir, if you don't believe me, if you don't want to accept my word, here's your JAG [telling you the same thing]"[304]. The officer then reflected they were "saving my commander's ass and doing the right thing according

[304] "Interview with MAJ Peter Zike". On file with author.

to the ROE…you have to understand your operating environment, especially in regards to the ROE".

Although ROE lines cannot be ignored or crossed, I found that lawyers often mitigated the limitations that these rules placed on commanders by pursuing exemptions to these restrictions that non-JAG officers were much less effective at utilizing. In this, military lawyers leverage their connections and legal argumentation skills to lobby higher levels of command for changes to the existing rules. "If [a restriction is] hard law, say it," an Army JAG explained. However, he then noted that "if [that restriction] is policy or ROE" that could be "a way to get your commander more flexibility…Everyone's got a boss" (Interview 01.01.10). Numerous other JAGs also described this process of "flexing the authorities" within the chain of command, typically through a combination of savvy legal argumentation and relationship-building within both the regular and technical (JAG) chains of command. For example, a special forces lawyer explained that most of the time, his response to ROE limits was to ask: "who can give us a waiver for that, or how can I get an exception, or who can delegate that authority to me?" He then continued:

> you can't get an exception to the law of armed conflict…But, everything else can be waved, or delegated, or you can get an exception…If you're willing to do the staff work and coordination, then you might be able to get an exception or something. You've just got to go to the person who has the authority and change it (Interview 01.01.01).

Furthermore, not only did most JAGs view this as an option, many perceived it as a core part of a JAG's contribution to the command. Put succinctly by a Navy JAG trainer "I'm here to help you [the commander] get more [ROE] authority, if you can justify it" (Interview 01.01.14).

The techniques described in this interview were also encouraged during the OPLOAC course I participated in. More experienced participants and trainers frequently referenced the need for JAGs, when faced with restrictive ROEs, to see if they can 'go get more authority' for their commander. This approach was taught as a move that JAGs should proactively offer to their commanders if such limits got in the way of an important mission. In a lecture on applying the ROEs, trainers walked trainees through the process involved in requesting exceptions for particular rules or having them eliminated altogether, which covered technical tips for how to use the JAG chain of command to expedite requests and make them more effective. The trainer emphasized the importance of these techniques by adding that combat units in Syria relied heavily on such requests, that JAGs were "essential for achieving flexibility under restrictive operational conditions," and thus the ROEs were "far more flexible, when you need them to be"[305].

A few exercises in this course were devoted to illustrating techniques for JAGs when advising on ROEs. These exercises revealed how perceptions of legitimacy risk shifted JAGs between advising approaches of *permission* and *restraint*. Regarding the former, when JAGs advised on internal military issues, such as regulations governing logistical movements, they favored the technique described in the previous paragraphs of trying to get these rules either eliminated or exempted for their commander[306]. Similarly, two exercises involved plans to target an individual or group of individuals who were demonstrated to be supporting the enemy forces. In these examples, the current ROEs had enacted limitations—one in form of identification requirements and the other through

[305] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.07.18). Charlottesville, VA.
[306] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.

a limited set of actors who had been 'declared hostile'[307]. The JAG trainees determined that, given these rules, "proceeding with this target at this time presents significant risk". However, encouraged by course trainers[308], the trainees nonetheless assured the 'commander' that these targets were "not necessarily off the table" and proceeded to try various ways of 'getting to yes'. These included altering the facts available—by gathering more intelligence that could meet identification thresholds—and "going up the chain" to alter these rules—by writing a memo petitioning for the targets to be 'declared hostile' and thus targetable.

However, an exception to this trend emerged during an exercise where the commander intended to use landmines. Unlike most states, the U.S. does not view landmines as an illegal weapon of war and has not signed onto LOAC treaties prohibiting their use. Instead, U.S. forces are subject to ROEs that heavily restrict the use of these weapons. However, since these rules are ROEs, not LOAC restrictions, JAGs could attempt to have those rules removed or relaxed for their commander. During this exercise, a trainee (halfheartedly) made precisely such a suggestion, telling the 'commander' that, while the rules did not permit him to lay landmines, "there *is* someone out there who can approve this"[309]. The trainer playing the commander in this exercise smiled before stepping out of this role, remarking: "are you really going to suggest that the boss throw down a bunch of landmines? How is that going to look? [The trainee shakes his head no] Then that memo [arguing for the authority to use these weapons] is a

[307] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.
[308] The trainer, playing the role of the commander, at one point asked the trainees "tell me what I need to satisfy in order to get to yes". Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.
[309] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.

waste of everyone's time"[310]. This instance—and others involving high perceptions of legitimacy risk, such as the targeting of specially protected objects and persons (Chapter Six)—involved the use of legal advising on these areas of the ROE as a form of *restraint* rather than *permission*.

The first half of this chapter has explored three areas where JAGs either primarily or almost exclusively deploy their authority as a source of *permission*. When advising on the military's use of funds—an often under-emphasized component of modern operations—JAGs respond to perceived high legal risk and low legitimacy risk by deploying techniques of 'getting to yes' and constructing clever legal strategies for enabling the commander, in most cases, to locate the resources they seek. Similarly, when advising on the provision of training, assistance, and materials to proxy forces, JAGs prioritize the necessity of providing this support and offer suggestions for how revisions to the facts on the ground could re-classify military activities and manage the legal risk of vetting practices. However, I also noted that if the U.S.'s support to proxies is placed under greater media scrutiny in the coming years, these practices could shift to resemble *restraint*. Lastly, I showed that JAG advising on the rules of engagement—in most areas—was defined by practices of *permission*, although certain subjects, such as landmines, push JAGs to adopt advising practices of *restraint*.

Permission II: Low Legal Risk and High Legitimacy Risk

When advising on civilian casualties, I expect JAGs to advise—under *current* operational conditions—largely through perceptions of low legal risk and high legitimacy

[310] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.16.18). Charlottesville, VA.

risk. I would expect JAGs to perceive low levels of legal risk because of the lack of precision and enforcement of LOAC rules regarding civilian casualties. LOAC requires states to refrain from attacks that "may be expected" to cause damage to civilians (persons and objects) that "would be excessive in relation to the concrete and direct military advantage anticipated" to result from the attack[311]; as well as to "take all feasible precautions" against harm to civilians when conducting such actions[312]. These definitions are widely perceived as some of the vaguest and most difficult to prosecute in all of LOAC[313]. Furthermore, JAGs do not have much historical evidence of soldiers being prosecuted for such violations. Not only is there an absence of U.S. court-martial case law based on violations of these rules, but prosecutions for violations of these rules by any domestic or international tribunal are few and far between. However, as I discuss in the final section of this chapter, I expect JAGs' perception of legal risk to increase when and where the U.S. DoD has implemented regulations that place firm limits on civilian casualties and do not delegate the authority to remove those limits to lower-level commanders[314]. However, since these limits were weakened gradually over the 2010s and

[311] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 51(5)(b)
[312] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 57
[313] "The language [of proportionality] is so general and subject to contradictory views that under U.S. domestic law it would be constitutionally void for vagueness. As one pundit noted, 'Only international lawyers would make something a crime they couldn't define'" (Parks 1990, 5). For a more empirical assessment of this ambiguity see Janina Dill's discussion of how even legal and military experts cannot come to similar conclusions on when civilian casualties are "excessive" in relation to expected gain. "2016: Joint Series on International Law and Armed Conflict: Janina Dill on Assessing Proportionality" (2016) https://intercrossblog.icrc.org/blog/r19aesa7v1kylcc5a4hbcwvfx8imus.
[314] These limits, termed Non-Combatant Casualty Cut-Off Values (NCVs), are rules of engagement that prohibit any deliberate (pre-planned) attack in which the *expected* (but not eventual) civilian casualties exceed a certain number.

then eliminated completely from DoD doctrine in 2018[315], I take them as an illustrative example of how JAG advising in this area could change in the future[316].

On the other hand, I would expect JAGs to approach such decisions with a perception of high legitimacy risk. While scholars continue to debate the extent and conditions under which civilian casualties can undermine public opinion and hamper a state's war effort, there is broad recognition that states have become more attentive to civilian casualties over time as a signal of wartime legitimacy (Larson and Savych 2007; Eichenberg 2005; Gelpi, Feaver, and Reifler 2009; Ron, Lavine, and Golden 2019). Along with the use of torture and the protection of hospitals and religious and cultural sites, civilian casualties during the War on Terror have become the most intensely covered aspect of war that would fall under the purview of military lawyers. This can be seen in media coverage, where the topic of civilian casualties killed as 'collateral damage' has become an area of heavy media attention, with numerous high-profile, award-winning journalistic projects covering the question of whether the U.S. takes sufficient care to prevent civilian casualties[317]. This claim is further bolstered by statements and documents from the Department of Defense over the War on Terror,

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[315] For a general description of NCVs, their function in civilian casualty mitigation, and the factors that determine their use, see McDonell (2018) and "This Is How The U.S. Decides How Many People It Can Kill In Syria" (2016) https://www.buzzfeednews.com/article/alimwatkins/syria-civilian-casualties-policy.

[316] NCV values are a conceptually complex factor for my theory. On the one hand, they are almost entirely driven by the legitimacy risk perceived by civilian and military leaders in the DoD, potentially with the advice of their lawyers. However, the JAGs advising on targeting decisions view them through the lens of legal risk, since they are written requirements backed by formal sanction. Since my analysis focuses on the perceptions of the *JAGs* specifically, I treat them as inputs of legal risk. However, as noted in Chapter Two, these two sides of the 'risk' that JAGs manage are analytically separate and useful yet ontologically intertwined.

[317] The media coverage of this topic has been vast. See, for example, the New York Times' Pulitzer Prize-winning project "The Uncounted" (2017) https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html.

which indicate that military and civilian defense leaders have largely come to view civilian casualties as a serious issue for the legitimacy of U.S. military operations[318]. Lastly, I would expect JAGs' perceptions of legitimacy risk to fall if the U.S. military engages in a high-intensity interstate conflict again in the future. While states are concerned with civilian casualties, they are often more concerned about the lives of their own forces and civilians (Mueller 1985; Althaus, Bramlett, and Gimpel 2012; Abrams and Bacevich 2001; Baum and Groeling 2010). As such, I posit that *if* U.S. military and/or civilian casualties increase in future operations, media coverage is likely to be divided, leaving JAGs less concerned about the legitimacy costs of "collateral damage"—a point I return to at the end of this discussion.

In the next section, I show that JAGs advise on civilian casualties through a largely *permissive* framework that aims to mitigate the risks involved in using force rather than emphasize limitations. In this, JAGs used techniques of 'getting to yes' and risk mitigation, rather than lobbying for hard limits on military power. As glossed by a recently retired Army JAG, a military lawyer's task is to help mitigate civilian harm while doing "everything you can to help facilitate [the strike]" (Interview 01.02.17). In the subsequent section, I demonstrate how the constraints that JAGs *do* weave into decision-making around civilian casualties are based on assessments of high legitimacy risk. In this regard, JAGs often recommend that commanders take precautions *beyond* the law, but—in contrast to the prior chapter on *restraint*—do so in a much weaker fashion, presenting these constraints as *suggestions* while locating the prerogative to determine if

[318] "[T]he accountability, credibility, and legitimacy of a joint operation, the success of the overarching mission, and the achievement of US strategic objectives depends on the joint forces' ability to minimize harm to civilians in the course of their own operations" *Joint Publication 3-0: Operations* (2017, III-42).

an attack is "worth" the legitimacy costs squarely with the commander. Then, in the final section of this half of the chapter, I consider two potential changes that would shift JAGs' assessment of risk in regard to civilian casualties. Policy limitations on the maximum number of expected civilian casualties (NCV limits) could be reinstated by DoD leaders across U.S. operations, which could turn JAG advising into a variation between *restraint* and *permission*. Alternatively, JAGs' assessments of the legitimacy risk of civilian casualties could be greatly reduced during a high-intensity interstate war, leading JAGs to *expand* U.S. military power.

Permission **to Use Force: Proportionality as Procedure**

The largely *permissive* approach employed by JAGs in this area was most clearly demonstrated in a few hypothetical scenarios that involved expected civilian casualties (Figures A-1; A-2; A-4; A-5). During these scenarios, my JAG interviewees provided their advice to me as if I were the commander. In none of these scenarios did any of the JAGs play 'the red card' or use other techniques to imply that the use of force was off the table due to high 'collateral damage'—as, for example, many military lawyers did when presented with policies that amounted to torture. "If you want to hit it," a Navy lawyer remarked in response to the civilian casualties expected in one of the hypothetical airstrikes (Figure A-1), "I'll get you to hitting it" (Interview 01.01.14). This included the scenario summarized in the previous chapter where approximately one hundred civilian casualties were estimated as a result of targeting the enemy's leadership (Figure A-4). An Army JAG assessed that he could "get to a yes answer [on this strike]" as long as there was sufficient evidence that the strike would heavily damage the enemy's capabilities (Interview 01.01.17). In this regard, the scenario did involve potentially large-scale

strategic benefits for the attacking force. However, there was a noticeable difference in how most of my JAG interviewees treated the issue of the expected civilian casualties in this vignette compared with the likely destruction of a cathedral and a museum, which were also expected. As explained in the prior chapter, the latter were framed as potential reasons not to conduct the strike at all. The former was taken as a factor that needed to be minimized, as much as possible, but would not stop the command from taking the strike.

In adopting this *permissive* approach, JAGs do not deny the applicability of LOAC. However, they view its relevant components—requirements regarding 'proportionality' and 'feasible precautions' to present very little legal risk. "Here are the principles [in regard to civilian casualties] we're operating under that could land you in a court," a Marine JAG remarked. "Unlikely, but that threat's always there" (Interview 01.01.04). A Navy JAG broke down this lack of legal risk even further and attributed it to the indeterminacy of the law. "From an international [law] perspective, how many civilian casualties is too many? Where does the scale of military necessity tip?," he reflected, before adding: "Who's to say?" (Interview 01.01.14). Similarly, a retired Army JAG posed the following hypothetical:

> So, if I have Osama Bin Laden in my sights, and there's a hundred school children around, can I bomb that and kill 100 school children?... The answer under the law of war is, if the commander has gone through that analysis…[he can] take that shot (Interview 01.02.17).

The only example I encountered of a JAG strongly lobbying against the use of force on legal grounds in regard to civilian casualties was when those casualties were estimated (in a training scenario) to be in the quadruple digits. "I basically put up a red card," this

JAG explained, "[because] they were assessing [the strike] with, notionally—again, this is an exercise—thousands of civilian casualties" (Interview 01.02.07).

Instead of viewing 'proportionality' and 'feasible precautions' as hard limits, JAGs operationalize them as *procedures* of reflection that need to be integrated into decision-making. A Marine JAG demonstrated this difference by contradistinguishing the rules around civilian casualties with other more precise aspects found in LOAC, such as the ban on "intentionally targeting civilians that are there peacefully[319]" which he described as "a clear red line" that he would communicate by saying "sir, you're gonna get caught [and] you're gonna go to jail if you do this, and I'm gonna put it in writing that I told you not to do it" (Interview 01.01.09). He then contrasted that example with how he advises on civilian casualties, using the example of "the proportionality of nine [civilians casualties]" in order to kill "a low level [insurgent] functionary". Rather than using warnings of imprisonment to convince the commander to change course, he described how LOAC required asking questions of the commander to make sure he'd made a reasonable and good-faith assessment of proportionality. "You [the commander] have the responsibility to identify the proportionality of decisions," he explained, "and if you're saying you think it's proportional [and can articulate why you think those lives are not excessive to the military advantage gained], [then] you haven't clearly violated LOAC" (Interview 01.01.09). Put most succinctly, an Air Force JAG explained that his legal concerns hinged on "whether they've put a lot of thought into it, or whether they're just looking to blow everything up" (Interview 01.01.07).

[319] In this statement, the JAG was referring to the intentional targeting of civilians who the military *defines* as civilians. The additional qualifier of "that are there peacefully" is a reference to the concept of civilians who are directly participating in hostilities, which I turn to in the following chapter on *expansion.*

These procedures amounted to mitigation techniques—as laid out in Chapter Five—on demonstrating 'reasonableness' and 'good faith'. For example, an Army JAG explained in "consider[ing] whether the strike is going to be proportionate…what I'm looking for is [whether] your decision is reasonable" and whether the staff has made a good-faith effort to "mitigate [those casualties] down" (Interview 01.01.17). By inserting these procedures—of demonstrating 'reasonableness' and 'good faith'—the JAGs enact strategies for mitigating legal risk by making it highly unlikely that a 'mistake' will lead to sanctions. A Navy JAG explained that by making the commander and staff officers articulate their reasoning and attempts to reduce casualties "out loud, not only for themselves but for everybody around them [in the staff] to hear…[that] legitimizes their process [under LOAC]" and "provides them with a certain level of protection" if the military launches an investigation (Interview 01.01.14). Similarly, a Marine remarked that the JAG's main role in assessing civilian casualties is to insert these conversations into the decision-making process so that if "they're interviewing you [the commander] for an investigation" you can say "my [JAG] brought up proportionality and we had an analysis of that [to demonstrate reasonableness]," and "we asked these questions [of the other staff sections]…to minimize the civilian casualties to the greatest extent possible" (Interview 01.01.04).

To demonstrate reasonableness, JAGs ask the commander to articulate why they think the military advantage is "worth"[320] the cost in civilian life[321]. In this, the fact of

[320] "Articulate to me why you think this is a good idea," an Army JAG remarked to me, in the role of a hypothetical commander. "Have you done your math? Have you thought it through?" (Interview 01.01.14).
[321] JAG assessments of 'proportionality' were far less likely to consider the damage to homes and other civilian *objects* in their legal assessments, unless these were specially protected cultural, religious, or medical sites as described in the prior chapter.

being able to come to an answer, and document that answer if possible, largely demonstrates a rational approach[322]. For example, after conducting an exercise involving assessments of proportionality, a trainee asked one of the trainers what distinguished a 'reasonable' articulation by a commander from an 'unreasonable' one, noting that commanders' temperaments and values varied. "Some commanders are cautious, some like to come in real hot," the trainee asked, "so, which one of them is 'reasonable?'" The trainer provided a long answer, explaining that a decision would have to be *widely*, if not universally, deemed 'unreasonable' in order to not pass this test. "Our commanders are, by and large, very reasonable people," he added[323]. Similar guidance from JAGs can be found in doctrine. "If the commander can clearly articulate in a reasonable manner what the military importance of the target is and why the anticipated civilian collateral injury or damage is outweighed by the military advantage to be gained," reads a publication of the Air Force Judge Advocate General's School, "this will generally satisfy a 'reasonable military commander' standard"[324].

JAGs operationalized LOAC requirements to take all "feasible precautions" as a 'good-faith' attempt to minimize civilian casualties as much as possible within the scope of an operation. One JAG explained this as checking to see whether the staff has attempted to apply "the minimum amount of force we could use" without sacrificing any of the commander's end goals. For example, the JAG who provided the hypothetical of

[322] One JAG emphasized the importance of documentation not only to mitigate legal risk but also legitimacy risk: "How we get ahead of [the media criticism that could result from]…the strike? Demonstrate the fact that we did a lawful analysis of it…[and use this to] provide contrary information [to the media narrative]" (Interview 01.01.14).
[323] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.08.18). Charlottesville, VA
[324] *Air Force Operations and the Law* (2014) 3rd Edition. 18.

targeting Osama Bin Laden and killing one hundred school children explained that the JAG also had an obligation to find out if the staff was attempting "[to mitigate civilian casualties], up to the capacity that we can, given our armaments, given the situation, given who we're trying to pinpoint, kill or capture" (Interview 01.02.07). Similarly, a Marine remarked, "there's no right answer or wrong answer on [a good-faith attempt to minimize civilian casualties]" (Interview 01.01.04). The JAGs only tended to worry about legal sufficiency if it seemed that the staff had *not* considered ways for reducing civilian casualties. For example, an Army JAG explained that he only had legal concerns "[w]hen you get to a point [in the discussion of civilian casualties] where they look at you like a deer in the headlights" (Interview 01.01.17).

Legitimacy Concerns

Although JAGs adopt an enabling approach to the legal calculation of proportionality, this position is tempered by a secondary, but still influential, emphasis on the need to go beyond the law—at times—in order to mitigate the legitimacy risks posed by civilian casualties. Every JAG who participated in a scenario involving civilian casualties discussed attempts to reduce harm beyond what the law required. For example, the Marine JAG referenced earlier, who considered the hypothetical of nine expected civilian casualties for a low-level insurgent, explained that he would advise the commander to not take that strike—as a matter of *choice*—by framing the legitimacy risks involved:

> [I would say] "hey sir…maybe you wanna reconsider. Because the more that you do this, the more you increase that bad optic. So, ISIS for instance, is gonna come back and say look how many civilians the coalition is killing. This is going to make it more difficult for us to

> operate"…The more civilian casualties the coalition sustains, the more you're gonna start losing those hearts and minds. (Interview 01.01.09).

Similarly, in response to one of the hypothetical scenarios provided (Figure A-1), a different Marine JAG emphasized the consideration of other factors—which, he explained, went beyond the legal assessment—as a matter of strategic legitimacy:

> Can you target this facility [despite the civilian casualties]? Generally, yes. But that doesn't end the analysis. Just because you *can* do something doesn't mean you *should* do something or you *want* to do something…Taking [the communications center] out is gonna have a negative effect on the civilian population [who could lose television and Internet access] …You've gotta be thinking about the big picture (Interview 01.01.04).

These remarks fit broader assessments of how JAGs in targeting frequently recommend considerations that go beyond the law due to legitimacy concerns. For example, the chairman of a 2005 DoD panel remarked that "the targeting shops are just loaded with lawyers these days because there is a strong effect to try to limit collateral damage in these events, and to try to make sure you're not angering the population"[325].

As others have documented, JAGs function as an important part of a broader apparatus through which the U.S. in the War on Terror attempts to diminish the legitimacy costs of using force by reducing civilian casualties[326] (McDonell 2018). In this, strategic motivations for reducing civilian deaths matter far more than legal obligations. As such, JAGs are careful to emphasize that their assessments of high risk are derived from legitimacy rather than law. "In addition to the lawfulness of the strike," a Navy JAG established, "we wanna think about what is the secondary effect…are we

[325] DoD Panel (06.02.05)

[326] One interviewee framed JAGs as having been integral to the development of the civilian casualty mitigation apparatus. "So the concept of civilian protection [in the military] really arose out of JAGs trying to help commanders figure out ways to create less collateral effects" (Interview 01.02.07).

suddenly going to see bleeding children on TV?...Are we actually creating a bigger problem?" (Interview 01.01.14).

Because JAG suggestions about altering the mission to reduce civilian casualties are almost exclusively framed as legitimacy concerns, these concerns do not take the form of a strong limitation. Rather, the prerogative to strike is quite explicitly left with the commander. For example, after recommending that the commander consider a number of extra-legal concerns regarding adverse impacts on the civilian population, a Marine JAG clearly noted "but, it's not my call…[it all boils down to] what policy risk [legitimacy loss] are you willing to take [to destroy this target]?" (Interview 01.01.04). Similarly, the JAG who provided the hypothetical involving Osama Bin Laden and one hundred school children added that "policy-wise, I [would] say [to the commander] 'I'm not sure that's the best idea'" (Interview 01.02.17). However, he then added "[but] if you've gotta kill that guy, you kill that guy" (Interview 01.02.17). As another example, a Navy JAG recommended against taking some of the courses of action presented in these hypothetical scenarios, but always framed these recommendations as a "policy decision" and therefore the commander's prerogative. The question, he remarked over and over in each scenario, isn't whether we can destroy it but "do we really *want* to hit it[327]?" (Interview 01.01.14).

[327] In other moments, the driving factor in determining acceptable civilian harm was not only law and legitimacy, but also broader questions of military interests regarding economy of force (minimizing the resources expended) and the strategic implications of damaging infrastructure. The same Navy JAG explained that, in asking the commander if they wanted to destroy this target, the commander should consider a broad range of factors. "[It's] not necessarily legally [an issue to destroy this port], but political, ethically we'll have a responsibility to do something, and we're probably going to need that port [during the occupation]" (Interview 01.01.14).

In this regard, JAG recommendations regarding limitations look different than under the conditions of *restraint* described in the prior chapter. When advising on the treatment of detainees and the targeting of specially protected persons and objects, JAG concerns with both legal and legitimacy risks combine to translate these constraints into decision-making by either strongly lobbying commanders to accept limitations or, if needed, playing 'the red card'. While JAGs also integrate constraints into decision-making when advising on civilian casualties, these concerns—based almost exclusively on legitimacy risk—take the form of recommendations and, if possible, alternative proposals that are presented with a much softer touch. These suggestions don't imply that the commander is obligated to change course or even, in most cases, strongly lobby for one course of action over another. The emphasis of operational advice communicates a *permissive* approach to the question of civilian casualties, mitigated (mostly) by prudence and big-picture strategic thinking.

Shifting the Risks: NCV Values and High-Intensity Conflicts

JAGs only shift to translating firmer constraints into decision-making around civilian casualties when top-level military and civilian leaders have explicitly withheld the authority to cause more than a certain number of civilian casualties to the highest level of the chain of command through Non-Combatant Casualty Cut-Off Values (NCVs). NCV policies can look very different depending on how these "tools" are employed. A commander's NCV value could be in the hundreds or be as low as zero—as was the case for military operations outside of "areas of active hostilities" during the

Obama Administration and, for a brief period, in Afghanistan as well[328]. In this, different levels of the command can be assigned different NCVs, with each commander having the authority to extend the NCV limit they receive from their higher headquarters to their own subordinates or further tighten that NCV for those subordinates (but not exceed these limitations). Furthermore, NCVs can either remain relatively static in a theater of war or change with the operation.

NCV values impact JAG advising by adding a much higher degree of precision to determinations of civilian casualties. When firm NCV values were inserted into targeting training scenarios, JAG advice more closely resembled a form of *restraint*. In this, JAGs still enacted procedures for demonstrating 'reasonableness' and 'good faith' in civilian casualty mitigation—since NCV values are U.S. policy rules, not LOAC requirements, as JAG trainers frequently remarked[329]—and offered assessments of and recommendations on the legitimacy risks of using force. However, the addition of heightened *legal* risk—in the form of an inflexible cap on estimated casualties—shifted JAG recommendations into stern warnings about sanctions when the Collateral Damage Estimation (CDE) specialists predicted deaths that exceeded this value. "That's not me or the law of war saying 'no'," a JAG trainee added, after remarking that the risks of such a strike would be very high, "that's your higher headquarters saying that"[330].

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[328] "The foggy numbers of Obama's wars and non-wars" (2016) https://www.washingtonpost.com/world/national-security/the-foggy-numbers-of-obamas-wars-and-non-wars/2016/05/22/5648b798-1d2f-11e6-b6e0-c53b7ef63b45_story.html.

[329] This is an area where JAGs, as with other rules of engagement, sometimes intervene to counteract what they view as overly restrictive assessments of the law. Trainers at the OPLOAC course explained that soldiers can start treating NCV values as LOAC requirements and thus excessively limit their own authorities.

[330] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.07.18). Charlottesville, VA.

This entire process and set of factors were summarized by a Navy JAG, who outlined his overall approach to civilian casualties—starting with the low legal risk presented by 'collateral damage' under LOAC and the firmer limitations that NCV policies can enact:

> Here's what I'm looking at [in this scenario]: How many people are we gonna' kill in addition to the people we want to kill? Because, sometimes, people gotta' die. It's ok to kill people [if we've gone through and answered the LOAC questions first]. That is, unless a higher commander's intent [an NCV cap from a combatant commander, the DoD, or the Commander-in-Chief] places additional limits on civilian casualties (Interview 01.01.14).

As such, the added considerations of NCV limits complicate my ability to make broad-scale assessments regarding the effects of 'lawyerization' on the use of force in regard to civilian casualties. Since NCV limits—before being loosened in 2016[331] and then eliminated in 2018[332]—were used inconsistently across theaters and missions, I would expect JAG practices to vacillate between *restraint* and *permission* if they were reinstated. These observations reinforce the prior chapter's conclusions: that JAG practices of *restraint* are contingent on assessments of *both* high legal risk *and* high legitimacy risk.

Conversely, many of my interviewees also speculated that their typically high assessments of legitimacy risk could change, perhaps dramatically, if the U.S. were to find itself fighting a "hot war" against another state. For example, the Navy JAG quoted in the prior paragraph further reflected that whether or not a strike is deemed to be "worth

[331] "Trump Gives Military New Freedom. But With That Comes Danger" https://www.nytimes.com/2017/04/05/us/politics/rules-of-engagement-military-force-mattis.html.
[332] DoD officials are currently debating whether to reinstate the use of NCV limits. "Pentagon Removed Non-Combatant Casualty Cut-Off Value From Doctrine in 2018" (2021) https://www.defensedaily.com/pentagon-removed-non-combatant-casualty-cut-off-value-doctrine-2018/pentagon/.

it" (in regard to the legitimacy risk of civilian casualties) could be revised in the coming years:

> Maybe the conflict has changed. Maybe wherever this is we don't particularly care about the civilians there or we don't care what the rest of the world thinks of us because of the type of conflict we're in [such as a high-intensity inter-state armed conflict] (Interview 01.01.14).

While JAGs have adopted a largely *permissive* approach to civilian casualties, the fact that the legitimacy risks of these casualties during most of the War on Terror has been seen as relatively high in the JAG Corps has meant that JAGs have not demonstrated concerted efforts to *expand* the U.S.'s LOAC authorities in regard to proportionality. However, such a move could be on the horizon. As referenced in Chapter Five, a small number of JAGs have, within the last few years, written about the need to better "correct…the news media and various NGOs" on the subject of LOAC standards[333]. This was a central theme of an international military legal symposium, hosted at the Army JAG School in spring 2018, that I attended as an unofficial observer[334]. The theme of this symposium was "Future Conflict" and one of the four panels—all selected and organized by U.S. JAGs—was on civilian casualties. "The panel," the program explained, "will use the targeting principles in the current US DoD Law of War Manual as a platform to debate gaps and adjustments that may be required [to existing civilian casualty mitigation practices] to the expanding focus from counterinsurgency to a high-end, decisive action fight"[335]. This discussion took place between six U.S. JAGs (five on the panel and one

[333] MAJ Jon Stevens and LCDR Tim Cronin, "Understanding and Responding to Civilian Casualties" *The Operational Law Quarterly*. Vol. 18-1 (Dec. 2017) 25; on file with author.
[334] This bi-annual conference is called the "The Multinational TJAG Interoperability Symposium" and was attended by legal advisers to nearly forty other states.
[335] Program of "The Multinational TJAG Interoperability Symposium," held at The Judge Advocate General's Legal Center and School, Charlottesville, VA (05.28.18). On file with author.

moderating) and legal advisers to France (two), the U.K. (one), and Uganda (one). It focused on how existing "expectations" for civilian casualties, developed over the last few decades, would have to be "rethought" both operationally *and* in terms of public debates with humanitarian and media actors over the meaning of 'proportionality' and 'feasible precautions' in LOAC[336].

In sum, JAG advising on civilian casualties functions as a force for *permission* in operations in the current moment. The low legal risk that JAGs perceive in LOAC requirements to conduct 'proportionate' attacks that take all 'feasible precautions' to avoid civilian casualties are translated into largely procedural requirements of demonstrating 'reasonableness' and 'good faith.' The high legitimacy risk that JAGs attach to this area pushes them to frequently recommend that the command go beyond the requirements of the law; however, these mostly take the form of suggestions that lay out these risks and reaffirm the commander's prerogative to determine if the attack is 'worth' those legitimacy costs. Furthermore, this approach, more than with any other considered in this study, could shift in the coming years towards a mix of *permission* and *restraint*—due to the higher legal risk of NCV limits—or *expansion*—due to the continued non-application of NCV limits and an erosion of the legitimacy risk JAGs perceive in the expected, incidental killing of civilians.

[336] Fieldwork notes. "The Multinational TJAG Interoperability Symposium" (05.28.18). Charlottesville, VA.

Conclusion

In this chapter, I have demonstrated how JAGs enact their advice as a form of *permission* under conditions where either legal or legitimacy risk is perceived to be low and the other is seen as high. Legal advising practices of *restraint*, which I explored in the prior chapter, prioritize constraints on military power and rarely emphasize how commanders can enable their efforts through the law, with JAGs using their authority to lobby their fellow soldiers to accept limitations and, if necessary, play 'the red card.' In contrast, legal advising as *permission* emphasizes a mix of the constraining and enabling aspects of law and legitimacy, with an emphasis on enabling. When the perceived legal risk is high, but the legitimacy risk is low, JAGs warn commanders of legal sanctions while devising strategies for mitigating or even evading those risks without limiting their commander's capabilities. Under the reverse conditions, JAGs enact largely procedural legal requirements that enable the U.S.'s ability to use military power while often layering their advice with suggestions for alternative methods and/or limitations that will mitigate legitimacy risk. However, unlike with *restraint*, JAGs frame these changes as the commander's prerogative and rarely play 'the red card' or use the full weight of their authority to lobby for them. Lastly, this chapter further demonstrated how changes in either the perception of legal risk (in regard to civilian casualties) or legitimacy risk (in regard to ROEs and, potentially, civilian casualties) can shift how JAGs approach these issues.

A rigorous assessment of what fraction of a JAG's activities fall under which category of advising is beyond this project. However, my sense—throughout fieldwork

and interviews—is that a majority of issues would be perceived as posing a low degree of risk in one or another of these categories. As argued in Chapters Four and Five, this state of affairs is part of what allows military lawyers to retain their influence in command decisions. By emphasizing the military's authority to deploy military power, identifying the risks involved in those actions, and then working to mitigate that risk as much as possible, JAGs are able to cultivate and maintain a position of prominence in operational decision-making. Advising on every issue through modes of *restraint*—which involves heavily lobbying for limitations and occasionally playing 'the red card'—would likely erode the JAG Corps' identity as soldiers and their standing with the command. On the other hand, if JAGs were almost entirely focused on enabling their commanders, their legal credibility would be undermined. However, as I turn to in the next chapter, there are some key areas where JAGs almost entirely seek to enable the armed forces by deploying their authority as a mechanism for *expanding* the U.S.'s capacity to use military power by gradually re-shaping the Laws of Armed Conflict.

Chapter Eight: Legal Advising as Expansion

Introduction

When the perceived 'legal risk' and 'legitimacy risk' of an issue are both low, JAG advising shifts to not only permitting military power but actively *expanding* the definitions of key legal concepts. Such practices work to re-shape the law to enable the U.S.'s capacity to make war. JAG activities of *expansion* differ from those of *permission* in that they not only take advantage of opportunities to put the law to work for the U.S. on the battlefield but also engage in 'law-making' activities that alter LOAC itself. In this, JAGs on and off the battlefield make strategic efforts to re-shape the law around U.S. military interests gradually over time. In this chapter's first section, I show how JAGs have mobilized their dual identity as lawyers *and* soldiers to proactively defend the U.S.'s interests through the law. In this, the JAG Corps has developed different strategies for linking operational advising with the progressive development of international law.

In the rest of the chapter, I offer two examples of *expansion*, both of which involve LOAC definitions of a legitimate military target. The first details how JAGs have exploited vague rules and low media concern around the targeting of ostensibly economic sites to construct the legal category of 'war-sustaining objects.' The second example pertains to how JAGs have altered the U.S.'s definition of the law around when and how civilians are said to have lost their immunity from attack as a result of having 'directly participated in hostilities' (DPH). In both cases, the JAG Corps *expanded* the category of

a legitimate target in LOAC for the United States: 'war-sustaining objects' broadened commanders' authority to target things, and the revised DPH definitions claimed greater authority to target people. Both were done with an explicit sense that the relevant law was sufficiently vague to accommodate these broadened authorities *and* that as long as this targeting was limited to persons and objects deemed 'not innocent'—by virtue of their perceived contribution to the war—such actions would not lead to media backlash.

JAGs as 'Law-makers'

JAGs consciously and proactively take steps to ensure the commensurability of the U.S.'s interpretation of LOAC and the tactics it would need to succeed on future battlefields. "I think the [military has come to realize] that," an active-duty Navy military lawyer explained, "[the JAG Corps] helps to not only *navigate* the legal operational environment, but can help *shape* it" (Interview 01.01.16). The first 'wave' of *expansion* strategies involved prominent JAGs 'shaping' the law and war by authoring in *both* these realms—such as through military handbooks as well as articles in law journals. These strategies involved attempts to shift debates on LOAC among both military leaders and international lawyers and have these emerging ideas reflected in doctrine as well as emerging legal debates. In the last decade, however, a second 'wave' of these strategies has focused on utilizing the full breadth of the JAG Corps—not just a cadre of leading military lawyers and retired JAGs—to create a more direct conduit back and forth between more micro-spaces of law and war to enhance the U.S.'s claims about customary international law.

These efforts began as largely individual endeavors by various JAGs in the 1980s and 1990s, rather than as a concerted program by the DoD. For example, Captain Jack Grunewald, the initiator and lead author of the highly influential *Commander's Handbook on the Law of Naval Operations* in the late 1980s—which is frequently referenced in the following pages for its importance in establishing the phrase 'war-sustaining objects' and broadening the scope of DPH—explained his motivations for the text in his oral history in the following way:

> My concern is that we must preserve to the United States Navy the ability to do these things we must do in a global war, things that we know we are going to have to do to prevail over our adversary…So my thinking regarding the concept of 'war sustaining' was that we need to keep it viable[337].

Similarly, one of my JAG interviewees—who began publishing in the 1980s—explained that early military lawyer authors (from the U.S., U.K., and Israel) "wanted the international law world to [refocus on the] problems that the first world militaries faced when they were confronting not only third-world but non-state groups that didn't comply with the law" (Interview 01.02.01).

Other early JAG authors detailed being motivated by a sense that the military had to counteract the 'humanitarianization' of LOAC. Hays Parks—a former Marine JAG, author of over 70 publications, and a central figure in the creation of the U.S. *Law of War Manual* (2016), an important statement of these *expanded* concepts—articulated similar concerns, emphasizing that he intended his work to counteract the increased influence of

[337] "Oral History of Jack Grunewald," sections on file with author, 45-46

humanitarian groups in LOAC between the 1980s and 2000s[338]. Similarly, Waldermar Solf—the Army JAG credited with first proposing the U.S.'s Law of War Program in the early 1970s—published a widely cited text and describes, in his oral history, how he was motivated (in part) by his experiences as a U.S. negotiator for the Additional Protocols—where he clashed with the representatives of smaller states and humanitarian officials, who he describes as pushing through proposals that were out of touch with military realities[339].

These individual efforts have gradually obtained degrees of institutional support from the DoD since the 1990s. "[In the mid-1990s, the DoD and JAG Corps] would send us out to legal conferences [just for]…professional development," a retired Army JAG explained. However, he continued, the military eventually realized "that we're actually going to get out there and [say to the U.S.'s legal critics], 'actually, you have your facts wrong…here's what really happened [and I would know, because I was there]'" (Interview 01.02.12). In this, a small number of JAGs—some active-duty, some retired—were placed at the fore of these efforts to carve out footholds in the broader legal community. For example, one such JAG who now works for the DoD explained:

> I go to conferences…to counter the academic pieces that are out there, because there's a lot of stuff being written by academics…[But] states make international law…So, part of my job is just to write articles to go out to these conferences and sort of present what the Army and DoD position is to counter some of the messages that are out there (Interview 01.02.16).

[338] See, for example, Parks (1990, 116–21) for a scathing critique of the activities of the ICRC and a number of other states in the negotiation of the 1977 Additional Protocols. This critique is then used to present proto versions of the U.S.'s arguments on both DPH and 'war-sustaining objects'.
[339] "Oral history of Waldemar Solf." On file with author.

Similarly, a senior Army JAG described these 'tours' of prominent spaces of international legal discourse by JAGs as "Legal FONOPS [Freedom of Navigation Operations]"—invoking the term for operations in which the U.S. Navy charts courses intended to challenge Chinese claims about the extent of its territorial waters (Interview 01.01.02). Instead, he explained, experienced military lawyers would be sent to prominent forums to "get in the fight" over the law and produce or influence articles, handbooks, and other 'soft law' documents that "make sure our view is heard"[340].

In conducting these activities, many JAGs emphasized their identity as 'warrior lawyers' as the key to carving out their place in international legal discourse. While this dissertation has focused almost entirely on how this dual identity is leveraged in the military, it can also prove a potent tool in the realm of international law. In a conference full of lawyers, JAGs utilize their claim to having "lived and breathed the law amid the fast, often confusing flow of war" to distinguish themselves from those who write on LOAC in "academia and think tanks" (McChrystal 2016, xii). This aspect of JAG *expansion* strategies is not lost on those attending these conferences. A retired JAG who is frequently sent to these events observed that "being in the military has importance because it gives you sort of credibility on the topic" (Interview 01.02.16). Not only is their dual identity used to gain credibility, my interviewees explained, it also provides a greater likelihood that military experiences wind up in the law. "It's easy to do law in the air-conditioned rooms where a lot of the academics, like me now, sit," a retired JAG, who

[340] As a primary example of such efforts, this JAG referenced the involvement of military lawyers in the authoring of the *Tallinn Manual on the Law Applicable to Cyber Warfare* (2013), which I turn to briefly in the conclusion of this chapter.

is now a legal scholar, remarked (Interview 01.02.03). “It is much harder to provide that legal advice in a tent in Afghanistan…so I think the insertion of the people who practically participate in the application of the law of war is very significant to the development of that body”.

Furthermore, within the last decade, these *expansion* strategies have broadened to *also* include a second type of mechanism. Whereas the first wave emphasized JAGs carving out a presence in high-profile spaces of law and war, the second wave has also emphasized the articulation of U.S. legal positions through a wider range of more ‘micro’ spaces where these two worlds meet. For example, an active-duty Army JAG highlighted these more ‘micro’ pathways, explaining that the JAG Corps of late seemed more interested in “[going] into schools, colleges, ROTC units, JROTC units, outreach in your community [to] explain what we do, why we do it, and make sure we’re giving the right information” (Interview 01.01.10). Legal training centers and conferences taking place *between* militaries—which often feature less involvement from non-military lawyers—have also become an area of focus, as have smaller journals and newsletters with primary circulation among military readers.

This broadening of the JAG Corps’ existing ‘law-making’ pathways was most clearly articulated in a 2016 program initiated by a former Judge Advocate General of the Army (TJAG) called “Strategic Legal Messaging (SLM) activities” [341]. This document describes these SLM engagements as “strategic communications focused on the international legal community” *as well as* “our [military] partners and others” that

[341] SUBJECT: Guidance for Strategic Legal Engagements, 8 September 2016 (on file with author)

"advocate positions consistent with US LOAC standards" and "support U.S. state practice". The incoming Army TJAG soon expanded on this program, stating:

> [The DoD in 2011] elevated "legitimacy" to a principle of warfare, underscoring a doctrinal imperative for the [JAG Corps] to proactively promote US legal standards as the international law (ILAW) benchmark by which the legality of US operations will be judged. This doctrinal imperative to achieve legitimacy in operations coincides with a countervailing trend by international tribunals, international organizations, and adversaries to dispute accepted ILAW norms and thereby raise doubts about the legitimacy of lawful operations[342].

The memo then expands on a long list of methods—such as increased JAG presence at legal conferences and institutions; funds for seminars and training programs; the creation and dissemination of U.S. legal perspectives through JAG writings; and "assisting partner nations in drafting legal manuals"[343].

By broadening the scope of these activities, this document not only identified new avenues for persuasion—by emphasizing direct messaging with other militaries—it also focused on the U.S.'s capacity to translate its views into operations. I show this most directly in this chapter through the example of the use of long-standing arguments about 'war-sustaining objectives' on the battlefield. These pathways, some of my interviewees explained, enable the DoD's thousands of lawyers to better influence the development of customary international law. An active-duty JAG assigned to an international training course as an instructor remarked that this 'second wave' of law-making strategies slowly emerged "in light of the ICRC's commentary on what international customary law is [during the mid-2000s]" (Interview 01.01.10). As a result, he explained, "we're out here

[342] SUBJECT: Strategic Legal Engagement Planning Guidance, 30 September 2016, 1 (on file with author)
[343] Ibid., 3

[in part] to in fact give our position…to either consistently object to what they perceive as customary international law or to make sure [our view] is getting out there". The activation of the broader ranks of the JAG Corps in these activities, a retired JAG remarked, can activate "a continuum of customary practice where you have utility from the battlefield to the streets of Washington DC" to further the U.S. position (Interview 01.02.12). In a 2019 initiative meant to boost rank-and-file JAG contributions to these legal strategies, the prior TJAG began offering career incentives for JAGs who publish in *any* forum, including law journals, digital platforms devoted to law and security, or military publications[344]. This program, he remarked, would better enable all JAGs to translate their operational experiences into statements on the law, and vice versa[345].

In reflecting on the effectiveness of these activities, a Navy JAG reflected that "[as more JAGs get into academia since the mid-2000s] you're seeing perhaps more support for…a U.S. centric interpretation" (Interview 01.01.16). For example, this JAG continued, "the consensus in the early days [of the War on Terror] in the international legal community was…LOAC doesn't apply to the fight against terrorists. It's a law-enforcement issue, right? I think that debate's …come along to be much more in line with the U.S. view" (Ibid.). Similarly, another JAG explained that, over the long run, the U.S.'s views, while controversial at first, often come to be *at least* tolerated by the international legal community as divergent opinions rather than full violations, if not

[344] "A lot of these captains and majors and lieutenant colonels are writing things… It's definitely one of General Pede's focus areas, and he has encouraged them [through incentives] to write" (Interview 01.02.16).

[345] In this, he encouraged JAGs to focus on areas where the U.S. position is frequently challenged, such as issues "where, for example, U.S. Policy ends and the Additional Protocols leap forward, or where an ICRC 'interpretation of LOAC' has gone beyond its moorings in International Agreement or State Practice". "Evolving with the Threat". Lieutenant General Charles N. Pede. *Army Lawyer*. (Issue 2, 2019). 2.

fully adopted as new law. "Twenty years ago," he remarked, when the U.S. declared that "we are in a global non-international armed conflict with a non-state actor…[even some of] our NATO partners and other allies…[were] like 'you guys are out of your mind. You can't do that!'" (Interview 01.02.06) "Now," he continued, "it's like yeah, of course we are. This transnational non-international conflict has become the sort of the rule" (Ibid.).

These two strategies seek to leverage JAGs' positions in both operations and the international legal community to more effectively turn *expanded* legal arguments into practices on the ground and then back into law through precedents and normalization. This chapter primarily looks at the 'first wave'—in which prominent military lawyers promulgated *expanded* concepts on the definition of a legitimate military target through military doctrine and journal articles over the last three and a half decades. While the 'second wave' of *expansion* strategies—in which the full breadth of the JAG Corps is mobilized to articulate these claims in everyday operations as well as more 'micro' spaces of war and law—plays a less prominent role in these accounts, it has assisted in the leap from 'theory' to 'practice'. While these efforts cover a wide range of legal issues, as I briefly discuss in the conclusion, this chapter focuses on two, both of which were explicitly highlighted in the Army's 2016 memo on "Strategic Legal Messaging": "[t]he definition of a 'military objective' as including those objectives which are 'war sustaining'" and "[t]he manner in which otherwise protected persons become targetable based on their direct participation in hostilities"[346].

[346] SUBJECT: Strategic Legal Engagement Planning Guidance, 30 September 2016, 4

‘War-Sustaining Objectives’

Since the 1970s U.S. military lawyers have proactively carved out, institutionalized, and disseminated the international legal authority for U.S. commanders to target “war-sustaining objects”—ostensibly civilian, economic objects whose destruction could be expected to have a ‘direct’ impact on the conflict. I would expect JAGs to perceive the issue of the targeting of this economic infrastructure with relatively low degrees of ‘legal risk’ because the definition of a military objective in relevant treaty law is vague. The 1949 Geneva Conventions provide no such definition. The First Additional Protocol of 1977 (API) added some precision to this area, however, the definition found in this treaty has been plagued by ambiguity[347]. In order to obtain universal buy-in from states participating in the 1977 conference, more precise definitions that included non-exhaustive lists of permitted or prohibited targets were jettisoned during pre-conference negotiations (Jachec-Neale 2014, 32–37). As a result, some legal scholars have argued the definition in API is “so sweeping that it can cover practically anything” (Cassese 2001, 339, quoted in Jachec-Neal 2014, 91). Even those with more favorable views of this definition have written that “it is regrettable that the wording is abstract and generic, and no list of specific military objectives is provided” (Dinstein 2002, 141). Furthermore, the U.S. never ultimately signed API, thus giving it

[347] “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977). Article 52(2).

even more leeway to construct legal interpretations of a 'military objective' that fit its strategic interests in the years after 1977.

I would also expect JAGs to perceive low degrees of legitimacy risk because the intended targets of the U.S.'s 'war-sustaining' claims would frequently be viewed as part of the war effort by the lay public and thus less likely to get covered by the media. Definitions of a 'civilian' and the concept of 'noncombatant immunity' in ethics and popular discourse have long rested on notions of 'innocence' (Kinsella 2011; McKeogh 2002; Lichtenberg 1994). Portrayals of who or what is 'innocent' and worthy of protection may not match the definition of a civilian in LOAC, leading to persistent arguments regarding 'quasi-combatants' who can be legitimately targeted by virtue of their 'guilt' in war rather than a strict legal nexus of connection to *military* activities[348]. For example, such associations have been used to differentiate 'innocent' human shields that are involuntarily placed at a site from 'guilty' ones who are motivated by support for one side (Bargu 2013; Gordon and Perugini 2020; Schmitt 2008). While economic sites, as inanimate objects, are unlikely to be deemed 'guilty', arguments by the government and military that frame certain economic activities as being at the heart of the enemy's war effort play off these long-standing tropes and diminish the likelihood of media criticism.

[348] The U.S.'s Law of War Manual (2015) and speeches by DoD officials (O'Connor 2016) have claimed, through various language, that 'quasi-combatants'—who support the enemy but are not full participants in a fight—receive fewer protections and count less in proportionality calculations. Aspects of this reasoning have taken many forms in U.S. legal arguments. Pertaining to economic sites, the term 'dual use' facilities is the most prominent and was used, for example, to justify the targeting of 'quasi-military' installations such as powerplants in the First Gulf War.

The relative absence of moral outrage in recent media coverage of the targeting of economic objects—when JAGs first took up this subject in the 1980s and early 1990s—would further lead me to expect perceptions of low legitimacy risk. While much of the U.S.'s conduct in the Vietnam War was heavily criticized, its (rather limited[349]) decisions to target what the U.S. would later call 'dual use' facilities (partially economic and military) in North Vietnam, such as railways and bridges (Bothe 2002, 178), were not part of what the military perceived to be the strategic liabilities of that conflict[350]. As such, the definition of U.S. targets was not one of the areas identified by the U.S.'s 'strategic restraint' reforms. These perceptions—that the public was tolerant of the targeting of 'dual use' economic facilities as long as they were framed as being 'in the fight'—were likely reinforced in the First Gulf War. During this conflict, U.S. aerial targeting was actually far more likely to destroy 'dual use' targets than in Vietnam (Dill 2015a). However, this air campaign was largely framed by the media as 'clean' and 'precise'—much to the frustration of critics in the years that followed (Normand and Jochnick 1994). When the U.S. air campaign was criticized in the media, it was for instances like the 'highway of death'[351]—which portrayed U.S. forces as needlessly massacring fleeing Iraqi soldiers—and for instances of where numerous 'innocent'

[349] Dill (2015) and Parks (1990) both argue that U.S. bombing campaigns in the Vietnam War were actually more concerned with adhering to strictly 'military' targets than the U.S. has been in more recent conflicts.
[350] I base this on the observation that none of the reforms initiated by the Law of War Program touched upon the classification of targets in general or bombing of economic sites in particular. If anything, these bombing programs became more heavily criticized for their *reluctance* to engage a wider range of targets (Parks 1987)
[351] "After the War: The Battleground; Death Stalks Desert Despite Cease-Fire" (1991) https://www.nytimes.com/1991/03/02/world/after-the-war-the-battleground-death-stalks-desert-despite-cease-fire.html.

civilians were killed—such as in the Al-Firdos bunker[352]. Even though the U.S. military also framed these targets as 'military objectives' (the U.S. claimed it did not know the Al-Firdos complex was being used as an air raid shelter), these arguments were not as effective as those denying the 'innocence' of power plants and other pieces of infrastructure that were framed as sustaining the Iraqi war effort. As such, I expect that U.S. military lawyers, who heavily studied the targeting campaigns in both Vietnam and the First Gulf War for lessons (Parks 1987; 1991), to have internalized the public's generally liberal understanding of a 'legitimate target'.

The U.S.'s creation of 'war-sustaining objects' as a LOAC category emerged over a number of decades and broadened the scope of how the military had previously defined a 'military objective'[353]. During the Vietnam War the authoritative statement on and guidance for the U.S. military's wartime legal practice was the *Law of Land Warfare Field Manual*, published in 1956 and revised just after the end of the war in 1976. Both editions of the *Field Manual* explicitly define "Military Objectives" without reference to 'war-sustaining objects' or any other term specifically mentioning material support for war-fighting. The text of both versions of the *Field Manual* limited legitimate targets to those that "make an effective contribution to military action," (para. 40) and offers a long list of examples, none of which involve economic activities beyond the manufacture and transport of arms. In contrast, the DoD's *Law of War Manual (LoWM)*, published in 2015

[352] "War in The Gulf: Iraq Says U.S. Killed Hundreds of Civilians at Shelter, But Allies Call it Military Post" (1991) https://www.nytimes.com/1991/02/14/world/war-gulf-overview-iraq-says-us-killed-hundreds-civilians-shelter-but-allies-call.html.

[353] Dill (2015) and Goodman (2016) have also offered accounts of this history of 'war-sustaining objects', although without a focus on the work of JAGs.

and updated in 2016, also uses the term "effective contribution to military action" but adds that that "this contribution need not be 'direct' or 'proximate'" (Para. 5.7.6.2) and that "[i]t is not necessary that the object provide immediate tactical or operational gains" (Para. 5.6.7.2). Furthermore, the *LoWM* states that "'[contributions to] [m]ilitary action' has a broad meaning" and includes, as one of its examples of a legitimate target, "economic objects associated with military objectives" (Para. 5.7.6.2.). In some cases, JAG arguments explicitly stated that their claims expanded the U.S.'s legal authority to target. For example, an admiral who contributed to a number of influential JAG publications remarked that arguments about 'war-sustaining objects' were broader than the U.S.'s legal positions in the Korean War, Vietnam War, and First Gulf Wars (Robertson 1997, 50–52).

The pathway from the more restrictive definition provided in the 1976 *Field Manual* to the more expansive version found in the 2016 *Law of War Manual* was carefully and repeatedly carved by JAGs during the intermittent decades. From the 1980s to the publishing of the *LoWM*, JAG officers from every service branch introduced and refined legal justifications for the targeting of economic facilities under LOAC. The concept, but not language, of 'war sustaining' objects first appeared in a 1980 Air Force publication, authored by the Air Force JAG Corps, called the *Commander's Handbook on the Law of Armed Conflict*[354] (Goodman 2016). This handbook instructs commanders that

[354] In the 1980s the US did not believe that such handbooks could be taken as statements of official state practice. As such, there was very little oversight by the DoD over the content of the handbooks that the JAG Corps was releasing. For a discussion of the legal status and legal, policy, and doctrinal impact of military manuals, see Reisman and Leitzau "Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict" (In Robertson ed (1991); Jachec-Leale; ICRC; US reply to ICRC.

"[i]t is permissible to attack economic targets that give only indirect support to enemy operations, so long as that support is effective and a definite military advantage can be foreseen" (*AF Handbook* 1980, 2-3(a)). Soon after, three authors—one of whom was a prolific Army JAG who played a key role in the initial 'lawyerization' of JAGs after the Vietnam War—released a still widely-cited commentary on the 1977 Additional Protocols, which argued that the treaty's definition of 'military objectives' permitted the targeting of critical revenue-generating industries, such as cotton for the US Confederacy[355] (Bothe, Partsch, and Solf 1982, 366 n. 15).

Numerous JAG publications and legal reviews through the 1980s continued this pattern of citing one another and slowly refining the notion that states have customary and treaty rights to target 'war-sustaining objects.' In 1985, the JAG lawyers for the Joint Chiefs of Staff completed a legal review of the Additional Protocols, where they concluded that API's definition of a 'military objective' included "political and economic activities that support the enemy's war efforts."[356] This was followed in 1987 by the first publication of the highly influential *Commander's Handbook of the Law of Naval Operations*—the brainchild of a Navy JAG who is widely credited with institutionalizing Operational Law in the Navy. The *Naval Handbook* and its *Annotated Supplement* (1989)—which frequently cites the 1980 *Air Force Handbook* as well as specifically

[355] The example of Confederate cotton was a frequent historical example offered by JAG as justification for the expansion of targeting authorities. For example, a relevant section of *New Rules* cites a 1976 article by an Air Force JAG, Burrus Carnahan, who almost certainly contributed to the previously mentioned 1980 Air Force *Handbook*. The *Handbook* uses the same example of Confederate cotton to illustrate the legal authority to target economic facilities. Subsequent JAG publications repeated the same example, sometimes word for word, highlighting a clear chain of scholarly influence across the years.

[356] "Memorandum from the Joint Chiefs of Staff to the Secretary of Defense, Review of the 1977 First Additional
Protocol to the Geneva Conventions of 1949," app. at 51 (May 3, 1985). Quoted in Goodman 2016, 670.

citing both the 1976 Carnahan article and the *New Rules* commentary on the right to target economic objects—further expanded the legal justification for targeting. It contested that military objectives included "the enemy's war-fighting or war-sustaining capability" and that, in addition to objects that directly contribute to military activities, "economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked" (*Handbook* 1987, 8-3). Two years later the Air Force updated its targeting guidelines and borrowed the Navy's terminology of the enemy's "war-fighting or war-sustaining capability" as a legitimate target[357].

In the 1990s and 2000s, these arguments were further refined in JAG articles and updates to JAG-issued handbooks. The most prominent of these articles was a widely cited 216-page article[358] on aerial combat and the laws of war by a retired Marine military lawyer. Referencing the Air Force's updated targeting guidelines from the year before, the article strongly affirms the legality of targeting "the enemy's war fighting or war sustaining capability"[359] (Parks 1990, 139). Starting in 2004 the US Army JAG Corps began publishing its own version of the 'war-sustaining' argument in its yearly *Operational Law Handbook*—replacing a more restrictive definition with the expansive claim that:

> The connection of some objects to an enemy's war fighting or war-sustaining effort may be direct, indirect, or even discrete. A decision as to classification of an object as a military objective ... is dependent upon its

[357] *Air Force Pamphlet 200-17: An Introduction to Air Force Targeting* (1989).
[358] Parks' article and broader work is identified in the US JAG Corps as the gold standard example of how JAGs can influence debates within legal academia.
[359] To illustrate this point Parks returned to the example of the destruction of Confederate cotton production, which JAGs had been citing since the 1970s, as well as a second example introduced by the 1987 *Naval Handbook*, which was the targeting of Iranian oil tankers by Iraqi vessels in the 1980s. As an indication of the slow creep of permissive legal argumentation, the *Naval Handbook* referred to the legality of the destruction of Iranian oil assets as "not firmly settled" (8-3 n. 11) whereas Parks cites this instance as an established practice of legitimate targeting (139 n. 412).

> value to an enemy nation's war fighting or war-sustaining effort (including its ability to be converted to a more direct connection), and not solely to its overt or present connection or use (Quoted in Dill 2015, 95).

Not only did this publication signal the degree to which 'war-sustaining objects' had become institutionalized in JAG practices, but it also showed how the definition of what constituted a 'war-sustaining object' continued to broaden as its invocation became normalized in U.S. circles.

During the late 1990s and 2000s, this concept also made the jump from the military lawyer community to broader U.S. doctrine. In 1997 the term "war-sustaining object" was referenced in a DoD-wide manual on targeting[360]—the first appearance of this term in a joint-service publication for operators. The document instructs "[joint force commanders]" to take "a broad perspective of the comprehensive impact of operations against the enemy and [evaluate] mission accomplishment *on the enemy's warfighting and war sustaining capabilities*" (I-10, Emphasis added). The 2002 edition of the *Joint Chief's Targeting Handbook* went further by devoting extensive coverage to the concept of 'war-sustaining objects' and repeating verbatim the definition provided in the *Naval Handbook* (1997). In 2003 the DoD General Counsel issued a guidance on crimes for which 'unlawful enemy combatants' in US possession could be tried at military commissions. Its discussion of the term 'military objective' similarly copies the *Naval Handbook* definition[361]. This definition then migrated into U.S. statute via the Military

[360] *Targeting: The Joint Targeting Process and Procedures for Targeting Time-Critical Targets* (July 1997)
[361] "*Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack." (Haynes II 2003)

Commissions Act (MCA) of 2006, which included in its definition of a 'military objective' the phrase "effectively contribute[s] to the opposing force's war-fighting or war-sustaining capability"[362]. The U.S.'s formal position on 'war-sustaining objects' was fully crystalized in 2015 with the first issue of the *LoWM*, which cited and borrowed both its language and its examples from many of the JAG documents detailed prior.

While some JAGs described U.S. targeting patterns in the 1990s as attacking 'war-sustaining objects'[363] and speculated that certain operations in the War on Terror might be authorized using this language[364], the first public invocation of this term came not long after the release of the *LoWM* in 2015 against the Islamic State of Iraq and Syria (ISIS). That autumn the U.S initiated a bombing campaign called *Operation Tidal Wave II*, which broadened existing attacks on refineries—which produced oil for ISIS's military operations and thus proved a legally uncontroversial target—to include the targeting of oil trucks owned and operated by civilians who transported refined oil from ISIS-controlled territory to be sold on the black market. In February 2016 President Barack Obama publicly noted and applauded the campaign with the following speech:

> Thanks to our wave of strikes against its oil infrastructure, tanker trucks, wells, and refineries, ISIL's oil production and revenues are significantly reduced. We're destroying the storage sites where ISIL holds its cash—its money is literally going up in smoke. As a result, ISIL has been forced to slash the salaries of its fighters, which, increasingly, diminishes their

[362] *Military Commissions Act of 2006*, at para. 950v. 2(B)
[363] JAG documents claimed that the targeting of Iraqi oil facilities during the First Gulf War fit the category of 'war-sustaining objects,' although there's no indication that U.S. commanders invoked this term. A JAG deployed during the NATO air campaign over Serbia and Kosovo noted that planners had selected targets with an eye towards "the individual and cumulative effects on the enemy's war-making and war-sustaining capability." (Lohr and Gallotta 2003, 475)
[364] The most prominent example from the 2000s had been the U.S. policy of targeting and destroying poppy fields suspected of providing financing for the Taliban, especially in 2008, when the U.S. High Commander of NATO expanded this policy to authorize attacks on production facilities as well. In both cases, legal observers speculated that such authority could only be found by designating the Taliban's drug production network as 'war-sustaining objects' (Schmitt 2009).

> morale. We continue to hear reports of defections and executions of those who try to defect[365].

The president's speech was shortly thereafter expanded on by justificatory remarks from military spokespersons, the General Counsel to the Department of Defense[366], and the State Department Legal Adviser[367], all of which justified U.S. actions by explicitly labeling the fuel-transport trucks used to facilitate the sale of oil as "war-sustaining objects."

Throughout this operation, JAGs employed their expertise to expand the U.S.'s capacity to use force, in reflection of the work of JAGs over the decades to institutionalize 'war-sustaining objectives' as a term of art. According to JAGs involved in the planning and conduct of *Operation Tidal Wave II*, JAGs on the ground in Syria proactively initiated the process of labeling the fuel trucks as "war-sustaining objects." One Army JAG who was deployed with special forces in Syria during *Operation Tidal Wave II* told me that a fellow military lawyer in an attached unit had written a (still classified) legal opinion that made the initial case for such a classification (Interview 01.01.10). Similarly, another JAG explained that a small group of military lawyers gathered information on ISIS's oil sales to argue that if such sales were indeed critical to maintaining ISIS's war effort, the fuel trucks could be targeted[368]. This memo rose through the chain of command within the JAG Corps, eventually reaching a lawyer for

[365] "Remarks by the President on Progress Against ISIL" https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/remarks-president-progress-against-isil
[366] O'Connor "Applying the Law of Targeting to the Modern Battlefield." Speech delivered at the New York University School of Law, November 28, 2016.
[367] "International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations" Speech delivered at the Annual Meeting of the American Society of International Law, April 1, 2016.
[368] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.07.18). Charlottesville, VA.

the Chairman of the Joint Chiefs and the DoD General Counsel's office. Jennifer O'Connor, the DoD General Counsel who laid out the US's official position on this subject, later traveled to Syria and Iraq to meet with field-deployed operational lawyers and get a better sense of their duties prior to delivering her public defense of the U.S. airstrike policies in Syria[369].

These writings demonstrated a consistent perspective of low legal risk in regard to the use of force against such targets. While U.S. officials in the 1980s, including some JAGs (Parks 1990), initially criticized the API definition of a military objective for being too restrictive, the majority view among JAGs since the 1990s has been that the API definition remains primarily flexible, with the targeting of 'economic objects' still a 'grey area' of the law. I saw this perspective firsthand at the OPLOAC course I attended. In general, JAGs were instructed on how to apply the law in a relatively permissive manner. Explicitly referencing the vagueness of these restrictions, a trainer noted that for most any reasonable targeting request "LOAC [definitions of a military objective] will get you 90% of the way to 'yes.'" In other words, the JAGs view this definition as putting up very few restrictions on U.S. commanders' authority to use force. This perspective came into greater focus during an exercise in which trainees asked numerous precise questions about the scope of this definition. The JAG trainer, after answering a few such questions, provided some overall guidance:

> It comes down to this: are you doing something because it helps you, or because you hate the people? If it helps you, then it's military necessity. And if it contributes to the war effort, then it probably passes the test [of a

[369] "She got to see the young officer, a Captain who had written the legal review [on the oil trucks as 'war-sustaining objects'] that passed through her office and up to higher levels, she got to see that and she got to put a coin in his hand for his great work." (Interview 01.01.10)

> military objective]. You've gotta do the work [of checking it against the definition], but you're probably good to go[370].

Given this view of the flexibility of the legal authorities available to lawyers and commanders, it is not surprising that JAGs have pushed to expand the law in this area.

Similarly, JAGs faced very minimal legitimacy risk when invoking the 'war-sustaining objectives' authorization for the targeting of fuel trucks. Due to the widespread coverage of how essential these oil sales were to ISIS's political and military prospects and the framing of the truck drivers as participating in ISIS's activities[371], public opinion around the targeting of this infrastructure was unlikely to produce added concern. As a Canadian military lawyer reflected during a legal symposium at the U.S. Naval War College: "[T]he terrorist nature of the Islamic State combined with the illegal nature of oil smuggling makes it emotively easier to apply the broader war-sustaining rationale for conducting such strikes" (Watkin 2014, 505)[372]. To the contrary, outlets such as Fox News[373] and The New York Times[374] produced critical reporting on what was described as an excess of *caution* in the Obama White House's attempts to disrupt ISIS. This caution was repeatedly attributed to concerns that strikes on fuel trucks would lead to civilian casualties if the drivers of those trucks were inside during the attack. There does not seem to have been concern over negative blowback regarding the targeting of the

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[370] Fieldwork Notes. "Operational Law of Armed Conflict Course" (03.07.18). Charlottesville, VA.
[371] Numerous news outlets ran stories on the scale of these oil sales. For example "Isis Inc: how oil fuels the jihadi terrorists," published in the *Financial Times* https://www.ft.com/content/b8234932-719b-11e5-ad6d-f4ed76f0900a; https://www.cnbc.com/2014/09/14/oil-smuggling-theft-extortion-how-isis-earns-3m-a-day.html;
[372] https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1731&context=ils
[373] The Five on Twitter: ".@EricBolling breaks down the way #ISIS makes its money. WATCH and weigh in. #TheFive https://t.co/yEZYvVMfLi" / Twitter
[374] https://www.nytimes.com/2015/05/27/world/middleeast/with-isis-in-crosshairs-us-holds-back-to-protect-civilians.html

trucks themselves. The absence of any public perception of illegitimacy around the targeting of fuel trucks as 'war-sustaining objectives' carried through *Operation Tidal Wave II*. The extensive news coverage of the U.S,'s initial wave of attacks on fuel trucks was overwhelmingly positive, with virtually no attention given to the legal concerns raised by certain international lawyers[375]. For example, ABC news anchor George Stephanopoulos remarked that it was "hard to believe that was the first time [that the U.S. had targeted the fuel trucks]"[376].

The legitimacy of these strikes in the court of public opinion was not lost on other legal defenders of the concept of 'war-sustaining objects' at the time. Writing just after the end of his tenure as Special Counsel to the General Counsel of the Department of Defense during the start of *Operation Tidal Wave II*, Ryan Goodman defended the U.S.'s legal position by arguing that even though "the weight of scholarly opinion has for years maintained that such objects are not legitimate military targets," both the distant and recent *actions* of states—such as France, the U.K., and Russia, all of whom also publicly announced aerial strikes against oil trucks and facilities—suggested a much broader acceptance of 'war-sustaining objects' as legitimate targets than the international lawyers would like to admit (Goodman 2016, 663). The jurists, he argued, had fallen out of touch with military and political actors, most of whom had accepted the legitimacy of the

[375] See "Hitting ISIS Where It Hurts By Striking Oil Trucks" (2015) https://www.npr.org/sections/parallels/https://www.npr.org/sections/parallels/2015/11/19/456600398/hitting-isis-where-it-hurts-by-striking-oil-trucks2015/11/19/456600398/hitting-isis-where-it-hurts-by-striking-oil-trucks; "U.S. airstrikes against ISIS target oil tanker trucks" (2015) https://www.cbsnews.com/news/u-s-airstrikes-against-isis-target-oil-tanker-trucks/; "U.S. Warplanes Strike ISIS Oil Trucks in Syria" (2015) https://www.nytimes.com/2015/11/17/world/middleeast/us-strikes-syria-oil.html?_r=0

[376] "US Warplanes Destroy ISIS Fuel Trucks" (2015) https://abcnews.go.com/International/us-warplanes-destroy-116-isis-fuel-trucks-syria/story?id=3522904.

strikes on the fuel trucks. This same point was articulated by the JAGs I spoke with. "Look, four out of the five permanent members of the Security Council have used 'war-sustaining targeting', [they just don't call it that]," a retired Army JAG remarked. Previously, he continued, other states would actively challenge the U.S. on this subject, but "now the law is changing to reflect the realities that we're all in" (Interview 01.02.16).

In sum, the legal ambiguity in definitions of a 'military objective' left ample room for JAGs to expand this term and authorize the destruction of certain economic targets. In this, JAGs provided examples of economic targets that would be viewed by many non-legal audiences as being 'in the fight', such as oil tankers in the Iran-Iraq war and the Confederacy's cotton industry during the U.S. Civil War, to expand this legal category by noting that such objects *should* be targetable. When combined with a real-world example that exerted low legitimacy risk—ISIS's black market oil network—JAGs on the ground helped 'operationalize' this expanded category by devising memos that ultimately guided U.S. aerial policy in *Operation Tidal Wave II.* Not only has this use of the law as a source of *expansion* provided LOAC justification for recent U.S. airstrikes against opponents such as ISIS, it has also initiated debate amongst global civilian and military leaders, as well as a minority of international legal scholars, about an emerging customary precedent permitting the use of force in this area.

Civilians Directly Participating in Hostilities

My second example of JAGs enacting the law as a source of *expansion* comes from the U.S.'s military capacity to target civilians who are said to have lost their immunity by participating in hostilities. In this, I would expect JAGs to perceive low

levels of legal risk, due to the ambiguity of this term in international law. The 1949 Geneva Conventions state that civilians who "[take] active part in the hostilities" may be targeted and prosecuted, but it does not define or unpack this term. API revises the wording used but leaves the concept similarly vague, saying only that civilians cannot be the subject of attack "unless and for such time as they take a direct part in hostilities"[377]. In recognition of the vagueness of the term "directly participating in hostilities" (DPH) the International Committee of the Red Cross (ICRC) conducted a years-long study of DPH in the mid-2000s, eventually releasing an 'interpretive guidance' on DPH that provides greater precision. However, that guidance remains an expert opinion, not binding law, and many states such as the U.S. have heavily criticized the ICRC's interpretive guidance while retaining their interpretive flexibility offered by the existing treaty language. Furthermore, even proponents of the ICRC's 'interpretive guidance' have remarked that it does not resolve the ambiguity of this term (Melzer 2009). Furthermore, there is similarly low enforcement of the boundaries of DPH definitions. To date, no U.S. servicemember since 2001 has been charged with an illegal killing based on a flawed application of DPH. As such, there is little reason for JAGs to perceive high legal risk when applying this principle.

I would also expect JAGs to perceive low levels of legitimacy risk for targeting the individuals that they have argued fall under the category of DPH. As discussed in the previous section, non-legal assessments of 'innocence' and 'guilt' in determining the legitimacy of killing—aided by opportunistic arguments from the U.S. government—can

[377] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977). Article 51(3).

render certain 'civilians' and 'civilian objects' appear as legitimate targets of destruction. Therefore, I would not expect high media 'visibility' with regard to the killing of those most commonly placed under this category by U.S. forces, such as individuals constructing or laying improvised explosive devices (IEDs), planning attacks, serving as spotters and intelligence gatherers, working as drivers, providing recruitment into these groups, conducting propaganda activities, or practicing other techniques common to guerilla warfare. As such, JAGs would feel more comfortable pushing at the limits of the law in regard to targeting of such individuals. Furthermore, prior experiences in Vietnam would have instructed many of these initial JAGs on what the U.S. public would and would not tolerate in regard to these arguments. For example, the U.S.'s targeting of civilians providing materials and logistical support via the Ho Chi Minh Trail did not become a major flashpoint for controversy; however, the perception among U.S. troops that mere support for the Viet Cong or the provision of minor forms of aid could legitimate violence against Vietnamese villages was specifically identified in the wake of the My Lai Massacre as a strategic problem for the military[378].

Such an approach is evident in efforts to expand the concept of DPH in legal argumentation and customary practice. Using many of the same publications covered in the prior section on 'war-sustaining objects,' JAGs since the Vietnam War have also *expanded* the definition of DPH by pioneering, affirming, and institutionalizing a broader legal understanding of the range of activities that fall under the scope of this term, the time span for which civilian immunities are forfeited, and how commanders and lawyers

[378] See, for example, *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident* (1970) "Significant Factors Which Contributed to the Son My Tragedy" (8-1 to 8-15).

should treat ambiguous cases. As with 'war-sustaining objects,' earlier military doctrine was less permissive than what exists today. "Persons who are not members of the armed force," the 1956 *Field Manual on the Law of Land Warfare* states, "[and] who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population"[379]. This focus on *attacks* as the core of DPH was further demonstrated by a non-JAG Air Force publication in 1976, which concludes: "Taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material"[380]. The emphasis of both these sources is largely on civilians engaged in *combat* activities, with no specific clauses that enabled U.S forces to legally target individuals engaged in logistical, intelligence, recruitment, or manufacturing support.

In contrast, Judge Advocates after the release of the DoD Law of War Program in the 1970s began authoring handbooks and manuals that classified a wider range of activities as DPH. Throughout the subsequent decades, various JAG-authored articles, handbooks, and manuals gradually expanded on the Vietnam-era legal definition of DPH and frequently cited one another to build up a demonstrated body of scholar-practitioner agreement[381]. In this, JAGs were eventually joined by a handful of military lawyers and

[379] *Field Manual FM 27-10: Field Manual on the Law of Land Warfare* (1956, para. 60)
[380] *Air Force Publication 110-31* (1976, 5-3)
[381] *The US Air Force Commander's Handbook,* 1980; *The Naval Commander's Handbook* 1987; Parks 1990; "Memorandum on Law and Executive Order 12333 [DoD policy on assassinations]"; *The Naval Commander's Handbook* 1997; Parks 2002; Schmitt 2004a; 2004b; Beard 2005; *Operational Law Handbook* 2007; Solis 2007; Schmitt 2009; Schmitt 2010; Parks 2010

legal experts from allied states, such as the U.K.[382], Canada[383], Australia[384], and Israel[385] who cited the exposition on DPH provided by the JAGs (and were then cited by them in return) to construct a small yet influential sub-community of international lawyers that sought to affirm a broad interpretation of customary and treaty law around DPH. Eventually, this corpus came to explicitly inform court cases in both the United States[386] and Israel[387], which accepted and cited many of these authors and their arguments in the development of domestic legal approval to engage with a wide range of civilians providing support to armed non-state actors as if those individuals were (unprivileged) combatants. This international corpus, including the Israeli Supreme Court's approach to DPH in 2006, were all frequent citations in the *LoWM's* definitive statement on U.S. policy regarding DPH upon its release in 2015 and update in 2016.

The *LoWM* explicitly provided authorization for the use of force against certain civilians whose legal status according to the U.S.'s Vietnam War-era doctrine and policy would have been debatable. This *expansion* of the term DPH entailed three key areas—all of which were carved out by JAGs and their allies in recent decades: 1) the range of activities constituting DPH; 2) the duration for which a 'DPHing'[388] civilian is said to

[382] Boothby 2010; 2004 *UK Law of War Manual* (5.3.3)
[383] Watkin 2004, 2010
[384] 2006 Australian Law of War Manual (5.36)
[385] Dinstein 2004, 2010
[386] See, for example, United States v. Hamdan (2007), which relies heavily on Dinstein 2004 in its decision and cites Schmitt (2004a). See also Gherebi v. Obama (2009), which called JAG Gary Solis as an expert witness on the definition of DPH, ultimately defining the term as "any person who has committed a belligerent act, or has directly supported hostilities in aid of enemy armed forces."
[387] See *Public Committee Against Torture v. Israel (2006)*, in which the Israeli Supreme Courte cited, among others, Dinstein (2004) and Schmitt (2004a) as key experts on the definition of DPH
[388] This is an informal term frequently applied by JAGs when invoking these authorities in their advice to commanders.

have lost their protections and been rendered targetable; and 3) how to determine an individual's status during 'borderline' cases. Additionally, JAG writings helped establish precedent for the Bush administration's claims, which are repeated in the existing *LoWM*, that 'membership' in an armed group turns a civilian into an (unprivileged) combatant, thus negating the need for an assessment of DPH as the target is no longer a civilian.

Explicitly expanding the stated scope of activities said to constitute DPH has been the most prominent and prevalent of these chains of scholarship. In contrast to the U.S.'s Vietnam War-era statements on the law, which focused on civilians taking a direct role in combat and left ambiguous the status of more diffuse or secondary activities, the *LoWM* immediately states, in its section on DPH, that "[t]aking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations" (5.8.3). It then provides an extensive, but not exhaustive, list of non-combat functions included within the category. In offering this definition, the *LoWM* relies on three decades of writings by JAGs and their allies making similar arguments. During this time JAG documents argued that DPH included civilians who gather intelligence[389], provide administrative or logistical support[390], serve as 'spotters' or 'lookouts' for enemy forces[391], conduct intellectual activities with a military

[389] *The US Air Force Commander's Handbook* (1980), para. 2-8; Parks 1990, 118;
[390] *The Naval Commander's Handbook* (1987), Sec. 11.3; Parks 1990, 118; Schmitt 2004a; 2004b; *Operational Law Handbook* 2007, 30
[391] *The US Air Force Commander's Handbook* (1980), para. 2-8; *The Naval Commander's Handbook* (1987), Sec. 11.3; Schmitt 2010

value[392], construct IEDs[393], or serve as voluntary or involuntary human shields[394]. A 1997 report by the ICRC—citing many of the JAG sources mentioned here—assessed that under U.S. state practice the conditions for direct participation "may be met by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel. Other acts might be considered to be taking a direct part in hostilities, depending on the intensity of the conflict and other circumstances"[395].

Beyond enlarging the range of activities that should fall under DPH, many of these sources also argued that any loss of civilian protection under DPH rendered the individual targetable long after the conclusion of those belligerent activities, another area where the Vietnam War-era U.S. manuals—as well as the Geneva Conventions of 1949 and API—had been ambiguous. As with the range of DPH activities, this interpretive ambiguity was addressed by military lawyers in ways that afforded commanders with explicit statements authorizing close to the broadest potential interpretation of this concept. Various authors criticized what they saw as attempts in API and its interpretation by humanitarian organizations to permit "revolving door" protections for civilians who directly participate in hostilities, characterizing such interpretations as enabling such civilians to attack, drop their weapons, and retain civilian immunity—a position one JAG author referred to as enabling guerillas to "have their cake and eat it

[392] Parks 1990, 131; "Memorandum on Law and Executive Order 12333 [DoD policy on assassinations]";
[393] Parks 2002; Solis 2007; Beard 2005; Schmitt 2010
[394] Parks 1990; Schmitt 2009
[395] "Report on US Practice" [Original citation unclear]; cited as part of the ICRC's Customary IHL Database. Accessed at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule6.

too" (Parks 1990, 118, footnote 369). This phrase is repeated in the *LoWM*, which argues strongly against any interpretation of the law that would provide a "'revolving door' of protection" for individuals directly participating in hostilities (5.8.4.2). The *LoWM* explains that any civilian who commits an act that falls under DPH is liable to be attacked until "they have permanently ceased their participation." The manual provides little guidance on what such a permanent cessation might look like, beyond stating that such an assessment "must be based on a good-faith assessment of the available information" (5.8.4.-5.8.4.1.). Furthermore, the manual ultimately suggests that the burden of proof for this demonstration lies with the potential *target*, who must indicate to their would-be-attackers that they have ceased any inclination to further participate in hostilities[396].

In this, the manual was also relying on numerous JAG writings that have more explicitly offered this claim. In 2004, a lead expert with the ICRC characterized the position of this group on the question of the duration of the loss of protections as follows: "once a person had undertaken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack"[397]. The *LoWM* explicitly cites this assessment of the position of JAGs and their allies. This assessment is born out in the pages of JAG writings, which carved out this burden on the part of 'DPHing' civilians. For example, one widely cited JAG article declares that once an individual lost

[396] "However, if this participation was an isolated instance that *will not* be repeated, then no military necessity for attacking that person exists after he or she has ceased taking a direct part in hostilities." (*LoWM* 5.8.4.1, emphasis mine)
[397] Melzer, "Background Paper – Direct Participation in Hostilities under International Humanitarian Law – Expert Meeting of Oct. 25-26, 2004" 34.

his protections due to DPH, "most certainly he became a legitimate target and could not revert to his civilian status" (Parks 1990, 118). While the *LoWM*—to frame its arguments as grounded in international legal practice—refers only sparingly to U.S. sources on this matter, it repeatedly cites articles and manuals by military lawyers from Canada (Watkins 2004; 2010), Australia (2006 Australian Law of War Manual) and the U.K. (Boothby 2010; U.K. Law of War Manual), all of which, in turn, repeatedly cite and quote from a variety of JAG sources[398], including Parks' 1990 article, to argue against 'revolving door' interpretations. The *LoWM* also extensively cites the Israeli Supreme Court's 2006 ruling to make this point, which drew from the same pool of military legal scholars to argue that the return of protections required proactive and clear signals by an individual that they had broken off all ties with an armed group and DPH activities in order to regain their protections.

Lastly, JAG writings have carved out explicit authority for commanders to presume that someone is 'DPHing' when there is doubt as to the classification of their status as such. The *LoWM* explicitly rejects the claim that borderline cases should be decided in favor of greater protections for civilians. "Under customary international law, no legal presumption of [protected] status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases" (5.4.3.2). Instead, the *LoWM* states that such instances should be resolved by commanders "in good faith based on the

[398] These materials all cite writings by Air Force JAG Michael Schmitt—the most prolific JAG author on the subject—as well as other articles by and communications with Hays Parks, as well as U.S. military manuals.

information available to them in light of the circumstances ruling at the time" (Ibid.). In its discussion of DPH, the *LoWM* frequently cites the Israeli Supreme Court's 2006 examination of DPH, which asserted that "[g]ray areas [in the law surrounding DPH] should be interpreted liberally, i.e., in favor of finding direct participation". In this finding, the court was quoting from Mike Schmitt, a U.S. Navy JAG (Schmitt 2004, 509). In setting up this claim, Schmitt in turn quotes the following line from the 1997 *Supplement to the Naval Commander's* Handbook, which provided this addendum to its prior definition of DPH: "Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time" (Sec. 11.1 note 2). All of these sources have since been cited or quoted in U.S. federal statutes and court rulings issued during the first few years of the War on Terror, including the 2006 and 2009 Military Commissions Acts and the Supreme Court rulings in *Hamlily v Obama* (2009) and *USA v Hamdan* (2007). The *Hamdan* ruling, in particular, cites Schmitt's definition of DPH in determining that the defendant had directly participated in hostilities by working as a driver for high-level members of Al-Qaeda and transporting weapons in his personal vehicle.

JAG practices on the battlefield when advising on DPH issues have similarly reflected this *expansive* attitude. During the 'War on Terror,' with many members of insurgent networks functioning primarily as 'civilians,' JAGs have employed DPH in a manner that enables the U.S. to nonetheless preemptively target individuals based on

their conduct, rather than demonstrated membership, even in situations where the target has not deployed weapons against U.S. forces. A number of JAGs have provided complementary narratives of how the U.S.'s broad understanding of DPH—*expanded* by JAGs since the 1970s—became a critical source of authority for U.S. forces (Bagwell and Covite 2016; Husby 2012; Bagwell 2008; Schmitt 2007; *Lessons Learned Volume I*). Early in the invasion of Afghanistan and after the fall of the Baath regime in Iraq, U.S. forces began facing use of force circumstances that did not fit comfortably into the two types of authorities provided at the time: self-defense and attacking 'declared hostile' armed groups on sight. However, JAG after-action reports quickly noted confusion and frustration over the use of force in circumstances where individuals—whose membership in armed groups could not be immediately determined—engaged in activities that greatly stretched the bounds of self-defense[399]. According to one JAG deployed at the time "[i]n this complex environment, where U.S. ROE policy did not adequately address the situations commonly facing ground troops, commanders and their legal advisors explored other options" (Bagwell and Covite 2016, 11). Although U.S. forces did not use the term DPH very frequently in the 2000s, JAGs and operators collaborated to construct 'middle ground' authorities for using force against civilians providing 'support' functions that mirrored and utilized the arguments regarding the expanded scope and duration of DPH carved out by JAGs in prior decades[400]. These authorities have enabled U.S. forces to

[399] *Lessons Learned Volume I*, 102--"Thus, LIT was neither a declaration of hostility nor a restatement of SROE self-defense principles; it…fell in between the two"

[400] In the words of one JAG, the new targeting authorities were "roughly comparable to the liberal standard of direct participation" (Schmitt "Targeting and IHL in Afghanistan" 2009, 319). By 'liberal standard of direct participation,' Schmitt is referring to the 'expansive' version of DPH that he and other JAGs helped carve out.

more rapidly and confidently open fire when targeting, for example, suspected IED layers who no longer pose an immediate threat (Bagwell and Covite 2016, 1), 'unconventional' fighters in their homes (Schmitt "Targeting and IHL" 2009, 316), and individuals whose link to the conflict can be demonstrated through intelligence gathering on their repeated patterns of behavior rather than individual acts (Bagwell and Covite 2016, 35-36). As such, two JAGs concluded, "[f]or years now, commanders and legal advisors alike have essentially utilized direct participation authority in Afghanistan and Iraq" for a wide range of targeting activities (Bagwell and Covite 2016, 11).

One prominent case, involving the review of a determination to use force in Afghanistan, offers a telling glimpse into the flexibility with which this term was [explicitly or implicitly] applied in order to extend the use of force to a variety of circumstances. It was recounted in Chapter Six how a JAG recommended an officer for punishment based on his decision to open fire on a group of civilians attempting to carry away a wounded suspected IED layer. However, the same JAG was also asked to assess whether the soldier's initial decision to open fire on the suspected IED-layer adhered to LOAC and the ROE. Given that the individual was neither identified as a member of a hostile armed group nor engaging in an immediate threat to U.S. forces or their allies, the targeting of this individual as he left the side of the road would have to fall into that 'middle area' of DPH authorities. The issue at hand was whether U.S. forces had appropriately classified this as a case of DPH (using different language), given that no IED had been spotted and the individual was only *suspected* of having planted such a device. The JAGs who initially reviewed this case 'cleared' the soldier on this decision, despite recommending significant punishment over his decision to fire on the tractor that

came in to provide aid. Thus, the ambiguity of the individual's actions was resolved "liberally, i.e. in favor of finding direct participation," and the soldier's actions were deemed legally sufficient—reflecting the *expansive* approach taken by military lawyers in this area in general.

Similar attitudes were on display during the OPLOAC course I attended when scenarios involving DPH occurred. Throughout the two-week course, DPH arguments were frequently thrown at a targeting problem by trainees in order to 'get to yes' and provide the 'commander' with the legal authority to strike, if they chose. For example, in a discussion of the fuel trucks struck during *Operational Tidal Wave II*, course trainers entertained trainee arguments that, with sufficient intelligence, the civilian drivers of the trucks could have been considered to be 'directly participating in hostilities'—and therefore could be directly targeted after leaving their trucks and returning home. Other scenarios involving the use of force against political leaders, third-party advisers offering consultations to enemy forces, and armed patrols of civilians all played out with trainees offering 'creative' interpretations of DPH to see if they could find the authority to strike. While not all of these arguments were accepted by trainers, such as an instance where a trainee offered a DPH justification for quelling looters in an occupied zone that was quickly rejected, the overall perception of DPH provided in the course—as with 'war-sustaining objects'—was that it offered a flexible legal tool for JAGs to help enable the use of force against key targets in the War on Terror.

The most famous example of this flexibility came with the killing of Anwar Al-Awlaki in Yemen in 2010. The memo detailing the legal justification for this targeted killing was declassified in the course of lawsuits resulting from al-Awlaki's US

citizenship—which, along with his killing taking place outside of a U.S. war zone and the method used for this attack (drone strike) drew far more public outcry and attention than the DPH determination involved. One of the issues considered in this memo is whether or not al-Awlaki's activities rendered him a legitimate target. The memo lists, as one of the activities that rendered al-Awlaki targetable, that he was a major figure in "recruiting for terrorist attacks". A subsequent lawsuit by the ACLU later obtained further evidence on the decision-making used to determine al-Awlaki's status, which also revealed recruitment activities to be one of the core pieces of information used. Another issue was whether al-Awlaki had lost his immunity from attack months and years after his alleged involvement in the planning of violent activities. The memo determined that even though al-Awlaki had been mostly inactive for months before the strike, his actions had meant he had permanently lost his civilian immunity until he publicly renounced his connections to Al-Qaeda. Therefore, he could be targeted at any time.

This decision reveals two things about the legal advising of JAGs around DPH. First, even though it was authored by a civilian attorney with the DoD, the memo relies heavily on two JAG writings on DPH (Parks 1989; Schmitt 2005; "Memorandum on Law and Executive Order 12333 [DoD policy on assassinations]") to defend its positions on al-Awlaki's recruitment efforts and the duration of his DPH status. Second, given that legal limitations for targeting in areas 'outside of active hostilities' such as Yemen have almost always been far more restrictive than in war zones, such as Iraq and Afghanistan, it can be inferred that recruitment may have been considered a valid category of DPH by JAGs.

Throughout the *expansion* of DPH in articles, conferences, and in operations, JAGs perceived low legal and legitimacy risks involved in most of the applications of this concept. In terms of legal risk, JAG publications since the 1970s have explicitly remarked that the concept of 'DPH' has lacked specificity in both treaty and customary law. For example, the *Naval Commander's Handbook* (1997) specifically acknowledges the limits of the existing guidance, offering a non-exhaustive list of DPH activities before stating "[d]irect participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time" (11-3). The *LoWM* highlights the legal ambiguity in the law at a number of points in its discussion of DPH. For example, when unpacking the term 'direct,' the manual states "there are a range of views as to what that legal standard means. Thus, there may be different views about what the underlying standard means, even when there is agreement on the appropriate term to describe that standard" (5.8.1.1). The *LoWM* also quotes prominent humanitarian lawyers, including some leading figures at the ICRC, to demonstrate widespread recognition of this interpretive breadth and, more importantly, the divides that exist among international lawyers[401]. JAG articles were often even blunter in regard to this

[401] For example, in the *LoWM's* discussion of the temporal scope of DPH, one of its chief interpretive rivals, Nils Melzer of the ICRC, is cited to demonstrate the range of opinions on the subject. "See, e.g., Nils Melzer, Background Paper – Direct Participation on Hostilities under International Humanitarian Law – Expert Meeting of Oct. 25-26, 2004 34 ("At one end of the spectrum were experts who preferred narrowly defining temporal scope and favoured strictly limiting loss of protection to the period where DPH is actually being carried out. At the other end were experts who said that, once a person had undertaken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack. However, opinions varied greatly and could not easily be divided into two groups supporting distinct positions.")" (*LoWM* 5.8.1.1)

subject, with almost every article listed above including a strong reference to both the ambiguity of the term 'direct participation in hostilities' and the degree of expert disagreement over its application[402].

Regarding legitimacy risk, very little mention was made of the 'CNN' effect when discussing DPH issues at the OPLOAC Course, in comparison to an issue like proportionality. There were only two instances where trainers or trainees added caveats to their advice about the optics of attacking a 'DPHing' target: one where a hypothetical child 'spotter' and lookout was signaling an armed group about the arrival of U.S. forces and another where concern was expressed about diplomatic relations with another state being upended if their advisers to an enemy force were targeted. This included the discussion of the targeting of the oil truck *drivers*, whose destruction was presented as reflected 'common sense' principles about warfare. One experience in particular encapsulated the relative lack of concern that JAGs carry when advising on DPH issues. During one targeting exercise, my 'team' was deliberating how to advise a U.S. commander in a multinational (NATO) force on the targeting of an individual who was identified as having manufactured a large number of IEDs that had killed U.S. forces and who had trained others in these techniques. Rather than cautiously applying the law, as

[402] See, for example, Schmitt and Watts 2015: "Articles in each of the Protocols provide: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.' Though undoubtedly an important concession to the realities of combat, and although all of the experts involved in the project agreed that the provisions accurately restated customary law, these two brief articles have been exceptionally difficult to interpret and implement in practice" (185). See also, Schmitt (2010), describing the ICRC's attempt to identify interpretive overlap in the mid-2000s: "Although the planned output of the project was a consensus document, the proceedings proved highly contentious. As a result, the final product contains the express caveat that it is 'an expression solely of the ICRC's views'. Aspects of the draft circulated to the experts were so controversial that a significant number of them asked that their names be deleted as participants."

was often the case when the discussion turned to civilian casualties and detainee treatment, the application of DPH was suggested without hesitation. “I’d blow his bitch ass up and defend it on television” one trainee remarked during the discussion.

While most JAGs are less cavalier than this, the notion that the JAG’s position is *supported* (rather than hindered) by U.S. popular opinion and media attention is a subtle yet common theme in many of the JAG articles provided in this section. In his critique of API and the ICRC’s vision of DPH, Parks writes “Civilians in a combat area are expected to exercise the common sense to stay out of the way of combat operations while avoiding any action that might be construed as a threatening act by combatants” (1990 117). His text also frequently distinguishes between *‘civilians’* and *innocent civilians,* with the former referencing a segment of individuals categorized as civilians by LOAC treaty law and the latter being those who not only fall under the same treaty protections but would also be commonly viewed as civilians[403]. Bagwell and Covite open their article with a hypothetical vignette about an attack helicopter pursuing an IED-layer well after the IED has been planted. “Common sense,” the article explains, “tells the pilot and commander in the scenario to prevent a hard-to-identify enemy from escaping” (Bagwell and Covite 2016, 1,4). Schmitt, writing on the ICRC’s definition of DPH, remarks: “According to the Guidance, [sporadic fighters] are to be treated as civilians and thus may only be attacked if and while they engage in an act of direct participation. This requirement flies in the face of common sense. Imagine the difficulty, for instance, of requiring ISAF forces to

[403] “Clearly the work of some "civilians" has become so critical to military success that those individuals are civilians in name and garb only…Their civilian status should not be permitted to jeopardize the safety from attack of the innocent civilian, whose numbers make up the vast majority of any nation's population” (132).

ascertain the function of a particular member of the Taliban before conducting an attack" (Schmitt 2010 "Targeting Narcoinsurgents in Afghanistan"). These gestures to 'common sense' understandings of who is 'in the fight' reflect a predominant JAG perception that the U.S.'s legal interpretations enable the targeting of individuals whose deaths are unlikely to be perceived as injustices, thus greatly limiting the 'legitimacy risk' of carving out expanded authorities for U.S. commanders.

Conclusion

When JAGs perceive lower degrees of legal and legitimacy risk, they not only *permit* the use of military power but may attempt to carve out greater LOAC authorities for future commanders. As such, when practicing the law as a form of *expansion*, JAGs are primarily enabling their comrades to use force legally in ways that would not have otherwise been possible. First, I provided an overview of how JAGs have leveraged their 'warrior lawyer' identity to develop strategies of *expansion*. Individual JAGs, and later the JAG Corps as a whole, have primarily focused on carving a unique foothold in higher-profile spaces of law-making, such as important conferences, soft law negotiations, and the pages of law school journals. More recently, these efforts have broadened to include a second strategy of also utilizing the broader ranks of the JAG Corps in more 'micro' spaces of war and law, especially those where the U.S. can directly present its views on LOAC to other militaries. These two strategies seek to mobilize the JAG Corps' unique dual role in both the operational and intellectual practice of LOAC. Novel legal arguments can become tactics on the battlefield, which can then filter back up as evidence for more legal claims about state practice.

I demonstrated how JAGs have *expanded* the U.S.'s capacity to target various economic targets by devising and institutionalizing the notion of 'war-sustaining objectives' as legitimate military targets. I also showed how U.S. military lawyers have actively carved out a more permissive concept of civilians who 'directly participate in hostilities' in recent decades. Because of the ambiguity of LOAC definitions of legitimate targets and the perceived lack of wartime 'innocence' of key economic objects and individuals in supporting roles among the public, JAGs worked to *expand* the law through a combination of words and deeds. Chains of citations in handbooks and articles altered U.S. doctrine, which in turn allowed for more permissive practices in operations. These operational experiences have then been re-inscribed by U.S. officials (including JAGs) as demonstrations of state practice and emerging customary international law.

Lastly, 'war-sustaining' objects and DPH are not the only two "issues of ILAW where the lawful US position is questioned"[404] and the JAG Corps seeks to engage in 'Strategic Legal Messaging'. The application of LOAC in cyber activities, for example, is an area of increasing focus for the JAG Corps, in which current military lawyers have been seeding the ground for future claims of state practice in the use of cyber capabilities against both states[405] and non-state actors[406]. In this, the JAG Corps has both sought to place some of their top military legal minds at the head of major forums, such as in the development of influential 'soft law documents' on cyber activities[407] and has recently

[404] SUBJECT: Strategic Legal Engagement Planning Guidance, 30 September 2016, 1 (on file with author)
[405] The JAG literature on cyber capabilities and LOAC is vast and growing. For a widely cited example, see Schmitt (2011).
[406] "Revisiting a Framework on Military Takedowns Against Cybercriminals" (2021) https://www.lawfareblog.com/revisiting-framework-military-takedowns-against-cybercriminals
[407] The primary example of this is NATO's *Tallinn Manual on the International Law Applicable to Cyber Warfare*, which was heavily influenced by two U.S. JAGs (Schmitt 2013).

encouraged *all* JAGs to "embrace…multiple practice areas in a constantly evolving arena, [such as] Cyber"[408]. In this, the JAG Corps is seeking to carve out new forms of 'brokerage' between the professions of war and law, a theme that I return to in the concluding chapter.

[408] For example, the Army and Navy JAG Corps recently renamed their long-standing Departments of international and Operational Law to Departments of National Security Law, in a move designed to both provide a title for JAGs that is more germane to the broader legal field *and* to better stake their claim over the application of law in cyber operations. "Evolving with the Threat". Lieutenant General Charles N. Pede. *Army Lawyer*. (Issue 2, 2019). 2.

Chapter Nine: Conclusion

In this dissertation, I have argued that the proliferation and empowerment of U.S. Judge Advocates General (JAGs) in the armed forces since the 1970s—a process I term military 'lawyerization'—has occurred because JAGs re-produced their own *identity* (as 'warrior lawyers') and *role* (as 'risk managers') to carve out nodal positions that have facilitated not only their own rise to prominence but also the *restraint*, *permission*, and *expansion* of U.S. military power through techniques of 'risk management'. Rather than viewing military lawyers as expressions or outcomes of the structure of the international legal system, as has been the case in the prior literature, I conceptualize JAGs as agentic actors who have responded to broader transformations in the worlds of law and war by ensconcing themselves as novel points of linkage in between these two. As they moved to the front lines, JAGs developed a hybrid identity in which martial commitments, skills, and inclinations became as highly valued as legal ones. However, this identity is also unstable. Not only does it require JAGs to perform their legal and martial credibility to cultivate standing but it also results in a deep tension between these two components. To mitigate this, the JAG Corps has gradually adopted the role of a 'risk manager' who navigates this tension by assessing and mitigating risk to avoid saying 'yes' or 'no' in operations, as well as identifying opportunities for commanders to enhance their capabilities through the law. As 'risk managers', JAGs deploy their expertise to *restrain*, *permit*, or *expand* U.S. military power based on their perception of legal and legitimacy risk.

In Chapter Two, I provided an overview of my core argument. I first outlined three potential understandings of JAGs' professional *identity*—the soldier, the lawyer, and the 'warrior lawyer'—and argued that the latter not only holds up to empirical scrutiny, it also offers a key insight for understanding the causes of 'lawyerization'. Carving out a hybrid identity at the interstices of two fields can enable actors to function as 'brokers' across these fields and leverage different aspects of that dual credibility in different contexts. This, I argued, is how JAGs have taken advantage of waves of 'strategic restraint' reforms to position themselves as new and essential nodes for translating law into the operations center (and, eventually, the other way around). I then turned to the *role* of JAGs in operations and considered two ideal-typical framings derived from the existing literature—the 'watchdog' and the 'apologist'—neither of which, I argued, captures the full range of JAG influence on decision-making. Combining my prior assessments of the 'warrior lawyer' hybrid identity and existing scholarship on legal advisers in world politics, I posited that JAG expertise is plagued by a paradox of authority, in which the dual pillars of that authority—'utility' and 'objectivity'—undermine one another when pushed to the fore. As such, I outlined how techniques of 'risk management' enable military lawyers to mitigate key aspects of that paradox, without fully being able to unravel it. I then offered a theoretical account of how JAGs, in the role of 'risk managers', deploy their legal expertise based on their perceptions of legal risk—operationalized as legal precision and enforcement—and legitimacy risk—operationalized as visibility and prior media salience. High risk in both, I argued, leads JAGs to function as forces of *restraint*; high perceived risk in one category and low risk in the other shifts the practices of operational advisers to that of *permitting* military

power; and, when both forms of risk are perceived to be low, JAGs translate between operational and legal spaces to engage in 'law-making' activities that *expand* the military's capacity.

In Chapter Three, I demonstrated how JAGs during the Vietnam War moved from being strictly lawyers, with virtually no place in operations, to trusted and highly sought-after operational advisers on both law *and* legitimacy-related issues during the War on Terror. This account highlighted the contingency of 'lawyerization,' which was never a foregone conclusion, and emphasized the causal impact of JAG efforts to re-produce themselves as 'warrior lawyers.' In this, I argued that world-historical changes in the valuation of civilian life and visibility of warfare led to heightened strategic concern among civilian and military leaders in regard to the U.S. military's perceived legality and legitimacy when conducting warfare. In the wake of the Vietnam War, these changes were particularly acute, providing an opening for JAG leaders—some of whom had broken with existing norms and enacted operationally-adjacent activities during the Vietnam War—to present the JAG Corps to DoD leaders as important figures for carrying out these 'strategic restraint' reforms. This gradual re-production of the JAG Corps as 'warrior lawyers' from the 1970s to the end of the 20th century—largely through the invention of 'Operational Law' as a unique 'field' of practice and experimentation with new responsibilities in U.S. deployments—emerged in response to the command's initial hostility to having lawyers by their side. By the early years of the War on Terror, JAGs' demonstrations of their martial credibility had reversed the prior hostility of the command, and commanders began requesting additional lawyers during the occupations

of Afghanistan and Iraq. The rise of counterinsurgency doctrine and revelation of the systematically authorized torture and abuse of detainees led to another wave of 'strategic restraint' reforms. JAGs again positioned themselves at the forefront of these changes by leveraging their 'warrior lawyer' identity to frame themselves as key figures, both practically and representationally, for enacting a more legally conscious version of the War on Terror between the mid-2000s and early 2010s. This increase in 'lawyerization' institutionalized JAGs as key advisers on not only law but legitimacy in modern warfare and ultimately formalized the JAGs' *role* as 'risk managers.'

In Chapter Four, I unpacked the production and tension of JAGs' *identity* as 'warrior lawyers.' In this, I argued that JAGs must cultivate this dual identity for ontological security and to claim authority on the command staff. Effective operational military lawyering hinges on the production of JAGs as committed members of these two professional communities. On the one hand, JAGs' martial identity amounts to more than just wearing a military uniform. Successful operational attorneys are instructed to demonstrate their understanding of the exigencies of combat and the culture of warfighting. On the other hand, JAGs' legal identity is not just about professional titles, it is also linked to their symbols of commitment to the law and legal field. As such, JAGs must perform a complex balancing act of reconciling these two sets of identities and commitments. However, given that JAGs interact primarily with other soldiers, their legal credibility—unlike their soldiering talents and commitments—is largely presumed by their fellow officers. Furthermore, these two identities can quickly come into tension when JAGs enact their primary operational duties: providing legal advice on plans and

decisions. On the one hand, shutting down a tactically advantageous course of action by throwing out a 'red card' can erode a JAG's martial credibility. On the other hand, approving legally questionable ideas can destroy a JAG's legal identity in the eyes of their JAG superiors or their commander and fellow staff officers, if a JAG-approved plan results in serious legal consequences. This, I conclude, explains why very few JAGs adopt the *role* of a 'watchdog' or an 'apologist'. Apologists erode their own legal credibility and thus lose the trust of their commander as a subject matter expert and/or face career repercussions within the JAG Corps. Watchdogs lose their martial credibility, thus alienating them from the rest of their unit and pushing them out of decision-making.

In Chapter Five, I continued this discussion of the JAG Corps' *role* in operations by arguing that approaching these duties through the role of a 'risk manager' enables JAGs to mitigate, but not resolve, the tension that arises between the two sides of their identity. In this chapter, I highlighted five aspects of the 'risk manager' JAG, each of which contributes to reducing the effects of this tension. First, JAGs adopt the language of 'risk' to gesture towards both sides of their identity in the formation of their legal advice, rather than deploying a vocabulary that is either overly legal or martial. Second, military lawyers frame themselves as assessors of risk rather than decision-makers to avoid being put in the position of saying 'yes' or 'no' to an operational plan and accentuating the tension between their identities. Third, JAGs nonetheless influence decision-making by providing risk assessments of multiple courses of action for reaching a particular goal and, when the proposed plan appears highly risky, steering commanders towards less risky options. Fourth, once a course of action has been selected, JAGs enact

risk mitigation strategies by suggesting alterations and introducing procedures for helping an operation withstand investigative as well as external scrutiny. Fifth, JAGs not only intervene when they believe their fellow soldiers are being too 'risk tolerant' but also when they are too 'risk averse'. In this, they identify additional legal authorities for their commander and thus reinforce their martial credibility. In sum, I argue, these techniques allow JAGs to deliver advice in a manner that communicates their dual commitments, avoids saying 'yes' or 'no' as often as possible, and reduces the impact of the tension between their identities by compensating for these moments with others where they directly enable the command. However, as I show in the following three chapters, different assessments of risk result in JAGs emphasizing some of these techniques more than others under different conditions.

Military legal advisers practice international law in a way that both enables and restricts their 'clients'. My theory of JAGs as 'risk managers' identified three different ideal-typical modes of advising—*restraint*, *permission*, and *expansion*—which, I argue, are adopted based on JAGs' assessments of the 'legal risk' and 'legitimacy risk' entailed in a particular course of action. In Chapter Six, I demonstrated that, when JAGs perceive both high legal and legitimacy risk, they adopt advising practices of *restraint*. In this, they manage the risk of operations by employing techniques that primarily limit their commanders' options, such as by lobbying for alternative courses of action and, if necessary, playing 'the red card' to prevent high-risk plans from proceeding. I provided two examples of *restraint* in action: legal advising on the treatment of detainees and the targeting of specially protected objects and persons, such as museums, religious sites, and

medical personnel. While advising on the latter, JAGs have consistently opposed attacks on these objects and persons—out of a combination of both legal and optics-related concerns—and have worked to institutionalize rules that make it harder for U.S. troops to use force in these circumstances. JAG advising on the treatment of detainees has primarily demonstrated patterns of *restraint*, even in the face of intense pressure by the Bush Administration to get on board with policies authorizing torture. However, a few JAGs displayed more *permissive* approaches prior to the revelation of abuse at Abu Ghraib because of a diminished perception of the legitimacy risk of torture at military prisons that were away from the public eye. The shift of JAG advising to *permission* in these instances—as well as the JAG Corps' emphasis on *restraint* in the wake of Abu Ghraib—both support my argument that, under conditions of high legal risk, changes in legitimacy risk alter JAG practices between *restraint* and *permission*.

In Chapter Seven, I turned to JAG practices of *permission* under conditions where either legal risk *or* legitimacy risk is low and the other is seen as being high. In the first half of the chapter, I showed how perceptions of high legal risk and low legitimacy risk around the use of funds in operations; coordination with proxy forces; and the navigation of the rules of engagement have led JAGs to approach these issues primarily through risk management techniques of mitigation and enabling rather than placing limits on commanders. In these advising practices, I demonstrate how JAGs are concerned almost exclusively with formal sanctions and warn commanders about stepping over the line. However, to avoid saying 'no' they also pursue exceptions to rules; craft creative legal arguments that offer new authorities; and suggest revisions to the facts on the ground in

order to relieve the strain that these laws impose on the command. Such behavior is the most consistent and pronounced in the area of fiscal advising, with advice on proxy forces and the rules of engagement generally demonstrating this approach as well. However, I speculated that U.S. support to proxy forces *could* garner front-page attention, in which case I would expect to see operational advising change to emphasizing *restraint*. Similarly, I showed that when the rules of engagement involve hot button issues, such as the use of landmines, JAG advising similarly shifts into a form of *restraint.*

The second half of Chapter Seven focused on JAG advice on civilian casualties. I demonstrated that JAGs view the issue of civilian casualties as one presenting low legal risk, due to the ambiguity of LOAC rules on 'proportionality' and 'feasible precautions' but high legitimacy risk, due to the capacity and willingness of the media to cover and track civilian casualties in recent conflicts. As a result, JAG advising emphasizes techniques of risk mitigation, enabling military power, and making alternative suggestions. JAGs translate LOAC standards regarding 'proportionality' and 'feasible precautions' as mandatory *procedures* of, respectively, 'reasonableness' (in determining the costs and benefits of an attack) and 'good faith' (attempts to reduce civilian casualties)—both of which can almost always be met through the involvement of a lawyer. However, perceptions of high legitimacy risk move JAGs to temper their legal assessments with suggestions, in almost every case, for altering a plan to reduce civilian casualties. While these proposed revisions could be minor (selecting a different weapon system) or major (considering non-kinetic means for reaching the same goal), they are explicitly framed—unlike with *restraint*—as the commander's prerogative and rarely

result in JAGs 'playing the red card' to stop a mission. Lastly, although *current* JAG advising practices in this area generally *permit* the use of force, if the U.S. returns to earlier practices of imposing hard numerical caps on expected civilian casualties I would expect JAG advising to reflect a mix of *permission* and *restraint*. Conversely, if the military is deployed in an interstate conflict involving high operational tempo, I would expect JAG advising in this area to shift towards practices of *expansion*.

In Chapter Eight, I explored how JAGs engage in 'law-making' practices of *expansion* in areas where they perceive low legal and legitimacy risk. Not only do JAGs advise commanders in operations in a *permissive* manner, but they also move between the war room and legal conference rooms to carve out greater legal authorities for the use of military power. I began by demonstrating how these techniques of *expansion* first emerged on the initiative of individual high-profile JAGs and have since become increasingly formalized. In this, JAGs deploy both sides of their dual identity to translate novel operational practices into legal arguments, and vice versa. In this, they seek to normalize the U.S.'s legal arguments and enhance evidence of state practice in support of these claims. *Expansion* has been primarily the province of a small number of highly experienced JAGs—many of whom have moved from the military to academia—that have focused on 'core' spaces of international legal deliberation, such as important conferences and soft law projects. However, recent JAG Corps initiatives have attempted to bring more of the JAG Corps into these activities and broaden their reach to include more 'peripheral' linkages between law and war—such as military training courses, direct assistance programs, and more minor publications with a largely military

readership—all of which also rely less on interactions with humanitarian international lawyers. I provide two examples of JAG *expansion* through these techniques over recent decades: the creation of 'war-sustaining objects' as a legal category for targeting economic sites and the broadening of the concept of civilians who 'directly participate in hostilities (DPH)'. In both cases, leading JAGs in the 1980s and 1990s who were motivated by concern over the U.S.'s future capacity to wage war established these *expanded* claims in articles and handbooks. In the following decades, other JAGs built up chains of citations and migrated these claims into U.S. doctrine and policy. Furthermore, JAGs on the ground experimented with these *expanded* arguments in operations—with broadened DPH claims proliferating during the occupations of Iraq and Afghanistan and 'war-sustaining objects' being deployed in the campaign against ISIS. Although both of these claims remain—to varying degrees—controversial in international legal circles, the U.S.'s broadened DPH claims have become established as one of two recognized 'interpretive camps' on this issue and its arguments about 'war-sustaining objects' (the more recently deployed of the two) are showing signs of slipping into state practice among the world's most active militaries.

Stakes of this Research

My research shows that the multiple ways in which military lawyers deploy their expertise to influence operations indicate that military 'lawyerization' has multi-faceted consequences for the conduct of warfare by the United States. On the one hand, highly integrated military legal advisers reduce the likelihood of states committing grave violations of LOAC—such as by directly targeting civilians or executing prisoners—and

frequently lobby for restrictions on harm that go beyond the law. On the other hand, legal advisers also make it easier to use military power in a more legally advantageous and media-savvy manner and prioritize the right to use force above other concerns.

JAGs in operations and policymaking frequently inject legal and legitimacy-related concerns into decision-making. These considerations—ranging from mitigation techniques to playing the 'red card'—when integrated up and down the chain of command can serve as institutional mechanisms of restraint and reduction in harm. Just as the JAG Corps mostly (but not entirely) pushed back on the authorization of torture in the first years of the War on Terror, prominent retired judge advocates were quick to decry President Donald Trump's campaign statements that "torture works" and that he would "bring back a hell of a lot worse than waterboarding" as signs that he was "unfit to command the military"[409]. Other retired JAGs decried Trump's stated intention on the campaign trail to "take out [the] families" of suspected members of ISIS[410] and labeled such strategies illegal orders that all members of the military would be honor and law-bound to disobey[411]. Such advice was also evident in the heat of battle. In a particularly evocative anecdote from Iraq, a staff officer recalled an instance in which an airstrike had seriously wounded an insurgent and the commander wished to launch a follow-up attack. Seeing the wounded individual crawling out from the initial blast zone through the drone footage, the JAG and staff officer engaged in a fierce argument with the commander over

[409] "Trump is unfit to command the military" (2016) https://www.usatoday.com/story/opinion/2016/03/03/donald-trump-commander-in-chief-war-crimes-military-torture-civilian-targeting-column/81271916/.
[410] "Trump's campaign rhetoric, ISIS and the law of war" (2016) https://theconversation.com/trumps-campaign-rhetoric-isis-and-the-law-of-war-55807.
[411] "President Trump's Illegal Military Orders" (2016) https://time.com/4244608/donald-trump-military-orders-illegal/.

the deployment of a second strike, at one point shouting "that's an illegal kill!"[412] The force of not only the law but the lawyer as its voice, the staff officer implied, eventually stayed the commander's hand.

Beyond instances of *restraint*, military lawyers also frequently emphasized using minimal force in both strategic and tactical decision-making. As mentioned frequently in the prior chapters, my JAG interviewees almost always interrogated my hypothetical scenarios to try and determine less destructive methods for reaching the same ends, quite frequently beyond the bounds of what they believed the law required. Depending on the circumstance, these suggestions often went to great lengths to employ military power with the fewest possible consequences for civilians. These legal techniques make use of technological developments that enable, at least in theory, wider capabilities for controlling the extent and location of violence—providing an arsenal that can allow for calibrating the extent, direction, and timing of an explosion, or even whether a missile explodes at all[413]. The JAGs in my training courses consistently pushed their 'commanders' to consider every piece of this arsenal in order to "see what we can do to get [the number of civilian casualties] down" (Interview 01.01.06).

JAGs also broadly institutionalize rule-following behavior, even if, when the perceived legitimacy risk is low, the emphasis is placed on navigating those rules for the

[412] "Interview with MAJ Peter Zike"
[413] Since 2017 the military has made selective usage of a missile that does not explode but rather "brandishes knives to shred [its] target". This is designed for use in urban warfare where the military wishes to attack only a particular room in a structure without causing harm to the building as a whole. "Secret U.S. Missile Aims to Kill Only Terrorists, Not Nearby Civilians" https://www.wsj.com/articles/secret-u-s-missile-aims-to-kill-only-terrorists-not-nearby-civilians-11557403411

overall benefit of the command. The bigger picture aim, many of my interviewees explained, is to "put limits on something [war] that, by its very nature, rejects limits" (Interview 01.02.12). In this, many of my interviewees passionately invoked the specter of a return to total warfare, where the only rule of combat is that there are no rules. This monstrous future, a few described, has its origins in the seemingly minor, everyday actions by which officers and their subordinate soldiers either learn to follow the rules or habitually begin to jettison them. JAGs, my research shows, have become a crucial part of how the military sutures this habitual rule-following into the fabric of operational conduct.

Yet this research also reveals the consequences of using military lawyers to enact these restraints, reduce harm, and ward against lawlessness. Institutionalizing the expertise to uphold the rules has also given the military greater capacity to 'flex', obtain exemptions from, and expand those rules. As my last two chapters show, frequently the conditions under which JAGs act as forces of *restraint* are not present. Most areas of LOAC and military operations have not been perceived to entail both high levels of legal *and* legitimacy risk, even under two decades of operational circumstances in which rules and perceptions of the military's behavior have taken on outsized importance for the U.S. armed forces—a point that I return to in a moment. While *permissive* JAG approaches do, in many cases, reduce harm and reinforce general patterns of rule-following, they first and foremost affirm the right to use force—not international law or legitimacy or humanitarian concerns—as the fundamental principle of the military as an institution. Seen through this broader lens, 'lawyerization' does not much alter the tools and

techniques of war-making. Rather, it cleans them up and makes them more palatable—at least to certain audiences[414].

Furthermore, I have shown how much perceptions of legitimacy risk matter to how JAGs advise commanders. Even when the rules are generally precise and enforceable, JAGs primarily seek creative ways for evading limitations when their analyses of legal risk are not also influenced by considerations of extra-legal appropriateness and strategic perceptions. In this manner, JAG advisers at the U.S.'s Guantanamo Bay prison facility *permitted* their commanders—often proactively—to engage in torture. Despite general depictions of this behavior as 'lawless', acts of JAG *permission* are not primarily grounded in a perception that the laws don't have teeth. Rather, these military lawyers believed that their actions were taking place in the absence of media and public relations oversight, not the absence of legal supervision. Similarly,

[414] My research, as well as the prior scholarship on military lawyers (and legitimacy in LOAC more broadly) have not fully addressed the question of *who* is moved by the U.S.'s demonstrations (or those of other states) that they uphold legality and legitimacy in warfare. After the invasion of Iraq, the War on Terror became highly unpopular around the world and gradually eroded support at home. Seen from this angle, the link between what the military *believes* will legitimize its actions and what actually determines how war-making is perceived by most audience appears tenuous, at best.

One answer is that, within a (primarily still) liberal international order, these demonstrations matter to key global governance experts and policymakers, even if they don't often work for the broader public. Another answer would be to consider the counterfactuals of *not* communicating these commitments. If the U.S. military had given up on legality and legitimacy, these negative perceptions and bad headlines could have grown into far more serious domestic and international political challenges to the U.S. war effort. Going further, perhaps if the War on Terror had been conducted, from the start, in a manner more in line with JAG advising, it might not have become so broadly associated with lawlessness and disregard for civilian lives. Alternatively, it may be that these expensive displays of fidelity to the law and humanitarian concerns are, in fact, largely self-referential. U.S. soldiers—or, perhaps, just the U.S. officer corps—want to feel like the 'good guys' at the end of the day, even if they often complain about these limits in the moment. Perhaps this moral identity is grounded as much in the means of warfare as it is in the ends, thus making the military the primary audience for its own claims. I propose a modest version of the latter argument in a separate article (Blasenheim 2021, forthcoming in the *Cambridge Review of International Affairs*). However, for the time being, these potential answers are largely speculative. There is far more research to be done in this area.

the degree of JAG efforts to mitigate harm in the use of force depended, first and foremost, on concerns over optics rather than law[415].

In addition to normative implications, this observation suggests that the capacity of 'lawyerization' to promote less destructive methods hinges on relatively shaky foundations. As I briefly explored in Chapter Seven, current patterns of media attention to civilian casualties in U.S. wars cannot be presumed to hold. The contemporary levels of scrutiny provided to the killing of civilians—which are still insufficient for getting an accurate picture of the costs of war—may well prove to be an exceptional deviation from a much more gruesome norm. If the U.S. returns to a period of high-intensity conflict with an opponent who can enact much higher casualties on U.S. soldiers and civilians, my research suggests the perceived legitimacy risk and concern with harm mitigation enacted by JAGs would be noticeably diminished. In a signal of this potential future, the JAG Corps has explicitly begun to emphasize that LOAC authorizes *far* more civilian casualties than has become the norm over the War on Terror. Because pure legal analysis by the JAG Corps in this area—requiring just procedural demonstrations of 'reasonableness' and 'good faith'—almost exclusively serves to *enable* the killing of civilians, many of the main humanitarian contributions of 'lawyerization' could disappear under different operational environments.

[415] My analysis does not give much explanatory weight to ethical motivations to reduce human suffering in JAG advising. However, that is not to say these were not present. My interviewees overwhelmingly expressed moral concern with the harms of warfare and a desire to reduce those harms. These concerns permeated most of the issues covered in this dissertation and, as described in Chapter Four, constitute a part of JAGs' self and collective identity. However, risk assessments of optics were the primary factor that *differentiated* these modes of JAG advising.

This research also indicates that for 'lawyerization' to "work", *restraint* must remain the exceptional mode of JAG advising rather than the rule. This dissertation has demonstrated just how integral JAGs' military credentials have been to their capacity to claim institutional positions of prominence and cultivate authority on the command staff. Additionally, I have shown that when JAGs play 'the red card'—the 'last resort' technique of *restraint*—with any frequency they erode their own authority and future capacity to dissuade their fellow soldiers from illegal actions. This paradoxical element of the 'lawyerization' of the military—in which the capacity to constrain requires that constraining frequently be eschewed—indicates an important limit on the ability of military lawyers to achieve humanitarian outcomes under even the most ideal of conditions.

Additionally, my research contains important implications for not only U.S. war-making but also law-making. The United States has long carved out an exceptional place for itself in international law (Ikenberry 2011) and, in recent decades, has pursued that exceptional place with particular vigor in the area of the Laws of Armed Conflict. My research suggests that the U.S.'s 'army' of military lawyers should be viewed as neither cause nor outcome of these heightened practices of exceptional law-making. Instead, 'lawyerization' is an under-appreciated and increasingly impactful pathway by which the U.S.'s attempts to shape the law in its interests have traveled. This pathway is not merely a reflection of design by U.S. leaders and the U.S.'s material power. First, JAG efforts to *expand* the law were initially born of their own initiative. Second, the capacity of JAGs to gain a foothold in international legal debates—as international lawyers who have *lived*

the application of LOAC on the battlefield, not merely debated it—was itself the product of the JAGs' own, historically contingent efforts of self-reproduction as 'warrior lawyers.' Rather, the 'law-making' activities of JAGs, my research shows, should be viewed as an important element of the U.S.'s broader efforts and disproportionate capacities to carve out a permissive vision of LOAC.

Furthermore, my research shows that JAGs' unique contribution to these efforts is not necessarily the persuasiveness of their arguments (although some of their ideas have featured such content). Rather, this value lies in their dual position in both international legal circles and operations centers, which enables them to work both sides of the determination of state practice in regard to the application of LOAC. At conferences, in the pages of law journals, and through a proliferating array of digital forums JAGs stake out novel claims that promote a permissive approach to the application of law in operations. These claims are both *inspired by* and then *inspire* experimentation with new practices on the ground which, increasingly, can be communicated directly to the military officers of other states. As such, statements of law lead to demonstrations of operational practice (by the U.S. and others), which can then filter back up as evidence of law—all through the networks of the JAG Corps and its close relationships (commanders, international lawyers, and legal advisers to other militaries). In this manner, military 'lawyerization' facilitates the U.S.'s reliance on the slow normalization of 'exceptions' and minority opinions (Sanders 2018; Weizman 2010; Jones 2015) as well as the potential hardening of those norms into statements of emerging customary international law as its primary vehicle for 'law-making'. This further allows the U.S. to eschew and

diminish other avenues of 'law-making' in the international system, such as international courts (Alter 2014), international institutions (Brunnée and Toope 2010), and treaty negotiations (Mantilla 2020).

This observation points to another theoretical implication of my research for the study of international law in International Relations. A number of texts have highlighted patterns such as the diminished representation of military officials at treaty conferences (Fazal 2018) and the increased power of non-state actors to set agendas (Price 1998; Mantilla 2020) as signs that humanitarian actors are increasingly charting the course for the Laws of Armed Conflict. However, my research suggests that scholarship in IR in recent decades has too readily framed the military as a passive actor in the development of LOAC. Whether articulated through the lens of formal 'legalization' (Abbott et al. 2000) or processes of norm diffusion (Finnemore and Sikkink 1998) and soft law (Finnemore and Toope 2001), these accounts tend to present militaries as institutions or actors that can merely *react* to these changes, through forms of adoption (compliance) or resistance (non-compliance). My research shows how military actors participate in the politics of international law with agency, both in the production of themselves and the law. Taking seriously the agency of the military—and military lawyers as its primary broker between the worlds of law and arms—can enable scholars to better understand how LOAC changes and how international law is translated into operations. This point is particularly relevant given the global reach of 'lawyerization' today—which I turn to in the next section—and the tendency of scholars to treat military lawyers as expressions of the legal system. In this, greater emphasis on the agency of military actors can contribute

to existing debates on whether LOAC as a legal regime is in 'crisis'—in part due to the U.S.'s practices (Clark et al. 2018)—and what the stakes of such a crisis might be.

Lastly, this research has conceptual implications for broader scholarly depictions of international law and power. As I discussed in Chapter One, scholarship on international law has tended to frame the law as constraining or enabling force. My research contributes to a newer wave of work that highlights both of these aspects (Aalberts and Gammeltoft-Hansen 2018; Búzás 2017; Nuñez-Mietz 2016; Sanders 2018; Rajkovic, Aalberts, and Gammeltoft-Hansen 2018) and adds novel insights about how these 'faces' of the law are interconnected. In order to have the credibility to constrain U.S. forces, JAGs must also enable them (including by *expanding* the law). Similarly, in order to be effective in these enabling activities, JAGs must demonstrate their commitment to the law by constraining the use of military power. As such, each of these 'faces' of the law requires the other. In this, I am not suggesting that the history and ontological conditions of U.S. military lawyers are generalizable to all practices of international law. However, beyond the unique conditions of the 'lawyerization' of the U.S. military, novel research is identifying many other examples in which both of these 'faces' are visible. My work demonstrates the need for scholarship that not only declares that 'the law constraints and enables [and is a form of] state power' but takes these functions as vitally interconnected and thus worthy of cotemporaneous, rather than isolated, explanation.

The Globalization of Military Legal Advising

As noted in the introduction, military 'lawyerization' has not been an exclusively U.S. phenomenon. This represents an important area for future research, which I have begun in preparation for this dissertation. *At least* forty states now field legal advisers to their militaries in some capacity, with the actual number almost certainly being higher[416]. Outside of the U.S., 'lawyerization' has moved the fastest in states featuring some or all of the following characteristics: a political system and economic status as an 'advanced industrial democracy'; a close military relationship with the United States; military deployments in contexts of counterinsurgency, 'counterterrorism', and/or the military administration of occupied territory; a military justice system for punishing criminal offenses committed by soldiers (rather than charging servicemembers under civil codes and/or in civil courts)[417]; and a common law legal system. Yet this shift has not occurred in the same way for all states. As explained in the introduction, different militaries have become 'lawyerized' according to different degrees of 'intensiveness'—based on the authority and breadth of responsibilities in operations—and 'extensiveness'—based on how widely legal advisers are deployed and at which points in the chain of command. I

[416] This is a conservative estimate, based on the legal advisers to forty-three different states that I have spoken with and/or attended legal adviser training courses and symposiums with. I adopt the term legal adviser here, rather than military lawyer, because—as I discuss further in this section—not all operational advisers to militaries are lawyers. Thus, in this section, I use the broader category of 'military legal adviser' to describe this general class of actors.

[417] The vast majority of states that use military lawyers (rather than civilian lawyers) as operational legal advisers all have long-standing codes of military justice that are considered distinct from the civil legal system. In such states (the US, the UK, and Canada being three examples), justice in the military is adjudicated according to a distinct body of law—military law—and typically presided over by the military's own legal experts. In comparison, states that use civilian lawyers for counsel, such as France, have long considered military justice to be a part of the civil legal code and prosecuted soldiers—except under extreme circumstances—in civilian courts with (specialized) civilian barristers and judges.

provide three examples of relatively lawyerized militaries (the U.K., Israel, and France) before returning to broader trends among states with some degree of military lawyerization.

The armed forces of the United Kingdom have displayed tendencies of high 'intensiveness' and 'extensiveness' with regard to military 'lawyerization' for most of the 21st century. U.K. legal advisers (also military lawyers) can be found in more or less the same positions as U.S. JAGs on land, although the ranks of legal advisers in the Royal Navy and Air Force are noticeably thinner[418]. These legal advisers began as military justice experts and then first slowly expanded into pseudo-operational—but largely informal—duties in the context of 'counterterrorism' operations in Northern Ireland during the late 1970s and 1980s—mostly around legal issues with detainees and the institution of rules of engagement by the military to attempt to reduce widely-covered use of force incidents by soldiers against civilians[419]. Participation in coalition operations with the U.S. during the 1990s (especially the First Gulf War and NATO intervention in Serbia and Kosovo) led to the institutionalization of military lawyers as operational advisers[420] (Interview 02.02.02). As with the U.S., the U.K.'s participation in the War on Terror has expanded the ranks of their legal advisers as well as their purview (Interviews 02.01.01; 02.01.02; 02.01.03; 02.01.04; 02.01.05; 02.01.06) and has furthered a strong

[418] Virtually no scholarship exists on U.K. legal advisers in operations. Jones (2020) had intended to include the U.K. as a third case study but was denied permission to interview British military lawyers.
[419] This led to the creation of the Army Legal Corps during this time—a much more centralized and influential organization for the fielding of military lawyers.
[420] For example, Royal Air Force Legal Branch was significantly expanded and revised in the wake of the First Gulf War, largely by virtue of the rushed integration of a couple of RAF lawyers into these roles alongside U.S. JAGs in coalition headquarters.

trend of the U.K. molding its legal advising program around the U.S. example (Interview 02.02.01).

U.K. military lawyers today perform much of the same breadth of *legal* activities as JAGs in the field and demonstrate many similar techniques of relationship-building as their American counterparts, including many of the same techniques for performing and balancing a dual soldier-lawyer identity. However, military lawyers in the U.K. have a much less established position advising on issues of legitimacy and are much more cautious about offering guidance on 'policy', with the U.K. frequently fielding 'political advisers' whose precise function is to offer such advice[421].

The Israeli Defense Forces (IDF) have incorporated legal advisers in a manner resembling high 'intensiveness' but much lower 'extensiveness'. Israeli military lawyers, referred to as Military Advocates General (MAGs), were also formed to conduct military justice issues and then expanded into operational advising roles[422]. Decades of experience in the administration of the Palestinian Occupied Territories since 1967—where MAGs have extensive authority over daily life through a combination of military codes, court rulings, holdovers from the British mandate of Palestine, and international law pertaining to occupations—demonstrated how uniformed lawyers can contribute to the military's broader strategic goals. As such, within the narrow scope of advice to commanders on the laws of occupation, the Israeli MAG Corps' involvement in operations precedes that of

[421] However, my conversations with U.K. legal advisers indicate that military lawyers are frequently invited by commanders to participate in discussions of legitimacy along with these political advisers.
[422] In contrast to the U.K., there is as much written about Israeli MAGs as about U.S. JAGs. See, for example, Jones (2015; 2020); Craig (2013); Weizman (2010; 2011); Cohen (2011); Erakat (2020); Hajjar (2005).

the U.S. JAG Corps. However, for the rest of the 20th century, the MAG Corps remained primarily static in regard to their activities as advisers on operational planning and decision-making (Interview 03.02.01). This scope of activities rapidly grew, however, during the Second Intifada (2000-2005) and subsequent 2006 Lebanon War to include the oversight and development of novel targeting policies and legal arguments[423] (Ibid; Interview 03.02.02). During this period, the U.S. JAG Corps and the MAG Corps began a period of greatly enhanced cooperation in terms of both advising practices and broader legal positions regarding LOAC (Interviews 03.02.02; 01.02.01).

Since at least the late 2000s, the International Law Division of the MAG Corps has had a permanent, institutionalized presence in the operational decision-making chains of the Israeli Defense Forces' three regional command headquarters, with lawyers on call around the clock to review targeting packets and provide advice on targeting[424]. However, two interconnected characteristics of Israeli operational advising distinguish it from that of the U.S. First, MAGs tend to be more independent and disconnected from their commanders than U.S. JAGs, with commander-lawyer relationships often being more adversarial[425]. Israeli MAGs also place less emphasis on demonstrating their martial identity than U.S. JAGs do, with many of the soldierly performances described in chapter four being relatively foreign[426]. Second, MAGs tend to wield more *formal* operational

[423] According to Jones' (2020) interview with the retired former Head of the International Law Division of the MAG Corps who first placed MAGs in targeting roles, his direct inspiration for these activities was the accounts he had read of U.S. JAG involvement in the invasion of Panama (1989).
[424] Fieldwork notes: Informal conversation at Advanced LOAC Course (05.07.18). San Remo, Italy.
[425] For example, MAGs do not deploy with units in the field to advise on the wide range of topics fielded by U.S. operational lawyers (Interview 03.02.02).
[426] For example, an Israeli MAG officer also in attendance at the U.S. Army's OPLOAC Course remarked to me, during a break: "I didn't expect to see so many soldiers here…I'm wearing a uniform. But [the U.S. JAGs are] really *soldiers*." Fieldwork notes: Informal conversation at OPLOAC Course (03.13.18).

authority than JAGs and are more comfortable being seen as decision-makers, under certain circumstances, than JAGs[427]. Like JAGs though, MAGs have also been very heavily involved in 'law-making' activities, especially around the classification of conflicts and use of 'targeted killing' techniques (Jones 2015).

France's armed forces have rapidly 'lawyerized' over the 21st century, with operational legal advisers displaying signs of moderate-high 'intensiveness' and moderate-high 'extensiveness' just within the last decade[428]. Unlike the U.S., U.K., and Israel, France has a civil law code and its military justice system is limited to disciplinary (administrative) actions, with more serious crimes being prosecuted under the civil legal code (although at times in a distinct military courtroom with a mix of civilian and uniformed lawyers and personnel). As such, the French military does not have a long-standing institutional equivalent to the U.S. JAG Corps and its legal advisers are not lawyers (Interview 04.01.01). Rather, French operational advisers are technically logistics officers falling under the Quartermaster's Corps who receive specialized training in LOAC and international law (Interview 04.01.04). This unique division was created wholesale after the 1999 NATO intervention in Serbia and Kosovo, during which France was effectively pushed out of the legal aspects of the coalition's targeting practices (which were almost entirely shaped by the U.S. and U.K.) because they did not have sufficiently trained officers to contribute to these deliberations (Interview 04.01.01). The

[427] For example, under certain circumstances, MAGs have the authority to veto targeting decisions and the approval of the Military Advocate General (the top military lawyer) is required for the IDF to undertake certain changes to operational policy (Interview 03.01.01). Retired MAGs and Heads of the International Law Department have openly discussed the role they have played in shaping, approving, and vetoing important operational decisions.

[428] I was unable to locate any scholarship on French operational legal advising, although I was only able to search for these resources in English.

size and formal scope of the French operational legal advising division have grown rapidly since the early 2000s, although these new authorities were not really put into practice until French forces began conducting kinetic 'counterterrorism' operations in West Africa in 2013 (Interview 04.01.02).

The department has further expanded since French forces joined the U.S., U.K., and others in conducting operations against ISIS in 2015 (Interviews 04.01.02; 04.01.03; 04.01.05; 04.01.06), with a new series of policy changes that increased the 'extensiveness' of French legal advisers having been announced (but not yet implemented) just weeks prior to my interviews with six active-duty French legal advisers in spring 2018[429]. In sum, French legal advisers are highly specialized experts on LOAC and, to a certain extent, other areas of international law that may impact operations. However, they have very little role outside of those areas and, as with U.K. legal advisers, are frequently accompanied by political advisers who are identified as the commanders' primary advisers on matters of legitimacy. In comparison with U.S. JAGs, French legal advisers also appear to have a more adversarial relationship with their commanders, although they do not hold formal veto powers in any circumstance and therefore more frequently run into obstacles having their legal advice heeded than legal advisers to the U.S., U.K., and Israel[430].

[429] Many of my U.S. and French interviewees gave examples of JAGs instructing French legal advisers on the 'tricks of the trade' in coalition operations and other military legal forums in the last decade as the French legal advising division has grown.

[430] It's unclear if this is a relationship that French legal advisers, as a whole, are looking to change, as the U.S. JAG Corps did during the 1970s and 1980s. My interviewees largely described the challenges they faced in being a significant impediment to their effectiveness and hoped to carve out better relationships with commanders in the future (Interviews 04.01.05; 04.01.06).

Many other militarily powerful states have deployed operational legal advisers in positions of low 'intensiveness', low 'extensiveness', or both. For example, Pakistan[431] and Indonesia[432] have long-standing JAG Corps that, until quite recently, have had very little role in operations but have recently begun emphasizing these topics. The Russian military has a number of experienced military lawyers possessing a vast knowledge of LOAC, but only deploys them at very high levels on the chain of command (Interview 05.01.01). China fields more military lawyers than any state in the world, although the operational role of those attorneys appears quite limited[433]. Within the last few years, perhaps as a result of significant negative media coverage, Saudi Arabia has begun sending uniformed but (primarily) non-lawyer legal advisers to prominent international training courses[434].

One potential pathway for future research on military 'lawyerization' is to conduct a more comparative study of both the causes and form of 'lawyerization' among states with larger, well-funded armed forces. Whereas other states may not have enough resources or enough of a standing military to warrant training and maintaining significant numbers of legal advisers, these states and others with a sizeable military capacity could provide a sufficient 'universe of cases' from which to unpack 'lawyerization' around the world. In this, not only have such states 'lawyerized' their militaries to greatly varying degrees—across axes of both 'intensiveness' and 'extensiveness'—but their legal

[431] Fieldwork notes: Informal conversations at Foundations Course (05.11.18) and LOAC Trainers Course (05.16.18) San Remo, Italy.
[432] Fieldwork notes: Informal conversation at LOAC Trainers Course (05.16.18) San Remo, Italy.
[433] Fieldwork notes: Informal conversation at LOAC Trainers Course (05.18.18) San Remo, Italy.
[434] Saudi officers were, by a sizeable margin, the most heavily represented nationality at the Foundations Course I attended at the International Institute of Humanitarian Law (IIHL) in San Remo, Italy. Conversation with trainers at the IIHL indicates that this is a recent development.

advising corps have also taken on different *identities* and *roles*. While the trajectory of U.S. JAGs as 'warrior lawyers' who function as 'risk managers' in operations may or may not hold true in these other cases, the core framework of this dissertation—assessing the causes and effects of 'lawyerization' by analyzing both structural changes and the efforts of legal advisers to construct *identities* and *roles* in operations—could prove a useful starting point.

However, any comparative study of military 'lawyerization' will have to contend with the deeply interconnected nature of these phenomena, especially in regard to the outsized influence of the United States. While this study has focused exclusively on the U.S. military, my research indicates that studying any other military with a moderate to high degree of lawyerization across both axes as a discreet 'country case' would be misleading[435]. Even relatively early adopters, such as the U.K., Israel, and France, have been notably impacted by U.S. operational advising through mechanisms of socialization and institutional conformity in coalitions; strategic coordination; and emulation. For example, many lawyerized militaries have, as in the case of the U.K. and France, increased the operational presence of legal advisers through their participation in the NATO alliance, which now requires states to attach an appointed legal adviser with their forces (Interviews 01.01.08; 01.03.01). States like Denmark (Interview 05.01.01), Canada (Pitzul 2001), and the Netherlands[436] have much more thoroughly incorporated their legal advisers in operations as a result of years of operational experience with NATO missions

[435] It is of course possible that my position as a U.S. citizen, an English speaker, and a resident of the U.S. with greater access to the U.S. military than other larger powers has kept me unaware of major trajectories of military 'lawyerization' in other states.
[436] Fieldwork notes: Informal conversation at Advanced LOAC Course (05.11.18). San Remo, Italy.

in Europe during the 1990s and Afghanistan after 2001[437]. During fieldwork at NATO's Supreme Headquarters Allied Powers Europe (SHAPE), I spoke with legal advisers from a dozen NATO member states who review plans and plot legal strategies for the alliance—with a number describing how NATO has served as a catalyst for the diffusion of operational legal advising in Europe since the late 1990s[438]. However, the background of these advisers varies widely, with states such as Germany, Greece, Poland, and many of the Baltic countries sending civilian legal advisers who receive specialized training in LOAC.

Much of the most recent 'wave' of military 'lawyerization' has taken place within the last decade in small and middle powers through direct military assistance programs. The leading provider of this funding and instruction around the world is the United States, which now aims to train small to moderate numbers of legal advisers on LOAC and operational advising for each of the states to whom it provides substantial legal assistance and support—in some cases as a condition of that aid (Interview 01.02.16)[439]. For example, U.S. JAGs have set up a flurry of 'legal interoperability' and 'legal assistance' training programs in Uganda, Nigeria, Ghana, and many other states in Africa, including forums hosted by U.S. Africa Command and the Department of Defense that provide (military only) discussions of pressing issues in LOAC[440] and a specialized

[437] Other non-NATO partners who have deployed to either Iraq or Afghanistan for stretches of time, such as Australia and New Zealand, have seen their military lawyers—traditionally focused on military justice—also take a more pronounced operational role.
[438] Fieldwork notes: Supreme Headquarters Allied Powers Europe (08.05.18). Mons, Belgium.
[439] I did not hear of any instances where offers to fund trainings for legal advisers were met with resistance and thus cannot speak to how strictly this is enforced if there is any friction.
[440] For example, the "The Africa Military Law Forum" is an annual military conference started by AFRICOM in the mid-2010s to facilitate "legal interoperability" between the U.S. and its partner forces

multi-day summit for pairings of commanders and legal advisers to work through operational issues together and build trust[441] (Interview 01.02.16). Similar endeavors have been made by U.S. Pacific Command to host summits of U.S. allies in East and Southeast Asia and Oceania—often with a focus on Chinese expansion and the Law of the Sea to combat Chinese claims to exclusive territorial waters (Interview 01.01.16). Legal support training is also now attached to U.S. military assistance to major Latin American military partners, such as Colombia[442]. Furthermore, as part of its 'nation building' programs, the DoD has established JAG Corps in the militaries of Iraq and Afghanistan although, based on conversations with two military advisers to Iraq, in the former case at least these military lawyers have yet to take an impactful role in operations[443].

These regional efforts are complemented by a centralized DoD program called the Defense Institute of International Legal Studies (DIILS) [444] that provides operational legal training for, likely, hundreds if not thousands of legal advisers, commanders, and operators around the world each year. In this, DIILS offers both one or two-week, JAG-taught courses held at its school in Newport, Rhode Island as well as JAG trainer teams

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conducting 'counterterrorism' operations across the continent. https://www.africom.mil/image/32322/the-africa-military-law-forum.

[441] "Legal Colloquium strengthens relationships between African commanders and legal advisors," https://www.dvidshub.net/news/368013/legal-colloquium-strengthens-relationships-between-african-commanders-and-legal-advisors.

[442] A high-ranking Colombian legal adviser I spoke with described the direct role that U.S. JAGs have played in developing a Judge Advocate division in the Colombian military. (Fieldwork notes. "The Multinational TJAG Interoperability Symposium" (05.28.18). Charlottesville, VA). Others have argued that the Colombian military's turn to LOAC in recent years has been driven by an interest in framing its conduct in terms of LOAC rather than human rights law, given the greater permissiveness of the former.

[443] Fieldwork notes: Informal conversations at Foundations Course (05.09.18)

[444] https://www.dsca.mil/defense-institute-international-legal-studies-diils

that travel to provide free or low-cost training at the facilities of U.S. allies and security partners. During fieldwork at the DIILS training center in Newport, I was able to sit in on a few course sessions taught by JAGs. As with the Army's OPLOAC course, these sessions combined instructions on the content of the law with guidance on the art of being an effective legal adviser, such as through the techniques of the operational 'risk manager'. Through these courses—as well as military legal symposiums for high-ranking legal advisers, one of which I attended at the Army JAG School—JAGs also engage in Strategic Legal Messaging activities (Chapter Eight) that provide a favorable view of U.S. legal positions, such as by teaching the U.S.'s Law of War Manual and the Additional Protocols as co-equal interpretative versions of modern LOAC.

A different trajectory for further research would be to study these diffusion patterns, their motivations, and their effects, rather than approaching 'lawyerization' as a phenomenon that occurs primarily within the political borders of discreet states. While these diffusion patterns would likely emphasize the U.S.'s efforts, similar programs have been established by other states and groups of states, such as the U.K., France, the Netherlands, and NATO. France, for example, has established similar training programs in West Africa for its operational partners. In this, it's not fully clear why the U.S., France, and others invest the time and resources into these programs. My JAG interviewees offered a variety of guesses, ranging from a desire to integrate rules of engagement with proxy forces to the desire to spread U.S. legal arguments regarding LOAC and "commitment to the rule of law". Similarly, it's not yet clear what motivations and visions smaller militaries have for participating in these trainings and

symposiums. The participants in these courses who I spoke with provided an even wider range of explanations, which included enhancing their 'counterterrorism' capacity, building ties with the U.S., and, quite simply, enjoying an all-expenses-paid trip[445]. Furthermore, none of these training courses have particularly good ways of assessing what the impacts of these courses are on legal advisers and operations. Taking these growing lines and practices of "legal diplomacy" as a starting point for unpacking 'lawyerization' could offer another fruitful study.

Lastly, military 'lawyerization' could be studied in terms of conflict and cooperation between transnational networks of international legal experts. Despite differing in terms of identity and role, military legal advisers have nonetheless formed loose networks as a common 'class' of actors located at the interstices of law and war in global politics. My interviews and fieldwork indicated plenty of coordination between, for example, U.S. and Israeli military lawyers over their shared interests in most LOAC debates (Interview 01.02.01). More broadly, many of the military legal advisers with whom I attended legal training courses grumbled, either publicly or in private, about what they saw as general attempts by NGOs and humanitarian organizations to handcuff the armed forces that attempted to follow LOAC, to the benefit of those (state and non-state) armed groups that did not. In this, the legal advisers—despite sometimes heated interpretive disagreements between them[446]—typically saw themselves as being on the

[445] This was a consistent, if partial, motivation for most every participant—student and trainer—in the majority of the legal training courses that I attended, regardless of nationality. The IIHL in San Remo, for example, is located in an historic villa along the Italian Riviera.
[446] A smaller number of the legal advisers I spoke with complained about the 'permissive' attitudes of, most often, U.S. JAGs and Israeli MAGs as undermining LOAC and the credibility of their profession.

'military' side[447] of a broader struggle for 'ownership' of the rules of war between those who refer to these rules as 'the laws of war' and those who adopt the term 'international humanitarian law'[448] (Anderson 2003a; 2003b; 2018).

On the other hand, these relationships with proponents of 'international humanitarian law' are not exclusively antagonistic. Military 'lawyerization' has long been supported and promoted by many of the same organizations that can be the focus of ire for many military legal advisers. Article 82 of the First Additional Protocols—which calls for all state parties to field military legal advisers—was proposed and passed (in a weakened form) through the combined efforts of humanitarian advocates in government and at the ICRC[449]. Similar to the position taken by U.S. officials, most humanitarian international legal organizations frame 'lawyerization' as an exemplification of and mechanism of a state's commitment to the law—largely framing military legal advisers as 'watchdogs.' For example, in 2003 the ICRC published a guide urging states to integrate legal advisers into their armed forces, arguing that "[i]ntroducing legal advisers into the armed forces demonstrates a State Party's commitment to improving respect for

[447] Furthermore, many of these legal advisers shared common frustrations with commanders and operators as well as criticism from conservative political circles and proponents of realpolitik who have portrayed 'lawyerization' as a naïve and harmful trend. For example, in the U.K., high profile human rights cases filed against the military for actions taken in Iraq and Afghanistan have been met with divided opinion in the public and military and, at times, triggered a backlash against judge advocates. "Lawyers to right of them, lawyers to left of them" (2014) https://www.economist.com/britain/2014/08/11/lawyers-to-right-of-them-lawyers-to-left-of-them

[448] This was even true of many of the civilian legal advisers to militaries, I spoke with such as legal advisers to the German armed forces who—while being critical of certain U.S. positions—generally identified with JAGs over humanitarian international legal experts.

[449] The preparatory documents for API indicate that the U.S. neither supported nor criticized this article and generally played a very minor role in its development and passage. The leading advocates of what became article 82 were primarily smaller, European states, with a handful of detractors from states that were concerned that such a requirement could not be enacted by less wealthy countries. As a result, article 82 was ultimately watered down to merely outlining the role of legal advisers, leaving it up to each state who these experts would be and how, where, and in what number they would be fielded.

international humanitarian law and compliance with it" and that "[t]he ICRC is prepared to support them in this, and is willing to help train legal advisers"[450].

This isn't just a phenomenon at the ICRC, which holds a unique position in these debates. Interviews with officials at both the ICRC *and* Human Rights Watch—an organization that is far more critical of state behavior—revealed an overwhelmingly positive attitude towards military legal advisers in general (Interviews 06.01.01; 06.01.02; 06.01.03; 06.01.04). This included almost exclusively positive remarks about U.S. JAGs by Human Rights Watch officials who specialize in LOAC advocacy, which includes frequent criticism of the U.S. military's legal claims and operational practices (Interviews 06.01.01; 06.01.03). These interviews indicate that humanitarian officials—despite recognizing that JAGs and many other legal advisers to militaries are often their rivals in LOAC debates—nonetheless view military legal advisers as crucial corridors for accessing military leaders and getting legal constraints integrated into operations. Furthermore, the officials I spoke with differently framed the 'sides' of the debate over LOAC. They argued that, in the long run, JAGs and other legal advisers were more akin to rivals, who shared a common commitment to the law, rather than being enemies (Interviews 06.01.01; 06.01.02; 06.01.03; 06.01.04). Instead, they remarked, both military and humanitarian legal experts strived, in their own way, to defend and promulgate LOAC. Furthermore, despite frequently criticizing these humanitarian groups—and Human Rights Watch in particular—many military legal advisers nonetheless made similar statements. Working from these shifting signals of

[450] "Advisory Statement: Legal Advisers in Armed Forces" (2003) https://www.icrc.org/en/download/file/1043/legal-advisers-armed-forces.pdf.

commonality and hostility, future research on military 'lawyerization' might fruitfully take networks of military legal expertise as their subject of analysis. Exploring the links and fault lines both among this emerging class of actors—as well as connections with prominent transnational activist organizations and other international legal experts—can offer new pathways for understanding how LOAC expertise and authority is formed and contested (Sending 2015).

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Appendix A: Training Scenarios

Figure A-1: Training Scenario 1

The proposed attack is on the Radio Television of Cardasia (RTC) complex. It is the primary source of all television, radio, and Internet communications throughout the country. However, it is also being used by the military as a command, control and communications network. The RTC complex is also known to broadcast Cardasian nationalist propaganda while demonizing ethnic minorities seeking to legitimize Cardasian atrocities against them. Approximately 16 civilian employees work at the facility.

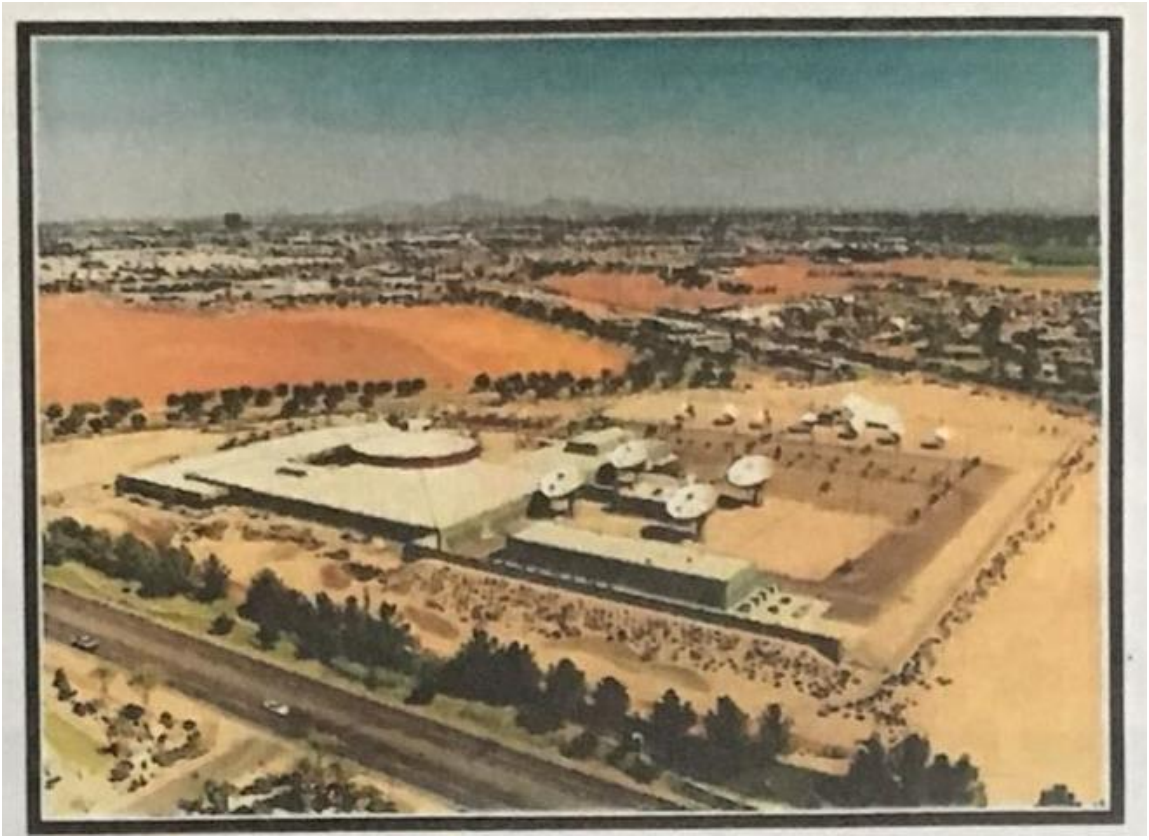
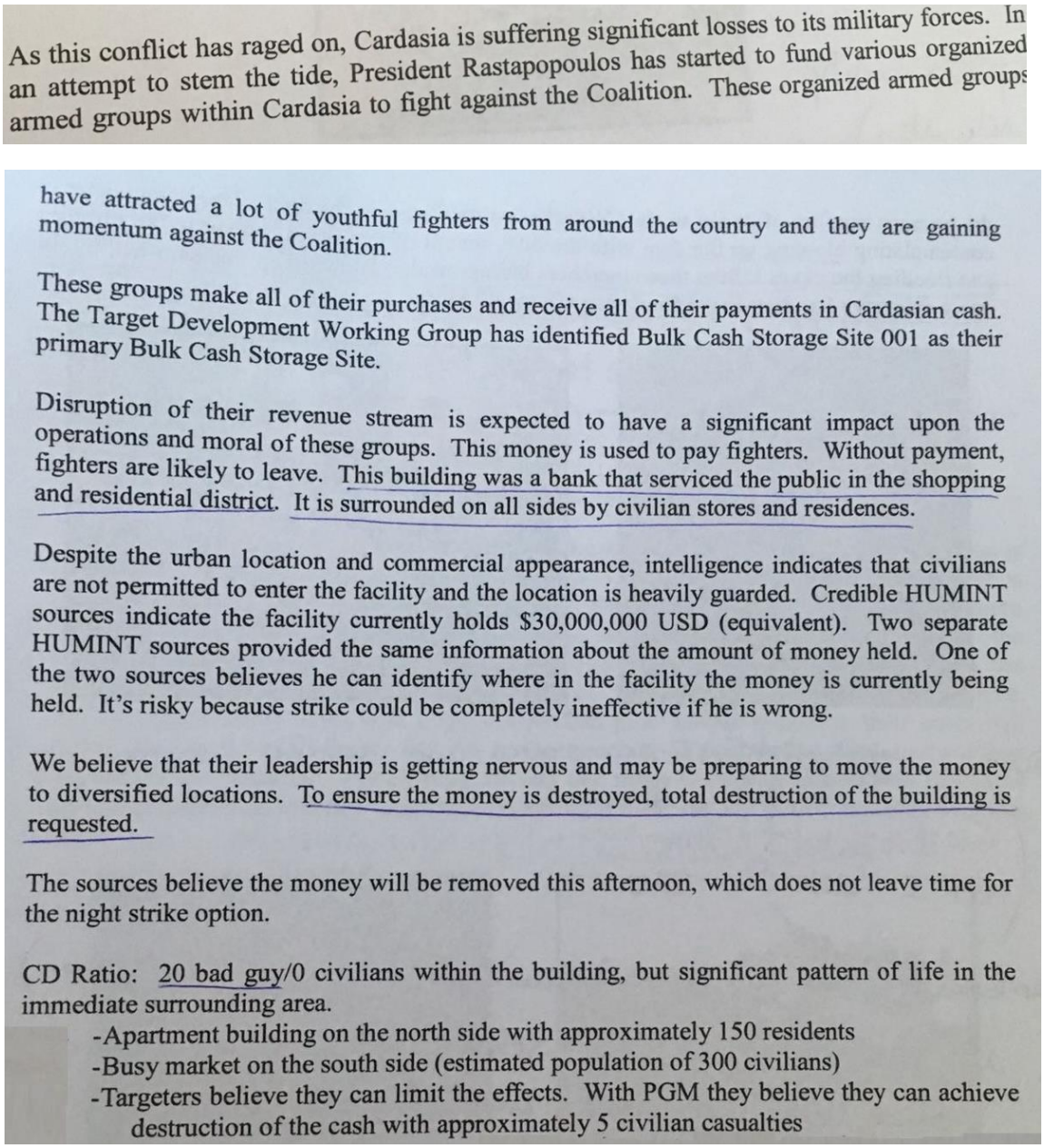


Figure A-2: Training Scenario 2



As this conflict has raged on, Cardasia is suffering significant losses to its military forces. In an attempt to stem the tide, President Rastapopoulos has started to fund various organized armed groups within Cardasia to fight against the Coalition. These organized armed groups have attracted a lot of youthful fighters from around the country and they are gaining momentum against the Coalition.

These groups make all of their purchases and receive all of their payments in Cardasian cash. The Target Development Working Group has identified Bulk Cash Storage Site 001 as their primary Bulk Cash Storage Site.

Disruption of their revenue stream is expected to have a significant impact upon the operations and moral of these groups. This money is used to pay fighters. Without payment, fighters are likely to leave. This building was a bank that serviced the public in the shopping and residential district. It is surrounded on all sides by civilian stores and residences.

Despite the urban location and commercial appearance, intelligence indicates that civilians are not permitted to enter the facility and the location is heavily guarded. Credible HUMINT sources indicate the facility currently holds $30,000,000 USD (equivalent). Two separate HUMINT sources provided the same information about the amount of money held. One of the two sources believes he can identify where in the facility the money is currently being held. It's risky because strike could be completely ineffective if he is wrong.

We believe that their leadership is getting nervous and may be preparing to move the money to diversified locations. To ensure the money is destroyed, total destruction of the building is requested.

The sources believe the money will be removed this afternoon, which does not leave time for the night strike option.

CD Ratio: 20 bad guy/0 civilians within the building, but significant pattern of life in the immediate surrounding area.

- -Apartment building on the north side with approximately 150 residents
- -Busy market on the south side (estimated population of 300 civilians)
- -Targeters believe they can limit the effects. With PGM they believe they can achieve destruction of the cash with approximately 5 civilian casualties

Figure A-3: Training Scenario 3

Intelligence sources indicate that Cardasia has been openly recruiting and training child soldiers to supplement its forces. In addition to recruiting volunteers, mostly children with parents already serving in the Cardasian military, recent reporting indicates that the Cardasian Special Security Police units have kidnapped Arumbayan children and may be forcing them to join its "cub" child soldiers. Be prepared to fully advise the Commander on his options.

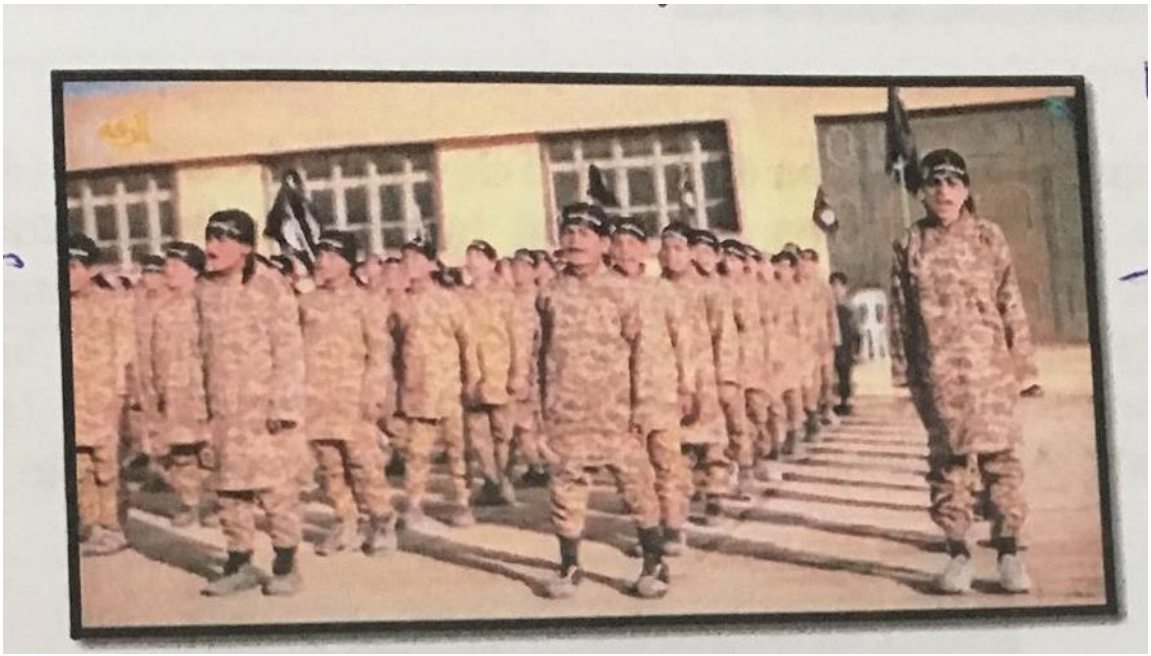
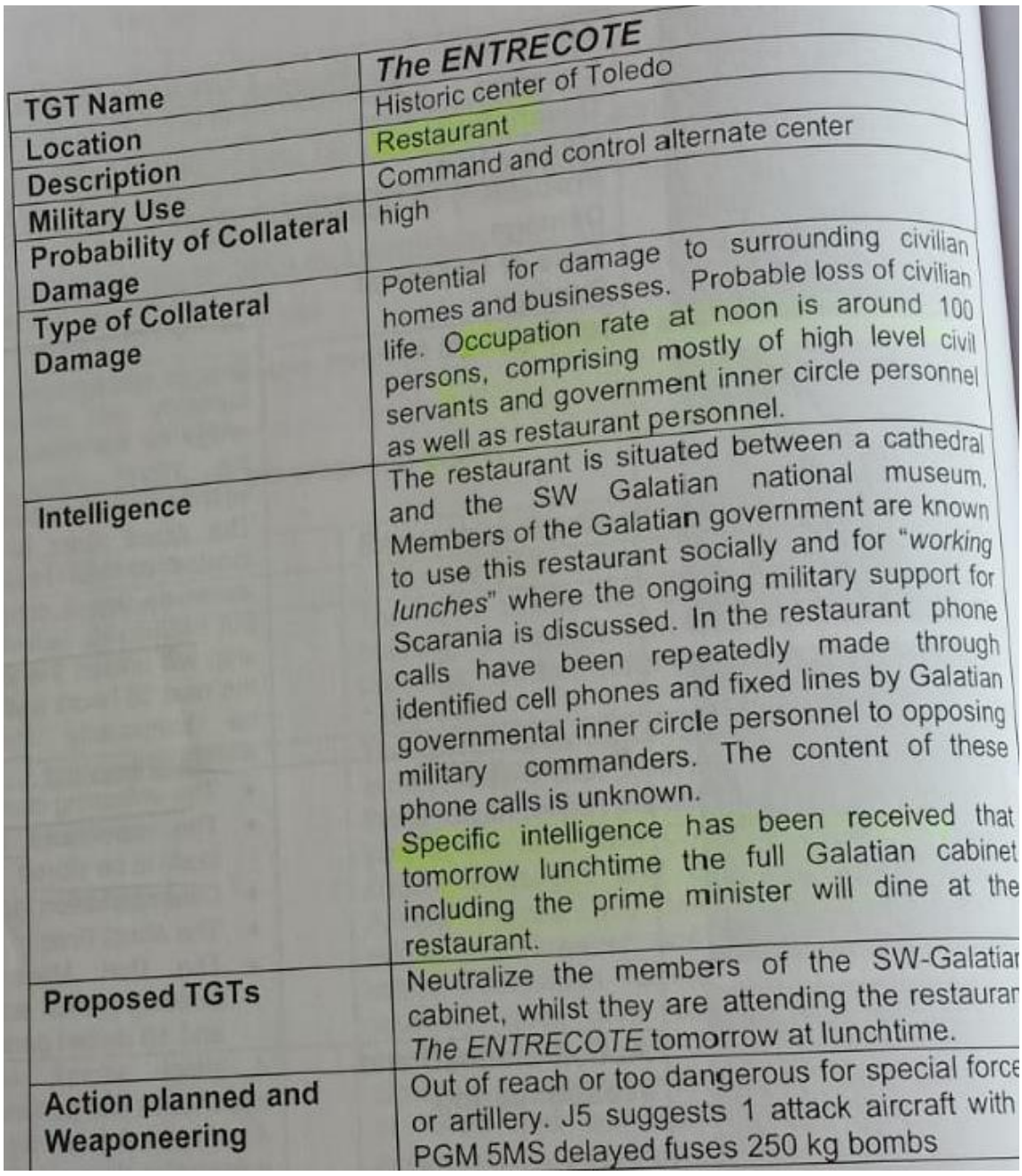


Figure A-4: Training Scenario 4



TGT Name	*The ENTRECOTE*
Location	Historic center of Toledo
Description	Restaurant
Military Use	Command and control alternate center
Probability of Collateral Damage	high
Type of Collateral Damage	Potential for damage to surrounding civilian homes and businesses. Probable loss of civilian life. Occupation rate at noon is around 100 persons, comprising mostly of high level civil servants and government inner circle personnel as well as restaurant personnel.
Intelligence	The restaurant is situated between a cathedral and the SW Galatian national museum. Members of the Galatian government are known to use this restaurant socially and for "*working lunches*" where the ongoing military support for Scarania is discussed. In the restaurant phone calls have been repeatedly made through identified cell phones and fixed lines by Galatian governmental inner circle personnel to opposing military commanders. The content of these phone calls is unknown. Specific intelligence has been received that tomorrow lunchtime the full Galatian cabinet including the prime minister will dine at the restaurant.
Proposed TGTs	Neutralize the members of the SW-Galatian cabinet, whilst they are attending the restaurant *The ENTRECOTE* tomorrow at lunchtime.
Action planned and Weaponeering	Out of reach or too dangerous for special force or artillery. J5 suggests 1 attack aircraft with PGM 5MS delayed fuses 250 kg bombs

Figure A-5: Training Scenario 5

TGT Name	***Granada Harbour***
Location	10 km north of Granada
Description	Large port facility
Military Use	Resupply of MIL ships (general, ordnance, POL)
Probability of Collateral Damage	high
Type of Collateral Damage	CIV personnel, buildings
Intelligence	Due to malnutrition of the population the port currently also unloads and stores, food and drugs for the civilian population received from the World Food Programme and other international and non-government organizations. The *Mardi Gras* (a civilian ship) has been located at sea. However, reliable intelligence assesses that it contains no humanitarian aid but exclusively weapons for enemy forces. The ship will unload the weapons in this port within the next 36 hours and the cargo of weapons will be temporarily stored in a designated warehouse.
Proposed TGTs	• The unloading cranes • The warehouse where the weapons are likely to be stored • Disembarkation facility area • The *Mardi Gras* • The Port Management and Comman Building (which accommodates between 1 and 15 civilian personnel at all times).
Action planned and Weaponeering	4 attack aircraft with cruise missiles (f warehouse and port management facility) 4 attack aircraft with each 2 PGM 5 M delayed/un-delayed fuses 250 kg bombs (f cranes and DISEMB area). 2 Anti-ship missiles AM 39 (for *Mardi Gras*)